The Promulgation Theory on Statutory Interpretation and the Rule of Law in Denmark

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1 Introduction

»Statutory interpretation« in a Danish context is the question of how to interpret an act (statute) passed by Parliament. There is no agreement amongst Danish commentators on the exact formulation of general rules or principles for statutory interpretation. At the same time, most commentators agree that the courts in practice use some interpretational principles or tools, especially when interpreting public law statutes.[1] The leading Danish textbook on constitutional law tells us that constitutional interpretation essentially is no different from the usual statutory interpretation, where the text, »the law motivation in the preparatory works«/»explanatory remarks«,[2] the purpose, case law, and practice are the relevant legal sources.[3]

Meanwhile, in other jurisdictions, legal scholars and judges claim that certain theories of constitutional or statutory interpretation *is* the law.[4] Chicago Law School Professor William Baude poses the question if originalism is the law of the United States, answering the question on balance with a "yes".[5] Justice Antonin Scalia and others claim that originalism and textualism are in fact the correct methods for interpreting the US Constitution and statutes.[6] In Denmark, though, the Constitution contains no explicit rules on constitutional or statutory interpretation. Neither does it contain an explicit reference to the principle of rule of law. Indeed, in Denmark, we have very limited scholarly tradition of discussing the question of whether the constitutional text and structure – seen together with the constitutional formulation and adoption debates in 1849 – provide us any indications on how to interpret public law statutes.

This article addresses exactly that question. Based on the legal sources, it is my proposition that we in the constitutional framework itself may find indications or guidance for how to conduct statutory interpretation. Importantly, though, I do not propose that we may *prove* certain »meta rules« for statutory interpretation. To be sure, if such proof were waiting to be discovered someone would likely have found it in the Constitution during its 174 years long existence. It is not my errand to make assertions on what the law of interpretation actually

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1 How to *interpret* or *construe* a statutory text has been a question in Danish literature. See Jens Evald, *Juridisk teori, metode og videnskab*, 2020, Carsten Munk-Hansen, *Retsvidenskabsteori*, 2018, Søren H. Mørup in Niels Fenger, *Forvaltningsret*, 2018, Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner*, 2022, and Christina D. Tvarnø & Ruth Nielsen, *Retskilder og retsteorier*, 2021.

2 The law motivation refers to the Danish terms *lovmotiver/forarbejder*, while the explanatory remarks refers to the explanation attached to a draft statute presented to Parliament. On the concept of explanatory remarks, see *Part 5.2.*

3 See Jens Peter Christensen, Jørgen Albæk Jensen & Michael Hansen Jensen, *Dansk Statsret* (2020), 43.

4 See William Baude & Stephen E. Sachs, *The law of interpretation*, Harvard Law Review, 2016, 130: 1079.

5 See William Baude, *Is originalism our law*, Colum. L. Rev., 2015, 115: 2349.

6 See Antonin Scalia and Bryan Garner, *Reading law*, 2012, or Brett M. Kavanaugh, *Fixing statutory interpretation*, Harvard Law Review, 2016, 129: 2118.

is. However, by analyzing the constitutional framework, we may find important legal material and arguments on how to conduct statutory interpretation.[7]

As a matter of legal methodology, I propose a number of specific meta rules that others may further discuss and refine. Instead of legal proof in a classic dogmatic sense, I offer merely an explanation for how one can set up a coherent system of methods that should be used in the field of statutory interpretation of public law statutes. Indeed, this theory, which I coin the 'Promulgation Theory' of statutory interpretation, is nothing more than an attempt to apply a faithful reading of the Danish constitutional framework in order to discover specific and operational meta rules for statutory interpretation.

Although interpretational meta rules on interpretation often appear somewhat vague because of their discretionary nature, such meta rules are unavoidable to the extent that the legislator enacts the discretionary statutes often seen in Denmark. By making the mode of interpretation principled and still operational, we can achieve more legal certainty. If we can reasonably provide more foreseeable and detailed meta rules for statutory interpretation, we may achieve a legal system in better shape.[8] Additionally, if we can deliver reasonable constitutional support – not proof – for these meta rules, we might arguably strengthen the legitimacy of the constitutional legal actors' actions and the general public trust in the legal system. Perhaps, we might even make life easier for politicians, government lawyers preparing draft legislation, and others.

The rule of law principle is itself an expression with no settled or clear content. The divergence of understandings makes it difficult to formulate a succinct and accurate definition. However, the intellectual discussion of the rule of law principle itself is beyond the scope of this article.[9] For the purpose of this article, the principle of rule of law is primarily centered on the general need for a citizen or legal person to foresee – to a degree that is reasonable in the specific circumstances – the consequences of the person's actions, if need be with appropriate advice.[10]

The structure of the article is presented in *Part Two*. However, it is worthwhile revealing the two main elements in the article: First is the question of whether the settled administrative law duties on care, loyalty, and faithfulness to legitimate statutory goals (*saglighed*) should rather be considered to have a constitutional basis. Second is the question of how to formulate meta rules on interpretation of Danish public law statutes. The second question in particular appears relevant for other jurisdictions too.

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7 In the Danish Ministry of Justice Guidance Note on Law Quality (June 2018), part 13.2.1 touches on legal-political principles that builds on the Constitution. According the Ministry of Justice, these constitutional principles are not necessarily legally binding, but they are fundamental in the sense that legislator should stay within the bounds of the principles.

8 On predictability, see e.g. Antonin Scalia, *The rule of law as law of rules*, U. Chicago Law Review (1989), 56: 1175.

9 See e.g., Brian Z. Tamanaha, *On the rule of law: History, politics, theory*, Cambridge University Press, 2004, or Lord Bingham, *The rule of law*, Cambridge Law Journal, 66(1), March 2007, 67–85.

10 See e.g. European Court of Human Rights, Sunday Times v UK (1979).

2 Rule of Law and the Promulgation Theory on Statutory Interpretation

Promulgation is the authoritative publication of legal texts in Denmark. In practice, the promulgation of statutes passed by the Danish Parliament follows the constitutional framework in Section 22 of the Danish Constitutional Act from 1953. Since 1870, the Act on a Law Gazette (*Lovtidendeloven*) – still today the legal code publication – has contained specific rules on the promulgation requirements. As a main rule, the legislator must publish laws and executive regulations in *Lovtidende* for the subjects to be able to read and foresee their rights and obligations.[11]

Perhaps a little surprising, Danish legal scholars rarely touch on the constitutional framework on promulgation. Indeed, constitutional law textbooks deal with retroactivity issues and statutory rules on promulgation.[12] No one seems to have answered the question of whether the Constitution itself indicates which legal methodology or guiding principles we should deploy in our statutory interpretation of statutes.

In *Part Three* of this article, I explore whether the Danish Constitution provides us any indications on how to conduct statutory interpretation of Danish public law statutes. While the text and structure of the Constitution is the starting point for the inquiry, the debates[13] on the formulation and adoption of a Constitutional Act of Denmark are relevant too for understanding the scope and content of the Constitution.[14] The role of the judicial branch, the legislative branch, and the executive branch are all considered, including the general separation of powers clause in Section 3. The judicial scrutiny clause in Section 63 empowers the courts to »decide any question relating to the scope of the executive's authority«, and, according to Section 64, when deciding cases judges shall be governed solely by the law, meaning promulgated law or customary law.[15] Besides those three well-known clauses, I suggest that the somewhat overlooked *take care clause* in Section 22 should be considered paramount

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[11] See the Act on a Law Gazette (*lov om udgivelsen af en Lovtidende*) in consolidated act no. 1098 10 August 2016 and Committee report 1464/2005 on an electronic legal gazette (*Betænkning om Lovtidende i elektronisk form*), especially section 3.1.

[12] See Peter Germer, *Statsforfatningsret* (2012), 137 – 170, and Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 185-195.

[13] The debates are found in The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849) available in Danish on: https://grundlov.dab.dk/.

[14] See Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 28-43, and Henrik Elmquist, *Statsret* (2018), 128-129. The drafters themselves considered the adoption debates important for the interpretation and application of the constitution. For example, they voted on whether certain declarations could be added as official appendixes. See e.g. *Beretning om forhandlingerne på Rigsdagen* (1849) columns 3624-3626. With the votes 58 against 54, a request of adding a declaration to the protocol was rejected.

[15] See The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849) columns 2479-2481, and Poul Andersen, *Dansk Forvaltningsret* (1963), 576-577.

because of the express executive duty to *take care* of the execution of the laws after the authoritative promulgation.[16]

Against this background, *Part Four* of the article considers the specific implications of the duty to take care that the laws are faithfully executed. The article focuses on the executive faithfulness required when the Danish government presents draft legislation to Parliament. Pointing to the tradition of explanatory remarks and the weight assigned to the remarks by all three constitutional branches, I emphasize the immensely important substantive requirements regarding explanatory remarks on a proposed statute's interpretation and application.

In *Part Five*, the main part of the article, I discuss the existence of certain meta rules for statutory interpretation in Danish public law. I argue that it is possible to see »faithful execution«[17] and »originalism«[18] as guiding stars in the interpretation of public law statutes in Denmark. With the promulgated text instructing us all, the executive must particularly take care of the execution of the statutes and carry out the proper original meaning of those statutes. All government officials and judges must interpret the law in good faith and in a loyal manner. However, while government officials serve the government, their agency is limited in the sense that they must always observe »the public good« defined in written and customary public law.[19] Thus, the principal-agent relationship is quite different from private law notions on fiduciaries duties, although there are some obvious overlaps.[20]

Identifying meta rules for how to understand the promulgated text, I also touch on the many permissible tools for interpretation and present suggestions on how to solve interpretational questions where the relevant material contains conflict. As mentioned, the Promulgation Theory's meta rules are nothing more than my propositions for principles guiding the statutory interpretation of public law statutes, offering a more coherent approach to practicing public law and a possible path forward in the quest of a better understanding of the law.

Even if you should not end up convinced by this article's constitutional argumentation on the text, structure, and debates on the formulation and adoption of the Constitution, it is my proposition that the presented interpretational meta rules as guiding principles are valuable for legal theory on statutory interpretation.[21] The interplay between the different meta rules is inherently

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16 The duty to act faithfully and with due care is already considered a settled administrative law principle (in Danish *saglighed*). Arguably, the duty may follow from Section 22 of the Constitution. See *Part Three.* On the US take care clause, see Jack Goldsmith & John F. Manning, *The Protean Take Care Clause,* U. Pa. L. Rev. 164 (2015), 1835.

17 The term refers to the duty of care, loyalty, and faithfulness (*saglighed*) obligating the execution branch. See *Part Four.*

18 While originalism in the US doctrinal discussions concerns constitutional interpretation, the term in this article refers to statutory interpretation with weight on the original meaning expressed by the legislators enacting the specific statute. See *Part Five*.

19 The executive branch officials must follow rules stipulated in the Constitution or in statutes as well as customary law. See *Part Three* and *Four*.

20 See *Part 4.2.*

21 Settled administrative law principles on duty of care, loyalty, and faithfulness (*saglighed*) already require conformity. See *Part 4.2.*

difficult, and therefore a theory on legal method and methodology based on indications in the constitutional design is at least worth exploring.

In *Part Six*, conclusions on the Promulgation Theory and brief considerations on its further development are presented.

3 The Constitutional Framework and Aspirations of the Founding Generation in the Kingdom of Denmark

3.1 A New Hope

The Framers[22] expressed a new hope in 1849 during the debates on the preparation and adoption of a new Constitutional Act of Denmark. They wanted to leave the old regime of arbitrariness – the government of men – behind and produce a government of laws. With an intention to establish a *frame* for the political institutions that would last for generations, they suggested to the King a constitutional design based on the principle of rule of law.[23] In June 1849, the King signed the constitution proposed by the members of the elected assembly preparing the formulation and adoption of the constitution.[24]

The separation of powers in Section 3 of the Danish constitution is considered important because of the express notion of Parliament and the Government (formally the King) as co-legislators. Arguably, the Constitution's very specific law adoption procedure makes Parliament the key legislator, but executive assent and subsequent promulgation are required for the execution of the law, according to Section 22 of the Constitution. Moreover, the Prime Minister of the Danish Government may in case of disagreement with a law adopted by Parliament call for an election, effectively blocking the enactment of an adopted statute.[25]

Section 22 states:

> A draft statute adopted by the Parliament becomes law when it receives the assent from the King no later than thirty days after adoption. The King orders the promulgation of statutes and take care of their execution.[26]

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[22] The people that formulated the Danish Constitution are known as the Framers, because they framed the Danish Constitution.

[23] On the Constitution as the frame and the first version of the Constitution, see Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 19-24.

[24] See The Danish Constitutional Act and The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849).

[25] Executive assent and promulgation are both required for the adopted act to become law. See Section 22 of the Constitution.

[26] However, compare my translation with the translation on the homepage of the Danish Parliament: »A Bill passed by the Folketing shall become law if it receives the Royal Assent no later than thirty days after it was finally passed. The King shall order the promulgation of statutes and shall ensure that they are carried into effect.« See https://www.thedanishparliament.dk/en/democracy/the-constitutional-act-of-denmark. My translation takes into account the fact that the Framers explicitly used the language of Section

Indeed, according to the text of Section 22, the King assents and promulgates the law, but there is universal agreement that in the Danish form of constitutional monarchy, the government must too assent to the law.[27] Moreover, the government in fact promulgates the law, as it would be difficult for the monarch to promulgate the laws without assistance.

3.2 The Separation of Powers and the Take Care Clause

After parliamentary adoption and executive assent, promulgation is the third action required in the legislative process. As already established, this makes it constitutionally significant. Yet, according to the Promulgation Theory, the promulgation is important for other reasons. The framers wanted a rule of promulgated laws, as the absolute discretion for the King in the existing monarchy allowed him to dispense from the laws at will.[28]

For the Danish Constituent Assembly the promulgation was paramount for the rule of law, and the members repeatedly stressed the need for legality in the statutory interpretation. Significantly, the take care clause incorporated this exact rejection of executive discretion to suspend the laws or dispense from their execution. The Framers agreed that the *take care* duty involved a prohibition against discretionary dispensations and derogations issued by the executive branch without statutory authority.[29] They saw the prohibition as a fundamental principle, concluding that it was unnecessary to inscribe the principle explicitly in the text.[30] During the constitutional debates, all assembly members speaking on the subject expressed the uniform view that the take care clause in Section 22

67 of the Belgian 1831 Constitution in their discussion on formulating the draft constitution: »He shall make the rules and regulations necessary for the execution of the laws, without power to suspend the laws themselves or to dispense with their execution« to formulate Section 22 of the Danish Constitution. Reference is made to The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849) columns 1767. See also A.S. Ørsted's comments in column 2851: "*fordi den, som har den fuldbyrdende Magt, ikke kan henvises til at gjøre Undtagelser fra Loven*", or the encyclopedia handbook from 1817 *ConversationsLexikon eller encyclopædisk Haandbog*, 3rd edition (1817), 346, which under »execution« mentions the »*fuldbyrdende, udøvende magt i Statsforvaltningen*«.

[27] See Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 56-57. As the authors explain, despite the text, the King cannot veto an adopted law by refusing to assent to the law. If the King were to refuse to assent, he would have to resign, and assent and promulgation by the government would in turn be sufficient for a valid enactment of the law.

[28] See Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 270-271.

[29] See The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849) columns 1760-1761, 1767, 2849-2851 and 2864-2868.

[30] See The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849) columns 1760-1761, 1767, 2849-2851 and 2864-2868.

should be understood to outlaw unauthorized exceptions and dispensations from the law.[31]

Certainly, the words – »to take care« that the laws are executed – strongly imply a positive duty of deliberate and due care in the performance of execution. »To take care« refers to a discretion, with the executive branch bound by the laws and bound to execute the laws. Seeing the text together with the clearly stated views in the constitutional debates, the take care clause arguably has a specific meaning, requiring the executive branch to never frustrate statutes passed in accordance with the procedure laid down in the constitution. In this reading, the take care clause is in part designed to deny the executive branch the power to suspend the execution of the laws or to dispense from these. Officers of the executive branch are bound to promote bounded discretion and secure the rule of law, as the executive branch must show an appropriate exercise of the delegated authority. Officers must base decisions on contextually legitimate reasons rather than favoritism or animus. If officers of the executive branch could frustrate the statutes' intended application, by for example announcing dispensations in perceived »unfair« cases, they would indeed not be *taking care* of the faithful *execution* of the enacted statutes adopted and promulgated by the politically elected branches.[32]

Thus, the Promulgation Theory holds the take clause to be incorporating certain rule of law principles. This incorporation of rule of law principles is substantiated by the judicial scrutiny clause in Section 63 that empowers the courts to »decide any question relating to the scope of the executive's authority«, and the clause in Section 64 establishing that judges shall be governed solely by the law when deciding cases. Alas, the constitution empowers the courts to scrutinize the legality of administrative decisions; that they are within the law.

3.3 The Traditional Public Law View on Rule of Law Principles in the Constitution

Whereas the Promulgation Theory places emphasis on the content of the take care clause in Section 22, the traditional Danish public law approach does not even consider the take care clause's potential relevance.

In the traditional Danish public law approach, courts developed the public law principles over time. Ground pillars are the principle of legality, the rule of law principle on statutory authorization, and the principle of impermissible interests, which includes the principle of equality.[33] Constitutional scholars consider these principles not derived from the constitutional text or from the constitutional debates, but rather from administrative law notions on legality

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31 Ibid.

32 On the US take care clause, see Jack Goldsmith & John F. Manning, *The Protean Take Care Clause,* U. Pa. L. Rev. 164 (2015), 1835, or Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution,* The Georgetown Law Journal, 108 (2019), 1.

33 On the Danish administrative law requirements on *lovmæssig forvaltning* og *saglighed* (the principle of legality and the duty to pursue only legitimate statutory goals) see Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 147-289.

invented by courts.[34] In my view, methodologically, the courts could have been on firmer ground if they had acknowledged the principles with reference to the take care clause, which explicitly prescribes the *take care* requirement and thus the considerate and faithful execution of laws. However, the ultimate result would be the same.

Constitutionally required or merely a public law principle, the requirement of executive faithfulness to written and customary law entails principles of legality and equality because everyone is to be treated equal unless provided for by law. This requirement has significant effect for the executive officers and ministers presenting to the Danish Parliament explanatory remarks to a draft statute. The effect is considered in detail in *Part Four*.

4 Executive Faithfulness and Explanatory Remarks Presented to Parliament

4.1 Draft Legislation

According to the Danish constitution, any member of Parliament or the ministers of the sitting government may introduce draft legislation.[35] In practice, ministers introduce all draft proposals. The ministers have the government employees from the ministries and agencies to assist them. These employees are essential for drafting legal texts, and they must faithfully assist their ministers within the constitutional and public law framework.[36]

If the ministers should request a draft that would be unconstitutional, the administration must decline it. In short, the executive branch officers must follow the fundamental public law principles limiting their agency.[37]

4.2 Substantive Duties for Executive Branch Officials Writing Explanatory Remarks

As shown, the executive branch officers must faithfully execute the enacted laws. Moreover, when executive officers and ministers propose a draft statute to the Parliament, the explanatory remarks to the draft statute must faithfully explain the relevant existing law and the main effects intended with the draft.[38] If the existing law is not loyally and correctly presented in the explanatory remarks, courts are unlikely to accept the »codification« of the incorrectly

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[34] See Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 270-271.

[35] See Section 41 and 21 of the Danish Constitution. See also Parliament Handbook on Legislation (*Håndbog i Folketingsarbejdet*) available on www.ft.dk (October 2015).

[36] See e.g. Jens Peter Christensen, *The Constitution* in *The Oxford Handbook of Danish Politics* (2020), 15, or Helle Krunke, *Legislation in Denmark* in Legislation in Europe: A Country by Country Guide (2020) with references. On the substantive duties, see *Part 4.2.*

[37] See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 147-289.

[38] See *Part Three*.

presented law.[39] Certainly, it would be unlawful to sneak through hidden changes by an incorrect description of existing law.[40]

The loyalty requirements for executive branch officers appear quite similar to the fiduciary duties known from company law and foundation law.[41] The context, though, is different. Business law usually prescribes fiduciary duties of care and loyalty. This generally means that directors and board members must act in the best interest of the company or foundation and not in their own self-interest.[42] To be sure, in Danish public law the executive branch officers must truthfully[43] and faithfully[44] act in the interest of their principal, i.e. the current government. They must perform loyally with due care and provide a good faith effort. Yet, they are bound both by the constitutional framework, by the statutory framework, and by customary public law principles. They must perform their duties with malice towards none and with appropriate regard of all relevant and permissible interests, respecting the customary public law principles developed in practice.[45] Thus, arguably, they are agents of both the »public good«[46] and the government. This relationship is inherently different from the relationship between the company and the company director, where the interest of the firm and thereby its stakeholders is the North Star.

Thus, because of settled public law principles[47] – and, in the minority view of the Promulgation Theory, because of the take care clause in Section 22[48] – the

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39 See Justice Per Sørensen in *Ugeskrift for Retsvæsen*, U1992B.34 (37) and *Part Five.*

40 See Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 126-129.

41 See Ethan J. Leib and Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*. Geo. JL & Pub. Pol'y, 2019, 17: 463, Samuel L. Bray ; Paul B. Miller, *Against Fiduciary Constitutionalism*, Virginia Law Review, 2020, 106.7: 1479-1532, Ethan J. Leib and Andrew Kent, *Fiduciary Law and the Law of Public Office*, Wm. & Mary L. Rev., 2020, 62: 1297.

42 See e.g. Melvin A. Eisenberg, *The Duty of Good Faith in American Corporate Law* (2006).

43 See Committee Report 1443/2004 (*Betænkning nr. 1443 om Embedsmænds rådgivning og bistand*) 2004, 156-157. The report is found on the Ministry of Finance's homepage: https://fm.dk/media/14691/Betaenkning1443Embedsmaendsraadgivningogbistand.pdf.

44 See Committee Report 1443/2004 (*Betænkning nr. 1443 om Embedsmænds rådgivning og bistand*) 2004, 155-156: A government official must "[…] faithfully and loyally ensure the best possible implementation of the minister's policy", but this assistant must be within the public law framework and thus in accordance with the principle of legality. (My translation)

45 On the customary public law principles, see Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 147-289. The requirement of *saglighed* is mentioned by the majority of justices (25 of 26) in the High Court of the Realm case (*Rigsretssag*) of December 13 2021 on a minister's criminal liability, *Ugeskrift for Retsvæsen*, U.2022.653.

46 The public good in this context is what the Constitution, statutes, and customary law provides for.

47 On the customary public law principles, see Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 147-289. See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 155-157.

48 As mentioned in *Part Three*, the result would be the same in both views, but the legal reasoning is different.

careful and faithful execution of laws has significance for statutory interpretation. This significance is the subject of *Part Five*, where I discuss the existence of interpretational meta rules for statutory interpretation in public law, as well as the content of those rules.

5 Faithful Execution and Originalism as Guiding Stars in Danish Statutory Interpretation

5.1 Statutory Interpretation and the Rise of the Dead Hand – The Authoritative Promulgation of the Text

From a democracy perspective, to achieve predictability and equal justice, it is of paramount importance that Parliament »be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts«.[49] Probably, most of us can agree on the need for clarity and predictability in lawmaking and agree on securing greater respect for the rule of law. The interpretive process involved with applying the law in specific circumstances, though, is sometimes difficult. Good faith efforts from skilled lawyers may sometimes lead to different results. When the law is of somewhat discretionary nature, even lawyers following the same method of interpretation are bound to disagree amongst themselves.

In this *Part Five*, I discuss the existence of certain meta rules for statutory interpretation in Danish public law. The discussion builds on the notion of the executive officers as faithful agents of both the current government and of the given law, i.e. the constitution, statutes, and customary public law. In other words, the executive officials must take care when they execute the promulgated law. Additionally, the discussion builds on a variation of a statutory interpretation method labelled originalism. To »take care« of the execution of laws is to give appropriate effect to the text enacted by the lawmakers, as people rely on the promulgated text and the explanatory remarks attached to this text. What the lawmakers meant with the text matters. Yet, sometimes, even a faithful interpretation of legal texts may lead to two totally different but permissible meanings.

The promulgated text enjoys special status according to the promulgationist understanding of the constitution. Therefore, as a starting point, we look to the original and ordinary meaning that the statute had at the time of adoption, but a technical legal sense may indicate otherwise.[50] With the universally accepted tradition of reliance on explanatory remarks to the promulgated text, we must faithfully follow these remarks on the condition that the remarks themselves are compliant with the promulgated law.[51] Indeed, numerous complications may arise when interpreting the promulgated text in the context of the explanatory remarks. Moreover, lawmakers enact many statutory provisions so broadly that

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[49] See e.g. The US Supreme Court, Finley v. United States 490 US, 545, 556 (1989).

[50] See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 155-157.

[51] The remarks cannot themselves change statutory law.

the real focus of the interpretation inherently moves from the statutory text to the explanatory remarks.[52]

The issue of the so-called »Dead Hand« and »rule by the dead«[53] is a key part of statutory interpretation in Denmark. We accept the starting point, according to which the original meaning governs the understanding of the promulgated text. We accept that the meaning is fixed. Of course, the fixed-meaning principle accepts that some statutory provisions are understood to be subject to change. In those cases, lawmakers are seen as authorizing statutory terms to be continually developed in practice. Figuratively speaking, the lawmakers' dead hands regulate us, as this is the system prescribed by the constitutional adoption process. Winter is coming to stay, and the winter starts instantly upon promulgation, keeping the dead hands of the lawmakers frozen in the ground. Yet, in some cases, the lawmakers allowed us discretion to adjust the frozen fingers on the hand so that the fingers point a little differently than they did originally, leaving open some space for a development that is faithful to the original authorization.[54] Typically, lawmakers grant such authorization because the lawmakers knew that society was likely to change in unforeseen ways or because the lawmakers wanted to give government agencies discretion to develop a well-balanced practice within the framework provided for by statute.[55] Obviously, the lawmakers have the power to take back the authorization or amend the delegation, if the practice in question is not developed in a way that is supported by the lawmakers.

According to the Danish constitution, judges are not lawmakers. Judges interpret the law, as the constitutional procedures of lawmaking and the constitutional rules of separation and division of powers in the text of the constitution demand that only lawmakers may *make* the law.[56]

As a matter of principle, statutory words are to be understood in their ordinary meaning unless context or legal tradition indicate that the words bear a legal-technical meaning.[57] Surely, Danish explanatory remarks regularly provide a certain legal meaning to the statutory text.

Significantly, the Promulgation Theory holds certain principles of statutory interpretation to be fundamental for understanding public law statutes:[58]

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52 On the significance of explanatory remarks, see Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 157-161.

53 See Frank H. Easterbrook, *Textualism and the dead hand*, Geo. Wash. L. Rev., 1997, 66: 1119.

54 Even to a textualist like Antonin Scalia, the authorization of further common law development is permissible. See Antonin Scalia and Bryan Garner, *Reading law* (2012), 98.

55 Delegation – critics in the US.

56 The Danish term "*lovgivende magt*" translates to "legislative power", meaning the "law giving branch" or "law making power". See section 3 of the Constitution and Jens Peter Christensen, *The Constitution* in *The Oxford Handbook of Danish Politics* (2020), 9-27.

57 See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner* (2022), Djøf Forlag, 155-157.

58 These principles are inspired by inter alia the work of Antonin Scalia and Bryan Garner, *Reading law* (2012) and the Danish Ministry of Justice Guidance Note on Law Quality

1) Within their lawmaking power according to Section 3 of the Constitution, the elected branches adopted and promulgated the statutory text. As the constitutional adoption and promulgation makes the promulgated text supreme, courts should only deviate from the statutory text in extremely rare cases and only where truly compelling reasons mandate such deviation, so that there is no risk that the legislative process in the constitution is undermined. See *Part 5.2.3*.
2) The promulgated text should always be interpreted as a whole.
3) In case of two or more permissible textual understandings of the text, there is a presumption that the interpretation should not obstruct the purpose of the law but rather further the purpose.
4) If a specific statutory provision is in conflict with a general provision, the specific presumptively prevails unless the explanatory remarks indicate otherwise.
5) Titles and headings are indicators of meaning.
6) Common phrases and concepts in related statutes are to be interpreted in the light of each other, but not as if the statutes were one law.
7) A significant change in statutory language is an indicator of change in meaning unless the context indicates otherwise.
8) Both written EU law and customary principles developed by the EU courts must be respected if constitutionally permissible. Thus, the requirement to interpret national law in conformity with EU law must not lead to an interpretation *contra legem*.[59]

While promulgationism considers these principles fundamental, other sources and interpretational tools are accepted too. These sources and tools and their intertwined relationships are analyzed thoroughly in the following parts.

5.2 The Interpretational Value of the Official Explanatory Remarks on the Application and Interpretation of the Statute

5.2.1 Authoritatively Published Explanatory Remarks

Explanatory remarks on a proposed statute's interpretation and application are published in the official Parliament Journal *Folketingstidende*. In short, the drafting ministry must add extensive explanatory remarks to the bill containing the proposed statutory text. Today, a 274-pages long guidance note from the Ministry of Justice on the formal and substantive requirements set up a detailed framework for the remarks, but many of the main requirements have essentially been there for decades.[60] Notably, the remarks constitute the authoritative

(2018), see *Part 5.2*. Application of the principles requires attention to the many other legal sources and legal material considered in *Part Five*.

[59] On Danish case law (Ugeskrift for Retsvæsen 2017.824H) and the ECJ case 15/2014, *Dansk Industri acting for Ajos A/S v. the estate left by A*, see Rass Holdgaard, Daniella Elkan, Gustav Krohn Schaldemose, *From cooperation to collision: the ECJ's Ajos ruling and the Danish Supreme Court's refusal to comply*, Common market law review, 2018, 55.1.

[60] Ministry of Justice Guidance Note on Law Quality from June 2018.

explanation of the proposed statute's content, the intended changes to existing law, definitions of some of the draft statutes concepts, and the ministry's suggestions on the application and interpretation of the proposed statute.[61]

The objective of the explanatory remarks is to ensure general predictability for all stakeholders and to give members of Parliament an actual chance to understand and evaluate more than 200 bills every year.[62] Thus, for rule of law reasons, governments and parliaments worked for decades within the framework now set up in the guidance note.[63]

The Ministry of Justice supervises practically all draft statutes and their explanatory remarks. The ministry zealously examines the relevant ministry's fulfilment of requirements on law quality in terms of substantive and formal requirements and best practices.[64] If the Ministry of Justice finds significant shortcomings, the relevant ministry in practice always undertakes the necessary changes.[65]

Sometimes the Danish explanatory remarks are translated into »preparatory works« or »legislative history«, but I see both terms as unfit for the description of what is more accurately described as a comprehensive version of the »explanatory memorandums« in EU law. The explanatory remarks include general remarks and specific remarks to the specific sections of the proposed law. In some cases the explanation consists of many hundreds of pages, while the statutory text itself is only a few pages long.

According to the Ministry of Justice Guidance Note, actual customary law principles are commonly accepted in areas such as retroactivity, delegation, customary law, the special status of certain statutes with horizontal legislative importance, criminal law etc.[66] Some of these principles are substantive and must be followed, but the guidance note itself is not binding.[67]

The legislative tradition developed over time by numerous governments and parliaments is immensely important for understanding statutes. Moreover, Danish courts and scholars uniformly attribute the explanatory remarks high value in the statutory interpretation.[68] Thus, the tradition now manifested in the guidance note has great implications for statutory interpretation of public law statutes and other statutes.

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61 Ministry of Justice Guidance Note on Law Quality, 165-167.

62 Ministry of Justice Guidance Note on Law Quality, section 2.8.

63 On former guidance notes, see Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 127 with references.

64 Ministry of Justice Guidance Note on Law Quality, 19.

65 Around the time of the millennium the intensity of the examination rose. Explanatory remarks from before that time differs more in terms of law quality compared to the somewhat uniform level of remarks today.

66 Ministry of Justice Guidance Note on Law Quality, 18.

67 The Danish approach to international law is dualistic. Unsurprisingly, though, EU law influenced Danish public law during the years. See e.g. Niels Finger, *EU-rettens påvirkning af dansk forvaltningsret*, 2021.

68 See Søren H. Mørup in Niels Fenger, *Forvaltningsret*, 2018, 330-331, Jens Evald, *Juridisk teori, metode og videnskab*, 2020, 51., Carsten Munk-Hansen, *Retsvidenskabsteori* (2018), 299, and Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 121-126.

I examine the implications in the following parts of the article, drawing also on the constitutional insights developed in the previous parts of the article. It is again worthwhile to highlight the nature of the explanatory remarks. The remarks are nothing more than an explanation by one part legislative of the legislative branch.[69] Parliament may amend the proposed statutory text or discard the draft statute or parts of the explanatory remarks during the legislative process.[70] At the same time, in cases of conflict between the promulgated statutory language and the explanatory remarks, the hierarchy between the two is hardly ever questioned.[71]

5.2.2 Explanatory Remarks and the Issue of Discretionary or Ambiguous Language in the Statutory Text

After the enactment of a proposed statute, the explanatory remarks are typically highly significant for the application of the statute in practice, as the guidance note explains.[72] Explanatory remarks on a proposed statute's interpretation and application are particularly useful when the statutory text is discretionary or ambiguous. The remarks may explain, clarify, or comprise elaborations on the language used in the statute.[73] In most cases, the remarks contain specific examples of the typical situations that the statutory text – according to the ministry – will be applied to. In addition, expected effects of the statutory text are considered in the remarks. Sometimes, where an existing statutory rule is amended, the explanation even includes a »clarification« on questions regarding the correct interpretation of existing rules. Unless lawmakers disagree with this clarification during the adoption process, the Parliament presumptively acquiescence to the solution presented in the remarks.[74]

To be sure, unclear statutory language should be avoided. However, when a statutory provision appears unclear, courts often seem to have an inclination towards the interpretation suggested in the explanatory remarks. From one view, the Promulgation Theory's notion on promulgated text[75] could indeed speak in favor of leaving this practice. However, since the Danish tradition with »legislation in the explanatory remarks« has been accepted unconditionally over time by all three constitutional branches and since this Danish tradition arguably offers significant advantages for achieving higher predictability in discretionary

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69 See Justice Per Sørensen in U1992B.34 (37).

70 On the process, see Helle Krunke, *Legislation in Denmark* in Legislation in Europe: A Country by Country Guide, 2020, 137.

71 See e.g. Søren H. Mørup in Niels Fenger, *Forvaltningsret*, 2018, 330-335.

72 Ministry of Justice Guidance Note on Law Quality, 130. See also Søren H. Mørup in Niels Fenger, *Forvaltningsret*, 2018, 330-331, and Jens Evald, *Juridisk teori, metode og videnskab*, 2020, 51. From Norwegian practice, see e.g. Arnulf Tverberg, *The Use of Preparatory Works as a Source of Law in the Norwegian Legal System*, The Journal of Legislative Evaluation Vol. 10-1, 2016, 205-257.

73 See 2.8 and 2.9 in Ministry of Justice Guidance Note on Law Quality.

74 See Søren H. Mørup in Niels Fenger, *Forvaltningsret* (2018), 330, and Carsten Munk-Hansen, *Retsvidenskabsteori* (2018), 301.

75 See *Part Three* on the Promulgation Theory's notion on supremacy of promulgated text.

language, I would on balance consider the Danish approach to be the lesser of two evils in the specific Danish context.[76]

Specifically, in case of ambiguous statutory language the remarks may specify the intended application, perhaps substantiating a certain broad or narrow reading of the language. In particular, *if* the remarks state a statutory purpose with the specific section of the statute, and *if* that stated purpose would be obstructed by one of two permissible readings of the statutory text, then the reading supported by the remarks would presumptively prevail. Here, the Promulgation Theory recognizes the presumption, because the legislators by acquiescing arguably accepted the position declared in the explanatory remarks.

Unclear or ambiguous text in the explanatory remarks often leads to unfortunate results, because the practical application of the statute has effects not intended by the ministry formulating the explanatory remarks.[77] The same is true for sloppy statutory language, as we shall see in the next part.

5.2.3 Sloppy Language in Statutory Text or the Explanatory Remarks

Legislators vote on the bill presented to them, and if they are not presented with sufficient and correct information, they can hardly be said to have accepted that the administration or the courts should be able to fix the mistakes with reference to ministerial intent expressed after the adoption of the law. Indeed, if the executive officials did not take care that the language in the proposed statute or the explanatory remarks was formulated sufficiently succinct, there are no compelling reasons for courts to step in and fix the mess. As shown above, the courts follow and interpret the law; they do not make new law.[78] The promulgated text is supreme and should not be altered by ministerial intent that has not been voted on by lawmakers, as this would possibly open the door for speculation in working around the constitutional adoption process. Thus, the Parliament must start the process all over to fix the mistake. This approach with emphasis on the promulgated text incentivizes high quality legislation as well as legal certainty and predictability.

Still, the principle of supremacy of promulgated text has few and narrow exceptions. Under truly rare and unique circumstances, there might be persuasive evidence to depart from the promulgated text. The rationale is rather complicated. According to the Promulgation Theory, the executive must

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[76] See Ministry of Justice Guidance Note on Law Quality, 166-167. Discretionary rules involves a balancing of interests, but compared to EU law and US Law, the discretionary rules in Denmark appear to be more predictable, as the discretion is often bound both by statutory language and the explanatory remarks. In addition, it appears easier to identify the expectations of the lawmakers. On the arguments favoring the use of preparatory works in Norway, see e.g. Arnulf Tverberg, *The Use of Preparatory Works as a Source of Law in the Norwegian Legal System*, The Journal of Legislative Evaluation Vol. 10-1, 2016, 232-237. In a union of states or in federal systems it would perhaps be more difficult to agree on both statutory text and explanatory remarks. Another issue is the tradition in international law regarding interpretation of preparatory works, see article 31 and 32 of the Vienna Convention of the Law of Treaties (1969), United Nations, Treaty Series, vol. 1155, 331.

[77] Ministry of Justice Guidance Note on Law Quality, 130.

[78] See *Part 5.1.*

faithfully *take care* of the execution of the laws.[79] If there is a clearly erroneous text, and you can prove to a high degree of likelihood what really should have been the text because the text intended to codify existing customary law, you might convince the courts to fix the problem.[80] In these cases, the executive presenting the text to Parliament did not carefully draft the bill. Since the presented material was not in conformity with the fundamental requirement that existing (customary) law is presented faithfully, so that the lawmakers can make an informed decision, then the Parliament cannot *per se* be said to have accepted the change of law. Particularly if the statutory purpose stated in the explanatory remarks would be obstructed by the (clearly) erroneous statutory language, there is a possibility that the courts will read the promulgated law in the light of the customary law and thus not let the sloppy promulgated language take effect.[81]

5.2.4 The North Remembers – Deliberately False Information about Existing Law Presented in the Explanatory Remarks

Explanatory remarks containing deliberately false information about existing law rarely appear. However, occasionally officers in the executive branch compose the explanatory remarks in a fashion that shows that they either knowingly included false information or that they must have known that they did so.[82]

As stressed repeatedly, the explanatory remarks are quite important for understanding Danish statutes. If the executive officers sneak through a »codification« of the false information by presenting the information in the explanatory remarks connected to a statute that lawmakers vote to adopt, then the courts must prevent this attempt and decline the »codification«. In these cases, according to the Promulgation Theory's reading of the take care clause, the courts have an obligation to reject the attempted change of law.[83]

Government officials too must reject such an attempt. To take due care of the execution of statutes mandated by the Constitution's take care clause, government officials must necessarily follow only the law truly recognized by the lawmakers. Obviously, this is potentially a delicate situation for the government officials because they usually must follow the text in the explanatory remarks faithfully.[84] In practice, it seems rather difficult for an executive officer to decline to follow the description of existing law presented in the explanatory remarks, since a minister in charge of the relevant ministry approved such description. Nevertheless, because of the Promulgation Theory's emphasis on

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79 See *Part Three* and *Four*.

80 Case law is quite rare. See e.g. the case in *Ugeskrift for Retsvæsen*, U2006.866H.

81 See e.g. W.E. von Eyben, *Juridisk Grundbog, bind 1 om Retskilderne*, 67, and Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 125 and 141-143.

82 See Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 126-129.

83 See *Part Four*. See also Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 126-129 with references and Jens Evald, *Juridisk teori, metode og videnskab*, 2020, 60.

84 On the importance of explanatory remarks and other material in the adoption process, see Søren H. Mørup in Niels Fenger, *Forvaltningsret*, 2018, 330-331.

the faithful execution of the lawmakers' statutes, government officials must decline to recognize a deliberately false text in the explanatory remarks.

With a tradition like the one in Denmark, where explanatory remarks hold important interpretational value for statutory interpretation,[85] we must remember to scrutinize whether the explanatory report is in fact correctly describing the law. As one Justice once stressed in an article, the ministry's presentation in the explanatory remarks is nothing more than the ministry's perception of existing law.[86] Indeed, the text of the constitution affords ministerial assertions no special value.

5.2.5 Incorrect Information about Existing Law Presented in the Explanatory Remarks

Explanatory remarks containing incorrect information about existing law only appear sometimes. In these cases, judges should make an overall assessment of the promulgated statutory text and the text in the explanatory remarks to find the relevant weight that should be attached under the specific circumstances. Perhaps, Section 22 speaks in favor of a weak presumption of not following the incorrect information in cases where the presenting ministry should have known better, as the requirement of due care in Section 22 presumably has not been satisfied. Moreover, the general interests of only presenting correct information to the lawmakers point to such presumption, and the ministry may always present a new and proper draft statute to the lawmakers.[87]

However, if the explanatory remarks contain incorrect information about existing law, and if that information regards fundamental rules or definitions within a certain area of law, I would argue for a strong presumption that the incorrectly stated information in the explanatory remarks does not itself lead to a change of the existing statutory text or existing customary law.[88] This view is essentially based on the mentioned requirement of due care.[89] If Parliament is to change fundamental legal rules, it should only happen where Parliament has been accurately and sufficiently informed about the consequences of the proposed statute.

If the statutory text, though, clearly states that there is a matter of debate on how to understand a certain provision and that the proposed statute invites Parliament's decision on the matter, the situation is different. Here, presented with the interpretive doubt and the intention of the proposed statutory change of the relevant section of the statute, Parliament arguably accepted the change described in the explanatory remarks.[90]

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85 See Søren H. Mørup in Niels Fenger, *Forvaltningsret*, 2018, 330-331.

86 See Justice Per Sørensen in *Ugeskrift for retsvæsen*, U1992B.34 (37).

87 See Ministry of Justice Guidance Note on Law Quality, section 2.8.

88 If the change follows from the promulgated text, the situation is different.

89 See Ministry of Justice Guidance Note on Law Quality, section 2.8.

90 See Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 126-130 with references.

5.2.6 The Explanatory Remarks provide two Conflicting Messages on two Equally Permissible Understandings of the Promulgated Text

The Danish constitution authorizes the judiciary to rule on whether the decisions of the executive branch are lawful, and difficult questions of statutory interpretation may sometimes end up in the Supreme Court.[91] Every year, interpretation of statutes spurs dissent in the Supreme Court cases, typically because ambiguous statutory terms provide the court with two possible meanings that are both permissible for an interpreter in good faith.[92]

Now and then, two divergent meanings of a statutory text are equally sound, and, as a judge presented with a specific question, you must choose.[93] In the Danish tradition, the explanatory remarks or case law usually direct you towards one of those two reasonable readings. However, if the explanatory remarks themselves provide two diverging messages on how to solve the ambiguity in the statutory text[94] and we have no relevant case law, a classic dilemma in Danish statutory interpretation occurs. Here, there is no clear statutory purpose to indicate meaning because both readings of the statutory language appear convincing after consulting the explanatory report.

So, imagine a public law statute question of interpretation with no clear-cut answer; the text, explanatory remarks, case law, and purpose of the relevant section of the statute offer us no guidance as to how to choose between the equally sound interpretations. The case is truly difficult to decide, and the fundamental principles mentioned under part 5.1 give away no indications on how to choose. An important question is whether the government should presumptively prevail in these truly hard cases. That question is the subject of the consideration in the following paragraphs.

Obviously, overturning a long-standing administrative practice may result in a mess, but on the other hand, you could argue that deference would lead to systematically biased judgment in favor of the government.[95] Some might possibly see judicial deference to one party in a court case as impermissible, arguing against the legality of court deference unauthorized by written law.

Relatedly, from one constitutional perspective, the courts are independent and bound only by the law, as the text instructs us.[96] Thus, judges have a duty to exercise an independent and full judgment when interpreting statutes. In this line of argument, there are no constraints on the judicial power mentioned in the text

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91 See Section 63 of the Constitution.

92 If a statute is clear and unambiguous, litigation rarely reaches the Danish Supreme Court.

93 Categorizing such cases is inherently difficult. Of course, one could argue that cases are never truly fifty-fifty because one reading is always a bit more persuasive. I do not purport to be able to *prove* that some interpretations can be equally sound. Merely, I note the existence of dissents in Supreme Court cases where the court splits 4-3 or 3-2. Arguably, at least in some of those cases, it seems permissible to view the two positions as equally sound.

94 The same is issue may occur if the remarks contain no mentioning of the issue.

95 See Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

96 See Section 64 of the Constitution.

of the constitution and it would therefore be unconstitutional to read a deference principle into the constitution.[97]

However, the leading textbook on Danish administrative law acknowledges that the administrations interpretation of statutes generally holds some interpretational value, of course unless the interpretation is incorrect.[98] According to an influential 1965 article on tax law by Justice P. Spleth, the Danish courts appear reluctant to overrule an agency lax law practice where two interpretations are more or less equally sound.[99] Others argue that if the administration's interpretation has been followed consistently over a long period and if lawmakers did not change the ambiguous statutory provision during revisions of the statute, this is an argument supporting some judicial deference to the executive's interpretation.[100]

Promulgationists would take a different path. Promulgationism finds substantial constitutional support for accepting that the government's interpretation should presumptively prevail in the mentioned truly hard cases of interpreting a public law statute. To be sure, the Promulgation Theory stresses that the executive must take care that the statutes are executed, and when Parliament makes an ambiguous statute and gives no answer in the explanatory remarks, then you fall back on the fundamental principle that the executive power rests with the executive. In this vein, a reasonable argument could be made that *since* the executive must take care of the execution,[101] *since* the courts are only checking the limits of the executive,[102] and *since* the legislator has not acted upon the administrative practice,[103] then the courts should not interfere in situations where the text, the explanatory remarks, case law, and the purpose offer no guidance. In those truly difficult cases of statutory interpretation, and only in those cases, promulgationism argues for the presumption that executive interpretation should be determinative for the courts.

As further support for this presumption, you could see the statutory ambiguity as an implicit delegation of power from the legislative branch to the

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97 See from US doctrine e.g. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

98 Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner*, 2022, 140-141.

99 See *Ugeskrift for Retsvæsen*, U1965B.250 with references.

100 See *Ugeskrift for Retsvæsen*, U1965B.250 with reference to Jørgen Mathiassen, *Tidsskrift for Retsvidenskab* 1965.77. In my view, this argument appears unconvincing considering the Danish law quality tradition, where you very often amend only small parts of a statute, as you, from a political point of view, do not wish to "open up" other parts of the law for discussion, knowing that these discussions may very well sink the whole amendment process. Indeed, every specific section you 'open up for' revisal must be dealt with in the explanatory remarks. If you read *intent* into amendments of other and unrelated parts of the law you are truly in risk of not faithfully interpreting the promulgated text.

101 Section 22 of the Constitution.

102 Section 63 of the Constitution.

103 Indeed, the legislator might in most instances very well not be aware of the administrative practice, but the relevant stakeholders have the possibility of raising the issue with the lawmakers.

administration.[104] If the text has two possible meanings and the statute made an agency the enforcer of the law, the delegation argument seems to have at least some persuasive value. To be sure, like any giver of instructions, Parliament could have provided us with specific instructions to that statute or provided us with general principles for statutory interpretation, and since it has not, courts should defer to the executive branch in the mentioned type of cases.[105]

So, on balance, promulgationists would support the view that, in the those truly hard cases with two equally sound interpretations – where the legislator by statute charged an agency with a statute's execution and no guidance appear in the text, the explanatory remarks, case law, or the purpose of the section – the agency interpretation should presumptively prevail.[106]

5.3 Relevant Interpretational Material from the Public Consultation Process

The explanatory remarks go through a public consultation process before being presented to Parliament, along with the draft statute.[107] In quite rare instances, the courts look to material from the consultation process in order to assess the context of the final explanatory remarks presented to Parliament.[108] For example, if input from relevant stakeholders caused the inclusion of a specific passage in the explanatory remarks, that input may shed light on the meaning of the passage in the explanatory remarks.

Even in cases with unpublished input, the courts may opt to use the input where the input provides the necessary context for the correct application of ambiguous language in the explanatory remarks.[109] Use of unpublished input from before the age of digitalization arguably appears problematic, especially in the view of a theory with focus on the promulgated text. However, because promulgationism strives for a statutory interpretation of the promulgated text as close as possible to the *specific* meaning attached to the promulgated text, a careful and faithful interpretation demands the use of unpublished materials in exceptional cases.[110]

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[104] Compare the US discussion on Chevron deference, see e.g. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983), The US Supreme Court Case Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, Vanderbilt Law Review 71, 937 (2018).

[105] Compare again the US discussion on Chevron deference, e.g. Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*. Vand. L. Rev., 2018, 71: 937 with references.

[106] Before applying this presumption, one would have to see if the consultation process leading up to the bill contains instructive material. For example, the input from stakeholders or the consultation version of the explanatory report may be indicative. See *Part 5.2.7*. Additionally, the parliamentary process might also contain indicators of meaning.

[107] See Ministry of Justice Guidance Note on Law Quality.

[108] See e.g. the Danish Supreme Court case in *Ugeskrift for Retsvæsen*, U2018.3697H (3711).

[109] See the Danish Supreme Court case in *Ugeskrift for Retsvæsen*, U2018.3697H (3711) and Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner*, 2022, 157 with references.

[110] See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner*, 2022, 157-159.

Moreover, if a private party in public law litigation can point to inconsistencies between the relevant ministry's comments on interpretation during the consultation process and the ministry's interpretation before the court, the private party may potentially move the court in a favorable direction. However, due to the weight attached to promulgated text and the connected explanatory remarks, courts are perhaps somewhat reluctant to apply ministerial comments from the consultation process in their reasoning.[111]

5.4 Parliamentary Committee Reports in Danish Parliamentary Tradition

During the adoption process in Parliament, committees may vote to amend the language of the statute and attach new explanatory remarks to the amended text. The committees often adjust or amend the proposed statutes, and amendments occur in many phases of the parliamentary process.[112] If a committee amends the language and lawmakers subsequently in the third and final reading of the law vote to adopt the law, they vote on the amended version.

On occasion, though, the excessive speed of the legislative process or political compromises in a committee lead to ambiguity or inconsistencies in the statute. Besides the nature of these processes, another contributing factor is the lack of government officials from the relevant ministry involved in this late part of the process.[113]

The nature of these ambiguities and inconsistencies varies to great extent, sometimes leading to difficult questions of statutory interpretation. Obviously, to faithfully interpret the law, the interpreter must observe the relevant material in the explanatory remarks and subsequent committee report(s).

5.5 Expert Committee Reports in Danish Parliamentary Tradition

Expert committee reports laid the foundation for many legislative reforms. If a statute and the explanatory remarks are based on an expert committee draft statute with accompanying explanation, the expert report holds high interpretational value unless the subsequently development indicates otherwise. For example, this could be the case if a ministry in the draft statute deviates from the expert advice or if Parliament amends the language in the adoption process.[114]

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[111] If conflict between consultation process and the explanatory remarks occurs, the explanatory remarks should usually prevail, seeing that this is the material presented to Parliament.

[112] See Ministry of Justice Guidance Note on Law Quality.

[113] The standing committees have a permanent secretary with rather limited resources allocated to draft committee reports compared to the resources and time available in the ministries. Moreover, the Parliament has a law secretariat, but they are generalists and assist on various bills and related material every year.

[114] See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner*, 2022, 157-161.

5.6 The Promulgated Text Provides the Frame for Using Implicit Statutory Purposes as Worthwhile Aids in Statutory Interpretation

If the general statutory purpose is stated in the statute itself, such purpose if obviously of high interpretational value. If the explanatory remarks mention the purposes of a specific provision, such purpose might be useful as aid in statutory interpretation. According to the Promulgation Theory, though, the purpose of the law shall always be ascertained with respect for the promulgated text. Speculation on lawmakers' unexpressed intent should be discarded, while arguments of the meaning of the text and the (logic) implicit purpose are permissible. Importantly, an overall purpose of the statute expressed in the explanatory remarks should rarely be decisive for the understanding of a specific section in the statute.[115]

Equally important, as an almost absolute rule, the purpose of the statute shall not prevail over the promulgated text.[116] Such an approach would entail a risk of manipulating the operative statutory text by applying the purpose, as the purpose clause or purpose in the explanatory remarks are only aids to understand the operative language of the statute.[117]

In some cases, the stated purpose in the explanatory remarks substantiates a narrow or broad reading of the statutory text.[118] In is only in extremely rare cases that the purpose and the explanatory remarks together may prevail over the letter of the law, resulting in an interpretation that is against the language used in the promulgated text. *Part 5.2.3* touched on these exceptional instances.

5.7 The Constitutional Importance of Judicial Decisions

The constitution empowers the judiciary to issue decisions in specific cases presented to the courts but provides no legislative power to the court.[119] As mentioned, Section 63 vests the courts with the power to scrutinize executive decisions and allows them to assess whether the executive decisions are issued within the statutory authority, thereby meeting the demand for a rule of law envisaged by the Framers.[120] Indeed, the constitution's chapter on the judiciary speaks in favor of acknowledging court practice as a legal source with potentially

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[115] In some cases, the courts mention – as an additional but unnecessary argument – that the result finds support in the overall purpose of the law. In other cases, the courts mention – as one of two or more reasons – the main purpose of the law. See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner,* 2022, 161 with references to Danish case law.

[116] However, see *Part 5.2.3* on inter alia sloppy statutory language.

[117] To be fair, purpose clauses are also promulgated and they are arguably important for deciding truly hard cases.

[118] See Jens Garde, Karsten Revsbech and Søren H. Mørup, *Saglige Krav*, in Søren H. Mørup and others, *Forvaltningsret: Almindelige emner,* 2022, 160 with references.

[119] See Section 3 of the Constitution and Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 151-159 and 263-301.

[120] See *Part* 3.1-3.2 and Jens Peter Christensen, Jørgen Albæk Jensen and Michael Hansen Jensen, *Dansk Statsret* (2020), 269-276.

high interpretational value. As the Framers expressed in the debates on the formulation and adoption of the constitution, there would be customary law principles developed and enforced by courts.[121]

5.8 Attempts to Change the Meaning of Promulgated Text by New Description of Existing Law in Explanatory Remarks Unrelated to the Specific Statutory Section

Perhaps due to the universal acceptance of explanatory remarks in the interpretive process, government officials sometimes – intentionally or not – attempt to change the content of one provision of a statute, even though that provision of the statute is unchanged by the text of the draft statute presented to Parliament. For example, in explanatory remarks to the provision that is to be amended upon adoption, the government officials writing the remarks state[122] that this change entails a change of the content of the other and unrelated provision. Promulgationism rejects such approach. Promulgated law is the express will of the legislative branches, adopted in accordance with the prescribed constitutional process. To change the promulgated sections in a statute, the legislative branches must enact new statutory language designed to amend that section.[123]

Nevertheless, to a very limited extent, a ministry may amend one provision of a statute and in the explanatory remarks explicitly emphasize that the effect of the proposed amendment will affect other provisions too. Where the ministry is very clear that there is an existing and real question on how to interpret a statutory provision correctly, and the proposal purports to clarify that question of law, Parliament may – under the right circumstances – be said to accept the proposed clarification.[124] Here, the promulgated text is ambiguous, and there is a good faith argument that it was in fact the will of the lawmakers to choose one of the permissible interpretations.

Of course, the straightforward and correct method is typically rather to change both provisions so that lawyers and others tracing the adoption history of a provision are provided with a real chance to find the relevant material.[125]

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[121] See e.g. the 1849 constitutional debate dealt with in *Part Three.* There, it is mentioned how the principle of legality inter alia was seen as a customary principle (*grundsætning*). Reference is made to The Danish Constituent Assembly Debates on Formulation and Adoption of the Danish Constitution, *Beretning om forhandlingerne på Rigsdagen* (1849) columns 2850.

[122] Of course, the minister must approve the text. However, as officials usually prepare the explanatory remarks based on broad directives from the ministers, the ministers usually do not change much in the specific text.

[123] See Ministry of Justice Guidance Note on Law Quality, section 2.8-2.9.

[124] See Ministry of Justice Guidance Note on Law Quality, section 2.8-2.9, and Mark Ørberg, *Fondsretten og den levende vedtægt*, 2022, Djøf Forlag, 129-130 with references.

[125] For instance, if Parliament wishes to change the guiding principles for court imposed criminal punishment, it must change the relevant criminal provision or include a new provision connected to the existing provision. See Ministry of Justice Guidance Note on Law Quality.

6 Further Development of the Promulgation Theory as a Theory of Statutory Interpretation

The proposed theory on statutory interpretation argues for certain interpretational meta rules, indicated by the constitutional design in the text and structure of the constitution and indicated by the debates on the formulation and adoption of the constitution. Thus, as something new, the Promulgation Theory tries to *link* the specific constitutional design to a methodological interpretation of public law statutes. In many ways, the theory finds inspiration in debates on statutory interpretation in the US, but the theory does not aim to *prove* the existence of a certain set of meta rules for statutory interpretation of Danish public law statutes.

The Promulgation theory may offer a path forward in the quest of a better understanding of the law and may offer a more coherent approach to practicing the law. The interplay between the different »rules« is inherently difficult, and I argue that a theory on legal methodology inspired by the constitutional design is an exercise worthwhile. Even if you ultimately end up unconvinced by the constitutional argumentation,[126] it is my proposition that the presented interpretational meta rules (or, in other words, guiding principles) are valuable for the further development of legal theory on statutory interpretation of public law statutes.

Developing a new legal theory on statutory interpretation takes time. Possibly, the propositions in this article may function as step stones for the development of a more coherent approach. Perhaps legislators or government officials preparing draft statutes will find inspiration in the Promulgation Theory. Perhaps the theory will stimulate judges or attorneys. Perhaps scholars will discuss, reject, or cultivate promulgationist propositions on methodology. Realistically, the composition of a truly coherent legal theory requires multiple contributions. With any luck, the Promulgation Theory's aspirations may lead to new contributions that further the insights on statutory interpretation, lighting a new hope for the pursuit of more predictability and equality in the law. Such explorations would arguably be the continuation of the thoughts on the rule of law introduced by the Framers in 1849.

The Framers almost certainly did not envisage the current state of affairs in Denmark, but reading their 1849-debates has led me to the conclusion that the rule of law is in good shape and well within the constitutional frame delivered to us by the Framers. At least in one sense, the dead hands of the Framers still guide us today.

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[126] See *Part Three* and *Part Four*.