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Author(s): Bønsing, Sten; Mäntylä, Niina; Wenander, Henrik

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Status and Criminal Liability of Civil Servants in Modern Public Administration: A Comparative Study of Denmark, Finland, and Sweden

Sten BØNSING^{*}, Niina MÄNTYLÄ^{**} & Henrik WENANDER^{***}

Accountability is a central topic in administrative law. To hold persons and institutions executing public power legally accountable in various ways is linked to ideas of good governance, democracy, legitimacy, and the rule of law. In the last decades, established structures for accountability in the public sector have been challenged through processes of privatization of public services, digitalization and a trend of flexibilization of the employment status of civil servants. All these developments are closely related to the impact of Europeanization.

Among the various tools for accountability, criminal liability for public officials constitutes the most far-reaching form of measures from the perspective of the individual. The aim of this comparative study is to draw conclusions on the challenges in defining the legal status and the scope for the criminal liability of civil servants against the background of the developments just mentioned. The choice to study three Nordic countries (Denmark, Finland and Sweden) is made against the background of the Nordic countries all being highly ranked in international surveys of democracy and the rule of law. Alongside introducing Nordic solutions for the modern liability challenges, the study points out development trends driven by europeanization, which bring new elements into Nordic thinking.

Keywords: Accountability, criminal liability, civil servant, public employees, Nordic countries, privatization, public administration, legal status, automated decision-making, rule of law

1 INTRODUCTION

Accountability is a central topic in administrative law. To hold persons and institutions executing public power legally accountable, in various ways is linked to ideas of good governance, democracy, legitimacy, and the rule of law.¹ In the last decades, established structures for accountability in the public sector have been

^{*} Prof., Department of Law, Aalborg University, Email: sb@law.aau.dk.

^{**} Prof. of public law, University of Vaasa, Email: ncm@uwasa.fi.

^{***} Prof. of public law, Lund University, Email: henrik.wenander@jur.lu.se. We would like to express our gratitude to Associate Professor Melanie Hack (University of Bergen) and to Professor Birgitta Nyström (Lund University) for valuable comments.

¹ See on the concept of accountability in administrative law and public administration A. Psygkas, *Accountability*, in *Oxford Handbook of Comparative Administrative Law* 444 ff (P. Cane et al. eds, Oxford University Press 2021).

challenged through processes of privatization of public services and changes in management ideologies (often referred to as ‘New Public Management’). Related to this, there is also a trend of flexibilization of the employment status of civil servants in Europe. Furthermore, the use of automatic decision-making is developing rapidly.² All these developments are closely related to the impact of Europeanization, that is, the influence on national administrative law structures through EU Law and the ECHR.

Among the various tools for accountability, criminal liability for public officials constitutes the most far-reaching form of measures from the perspective of the individual. The use of sanctions, such as imprisonment or fines, against public officials deviating from their duties raises important questions on the legal status of civil servants and the functioning of the public administrative system. Seemingly, this aspect of accountability has not gained much attention from a comparative perspective.

This article conducts a comparative legal study of the systems for criminal liability for civil servants in the three Nordic EU countries Denmark, Finland, and Sweden. The aim of the comparative study is to draw more general conclusions on the challenges in defining the legal status and the scope for the liability of civil servants against the background of the developments just mentioned. The main question is how the national criminal liability systems for public officials respond to the challenges of privatization, and digitalization. However, the focus of the study is more on the public law dimension of this form of accountability (relating to the tension between the interests of good governance, legitimacy and the rule of law), than on doctrines of criminal law.

The article will point out possible differences between the systems and analyse the different legislative solutions. The choice to study three Nordic countries is made against the background of the Nordic countries all being highly ranked in international surveys of democracy and the rule of law.³ Nordic solutions may therefore be of general interest to European and international legal discourse.⁴ Since the countries have very similar societal systems, but in part different administrative systems, the comparison may provide interesting insights into the legislative choices being made and their effects in the field studied.⁵ This study uses what

² M. Considine & K. A. Afzal, *Accountability in an Age of Markets and Networks*, in *The SAGE Handbook of Public Administration* 620 ff (2nd ed., B. Guy Peters ed., SAGE 2012).

³ F. Martela et al., *The Nordic Exceptionalism: What Explains Why the Nordic Countries are Constantly Among the Happiest in the World*, in *World Happiness Report 2020* 130 (J. F. Helliwell et al., eds, Sustainable Development Solutions Network 2020), worldhappiness.report/ed/2020 (accessed 21 Oct. 2021).

⁴ R. Hirschl, *The Nordic Counternarrative*, 9 *ICON* 449–469 (2011), doi: 10.1093/icon/mor034.

⁵ Compare on ‘the most similar cases’ approach in designing comparative legal studies R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *Am. J. Comp. L.* 125–155, 133 ff (2005), doi: 10.1093/ajcl/53.1.125.

Kischel has labelled a ‘classic comparison’ approach, which looks into the legal norms that are relevant in a field. This is done by focusing on the legal concept of liability for civil servants. The comparison of legal concepts may be difficult since their realization and meaning may vary owing to extra-legal differences.⁶ However, the mentioned similarities between the three legal systems diminishes this risk. Furthermore, the article also takes note of the historical and societal developments behind the legal regimes.

Concerning delimitations, the focus on state administration means that municipal administration will not be included in the study. Because of the special constitutional role of local government and municipalities in the three states, the approach would become too wide if the article were to include the role of civil servants in municipalities and regions.⁷ We also leave out the analysis regarding criminal liability of ministers because the legal status of ministers differs from the status of civil servants.⁸

2 STATE ADMINISTRATION: BASIC STARTING POINTS

Nordic countries repeatedly rank very highly in international surveys concerning the rule of law and democracy.⁹ Global indexes also indicate that together with the other Nordic countries, Denmark, Finland, and Sweden are the least corrupt countries in the world. Citizens in the Nordic countries also trust on their civil service and national government, despite the COVID-19 pandemic in particular having raised some challenges (e.g., polarization).¹⁰

The president and the government exercise governmental powers in Finland, but the president’s role has become more symbolic during the last thirty years.¹¹ In Sweden and Denmark, the head of state, the king or reigning queen, has a mainly ceremonial role.¹² In all Nordic countries, all public power emanates from the

⁶ U. Kischel, *Comparative Law*, 162 ff (Oxford University Press 2019).

⁷ Compare for an overview of Nordic municipal law E. Mäkinen, *Controlling Nordic Municipalities*, 23 Eur. Pub. L. 123–146 (2017), doi: 10.54648/EURO2017007.

⁸ Compare in Finnish Law D. Hellenius, *Criminal Liability of Political Decision-Makers in Finland* in *Criminal Liability of Political Decision-Makers* (F. Zimmermann ed., Springer 2017).

⁹ F. Martela et al., *World Happiness Report 2020* 130 (J. F. Helliwell, et al. (eds), Sustainable Development Solutions Network 2020), worldhappiness.report (accessed 20 Jan. 2022); T. Virtanen, *Public Administration Characteristics and Performance in EU28: Finland*, 295–307 (European Commission 2018).

¹⁰ OECD, *Drivers of Trust in Public Institutions in Finland* (2021), <https://www.oecd-ilibrary.org/sites/52600c9e-en/index.html?itemId=/content/publication/52600c9e-en> (accessed 20 Apr. 2022); J. Nielsen & J. Lindvall, *Trust in Government in Sweden and Denmark During the COVID-19 Epidemic*, 44(5–6) W. Eur. Pol. 1180–1204 (2021), doi: 10.1080/01402382.2021.1909964.

¹¹ T. Virtanen, *supra* n. 9, at 295.

¹² T. Bull, *Institutions and Divisions of Power*, in *The Nordic Constitutions: A Comparative and Contextual Study* 45 f (H. Krunke & B. Thorarensen eds, Hart 2018).

people and the government is politically accountable to the parliament through the mechanism of a vote of no confidence.¹³

In Finland, the central government comprises strong, independent ministries and central agencies and institutes. The ministers work quite independently, but typically the Government Programme includes horizontal policy objectives, which lead to broader collaboration between ministries.¹⁴ The role of strategic steering belongs to ministries, while the agencies focus on operative tasks.¹⁵ Similar to Finland, the government in Denmark does not act as one single body. Formally speaking, each minister acts on his/her own and has neither the total government nor the prime minister as the administrative head. The prime minister has the opportunity and right to dismiss a minister if he/she acts against directions from the prime minister. However, this means that the ministers usually act in understanding with the will of the prime minister.¹⁶

On the contrary, under the Swedish administrative model, the government – apart from certain decisions on matters on military defence – shall always decide as a collective.¹⁷ The minister in the relevant field is responsible for the drafting of proposals in his or her ministry (*department*). The ministries consist for the most part of non-political civil servants acting as experts, but there are also civil servants representing the political parties forming the government (State Secretaries and other political appointees). An elaborate system of cross-ministerial contacts, involving both experts and political appointees, aims at making it possible for this collective decision-making to work in practice.¹⁸

Despite this exception, in Denmark and Finland, as well as in Sweden, civil servants (with a few exceptions in the governmental ministries) are not politically appointed and are appointed by merit. This is connected to the system for accountability, which makes a clear distinction between the political level and the civil service. Accountability of civil servants is assessed purely from a legal perspective: they are not held accountable from a political perspective.¹⁹

¹³ *Ibid.*, at 56.

¹⁴ OECD, *Centre Stage. Driving Better Policies from the Centre of Government* (2014), <https://www.oecd.org/gov/report-centre-stage-2.pdf> (accessed 3 Jan. 2022).

¹⁵ Ministry of Finance, *Central Government* (2020), <https://vm.fi/en/central-government> (accessed 20 Jan. 2022).

¹⁶ See e.g., J. P. Christensen, 'Regeringsdannelse' (2019) *Ugeskrift for Retsvaesen B* 89–99.

¹⁷ Instrument of Government 1974, Ch. 7 Art. 3.

¹⁸ T. Persson, *Policy Coordination under Minority and Majority Rule*, in *The Oxford Handbook of Swedish Politics* 636 ff (J. Pierre ed., Oxford University Press 2016).

¹⁹ Political affiliation affects the recruitment of top civil servants in Finland. There has been a large media discussion concerning these questions recently. It has been seen as problematic that there is no possibility for appeal in these recruiting decisions concerning some of the highest civil service positions (State Civil Servants Act (750/1994) 59 §). T. Virtanen, *supra* n. 9, at 310. See HE (Government proposal) 77/2017.

In addition, it is important to note that all state administrative agencies make their decisions in their own name in all three countries. However, some significant differences occur concerning the possibilities ministers or governments have to intervene in the operation of agencies. Denmark, contrary to the Finnish and Swedish systems, is closer to the traditional European model, where a minister has greater opportunity to intervene in agencies' day-to-day operations.²⁰ In Sweden, although there is no formal direct line of command from the minister to the leadership of an administrative agency, there is still considerable scope for formal and informal influence, with the government (as a whole) handing out assignments to the agency or the minister or state secretary maintaining so-called informal contacts. However, according to the Instrument of Government, neither the government nor any other public body or the parliament may decide how an administrative agency shall decide in an individual administrative matter relating to either the exercise of public authority (*Myndighetsutövning*) vis-à-vis an individual or a local authority, or the application of an Act of Law.²¹ This constitutional rule is often invoked in public debate, but its scope is debated from both a political as well as a constitutional perspective. Similarly, in Finland, the chances of a ministry attempting to change the application of law by an agency in an individual case are limited. The ministry may issue general policy instructions or it can try to amend the applicable rules.²²

In Denmark and Sweden, as well as in Finland from 2023, public administration consists of three levels: central, regional, and local.²³ In all Nordic countries, local and regional government play an important role in the constitutional system.²⁴ Because of the strong role of municipalities at the local level, most of the state civil servants work at the central or regional level of public administration. In Sweden, for example, there are regionally organized state agencies in the form of the County Administrative Boards (*Länsstyrelser*), which date back to the 17th century. These bodies are today responsible for a wide range of matters, including public safety and environmental protection. However, there are also signs of centralization in public administration. For example, in Finland, a new Digital and Population Data Services Agency operates today on a national level – taking care of the tasks of the old local register offices.

²⁰ O. Mäenpää & N. Fenger, *Public Administration and Good Governance*, in *Nordic Law in European Context* (P. Letto-Vanamo, D. Tamm & B.O. Mortensen eds, Springer 2019).

²¹ Instrument of Government 1974, Ch. 12 Art. 2.

²² Mäenpää & Fenger, *supra* n. 20, at 164.

²³ In Finland, there has been a reform in 2023, which means the transfer of the responsibility for organizing health and social services and rescue services from municipalities to regions.

²⁴ V. Persson, *Sweden: Local Government in Sweden-Flexibility and Independence in a Unitary State*, in *Local Government in Europe: The 'Fourth Level' in the EU Multilayered System of Governance* (C. Panara & M. Varney eds, Routledge 2013).

S. 3 LEGAL STATUS OF CIVIL SERVANTS

3.1 THE FLEXIBILIZATION OF THE EMPLOYMENT STATUS OF THE CIVIL SERVANTS

The flexibilization of the employment status of the civil servants has become a trend in many countries in Europe as a result of New Public Management (NPM). According to Demmke and Moilanen, public employment is becoming more diverse. In a study in 2012, they pointed out that in almost all EU Member States, the percentage of civil servants was decreasing. At the same time, a third employment group, *public employees* under fixed-term contracts, started to emerge.²⁵ It is also possible to see this kind of development in the Nordic countries, but the situation varies from country to country. For example, in 2012, in Sweden >99% and in Denmark 73% of staff in central public administration were already working with labour law status, when in Finland the number was only 13%.²⁶ Also, in the OECD report in 2018, Denmark and especially Sweden were mentioned as an example of countries where relatively few statutory civil servants work in central public administration.²⁷

In Sweden, since the reforms on public employment that took place between 1965 and 1975 (*see* further section 4.1), there is in principle no special status for public employees. Put very briefly, the idea behind the reforms was to regulate the labour law relationships in public employment in the same way as in the private sector. This means that the general labour law system should also apply to public employees. Except for judges, the protection against dismissal of higher public employees was for the most part abolished.²⁸ Notably, university professors continued to be appointed by Governmental decision and to enjoy protection of dismissal from office until 1999.²⁹ Today, certain aspects of public employment are regulated in a special Act on Public Employment (1994:260). Among other things, the status of heads of authorities, Directors General, is subject to such special rules. Directors General are employed by the government for a limited term and enjoy a special status concerning removal from office (Act on Public Employment Article 33).

In Sweden, this also means limited criminal liability in the public administration. Before 1975, the scope for the criminal responsibility of civil servants was

²⁵ D. Bossaert, C. Demmke & T. Moilanen, *The Impact of Demographic Change and Its Challenges for the Workforce in the European Public Sectors. Three Priority Areas to Invest in Future HRM. EIPA Working Paper 1,19* (2012).

²⁶ *Ibid.*, at 22.

²⁷ OECD, *Government at a Glance*, OECD Publishing (2021), https://read.oecd-ilibrary.org/governance/government-at-a-glance-2021_1c258f55-en#page1 (accessed 20 Apr. 2022).

²⁸ L. Ryberg-Welander, *När ämbetsmannen blev arbetstagare*, Förvaltningsrättslig tidskrift, 999 (2018).

²⁹ Bet. 1997/98:UbU6 *Anställningsskyddet för professorer* (Report by the Committee on Employment, Employment Protection for Professors).

much wider, meaning that also rather minor errors could result in criminal sanctions. For some years there has been a political debate on whether Sweden in some way should return to a version of the old system for responsibility, with reference to a widespread view on there being gaps in the accountability structure in Sweden. As opposed to its Social Democratic predecessor, the current Liberal-Conservative Swedish Government (in office since 2022) has the ambition of reforming criminal liability for civil servants (see below section 4.2).³⁰

In comparison, in Finland the employment conditions still differ between civil servants and public employees who have been hired under labour law, despite some convergence having occurred between the legal frameworks (Employment contracts act, Act on public officials in central government, and Act on civil servants in local and regional government). However, the difference from the perspective of criminal liability is still significant between civil servants and public employees on employment contracts. All Criminal Code provisions (offences in office) apply to a person exercising public authority, but only bribery offences and breach/negligent breach of official secrecy apply to an employee of a public corporation (Criminal Code 40:12). In addition, there is also a third category in the public sector: employees in state-owned companies are being held liable only based on 'normal' criminal rules similarly to private actors. For example, in case of secrecy crimes, this means a shorter limitation period and milder sanctions.

In Denmark, civil servants are employed in three possible ways. They can be employed 1) by individual contract, 2) based on a collective agreement (agreed by a union and the employer), or 3) based on the Civil Servants Act (*Tjenestemandssloven*). Each of these employment methods implies different kinds of sanctions and procedures to impose sanctions if duties are misconducted and employees are acting against their duties.

3.2 THE RELATION BETWEEN CRIMINAL PROCESS OR DISCIPLINARY SANCTIONS

In Denmark, Finland, and Sweden, sanctions against civil servants who act against their duties can come into force by two routes: criminally or through disciplinary sanctions/ employment wise. By disciplinary sanctions are meant measures that relate to the employment relation, such as dismissal, which primarily base on non-performance of the employment, but they may also relate to the civil servant's

³⁰ Bet. 2017/18:KU37 *Offentlig förvaltning* (Report by the Committee on the Constitution, Public Administration); Skr. 2019/20:75 *Riksdagens skrivelser till regeringen – åtgärder under 2019*, 65 (Report on the Parliament's Communications to the Governments – Measures taken during 2019); see also the Government coalition agreement *Tidöavtalet: Överenskommelse för Sverige*, at 61, <https://www.liberalerna.se/wp-content/uploads/tidoavtalet-overenskommelse-for-sverige-slutlig.pdf> (accessed 22 July 2023).

acting in a way that is unacceptable but not necessarily against fulfilling the obligations in the contract. Disciplinary sanctions can be compared with criminal punishment (*see below*). In addition, liability for damages is possible, but tort liability primarily concerns the administrative agency as such.

A disciplinary case may result in various kinds of sanctions, from dismissal in the most severe cases to lower-grade sanctions, such as salary deduction, reprimands, etc. In Sweden, the Government may decide that an administrative authority shall have a special Staff Disciplinary Committee (*Personalansvarsnämnd*), chaired by the head of the authority, to make this kind of decision (Government Authority Ordinance (2007:515) Article 25). As a rule, at least the larger authorities have such bodies. For certain higher officials, such as directors general and, interestingly, university professors, such procedures take place before the Government Disciplinary Board for Higher Officials (*Statens ansvarsnämnd*). The decisions of a Staff Disciplinary Committee and the Government Disciplinary Board for Higher Officials can be challenged by instigating a procedure before the Labour Court (*Arbetsdomstolen*).

In Finland, the legislators' will has been that only the most serious cases will be taken through the criminal proceedings.³¹ Also, the statistics show that typical crimes performed by civil servants, which are dealt with by courts, have been performed with intent.³² However, the strong disciplinary liability system is no longer typical in Finland. This liability route has been developed more to the direction of the employment-based system. One reason for this has been, that punishment-type disciplinary sanctions have been seen as problematic in the light of European law and *ne bis in idem* principle.³³ Sometimes parallel application of the other liability action and criminal sanctions occur, but the public officials can not be punished twice in several procedures. For example, dismissal might follow the criminal proceedings if committing an offence in office endangers the citizens' trust in the authority, but it is not a punishment.³⁴

It seems that when in Sweden, the criminal liability of civil servants is limited, the process of disciplinary sanctions is developed more systematically than in Finland or Denmark. From the viewpoint of *ne bis in idem* principle, it seems

³¹ HE (government proposal) 58/1988 vp, 17–19 and LaVM (report of Legal Affairs Committee) 7/1989 and HE (government proposal) 77/2001 vp, 11.

³² N. Mäntylä et al., *Virkavastuu julkishallinnon muuttuvassa toimintaympäristössä* (The liability of civil servants in the changing environment of public administration), 14 Valtioneuvoston selvitys- ja tutkimustoiminnan julkaisusarja 11–19 (2022), <https://julkaisut.valtioneuvosto.fi/handle/10024/163833> (accessed 3 Jun. 2023).

³³ See case of *Albert v. Romania* (ECHR), <https://hudoc.echr.coe.int/fre?i=001-97242> (accessed 16 Feb. 2010) and *Ibid.*, at 95–97.

³⁴ See e.g., Administrative court of Eastern Finland (17 Apr. 2018), 18/0107/4 and Administrative court of Eastern Finland (20 Jun. 2019), 19/0297/2.

relevant to develop one route or the other. This is one of the reasons, which explains the differences in the liability systems between the countries.

Usually the management of the public entity decides whether to bring sanctions into action against the employees. This applies both for the criminal and the disciplinary track. If the management assesses that criminal sanctions are relevant, it has to make a report to the police, who prosecute if the conditions are fulfilled. If the management considers that other sanctions are relevant, the management starts a case against the employee. It is also important to note, that in Finland and Sweden, the parliamentary ombudsman and the chancellor of justice have a role concerning criminal proceedings. A criminal prosecution is one of the measures that they can take.³⁵ In severe cases, they may initiate criminal proceedings for official misconduct or a general prosecutor may also instigate such a procedure. Such procedures are, however, rare in Finland and Sweden. In Sweden, furthermore, they predominantly concern persons with functions relating to criminal law, such as police officers, prison personnel, or judges.³⁶

Instead, the Danish Ombudsman supervises the actions of the authorities as such and not the individual employees. This reflects a deeper difference. In Sweden and Finland, there is, in principle, an individual responsibility for errors of civil servants in their carrying out of their duties. This is linked to the general rule that their actions are not considered to be made on behalf of a minister after delegation, as opposed to the situation in Denmark, as well as many other European states.³⁷

4 CRIMINAL LIABILITY

4.1 PERSONS COVERED BY SPECIAL CRIMINAL LIABILITY

The Danish Criminal Code has a particular chapter concerning civil servants' criminal liability. Chapter 16 applies to people employed in or appointed to public tasks. The group of persons covered by the chapter is very wide. It covers all kinds of persons whether they are hired, appointed, or elected and whether they are salaried or not. What matters is whether the person performs public tasks.

³⁵ H. Stoor, *Criticism by the Parliamentary Ombudsman – Punishment or Guidance*, Parliamentary Ombudsman 65 (2009), <https://www.oikeusasiamies.fi/documents/20184/38532/Stoor%2C+Criticism+by+the+Parliamentary+Ombudsman.pdf/7cc24f24-13ff-4ffc-9dc0-9abeb08b56df>.

³⁶ T. Bull, *Tjänstefelet och den goda förvaltningen*, in *Fundamentala fragment. Ett konstitutionellt lapptäcke* (Official Misconduct and Good Administration) (T. Bull ed., Iustus 2013).

³⁷ H. Wenander, *Rättsliga ramar för styrning av förvaltningen i Danmark och Sverige* (Legal Framework for Steering Public Administration in Denmark and Sweden) 93(1) Nordisk Administrativt Tidsskrift 57–74, 66 ff (2016).

In Finland, Chapter 40 in the Criminal Code describes offences in office, and it covers similar offences to the Danish Criminal Code. Also, the group of persons governed by the chapter is as broad as in Denmark, but there are also differences between the Danish and Finnish systems. The main idea of Chapter 40 in the Finnish system is to regulate the criminal liability of persons exercising public authority (civil servants), but it partly applies to persons performing public tasks as well. For example, only bribery offences and breach/negligent breach of official secrecy apply to an employee of a public corporation (Criminal Code Chapter 40 Article 12), while also abuse/aggravated abuse of public office and violation/negligent violation of official duty apply to a person exercising public authority.

In the Finnish system, efforts have been made, by the definitions of Chapter 40 in the Criminal Code, to define when a person is exercising public authority. This kind of case is, for example, when a person, on the basis of an act or decree, participates in the preparation of an administrative decision (Criminal Code Chapter 40 Article 11). However, these definitions do not exhaust all situations where this kind of special criminal liability has been seen as necessary, which is why there are about 150 sections in the Finnish legislation which refer to the liability described in Chapter 40. This kind of special regulation has been needed especially because of the trend of outsourcing and privatization. Also, cases where, for example, the taxation authority has been hiring temporary agency workers for their phone service have been seen as problematic from the viewpoint of liability issues because Chapter 40 of the Criminal Code will not apply to these workers. The deputy ombudsman highlighted that administrative guidance is a public administrative task and special legislation concerning criminal liability is needed if agency workers are used.³⁸

4.2 TYPES OF CRIMINAL OFFENCES COMMITTED BY CIVIL SERVANTS

In Sweden, the 1975 reform greatly reduced the criminal responsibility for civil servants. Whereas the old Swedish system criminalized also minor offences or mistakes by civil servants, the current system established aims at punishing only more severe cases of misuse of power and similar. Although the legal provisions have been somewhat adapted (notably in 1989), the main features of the reforms still exist.

The offence of official misconduct (*tjänstefel*) Criminal Code Chapter 20 Article 1) covers intentional or negligent disregard of duties when exercising public authority. Minor acts are not criminalized. The assessment of what acts shall be

³⁸ Parliamentary Ombudsman EOAK/7302/2019.

considered minor shall be made considering the perpetrator's powers or the connection between the duties and the exercise of public authority. The core of the provision on official misconduct is the concept of 'disregard of duties'. This fairly vague phrasing includes both the applicable legal rules in Acts of Law and other legislation, such as rules on disqualification, and other unwritten expectations on civil servants. The latter category has to some extent been clarified in case-law (*see below*). Intentional and gross offences are to be punished as gross official misconduct.³⁹

In Sweden, civil servants, as well as certain private employees, are also covered by the provision on breach of duty of confidentiality (Criminal Code Chapter 20 Article 3).⁴⁰ It is also remarkable that some other provisions of the Criminal Code may be relevant to civil servants, despite there not existing special regulation concerning civil servants. These provisions include the offences of taking of a bribe and trading in influence (Criminal Code Chapter 10 Articles 5 a and 5 d).

Contrary to Sweden, specific, separate criminal law provisions on civil servants are typical for the Danish and the Finnish systems. A chapter about civil servants' criminal liability in these countries also typically consist of precise rules (e.g., bribery crimes) and more general rules. For example, in the Danish system, Criminal Code Articles 155 to 157 are very broadly worded provisions that pick up on cases and situations not covered by the special articles. Article 155 criminalizes the misuse of power in general. Article 156 criminalizes both when a person refuses or fails to fulfil a duty or obligation and when a person does not comply with an order or instruction from a superior. Article 157 criminalizes misconduct and neglect of duties in terms that are more general. The Articles (155 to 157) largely refer to ordinary administrative rules, that is, administrative law in general (conflict of interest, misuse of powers, misconduct, deliberately wrong decisions, etc).⁴¹

³⁹ According to the text of the provision, the assessment whether the offence is gross shall give particular consideration 'to whether the perpetrator seriously abused their position, or whether the act resulted in serious detriment or considerable undue advantage for an individual or the public'.

⁴⁰ According to the provision, persons who divulge information that they are legally obliged to keep secret are guilty of this crime. However, under the constitutionally entrenched so-called freedom for messengers (*meddeläfrifhet*), civil servants may nevertheless pass on secret information for publication in media without risk of criminal prosecution. (Freedom of the Press Act Ch. 1 Art. 7; Fundamental Law on Freedom of Expression Ch. 1 Art. 10). Exceptions apply for especially sensitive information (Freedom of the Press Act Ch. 7 Art. 22, as specified in the Public Access to Information and Secrecy Act (2009:400)).

⁴¹ As a recent example of a high-profile case, it can be mentioned that in 2020 a Chief Commander of the Army was sentenced to a three-month prison term for conflict of interest, misuse of power and disclosure of confidential information. He was found to have favoured his wife (also employed in the army) by giving her a promotion that she was not qualified for and giving her permission to study for a master's degree in military studies. She was not entitled to this study based on internal military guidelines. The chief commander was also charged with breaking his duty of confidentiality by giving his wife access to his email box with confidential information (cf. TfK 2020.958 V).

The main idea is similar in Finland. Violation/negligent violation of official duty is the most typical offence, and the content of the duty is based on the provisions or regulations in the other acts, such as the Act on the Civil Servants of the State (750/1994) and the Administrative Procedure Act (434/2003) as well as instructions and guidelines to be followed in official functions. Other sections, mentioned in Chapter 40 in the Finnish Criminal Code, include general rules (abuse/aggravated abuse of public office) as well more precise rules about bribery offences and breach/negligent breach of official secrecy. In Finland, discussion about the need to develop the Finnish system closer towards the Swedish model of more compact regulation began already in the 80s and was based on the argument that the system includes overlapping elements. Some changes were made in 1990, but the greater move towards the Swedish model has not gained political support.⁴²

At the same time, there has been an interest to develop the Swedish system in order to be closer to the other Nordic countries. Some political parties support stricter criminal liability for civil servants, in part with reference to the legal situation before the reforms of 1975. In April 2018, a parliamentary majority requested that the (minority) government act to expand the criminal liability for official misconduct.⁴³ The Social Democratic and Green Party government appointed a commission of inquiry (in the form of a special expert), which is the usual form for drafting legislative changes.⁴⁴ However, the ensuing report stated that Sweden consistently ranks very high in international comparison on citizen trust in the public sector and that criminal liability must be seen as part of a wider system for accountability, including tort liability and supervision by the parliamentary ombudsman and the chancellor of justice. Since changes in one part of this system may affect other parts, caution is necessary when considering such changes. The special expert concluded that an expanded criminal liability could limit the integrity of civil servants in relation to their management. Furthermore, a stricter criminal liability would risk creating a ‘culture of uncertainty’, which would affect recruitment of civil servants negatively. In sum, the risks associated with expanding criminal liability would not outweigh the benefits, which in any case are uncertain.⁴⁵ As noted above (section 3.1), the current Liberal-Conservative Government apparently does not share the views put forward by the special expert,

⁴² P. Viljanen, *Virkarikokset*, in *Keskeiset rikokset* 573–581 (D. Frände et al. eds, Edita 2010).

⁴³ Bet 2017/18:KU37 *Offentlig förvaltning*; rskr 2017/18:229.

⁴⁴ Dir 2020:54 *Ett förstärkt straffrättsligt skydd för vissa samhällsnyttiga funktioner och några andra straffrättsliga frågor* (Enhanced criminal law protection for certain vital functions in society and some other criminal law matters); see generally H.-H. Vogel, *Sources of Swedish Law*, in *Swedish Legal System* (2nd ed., M. Bogdan & C. Wong eds, Norstedts Juridik 2022).

⁴⁵ SOU 2022:2 *En skärpt syn på brott mot journalister och utövare av vissa samhällsnyttiga funktioner* (Enhanced criminal law protection for journalists and those performing certain vital functions in society), at 370 ff. (English summary, at 36).

and aims for reforms of the liability system. This indicates that criminal liability for civil servants is an important ideological matter.

In the light of these arguments, it is interesting to note that despite the number of civil servants convicted of a crime being small in the Nordic countries, some high-profile cases end up in courts yearly. For example, in Denmark, during the last few years, there have been a couple of important high-profile cases concerning bribes. In 2019, the supreme court in Denmark ruled on a passive bribery case concerning two police officers. A businessman was suspected of human trafficking, and after conducting an investigation, the two police officers were given free holiday travel. The police officers completed the investigation without filing charges. Approximately one year later, the businessman gave a free holiday to Africa to the two police officers (cf. UfR 2019.2086 H). Another case (or in fact many cases in the same complex) is the so-called 'ATEA'-case. The High Court of Eastern Denmark ruled in 2017 on the high-profile bribery case. A big information technology company ('ATEA') was discovered to have given gifts (products, holidays, travels, etc.) to public employees in purchasing departments. The court judged this to be both active and passive bribery (cf. UfR 2017.1989 Ø, TfK 2017.1067 Ø, and TfK 2017.1092). In Denmark, articles which deal with the duty of confidentiality are also some of the most used (violated) articles.

In Finland, the number of judgments concerning offences in office (Chapter 40, Criminal Code) varies from year to year, but has been quite low during recent years. Statistics Finland has gathered the following numbers from the first court instances: 2021 (39), 2020 (21), 2019 (19) and 2018 (33). The most typical offence is violation of official duty. From the cases of the Supreme Court, (*Korkein oikeus*, KKO) the case KKO 2017:92 is one worth mentioning. The prosecutor general contracted services for the public prosecutor's office from a company owned by his brother. The Supreme Court decided that he deliberately violated the duties of office. Also, cases related to the former head of Helsinki police's anti-drugs unit have highlighted the importance of special liability regulation. Besides drug offences, he also committed offences in office, such as accepting bribes and aggravated abuse of public office.⁴⁶

In Sweden, the special expert appointed for investigating legislative changes in the field carried out a survey of the case-law on official misconduct from 2007 to 2020. The conclusion was that cases on official misconduct primarily concerned police officers, judges, and other persons with functions in the criminal law system. Notably, many of the cases concerned deprivation of liberty or the use of force.

⁴⁶ He owned part of a technology company called Trevoc, which sold surveillance and tracking devices to Finnish law enforcement agencies (police, the border guard, and the customs agency). He also had a key role in receiving narcotics imported to Finland and used opportunities offered by his position to mislead his colleagues and to conceal evidence.

This is understandable, since the interest of protecting the rule of law is especially strong in such situations. Furthermore, the actions by police personnel almost always involve exercise of public authority. The traditional focus on civil servants and judges in the criminal law system may also be explained by the existence of relatively clear rules of action, sometimes involving explicit rules on time-limits. There are, however, also examples of other categories of civil servants in the case-law.⁴⁷

5 COMPARATIVE ANALYSIS – TACKLING THE LIABILITY CHALLENGES IN MODERN PUBLIC ADMINISTRATION

5.1 PRIVATIZATION AND OUTSOURCING

Traditionally, the Nordic model is characterized by a big public sector that provides welfare services and secures socio-economic equality. However, since the 1980s, the ‘Chicago school’ of economics and theories of NPM have been sources of inspiration for many public sector reforms. In short, they emphasize deregulation, privatization, and marketization.⁴⁸ An efficient public sector that promotes productivity and efficiency became the goal also in the Nordic countries. In the state administration, for example, privatization of telecommunications or electricity generation and distribution are typical examples of this kind of development in all the Nordic countries.

In Denmark and Sweden, there are no constitutional limits for delegating tasks of public authority to private bodies. The only condition is that this is founded on an act.⁴⁹ Instead, in Finland, delegating public administrative task to others than public authorities is possible only by an act or by virtue of an act, and if certain conditions are met, for example, if legal remedies and other requirements of good governance are not endangered. This means, according to the Constitutional Law Committee, that the special criminal liability has to be extended to these actors as well.⁵⁰ A task involving *significant exercise of public powers* cannot be delegated to entities outside public authorities at all (Constitution of Finland, Article 124).

From a criminal liability viewpoint, the starting point in Finland is that Chapter 40 in the Criminal Code formulates the liability of when a person is exercising public authority. This is the case also when a private actor is exercising public authority. Instead, if the privatised or outsourced task is a public administrative task, which does not include exercising public authority (e.g., advice on

⁴⁷ SOU 2022:2, *supra*, n. 45, at 338–349; *see also* the survey by Bull, *supra* n. 36, at 512 ff.

⁴⁸ J. Lane, *Public Sector Reform Rationale, Trends and Problems* 1–2 (Sage 1997).

⁴⁹ S. Bonsing, *Lovbestemt delegation af forvaltningsvirksomhed til private*, Juristen 263 (2013).

⁵⁰ Statement of Constitutional Law Committee, (Perustuslakivaliokunnan lausunto, PeVL) 20/2006.

administrative matters in some cases), the special regulation about criminal liability is needed, which refers to the liability described in Chapter 40 of the Finnish Criminal Code.⁵¹ Criminal liability regulated by special regulation is then a very typical solution for the challenges caused by privatization and outsourcing. Factual activities and such tasks of private health care providers are usually not public administrative tasks in the Finnish system and the special criminal liability does not apply to them.

In Sweden, the role of private actors in publicly funded activities such as healthcare, schools, and social care has from time to time been vociferously debated.⁵² These discussions, however, have primarily focused on the concrete activities, such as the quality of services, by private health care providers, private schools, etc., and their funding, rather than the questions on use of delegation of public authority normally in focus for general public law discussions. Only concerning the question of delegation of public authority are there constitutional limits. The 1974 Instrument of Government provides that administrative functions may be delegated to local government (municipalities or regions), other legal entities, or individuals. If the function delegated involves the exercise of public authority, the delegation requires support in an act of law, that is, legislation adopted by the Riksdag (Parliament).⁵³ As opposed to Finnish constitutional law, but in accordance with Denmark, there are no constitutional limits to delegation, but the decision to delegate to private bodies or not is left to the discretion of the Riksdag, that is, to political considerations. The exercise of such delegated public authority is, however, covered by the constitutionally entrenched requirement to pay regard to the equality of all before the law and to observe objectivity and impartiality.⁵⁴ Furthermore, the provision on criminal liability for official misconduct also covers the use of public authority by private legal entities or individuals. These entities are also subject to supervision by the parliamentary ombudsman and the chancellor of justice in their exercise of public power.⁵⁵ From a legal perspective, private entities exercising public authority are therefore covered by the same obligations as administrative agencies. Compared to Sweden, in Finland, not only actors exercising public power or performing a public administrative tasks but also private actors performing public tasks are under supervision of the parliamentary ombudsman and the chancellor of justice.

⁵¹ Viljanen, *supra* n. 42, at 580.

⁵² For example M. Katzin, *Taking Care of Business: A Study of the Governing of Care Choice Systems in Swedish Home Care* 45 ff (Lund University 2020).

⁵³ Instrument of Government, 1974, Ch. 12 Art. 4.

⁵⁴ *Ibid.*, Ch. 1 Art. 9.

⁵⁵ Act with Instructions for the Parliamentary Ombudsmen (Lag med instruktion för Riksdagens ombudsmän (JO) 2023:499), Art. 14; Act concerning the supervision exercised by the Chancellor of Justice 1975 (Lag om justitiekanslerns tillsyn 1975:1339), s. 3.

In Denmark, private enterprises are not bound by public administrative law, and they are only, to a minimal extent, criminally liable under the special regulation for civil servants in the Criminal Code. For this reason, the Danish Parliament has to decide, when privatizing and delegating authority to the private sector, whether and to which extent the private body should be liable in the same manner as before the privatization. Roughly speaking, it is very rare that the Danish Parliament decides that such rules about criminal liability follow privatization.

In the light of these remarks, it seems that in Finland, in many cases, the special criminal liability follows privatization, and there are over 150 sections in special regulations which refer to the special criminal liability when delegating public administrative tasks to others than the authorities. Instead, in Sweden, the privatization, together with the development of no special status of public employees, has more dramatically changed the accountability system in the modern public administration. Denmark lies somewhere between the Finnish and the Swedish systems.

This means, for example, that the Swedish liability system is more flexible in facing challenges such as the shift from executive government to public governance.⁵⁶ When there are fewer special liability rules and no special status of public employees, public-private partnership and decision-making in collaborative governance networks is easier to realize. At the same time, trust in public administration might be more vulnerable in this kind of system.

5.2 INTELLIGENT AUTOMATION

Digitalization of public services is the most common focus area across the national digitalization strategies in the Nordic Region. Interest in taking advantage of intelligent automation has increased in all Nordic countries.⁵⁷ Some Nordic countries have already created general legislation concerning automated decision-making in public administration, and some requirements are a consequence of EU data protection legislation (e.g., General Data Protection Regulation (GDPR) Article 22). However, the current legislation is typically lacking special liability rules, despite especially actions to develop civil liability rules at EU-law level are already at an advanced stage.⁵⁸

From a very early stage, Denmark has regulated specific areas, for example, tax decisions, but there is no general legislation that regulates automatic decisions. Instead, in Sweden, in the Administrative Procedure Act (2017:900), a section was

⁵⁶ See about this development Mäenpää & Fenger, *supra* n. 20.

⁵⁷ L. Randall & A. Berlinda, *Governing the Digital Transition in Nordic Regions: The Human Element*, Nordregio (2019), <http://norden.diva-portal.org/smash/get/diva2:1295022/FULLTEXT01.pdf>.

⁵⁸ See Proposal for a directive of the European Parliament and the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive). COM(2022) 496 final.

included which states that decisions may be made by civil servants or by way of automated procedures.⁵⁹ The purpose was to codify the law and to provide general legal support for automated procedures. In 2022, the Local Government Act was amended to allow for delegation to automated decision-making, with certain limitations, also in the municipalities and regions, which previously lacked legal support. These changes are indirectly relevant also for state authorities.⁶⁰ Also in Finland, the new Chapter 8b concerning automated decision-making in the public sector, was added to the Administrative procedure act in 2023. In addition, the liability rules were defined by adding a new Chapter 6a to the Act on public administration information management.⁶¹

From the liability perspective, automated decision-making (ADM) has brought up new problems for traditional thinking of criminal liability. It is not easy to define who is in charge in public administration when using ADM. Because of software, algorithm, and codes, there are also more private actors involved in the process within public authorities. Especially in Finland, in light of Article 118 of the Constitution of Finland, it is difficult to develop a modern approach to liability issues because this section of the constitution is based on traditional thinking of personal accountability. According to Article 118, a civil servant is accountable for the lawfulness of his or her official actions, but as Suksi argues, the main problem when ADM is taken into use is that, in that case, the civil servant who would be accountable for decisions and measures disappears. There have been attempts to name a certain civil servant in the organization as the responsible person (e.g., the director general) when using ADM, but this has conflicted with the principle of legality when it has not been possible to define the tasks and responsibilities of the responsible person clearly enough (Constitution of Finland, Article 8).⁶² As a solution the new Finnish legislation stipulates that the officials responsible for the adoption of the decision-making rules used in the

⁵⁹ Administrative Procedure Act (2017:900) Art. 28; M. Suksi, *Automatiserat beslutsfattande enligt den svenska förvaltningslagen*, *Tidskrift utgiven av Juridiska Föreningen i Finland* 463–472, 469 (2018).

⁶⁰ Local Government Act (2017:725), Ch. 6 Art. 37; cf. Markku Suksi, *Administrative Due Process When Using Automated Decision-Making in Public Administration: Some Notes from a Finnish Perspective* 29 *Artificial Intelligence & L.* 87–110, 99 (2021), doi: 10.1007/s10506-020-09269-x. In Sweden, in 2021, the Parliamentary Ombudsman criticized the Migration Board (*Migrationsverket*) for introducing ADM in order to handle the workload in relation to the provisions on delays in the handling of a matter in the Administrative Procedure Act 2017. The Ombudsman held that the automated procedure did not take into account the actual circumstances of the individual case since the result was that applications that had not been treated in time by the Board were simply dismissed. Furthermore, the reasons for the decision were not stated. According to the Ombudsman, this was an example of use of ADM that is not acceptable, JO 2022/23 s. 481. Also, in Denmark and Finland, the Ombudsman has pointed out problems when using ADM and pronounced that authorities have an obligation to make digital systems in a way that secures compliance with the law and especially administrative law. See FOB 2014–24 (Denmark) and EOAK/3379/2018 (Finland).

⁶¹ Government proposal for a legislation concerning ADM in the public administration HE 145/2022.

⁶² Suksi, *supra* n. 60.

system, for the approval of the system or any changes made to it, and for the conformity assessment and monitoring of the system, should be defined (Act on public administration information management, Chapter 6a). It is remarkable, that the broader criminal liability rules apply to the employee of a public corporation, which takes care of these special tasks mentioned in Chapter 6a. This means that criminal liability is as broad for the employees of a public corporation as it is for civil servants, which is an exception from the general Finnish criminal liability system presented in section 4.1. above.

In Sweden, the use of ADM has, rather surprisingly, not led to any major discussions on criminal liability in public administration. Neither the legislative materials to the changes in the Administrative Procedure Act and the changes to the Local Government Act in 2022, nor the special expert report on expanding criminal liability for misuses of office in 2022 discussed the implications of ADM for criminal liability. The lack of clear rules and principles for distribution of liability in all likelihood mean that criminal sanctions cannot be used as a reaction to errors stemming from ADM.

In Denmark, ADM is not regulated, but has been the turning point in a couple of cases. Since 2017 there has been an independent inquiry about faults in the digital recovery of taxes from 2010 until now.⁶³ Implementing a digital system to collect/recover taxes from citizens has suffered from so many faults and mistakes that the system was cancelled. The inquiry evaluates why and who is responsible for the many errors. The Danish Ombudsman has also announced that authorities have to be clear and strict about who is responsible for information about regulation on public websites. In Denmark, as in many other countries, the public sector has one main entrance to information and systems. In Denmark, the main entrance is, www.borger.dk. In several cases, this leads to the problem that the different authorities have subpages. When it comes to updates of the subpages, the responsibility fades out between the central [borger.dk](http://www.borger.dk)-authority and the specific authorities. The Ombudsman has announced that it has to be very clear and that it must be the particular authority that has the primary responsibility for the updating of information.

Based on these remarks, it is important to note that in modern public administration, the question is not only *who is responsible*, but instead, an effective liability system seems to require more precisely laid down *obligations for action*.

⁶³ *Undersøgelseskommissionen om SKAT* (2022), <https://kommissionenomskat.dk/>.

6 CONCLUSIONS

Rules governing public employment are still important parts of the state's sovereignty, and there is a considerable heterogeneity, what comes to the civil service systems in Europe, as well in Nordic countries.⁶⁴ However, Europeanization has its effects on public sector. Along with law-making, also administration and court rulings are affected.⁶⁵ Concerning this study, Europeanization has multi-layered effects. For example in Finland, the privatization was driven by European integration requirements and also in Denmark and Sweden there were need to reinforce their competitiveness in Europe, as well as globally during the 1990s.⁶⁶ When changing the structure of public sector, Europeanization at the same time strengthens development, where liability of private and public actors is starting to converge.

Europeanization also highlights the liability of authorities or state, instead of individual liability of civil servants. A remarkable example is the GDPR which lays down similar requirements for private and public entities and also emphasizes the liability of authorities. For example, in Finland, GDPR raised the need to discuss administrative fines targeting public authorities. The liability of authorities has not been traditionally a solution for accountability issues when the Finnish system is strongly based on individual liability of civil servants. Based on this, the outcome was that these sanctions are not imposed on public authorities in Finland. However, it launched an important discussion. Instead, in Denmark, after some debate, fines for breaching GDPR were introduced and the first fines are imposed.

In the future, there is potential that Artificial Intelligence (AI) regulation might have similar effects on the development of liability matters, highlighting the liability of authorities, when it is impossible to find an individual civil servant liable. For this need, it might be easier to develop administrative sanctions and tort law system, rather than criminal, when criminal liability is traditionally based on individual, natural persons' liability. In Denmark, Finland, and Sweden, authorities are not liable according to criminal law if they are exercising public authority. In other cases, authorities might be liable in the same way as private companies and it is possible to impose a corporate fine (*företagsbot*) on a company where crimes have been committed in the exercise of business activities. Notably, public activities which are carried out by private actors

⁶⁴ A. Krzywoń, *The Notion of Civil Service in Europe: Establishing An Analytical Framework for Comparative Study*, REALaw.blog (2021), <https://realaw.blog/?p=640>.

⁶⁵ H. Hoffman, *Europeanisation and German Public Administration*, in *Public Administration in Germany* (S. Kuhlman et al. eds, Palgrave Macmillan 2021).

⁶⁶ J.Clifton et al., *Privatizing Public Enterprises in the European Union 1960-2002: Ideological, Pragmatic, Inevitable*, 13 J. Eur. pub. pol'y 745 (2006), doi: 10.1080/13501760600808857.

on a market in Sweden, such as healthcare, schools, and social care, fall under this concept. However, legal scholarship in criminal law has observed that the provision is used relatively seldom.⁶⁷ It is not possible to impose a corporate fine against an authority.

In conclusion, it is important to highlight that criminal liability is one element of the public sector's liability system. In the future, it is necessary to analyse the effectiveness of the liability systems as a whole and make visible the two different purposes of the liability. For the customers of public administration, it is important that they can trust public administration and, for example, obtain compensation for the damages caused by civil servants. Improving public trust does not always require the personal liability of civil servants. At the same time, it is essential to control behaviour of civil servants and other actors taking care of public tasks and prevent illegal activities. Here criminal liability still has an important role – also from the viewpoint of public trust.

⁶⁷ S. Wennberg, *Criminal Law*, in *Swedish Legal System* (1st ed., Michael Bogdan ed., Norstedts Juridik 2010,) 197.