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## Reversing the Principle of the Prohibition of *Reformatio in Pejus*: The Case of Changing Students' Possibility to Complain about their Marks in Denmark

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### Introduction

In recent years, citizens' possibility to complain about administrative acts has been subject to a redesign in a number of European countries, including Denmark, with the more or less explicit purpose of (de facto) limiting this access.<sup>1</sup> In Denmark one recent change is the replacement of the principle of the prohibition of *reformatio in pejus* with the the principle of *reformatio in pejus* as regards students' complaints about their marks. The direct consequence of this change is that a student now risks that the mark complained about is lowered.

It is relevant to study this change because what appears on the surface to be a minor adjustment, and as we shall see it was to a large extent indeed perceived as such, in reality constitutes a major change in the importance ascribed to the value underlying the principle, viz. the possibility for citizens to complain about administrative acts without fear of a worse result, and as such to the general access to complain.

It is the purpose of the paper to investigate why and how the change came about, with a view to examining the implications of this change for the ongoing redesign of the access to complain. As the case will show there is a conspicuous absence of debate as to *why* the change was called for, and part of the explanation for this is linked to *how* the change came about.

The paper is divided into six parts. The first part is concerned with the methodology applied in the paper. The second part places complaints about marks in the administrative legal landscape; as we shall see they transgress a number of legal categories. The third part of the paper outlines the origin and mechanisms of the principle of the prohibition of *reformatio in pejus* and analyses the understanding of the principle in Danish administrative legal doctrine. The fourth part of the paper analyses the statutory changes that were introduced in Denmark in 2010. The fifth part analyses the principle of the prohibition of *reformatio in pejus* in the light of the case, and the sixth and final part concludes the paper by pointing out the implications of the changes in a broader legal context.

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1 Examples are the introduction of dialogue and fees, as well as the general tendency to restructure administrative appeal systems with a view to removing a level of appeal. For an analysis of the changes in health-care law see I.M. Conradsen, 'The end of administrative appeal? The case of the Danish National Agency for Patients' Complaints and Patients' Rights', in D. Dragos et al. (eds.), *Proceedings of the 33<sup>rd</sup> Annual Conference of the European Group for Public Administration: Permanent Study Group Law and Public Administration*, 2012, pp. 48-61.

## 1. Methodology

Methodologically the paper is inspired by case-studies in the social sciences, as case-studies are considered to be particularly useful when investigating the how and why of a particular phenomenon, as is the purpose here. The value of a case-study is that it allows a deep structure analysis of a specific problem in a specific context, and as such allows us to gain valuable knowledge.<sup>2</sup> Within case-study theory it is generally asserted that this knowledge is applicable also outside the single case, and as such it is the purpose that the findings of this paper will contribute to a broader understanding of the ongoing redesign of the access to complain, also outside the case of marks in Denmark.

This said, the analysis is legal in its scope as well as its approach. However, the focus of the analysis on how and why the introduced change came about has implications for the type of legal material that is relevant to study. The study of cases, whether of administrative or judicial origin<sup>3</sup> that traditionally plays an important part in legal analysis must give way to the study of the legislative process and the *travaux préparatoires* of the statutes. This should not be seen as a dismissal of the importance of case law, but simply that in order to answer the research question posed here, it is necessary to look elsewhere for answers.

## 2. Marking as an administrative legal concept

In order to fully understand the scope of the changes it is necessary to place the fact of marking in the administrative legal landscape. First, it is important to establish that the schools and universities that are affected by the changes are considered to form part of the public administration. Secondly, marking is in Danish administrative law considered a real act as opposed to a legal act despite its obvious direct consequences for the student involved.<sup>4</sup> The main consequence of this is that the procedural rules of the Administrative Act (*Forvaltningsloven*)<sup>5</sup> do not apply to marking, as this act applies to individual legal acts only. However, a number of rules that appear in the Administrative Act have been incorporated into the regulatory framework governing examinations, to a large extent providing students with the same procedural rights that are provided in the Administrative Act.

A student may complain about several matters: legal matters, the foundation of the examination (questions, cases etc.), the course of the examination or the mark,<sup>6</sup> and the complaint may result in the offering of a reassessment or a re-examination, or in a dismissal.<sup>7</sup> The mark is in other words just one of more matters that a student may complain about.

A complaint about a mark must be filed with the university and hence constitutes an internal review; in the case of a reassessment or re-examination new examiners are appointed and this constitutes a built-in external review in the internal review. Complaints that are dismissed may be appealed to a board of appeal set up by the university as regards academic matters in which case the situation constitutes an external review. Decisions made by the board of appeal are considered legal acts. Decisions of the board of appeal are final, but complaints regarding legal matters arising from the board's activity may be filed with the university. Decisions of the university regarding legal matters may be appealed to the National University Board. Complaints about the result of a re-examination or reassessment may be filed with the university as regards legal matters only, and decisions in such matters may be appealed to the National University Board, but must first be filed with the university. This constitutes a built-in internal review in the external review.

The administrative legal landscape as regards complaints about marks is thus made up of an intricate pattern of real acts and individual legal acts as well as internal and external review. To this should be added the hybrids of built-in internal review in the external review and of built-in external review in the

2 B. Flyvbjerg, 'Five misunderstandings about case-study research', 2006 *Qualitative Inquiry* 12, no. 2, pp. 219-245.

3 This distinction between administrative and judicial case law is particularly important in a Danish context where there is an absence of administrative courts and a large number of administrative boards of appeal.

4 FOB 1993.315; FOB 1997.316.

5 *Lovbekendtgørelse nr. 988 af 9. oktober 2012*, consolidated. The Act dates back to 1985.

6 Cf. s. 33 of the Examination Order (*Eksamensbekendtgørelsen*) no. 666 24 June 2012.

7 Cf. s. 34 of the Examination Order.

internal review. To the student these administrative legal categories make little if any sense; what matters is the legal certainty inherent in the access to a second opinion. To the legal scholar, on the other hand, the case of complaining about marks indicates that the traditional categories of administrative law are challenged by the complexity of reality.

### 3. The principle of the prohibition of *reformatio in pejus*

#### 3.1. The origin and mechanism of the principle

Before turning to our case it is useful to outline the principle and its origin. The principle dates back to Roman law, where it was first reported in a case concerning civil procedure, and from here it found its way into criminal procedure and administrative law.<sup>8</sup> Neither time nor the place allows for a full account of the principle across legal disciplines or indeed across Europe.<sup>9</sup> For our present purpose it suffices to give an account of the mechanisms of the principle. In doing so, the paper draws on examples from Scandinavia and Eastern Europe as well as European law.

The review of individual administrative acts is considered an important legal guarantee for the citizen. The principle of the prohibition of *reformatio in pejus* extends this guarantee as it prohibits the result of the review from being more disadvantageous than the result of the decision that is being reviewed. As a consequence the core of the principle has accurately been described as ‘the right to appeal without fear’.<sup>10</sup> However, the deviation from the ideal of reaching decisions that is accurate in substance, which is otherwise law’s hallmark, makes the principle controversial.

In criminal procedure the principle is often balanced by the possibility for the prosecution to appeal against a sentence with a view to having it increased. This balancing effectively restores the ideal of reaching the result that is accurate in substance. In Scandinavia the principle has not been subject to academic discussion in the past decades. In 1963 the principle as it manifests itself in criminal procedure was on the agenda at the triennial Nordic Law Meetings (*Nordiske Juristmøder*) that took place in Copenhagen.<sup>11</sup> The proceedings of the meeting reveal extensive differences in the in many respects homogenous ‘Nordic legal family’<sup>12</sup> as regards the time of the introduction of the principle as well as its extent and its desirability. As regards the situation in Eastern Europe, Herke and Toth describe the oscillation of the principle in Hungarian criminal procedure over the past century and draw attention to the fact that historically dictatorships have always rejected, or limited, the principle of the prohibition of *reformatio in pejus*.<sup>13</sup> The examples from Scandinavia and Eastern Europe illustrate that the principle is neither given nor absolute, nor is the balancing thereof by the prosecution.

In the context of administrative law the balancing becomes more complex as the opposing interests are less easily identified than in the case of criminal procedure: they may be vested in one or more private parties just as the public interest differs from policy area to policy area. This implies that the balancing of interests must take as its starting point the interests that that particular complaints system is presupposed to safeguard.<sup>14</sup> If the sole purpose of the complaints system is to create a legal guarantee for the addressee of the decision at first instance, then the decision should be changed in favour of the addressee only. If, on the other hand, the purpose of the possibility to complain includes a protection of other private and/or public interests, then these interests may lead to the decision being overruled.

When transferred to the context of legislation that is our concern here, the situation remains one of balancing interests, with the important exception that the legislator is not bound by the same limitations

8 C. Herke & C. Toth, ‘Overview of the Prohibition of Reformatio in Peius in the Hungarian Criminal Procedure’, 2011 *Challenges of the Knowledge Society* 1, pp. 3-12, <<http://doaj.org/doaj?func=issueTOC&isId=156506&uiLanguage=en>> (last visited 10 January 2014). According to the authors the principle does not form part of criminal procedure in the United Kingdom or Switzerland.

9 See as regards the principle in administrative law D. Dragos & B. Neamtu (eds.), *Alternative Dispute Resolution in Administrative Proceedings*, 2014 (forthcoming).

10 Molnar cited in Herke & Toth, supra note 8.

11 Proceedings of the 23rd *Nordiske Juristmøde*, 1963. The institution dates back to 1878.

12 The term ‘Nordic legal family’ that was introduced by Zweigert and Kötz consists of Denmark, Norway, Sweden, Finland and Iceland. Characteristic of this legal family is that it has elements of both civil law and common law.

13 See Herke & Toth, supra note 8.

14 E.M. Basse, ‘Om adgangen for en forvaltningsmyndighed til at ændre til skade for en klager’, 1978 *Juristen & Økonomen*, pp. 39-47. B. Christensen, *Forvaltningsret. Prøvelse*, 2004.

when enacting a statute as the administration is when applying it. In fact, legislation in its coining of politics is all about balancing interests and values, within the limits of the constitution and international obligations, and subject to the thoroughness and transparency that the legislative process is designed to safeguard. Outside the case of marks the Danish legislator has *inter alia* balanced against the prohibition of *reformatio in pejus* in the areas of taxation and social benefits.

### **3.2. The principle as a European legal value**

The European Court of Justice has dealt with the question of the principle of the prohibition of *reformatio in pejus* in a recent case that concerned a reference for a preliminary ruling.<sup>15</sup> The question referred to the Court was whether a national court is under an obligation to raise pleas based in EU law on its own motion, if this would result in placing the applicant in a worse position than if he had not brought the action.

The facts of the national case were the following: the Dutch Product Board for Livestock and Meat (*Productschap Vee en Vlees*) had paid an export subsidy to exporters of cattle under EU agricultural rules. It turned out that the vessel used to ship the cattle from the Netherlands to Morocco was overloaded contrary to different EU regulations. As a consequence the Dutch Product Board for Livestock and Meat required the already paid subsidy to be repaid. The exporters administratively appealed against the decision ordering a repayment and the Product Board decided to reduce the amount to be repaid. The exporters subsequently challenged the new decision before a Dutch court. During the course of those proceedings the court identified other arguments of EU law that could influence the case, but had not been raised by the parties. The question arose whether a national court must raise pleas based in EU law of its own motion if to do so would place the applicant, in the present case the exporter of cattle, in a worse position than if he had not taken the case to court. The Court ruled that: 'Community law cannot oblige a national court to apply Community legislation of its own motion where this should have the effect of denying the principle, enshrined in its national procedural law, of the prohibition of *reformatio in pejus*. Such an obligation would be contrary not only to the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations, which underlie the prohibition, but would expose an individual who brought an action against an act adversely affecting him to the risk that such an action would place him in a less favourable position than he would have been in, had he not brought the action.'<sup>16</sup>

The ruling is interesting for our present purpose as in addition to outlining the underlying rationale of the principle – i.e. three fundamental legal values: respect for the rights of the defence, legal certainty and the protection of legitimate expectations – it places the right to appeal without fear, without using this term, on a par with these values. Thus the Court establishes that the right to appeal without fear is a fundamental legal value in Europe. However, when doing so the Court was faced with balancing two principles that relate fundamentally differently to the ideal of a result that is accurate in substance. We have already established that the principle of the prohibition of *reformatio in pejus* constitutes a deviation from this ideal. The obligation of a court to raise a legal issue of its own motion, on the other hand, constitutes a deviation from the principle that as a general rule the court must base its decision on the legal arguments presented by the parties, the purpose of this being that the result is accurate in substance. That the Court, when faced with this choice between two legal principles where one points away from the accurate result and the other towards it, favours the principle that points away from the accurate result emphasizes the importance that the Court ascribes to the right to appeal.

It should be mentioned that the Advocate General reached the opposite conclusion in his opinion in the case. He did so based on a line of reasoning that took as its point of departure the effective application of EU law, and he found that safeguarding the general interest requirements of the case, i.e. the health and life of animals and the protection of the financial interests of the EU, outweighs the protection of the individual appellant that the principle of the prohibition against *reformatio in pejus* constitutes.<sup>17</sup>

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15 Case C-455/06, *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees*.

16 Case C-455/06, *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees*, Judgment of the Court (Grand Chamber) 25 November 2008, at 46-47.

17 Case C-455/06, *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees*, Opinion of Advocate General Bot delivered on 6 May 2008 *ibid.*, at 129.

In taking this view it is clear that the Advocate General reduces the value of the right to appeal without fear that underlies the principle of the prohibition of *reformatio in pejus* to a matter for the individual complainant only, thus overlooking the general interest of the EU in the possibility to complain.

In contrast to the analysis earlier in this part of the paper, the disagreement at Community level concerning the scope of the principle of the prohibition of *reformatio in pejus* cannot be explained by differences in time and space and this underlines the controversy of the principle.

If the often held view that the Advocate General is more progressive in his opinions than the Court in its rulings holds true also in a broader legal context, then the opinion of the Advocate General may portend a redesign of the role of appeal more generally. However, for now, the Court has underlined that the access to appeal is an important legal value in Europe.

### 3.3. The principle in Danish administrative legal doctrine

The discussion of the principle of the prohibition of *reformatio in pejus* traditionally takes place in the context of external review and thus in situations where an appeal is made to another public authority than the one that made the original decision. As the principle is concerned with the extent to which a decision may be changed for the worse when the initiative is that of the citizen, it is highly relevant to consider it in the context of internal review as well. Danish administrative legal doctrine deals with this dimension of the principle only summarily and the conclusions are cautious, but there appears to be agreement that the difference, if it all, is one of degree.<sup>18</sup> As we have seen, complaints about marks have elements of internal as well as external review, in addition to elements of real acts and individual legal acts. The following outline takes the external review as its starting point. As the difference in the application of the principle in the two situations is one of degree this approach does not pose methodological problems.

The traditional position in Danish administrative law has been that where the relevant statute is silent on the matter, the principal rule is a prohibition of *reformatio in pejus*.<sup>19</sup> Where more private parties with opposite interests may lawfully complain, the principle shifts in favour of the administration reaching a decision that is accurate in substance.<sup>20</sup> This applies even if the private party has not complained in time. In contrast, the principle does not apply where the opposite interest is of a public nature. In this case the public interest in the legal accuracy of the decision must give way to the legal certainty of the citizen that is inherent in ensuring the access to complain.<sup>21</sup>

Today the prevailing assumption is that the traditional view is too restrictive and that the starting point must be that the decision is accurate in substance.<sup>22</sup> As a consequence it is now asserted, albeit with some hesitation, that legal acts may also be changed to the disadvantage of the complainant on the basis of a public interest; however, only where this interest is explicitly vested in a public complainant. A broad reference in the statute to the safeguarding of public interests thus does not suffice.<sup>23</sup>

As regards situations where there are no parties with opposite interests and it may be ascertained that the sole purpose of the access to review is to give the complainant additional legal protection, the principle of the prohibition of *reformatio in pejus* applies. This was confirmed in an Ombudsman opinion from 1978 that was concerned with complaints about marks. We shall return to this opinion in greater detail below, at this place it suffices to mention that the category of complaints about marks seems to epitomize the principle of the prohibition of *reformatio in pejus*.

Doctrine's adjustment of the scope of the principle of the prohibition of *reformatio in pejus* reflects a shift in the importance ascribed to the access to complain as such in favour of the accuracy of the result of the complaint. It is not clear whether the playing down of the legal certainty inherent in the access to complain should be seen in connection with a general wish to limit the access to complain as a response to the growing number of complaints.

18 K. Loiborg, 'Administrativ Kontrol', in J.A. Gammeltoft-Hansen et al., *Forvaltningsret*, 2002, p. 928, S. Bønsing, *Almindelig Forvaltningsret*, 2013, p. 335, note 15.

19 K. Revsbech, 'Administrativ Rekurs', in J. Garde et al., *Forvaltningsret. Almindelige emner*, 2009, p. 347; Loiborg, *supra* note 18, p. 1010.

20 Revsbech, *supra* note 19, p. 347; Bønsing, *supra* note 18, p. 359.

21 Revsbech, *supra* note 19, p. 347.

22 Revsbech, *supra* note 19, p. 347; Loiborg, *supra* note 18, p. 1010; Bønsing, *supra* note 18, p. 356.

23 See for a similar hesitant view Bønsing, *supra* note 18, p. 356.

### **3.4. The Ombudsman's opinion on complaints about marks**

As mentioned above the Parliamentary Ombudsman dealt with the question whether a complaint could result in a lower mark in 1978.<sup>24</sup> He concluded that neither the examiners nor the board of appeal could, under the law which then applied, do so. Following his opinion the principle of the prohibition of *reformatio in pejus* was introduced into the statute book in 1980.<sup>25</sup> It is this provision that has now, 30 years later, been repealed. Before turning to the statutory changes that enabled this, and that as we shall see shortly leaves much to be desired as regards the why of the change, it is useful to take a closer look at the Ombudsman's opinion regarding the matter, as a number of the issues are still relevant when studying the principle of the prohibition of *reformatio in pejus*.

The case sprang from a written examination at the Faculty of Medicine at Aarhus University and was concerned with six different items of complaint, one of which was that the examiners, following a complaint, had changed the mark for the worse for two of the total 29 complaining students. Four students had their marks changed for the better. During the course of the Ombudsman's inquiry, the issue of whether the board of appeal could change the mark for the worse also arose and the Ombudsman addressed this issue in an '*obiter dictum*'.

As regards the examiners, the Ombudsman concluded that they could not change the mark for the worse.<sup>26</sup> He based his opinion on the general principle in administrative law that a complaint does not give the public authority that made the decision a more extensive right to change it for the worse. In the case of marks, examiners do not have the right to change these marks subsequent to their announcement. The purpose of laying the complaint before the examiners is, should they find that their assessment has been too low, to avoid laying the complaint before the board of appeal; but not to give the examiners an opportunity to lower the mark.

As regards the board of appeal the Ombudsman asked the Directorate of Higher Education to comment on the right of boards of appeal to change a mark. The Directorate considered the issue in great detail in the course of revising the existing regulation and, at the request of the Ombudsman, asked the universities if and to what extent their boards of appeal had lowered marks in the past. The universities were also invited to comment on the consequences of preventing this option. The universities replied that the boards of appeal had only lowered marks in a very few cases. In spite of this, the universities considered it important to maintain the option of lowering a mark following a complaint, as they otherwise feared a heavy increase in the number of complaints and as a consequence a large administrative workload.

In its reply to the Ombudsman the Directorate<sup>27</sup> referred to an opinion by the legal scholar Ellen Margrethe Basse that was obtained in the Århus case and that concluded that university boards of appeal could not lower a mark following a complaint.<sup>28</sup> The main argument in support of this is that the sole purpose of the university complaints system is to create legal guarantees for the complainant. According to Basse, no opposite interests, either private or public, may justify that a mark is lowered. The Directorate also referred to the interim report of the Ombudsman where he expressed views similar to those put forward by Basse: that the student is the sole lawful complainant, and that a public interest in lowering the mark, not least in cases where the examinee has complained, is not regarded as having sufficient weight to support the opposite view.

However, the Directorate did not leave it at that but considered the possible public interest in marking in great detail. In contrast, a recent court decision imposed on a student a suspended 30-day custodial sentence for changing his mark in Danish along with those of his 20 classmates, without any elaboration on the public interest in the accuracy of marks.<sup>29</sup> The Directorate called attention to two public interests: First, the ideal interest in that every mark reflects, as accurately as possible, the value of the performance in the examination; and secondly, the administrative interest in that the number of complaints does not

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24 FOB 1978.230.

25 Order amending the Order on External Examiners, no. 51 12 February 1980 (*Bekendtgørelse om ændring af bekendtgørelse om visse forhold i forbindelse med censorers medvirken ved bedømmelse af eksamen på de højere uddannelsesinstitutioner*).

26 Parliamentary Ombudsman, *Annual Report 1978*, pp. 230-262 at p. 252.

27 *Ibid.*, p. 259.

28 See Basse, *supra* note 14.

29 The court in Roskilde, 16 August 2012. Case.no. 18A-4715/2012. Unreported.

exceed what is necessary, in which it is implied that the risk of receiving a lower mark may result in the situation where only students who truly feel unjustly assessed will complain. Along the same lines as the views of Basse and the Ombudsman, the Directorate concluded that the mentioned interests are not sufficiently strong to substantiate the possibility to change a mark for the worse in a complaints system that is introduced with a view to protecting the complainant. As to the first consideration, the Directorate found that lowering a mark will appear random to the complainant as well as to others, as a mark in the majority of cases is discretionary in nature and thus will never be an objective measuring of the examinee's performance. As to the latter consideration, the Directorate interestingly enough underlined that this is more important than the former as the universities find that the mere risk of a mark being lowered will help to ensure that complaints are only filed when there is a proper cause. However, the Directorate dismissed this administrative interest as it is difficult to transform its general purpose, to ease the workload of the administration, into a specific interest regarding the individual complainant. In other words, the Directorate found that a general public interest cannot trump the legal certainty of the individual. The Directorate concluded that the future legal framework for complaints would be based on the understanding that access to complain is an additional legal certainty for the student, and that it is undesirable that complaints should deteriorate the situation of the student. As already mentioned, the amended legal framework was introduced in 1980.

The line of argumentation of the Directorate is interesting due to the emphasis put on the administrative burden of dealing with complaints, even if this is dismissed. It reflects that handling complaints is perceived as a strain on the administration and that the risk of a mark being lowered is considered an effective means to reduce the number, not of complaints themselves, but of unfounded complaints.

As we shall see below, the considerations put forward by the Directorate when considering whether the content of the rule should go one way or the other is in stark contrast with the situation in 2010, when the change was rolled back, and the principle of *reformatio in pejus* was (re)introduced. At this place it should be mentioned that despite the fact that the Ombudsman's opinion is concerned with the principle of the prohibition of *reformatio in pejus* in administrative decision making, the considerations underlying the analysis of the content of the principle are the same when the considerations take place as part of the legislative decision making, with the important difference that the legislator is free to strike a balance differently, as was outlined above.

#### 4. The introduced statutory changes in the possibility to complain about marks

In 2010 the principle of the prohibition of *reformatio in pejus* was abolished as regards complaints about marks in upper secondary as well as in higher education.<sup>30</sup> When I have found it useful to include both Bills in the analysis it is because the parliamentary process as well as the arguments put forward in support of the change differ in the two situations and hence contribute to the analysis in different ways.

##### 4.1. Upper secondary education

The change in the possibility to complain about marks in upper secondary education was set off by a political agreement from April 2009 between the Government and four out of the six parties from the opposition concerning various changes in upper secondary education.<sup>31</sup> The headline introducing the abolition of the principle of the prohibition of *reformatio in pejus* is the final of about 40 headlines in the agreement, and in contrast with the majority of other headlines, neither the background nor the purpose of the change are elaborated upon.

30 Bill L 58 introducing amendments regarding upper secondary education (*L 58 Forslag til lov om ændring af forskellige love på Undervisningsministeriets område*). Introduced 11 November 2009 and passed 4 February 2010. Bill L 199 introducing amendments regarding higher education (*L 119 Forslag til lov om ændring af universitetsloven*). Introduced 28 January 2010 and passed 4 June 2010.

31 *Aftale mellem regeringen (Venstre og Det Konservative Folkeparti), Dansk Folkeparti, Socialdemokraterne, Det Radikale Venstre og Socialistisk Folkeparti om ændringer af reformen af de gymnasiale uddannelser, Undervisningsministeriet* (Political agreement between the Government and four opposition parties), 12 April 2009.

When introducing the Bill in Parliament the Minister for Education referred to the political agreement and explained that the proposed amendments were not limited to upper secondary education as was the agreement, but were to be extended to cover all studies covered by the departmental order concerning examinations.<sup>32</sup> Despite this extension from 3 to 15 studies the rationale underlying the change was not elaborated upon. The extension, on the other hand, was justified by making reference to the principle of equality across studies. Reference to the principle of equality was made in a different way, too, as *reformatio in pejus* already existed as a possibility as far as oral examinations are concerned, as reassessments are not possible in these cases. Reference was in other words made to equality across studies, and as we shall see below to studies across ministries, as well as across types of complaints. No reference to the legal certainty of students or to the broader principle of the prohibition of *reformatio in pejus* underlying the existing system was made.

The *travaux préparatoires* stressed that should a complaint result in the complainant being given the possibility of a reassessment, the complainant should be informed about the risk of receiving a lower grade than the one originally received, and the complainant may then choose not to accept the offer. It is equally stressed that it was the intention to phrase the amended possibility to complain in such a manner that the general rules and principles of administrative law would apply, and reference was made to the fact that a reassessment may place the complainant in a worse position than before the complaint.<sup>33</sup> It is obvious that these comments are concerned with legal certainty even if this was not specifically mentioned. Whereas the first comment reflects the involvement of the citizen in the decision making as seen elsewhere, e.g. in the health-care sector as informed consent, the latter is a fine illustration of procedural rules being used to compensate for the loss of substantial rights.

The consultation process preceding the introduction of the Bill in Parliament reflected the general content of the Bill.<sup>34</sup> The responses from organizations representing schools were all positive whereas student organizations were more reserved, but not all were entirely dismissive of the idea. The universities stressed the importance of striking the right balance between the legal certainty of the student and the use of the resources of the institutions as well as striking the right balance between the rights and duties of the individual student. One university added that it was to be hoped that the change would alter the complaints culture so that students would not be tempted to complain 'as no harm is done' by doing so. Student organizations, on the other hand, stressed that the proposed change would prevent students with legitimate complaints from complaining and that it would result in fewer complaints and hence prevent students from having erroneous marks reviewed. This remark captures the essence of the principle of the prohibition of *reformatio in pejus*: that the fear of a worse result should not prevent a citizen from having a decision reviewed. The importance of the possibility to have erroneous decisions reviewed in other words outbalances the risk of an erroneous decision as such.

The response from the Confederation of Danish Industries that represents employers stands out as it drew attention to the fact that examination results play an important part in a student's future career. The use of the result by external parties makes it essential that the examination system gives a true and fair picture of the student's competences and an integrated part of this is that the student is given the opportunity to complain about incomprehensible results. Thus Danish Industries link the need for an accurate result with the possibility to complain, but see it as a natural consequence that the result of a complaint may go both ways.

In its comments to the consultation, the Ministry of Education underlined that the purpose of the Bill was to ensure that the school reaches a decision that is accurate in substance with a view to the student obtaining the correct mark.

The parliamentary debate is interesting in that only the first reading of the Bill contained an actual debate and even this debate appears somewhat brief as only the spokespersons of the various parties took the floor and the debate was over in only 15 minutes.<sup>35</sup> No debate took place at the second or

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32 Introductory speech, 11 November 2009.

33 Bill L 58, supra note 30, p. 5.

34 *Høringsnotat til L 58 Forslag til lov om ændring af forskellige love på Undervisningsministeriets område, Undervisningsministeriet* (Consultation report concerning the Bill regarding upper secondary education, Ministry of Education), October 2009.

35 1st reading, 24 November 2009.

third reading.<sup>36</sup> The Parliamentary Standing Committee for Education held three meetings, but the committee report is silent as to any substantial debate. Only one question, which was concerned with the transparency of the complaints system, was addressed to the Minister.<sup>37</sup>

The Minister finished the first reading of the Bill by concluding that the issue was not a serious one, and added that he personally had never understood why, when one complained, the result could not go both ways. It is not clear from his speech whether he was referring to complaints in general or to marks in particular, but either way the principle of the prohibition of *reformatio in pejus* had not made a lasting impression on him. He was not, however, entirely blind to the legal certainty of students as he did refer to the general procedural rules and to the fact that written assignments would be reassessed by impartial examiners just as he referred to the fact that students must be informed about the risk of the mark being lowered.

When turning to the speeches of the spokespersons of the various parties, six in total, the focus is very much on the mark reflecting the accurate result. The first spokesperson, who represented the Minister's party, stressed that her party supported the Bill not because the party was concerned with increasing or diminishing the incentive for students to complain, but because students who have a well-founded reason to complain should have the possibility to do so, just as any assessment should reflect the actual competence of the student. A logical consequence of this, she added, is that a new mark may be lower than the one complained about.

This focus on the mark being accurate was a recurring theme in the majority of the speeches. One speaker stood out, referring to the little boy in Hans Christian Andersen's fairytale *The Emperor's New Clothes*, when she said that it was difficult to see that the Bill was concerned with anything else but scaring students so that they would not complain.<sup>38</sup> Her speech stood out in another respect, too, as she was the only spokesperson who made reference to data. She quoted an official from the Ministry of Education who was cited on the website of Danish national television for saying that it was likely that the Bill would result in a decrease in complaints. Similarly she referred to the fact that schools had not considered the number of complaints to be a problem. It is striking that this is the only place in the *travaux préparatoires* where reference was made to official considerations as to the possible impact of the Bill on the number of complaints.

In his reply to the only question posed by the Standing Committee for Education, the Minister referred to the fact that a situation similar to the one proposed in the Bill already existed as regards complaints concerning oral examinations, and that this had not given rise to any problems. The legal certainty inherent in the possibility to complain without fear was thus replaced by a reference to the principle of equality across written and oral examinations.

#### 4.1.1. Recapitulation

That the Bill was subject to a summary procedure in Parliament can doubtless be subscribed to the fact that the idea originated from a political agreement and thus had already been cleared. This also explains the unusual degree of political agreement as regards the substance of the Bill. Despite this agreement, a difference in the arguments supporting the change can be detected. Whereas the Minister was concerned with equality within and across studies, the spokespersons were more concerned with the mark reflecting the student's accurate level of attainment and thus in administrative legal terms with it being accurate in substance. The Minister's downplaying of the importance of the issue in his closing remarks was in stark contrast with the overall number of examinations that take place in the educational sector as well as with the extension of the political agreement from 3 to 15 studies. Last but not least, the absence of any discussion on the balancing of the possibility to complain and the administrative relief of reducing this possibility to complain that was the essence of the Bill is conspicuous.

36 2<sup>nd</sup> reading, 26 January 2010. 3<sup>rd</sup> reading, 4 February 2010.

37 Report from the Parliamentary Standing Committee for Education, 19 January 2010.

38 Johanne Schmidt Nielsen, representing the extreme left party *Enhedslisten* that was one of two parties outside the political agreement.

#### **4.2. Higher education**

A similar change to the one in upper secondary education was introduced simultaneously in higher education. Contrary to the development concerning upper secondary education, the abolition of the principle of the prohibition of *reformatio in pejus* in higher education appears in a Bill that was primarily concerned with the international activities of the universities. The absence of a political agreement made the parliamentary set-up significantly different from that in upper secondary education as the question had not been cleared beforehand.

The idea of abolishing the principle of the prohibition of *reformatio in pejus* was first launched in a memorandum from the Confederation of Danish Universities in December 2008.<sup>39</sup> The memorandum was concerned with the overall simplification of the regulatory framework affecting universities, but the question of the possibility to complain about marks was dealt with specifically. The possibility to complain was described as confusing as well as being highly cost-demanding: 'students may complain about everything and while the universities spend vast amounts of time and resources dealing with complaints it is in most cases without any cost for the student complaining. It is free of charge and the student does not even risk that a new assessment results in a lower mark. The rules governing complaints lack balance between the rights and duties of the student.'<sup>40</sup>

When presenting the Bill, the Minister for Research stated that the purpose of the Bill as regards changing the complaints system was to ensure that universities make a decision that is accurate in substance with a view to the student obtaining an accurate mark. Reference was made to the Bill presented by the Minister for Education as well as to the principle of equality across the educational sector.<sup>41</sup>

In the consultation preceding the introduction of the Bill in Parliament there was general agreement that the introduction of the possibility of lowering a mark following the result of a complaint was called for. Whereas the majority of the consulted organizations etc. did not elaborate on their stance, apart from the usefulness of having identical rules across the educational sector, some of the universities actually did elaborate upon their stance. Copenhagen Business School found that the number of complaints was a heavy administrative burden and that every change that may contribute to changing the prevailing 'we may as well complain as there is nothing to lose' attitude was a step in the right direction. The University of Southern Denmark reported that universities experience a great number of unfounded complaints and it found that the risk of receiving a lower grade may have a positive effect on the number of complaints that are not met. The presidency of the external examiners of the technical universities also acknowledged the positive aspects of the proposed change, but add that, based on experience, the impact of the proposed change was likely to be small as the number of complaints in general was low, and that only very few complaints result in a reassessment. In contrast the student organizations had strong reservations about the Bill due to the loss of legal certainty inherent in the change as it could prevent some students from complaining, but the existence of an unfortunate complaints culture was partly acknowledged.

In contrast to the Bill, the consultation revealed that the change was in reality concerned with curtailing the number of complaints, and not surprisingly the perspective on the consequences of this differed among those primarily affected, viz. the students whose legal certainty was affected and the universities whose resources were affected.

That the Bill was primarily concerned with the international activities of the universities and not complaints about marks as such was reflected in its first reading in Parliament, where the issue of complaints was dealt with only in passing. Six out of seven spokespersons supported the proposed change; however, the reason for this support differed. The first speaker, representing the Minister's party, referred to the importance of reaching a decision that is accurate in substance, it being either higher or lower than the mark complained about. A recurrent theme was the parallelism that would be obtained between the possibilities to complain throughout the educational sector, but reference was also made to a bureaucratic relaxation, including cost savings, for the universities that the Bill entailed. One spokesperson was critical towards the proposed change as it left students in a worse position, and she

<sup>39</sup> *Notat om overvejelser om regelforenkling på uddannelsesområdet. Danske Universiteter* (Brief on rule effectiveness in the educational sector, The Confederation of Danish Universities), 5 December 2008.

<sup>40</sup> *Ibid.*, p. 7.

<sup>41</sup> Introductory speech, 28 January 2010.

called on the Minister to separate the amendment regarding the complaints system from the remaining elements in the Bill. The Minister, who had only been appointed two days prior to the first reading of the Bill, did not comment on the issue of complaints in her closing remarks.

The principle of obtaining a mark that is accurate in substance, which played a dominant part in the corresponding Bill on changing the complaints system in upper secondary education, was played down in the present Bill in favour of equality, as manifested in the parallelism across the educational sector. However, a part of the explanation for this may be ascribed to the fact that the first reading of the Bill took place three weeks after the Bill introduced by the Minister for Education was passed. Nevertheless, the reference to the bureaucratic relaxation, including the possible savings, in the proposal is more explicit here.

The parliamentary procedure had common features with that for the Bill regarding upper secondary education, as no debate took place during the second and third reading of the Bill. In contrast with the Bill regarding upper secondary education, several questions were addressed to the Minister but none regarding complaints.

In the report from the Parliamentary Standing Committee the purpose of the Bill was presented as ensuring parallelism across the educational sector, and for the first time a direct reference was made to the call from the universities to change the complaints system. The legal certainty of students appeared in the report in two forms. One where the encroachment on students' legal certainty is balanced by insisting on ensuring transparency and counselling. And another where the encroachment is seen as contrary to the very purpose of the complaints system, as it will scare students from complaining.

#### **4.3. Recapitulation**

When the two Bills are taken together, it is clear that the value underlying the principle of the prohibition of *reformatio in pejus*, protecting the possibility to complain as such, had given way to the mark being correct in substance as well as to the principle of equality across various studies. At the political level, only one party opposed the change, and did so by emphasizing that the legal certainty of students was being encroached upon. Student organizations also opposed the change, albeit not unanimously as a certain concession was made as regards the existence of an unfortunate complaint culture. However, neither legal certainty nor the strains on the administration played a prominent part in the debate.

As regards the higher education Bill it is clear that the change was called for by the universities as an attempt to curtail the number of complaints with a view to spending fewer resources on dealing with complaints. It is therefore not very surprising that the universities supported the Bill. However, the support is differentiated as it is stressed that the need to curtail the number of complaints refers to the number of *unfounded* complaints, and as a dimension of this to an existing unfortunate complaints culture. As such the principle of legal certainty is present as the possibility to complain is respected as a value, whereas its abuse as it is manifested in the mentioned complaints culture is not.

When the focus shifts to the parliamentary proceedings two matters catch the eye. First, the political agreement that lay behind the school Bill rendered any public debate somewhat superfluous, or more precisely shifted it from the public domain in Parliament to the clandestine domain of *Slotsholmen*, the Danish equivalent of Whitehall.<sup>42</sup> This explains the absence of any parliamentary debate as regards the substance of the proposed change. Whereas political agreements are not new phenomena, the extent to which they replace parliamentary debate appears to be. Secondly, as the first reading of the higher education Bill did not take place until after the school Bill had been passed, and no debate took place here, the political agreement was imperceptibly extended to cover situations that had never been discussed.

### **5. The principle of the prohibition of *reformatio in pejus* rebalanced**

Above it was demonstrated how in recent Danish administrative legal doctrine regarding the prohibition of *reformatio in pejus*, the balancing of the possibility to complain and obtaining a result that is accurate

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<sup>42</sup> See for a discussion of the broader consequences of this O. Jørgensen, 'Offentlighedskommissionens forslag til ny offentlighedslov', 2010 *Juristen*, pp. 37-42.

in substance has been shifted in favour of an accurate result. However, this rebalancing did not apply to situations where opposite interests are absent, and where it could be ascertained that the sole purpose of the possibility to complain is to give the complainant additional legal protection. Complaints about marks were pointed out as the prime example of this situation. Thus, doctrine's rebalancing does not extend to complaints about marks. Where doctrine hesitates, our case takes over: it shows how the legislator has effectively abolished the principle of the prohibition of *reformatio in pejus* as regards complaints about marks broadly across the educational sector, and apparently without relating to doctrine's reservations. Against this background it is fair to conclude that the value ascribed to the legal protection inherent in the possibility to complain has lost ground.

## **6. Concluding remarks**

The Minister for Education characterized the introduced changes as unimportant. The changes were neither explained nor publicly debated, and the extent to which they were debated at all is lost in the confidentiality surrounding the political agreement. As regards the process, the absence of a public debate on why change was needed, as well as its possible consequences, prevented actors and commentators outside Parliament from taking part in the debate, not least those that were not invited to participate in the consultation. As none of the traditional bearers of legal certainty, such as the Bar, the Law Society and the Confederation of Judges, were invited to participate in the consultation, it is hardly surprising that the legal aspects of the change, including its broader implications, are underexposed.

As regards the substance of the change, the problem is not so much that the principle has been reversed; as we have seen, it is not absolute nor is the possibility to complain the only consideration that should be taken into account. The problem is that the principle has been reversed without any prior discussion of the values underlying the reversion. This is in stark contrast to the situation in 1978 when the principle of the prohibition of *reformatio in pejus* was introduced in complaints about marks. Here the Government discussed the opposite public interests in great detail, and the administrative strain of dealing with complaints was pointed out as the most important yet, in this context, unsustainable consideration.

I believe that the key to understanding the absence of a similar discussion in 2010 lies exactly here, that the administrative strain of dealing with complaints is still considered to be an unsustainable argument. If this is the case, it confirms that the possibility to file a complaint is indeed a fundamental value in our society, just like the European Court of Justice pointed out in the case of *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees* analysed above. However, it also confirms that there is a need for a public debate on how the possibility to complain should be designed in the future, including a discussion of existing complaints cultures. Neither complainants, the legal system nor society at large have anything to gain from keeping important discussions clandestine or from shying away therefrom. It is concerning this call for a public debate about the values that underlie the possibility to complain and their balancing in the redesign of this possibility that this case is also relevant outside marks in Denmark. ¶