

# Editorial

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We hereby proudly present Volume 6, Issue 2 of *Retskraft – Copenhagen Journal of Legal Studies*, the seventh overall issue of the journal. This issue marks our return to the publication of general issues after our previous two special issues on Artificial Intelligence and EU Law & Politics,<sup>1</sup> and is primarily based on articles submitted in response to a Call for Papers in June 2022.

For a long time, the inside of the cover of the print journal read ‘[p]ublished twice annually’, which became something of an inside joke since various circumstances meant that the journal has historically been published once a year. As mentioned in the previous issue, we have modified our publication workflow to facilitate faster publication, and we hope that this issue will mark the beginning of consistent running publication of articles.



A theme which spans across the articles in this issue, although not intentionally, is *human rights*.

*Annemette Fallentin Nyborg* considers the issue of derogation from human rights in time of emergency, something which the events of the last three years have certainly brought to the fore.<sup>2</sup> Nyborg conducts a comparative analysis of the law of necessity in Danish constitutional law (*konstitutionel nødret*) and the rules regarding derogation from the European Convention on Human Rights in times of emergency, noting both differences and similarities. She concludes by considering whether Danish constitutional law, which has had limited

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<sup>1</sup> Special Issue, ‘Artificial Intelligence and Legal Disruption’ (2021) 5(1) *Retskraft – Copenhagen Journal of Legal Studies* 1; Special Issue, ‘EU Law & Politics’ (2022) 6(1) *Retskraft – Copenhagen Journal of Legal Studies* 1.

<sup>2</sup> Council of Europe Treaty Office, ‘Derogations Covid-19’ (3 January 2022) <<https://www.coe.int/en/web/conventions/derogations-covid-19>> accessed 27 December 2022; Permanent Representation of Ukraine to the Council of Europe, ‘Note Verbale No 31011/32-017-3’ (28 February 2022) Annex (on Ukraine’s derogations from the International Covenant of Civil and Political Rights and the European Convention on Human Rights due to the Russian invasion).

experience with emergency situations, can find inspiration in practice concerning derogation from the ECHR in emergencies.<sup>3</sup>

*Katrine Albrechtsen* looks at the Danish rules on rejection of life-sustaining treatment by so-called permanently incompetent patients (*varigt inhabile patienter*) in light of the UN Convention on the Rights of Persons with Disabilities. Denmark has generally not been receptive toward the Committee on the Rights of Persons with Disabilities' more 'radical' interpretation of the CRPD,<sup>4</sup> opting to maintain substitute decision making schemes across a variety of sectors.<sup>5</sup> Albrechtsen evaluates the current rules in the Health Act and proposes changes to make sure the patient remains the primary decision maker to the widest extent possible.

*Matthias Smed Larsen* tackles the issue of user access to social media platforms through the lens of European human rights law – specifically whether the European Convention on Human Rights either requires states to mandate user access to private social media platforms or allows states to do so if they wish.<sup>6</sup> The analysis is situated in a broader discussion about whether (international)

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<sup>3</sup> On this, see Peer Lorenzen, 'Den Europæiske Menneskerettighedskonventionens retlige stilling i Danmark' in Henrik Zahle (ed), *Danmarks Riges Grundlov med kommentarer* (2nd edn, Jurist- og Økonomforbundets Forlag 2006).

<sup>4</sup> Committee on the Rights of Persons with Disabilities, 'General Comment No 1: Article 12, Equal Recognition Before the Law' (19 May 2014) UN Doc CRPD/C/GC/1, pts II–III; cf Ministry of Children, Gender Equality, Integration and Social Affairs, 'Response from the Government of Denmark with regards to Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law' (File 2014-448).

<sup>5</sup> Aside from the rules in the Health Act covered by Albrechtsen, other examples include the Guardianship Act (Consolidated Act No 1122 of 28 May 2021, as amended by Act No 569 of 10 May 2022) ch 2, and the Act on Coercion in Psychiatry (Consolidated Act No 185 of 1 February 2022).

<sup>6</sup> In the US, a bevy of lawsuits have centered on this question through the lens of the U.S. Constitution. Eg, *Freedom Watch Inc v Google Inc*, 368 F Supp 3d 30 (DC 2019); *Fed Agency of News LLC v Facebook Inc*, 432 F Supp 3d 1107 (ND Cal 2020); *Prager Univ v Google LLC*, 951 F 3d 991 (9th Cir 2020). All have failed due to a lack of state action.

human rights law needs to be more wary and proactively controlling of private power.<sup>7</sup>

*Elena-Mathilde Heiring* addresses how the European Court of Human Rights case law impacts the right to privacy, and whether it provides an adequate legal basis for the protection of this human right in the online world. To address this question, the development of the European Court of Human Rights' case law on mass surveillance and bulk interception as it relates to the right to privacy under the European Convention on Human Rights are examined. She critically analyzes the ECtHR's recent findings in the *Big Brother Watch* case<sup>8</sup> along with practice from the Court of Justice of the European Union, and evaluates those courts' assessment of mass surveillance and consideration of whether the benefits of bulk interception for national security outweigh the invasion of privacy of affected individuals.

The varia section of this issue features an interview (in Danish) with Danish Supreme Court Judge Jens Peter Christensen on judge-made law, conducted by *Christoffer de Neergaard* as part of his LL.M.-thesis. Since the interview, Christensen has become President of the Supreme Court.



Publishing a journal like *Retskraft* is dependent on many different types of contributions. The work of the Editorial Board itself, the generosity of the Faculty of Law at the University of Copenhagen which has supported our work since the journal's inception, the contributions of the peer reviewers who generously lend their time and knowledge to us, and of course the work of the authors who see *Retskraft* as an attractive venue to publish their scholarship.

We want to extend our thanks to all contributors to and readers of the journal, and hope that you enjoy reading this issue.

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<sup>7</sup> Cf Berdien van der Donk, 'Restricting Access to Legal Content in House Rules: The Platform's Freedom to Conduct a Business as a Counterargument to Limit Users' Freedom of Expression' [2021] YSEC Yearbook of Socio-Economic Constitutions 33, on the rights of platforms under the EU Charter of Fundamental Rights.

<sup>8</sup> *Big Brother Watch and Others v UK* (2021) 74 EHRR 17.