DITLEV TAMM

The History of Danish Law

Selected Articles and Bibliography

DJØF Publishing

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Ditlev Tamm

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Preface

A complete history of Danish law in English is not available. However many topics from Danish legal history have in later times been exposed in English. This book was originally meant as a bibliography to help finding out what is written by mostly Danish Legal historians in other European languages on Danish law. I found it useful to combine such a bibliography with a series of my articles on selected topics of the History of Danish law from the middle ages till our times.

The subjects concentrate on the main topics of legal history, legislation, courts and legal thinking. The first article is a general outline of characteristics of Danish law, whereas other articles concentrate on medieval law, the importance of the Reformation for the Law, the Danish Code of 1683, Danish Law in the 18th and 19th century stressing the importance of A.S. Ørsted and later the Danish constitution of 1849 and the harmonization of Nordic Law to end with the important subject of post-WW II trials against Danish collaborators.

It is my hope that this collection of articles, even if it cannot substitute a complete story of Danish law, may be informative for those who seek information on Danish law and its historical background*.

The bibliography was made by Margrethe Reitov with help of Helle Vogt. Gitte Kjær has done valuable technical assistance. I thank them all.

Ditlev Tamm

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* The articles are presented in their original version. It has only to a very limited extent been possible to add new literature.

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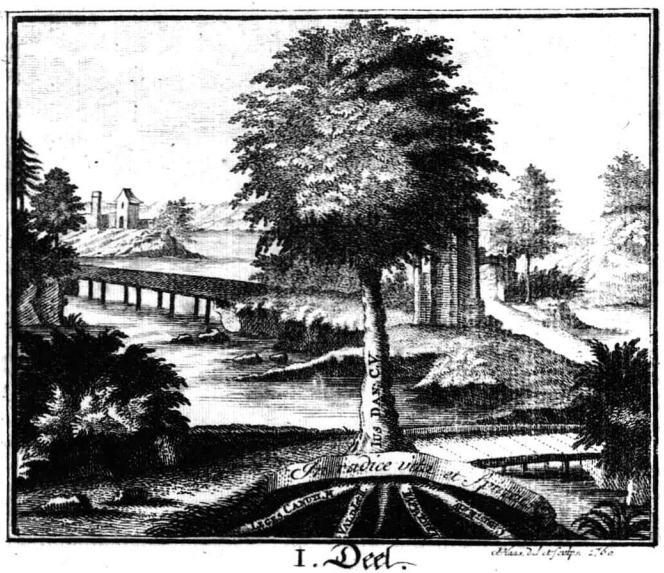
En

Danſk Lov-Hiſtorie

Fra Kong HARALD BLAATANDS Tid
til Kong CHRISTIAN den Femtes,

af PEDER KOFOD ANCHER,
Etatz-Raad og Profeſſor Juris ved Kiøbenhavns Univerſitet.



I. Deel.

Kiøbenhavn 1769, trykt hos A. H. Godiche, Kongel. Univerſitets Bogtrykker.

Peder Kofod Ancher was the author of an authoritative presentation of Danish legal history, edited in two volumes 1769 and 1776, which covers the period from Antiquity until the sixteenth century. The front cover illustrates the basic idea that knowing the roots is essential to understand the law. Kofod Ancher used a metaphor from Montesquieu, when he compared the law with a tree that in this case is a symbol of the Danish Code from 1683. The life and spirit of this code has to be found in the roots which are the old Danish laws.

The Danes and Their Legal Heritage

The Danish medieval provincial laws have for a long time played a crucial part in the development of Danish law. The history of Danish law begins with these laws becoming a monument to Danish legal culture and its proud tradition. Around 1200 the laws were committed to paper at a time when King and Church worked closely together with the shared aim of building a peaceful society based on the rule of law. An empowered monarch was essential to this development. But Danish provincial laws do not only belong in a national context. They are part of a common European pattern in which the rule of law emerges as basic to forming a society.

Denmark and the other Nordic countries are situated geographically on the periphery of Europe. Medieval European history tended to concentrate on countries at its centre: France, Italy, Germany and, partly, England. Rome was the ecclesiastical centre and its influence can be traced to the Nordic countries – all part of the European medieval community. Canonical law played an important role in Denmark. In 1234 the Pope issued Liber Extra. Jyske Law was issued by the Danish King Valdemar Sejr in 1241 and various laws were committed to paper throughout Scandinavia and Europe all documenting the link between the centre and periphery of Europe. In short, the Danish provincial laws are Danish but they have their place in a European context. Danish law is *ius proprium* to a great extent but Danish law also in the Middle Ages belongs to the *ius commune*.

This view has not always been prevailing. The first detailed account of a Danish History of Law was published in the years 1769-1776 and written by Peder Kofod Ancher, a professor at the University of Copenhagen. This work can be viewed as the foundation on which the later study of the History of Danish Law is based. The frontispiece of the book was adorned by the picture of a tree which illustrates the purpose of the study of The History of Law as it was perceived by Kofod Ancher.

The inscription on the trunk of the tree reads: Ius Dan. C.V. This refers to the code given 1683 by the king Christian V, Danske Lov, the first Danish code valid for the whole Kingdom of Denmark. The tree has roots which all are inscribed with the names of the laws of former kings (from The Middle Ages: Knud, Valdemar the Great, Valdemar the Conqueror, Erik the VI and VII, while Christian III and Christian IV represent the 16th- and 17th centuries). The idea is that the tree, i.e. Danske Lov, receives its nourishment from older law. This is made clear by the Latin inscription which reads "In the root all life and spirit is found" and which is written across the

roots. Kofod Ancher also said that "to truly understand a law, one has to know its roots." To Kofod Ancher the study of The History of Law thus meant the study of older laws as the understanding of the older laws was viewed as a prerequisite to understanding the current laws. This was in accordance with the thoughts of the French writer Montesquieu who considered it necessary to know the roots of the current law in order to understand it and also be able to articulate sensible new laws. Montesquieu spoke of the "Spirit of the Law" and by this he meant the socio-political circumstances that were decisive in terms of why a particular peoples' law became a certain way. In a chapter in his book on The Spirit of Laws from 1748 Montesquieu compared the law to a tree which finds its spirit in its roots. This is where Kofod Ancher found the aforementioned illustration. His book was published at a time when strong feelings of national identity had come into existence in Denmark. The History of Danish Law thus became part of the national identity with Kofod Ancher stressing the national character of the Danish law.

Danish Law in a European Perspective

A stone set in the southern gateway of the town of Rendsborg in Slesvig marked the northernmost limit of the Holy Roman Empire. The inscription in Latin stated: *Eidora Romani terminus imperii*. It tells us not only that the river Ejder, which used to separate the Germans and the Danes, was the Northern frontier of the Holy Roman Empire but in many ways it also illustrates the separate position of Nordic law, both today and in the past.

It is not easy to give an exact description of this position. Denmark (including the Faroe Islands and Greenland), Finland, Iceland, Norway and Sweden constitute the Nordic countries (often referred to as the Scandinavian countries; strictly speaking however Scandinavia only comprises Denmark, Norway and Sweden). On the one hand these countries geographically belong to Europe. On the other hand they have their own history of mutual wars and later of collaboration, and the various countries have different points of orientation towards the surrounding world. Denmark traditionally has had close ties with Germany, as it was the culturally dominant force. What was originally a peaceful coexistence with Germany in the 19th century became a tense relationship due to the rise of German nationalism, that resulted in two wars. Even by the 18th century, Danish-German relations had already served as a catalyst for the development of a Danish feeling of national identity as opposed to German influence.

Historically, the Nordic countries fall into two groups, and that fact may still be noticed in the law. Denmark and Norway were united from 1380 until 1814 and to a large extent the law was the same. Iceland, as part of the Norwegian Realm, was also under Danish domination and remained so even after Norway entered into a union with Sweden in 1814, which lasted until 1905. Iceland then became independent in 1944. Greenland and the Faroe Islands in the Atlantic remained with Denmark. How-

ever, they both have an autonomous status, and legislative power is delegated to local parliaments.

Sweden and Finland form the second group. Finland was part of Sweden until 1809 when Finland was conquered by Russia. However, the Russian czar Alexander I guaranteed Finnish autonomy. The Finns were thus allowed to govern themselves according to Finnish law as set forth in the Swedish Code of 1734. Finland remained a grand-duchy within the Russian Empire until gaining its independence in 1917 after the Russian Revolution.

Since the end of the 19th century there has been close cooperation among the Nordic countries within the field of law, which is an important feature of legal development in these countries. This history of cooperation started in 1872 when lawyers from the Nordic countries held a conference in which future cooperation was discussed. In the 19th century Nordic cooperation concentrated especially on the development of a common commercial law. By the turn of the century, cooperation extended to central areas of the law of obligations and later also to family law. This pattern of cooperation still continues. It has led to common legislation, but not to any sort of "supranational" law. All statutes resulting from common deliberations are separately drafted in each country and the statutes may vary on certain details.

The geographical and historical conditions of the various Nordic countries are different and may explain some important basic differences. Norway as a trading nation looking towards the West has had an interest in England, whereas the history of Sweden and Finland was more influenced by the expansion of the Russian empire in the East since the 16th century. The chief issue in the relationship between Denmark and Sweden, the two main powers in the North, was, since the 16th century, the struggle for domination of the Baltic Sea.

Denmark was the first Nordic country that from 1973 became a member of the European Community. Traditionally, Denmark has played the role of a bridge to Europe for the Nordic countries.

As the Nordic countries themselves developed separately within the European context, so is the case with their law. It may be useful first to place the law of the Nordic countries in the traditional pattern of so-called legal families as this concept has been developed by scholars of comparative law. In their *Traité de droit comparé* from 1950, Arminjon, Nolde and Wolff tend to consider the law of Denmark, Finland, Norway and Sweden as one of the seven legal families which include French, German, English, Russian, Islamic and Hindu law, and which, according to their system dominated the World. However, the Introduction to Comparative Law by the German comparatists Zweigert and Kötz considers the Nordic legal system as a separate group within the Civil Law system that includes French and German law. René David, in his treatise on contemporary legal systems, counts Nordic law among Civil Law systems without the separate position admitted by Zweigert and Kötz. The most common opinion today, also shared by Nordic lawyers, however, seems to be that the Nordic legal systems are a separate legal family distinct from both civil law and common law. Generally it is considered that the laws of the Nordic countries form their own

category even if it must be admitted that there has been a considerable influence from continental legal thinking. The Nordic legal tradition comes much closer to that of continental Europe than to English and American law.

It is difficult to point out the specific characteristics of Nordic law that distinguish it from other legal families. The use of tradition may be an important one. Not much importance is attached by the law to legal formalities, and this characteristic is often viewed to be peculiar to Nordic law. The lack of modern codes in the field of private law often seems to create an atmosphere of more concrete and practical thinking as opposed to the more abstract and systematic way of thinking in continental European countries. The "allgemeiner Teil" – the general part known in the civil law codes, so characteristic of, for example, the German Civil Code, is unknown in Nordic law, as is generally any sharp distinction between civil law and commercial law.

The Law of Jutland and Danish Medieval Law

The peculiar position of Nordic Law in European legal tradition is to a great extent due to the fact that local legal traditions have been maintained to a high degree even until early modern times. Legal concepts in the Nordic countries were based on medieval provincial laws from the 13th century. Especially in Denmark, these laws played an important role well into the 17th century. The medieval written laws were not formally abolished until 1683 when a new code was issued, but even this new code incorporated several articles from the old laws.

These laws contained the basic rules on family law, property, procedure and crime. They reflected an agricultural society ruled by a king who had established himself as the dominant power. Such laws are found in Denmark, Norway and in Sweden. In this legislation the influence from Canon Law is obvious, whereas only few examples of an influence from Roman law can be found.

An especially clear example of the influence of universal legal systems on Nordic legal thinking at that time is the prologue to the Law of Jutland (in Denmark), which dates from 1241 and was given by the Danish king Valdemar II. This prologue, written, like the rest of the Law of Jutland, in Danish, is considered a treasure of Danish medieval literature. It is almost entirely a paraphrase of selected quotations from the 12th century collection of Canon Law known as the Decretum Gratiani, and it deals especially with the nature of law and legislation and the relations between the Church and the secular authorities.

The first sentence of this prologue of the Law of Jutland, stating that "Land must be settled through the law", is a famous phrase well known not only by Danish lawyers. It is found as an inscription on court houses and it will often be quoted as a legal adage. Another popular sentence from the prologue says, "The law shall be honest and just, bearable, in accordance with the customs of the country, appropriate, useful, and unequivocal so that all men may understand what the law provides." This ideal of simplicity, even if it is part of European heritage going back to the Church Fathers, is

often quoted as an example of the true Nordic legal spirit in contrast to the complications of modern law.

The Law of Jutland recognized the validity of the Canon law of marriage, which, like other so-called *causae spirituales*, came under ecclesiastical jurisdiction. Even one of the more peculiar rules of the law stating that a man and a woman who have lived together for three years should be considered a married couple is probably a concession to the ecclesiastical demands that such free relations should be legalised. However, in various fields canonical legal perceptions were not accepted by the law. This was the case, for example, in relation to recognition of last wills which were contrary to the kin's traditional right of inheritance. The church, however, successfully established the rule that for pious purposes, a person was entitled to dispose of part of his belongings mortis causa and thus had testaments recognised as part of the law.

A characteristic feature of the provincial laws consisted in the so-called system of composition or fine, which meant that even conflicts arising out of major misdemeanours could be settled by payment of fines. Also in the case of homicide the payment of a fine was common, but the kin of the person killed was not obliged to receive economic compensation; he could choose to seek revenge instead. When fines were paid on account of homicide the old liability of the kin continued to exist, and the church tried in vain to introduce a principle of guilt in this area. However the principle of guilt advocated by the church gained a footing in other areas. This was the case, for example, in relation to a distinction between intentional and non-intentional breaking of the law. Only the former gave the King a right to collect a fine.

The procedural system of the provincial laws was characterized by formal evidence, and the church spoke in vain against the most common evidence, namely that of a party taking an oath supported by compurgators. Under this type of proof a person could free himself of any charge provided a certain number of persons were willing to take an oath that according to their knowledge of him, but not necessarily their knowledge of the case at hand, his word could be relied upon.

The trial by fire existed in old Danish law, but it was as in other parts of Europe abolished subsequent to the Fourth Lateran Council in 1215 that barred ecclesiastical persons from assisting therein. The ordeals were substituted by jurymen who gave their opinion on questions of guilt, but it was not until the 16th century that the older types of evidence were substituted or at least overruled by methods of proof based on witnesses and documents.

We do not know very much about the law as it might have been before it was written down in the time around 1200. It was a period in which society was in many ways reformed by a strong royal power in collaboration with the Church. The cultural expansion around 1200, involved not only a recording of current law but also the erection of more than a thousand new churches all over the country. Under weaker successors to the Crown a constitutional practice gradually developed, under which the King was obliged intermittently to consult with the nobles of the Realm. Since 1282, at which time the King issued a document that in several respects is reminiscent of the British Magna Charta from 1215 in that the authority of the Crown was curtailed in a

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