THE DANISH CODE OF 1683

AN EARLY EUROPEAN CODE IN AN INTERNATIONAL CONTEXT

BY

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On September 4, 1688, Matthias Skaanlund, a servant of a son of the Danish King Christian the Fifth, was called before the head of the King's Chancery. He was asked whether he knew anything about Norwegian law. He frankly answered that he knew nothing, neither of Danish law nor Norwegian law. He had never tried to study law, he said, as he did not know what path he would follow in life. However, he added that he was able to count and to write a little. In spite of this candid answer he was offered a post as a judge in Norway, although he was advised to use a clerk until he had gained sufficient experience himself. The head of the Chancery held the opinion that one year would be enough to become familiar with the job.

This conversation, which is recorded by the servant Matthias Skaanlund himself in his diary,[1] reveals quite a lot about the Danish judicial system in the last decades of the 17th century. Skaanlund accepted his nomination as a judge in Norway and stayed there for the next forty years. We have no reason to think that he did not manage quite well.

In 1688 the Norwegian law was contained in a new code—the Norwegian Code of Christian the Fifth—which had entered into force on January 1 that year. This code, with a few modifications, was a copy of the Danish Code of 1683.

It may be difficult to understand how the administration of such a code could be put in hands as inexperienced in legal matters as those of Matthias Skaanlund. Some basic conditions had to be fulfilled in order that a man of that sort might succeed: the law had to be easily understandable to people with no legal education, and the cases brought forward could not be too complicated.

Although the Danish and Norwegian Codes appeared at a moment when Roman law had a strong influence on legal thought on the Continent, only a rather small portion of Roman law had been part of the legal rules which went into the codes. The Danish and Norwegian judiciary at that time lacked a theoretical basis. Until late in the 18th century judges and advocates with a legal education were very few in number.[2] In order to ensure that cases did not

* This paper is based on a lecture given at the Thirteenth Annual Meeting of the American Society for Legal History, Baltimore, October 22, 1983.

[1] *Gyldenløves Lakaj. Optegnelser fra Chr. V's Tid af Mattias Skaanlund.* (Printed in Copenhagen in 1912 as vol. I of the series *Memoirer og Breve* ed. by Clausen and Rist.)

[2] The study of law had been introduced in Denmark in 1479 with the foundation of the University of Copenhagen. In 1736 a university examination in law was organized, but not until 1821 did a law degree become a necessary qualification for a judge or a civil servant.

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become too confused, the use of advocates in the villages was prohibited. It was customary for the local judge to be elected from among the local people.

In the case of Matthias Skaanlund, however, a complete stranger was sent up to head the local court. The appointment of a servant—in this case from a princely house—to administer the law was a not uncommon result of the centralization of government which had taken place in the 17th century.

In 1660 an important change in government had taken place in Denmark but the historical background must be omitted here. What happened was that the "monarchia mixta"—the King restrained in his exercise of power by an aristocratic council—had been replaced by an absolute monarchy introduced through a rather peaceful coup d'état. In 1665 the King's power as an absolute monarch was laid down in a fundamental law, the Royal Law or *Lex Regia*, and from the outset the legal impact of the new form of government was being considered.

The Danish Code of 1683 was a product of these political changes in Denmark in the last half of the 17th century. In this sense it was a "fresh start" code. In 1661 a commission was appointed with the task of going through the mass of old laws in order to remove those which did not comply with the new system of government. A reform of the judiciary was another task. Successively, revised terms of reference extended the scope of the commission, and its work proceeded with the aim of making a complete revision of the whole body of the law and having it collected in one code.

The efforts to remodel the law were extended to Norway, which had been united with Denmark since 1387. However, instead of basing a new Norwegian Code on old Norwegian law the Danish Code was taken as a model and only a few special rules concerning specific Norwegian institutions were introduced.[3]

The final result of the work of several subsequent commissions, the Danish Code of 1683—which in 1983 celebrated its third centennial[4]—does not belong to that select group of codes well known to all legal historians as milestones in European legal history. Napoleon was well aware that his French civil code—the Code Napoleon of 1804—was such a milestone in European history: "My honour is not to have won forty battles ... what never will be extinguished and is to live forever is my civil Code."[5] Thus did Napoleon

[3] For a survey of the differences between the Danish and Norwegian Codes, see L. M. B. Aubert, *De norske Retskilder og deres Anvendelse*, Christiania 1877. Gudmund Sandvik, *Forholdet mellem Danske og Norske lov*, in Ditlev Tamm (ed.), *Danske og Norske Lov i 300 år*, Copenhagen 1983.

[4] To commemorate the third centennial, a collection of articles on several subjects in connection with the Code was published as *Danske og Norske Lov* i 300 år (Ditlev Tamm ed.), Copenhagen 1983. The international context is here treated in a paper by Wolfgang Wagner, *op. cit.*, pp. 207–54. A bibliography is found on pp. 820f.

[5] "Ma gloire n'est pas d'avoir gagné quarante batailles ... ce que rien n'effacera, ce que vivra éternellement, c'est mon Code civil." Quoted from Paul Koschaker, *Europa und das römische Recht*, Munich 1947, p. 136.

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himself during his exile on St. Helena evaluate his efforts as a law-maker and as a general. The Danish King Christian the Fifth certainly did not possess the military genius of Napoleon, though he was a product of the ideals of a prince of his time, which were to be a military commander and a law-maker. Also in his case more has been preserved of the legal rules in his code than of what was gained in battles. Even today sections of what was to be the first and still the only Danish Code covering a vast field of legal material—the Danish Code of Christian the Fifth of 1683—are still in force. The scope of this paper will be to introduce this code and to give an idea of its position in the broad panorama of European Codes.

Two quotations from Anglo-Saxon observers of Danish legal institutions may here serve as a guideline to the appreciation of the Danish Code.

The first quotation is taken from the work of the British ambassador to the court of the Danish King Christian the Fifth during the years 1689–92, that acute observer of Danish institutions, Robert Molesworth. Molesworth was a Whig and proud defender of the Glorious Revolution in his own country. Denmark had in 1660 undergone a fundamental change in government in the opposite direction. Absolutism had been introduced and in the *Lex Regia*—a unique document containing contemporary political writing in a nutshell—it was stated that the King alone was in possession of "all iura majestatis, absolute power, sovereignty and all royal incomes and regals ...". Jean Bodin and probably Thomas Hobbes were the spiritual fathers of this *lex fundamentalis*.[6] To Molesworth this change of government was a catastrophe which explained the deplorable situation of the country which he described in his famous *Account of Denmark as It was in the Year 1692*, which was published in London 1694. In this hypercritical and most unflattering exposition of Danish society only one institution is spared, the Danish Code of 1683:

> Hitherto we have indeed met with many things in it to be avoided, and little deserving imitation: but being now to speak of the Danish Laws, I must needs being with this good Character of them in general; that for Justice, Brevity, and Perspicuity, they exceed all that I know in the World. They are grounded upon Equity, and are all contained in one Quarto Volume, written in the Language of the Country, with so much plainness, that no Man, who can write and read, is so ignorant, but he may presently understand his own Case, and plead it too if he pleases, without the Assistance of Counsel or Attorney.
>
> Here is none of that Chicane to be found which destroys and raises so many great Estates in England; a very few Advocates do the business of all the Litigious Persons in these Kingdoms. Neither are their Fees arbitrary or exorbitant; no Suit

[6] The most thorough study in Danish of the *Lex Regia* is still Knud Fabricius, *Kongeloven*, Copenhagen 1920. An interesting German assessment of this fundamental law against a European political background is given by Johannes Kunisch, *Staatsverfassung und Mächtepolitik*, Berlin 1978, with several references.

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> of what importance soever hangs in suspence longer than one Year and a Month: since a Man may go through all the Courts, and have Execution done within that time, unless he be wanting to himself.[7]

A hundred years later the Danish Code could be found among the vast material used by Jeremy Bentham in his efforts to promote legislation which corresponded to his utilitarian ideas. Completeness was one of his ideals, and in his treatise *A General View of a Complete Code of Laws* the Danish Code is considered in this respect. Bentham writes:

> Of all the codes which legislators have considered as complete, there is not one which is so. The Danish is the most ancient code; it is dated 1683; the Swedish code is dated 1734; the code Frédéric, 1751; the Sardinian, 1770.
>
> In the preface to the Danish code, it is expressly stated to be complete. However, it contains nothing about taxes, no regulations relating to professions, nothing about the succession to the crown, nothing about the powers of any subaltern officers, except those of justice; nothing respecting international law; no formularies, either for contracts, or the disposal of goods, or for different stages of procedure. It is, however, the least incomplete of all the codes.[8]

This was written in the last decades of the 18th century before the enactment of the Prussian Code of 1794. In his works Bentham makes several references to Danish law based apparently on a rather well-founded knowledge of the Code.

A more casual knowledge of the Danish Code was acquired by Francisco de Miranda—the famous companion of the South American liberator Simon Bolivar—during a long stay in Copenhagen 1787–88. In his diary for February 27, 1788, we find the note that he has finished reading the Danish Code, which he had read in an English translation: "Apart from its Christian worries, I find it more just and unpartial than the other European Codes and even written in a clearer language."[9]

The Danish Code was written in the Danish language but it was accessible to the European learned world through several translations. A Latin translation was provided in 1698,[10] a German version was published in 1699,[11] another Latin version in 1710[12] and an English translation in 1756.[13] Curi-

[7] Robert Molesworth, *An Account of Denmark as It Was in the Year 1692*, London 1694, p. 232.

[8] Quoted from the *Works of Jeremy Bentham* (John Bowring ed.), vol. III (1848), p. 206. This fragment of Bentham's Pannomion was first published in Dumont's French edition of Bentham's works in 1802.

[9] See *Archivo del General Miranda. Viajes. Diarios 1787–1788.* Tomo III, Caracas 1929, p. 177, 27.2.1788: "Tambien he concluido de Leer el *Codigo de leyes* de *Dinamarca* ... en Yngles ... y fuera de sus preocupaciones de christiano, me parese mas *justo* é imparcial que los demas de Europa ... y aun mas claramento escrito."

[10] *Regis Christiani Quinti jus Danicum*, Latine redditum ab Henrico Weghorst, Hafniae 1698.

[11] *Königs Christian des Fünfften Dänisches Gesetz. Aus den Dänischen ins Teutsche übersetzt durch H. (einrich) W. (eghorst)*, Copenhagen 1699.

[12] *Regis Christiani Quinti leges Danicae*, quas e Danico in Latinum convertebat Petrus Andr. Höyelsinus, Hafniae 1710.

[13] *The Danish Laws*, or, the Code of Christian the Fifth. Translated for the Use of English Inhabitants of the Danish Settlement in America, London 1756.

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ously enough Bentham seems to have used the Latin version of 1710 and not the English one read by Francisco de Miranda. However, he did well. The English translation was especially provided for the use of the planters of the Danish West Indies—the Virgin Islands of St. Thomas, St. John and St. Croix, which were transferred from Denmark to the United States in 1917. Some of the special problems which arose from the application of the Danish Code in the West Indian setting, which differed completely from the society which it was originally meant for, will be mentioned later in this paper.

From a legal point of view Denmark had basically been divided in three different areas until 1683. Collections of law from the beginning of the 13th century—the so-called provincial laws—formed the basis of the law in each legal area. Later, royal legislation had to a great extent been common to the three areas and in the 17th century the differences were not very marked.[14]

After the publication of the Code the old law was abolished. This meant that all the differences which had existed till then between the three provinces were eliminated; unity of the law was thus an important achievement due to the Code.

Another important achievement in the drafting of the new code was the arrangement of the articles in a logical and clear system. Starting with the law of persons (in the administration of justice, in the church, and seculars) it passed via property to penal law, an adaptation of the famous system of the Institutes of Gajus—*personae, res* and *actiones*.

The Danish Code was divided in six books containing a total of about 1 800 articles. The relationship between the royal power and the law is stressed in the first chapter of the first book—called *Of the Obedience Due to the Legislator and the Law*—where a summary is to be found of the fundamental law of government—the *Lex Regia* of 1665. Then follows the law of procedure. The second book contains ecclesiastical law. The third book has sections concerning the different social classes, the King's civil servants, privileged persons, townsmen and peasants. In this book the law of marriage, of tutelage and the relations between master and servant are also to be found. Maritime law is contained in the fourth book, property and contracts in the fifth and penal law in the sixth book. As Bentham established it was no complete code—and was not meant to be either. Most permanent rules from the old body of law were included, however. These were the so-called policy rules, while those rules which were supposed to undergo frequent changes were omitted. It was intended to make a special code of those rules, though this was a task that was never completed.[15]

[14] A short survey of Danish Legal History is provided in *Danish Law, A General Survey*, ed. by H. Gammeltoft-Hansen *et al.*, Copenhagen 1982, pp. 21–35.

[15] See concerning the efforts to establish a special code covering the vast field of trade, duties, measure, etc., Inger Dübeck's paper on the composite work mentioned in footnote 4 above, pp. 145–78.

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The Danish Code of 1683, however, was no reform code. A more detailed look at the articles of the law will disclose that to a very high degree it was based on the old provincial laws of the 13th century and later royal legislation. The compilers had done what was largely a "paste and scissors'" job. Provisions of the provincial laws of the 13th century were often literally incorporated in the new code. "Les codes se font, on ne les fait pas": Codes make themselves, one does not make them. This famous statement by one of the makers of the French Civil Code is also true of the Danish Code—which is a more systematic summary of what was the law in Denmark in 1683—though sometimes not even that. To a certain extent the courts' practice had introduced modifications in some of the rules of the old laws which were not considered by the makers of the code.

Roman law as it was found in Justinian's *Corpus juris civilis* was used as a source but much less than it was in Germany at that time. In Denmark no such *en bloc* reception of Roman law took place. The lacunae in the legal network that were laid down in the Danish Code were still too large and the legal learning among judges was at too low a level for the subtlety of the Digests and Codex to be admitted as a supplementary *jus commune*. Roman Law was indeed taught at the law school of Copenhagen, but it is not until the 18th century that one finds textbooks on Danish law or other indications of more theoretical legal thinking.

Until the beginning of this century the Danish Code of 1683 was still considered the foundation of Danish law, although many of its articles had been substituted by others or had simply grown obsolete. What should be treated here is not this history of the growing *decodification* of Danish law—to use a modern term for the simple fact that the code has gradually been replaced by a large number of statutes covering smaller fields of the law. What should instead be stressed is the special importance of the Danish Code in a European perspective as an initiator of a new epoch of codification.

In European legal history various attempts to collect the law in written codifications can be observed. In the 13th century several attempts were made to collect customary law and new royal enactments in codes.[16] In the 16th century once again we can find all over Europe new compilations which tried to produce order out of the legal chaos. The Danish Code of 1683 can be seen as the inauguration of another type of code: the complete code of law. In this respect the single rules of the code play a lesser role. What is important is the example that was given for the systematic collection in one code of the whole body of law. In 1683 the absolute Danish monarch had achieved what many princes were dreaming of: the unification of the law of the country in one lawbook—a code—comprising the most important fields of the law.

[16] A Danish example is the law of Jutland promulgated by the king Valdemar II in 1241.

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In his above-mentioned account of Denmark Molesworth had especially stressed the simplicity of the procedural system of the code: any man "... may presently understand his own Case, and plead it too if he pleases without the Assistance of Counsel or Attorney".

Rumours of the simplicity of Danish judicial procedure had crossed the Baltic and seem to have impressed King Frederic William of Prussia.[17] In 1713 the Prussian King ordered a law commission to take the procedural law of the Danish Code as a model for the work of a new Prussian code of procedure. The translation into German of the Danish Code was excerpted by the Prussian Commission, which however showed itself very loath to recognize the superiority of Danish law. The excerption of the code was done in a way that resulted in the articles being incorporated piecemeal so that the inner coherence of the law was lost. The Commission probably did this intentionally in order to prevent the introduction of Danish law. After all, it had its own earlier project to consider. The obstructions succeeded: the Danish Code only slightly influenced the Prussian law reform work which was finally crowned with the enactment of the Prussian Code of 1794.

About the same time another great reform work was started by the Russian Czar Peter the Great. The administrative reforms of Peter the Great in order to create a modern state have recently been the object of an intensive study by Claes Peterson, who has given us a new and much more detailed picture of this work than we had before, especially as regards the imitation of Swedish institutions.[18] A clear parallel can be seen between the precautions taken by the Danish kings, e.g. Christian V, and by the Swedish King in order to secure a more rational administration, and the reforms undertaken by Peter the Great in the fields of administration and law. The same wish to consolidate absolutism through firm centralized government is visible in Peter's reforms.

During the course of the Czar's reforms both Swedish and Danish laws were considered.

After some attempts to reform the Russian statute book of 1649 had failed, a new commission was set up in 1720. For the use of the commission translations were made of the Danish Code and several Swedish statutes. Claes Peterson has studied the work of the commission and reconstructed part of its proceedings. We can see that the commission followed the system of the Danish Code. Parallel to each article of the Danish Code Russian law and Swedish law were then cited and a proposal for a new Russian law was made. In the final project rules from both Swedish and Danish law were used as a basis for new articles. According to Claes Peterson the Danish law seems especially to have served as

[17] See W. Wagner, *op. cit.*, footnote 4, pp. 229 f.; F. Holze, *Königs Christian's V Dänisches Gesetz als Vorbild für die preussische Justizreform 1713*, Berlin 1893.

[18] Claes Peterson, *Peter the Great's Administrative and Judicial Reforms*, Stockholm 1979. On what follows, see also the paper by Claes Peterson, *op. cit.*, footnote 4, pp. 369–403.

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a pattern for the system. In the elaboration of the individual articles more was taken from Swedish statutes. The project for a new code was almost finished in 1725. However, it was never promulgated as law. Perhaps it was realized that the Danish and Swedish rules which had been taken as a pattern could not be easily transferred to Russian society. The changed political conditions after the death of Peter were probably another decisive factor. Not until 1833 did the Russians have a new code—the *Svod Zakonov*. However, even in the 1820s and 1830s the Danish and Swedish codes were considered to be examples of how political duties—showing respect for the political system—were the basis also of the private law system.

The Danish Code probably also served as a model for the codification work in Sweden, which resulted in the Swedish Code of 1734; however, direct influence is difficult to find.

In Poland the Danish Code was considered in the 1770s. The Polish nobility had anxiously followed the change in the Danish political system in 1660, which to the Polish noblemen could be interpreted as a warning against a strong monarchy. An anonymous treatise of 1701 gave an account of the political changes in Denmark and Sweden in the 17th century based on Molesworth's account of Denmark.[19] In the Polish version the positive opinion of the Danish Code was omitted, though later in the century the Danish Code was often cited in Poland as an ideal. In 1776 a law commission headed by the Chancellor Andrzej Zamoyski (1716–1792) was appointed. Among the materials that were gathered by the commission were also fragments of the Danish Code. The project which was presented by the commission was rejected by the Polish Parliament—the *Sejm*—and never came into force.

The rule of the Danish monarchs of the 17th and 18th centuries extended over a vast area. It has already been mentioned that Norway formed part of the monarchy and that a code based on the Danish Code was introduced there, but the Code was also enacted on a small part of the American continent.[19a]

[19] *History O Rewolucyi Krolestw Szwedzkiego y Dunskiego* (1701). On this work, see Andzej Gaca's essay on the influence of the Danish Code in Poland, *op. cit.*, footnote 4 above, p. 411.

[19a] It has even been suggested that the Danish Code might have served Thomas Jefferson as a model for the drafting of the Virginia Succession Act of 1785, see Leigh on the Virginia Law of Descents, *Virginia Law Journal*, vol. 9 (1885), p. 200: "I have seen the revised Code of Denmark, which begins with a formal declaration that the King is a sovereign, lord and master of the lives, liberties and properties of all his subjects; and yet the Danish law of descents is so very like ours, that it is hardly possible to doubt that Mr Jefferson has seen it when he drew the statute of 1785, and in many respects designedly followed its model." It is true that the order of succession described in the Virginia Act may have some superficial resemblance to the provisions in the Danish Code on descent. It might therefore seem probable that Jefferson was familiar with the Danish Code. However, there are also differences which make the influence more doubtful. I am grateful to Mr J. W. McKnight and Mr W. Hamilton Bryson for the reference to Mr Leigh's remarks on the Danish Code.

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In 1672 a Danish enterprise, the West Indian-Guinean Company, acquired the West Indian island of St. Thomas. In 1718 St. John was taken into possession and in 1733 the island of St. Croix was bought from France. This was colonization on a rather limited scale though it lasted for more than 200 years. In 1917 the three islands were transferred to the United States in return for a sum of $25 million.

The economic importance of the colonies to their mother country was modest. In nearly all aspects—socially, economically and culturally—the islands differed from Denmark. From a legal point of view especially the recognition of the institution of slavery on the islands was a difference that could give rise to juridical problems. In the first years of colonization jurisdiction was exercised by the Danish West Indian company. In 1755 the Danish Crown took over the islands and it was expressly stated that judicial authorities should judge according to Danish law—including of course the Code of 1683.[20]

As early as in 1756 a translation of the Danish Code was provided "for the use of the English Inhabitants of the Danish Settlements in America". The initiative was not official but came from Nicholas Tuite, one of the richest planters. The translation cannot be considered completely successful. Some sections of the statute book are omitted altogether, while others are abbreviated as being less important to the inhabitants of the West Indian Islands. The translator seems to have based his work more on the Latin translation than on the Danish original.[21] The translation had only little influence as the legal language used in the courts was still Danish and no statements in English were allowed. However, as a means of acquiring some basic knowledge of the principles of Danish law the translation may have been useful.

Danish law applied in the first place to free people on the islands and only to the slaves in so far as no local provisions were specified. Slaves were subject to special rules which, especially in the field of crime and punishment, were more severe than the Danish Code. A special code for the slave population was planned but the preparatory work was still not finished when the slave rebellion on St. Domingo burst out in 1789. The event made such an impression even in Copenhagen that the work on the special code was not continued. In 1848 slavery was abolished on the islands and from that time the Danish Code embraced the entire population of the islands.

Legally the status of slaves had to be considered according to the law of

[20] According to the Act of the U.S. Congress of March 3, 1917, Danish law remained partly in force also after the sale of the islands to the USA. It seems that the enactment of the Virgin Island Code of 1957 has eliminated any traces of Danish law that might have remained after 1917.

[21] A clear example is his dating the law—"this seventh of the Calends of May" instead of April 15. The translator has also misunderstood the "decimo septimo ..." of the Latin text for "seventh".

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property. Slaves were treated as chattels and as such as part of the estates of their owners; however, their status gave rise to special problems of interpretation. Slaves working on the plantations were often considered as part of the real estate but it was still unclear under what circumstances they might be alienated from the land. Slaves given as security constituted another legal problem not foreseen by the fathers of the Danish Code.

Danish law gave the slaves protection against cruelty inflicted by their masters, which was punished according to the rules of personal injury. However, the penalties were normally less severe than in cases of injuries to free people. The raping of slaves seems not to have led to prosecution,[22] but the abduction of slaves belonging to other slave-owners in the islands was considered to be theft.

Yet another problem, however, arose when the masters took their slaves with them to Denmark. If such a slave ran away in Copenhagen—could the master then claim him as his property?

This question was decided by the City Court of Copenhagen in a famous trial in the year 1802.

The case concerned a West Indian slave who during a stay in Denmark had left his master. He was put under arrest and jailed and the question was raised whether his master could maintain his right of property over the slave in Denmark. Slavery was an unknown institution in Denmark at that time and no provision in the Danish Code gave any solution of the issue.[23] The court came unanimously to the result that the slave-owners could claim their rights to return the slaves to the islands.

Two of the three judges simply found that the owner's right of property, which was acquired legally in the West Indies, did not cease just because the object of the right was moved to another territory. The slave-owners consequently were entitled to send back the slaves to the West Indies. What is especially interesting, however, is the opinion of the third judge—at that time a young man who was later to be the most famous Danish jurist of the 19th century. His name was Anders Sandøe Ørsted (1778–1860).[24] He agreed with his colleagues as to the result of the judgment but on somewhat more subtle grounds. His basic view in this case was that a right of property could not be exercised over a slave in Denmark, as the law did not recognize ownership of

[22] A survey of some of the legal problems on the islands which had to be solved by Danish law is given by Poul Erik Olsen in his essay on the Danish Code in the West Indies, *op. cit.*, footnote 4, pp. 289–321.

[23] The code for the slaves, which never came into force, had contained a provision which limited to one year the owners' right to keep a slave in Europe.

[24] Ørsted's contribution to Danish law is the object of an essay by this author in 22 *Sc.St.L.*, pp. 243–64 (1978). In a paper on "The Concept of a Person according to A. S. Ørsted" by Jes Bjarup in *Quaderni Fiorentini* 11/12 T.I. (1982), pp. 461–74, will be found an assessment of Ørsted's attitude in the slavery case together with references to Ørsted's works on this matter.

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human beings. This did not mean, however, that he had come to the conclusion that slaves were free when they came to Europe. According to Ørsted's general view legal rights once established had to be respected as far as possible. The courts could not set aside a right recognized in some other part of the King's realm. In the case of slavery established in the Danish West Indies he found that the legal positions of slave-owners and slaves had to be interpreted in terms of the institution known to Danish law which came nearest to it. The relation of master and servant could here be taken as a model and Ørsted accordingly constructed the slavery relation as one of life-long servitude. During a stay in Denmark slavery was then suspended, but according to a constructed life-long contractual relationship as servant the master could still demand that the slave be returned to the West Indies.

Ørsted in a comment to the judgment of 1802 mentioned that his point of view was supported by the authority of Blackstone and he refers to a passage from the fifth edition of his *Commentaries on the Laws of England*, which states that the servant will be free on arrival in England but the master still has a right to his personal service for life.[25] Even in 1824 he still defended this opinion.

In a famous English precedent, lord Mansfield's decision in the Somersett case in 1799, it was stated that the owner of a slave had no right to take the slave out of England without his own consent. It seems probable that the judges in the Danish city courts did not know of this decision.

Continuity is a characteristic of the evolution of Danish law. The Danish Code of 1683 was not the result of a quest for a general law reform. The change in the political system did not lead to a general reform of society and legislation since most of the articles found in the Code of 1683 were taken over from earlier legislation.

This feature is especially visible in the sixth book of the Code which deals with crime and punishment. This part of the law draws extensively on older statutes dating back to the 13th century and on more recent statutes from the 17th century. No clear, basic principle lying behind the provisions in the code on crime can be found. The whole criminal law part of the Code is structured according to the order of the Ten Commandments in *Exodus*. The first attempt to introduce a new order in the legislation dealing with crimes was based on a common European model of the age, which is found in several contemporary German statutes and treatises. No general part of criminal law existed, but the

[25] "... a slave or negro the instant he lands in England becomes a free man; that is the law will protect him in the enjoyment of his person and his property. Yet with regard to any right which the master may have lawfully acquired to the perfected service of John or Thomas this will remain exactly in the same state as before; for this is no more than the same state of subjection for life which every apprentice submits to for the state of seven years or sometimes for a longer period." See W. Blackstone, *Commentaries on the Laws of England* I, 5th ed. Oxford 1773, p. 424.

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Code started directly by listing specific crimes. In this way religious and secular crimes were collected in the same part of the Code and it was thus once again stated that all law enforcement was based on the royal power. The basic work for the compilers of the Code had been the making of the framework into which the different crimes had to be put. Accordingly, the first chapter of the criminal law book treated blasphemy, magic and witchcraft. Old statutes punishing the forswearing of baptism and religion and allying oneself with the Devil by burning at the stake were still repeated in the Code. The days of witch-hunting, however, were passing. The last witch was burnt in 1693. In this chapter harsh rules against Roman Catholics, especially against members of the Jesuit order, were also to be found. The second chapter dealt with oaths and the third chapter with "sabbath-breaking".

The fourth chapter of the sixth book treated the crimes against the royal power—the *crimen laesae majestatis*. In this chapter several new articles were introduced which were based on contemporary German and Italian legal treaties on criminal law. The introduction of absolutism in 1660 had given this chapter a special relevance and a severe punishment—decapitation and the cutting off of the right hand—was introduced for high treason in the first degree.

Also new was a special chapter referred to the fourth commandment, on the offences of children against their parents and the rights and duties of husbands in relation to wife, children and servants. "Children beating their parents shall suffer death", was one of the provisions.

The remaining chapters treated ordinary crime, murder and personal injuries, sexual offences, theft, etc.

The main principle laying behind the criminal law was that of deterrence. However, several articles were still based on the principle of composition—the paying of fines—taken from the old provincial laws of the 13th century. Still others were based on Mosaic law, e.g. the use of burning as punishment for what were called "sexual crimes against nature".

In the chapters on murder and personal injuries a distinction dating back to the provincial laws still existed between intentional crime and such personal harm as had been caused unintentionally, though this latter concept embraced both negligence and accidental damage. In both cases fines were to be paid. Torts were treated as part of the criminal law. A general principle of negligence was not found in the Code and it was not until the 19th century that this part of the law became the object of more detailed interest as a result of an increase in the number of legal cases where this was an issue.[26]

[26] The "law in action" in the field of private law in the 18th century is the object of Thøger Nielsen, *Studier over ældre dansk formuepraksis*, Copenhagen 1951. A survey of the cases treated by the Appeal Court of Jutland in the period about 1600–1800 is given by G. Henningsen, J. C. Johansen

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In comparison with other European statute books at the time the use of capital punishment was rather restricted in the Danish Code. Capital punishment was the ordinary punishment for homicide except in cases of pure accident, where fines were to be paid, and self-defence, which led to acquittal.

The law of theft was mitigated in the Danish Code. Capital punishment was restricted to cases where a convicted thief broke out of jail and committed a new theft. Only a few years later, in 1690, capital punishment was reintroduced for burglary and cattle-rustling. Before the enactment of the Code a merciful application of the law in cases of theft seems to have been common. It often appears in the records that an amicable agreement was reached in court between the parties in order to avoid sentence being passed. This system could not continue after the introduction of absolutism but it was replaced by the use of the King's right of pardon. Under the influence of the 18th Century Enlightenment this right was often used to mitigate sentences rendered according to the Danish Code. Capital punishment for theft was finally abolished in 1771.

Criminal procedure in the Danish Code was not distinguished from civil procedure. The injured person would normally have to conduct his own case. In the first book of the Code the rules of procedure were set out clearly and comprehensibly.[27] The system of evidence had been modernized—the use of compurgators was finally totally abolished and a last remnant of the formal evidence known in the provincial laws was thus eliminated. The use of torture was very restricted. Apart from felony cases, torture could only be used when the accused had already been sentenced to death and in cases of *crimen laesae majestatis*.

Parts of the criminal law sections of the Danish Code continued in force until a new Danish Penal Code was introduced in 1866.

The Danish Code came into being at a crucial moment for legal theory. Theories of natural law were gaining in importance. Especially the works of the Dutchman Hugo Grotius—*De jure Belli ac Pacis* from 1625—and of the German Samuel Pufendorf—*De jure Naturae et gentium* from 1672—were widely read and were rapidly forming the minds of the people who dedicated themselves to the study of law or social relations in general. A century later the ideas of natural law were the basis on which new codes in Prussia, France and Austria were constructed. The Danish Code was influenced only very slightly by contemporary thinking on natural law, and there is perhaps only one

and Ditlev Tamm, "16,000 jyske domme" (with an English summary), in *Fortid og Nutid* XXVIII (1979), pp. 240–70.

[27] The established court system was accepted by the Code. On the Supreme Court, which had been founded in 1661, see Stig Iuul in 6 *Sc.St.L.*, pp. 163–83 (1962).

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example in the Code of clauses which might have been inspired by natural law. In the first chapter of the fifth book of the Danish Code, on property and contract, two articles establish a general rule, which in the English translation read as follows:

> 5-1-1:
> Let everyone stand to whatever he has engaged to do by Word, Hand, and Seal.
> 5-1-2:
> All Contracts concerning buying, selling, Gift, Exchange, Mortgage, Loan, and all other Affairs whatsoever, made by Persons of Age, and under no one's Tutelage shall be Obligatory in all Points, Conditions and Particulars agreed to, as far as they are noways repugnant to the Laws, and the rules of Decency, and the Parties not forced into them.

These paragraphs have no parallel in earlier Danish law. It is stated that all contracts—whether written or oral—shall be considered valid without any further formalities being demanded. This amounts to a general principle of natural law, i.e. that all contracts and agreements are binding. This principle has since then been the basis of Danish contractual law, of which the lack of formality is characteristic.

Another important new article was introduced in the section of the third book on master and servant. It is here stated as a basic premise that the master cannot be held responsible for the tortuous acts of his servant. Only if the servant's acts are due to negligence in the course of the service of the master will the latter be responsible. The exact meaning of this article at the time of the Code is not quite clear. However, since the last decades of the 19th century this article has been the basis of the rule of the employer's responsibility for torts committed negligently by his employees, the *respondeat superior* principle.

The society reflected in the Danish Code was a society differentiated in classes. The Code of 1683 furthered equality before the law. Several articles which had given the nobility a privileged status were abolished; however, the old class structure was preserved in the Code.

The third book of the Code contains the legal rules which applied to different classes, the privileged classes, townsmen and the rural population. The second book dealt with the clergy and the fourth book with shipping merchants.

The establishing of absolutism did not mean much immediate change for the greater part of the population living as peasants on copyhold estates in the rural districts. The Code still repeated an article from earlier law, i.e. that landowners were in principle unrestricted in their use of the resources of the land.[28] The right of corporal punishment as a means of disciplining the

[28] Thomas Munck, *The Peasantry and the Early Absolute Monarchy in Denmark 1660–1708*, Copenhagen 1979.

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peasants was also preserved. A substantial rural reform was not undertaken until the last decades of the 18th century.

Quite soon after the enactment of the Danish Code of 1683 it became clear that it was felt insufficient and so on several points the Code was supplemented with new legislation, which was not inserted in the body of the Code. Some of the Code's sections soon went out of use or were abolished. The mass of new legislation was so large that as early as in the 1730s it was felt necessary to undertake a complete revision. Such plans, however, were never fulfilled. Reform commissions worked throughout the 18th century without reaching any result.

At the beginning of the 19th century a new point of view prevailed. The German jurist F. C. von Savigny, in his famous pamphlet on legislation and legal science of 1814, gave the whole idea of codification a new turn when he pointed to the great difficulties which had to be overcome in order to make a codification. Savigny and the historical school did not think their own age capable of carrying out such a project. An evolution of law through legal science was considered necessary before the codification task in the field of private law could be undertaken. This pessimistic view as to the possibilities of codification also prevailed in Denmark in the 19th century. It was only in 1899 that a Danish law professor Julius Lassen[29] formulated a new goal for the legislative effort: a Nordic code.

A gap of more than two hundred years divided the enactment of the Code from the moment of Lassen's statement. In the 19th century, however, important changes had taken place which made the Danish Code seem even more obsolete than had hitherto been the case. In 1848 absolutism had finally been replaced by a new political system. A wave of new legislation in the last half of the 19th century was rapidly shaping a new society. In the field of private law legal science had made enormous progress due to the influence of the German Pandectists and it was felt that new legislation was necessary to fill the gaps in the Code. In the 1870s legal collaboration between the Nordic countries had started. The quest for a Nordic civil code was meant as an encouragement to continue on these lines. Such a code never came into being, but the most important institutions of private law, contracts, sale, bills of exchange, promissory notes, family law, etc., all had a new legal basis in the years following 1900 in the form of new statutes enacted as a result of common Nordic efforts. The penal law had been reformed as early as 1866 and a reform of the Danish judiciary was enacted in 1916. Not much was left of the Danish Code of 1683

[29] Julius Lassen (1847–1923) as law professor gave the Danish law of obligations, contracts, torts, etc., a new shape. He has himself referred to the works of the great English lawyers, Pollock, Wharton *et al.*, as an inspiration in this field.

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but even today some sections are in force as evidence of the continuity which is characteristic of Danish law.

A Scandinavian lawyer is often asked whether Scandinavian law can be considered a civil law or a common law system,[30] and one is bound to say that it is doubtful whether a clear *fundamental division* really exists between continental law and Anglo-American law. The existence of a written code is often taken as one of the characteristics of civil law, but as will be understood from what is said about the Danish Code of 1683, Danish law is not codified in the same way as, e.g., German or French law. Danish law is linked to the continental law tradition through its legal science and the position of the judge in Danish law is also closer to continental law than, at least, to English traditions. Legal tradition links Danish law more closely to continental law than to common law. However, due to a geographical position on the outskirts of European culture, until quite late in history Danish law has found itself outside the influence of learned law—the orbit of the *jus commune*. The history of the Danish Code of 1683 is a unique example of continuity in legal history which makes it virtually impossible to set Danish law precisely in any framework denominated as civil law or common law.

The Danish Code of 1683 was no masterpiece. It was, as Bentham said it, "imcomplete", and as such it was never an obstacle to a natural development of "the law in action".

[30] Cf. essays by Bernhard Gomard, Åke Malmström and Jacob Sundberg in 5 *Sc.St.L.*, pp. 27–38 (1961), and 13 *Sc.St.L.*, pp. 127–49 and 179–205 (1969).

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