THE DANISH SUPREME COURT THROUGH 300 YEARS

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On February 14, 1961, the Supreme Court of Denmark celebrated its three hundredth anniversary. On the same day the Court issued a memorial publication which contains, in some twelve hundred pages, answers to almost every question that might be asked concerning the history of the Court.

To those, however, who are not familiar with the history either of the Supreme Court or, more generally, of the early days of Danish Royal absolutism, the most natural question to put is: What did in fact happen on February 14, 1661?

In the year 1660 the Danish Constitution underwent a decisive change. For centuries, the Kings of Denmark had acceded to the Throne after an election by the Council of the Realm. True, membership of the Royal Family was a condition of eligibility and normally a King was succeeded by his eldest son; but this was not a matter of course, and the election therefore gave the Council an opportunity to demand important concessions from the new King. On the other hand, it should not be overlooked that the King was nevertheless invested with considerable power, and if the Royal authority was given to a strong man, his actual political influence was considerably greater than would seem to follow from the Constitution.

The events of 1660 may be briefly summarized as follows. With the political assistance of the clergy and the burghers of Copenhagen and other towns, King Frederick III forced the noblemen of whom the Council was composed to accept the introduction of hereditary monarchy in Denmark. This meant that it was no longer possible to extort political promises from the King in connection with his accession to the Throne, and the concessions granted by Frederick III at his election in 1648 were abrogated. At the same time the King was entrusted with the drafting of a new Constitutional Statute. The last-mentioned task was performed in 1665 with the enactment of the so-called *Lex Regia,* which gave the King absolute powers to an extent unparalleled in other European States. Even before the enactment of the detailed rules of the *Lex Regia*—which incidentally were kept secret for many years—it was

however obvious that the King considered himself the holder of absolute powers and that this state of affairs was acknowledged by the population. The new Government was organized by a series of Royal decrees, and the Letter Patent of February 14, 1661, was one of these. However, the Letter did not envisage the introduction of a Supreme Court for the whole Kingdom. Such a Court had existed for centuries, and there was such a strong feeling of continuity between the old and the new Court that writs issued by the old Court seem to have held for the opening of actions in the new one. Further, it is well known that the old term denoting the sessions where the King's supreme jurisdiction in error was exercised—*the Assembly of Peers*—lasted as long as Royal absolutism. As late as three months before the Constitution of June, 1849, was introduced, King Frederick VII[1], in his state coach, surrounded by mounted officials, inaugurated the Assembly in Copenhagen on March 1, 1848, i.e. participated in the solemn opening of the Supreme Court session of the year. Nor did the Letter Patent of February 14, 1661, introduce or presuppose a greater influence from the King himself upon the exercise of the supreme judicial power than had been usual before. Even less did the enactment provide who was to sit on the Bench of the Supreme Court in the future. For the public, this was an open question until the Court held its first session by Royal command on March 4, 1661—incidentally, this was several months earlier than the time envisaged by the Letter Patent. The only important rule in that document was that, hereafter, half the members of the Court should be noblemen and the other half should belong to the learned order or the commons in general; finally, all the members should hold the King's appointment.

Thus, in its actual wording the Letter Patent of February 14, 1661, was hardly more than an announcement of future provisions. Its real content was to deal a final blow to the old Council. Those of its members who were still alive were not even allowed to join the new Supreme Court *eo ipso;* they had to compete not only with the commoners, learned and others, but also with those members of the old nobility who had not had a seat in the Council. If it had been possible, as late as October 18, 1660, when the King received the homage of the Estates as an hereditary monarch, to uphold the illusion that there would be a chance that the Council

[1] King of Denmark 1848–63. Through the *Constitution* signed by him on June 5, 1849, Royal absolutism was abolished, and Denmark became a constitutional monarchy.

might survive in a more or less modified form under the new Constitution, there was but small hope left after the so-called Act of Sovereignty which, on January 10, 1661, was sent out, under heavy political pressure, to be signed by the members of the Council and by representatives of the nobility and the burghers. The Letter Patent of February 14, 1661, embodied the first practical conclusions by abolishing the time-honoured right of the Council to take part in the exercise of supreme judicial powers.

The Council—which, in 1648, had elected Frederick III to the Throne and imposed humiliating conditions on his exercise of the Royal power—may seem to have vanished from the history of Denmark in a rather inglorious manner. However, the Councillors had no alternative. They were in Copenhagen, where the high nobility did not enjoy great popularity. The city gates were closed and the guards reinforced. The Council disposed of no military resources whatever, and its opponent was a member of the House of Oldenburg.[2] The Council was well acquainted with the methods of the Oldenburg family in a conflict. Among the Councillors of 1660, there was hardly one who could not claim, among his near or distant relatives, some of the bishops who were arrested in 1536 and were not released from prison until they had expressly surrendered to the King and given up their resistance to the introduction of Lutheranism. The staunch Bishop of Roskilde, Joakim Rønnow, was liberated from jail and disgrace only by his death, which occurred in 1544—eight years after the Reformation. It is certainly not astonishing that the Council despaired completely in 1660.

However, the inglorious end of the history of the aristocratic Council of the Realm should not in any way be allowed to obscure the manner in which it had administered its task in the service of justice, or the inheritance it left to the new Supreme Court. To those who are not familiar with the state of affairs in those days, it may be difficult to realise how these landowners could have any particular qualifications for the Bench. This is to overlook, however, that they were not only landowners on a scale ever since unknown in this country but that they also represented the height of contemporary civilization. Most of them could look back at educational journeys abroad which had lasted for years, and several could claim to have written learned works. In 1642, when the

[2] The Kings of Denmark during the period 1448–1848, originally descended from an older branch of the House of the Counts of Oldenburg.

Councillor Holger Rosenkrantz died, memorial lectures were delivered not only in Copenhagen and at the Danish College of Sorø but also at Wittenberg. Other Councillors have acquired everlasting merit as patrons of authors and scholars less highly born than themselves.

With this theoretical education, the Councillors of the Realm often combined obvious practical experience. As the King's Governors in the provinces—most often in the so-called large fiefs, which developed into the modern administrative counties of Denmark—they were already accustomed to representing the authority of the State in local conditions and to possessing the power to decide a great number of legal and economic questions in the everyday routine of administration when they took their seat in the Council.

But what about the Councillors on the Bench?

There can be only one answer: they represented a very high standard of judicial ability. In spite of its exclusively aristocratic composition, the King's Court of Justice was far from being a tribunal in the service of the Danish aristocracy. Some twenty years ago, a historian who examined all the cases in which a peasant had been opposed to a nobleman reached the conclusion that there was a distinct tendency for the Court to assist the peasantry. The more a lawyer considers those decisions of the King's Court which are still extant, the greater will be his respect for them. There is no doubt that at every period of its existence the Council contained excellent lawyers, whether these had no qualifications save their native gifts or had added a valuable store of specialized knowledge to their innate talents; and these men were in a position to impress their personality upon the decisions.

However, another question, which has so far been neglected by writers, must be answered in order to complete the portrait of the Council: What were the relations between King and Council when they sat together on the Bench? It was far from being necessary for the King himself to participate in the judicial activity of the Council. On the contrary, most of the decisions of the King's Court were reached by the Council alone, and these decisions were just as final as those in which the King had taken part. But when the King presided over his Court of Justice, what were his powers as compared with those of his colleagues? This question is difficult to answer, since the deliberations of the King's Court were secret, and only the minutes of the deliberations from the last decades of the Court's existence have been preserved. When a decision was published, it appeared as unanimous, and those mem-

bers of the Bench who did not concur had no means of expressing their points of view. However, an examination of a considerable number of those minutes which are extant has convinced the present writer that not only could the King, by coming down on the side of the minority, make the latter's standpoint appear as the final result of deliberations: he could on occasion outweigh all the other members. In other words, the Councillors were the King's advisers, no more, and the King's dependence on the Council in political matters did not extend to the decisions in law suits. It is important to keep this fact in mind when considering the relations between the absolute monarch and his Supreme Court. We cannot find any change in the principles governing the King's influence upon the exercise of supreme judicial power before and after February 14, 1661. The opinions of the individual members of the Court remained unknown to the parties and the public until, in 1958, it was enacted that in future a decision of the Supreme Court shall not only give information about the various opinions expressed during the deliberations of the Bench but also state the names of the Justices who had held the different opinions.

What did it look like, this Supreme Court, at its first session in March, 1661? The intention, announced in the Letter Patent, that half the members should be noblemen had been realized by making five of the members of the old Council Lords Justices. As for the other four noblemen, they had been given the title of Councillor of the Realm, but they had all been appointed since the constitutional change in 1660.

In the course of time, however, the few other members of the old Council who were still alive and had sworn loyalty to Frederick III (1648–70) as their absolute monarch were also appointed to the Supreme Court. But it is the composition of that moiety of the Court which was to consist of learned men and other commoners that seems of greater interest.

As a general observation, it can be stated that the commoners were as well qualified as they could be. In administrative experience, however, they could not compete with their noble colleagues. As for their theoretical background, it should be stressed that several of them had made lengthy trips abroad. In some cases, this was because, in the capacity of tutors, they had accompanied young noblemen on their long educational journeys; having at one time eaten the noblemen's bread, they had now advanced to being their equals in the Supreme Court. However, several of the commoners had made such good use of their stay abroad that they had

come back with degrees from foreign universities, and these men, at any rate, brought valuable theoretical knowledge to the Court.

It is known that it took a long time before membership of the Supreme Court became a real profession which constituted the main occupation of the person concerned. Indeed, the tradition from the old Council was in this respect maintained. It should be pointed out, however, that the new absolute regime had to face the additional problem that the number of competent officials of the commoner class who were at the Sovereign's disposal was so small that those who could be found must be used, if not abused. Thus Peter Scavenius, who was a member of the Supreme Court for 22 years, was at the same time professor of law at the University, a member of the Academic Senate, a member of the Boards of State, of Commerce and of the Treasury, and finally a member of numerous special commissions, among them five of the seven commissions which, in the course of time, were successively occupied with the drafting of the Danish Code of Laws, which was enacted in 1683.

Under these circumstances, it is hardly astonishing that the function as member of the Supreme Court tended to be relegated to the background by those who had been appointed. If they had nursed any illusions about the splendour and glory that the office might bring, they were soon disappointed, for the Royal Ordinance on Rank and Precedence, 1670, which created fifty-five classes of rank, consigned members of the Supreme Court to the forty-fourth. From an economic point of view, the office was even less attractive, since it was, at least in principle, honorary. In the course of time, however, certain justices were granted a stipend—thus Peter Lassen was given 800 *daler* a year—and this was quite natural, for the membership of the Court was the main occupation of the persons concerned. Nevertheless, Peter Lassen had been dead for ten years before his widow managed to obtain payment of his arrears for twenty years of work in the Court, so it was fortunate that he had had private resources.

Under these conditions, it is obvious that at any given moment a considerable number of Justices must be in office in order to avoid the Court's being unable to sit because a sufficient number of justices were not present. The Letter Patent of 1661 had not established any quorum. However, from 1677, the rule was that not fewer than 11 members should participate in the hearing of all actions, but in 1690 it became necessary to reduce the number to nine, a figure which remained unchanged until our days. In the

course of time, this resulted in the creation of a reasonably fixed inner circle of justices who participated regularly in the work of the Court, and it cannot be denied that their number was chiefly composed of commoners. This suited the King excellently. In their hearts, the first absolute monarchs of Denmark felt a certain fear of the old nobility. In his political testament Christian V (1670–99) instructed his son to ensure that there should be more commoners than noblemen in the Supreme Court. Once every year, however, the noble members put in a splendid appearance, on the opening day. As late as the middle of the eighteenth century, it might happen that some fifty justices gave their opinions in the Royal Presence on that day. Later, the number was considerably reduced, but it was still a colourful spectacle, the Councillors of the Realm appearing in their crimson velvet robes lined with purple taffeta and covered with stars and ribbons, while the ordinary justices wore their more modest satin robes. Later on, those Supreme Court Justices who were "conseillers de conférence" or chamberlains—the last-mentioned title was given only to *noble* members of the Court—also became entitled to wear the crimson velvet robe. It was not until the Constitution of 1849 that this differentiation disappeared, and all were allowed to wear velvet robes. The introduction of the new Constitution made itself felt on another point too: the Royal Throne was taken away. It had stood in the session room of the Supreme Court since 1670, and parties as well as counsel were enjoined to deliver their addresses to the Throne, and to begin with the words: *Most Powerful and Most Gracious Hereditary Lord and King.* This form of fetishism was now abolished, and at the same time the Throne was removed —curiously enough, nobody knows where it was put. However, the Supreme Court seems to have felt the lack of some symbol of Royal power, for after the accession of Christian IX (1863–1906), when the Court moved to Christiansborg Palace,[3] a bust of the reigning monarch was bought and placed behind the President's chair. It was made of plaster and had cost only twenty crowns, so no one could cavil at the expense.

Far more essential for the history of the Supreme Court than these picturesque details are two questions: How did the King look upon his Supreme Court, and how did the Court behave in relation to the absolute monarch?

[3] The Palace of Copenhagen, which dated from the Middle Ages, was replaced by the Palace of Christiansborg, built by Christian VI in the middle of the eighteenth century. Today, Christiansborg is the seat of Parliament.

As for the old King's Court, we have already mentioned that the King had regarded the Councillors as mere advisers when he presided over the Court in person. On the other hand, he frequently delegated judicial powers to the Council, which then reached its decisions in the King's name. When one considers the degree to which the codified law of those days was casuistic one will easily understand that as a result of such delegation the Council often created new law all by itself. What is peculiar to this period of Danish legal history is the fact that precedents were observed to an extent that has never been paralleled since, and these precedents, which were endowed with an enormous weight of authority in court, were very largely decisions by the Council acting as the King's Court in the King's absence. It might happen that no majority for a decision could be attained in the Council, and in such cases the Council brought the matter before the King to be decided. This solution was identical with the practice of the new Supreme Court of bringing an action before the absolute monarch *ad referendum*.

In the rules on the jurisdiction of the new Supreme Court it is easy to see how jealously the King guarded his prerogative of making new law. In several instances when a case was brought before the Court, reference to the King was simply ordered; thus the activity of the Court no longer aimed at a decision, but rather served as a preparation for a reference to the King, who normally had not been present at the hearing of the case. In the Rules of the Supreme Court, 1670, it was explicitly laid down that a case should be referred to the King when an equal number of opinions was given for two opposite solutions—this corresponds to the custom before 1660; further a *referendum* was required when a matter of any importance was brought before the Court and when the Court found reasons for departing from the strict letter of the law. What the Court had to do was strictly to administer the law as then in force. It was expressly stated in the Rules of 1670 that the Justices had "only to follow the letter of the law". In the course of time, reference to the King became relatively infrequent, and the last remains of this procedure were swept away in 1771.

Under the rules set out above, there was no place for the observance of precedent, which had earlier been frequent, and one finds that the older members of the Supreme Court were at some pains to acquire the habit of following the new principles. In an action from 1665 three noble Justices—headed by the Chan-

Axel Juel, who had been sentenced by a special tribunal to lose his life, honours and estate. In the course of the hearing in the Supreme Court, however, it became apparent that the accusations against Axel Juel were pure inventions, that the evidence against him had been forged and that, at the same time, a document which proved his innocence had been suppressed. Thereupon, by a large majority, the Court acquitted Axel Juel. The decision contained an explicit disavowal of the special tribunal, which had been headed by Mathias Moth, brother of the King's mistress, Sophie Amalie Moth. However, Christian V made no attempt to change the decision but confined himself to the above-mentioned letter, with its distinct ring of irritation—in all likelihood it had been drafted by Mathias Moth in his capacity of First Secretary of the Chancery. The only Justice who got a real proof of the Royal displeasure was the Councillor of the Realm Marcus Gøye who had taken Axel Juel home in his own coach after the judgment had been delivered. Gøye was at once banished from Court, but one month later he was restored to grace.

It is characteristic that the Supreme Court Justice who showed the most independent attitude towards the Royal power in this case was a member of one of the oldest noble families in the country. In the course of time, however, an element of sharpness also appeared in the remarks which the commoners in the Supreme Court occasionally made to the monarch. The explanation given in 1740 by the President, Didrik Seckman, to Christian VI in the action against Governor Gersdorff is an illuminating example. In spite of respectful declarations to the effect that he was a most obedient and most faithful liege subject and servant, he did not hesitate to point out to Christian VI that *all* Governments had found it necessary to make a final end to all quarrels by *instituting* courts with whose decisions the subjects had to be content, and not by rescinding what had once been settled by the judgment of the Supreme Court.

Thus spoke a commoner Justice to the absolute monarch in those years when—to quote a contemporary author—"all were afraid, even it they had no reason to be", and nothing happened to him as a result of it.

It is interesting that there is no example of Royal dissatisfaction with a Supreme Court decision in the period of absolutism having led to the dismissal of any of the justices, whose places in the Court were at all times dependent upon the King's grace. In fact, the only political dismissal of Supreme Court Justices was made by a

Constitutional King, Frederick VII, but of course upon the proposal of the Cabinet. The reason has been made clear in the literature. It was the decision, delivered in 1856 by the Court of Impeachment which acquitted Ørsted's Cabinet, whose members had been charged with spending money, which had not been duly granted, for defence purposes during the Crimean War. With regard to three of the accused, it is known that the acquittal was due to the opinions of the eight Supreme Court Justices who were members of the Court of Impeachment. The new Cabinet retorted by dismissing five Justices who were more than 65 years old and could therefore in accordance with the Constitution be discharged, but only without loss of salary. The blow was made as heavy as possible from a financial point of view by arranging that an increase of the salaries of the Supreme Court Justices which had been contemplated for a long time was deferred until the last of these Justices had been dismissed. The measures were the more irritating since a couple of the Justices who had sat on the Court of Impeachment were not discharged although they were 80 and 71 years old respectively, whereas in the case of another Justice the Cabinet went right down to the 65-years limit.

The dismissal of President Niels Lassen in 1915 was possibly also of a partly political character. The formal ground was "his health, which had been somewhat precarious in recent years". Undoubtedly, this accorded with the facts to some extent, but it cannot be denied that the dismissal was seen as the reply of Zahle's Cabinet to the violent attacks upon Lassen which were launched in the Social Democratic newspapers. The Zahle Cabinet (1913–20) was composed solely of members of the Radical party, but in Parliament it was dependent upon the support of the Social Democrats. Lassen had himself to blame for the press attacks, inasmuch as he had stated in an interview that he never read Social Democratic newspapers. The dismissal was immediately described by these very newspapers as due to his statements on Socialism, and the Cabinet did not correct this comment. It should be pointed out, however, that a year and seven months passed between Lassen's statements and the dismissal and that the accuracy of the Socialist explanations of the dismissal was never confirmed by other sources.

If it can thus be stated that political dismissals are quite exceptional, it may also be asked whether the Government pursued distinct political ends when appointing Supreme Court Justices. To this, it can be answered that as long as the King could possibly

modify a decision which did not satisfy him, the question was without practical importance, and about the middle of the 18th century, when the Supreme Court had attained a position of independence, actions of a more or less political character were so exceptional that considerations of their possible outcome could not assume any importance for the Government. It was only in the last years of Frederick VI's reign and under Christian VIII,[5] when actions instituted by the Chancery against writers and printers were of almost daily occurrence, that the question of the Justices' political convictions could assume real importance.

It is the more astonishing to find that when instituting press actions and when proposing candidates to the King for the Supreme Court, the Danish Chancery followed lines which are so divergent that occasionally it is difficult to realize that it is one and the same public body which is at work. As a prosecuting authority, it had to suffer many defeats in the Supreme Court, but this did not influence the considerations which lay behind the proposal to the King of candidates.

Examination of the appointments of Supreme Court Justices in the last twenty years of Royal absolutism will show that quite strict rules were followed with regard to training, seniority, etc., and once one has become familiar with these rules, the result in each individual case can be predicted with certainty. One exception should be mentioned, however, the passing over of Spandet in 1833. He was a judge in the Court of Appeal when he applied for the post, and enjoyed a very high reputation. However, he had been severely reprimanded by the King a few years earlier when, in one of the most famous slander actions of those days, he had publicly renounced all responsibility for a decision by the Court of Appeal. The King had even ordered that his rebuke should be published in the official newspaper, as a warning to others. In these circumstances, the Chancery could not propose him but left it for the King to choose for himself. The manner in which the Chancery made Spandet stand out among the other candidates leaves no doubt as to who had the sympathy of the Chancery, and it was only Frederick VI's somewhat petty character which prevented Spandet from taking his seat in the Supreme Court, of which he would certainly have been an ornament. In 1856, when five new Justices were to be appointed to replace those who had been dismissed after the decision of the Court of Impeach-

[5] Frederick VI reigned from 1808 to 1839, and Christian VIII from 1839 to 1848.

ment, it was not disguised that the purpose was to put into the Court men who were more reliable from a political point of view; but apart from this there are no examples of political nominations of Supreme Court Justices.

It is not easy to give an answer about the quality, from a legal point of view, of the Justices who have filled the highest judicial posts of the Realm for the last three centuries. The only guidance is furnished by the short records of deliberations, and these records are often but indifferent.

The Lord High Admiral Henrik Bielke, one of the first members of the Court, enjoys an almost herostratic fame. His military and naval training does not seem to have given him any legal competence; at any rate the minutes of a deliberation in 1668 tell us that the Lord High Admiral had to excuse himself from not giving an opinion, on the ground that he had not understood the case at bar. Against this, it should be emphasized that among the later Justices of the Supreme Court there is a long series of eminent lawyers who would be an ornament to the bench at any time. In older days, however, it is true that many of these men did not long have the opportunity to give opinions, being soon called to other tasks.

Thus, Ørsted[6] spent two and a half years in the Supreme Court before his meteoric career carried him to Chancery as Commissioner. A. C. Kierrulf served a similar period before being promoted successively Commissioner of Police in Copenhagen, Commissioner of Chancery and Governor of Copenhagen. From earlier days, mention may be made of Stemann, later on an impressive President of Chancery, who became Governor of Sorø in 1798, after four years' judicial work. Among those with longer service was Justice Mads Fridsch who was a member of the Supreme Court for 21 years until in 1799, at the age of 57, he was appointed a member of the Board of Exchequer. Fridsch is probably known to very few people today, but he is worthy of special mention because he persuaded the Supreme Court to recognize the concept of *constitutum possessorium* at a time when neither Danish nor German writers respected this exception from the rule that *traditio* is necessary for transference of title in choses in possession.

Thus it will be seen that, even after they had become permanent

[6] Anders Sandøe Ørsted (1778–1860). The most famous of all Danish lawyers. At the same time as his public career took him to the position of Prime Minister, his writings became the foundations of modern legal science in Denmark.

and relatively well paid, the judgeships of the Supreme Court were, for a good many of their occupants in earlier days, only a stepping stone to other positions. The reason for seeking to leave the Court might be that the person concerned could secure a higher income in some other public office; moreover, so far as the central administrative bodies were concerned, the leading posts in these had, in older days, an even greater aura than the highest judicial offices of the Realm. After all, it was these bodies that wielded the real legislative power, and thus the supreme influence over the community. It must be admitted that at the beginning of the 19th century, if not at other times, there was mutual jealousy between the Chancery and the Supreme Court. In 1795, when Chancery asked the Court to explain why different results had been reached in two seemingly identical cases, Justice Stemann advised the Court to reply that the Supreme Court, over which the King himself presided, had to render an account to no one but His Majesty. On the other hand, it happened that the Chancery passed enactments without hearing the Supreme Court in matters where such consultation would have been natural. It is certainly in harmony with the actual facts when it is stated in 1798 that "between this *dicasterium* (the Supreme Court) and *collegium* (the Chancery) there is always *animosité*".

It has been mentioned above that shortly after the creation of the Supreme Court it was argued that precedents make no law. The explanation is obvious. The absolute monarch could not admit that his own Court was obliged to observe its own earlier standpoints in similar cases, while he was entirely unbound by rules himself. The ways of ascertaining the reasons on which the Supreme Court had based individual decisions were materially reduced in 1674, when the Court was simply forbidden to state the reasons for its judgments, on the ground that Supreme Court decisions could not be challenged. The drafters of the Rules of 1690 originally wanted to prohibit even the use of precedents in the course of the pleadings, but at the last moment this proposal was abandoned. This, however, was of no great importance, for through more than a hundred years it was *believed* that it was not permissible to invoke precedents. Shortly before his death in 1739, the famous historian and jurist Andreas Højer stated: "Like other men the Justices of the Supreme Court may have been in error in an earlier decision; if so it should not be for attorneys to reproach them, nor should the Court be obliged to pass a similar decision in a case of the same kind."

It is a different matter whether the Supreme Court itself kept its own decisions in mind and felt obliged to stick to positions once taken. No strict harmony can be observed between intentions and the way in which they were realized. The memory of the Court was fallible—a necessary consequence of the facts that the individual Justices usually did not serve very long, and that no trouble was taken to keep records or employ other aids to memory. In view of this it was of no great avail that it was emphasized from time to time that in identical cases the Court should be faithful to its own principles. There are several famous decisions from the 18th century which must be explained either by forgetfulness or by misunderstanding of earlier decisions—the last-mentioned mishap could easily occur, since Supreme Court decisions set out no grounds, whether the judgment of the inferior court was upheld or reversed. The last obvious example of this kind is a Supreme Court decision of 1808 in which it was laid down that the question whether a Jew had become of age should be determined by the Code of Laws of Denmark, 1683. Before that case, the rules of Mosaic law had been applied, and a Chancery Order from 1794 had pronounced that this principle was in accordance with the law of the land. However, in a decision of the Supreme Court of 1796, Danish law was applied to Jews, but it appears from the minutes of the deliberation that this was due to the fact that, with regard to contracts of the kind concerned in the case, Mosaic law contained a reference to the general laws of the country in question. In other words, a *renvoi* rule in Jewish law was applied; but since no grounds were set out in the decision it was believed, in 1808, that the legal relations of Jews should, upon the whole, be governed by *Danish* law, and the Court's decision of that year simply endorses this opinion.

In the course of the 18th century, the Court managed to disregard completely the rule that precedents make no law; indeed the Justices of the Supreme Court felt obliged to hold to the positions they had once taken. It is interesting to find that this new opinion developed within the Court itself and that it had no support whatever in the theoretical writings of the 18th century. These, on the contrary, treat precedents in a way which seems astonishingly cavalier to present-day minds. Even in Ørsted's supplement to Nørregaard's lectures, 1804, there is a statement to the effect that the Supreme Court cannot be trusted to stick to its own principles.

After Ørsted had had the opportunity to sit on the Supreme

Court, however, he struck an entirely different note. In his "Textbook" it is stated that the members of the Supreme Court feel bound by those principles which they have adopted earlier. Moreover, if an unhealthy principle should have found its way into the body of precedents, *it is for the legislative power to find the remedy against it,* just as much as if an injurious enactment had been passed. This seems to be the most far-reaching adoption of the doctrine of *stare decisis* which can be found in Danish legal writing, except for the words of J. F. W. Schlegel concerning a certain Supreme Court decision, namely that it was an authoritative interpretation of the law with the binding force of a statute, because it had been passed in the Royal presence. The King was Christian VII, at that time completely insane. However, Ørsted was also a faithful supporter of Royal absolutism. With regard to a well-known decision on the effects of minority, he points out that it was delivered at the solemn opening session of the Court in 1819, and it is obvious that what gave the judgment particular weight in his view was not the fact that it was rendered in Christiansborg Palace in the presence of diplomats, generals and guardsmen—unlike other judgments, which were delivered in the Prince's Palace with less pomp—but the circumstance that on the day in question Frederick VI sat on the Throne and participated formally in the deliberation.

If we now put the question how the Supreme Court has been considered by public opinion in the various periods concerned, the answer must be that the Court has enjoyed exceptional prestige. One has to search well into the 19th century before finding attacks upon the Supreme Court. As for the quality of its members, there is a statement in one of Holberg's[7] epistles (No. 146) to the effect that the high offices of state, and particularly the Supreme Court, must be regarded as university churchyards, for as soon as a person has attained distinction among his academic colleagues he tries to enter these careers. In fact, it was only in the 1830's and 1840's that really sharp attacks were launched against the Supreme Court, and in view of the fact that the Court was constantly striking editors and writers with its thunderbolts for their infringements of the press laws, it is astonishing that the attacks were not even more fanatical. The probable explanation is that, after all, the Court was considered a safeguard against more

[7] Ludvig Holberg (1684–1754). The greatest name in the history of Danish 18th-century literature and founder of Danish comedy.

far-reaching persecution on the part of the Government. Conversely, criticism of the Supreme Court exceeded all reasonable bounds after the judgment of the Court of Impeachment in 1856. As mentioned before,[8] the Court acquitted the members of Ørsted's Cabinet for incurring military expenditure beyond the budget voted by the Diet during the Crimean War. Half the members of the Constitutional Court were Supreme Court Justices, and the acquittal was attributed to the votes of these Justices. Sharp criticism also followed upon the sentences of several years' imprisonment passed on the Socialist leaders Pio, Brix and Geleff in 1873 for instigating rebellion. It is not surprising that the press had harsh words to say about the Supreme Court in the days of "the Provisional Statutes",[9] but the same should be said of this period as of Christian VIII's reign (1839–48): the fact that persons accused by the Government were acquitted by the Court in a considerable number of cases—particularly in actions concerning *crimen laesae majestatis*—helped to cool the atmosphere. From later days, only a small number of actions with a political character can be mentioned. When we consider that for a long period of its existence the Supreme Court appeared as one of the most obvious expressions of the absolute monarch's powers, and that later it was regarded by certain groups of the community as an institution which had been taken over direct from the days of absolutism, what is striking is not that attacks have been made but that they have been so few.

In an attempt to consider the work of the Supreme Court through the 300 years which have passed, one's head is likely to reel. Tens of thousands of judgments are contained in its records, and new thoughts and problems have succeeded those which left their traces in the precedents of the past. In this mass of decisions, it is not easy to find the really epoch-making judgments which owe their ideas to the Supreme Court alone. In Denmark, the making of the law has usually been a matter of close collaboration between the Courts, the legislative power and legal science. Centennial precedents as known and still cited in the common-law jurisdictions are not to be found in Danish law, whether civil or criminal.

From an historical point of view it may be stated that the con-

[8] *Supra*, p. 175.

[9] The period 1885–94. The name is due to the fact that the Cabinet, which could not manage to get the consent of Parliament, designated the budgets and other statutes, enacted by the King and his Cabinet, as "provisional".

tribution of the Supreme Court in the field of criminal law has made the greatest impact, and that legal science in the past has made little contribution of importance to this work. In fact, the criminal law applied in Denmark today is very largely the work of the Supreme Court. The final part of the Danish Code of Laws, 1683, which dealt with criminal law was meagre. It seems as if the various commissions which worked upon the draft lost interest in the work each time they arrived at the sections on criminal law. It was therefore with justice that Kofod Ancher (1710–88) said, at a time when the Code was not a hundred years old, that the criminal enactments were too old-fashioned in most respects. They needed to be changed and rearranged. However, almost another century was to pass before criticism resulted in a new Penal Code—that of 1866—and in the intervening period the Supreme Court had to work with the antiquated Code. As we have already mentioned, there was no support to be had from the contemporary representatives of legal science. The treatment of criminal law in the textbooks of the time is poor, and the Faculty of Divinity was a serious obstacle to far-reaching reforms. Whatever may be said from other points of view about the professors of theology in the 18th century, they did not exhibit great proofs of charity. Since Mosaic law demanded life for life, and without any regard to subjective circumstances—as would be expected in a source of law derived from a nomadic tribe about the year 1000 B.C.—the Faculty advised against the use of any other penalty than capital punishment in all cases of manslaughter brought before it. After the middle of the 18th century, however, the Court ceased to ask the theologians for declarations the contents of which could be imagined beforehand, and to a large extent the Court proposed that the draconic punishments be remitted through pardon.

As the result of a large number of proposals of this kind, the penal law as actually applied underwent decisive changes. Thus, remission of punishment was proposed in all cases of *unpremeditated* manslaughter and, further, in cases of infanticide in connection with childbirth, where the woman had not killed the child intentionally. With regard to the crime of adultery, for which the punishment for a third offence was death—under Chap. 6, sec. 13, subsec. 24, of the Code of 1683 the woman had to be drowned—it gradually became an established rule that the Supreme Court confirmed sentences of drowning but at the same time proposed that the culprit be put on bread and water for a fortnight! In harmony with Mosaic law, the Code of 1683 stipulated that those who had

committed unnatural intercourse should be burnt at the stake, but the Court proposed imprisonment, etc.

Similarly, the necessity of criminal intention was read into the rules of the Code where these merely contained a description of the objective set of facts; thus pardon was proposed in cases of bigamy where the accused had not known for certain that his or her first spouse was alive. It should not be forgotten that it was upon the initiative of a President of the Supreme Court, von der Osten, that the famous Ordinance of Larceny was introduced in 1789; to contemporaries it seemed a very advanced penal code, for it not only abolished capital punishment for larceny but also granted the courts considerable freedom to mete out appropriate punishment within certain specified limits.

It may be said, on the whole, that when real reform work in the field of criminal law was commenced in the 19th century, the proposals of the Supreme Court for reprieve from the punishments set out in older enactments had created a firm basis for the work, and the Court retained its humane attitude. In this connection, it should be particularly emphasized that, while in questions of private law the Court was very slow to free itself from the points of view expressed in the writings of Ørsted, criticism of him in matters of penal law was constantly awake. While he was a member of the Court, he often met with considerable difficulties in forcing through his severe views against the resistance of other members, and in the 1830's and 1840's, when he elaborated his proposals for the so-called "Ørsted penal codes" and the Supreme Court was given the opportunity to give its opinion on some of these proposals, the suggestions of the Court were always characterized by a deeper human understanding than was expressed in Ørsted's drafts.

It is impossible to make an attempt to portray in so brief a space the Danish Supreme Court and its members. It is an institution which now has lasted for three hundred years under highly divergent conditions with regard to the structure of the community, and in the course of its history hundreds of Justices have served on it. Two points deserve to be emphasized, however. First, the Court had always enjoyed uncontested respect and prestige, except during the first few years of its existence and save for certain inevitable attacks in periods of political unrest. Secondly, the work of the Court has constantly been of high quality, and the will and determination to do justice have always been the forces guiding its various members.