LEGAL CULTURE AND LEGAL TRANSPLANTS
DANISH NATIONAL REPORT

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Legal Model as a whole. I. *Historical perspective*. II. *19th century*. III. *20th century*. IV. *Bibliography*.

In this report I will try to answer the questions concerning the use of foreign legal models and the reception of foreign law in Denmark in the period indicated. However I have some preliminary remarks as to basic classification of legal systems and to the historic periodization and perspective on which the general report is based.

In the questionnaire a starting point is taken in a classification A-H in which Denmark (together with the Faroe Islands and Greenland) is placed in group D: Franco-Latino-Germanic systems, whereas the other so called Nordic countries (Finland, Iceland, Norway and Sweden) are placed in group C: German – Scandinavian legal systems. Without entering into details as to the classification indicated you may, as a first remark, state that the law of the Nordic countries do present so many common features that they should not be separated into different groups. In comparative law theory you may consider establishing a specific Nordic legal family and thus Denmark, if you use the classification suggested, should definitely be put alongside the other Nordic countries.

It should even be mentioned that you may divide, the Nordic countries, as seen from a historical perspective into a western and an eastern group. Denmark and Norway with Iceland for historical reasons (Denmark and Norway were united from 1380-1814) constitute one group, whereas Sweden and Finland are another group based on the fact that Finland until 1809 was a part of Sweden that, even under Russian domination 1809-1917, kept Swedish law. Since the 1870's, the Nordic countries have collaborated in many fields of private law thus creating a common legislative basis within the law of obligations, family law, the law of persons and other disciplines. This collaboration has led to a harmonisation of the Nordic legal systems. Natural law did not replace earlier models – it was a supplement and a way of introducing a new way of legal thinking. Natural law was received by legal scholars through reading and also partly by studying abroad. At this point it should be noted that Germany, as a neighbouring country, has played a

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decisive role in the development of Danish legal thinking. However it should also be noted that Roman law was never received in Denmark. The river Eider was the borderline between Denmark and the Holy Roman Empire and also a borderline between Roman law and a system which, until late, was based on legislation in the vernacular with medieval roots and a high degree of lay participation in justice. Only gradually since the 18th century did a legal profession come into being.

My other preliminary remark refers to the historical framework taking the discovery of the Americas as a starting point. Denmark, as other European countries, has a history of law that predates this. Historically you may consider legal history and also thus the history of legal culture and legal transplants as starting around 1200 when the first Danish legislative texts were drafted. It should be mentioned that an influence from Canon Law is to be seen in the legal texts from the 13th century and also some knowledge of Roman law. However shortly after 1500, with the emergence of the modern state and especially also as a consequence of the introduction of the Lutheran Reformation in Denmark, changes in the law were introduced that may constitute the basis for a historical periodization that consider the period after 1500 as a whole. In the following paragraphs I will therefore accept a periodization based on the four periods: around 1500 - the French Revolution, the "long" 19th century, the period from 1918-1989 and the time after 1989.

I will try to answer the questionnaire using the division and the questions put by the general reporter. However it must be stressed that due to their generality and in view of the specific characteristics of each country, not all questions put may correspond completely to the national reality.

LEGAL MODEL AS A WHOLE

I. HISTORICAL PERSPECTIVE

Since the middle ages Denmark has been an independent kingdom. Therefore there is no question of colonization or violent reception of foreign law. In modern times Denmark had a period of absolute rule from 1660-1848/49 and since 1849 has been a constitutional monarchy.

No specific foreign model was ever received in Denmark in the sense that an *en bloc* reception of any foreign system has taken place. Seen from a historical point of view you would generally stress the continuity of legal development based on medieval laws. The Reformation in 1536 led to a reception of what, by the American historian Berman, has been known as the protestant *ius commune* created by German lawyers in particular in the

leading universities of Northern Germany. In Denmark the reform especially led to important changes of family law that, in the future, were to be based on protestant principles including the recognition of divorce.

Danish legal history was also determined by the elaboration in the years up to 1683 of what can be considered an early modern code and one of the first. The Danish Code of the King Christian V from 1683 and the corresponding Norwegian Code from 1687 basically unified the law of the two countries and also was the basis of private law for the centuries to come. The codes were divided into six books. The first and the second dealt with the law of procedure and ecclesiastical law whereas the third book and the fifth book contained private law (family, person, property, contracts). The fourth book was dedicated to maritime law and the sixth book to torts (including crime). The codes were not codifications in the modern sense of the word, they were, to a great extent, based on older law but they did systematise the law.

In the 18th century the codes of 1683 and 1687 were already partly seen as unsatisfactory as to the new legal problems arising. Natural law, as it was found in the great Northern European systems elaborated by especially Hugo Grotius, Samuel Pufendorf and Christian Wolff, thus came to play an important role for the courts in the decision of questions not dealt with in the codes. The reception of natural law thinking in the 18th century was clearly seen in 1736 when a statute was issued concerning the introduction of a law exam at the Copenhagen University. Natural law and Danish law were the subjects to be taught whereas the importance of the teaching of Roman law was reduced. In terms of legal models as a whole you may see the reception of natural law as a general subsidiary law and also as the basic introduction to the study of law as decisive for the development of a Danish legal science in the 18th century.

In the Danish Code only few traces of influence from foreign law are found. However in the field of family law and in the law of obligations, some articles seem to be based on knowledge of Roman law. Roman law has also had influence since the 16th century e.g. the law of surety.

An example of how Roman law through natural law came to influence Danish law is the introduction of the principle of *culpa* as a general principle of responsibility in torts law. The principle was first used in Supreme Court decisions in 1757 and was later elaborated theoretically by the Danish lawyer Anders Sandøe Ørsted in the first part of the 19th century.

II. 19TH CENTURY

Anders Sandøe Ørsted (1778-1860) is generally considered a founding father of Danish legal science. In a series of articles and books on nearly all topics within positive law he gave Danish law a new fundament. To a high degree his learning was based on knowledge of contemporary German legal science and French law. Some significant examples of how foreign law through his writing found its way to Danish legislation are the principle of heritage *in stirpes et lineas (Parentelsystem)* found in the Austrian ABGB, and the influence of the Bavaria system of land registration on the forming of a new Danish registration system in the 1830's. The French Code had an influence in the making of rule on servitudes. Ørsted in general considered foreign law as a highly significant way of assessing national law. It could also be used to find solutions for legal questions not posed in Danish law and was, according to him, also a way of finding inspiration for new legislation.

The reception model for foreign law in the 19th century was basically through doctrine which later could lead to legislation. Ørsted himself was a civil servant and as such had a direct impact on Danish legislation in his time. You may consider this kind of reception conscious and scientific. German was a second language in Denmark at that time, the impact of German culture was considerable, so it is only natural that German legal science, which at that time had a predominant influence in Europe, also played a significant role in Danish law in the 19th century.

The same German influence can be found later in the century. German lawyers such as Savigny, Jhering and Windscheid were well known in Denmark. the *Pandektensystem* of Windscheid and his legal terminology was particularly instrumental in the development of The Danish law of obligations. The influence of Jhering may be seen in his view of the importance of the "*Zweck*" (purpose) in understanding the law. You may generally state that German law had a decisive influence on the terminology and systematic concepts of Danish private law, especially within the field of the law of obligations. Very little could be deduced from the Danish Code of 1683. It was therefore necessary to construct a completely new framework for this part of private law in the 19th century. Legislation was very scarce. The main influence is thus seen in doctrine and stems from doctrine.

III. 20TH CENTURY

In the 20th century there was a change in orientation in Danish law. In the first half of the 20th century doctrine was still oriented towards Germany and France. However in the time after the WW II and more so in

the years to follow, it was oriented towards the Anglo-Saxon world and concepts of American contract law became common. The year 1989 did not have any specific importance in Danish law. What is of importance however, is the membership of Denmark in the European Community (European Union) since 1973. A great deal of modern Danish legislation is initiated by the Community authorities. Furthermore, Denmark has accepted CISG and other conventions and is taking an active part in endeavours to harmonize European Law (Lando-Commission, Ole Lando is a Danish law professor). The European Convention of Human rights were received as national law in 1992. In that case the convention as such was turned into Danish statutes. Generally the system is however to create specific laws that incorporate foreign law principles alongside Danish law.

It should be mentioned that in the Nordic countries there is a long tradition of collaboration and harmonization within the field of law. It started after a first meeting of Nordic lawyers which still takes place every three years. This collaboration has a national side and a Nordic side. Each country produces its own national statute within the field that has been chosen for collaboration (maritime law, law of obligations, family law) but part of the preparation is done in joint committee meetings. This feature of collaboration in basic fields of law has lead to a high degree of harmonization which legitimizes the idea of sometimes considering the Nordic countries as constituting one legal family. Turning back to the most recent development since 1989, it should however be noted that EU-law and the legislative work within the EU has, to some not inconsiderable degree, led to a certain loss of pace in Nordic collaboration. Apart from Norway and Iceland, the Nordic countries are member states of the union and have to give EU-legislation priority. We may thus, in the future, probably note a less Nordic approach to the law and a stronger influence from general European law and legal principles. The modern period after 1989 can therefore be seen as a period of accelerated reception of foreign law through EU-law and as part of international conventions. The challenge for a small national law orbit such as Denmark is how to maintain a high standard of national law and a national legal language.

By way of conclusion, you may state that the dichotomy between the necessity of receiving foreign law as an important player in the development of Danish national law on the one side, and the consciousness that Danish law should be national and stick to its own principles on the other side, has, since at least the 18th century, laid behind all discussions of the influence of foreign law or legal transplants in Denmark. There has been a certain psychological reluctance to admit that Roman law and later German law and other laws have been significant in the making of Danish law and especially the making of Danish legal science. However it is clear that legal

transplants have played an important role in the history of Danish law. There have never been great revolutions in Danish law or any reception *en bloc* of foreign law. Legal transplants have taken place when the need to update positions in Danish law was important. As the example of the writings of A.S. Ørsted shows, there has been a rather pragmatic view in Denmark of the admissibility of such loans or transplants.

Today you may consider Danish law a specific case within a Nordic family, but at the same this specific case through history has been open to transplants from foreign law. Danish law is different from both codified German law – there is no modern Danish code – and English common law – there is no rule of precedent – but today Danish law can be considered a dynamic national legal system within the European Union.

III. BIBLIOGRAPHY

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