LAW AND SOCIETY

BY

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1. INTRODUCTION

1.1 Law and Society

All societies have legal rules. The beginning of the preamble to the Jutlandic Law of 1241 reads "The land shall be built by laws" and goes on to state that "Were there no laws in the land, he who could appropriate the most property would have the most. Therefore the law shall be enacted for the purposes of all people, so that those who are just and wise and innocent may enjoy their peace, and those who are unjust and treacherous fear only what is enacted in the law and therefore do not dare to implement the evil which is in their minds".[1] In the Digest of Justinian, which was a compilation of the literature of the Roman Law in Corpus Juris Civilis (A.D. 533), the law is described as *ars boni et aequi* (the art of equity and equality).

Nowadays, law is necessary both to ensure that human rights and justice are observed and to regulate and govern a multiplicity of activities. It is necessary that the structure and administration of such areas as social welfare, public health, training and education, protection of the environment, safeguarding of a proper working environment and of life and property in general are efficient and acceptable to the population. In Denmark, essentially, the necessary regulation consists of legal rules enacted by the *Folketing* (the Danish Parliament) and the Government, by the legislature and the administration. Legal rules are an inseparable or integral part of social life. The law is only understandable when seen in its proper social context.

1.2 Law and Legal History

A comparison between the law in Denmark in different periods, e.g. of the law as it appears in the Jutlandic Law of 1241, in the Danish Law of 1683, and the Handbook by Anders Sandø Ørsted of Danish and Norwegian Jurisprudence of 1822, and modern law, shows that the law embodies

[1] The Jutlandic Law is discussed e.g. in Ditlev Tamm, *Retshistorie* (Legal History) vol. 1, 1990, pp. 23 et seq.

a mixture of elements of stability and established tradition and of rapid change and constant development.

A.S. Ørsted was one of the founders of the pragmatic legal method used by the courts and the administration in their efforts to specify the substance of the law and the application of the general rules in the many specific situations in which the rules are significant. The application of the law is directed towards the practical.

1.3 Tradition and Development

The law may surprise both by its stability and its flexibility. We probably do not know all the fundamental factors determining whether traditions are maintained or whether a development gains momentum, but the rules and factors that we do know may be classified in three groups:

(1) Some rules or doctrines are firmly rooted in western culture. An ideology of justice and protection of legal rights is a major driving force behind the origin and application of the provisions of the Danish Constitution of 1953 and of the European Convention of Human Rights of 1950 on some fundamental human rights such as the freedom of expression and the right to due process of law, the doctrine of the criminal law to the effect that only conduct which is punishable in pursuance of a provision of the Penal Code is liable to punishment (*nulla poena sine lege* – no punishment except in accordance with statutory law; now sec. 1 of the Danish Penal Code), the doctrine of procedural law to the effect that both parties to a dispute are entitled to a hearing, and the property law doctrines of freedom of contract and liability (*culpa,* fault or negligence).

(2) The rules which are necessary to safeguard fundamental rights require no further practical explanation, but otherwise the law is not an end in itself. The law serves as a regulator of varied activities, each of which has its own separate end. It is necessary to adjust the rules according to the purposes of the individual activity to be regulated, and law must change in step with technological, commercial and economic developments, and attitudes to public control and regulation.

(3) Not only substantive technology is developing; legal techniques are also doing so, becoming ever more sophisticated. Major codes of practice are moving towards increasing sophistication – or complex-

ity – and effectiveness in terms of achieving the targets set, even where targets and external factors both remain unchanged. Prior to 1926, interests were recorded under a registration system by means of entries in handwritten hardcover files, and after 1926 in loose-leaf binders. Now registration is being computerised. It has been possible to extend and render more efficient the required registration of interests by applying a more up-to-date technique[2]

1.4 Overview of the Present Article

The notion discussed in more detail in section 2. is that the law regulates activities over an area that is extensive and varied. The law is in constant change, but even its short-term development is often unpredictable. In sections 3.–7. the development and some issues within three of the most important areas served by the systems and institutions of the law are discussed. These areas are positivism and natural law (section 3.), human rights (section 4.), family law (section 5.), public law (section 6.), and commercial law (section 7.). Two topical and important movements within social life which are currently leaving a visible mark on society and the law, viz. the canonisation of the market economy and internationalisation, are discussed in sections 8. and 9.

2. THE COMPLEXITY OF THE LAW AND ITS DETERMINANTS

2.1 The Multitude of Rules

Both the number of laws in force and the number introduced in a modern society each year are huge. Primary and secondary legislation is published, cf. sec. 22, second sentence of the Danish Constitution and art. 191 of the Treaty of Rome, and is thus accessible to the public, but nobody can manage to read all that is published in the Danish Law and Ministerial Gazettes and the Official Journal of the European Community, let alone study and fully understand this huge amount of material.

Legal studies should as far as possible focus on rules and institutions of fundamental or general importance, and legal method, i.e. the

[2] See Report on National Computerised Registration no. 1177/1989 and Report on Undisclosed Charges affecting Motor cars no 1190/1990. By Act no. 281 of 29 April 1992 on Computerisation of the Registration System, a national centralised system of registration of interests etc. was introduced, including retention of title to motor cars etc.

procedure for determining current law within a given area. The method consists of establishing the statutory provisions, previous decisions in similar cases etc. which are applicable as sources of law, and then as precisely as possible establishing what is provided by those sources for a given general subject or a given specific case.

2.2 Different and Common Features of the Law

Part of the law pertains to the structure and procedures of the institutions, the *Folketing* (the Danish Parliament), central and local government, and the courts. Most legal rules, however, provide for the regulation of other structures and activities. A large number of legal provisions interfere with a multitude of different activities. Hardly any activity or structure – apart from freedom of thought – is entirely free from some measure of legal control or regulation.

It is only natural that legal regulation of a specific area should be subject to the special conditions prevailing within that area, e.g. corporation tax, leases of land, etc. Like commercial services, legal regulation must necessarily be adapted to the interests and needs of society and the citizen. This applies both to the regulation of relations between parties through non-mandatory rules of private law or mandatory rules providing for the protection of the weaker party (consumers, employees, customers), and to regulation in the form of public law-rules on mandatory or prohibitory injunctions or controls. To perform its function as usefully as possible, the legal profession must deal not only with legal rules, their interpretation and the compliance with their requirements, but also with the matters that are subject to such regulation.

Economic, technological and general development has called for specialisation within the ambit of the law as well. It is necessary to know the clients' business, and the special rules applying to it. Much of the legislation of the past few years contains rules applying only to certain specified matters, but general legal principles still form a common basis though its relative importance has dwindled, both because of the increasing number of special rules and because of a trend towards their independent application. The general principles of law specify guidelines and models which are often important, rather than detailed and exact rules for the solution of specified conflicts. The general common legal material is embodied in textbooks on the "general part" of large areas such as the law of contract, and tort and administrative law. A general part provides a basis for the solution of various "special" problems.

Some new statues have the characteristics of independent new legal areas. A clear and significant example of this is the recent consumer protection legislation. The consumer credit agreements legislation differs considerably from the general law of contract on several points. Under general contract law an agreement is binding[3], but a consumer may cancel an agreement made with a trader outside the business premises of that trader ("doorstep-selling") not later than one week after the date of the meeting with the trader, cf. the Consumer Credits (Consolidation) Act no. 886 of 23 December 1987 as amended by Act no. 262 of 6 May 1993. Several other statutes contain special rules on consumer agreements. Among recent statutes can be mentioned those passed in 1993 on package holidays (Act no. 472 of 30 June 1993) and on the service of estate agents and property dealers in the sale of freehold property (Act on the Sale of Land no. 453 of 30 June 1993).

2.3 The Direction and Pace of Development

The numerous legal rules and codes of practice each have their own subject-matter, object and history. The law is conservative. When deciding new cases, courts normally consider the interpretation of rules applied in previous cases. However, precedents do not prevent a development of the law even without changing the legislation. The direction and pace of changes in case law are affected by the general trend of public opinion and external factors in society, but normally developments occur only in response to a pressure for change and even then not by leaps and bounds. The frequent changes and rapid pace of legislative development make any forecast of the future of the legislative rules especially relevant for planning purposes.

It is often stated that one can learn from history, but no soothsayer or futurologist can predict the future course of developments. A prediction can neither be based on a simple extrapolation on the basis of a single factor nor on a sophisticated model taking into account as many of the factors as possible that seem to have promoted recent developments. An economic model demonstrates the future on the basis of a few relevant assumptions involving known causal parameters and based on the assumption that the effect of the parameters will remain unchanged. No

[3] This was established as early as in 1683 in general rules in secs. 5-1-1 and 5-1-2 of the Danish Law. The provisions are mentioned in Gomard: 300 Years of Danish and Norwegian Laws, 1983, pp 537 et seq.

similar model of the future of the law can be established, either for its application or for legislation. Any purported prediction cannot be compared to a weather forecast, which is certainly determined by given factors. Neither the forces determining the present situation nor those determining the future are clear, and the forces in society which are known, such as the need for security and justice, are not quantifiable. We do not know what goals the authorities and the citizens (the voters) will set and govern by in the future, nor what spiritual and material forces will influence the creation of public opinion. Pure coincidence such as the personality of the individual judge seems to play an important part at least in the short term, but a determinist philosopher may believe that developments follow a firmer course in the long term. Thus, nobody has been able to explain why so many young people rebelled in 1968 whereas the vast majority today seem to favour the old-established virtues. No election expert or interested layman can predict with even the slightest degree of certainty who will win the next election. Election results often come as a surprise despite frequent opinion polls.

There is a marked difference between the ability to predict and the ability to explain why things turned out the way they did. Economists can explain why share prices went up or down yesterday, and lawyers can explain why our law has developed to its present state. However, research into the future of the law extending beyond contemporary history, extrapolations and qualified guesses still remains to be seen.

Like the rate of increase in the population or the gross domestic product, developments within the law have gained momentum from the Middle Ages to the hectic society of today. However, even in contemporary society social structures in many areas are somewhat inert despite the rapid pace of development, and interest groups sometimes protect their members' vested interests, even after these interests have become obsolete. Common well-known examples of this trend are the rigid demarcation lines between different trades and professions, the Sunday Trading Act, and some of our traditional rules pertaining to agriculture.

3. POSITIVISM AND NATURAL LAW

3.1 An either – or?

The law comprises a large body of rules based on statute law and decided cases, and sometimes the law has been equated with what has been provided for by statute and/or decided by the authorities. At the other

extreme we have natural law, according to which the law must be, and indeed is, rooted in man's better self and in external human conditions. The concept of natural law makes good sense if by "nature" is meant not only physics and biology, but also culture. The conception of what is fair and just, proper professional conduct or ethics within a certain trade or profession[4] changes just as attitudes and external factors change. Development will take a different direction according to whether the population believes in personal responsibility, independence and observance of agreements entered into rather than the wish for control and intervention in the affairs of individual citizens, see section 5. below, *in fine*. Concerning fundamental human rights times move slowly. Despite major encroachments as well as minor areas of neglect, the idea that every human being has some inalienable rights has survived all absolutist "isms" and has proved viable even side-by-side with the omnipotence of elected parliaments, see section 4, below.

Comprehensive legislation leaves little scope for decisions based on equity or fairness (*ex aequo et bono*) in heavily regulated areas such as tax law and the law of landlord and tenant, but the law has increasingly incorporated general provisions consisting simply of a reference to reasonableness or proper conduct within a certain area. In this way the law has not surrendered to a totally unknown development, but is relying on satisfactory results being reached through fairness and justice. We have probably not seen the end of the recourse to general provisions.

An objection to natural law which is often voiced is that everybody has an opinion of what is fair and reasonable, and that consequently references to fairness and reasonableness etc., provide no real guidance. This objection is not borne out by experience. It is true that people differ, and that the differences also relate to the conception of what is fair and reasonable, but tribunals of arbitrators of different nationalities often agree as to what would be a fair decision. Rather than taking the lead here, the law follows the prevailing conception. Our conception of what is fair and just is governed by the same forces that govern general cultural development. We want to stretch out a social safety net under everybody, and especially to protect the weak.

The reason why the regulation of some occupations has been left to chance, i.e. to judge-made law (*Richterrecht*) guided solely by what is generally felt to be proper conduct within that occupation has often been the wish to establish a legal regulation even of areas where lack of experi-

[4] See sec. 1 of the Danish Fair Trading Act, see Report no. 1236/1992 p. 22.

ence, or the pace or unpredictability of the development, have prevented the formulation of rules.

Ex gratia payments, which were originally merely a matter of good customer relations in some businesses, may become a widespread or recognized code of good conduct or ethics, subsequently becoming legally binding by virtue of a rule. Despite the undefined nature of the elements of a code of conduct, a statutory reference to a code is binding like any other legal rules. Accounts must be presented in compliance with proper accounting practices, insurance be effected in compliance with proper insurance practices etc. In other areas special ethical rules have been laid down heralding future legal rules, e.g. pertaining to stock exchange transactions, advertisements etc., which at first are merely "soft laws", but which it is nevertheless advisable to observe.

4. HUMAN RIGHTS

The rights which were incorporated into the French Déclaration des Droits de l'Homme of 1789 are repeated in the European Convention on Human Rights of 1950, and to a certain extent it has proved correct that these rights were called *sacrés et inaliénables* (sacred and inalienable) in the preamble in 1789. Some changes have been made, however. Even natural law follows general cultural trends. The rights to be considered fundamental human rights, and their content, have changed, albeit slowly except for a few areas, where the development has been rapid. In our parents' generation it would not have been possible to establish a majority in favour of a Danish act providing for a marriage-type registered domestic partnership between two persons of the same sex (Act no. 372 of 7 June 1989). The changes have been in the direction of greater tolerance, more equality, and a humanisation of the law as reflected e.g. in the *Zug zur Milde* (move towards leniency) in criminal law. The humanisation of law enforcement has recently been expressed in protocols to the Convention on European Human Rights, Imprisonment for Debt (protocol no. 4 of 1963) and Capital Punishment (protocol no. 6 of 1983).[5]

We are witnessing the increasing influence, through court decisions, of the European Convention on Human Rights on the domestic law of the countries that have ratified the Convention. In Denmark the Conven-

[5] The Human Rights Convention and subsequent protocols are discussed in Report no. 1220/1991 pp. 16 et seq.

tion has the force of law, cf. the Incorporation Act no. 285 of 29 April 1992, and Denmark has an obligation under public international law to observe the Convention. The increasing attention paid to the Convention is illustrated e.g. by the Supreme Court decision reported in UfR 1992. 87 H, 300 H and 879 H. Maybe the enforcement of human rights in large parts of the world will become more effective as one of many consequences of the end of the cold war. Maybe a general institution will be established by the UN for the prosecution of serious violations of human rights in times of rebellion and war. UN Resolution 827 (1993) established an international tribunal for the adjudication of war crimes in (former) Yugoslavia. This is discussed in more detail in the explanatory notes on the Danish bill introduced to that effect (Act no. 1099 of 21 December 1994).

5. PRIVACY AND FAMILY LAW

According to art. 8 of the European Convention on Human Rights, everyone is entitled to respect for his privacy and family life, his home and his correspondence. The protection of privacy and family life does not mean that the private sphere is unaffected by the law. The relationships between husband and wife and between parents and children have always been subject to legal regulation, and over the past 100 years family law has changed drastically, tending to place husband and wife on an equal footing and enable each to claim legal separation or divorce regardless of any fault on his or her part. The right to maintenance from a present or former spouse has been restricted.

The powers promoting the development can hardly be identified. The debate has been characterised by ideologies. The dignity of the individual human being, his rights and independence have been emphasised, while the belief in marriage as an institution or at least in the sanctity of marriage as a bond having a religious significance has lost its power as a determining factor within family law. The arguments which have had the greatest impact on most minds are not legal academic treatises, but literary works such as "A Doll's House" by Henrik Ibsen (1879) which have artistic value as well as great argumentative power. However, the development has only been possible because of the changes in economic conditions, such as urbanisation, increasing efficiency leading to a reduction of working hours in the home, and increased requirements for manpower in times of economic prosperity or war.

The times of change within family law are probably not over yet, but it is hard to predict what attitudes towards cohabitation and marriage will gain ground among the population and what direction the development will take. All men are born free and equal as it is stated in declarations of human rights, but putting the ideal of equality into practice is not an unambiguous process. Will the goal be, one may wonder, for every person – whether married or unmarried – basically to be on his own, thus having to make a living for himself by gainful employment, owning separate property rather than a share in jointly owned property, and if in need having recourse to public welfare only, without entitlement to any contribution from a present or former spouse? Such rules and a rule on full freedom of contract which would entitle spouses to agree on any property regime they may wish would seem to be the natural consequence of full equality and a maximum rate of employment. However, equality is a difficult and ambiguous concept. Economic equality could also be established between cohabitants under rules providing for the balancing of benefits and burdens by reciprocal transfers, subject to pedantic and over-scrupulous justice. The enforcement of rules for this type of equality would require a major effort from the law machine, with much quarrelling but little satisfaction. This is not the time for such rules.

Many feel that in e.g. family law considerable advantages can often be obtained and unreasonableness be avoided, by substituting for general rules specific references to individual discretion with provisos that decisions must take into account the unique features of the individual case and are to be fair and reasonable. Development is often described as a pendulum. Reasonableness as a general concept does not have a defined content, and where opinions differ reasonableness is certainly not a general guideline either. As yet, there has been no clear reaction to the application of general provisions.

6. THE PUBLIC SECTOR

6.1 A quick glance in a statute book makes it clear that most Scandinavian legislation relates to the public sector. There are rules about the right to complain to administrative and judicial authorities and rules about dispute resolution. There are rules about financial equalization or redistribution by the collection of taxes and duties and the payment of transfer incomes by way of welfare payments, pensions etc.; rules about public health services, about controls and subsidies for numerous activities. In

some areas the substance of the rules depends largely on the current political majority whereas in others the difference between the fundamental ideas is slight. Increased scientific insight and greater technological skills have led to new or amended rules on product safety, health and safety at work, and protection of the environment. Dangerous medical and other products have been banned, and safety precautions designed to prevent accidents have been required.

The growth in legislation is an unavoidable consequence of the public sector undertaking numerous new tasks and the overall intensification of public activities. Technological development can be exploited for the sophistication of bodies of rules, for the intensification of controls and for the promotion of over-scrupulous justice; but also for increased efficiency and reduced consumption of resources. Some administrative growth problems have been solved by computerisation, making it possible to store and retrieve huge amounts of data and thereby to administer rules based on far more complex facts and combinations of facts than could ever have been dealt with by hand.

Examples of technological innovation are that securities have been turned into entries in a computerised centre (cf. Consolidation Act no. 807 of 6 October 1993 on the Securities Centre) that records and accounts are becoming computerised, and that more and more letter and postal communications are being effected by electronic transfer of text and images. The provisions of contract law must keep up with modern communications and information retrieval technology. Telex is included in the UN Convention on International Sales of Goods (art. 13). Telefax and electronic mail (EDI) did not make it.[6]

> It has been necessary to develop legal systems that are more sophisticated than the systems known so far, in order to take full advantage of the huge increase in productivity made possible by modern technology development of new products and specialisation. Innovation has consisted of the adaptation of known rules to modern technology, such as e.g. the adaptation of rules on inspection of goods to container transport, as well as in the development of new bodies of rules on transaction types and products which have only recently been introduced, such as turnkey projects, project finance, derivatives such as futures and options etc. etc. Much of this recent legislation is only new in terms of the technical details as compared with the traditional general and simple rules created on the basis of considerations of justice and common sense. The modern school – law and economics – which argues that the rules of private law should be drafted according to the dictates of calculations of maximum efficiency and profitability, has hardly

[6] For more details, see e.g. Susanne Karstoft, *Elektronisk dokumentudveksling* (Electronic Document Exchange), 1994.

> got past the stage of the adding machine at the time when people were still checking – mentally or on paper – whether the machine had actually arrived at the correct result.

In the provision of legal services, negotiating and drafting contracts, preparing draft bills and regulations, drafting legal argument and judgments, it is hardly possible to increase efficiency to any great extent. Not so in industry, where modern technology results in increased productivity, stagnating or decreasing employment unless productivity is increased even more. In agriculture, environmental protection will curtail the increase in productivity.

6.2 Increasing prosperity has made it possible and natural not only to ensure assistance to anybody in need (the Social Welfare Act), but also to ensure that anybody suffering accidental injury is compensated as far as possible. The oldest and most important example of this is industrial injury compensation through compulsory insurance. The current rules are embodied in the Act on Insurance of Effects of Industrial Injuries no. 390 of 20 May 1992. Other examples of compensation for certain types of injury through compulsory insurance are patients' insurance, which has now also been introduced in Denmark (Act no. 367 of 6 June 1991 as amended by Act no 239 of 8 April 1992),[7] and damage caused by flooding (Act no. 340 of 6 June 1991). Insurance compensation for damage or injury is sometimes payable, not under direct insurance covering the victim, but under liability insurance covering the party causing the damage or injury. Under a comprehensive rule of tort law, liability is imposed for damage or injury of a certain nature, and any party likely to incur such liability is required to arrange insurance covering the liability in question. An obligation to take out insurance is imposed in respect of damage or injury caused by dogs, in connection with hunting accidents and – especially important – in respect of traffic injuries caused by motor vehicles. Compensation by way of a compulsory liability insurance does not provide cover if the tortfeasor is not liable, but in cases of strict liability as in sec. 101 of the Road Traffic Act, any person suffering injuries covered under the scheme will be entitled to receive compensation.

6.3 The development of public-sector law has been determined not only by the advent of modern technology, but by the increase in prosperity,

[7] The criteria for granting compensation set out in the Patients' Insurance Act are described in Notes for Guidance dated 25 June 1992. The Act is discussed in detail in Bo v. Eyben, *Patientforsikring* (Patients' Insurance), 1993.

and by political wishes for more extensive and more radical regulation. Opinions of a specifically legal nature regarding how public law should be arranged have also played an important part. Considerations of how citizens' equality before the law and the protection of their legal rights demand that –

(i) public services are governed by rules of general application. Neither the handling of proceedings nor decisions should be left to the discretion of the actual decision-makers. It may be difficult to insist as firmly on the authority of the law in new areas of legal regulation as in the conventional areas where policy statements and procedures are embodied in a fine-meshed network of legal rules. A much debated question is whether public assistance should be granted according to established general rules, a "legal principle", or according to an assessment of the needs of the individual person suffering hardship, an "assessment principle".

(ii) the protection of a person's rights should be made more efficient, e.g. by giving every citizen access to information on his case and how it is being handled, a right to be heard before a decision is made, a right to professional assistance and a right to complain to public authorities, tribunals or courts with at least one appeal. The three aims are: protection of legal rights, speedy disposal of cases, and a moderate use of resources.

(iii) generally the proceedings of the judicial and the administrative authorities are open to the public, thus ensuring that the population is kept informed of developments through the freedoms of expression and the press. The "fixed-rule" cases safeguard citizens' legal rights despite the vast number of highly complex rules; but in the long term free public debate and alert public opinion are the best guarantors of a statutory and reasonable handling of cases.

6.5 Apparently it is a law of nature that any body of rules and the authorities in charge of its administration invariably grow. A new statute is always more perfect technically and more complete than its predecessor, but it is also longer and more complex. The use of manpower and money for public administration is high, and it is necessary to consider whether a continued steep growth is justifiable, or whether the trend can and should be changed. In the private sector, the requirement for profitability constitutes a simple and effective controlling mechanism: any use of resources which is not profitable must be discontinued. There is no corresponding regulator in the public sector. An application of the

brakes and a de-escalation are probably needed in many areas, also to make growth possible in the areas where growth is really necessary.

Any substantive change therefore requires a change of the rules. A return to the previous freedom from rules and to the larger scope for discretion prevailing in the private sector would be an advantage in some areas. This trend has begun, e.g. under slogans such as deregulation and decentralization. It would be in line with current austerity for citizens to wish that their contributions to the public purse should be spent carefully and prudently. Overly detailed regulation of the activities of the public sector often brings to mind the old adage *fiat justitia, pereat mundus* (let justice be done even if the world may perish). Good administration without regulation in detail requires a well-trained staff. The heavy investments in training and education have yielded good returns.

The present is always experienced by many people as a crucial point in development. This is often only imagination, but there are actually good grounds for considering the beginning of the 1990s as a watershed. The international situation has changed. Rather than the cold war and rearmament, economics, quality of life, human rights, and the aid given by the rich countries to the poor countries of the world are the foci of attention.

The overall social targets for economics and employment are set by politicians and economists, but lawyers contribute to the achievement of the targets. The law is a necessary factor both in current administration and in changes. Everything has become subject to rules. Lawyers can contribute knowledge of regulation techniques, harmonization of the legal system, and adherence to fundamental doctrines of fairness and justice. Essentially, the tasks of lawyers are at the operational level, but that level is important, too. Reforms have to work in the real world.

7. THE BUSINESS COMMUNITY

Economic activities are subject to comprehensive legal regulation. Even in a free market economy, a private-law regulation of the relationship between the parties is necessary. A few basic but significant clauses based on practical necessity and expediency as well as on ideal justice have long been established. Rules that an agreement is binding, rules on fault liability and on complaints procedures enable the business community to act, and pointers facilitate the resolution of much doubt and many disputes arising from the general doctrines of freedom of contract, of equality

between performance and consideration, and of ownership involving the right of disposal. Commercial law is also characterised by tradition and change, however. To the traditional doctrines of natural law has recently been added the protection of the weaker party, typically the customer and the private consumer in particular. A stable equilibrium between freedom of contract and consumer protection has hardly been created yet. Trade puffs or failure to disclose defects in products, the use of contract forms which are difficult to understand or extensive exemption clauses are not acceptable, but it should still be possible legally to sell e.g. an old shanty or a surplus stock of unmarketable products. Cheap products should be admitted to the market, especially in times of austerity when discount shopping is successful.

8. CONTROL OR FREE INTERACTION OF MARKET FORCES. COMPETITION LAW

For decades it has been debated whether efficiency or happiness exist in socialism and planned economy, in liberalism and freedom, or in a mixed economy. Depending on which viewpoint is uppermost, there will be special needs for legislation on public regulation and control or on competition law and other legislation designed to secure equal conditions for everybody carrying on business for profit. Over the past few years new and important factors have been included in the debate on what can and should be left to the free interaction of market forces.

- The dismantling of the Soviet Union and the changeover in Eastern Europe and China from socialism and planned economy to market economy are of major importance in the ideological struggles in this area as elsewhere.

- In a world which is becoming increasingly open through cooperation in the WTO and the EU etc., it is necessary to be competitive. Partly as a result, deregulation and privatization have become key issues in several of the large countries with which we have a good and close relationship.

- The Treaty of Rome does not determine who should own the factors of production (art. 222), but it provides for freedom of competition (articles 85 & 86) between all undertakings including public-utility companies and public undertakings (art. 90). Member States should not distort ("verfälschen") competition by granting state or municipal

aid to undertakings (art. 92), or by maintaining state monopolies (art. 37).

Our legislation on competition needs overhauling to secure free competition and clear away much public regulation and control. Several countries in Europe, including Norway and Sweden, have restructured their domestic competition laws in new legislation moulded on the provisions of the Treaty of Rome and on Community competition law (on the basis of NOU 1991:27 and SOU 1991:59). Denmark should follow suit, but a prohibitory act is based upon the recognition that now the single market often constitutes the relevant domestic market. The Competition Council seems to wish to expedite the development by stepping up its measures against restrictive trade practices in general, including the public sector and the professions (Annual Report pp. 14 et seq.).

In a competitive society many public special arrangements and monopolies must be removed. According to the Treaty of Rome, the freedom and equality of access to the labour market should also include transport (articles 74–84), telecommunications, energy and other types of activity where state undertakings or public utilities have enjoyed a special status and monopoly. To create free competition in such areas it may be necessary to break new ground. Any *bona fide* undertaking must as far as possible be given access to the use of the infrastructure, installations such as harbours, railway lines, transmission lines etc. on equal terms. In the single market, competition is both free and keen.

Competition is likely to extend to many areas, e.g. to the professions and also to the states. Competition among the states consists either in harmonising conditions for the undertakings or in not making domestic conditions more burdensome than conditions elsewhere in order to preserve economic activity in the country in question.

Discontinuing all state aid and creating equal conditions are – even with good intentions – not always all that easy because taxes are high and are levied according to very complex rules, because public support is granted in various ways to a multiplicity of objects, and because many activities are subject to official permits. Charting a borderline between nonpermissible public support for an undertaking or an industry and unavoidable dependence on general social conditions and rules is a deserving task for advanced law.

Not all prohibitions or controls can be dispensed with. This is especially so during a recession when many undertakings are facing difficulties, shareholders and creditors are sustaining losses, jobs are being lost, and people are asking wether there is a need for a further tightening

of rules on control of business undertakings to prevent excessively risky projects and white-collar crime. However, there are major advantages in reducing legislation to a minimum required for the protection of the public and for the prevention of unfair competition. Most honest people should be left in peace to run their business. The small minority who intend to cheat will often do so in so flagrant a manner as to violate even the basic rules, especially the Penal Code. The business community – individual undertakings as well as organisations – sometimes contributes to adopting and upholding control legislation and keeping authorities busy by using restrictions and rights of complaint to combat a cumbersome and possibly somewhat sturdy competition.

9. INTERNATIONALISATION OF THE LAW

9.1. Doctors, engineers and many others have the whole world as their playground. Their diplomas are recognised throughout the EU (Directive of 21 December 1988). The doctrines of medicine, the natural sciences and technology are universal. The greater part of the law, on the other hand, is national. A lawyer is primarily educated to become an expert in his own national law. Legal differences as well as differences in language and culture erect barriers between the law and lawyers of different countries. An intensification of international and regional cooperation will lower, though not remove, these barriers within the foreseeable future.

9.2. Nowadays a sizeable proportion of new legislation is common to several countries. National law is being harmonized on the basis of joint Scandinavian bills, international conventions, EU directives and UNCITRAL model statutes. In principle, it represents a simplification that e.g. an important part – maybe about 80 % – of all legislation in the EU member states now has a certain common basis. The national texts of the member states are, however, rarely replaced in full by a common text. Harmonization is not complete, and the interaction between Community law and national law is often complex.

It is difficult to rank national legal systems in terms of quality. Several systems are excellent, however. With the creation of the European Communities in 1957 a new era began, but it is unthinkable for all EU member states to agree to adopt, say the Danish, French or any other national system.

9.3. The legal system is an important element of any society. Despite the basic roots in democracy and constitution common to many countries, decision-making processes differ in the different countries. Many issues and problems which are most naturally solved in the central political environment in small homogeneous countries such as the Scandinavian are elsewhere more efficiently resolved by a court. In countries such as the USA and Germany this may be due to a heterogeneous population and a federal system of government, or in France to a tradition and gradual development e.g. arising from a constitutional provision to which less attention was previously paid (from Conseil d'Etat to Conseil constitutionnel). The general opinion or attitude – the spirit of the times – has favoured the court option. Experience seems to indicate that some problems which are significant and not governed by statute may be resolved by judicial decision rendered by skilled and impartial lawyers on the basis of a text of general universal rules, even though this text may offer general guidance and not a definite answer. With a more reticent court the European Convention on Human Rights would only have become a safety valve rarely used. The court option may be preferable in the EU to a debate in the Council of the European Union (the Treaty of Rome, art. 145), not to mention the European Council (Treaty on European Union, art. D). The fact that many matters in the EU are generally resolved by judgments, which are impartial and objective and based on directions embodied in the general principles of the Treaty of Rome, is particularly beneficial to the small member states.

> Decisions made by courts in which judges from different population groups sit may play a very special part in a community of several nations. The Federal Supreme court of the USA has played a significant part in the development of American society; and it became clear at an early stage that the Court of the EU was to play an important part in the European Community, especially in its first years when there was a great need for a specification of the scope and content of the provisions of the Treaty and the establishment of the cooperation. The Community is still developing, however, and the Court still has an important function as an active contributor in the creation of a cohesive and operational system based on the Treaty and the delegated legislation (le droit derivé). "L'Europe des juges" is the title given by a former president of the Court, M. Robert Lecourt to his book about the law of the Community (1976).

The Human Rights Court and the Court of the EU have chosen to pursue a more ambitious policy than Danish judicial tradition. Apart from the short article 189, The Treaty of Rome contains no provisions governing the relationship between the national law of the member states and the provisions of the Union, but the Court early held that it is a natural

consequence of the principles and objectives described in the first part of the Treaty and of the system created by it that Community law prevails over national law, and that the provisions both of the Treaty and of directives, which are of course binding on member states, also create rights for the citizens of the member states. These rights are enforceable by citizens against national authorities if the provisions are of a sufficiently specific nature to be directly applicable. Over time, the Court has constantly been increasing the pressure on member states that have not adapted their national laws to the provisions of Community law within the time stipulated. In Marleasing (Saml., *[the Danish translation of the European Court Report]* 1990.4135) the Court imposed on national courts a duty to interpret national law in accordance with Community law as far as ever possible. An even more far-reaching decision seems to have been made previously in Simmenthal (Saml. 1978.629). In Francovich (Saml. 1991.5337) the Court granted a party suffering a loss as a result of the failure by a member state to implement a Community rule into its national law, a claim for compensation enforceable by the national courts of the defaulting member state. If the reason why a claim based on Community law is not asserted within the time stipulated is a delay in the implementation of the Community rule, the claim is not barred, according to the decision in Emmott (Saml. 1992.4269). In Factortame (Saml. 1990.2433) the Court established that a national (in this case English) court is to postpone the commencement of any national legislation which appears to contravene Community law until the Court has made its final decision, provided such postponement is warranted in the given situation. This represented a new development in England and in fact it also led to an amendment of the then current Danish law.[8] The successful harmonisation aimed at by the adoption of a common text often requires that general terms appearing in the text, such as "worker" (Treaty of Rome, art. 48), are given identical meanings in all member states (Lawrie-Blum in Saml. 1986.2121).

The Court makes most of its decisions about the substance and the applicability of Community rules through rulings on references from national courts (Treaty of Rome, art. 177).

8.3. The European Convention on Human Rights has the force of law in Denmark. This is provided by Act no 285 of 29 April 1992. The Act first

[8] The Court decided recently that no such postponement was indicated (*periculum in mora,* risk in postponing) in the banana case raised by Germany (C 280/93). In the case reported in UfR 1994.823 H, the Danish Supreme Court accepted the innovation. See sec. 63 of the Danish Constitution, sec. 641 of the Danish Administration of Justice Act, and commentary by P. Gjørtler in *Lov & Ret,* October 1994.

originated in Report no 1220/1991.[9] Also the Human Rights Court in Strasbourg has chosen to apply an independent and expansive style of interpretation in its decisions. Therefore the decisions on the Human Rights Convention by that Court have gradually acquired great importance for the national administration of justice. Not only do the decisions secure the necessary protection of basic human rights, but they have gone further and thereby promoted a development and a harmonisation between the countries that must take the decisions as models and interpret the Convention in the spirit of the Human Rights Court. Often the Convention effectively becomes a schedule to the Constitution, notwithstanding that it is only incorporated into Danish law by statue, viz. e.g. the decision reported in UfR 1994.953 H to the effect that with reference to article 6 of Convention a worker was entitled to bring an action for a wage claim before the ordinary courts notwithstanding the provision of sec. 11(2) of the Industrial Tribunals Act, and notwithstanding that his trade union did not wish the claim to be subjected to the industrial disputes procedure, cf. Hasselbach: Arbejdsret (Employment and industrial law), 5th ed. 1995, pp. 63 et seq.

The fact that matters of great importance to national law are decided by a court which is neither familiar with the customs of the individual countries nor with their languages makes heavy demands on the conduct of the proceedings. It cannot be ruled out that a few decisions may be affected by communication problems; it seems natural e.g. to think that in the Hauschildt case EHRR 1989.266, the Court understood the words "highly probably cause (to suspect)" in sec. 762(2) of the Administration of Justice Act in the sense of provisional evidence of guilt rather than implying that – as is intended – there are degrees of suspicion.[10]

8.4. Under the free constitutions granted during the 19th century it became a tradition in Denmark, and probably in the other Scandinavian countries as well, for the courts to be cautious in or even to abstain from setting aside or amending statutory provisions adopted by Parliament, even where such provisions do not comply fully with the general provisions of the Constitution. The supervision of compliance with the Constitution is made less effective where the courts refuse to deal with major questions by not granting the citizens standing. This has happened in cases reviewing the constitutionality of the accession to the EU, cf. UfR 1972.903 H, 1973.694 H and an unreported Supreme Court ruling of 26 June 1992. In France the Conseil constitutionnel decided in three cases that the French Constitution allows for ratification of the Maastrict Treaty (EuGRZ 1993.183 et seq.) In England a similar case was adjudic-

[9] The report emphasizes pp. 148 et seq.

[10] Report no 1220/1991 pp. 60 et seq. and p. 84. It is very likely that a review of sec. 762(2) would have made the modification of the disqualification rule by Act no. 403 of 13 June 1990 superfluous or at least thrown new light upon it.

ated by the High Court and in Germany by the *Bundesverfassungsgerichtshof* with the same result.

The traditional conservative style of interpretation and restrictive attitude to granting standing cannot be maintained in Danish law in areas governed by EU law or the Human Rights Convention. A different style of interpretation in line with the interpretation applied by the courts in Luxembourg and Strasbourg will probably extend at least to subjects affected by or similar to the subjects governed by European law. There must be harmony in the legal system.

With a new style of interpretation further questions will sometime trarise on the likely effects on legal proceedings, judicial appointment and selection of arbitrators, and the legal education. The search for perfect justice – the philosophers' store – is a never ending quest.