

ESTUDIOS

# How Nordic are the old Nordic Laws?

## I

Medieval legislation plays a peculiar and very important role in Nordic legal history. These laws are important landmarks or *lieu de memoire*, which to a high degree have been used for centuries as a symbol of a legal culture different from the European continent. Written in the vernacular and even if not always too easy to understand these laws are still quoted as models of how to write legal texts in a short, clear style accessible to everybody. Due to a strange mixture of ingenuity and romanticism these medieval laws still hold a position as testimonies of a legal culture on a high level. They came into being at the same time as thousands of churches were erected, golden altars were forged and Saxo Grammaticus in his elaborate silver age Latin *capolavoro* with the title *Res Gesta Danorum* gave the Danish people a past even if not necessarily a past that could stand for modern critics based as it was on a common European partly legendary tradition. Also the medieval churches built all over Denmark in the 12th century were part of a European tradition. And then why not the medieval legislation? How Nordic are the Nordic laws actually?

«Why Nordic medieval law?». This question must necessarily precede the question posed above: «How Nordic are the Nordic laws?». The study of Nordic medieval law once had its heyday. For a time it was more or less neglected by legal historians. The time has come to assess whether new knowledge actually has been produced or whether we are just discussing old and well known topics in an apparently new context without really doing progress in our understanding of those legal texts from the past that once were the pride of Nordic legal history. Does a renewed study of old Nordic law really give us any new information or are we just left in a situation where it is not our level of knowledge that is increased but only our level of interpretation? And can we distinguish between these two levels?

The scientific discussion in the Nordic countries when it comes to new knowledge of medieval law differs from the situation in other countries. In the Nordic countries the discussion is basically a discussion about normative texts. It is about legislation as legal texts. The way in which the old legislation was actually interpreted and used in legal practice of the Middle Ages is practically unknown due to the lack of a sufficient amount of sources. We can read the texts but we cannot ascertain to which degree the texts reflect any kind of living legal order. The scientific discussion and also new interpretations therefore to a high degree centre themselves around the situation out of which the medieval laws actually did come into being.

The gaps in our knowledge as to what constituted the reality of medieval legal order probably explain why the legal texts themselves have been in the focus of interest. We even know that ecclesiastical courts existed in all Nordic countries but nearly no sources to inform us about the practice of these courts or about the interplay between secular and ecclesiastical courts. In Denmark, Norway and Sweden more or less critical editions of the legislation as well as modern translations have been provided<sup>1</sup>. However, recently the study and interpretation based on a reading of the texts seems to have given way to considerations as to the position of Nordic medieval law in a broader European context. This is how the question arises: «How Nordic are the old Nordic laws?».

This discussion is not new either but it was enriched and placed in a new context by the Swedish legal historian and later professor in Munich Sten Gagnér in his book *Studien zur Ideengeschichte der Gesetzgebung* from 1960. Gagnér's studies on the idea of positivism in the Middle Ages and his general European outlook on the sources placed the Nordic legislation in a much broader context than had hitherto been the case. If one of the questions earlier discussed in the Nordic countries had been the possible extent of influence from foreign law the situation was now reversed. The position of Nordic law in a general European pattern was now taken as a fact. Nordic medieval legislation was part of a general movement of legislation in the 13th century. A question was now how to define what was particular Nordic in the Nordic law once it was stated that these laws do form part of European legal history.

Also modern research into the concept of *ius commune* has been an important source of inspiration. The dichotomy of the universal *ius commune* opposed to the local *iura propria* has been refined in later years. It does not make sense to discuss whether the Nordic countries were countries of *ius commune* or not. Roman law was not part of the law of the land but legal thinking influenced from the centres of learning in Southern Europe definitely had a great impact as had canon law on Nordic medieval legal thinking. It may still be considered a valid observation when Ca-

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<sup>1</sup> See on Denmark: J. BRØNDUM-NIELSEN and P. J. JØRGENSEN (eds.): *Danmarks gamle Landskabslove med Kirkelovene* I-VIII, Copenhagen, 1932-61. KROMANN and IUUL (eds.): *Danmarks gamle love paa nutidsdansk* I-III, Copenhagen, 1945-46. For Sweden there is an older edition by H. S. COLIN and C. J. SCHLYTER: *Samling af Sveriges gamla lagar*, 13 vol., Stockholm, 1827-77. Åke HOLMBÄCK og Elias WESSÉN: *Svenska landskapslagar, tolkade för nutidens svenskar*, 5 bd, 1933-1945. For Norway: R. KEYSER and P. A. MUNCH (ed.): *Norges gamle Love* 1-2, Chria, 1846-48. J. R. HAGLAND og Jørn Jørn SANDNES (eds.): *Frostatingslova*.

lasso in order to describe the situation in the Nordic countries quotes the 17th century lawyer Besold: «Corpus iuris numquam receptum instar legis sed loco artis iuris»<sup>2</sup>, however this point of view has been infinitely refined since that time not least in the research of Manlio Bellomo that has added valuable new points of view to the understanding of *ius commune*. However it is important to stress that in Nordic legal history the figure of the learned or scientific lawyer only appears in the Middle Ages in the role of a leading ecclesiastical figure. We do not find a tradition of secular lawyers trained in the aulas of European universities. The opposition of a learned tradition, which Paolo Grossi calls a scientific laboratory, as opposed to an unlearned legal practice has a completely other and much lesser relevance in the Nordic countries than in the other Western European tradition.

## II

For quite some time time Nordic law has been neglected by European legal historians. The language is one of the reasons. The gradual softening of the opposition between a Germanistic and a Romanistic branch of legal historians has been another. There was a time when at least certain leading German legal historians showed an interest in Nordic law and dedicated their scientific skills to the study of those old laws. Great names of the 19th century as Konrad von Maurer who possessed an enormous learning of old Norwegian and Icelandic law and especially Karl von Amira may here be mentioned as examples of a method in legal history that considered Nordic medieval legislation as a examples of a legislation that might be rather young compared to other «Germanic» laws but which reflected layers of law that could lead to the understanding of the original Germanic law supposed to be an archeological layer that could be dug out partly through deductions from Nordic legal texts partly through texts like Tacitus' *Germania*. This way of thinking lead to imposing scholarly works like von Amira's two volumes on North Germanic law of obligations, *Nordgermanisches Obligationenrecht*, that today may stand as monuments of great learning but even if they do contain valuable information are hardly consulted by modern researchers. Nobody today seriously believes in the Germanic *Urrecht* any more and it also is common knowledge that the Nordic laws in no way can be considered especially pure examples of old Germanic law. Since at least the 1920ies and 30ies it has been acknowledged in Nordic legal history that the medieval laws do reflect a society in brutal change, that the law written down was not necessarily very old, that many changes were brought into the laws in the 12th and 13th Centuries, and –not least important– that many institutions thought to be very old, actually were quite new. In later years we have learned to question whether even one of the cornerstones of the old Nordic society, the idea of kinship was really as the basis of old Nordic society.

In the field of criminal law old Germanic concepts played a significant role. However concepts like *Friede*, *Treue* or *Gefolgschaft* or similar words connecting

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<sup>2</sup> F. CALASSO: *Medio evo del diritto I*, Milano, 1954, s. 626.

the old law with certain values are hardly found in Nordic law, and when found they can be identified as an influence either from canon law or as a consequence of a structure in which the position of the King was highly strengthened and thus be seen as more recent contributions to medieval legal order. That goes particularly for the use of the death penalty (*die germanische Todesstrafe*) and the concept of outlawry (*Friedlosigkeit*). Since the 1920ies and 1930ies it has been the position in Danish legal history that the ideas of a sacred death penalty as described by von Amira or the idea of outlawry as an old institution linked to a specific Germanic concept of peace and security in the society was not in conformity with the existing Danish medieval sources. Nordic legal history thus long ago has emancipated itself from ideas of the medieval legislation as a reflection of a particularly old and pure legal order. The connection between Nordic legal history and German legal history was thus severed. It does not make sense to study the medieval laws on a comparative basis aiming at excavating common roots. This position to a certain extent brought the study of the old Nordic laws to a stand still.

Today the research in the Nordic medieval legislation must be done by Nordic scholars. Gone with the wind is the idea of «Germanic law» and Nordic law therefore does not really belong in any legal kinship or specific European legal family any more. Nordic law constitutes its own family as is also recognized by modern legal comparativists like the leading manual by Konrad Zweigert and Hein Kötz. Nordic scholars have to dig out their own past. In this sense the Nordic laws are so much more Nordic today that only Nordic historians and legal historians can be supposed to take more than a distant interest in this old legislation. One of the questions to raise therefore is also whether there really exists a common core that can be conceived as specifically Nordic in the old Nordic laws. Is it meaningful to speak of Nordic laws or would it rather be more convenient to talk of different Danish, Norwegian and Swedish laws which can only be seen as more distant relatives?

At the same time as Nordic laws was written down in Denmark, Norway and Sweden in the Italian city states we find a legal culture «with the most wide-ranging and far-reaching legislation known to the medieval West», as Mario Ascheri puts it. In Saxony in Northern Germany Eike von Repgow composes his «Sachsenspiegel». England already in the seventh century A.D. had laws corresponding to the Nordic laws and it seems probable that especially old Norwegian law in the way as Norwegian cathedral architecture may have been inspired from England and this legislation that has newly been described by Patrick Wormald<sup>3</sup>. Other imposing legislative monuments from this same period who partly shows influence from the same European sources as we find in the North are the legislation of the Emperor Federico II of Sicily<sup>4</sup> and Alfonso X el Sabio of Castille<sup>5</sup>.

<sup>3</sup> Patrick WORMALD: *The Making of English Law: King Alfred to the Twelfth Century*, vol. I, *Legislation and its Limits*, London, 1999.

<sup>4</sup> See Ditlev TAMM: «La legge dello Jutland del re Valdemar II e la legge dello Uppland, due codici nordici», in Andrea ROMANO (ed.): ... *colendo iustitiam et iuram condendo. Federico II legislatore del Regno di Sicilia nell'Europa del Duecento*, Messina, 1997, pp. 470-484.

<sup>5</sup> Ditlev TAMM: «Un paralelo nordico a la obra legislativa alfonsina», in A. PÉREZ MARTÍN: *España y Europa, un pasado jurídico común*, Murcia, 1986.

New ways of looking at the Middle Ages have led to a rethinking also of the Nordic medieval laws<sup>6</sup>. The general view of the history of legislation made by Sten Gagnér has been mentioned. A new focus on the history of learning and the international community of a learned elite in the Middle Ages is another new trend that can lead to a more positive assessment of the contemporary importance of medieval law. Women's studies also is a focus of enthusiastic approach to Nordic medieval legal texts even if they are not too eloquent. To this should also be added the history of family and kinship that also sheds new light over old legal texts. The ideas of kinship (Sippe) as one of the dominant institutions in old medieval law as already mentioned is also one of those that are contested today. Researchers point to other networks similar to the Roman concepts of *clientela* and *amicitia* as dominant in Nordic medieval history since the 12th century<sup>7</sup>. Still others point to the importance of canon law and the rules on forbidden grades in matrimonial law for the establishment of a coherent system of kinship relations in the Nordic countries<sup>8</sup>. If we accept that the Nordic laws have to be seen as a part of a European project also investigation into medieval legal institutions in France and Italy may shed light on Nordic law.

There has not in the Nordic countries been a revival of the study of medieval law comparable to what happened recently in Italy when several manuals of medieval law were issued almost at the time and thus gave rise to a discussion of methods and means in medieval legal research<sup>9</sup>. However from such a revival of interest in the Middle Ages, from German deconstruction of old concepts, from new American and British interpretations of the role of the king as legislator and from a still richer general research in the Middle Ages so many new trends have emerged and can be ascertained. The effect is that the question: «How Nordic are the Nordic laws» will be answered quite differently from how it was, when Nordic and particularly Danish legal history, that will be the main theme here, started out in the 18th century as a patriotic science absolutely convinced of the unique national character of its old laws.

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<sup>6</sup> Lars HERMANSON: *Släkt, vänner och makt: En studie af elitens politiska kultur i 1100-talets Danmark. Avhandlingar från historiska institutionen i Göteborg 24*, Göteborg, 2000.

<sup>7</sup> Birgitte SAWYER: *Viking-Age Rune Stones: Custom and Commemoration in Early medieval Scandinavia*, Oxford, 2000, suggests that the rune stones found in the Nordic countries dating from the 10th and 11th century are in fact raised by heirs as claims of inheritance and thus reflect the existence of inheritance law. Some inscriptions mention the name of the stone-raiser and the deceased and often mentions the family relation between the two. Whether the rather few rune stones that actually mention inheritance can in fact be taken as evidence for the existence of a set of inheritance rules or not seems doubtful but it seems justified to maintain that there is a link between the rune-stones and a set of norms on heritage.

<sup>8</sup> Mia KORPIOLA (ed.): *Nordic Perspectives on medieval Canon Law*, Saarijärvi, 1999.

<sup>9</sup> On the Italian discussion of methods in medieval legal history see for a critical summary Emanuel CONTI: *Droit médiéval - Un débat historiographique italien*, Annales HSS 2002, pp. 1593-1613, in which he comments on books by Paolo GROSSI: *L'ordine giuridico medievale*, Roma, 1997, Mario ASCHERI: *Istituzioni medievali*, Bologna, 1994 (2nd ed. 1999) and *I diritti del medioevo italiano, secoli XI-XIV*, Roma, 2000, Ennio CORTESE: *Il diritto nella storia medievale 1-2*, Roma, 1995, A. PADOA SCHIOPPA: *Il diritto nella storia d'Europa. Il medioevo I*, Padova, 1995. To be mentioned is also Mario CARNAVALE: *Ordinamenti giuridici dell'Europa medievale*, Bologna, 1994.

The challenge to legal history posed by some of these new ways of looking on history is well known and common to those who look at legal history from a lawyer's point of view. To him or her medieval legislation forms part of a legal development that gradually has led to a modern legal order. The law, the understanding of legal concepts and the basic idea that change is a fundamental part of a lawyer's understanding of law will necessarily be guiding when the lawyer looks at the law in the Middle Ages. Legislation as a means to create new law is as familiar today as it was in the 18th century. In between there was a romantic period that believed in customary law as the real core of medieval law. The historian will tend to see the law in a historical context as one of the tools that make society function more than he will be interested in the interaction of legal rules as part of an integrated legal system. Both ways of looking at the old law is leading to new interpretations.

### III

Medieval legislation for more than two centuries played not only an important role in a Nordic legal history. Medieval legislation simply was the main field study. Medieval legislation was considered the core issue of the study of legal history, and even if legal history today is a busy field of study, the question of how to interpret the old laws and how to understand them in a European context remain a challenge to the legal historian. Once medieval legislation could be identified as the heart of the legal history and still in a country like Denmark medieval legislation is linked to national identity. History, language and law come together in the formative years of Danish nation building in the Middle Ages.

The historiography of Danish legal history has moved several steps since in 1769-1776 the Danish legal historian Peder Kofod Ancher published his *En Dansk Lov-Historie (A History of Danish Law)*, a chronological study of Danish legislation since the 10th century that still can be considered a rather advanced study for its time. For Kofod Ancher Danish law was part of Danish identity. He only wrote about Danish law, he was proud of that, and he did not raise the question to what extent Danish law was influenced by foreign law. The front cover of his book symbolically pictured Danish law as it was laid down in the Danish Code of 1683 as a tree that was nurtured from roots all being older Danish statutes from medieval and later times. Kofod Ancher had found this way of depicting the law in the description of the Law of the Franks in Montesquieu's *De L'Esprit des Lois*. The law is like a tree and only by digging up its roots you come to a real understanding of life and spirit of that particular law. So was the attitude of the learned baron of La Brède, which also in Denmark was seen as a modern and stimulating way of explaining the importance of history. History and especially legal history was there to tell what was particular in national law. Legal history did not aim at finding out what was the general principles of the law. The main task of legal history was the opposite. It was to find the roots of a specific national way of conceiving the law. Law and national identity thus became related. «I will restrict myself to Danish legislation», Kofod Ancher wrote in his

Introduction and so he did. His method was that of a critical researcher even if he did not live up to modern standards. However he based his study on original documents and even went to Stockholm in order to use a manuscript of The Law of Jutland in the Royal Library there. On the other hand he was highly reluctant to admit any foreign influence on medieval Danish legislation. One of the chapters of his book was dedicated to the complete refusal that the German *Sachsenspiegel* had had any relevance in Denmark. Danish law was according to him a domestic fruit grown in a well protected garden walled against foreign influence.

A second step in the historiography of Danish Law when in the first decades of the 19th century the study of Danish legal history came under the strong influence of the Germanic branch of the German *Historical School*. Especially Karl Friedrich Eichhorn and his *Deutsche Rechtsgeschichte* in several editions since 1808 had a heavy impact on the works of the Danish legal historian J.L.A. Kolderup-Rosenvinge who 1821 published a modern version of Danish legal history based on a systematic view that came close to Eichhorn. In stead of describing as had done Kofod Ancher the old legislation in a chronological order according to the reign of different kings Kolderup-Rosenvinge made a division according to periodical scheme and he acknowledged that law did include not only statutes but also unwritten law.

Kolderup-Rosenvinge's work remained an authority until the end of the 19th century. German legal historians like other German lawyers were taken as models in legal writing and also the new concept of legal history as a field of study the relevance of which did not depend on its importance for the understanding of modern law was readily adopted by Danish legal historians as a legitimation for a critical study of Danish medieval legislation. The result was the emergence of a small but efficient school of legal historians who soon emancipate themselves from German influence and started out to stress how Danish medieval legislation contrary to what was often claimed by German scholars did not reflect what could be interpreted as an original Germanic law. The law of Denmark and the law of the other Nordic countries was of a much later date and had to be interpreted in quite another context.

Probably the first to understand how deeply influenced Nordic law was by medieval canon law was the Danish legal historian Kolderup-Rosenvinge who already in his manual of Danish legal history from 1822 refers to the *Decretum Gratiani* as a source for the Prologue of the Law of Jutland. This theme was further and in more detail elaborated later by the legal historian Ludvig Holberg who in 1891 (*Om Dansk og fremmed Ret*) published an article in which he proved how the Prologue of the Danish regional law of Jutland almost literally was based on sections of the *Decretum Gratiani* of canon law. Since that time it has been manifest that ecclesiastical influence and canon law is an important source for the understanding of Nordic medieval law. The importance of Holberg's comparative study of canon law and the Law of Jutland was not immediately seen, but it can today be considered as a first important attempt to open up the European dimension of Nordic legal history.

The leading figure of Danish legal history in the first part of the 20th century Poul Johannes Jørgensen in a series of studies laid the foundation for a new un-

derstanding of the redaction of the old laws. He showed how different layers of law were found when the texts were looked at as an «archeological» field. However most likely the different layers were not of a very different age. It was thus clear that the laws should be seen as written documents of rather recent origin and that nothing proved that these laws reflected very old legal institutions like an *Urrecht*.

Later contributions to the study of Nordic medieval law have been the work of Stig Iuul on the medieval law of family property (*Fællig og Hovedlod*, 1940) arguing against e.g. the thesis that the property community was an institute of great age. Ole Fenger in 1971 published his study (*Fejde og Mandebod*) on medieval criminal law centred around the institution of feud and wergeld in a study which took as its starting point German research on the *Friedensbewegung*. Methodologically Fenger based himself in a conception of Danish medieval legislation as royal enactments based on agreements and a certain respect for a tradition of older customary law. He thus later opposed more recent Swedish studies especially brought forward by the historian Elsa Sjöholm who stressed the role of the king and the church as makers of written laws based on a complete new legal culture from which nothing can be deducted as to the earlier unwritten law. In this discussion is reflected some of the old positions taken by Fritz Kern in his today completely outdated but sometime famous article on *Recht und Verfassung im Mittelalter* (1919) on the medieval law as *gutes, altes Recht* and his modern critics<sup>10</sup> from a point of view that stresses the importance of the *voluntas legislatoris*.

A somewhat cautious approach to the medieval laws as a reflection of old customary law has been prevailing in Danish legal history. The old law has to be understood as a writing down of contemporary law that does not necessarily base itself on older law. Thus the field is open for the acceptance of a reception of a new legal culture and a complete change of the legal pattern at the time of the redaction of these laws in the late 12th and the first and second halves of the 13th century. Nordic law therefore cannot be categorized as «Germanic» law in any scientific sense of the word. Later scholars of Nordic medieval law have even more stressed that the medieval laws are not of a very old date but have to be seen as testimonies of a legal concern that had to do with the shaping of a new society around 1200. The question is to which degree it makes sense to talk about a «Nordic» law of medieval times. Therefore the question: «How Nordic are the Nordic laws?».

The time has gone when legal historians dedicate themselves only to the investigation of legal questions related to medieval legislation is over. The time therefore has come to consider what has been achieved and to discuss new ways of understanding Nordic law in the Middle Ages. As a Danish historian, Michael H. Gelting puts it: «Our main source for Scandinavian social structures in the high

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<sup>10</sup> Zu Kern: Gerhardt KÖBLER: «Recht, Gesetz und Ordnung im Mittelalter», in KROESCHELL und CORDES (eds.): *Funktion und Form. Quellen und Methodenproblem der mittelalterlichen Rechtsgeschichte*, Berlin, 1996 (Schriften zur Europäischen Rechts- und Verfassungsgeschichte 18), Johannes LIEBERECHT: *Das gute alte Recht in der rechtshistorischen Kritik*, op. cit., pp. 185-204. For a linguistic approach, Klaus VON SEE: *Altnordische Rechtswörter. Philologische Studien zur Rechtsauffassung und Rechtsgesinnung der Germanen*, 1964.

Middle Ages, the twelfth- and thirteenth-century law books, must be interpreted as a part of a common European trend to create a new kind of social order and predictability through comprehensive and systematic legislation»<sup>11</sup>.

#### IV

Medieval legislation is found in both Denmark, Norway and Sweden. There are of course differences between the Nordic countries. A main difference is that Norway and Sweden achieved legal unity with the edition of national codes by the end of the 13th or the mid 14th century respectively. In Denmark four different medieval regional laws remained in force until the introduction of the Danish Code 1683. This means among other things that a considerably larger amount of old manuscripts of Danish laws are preserved than in the other Nordic countries.

Today it is generally acknowledged that the old Norwegian laws may be the oldest Nordic laws with parts that may even stem from the late 11th century. Most of the old Norwegian law however is supposed to have come been made over a period of 150 years from around 1150 til 1300.

From old Norway we know the names of four regional laws. However two of them, the Law of the Borgarting and the Law of the Eidsivating, are only known as fragments containing the so called *Kristenrett*, the specific law of the church and Christian behaviour.

The law of the Gulating may have been redacted around already around 1100 and have been revised in the 1160ies. The law of the Frostatings probably is another Nordic law with a very old origin. It contains the church law of the Archbishop Øistein from around 1170. The oldest redaction seem to have been supplemented by royal decrees. We know of two laws preserved completely, the Frostatingslag from Northern Norway and the Gulatingslag from the West Coast. The Gulatingslag is preserved in one manuscript from the mid 13th century that probably served the compilers of the Law of Magnus Lagabøter from 1276 by which was introduced legal unity mainly based on the Gulatingslag. The Frostatingslag is only preserved in a copy of an old manuscript (the original was destroyed by fire 1728). Also this law is supposed to contain very old parts.

A specific feature peculiar to Norwegian –and perhaps even Swedish law– is the belief that the law was written down in accordance with some tradition related to persons presumed to have known the law by heart and to recite the law when people gathered at the «thing» –the place were the law should be handled. We do not have any vestiges of such an institution in Denmark and even if we find in Danish medieval laws sentences like «This should be noted», the men-

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<sup>11</sup> See Michael GELTING: «Predatory kinship revisited», in I. J. GILLINGHAM (ed.): *Anglo-Norman Studies XXV*, Woodbridge, 2003, pp. 107-118. The author suggests that the oldest part of the so-called *Arvebog & Orbodemål* (book on inheritance and crime that could not be settled by compensation) stems back form 1170 and that the other redactions of this law and the law of Scania are in fact draft work for a national codification. This theory even if attractive does have any support in existing sources.

tioning of an «I» or «we» or «you» or the like there are no convincing proofs of the existence of any significant oral tradition of the law.

The Danish *corpus* of medieval law consist of two so called «Ecclesiastical laws» from the second part of the 12th century, two private collections of local laws from Sealand named after the kings Valdemar and Erik, the Law of Scania including a Latin version of that law and the Law of Jutland. Only the Law of Jutland can be dated exactly. This law was given by the king Valdemar II in 1241. The other collections of law are private collections which however were considered official. The Law of Scania can be dated shortly after 1200. The Sealand based law of Erik is younger and at least one of the three editions of the law of Valdemar is probably older. Why was legal unity not achieved in Denmark before 1683? That is one of the puzzles of Danish legal history. Was the Law of Jutland with its famous prologue and its up to date procedural system actually meant to be new code for the whole country? This supposition as to the will of the king as legislator was made by Kolderup-Rosenvinge in 1822, later rejected by others but still discussed today as a relevant hypothesis.

Sweden is geographically a huge country with a greater number of medieval laws than any other Nordic country which were redacted within a period of about 150 years from about 1200 until the first half of the 14th century. The most prestigious laws are the laws from Uppland and from Östgötaland. Upplandslagen has a *praefatio* that tells us how the law was made by a commission of 15 men and ratified 1296. However the law is clearly influenced by canon law and probably also by Roman law. Östgötalagen is probably not much older than Upplandslagen. The Västgötalag may date from around 1220. Upplandslagen has influenced the laws of Vestmannaaland and Södermanland (1327) and Hälsingalagen in Northern Sweden (and Finland) whereas the laws of Dalarna and of Gotland are rather independant and probably older. Upplandslagen and other laws (The laws of Västmannaland and Södermannland) were the basis of the so called Landslag that introduced legal unity in Sweden about 1350.

There has been some important recent research into the Swedish medieval laws. Especially Sten Gagnér and Elsa Sjöholm should be mentioned. Sten Gagnér has questioned the date of the Upplandslagen, whereas Elsa Sjöholm in a very radical way that shall be mentioned later has maintained that the Swedish laws basically are to be considered as completely new legislation with literally no trace of an older tradition<sup>12</sup>. I think myself that she comes close to the truth even if her arguments are not also too convincing.

Swedish and Norwegian laws are divided into parts called balkar. We do not know this kind of system in the Danish laws apart from the tripartite law of Jutland. There does not seem to have been much direct influence from one Nordic country to another. The Norwegian laws as mention may have been inspired from England and also to a higher degree than e.g. the Danish laws have taken Mosaic law as a model. The Danish laws are different from the Norwegian

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<sup>12</sup> Elsa SJÖHOLM: «Gesetze als Quellen Mittelalterlicher Geschichte des Nordens», *Acta Universitatis Stockholmiensis* 21, Stockholm, 1977, and Elsa SJÖHOLM: *Sveriges medeltidslagar. Europæisk rättstradition i politisk omvandling*, Rättshistoriskt bibliotek 41, Lund, 1988.

laws and Danish law seems only to have had small if any influence in Sweden on the law of inheritance and procedure. Inside Danish law the law of Jutland must have been influenced by the law of Scania, and also the unknown authors of the law of Sealand must have known the Law of Scania. The law of Erik also seems to have been written down by someone who knew the law of Valdemar and the redaction of Erik's law especially stresses such themes that are not mentioned in the Law of Valdemar.

A Danish legal historian looking at the Norwegian Gulatingslag is equally estranged as he is looking at the laws of any other of the so-called «Germanic laws». He might even feel more at home reading a *Fuero juzgo* supposedly from the time of Alfonso X than looking at the older Norwegian laws. But still there are of course many common points in the laws of the Nordic countries. Family law and heritage, land law, penal law and partly the procedure have similarities. Danish law however does neither know the so-called «Christian law» which deals with the law of the church or parts of the laws dedicated to the position of the king which are found in both Norwegian and Swedish law.

The main body of Danish medieval legislation consists of regional or provincial legislation. Two so-called Ecclesiastical laws were issued in 1171 as a result of an agreement between the Church of Scania and Sealand and the local assembly. In these laws certain compromises were made between the Church and local people especially relating to dispositions mortis causa and criminal law. A law from Sealand is found in various redactions. This law that in older redactions date back to the 12th century was later to take the name of the King Valdemar and to be supplemented by a more extensive law called the law of Erik. From the province of Scania there exists the law of Scania of unknown origin. The exact date of this law is also unknown, however considering that it contains articles still based on the use of ordeal by fire it is normally dated to a time before the decision of the IVth Lateran Council 1215 that no clerics could assist at such ordeals was effectively enforced in Denmark. A Royal decree to that effect is known but also in this case the date is unknown. Conjectures of the date of this Royal enactment vary between 1216 and sometime in the 1220ies.

The most important part of Danish medieval legislation stems from the province of Jutland. The Law of Jutland is dated in a Prologue which fixes the time of its promulgation to the month of March in the year of 1241, the last year of the reign of the Danish King Valdemar II later known as *legifer*. The law of Jutland was actually issued at a national assembly in the town of Vordingborg situated in the South of the island of Sealand and thus outside the province of Jutland. It has therefore been discussed whether the Law of Jutland should actually be seen as a step towards a general code for the whole of the Realm of Denmark. Such theories were rejected in the 19th century but recently they have been revived based on new arguments taken from the general situation in contemporary Europe. If in other parts of Europe the will of the king as legislator managed to manifest itself why should that not have been the case in Denmark. An argument for such an approach to the law of Jutland is that systematically even if it resembles the older law of Scania it relies heavily in its systematic concept on new institution in procedure supposed to be royal innovations in the law. The main

example is the introduction of the so called *sandemænd*, eight men nominated by the king (or his local representative) with the task of investigating serious crimes and cases concerning real estate. This institution was only found in the law of Jutland but was later introduced in other parts of the realm.

However the main interest of the law of Jutland and its most distinguished feature is the prologue and the introductory words: «The country shall be built on the law», a phrase that stresses the primacy of the law and in its Danish *Wirkungsgeschichte* has traditionally been seen as the foundation of a legal order having its roots in medieval legal thinking. The phrase may be a paraphrase of Roman law and it is found in a Prologue that contains quotations from canon law echoing famous phrases of the *Etymologiae* of Isidor of Sevilla. The Prologue of the law of Jutland is the most prominent Danish example of the work of a learned canonist in the framing of *iura propria*.

Legal historians today who want to study Nordic medieval legislation find themselves in a difficult position. There are no new sources to find. All documents have been edited, critical editions of the laws are available and most legal questions arising from the laws have been treated. We know almost nothing about the way the law was handled until the 16th century. Studies of how the medieval legislation was dealt with in medieval society therefore can only build itself on conjectures. The unsolved questions and those that again and again will puzzle the legal historian are those that have to do with the origin of the medieval legislation and the position of this legislation in an international context.

Today the prevailing view is that Nordic medieval legislation must be seen in a European context. Very far from reflecting old legal convictions the Nordic legal sources do reflect a legal order establishing itself in the 12th and 13th century as a result of the influence from the «scientific laboratory» on the legal order. The most provocative approach in this direction was made by the Swedish historian Elsa Sjöholm who nearly shocked a Swedish audience dead when in two studies published in 1977 and 1988 she maintained that old Swedish laws were not old at all but part of a legislative conscious legislative project conceived by the Church. The texts should be seen as the political result of compromises made between existing power groups. Therefore she also preferred to see the Lombardic law and the Bible and especially Mosaic law as model for this new legislation in Sweden and almost completely rejected the idea that old customary law could be found in the Swedish legal sources. Provocative as it was her theory has been admitted as a new starting point for the understanding of medieval legislation even if her results as to a dominant influence from the church does not seem convincing when it comes to the understanding of a legislative body of a very differentiated character that came into being over a rather extended period.

## V

Another important aspect of the question: «How Nordic are the Nordic laws?», has to do with the actual framing of the law. Are we dealing with local

law of local origin or are we actually witnessing a process of internationalizing of the law according to the standard set by leading legislators of the time.

There was a time when it was only reluctantly admitted that Danish law was influenced from Roman law or other foreign laws. In the 18th century it was often denied that Roman law had had any significant impact on the development of what was supposed to be pure Danish Law. Such was the view in the work of Peder Kofod Ancher on the history of Danish law. Kofod Ancher was wrong in denying any influence from Roman law, but he was right in as far the old laws had been a conservative weapon in the hands of those who were against changes in the law. We see that already in a document from 1282 in which references the the «law of King Valdemar» are used to restrict the king's legislative power. In legal practice as we know it from the 16th century and onwards the old laws are clearly seen as the fundament of the law and as a protection of existing rights that should not be changed without good reason.

It was the great Danish lawyer Anders Sandøe Ørsted who in 1822 –long before the German contest between the defenders of German or Roman law– stated that such a point of view was to be considered as an «exaggerated patriotism». He in a time that did not acknowledge the importance of the concept of *ius commune* referred himself to certain examples of impact from Roman law, his main argument however was the basic value of Roman law as the foundation of any scientific method in the law. Since that time it has been generally recognized that Danish law was influenced by methods and institutions of Roman law. Denmark was not divided by the schools of Romanists and Germanists. Roman law was taught at the university. The importance of Roman law for the understanding of the law of obligations was recognized. In the field of legal history however Roman law did not play any role. There is no Danish parallel to the discussion of the «the reception of Roman law, which the germanist Beseler in his *Volksrecht und Juristenrecht* considered a German «Nationalunglück».

In Danish legal history Roman law still did not play an important role. However gradually canon law was understood as a system that played an important role in the Middle Ages. The interplay between Church and Society led to a great influence that was especially seen in matrimonial law. However in a protestant country it seemed difficult to admit the general civilizing force of the Church and of canon law. Several papal decretals addressed to Nordic archbishops were known, but it was only in 1890ies that canon law was understood as a coherent system of law worthy of its own study that could lead to important conclusions about Danish law.

Legal history in the Nordic country has not been in the need to invent a legal past in order to find a national law. The medieval laws were such a past. And at least since the time of Kofod Ancher it has also been recognized by legal historians that there are such similarities between the medieval laws of the Nordic countries that the study of the laws of one of the other countries must be considered as useful for the understanding of medieval Nordic law. However it was only later that the community of legal ideas found in the Nordic countries was given a high priority. It happened when in 1872 a first meeting between Nordic lawyers was convoked in order to discuss legislative questions of common inte-

rest. The inspiration to convoke such meeting came from Germany. However one of the aims of making such meetings was to find a common legal path that could lead to other solutions than those found in German law. The year 1872 may be seen as the year of the birth not only of Nordic legal cooperation in the field of law but also as the year in which the idea of a legal unity the Nordic countries was born independently of historical differences.

The medieval Nordic laws used to be the pride of legal historians. Legal history at least in Denmark to a great part was based on medieval law, scholarship was dedicated to their proper study and the introduction of the Danish Code was enacted 1683 was also the end of legal history. All this has changed. Medieval law is not any more the most important field of legal historians. However many historians have given contributions to medieval law, especially perhaps in Norway whereas I think medieval law has been somewhat neglected in Sweden since the days of Elias Wessén. Elsa Sjöholm has challenged the establishment and new studies would be a desideratum. That goes for Denmark too but we do see these years new ways of approaching the old law. One way is to look more at the social context. Another way is to look outside the Nordic countries for inspiration and for comparison. I do think that the Nordic laws are very Nordic but they also form part of a common European heritage of law from the 12th to the 14th century. New inspiration has come to continue the study of medieval law along the many new roads that have been opened in later years by scholars all over Europe. The Nordic laws belong in a European context. They can still be seen as the most important Nordic contribution to the making of European legal History.

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