On Polycentrism and Legal Pluralism or: Does a Concept such as "Danish Constitutional Law" exist?

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For somebody employed to write on and teach "Danish constitutional law", it lays near at hand to look for a concept on the subject which defines what to write on and teach. What does Danish constitutional law include?

An obvious answer would be to point to the fact that Denmark - like most other countries - has a special constitution text, the Act of the Constitution, and that this must be the text on which to concentrate. This answer is not entirely satisfactory, as the text of the constitution delimits the subject arbitrarily. It may be accidental what is included in a constitution text, and if one is concerned only with the text of the constitution, no coherent picture is obtained of the protection of human rights, or of the organisation of the state authorities. In order to obtain an impression of the legal structure of constitutional matters, both other legal source material and sources other than law must be included.

So how is The Subject to be Delimited?

The origin of constitutional law is the description of the state authority that the king obtained during the absolute monarchy. The birth period of the subject dates back to the time when

Denmark had absolute monarchy. The main questions concerned delimitation of the territory of which the king had a right of disposal and, in this connection, a description of the position of the king, including matters pertaining to succession - e.g. who was to be the king's successor?

Legally, this structure was the basis for the centralized creation of law, as the law emanated from the king or from the authorities that the king had at his disposal - either by way of regulation or by way of concrete decisions.

This structure has not fundamentally changed through the political revolution that took place through democratization of the constitutional system. It is true that politically, Parliament represents a change - brought about gradually through continuous extensions of the franchise, but legally and structurally the old structure has been preserved. It is still the central creation of law that constitutes the main theme of the subject, and this is reflected in the interest taken by constitutional law in legislation, the process of legislation, the publication and commencement of legislation, etc., and possibly also the interest taken in the regulations issued by the central administration.

The validity of this starting point may be contested for several reasons:

Firstly, central determination of what should be the law is supplemented by the creation of law in the form of agreements. This form may be glimpsed in the provisions of the constitution on recognition of the concept of property - also rights based on agreements belong under the concept of protected property - and a principle of freedom of contract goes with these rights. In this way, the importance of agreements has been recognized in the *negative* sense that the State cannot contest agreements and the rights on which agreements are based. However, agreements are the basis of something more than a negative restriction of public authority - agreements are in themselves a form of law, i.e. a means of producing law. Therefore, agreements are a kind of creation of law which is in practice on a par with the centralized creation of law.

Nor is it only within the State administration that decisions are reached. Also enterprises adopt regulations and make decisions.

These new areas are systematized by the well-known distinction between the public and the private sector. Constitutional law is made into a subject pertaining to public law

as it is concerned only with the public authorities. However, this delimitation in relation to the private sector is indeed distorted, as it neglects the question of the importance of private creation of law.

Instead, as already mentioned, private autonomy must be recognized as competent to create law which supplements or in part replaces the central determination of what should be the law.

What is common to the authoritative determination of rules and the agreed decision to adopt rules is that it is decided to create law with the ambition of being in control.

Another objection is related to the fact that custom and practice play a role - in addition to other sources of law that I shall not discuss here. Custom and practice are well-known elements in a North/South context as in non-verbalized systems the normative creation of law is to a great extent based on such sources. But also in "modern" and postmodern societies, custom and practice play a role. The professional formation of norms, which reflects the demands that may be made on and the expectations that may be held as regards doctors and engineers - as well as medical treatment and bridge building - are reflected in the professional custom learnt at universities and institutions of higher education and practised at good hospitals and construction sites. Thus, custom and practice are an important and relevant source of the creation of law.

Therefore, we are faced with competition between various sources of law where the interest taken by constitutional law in central state authoritative regulation only illustrates one of several - and with time perhaps not even the most important.

The constitutional structure has a pattern of competition.

Practice has a special meaning in relation to municipal autonomy because practice is the form in which the individual municipality shows its special characteristic within the administration, including the administration of national rules. Practice may lead to a national rule being administered in one way in one municipality, and in another way in another municipality. A traditional reaction to such differences is to regard one of these two municipalities as having gone astray - there is only one correct way of administering this national rule, and this way must be determined by a national court of law or a national supervisory authority. However, this "monistic" view

neglects the force which lies behind municipal autonomy and which is quite compatible with varied interpretation by municipalities. The interpretation becomes local; in the same way as local political and other circumstances determine the decisions that are otherwise reached within the framework of municipal autonomy. However, we are left with the question of where to find *national* law, when national legislation is administered differently within different municipalities.

This concern for the existence of national law is not less, if, for a moment we turn our attention from the intranational divisions to extranational matters: The development of international law, European law and transnational law.

From a starting point within the dualistic view: a sharp division between international law and national law, Scandinavian law has gradually moved in the direction of a monistic state of law. International law is relevant, but it is not clear in what way this relevance makes itself felt.

Also European law should be taken into account and this is so not only on account of membership of the EU, but also on account of the European human rights convention.

Whether an international or a European basis is chosen, law is harmonized, but there are still national variations. This raises the question of what we describe when we talk of Danish law.

The protection of interests that are covered by both a national constitution and by a European human rights convention includes legal viewpoints that are national, and also viewpoints that are European. The protection of privacy is not limited to a Danish provision contained in the constitution, but is also reflected in a European provision and the interpretations that are based on the European provision determine not only the state of law in Denmark, but also (that is, if the interpreter of the law is well-informed) the state of law applicable in other member states as regards the human rights convention. Thus, it is not a description of Danish law, but a description of the law applicable in Europe.

A similar duality is encountered in other fields. The regulation based on private law of international sales is based on international conventions so that a description of what is current Danish law will at the same time to a great extent be a description of what is current international law. Thus, it is not Danish law as such that is described, but a state of law

applicable far beyond Danish territory. The interest of the monarch in what was applicable within the borders of his country resulted in a good delimitation of the field of law, however, this viewpoint is completely antiquated.

When dividing constitutional law into a local, a national, a European and an international level, it becomes conspicuous that it is in particular the national level that is exposed to erosion. Even though constitutional law as a subject centers on the national decision-making process, in particular as this process is expressed in the national Parliament, it is at the other levels that major decisions are reached - in so far as they are reached at all at the public level and not in the private sector.

This leads us on to a different perspective as to what it is that is described in constitutional law or in other legal disciplines. The description of "the law" is based on an expectation of an authoritatively fixed system which defines good and bad, correct and incorrect, exempt from punishment versus crime, etc. The law is to show us the right way. There are indications that the law cannot (any longer) live up to this - almost religiously anchored - expectation. What a description of a field of law can provide is not a rule fixed in advance of what is good and what is bad, but a possible argument for anyone who later becomes a party to a conflict. A description of current law is a description of possible, i.e. legitimate arguments. No definite opinion can be held in advance as to how these arguments will work.

The consequence of this is that anyone making these arguments must imagine the positions from which the arguments are presented. And this determination of the position is a part of the argument. That is to say: One speaks from specific positions and the national position is one out of a set of positions that may be held. Being concerned with national constitutional law is phrasing arguments that may be used on national platforms where constitutional law is debated.

Thus there are many open ends as to the question of what constitutes Danish constitutional law. Does such constitutional law exist at all? If so, does a concept such as *Danish* constitutional law exist? And when we accept a description of the law as a description of arguments and we accept that an argument can be met by a counter-argument, what do we mean, then, when talking about describing the law? The account given for a set of conflicting arguments?