Absolutism and the ‘rule of law’ in Denmark 1660–c. 1750

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course, that no ‘rule of law’ can exist if the same authorities both act and control the legality of these actions.\footnote{P. Stuer Lauridsen, ‘Et essay om retssikkerhed som almen, juridisk standard’, 56 Økonomi og politik (1982), 9.}

David Neal is very close to a similar definition in his book on the penal colony of New South Wales, in which he distinguishes between on the one hand the judicial principles of the right to a jury (which only exists in common law countries) and the right to bring lawsuits,\footnote{D. Neal, \textit{The Rule of Law in a Penal Colony: Law and Power in Early New South Wales}, Cambridge, 1991, 24.} and on the other hand, a political feature in the protection against arbitrary interference from other citizens and from government.\footnote{Ibid., 57. He thus does not distinguish between the collective and the individual meaning of the concept.}

In his discussion of absolutism David L. Smith uses a broad definition of the concept of the ‘rule of law’ as a doctrine of power wielded in accordance with a normative system that has ‘the good of the community’ as a goal,\footnote{Smith, ‘Idea’, 167.} without describing the elements of the normative system, however.\footnote{Christopher Brooks, to a large extent agreeing with Smith, has pointed out that English lawyers of the sixteenth century ‘tended to see the rule of law as a system of authority before which all men were equal’. C.W. Brooks, ‘The Place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought’, in E. Sandoz, ed., \textit{The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of ‘Rule of Law’}, Columbia, MO, 1993, 67.}

In a recent article about witchcraft trials, Brian Levack has added a new aspect to the ‘rule of law’ discussion. He finds that cases regarding miscarriages of justice\footnote{B.P. Levack, ‘State-Building and Witch Hunting in Early Modern Europe’, in J. Barry et al., eds., \textit{Witchcraft in Early Modern Europe: Studies in Culture and Belief}, Cambridge, 1996, 102 and 103.} must also be considered when discussing the concept of the ‘rule of law’.\footnote{In England, when references are made to cases like those of the ‘Birmingham Six’ or the ‘Guildford Four’, the concept of ‘miscarriage of justice’ is used. Similar cases in Denmark would be discussed in terms of there having been a ‘breach of the “rule of law”’.}

To sum up: ‘rule of law’ means the expectation of equal judicial hearing, and treatment, with respect for and to the individual.

\textbf{THE ABSOLUTE CONSTITUTION IN DENMARK}

That Denmark acquired an absolute constitution\footnote{Regarding a constitution in French absolutism, see F. Cosandey and R. Descimon, \textit{L’absolutisme en France: Histoire et Historiographie}, Paris, 2002, ch.2:3.} must be seen in the context of what in Danish historiography has been termed \textit{statsomvæltningen}, or the coup d’état of 1660.

The Norwegian historian Jens Arup Seip distinguishes between three different periods of Danish absolutism; the first running from the introduction of absolutism until around 1720, spanning the reigns of Frederik III, Christian V and most of the reign of Frederik IV. The second covers the latter years of Frederik IV until shortly before the French Revolution, and the third covers the last years of Danish absolutism.\footnote{J.A. Seip, ‘Teorien om det opinionsstyrede enevelde’, (Norwegian) 38 \textit{Historisk tidsskrift} (1957–58), 447ff.} Seip terms the first period the period of personal absolutism, the second the period of bureaucratic absolutism, and the third and last the period of
opinion-based absolutism. This division will be adhered to in the ensuing discussion.

Denmark had been an elective monarchy since the early middle ages. Beginning in 1448, the Council of the Realm (Rigsrådet), however, consistently elected a member of the Oldenborg family to the Danish throne. Before acceding to the throne the kings had to negotiate a coronation charter with the Council. This charter consisted in part of promises of a legal normative character, and in part of pledges of good governance. Members of the Council of the Realm came from the upper nobility, and the type of state they developed in the sixteenth century, *monarchia mixta*, was based upon the collaboration between king and members of the Council.

In 1648, the new king, Frederik III, was forced to accept a coronation charter that narrowly restricted his possibilities to act independently of the Council of the Realm. If the king, for example, violated the charter, the Council was to try to convince him to do otherwise, but if the effort was in vain, the Council of the Realm had the right to settle the dispute on its own. The highest authority in the state belonged to the Council of the Realm, not to the king. The king was not allowed to leave the country without the consent of the Council. Furthermore, in the coronation charter of his father and predecessor from 1596, it had been proclaimed that at the death of the king administrative power in the country should be transferred immediately to his successor. But in the new charter of 1648, the Council of the Realm held these powers until the new king had been elected. In fact, two months passed between the signing of the coronation charter and the coronation of Frederik III.

Common to all coronation charters was the conspicuous insistence that the ‘rule of law’ be upheld. Article 6 in Christian III’s accession charter from 1536 included a stipulation that the king maintain law and justice for all the inhabitants of the realm, and that none were to be wronged. Article 17 prescribed that the king, as a member of the highest court, should render judgments impartially, regardless of the defendant’s class or descent. Article 26 contained a provision that the jurisdictional order of the courts was to be maintained. In Article 30 could be found a provision indicating that judges could be dismissed if they were bribed, and Article 32 stated that the king was subject to the law of the land just as all others and could be indicted by the appropriate court.

The respective coronation charters of Frederik II (1559), Christian IV (1596) and Frederik III (1648) repeated these articles in slightly altered order and language, but there was no doubt that the rights of the inhabitants were to be respected.

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25 Although absolutism in Denmark lasted until 1848, the discussion in this paper will stop in the mid-eighteenth century, when the government’s legal adviser Henrik Stampe had formulated principles akin to the Montesquian division of powers. For references to Montesquieu, see H. Stampe, *Erklæringer, Breve og Forestillinger Generalprocureurembedet vedkommende*, vol.5, Erklæring [Declaration] CXXX, Copenhagen, 1797, 416.


27 As the Estates General was only called four times between 1536 and 1660, the Danish *monarchia mixta* was a question exclusively of the balance between the monarchy and the aristocracy personified through the Council of the Realm.

28 *Samling af Danske Kongers Haandfæstninger og Andre lignende Acter*, Copenhagen, 1856–58.
The 1640s and 1650s were marked by several wars with Denmark’s traditional enemy, Sweden. The results were catastrophic for Denmark, and only the heroic defence of Copenhagen as well as the death of the Swedish king saved Denmark from being completely swallowed up by Sweden.

During this crisis, the Estates General was summoned to Copenhagen at the beginning of September 1660 (the peasants were as usual not invited to participate). Theburghers especially felt that the nobility had not lived up to the responsibilities which were the justification for its privileges, and that it had failed to defend the country. In this tense situation, negotiations for various reforms went forward until the beginning of October, but in vain. On 11 October, the king ordered the city gates of Copenhagen to be closed so that no one could leave without the permission of the king and the mayors. On 13 October, after hectic negotiations, a dynastic government, five years later to become inheritable on both the male and female side, was instituted.

As a result of this move absolutism was introduced into Denmark, a form of government that was to last until 1848. It is striking that the lively constitutional debate in Denmark prior to 1660 ceased at the establishment of absolutism and did not reappear until news of the French Revolution reached Denmark.

On 13 October 1660, the king appointed a small committee with representatives from the three estates. The committee was to make suggestions about how the future government might be structured. However, the committee could agree only to annul the coronation charter and to propose that the king draw up a rescript for the benefit of the king, the kingdom, and the estates. Precisely what the rescript was intended to regulate is not known – but in any event it gave Frederik III freedom of action.

In November 1660, a Council of State (statskollegium) was established to replace the Council of the Realm. The Council was to handle all domestic and foreign matters. After a thorough discussion the Council was to recommend the necessary decisions, but these could not be implemented without approval of the king.

In early 1661, it became apparent what kind of constitution the king wanted as the foundation for his new regime. On 10 January 1661, he sent a document – later called Enevoldsarveregeringsakten (the absolute inheritable government act) – separately to the three estates. The document was drawn up as a letter of obligation from the estates to the king in which they, without being requested to do so by the king, paid homage of their own free will to the king ‘as an absolute sovereign hereditary lord’. In a single passage, Enevoldsarveregeringsakten presented a consistent, absolute and dynastic concept of the state, in that it emphasized that the promised regularization of the succession would function as a fundamental law for all subjects and as a public statute. More was not necessary as the absolute monarch was raised over all human laws. He was subject only to divine and natural law like all other mortals.


The question now arose whether a constitution was necessary. French absolutism functioned without one, but Frederik III decided to have one written. It became *Lex Regia* of 14 November 1665, and made Danish absolutism constitutionally the least circumscribed in Europe.

Preliminary work on *Lex Regia* and some contemporary incidents indicate that there were people in Denmark who desired an ultra-absolute constitution. The attorney-general, Søren Kornerup, composed his own draft of a royal law in which the king’s rights superseded all others. During 1662 the Council of State clearly repudiated Kornerup’s ideas. It is apparent from Kornerup’s notations that he thought that the law commission would re-institute coronation charters, which should not be possible since the king ‘is no longer *in aequilibrio* with his subjects’.

Kornerup’s draft is characterized by a deep fear that government officials in the course of daily administration would assume part of the king’s absolute power. While Kornerup was defeated personally, since he was dismissed from the office of attorney-general, his principles prevailed. *Kongeloven, Lex Regia*, signed in 1665, was an extreme expression of royal power. However, as it was kept secret until 1709, the practical immediate outcome was that government officials could assume part of the king’s absolute power as feared by Kornerup. Yet *Lex Regia* had in fact been promulgated in 1670 at the coronation of Christian V. The secrecy was necessary, argues Sebastian Olden-Jørgensen, to avoid the contrast between the theory of absolutism – as described in *Lex Regia* – and the practice of absolutism – as it came to be expressed in government, law courts and administration – becoming a political problem. The conflict between royal autocracy and bureaucratic rule can be described as the structural problem of absolutism, and it was probably the bureaucracy that in 1709 was the driving force behind the publication of *Kongeloven*. Eighteenth-century Danish absolutism was primarily to become a bureaucratic absolutism.

Compared to the coronation charters *Lex Regia* does not say very much about the legal ideology of the country. Article III merely states that only the Crown had the

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34For the case against Kai Lykke, who was accused of *crimen lèse majesté*, because he had insinuated a love affair implicating the queen, see S. Olden-Jørgensen, ‘Generalfiskal Søren Kornerup – en af absolutismens uheldige høje’, 22.1066 (1992), 17f.
35The commission consisted of twenty-two members of the nobility, the learned community, and theburgers with the task of reforming the judicial process.
36Olden-Jørgensen, ‘Generalfiskal’, 18f.; Olden-Jørgensen continues, ‘the commission and the college of state had, in other words, luckily opposed the serious attack on the citizens’ rights [retssikkerhed] in relation to king and state that Kornerup had advocated,’ ibid., 23 (present author’s translation).
37Ibid.
38While laws as a custom were read aloud to the general public, the *Lex Regia* was only addressed to those present at the coronation.
power to issue or repeal laws, with the exception of *Lex Regia*. The king’s possession of the highest judicial authority is not even mentioned, although it was a royal prerogative recognized by all.

Danish absolutism resembled other European absolute regimes in that the king’s decisions in foreign policy were supreme, but it differed in two respects. Firstly it was limited in the sense that it was bound exclusively to King Frederik III and his male and female descendants. Secondly, Danish absolutism had – as something quite exceptional – a written constitution: the *Lex Regia* of 14 November 1665. In return for receiving the grant of hereditary rights to the throne the king had to issue a new fundamental law – the *Lex Regia* – to replace the discarded coronation charter.

**DANISH ABSOLUTISM AND THE THEORETICAL ‘RULE OF LAW’**

Nicholas Henshall emphasizes that while Jean Bodin can be seen as one of the most influential theoreticians of absolutism, he had, nonetheless, maintained that the authority of the monarch should be restricted by denying him the right to change the line of succession and by ordering him to levy taxes only with the consent of the estates. While the first of these restrictions became part of Danish absolutism, the second did not. Article III of *Lex Regia* established that the king could change all laws, with the exception of that part of *Lex Regia*, which delineated the lines of succession. In article V the monarch, as the commander-in-chief of the armed forces, was granted the power to levy taxes without anyone’s consent.

In discussing Swedish absolutism under Karl XI, Anthony Upton argues that one cannot speak of the ‘rule of law’ when the king can change laws arbitrarily and without the approval of the estates. No scholar questions that Danish absolutism was the most thorough in Europe. Firstly, the *Lex Regia* was, apart from the *Verneuerte Landesordnung* of Bohemia, the only absolute constitution in Europe; thus Danish

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44If the ‘rule of law’ is reduced to the question of whether or not the monarch is over or under the law, not much is left of the concept, when one remembers that, as Henshall writes, until 1947, the English Crown could not be taken to court, see Myth, 168.
45Henshall, Myth, 126.
46Ibid., 129.
47Around the end of the Thirty Years War, many German princes introduced taxation without the consent of the estates, P.H. Wilson, Absolutism in Central Europe, London, 2000, 84.
48A.D. Jørgensen, ed., Kongeloven og dens Forhistorie, Copenhagen, 1886, 44.
49After 1660, the estates did not meet again until 1835. Henshall is, unfortunately, on thin ice when, after having discussed the aristocracy’s participation in the tax negotiations in Schleswig-Holstein, he writes, ‘these provinces stood in a special relation to the Danish Crown, but arrangements are unlikely to have been totally different elsewhere’, see Henshall, Myth, 185.
50A. Upton, ‘Absolutism and the “Rule of Law”: The Case of Karl XI of Sweden’, 8 Parliaments, Estates and Representation (1988), 36. Upton is, however, considering the “rule of law” on the basis of ‘constitutional law’; at page 33 he admits that, ‘in a general sense there was a [sic] ‘rule of law’ under Swedish Absolutism . . . it was based on the written Land Law’.