

# 0315

## LAW AND ECONOMICS IN DENMARK

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### Abstract

Law and economics is a small but growing area of research and teaching in Denmark.

Economic reasoning applied especially to tort law has a long precedent in Denmark, but often meets with opposition. At the universities, only little research in law and economics is done within the law faculties and there is no chair in law and economics. At the business schools the interest among legal scholars seems greater, as is manifested by the establishment of a law and economics programme at some of the major business schools. Economists show an increasing interest in law, and this is largely due to developments within the theory of industrial organization, mechanism design/contract theory, and institutional economics.

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### 1. Ussing's Early Contribution

Around 1900, there was a wave of interest in law and economics reasoning among Scandinavian tort scholars. The inspiration was a book by lawyer-economist Victor Mataja (a student of Menger) who advocated strict liability on the basis of the principle of internalization. The wave may be said to have culminated in the doctoral dissertation of the Danish jurist Henry Ussing in 1914. He analyzed the question of strict liability vs. negligence in tort law against the background of neoclassical economic principles. Ussing advocated strict liability for 'extraordinary acts which involve unusual danger'.

Much of his reasoning was couched in today's modern terms of prevention, risk-allocation and administration costs. His arguments are modern. For example, with respect to prevention he mentioned as an argument for strict liability the problem of 'non-observability' (though he does not use this term), that is the difficulty for the judge of knowing the particulars of a case, which means that not all 'truly sensible precautions' will be made under the negligence rule. He also mentioned that strict liability may induce more innovation in safety. Ussing's main argument for restricting the scope of

limited liability to extraordinary acts concerned the administrative costs of insurance, including 'not only the expense of enforcing claims but also of administration expenses in the widest sense'. In conclusion, Ussing's analysis is an early example of the application of economic principles to tort law.

However, Ussing's (and Mataja's) analysis was met with scepticism by most Danish jurists. Even today, most leading Danish tort scholars seem sceptical of the law and economics approach. For example, in the leading textbook on tort law (Von Eyben et al., 1995, p. 35) one reads: this theory - like all other prevention theories - in the end rest on a speculative foundation'.

## 2. More Recent Contributions

Since Ussing's doctoral dissertation in 1914, three doctoral law theses (to be distinguished from PhD dissertations, the doctorate thesis is usually larger than a PhD) and one PhD thesis have combined law and economics.

Bo Von Eyben, in 'Kompensation for personskade' (Compensation for Personal Injury) (1983) discussed the economic approach to tort law at some length, including references to the works of Ussing, Calabresi and Posner. As in the textbook mentioned above, the author was sceptical of the value of the economic approach.

Jens Fejøl's dissertation (1985) in English translation (1990) was entitled 'Monopoly Law and the Market - studies of EC competition law with US American Antitrust Law as a frame of reference and supported by basic market economics'. He compared American competition policy with that of the European Common Market (in particular with respect to the use of 'per se' prohibitions versus 'the rule of reason') and made extensive reference to economic theory in his attempt to derive prescriptions.

Jan Schans Christensen's doctoral dissertation from 1991, 'Contested Take-overs in Danish Law - A Comparative Analysis based on a Law and Economic Approach' discussed the need for legal reform in Denmark to facilitate contested take-overs.

Thomas Riis's PhD thesis 'Ophavsret og Retsøkonomi' (Intellectual Property and Law and Economics) (1996) deals, within an economic model, with the optimal law of copyrights. His thesis is the first to be written by a cand.merc.jur which combines law and economics.

The history of Danish economists' contributions to law and economics is difficult to write. Naturally, many economists have been active in designing laws and regulations, as members for example of expert committees. However, we will refrain from delving into how economic thought on law has developed 'in practice', so to speak. Basic economic research in law seems a recent phenomenon in Denmark.

### **3. Present Research**

As in other countries, both law scholars and economists show an increased interest in law and economics. Law scholars are doing work on the law and economics of intellectual property, contract law, company law and competition law. Among economists, work is done in competition law, property rights, tort law, tax law, environmental law and company law. However, the total number of researchers in these fields amounts to a handful of law scholars and perhaps a few more economists. There is at present no research in such areas as the economics of litigation, criminal law, or family law. Law faculties of universities have no chair in law and economics and it is not part of their research agenda.

Two positive developments are worth mentioning. First, an increasing number of economists work on subjects which have a clear connection to law. Industrial organization, the theory of contracts and the theory of mechanism design (institutional design) have, as in other countries, become new major fields of study. This has already spilled over into law and economics research. A few economists with a background in industrial organization and contract theory are at present applying formal economic modelling to competition law, tort law and environmental law. This is a new development. Second, it is widely recognized that more research needs to be done in this area. At present, there are good incentives for going into this area of research both, it seems, in terms of future faculty positions and in terms of the funding available from different sources.

On the negative side, development of the field seems hampered by misconceptions and misunderstandings between jurists and economists. Communication difficulties certainly exist between the two paradigms, as in other countries.

### **4. Courses in Law and Economics**

The teaching of law and economics has mainly expanded at the Business School of Copenhagen, the Business School of Aarhus and at Ålborg University. In the middle of the 1980s, the three institutions began a law and economics programme, consisting of a 3-year undergraduate study and 2½ years of graduate studies. This is perhaps the main positive development within law and economics and it is hence worth giving some details about the study.

At the Copenhagen Business School, 588 students are at present enrolled as law and economics students (373 undergraduate and 215 graduate students), in Århus the number is 251 (177 undergraduate and 74 graduate students), and in Ålborg University the number is approximately 250. At the Copenhagen Business School the total number of students who have finished their graduate

studies from the beginning to the present is 163, in Århus it is 124 and in Ålborg it is approximately 160.

Some of the graduate courses are taught jointly by a law scholar and an economist, for example Tort and Insurance Law and Competition Law, at the Copenhagen Business School. The programme enjoys a good reputation and candidates have in general had no problems finding jobs in the private or public sector. However, it is fair to say that the students are given more training in law and legal method than in economics. In particular, economic modelling is given very little attention.

Outside the business schools little is happening in terms of incorporating law and economics into education, though there are signs of an increasing interest. At the law faculty of Copenhagen University, a course in law and economics was established last year, but so far with only a low attendance. In Aarhus (the second largest city), a similar course was begun some years ago but it has been abandoned since.

Students of economics are rarely taught law, with the exception of a course in business law at the undergraduate level at the business schools. Economic students may, however, obtain credit during their graduate studies for following courses at the law faculty. In general, however, economists' knowledge of law is very limited at the time they finish their education. Formerly, law was a first-year mandatory course, but this is no longer so.

Law students are generally taught a first-year course of elementary economics (although it looks like this course may be cancelled soon at Aarhus University).

## **5. The PhDs**

It is worth paying attention to the number of PhD students which the subject attracts, since this number (and the quality of the students in combination with the quality of the PhD education) is likely to be important for the future of law and economics in Denmark, even though it must be remembered that some of the best students study abroad. One can hope, and it seems likely, that the latter will be of importance in importing law and economics into Denmark.

The number of PhDs working in the field of law and economics is expanding. As a result of the establishment of the law and economics line of education mentioned above, this is particularly the case in the business schools. A handful of graduates with a law and economics degree are presently writing PhDs, most of them at business schools. Only a couple of these PhDs, however, combine law and economics in their research, while the rest have mainly specialized in law. At the law faculties of universities, there is at present only one PhD student in the field of law and economics (at Copenhagen University, in contract law).

## 6. Conclusion

Law and economics, that is, the application of economic theory to the field of law, is a growing area of research and teaching in Denmark. However, the area is at present small, even in relation to the size of the country.

The following features stand out: economic reasoning applied to law has a long history in Denmark, but has often met with opposition. At the universities, only little research in law and economics is done within the law faculties. At the business schools, the interest among legal scholars seems greater, as is manifested by the establishment of a law and economics programme at some of the major business schools.

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