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Studi per il settantesimo compleanno di Mario Ascheri

IL CAMMINO DELLE IDEE DAL MEDIOEVO ALL'ANTICO REGIME

Diritto e cultura nell'esperienza europea

a cura di

Paola Maffei e Gian Maria Varanini

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From Oral to Written Legal Culture
When Access to the Law is Depersonalised

by Per Andersen

1. *Introduction*

> While it is in the King's power to give or to amend laws, We do not give this law as a new law, as it has stood from time immemorial, but We proclaim it anew to recall to the memories of men from which it may have faded away, lost in the mists of ignorance by the passing of time, as is the way of forgetfulness[1].

These words conclude King Canute VI's review of the provisions of the Decree on Homicide of 28 December 1200, which regulated procedures and sanctions in connection with homicides committed in the province of Scania, at that time part of Denmark. With this decree Canute VI (r. 1182-1202) clearly stated that oral law belonged to the past and written law was the future, and in this contribution to Mario Ascheri's *Festschrift* I will discuss what happens to the law and to the accessibility of the law when the law is written down in contrast to the oral basis existing in «the memories of men». Based on the example of 12th and 13th century Denmark, I will make some general comments on the conditions for and consequences of moving from oral legal norms to legal rules set down in writing and on the question of the accessibility of the law, i.e. on whether the members of society find it easier to obtain knowledge about and to understand the law when it is written down compared to the oral culture prior to the written records.

2. *The accessibility of the law in a society where it is oral*

When considering the accessibility of the law prior to the time it is written down, i.e. in a society where it is transmitted orally, the legal historian must address the anthropological research on pre-literate societies, and fortunately modern anthropological findings are generalised so they may be assumed to reveal something about all pre-literate societies, across time and space (of course with the uncertainties in consequence of doing so).

[1] *Diplomatarium Danicum*, udgivet ved [edited by] F. Blatt *et al.*, København 1938 ff., 1st series, Vol. 4, No 24, § 9.

2.1. *The established customs*

The modern school of research into oral cultures and their forms of communication was established in the 1920s and 1930s by the classical linguists Milman Parry and Albert Lord. On the basis of empirical studies, Parry and Lord developed a theory of how historical tales and epics were transmitted from generation to generation in pre-literate societies. They observed that the singers of epics composed a new song or tale on each occasion they sang, but that they did so on the basis of some individual, simple and easily memorable formulas which they could draw on to carry the story forward when the singer reached a decisive or a difficult point. These formulas made it possible to perform long narratives and gave the singer some security in the performance, at the same time ensuring that the listeners could recognise the telling of the story, not only in relation to its main points and its moral, but also in relation to the construction of its key episodes. According to the Parry-Lord theory, this did not mean that the singer could not give different meanings to the same phrase, depending on what he wanted to highlight, or the direction in which he wanted to take the story. On the contrary, the singer could simply use a particular phrase which he had ready at hand in whatever context he chose[2].

In its essence, the Parry-Lord theory still enjoys overwhelming support, among others by the late Walter J. Ong who has had focus on how the medium of communication itself affects the content of what is communicated[3]. According to Ong, in oral cultures what is communicated is typically kept at a simple level and such communication is characterised by a style of mnemonic repetition, carried forward by «and then … and then …», rather than by linguistic variation. The content is characterising rather than analytical; the story proceeds from the beginning to the end and is coherent rather than jumping about in time and place; the content can be recognised by the listener by being built up around the lives of people; the approach is to be empathetic and to identify with characters, rather than being distanced and objective; and the content is concrete and only abstract to a limited extent. According to Ong, the reason why the message or story is so concrete, plain and relatively simple is that it must be understood by the listener first time – it is not possible to go back and check what has been said or argued, and it is not possible to compare two different statements made at different times in the same way as with written communication.

However, according to Ong, a simple message without too may nuances means that the listeners will be relatively conservative and traditional. All will know and be able to remember the simple message, so it will be difficult to change or embroider upon it. A clear and simple legal rule will also be easier to remember than one that is more complex or dependent on the content of other provisions. This has a huge influence on law as both in the present and over time

[2] J.M. Foley, *The Theory of Oral Composition. History and Methodology*, Bloomington (IN) 1988; W.J. Ong, *Orality and Literacy. The Technologizing of the Word*, New York (NY) 2002, pp. 17-30.
[3] Ong, *Orality*, pp. 37-57.

there will be a certain inertia within a given society that will resist change to the law, to making refinements or revolutionary changes to its content. Thus, change is mainly possible if there is doubt about the formulation of the law or its consequences for certain members of society, if there are repressive power holders who can change the law to their own advantage, or if the members of the society in general doubt the effectiveness of the rule. In these circumstances it is possible to envisage changing a law which all the members of an orally-based society know or can quickly get an insight into.

What is special about oral communication is that it must be made face to face. It is not possible to communicate over greater distances, without either the giver of the message standing face to face with its recipient of it, or by means of a messenger. This sets limits to the accuracy and clarity with which messages can be communicated over greater distances. In practice this means that it would be very difficult to establish and maintain an imperial state in cultures that are based on oral communication. If a ruler wants to rule over a large area, he must accept a considerable degree of freedom of action by those people who live furthest from the centre of power. In the case of the law, this means that a ruler who would build an empire must accept a pluralist state of the law and can only have limited control over whether subjects living in outlying regions carry out the instructions issued by him[4]. This is probably also the reason why some colonial powers became successful: they incorporated a legal pluralism in their governance systems[5].

According to anthropologists, the simple message known to all in a given society, the consequent conservatism about changing legal rules and the resistance to imposed norms that are found in pre-literate societies mean that in such societies the law is the same as custom. The law is what is remembered as being the law and what is passed on as the law from preceding generations[6].

This means that the members of a small, pre-literate society will have a good ability to obtain knowledge of the law, as it will always be possible to ask and get an answer locally. However, knowledge can only be acquired in a public space as it cannot be acquired privately, as in the case of reading a law text yourself. The public space is also connected to the social pressure on settling disputes. In small societies it is highly probable that there will be some social pressure for the parties to come to a peaceful settlement so the internal order, the homogeneity and cohesion of the society, is not disturbed by nominating a winner and a loser[7]. This is supported by the fusion of law and social norms as the simple, concrete

[4] J. Goody, *The Power of the Written Tradition*, Washington-London 2000, pp. 27-40.
[5] L. Benton, *Law and Colonial Cultures. Legal Regimes in World History, 1400-1900*, Cambridge 2001.
[6] J. Goody, *The Logic of Writing and the Organization of Society*, Cambridge 1986, p. 130, with further references.
[7] Examples in P. Andersen, *Studier i dansk procesrets historie. Tiden indtil Danske Lov 1683* [*Studies on Danish Procedure Legal History until the Danish Law 1683*], København 2008, partly translated and re-edited in *Legal Procedure and Practice in Medieval Denmark*, Leiden 2011 (Medieval Law and Its Practice 11).

rules of law will be recognisable for those who ask about it or who need to know and understand it, and as a large proportion of a small community's members will regularly be present at and take part in legal communication in local forums, ideally ensuring a high degree of agreement between people's understanding of the law and the law itself[8].

2.2. *New "customs"*

There is no doubt that there have been norms for socially acceptable behaviour in pre-literate societies, and sanctions for breaches of such norms. However, in recent years more studies have cast doubt over whether there was a specific system consisting of clearly formulated provisions which collectively formed a wholly custom-based norm or legal system.[9] Anthropological studies have indicated that such local custom-based "legal systems" was a transition between prehistory and the process of change in a society: When colonial powers encounters relatively clearly formulated legal provisions in the areas they occupy, such provisions are not necessarily traditional older customary law but rather newly formed law which the tribes and regions hold onto in opposition to the new centralising colonial power. They do so in order to protect themselves from the social uncertainty which is the result of the creation of the colonial state in the initial phase. Thus, well formulated customary law is more part of the centralising process and an expression of contemporary interests and ideologies than a definite survival from older social structures[10].

If this is the case, this naturally has consequences for the ordinary tribesman's or villager's access to the law, as on the one hand it becomes even clearer that it is those who formulate the law in relation to the new colonial masters that can influence the law in a new and possibly even radical direction (for their own advantage), and on the other hand it may be necessary to consult the law in writing if it is radically new and thus largely unknown by others than those who have taken part in drawing it up.

If this assumption is transferred to Denmark of around 1200, some of the provisions of King Canute's decree may probably have had some basis in the local tradition of Scania. Also, in connection with the centralising power of the king, the decree may have been more clearly formulated by a small group of the people of Scania whom the King consulted or by the King and his counsellors on their own, attempting to influence the development of the law in a desired direction. As the decree ends by referring to the Archbishop and some of the province's most powerful men, the proclamation seems to indicate there was

[8] H. Zahle, *Kritisk proces*, København 1974, pp. 60-61.
[9] M. Pilch, *Der Rahmen der Rechtsgewohnheiten. Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte*, Wien 2009; M. Chanock, *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia*, Cambridge 1985, pp. 3-67.
[10] Chanock, *Law, Custom*; S.F. Moore, *Law as Process. An Anthropological Approach*, 2nd ed. (with a new introduction by M. Chanock), Hamburg 2000.

some negotiation about the law rather than a more positive laying down of the law by the King. So, probably the decree was written down because the rules were new and unknown to many. If the people were to have the opportunity to learn it and remember it, it simply became necessary to write it down. Only in this way would it be possible to obtain knowledge about and refer to the newly applicable law which had been drawn up in the meeting and in negotiations with the king, a church that was growing in influence, and the local society.

3. *Access to knowledge about the law in a literate society*

In the period c. 1170 to the 1320s the Danish provincial laws for the provinces of Scania, Zealand and Jutland were written down and frequently extended and edited to adapt to new problems arising in society[11]. The constant willingness to rewrite, adapt and give new laws was not unique to Denmark but is seen in several places in the Europe of that time, so the writing down of the law does not give the impression of expressing a mindless ossification of the existing law, but rather a conscious method for trying to shape society in the form desired by those writing down the law.

According to anthropologist Jack Goody, the ability to write and to develop a written language is the essential technical tool that have driven historical developments by making it possible to exercise administrative power over greater distances. The earliest methods of writing were relatively difficult to manipulate, so that these written languages had limited relevance, but in Greece in the 7th century BCE a simpler and more flexible alphabetical written language began to be developed. Hitherto writing had largely to do with the registration of accounts, but the use of a more flexible alphabet quickly led to a desire to control time and space so that taxes etc. should be paid at appropriate intervals. From this registers and administrative correspondence were developed, and the major breakthrough came in connection with the recognition of the usefulness of writing in developing trustworthy communication independent of face-to-face meetings, making it possible to establish state power over greater geographical areas with a more or less uniform system of government[12].

3.1. *Consequences of the appearance of written laws*

Basically, the appearance of written language meant that it was now possible to revolutionise the characteristics that had marked the former oral communication. According to Goody, if one writes down a surviving myth that has previously been passed on orally, it is transformed at three levels.

[11] P. Andersen, *Lærd ret og verdslig lovgivning. Retlig kommunikation i middelalderens Danmark* [*Learned Law and Secular Law. Legal communication in Medieval Denmark*], København 2006.
[12] J. Goody, I. Watt, *The Consequences of Literacy*, in *Literacy in Traditional Societies*, edited by J. Goody, Cambridge 1968, pp. 27-69; Goody, *The Logic of Writing*, pp. 92-113; J. Goody, *The Interface between the Written and the Oral*, Cambridge 1993, pp. 54-55; Ong, *Orality*, pp. 80-82, 121-123.

At the linguistic level it will lose its relatively simple form, based on repetition, and now that it is possible to refer back in the text and check, there will be more linguistic variations which in itself reflect a deeper linguistic consciousness[13]. With a higher linguistic level than is possible with oral communication, the narrator can more easily clarify what is important and what is formulaic.

The same capacity applies at the structural level. Instead of communication being narrative and sequential, it now becomes possible to jump around in time and place. This enables the writer to make it clear, structurally, what is most important in the message. All things being equal, the possibility of reworking the text and making it structurally clearer must also mean that more (possibly hierarchical) information can be accumulated, and this in turn must lead to a greater awareness of the intentions of the person sending the communication.

At the level of the content, there are increased structural possibilities for showing the hierarchy of information and the writer's intentions and awareness, so that both what is communicated and the recipient's use of it can be more analytical then characterising. The content now is to a greater degree based on persuading the reader of the correctness of what is communicated by means of argument. What is communicated is thus more objective and distanced, and thus more rationalising, than empathic and identifying with the attitudes of the recipient. Since the writer often wishes to persuade or to have the text made understandable for as many as possible, the content becomes more abstract and general than was possible with oral communications[14].

However, the introduction of writing as a new and revolutionary means of communication did not have only positive effects on the volume and complexity of texts and the method used to follow up or rewrite the texts; there were also a number of disadvantages.

First, what is written down does not always reflect the reality. For example, putting in writing ownership relations sets the contemporary reality in stone, but it can only reflect the reality here and now[15]. Likewise, writing something down may simplify some phenomenon, such as a description of a complex ceremony[16].

Second, written communication can be discriminatory by excluding those who cannot read. When writing first becomes a widespread form of communication, it is necessary to be able to read (and maybe write) in order to have proper access to what is communicated. The increased literacy of society thus favours those with greater (learned) resources[17]. (Conversely it could be argued that if all can read it becomes possible to implement democratic rule over larger areas and greater distances[18], so that writing can both act as an excluding mechanism and an expansive and inclusive mechanism).

[13] Goody, *The Power*, p. 47.
[14] *Ibidem*, p. 78.
[15] *Ibidem*, pp. 80-81.
[16] *Ibidem*, p. 58.
[17] Goody, *The Logic of Writing*, pp. 113-119; Goody, *The Interface*, p. 182; Goody, *The Power*, pp. 109, 152, 155-157.
[18] Goody, *The Logic of Writing*, pp. 119-122.

Third, the effect of fixing things in writing is that it is possible to secure the knowledge that has been obtained in a society. However, the converse is that it becomes more difficult to change elements of society and traditions that are no longer necessary or relevant, but which have been committed to writing. Fixing something in writing can in itself be a conserving element[19].

3.2. *The effect of writing on access to knowledge about the law*

In Denmark in the Middle Ages written law was found in two different forms: the provincial laws which were in the vernacular, and the royal decrees such as Canute VI's Decree on Homicide which were in Latin. What was common to both was that the written form immediately depersonalised the law.

First, the manuscripts of the laws and decrees were not the sort of thing that just anyone could get hold of. Manuscripts were made by hand, and it took both skill and time to make copies of existing manuscripts. And, of course, it was necessary to have the text to copy. It was not easy to acquire a version of the written law; generally it either required a lot of money to buy such a manuscript, or to have access to a library. For the ordinary farmer or burgher, it was virtually impossible to get hold of such documents. Thus the depersonalisation of the law by writing it down meant that for the population at large access to knowledge about the law was made more difficult.

Second, only few people were capable of reading. It was difficult, and for the illiterate impossible, to obtain direct knowledge and understanding of the law which was now written down. This might well stimulate interest in learning to read, but this again required time and economic resources which were only available to few. In this sense, written communication can be discriminatory by excluding those who cannot read, and thus it becomes an instrument of power. The king and his court – and others – were not literate because of an interest in learning, but because it was useful in order to hold power[20].

Third, the transition from oral to predominantly written transmission meant that over time the law could become remote from everyday reality. The formulation of law always reflects a norm, i.e. it reflects the rules of conduct, a principle or a desire for how society ought to be ordered, and how society should react to those who do not comply or who disagree with the content of the norms. Writing them down fixes such rules of conduct or norms, and they become more difficult to change as they can always be brought out and presented as being authoritative, so the split between the reality reflected in the written text and the reality experienced by the people becomes wider over time.

Fourth, the transition from oral to predominantly written laws meant that it was now possible to communicate over greater distances about what was the law, and this in itself led to some problems between the written norms and the

[19] Goody, Watt, *The Consequences*, p. 68.
[20] M.T. Clanchy, *From Memory to Written Record. England 1066-1307*, 2nd ed., Chichester 1993, pp. 271-272.

practice on the ground. The geographical area that could be regulated and directed by means of written norms became greater, and this eroded the distance between the lawful, i.e. written, norm and reality. In smaller oral societies the law and legal norms were something that each person absorbed almost with their mother's milk – they were part of the rules of conduct which were internalised from childhood on by the customs of the society. This meant that there could be great variances between how the law operated in practice in different places. Thus local communities lost the possibility of formulating and applying the law in the way they thought right. This was probably not readily accepted in all local communities and in Medieval Denmark there are many examples showing that things were not always done in the way prescribed by the written law[21]. This is probably some of the reason why there are several additions to, amendments to and editing of manuscripts containing the Danish provincial laws: the written law was sometimes changed in order to reflect a local interpretation or practice[22].

Fifth, the transition to a literate society meant that economic transactions could be more complex, could be conducted over greater distances and became more explicit[23]. The content of legal documents could and should be expressed with greater precision to ensure that all parties agreed about how an agreement or rule should be understood. It also meant that legal problems could be narrowed down and that evidence of claims had to be made more explicit, which in turn led to greater focus on obtaining one's rights rather than on a compromise between the parties[24]. However, this did not necessarily mean that a document could stand alone as evidence. Documents were often important by mere virtue of their existence, but the content of a document may have been less significant[25]. Transactions in connection with real property were often supplemented by some non-written action, such as a conveyance, symbolising the property being transferred. Thus, writing did not engender the same trust in the written documentation, as oral transactions were often more public than what was written down. For this reason, documents were not merely presented but also read aloud in court proceedings. This enabled illiterate people to take part in proceedings where writing was involved[26]. This is seen, for example, in the summoning of people to come before a court: While a summons was in writing – containing information about who was the plaintiff, who the defendant, what the claim concerned and when the person summoned should attend the court – it had to be read aloud to the person summoned and in public in order for it to have effect[27].

[21] Andersen, *Studier i dansk procesrets historie*.
[22] Andersen, *Lærd ret*; Andersen, *Studier i dansk procesrets historie*.
[23] Goody, *The Logic of Writing*, pp. 144-151, 154-159.
[24] *Ibidem*, p. 153, with references to literature.
[25] K. Heidecker, *Communication by Written Texts in Court Cases: Some Charter Evidence (ca. 800-ca. 1000)*, in *New Approaches to Medieval Communication*, edited by M. Mostert, Turnhout 1999, pp. 101-126; Clanchy, *From Memory*, p. 267.
[26] *Ibidem*, pp. 267-276.
[27] *Ibidem*, pp. 272-273; Andersen, *Lærd ret*, pp. 172-174, 254-257.

Sixth, the transition from oral to written law also saw a transition from concrete formulations of the law and concrete effects to more abstractly formulated rules. When it is possible to refer back, restructure and rework the legal rules, it is also possible to make decisions by analogy, rules on the same subject can be collected together, and it becomes possible to distinguish between general principles and exceptions to them. Knowledge of the law and insight into the law can be arranged hierarchically. Part of this process was the transition to recording court rulings in writing, since this made it possible to consult previous decisions, and create a body of precedents and the ability to categorise and systematise the many past decisions, making it possible to make analogous decisions based on specific decisions in similar cases[28]. A consequence of writing down court rulings was that it became necessary to organise the courts in such a way as to make it clear which decisions took precedence over others, i.e. to establish a hierarchical system[29].

For there to be such a development it was a prerequisite that there should be people in society who were able to understand the law and operate it in such a way that it was possible to write it down in the first place, and to make it systematic and hierarchical. It is presumably this preliminary stage that is reproduced in the provincial laws of Denmark with their very specific, non-abstract rules structured in groups dealing with inheritance law, property law and so on[30]. One of the consequences of the transition from an oral to a predominantly literate culture is that those who do not have the necessary skills find access to the law more difficult as it requires some insight into the language of the law and into its systematisation and hierarchy in order to relate the formal and increasingly abstract rules into analogous concrete decisions, and to do so correctly with knowledge of the proper procedure and previous decided cases. The transition from oral to written may not require people to have highly specialised knowledge of the law in its first phase, but the transition did require there to be somebody who had at least a basic knowledge and who could pass on this knowledge in a coherent way. Thereafter it must quickly have become a requirement for there to be people who could do more than just read the written law in order to perform the more abstract reworking of the written law and to develop it and apply it to concrete circumstances, just as it is seen in the appointment of jurors as known from the Danish provincial laws[31].

Seventh, the transition from oral to written law means that there can be conscious inclusion or exclusion of those who can or cannot have access to knowledge of the law. The choice is that of the law-giver, and the mechanism for inclusion or exclusion is the choice of language in which the law is formulated and made public. The law can be promulgated in a language which all or only few members of the society can understand.

[28] Goody, *The Logic of Writing*, pp. 137-139.
[29] *Ibidem*, p. 143.
[30] Andersen, *Lærd ret*.
[31] Andersen, *Studier i dansk procesrets historie*.

It appears from the provincial laws that there was a Danish legal language prior to the spread of Latin[32], i.e. that the law was relatively accessible to all who could understand Danish. However, this accessibility is not found in the king's law-giving, in the form of decrees which was drawn up in Latin[33]. This restricted access to the law for those who did not master Latin, but the fact that the decrees were given in Latin must have given rise to some interest in learning it in order to become a member of the increasing powerful group of law-knowing men[34]. The reason why royal decrees were promulgated in Latin in Denmark could be multiple: that those who drew up the new law-giving measures of the central power communicated with each other about the law in Latin, since they were trained in that language; that the king's counsellors deliberately wished there to be some social stratification to the benefit of the hierarchy of the king's counsellors or for the establishment of a feudal society; that the king's counsellors were more focused on showing the church what was done to improve the law normatively than in making such measures effective in practice; that the king's counsellors protected themselves against too vocal an opposition to new rules, since only few could understand and directly oppose them; that the king's counsellors simply drew up the new rules in the language they worked with, knowing that they would be made public in the vernacular by those with knowledge of Latin who regularly addressed the political assemblies and courts.

There are possibly additional grounds to these, but it is also highly probable that several of the reasons have combined to influence the decision to promulgate royal decrees in Latin. But one thing is certain – that accessibility to the law for the ordinary people suffered from it, as only few could refer to the new law as a primary source.

4. *Summing up*

I have offered a number of suggestions about the consequences of the transition from orally based law to predominantly written law for the accessibility of the law. This is a transition which nearly all human societies have made at some point, but I have tried to illustrate it using Medieval Denmark as an example.

One can conclude that, in a given society, the transition from orality to predominantly literacy on and about the law seems to have led to social stratification, based on skills and knowledge. The law was now only accessible to those who had or who acquired specialised knowledge. The rest of the population had to refer to these specialists for help in getting access to and understanding of the law. This meant that while the law could be used to regulate more and more situations, it became less and less accessible for anyone other than those who devoted their lives to working with the law and understanding it.

[32] D. Tamm, *Latein oder Dänisch. Zur Entwicklung einer dänischen Gesetzsprache im 13. Jahrhundert*, in *Sprache-Recht- Geschichte*, hrsg. von J. Eckert, H. Hattenhauer, Heidelberg 1991, pp. 37-48.