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RELIGION AND CRIMINAL LAW

RELIGION ET DROIT PÉNAL

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LISBET CHRISTOFFERSEN

RELIGION IN CRIMINAL LAW: DENMARK

Introduction: religious norms, criminal law and the protection of religion

The current Danish Penal Code from 1930 is understood as contributing to the modern breakthrough in Danish legislation (Hurwitz 1969). This accounts for the punishments (length and type) as well as for the systematic ordering of the law. The offences, on the other hand, still draw on a legal tradition which is hundreds of years old. Christianity influenced the law from the 13th century and this was greatly strengthened by post-Reformation legislation. The Reformation meant a break with Canon Law. Roman Law came into focus – except when it came to marriage law, penal law and other types of legislation related to the individual. In these fields the post-Reformation inspiration was the Decalogue. From 1683 the systematization of Danish penal law followed that of the Ten Commandments; offences were taken from Mosaic Law and punishments were also inspired by these sources (Tamm 1983; Tamm 2005). Much of this inspiration was down-scaled during the enlightenment and the first penal law following the constitution of 1849, but offences still show the old Christian influence. The Danish penal code, for example, has what is often called a *Samaritan rule* – everyone who, without any special danger to himself or anyone else, is in a position to help another person in obvious danger of his life, must do his best to save such other person; failure to do so may give rise to 2 years' imprisonment.¹

Crimes in relation to religion

Also the offence of *blasphemy* comes from post-Reformation 1683 Danish Law. It stands alongside other provisions protecting religious aspects of life in a chapter in the penal law concerning crimes against public

¹ Strl §253: "Med bøde eller fængsel indtil 2 år straffes den, som, uagtet det var ham muligt uden særlig fare eller opofrelse for sig selv eller andre, undlader 1) efter evne at hjælpe nogen, der er i øjensynlig livsfare..."

order and peace.² The blasphemy rule provides that “a person, who publicly mocks or insults the dogma/creed or cult/form of worship of any religious community lawfully present in the country, is to be fined with a maximum of 4 months’ imprisonment”.³ The rule thus covers *religious feelings* related to all types of creed, not only Christianity. Several suggestions in Parliament over the years (since the Cartoons crisis) have proposed to remove blasphemy from criminal law. A leading professor in criminal law supports the suggestion based on the argument that freedom of speech in relation to powerful institutions (monarchy, religion etc) has brought us to the current enlightened stage in Europe; however, a leading professor in constitutional law suggests that the norm is upheld in the code with reference to the ‘public peace’-argument in order to protect religious groups from crimes not covered by the prohibitions on defamatory statements.⁴

The blasphemy rule was used in 1938 in a rather famous judgment with regard to changing the content and meaning of Jewish religious writings in Nazi propaganda. In order to protect the (Jewish) religious minorities further, the Danish parliament in 1938 added a paragraph penalizing defamation. This rule was later changed and widened in order to meet international standards, so that the Danish criminal code, as with all other European legal systems, now contains a rule criminalizing defamatory statements about a group of persons on the grounds of *inter alia* their religion or personal beliefs.⁵ The legislative question, currently being investigated, is whether or not the possible crimes are all covered by §266 b; or whether or not this rule should be widened if the relevant protection should be secured in the event that the blasphemy rule is removed.

² Strl. Kapitel 15: Forbrydelser mod den offentlige orden og fred.

³ Strl. §140: Den, der offentligt driver spot med eller forhåner noget her i landet lovligt bestående religionssamfunds trosfærdighed eller gudsyndelse, straffes med bøde eller fængsel i indtil 4 måneder.

⁴ See e.g. L 90 2007-08, 2. Samling: Forslag til lov om ændring af straffeloven (ophævelse af straffelovens blasfemibestemmelse), fremsat 28 februar 2008, med bemærkninger samt særligt udvalgsbehandlingen med svar fra Justitsministeren på spørgsmål fra udvalget; beretning fra udvalget samt referat fra offentlig høring 22. Maj 2008 med deltagelse af professor Vagn Greve og professor Henning Koch. [references are made to the relevant suggestion of new laws in the Danish Parliament and the public hearing involving the participation of Professor Vagn Greve, criminal law, and Professor Henning Koch, constitutional law. The Parliamentary committee decided to request a scientific analysis and ask the government to suggest a proposal for new laws. This proposal has not yet been made]. See also Koch 2006.

⁵ Strl. §266 b.

Different groups in Danish society tried to get the 12 infamous cartoons evaluated in relation to the blasphemy rule, but no case was initiated as they were far from being blasphemous in the Danish context. There were also two or three earlier cases in the 1970s and 1980s, where songs and paintings showing the Christian God and Jesus in very humiliating positions did not lead to a blasphemy judgment (Christoffersen 2005 gives an overview).

Moreover, as part of the protection of public peace, the criminal law penalizes the disturbance not only of meetings in parliament and public councils, but also religious services or other public religious functions (such as wedding ceremonies or funerals).⁶ All religious ceremonies are protected, no matter what confession, but in order to attract protection the ceremony must be public since the protection is designed for the public life of the country. In the same way *desecration of graves* is forbidden along with the *indecent handling of corpses* – again, no confessional distinctions are made.⁷ The same paragraph has a special blasphemy provision which penalizes the indecent handling of objects belonging to a church and used for religious purposes; this provision is also being discussed in relation to the blasphemy rule.

Proselytizing and apostasy are of course not crimes in Denmark and this has been the position since full freedom of religion was introduced with the constitution of 1849.

The misuse of religious garments is only protected in relation to the national church, not through a special law but through a general norm that misuse of garments belonging to Danish public authorities (which in certain matters also covers the ministers of the national church) is criminalized.⁸ *Secrets of confession* are protected in relation to all functions of ministers of the national church because they are civil servants.⁹ The secrecy of confession is only protected in relation to religious leaders from other confessions in those situations in which such leaders exercise public

⁶ Strl §137, stk. 2:.. straffes den, der ved larm eller uorden forstyrrer offentlig samling af Folketinget, Færøernes lagting, kommunale eller andre offentlige råd, gudstjeneste eller anden offentlig kirkelig handling, eller som på usømmelig måde forstyrrer ligfærd.

⁷ Strl §139: Den, som krænker gravfreden eller gør sig skyldig i usømmelig behandling af lig, straffes med bøde eller fængsel indtil 6 måneder. På samme måde straffes den, som gør sig skyldig i usømmelig behandling af ting, der hører til en kirke og anvendes til kirkeligt brug.

⁸ Strl. §132, stk. 1, nr. 1: Med bøde straffes den, som forsætligt eller ved uagtsomhed på retsstridig måde benytter kendetegn eller dragt, som er forbeholdt dansk eller fremmed offentlig myndighed eller militærperson

⁹ Strl. §152: Den, som virker eller har virket i offentlig tjeneste eller hverv, og som uberettiget videregiver eller udnytter fortrolige oplysninger, hvortil den pågældende i den forbindelse har fået kendskab, straffes med bøde eller fængsel indtil 6 måneder.

power.¹⁰ That is the case as to the general permission for religious ministers to perform marriages under the marriage act; Danes may choose between civil marriage or religious marriage according to civil legislation (whereas religious laws are not in use with regard to religious marriages). Ministers from religious minorities such as the Catholic Church also exercise public power when they bury the dead, even though authority to decide the funeral for all citizens is delegated to ministers of the national church. All religious ministers (regardless of confession) are however protected by the *secrecy of confession* when administered in prisons and they are not obliged (or allowed) to function as *witnesses* before the courts.

Female genital mutilation is prohibited in Denmark under criminal law, and the act is punishable with 6 years' imprisonment. The rule is new in the criminal code (from 2003).¹¹ Moreover, in 2008 a new law was enacted to penalize *forced marriage*, technically by making it compulsory to see this as an aggravated form of common crimes of coercion, with imprisonment for up to 4 years.¹² Male mutilation is not criminalized, but there were serious suggestions to do so in public debate in 2009.

The question of *aggravation* has also been relevant in a couple of cases regarding *honour killings*, where the religious dimension has resulted in a more severe punishment – whereas a killing, based on jealousy would often result in an *attenuation* of the punishment.

The concept of *sects* is not known in Danish legislation. If a religious group as part of its activities breaks the criminal law, the religious dimension and a closed milieu might be seen as some sort of aggravation, but there have been no cases.

Religion in criminal law

As can be seen, religion as a protected function does not play a central role in criminal law, whereas there have been attempts to see religiously-motivated acts as more severe than other breaches of the criminal law.

¹⁰ Strl. §152 b, stk. 1: Med samme straf som efter §152 straffes den, som udøver eller har udøvet en virksomhed eller et erhverv i medfør af offentlig beskikkelse eller anerkendelse, og som uberettiget videregiver eller udnytter oplysninger, som er fortrolige af hensyn til private interesser, og hvortil den pågældende i den forbindelse har fået kendskab.

¹¹ Strl. §245 a: Den, som ved et legemsangreb med eller uden samtykke bortskærer eller på anden måde fjerner kvindelige ydre kønsorganer helt eller delvis, straffes med fængsel indtil 6 år.

¹² Lov nr 316 af 30/04/2008 om ændring af straffeloven (Skærpelse af straffen for ulovlig tvang i forbindelse med indgåelse af ægteskab): Tvinges nogen til at indgå ægteskab, kan straffen stige til 4 år.

However, where religious motivation does play a most crucial role is as the normative basis of the crimes. As far as I can see, the more central discussion for the future will be about which acts are to be seen as crimes and on what philosophical or normative basis in democratic societies with a plurality of religions.

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This book contains the contributions made to the conference 'Religion and Criminal Law', organized by the European Consortium for Church and State Research in 2008. The contributions represent national reports which deal with the topic in nearly all EU member states: each is written by a national expert. The book also contains an analysis of the status of religion in criminal law on a regional basis separately for Northern Europe, Western Europe, Southern Europe and the "new" EU states. The overall analysis was written by Professor Matti Kotiranta of the University of Eastern Finland.

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