

## Appendix 1. General project description

### Towards a European Legal Method: Synthesis or Fragmentation?

#### 1. Project relevance

The project will examine the extent to which it is possible to identify a coherent legal method (doctrine of the sources of law and their interpretation<sup>1</sup>) that may be applied when analysing EU law and the law of EU Member States within the scope of application of EU law.

The project is meant primarily to be basic research (Grundforschung) at a meta-level, not a dogmatic study of the selected substantive areas of law covered by the sub-projects (general project on European legal method in light of currently prevailing legal theories, EU market law and discrimination law). It aims to develop theoretical and conceptual tools that can facilitate a dogmatic examination of EU law, the law of EU Member States within the scope of application of EU law and the mutual embeddedness of EU law and the national law of Member States of the EU.

In the first years of its existence EU law was generally perceived as rather superficial, immature and fragmentary with many gaps and inconsistencies. Now, EU law is ripening and the mutual embeddedness of EU law and the national law of its Member States is becoming more intense. It is therefore both more possible and more necessary to identify and explain the legal method that is applied by European legal actors, in particular legal scholars and courts, when analysing EU law and the law of EU Member States within the scope of application of EU law.

There is only a limited literature on this subject.<sup>2</sup> The project will therefore develop important new knowledge and understanding and increase the transparency of legal scholarship on EU law and its interplay with the national law of its Member States, exemplified in particular by Danish law.

#### 2. Problem formulation

The project aims to answer three main research questions about the doctrine of the sources of law and their interpretation related to the development of EU law in interaction with the law of its Member States:

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<sup>1</sup> In accordance with the Danish (Nordic) tradition which is based on a modified and diluted form of Scandinavian legal realism we use the expression 'legal method' as referring to the doctrine of the sources of law and their interpretation which is used in dogmatic studies of law.

<sup>2</sup> See Ward, Ian: Making sense of Integration: A Philosophy of Law for the European Community, *Journal of European Integration* 1993 p. 101, MacCormick, Neil (ed.): *Constructing Legal Systems. 'European Union' in Legal Theory*, Dordrecht 1997, Bengoetxea, Joxerramon: *Institutions, Legal Theory and EC Law*, *Archiv für Rechts- und Sozialphilosophie*, 1991, p. 195, Bengoetxea, Joxerramon: *The Legal Reasoning of the European Court of Justice*, Oxford 1993, Hesselink, Martijn: *A European Legal Method? On European Private Law and Scientific Method*, *European Law Journal* 2009 p. 20 and Nielsen, Ruth: *Scandinavian Legal Realism and EU Law in Neergaard, Ulla, Ruth Nielsen and Lynn Roseberry (eds.): The Role of Courts in Developing the European Social Model – Theoretical and methodological Perspectives*, Copenhagen 2010 (forthcoming).

- What are the characteristics of the legal method(s) actually used by European legal actors, in particular legal scholars and courts, when making dogmatic legal analyses of EU law and the law of EU Member States within the scope of application of EU law or deciding cases applying these parts of law? When answering this question we will focus on three sub-problems:
  - The role of Article 234 EC in ensuring a uniform interpretation of EU law
  - The duty under Article 10 EC to interpret national law in conformity with EU law
  - The role of the teleological method of interpretation
- What changes in the relative importance of various sources of law occur in connection with the integration of EU law into national law? With regard to this question we will focus on:
  - The increased importance of soft law, including the open method of coordination
  - The increased importance of fundamental rights and general principles of law
  - The reduced importance of interpretation by reference to the preparatory works of legislation
- Can the currently prevailing legal theories in Europe, in particular legal positivism, natural law theory and institutional theory, explain the characteristics of the legal method(s) and the changes therein identified in answer to the first two questions – and if not, is it possible at present to formulate an evolving alternative theory?

In what follows, each of the questions will be further explained.

### 2.1. Legal methods actually used

The European Court of Justice (ECJ) has asserted in its case law that EU law is neither public international law nor national law, but rather a new kind of law (*a sui generis* law) that takes precedence over any national law, whatever it might be.<sup>3</sup> EU law aims to make all legal actors, in particular judicial bodies, in the EU interpret EU law in the same way and avoid or overcome its fragmentation into (27) different legal systems when meeting national law. To facilitate this, a new legal institution – the preliminary reference procedure in Article 234 EC – has been established. The ECJ has also held that national courts under Article 10 EC are required to interpret national laws in conformity with EU law, even when the relevant EU law does not grant individual rights that can be enforced in private lawsuits.<sup>4</sup> In spite of these efforts to promote a shared view of what the content of EU law is, many – probably most – national legal actors approach EU law in a way that at the methodological level is strongly influenced by their (different) national legal cultures.

According to existing EU law literature, the ECJ applies a teleological method of interpretation and often finds support in provisions in preambles. In *Palacios de la Villa* on age discrimination and *Maruko*<sup>5</sup> on sexual orientation discrimination, the ECJ, however, held that provisions in preambles cannot limit the fundamental principle of non-discrimination. The sub-projects will examine to what extent other legal actors than the ECJ can be said to apply a teleological method and what that method more precisely implies

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<sup>3</sup> Case 6/64 *Costa v ENEL* ECR [1964] 614

<sup>4</sup> Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen*.

<sup>5</sup> Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531 and Case C-267/06, *Maruko*, judgment of 1 April 2008

for the relative importance of different sources of law and whether there have been any changes in the use of the teleological method.

## 2.2. Changes in the relative importance of the sources of law

EU law consists of a number of different kinds of legal sources, some of which may be viewed as being constitutional in nature, while others fit the category of legislation, and then there is a third category that is neither, but nevertheless has significant legal effects. The legal effects of all these sources of law are dependent upon how the legal source is categorized. Treaty provisions and secondary legislation are thought to impose legal obligations on Member States in some way and sometimes also on individuals.

In many EU countries the traditional national doctrine of the sources of law and interpretation is put under pressure as a result of EU Membership. In the project we will identify and analyse the sources of law and methods of interpretation that have gained in importance and other sources of law and methods of interpretation that may be losing their importance in connection with the growing integration of EU law and national law.<sup>6</sup>

We put particular emphasis on the interplay between Danish law and EU law. In Nordic legal literature, it has for many years been usual to state that there are various sources of law, primarily legislation, precedent, custom, and the 'nature of the case' (Natur der Sache, forholdets natur, cultural tradition<sup>7</sup>). In a comparative perspective, the roles of preparatory works of (national) legislation and 'the nature of the case' constitute distinctive features of the Nordic doctrine of the sources of law. Much less emphasis has in Scandinavia been put on the constitutional dimension, fundamental rights and general principles of law. The Nordic countries are examples of majoritarian democracies as opposed to constitutional democracies.<sup>8</sup>

### 2.2.1. Soft law

An array of soft law instruments,<sup>9</sup> are generally acknowledged as not giving rise to any enforceable legal obligations (hence soft), but at the same time have some kind of legal value (hence "law"), and should thus be taken into account when interpreting binding law.

### 2.2.2. Fundamental rights and general principles of law

The ECJ has identified certain general principles of law on the basis of common constitutional traditions of the Member States, which are understood to include fundamental human rights and which the ECJ has held itself, the other EU institutions and the Member States when acting within the scope of application of EU law obliged to respect and uphold. There is probably a tendency towards changes in the source of law

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<sup>6</sup> See Nielsen, Ruth: Nordic Sources of Law in a European Environment in Cameron, Iain and Alessandro Simoni (eds.): Dealing With Integration: Perspectives from Seminars on European Law 1996-1998 (Skrifter Från Juridiska Fakulteten i Uppsala, 52), Uppsala 1996.

<sup>7</sup> In the English translation of *Ret og Retfærdighed*, Copenhagen 1953, translated into English as *On Law and Justice*, London 1958, Ross used the term 'cultural tradition' as translation of the Danish 'forholdets natur'.

<sup>8</sup> See Wind, Marlene: The Nordics, the EU and the Reluctance Towards Supranational Judicial Review, *Journal of Common Market Studies* 2009.

<sup>9</sup> See on soft law in EU law Senden, Linda: *Soft Law in European Community Law*, Oxford 2004.

called the 'Nature of the Case' from casuistic pragmatism in its interpretation to construction in line with fundamental rights and general principles.

### 2.2.3. Preparatory works of national legislation, in particular as a traditionally important source of law in the Nordic countries

In the Nordic countries, preambles are typically not used when drafting legislation. Many legal actors in these countries regard the preparatory works of legislation as a functional equivalent to preambles. The Nordic legislators' habit of placing some rules or observations about the law in the preparatory works of statutes and the importance attached to preparatory works as a source of law has given rise to two infringement cases brought by the Commission against Denmark and Sweden before the ECJ in connection with implementation of directives, see *Commission v. Denmark*<sup>10</sup> on the implementation of the Equal Pay Directive from 1975 where the ECJ ruled that Denmark had violated its duties under the EC-Treaty by partly implementing the Equal Pay Directive in the preparatory works of the implementing Act and not in its text and *Commission v. Sweden*<sup>11</sup> on the implementation of the Directive on unfair terms in consumer contracts<sup>12</sup> where Sweden had implemented part of the Directive in the preparatory works and not in the text of the implementing Act. Denmark and Finland had done the same and intervened in the case in support of Sweden. The Advocate general stated (emphasis added):<sup>13</sup>

The Commission claims that the importance of the preparatory work has declined as a result of Sweden's accession to the European Union, but the Swedish Government contests that assertion. *It is possible that the preparatory work for a law is still an important source of law in the Nordic countries.*

In the project we will examine whether the preparatory work for a law can still be said to be an important source of law in Denmark.

### 2.3. European legal method in light of currently prevailing legal theories

With regard to the third research question, we will examine the legal theories – with particular emphasis on legal positivism, natural law and institutional theory of law - that explain the characteristics of the legal methods observed in each of the subject areas studied. For example, we will examine the normative effects of soft law and how soft law is used to determine applicable law and what theory or theories of law best explain the way soft law is used.

The third research question is an open question with regards to whether legal positivism, natural law theory and/or institutional theory can play a role in explaining the characteristics of the legal method(s) and the changes therein identified in answer to the first two research questions. If the result should be that none of the currently prevailing theories can provide satisfactory answers, we will try to formulate an evolving alternative theory.

## 3. Theoretical framework

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<sup>10</sup> Case 143/83 *Commission v. Denmark* [1985] ECR 427.

<sup>11</sup> Case C-478/99 *Commission v. Sweden* [2002] ECR I-4147.

<sup>12</sup> 93/13/EEC.

<sup>13</sup> In footnote 32 of his opinion.

By 'legal theory and method' we mean meta-theories about how to do legal science<sup>14</sup> (retsvidenskab, Rechtswissenschaft, legal scholarship), in this project in particular legal dogmatics. The English word 'science' probably has a connotation with natural science and empirical methods that the Danish/German words videnskab/Wissenschaft do not have. We do not regard legal science as a purely or predominantly empirical study of law, see further below in the section on method. We will speak of legal science in a broad sense as comprising any scientific study of law, including legal dogmatics, philosophy of law, sociology of law, political science studies of legal matters, law and economics, and other 'law and' disciplines.

We will speak of legal dogmatics (retsdogmatik/Rechtsdogmatik) and the dogmatic study of law (or legal doctrine and the doctrinal study of law) when we refer to legal science in a narrow sense, i.e. a science which answers questions about what is valid law in a particular legal system (in this project EU law and the law of its Member States). In this project we are primarily concerned with methods used in the dogmatic study of EU law and its interplay with the law of EU Member States.

The decisive difference between legal dogmatic studies of law and studies of law from the perspectives of other social or humanistic sciences lies in the research questions. In legal dogmatics, the central questions are about what is valid law. That is true both for judges when they exercise their functions as judges and for academic research irrespective of whether it is based on natural law theory or a legal theory which can be seen as positivistic. More detailed studies of the methodological consequences of different legal theories – in particular variants of natural law theories, legal positivism and institutional theory - will be undertaken in the sub-projects, in particular in the sub-project on European legal method in light of prevailing legal theories.

#### 4. Method

There are marked differences between the methods and practices used for answering research questions in legal dogmatic research and the methods used in other social or humanistic sciences studying law as an object.<sup>15</sup> A reason for this is that it is necessary to use different methods to answer different research questions. In dogmatic studies of law the questions relate to what is valid law and the material examined in order to arrive at an answer is a normative material (the sources of law) which are read and interpreted in accordance with the expert legal culture. Our primary method for finding out which method(s) courts apply will be reading and interpreting judgments and our primary method for finding out which method(s) academic researchers apply will be reading and interpreting academic literature. The legal method(s) applied in dogmatic legal research still have common traits with the scholastic methods developed in early

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<sup>14</sup> In the English translation *On Law and Justice*, London 1958 of Ross, Alf: *Ret og Retfærdighed*, Copenhagen 1953, (which is the classic Danish work stating the research programme of Scandinavian legal realism) the English term legal science was chosen as equivalent to the Danish and German words *retsvidenskab/Rechtswissenschaft*. Ross also spoke of 'retsvidenskab' as the doctrinal study of law.

<sup>15</sup> See for example the analysis of the debate on an EU Constitution from a rhetorical perspective in Just, Sine Nørholm: *The Constitution of Meaning - A Meaningful Constitution?*, Copenhagen 2005, where the author *inter alia* uses newspaper articles as material, and the analysis of Article 234 EC references from a political science perspective in Wind, Marlene: *The Nordics, the EU and the Reluctance Towards Supranational Judicial Review*, *Journal of Common Market Studies* 2009, where the author examines what judges do (not by reading their judgments but) by sending them questionnaires.

natural law theory where a statement was regarded as true when it could be traced back to an authoritative source.<sup>16</sup>

The research questions will be studied in detail through three sub-projects: a general sub-project on European legal method in light of prevailing legal theories and two sub-projects examining two major substantive areas of EU law: anti-discrimination law and EU-market law. See for more detail the project descriptions for each sub-project. These two areas of law, are the most developed areas of EU law, as they are based in the basic treaties and have been under development since the establishment of the European Economic Community by the 1957 Treaty of Rome. In the sub-projects we will look at different aspects of the research questions and it will vary from sub-project to sub-project which sources of law will be in focus.

The project will look into what, if any, difference it makes at the methodological level that the object of a dogmatic study of law is changed from being directed towards one particular national system (for example Danish law) to another particular system (EU law) or the interplay between EU law and national law in the Member States, and whether there is one or a number of different legal methods.

The focus in the project will be on the interface between the Danish legal system and the EU legal system and their underlying legal theories and methods. We will, however, look at this interface in a comparative perspective and include insights from other legal traditions in Europe and the United States. To Ross it was obvious that legal method varies from legal system to legal system.<sup>17</sup> He, for example, underlined the difference in methods used in common law systems where case law is a predominant source of law and civil law systems where legislation is a predominant source of law. Continental European law and Nordic law are primarily civil law systems while the US and the UK are common law countries. EU law is very much influenced by the civil law tradition but the ECJ has some of the same characteristics as courts in common law jurisdictions. The research group doing the project consists of three legal scholars with roots in different legal cultures.<sup>18</sup> The group therefore has first hand knowledge of legal method as applied in both civil law and common law.

The methods used by researchers doing dogmatic studies of law and practitioners applying the law have traditionally been very much alike, in particular in common law and in the Nordic tradition of legal realism, but less so in the German tradition. The ongoing European integration process will probably result in legal science becoming more autonomous and separate from legal practice as regards theories and methods applied.

## 5. Coherence and synergy between the sub- projects

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<sup>16</sup> See Hesselink, Martijn: A European Legal Method? On European Private Law and Scientific Method, *European Law Journal* 2009 p. 20.

<sup>17</sup> See Ross, Alf: *On Law and Justice*, London 1958 p. 110 where he stated: 'it is clear that the doctrinal study of method must assume a different character in various systems'.

<sup>18</sup> *Lynn Roseberry* received her basic legal education (including an LLM degree from Harvard Law School) in the US. She has obtained her phd-degree in law at CBS. *Ulla Neergaard* received her master degree (cand.merc.jur.) at CBS and then studied for a PhD-degree at the European University Institute in Florence where she received her phd-degree. *Ruth Nielsen* received her basic legal education (the cand.jur.-degree) at the University of Copenhagen. She holds a dr. jur.-degree from the University of Copenhagen.

By examining the legal methods actually used by the EU institutions and other European legal actors in each of the substantive areas examined in the sub-projects, and by analysing those methods in light of the currently prevailing legal theories we will be able to identify similarities and differences in the way the European legal actors go about answering questions about what is valid law. On this basis we will be able to answer the general question regarding synthesis and/or fragmentation and possibly come up with suggestions for improvements of the currently prevailing legal theories.

As part of the project, we will arrange three international research seminars/conferences which cut across the sub-projects. Preliminary themes for the conferences will be the three research questions set out above in section 2.

Research results from the project will be published in journals and books (including Ph.D. theses and anthologies). Each of the conferences will result in publication of a book with contributions from the speakers at the conference.

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