

Appendix 1a

Sub-project: European legal method in light of the currently prevailing legal theories

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1. Presentation of the problem

In this sub-project, the focus will be on the third research question.

Most of the basic thoughts in current legal theory date back to the time before the inception of the EC/EU and were developed with a view to either national law (in Western countries) or public international law. In critical legal positivism, law and its changes are examined on three levels: the surface level of the law; the legal culture; and the deep structure of law.¹ Legal development is seen as a sedimentation process, i.e. it starts at the surface level and then over the years seeps down to the medium level and the deep structure of law. The surface level of the law comprises various pieces of legislation as well as court and administrative decisions in individual cases. The legal culture constitutes the middle or mediating level of law. The doctrine of the sources of law is part of the expert legal culture. As appears from the case law of the ECJ,² EU law is with great certainty – and has for a number of years been - a *sui generis* law at the surface level which is neither national law nor public international law. This sub-project is concerned with the question, expressed in the terminology of critical legal positivism, to what extent the currently prevailing legal theories at law's medium level of the expert legal culture match the specific characteristics of EU law as a *sui generis* legal system. The focus will be on the traits of EU law that distinguishes it from national law and public international law. In particular, the subproject will examine how different legal theories address EU law's pluralistic and flexible approach to the sources of law and their interpretation, the trend in EU-law to combine an 'external' (economic, sociological, political, etc.) and an 'internal' traditionally dogmatic perspective on the law and the relationship between law and politics including the role of courts in majoritarian (the UK and the Scandinavian countries) and constitutional democracies (the rest of the EU-countries and perhaps the EU itself).

2. Theory and method

Different legal theories define valid law differently resulting in different concepts of valid law and different views on the doctrine of the sources of law and their interpretation. The currently prevailing legal theories are subdivided into three main groups: legal positivism, natural law theory and institutional legal theory.

The words 'legal positivism'³ and natural law theory are used in a broad sense whereas institutional legal theory is used in a more narrow sense as referring to the theory developed primarily by MacCormick and Weinberger.⁴ In this sub-project the prime method will be analysis of existing literature. The focus will be

¹ See on the levels of law Tuori, Kaarlo: Critical Legal Positivism, Aldershot 2002 chapter 6. See also Tuori, Kaarlo: Towards a Multi-Layered View of Modern Law, in Aarnio, Aulis et al (eds.): Justice, Morality and Society, Lund 1997.

² Case 6/64 Costa v ENEL, ECR [1964] 614.

³ See for a similar terminology Spaak, Torben: Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification, Ratio Juris 2003 p. 469.

⁴ See in particular MacCormick, Neil and Ota Weinberger: An Institutional Theory of Law. New Approaches to Legal Positivism, Dordrecht 1986, Weinberger, Ota: Law, Institution and Legal Politics, Fundamental Problems of Legal Theory and Social Philosophy, Dordrecht, 1991, Bengoetxea, Joxerramon: Institutions, Legal Theory and EC Law, Archiv

on specific authors as representative of different legal theories. In addition to institutional legal theory by MacCormick and Weinberger the Pure Theory of Law (Reine Rechtslehre) by Kelsen,⁵ Hart's theory of law,⁶ Scandinavian legal realism represented by Ross,⁷ Critical legal positivism represented by Tuori (see footnote 1) and modern natural law theory represented by Dworkin⁸ will be analysed.

(4.664 keystrokes)

für Rechts- und Sozialphilosophie, 1991, p. 195 and MacCormick, Neil (ed.): Constructing Legal Systems. "European Union" in Legal Theory, Dordrecht, 1997.

⁵ See in particular Kelsen, Hans: Introduction to the Problems of Legal Theory (A Translation of the First edition of Reine Rechtslehre 1934), Oxford, 1992.

⁶ See in particular Hart, H L A: The Concept of Law, Oxford, 1994.

⁷ See in particular Ross, Alf: On Law and Justice, London 1958 (Danish original Om Ret og Retfærdighed, Kbhvn. 1953).

⁸ See in particular Dworkin, Ronald: Taking Rights Seriously, London, 1977.