Labour Law in a Period in which Law Loosens its Ties with the Nation States – Towards a New European Legal Realism?

Ruth Nielsen

1 Introduction

In this essay, I discuss how Danish labour law is responding to the ongoing changes in the role of the Danish state in connection with the europeanisation and globalization that has been occurring since Denmark's membership of the EC/EC as of 1 January 1973. I look in part at a specific area of substantive law – the changes taking place in Danish labour in connection with the integration of EU law and international labour law into Danish labour law - and in part at the relationship between law and state at a more general level. I use legal sources on Danish and EU labour law as examples to illustrate the general question whether time has come to choose a new definition of the concept of law. I also look at the development of a common European doctrine of the sources of law in the EU which is occurring in connection with the integration of EU law and public international law into national law in the Member states of the European Union.

Under the heading 'The Identity of Law and State' Kelsen stated in Reine Rechtslehre from 1934[1] that the state is a coercive order which is identical with the legal system. Every state is a legal system but all legal systems are not states. As Kelsen expressed it: When the legal system has achieved a certain degree of centralisation, it is characterised as a state. Primitive law has a pre-state form. Public international law and EU law are also not states. The view expressed by Kelsen is a classic statement of the relationship between law and state as seen by legal positivism and legal realism. The establishment of nation states in Europe during the 19th and 20th century was accompanied by a development of labour law as a specific legal discipline.[2]

2 Danish and EU Labour Law

Today (2016), the labour law system that applies in Denmark constitutes 'one big system' which is a mixture of national law, EU law and public international law. EU labour law is intensely integrated into national Danish law.

1 Kelsen, Hans: *Introduction to the Problems of Legal Theory* (A Translation of the First edition of Reine Rechtslehre 1934), Oxford. (1992) p. 99.

2 *See* Fahlbeck, Reinhold: *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, and Hasselbalch, Ole: *The Roots – the History of Nordic Labour Law*, both in Scandinavian Studies in Law, Stockholm, Vol. 43, Stability and Change in Nordic Labour Law, 2002, pp. 87 and 11 respectively.

2.1 The Traditional Danish Labour Law System

A hundred years ago, Denmark played a pioneer role in developing the concept of a collective agreement and collective labour law generally. As Hepple points out:[3]

> 'labour law' is of recent origin. In most countries it became recognized as a distinct division of law only after the Second World War…The exceptions were Germany and Denmark. In the latter, Carl Ussing, a Supreme Court judge who presided over the "August Committee" of 1908-10, combined academic and practical expertise to produce a sharp analysis which helped to lay the foundations of Denmark's collectivist system…, but mainly due for reasons of language the impact of the Danish innovations was limited to Scandinavia.

Danish labour law evolved during the first part of the 20th century into a semi-autonomous legal discipline which was to some extent cut-off from the expert legal culture and left to the main Danish social partners, in particular the Danish Employers' Organization and the Confederation of

Trade Unions (Danish LO). For some 100 years ago, Carl Ussing wrote[4] that

> Legal Developments in the collective contract in this country in a conspicuous way has been taken out of the hands of the Legal Science and placed in the hands of practitioners who are in the midst of the fights on the labor market.

In Denmark, the social partners serve both as legislators, judges and litigators. The labour market organizations fulfil legislative functions mainly through the adoption of collective agreements. They have adjudicative functions mainly by participating as lay judges in the special labour courts and industrial tribunals which have exclusive competent where a collective agreement applies. Finally, trade unions are the main litigators in Danish labour law, both in collective labour law adjudicated by the special Labour Court/industrial tribunals and in individual employment law adjudicated by the ordinary courts. Collective agreements were thus, in the traditional Danish context, the key both to the legislative and the adjudicative function of the social partners.

Traditionally Danish labour law has been rather unclear and designed to function better for members of the labour market organizations – both on the employer side and the worker side – than for non-members. Its strength is that it is flexible and offers a fairly quick, cheap and efficient system for the majority of Danish employers and workers/employees who are members of the social partners.[5] 4 It may, however, be questioned whether the legal situation resulting from it is ufficiently precise and clear in an EU context.

---

3 Hepple, Bob: *The Making of labour law in Europe. A comparative study of nine countries up to 1945*, London, 1986, p 7.

4 U 1914 B 121.

5 Bruun, Niklas: *The Future of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stability and Change in Nordic Labour Law, Stockholm, 2002, p. 375.

2.2 EU Labour Law

Since the creation of the EC/EU labour law is in a process of transformation resulting in more law that is not closely linked to a nation state. As stated by Carlson, Edström og Nyström it is strongly influenced by globalisation and europeanisation, see the following:[6]

> Labour and employment law is at the cutting edge of both globalization and Europeanisation with the rights of employees and labour unions now challenging traditional nation state-based approaches. Globalisation, the internationalisation of law and the freedom of movement for both workers and companies has forced a rethinking of labour law-related matters on both national and international levels, with many of these issues now falling explicitly within the category of human rights.

Since its formation the EC/EU has exerted intense influence on the legal developments in Europe; in the first about 40 years mainly through the development of free movement rules related to the establishment and functioning of the internal market and during the last 20 years also through the development and consolidation of the fundamental rights the EU guarantees union citizens in the context of Economic and Monetary Union (EMU).

Since Denmark's entry into the EC/EU January 1 1973, Danish labour law is increasingly being shaped by EU law and being brought into the mainstream of law.[7] EU law puts new actors on the labour law scene such as the Commission and the ECJ. EU law also builds on principles such as transparency and legal certainty which have not played a predominant role in Danish collective labour law.

EU law is primarily a challenge for the classical Danish collective agreement based model on the labour market in four ways:

1) Through the ban on restrictions which forms part of the free movement rules linked to the internal market.
2) Through EU's rights-based regulation in favour of workers.
3) Through the constitutional development in the EU.
4) Through the requirements of macro-economic balance as part of the EMU (Economic and Monetary Union).

In the general development of EU labour law there is a shift in focus from an older layer where EU labour law was seen primarily in an Internal Market perspective to a newer layer where EU labour law is seen as part of the legal regulation of both the Internal Market and the fundamental rights the EU

---

6 Carlson, Edström and Nyström (eds.): *Globalisation, fragmentation, labour and employment law – a Swedish perspective*, Uppsala. (2016) p. 15.

7 *See* Nielsen, Ruth: *Europeanization of Nordic Labour Law*, Scandinavian Studies in Law, Stockholm, Vol. 43, Stability and Change in Nordic Labour Law, 2002, p. 37.

guarantees union citizens in the context of Economic and Monetary Union (EMU)

Internal market law refers to the law of free movement (of goods, services, capital and persons (workers and freedom of establishment)) and of competition law. The free movement rules started like EU labour law in an internal market context which still is the most important context for free movement. Since the development of the fundamental rights dimension of the EU, free movement for workers and union citizens must, however, also be seen in a fundamental rights/EMU context. Article 45 of the Charter of Fundamental Rights of the European Union (CFREU) repeats Article 21 TFEU on the free movement rights of union citizens. The original similarities between the four freedoms (goods, services, capital and persons) are probably smaller today than 50-60 years ago, see for the same view the following quotation from Oliver & Roth:[8]

> Surely it is right that the same principles should apply in the absence of any objective reason to make a distinction. Unwarranted divergences should clearly be avoided. But at the end of the day the four freedoms cannot all be treated in the same way. The principal dividing line should be drawn where common sense and humanity suggest: between the movement of human beings, on the one hand, and purely economic transactions on the other.

EU labour law started in the Rome Treaty 1957 with two Treaty articles: Article 45 TFEU on free movement for workers and Articles 157 TFEU on equal pay between men and women. Article 45 TFEU was intended to ensure the principle of free movement for workers. Article 157 TFEU was introduced because France claimed that it had more advanced equal pay provisions than the other initial EU countries. French undertakings, e.g. shoe factories, were therefore at risk of being put at a competitive disadvantage compared to undertakings from other EU countries which could get cheaper female labour than French employers because there was more sex discrimination in wages in the other EU countries. Later, in particular after the creation of the European Union (EU) by the Maastricht Treaty 1992 the fundamental rights dimension of EU law has been developed considerably. Today (2016), there is a comprehensive rights-based regulation of the legal relation between workers and employers both through secondary EU-legislation (in particular directives) and through the case law of the Court of Justice of the European Union (CJEU).

Today (2016), the fundamental rights/EMU context is probably more important for EU labour law than the internal market context. It has a wider scope of application. Free movement rules and EU competition law only apply to cases with cross-border aspects. Many employment or labour conflicts in a Member States take place in situations that are purely internal. In such situations EU free movement law and competition law is not applicable. There are, however, a number of labour law cases which are of a cross-border nature,

---

8 Oliver, Peter & Roth, Wulf-Henning: *The Internal Market and the Four Freedoms*, Common Market Law Review 2004.

for example trans-national posting of workers. Since the Eastern enlargement of the EU in 2004, the potential 'clash' between EU free movement law and national collective labour law has acquired renewed actuality, see the *Laval*[9] and the *Viking*[10] cases where the question whether the question was at issue whether collective actions (strikes, blockade, etc.) as means to obtain collective agreements which are traditionally considered lawful under Nordic law constitute unlawful restrictions of free movement under EU law.

A nation state has both legislative, judicial and executive power. Before the creation of the EC/EU in the mid 20th century the nation states had nearly monopoly of both adoption of laws and administration and enforcement of the law. In Nordic labour law the states to a large extent abstained from exercising these powers and allowed the social partners to settle questions about wages and a number of working conditions by collective agreements.

Since then, the Member States of the EU have transferred a considerable part of their role as legislator to the EU legislator but have retained a large part of their function as the only or main institution which can execute and enforce the law, not only national law but also EU law and public international law since EU law and public international law do not dispose of their own enforcement systems.

The constitutional development in the EU involves an EU law duty for the Danish state in all its functions as legislator, courts and administrative authorities to play an active role on the labour market and ensure the integration of EU labour law and part of international labour law into Danish labour law. Compared to the classical Danish collective labour law model where the state played a passive role and left most of the active exercise of legislative, judicial and executive power to the labour market organizations that means that in a way the trend is towards more state in national Danish labour law even though the nation states generally looses power to EU institutions.

As stated by Tuori[11], the Maastricht Treaty, with its provisions on the EMU (Economic and Monetary Union) introduced a new, 'macroeconomic' layer into the European economic constitution. The Maastricht layer of the European economic constitution was based on the following principles: exclusive competence of the EU in monetary policy in the euro area; price stability as the primary objective of Europeanized monetary policy; independence of the ECB and national central banks; Member State sovereignty in fiscal and economic policy with the Union accomplishing a coordinating task; Member State fiscal liability as the reverse of their fiscal sovereignty; and primacy of price stability pursued by Europeanized monetary policy over national fiscal-policy objectives.

9 Case C-341/05 *Laval*.

10 Case C-438/05 *Viking*.

11 Tuori, Kaarlo: *The European Financial Crisis: Constitutional Aspects and Implications*, EUI Working Papers LAW No. 2012/28.

2.3 Transposition of EU Law into Danish Law

The CJEU, already in 1964, held that EU law is neither public international law nor national law, but a new kind of law (a *sui generis* law) that takes precedence over any national law, whatever it might be, and is integrated into the national law of its Member States.[12] This legal integration takes place in different ways, including implementation of directive and onterpretation of national law in conformity with EU law and direct application by national courts of EU law with primacy over national law, see on the evolving common European legal metohod below in section 4.

Until now, four models have been used in the Danish implementation of EU Directives:[13]

1) Ordinary statutory legislation as the sole instrument of implementation (this is a clearly lawful model under EU law);
2) A combination of statutory legislation and ordinary Danish collective agreements where the legislative act is subsidiary to collective agreements which are at least as favourable to the workers/employees as required by the implementing legislation or the underlying directive (this is by and large a lawful model under EU law);
3) Collective agreements with mandatory normative effect which have been extended so as to have *erga omnes* effect as the sole instrument of implementation (this is a lawful model under EU law, but collective agreements with *erga omnes* effect only exist in exceptional cases in Denmark);
4) Ordinary Danish collective agreements without *erga omnes* effect as the sole instrument of implementation (this model is inconsistent with EU law).

Model 2), i.e. a combination of subsidiary legislation and collective agreements is today the typical Danish way of implementing EU directives. Denmark has made more use of the possibilities for implementing EC directives, fully or partially, by means of collective agreements than most other EU countries 1 and has occasionally done so to a greater extent than accepted by the EU Commission and the CJEU.

The labour market organisations typically prefer implementing directives by collective agreements in order to maintain their roles as legislators and judges in Danish labour law. Employment directives usually contain provisions that Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with the directive at issue.

---

12 Case 6/64 Costa v ENEL.

13 *See* Nielsen, Ruth: *Implementation of EC Directives in Denmark*, The International Journal of Comparative Labour Law and Industrial Relations 2002. *See* also Adinolfi, Adelina: *The Implementation of Social Policy Directives through Collective Agreements*, Common Market Law Review 1988 p. 291 et seq.

Since the early 1990s, the possibility for implementing directives by means of collective agreements has been mentioned explicitly in a number of legal acts. Under Article 153(3) TFEU a Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to Article 153 (2) TFEU. According to settled case-law on implementation of directives, it is essential that the legal situation resulting from national implementing measures is sufficiently precise and clear and that individuals are fully aware of their rights so that, where appropriate, they may rely on them before the national courts.

In Denmark, collective agreements are as other contracts – except in a few special cases – only binding for employers who are parties to them. A Danish employer who is bound by a collective agreement must comply with it vis à vis all workers/employees doing work covered by the collective agreement irrespective of whether the workers/employees are members of a union.

In Denmark, nearly 100 per cent of public employers and around 70 per cent of private employers are bound by collective agreements. 80-90 per cent of all Danish workers/employees are members of trade unions. In most EU countries the coverage of collective agreements, i.e. the percentage of employers who are bound to follow them, is higher than in Denmark though the union density, i.e. the percentage of workers/ employees who are members of trade unions, is lower. That is mainly because most EU Member States have a system for extending collective agreements so as to make them binding on employers who are not parties to them. That possibility does not exist in Denmark.

Combination of statutory legislation and ordinary Danish collective agreements is accepted in the case law of the CJEU. In Commission v. Denmark the Commission brought an infringement action against Denmark for failure to implement the Equal Pay Directive correctly. The ECJ held that Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour.[14]

It has been a much debated issue in Denmark whether Danish collective agreements can serve as the sole instrument of implementation. In respect of the Working Time Directive,[15] until 2001, Denmark refused to supplement collective agreements with legislation contending that Danish collective agreements should be accepted as the sole instrument for implementing a number of provisions in the Directive, e.g. the maximum of 48 working hours a week. It was a political rather than a legal decision. The harshest opposition against implementing legislation came from trade unions who preferred open non-compliance rather than adaptation of the Danish industrial relations model to EU law. In 2001, Denmark was facing an infringement procedure over the implementation of the Directive. Denmark decided to give in to the criticism from the Commission. In December 2001, the Danish government in agreement with the Employers' Organization and the Confederation of Trade Unions (Danish LO) promised to table a proposal for implementing legislation.

14 Cae 143/83 Commission v. Denmark. *See* for a similar judgment Case 235/84 Commission v. Italy.

15 93/104/EC.

Denmark thus finally implemented the Directive by means of a combination of legislation and collective agreements (model 2 in the overview above).

2.4 The Main Differences Between the Traditional Danish Labour Law System and the Present Integrated EU and National Legal System

Many authors have made the observation that the importance of national legislators as producers of sources of law is falling in connection with the development of the EU. Van Gerven thus writes in *The Common Law of Europe and the Future of Legal Education:*[16]

> As has happened before in the legal history of Europe, the making of the common law of Europe will in the first place be the work of judges and professors, not of legislators.

In respect of Danish labour law, the Danish state didn't exercise its constitutional role as legislator before the entry into the EU but allowed the labour markets organizations to regulate nearly everything related to the labour market by collective agreements, i.e. collective contract, the content of which was decided by the organizations and which were binding on the parties as other contracts.

Through Denmark's membership of the EU the old contract-based labour law model in Denmek has been replaced by a European constitutional model which puts a constitutional duty on the Member States of the EU, see Article 4(3) on the duty of loyalty, to ensure integration of EU law into their national law. This has led to a shift from collective agreements as the sole form of regulation in Danish labour law to a combination of statutory legislation and ordinary Danish collective agreements in most areas of labour law. When the labour market organizations implement an EU directive by collective agreement they cannot decide the content of the agreement but the procedural effect is that enforcement then will take place before the Labour Court and industrial arbitration and not through litigation before the ordinary court. The labour market organisaitons thereby retain their judicial functions and their decisive influence on case law.

3 The International and Global Dimension

A significant trend in the economic development can be described as a process of globalisation. The changes behind this description are the increased concentration and impact of big multinational companies on the world economy. Moreover, the amount of foreign investment and cross-investment has grown, and barriers to the free movement of capital and financial services have been removed.

---

16 Van Gerven, W. *The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords* in Curtin, D. and Heukels, T. (eds) *I*nstitutional Dynamics of European Integration. Essays in Honour of Henry G Schermers, Volume II Dordrecht, 1994 p. 335.

Before the second World War, most public international law was law between nation-states based on treaties or soft law. During the last 70 years or thereabout, public international law is increasingly becoming the law of international organizations/institutions such as UN, WTO, EU, Council of Europe and many others, or the law of multinational (private) companies, a new kin of international business law . Treaties and soft law are still the main sources of law in international law.

In recent years labour law is increasingly being seen as human rights law.[17] In Europe, fundamental rights/human rights are governed by two separate but overlapping regimes, EU law and ECHR (European Conventions on Human Rights) law. ECHR is a treaty entered into with in the framework of the Council of Europe. A major part of the fundamental rights in the EU is now codified in the Charter of Fundamental Rights of the Union. There are seven chapters in the Charter: Title I. Dignity;[18] Title II. Freedoms;[19] Title III. Equality; [20] Title IV. Solidarity;[21] Title V. Citizens' Rights;[22] Title VI. Justice[23] and Title VII. General Provisions. The Charter contains 50 'rights, freedoms and principles without identifying which of its provisions are rights, which are freedoms and which are principles.

Compared to the ECHR the Charter goes much further in protecting economic and social rights including labour rights. The content of the solidarity provisions in the Charter draws heavily on the Council of Europe Revised

---

17 *See* Alston, Philip (ed.): *Labour Rights as Human Rights*, Oxford 2005.

18 This title includes: human dignity, right to life, right to integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment and prohibition of slavery and forced labour.

19 This title includes: right to liberty and security, respect for private and family life, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, right to education, freedom to choose an occupation and right to engage in work, freedom to conduct a business, right to property, right to asylum and protection in the event of removal, expulsion or extradition.

20 This title includes: equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly and integration of persons with disabilities.

21 This title includes: workers' right to information and consultation within the undertaking, right of collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection and consumer protection.

22 This title includes: right to vote and to stand as a candidate at elections to the European Parliament, right to vote and to stand as a candidate at municipal elections, right to good administration, right of access to documents, ombudsman, right to petition, freedom of movement and of residence and diplomatic and consular protection.

23 This title includes: right to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Social Charter from 1996 to which there are many references in the Explanatory remarks. All 28 EU Member States are signatories to the Revised Social Charter but twelve of them have not ratified this convention and have consequently never been bound by it under public international law.

Eight ILO-Conventions have been identified by the ILO's Governing Body as being fundamental to the rights of people at work, irrespective of levels of development of individual member states. They are grouped into four categories:

1) Freedom of Association
2) Abolition of Forced Labour
3) Equality
4) Elimination of Child Labour

There is generally only scant reference to ILO conventions in EU law. That has been criticized in the literature. In Laval and Viking, the CJEU did, however, refer to ILO-Convention 87 as a basis for considering the right to take collective action as a fundamental right.

4 A Common European Doctrine of the Sources of Law and a New European Legal Realism

Ross [24] who was a main figure in Scandinavian legal realism in the 20th century defined statements in legal science about valid law (gældende ret) in a particular legal system (for example Danish law), as prophecies of the rules the courts (or - in later works on constitutional law - the state apparatus in general) will follow in future decisions in hypothetical cases. His theory, Ross stated, is based on a synthesis of ideological and behavioural realism. This does not mean that the method employed to generate such science should be limited to the external observations of the courts (or other relevant law-defining actors) by means of sociological or other empirical methods. On the contrary, Scandinavian Legal Realism subscribes to examining both the ideology of the judges and their (enforcement) behaviour. The most important manifestation of the judges' ideology is supposed to be the doctrine of the sources of law and legal interpretation. In legal science application of this doctrine provides a basis for a probable prediction of the outcome of a hypothetical case before the courts. The reason why academic lawyers are able to predict what the courts will do because they feel obliged to do

24 Ross, Alf: *Ret og Retfærdighed*, København 1953. translated into English *On Law and Justice*, London 1958.

so is that they know the same doctrine of the sources of law and their interpretation as the courts use and therefore are able to guess or predict how the courts will react in hypothetical cases.

The doctrine of the sources of law thus provides a basis for a probable prediction of the outcome of hypothetical cases before the courts or other law-applying bodies which in Scandinavian legal realism as defined by Ross is the criterion for valid law; see the following citation from On Law and Justice:[25]

> prediction is possible … because the mental process by which the judge decides to base his decision on one rule rather than another, [is] a process determined by attitudes and concepts, a common normative ideology, present and active in the minds of judges when they act in their capacity as judges. …
>
> This ideology is the subject of the doctrine of the sources of law. It … consists of directives which … indicate the way in which a judge shall proceed to discover the directive(s) decisive for the question at issue.

The doctrine of the source of laws and their interpretation is thus a normative ideology which is shared by judges (and other law-applying bodies). Legal academics doing research into law are not supposed directly to share this normative ideology but to describe and analyse it and, on the basis of their understanding of it, make predictions about what the courts will do in a hypothetical case because they feel obliged to do so. The ability of legal researchers to make correct predictions about what is valid law (what the courts will do) is in the framework of this legal theory conditioned upon their using nearly the same method (the normative ideology shared by judges) to find and interpret the law as judges do when exercising their powers/competence as judges. If a researcher chooses to look for law in sources no judge would look at or interpret the sources of law in a way that is clearly different from the way a judge would interpret it, he or she cannot on that basis come up with a prediction of what the courts will do in a hypothetical case.

The normative ideology about sources of law and their interpretation shared by judges in a given legal system is part of that legal system. To Ross it was obvious that the legal method described above varied from legal system to legal system; see the following citation:[26]

> it is clear that the doctrinal study of method must assume a different character in various systems.

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.

---

25 Ross, Alf: *On Law and Justice*, London 1958 p. 75.

26 Ross, Alf: *On Law and Justice*, London 1958 p. 110.

As Tuori[27] expresses it, modern national law is tied to the nation state both in its positing and for its enforcement. In the EU it is different. The EU has developed a law-making procedure of its own. Representatives of the Member States play a decisive role in the law-making institution, for example in the Council. Enforcement, on the other hand, is by and large left to the Member States. It is necessary that there is some uniformity in the legal method applied by different courts within the EU, both at national and European level.

Martin Scheinin has argued[28] that EU law has benefited from the sources doctrine of international law, as it developed the basis for its legal order in the form of a set of international treaties. This has enabled the adoption of an international doctrine of sources of law at EU level and the avoidance of endless controversies concerning the differences in the national sources doctrines of continental and common law countries, or northern and southern member states. He points out that international human rights law and also EU law can be seen as a major unifier of national doctrines of sources of law. For instance the ECtHR applies the international law doctrine of sources. Through its role as a de facto constitutional court for Europe and because of the incorporation of the ECHR into most national legal systems and also into EU law through the Charter on Fundamental Rights, the ECHR is in force in the internal legal systems of the member states with the same content, including with the same sources of law, as it has on the level of international law. Hence, also courts in countries that for domestic legislation would apply a continental or Nordic or common law doctrine of sources will need to follow an international sources doctrine in issues involving fundamental rights.

As an example of the interplay between public international law and EU law the recent judgment in *Ring and Werge*[29] which held that disabled workers have a right to part time work may be mentioned. In this case, the CJEU stated as a preliminary observation that by virtue of Article 216(2) TFEU, where international agreements are concluded by the EU they are binding on its institutions, and consequently they prevail over acts of the European Union. The primacy of international agreements concluded by the EU over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements. The EU has approved the UN Convention on Disability. The provisions of that convention are thus, from the time of its entry into force, an integral part of the EU legal order. The Framework Employment Directive[30] is one of the European Union acts which refer to matters governed by the UN Convention on Disability. It follows that the Framework Employment Directive Directive must, as far as possible, be interpreted in a manner consistent with that convention.

---

27 Tuori, Kaarlo: *Critical Legal Positivism*, Aldershot 2002 p. 250.

28 Scheinin, Martin: *International Law and Human Rights - Good or Bad for European Union Law?* In Neergaard, Ulla & Nielsen, Ruth (eds.): European Legal Method – In a Multi-Level EU Legal Order, Copenhagen 2012.

29 Joined cases C-335/11 and C-337/11 *Ring and Werge*.

30 2000/78/EC.

Today (2016) the highest courts in Germany and probably similarly in the other Member States of the EU only accept/recognise the case law of the CJEU as valid law as long as the CJEU applies an *acceptable legal method* (judicial method). This can be illustrated by the reaction of the German *Bundesarbeitsgericht* and *Bundesverfassungsgericht* to the CJEU's *Mangold* judgment,[31] which has met with heavy criticism for overstepping the borderline between law and policy but was accepted by the German courts partly because the *Mangold* judgment was deemed to be correct from a methodological point of view. The *Bundesarbeitsgericht* followed the CJEU's judgment in *Mangold* in a judgment from 2006 against Honeywell, where it stated that the CJEU's *Mangold* judgment was (emphasis added):[32]

> … *methodisch vertretbar* und hält sich daher im Rahmen der dem Europäischen Gerichtshof bei der Auslegung des Primärrechts eröffneten Rechtserkenntnismöglichkeiten…

In July 2010, the German *Bundesverfassungsgericht* in rejecting a constitutional complaint (*"Verfassungsbeschwerde"*) against the *Honeywell* judgment of the *Bundesarbeitsgericht* stated that (emphasis added):[33]

> Dem Gerichtshof [*i.e.* CJEU] ist auch die Rechtsfortbildung im Wege *methodisch gebundener Rechtsprechung* nicht verwehrt.

A new European legal realist approach to law is developing. It builds on the traditions developed by continental European legal positivism and Scandinavian legal realism. It tends to develop a uniform European legal method, where EU law, national law and public international law are interconnected and all have to be taken into account when discussing doctrinal questions concerning valid law.

Until the 19th century natural law theory was the main approach in legal scholarship in Europe. The US Declaration of Independence 1776 and the French Declaration of the Rights of Man and the Citizen in 1789 in many ways codified the rights which proponents of natural law had argued for as the good or just law. These declarations formed the basis of the constitutional law developed in the following years and paved the way for a shift towards legal positivism since the right content of the law now could be found in posited law and wasn´t dependant on moral, religious or rational insights.

The interpretational style of the CJEU in its early days (1960's and 1970's) is often seen as strongly influenced by natural law. In a general textbook on EU

---

31 Case C-144/04, *Mangold.*

32 Urteil vom 26.4.2006, 7 AZR 500/04, "juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&sid=7748175819924172abf091c3a364e945&nr=11198&pos=0&anz=1".

33 BVerfG, 2 BvR 2661/06 vom 6.7.2010, "www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html".

law which for a number of years was the leading Scandinavian textbook on EU law, Gulmann and Hagel-Sørensen stated that:[34]

> Seen from a Nordic legal positivist perspective the CJEU's case law contains clear natural law elements.

In my view, the Lisbon Treaty which came into force December 1, 2009 and the ensuing elevation of the EU Charter on Fundamental Rights of the EU Citizens to Treaty-rank in the hierarchy of the sources of law can be seen as a present day natural law codification of fundamental rights partly similar to the American Declaration of Independence in 1776 and the French Declaration of the Rights of Man and the Citizen in 1789 in connection with the French revolution. The Lisbon Treaty, especially the changed legal value of the Charter on Fundamental Rights will probably likewise serve as a step in the legal development which facilitates a realist/positivist approach to EU law.

Legal positivism is today the main legal theory in Europa. Legal positivism, institutional theories and Scandinavian legal realism are in many ways similar. They are all adapted to modern law of a Western kind as the legal systems developed in Europe and other parts of the Western world since the 19th century in connection with the establishment of modern nation states. They are all focused on valid law. Their slightly varying definitions of valid law lead to more or less identical results as to what is valid law, why it is as it is, etc. They all see a close link between valid law and a shared doctrine of the sources of law and their interpretation.[35]

34 Gulmann og Hagel-Sørensen: EU ret, København 1995 p. 155, note 22.

35 *See* Nielsen, Ruth: *New European Legal Realism – New Problems, New Solutions?* In Neergaard & Nielsen: European Legal Method – Towards a new European Legal Method, Copenhagen 2013.