

Digitization of the Sources of Law

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1 Introduction

In this essay I use Danish law, EU law and ECHR law as examples of legal systems where sources of law are digitized to a great extent. I give a brief description of the main rules that provide for the digitization of the sources of law. In Denmark, no one owns copyright to public sources of law. Section 9 of the Copyright Act (Ophavsretsloven) provides:¹

laws, administrative regulations and judgments are not subject to copyright.

Contracts including collective agreements are owned by the parties. Authors of literary products have copyright also when the texts are regarded as sources of law. In this essay, I describe and discuss the changed conditions for publishing legal journals in Denmark with both judicial decisions (to which there is no copyright) and literary articles (to which there is copyright). I use *Arbejdsretligt Tidsskrift* (Labour Law Journal) and *Ugeskrift for Retsvæsen* as examples. Since 2014, *Arbejdsretligt Tidsskrift* no longer exists. *Ugeskrift for Retsvæsen* still exists but its publication conditions in the coming years are uncertain due to the ongoing establishment of a public digital judicial database which will be available free of charge for the users.

The essay ends with a discussion of the methodological consequences of digitization of sources of law, in particular the question as to whether it leads to changes in the traditional legal dogmatic method.

2 Electronic Collections of Danish Statutory Laws

According to section 22 of the Constitution, laws shall be announced. Laws are announced in the Law Gazette (*Lovtidende*), published by the Ministry of Justice. Since January 1 2008, *Lovtidende* is published solely on the Internet, see “<https://www.lovtidende.dk/>” and not as previously on paper.²

3 Digital Processing of Civil Cases

Denmark is a highly digitized country where nearly every citizen has an email account. With a few exceptions, all citizens must accept that public authorities communicate with them by digital mail. Procedural law is also marked by this

1 The Danish original reads: § 9. Love, administrative forskrifter, retsafgørelser og lignende offentlige aktstykker er ikke genstand for ophavsret.

2 From 1 January 1871, when the Act on the Law Gazette (*Lovtidende*) containing rules on the method of proclaiming laws and declarations of royal orders came into force, and until the end of 2007, the official announcement of laws and notices was based upon publication of the text of the prescripts in the printed, paper-based Law Gazette (*Lovtidende*).

development. The Administration of Justice Act (Retsplejeloven) was amended with effect from January 1 2016.³ It now provides:⁴

Section 148 a. Civil litigation and cases of proof of civic claims are filed and processed using a digital case portal provided by the courts. Any written inquiry about the case shall be made in the digital case portal, cf. subsections 3-6.

Section 219(6) now reads:⁵

After delivery of the judgment or order, the court makes the judgment or order available on the digital court portal, cf. section 148b (1)(2) and (4).

The digital portal is found at “minretssag.dk/frontpage”.

In September 2016, Domstolsstyrelsen (Court Administration) started issuing Ministerial orders⁶ on the date from which the digital court portal should be implemented by different Danish courts in civil litigation and cases of proof of civic claims. October 4 2017, the city court in Hjørring started implementing the digital portal minretssag.dk. Since February 2 2018, it has been implemented by all Danish courts.⁷

4 Electronic Collections of Danish Judgments

4.1 Public Judicial Database

In connection with the Finance Bill negotiations in 2014, it was decided to establish a national judicial database. 29 December 2015, an Act⁸ was adopted that required Domstolsstyrelsen (Court Administration) to establish and administer the operation of a digital judicial database for the publication of judgments.

4.1.1 EU tender

In 2015, work began to establish a project team to conduct market research and prepare the tender for the judicial database, April 7 2017, Domstolsstyrelsen

3 Act no 1867/2015.

4 The Danish original reads: ‘§ 148 a. Borgerlige retssager og sager om optagelse af bevis om borgerlige krav anlægges og behandles ved anvendelse af en digital sagsportal, som domstolene stiller til rådighed. Enhver skriftlig henvendelse om sagen skal ske på domstolenes sagsportal, jf. dog stk. 3-6.’

5 The Danish original reads: § 219, stk. 6: Efter afsigelsen af en dom eller kendelse gør retten dommen eller kendelsen tilgængelig på domstolenes sagsportal, jf. dog § 148 b, stk. 2 og 4.

6 Ministerial Order no 1171/2016.

7 Ministerial Order no 79/2018.

8 Act No 1867/2015.

(Court Administration) published a Contract tender notice in TED -Tenders Electronic Daily⁹ for a service contract under the competitive procedure with negotiation in the procurement directive.¹⁰

The contract concerns a contract for the Development, Maintenance, Support and Further Development of a Digital Judicial Database. According to Law No 1867 of 29 December 2015, Domstolsstyrelsen (Court Administration) shall, as mentioned above, establish and administer the operation of a digital judicial database for the publication of judgments. Against this background, Domstolsstyrelsen (Court Administration) wishes to provide the development, support and maintenance of a digital judicial database which, through public access to a web portal, must provide the public with prompt access to judgments. A solution must therefore be made available to Domstolsstyrelsen (Court Administration), which can both support the internal processing of the judgments to the database and the external portal for publication of the database. The solution thus includes IT work tools and IT process support for the anonymity of convictions and, on the other hand, a web portal that allows public access to judicial review, including search. The solution must contain in particular:

- Integration into a case handling system e.g. with a view to identifying, advising and transferring judgments and metadata from the courts' case handling system to the judicial database.
- IT support for manual upload of judgments and metadata.
- IT support for automatic anonymization of sentences.
- IT support for workflow relating to visitation, categorization, anonymization, checking / correction of anonymization and publishing on the web portal.
- IT support for web portal for displaying judgments and associated information, including search.
- IT support for statistics.

The contract also includes maintenance and support of the solution and the contract allows Domstolsstyrelsen (Court Administration) to purchase further development services for the solution. Operation of IT infrastructure is carried out by Domstolsstyrelsen (Court Administration)'s external service provider.

Three prequalified tenderers chose to bid on the assignment. Domstolsstyrelsen (Court Administration) has assessed the three offers according to the 'best price/quality ratio' criteria - based on the specific subcriteria and weights shown in the comprehensive tender document.

The judicial database will contain a wide range of judgments in civil cases that will be handed over after launching the database - and transferred automatically from minretssag.dk, which is the courts' self-service solution for civil cases. In addition, the judicial database will contain some historical

9 “ted.europa.eu/udl?uri=TED:NOTICE:130451-2017:TEXT:EN:HTML&tabId=0”

10 102014/24/EU.

judgments from civil and criminal cases that have a particular public interest. In the long term, the database will also be updated on a regular basis with a wide range of sentences in criminal cases.

On March 15 2018, Domstolsstyrelsen (Court Administration) announced¹¹ that the contract has been signed with Schultz. The digital judicial database is expected to be finished before the end of 2019.

The history of the printing house Schultz dates back to 1661. In 1731, Schultz received the privilege of printing all official printed matter, laws, etc. Today (2018), Schultz¹² has an ambition of being a significant player in the public IT market. It has a century-old tradition of public co-operation, including cutting edge technology, as well as a unique brand in the public market as a trusted and foresighted partner that helps digitize public case management, information and administration. As a result of a timely strategic goal, Schultz has moved from being a strong information and content provider to being a significant IT provider, developing solutions for digitizing public case management and administration.

4.1.2 Historical background

In Denmark, efforts to establish a public judicial database date back to the early 1980's. Following a government decision in April 1982,¹³ a Legal Information Council was set up, which proposed¹⁴ the establishment of the law database, which was subsequently known as Retsinformation (Legal Information).¹⁵ The report was followed up with a report¹⁶ on databases with concrete decisions, which led to a Circular¹⁷ concerning the lodging of decisions in Retsinformation (Legal Information).¹⁸

Central in the process is the decision of principle taken by the Ministry of Justice in 1997 to establish a public judicial database with unedited court decisions. The decision led to a committee work, which in June 1998 resulted in a new report. A statement by Domstolsstyrelsen (Court Administration), submitted to the Parliamentary Committee on Legal Affairs (Retsudvalget) on April 26, 2001, shows that the board worked at that time to establish such a database which, inter alia, should be available to the commercial publishers and the press. The proposal was met with strong criticism from *Advokatrådet* (the Council of the Bar and Law Association).

11 ”www.domstol.dk/om/Nyheder/oevrigenyheder/Pages/Leverandoertildomsdatabasevalgt.aspx”.

12 See further “schultz.dk/da-DK/OmSchultz.aspx”.

13 Later followed by Circular No. 34 of 18 March 1983.

14 By report 1001/1984.

15 See “www.retsinfo.dk”.

16 Report 1144/1988.

17 Circular No. 85 of 8 July 1988.

18 See Michael Gøtze & Henrik Palmer Olsen in U 2010B, pp. 74 et seq.

Along the way in the project, the basis for the practice currently being followed by the courts was to publish minutes of particularly interesting decisions. According to a reply to the Parliament (Folketing),¹⁹ Domstolsstyrelsen (Court Administration) stated that a judicial review project had been launched that allowed the courts from 1 January 2008 to include selected judgments and orders on their website. In most areas of law only a selection of cases are published, but in labour law all cases are published. Since 2009 all judgments from the Labour Court and decisions from industrial tribunals are published on the website of the Labour Court, see “www.arbejdsretten.dk”.

4.1.3 Commercial and non-commercial publications of judgments

Today (2018) the most important Danish information source for judicial decisions is *Ugeskrift for Retsvæsen*.²⁰ From 1867 to 1994, it was published by *Gads Forlag* (Gad Publishing Ltd) which is a commercial publishing company. Since 1992 *Ugeskrift for Retsvæsen* is published both on paper and online on a digital platform. In 1994 *Ugeskrift for Retsvæsen* was sold to other commercial publishing companies. It is now (2018) published by *Karnov Group Denmark A/S*.

The first judgment collections were published as actual journals in the late 1700s in connection with the *Sorø Akademi*. The newspaper, published today under the name of *Berlingske*, started in January 1749. *Ugeskrift for Retsvæsen* started 100 years later, at a time when a market for judicial issues had been established. Since 1857, *Gads Forlag* had published *Højesteretstidende* which published supreme court judgments. Before 1867 there was a legal journal *Juridisk Ugeskrift* which in addition to judgments, brought academic articles. It had been published since 1839 by *Reitzels Forlag*. One of the initiators of *Ugeskrift for Retsvæsen* described the reason for starting it in a note in 1872.²¹ *Juridisk Ugeskrift* stopped in 1869.

Previously, there were other legal journals than *Ugeskrift for Retsvæsen* with judicial decisions: *Højesteretstidende* and *Sø- og Handelsretstidende* and later: *Juristen* (in 1919), *Juristens Domssamling* (in 1935) and *Vestre Landsrets Tidende* (in 1928).²²

The above mentioned journals stopped in 1958 as a result of an agreement between *Advokatrådet* (the Council of the Bar and Law Association), *Juristforbundet* (the Lawyers' Association, now DJØF), *G. E. C. Gads Fond* and *Dommerforeningen* (the Association of Judges) which provided for publication

19 On April 4, 2007 (question 287).

20 See on the historical development of the changed market and power conditions Mads Bryde Andersen: *Ugeskrift for Retsvæsen gennem 150 år*, U 2017 B 1 and Mads Bryde Andersen: *Hvorfor går der ofte politik i domsudgivelser?*, U 2017 B 309. Mads Bryde Andersen is editor in chief of the literary section of *Ugeskrift for Retsvæsen*.

21 See U 1872, p. 431 f.

22 See W. E. von Eyben in U 1952B, pp. 121 et seq.

of most judgments in *Ugeskrift for Retsvæsen* and set up *Kuratelet (the council)* for *Ugeskrift for Retsvæsen*. It consisted of four members representing *Advokatrådet*, *Juristforbundet*, *G. E. C. Gads Fond* and *Dommerforeninge*. *Kuratelet* had powers to control *Ugeskrift for Retsvæsen*. Among other issues it approved the prices of *Ugeskrift for Retsvæsen*.

The agreement on *Kuratelet (the council)* for *Ugeskrift for Retsvæsen* was abandoned in 1996 because of disagreement among the parties to the agreement. Since 1996, all major decisions on *Ugeskrift for Retsvæsen* has been taken by the commercial publishing company which publishes *Ugeskrift for Retsvæsen*. Since 1996, it has been in conflict with its previous partners on important issues.

Since 1996, the prices are fixed unilaterally by the publishing company and not subject to approval by anyone else. The prices have been raised considerably. The publisher maintains that it is only demanding a reasonable return on its investment and a fair profit. The Bar Association has complained to the Competition Authority claiming that the prices are excessively high and the publisher abuses its dominant position in the market for digital judicial decisions in a way that is unlawful under competition law. The publisher contends that it has exclusive right (copyright) to the summaries to the judgments and the registration system of *Ugeskrift for Retsvæsen*. *Juristforbundet* contends that the agreement on *Kuratelet (the council)* for *Ugeskrift for Retsvæsen* created a joint ownership (copyright).

5 Changed Market and Power Conditions for Legal Journals in Denmark Publishing both Judicial Decisions and Academic Articles

The above described decisions of the state to publish judgments online at the expense of the state and make them available free of charge for the end-users change both the market and the power conditions for publishing legal journals containing both judicial decisions and academic articles. In the following I will illustrate this by using publications on labour law, in particular *Arbejdsretligt Tidsskrift* and *Ugeskrift for Retsvæsen* as examples.

5.1 *Arbejdsretligt Tidsskrift (Labour Law Journal)*

From 1980-2014, *DJØF Forlag* (the publishing house of the association of lawyers and economists, now *DJØF*) published a legal journal under the title *Arbejdsretligt Tidsskrift* which published all judgments delivered by the Labour Court from 1980 – 2013, some awards by industrial tribunals and some academic articles. In the last years it was published both on paper and online on a digital platform. Users of *Arbejdsretligt Tidsskrift* had to pay a subscription fee to *DJØF Forlag*.

Since 2009, all judgments from the Labour Court and decisions from industrial tribunals are, as mentioned above in section 4.1., published on the

website of the Labour Court and made available free of charge for the users.²³ With effect for material produced after January 1 2014, DJØF Forlag stopped publishing *Arbejdsretligt Tidsskrift*. Some of the material from *Arbejdsretligt Tidsskrift* was put into *Arbejdsretsportalen+* which is published by *Schultz* in collaboration with *DJØF Forlag* and *DA (Dansk Arbejdsgiverforening, Danish Employers' Association)* on a subscription basis.

The first Danish labour court was Den Permanente Arbejdsret which existed from 1900-1910. The present day Labour Court was created in 1910 under the name Den Faste Voldgiftsret. In 1964 it changed name to *Arbejdsretten*. Labour court judgments from the period before 1980 (the start of *Arbejdsretligt Tidsskrift*) were published in other paperbased publications.²⁴

Since the closure of *Arbejdsretligt Tidsskrift* the only legal journal that is specialised in labour and employment law is *HR Jura Magasinet* (Human Resource Law Magazine) which is published online.²⁵ It is available free of charge.

5.2 *Ugeskrift for Retsvæsen*

Since 1958, *Ugeskrift for Retsvæsen* has, as appears from section 4.2. above, been the most important Danish information source for judicial decisions. It still holds this position today (2018) but when the public judicial database is up and running by the end of 2019 there is a new situation. When all the judgments that used to be published in *Ugeskrift for Retsvæsen* become easily available free of charge it is unlikely that users will pay the publisher of *Ugeskrift for Retsvæsen* for access to them. The case law section of *Ugeskrift for Retsvæsen* will probably not survive the public digital database. Whether the literary section of the journal will also come to an end – like it did in the context of *Arbejdsretligt Tidsskrift* – seems more uncertain.

6 EU and ECHR Sources of Law. ECLI (The European Case Law Identifier)

EU and ECHR sources of law are highly digitized. Most EU sources of law can be found on the eur-lex server.²⁶ The website of CJEU (Court of Justice of the European Union) can be found at “www.curis.europa.eu”. Annual report from the CJEU can be found at “curia.europa.eu/jcms/jcms/Jo2_7015/en/”.

ECHR and its protocols are available at the internet.²⁷ Case law from the ECtHR (European Court of Human Rights) can be found at “hudoc.echr.coe”.

²³ See “www.arbejdsretten.dk”.

²⁴ See in particular *Socialt Tidsskrift*.

²⁵ See “hrjura.in/”.

²⁶ See “eur-lex.europa.eu/homepage.html?locale=en”.

²⁷ See “www.echr.coe.int/Documents/Convention_ENG.pdf”.

int”²⁸ ECLI has been developed to facilitate the correct and unequivocal citation of judgments from European and national courts. With the ECLI system one search via one search interface using just one identifier will suffice to find all occurrences of the ruling in all participating national and cross-border databases. ECLI is a uniform identifier that has the same recognizable format for all EU Member States and EU courts. It is composed of five, mandatory, elements:

- ‘ECLI’: to identify the identifier as being a European Case Law Identifier;
- the country code;
- the code of the court that rendered the judgment;
- the year the judgment was rendered;
- an ordinal number, up to 25 alphanumeric characters, in a format that is decided upon by each Member State. Dots are allowed, but not other punctuation marks.

Every Member State using ECLI appoints a governmental or judicial organisation as the national ECLI coordinator. The National ECLI coordinator is responsible for establishing the list of codes for the participating courts, the publication of the way the ordinal number is made up, and all other information that is relevant for the functioning of the ECLI system. The ECLI co-ordinator for the EU is the Court of Justice of the European Union (CJEU).

Each Member State decides whether, and to what extent - it will use the ECLI system, e.g. if it will apply it retroactively to historical records or the number of courts participating, for example only at supreme court level, all courts, etc. The EU Council has adopted a conclusion²⁹ recommending ECLI and the European Commission has developed a multi-lingual ECLI search engine³⁰ which allows users to find judicial decisions from the databases of those case law publishers who have implemented the ECLI standard and provided the European e-Justice Portal with access to their data.

7 Methodological Consequences of Digitization of Sources of Law

In the traditional legal dogmatic method four methods of interpretation³¹ are used to interpret sources of law, namely; the wording of the law (grammatical interpretation), the context of the law (systematic interpretation), the object and purpose of the law (teleological interpretation), and the legislative history of the

28 See “hudoc.echr.coe.int/”.

29 OJ C 75, 31.3.2009, p. 1.

30 “e-justice.europa.eu/content_ecli_search_engine-430-en.do?clang=en”.

31 See Jan Komárek: *Legal Reasoning in EU Law* in Anthony Arnull and Damian Chalmers (eds): *The Oxford Handbook of European Union Law*, Oxford 2015.

law and the intentions of the legislator (historical interpretation). In a legal analysis the four methods will often influence each other and it will therefore not always be possible to adhere to one specific method of interpretation, nor is it always possible to detect which method of interpretation is used. The traditional legal dogmatic method answers to the following questions:

1. How do we find the sources of law?
2. How relevant is a particular source element?
3. When different sources of law have different content, how do we choose between them and weigh them against each other?

The legal dogmatic method is used in different forms of legal practice such as legislative practice, judicial practice, administrative practice, lawyers' practice and research practice.

Legal dogmatic expositions of the law typically aim at a high level of precision, in particular as regards the sources of laws dealt with.

7.1 *Changed Conditions for Legal Information Search*

As appears from the descriptions in the previous sections of this essay practically all sources of law have been digitized since the early 1990's. Before the digitization we found the law in the texts of paper-based books and magazines and journals. After the digitization we find the law in the texts of digital files. Most books are still paper-based but the biggest legal publishers offer some books both on paper and in digital form as e-books or online. The search process when we search in paper-based books and magazines and journals is in important ways different from the search process when we search in digital files.

a Physical distance

Sandgren³² has argued that the physical distance between an author and the sources of law he or she uses is important for how likely it is that a source of law will actually be applied. If it is necessary to move, for example go to a library or abroad, as may be necessary when including foreign law, many will give up. Sandgren argues that in practice elementary textbooks are often used as sources of law because the authors has them in his or her office so that they are within arms length.

In a digitized legal world most sources of law are within arms length because nearly everyone has a computer and the sources of law can be looked up on the computer.

b Time

If it takes long time to find a source of law that may be a reason to disregard it. Before digitization when law was to be found in books finding all the relevant

32 Sandgren, Clas: *Vad gör juristen? Och hur?* – del I, Juridisk Tidskrift, 1999-2000, p. 591, *Vad gör juristen? Och hur?* – del II, Juridisk Tidskrift 1999-2000, p. 867.

sources of law could be very time consuming. After digitization most sources of law can be found quickly online.

c Economic barriers

If one can only access the law through buying books and other material or services only those who have sufficient economic resources have access to the law. In connection with the digitization of law the trend is that states take over the financial responsibility so that all citizens get access to law irrespective of economic resources.

d Skill barriers

Often, it is only possible to understand the content of the law with a legal education. Many persons are therefore still excluded if they do not have enough resources to buy legal help.

7.2 Computer Aided Public Administration

In many areas of law it is administered by public authorities assisted by artificial intelligence. In autumn 2012, Schultz for example launched a new professional system for case management at the job centers. Schultz Fasit is based on modern standard technology. It includes citizen-oriented case management, offer catalog, business module and document management journal in one single system. Concepts such as target groups, types of cases and responsibility for cases and tasks contribute to the structure of case management and assignment. User-friendly guides with instructions and legal references provide help for tasks such as calling and conducting calls. Journal notes are automatically created by all relevant actions in the system. The guides ensure a uniform and effective case processing, where the employee can always make decisions on a correct and updated legal basis.

7.3 Lawyer Robots (Advokatrobotter)

Recently, the digitization of law has led to the launch of what has been popularly called lawyer robots. Internally at IBM, the supercomputer Watson is assisting the company's lawyers with due diligence when IBM buys businesses. The head of one of the biggest Danish law firms have stated:³³

Artificial intelligence is going to change a lot for our industry. The great law firm Dentons has gone into the development of supercomputer Ross, who is going to remove much of our work. We recently witnessed it at Dentons, who expects that in a couple of years with a few clicks, we can replace four proxies' work for a week,

The computer Ross is at its website³⁴ presented in the following way:

33 See "www.business.dk/raadgivning/robotter-udfordrer-advokaterne".

34 See "www.rossintelligence.com".

Mission And Vision

ROSS Intelligence builds artificially intelligent tools to enhance lawyers' abilities – allowing them to do more than ever before humanly possible. When we see the future, we envision a world where everyone has access to affordable legal representation.

Facts: How does Ross work? Lawyers can ask Ross questions - just as they would do to a colleague. Ross comes up with reasoned answers referring to law papers and the outcome of judgments in similar cases. Ross is just a bit faster than the colleagues.

7.4 *Consequences for Legal Research Methods*

Some authors have tried to combine traditional legal dogmatic qualitative interpretation of sources of law and quantitative (statistical) analysis.³⁵

35 See Henrik Palmer Olsen og Martin Christensen: *Netværksanalyse som bidrag juridisk (forsknings)metode*, Juristen nr. 3 2016 Side 110, Mattias Derlen og Johan Lindholm gennem nogle år forsket i anvendelse af netværksanalyse og andre lignende metoder som instrument til at udforske EU-ret, se ex. senest deres artikel: *Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions*, in: German Law Journal, 16(5): 1073-1098, 2015, Urska Sadl og Henrik Palmer Olsen: *Empirical Studies of the Webs of International Case Law: A New Research Agenda*, can be seen on SSRN “papers.ssrn.com/sol3/papers.cfm?abstract_id=2671678”)” and Urška Šadl and Mikael Rask Madsen: *Did the Financial Crisis Change European Citizenship Law? An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis*, European Law Journal 2016 p 40.