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The Approach to European Law in Norwegian Legal Doctrine*

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Introduction

In this paper I will examine the approach to European law in Norwegian legal doctrine. By European law I will understand not only European community law, but also include the European convention of human rights and national law of the states of Europe. By law I will understand not only legislation and substantive law, but also legal doctrine. My theme is in other words, what is the approach in Norwegian legal doctrine to substantive supranational and national European law and the doctrinal treatment of such law in other European countries than Norway?

With legal doctrine I understand that part of legal theory or scholarly legal writing that has as its aim to describe, analyse and interpret the normative contents of a given legal order. This means that I do not in this paper treat other parts of legal theory such as legal history, sociology of law or legal philosophy. A study of these branches of legal theory would show different developments in their relation to foreign sources. Legal philosophy and sociology of law has in the post World War II years been much more heavily influenced by Anglo-American theory than the case is for legal doctrine in the sense I use the term here.

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The relation of legal doctrine to law is many-faced. On the one hand, legal doctrine is descriptive to the extent that in some strains of legal theory, legal doctrine is regarded as the product of a science with law as its subject matter. On the other hand, legal doctrine is normative to the extent that in other strains of legal theory, scholars producing legal doctrine are regarded as participants necessary for the legitimacy of modern law. Regardless of the theoretical debate on the normativity of legal doctrine, doctrinal texts in practical life often function as the main source for determination of the content of legal norms.

Different legal cultures have different styles of legal doctrine. Nevertheless, doctrinal texts are typically based on a broader scope of data and input than other legal texts such as legislation and judgements. This specifically holds true in cultures where legal doctrine has theory as its main point of orientation, as opposed to court practice which has been the main orientation point for legal scholars from the countries of common law. In the Norwegian legal culture, legal doctrine is expected to refer to the sources of law as they appear to the judge. In addition, however, legal doctrine is expected to have an aspiration of science. This entails that good doctrine should be more comprehensive in its use of sources than what is expected of a judge faced with deciding a single issue. Legal doctrine should refer to and discuss the approach and stand of earlier doctrinal work on the topic, and should analyse systematic implications of different answers to legal issues.

The approach to European law can be examined as a question of Europeanization. In this context, legal doctrine may be of interest because of its possible importance for institutional change within the legal orders of the states of Europe. Legal doctrine directly concerns a key dimension of institutional change, namely structures of meaning and peoples' minds. Changes in legal doctrine concern the development and redefinition of political ideas, and as we know, common visions and purposes, codes of meaning, causal beliefs and worldviews give direction and meaning to common capabilities and capacities.¹ From this one should expect a certain resistance to change in legal doctrine. On the one hand, the effects of more substantial changes could be deep for the legal profession and thus to the legal order more generally.

¹ Johan P. Olsen, The Many Faces of Europeanization in *Journal of Common Market Studies*, Vol. 40, No. 5, December 2002, s. 921-952.

European law in the context of Norwegian law can entail different subject matters. It can refer to legal orders of (other) European countries. In the Norwegian context, this most typically means Nordic law or the law of the large, western-European countries Germany, France and United Kingdom. Because of the common-law roots of US law, it is often hard to distinguish between approaches to English law and US law. In the following I will therefore often refer to “Anglo-American law” and include this in the category of European law.

In the past few decades, European law has taken on a new meaning referring to the legal orders of regional institutions, notably EU and the European Convention for the Protection of Human Rights. In this sense, whole new orders of European law have appeared on the scene. When the term “European law” is used in university curricula and indexes of legal subject matters, most often it is this meaning that is currently employed. This indicates that to most people, “Europeanisation of Law” means the influence of supranational law on the national legal orders in Europe.

A third meaning of the term “European law” may also be identified when the term refers to the common traits in the form of principles, concepts and structure of the legal orders of some or most of the national European legal orders. This meaning is explicitly referred to in the EC treaty article 288 which states that the community shall be liable to non-contractual damage caused according to “the general principles common to the laws of the Member States.” It is European law in this sense that forms the basis for the ongoing work on formulating principles of European contract law.

Europeanisation is a term that can cover many different processes of change.² Of specific interest to the study of legal doctrine are Europeanisation as export of forms of political organisation and governance, as a unification and integration of Europe and as central penetration of national and sub national systems of governance. In the first meaning, we can see Europeanisation as export of norms, concepts and structures from the central European countries to countries outside. The other end of this question is legal reception, and the question is to what extent has legal doctrine in Norway contributed to a reception of law from the main European countries? In the second meaning, the unification of Europe, the question

² Johan P. Olsen, The Many Faces of Europeanization in *Journal of Common Market Studies*, Vol. 40, No. 5, December 2002, s. 921-952.

is whether law and legal doctrine in the European countries is becoming more *European*. Are national specifics in norms and legal method converging? Is the scholarly debate on law becoming less confined to national barriers and more of a pan-European debate? In the third sense, Europeanisation stands for the influx of European community law into the legal orders of the states of Europe and for the boundaries formed for national law by the Human rights convention and institutions. This group of questions is impossible to answer just from a Norwegian perspective, but requires studies encompassing the legal debate of several countries. A report from Norway may however be a contribution to the investigation and discussion of such questions on a European level.

The driving force of the current Europeanisation within law is of course the European integration taking place within the EU and EEA. This integration is to a substantial part a legal integration in the sense that legal norms and institutions at the European level play an important part in the process. Law at the national level has to comply with restraints set by the treaties of EU, and is also to a large extent subject to harmonisation by legislation at the EU level. The plain fact that there is an ongoing Europeanisation of substantive law does not, however, by necessity entail an Europeanisation of legal doctrine. History shows us examples both of internationalisation of legal norms without a corresponding internationalisation of legal doctrine, and *vice versa*.³ Neither does it entail that law in Europe is becoming more European in the sense that a harmonisation of thoughts, models and values is taking place outside the scope of the positive legal penetration of community law into national law. There are indications that European legal norms are perceived as alien (*systemfremd*) in many national legal orders.

Legal doctrine of one legal order can approach another legal order in many ways and for several purposes. In real life, several modes and reasons for approaching foreign material may be in operation at once. In principle however, some distinctions may be made. A central distinction to be made is between the approach to foreign material for reasons of inspiration on the one side, and reasons of obligation on the other. Especially in a small country like Norway, the search for models and solutions can be an important driving force behind looking abroad when performing different types of legal work. A small and homogenous population may generate fewer conflicts and problems that are taken to court, and thus

provide less material for doctrinal investigation than a larger community. There will also generally be fewer people performing legal doctrine, and thus a leaner national doctrine to draw upon. Legal doctrine may therefore look to legal doctrine in other countries to find examples of legal problems to discuss, inspiration as to what arguments to use and models for the conceptualisation and systemisation of the legal material. The situation may also be that the national legislator looks abroad to find inspiration as to legislative models and solutions to problems that the legislators in many countries are faced with.

There may also be different norms in operation that oblige actors of a legal order to look to other legal orders. Such obligations may be legal in character. A prominent example of such an obligation is of course the obligation in community law on national administrators and courts to apply community law. An example of a weaker obligation is the obligation that has been connected with the Nordic legislative cooperation. A norm to look to other legal orders may be unrelated to harmonisation of legislation, but more connected with theoretical conceptualisations of law as such. If positive law is regarded as expressions of more general legal principles and values, founded in legal culture, reason or religion, other examples of these principles in other legal orders may provide a better understanding of the underlying principles. This implies that the positive law of countries belonging to the same culture may provide valuable source material for legal analysis and argument in each of the countries. On the other hand, a concept of law denying such underlying principles or values, may deny relevance to a comparative approach.

Pre 1940: European orientation

It is well known that Norwegian legal doctrine has its recent roots outside of the boundaries of Norway. A university degree in law was instituted in 1736 as a requirement to become a judge. Until 1813 this entailed that all Norwegians wishing to embark on this road had to go to Copenhagen to study law. The first law faculty was established in Norway as recently as 1813. In the nineteenth century, European law and doctrine heavily influenced legal doctrine in Norway.⁴ The approach to European law had a two-sided foundation; both through the

³ Dag Michalsen, *Internasjonaliseringens historie i norsk rett*, Lov og rett 2001 s. 451-473.

⁴ See for an overview, Dag Michalsen, *Internasjonaliseringens historie i norsk rett*, Lov og rett 2001 s. 451-473, and for a more specific description of German-Norwegian doctrinal relations of the period, Gebhard Carsten xxx

Nordic legal cooperation and more directly by relation to the larger countries of Western Europe. In private law, doctrinal concepts and discussions were influenced by the German Roman-law doctrine. Constitutional law was affected by the fact that the 1814 Constitution was inspired by the constitutions of France and United States from the eighteenth century. Criminal law and administrative regulation was to a large extent inspired by models from German law and administration.

Norwegian legal doctrine in his period was undergoing a process of Europeanization in the sense of export of legal doctrine from the larger western European countries to Norway. This Europeanisation continued into the first part of the twentieth century. Before the Second World War, legal doctrine in Norway was to a large extent oriented towards European legal doctrine. A review of the legal text-books in the different legal disciplines, show a repeating picture; to a large extent students of Norwegian law were introduced to major works in the field from other European countries.

In constitutional law, the latter part of the nineteenth century was ruled by T.H. Aschehoug, *Norges Nuværende Statsforfatning*, published first in 1875. This work referred extensively to British, French and German literature on constitutional law. The successor, *Morgenstierne, Lærebok i den norske statsforfatningsret*, takes a purely national view and is virtually devoid of European references. This picture is slightly changed if we look at the last text-book published before the war, *Castberg Norges Statsforfatning* from 1937. The introduction to this study discusses concepts and method in constitutional law. This discussion refers to German, British and American studies in legal theory and constitutional doctrine. The more doctrinal parts of the text are however, almost exclusively based on Norwegian sources. We can take this as evidence for the maturing of constitutional law as a national legal discipline.

In criminal law, *Scheie, Den norske strafferett, 1937* makes extensive use of international sources, especially German texts. Administrative law is a fairly new discipline within Norwegian legal doctrine. The first textbook is *Morgenstierne, Forvaltnings- og næringsret* from 1912. The text is almost without references and based on national sources. The successor, *Castberg, Innledning til forvaltningsretten, 1936*, bases its discussion of

in Müller-Graff and Selvig (eds.), *The Approach to European Law in a Norwegian and German Perspective*, xxx xxx.

Norwegian law on the Danish work of Poul Andersen and the German work of Walter Jellinek (*Verwaltungsrecht*, 1929). In addition, there are some references to other Scandinavian and German texts. Castberg's work is the first scholarly book on administrative law in Norway, and administrative law as a discipline of doctrinal law in Norway is thus heavily inspired by and imported from Europe.

Private law shows us a similar picture. Fredrik Stang gives an introduction to private law and a treatment of the rules of contract in his *Innledning til formueretten*. The study is broadly referenced and includes a wide scope of texts from German, French, Anglo-American and Roman law. On the other hand, the property law textbook Gjelsvik, *Norsk Tingsrett*, 1919, is based mainly on national sources.

The picture that emerges when we look at Norwegian legal textbooks from the first half of the twentieth century is that of a legal doctrine which relates to the doctrine of other countries, especially Britain, France and Germany and the United States. With a few exceptions, Norwegian legal texts refer to texts from these countries as sources for posing legal questions, as support for arguments and as examples of positions to refute. In some cases, Norwegian authors based their text closely on specific works by foreign scholars in such a way that it is fair to say that the Norwegian work to a lesser or greater extent is modelled upon a foreign text. This may for example, be said of the relation between Castberg's book on administrative law, and Poul Andersen's and Walter Jellinek's works.

Despite the fact that extensive use is made of foreign sources, none of the mentioned works are comparative. The focus is on positive Norwegian law, and European law is referred to in order to develop legal concepts and arguments. The reference that is made to foreign sources is to legal doctrine and not to legislation or court decisions. The import that took place was thus mainly indirect through legal doctrine.

1945-present

If we look at books where the first editions were published after 1945, there is a marked change in the way Norwegian legal textbooks refer to foreign doctrine in the second half of the twentieth century. Within Constitutional law, Andenæs, *Statsforfatningen i Norge* was first published in 1945. It was originally not intended for law students but for students of

political economy. After a few years it became part of the curriculum for law students, and served as textbook for the study of law the latter part of the twentieth century. The book has no reference to the discussion of issues of constitutional law in other countries (with the exception of some unreferenced mention of the position of the Danish scholar Alf Ross).

In his textbook on criminal law from 1956, Andenæs states in the preface that he is indebted to the Dane Hurwitz and the Swede Agge. In his list of references, he mentions several Nordic works, but none from other countries. In a chapter on sources he lists one book from each of Britain, France, Germany and the United States. Within administrative law, Castberg's book was the basic text-book until Frihagen's *Lærebok i forvaltningsrett* from 1968. This work is based mainly on Norwegian sources, with the exception of some scarce references to Danish and Swedish literature. The same characterization can be made of Eckhoff, *Forvaltningsrett* from 1978. A shift can be observed in the latest editions of Eckhoff's book starting with the 1994 edition by Smith, where implications of the EEA-agreement are introduced. Graver, *Alminnelig forvaltningsrett*, first published in 1999 systematically deals with implications for Norwegian administrative law of the European Convention for Human Rights and the EEA agreement. There is little reference, however, to the national administrative law of other European countries.

Within private law, Arnholm published his introduction to private law in 1964. In this book he makes an analytical presentation of the main concepts of private law such as the concepts of "right", "duty" and "promise". The treatment is theoretical and not related to the specifics of positive law. Nevertheless, the text with few exceptions does not refer in any systematic sense to the international debate on such issues. There is some reference to Nordic works, but virtually none to the broader European doctrine. The standard textbook on the law of obligations by Augdahl, *Den norske obligasjonsretts almindelige del* from 1953 portrays the same picture. Some central Nordic works are discussed, and mention is made of a few French works and one British work. Basically the argument is based on national sources. In the most recent work on the law of obligations by Hagstrøm, the picture is altered. This book makes extensive use of Nordic sources, and other European sources play a greater part in this text than in the near predecessors' works. A closer examination reveals that the non-Nordic references are works mainly dealing with the international rules and principles connected with the United Nations Convention on Contracts of the International Sale of Goods, the

UNIDROIT principles of International Commercial Contracts and the Principles of European Contract Law.

The basic trend that emerges compared to the previous period is one of isolation. Norwegian legal doctrine no longer systematically refers to the legal doctrine of other countries, with the exception of reference to Nordic doctrine, mainly in the field of private law. At the end of this period, reference is made to international legal sources tied to international treaties, notably the European Convention on Human Rights, the United Nations Convention on Contracts of the International Sale of Goods and the EEA agreement.

Legal textbooks are but one type of legal doctrine. These are texts written mainly for the use of students and legal practitioners, where detailed references are often omitted for the sake of brevity and significance. It could therefore be argued that such texts do not reveal the whole picture of the approach legal scholars take to European law, because there may be more to the story than what is explicitly told. At the other end of the scale lie texts written as doctoral theses. In these cases, the author is under strict requirements of the community of legal scholars to conform to the ruling opinion on what constitutes good legal scholarship. One such requirement has always been to relate to the relevant body of previous scholarly work on the chosen topic, and to list all references used for the thesis. One can say that while legal textbooks show aspiring members of the profession how to do legal doctrine, doctoral theses show how aspiring members perceive the requirements of the state-of-the-art. The legal textbooks seem to indicate a shift in the approach to Europe in the last couple of decades. To further investigate this, we shall look at doctoral degrees awarded by the three Norwegian law faculties from 1970-2002.⁵

In the period from 1970 until 2002, 113 degrees were awarded. Fifteen of these were awarded in the nineteen seventies, twenty-two in the nineteen eighties and sixty in the nineteen nineties. Not all these theses deal with legal doctrine in a more strict sense. The figures also include theses in legal philosophy and –theory, legal history, sociology of law and law and economics. The main part however, is works of legal doctrine. In other words, there is an increasing amount of legal doctrine produced in Norway.

⁵ Based on the compilation by Hilde Westbye, *Juristers doktoravhandling og juridiske doktoravhandling i Norge, en oversikt*, Det juridiske fakultets skriftserie nr. 17, Oslo 2002.

If we look at the subject-matters of the books, and take subject-matters dealing with EC-EU law, international law, conflict of laws and comparative law as evidence of an international approach of legal doctrine, we see that the international approach is also increasing. In the nineteen seventies, one thesis had an international approach in its choice of subject, dealing with EC competition law. In the nineteen eighties, there was one thesis dealing with taxation from a comparative law perspective and one thesis on international refugee law. Since 1990 there have been 23 theses with an international subject matter. Although the total amount of theses has increased, this also indicates an increase of the relative number of studies that in this way are oriented outside the national borders from less than one out of ten to three out of ten.

Although these numbers show an increasing interest among Norwegian legal scholars to deal with matters outside of Norway, they tell us little about developments in the approach to European law within legal scholarship dealing with subject matters of Norwegian law. To answer this question it is necessary to go beyond a categorization of the theses based on subject matter, and to examine more closely the methods and perspectives employed when dealing with national law.

Theses from the nineteen seventies and eighties dealing with public law are typically national in their orientation. The vast majority of references are to purely national sources. To a greater or lesser extent, they also relate to the doctrine of the other Scandinavian countries, see for example the works of Kjørstad, Bernt, Smith, Boe and Backer.⁶ References to works from countries outside the Nordic countries are minimal. There are some exceptions to this picture. Hov's thesis on legal settlement has a chapter with brief presentations of German, French and Anglo-American law.⁷ His use of Nordic sources throughout the thesis is quite extensive. The thesis by Gjems-Onstad on depreciation in tax law takes a comparative law approach, and thereby also in its subject matter crosses the border of national law.⁸ The legal orders that are used for comparison are those of Britain, Germany and US. Kaasen in his

⁶ Asbjørn Kjørstad, *Yrkesskadetrygden, fire utvalgte emner*, Oslo 1979, Jan Fridthjof Bernt, *Avtale og offentlig myndighetsutøving*, Bergen 1978, Eivind Smith, *Organisasjoner i fiskeriforvaltningen*, Oslo 1979, Erik Boe, *Distriktenes utbyggingsfond*, Oslo 1979, Inge Lorange Backer, *Naturvern og naturinngrep*, Oslo 1986.

⁷ Jo Hov, *Rettsforlik*, Oslo 1976.

⁸ Ole Gjems-Onstad, *Avskrivninger: avskrivningsprinsipper og avskrivbare objekter i skatteretten*, Oslo 1984.

study of Safety regulation of offshore petroleum activities on the Norwegian continental shelf includes references to the neighbouring British legal regime.⁹

From the nineteen-nineties, we see a different picture emerging. Most theses in public law relate to foreign law outside the Nordic countries. In many cases this can be explained by the fact that the thesis addresses legal issues where community law plays an important role in restricting the scope of national regulation or because national law is harmonised through community legislation. An increased international orientation can be seen in many theses dealing with Norwegian law which is more unaffected by community law. In some theses dealing with different aspects of welfare law (Syse on care for the mentally retarded and Haugli on parents' right to access to children under public care) we see the impression on national regulation made by the European Convention on Human Rights.¹⁰ In other cases, an international orientation is explained by the fact that the problems that face the legislator, and the solutions offered are the same across national boundaries, see for example Bugge on liability for pollution who draws on Anglo-American, German and French law as well as international treaty-based law.¹¹ It is still possible however to find examples of theses within administrative law that do not relate to foreign law to any greater extent than theses from the seventies and eighties, see Kristiansen on municipal sureties, and with the exception of some mention of Human rights, Haugli.¹²

Private law theses give a different impression all together. The theses here from the nineteen seventies and eighties are typically more oriented towards the law and doctrine from outside of Norway. Austenå's thesis on real estate law makes extensive use of Danish, German and Swedish legal doctrine. Hagstrøm on public liability draws on sources, including court cases and legal doctrine, from Denmark, England, Germany, France and Sweden. Bull writes on insurance coverage of third parties based on material from Anglo-American, Danish, German, French and Swedish law with extensive use of doctrine from the Nordic countries, Britain and US. This international orientation continues through the nineteen nineties.

⁹ Knut Kaasen, *Sikkerhetsregulering i petroleumsvirksomheten*, Oslo 1984.

¹⁰ Aslak Syse, *Rettsikkerhet og livskvalitet for utviklingshemmede*, Oslo 1996 and Trude Haugli, *Samværsrett i barnefordelingssaker*, Oslo 1998

¹¹ Hans Chr. Bugge, *Forurensningsansvaret*, Oslo 1999.

¹² Torill Kristiansen, *Kommunale garantier*, Oslo 1998.

When summing up this review, it can be held that the international orientation of Norwegian legal doctrine consist of approaches to European and US law, and in the later years different bodies of international and supranational (community law). An orientation outside of national law is in other words mainly an orientation towards European law. It can likewise be held that the orientation towards Europe has been increasing the in the last decade.

There is a marked shift in the approach to European law in legal textbooks at the middle of the twentieth century. In the first half of the century, legal textbooks across the different disciplines of law generally related to legal doctrine from the Nordic countries, Britain, Germany, France and the United states. In the second half of the century, reference to countries outside the Nordic realm virtually disappeared. At the turn of the century, increasing reference is made to international instruments of law, and doctrine related to these. These instruments include community law, and for the public law field international conventions for Human rights and the private law field general principles of contract law.

The picture portrayed by the textbooks is only partly replicated by studies of doctoral thesis. Here we see a marked difference between works in the field of private law on the one hand, and public law on the other. Private law studies continue through the period to relate to legal doctrine from outside the Nordic countries. The break at the middle of the century that can be observed in legal textbooks, also within the field of private law, is not matched by a changed approach in scholarly work represented in doctoral theses. Public law theses on the other hand show a marked break from the approach taken by Castberg. Doctoral theses within public law from the nineteen seventies and eighties are markedly national in their approach, with no systematic use of legal sources or doctrine even from the other Nordic countries. The nineteen-nineties show a more European and international orientation in legal research in general. This is shown both by the fact that almost one in three scholars choose a subject matter related to international law, and by the fact that studies in national Norwegian law relate to European and international law. The development we can se in doctoral theses from the nineteen nineties and onwards is, however, mainly towards supranational and international law, not so much towards European law in the national sense. The change is greater within the field of public law that within private law.

Discussion

The examination of Norwegian textbooks and monographs shows variations in the approach taken to European law. We see a variation both over time, across legal fields and between different types of doctrinal work. To understand these variations and developments it is necessary to place legal doctrine in a broader social and legal context. In the following I will consider more general trends in internalisation and Europeanization, developments in Europeanization of law more specifically, as well as explanations more internal legal research.

The end of World War II marked the end of a period of international political and economic isolation. Politically, international ties were built with the UN, and on a regional European level with NATO, the Council of Europe and EEC. Economically the development was fostered by the creation of GATT, OEEC (later OECD) and again EEC. It took, however, a long time for these institutional efforts to materialise in the everyday workings of politics and economics. The first decades after the war in Norway, were marked by a regulated plan-based economy designed to rebuild the country. From around 1975, the second globalisation set in, marked in the economy more specifically with the liberalisation of capital movements and international investments. Parallel to this development, we have witnessed increases in the cross-border movement of persons first in the form of migrant workers and later in the increasing number of refugees, and increasing political internationalisation thorough regional and multilateral agreements. It can therefore be said that the world since 1945 has witnessed an increased development from national isolation to trans-national integration, with a shift both in the scope and depth of the integration from 1975 and onwards

Seen on this background the tendency to isolation that can be observed in Norwegian legal doctrine in the years after World War II may seem unexplained. Based on the increasing internationalisation that started already soon after 1945, one could have expected legal doctrine to move not in the direction of isolation, but towards an increased use of material from outside of the national borders. The tendencies that can be observed within legal doctrine can therefore not be accounted for solely by reference to factors such as developments within economic and political internationalisation.

One should however not discard such external factors all together. When it comes to Norway, one could argue that the isolation of the nineteen twenties and thirties was more on the political level than on the level of economics. Foreign trade has always played a major role in Norwegian economy. Even during the depression, export and import accounted for 30% of GNP, and by 1950 exports and imports had reached higher levels than what is the case of the present.¹³ The broad international orientation of Norwegian trade and commerce could be a factor to be taken into account when explaining differences between public law and private law doctrine in the second half of the twentieth century.

When assessing the lack of impact from the general internationalisation that started after 1945, it should be taken into account that this development was initially not so much on the legal level as on the level of political and economic internationalisation. The main international institutions of the nineteen fifties were international treaties and intergovernmental institutions such as the UN, OECD and NATO. Instruments of economic internationalisation were global and regional trade liberalisation regimes such as GATT and EFTA. The work in these bodies to a little extent resulted in requirements to the national law of the participating states.¹⁴ The European Convention for the Protection of Human Rights from 1950 represents an exception to this picture. The Human rights court was however, not operational until 1960, and received only 30 cases in its two first decades of operation. In practical terms one may therefore say that the role of the convention as review of national law was established during the very last years of the century.

Its relations to the Nordic neighbouring states have always been an important part of the foreign relations of Norway. In comparative law theory it is argued whether the legal orders of the Nordic states form a separate legal family, or whether they are best regarded as part of the continental Germanic legal order.¹⁵ There is however, no argument over the fact that the Nordic legal orders have close ties and common traits. Since the end of the nineteenth century there has been a substantial amount of legal cooperation among the Nordic states. This cooperation focussed around organised meetings between members of the legal profession

¹³ Tore Tronstad, *Mindre handel, men mer sårbarhet? I Tranøy og Østerud* (red), *Mot et globalisert Norge*, Oslo 2001.

¹⁴ An overview from a legal perspective was made by the ministry of justice for the Norwegian Parliament in St.meld. nr. 89 1951 om Grunnloven og Norges deltakelse i internasjonale organisasjoner.

¹⁵ See for references Gerhard Ring and Line Olsen-Ring, *Einführung in das skandinavische Recht*, München 1999 p. 2.

and an extensive amount of joint preparation of legislation. The legislative cooperation has been focussed mainly on commercial law and other branches of private law. There has been virtually no Nordic cooperation on public law legislation. The intensity of the legislative cooperation has been in decline since 1960, and in the recent decades been transformed by the influence of community legislation.¹⁶

From the early nineteen nineties, the quality of internationalisation and Europeanization took on a distinct flavour of law. By this time the Human rights court had started to decide cases also pertaining to Norway, and the Norwegian Supreme court started applying the rules of the convention in a noticeable manner. In 1994, European community law became part of the Norwegian legal order through the EEA agreement. Internationalisation in politics and commerce is at this time joined by internationalisation in law.

We can therefore observe two separate trends in the relations between Norwegian law and the outside world. On the one hand we have the Nordic relations which were established as a forum for legal cooperation from the late nineteenth century, and up until the nineteen fifties. On the other hand we have the general internationalisation starting after World War II, taking on a more distinct legal flavour in the last decades of the twentieth century. The general internationalisation from the middle of the century in the first place affects economics, with the Norwegian economy and commerce much exposed to foreign trade all the time. Nordic cooperation within the field of private law and commercial law is still at its peak at this time. Towards the end of the century, Nordic cooperation declines. At the same time European community law and human rights law is a factor increasingly to be taken into account by the national legal orders. The main thrust of influence from these bodies of law is towards public law. There is in other words a shift in areas of law exposed to ongoing external processes of internationalisation. In a more general way, these trends correspond to what we have seen by examining developments in different forms of Europeanisation in the different fields of legal doctrine.

The approach to European law should also be viewed on the background of developments in legal theory and development of legal science. The development of legal doctrine as a

¹⁶ See Fredrik Sejersted, *Nordisk rettssamarbeid og europeisk integrasjon* and Inge Lorange Backer, *Nordisk lovsamarbeid i europeiseringens tegn*, both in Olsen and Sverdrup (eds.) *Europa i Norden*, Oslo 1998.

scientific endeavour appeared relatively late in Norwegian legal history. It was not until the nineteenth century that a Norwegian legal science was developed. Originally, Norwegian legal doctrine was formed as part of Danish legal doctrine, which in itself attained a scientific approach only in the nineteenth century under the influence of foreign, especially German legal writing.¹⁷ The advance of legal science can on this background be seen as a process of growth and nationalisation. The more general trend that can be seen in legal textbooks can be understood in this light. Legal science is established in different new disciplines by reference to concepts and analysis taken from legal scholarly work in countries that previously have exerted influence on the formation of a Norwegian legal science. Castberg's construction of an administrative law gives the most recent example of such a development. After maturity is established within the field as a discipline of Norwegian law, the high amount of references to foreign legal doctrine as compared to national sources diminishes. Since the nineteen seventies and eighties, development of new disciplines of law more often was undertaken by reference to other disciplines, especially social science, than by reference to legal doctrine from other countries. This was for example the case in developing fields of law such as women's law, social law and legal informatics.

Another trend that should not go unmentioned in the context of describing developments internal to the field of legal science is the dominant position of Scandinavian legal realism as the general theory of law. Scandinavian legal realism is tied to the Uppsala school philosophy of Sweden of the nineteen twenties, and to the Dane Alf Ross of the same period. In the years after 1945 this line of thought dominated legal theory in the Scandinavian countries.¹⁸

Scandinavian legal realism was a positivist theory of law and thus focused on legislation enacted by competent bodies of the state, and adjudication performed by the courts as the ultimate determinators of law as its subject matter. It had as its theoretic basis the logical positivism of the Vienna School, and set out to transform legal doctrine into an empirical science. This led to a rejection of general concepts, principles and tradition as explanation of the legitimacy of law, and to the focus on social science and policy effects of legal rules. It is direct in line with such an approach to redirect legal research from seeking inspiration and arguments in legal doctrine of other legal orders and to focus on factors more directly related

¹⁷ Ditlev Tamm, *The Danes and Their Legal Heritage*, in Dahl, Melchior Rehof, Tamm (eds.) *Danish Law in a European Perspective*, Copenhagen 1996.

to the subject matter; how does the judge actually determine the legal rulings, what legal answers do different societal conditions call for, and what are the effects of different rule-alternatives? Such questions may not be answered with any empirical stringency without reference solely to the community where the questions are posed.

Seen on this background, the shift in orientation towards European law in legal textbooks in the second half of the twentieth century reflects the rising influence of Scandinavian legal realism over legal doctrine. The same can be said for the theses in public law. How then can one explain the more European orientation of doctoral theses in private law, also through the second half of the twentieth century? Was research in the field of private law less influenced by realism than public law research? The answer to this question is probably no. Realism certainly had its grip also over private law. Also in this field can we observe a focus upon national sources and legal policy-analysis. One of the most influential scholars of the time, Sjur Brækhus, employed Alf Ross critical analysis of the concepts of “right” and “property” directly in his works on property law.¹⁹ One of the more extreme variants of the positivist debate in legal doctrine of the nineteen sixties and seventies, the status of judgements of lower courts as sources of law, had its starting place in private law.

Apart from external factors such as the impact of the high proportion of foreign trade into commercial law, I think it possible to explain differences between private and public law also by factors more internal to the legal discipline. One of the hallmarks of Scandinavian realism is its monocentric view of law focussed upon what the courts, and more specifically, the highest court decides. The rulings of the Supreme Court become the last word on the answers to legal questions, and the reasoning of the Court the model for all legal reasoning. This monocentrism never got the grip on private law, which by nature is more polycentric. Private law reasoning has to take into account the autonomy of the parties to shape and determine the content of their mutual obligations, the force of usage and custom in commercial practices, arbitration and in international relations, the decisions and reasoning of courts in other jurisdictions.

¹⁸ For an overview see A.C. Stray Ryssdal, *Legal Realism and Economics as Behaviour*, Oslo 1995 chapter C.

¹⁹ Sjur Brækhus og Axel Hærem, *Norsk tingsrett*, Oslo 1964 pp. 374-382.

Another factor that may have played a role in the Norwegian context is the role of legislation and codification of general principles of law. Administrative law got its grand codification in 1967 with the administrative procedures act, based to a large extent on national sources. This codification was purely national in the sense that it did not come about as a result of any international cooperation or harmonisation. Not even among the Nordic countries did cooperation on codification of administrative law take place. Subsequent to this codification, legal arguments in administrative law have had national sources as their basis. The legislation is national, and precedents and doctrine of other countries do not address the legal questions that the act gives origin to. Private law never experienced such a codification based on national sources. On the contrary legislation was specific, and often based on international cooperation and harmonisation. Some pieces of legislation for instance within maritime law and financial instruments were based on international conventions. In 1988, the new sales of goods act was enacted based upon the international convention for the sales of goods. In relation to this situation, legal analysis in private law still has had the need for recourse to general, uncodified principles of law. When interpreting legislation, work from other countries that have taken part in the cooperation has been of interest also in a national Norwegian context because of the common aims and texts.

The Europeanisation we see of the past decade is of a different kind than the Europeanisation we know from before. Whereas the earlier Europeanisation had the form of export of legal concepts and ideas from the larger European states to Norway, Europeanisation of the twentieth century increasingly took the form of integration in the form of legal harmonisation, especially within private, commercial law. Commercial law has become more international or *ius commune*. In the last decade, a third form of Europeanisation of law has been predominant, Europeanisation as central penetration of national and sub national systems of governance through the invasion of community law and human rights into national law. This process has predominantly taken place within public law. Naturally, legal doctrine has had to take this third wave of Europeanisation into account. A question to be answered is whether this process will result in legal doctrine becoming more *European*, or whether we will see a continuation of national doctrines, but taking into account European legislation and precedents where pertinent.

Presently, there are but weak indications of the emergence of a true European legal doctrine. Legal doctrine is by nature tied to a specific legal order with its specific concepts and systematic relations between the institutions and norms of this order. Community law is most often particularistic and difficult to reconcile with the concepts and structure of the different orders of national law. Examples can be found in different fields. For instance within consumer law, the problems are illustrated by the varying definitions of the terms “consumer” even within the body of directives within community law itself. Within administrative law we see that the demarcation of public and private is different in community law from most national legal orders, and the reasons and functions of such a separation are also different. In a national legal order, the division is drawn to distinguish between phenomena that should be governed by administrative law and phenomena to be governed by civil law. In community law the division demarcates the boundary of the responsibility of the member states for legal subjects within its direct sphere of influence.

Community law as such does not constitute a comprehensive body of law in the sense that there is a way to answer any legal question. Community law presupposes a body of national law, and operates in concert with the national legal orders of the Member States. In this sense, Community law is a legal subject in the same way as Human rights law, property law and contract law, and not a legal order. As such, community law has its own features and structure that only to a limited degree infect other legal subjects.

A third reason why Community law has difficulties to transform the national legal orders, is that the different legal norms of community law are the *ad hoc* result of bargaining and compromises and thus give different directions to the legal orders of the Member States. The norms of Community law are therefore more easily contained as separate directives, with relevance only within their own strict field of application. There are of course exceptions to this, notably the fundamental freedoms of the treaties and the basic rules of competition law. The quantity of Community law is, however, the many and varying pieces of secondary legislation. On this legislation it is presently impossible to perform the classic task of legal doctrine to construct general concepts and a structural systematic order.

Conclusions

The monocentrism that was promoted by Scandinavian realism is now longer viable. Legal theory no longer legitimises law by sole reference to state institutions. According to dominant theories of the day, to be legitimate law has to respect fundamental rights and legal decisions to be acceptable by reference to rational arguments. In addition to majority voting and efficiency, natural law (fairness) and deliberative democracy are yardsticks for measuring the legitimacy of law. For legal doctrine, this puts more emphasis on plurality of sources and substantive arguments and less on formal aspects of authority. The *nationality* of an argument has to give way to its *rationality*.

This entails that the way to Europe for legal doctrine is paved by legal theory. It does not however, mean that legal doctrine has to walk the way. For the time being, legal doctrine seems reluctant. We see an increasing interest towards supranational European subject matters and sources, but no general increase in a European discussion on matters of national law. On the contrary, national legal institutions, at least in Norway, have a tendency to rise to the protection of the national in law against an invasion from Europe. Legal doctrine is important for the structures of meaning and minds in the legal profession. As such one may expect resistance to change and a tendency to redefine imports into the present concepts and attitudes of national law. Supranational European law is on its side however, shaped by contributions from lawyers trained in national law, bringing their different concepts and attitudes with them.²⁰ Even if we can identify a distinct community law attitude, community law and human rights law may in this way indirectly contribute to an Europeanisation of legal doctrine in the sense of an integration of the codes of meaning, causal beliefs and worldviews of the legal profession across Europe. So far there is no direct evidence of this. History shows us that the approach to Europe may change, so there is no guarantee as to the direction in which the future development will take. But such an Europeanisation should certainly no be ruled out from the realm of the possible.

²⁰ See Peter-Cristian Müller-Graff and Erling Selvig (eds.) *European Law in the German-Norwegian Context – Origins and Perspectives*, Berlin 2002.