Introducing legal method and the relationship between Norwegian domestic law and European and international law

Professor Mads Andenas, MA, DPhil (Oxford); PhD (Cambridge)

Plan for the day

- 1015-1100: Law and legal systems. Norwegian law, international law,
  European Union law, human rights protection at the different levels.
  What are sources of law and how do lawyers reason.
- 1115-1200: Introduction to the EU legal system
- 1215-1300: International law and its sources
- 1315-1400: Using legal texts: statutes, treaties and cases
- 1415-1600: Trying the new tools: reading out, in and down, looking around, behind and ahead and other legal games.

Format

- Lectures
- Interactive parts
- Exercises, groups

Law and legal systems

- Norwegian law, international law, European Union law, human rights protection at the different levels.
- What are sources of law and how do lawyers reason.

Using texts

- Texts, analysis and interpretaion
- Authorised texts
- What may “interpretation” mean? Exegesis

The national legal system as a paradigm

- Making law and enforcing law
- Legislation
- Public administration
- Private parties
- Courts

Constitutional principles in the national context

- Separation of powers
- Rule of law and state of law

Sources of law in the national system

- Constitution
- Statute
- Precedent
- Other practice

Legal positivism and legal realism in the Norwegian legal tradition.

The legal system as bearer of values and principles.

National sources of law and interaction with international, human rights and European sources.

National variation in sources of law

- What is a constitution? Written, thick or thin?
- Statute: its relative importance and coverage varies
- Precedent: the same here

Interpretation

- Interpreting constitutional texts, statutory texts and court decisions
- Relationship to public international law, human rights and EU sources of law

The legislative process

Some common features

National variations

How we use the legislative process when we later interpret legislative texts

Courts

- Hierarchical system
- Precedent

Introduction to EU law

- EU law principles on supremacy and direct effect.
- Sources of law in EU law
  - Treaties
  - Directives
  - Regulations

EU Courts

- ECJ
- CFI
- Member state courts
- Art 234 EC

Introduction to the EU legal system

1. Principal themes that underpin an understanding of the nature and purpose of the European Community Legal order include

2. ‘Task expansion’ – a summary

Article 5(1) EC: ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.’

3. The origins of the modern patterns of European integration: the immediate post-1945 debate

‘There are only two kinds of countries in Europe today – those that are small and know it, and those that are small and do not’ (Paul-Henri Spaak)

4. Peace – Politics – Economics – Law

5. The Treaties and EC lawmaking (distinguish between negative law and positive law)

The ‘negative law’ provisions: including free movement, competition law – most prominently Articles 81 and 82 EC. Where competition fits in the map of EC trade law. Competition and Integration.

‘Positive law’. What is now Article 5(1) EC – the principle of ‘attributed competences’ or ‘enumerated powers’. Specific provisions granting particular legislative powers are scattered throughout the text of the Treaty.

Regulations, Directives, Decisions; and ‘soft law’: [now Article 249 EC]

6. The ‘Community method’. The ‘Market without a State’

‘Contrary to expectations, the introduction of free markets, far from doing away with the need for control, regulation and intervention, enormously increased their range’ (Karl Polanyi, writing in 1944, quoted at p.1 of M. Egan, *Constructing a European Market* (Oxford University Press, 2001).

7. The development of the system – geographical and functional expansion

Accessions (from 6 Member States to 25)

The Single European Act (into force 1987)

The Treaty of Maastricht (or the *Treaty on European Union*, into force 1993)

The Amsterdam Treaty (into force on 1st May 1999)

The Nice Treaty (into force on 1st February 2003)

8. Institutional reforms/adjustment to the scope of legislative competence: the rise of subsidiarity as a controlling device

Article 5(2) EC: In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

9. The Treaty establishing a Constitution for Europe (?)

10. Community method: the constitutional dimension

11. Supremacy of EC Law

Case 6/64 *Costa v. ENEL* [1964] ECR 585

… the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

Case C-213/89 *Factortame* [1990] ECR I-2433

Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

12. The direct effect of EC law

Case 26/62 *Van Gend en Loos* [1963] ECR 1

13. The effect of EC secondary legislation in the legal orders of the Member States

14. The principle of liability for violation of EC law

Cases C-6, C-9/90 *Francovich v. Italian State* [1991] ECR I-5357

Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany* and *R v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-1029

Case C-392/93 *R v. HM Treasury, ex parte British Telecommunications* [1996] ECR I-1631

Case C-224/01 *Gerhard Köbler v. Austria* [2003] ECR I-10239

Case C-453/99 *Courage Ltd. V. Bernard Crehan* [2001] ECR I-6297

‘The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules’ (paras 26-28)

15. ‘Constitutionalism’

So: what happens if there is a violation of EC law? The principle of ‘dual vigilance’ – applied generally, and applied to the particular case of the competition rules. The role of (i) the Commission and (ii) private enforcement before national courts.

16. Concluding remarks: How EC law penetrates national legal orders, and the role of national judges in the application of EC law.

The European Community – and more recently the wider European Union – has always been profoundly concerned with politics and economics. Its legal order is a means to an end – though the precise nature of that ‘end’ remains contested.

Much of the *constitutional force* of EC law derives not from the explicit terms of the EC Treaty, but rather from the Court's view of what is required of the legal order in order to achieve the objectives of the Treaty.

The result of that process pioneered by the Court has been a ‘constitutionalised’ legal order for the European Community. EC law *is* international Treaty law – but it is *more than* international Treaty law

The story of the European Union is a story of ‘task expansion’. This is increasingly visibly problematic – for reasons of a symbolic and a practical nature.

In the field of competition law, we will need to consider objectives, institutional (political and judicial). Treaty provisions and secondary legislation, the constitutional character of the law of the EC, and patterns of enforcement. Some features of EC competition law are special, most are *not*. EC competition law is not a world that is separate from general EC law. And – like general EC law – EC competition law is not static. It evolves.

International law and its sources

- Different views on international law
- ‘Constitutionalisation’
- *Jus cogens* or peremptory norms

Peremptory norms or *jus cogens*

- Peremptory norms or *jus cogens* ("compelling law") accepted by the international community of states as norms from which no derogation is ever permitted.
- Which norms are jus cogens nor how a norm becomes jus cogens
- prohibition of genocide, maritime piracy, slavery and slave trade, torture, wars of aggression and territorial aggrandizement.

Treaties, conventions and pacta sunt servanda

- Autonomy of states
- Capacity to enter into treaties
- Difference from national system: no international organs to enforce

What is a treaty or convention?

Bilateral and multilateral treaties

Adding and amending treaty obligations

Reservations

Amendments

Protocols

Execution and implementation

Ending treaty obligations

Withdrawal

Suspension and termination

Invalid treaties, Ultra vires treaties

Role of the United Nations

Using legal texts: statutes, treaties and cases

Interpretation of treaties

Vienna Convention on the Law of Treaties, 1969

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31
General rule of interpretation

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

- 3. There shall be taken into account, together with the context:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding itsinterpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to a term if it is established that the parties so intended.

Interpreting national statutes

Interpreting cases from different courts

Trying the new tools: reading out, in and down, looking around, behind and ahead and other legal games

- Reading out
- Reading in
- Reading down
- Looking around
- Looking behind
- Looking ahead

Questions for discussion

- Referring to hand out containing legal sources

The ECJ opinion

- What are her sources?
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- Can you identify main rule and exceptions here?
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- How can one reach to these rules from the very brief wording of Art 28 EC?

The UN Charter

- How can Art 51 of the UN Charter give the US a right to invade Iraq? (problem: pre-emption.)
- What is the role of the Security Council in a situation where a country claims self-defence?