European Law Open (2024), page 1 of 35
doi:10.1017/elo.2024.8

CORE ANALYSIS

The triangular relationship between Danish, Nordic, and European law

Magnus Esmark[1,2]

[1]Faculty of Law, Department of Public and International Law, University of Oslo, Oslo, Norway and [2]Norway Inland University of Applied Sciences, Lillehammer, Norway
Email: magnus.esmark@inn.no

(Received 24 July 2023; revised 6 January 2024; accepted 29 March 2024)

Abstract

In this Article, I show how Danish reception of EC/EU law has been shaped by Nordic law and the connections between Danish and other Nordic jurists in a triangular system of social arenas. The purpose is to show in a concrete case that understanding the history of EU law in Member States requires us to engage increasingly with its connections to transnational legal orders and social structures that are older and different to the EU. In this, I aim to contribute to a history and sociology of EU law that puts its contingency at the forefront and removes EU from the main stage. The Article is based on the archives of the Nordic Jurist Meetings, a triennial conference of Nordic jurists dating back 150 years. I contextualise the debates with contemporary developments in the reception of EC/EU law within Denmark. I argue that Nordic law has played a special role in the history of EC/EU law in Denmark, as a source of reciprocal legitimation between the legal elites of the five Nordic countries. Whereas the Danish legal elite first believed in synergy between Nordic and EC law, the increased use of EU law to challenge this very elite during the 1990s onwards made them see Nordic law as in a principled, values-based opposition to European law. I argue that engagement in Nordic law has shaped Danish jurists' perception of EU law, just as it has been mobilised in a defence of the Danish legal order against EU law.

Keywords: Nordic law; Danish law; legal history; sociology of law; national reception

1. Introduction

The history of the European Union (EU) and of EU law has been closely intertwined with other inter- and transnational legal orders. Not only has the EU drawn inspiration from these other organisations, as well as transgressed their territory of regulation,[1] these exchanges of ideas have also been facilitated by multipositional actors moving in and out of the different projects of Europeanisation.[2] In addition, EU law has both shaped and been shaped through continuous interaction with national legal systems.[3]

In legal scholarship, Nordic law (sometimes named Scandinavian law in the Anglophone literature) has long been seen as a type of legal system like civil law or common law, united

[1]KK Patel, *Project Europe: A History* (Cambridge University Press 2020) in particular 13–49.

[2]See ia A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

[3]See eg F G Nicola, 'National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union' 64 (2016) The American Journal of Comparative Law 865.

© The Author(s), 2024. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

through a distinct set of legislative and interpretative characteristics.[4] This community has been shaped not only through a history of close relations between what are today the five Nordic countries, but also by one and a half century of legal harmonisation orchestrated by lawyer–politicians at the intersection between executives, legislators, and private practitioners from the five countries. While some scholarship has entertained the hypothesis of a particular Nordic reception of EU law,[5] it has focused mostly on Nordic law as a common set of ideas observable among the Nordic countries. This has left alternative perspectives somewhat understudied.

In this Article, I engage with Nordic law not primarily as a common set of ideas, but as a common social arena for the reciprocal reproduction of national legal authority among the Nordic countries, a distinct social space where multipositional actors can move in and out in addition to the national and European legal fields. While we should not think of the Nordic legal community as a fully-fledged field in the Bourdieusian sense, thinking it as a set of networks and institutions in which actors can engage to further their careers and legal authority on the national legal fields nonetheless allows us to study concretely how the national reception of EU law within one or more of the five Nordic countries has been shaped by Nordic law. The latter is understood not as an ideational construct, but as the outcome of actors engaging in other transnational legal networks than the EU. This provides a specific case for studying the broader problem of the contextualisation of the history of the EU into the history of all sorts of national, transnational and international legal orders and organisations.

To do this, I use archival material from the Nordic Jurist Meetings, a conference of Nordic jurists held triennially since 1872. I focus on material from 1966 to 2017, studying how the participants have debated the relation between EU law and Nordic law. Starting from a few years before Denmark acceded to the European Communities (EC) as the first Nordic country, and ending a little more than a decade after two more Nordic countries joined the EU (Finland and Sweden) and other two the European Economic Area (EEA) (Norway and Iceland), The Nordic Jurist Meetings are remarkably well-documented, with every intervention during the discussions reported verbatim in the proceedings published afterwards, yet their archives have received limited attention in socio-legal scholarship.[6] I contextualise this material with recent socio-legal scholarship of the reception of – and social struggle over the meaning of – EU law within Denmark, as the Nordic country with the longest history within the EU.

Based on this combination of material, I argue that we cannot understand the history of EU law in Denmark without reading it in conjunction with contemporary events in the Nordic legal community. As an alternative international space, Nordic law has been used by the Danish legal elite first to constitute its own legitimacy in positive connection to EC law, later as a lever to

[4]JM Smits, 'Nordic Law in a European Context: Some Comparative Observations' in H Jaakko et al (eds), *Nordic Law – Between Tradition and Dynamism* (Intersentia 2007) 55–64; P Letto-Vanamo et al (eds), *Nordic Law in European Context* (1st ed. 2019 edition, Springer 2019).

[5]See eg M Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review' 48 (2010) Journal of Common Market Studies 1039; A Nylund, 'Europeanisation of Nordic Civil Procedure: Does the Map Match the Terrain?' in L Ervo et al (eds), *Rethinking Nordic Courts* (Springer International Publishing 2021) 109–31.

[6]A few remarks on translation of the material into English are necessary: The minutes of the meetings are made in different ways over time. Some meetings were tape-recorded, transcribed, and published after the approval of each speaker. During other meetings, each speaker was expected to hand in written versions of their interventions after the meeting. And during other meetings again, one person was responsible for writing down the debate as it happened, meaning that all interventions would appear in the same language. This means that for some meetings, the quotes will be in thought-through written language, whereas other times, they will have a less structured and more oral character. Accurate and stringent translation would always be difficult in this case, translating a meeting between three different but alike languages, riven with a number of professional expressions and terms bound to the legal history and culture of these languages, some common and some particular to each of them. Adding on top of this that the production of the texts in the archive varies makes translation a demanding task. Although the limited lingual capability of the author undoubtedly bears some responsibility for translations that might appear as bad English, the reader ought as well to consider the underlying circumstances for the translations – translations that will always only act as mere shadows of the language in which the sentences were originally constructed.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

counter the increasing influence of EU law inside Denmark. Rather than approaching the national reception of EU law in a binary sense (EU-national), I claim that we ought to characterise it as triangular: actors mould the national reception by stepping in and out of two or three legal systems: national, Nordic and European. I use a Bourdieusian theoretical framework to understand the content of the law as the result of a social struggle over the right to speak about the law authoritatively, meaning that the law is an object of conflict over which actors will mobilise different states of legal capital acquired and valorised in one or more of these three social arenas. The Article is an effort to study in a concrete way how transnational legal orders other than the EU have played a role in the history of EU law – and conversely, how EU law has played a role in their history.

A. The skilled jurist between two forms of legal capital

We can think of the Danish legal order as structured around the reproduction of a certain elite who collectively possesses the monopoly of definition over *the law* (ie, Danish law). This elite is composed of jurists who are well-socialised into the language and ways of presenting reasons that are accepted as legal reasons, and who are dubbed *talented* or *skilled* jurists. One can identify certain career paths, connections, degrees, and even places of birth, which often happen to coincide with the presence of this legal skill.[7] We can think of the actors who are called skilled jurists as *well-socialised* jurists in the sense that their possession of objectified and generally acknowledged capital is celebrated by their colleagues as skill. From a sociological perspective, we can think of this skill as *legal capital*[8] in a broader sense, and when it comes to the specific skills that have value in the Danish legal order, we can speak of it more narrowly as *national legal capital*; symbolic possessions which have value in the struggle that takes places on the *Danish legal field* over the content of the law and over the ways to establish this content.

The value of this form of capital is not static, neither are the shapes in which it comes. As with other forms of currency, the value of national legal capital is linked to its value when exchanged into something else – be it other forms of symbolic capital or more mundane amenities. The Danish accession to the EC in 1973 opened new avenues for challenging the legal monopoly of definition controlled by actors intertwined with the central state apparatus, allowing for new sources of law and ways of reasoning to – potentially – gain traction and allow new actors to acquire acknowledgment as skilled despite not following the usual patterns of social reproduction. The advent of a possible *Europeanised legal capital* was an event which could provide ways of challenging the national elite.

It would, however, take a few decades from the Danish accession until the value of Europeanised legal capital increased significantly relative to that of its national counterpart. When it happened, it was catalysed not as much by any inherent dynamics of EU law itself as by certain changes on the Danish legal field creating new groups of actors who had the structural preconditions and predispositions to utilise the possibilities granted by EU law. A combination of an Americanisation of the legal services branch with a rapid increase in the number of enrolled junior scholars during the 1990s created new structures for producing and accumulating knowledge, which permitted and predisposed these new actors to challenge the central state apparatus and build increased legitimacy for peripheral ways of legal reasoning. The symbolic hierarchy on the field changed in tandem with the way EU law was doctrinally perceived and practiced, reflecting how the so-called internal and external perspectives on the law are intertwined and inseparable.[9]

[7]See in particular O Hammerslev, *Danish Judges in the 20th Century* (Jurist – og Økonomforbundets Forlag 2003).
[8]P Bourdieu, 'Force of Law: Toward a Sociology of the Juridical Field' 38 (1987) Hastings Law Journal 805.
[9]Hammerslev (n 7) 46.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

This development on the Danish legal field is the historical backdrop for the present Article, and I will return to it in more depth below. In the short summary given above, the story implies a somewhat binary relationship between national and European as regards the origin of the rules disputed over, the orientation of the actors and so on. This is a prevalent perspective in the studies of the reception of EU law within Member States, but also one that omits how social structures are connected across and within borders because its focus on European integration excludes other perspectives from the historical account. In this Article, I will construct a narrative of the above development as a triangular relation between Danish, Nordic, and European law to challenge this dichotomy and add another dimension of nuance to the history of EU law in Denmark.

Adding the Nordic dimension allows for a more thorough understanding of the social strategies employed by traditional national elites in relation to the doctrinal and symbolic changes brought about by (actors employing) EU law. It can show how EU law, in its national reception, is constantly shaped in opposition and in relation to existing national *as well as* transnational structures. This makes it easier for us to challenge the mythology of the EU as the core of the *European*, to show how it has always existed in relation to other and different thoughts and institutions which might (partly) fit or not into something called Europe. By telling a story about EU law that is not mostly about EU law, I aim with this Article to contribute to this provincialisation of the EU, as well as to go beyond the '. . . . spatial dichotomies that have tended to dominate European integration theory, such as the national versus the supranational or the nation-state versus the EU'.[10]

The circulation of actors and ideas in and out of transnational spheres have been treated in a range of studies, often within a profession-oriented framework. Lawyers transgressing the borders between national and transnational spheres, as well as the border between law and politics, have for at least a century played an important role in building international legal institutions.[11] Often, and in particular after the end of the Cold War, the picture has been one of a rising *noblesse de costume*, where lawyers from the heteronomous pole of the legal field have gained power by cross-acting between fields of power.[12] This is also the case with the early history of European law, where at first the attempts to build a legal academia around the European Coal and Steel Community (ECSC) from professors of international law failed,[13] whereas business lawyers and law professors had more success in building a community.[14] In the same vein, Avril has shown how an early generation of euro-lawyers were outsiders from the national legal fields, and were as such predisposed to seeking other opportunities in the European arena.[15] Loth also shows biographically how many of the lawyers taking cases to Luxembourg were even more peripheral outsiders of the national field.[16] The same fundamental dynamic shows up in other types of fields; as Sapiro has pointed out, avant-garde artists often seek the international scene because they have

[10]C J Bickerton, 'A Union of Member States. State Transformation and the New Intergovernmentalism' in C J Bickerton et al (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press 2015) 52.

[11]G Sacriste and A Vauchez, 'The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s' 32 (2007) Law & Social Inquiry 83.

[12]For some illustrative standard works see Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996); Y Dezalay and BG Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002).

[13]J Bailleux, 'How Europe Became Law: The First International Academic Congress on the ECSC (Milan-Stresa 1957)' 60 (2010) *Revue française de science politique* (English Edition) 67.

[14]Vauchez, (n 2) 56.

[15]L Avril, 'The Rise of Transnational Legal Experts: Two Lessons from Research on Private Practitioners as Euro-Lawyers' in E Korkea-aho and P Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022) 199–217.

[16]M Loth, 'Last Stop Luxembourg. Lawyers' Dynamism and the European Court of Justice's Contribution to Social Equity, c. 1970–1990' (PhD thesis, Universitetet i Oslo 2020).

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

fewer options to move forward within the rules of the game on the national field of culture, dominated by an older elite.[17]

In this direction of studies, the propensity of the established elite to defend their positions through the same type of transnational manoeuvring is relatively understudied. Rather, most of them seem to engage with a situation where the jurists who engage with transnational/international law and transgress the field boundaries are usually those who strive to change things, seeking either symbolic rewards for their investments, money, or both. In this Article, I will propose a perspective from which we can see certain actions of the established elite in much the same light; where a turn towards international/transnational arenas serves to build and preserve symbolic power in struggles on the national legal field.

This implies that the national elite will also, under certain circumstances, benefit from an orientation towards one or another international order, just as peripheral actors may do. The national elite might be the elite on the national field, but it is not only national – on the contrary, it engages willingly with the outside to preserve its national dominance. Characterised by large amounts of inherited social capital and balancing on the edge between law and politics in both national and transnational environments, we can think of the Nordic legal elites as 'lords of the dance'[18]; as dynamic and entrepreneurial internationalists able to profit from action in several social spaces. Acting across borders in this manner can be just as feasible a strategy for them as it can be for those seeking to rustle the status quo. I will argue in this Article that we can see the same propensity to '(at the same time) build and transgress, invoke and short-circuit the frontiers that organise international relations'[19] as we can see among the euro-lawyers.

B. Constructing the narrative – methods and data

To operationalise Nordic law, the core of the data are archives from the Nordic Jurist Meetings. I have extracted all debates which pertain EC/EU law from 1966 to 2017, as well as discussions on a general level about Nordic law from the same period. I have left out narrow and specialised discussions about specific areas of law. The suggested narrative builds on a reading of the Danish participation in the Nordic Jurist Meetings from 1966 to 2017, meticulously documented with minutes of presentations and discussions. I contextualise the debates about EC/EU law during these meetings with contemporary changes in the symbolic hierarchy among Danish jurists to see how national changes are reflected in the position-taking in the Nordic sphere. When the Danish legal elite was increasingly challenged on the national legal field, one strategy they employed in their defence was to construct their national legal capital more explicitly in light of a common Nordic legal heritage, drawing it into their construction of legal legitimacy that was fought over within the borders of Denmark.

The archives of the Nordic Jurist Meetings are a valuable and rich source of data, as the venues gather a range of actors and documents their interactions in a somewhat informal setting with three-year intervals. The meetings have always been well visited, often hosting almost 1,000 jurists from the Nordic countries. While a smaller group of actors take an active and dominant part in the resultant written material, we can use these minutes to extrapolate their interventions, assuming that if something can legitimately be said out loud in this public forum, it will often be an opinion that is shared with at least some other jurists. In the words of Avril, I use these detailed debates as 'echoes [of] the internal debates of the legal profession'.[20] In this sense, my approach to

[17]G Sapiro, 'Field Theory from a Transnational Perspective' in T Medvetz and JJ Sallaz (eds), *The Oxford Handbook of Pierre Bourdieu* (Oxford University Press 2018) 161–82.

[18]Y Dezalay and BG Garth, '"Lords of the Dance" as Double Agents: Elite Actors in and around the Legal Field' 3 (2016) Journal of Professions and Organization 188.

[19]A Cohen and A Vauchez, 'Introduction: Law, Lawyers, and Transnational Politics in the Production of Europe' 32 (2007) Law & Social Inquiry 75, 79.

[20]L Avril, 'Lobbying and Advocacy: Brussels' Competition Lawyers as Brokers in European Public Policies' 54 (2018) Czech Sociological Review 859, 863.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

construction by means of this archive has been similar to how one can use interview data qualitatively to construct a picture of the different perceptions of the world that exists on a field.

At the same time, the use of the archives of the Nordic Jurist Meetings comes with a few reservations. The meetings are attended broadly, but not by all groups of national jurists. As I will return to, top civil servants and judges are perhaps more evident here than are practicing lawyers and especially in-house counsels. There might also be a generational difference with younger jurists increasingly turning to other international fora, although it cannot be said with certainty here. If, however, that is the case, it should be seen exactly in light of the broader changes pointed to in this Article, with the older structures of internationalised legitimation coming under pressure and others being developed. Despite these reservations, the archives are a comprehensive and detailed source of debate, in which a broad spectrum of the national legal elites take part. In the context of this Article and its research questions, I find that, combined with existing knowledge on the area, they provide a reliable source for the interactions between national elites in the Nordic countries in relation to European law. They might not provide a complete picture of everything that happened between these groups, but they do provide a good picture of the unfolding of a particular dynamic, which this Article aims at rendering the focus of attention of future scholarship.

I have sought to relate the subjective positions of the actors to their objective positions – that is, their possessions of legal capital and place in the symbolic hierarchy of their own national contexts. Due to the nature of the data, patterns in the opinions compared to objective positions are difficult to use as the foundation for hard conclusions, while at the same time being difficult to simply ignore. I supplement the picture from the archival data by looking in the same way at contemporary legal literature, as well as existing research within the area to construct a broader context. The purpose here is not to put forward a complete picture of the relevant social fields and spaces and all the relevant actors, but merely to show how a particular dynamic unfolds. This delimitation is also the justification for the relatively narrow selection of data compared to what would have been needed to conduct a broader field study.

C. Structure of the Article

In the next section (2), I will introduce Nordic law as a social space and the role it has played for the national, Nordic legal elites, Denmark's in particular. I argue that the ability of the national legal elites to cross-act between national and Nordic contexts has been important for their reproduction and legitimation, and that we ought to think of Nordic law not only as a type of legal system, but as a social space connecting these elites. In section 3, I will first present the process of early Danish reception of EC law in more depth, arguing that it became a domesticated version of EC law interpreted authoritatively by the legal elite. I will then show how we can understand the contemporary debates on the Nordic Jurists Meetings in this light, and how national, Nordic, and European law was made to fit each other in a constructive optimistic vision of future legal harmonisation. In section 4, I will return to Denmark to present how and why the domesticated version of EC/EU law was challenged in the 1990s and 2000s, when more peripheral actors managed to mobilise it in opposition to the authority of the national legal elite. I will then show how we can see this reflected at the Nordic Jurist Meetings, arguing that the Danish national legal elite turned away from the constructive optimism dominating the meetings, using instead Nordic law as a counterweight to the increased legitimacy of EU law. In section 5, I will conclude with discussion of the results presented in the Article.

2. Nordic law and the order of an inter-state nobility

Nordic jurists have had a long experience with forms of international legal harmonisation going back before the EC made it into their ranks. For many years, Iceland was under Danish rule, Finland under Swedish rule, and Norway was both (though not at the same time!). This shaped the

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

countries' legal systems in similar ways during the important years of the constitution of the modern nation states. As independent states, it is not difficult to imagine how jurists from these five countries have found it easy to find common ground for rapprochement and harmonisation. The perception that Nordic law forms a substantive legal community is broadly accepted in legal literature, and not just in the Nordic countries. For example, Bernitz concludes that:

> the idea of Scandinavian law[21] is not only about legislative techniques and concepts. It is based, in principle, on a common legal tradition which forms part of the larger community of common culture and social life of the Nordic countries. Also, as has been illustrated here, Scandinavian law often has its special features when it comes to the solutions chosen and the substantive rules.[22]

In the years following World War II, the Nordic countries engaged in several forms of deepened international cooperation. Of importance is the engagement in the Council of Europe (CoE), where the Nordic countries often took upon them to coordinate proposals and positions during the initial construction of European human rights law. In the more trade-oriented ballpark, the Nordic countries all became members of the European Free Trade Association (EFTA) in parallel with the development of the EC, although the EFTA never aimed at the level of institutionalisation characteristic of the EC.

In parallel to the institutionalisation of international legal harmonisation in the rest of Europe, the post-world war period also saw an institutionalisation of legal harmonisation in the Nordic countries. The Nordic Council was instituted in 1952 with the declared aim of creating common solutions for perceived common problems and included a parliamentary-style organ with indirect elections from the national parliaments, following much the same model as the contemporary parliamentary assemblies of the EC and the CoE. During the 1970s, parties from the five countries increasingly started to caucus and coordinate policy proposals before Council meetings.[23]

The never-to-become culmination of the Nordic legal community was Nordek,[24] an initiative in the 1960s to promote trade and create something that, in many ways, was one among other popular attempts of the time at internal markets. However, the project was always marked by the fact that two countries – Denmark and Norway – were at the same time moving towards the EC. It is telling that the treaty on the common intentions of establishing Nordek included a clause that any country could terminate their obligations flowing from the contract if another of the Nordic countries acceded to the EC.[25]

Nonetheless, the initiative was dropped in 1970 following pressure from the Soviet Union,[26] but the changing conditions became a stepping-stone for new initiatives in other areas.[27] As an

[21]Bernitz uses the term Scandinavian law, which seems to be the usual term in English literature on the topic. In this Article, I prefer the Nordic law, since it is the accurate translation of the words used in the Scandinavian languages (eg 'nordisk ret' in Danish).

[22]U Bernitz, 'What Is Scandinavian Law?' 50 (2007) Scandinavian Studies in Law (Stockholm Institute for Scandinavian Law 2007) 29.

[23]C Wiklund and B Sundelius, 'Nordic Cooperation in the Seventies: Trends and Patterns' 2 (1979) Scandinavian Political Studies 99, 107.

[24]Abbreviation of the Swedish title, NORDiskt EKonomiskt samarbete, translating roughly as Nordic Economic Cooperation.

[25]P Kleppe, *EFTA – NORDEK – EEC* (Studieförbundet Näringsliv och Samhälle 1969); GK Ueland, 'The Nordek Debate: An Analysis of the Attitudes of Nordic Elites toward the Relationship between Nordek and the EC' 10 (1975) Cooperation and Conflict 1.

[26]The United Kingdom also worked to prevent the realisation of Nordek, fearing that it would weaken the utility of being in EFTA as well as draw Denmark and Norway away from the pending accession to the EC, see M Broad, 'Keeping Your Friends Close: British Foreign Policy and the Nordic Economic Community, 1968–1972' (2016) 25 Contemporary European History 459.

[27]Wiklund and Sundelius (n 23) 100–2.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

element of this development, Nordic cooperation was generally sectorised into different areas,[28] and lacked the sort of *totality* or comprehensiveness that we know from the EC system. Also, with or without Nordek the institutions of Nordic cooperation were never comparable in size to the EC apparatus. By the time of the Danish accession to the EC, only a few hundred people worked full-time at the secretariats of Nordic institutions,[29] and most of the power to act was still firmly placed within the national authorities.[30] The Nordic legal harmonisation was less institutionalised and more shaped by informal, bottom-up convergence, often facilitated through the Nordic Jurist Meetings.

A. A forum for reproduction of the national legal elites

The Nordic Jurist Meetings have occurred every third year since 1872 (with a few interruptions), gathering jurists from the five Nordic countries for common discussions about new legislation and case law, and to learn from developments in the other countries. Much of the most celebrated Nordic legislation has been discussed and developed during these meetings, for example the law of contracts, intellectual property law, and tort law. In addition, the meetings have been a place to develop new ideas and concepts for legal harmonisation, for example by publishing common gazettes of Nordic Supreme Court case law.

As both a professional and a social event, the Nordic Jurist Meetings have served to form ties between the participants and to constitute Nordic law as a coherent and connected entity. They have served as a forum for the existing as well as the soon-to-be legal elite of the Nordic countries. For an illustration of this, the meeting in 1978 was attended by eight former or current Danish Supreme Court judges: Johannes Bangert, Jørgen Gersing, Mogens Hvidt, Torben Jensen, Aage Lorenzen, Poul August Spleth, Henrik Tamm, and Jørgen Trolle, three of which either had been or presently were Presidents of the Supreme Court. In addition, on the list of participants were four later-to-be Supreme Court judges in different stages of a typical career path ending there: Børge Dahl (lecturer at the law school in Copenhagen), Leif Grønning-Nielsen (district court judge), Torben Melchior (head of office in the Ministry of Justice), and Niels Pontoppidan (head of division in the Ministry of Justice). The meetings in general are intensively visited by high-ranking civil servants and judges, but also by prominent lawyers whose family names were written on the doors of the Supreme Court barrister's offices around the Latin Quarter of Copenhagen. The number of times one can find several occurrences of the same family names in the alphabetically ordered participants' lists is indicative of the inherited social capital in play at these meetings and of the reproductive role that the meetings have for the national legal elites.

Inhabited by the legal elite of the Nordic states and providing a platform for exchange and development of ideas, the meetings have served to facilitate legal harmonisation from a bottom-up perspective. The meetings attracted not only high-level civil servants, but also sometimes members of government and/or parliament. Thus, they have not only been the basis for a continual convergence of mind-set, but also for developing and writing specific acts of legislation which have shaped Nordic legal community for a century or more, as well as facilitated a smooth exchange of ideas between legislators and jurists.

In this way, the Nordic Jurist Meetings have served to accomplish legal harmonisation not by treaty but by informal rapprochement and debate, then taken back to the national executive and parliament for enacting similar legislation. This is a historical experience which is deeply entrenched in the identity of the Nordic jurists as an acting collective in tandem with their nation state and Nordic peers,[31] an experience which is repeatedly brought up during the debates. It is

[28] Ibid., 105.
[29] Ibid., 103.
[30] Ibid., 104.
[31] As a testimony to the proximity between the Danish state and the Nordic Jurist Meetings, the board meetings in Copenhagen were in 1920 held at Christiansborg, the castle in which the Danish parliament resides, see H Tamm, *De Nordiske Juristmøder 1872–1972. Nordisk Retssamvirke Gennem 100 År* (Nyt Nordisk Forlag Arnold Busck 1972) 77.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

also an experience that is intimately linked to the close proximity between the legal elites of the Nordic countries and their nation states compared to many other countries. Whereas in many other countries lawyers have played a more active role in opposition to the state, legal training in the Nordic countries has traditionally been a training for the public administration rather than for private business, and jurists have mostly been employed in state administration.[32] Jurists have been placed close to state power and are perceived to have had comparatively little independent agency relative to their counterparts in countries such as France and the United States. This has been claimed as a reason that they have not taken the same independent role as jurists in some other countries, although there are some nuances among the Nordic countries in this regard, with Norwegian lawyers likely being more active than Danish ones.[33] As Feeley and Langford argue, lawyers as a group played a limited role in the formation of the Nordic liberal nation-states and only started to develop a collective identity as action-takers after the Nordic accessions to the European Convention on Human Rights (ECHR) and (for Denmark) the EC.[34] Before this, they had mostly been working as part of the state rather than outside of it.[35]

B. Ontological complicity and circuits of legitimation

There is a distinct reciprocity between the legal literature engaging with the existence and nature of Nordic law, and the fact that we can observe Nordic law empirically on the other hand. Nordic law can be observed materially not only in this or that harmonised legislation between the countries, but also as the result of an ongoing process of construction where Nordic jurists have written about and discussed Nordic law as a legal entity in and of itself that can be studied as a such. The connection between material substance and scholarly construction goes all the way back to the early institutionalisation of the Nordic Jurist Meetings during the latter decades of the 19th century, where similarities were sought out and propagated. Continuous academic connections through outlets such as *Tidsskrift for rettsvitenskap*, *Retfærd*, or *Nordisk tidsskrift for international ret* has added to this. We can see that the construction of the substantial commonalities has been closely connected to the scholarly construction of the relevancy of the substantial commonality.

There is a clear parallel to the history of EU law, which also builds on this sort of ontological complicity, where a 'relationship to the social world is not the mechanical causality that is often assumed between a "milieu" and a consciousness',[36] but where the two are continuously connected and mutually reproducing each other.[37] We can also observe the same complicity in the construction of national legal systems by first treatises written by prominent jurist–politicians during the formation of modern nation states. This intimate ontological complicity is an important part of understanding why the national elites are dependent on the symbolic value of Nordic law in relation to other legal paradigms.

There have been varying ideas of what the Nordic legal community consists of, but with a certain convergence towards a focus on limited judicial review as a core feature. Holtermann describes the so-called Nordic exceptionalism as ' . . . the peculiar constitutional tradition allegedly prominent in the region, which is characterised by the exercise of very limited or no judicial

[32]M Feeley and M Langford, 'Nordic Exceptionalism and the Legal Complex' in M Feeley and M Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021) 23.

[33]M Langford, 'Norwegian Lawyers and Political Mobilization 1623–2015' in M Feeley and M Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021) 147–74.

[34]M Feeley and M Langford, 'Introduction' in M Feeley and M Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021) 6–8.

[35]For a recent account of the development of more litigious, rights-oriented practices, see J K Schaffer et al, 'An Unlikely Rights Revolution: Legal Mobilization in Scandinavia Since the 1970s' 41 (2024) Nordic Journal of Human Rights 1.

[36]P Bourdieu, 'Men and Machines' in KK Cetina and AV Cicourel (eds), *Advances in Social Theory and Methodology* (Routledge 2014) 306.

[37]See above, with references to the role of scholarship in the construction and legitimation of EC law.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

control with the legislative branch of government'.[38] The extensive use of preparatory works for interpretation, written up by clerks in the state bureaucracy, is sometimes highlighted as another important feature and another important element of the close proximity between executive and judiciary. It is of little importance to what extent claims about Nordic legal exceptionalism holds substantial merit – what matters is that some people have met and agreed that they had something in common and felt the need to reproduce this commonality.

We should not overestimate the connectedness of the Nordic jurists; they each belong to and constitute distinct national elites. With this precaution, we should nonetheless think of the Nordic jurists as an *inter-state nobility*, and while the connections between Nordic countries might not have been stronger than the connections within each of them, they are strong, and around the 1970s, they were likely stronger and more broadly established than the connections to the outside world. We might not speak of a Nordic field of law as such, but there certainly were ways of reproducing national power which ran through the Nordics; a social space into which investments usually paid off in terms of increased national legal capital.

The community of Nordic orientation does not constitute a challenge to the role and authority of the individual nation states, even though it partly moves the reproduction of the state to somewhere outside. On the contrary, it has played a role as a continuous source for reciprocal celebration and recognition, reinforcing the authority of the central state actors in the Nordic countries by way of the temporal longevity and apparent independence between the celebrators. We can conceptualise this relationship as a *circuit of legitimation*. Any recognition of the legitimacy of power improves as its source moves further away from power. In order to maximise the legitimacy-output, one needs two types of distance: Socio-spatial distance, ie, apparent independence of the praiser from the praised (assuring the audience that the praise is not forced) as well as a temporal distance between the praise and the payment. In a somewhat condensed form, Bourdieu describes the mechanism in the following way:

> [G]iven that the symbolic efficacy of a legitimating discourse varies in direct proportion to the real or visible distance (independence) between the praiser and the praised, and that the distance between their corresponding points of view tends to vary in inverse proportion to this distance, an agent or institution wishing to perform an act of symbolic promotion (propaganda, advertisement, etc.) must inevitably find an optimum between seeking the maximization of the celebratory content of the message and the maximization of the (visible) autonomy of the celebrator, thus of the symbolic efficacy of the celebration.[39]

We can think of the Nordic legal community as a social arena which, like a stock exchange, facilitates reciprocal celebration between the participating national elites. Legitimacy runs both ways, and by running the celebration through *Nordic law*, its reciprocity is dimmed and therefore, its output is increased. The legitimacy of the state is thus underlined by its ability to refer out to a common legal heritage with other states. Lines of reasoning found in the Danish Supreme Court can be strengthened by showing how other Nordic supreme courts think and talk in the same way. Academic work is debated and reviewed across borders, adding scholastic internationalism while fully preserving the lingual purity of law written in the language of the state as the language of the state (an important element of the lingual community existing between the Nordic countries: The ability to maximise celebration without compromising on the language). The temporal longevity

[38] JvH Holtermann, 'Conspicuous Absence and Mistaken Presence. A Note on the Ambiguous Role of Scandinavian Legal Realism in Nordic Approaches to International Law' in A Kjeldgaard-Petersen (ed), *Nordic Approaches to International Law* (Brill 2017) 224.

[39] P Bourdieu, *The State Nobility. Elite Schools in the Field of Power* (Polity Press 1996) 384–5.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

only adds to this effect since the celebration appears that much more neutral as the reciprocity of the exchange is dimmed by its continuity.

This opens a different way of looking at Nordic law, in turn allowing for a break with the self-appearance of it. Looking at Nordic law from an internal perspective can yield the type of accounts that have been presented in numbers; as a tacit community of shared legal heritage which makes it professionally meaningful and profitable for actors to exchange ideas and learn from each other – since they share so much already. By thinking instead in terms of Nordic law as a central resource constituting the symbolic power of the national elites, we can see a different mechanic at play in parallel. None of the latter takes anything from the former; we can think of a circuit of legitimation without in any way questioning the substantial merits of the Nordic legal community. This perspective on Nordic law will underpin the argument of the Article.

3. Danish and Nordic reception

In this section, I will show how the reception and production of EC law in Denmark was reflected in the debates on the Nordic Jurist Meetings. In the first subsection (A), I will outline the initial reception of EC law in Denmark, and how it landed in the existing symbolic hierarchy of the Danish legal field. Next (B), I will use illustrative examples to show the positions and sentiments at place during the debates about European law during the Nordic Jurist Meetings from 1966 to 1978. Then (C), I will discuss how we can understand this debate, in particular its Danish participants, in light of the initial Danish reception of EC law. The section ends with a conclusion (D).

A. Initial Danish reception

To understand how the Danish administrative elite acted among their Nordic colleagues, I will first provide some context concerning the initial reception of EC law within Denmark. The two most important aspects of this were that (1) the administrative elite managed to gain a de facto monopoly of definition concerning EC law in Denmark, while largely excluding other groups of lawyers from participating, and (2) while EC law might have been faithfully implemented in Danish legislation, the monopoly of the administrative elite shaped Danish EC law into a domesticated form more similar to national law than to the kind of EC law developed on the European legal field.

Already the preparations for the Danish accession are illustrative of the reception that EC law would get in Denmark during the first decades of membership.[40] In a series of reports published by a committee of civil servants from 1967 to 1972,[41] the impact of EC law on Danish law is thoroughly discussed, and necessary changes in national legislation are pointed out so that Danish law could be in accordance with EC law by the time of accession. In around 2,000 pages, the report and its four supplementary reports only mention case law from the European Court of Justice (ECJ) two times, and without expressing any thought of the ECJ as a driver of legal integration – an idea that was already fairly well-developed on the European legal field by this time. The reports leave the impression that the civil servants in the committee have little understanding of the EC as a legal community, thinking of it more as a series of international legal-political obligations for the Danish state to comply with. Complying with EC law was, in these reports, about implementing legislation, not about taking part in a developing community of law.

[40]For an overview of the accession process, see M Rasmussen, 'The Hesitant European History of Denmark's Accession to the European Communities' 11 (2005) Journal of European Integration History 47.

[41]Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, 'Danmark Og de Europæiske Fællesskaber' (1967); Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, '1. Supplerende Redegørelse. Udviklingen i 1968' (1969); Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, '2. Supplerende Redegørelse. Udviklingen i 1969' (1970); Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, '3. Supplerende Redegørelse. Udviklingen i 1970' (1971); Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, '4. Supplerende Redegørelse. Udviklingen i 1971' (1972).

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

This picture is reinforced if we look at the interactions between Danish lawyer–diplomats and Jean Monnet in the period before the Danish accession. Some leading Danish jurist–diplomats took upon them a role of brokers between the new European connections and Denmark, such as Gunnar Riberholdt (from the Ministry of Foreign Affairs and the Danish representation in Bruxelles during the 1960s) and Per Federspiel (ia lawyer, Member of Parliament and from 1960 to 1963 chairman of the Parliamentary Assembly of the CoE). Through contacts with Jean Monnet and his *Comité d'action pour les États-Unis d'Europe*, they and others sought to get the different perceptions of the new order in tune. The connections to the Nordic legal community were a cause for debate here, for example during a conversation in 1970 between Jean Monnet and Per Federspiel. Monnet expresses his respect for what the Scandinavians have achieved in terms of harmonisation,[42] but also his concern that, particularly in the shape of Nordek, it might come in the way of the imminent expansion of the EC.[43] It is illustrative of the dialogue between the Danish elite and Jean Monnet (as well as some of his close associates) that the latter seem to have invested a lot into preaching to the Danes about the *political* dynamics of European integration (which they appear to largely agree on), but that the idea of *legal* dynamics are absent from the conversations.[44]

One thing was the attitude of – and the preparations made by the central administration around the accession – but what happened among the different groups of Danish jurists following it? The picture in general is one of the civil servants monopolising knowledge about EC law, while other groups of jurists proved unable to compete.

Scholarship of EC law was sparse, and mostly limited to the Copenhagen Business School. Since this university was not allowed to grant full law degrees (only the universities of Copenhagen and Aarhus had this privilege back then), the more active research environment had little impact on the mindset of new generations of jurists who would be taking jobs as civil servants, lawyers, and judges after law school. Research at the University of Copenhagen, to the extent that it happened, was focused on the issue of the constitutional relation between Denmark and the EC, rather than the more practical (so to speak) questions of doctrinal law. Illustrative for early Danish EC law scholarship is that the course on EC law at the University of Copenhagen was a subsection of the larger course on international law, and that for many years, the professor responsible for EC law was Isi Foighel, a professor of international law (and former Minister of Taxes and Duties).[45]

One of the larger groups working with EC law in this period was the civil servants. Not only did many of them have to deal with practical questions of implementing EC law in Danish legislation, but many were also sent to law schools in different European countries for post-graduate training prior to the accession.[46] This primitive accumulation (ie, accumulation establishing a new order rather than following from its structure[47]) gave this group a lead ahead of other jurists, who would have less practical knowledge about EC law when Denmark acceded. In addition to this, the State

[42] Although this might be out of courtesy, it is not difficult to imagine Monnet's honest fascination of a seemingly well-working integration process as the Nordic one.

[43] AMK C 27/1/60, Jean Monnet Fonds, Fondation Jean Monnet, Lausanne.

[44] M Esmark, 'Without Verona Walls. The Production of Danish European Union Law 1973–2020' (PhD thesis, Københavns Universitet 2022) 78–80.

[45] Ibid., 195–8.

[46] The plan was to train 40–50 clerks, see Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, '3. Supplerende Redegørelse. Udviklingen i 1970' (n 41) 455. Yet, only 29 clerks seem to have made it through these programs by the time of accession, see Udvalget vedrørende Danmarks forhold til de Europæiske Fællesskaber, '4. Supplerende Redegørelse. Udviklingen i 1971' (n 41) 265. The inability to live up to own expectations might stem partly from the structure of the administration, were seniority was lost if a civil servant shifted from one ministry to another, making bold career moves unattractive and likely reinforcing the famous silo-mentality, see HN Jensen and T Knudsen, 'Senior Officials in the Danish Central Administration: From Bureaucrats to Policy Professionals and Managers' in E C Page and V Wright (eds), *Bureaucratic Elites in Western European States* (Oxford University Press 1999) 229–48.

[47] K Marx, *Capital. A Critique of Political Economy. Volume One* (Ben Fowkes tr, Penguin Books 1976) 873. See also M Loveman, 'The Modern State and the Primitive Accumulation of Symbolic Power' 110 (2005) American Journal of Sociology 1651.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

Solicitor manoeuvred away from letting too many cases get to Luxembourg, generally through a policy of settling cases and changing contested legislation rather than fighting it out in the courtrooms. From the end of the 1970s, the cross-ministerial Legal Special Committee (*Juridisk Specialudvalg*) gave the state apparatus increased influence on the few court cases that came by supplying the State Solicitor with memos from experienced civil servants about the real content of EC law – often leading to the conclusion that referring cases to Luxembourg was not necessary. Since judges had little experience with – and interest in – EC law, they generally followed the recommendations of the Committee.[48]

This primitive accumulation of European legal capital within the central administration, and the ability of the civil servants to monopolise Danish EC law by way of their own interpretation of its dynamics, squeezed out the other groups. A few Danish lawyers did try to become somewhat familiar with EC law by taking LLM degrees in other Member States or in the USA and/or practicing for a year in one of the big Brussels-based law firms, yet only a handful of lawyers went this way. No court cases meant little work for the lawyers and the judges, and therefore little opportunity to build practical experience. In addition, most law offices by this time were too small to accumulate enough cases and develop routines from experience to seriously bet on EC law as an area of practice. After a short decade with a minimal number of cases, most lawyers had to withdraw, leaving the access to define EC law within Denmark mostly to civil servants.[49]

This process and its outcomes had important ramifications for the early EC law in Denmark. With civil servants dominating the production of EC law within Denmark, the potentially dynamic nature of EC law was not unleashed. With virtually no court cases, the supply track to the last leg of the famous *triangle magique* – preliminary references – was cut off, meaning that EC law in practice became a series of international obligations to be implemented by the executive and the legislator. EC law was something that was made and done by the state, and it was only in a few cases that non-state actors managed to use EC law to challenge this status.

This of course shaped the way that the administrative elite in Denmark thought about EC law. Without having their view challenged by others, they were in practice quite free to treat EC law as national law, in the sense that the special sources and sources doctrine distinguishing EC law (as produced on the European legal field) from Danish law found limited use in practice. EC legislation was largely interpreted as national legislation, and the dynamic nature of Europeanisation-through-case-law[50] was nowhere to be found. The civil servants simply applied what they knew – national law and legal method – to this new area of law.

The monopoly also shaped their perception of EC law in the sense that it was never a threat to their authority. Senior civil servants and high-ranking judges – the elite in the symbolic hierarchy of Danish law – were trained on Danish sources and doctrine. As long as no one challenged the fact that they applied this to EC law as well, they were perfectly able to keep their place as the authoritative interpreters of law. EC membership did not pose a real threat to the way things had worked before, in the same way as the Danish participation in EFTA, the CoE and Nordic law did not interfere with traditional power structures between Danish jurists.

From the perspective of social relations between Danish jurists, membership had had little influence within Denmark. Denmark's accession to the EC in 1973 made EC law a more pressing issue for Danish jurists than for those of the other Nordic countries. At the same time, the domesticated form that EC took became an important precondition for the way EC law played out in the Nordic sphere. Even though Denmark was the sole Nordic member of the EC, one can therefore question the extent to which this set Denmark apart compared to Norway, Sweden,

[48]M Esmark, '"Le droit communautaire – c'est moi !" – statsmonopol, national ret og euro-integrationisme i tiden efter Danmarks indtræden i EF' 14 (2020) *Praktiske Grunde. Nordisk tidsskrift for kultur- og samfundsvidenskab* 23, 35–6.

[49]Ibid., 31–4.

[50]A Vauchez, Integration-through-Law: Contribution to a Socio-History of EU Political Commonsense, Working Paper, EUI RSCAS, 2008/10.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

Finland, and Iceland. As I will argue in the following, despite certain differences, we can see that Danish ideas about EC law by and large lined up well with the ideas of their fellow Nordic jurists. Danish membership seems to not have bent their perspective in this regard.

B. The EC and the perceived future of Nordic law

During two important debates in 1972 and 1975, the future prospects of the Nordic legal community were discussed by a range of high-ranking civil servants. Despite the anticipated accession of Denmark and Norway to the EC, expectations were high not only for the continued importance of Nordic law, but also for its potential to both learn from EC law and contribute to shape it. The two systems were generally perceived not as conflicting, but as likely to be able to benefit from each other, overlapping through the two countries which were to become Member States. After the meeting in 1972 was concluded, Norway decided in a referendum not to accede, but the expectations regarding the implications and consequences of Danish membership persisted. Niels Madsen, head of department in the Danish Ministry of Justice, illustratively expresseed optimism regarding the synergic potential between Nordic law and EC law, not only despite the upcoming accession, but maybe even because of it. To give justice to the sentiment and argument presented, I will quote at length:

> With regard to the EEC problem, it must first be emphasized, as both the rapporteur and von Eyben[51] did, that the legal rules that are or can be created within the Communities only cover a limited area of what is the subject of Nordic legal cooperation. In the fields with areas of contact between Nordic legal cooperation and EEC cooperation – one can particularly highlight company law, bankruptcy law – many of the EEC rules are not foreign to us, and those of them that are new we will possibly be interested in implementing in the Nordic countries. It cannot be denied that, for example, in the area of company law, we are a little underdeveloped compared to the old, industrialized countries, although I would not use von Eyben's expression 'that we are Indian tribes'. It is true, at least for Denmark, that we probably need modernisation in the direction of the EC rules as far as company law is concerned. It is also very valuable, as has been emphasized by both the rapporteur and von Eyben, that there is an opportunity to exercise influence on rulemaking in the Common Market through the membership of Denmark and Norway, and that there is also the opportunity for the other Nordic countries to take advantage of this chance through a strengthening of Nordic cooperation.[52]

We can find similar perspectives among participants from the other countries. Stein Rognlien, Director General in the Norwegian Ministry of Justice, argued in a similar vein that connecting Nordic law with the EC through some countries might be beneficial for everyone involved:

[51] William Edler von Eyben, a then prominent Danish professor of law at the University of Copenhagen, who introduced the debate during which the above statement by Niels Madsen is presented.

[52] 'Med hensyn til EEC-problemet må det i første række understreges, som både referenten og von Eyben gjorde det, at de retsregler der er eller kan skabes inden for Fællesskaberne, kun dækker et begrænset område af det der er genstand for nordisk lovsamarbejde. På de felter hvor der er berøringsflader mellem nordisk lovsamarbejde og EEC-samarbejdet – man kan særlig fremhæve selskabsretten, konkursretten – er mange af EEC-reglerne ikke fremmede for os, og de af dem der er nye vil vi muligt være interesserede i at gennemføre i de nordiske lande. Det kan vist ikke nægtes at vi f. eks. på selskabsrettens område er lidt underudviklede i forhold til de gamle industrilande, selv om jeg ikke vil bruge von Eybens udtryk 'at vi er indianerstammer'. Det gælder i hvert fald for Danmarks vedkommende at vi for selskabsrettens vedkommende nok kunne trænge til en modernisering i retning af EF-reglerne. Det er også meget værdifuldt, som det er fremhævet både af referenten og von Eyben, at der er mulighed for at øve indflydelse på regeldannelsen i Fællesmarkedet gennem Danmarks og Norges medlemskab, og at der også er mulighed for at de øvrige nordiske lande kan udnytte denne chance gennem en styrkelse af det nordiske samarbejde'. *Förhandlingarna Vid Det Tjugosjätte Nordiska Juristmötet i Helsingfors Den 24–26 Augusti 1972* (Vammalan Kirjapaino Oy 1975) 61.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

> I mentioned at the beginning that I thought international cooperation was the seed for a renewal of Nordic cooperation . . . I believe that, in relation to the EC, there are opportunities both to preserve Nordic cooperation and perhaps to expand it, and that this will be possible, partly within the framework of the EC and its cooperation bodies, and partly through cooperation outside the EC's bodies between those who are involved in the EC and those who are not part of the EC. Although what Grönqvist was talking about may be difficult, I think there will be opportunities.[53]

We can see corresponding opinions between other important actors. Minister without portfolio Carl Lidbom, speaking explicitly on behalf of the Swedish government (illustrating well the blurred lines between law and politics in this forum), said that 'the mere fact that the areas of Nordic and European cooperation partially coincide cannot reasonably give rise to pessimistic considerations'.[54] More specifically, he continues the argument that Norway and Denmark can pull the other countries into negotiations to create a larger and more fluid cooperation around the EC, more in the style of what they know from the Nordic legal cooperation:

> But of course, the most important thing is that all Nordic countries who wish to will have the opportunity to participate in the work in some way when an issue of common interest is raised in the EEC. It naturally provides the best opportunities to forcefully assert Nordic viewpoints and interests. Even better, there are examples in the past of the EEC being aware that there are sometimes reasons to allow non-members into its cooperation. I am thinking above all about the European Patent Convention.[55]

Gustaf Petrén, judge at the Administrative Supreme Court in Sweden, concurred, arguing along the same lines that 'when Denmark and Norway enter the EEC, there will be a need to get new legislative ideas anchored throughout the Nordics. Thereby, there would be interest in also getting the other countries involved in a joint collaboration that can create a basis for ideas that are later taken up in the EEC from the Danish and the Norwegian side'.[56]

During the first meeting held after the Danish accession, optimism continued. In a debate from 1975 on 'Nordic legislation and the European Communities', head of office in the Danish Ministry of Justice Ole Due argued that there is no 'legal obstacle to the involvement of other countries in the cooperation on an equal footing with the EC countries'[57] for any of the areas regulated under EC, and 'informal consultations'[58] and intra-Nordic briefs can make the Nordic influence count during EC law-making processes. The essence of Due's position is supported by prominent figures such as Swedish Professor of Law Ulf Bernitz, who had no problem in seeing that the Nordic

[53]'Jeg nevnte til å begynne med at jeg trodde det internasjonale samarbeid var spiren til en fornyelse av det nordiske samarbeid. . . . jeg tror det i forhold til EF er muligheter for både å bevare det nordiske samarbeid og kanskje bygge det ut, og at dette vil være mulig, dels innen rammen av EF og dets samarbeidsorganer, dels ved samarbeid utenfor EF's organer mellom de som er med i EF og de som ikke er med i EF. Selv om det som Grönqvist var inne på kan være vansker, så tror jeg det vil være muligheter'. Ibid., 67.

[54]'enbart den omständigheten att områdena för nordiskt och europeiskt samarbete delvis sammanfaller kan inte rimligen ge anledning till pessimistiska betraktelser'. Ibid., 57.

[55]'Men allra angelägnast är naturligtvis att alla nordiska länder som vill får tillfälle vara med i arbetet i någon form när en fråga av gemensamt intresse tas upp i EEC. Det ger naturligtvis de bästa möjligheterna att med kraft hävda nordiska synpunkter och intressen. Dess bättre finns det exempel i det förflutna på att EEC har varit på det klara med att det ibland finns skäl att släppa in icke-medlemmar i sitt samarbete. Jag tänker då framför allt på den europeiska patentkonventionen'. Ibid., 58.

[56]'när Danmark och Norge kommer in i EEC, kommer det att bli ett behov av att få nya lagstiftningsideer förankrade i hela Norden. Därigenom skulle bli intresse för att också få med de övriga länderna i ett gemensamt samarbete som kan skapa underlag för ideer som man från danskt och norskt håll senare upptar i EEC'. Ibid., 63.

[57]'retlig hindring for medinddragelse af andre lande i samarbejdet på lige fod med EF-landene' *Forhandlingerne På Det Syvogtyvende Nordiske Juristmøde i Reykjavik Den 20.-22. August 1975* (Prentsmiðjan ODDI 1977) 176.

[58]'uformelle konsultationer' Ibid., 177.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

countries could cooperate with the EC while at the same time deepening their own intra-Nordic integration.[59] High Court judge Einar Lochen from Norway concurred, underlining that 'we have carried out far more harmonisation than the EC has done, and we should have something to contribute with in this field'.[60]

While the debate unsurprisingly intensified around the Danish accession, the optimism about synergies between Nordic and European and other international schemes of harmonisation went back to 1966. For example, the Swedish Secretary of State Ove Rainer,[61] argued for Nordic harmonisation in parallel with other structures (including the EC), and then Gustaf Petrén (at this time still Swedish High Court judge) argued for the strategy of presenting Nordic methods and results for the rest of the world to avoid conflict by reciprocal approximation.[62] A nuanced discussion presenting both problems and potential came in 1969 from the Norwegian Professor of Law Torkel Opsahl.[63]

From the Danish accession onwards, the optimism was not limitless, and there are some, particularly Danes, who raised more sceptical arguments. Despite their reservations, they remained not only keen to pursue the same goal of reciprocal benefit, but also insisted that it was possible, even if not uncomplicated. One issue was as profane as the allocation of labour to facilitate Nordic and European integration respectively, as the Finnish Supreme Court Judge Curt Olsson pointed out during the 1972 meeting, arguing that the EC 'requires a large pool of such qualified labour, not least lawyers with skill in – and experience of – international legislation and with diplomatic talent, something which no Nordic country even today has any abundance'.[64]

Some were more openly sceptical, for example Swedish Professor of Law Ulf Bernitz who, in response to the remarks of Ole Due said that the interest from the EC to cooperate with the Nordic free trade countries 'so far have been quite small. There is thus a gap between the theoretical analysis of the cooperation possibilities that the speaker has made and the real conditions as they appear today'.[65] Bernitz thus took a less optimist position than during the meeting three years earlier. The most clearly critical voice, notably, was not a civil servant, but a practicing lawyer. Bent Wellejus from Denmark argued that even though there might not be anything standing in the way of continued and meaningful Nordic cooperation after a Danish and Norwegian accession, the negative conclusion was not enough, since 'where the economic and commercial interests are present, the legal interest in cooperation will also be present',[66] nudging lawyers to move their billable hours south rather than north.

At the same time, most of the sceptical remarks were made not as principled statements, but as reservations to otherwise generally positive arguments. It is not surprising that speakers discussed some obvious objections, not only to strengthen their own argument, but also because it seemed implausible that anyone of them would have an unequivocal view on things. Despite acknowledging these objections, their concluding arguments were optimistic. One illustration was von Eyben who, despite obvious challenges, urged the 'old, tested Nordic community'[67] to 'pick up the glove'.[68] And despite being unsure about the exact form a cooperation between the Nordics and the EC could take,

[59]Ibid., 188.

[60]'Vi har gjennemfört langt mer av harmonisering enn EF har gjort, og vi burde ha noe å gi på dette felt'. Ibid., 190.

[61]*Förhandlingarna Vid Det Tjugofjärde Nordiska Juristmötet i Stockholm 31 Augusti–2 September 1966* (1966) 51.

[62]Ibid., 63.

[63]*Forhandlinger På Det 25. Nordiske Juristmøte i Oslo 13–15. August 1969* (Grøndahl & Søn Boktrykkeri 1969) 21–37.

[64]'kräver ett stort uppbåd av sådan kvalificerad arbetskraft, inte minst jurister med skicklighet i och erfarenhet av internationell lagstiftning och med diplomatisk talang, som intet nordiskt land ens i dag har något överflöd på.' *Förhandlingarna Vid Det Tjugosjätte Nordiska Juristmötet i Helsingfors Den 24–26 Augusti 1972* (n 52) 27.

[65]'hittills ha varit rätt litet. Det föreligger alltså ett gap mellan den teoretiska analys av samarbetsmöjligheterna som referenten har gjort och de reella förhållandena sådana de i dag ter sig.' *Forhandlingerne På Det Syvogtyvende Nordiske Juristmøde i Reykjavik Den 20.-22. August 1975* (n 57) 184.

[66]'[d]er hvor de økonomiske og erhvervsmæssige interesser er til stede, der vil også den juridiske interesse for samarbejde være til stede' *Förhandlingarna Vid Det Tjugosjätte Nordiska Juristmötet i Helsingfors Den 24–26 Augusti 1972* (n 52) 71.

[67]'gamle hårdtprøvede nordiske samarbejde' Ibid., 51.

[68]'tage handsken op' Ibid.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

Swedish docent Hans Stenberg argued that 'in any case, we already have some institutions that could perhaps be activated in this area. We have the Nordic Council, we have EFTA. I'm sure you can find other forms as well'.[69] Ole Due, one of the optimists quoted above, acknowledged clearly that Danish membership should not only be seen as:

> a risk for the Nordic legal cooperation, which it undoubtedly is, – it is a risk – but just as much as an extra, as an additional possibility, and in any case as a challenge that gives occasion to really consider which new and unconventional methods can be used.[70]

After intense debates around the accession of Denmark (and the expected accession of Norway), the interest faded away and basically died out by the end of the 1970s. At the 1978-meeting, the only part of the agenda pertaining to European law was '[i]nformation about the Danish participation in the legal harmonisation within the EC',[71] which was exactly what the title promised: Danish jurists transmited information about developments in European law and answered a few questions. After this, the debate, as pointed, died out. In the 1980s, there was basically no discussion about European law at the Nordic Jurist Meetings, and when it came up, the relation between Nordic law as such and European law was not debated. The discussion was solely about the latter of the two.[72]

It is tempting to hypothesise that this decline in interest was down to some perceived realities of European integration which made further Nordic discussion in the portrayed vein redundant. New debates of this sort did not emerge again until the 1990s, when Finland and Sweden both became members, and Norway and Iceland became closely associated through the EEA agreement. The discussion here in the first instance had close similarities with the one described in this section, but it morphed quickly, and was separated by around 15 years to the events depicted here. For those reasons, I will only return to it in section 4. In the rest of the present section, I will discuss different aspects of the debate outlined in the above extracts.

C. National legislation, realist assessments and Nordic focus

I have tried in the above to give a picture of the positions taken in the discussions by participants from all countries to show how the general sentiment spanned across the entire community (with some nuances), while pulling the Danes slightly more forward. In this subsection, I shall focus more on the Danish participants, with the purpose of linking their position during the meetings with the contemporary position of EC law in Denmark.

As I have argued above, the participants of the Nordic Jurist Meetings were predominantly high-ranking civil servants, together with professors of law (mostly of traditionally prestigious topics such as contract law, constitutional law etc) and some high-ranking judges. Practicing lawyers were present on a larger scale, but take little space in the debates, at least those about European law and Nordic law. This general picture applies also to the Danes who intervened

[69]'vi har ju i alla fall en del institutioner redan som kanske skulle kunna aktiviseras på det här området. Vi har nordiska rådet, vi har EFTA. Jag är säker på att man också kan finna andra former.' *Forhandlingerne På Det Syvogtyvende Nordiske Juristmøde i Reykjavik Den 20–22 August 1975* (n 57) 196.

[70]'en risiko for det nordiske lovsamarbejde, hvad det utvivlsomt er, – det er en risiko –. Men ligeså meget som en ekstra, som en yderligere mulighed, og under alle omstændigheder som en udfordring, der giver anledning til virkeligt at overveje, hvilke nye og utraditionelle metoder man kan bringe i anvendelse.' Ibid., 203.

[71]'Information om den danske deltagelse i lovharmoniseringen inden for EF' *Forhandlingerne På Det Otteogtyvende Nordiske Juristmøde i København Den 23–25 August 1978* (J H Schultz A/S 1978) 2, 47.

[72]And even framed as a debate about competition law and not about European law, although European law of course takes some space in the discussion. *Förhandlingarna Vid Det 31 Nordiska Juristmötet i Helsingfors 19–21 Augusti 1987 Del I* (Vammalan Kirjapaino Oy 1987) 367; *Förhandlingarna Vid Det 31 Nordiska Juristmötet i Helsingfors 19–21 Augusti 1987 Del 2* (Vammalan Kirjapaino Oy 1987) 579.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

during the debates in the first phase. Almost all were either top national figures or became so later: Of 16 Danes speaking at least once (but often much more) during the debates I have analysed from 1966 to 1978, nine were civil servants (mostly in the Ministry of Justice), two were full professors of law, and three were lawyers. Two of the 16 speakers were women. Of the civil servants, one would later become high court judge and two others would become Supreme Court presidents.

While the overall participants list might give a slightly more mixed picture, it is clear that this forum was dominated by the career civil servants who either were or would be at the top of the national state apparatus. This is particularly so if we think of the speakers (who comprised a minority compared to the much larger group of silent participants, or people who at least did not speak during the formal debates) as the leading figures in this space, those who had the power to define and delimitate the borders of opinion.

The leading Danish participants at the Nordic Jurist Meetings during this period were people from the centre of the Danish legal field. Positioned close to the reproduction of state power, they were at once benefitting from its legitimacy, as well as depending on its continuation for their own status. This is reflected in three distinct aspects of their actions and position-taking, which I will discuss in turn: Their reading of EC law within a national-legislative framework, their focus on realist assessment of possibilities, and their projection of the internal Danish debate on EC law to the Nordic arena.

A national, legislative framework

Nordic law is not just a legislative community, and efforts have been made to build common Nordic case law gazettes and legal journals, just as the legal harmonisation has been closely linked with political cooperation. This is also emphasised during the meetings, for example by Curt Olsson in 1972.[73] This certainly has some merit, yet most of the collective effort seem to be directed at legislation, whereas other processes of legal harmonisation are present, but remain peripherical. This fact is linked to the social position of the leading participants: Senior civil servants acting close to the political processes are inclined to think legal change and regulation in the terms that they not only can influence, but that they are also better placed to influence than most other jurists. Again, the Nordic Jurist Meetings have always been closely and organically connected to the political processes between the Nordic countries, and this is reflected also in the thinking of the dominant group on the meetings.

This legislative focus reoccurs in the comprehension of what EC law is, and how it can or cannot interact with Nordic and national law. Contemporary ideas of dynamic European integration produced on the European legal field are absent here. The treaties are repeatedly conceived of as regulating particular, limited areas of law, and no attention is paid to the role of the ECJ as a motor of integration. Instead, reading and interpretation of directives and regulations take up most of the time, when it is not devoted to assessing the political realities around membership. While people are aware of the possibility that the EC will expand its scope in the future, this is not clearly thought of as a legal process as much as a political or economic one.

This legislative focus is parallel to the way EC law was produced within Denmark. Danish EC law at this time was not a living instrument where different groups of actors could compete for its utilisation and the definition of its meaning; it was almost monopolised by the same group of civil servants we see at the Nordic Jurist Meetings. In the same way as Danish EC law was produced much in the semblance of national law, as I showed above, so was the Nordic EC law. There were no people engaged with a stake in challenging this legislatively oriented, domesticated version of EC law. On the contrary, the dominant actors, who as civil servants strive towards cosmos rather than chaos, put an emphasis on making everything fit in harmony rather than construct a picture of conflict between different legal systems. They had a clear interest in constructing a system where the elements were in harmony, not in conflict.

[73] *Förhandlingarna Vid Det Tjugosjätte Nordiska Juristmötet i Helsingfors Den 24–26 Augusti 1972* (n 52) 32–3.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

Realist assessments of politico-judicial options

When this politico-juridical elite discussed how to shape a world in harmony, the underlying premise of the debate was that of a realist-rational approach to maximising the utility of Nordic law as effective regulation (by learning from the EC), and to improve its influence abroad (in turn increasing its utility). The nuances I described above, where also otherwise optimist actors were keen to note and solve possible problems, were part of this discourse. They were charting the territory of possible action, not only in legal but particularly in political terms, again underlining the proximity between the Nordic Jurist Meetings and Nordic politics/politics in the Nordic countries.

In this respect, it is of little importance whether their guesses held true (mostly, they did not). The important part is that they sought to orient themselves rationally with respect to certain given intended ends, something that we can think of in Weberian terms as a 'purposive rationality'.[74] This is important to note not in itself, but as a prequel to the development covered in the next section, where the same group's orientation becomes governed rather by 'value rationality'.[75] I will return to this topic and develop on the causes for this change later in the Article.

Much Danish debate happens in the Nordic sphere

A last important aspect follows not only from studying the archives of the Nordic Jurist Meetings themselves, but also from undertaking a comparison with other contemporary discussions of EC law where Danish actors were involved. During this first period from 1966 to the end of the 1980s covered in the present section, a notably large proportion of Danish EC law reception and debate took place within the Nordic legal community. As I argued above, there were few actors engaging with EC law in Denmark during the first two decades or so of the Danish membership, and the amount of public debate was limited – understood in the sense that there were little case law or scholarship which could have facilitated an ongoing, living exchange about the content and importance of EC law relative to Danish law. Compared to the sparse debate in Denmark, it was notable how much the Danes engaged in Nordic debate about EC law. The Danish part of the debate did increase somewhat in volume during the 1980s, but not much compared to the increase in the 1990s, as I consider below. Meanwhile, there was a corresponding decrease in the volume of Danish participation in the Nordic debates about EC law, which largely died out in the eighties, as pointed.

In addition to the lively engagement with the topic at the Nordic Jurist Meetings, the Nordic Journal of International Law (*Nordisk Tidsskrift for International Ret*) was host to several articles about aspects of Nordic law and European law, mostly written by Danes. There was a marked change here. Before the Danish accession, this literature took the same open and curious approach to the EC, EFTA, NORDEK, and all of them together,[76] and there were also a few examples of the same approach after the accession.[77] However, the Danish accession seems to have narrowed the scope, with the articles now focusing more on EC law (or EC law in Denmark specifically) and less on its relationship to other systems. We can find general reports of recent ECJ case law[78] or

[74] M Weber, *Economy and Society: A New Translation* (Keith Tribe tr, Harvard University Press 2019) 101.

[75] Ibid.

[76] See eg C L S Cope, 'Kan vi få mere ud af EFTA' 39 (1969) Nordisk Tidsskrift for International Ret 28; En observatør, 'NORDEK – Et skridt mod en nordisk økonomisk union)' 39 (1969) *Nordisk Tidsskrift for International Ret* 33; P Hækkerup, 'Nordens forhold til Europa – politisk, økonomisk og kulturelt' 37 (1967) *Nordisk Tidsskrift for International Ret* 13.

[77] See G Møller, 'Metoder til harmonisering og unifikation i Norden, EEC og USA' 44 (1974) *Nordisk Tidsskrift for International Ret* 229; O Due, 'Nordisk lovgivning og De Europæiske Fællesskaber' 45 (1976) *Nordisk Tidsskrift for International Ret* 41.

[78] C Gulmann, 'EF-Domstolen i 1973' 43 (1973) *Nordisk Tidsskrift for International Ret* 43; C Gulmann, 'EF-Domstolen 1974' 44 (1974) *Nordisk Tidsskrift for International Ret* 50; M W Petersen, 'Ef-Domstolen 1976' 47 (1978) *Nordisk Tidsskrift for International Ret* 36.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

discussions of more specific issues.[79] This development was parallel to the one described at the Nordic Jurist Meetings, where the topic became a question of information rather than discussion before eventually dying out altogether.

Seen together with the Danish engagement when it came to debating EC law at the Nordic Jurist Meetings, there was a lot going on for this topic in a Nordic context compared to within Denmark. The Weekly Law Report (*Ugeskrift for Retsvæsen*), the dominant gazette of generalist case law and literature did not publish many more articles (written by Danes) about EC law during this period than the Nordic Journal of International Law did. Notwithstanding the qualitative changes in the sentiment and content of the debate, this shows how oriented towards the Nordic legal community Danish jurists were. Law and politics of the Danish state were, even when Denmark was the sole Nordic Member State of the EC, closely connected to Nordic law and politics, and despite the split situation, it still made sense for the Danes to engage EC debate in the Nordics. For them, engaging in the Nordics appear to have been at the same time national and international, home and away, to an extent where EC law, if one can reduce the debate to a quantum, happened almost just as much here as within the borders of the Kingdom of Denmark.

D. Connecting national legal elites and the outside

To comprehend this, we ought to think in terms of the circuits of legitimation which I introduced earlier in section 2, both in terms of the fluid borders between debate in Denmark and the Nordics respectively, but also in terms of their purposive–rational interest in contributing to the development of EC law (through Nordic law). The argument here runs in two parts: First, that actors integrating with Nordic law served to constitute the legitimacy of Danish state power (and hence, the legitimacy of the actors who relied on the state for authority). Second, that the EC was a viable possibility for the national elite to increase its range of external sources of legitimacy which could serve the same purpose as Nordic law. The latter provides the foundation for the orientation being rational in Weberian terms.

To reiterate, a circuit of legitimation consists of the reciprocal celebration of legitimacy but is dependent on apparent independence of the participants in temporal and socio-spatial terms to dim the reciprocity. This means that if the return of celebration occurs immediately or if the obligation to return celebration is too obvious, the output is limited correspondingly. Wanner describes this accurately with the example of medieval Norwegian lords, who were better served by having priests rather than skalds sing their praise, because the payment to the priests happened indirectly, and the religious bid to obey and respect the social hierarchy appeared to serve God. Thus, the interdependence of lord and church became less clear, just as the exchange was split apart in time.[80]

As regards the close connections between national Danish law and Nordic law, I have already argued above that the longstanding reciprocal acknowledgement between Nordic legal elites served to solidify their individual systems and their legitimacy. If the other countries do roughly the same, and if we have all been celebrating our ways for a century, surely it must be a legitimate way of running a legal system. In this light, we can understand why the national elite is so keen to engage in activities outside the national realm: It is not because they strive for something better than what they have, but because they want to preserve and consolidate it.

[79]For some illustrative examples, see N Akselbo, 'Offentlige virksomheder i EF' 43 (1973) *Nordisk Tidsskrift for International Ret* 84; O Carlsen, 'Den økonomiske og monetære union i EF' 44 (1974) *Nordisk Tidsskrift for International Ret* 146; K Hagel-Sørensen, 'Forholdet mellem EF-retten og de nationale grundlove' 44 (1974) *Nordisk Tidsskrift for International Ret* 113; C B Jacobsen, 'EF's statsstøtteregler som umiddelbart anvendelig ret' 43 (1973) *Nordisk Tidsskrift for International Ret* 76.

[80]KJ Wanner, 'Kings, Gods, Poets, and Priests. Varieties and Transformations of Circuits of Charismatic Legitimation in Norway' in Wojtek Jezierski et al (eds), *Nordic elites in transformation, c. 1050–1250* (Routledge 2021) 83–104.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

As regards the engagement with EC law, this arena potentially provided another source for externally validated legitimacy for the national elite. If the distinguishing features of Nordic law (ie, in turn, the national law of the Nordic countries) were to be acknowledged by the EC and some kind of fruitful relationship was to arise, this would be yet another external source of legitimation for the national elites. Mobilising EC law as an external source of legitimacy was a feasible social strategy in a situation where the EC law within Denmark had been domesticated to largely fit national law. Engaging positively with EC law, and thus also contributing to its legitimacy on the national arena, had no significant downside for the Danish legal elite. For as long as EC law posed no threat to them, they were free to engage in open discussion about the synergies of Danish, Nordic, and European law.

A key to understanding this internationalist orientation from the national elite is to think of the sovereign, coherent, legal system of a nation state to be deeply dependent on external validation, and to consider the need of the dominant actors to have their ways of thinking and reasoning legitimised by external sources of authority. Milward has argued in economic terms how the project of European integration was indeed not a challenge to nation-state sovereignty, but on the contrary a system for securing and legitimising it after World War II.[81] We can understand the events depicted here in terms of symbolic power much in the same way. Engaging in transnational legal systems did not go against the interests of the national elite, on the contrary, it was a reasonable strategy for accumulating symbolic power. The natural orientation for the national elite is not to reject interaction with external systems, but to engage with them, at least for as long as this does not entail a danger in the domestic symbolic hierarchy.

Nordic jurists, including the Danish ones, were not newcomers to transnational legal harmonisation of different sorts when Denmark acceded to the EC in 1973. As I have already discussed above, they were accustomed not only to each other, but also to the CoE and EFTA. They were used to engaging in multiple arenas, some internally Nordic and some including other European countries as well. They were not looking to pull the brakes on what today (spuriously) appear as the wheels of history, they were actively trying to work with them.

As the Nordic elites were closely connected to each other following a century of harmonisation than they were with the EC, the Nordic legal community became a natural place for them to meet and coordinate social strategies towards EC law. While the picture of a national elite can intuitively create images of resisting change and internationalisation, the Nordic jurists documented above seem to have been curious and creative. The Nordic Jurist Meetings, during this period, were not places of resistance against the process that we now call European integration. The picture emerging from the archives here is rather one of a metropolitan space where mobile internationalists sought to place themselves as active co-creators of law on the international scene.

4. Renaissance and reaction

During the period from the mid-1990s until 2017, we can observe both continuity and change in the orientation of the Nordic jurists. Throughout the 1990s, the four Nordic countries which were not full members of the EC became either members of the EU or associated to it through the EEA agreement. The EU accelerated its own development following the Single European Act (SEA) and the Maastricht Treaty. Somewhat ironically, these major changes seem to mostly have secured continuity in the dealings with European law in the Nordics. Meanwhile, the use of EU law accelerated inside Denmark, and many peripheral Danish actors started mobilising EU law in direct challenges to the authority of the state elite. This national development appears to have caused the change part, by pushing Danish actors into new strategies to reproduce symbolic power through Nordic law.

[81]AS Milward, *The European Rescue of the Nation-State* (2nd ed, Routledge 2000).

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

In this section, I will account for these two different tracks. First, I will sketch out how the Danish state elite lost its monopoly of definition over EU law, in turn leading to a (potentially) broader challenge to their legal authority (A). Second, I will argue briefly how we can see that the widened integration of Nordic countries into the EU/EEA did not create a significant change in their perception of the relation between European and Nordic law (B). Thirdly, I will argue that in the particular case of Danish state elite actors, the internal challenge to their symbolic position pushed them to a value-oriented, oppositional approach to EU law (C). I will discuss the connection between these in a last subsection (D).

A. Changing winds in Denmark

During the 1990s, the meaning of EU law in Denmark changed significantly, a process that continued well into the 2000s. If the knowledge of European law was hitherto largely monopolised by a small group of state bureaucrats, there was an increased plurality of actors engaging with the topic. From a doctrinal perspective, the most important element is perhaps a change in the view of European law as *law*, as something that is concrete and enforceable, and which contains rights and duties. As I wrote above, this view was mostly absent from the Danish legal field in the first two decades of membership, something that is reflected in the extracts from the debates on the Nordic Jurist Meetings. This change was still in its infant phase in the 1990s, and it is perhaps only really during the 2000s that we start to see its full effect.

We can explain this change from different perspectives. *One* starts from a prevalent view in Denmark that the change was the result of a wake-up call of embarrassment, forcing Danish jurists to reorient themselves. *Another* goes to the international level and sees the change as the result of changes in European-level structures, even global-level structures. *A third perspective* returns to the national level but seeks to explain the change as a result of structural changes in the legal field within Denmark. I shall deal with them briefly in turn, focusing on the latter one, as it will provide the starting point for the discussion in the next section.

In the Danish literature, one view focuses on the development as a reaction to the embarrassment following the ruling on the *Storebælt* case,[82] where the ECJ found Denmark guilty of treaty infringement in a large infrastructure project,[83] one that had taken many years and a shaky political compromise domestically to get going.[84] This is essentially a great man theory, with a great judgement replacing the man as the driver of history, and well-known objections against this model apply. We could of course also think of it as a type of *moment* in the sense that recent scholarship has looked at the *van Gend en Loos* moment of European law, a turning point not in itself but because of the surrounding social mobilisation, producing the moment as moment.[85] However, no research has empirically suggested this type of social process around the *Storebælt* case, or other similar cases in Denmark.

Another and more feasible perspective starts from certain major changes in international and European law. On the most general level, the end of the cold war, globalisation, and an increase in the amount of international law[86] could be thought to create preconditions for a change in ways of

[82]See prominently K Hagel-Sørensen, 'Fællesskabsretten som en del af dansk ret' in J Rosenløv and K Thorup (eds), *Festskrift til Ole Due* (GEC Gads Forlag 1994) 113–36. For another example, see *Forhandlingerne Ved Det 38. Nordiske Juristmøde i København 21.-23. August 2008 Bind I* (Kandrups Bogtrykkeri A/S 2008) 80.

[83]Case C-243/89 *Commission of the European Communities v Kingdom of Denmark* ECLI:EU:C:1993:257.

[84]Kommissionsdomstolen af 1. maj 1990, *Beretning vedrørende 'køb dansk klausulen' i A/S Storebæltsforbindelsens udbudsbetingelser* (Statens Informationstjeneste 1991).

[85]See in particular M Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' 12 (2014) International Journal of Constitutional Law 136; A Vauchez, *L'Union Par Le Droit: L'invention d'un Programme Institutionnel Pour l'Europe* (Presses de la Fondation nationale des sciences politiques 2013) 181.

[86]For a general argument in this direction, see KJ Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

thinking among jurists practicing in the national arena, in turn influencing also their thinking of European law specifically. More particularly, the Maastricht and the Lisbon Treaties introduced major changes in the organisation of European law on the European arena. Such changes could carve out new possible avenues of mobilising European law within national legal orders.

From this perspective, the reason for the national change in the perception of EU law stems from changes outside Denmark, which would then flow into Denmark and Danish jurists. In the Danish literature, Dyekjær has provided one of the more convincing arguments within this model, focusing on the increased number of legal acts enacted in the EU.[87] While having some appeal, the model relies overly on the presumption that international changes will have a certain (intended) effect within national legal orders. The problem is similar to the acceptance of European integration as a premise rather than an object of inquiry, an issue that has been challenged by scholarship over the past decades.[88] In the same way, assuming that efforts of integration on the European arena will have the intended effects within a nation state runs the risk of conflating explanation and legitimation, especially if most or all the underlying data is drawn from law itself, and does not manage to point sufficiently to external, social dynamics.

A third perspective does not exclude possible contributions from the second one but starts from within the nation state and outside the logics of EU law, focusing on structural changes on the Danish legal field which could influence the production of Danish EU law. I have argued[89] that such a focus can provide a meaningful framework for understanding the changes in Denmark during this particular period, and that we can identify specific dynamics which constitute likely causes for the observable changes in the way EU law was thought of and practiced. Within the scope of the present Article, I will here highlight some central elements of the development, to show a context in which the national elite saw not only their monopoly of definition over EU law challenged, but also the value of their investments in national legal capital relative to European legal capital. Understanding the process in these terms is important to understand the changed sentiment between Danish jurists at the Nordic Jurists meetings from around 2000 and onwards, and how the relationship between Danish, Nordic, and European law changed as a result of the challenges posed to the Danish elite.

This perspective has the advantage of more easily disengaging from the integrationist mythology, in rough terms simply by ignoring it. As a result, of course, the approach runs the risk of lapsing into ontological nationalism, where external dynamics are too easily discarded as at least contributing factors to national changes and where the spurious idea of the sovereign national law is inadvertently reproduced. While basing the remainder of the Article mainly on this perspective, I shall seek to take into due consideration how European and international events might have had parallel influence.

During the 1990s, the Danish legal field was marked by two important transformations of structure. The first and perhaps the minor one was an increased intake of junior scholars to the law school at the University of Copenhagen, the largest of the two law schools in the country. This created new possibilities to build academic careers, but also required this new generation to invent other research areas that were not already occupied by the already existing professorial layer. EU law provided just such an avenue, and the new generation of scholars produced an unseen amount of EU law scholarship, pressing the issue of EU law as an independent legal competence separate from and in opposition to national Danish law. Until then, EU law had received little attention in Copenhagen, and most of the living research environment had existed on the Copenhagen

[87]K Dyekjær, 'Om EU-rettens integrering i den danske retsorden, del I. – et paradigmeskift?' 18 (2015) *Europarättslig Tidskrift* 577; K Dyekjær, 'Om EU-Rettens integrering i den danske retsorden, del II – et paradigmeskift?' 18 (2015) *Europarättslig Tidskrift* 867.

[88]See for example Patel (n 1); Vauchez, (n 2).

[89]Esmark (n 44) 188–299.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

Business School which had little influence on the training of new jurist (for the reasons I already considered, namely, the School could not award a "full" law degree).[90]

The second and perhaps major factor contributing to the transformation of the role of EU law was the Americanisation of the Danish legal services branch, starting with what Madsen has termed the 'big bang' of mergers from 1988 and developing throughout the following two decades.[91] This process constituted the small group of large law firms still dominating the Danish market today, and sparked a broader Americanisation[92] of the Danish legal services sector, where the old *noblesse de robe* developed into a new *noblesse de costume* working in corporate structures and races for partnership. Contrary to the old, small law offices dominating the market in Denmark earlier on, these large firms had the capacity to take on larger and more complex cases and to accumulate experience and know-how working with EU law, also a result of the deepened division of labour between the compartments of the firms.[93]

These dynamics combined into a sharp increase in the amount of literature on EU law produced throughout the 1990s. Whereas EC/EU law had earlier been peripheral and taken up only very little space in the pages of the Weekly Law Report, the numbers were roughly tripled compared to the 1980s. It was predominantly scholars and large law firm lawyers who authored this new wave of articles.[94] Around 10–15 years later, there is a corresponding increase in the amount of reported Danish case law dealing explicitly with case law from the Court of Justice of the European Union (CJEU) and Advocate General opinions, either in the submissions or the judgement, or both. The lawyers are, again, predominantly from the largest law firms, and often the same individuals investing heavily during the surge in literary production during the 1990s.[95]

EU law was now no longer an unclear combination of national legal doctrine and international trade politics. It had become a form of law used actively, discussed in the literature, and raised in the courtrooms. This was a challenge to the national elite in two senses. In the *first* and minor sense, the intake of actors engaging with EU law and accumulating European legal capital eroded the monopoly of definition over what EU law meant in Denmark, a monopoly that had been held by the national elite earlier on. With more actors engaging with EU law, more scholarly works being produced, more court cases being written etc, many more people acquired experience and authority with EU law – and they did not always agree with the domesticated version of EU law that the Danish state-affiliated actors had produced over the first few decades of Danish membership. On the opposite, the literature often raised questions about the correctness of state actors' interpretation of EU law.

In the *second* and more far-reaching sense, the challenge threatened to decrease the value of national legal capital relative to its European counterpart. If EU law had become something that could actively be used to settle legal academic disputes as well as concrete social conflicts, knowing its content would be worth a lot more than when it was just the weird cousin of international law. Similarly, opposing the content of EU law with that of national law challenged the authority of the national elite, pinning it against another source of final legal legitimacy that could – at least allegedly – override the otherwise authoritative interpretation of *the law* provided by the state (or rather, actors close to the state and depending on it for symbolic status). This second implication

[90]Ibid., 192–9.

[91]MR Madsen, 'Fra sagførerkontorer til store advokatfirmaer: En retssociologisk analyse af ændringerne af den danske advokatbranche' 82 (2000) *Juristen* 127; MR Madsen, 'Return to the Copenhagen "Magic Circle": First Elements of a Longitudinal Study of Large Law Firms in Denmark' in P Wahlgren (ed), *Law and Society*, vol 53 (The Stockholm University Law Faculty 2008) 303–19.

[92]Among a rich literature on the structure of the American law firm, see in particular MS Galanter and T Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (The University of Chicago Press 1993).

[93]Esmark (n 44) 199–203.

[94]Without a corresponding number of articles about national law, such that the increase cannot be explained as a general increase in productivity. Ibid., 210.

[95]Ibid., 259–71.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

made the events a broader challenge to the symbolic dominance of the national elite, forcing it to develop counter play strategies.

B. Resurrecting the internationalist debate

Again, the possible connections between Nordic and European law died out as a theme of discussion during the latter part of the 1970s and the 1980s. When it resurfaced, however, it was largely with the same optimistic approach: In 1987 a few remarks in relation to competition law and in 1990 a more thorough discussion of European and Nordic company law. In the latter, Finnish senior civil servant Gustav Bygglin introduced the debate by proposing that:

> Even if the Nordic cooperation is clearly in a bind between national needs for revision and the European superstructure, I hope that there will be space, in the future as well, for at least a small Nordic sphere, a Nordic subculture, in the area of company law. As long as the European legislation is not comprehensive and until partly alternative solutions are allowed, common Nordic solutions still have their raison d'être.[96]

Christen Boye Jacobsen, clerk in the Danish Ministry of Industry and one of the jurists to engage early in EC law, had his reservations, but still managed to find possibilities and potential:

> While I am therefore very doubtful about the practical possibilities or the usefulness of Nordic cooperation in the area of public company law, the situation is different in the area of other companies. Here we are somewhat different, and Denmark is the least far ahead. It is a question of whether one should realistically recognise where one could intervene, and then try to invest in the areas where one can carry out an effort without coming into conflict with the EC.[97]

Another perspective emphasised Denmark's double-role, which would allow aligning Nordic company legislation with the EC, but starting from Nordic law:

> If Danish solutions are to be given a privileged position, as advocated in the keynote, then you can actually increase the Nordic legal system at the same time as you achieve adaptation to the EC. And that would be the best, I think. It will be exciting to see the further development.[98]

There were of course also sceptical voices, and people who pointed out places where it could be difficult to make the two systems work together, for example when it came to Nordic non-members participating in the European public company.[99] While many acknowledged that the increasing amount of EU legislation decreased the room for national manoeuvre, they did not take

[96]'Även om det nordiska samarbetet uppenbart hamnat i kläm mellan nationella revisionsbehov och den europeiska överbyggnaden så hoppas jag att utrymme för åtminstone en liten nordisk sfär, en nordisk underkultur, skall finnas även i framtiden på bolagsrättens område. Så länge den europeiska regleringen inte är heltäckande och till de delar alternativa lösningar tillåts har gemensamma nordiska lösningar fortfarande sitt existensberättigande.' *Forhandlingerne På Det 32. Nordiske Juristmøde i Reykjavik Den 22–24 August 1990 Del II* (Prentsmiöjan Oddi 1993) 193.

[97]'Mens jeg således er meget tvivlende over for de praktiske muligheder eller nytten af nordisk samarbejde på aktielovsområdet, forholder sagen sig anderledes på øvrige selskabers område. Her er vi noget forskellige, og Danmark mindst langt fremme. Det er et spørgsmål, om man ikke skulle erkende realistisk, hvor man kunne sætte ind, og så forsøge at satse på de områder, hvor man uden at komme i konflikt med EF kan udføre en indsats.' Ibid., 171.

[98]'Om man skall ge danska lösningar en priviligierad ställning såsom förespråkas i referatet, så kan man ju faktiskt öka den nordiska rättslikheten samtidigt som man åstadkommer anpassningen till EG. Och det vore det bästa tycker jag. Det skall bli spännande att se den fortsatta utvecklingen.' Ibid., 177.

[99]Ibid., 172.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

this as a sign that Nordic and European law were in principle opposed to each other. The premise underpinning the debate was the will and ability to find places where Nordic and European law were combinable, as illustrated in the quotes above.[100] The orientation of the debate was fundamentally the same as during the first period, even after 10–15 years of hibernation.

The changing landscape of the 1990s and onwards also showed in the discussion. The re-unification of Germany and the opening towards central and eastern Europe after the fall of the Berlin Wall seemed to create more consciousness that there were other regions around towards which the EC will orient itself – and that the Nordics were maybe not first in line.[101] But perhaps more importantly, the end of the cold war changed the prospects of more Nordic countries seeking membership. Sweden and Finland became members in 1995, and while a referendum in Norway rejected full membership again, Norway had already become closely associated with the EU through the EEA agreement, just as Iceland had. Unsurprisingly, these new circumstances sparked a renewed interest in European law at the Nordic Jurist Meetings.

The specific character of the discussions was of course shaped by the new, Nordic terrain where membership had become the main rule rather than a Danish exception. Instead of framing Denmark as the gatekeeper between Nordic and European law, the orientation became more one of a united Nordic community contributing to the European legal order. In this new picture of a common Nordic contribution to the European, the jurists seemed not to distinguish particularly between memberships of the EU or the EEA. On the contrary, the division was framed more as a historical anomaly unlikely to persist in the long run.[102] This way of thinking mimicked the open approach taken in the first wave of debates discussed earlier in this Article, and shows that to a large extent, for these people the historical trajectory of European integration was far from defined.[103] At the same time, however, it was, of course, increasingly difficult not to acknowledge the growing number of constraints EU law placed on Nordic law.

Despite the change in context, the overarching theme and approach of the meetings mimicked the one we saw in the early period: An open, curious, and constructive approach to the rapprochement of different legal systems and traditions. The spread of EU membership seems not to have eradicated the idea of a Nordic contribution to EU law. If anything, it seems on the contrary to have strengthened it. There was quite a nuanced discussion about how the Nordic countries could coordinate first political pressure during the legislative process in the EU and later the legal technicalities of implementing directives in a way that fitted with the Nordic legal tradition,[104] and this continuation of the orientation continues over the years. However, the end of the 1990s also marked the emergence of a new attitude from some Danish participants.

C. Danish reaction and doctrinal nationalism

In parallel to this continuity of curious dialogue between European and Nordic law, a strand of the debate marked a change in the orientation of the Danish state elite. Rather than pushing for reciprocal learning and mobilising for Nordic influence in the EU political–legal system, this group took a more defensive and oppositional posture, which focused not on a constructive meeting between Nordic and European law, but on inherent conflicts between the two systems.

[100]See also the debate on varying aspects of competition law, labour law and other topics, *Forhandlingerne På Det 32. Nordiske Juristmøde i Reykjavik Den 22–24. August 1990 Del I* (Prentsmiöjan Oddi 1990) 174, and of competition law again in 1993, *Det 33. Nordiske Juristmøde i København 18–20. August 1993 Bind I* (JM Grafisk A/S 1993) 263.

[101]*Forhandlingerne På Det 32. Nordiske Juristmøde i Reykjavik Den 22–24 August 1990 Del II* (n 96) 172–3.

[102]*Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18–20 August 1999 Del 2* (2000) 992. See also *Förhandlingama Vid Det 34:E Nordiska Juristmötet i Stockholm 21–23 Augusti 1996 Del I* (1996) 171, and to a certain extent *Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18–20 August 1999 Del 2* 800–01.

[103]This vision of the EEA stands in contrast with much Norwegian doctrinal scholarship, which has been giving more of an impression that EEA law is a *sui generis* of a *sui generis* rather than an aspect of a common European legal order.

[104]*Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18.-20. August 1999 Del 2* (n 102) 813.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

This happened in parallel with a continuation of the attitude of other Nordic elite actors, as described above. The reorientation was driven exactly by the very same elite with close ties to the Danish states which took a more constructive stance in the first period, as described above. Other Danes at the meetings, mainly practicing lawyers from the large law firms, did not take part in this turn. If they debated EU law, it was more often EU law per se, often aiming to discover new areas of application.[105] However, they had little eye for Nordic law as such, and their participation appears to be more about EU law in Denmark than reflect a genuine engagement with Nordic law.

The same is not true of the changing attitude of the Danish state elite, which is the focal point of this section. They showed up at the Nordic Jurist Meetings not (as in the first period) to build bridges between Nordic and European law, but to shield Danish law from European law by mobilising Nordic law. This new orientation runs along two main axes of reason. One is about the (lacking) legal stringency of EU law, supposedly transgressing the border between law and politics in a way that is dangerous to fundamental rule of law considerations. The other, and perhaps more widespread, is that European law (partly in connection with it being not-law) is a threat against the Nordic legal culture and Nordic values. In this section, I will show in more detail how this development looked like. I will then argue for a theoretical understanding of the development which links it to the increased mobilisation of EU law within Denmark.

At the same time, many Danish elite actors resorted to arguments related to emotion and subjective experience, for example when head of office (and later judge at the Danish Supreme Court) Lars Hjortnæs talked about 'legal systematic and legislative technical differences between the EU rules and the Nordic legislation, which are experienced by many – not least lawyers – as problematic'.[106] Basing the argument on subjective experiences is different from the purposive-rational arguments from the longer continuity of discussion.

Particularly important in this turn is Børge Dahl, a judge at the Danish Supreme Court (and, from 2010 to 2014, its president). During a lecture at the 2005 meeting entitled 'Has the Nordic legal cooperation outplayed its role?',[107] he made several instructive comments illustrating this new orientation. Talking about the influence of international courts (namely the European Court of Human Rights (ECtHR) and the CJEU), he argued that national courts in the Nordic countries should align their interpretation with the practice of other Nordic courts when applying EU law or the ECHR, ending the argument with the statement that '[w]e have common values that are worth guarding, and we ought not easily give in to others'.[108] When it comes to the practice of these international courts themselves, Dahl complains that some of their case law had been handed down without interventions from the Nordic countries, who have therefore lost their influence on the development, and that '[s]uch a loss of Nordic values is all the more regrettable as it occurs without the Nordic values being formulated at all'.[109]

During the debate following this lecture, Børge Dahl elaborated this value-oriented position, concurring for example with another participant that 'we are facing a struggle for values. In that struggle for values, we have a much better opportunity to safeguard shared Nordic values by maintaining and expanding and finding new forms of Nordic cooperation'.[110] In rhetorical

[105]An illustrative example of this is the possible use of free movement rules to challenge certain national tax regulations, see *Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18-20 August 1999 Del 1* (2000) 267.

[106]'retssystematiske og lovgivningstekniske forskelle mellem EU-reglerne og de nordiske lovgivninger, der af mange – ikke mindst jurister – opleves som problematiske.' *Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18–20 August 1999 Del 2* (n 102) 815.

[107]'Har det nordiske retssamarbejde udspillet sin rolle?' *Forhandlingerne Ved Det 37. Nordiske Juristmøde i Reykjavik 18–20 August 2005 Bind I* (2005) 157.

[108]'[v]i har fælles værdier, der er værd at stå vagt om, og vi skal ikke uden videre give efter for andres.' Ibid., 165.

[109]'[e]t sådant tab af nordiske værdier er så meget desto beklageligere, som det kommer, uden at det nordiske værdisyn overhovedet er formuleret.' Ibid., 172.

[110]'vi står over for en værdikamp. I den værdikamp har vi meget bedre mulighed for at sikre fælles nordiske værdier ved at fastholde og udbygge og finde nye former for det nordiske samarbejde.' *Forhandlingerne Ved Det 37. Nordiske Juristmøde i Reykjavik 18–20 August 2005 Bind II* (2005) 545.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

opposition to globalisation on a broader scale, he argued that it was evident that there was 'Nordic utility in finding common Nordic footing in working with new European or other international regulations',[111] and that '[from] a common Nordic understanding of values, it could be an idea to list what we would like to see left for ourselves, and what we would prefer to see harmonised on a Nordic, European, and global level respectively'.[112]

The value-orientation was also apparent in other debates, both before and after Børge Dahl's 2005 lecture. In a discussion in 1999 about the implementation of EU directives, professor of contract law Palle Bo Madsen argued for a unified Nordic approach, proposing among other things that 'in connection with the legislative work in the countries in question, a rule is made which forces legislators to think about the effects on the Nordic cultural tradition and legal tradition that the bill may have',[113] in the same way as the preparation of new legislation included an overview of budgetary or environmental consequences of passing the bill. He went on to celebrate common Nordic intervention in a treaty infringement case against Sweden[114] concerning the implementation of a consumer protection directive:[115]

> It was an example of the Nordic countries speaking together. It was an example of finding out that one had a different legal tradition than the rest of Europe, and that one therefore deliberately failed to incorporate the directive's 'grey list', ie the list of presumptively unreasonable and invalid contract terms, into the legal text. I think this is a fine example of acknowledging one's common Nordic legal traditions.[116]

Another illustrative example comes from a debate in 2008 about the possibility of harmonising company law in the Nordic countries within the overall framework of the existing EU harmonisation. Despite pessimism from participants from other countries, Professor of Company Law Paul Krüger Andersen sought to reject what 'sounds like the obituary of Nordic cooperation in the area of company law. I don't think it should go unchallenged'.[117] On the contrary, he argued that:

> striving for Nordic cooperation has an independent value. You could say it is a kind of ideological confession. You can agree or disagree with it, but it is a starting point that you can take . . . I think it is important to establish in this forum that Nordic cooperation has an independent value.[118]

[111]'nordisk nytte i at finde fællesnordisk fodslag i arbejdet med nye europæiske eller andre internationale regelsæt' Ibid., 440.

[112]'[u]d fra et fællesnordisk værdisyn kunne det være en idé at opliste, hvad vi gerne ser overladt til os selv, og hvad vi vil foretrække harmoniseret henholdsvis nordisk, europæisk og globalt.' Ibid.

[113]'man i forbindelse med lovgivningsarbejdet i de pågældende lande laver en regel, som tvinger lovgivere til at tænke over de påvirkninger af den nordiske kulturtradition og retstradition, som lovforslaget måtte have' *Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18–20 August 1999 Del 2* (n 102) 821.

[114]Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* ECLI:EU:C:2002:281.

[115]Directive (EEC) 93/13 of the Council on unfair terms in consumer contracts, OJ L 95/29.

[116]'Det var et eksempel, hvor de nordiske lande talte sammen. Det var et eksempel på, at man fandt ud af, at man havde en anden retstradition end resten af Europa, og at man derfor helt bevidst undlod i lovteksten at indarbejde direktivets "grå liste", altså listen med præsumptivt urimelige og ugyldige aftalevilkår. Det synes jeg er et fornemt eksempel på, at man vedkender sig sine fællesnordiske retstraditioner.' *Forhandlingene Ved Det 35. Nordiske Juristmøtet i Oslo 18–20 August 1999 Del 2* (n 102) 821.

[117]'lyder som nekrologen over det nordiske samarbejde på selskabsrettens område. Jeg synes ikke, at det skal stå uimodsagt.' *Forhandlingerne Ved Det 38. Nordiske Juristmøde i København 21–23 August 2008 Bind II* (Kandrups Bogtrykkeri A/S 2008) 66.

[118]'det har en selvstændig værdi at tilstræbe nordisk samarbejde. Man kan sige, det er en slags ideologisk bekendelse. Den kan man være enig i eller uenig i, men det er et udgangspunkt, som man kan tage . . . jeg synes, det er vigtigt at slå fast i dette forum, at nordisk samarbejde har en selvstændig værdi'. Ibid., 66–7.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

Putting culture at the forefront of the discussion was a new feature of the attitude among the Danish national elite. In some cases, the specific elements constituting this culture were clarified, for example in the above examples concerning the infringement case against Sweden, where the status of preparatory works was highlighted as a feature of the Nordic legal culture. In other instances, it remains a rather vague concept. The same can be said about the concept 'Nordic utility', introduced by Børge Dahl in his 2005 lecture, and used seven times yet never clearly defined, neither by him nor by any concurring participants in the debate that followed.

Beside culture and values in the more abstract sense, another theme taken up was the division between law and politics. Whereas Danish judges and civil servants shared the same socialisation and had corresponding, implicit understandings of this division, the different use of sources and reasoning in EU law appeared to them as a different division between law and politics, and hence, a transgression detriment to the rule of law.

An illustrative example of this is an intervention of the former State Solicitor, Michael Gregers Larsen, during a 2008 debate about damages in public procurement. He said that a reason for erroneous application of procurement rules by national authorities could often be ascribed to 'the interpretative doubt that many of the tender provisions contain. This interpretive doubt can especially bring clients into trouble as a result of a third circumstance: the unfortunate urge of the law-applying authorities to act as lawmakers'.[119] He went on to argue how the rule-application of the CJEU is in intrinsic conflict with democratic rule of law:

> When the law is changed democratically, an effective date for the change is set. On the other hand, when judges and board members create new law, the new rules are postulated to have also applied in the past. In the area of procurement, the ECJ is particularly creative in introducing new obligations for contracting authorities. The Court's new demands are often justified by an expanding interpretation of treaty provisions. In these cases, the contracting authority appears as a serious rule breaker, even if the contracting authority has acted fully in accordance with the general perception of the legal situation at the time the tender was made.[120]

Already Supreme Court judge Peer Lorenzen, in 2005, said that the difference in interpretational techniques between national and European bodies addressed by Michael Gregers Larsen was a not only a fundamental question of division between law and politics, but underlined how this was a common Nordic issue in relation to European law:

> How far should Nordic courts go towards applying the principles of interpretation followed by international courts in their application of national law? The question is central, not least because it also affects the core area of the relationship between the judiciary and the legislator.[121]

[119]'den fortolkningstvivl, som mange af udbudsbestemmelserne rummer. Denne fortolkningstvivl kan især bringe ordregivere i ulykke som følge af en tredje omstændighed: De retsanvendende myndigheders ulyksalige trang til at virke retsskabende'. Ibid., 87.

[120]'Når retstilstanden ændres ad demokratisk vej, fastsættes en ikrafttrædelsesdato for ændringen. Når derimod dommere og nævnsmedlemmer skaber ny ret, postuleres de nye regler at have været gældende også i fortiden. På udbudsområdet er EF-Domstolen særdeles kreativ i henseende til at indføre nye forpligtelser for de ordregivende myndigheder. Ofte begrundes Domstolens nye krav med en udvidende fortolkning af traktatbestemmelser. I disse tilfælde fremtræder ordregiver som en dadelværdig regelbryder, selv om ordregiveren har optrådt fuldt ud i overensstemmelse med den almene opfattelse af retstilstanden, dengang udbudet blev foretaget'. Ibid., 88.

[121]'Hvor langt bør nordiske domstole gå i retning af at anvende de fortolkningsprincipper, der følges af internationale domstole, i deres anvendelse af national ret? Spørgsmålet er centralt ikke mindst fordi det også berører kerneområdet af forholdet mellem domstole og lovgivningsmagt.' *Forhandlingerne Ved Det 37. Nordiske Juristmøde i Reykjavik 18–20 August 2005 Bind II* (n 110) 73.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

A pointier comment was made by Børge Dahl during the 2014 meeting, and although the specific discussion is about the relation to the ECtHR, it is clear from the context that the frustration was directed towards both European courts and their case law:

> The courts in the Nordic countries have refrained from a judicial activism which transgresses the boundaries to the political. The predictability of the law is an essential part of the Nordic understanding of the rule of law. Nordic judges find justice, they don't invent it – we shy away from creative judicial activism for reasons of legal certainty and the courts' legitimacy.[122]

As late as 2017, a judge at the Eastern High Court and Professor of Administrative Law Niels Fenger argued that this was a common problem for administrative law in the Nordic countries, that 'EU law moves this factual assessment from the political to the judicial stage and thus makes the content of large parts of national legislation a judicial issue'.[123]

D. Continuity and change

I argued in my discussion of the first phase that we can think of the orientation of the actors as purposive–rational in the sense that they oriented their actions towards obtaining an end, expecting certain actions and reactions from the surrounding world, but also that this observation in and of itself is of limited value. It becomes relevant because we see in this second phase that the Danish elite actors, and almost exclusively them, change their orientation towards a – to stick to Weberian terminology– value rationality. Rather than focusing on obtaining set ends, they shifted attention to actions and concepts containing intrinsic values, or at best actions whose purposive value is so difficult to identify that they become as good as intrinsic.

This change was driven exclusively by members of the Danish state elite, ie, senior civil servants and judges. There were other Danes participating at the meetings, occupying other positions on the Danish legal field. These people did not take part in this change. Some of them took part in the continuity of constructive optimism regarding Nordic and European law, while others used the Nordic Jurist Meetings to perform the same type of symbolic offensive against national law that they performed at the same time within Denmark, as described above. Participants from the other four Nordic countries also were not a part of this change but maintained continuity from the first phase. While they might have taken part in most of the same discussions, they did not air the same explication of dichotomy.

The group responsible for the value-turn was not a new group of actors at the Nordic Jurist Meetings. Older actors occupying the same objective position on the Danish legal field took full part in the constructive optimism of the first decades of Danish EC membership: senior civil servants, judges, professors of primarily national legal disciplines. The position was well-known, yet their orientation changes dramatically. To understand this, I suggest we think of it as a result of the changes in the symbolic order of Danish law going on at the same time. Losing terrain, this group needed counter play to regain what was lost.

If we think of this national legal elite as an elite in a one-dimensional hierarchy, we fail to see the challenge that European law – thought of as a form of legal capital distinct from national legal capital – posed to them. They were not on top of a pyramid, but instead were characterised by

[122]'Domstolene i de nordiske lande har holdt seg fra en domstolsaktivisme, som overskrider grænserne til det politiske. Rettens forudsigelighed indgår som noget væsentligt i nordisk retssikkerhedsforståelse. Nordiske dommere finder ret, opfinder den ikke – kreativ domstolsaktivisme viger vi tilbage for af hensyn til retssikkerheden og domstolenes legitimitet.' *Forhandlingene Ved Det 40. Nordiske Juristmøte i Oslo 21–22 August 2014 Bind II* (2015) 291.

[123]'EU-retten flytter denne saglighedsvurdering fra den politiske til den judicielle scene og dermed gør indholdet af store dele af national lovgivning til et retsspørgsmål.' N Fenger, 'Europarettens Indflydelse På Nordisk Forvaltningsret' (2017) *Det 41 nordiske juristmøte i Helsingfors 2017* 10. See correspondingly: Ibid., 11.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

having a homogenous capital composition after investing their career, skillset, and network in the state, and their authority and that of the Danish nation state was closely linked. Bourdieu accurately described this ideal-typical figure, the apparatchik:

> The apparatchik, who owes everything to the apparatus, is the apparatus incarnate and he can be trusted with the highest responsibilities because he can do nothing to advance his own interests that does not ipso facto help to defend the interests of the apparatus. He is predisposed to defend the institution, with total conviction, against the heretical deviations of those whose externally acquired capital allows and inclines them to take liberties with internal beliefs and hierarchies.[124]

With the introduction of EC law in Denmark, a potential challenge to the value of this national legal capital was created. It was, as I showed above, not until the 1990s and the early 2000s, that this potential was mobilised by a distinct group of jurists different from the traditional state elite. This new group drew on the externality of EU law to challenge the value of national interpretations, and the hierarchy of legal authority received another dimension: Now, it was not just about being the authoritative interpreter of Danish law, but also a struggle over whether Danish or European ways of thinking was best suited to solve a given social conflict. The point is not to place all actors at the end of one or another pole, but to understand their position-taking in light of this social opposition between different skill sets, that is, capital possession: national or European.

Unable to diversify their capital portfolio, the apparatchik used the externality of Nordic law to provide legitimacy to their existing possessions. While it might have a different look, it is fundamentally the same mechanism of using circuits of legitimation with the outside world to gain legitimacy in the national social order. The difference here is that when EU law became a challenge to the apparatchik, they could not continue to pursue the constructive optimism since giving legitimacy back to the EU system would now constitute something of an own goal. A viable alternative strategy could then be to link themselves only to Nordic law while trying to ostracise EU law.

We ought to think of this as a social strategy in the sense of an intuitive orientation based on the actors' habitual dispositions. Less of a conscious plan than a naturalised inclination – remember, this group is characterised by *not* possessing any significant European legal capital, having invested everything in the nation state. Defending the state and the ways of reasoning they associate with it against what appears to be transgressions of its sovereignty, does not have to be a plan more than a natural reaction. This group did not make up a contradiction between European and national law, they experienced the contradiction through the challenges posed to them on the national field, and they reacted accordingly.

5. A triangular relationship

In this Article, my central argument has been that to understand how Danish jurists have thought about European law, and by implication, how European law has been practiced in Denmark, we must look beyond a binary relationship between national and European, not only in terms of legal rules considered in the abstract but also in terms of the belonging of the jurists responsible for practicing the rules. I have argued that the Danish reception of European law has not only been shaped by prior Danish experiences with Nordic law, but also that Nordic law has been fed back into Denmark in an internal struggle over symbolic dominance. To understand this, we need to think of European law without making it the primary object of interest. In short, the aim has been to explore a way of understanding EU law in Member States without accepting as a core

[124] Bourdieu, 'Men and Machines' (n 36) 314.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

assumption the meta-narratives of European legal integration itself, asking if and to what extent other processes and rationalities have been important.

In this last section, I will first sum up the findings of the Article (A), then respond to one obvious first objection to my argument, that is, 'what about Maastricht?' (B). In the end, I will provide some suggestions for further research in the same direction as this Article (C).

A. A question of structure

Dezalay, in an article from 1990, writes that the new Big-Bang version of the lawyer (the *noblesse de costume*) challenges the state's 'judicial monopoly over the resolution of conflict',[125] since arbitration as well as other ways of producing justice outside the state institutions gain prevalence.[126] This observation is relevant for the development of EU law within the Member States, moving the final source of legal legitimacy outside the borders of the perceived sovereign state and to external institutions. This broader development, according to Dezalay, poses an important question for scholarship: 'How have the lawyers, who for centuries have tied their fate to that of the nation-states, accommodated themselves to the opening of frontiers which has accompanied the placing in question of a certain number of state prerogatives?'[127]

The broader challenge identified by Dezalay comes in a more specific form in the narrative of this Article. To put the conflict in simplified, ideal-typical terms: the Americanisation of the Danish legal services branch and its increased mobilisation of EU law in direct opposition to the apparatchik, a development which I sketched out in section 4A. In an effort to develop counterplay against the devaluation of their capital possession, the elite turned to a different transnational legal entity to secure the external validation that their national competitors had acquired in EU law. In this sense, the reproduction of national legal power, while at its core a sort of doctrinal nationalism, rested just as well on going beyond the borders of the nation state. While there are of course certain nuances to this picture, thinking in this fundamental tension between national and transnational legitimacy opens important perspectives to our understanding of the national reception of EU law.

In a more recent article, Kjær and Palsbro argue that 'contrary to the prevailing assumption that national elites are liable to share a rational pro-European attitude towards Europe and Europeanisation . . . we argue that national elites are not as homogeneously favourable towards integration as presumed'.[128] They continue the argument that 'the expression of nationalism is not confined to the general public or to right-wing political parties, but is evidenced even in the discourse of the powerful elite of national lawyers'.[129] Their examples from Danish debate on European human rights fittingly include both a judge and a law professor.[130] The oppositional attitude of the Danish administrative elite towards EU law evolving over the late 1990s and 2000s should be seen in this light yet has important nuances. They are not anti-EU as such, but rather favourable to their existing position and change attitude only when the latter is threatened by peripheral actors on the national legal field. Indeed, many of the arguments raised are also known from non-Nordic legal debates within Denmark. An important nuance added here is that doctrinal nationalism is not restricted to the national sphere, but extents to other possible venues for legitimation.

[125] Y Dezalay, 'The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field' 7 (1990) Theory, Culture & Society 279, 288.

[126] Ibid.

[127] Ibid.

[128] AL Kjær and L Palsbro, 'National Identity and Law in the Context of European Integration: The Case of Denmark' 19 (2008) Discourse & Society 599, 601.

[129] Ibid.

[130] Ibid., 604.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

It is in this regard that we see the triangularity referred to in the title of the Article. Danish reception of EC/EU law was not a strictly binary relation between national and European law. Already years before the Danish accession in 1973, Nordic law was pulled into the process and the debates here helped shape the perception of the Danish actors working with EC law. The deep entrenchment of the Nordic legal community within Denmark (and the other Nordic countries), having existed for a century before the Danish accession, made it a lot easier and more natural for the national jurists to understand EC law and its possible futures in light of Nordic law. This is not to say that they understood EC law *better*, but that they thought of it in terms of the process of legal harmonization that they already knew. Their specific reception of EC law was shaped by Nordic law and an effort to make everything fit together in a nice, coherent totality. While this alternative transnational legal space shaped a different, yet highly optimistic, approach to EC law than one might have found on the contemporary European legal field, it turned into a different tool when EU law started to gain traction against the Danish elite. At the same time, continuity seems to have prevailed for the other Nordic countries, at least based on the archival data discussed in this Article. For both groups, Nordic law has consistently been a point of reference and a source of inspiration and legitimacy for the Nordic jurists in their encounter with EC/EU law.

It is outside the scope of this Article to discuss in depth why the other Nordic elites seem to have taken a different orientation than the Danes, since it would require more extensive studies of the individual national receptions of EU law. Americanisation of the legal services branch was not special for Denmark in this period,[131] but we can assume that other factors have played in. Most importantly, the question of time becomes relevant, as Denmark was the only Nordic country that acceded to the EU/EEA before the middle of 1990s. Studies have shown how generational shifts and changes in legal education has been important for national judges' perception of EU law,[132] and it is not difficult to think that this could form part of an explanation of the particular trajectory of the Danish legal elite at the meetings.

The triangular relationship between Danish, Nordic, and European law is not a symmetrical one between three homologue legal orders. Rather, we should think of the triangularity as different elements to explain and understand the actions taken by the main character in this Article, the ideal-typical Danish apparatchik, and how they changed during the last half century. Each of the three points opened possible avenues of action for the apparatchik as well as for other groups, and thereby forced upon the former new circumstances to deal with. By first monopolising EC law within Denmark, the apparatchik managed to align all three in harmony. But when peripheral actors within Denmark broke the monopoly and mobilised EU law against the elite, the latter would change their picture of the relationship between Nordic and EU law to defend their authority over Danish law. To do this, they relied on the ability to produce legitimacy through their long-standing social ties with other Nordic legal elites. Thus, disengaging the study of European law in Denmark from a focus on European law (and partly from a focus on Denmark as well) allows one to see clearer how Nordic law has played a role in the production of European law in Denmark. Reaching out to a regional/transnational legal community has been an important element of the doctrinal nationalism that has been the reaction of the national elite against the increased mobilisation of EU law in Denmark. Paramount to understanding their changing orientation is not ideological confessions for or against Europe, but structural tensions and struggles over the symbolic dominance on the Danish legal field.

[131]For the similar history in Norway, see H Espeli et al, *Våpendrager Og Veiviser: Advokatenes Historie i Norge* (Universitetsforlaget 2008) 376.

[132]JA Mayoral et al, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge' 21 (2014) Journal of European Public Policy 1120.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

B. What about Maastricht?

Among the possible objections to the argument of this Article, the most pressing might be that the narrative I present belittles the importance of institutional changes from above, namely the Single European Act and the Maastricht Treaty. This is particularly so because of the apparent temporal congruence between the ratification of Maastricht and the shift from the first to the second period. It is not unreasonable to imagine a causal link from the increasing amount of European legislation and the new institutional structure to a change in orientation among the national elite towards European law, and this possible causal link is not sufficiently reflected in the narrative of the Article.

This is not out of ignorance to the broader European history but a deliberate choice to shift focus away from those institutional changes that have already received an abundance of attention in the literature. This attention might have been fruitful in some ways, but has meant that other perspectives, which do not put EU at the centre of the stage, have been comparatively understudied. As this Article is an effort to partly remedy these biases by showing a different type of mechanism, I consider it fully possible to align the argument presented here with a parallel argument that Maastricht was important as well.

Yet, concluding that Maastricht influenced the orientation of a national legal elite should not satisfy us. We cannot reduce history to mono-causal relations, whereby one single process causes another. On the contrary, we can be certain that several different reasons for something happening are always at play. Maastricht might have played a role in ways that are not shown clearly from the data used in this Article but that does not preclude that the dynamics shown were not also influential. In addition, it is more challenging to draw a clear causal link from Maastricht to the specific form that the reaction depicted in this Article. Maastricht might have caused *some* reaction, but it alone did not cause the Danish legal elite to turn to Nordic law specifically. Understanding this choice demands taking into account what went before and in parallel with Danish membership of the EC/EU. Thus, even if one accepts Maastricht as the main driver of the narrative, one will still have to account for other factors to explain the specific form the impact took. Again, the narrative of this Article does not preclude Maastricht, just as little as it relies upon it.

A lot more can be said about this but given the scope of the Article, I will leave it with the above. A thorough discussion would demand engagement not only with Maastricht, but also with the broader theme of top-down assumptions and the acceptance of institutional meta-narratives as the cognitive framework for scholarship on what we call ‘European legal integration’, in itself a flawed analytic concept owing to the ontological assumptions ingrained in all of the three words making it up.

C. New contexts for EU law studies

Constructing a broader and less EU-centric picture of European integration processes, ‘provincializing Europe’[133] in Patel’s words, has received some attention in recent scholarship. It seems fair to assess that much of this effort has been put into revealing the connections between different social networks and international organisations that emerged following the end of World War II, even though some research also reaches further back into the interwar period.[134] As I argue in this Article, there are further gains to be made by studying interrelations with legal orders that not only go even further back in time (the first Nordic Jurist Meeting was held in 1872[135]), but that also exists on a more specific regional level. Scandinavism, which served as an

[133]KK Patel, ‘Provincialising European Union: Co-Operation and Integration in Europe in a Historical Perspective’ 22 (2013) Contemporary European History 649.

[134]See for example W Kaiser, ‘Transnational Practices Governing European Integration: Executive Autonomy and Neo-Corporatist Concertation in the Steel Sector’ 27 (2018) Contemporary European History 239.

[135]Yet this development was of course made possible by much earlier connections through royal kinship, a lingual community etc, anchoring it even further back in time.

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press

important ideological aspect of the Nordic legal community at its emergence, bears many resemblances with the European movements in appearing to promote transnational peace, brotherhood, and cultural exchange. The findings of this Article clearly indicate that understanding so-called 'national' actors' links to this type of international legal harmonisation is paramount to understanding EU law.

Hence, the Article is also an invitation to broaden our perception of what we can see the history of EU law in context of, and what can be seen in the context of the EU law. The territory that is either Member States of the EU, used to be so, or in other ways are affected by EU law and the social practices making it up, is riven with different legal orders. Some of them, a situation that we often simplistically just term 'national law' or similar, confine nicely with the borders and jurisdictions of nation states. Others do not, so that legal practices and ideas still structure the orientations and actions of jurists across the geography and temporality of present nation state borders. Especially considering how recent the formation of many Member States is, there should be lots of fertile ground for further research in this direction.

Acknowledgements. Earlier versions of ideas and connections of concepts outlined in this Article were presented and discussed at the Differentiated European Integration conference in Kristiansand (June 2022), History and Law in European Integration in Oslo (November 2022), The Empirical Turn in International Legal Scholarship: Concepts and Methods in Lillehammer (February 2023) as well as during an internal seminar at the Department of Public and International Law, Faculty of Law, University of Oslo. I am grateful for all comments and suggestions I received during those discussions, as well as from two anonymous peer reviewers.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: M Esmark, 'The triangular relationship between Danish, Nordic, and European law' (2024) *European Law Open*. https://doi.org/10.1017/elo.2024.8

https://doi.org/10.1017/elo.2024.8 Published online by Cambridge University Press