

Law, Method and Values

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1 Introduction

The intention of the following presentation is to find out whether the modern theory about the sources of law has undergone a change in comparison with the traditional theory. I also attempt to find out if the development of the welfare state has changed the basic values of the legal system (political ideology) and, if so, whether this change is reflected by legal theory and practice.

2 The Sources of Law

2.1 Theories about the Sources of Law

2.1.1 The 19th Century Doctrine of the Sources of Law

The term “retskilde” (= source of law) only occurs in a few exceptional cases in the Nordic literature before the 1820’s, but it becomes generally accepted in the middle of the 1800’s.¹ Since then, the term source of law has been used in legal terminology, even though law itself cannot “flow up like water from a spring” or “live in the law source”.² In Denmark the terminology of the law source really establishes itself with J.E. Larsen³ (1799-1856), who in 1838 uses the phrase “On the Sources of the Danish Civil Laws”, and with Bornemann⁴ (1810-1861), who under the title “On the Springs of Law”

¹ Cf. Lars Björne, *Nordisk rettskällevärd. Studier i rettskällevärdan på 1800-talet*, Lund 1991, pp. 21 ff.

² Cf. A.S. Ørsted, *Haandbog over den danske og norske Lovkyndighed, 1822-35*, I, p. 292; Torstein Eckhoff, *Rettskildelære*, 3. utg., Oslo 1993, and Preben Stuer Lauridsen, *Retslæren*, Kbh. 1977, p. 349.

³ See J.E. Larsen, *Samlede Skrifter*, II, Kbh. 1857-61.

⁴ See F.C. Bornemann, *Samlede Skrifter*, I, *Foredrag over den almindelige Rets- og Statslære*,

discusses whether the different material as e.g. “custom”, “law”, “natural law”, and “practice” can be described as sources of law or not.

By comparing the definition of the concept of law with the definition of the term “source of law” used in jurisprudence, one will realize rather quickly that the term “source of law” is much wider than the concept of law. A common view in jurisprudence is that *the law* is identical with the norms that “individuals must subject themselves to, the order that they have to respect”. And the norms are those which society has recognized as being valid and necessary to follow.⁵ However, the fact that law is understood as norms which have to be followed by the citizens, does not imply that there is agreement in jurisprudence as to what can be described as a *source of law*. However, there is general agreement that law making, custom, and “the nature of things” can be regarded as sources of law, and most of the authors consider legal practice to be a source of law.⁶ Moreover, a number of authors think that analogy and jurisprudence must also be considered as sources of law, and in addition some authors claim that the spirit and general legal principles of law must also be regarded as sources of law.⁷ Statute and custom are considered as primary sources of law, i.e. they must necessarily be followed. “The nature of things”, legal practice, analogy, the spirit of the law, etc. are regarded as secondary sources of law, i.e. they can be used in cases where the answer can neither be found in statute nor custom. The division of sources of law into primary and secondary sources may be explained by the inconsistency between the abovementioned concept of law and sources of law.

The distinction between the sources of law, which can and should be used, and the sources of law, which only can be guiding, is maintained by *Viggo Bentzon* (1861-1937) who in his doctrine of legal sources primarily is interested in the judges' use of the sources of law. The distinction between primary and secondary legal sources was abandoned by *Alf Ross* (1899-1980), and today it is widely held that there is no particular rank order among the sources of law, see below.

2.1.2 Modern Theory

The term law source is still used in modern theory about the sources of law. Many authors have attempted to summarize or define the sources of law, however without great success.

Throughout the years, the sources of law have been described as “the sources of knowledge”,⁸ “the source that lawyers seek out in order to find the answer to

Kbh. 1863-1868, I, pp. 42 ff.

⁵ Cf. Bornemann, *Samlede Skrifter*, I, op.cit., pp. 42 ff. and Carl Goos, *Forelæsninger over den almindelige Retslære*, Kbh. 1885-92, I, p. 1 and p. 89.

⁶ Cf. Ørsted, *Haandbog over den danske og norske Lovkyndighed*, I, op.cit., pp. 81 ff.; J.E. Larsen, *Samlede Skrifter II*, 1, op.cit., pp. 68 ff.; Andreas Aagesen, *Indledning til den danske Formueret*, Kbh. 1881, and Goos, *Forelæsninger over den almindelige Retslære*, I, op.cit., pp. 102 and ff.

⁷ See Goos, *Forelæsninger over den almindelige Retslære*, op.cit., p. 102 f.

⁸ See O.A. Borum and Stig Iuul, *Juridisk Ordbog*, 1965.

what is valid law concerning a particular question”,⁹ “the factors of legal sources which are allowed to be included in legal argumentation”,¹⁰ “the factors forming the basis of the wording of legal rules”,¹¹ “the instruction in searching for legal information”,¹² “everything that can be referred to as legal authority”,¹³ and “all the factors which direct the courts (or other governmental administrative bodies) in their choice or formation of the norms which have to be applied in concrete cases and partly the norms themselves.”¹⁴

These different designations do not necessarily mean different conceptions of what the authors understand by the sources of law, but they can rather be seen as expressions of the desire to find a more modern designation instead of “law source”. Therefore, the different designations are neither especially enlightening nor precise.

Presently, there is general agreement in the theory on the sources of law that these sources should be systematized in four *main groups*: *statutes* (statutory laws, proclamations and decisions), *legal practice* (court decisions), *custom* (customary legal practice and customary business practice), and “the nature of things.”¹⁵ In Danish theory on the sources of law, there is general agreement that there is *no rank order* among the different main groups of legal sources, and there is no longer any distinction between primary and secondary legal sources. This point of view is correct if the legal sources are regarded from the court’s viewpoint. This means that the judges have no obligation to follow any particular legal source, and the courts are not afraid of interpreting away or setting aside a decided legal principle in order to pave the way for another in particular cases.

In a decision made by the Eastern High Court (Østre Landsret) 1983 U/R 453 ØLD, it is presumed that a legal custom had developed *contra legem*, i.e. contrary to the mandatory statutory provision in the Registration of Property Act § 40, section 4, point 2.

The assertion that there is no rank order among the sources of law, is not adequate when looking at the sources of law from the perspective of governmental administrative bodies, as these bodies are bound to obey the law when performing their activities (the formal law principle). No doubt, governmental administrative bodies are obliged to follow circulars, and they cannot just neglect to follow these circulars by giving greater weight to another

⁹ See Johs. Andenæs, *Innføring i rettsstudiet*, 2. utg., Oslo 1985, p. 54.

¹⁰ Cf. Eckhoff, *Rettskildelære*, op.cit., p. 18 f.

¹¹ See von Eyben, *Juridisk grundbog 1, Retskilderne*, 5. udg., Kbh. 1991, p. 15.

¹² See Stuer Lauridsen, *Retslæren*, op.cit., p. 349, and Ruth Nielsen, *Retskilderne*, Kbh. 1985, p. 1.

¹³ See Aleksander Peczenik (with Aulis Aarnio and Gunnar Bergholtz), *Juridisk argumentation*, Stockholm 1990, pp. 141 ff.

¹⁴ See Stig Strömholm, *Rätt, rättskällor och rättstillämpning*, 4. u., Stockholm 1992, p. 296 f.

¹⁵ Cf. Knud Illum, *Lov og Ret*, Kbh. 1945, pp. 65 ff.; Alf Ross, *Om ret og retfærdighed*, Kbh. 1953, pp. 90 ff.; Stuer Lauridsen, *Retslæren*, op.cit., p. 346, and Ruth Nielsen, *Retskilderne*, 4. rev. udg., Kbh. 1995, p. 18 f.

source of law. The question of the rank order of the legal sources and the law user's prioritizing of the sources of law is treated below in part 3.

The sources of law can - a little simplified - be seen in two principally different ways.

One conception of the theory of legal sources is that it is necessary to distinguish between legal sources on the one hand and which kind of approach should be followed by using the sources of law (the legal method) on the other hand. The general conception is that the sources of law are binding, i.e. normative for the legal decision. Therefore, the central question is *what* legal material is binding, i.e. can and should be used in the legal decision. This question can only be answered by establishing on what conditions a legal material (legal source) can be regarded as binding. This theory is described as the *normative or prescriptive theory about the sources of law*.

Another conception of the theory of legal sources is that it is neither possible nor desirable to distinguish between legal sources and the legal method, because it is impossible to make a distinction between the description of the individual legal sources and the description of their application. By describing legislation, for example, one must necessarily take into account the description of what the judge/law user attaches weight to when using the legislation. Thereby, the legislative material receives a central role as a source of law. This theory is called the *descriptive theory about the sources of law*.

An example is *Eckhoff*,¹⁶ who presents the so-called factors of legal sources, i.e. 1) law texts, 2) legislative material, other background material and following statements by the legislator, 3) legal practice (the practice of courts), 4) other governmental bodies' practice, 5) private practice, 6) conceptions of law (especially in legal literature), and 7) real grounds (evaluation of the results). By dividing up the sources of law into their individual factors, one obtains a more realistic picture of how these sources are used in law according to *Eckhoff's* view. *von Eyben*¹⁷ seems to be somewhat influenced by *Eckhoff*. Under the heading "The individual sources of law", *von Eyben* thus mentions the following: 1) motives of law, 2) analogy and contrary conclusion, 3) precedent, 4) custom, 5) legal literature, 6) the nature of things, and 7) the objective of the law. *von Eyben* does not explain in detail why he thinks that this material can be described as sources of law. Today, *Eckhoff's* "doctrine of legal sources" has established itself permanently in the Danish theory as well as the theories of the other Nordic countries about the sources of law.¹⁸

The problems caused by the descriptive theory will be treated below.

¹⁶ See *Eckhoff, Rettskildelære*, 3. utg., op.cit., p. 18. See also *von Eyben, Juridisk grundbog 1, Rettskilderne*, op.cit., p. 17 f.

¹⁷ Cf. *von Eyben, Juridisk grundbog 1, Rettskilderne*, op.cit., pp. 17 ff.

¹⁸ Cf. *Ruth Nielsen, Rettskilderne*, 4. rev. udg., op.cit., p. 18 f., and *Morten Wegener, Juridisk metode*, 2. rev. udg., Kbh. 1994, p. 32 f.; *Jan Fridthjof Bernt and David R. Doublet, Juss, samfunn og rettsanvendelse*, Oslo 1996, pp. 200 ff., and *Erik Boe, Innføring i juss. Juridisk tenkning og rettskildelære*, Oslo 1996, pp. 131 ff.

2.1.3 Criticism of the Descriptive Theory about the Sources of Law

The absence of distinction between sources of law and legal method has had the unlucky consequence that certain parts of the legal method are now regarded as a “new legal source”. In harmony with the 19th century theory about the sources of law, *von Eyben*¹⁹ regards “analogy” and “contrary conclusion” as independent sources of law, and he considers “the legislative material” and “the objective of the law” to be sources of law. *Eckhoff*²⁰ divides sources of law into their individual “factors”, by which he means the factors affecting the interpretation of the law, for example the text of the law, legislative material, earlier decisions, one’s own evaluations etc. This descriptive conception of the sources of law implies an unnecessary uncertainty about which legal material is normative and which is instructive. Whether the legislative material shall or can be taken into account, depends on *the interpretation of the text of the law*, in other words the question of which legal method (wording, interpretation, objective or subjective teleological interpretation) shall or can be used. By describing the legislative material as a source of law, one overlooks a decisive point: that the motives of law and subsequent statements made by legislators are not binding like law itself. Law will always come before the motives of law. By describing the legislative material as a source of law or a factor of the source of law, one does not get the opportunity to ask the question *if* the legislative material itself has any relevance to the existing situation.

The descriptive theory about the sources of law originates in the 19th century theory of legal sources. The consequence of recognizing the motives of law as sources of law in modern theory is a reintroduction of the distinction between primary and secondary legal sources in that the motive of law, as mentioned above, can *never* come before law itself.

By regarding “the legislative material” etc. as legal sources, the descriptive theory of legal sources has pointed to something important, i.e. that the sources of law must be adapted to the legal development, but at the same time this theory overlooks or undervalues the normative importance of the sources of law. This relativization of the sources of law can possibly be explained by the lack of settlement with the theory of the 19th century on the sources of law, but the court’s frequent use of the purposive construction obviously bears part of the blame.²¹ In this light it is easy to understand that the doctrine of legal sources - to put it mildly - is characterized by flexibility to such a degree that the Norwegian *Johs. Andenæs*²² finds that everything flows in the doctrine of legal sources.

¹⁹ See *von Eyben*, *Juridisk grundbog 1, Retskilderne*, op.cit., p. 17 f.

²⁰ Cf., *Eckhoff*, *Rettskildelære*, op.cit., p. 18. See also *von Eyben*, *Juridisk grundbog 1, Retskilderne*, op.cit., p. 17 f.

²¹ An investigation made by *Erik Brorly*, *Retskilderne i praksis*, *Justitia* 3, 1986, showed that subjective teleological interpretation was used in 20 p.c. of all the instances he investigated.

²² See *Johs. Andenæs*, *Innføring i rettsstudiet*, op.cit.

2.2 What does it Mean that the Sources of Law are Binding?

That the sources of law are binding means that they are norm-giving for the legal decision. A precondition is that the legal sources have come into existence in such a way that they are accepted by society as valid. By way of example, a law is valid when it is formed in agreement with the rules of the constitution concerning the passing of laws. To put it more generally, a particular legal material (source of law, legislation, practice, custom) is binding when it has validly been created in conformity with the rules of society for production of binding legal rules (“rules of recognition”).²³

However, the obligation to follow the sources of law is not unlimited. The following exposition of Danish Law 5-1-1, 5-1-2, The Law of Contracts § 1, and two decisions of the Danish Supreme Court (Højesteret) 1985 UfR 877 and 1991 UfR 43 illustrates this.

The Danish Law 5-1-1 (from 1683) provides that agreements must be kept “in all their words and points” (Danish Law 5-1-2). The Law of the Formation of Contracts § 1 (1917) also prescribes that offer and acceptance are binding. The basis is clear: agreements must be kept (*pacta sunt servanda*).

In the decision 1985 UfR 877 the question was if a retailer’s display of price-marked goods should be regarded as an offer or only an invitation to customers to make an offer. The legal consequence of the distinction is well known. In case of an offer, an agreement is made when the customer accepts it. In case of an invitation to make an offer, no agreement is made until the shopkeeper accepts the customer's offer. In its decision the Supreme Court establishes that the price-marked goods are an offer to the customers. In this way the Supreme Court has taken a position on a question of principle which is expected to be the basis of future legal decisions (precedential value). The same thing in another way: the *ratio decidendi* of the legal decision,²⁴ i.e. the rule which is deducible from the decision, is that price-marked goods are an offer.

In the *Danish Law 5-1-1* a.o. a rule is formulated, and from the decision in U 1985.877 HD a rule is deduced which judges and others are duty bound to follow. However, the extent and field of application for these rules are defined later on.

Danish Law 5-1-1 (the Law of Contracts § 1) provides that agreements are binding. This normative basis is abandoned in the Law of Contracts, Chapter III which mentions “invalid declarations of intention”.

The decision 1985 UfR 877, which establishes that price-marked goods are an offer, is abandoned and amplified in *1991 UfR 43*.

²³ Cf., H.L.A. Hart, *The Concept of Law*, Oxford 1961, pp. 100 ff., and Stig Jørgensen, *Retsafgørelsen og dens begrundelse*, JFT 115, 1979, p. 318 ff.; Stig Jørgensen, *Die rechtliche Entscheidung und ihre Begründung*, Rhetorische Rechtslehre, hrsg. von Ottmar Ballweg und Thomas-Michael Seibert, Freiburg/München 1982, p. 337 ff., and Stig Jørgensen, *Motive and Justification in Legal Decision-Making, Reason and Reality*, Aarhus 1986, p. 49 ff.

²⁴ See on the concept “ratio decidendi” Peczenik (with Aarnio and Bergholtz) *Juridisk argumentation*, op.cit., p. 156 ff., and Lars Erik Taxell, *Rätt och demokrati*, Åbo 1976, p. 179 f.

The decision 1991 UfR 43: In a trade circular distributed to households and on showcards in the shop Bilka advertised that “Marabou” chocolate was for sale for 12.95 Danish crowns a bar, which was 4.76 crowns cheaper per bar than any other purchasing possibility at all. Naturally, the advertisement aroused the interest of a manager for some other candy store in the area, and at the beginning of the time mentioned in the advertisement the manager went into Bilka in order to purchase all the 4000 bars kept in stock. Bilka refused to sell the 4000 bars of chocolate to the manager, who subsequently sued Bilka claiming compensation (4.76 Danish crowns x 4000 bars). The principal question was if Bilka was duty bound to sell the 4000 chocolate bars to the manager. The premise was clear: the display of a price-marked product is an offer, which the customer must only accept in order to make an agreement. A minority in the Supreme Court (3 of 9 judges) found that the offer had to be understood according to the terms, i.e. that an agreement had actually been made. The majority arrived at the opposite conclusion. The Supreme Court maintained, that Bilka’s usual customers were private individuals, and that the manager for the other candy store must have realized that the offer was meant for these, and that Bilka would not give other profit making enterprises access to purchase large quantities of the advertised products for resale. Thus, Bilka was not duty bound to sell to the manager. It appears from the decision that the crucial point was not the number of bars but the manager’s status as a profit making businessman and resaler. In Bilka’s opinion, too, a manager of a company who intended to purchase the chocolate bars in order to give them away to his staff was allowed to purchase all the bars.²⁵

As it will appear, the rule established in The Eastern High Court’s decision 1983 UfR 453 is specified and delimited from an interpretation of intent and reasonability.

These examples show that even if the rules seem to be clearly formulated, they often have to be specified and delimited. This is due to the fact that legal rules are abstract and only make allowance for certain kinds of situations (the social model). But legal rules have to be used concretely in a differentiated reality, which is also constantly changing. Legal rules are therefore laid down under a large number of unspoken conditions. That is to say that legal rules must be understood subject to these unspoken conditions; agreements must be understood subject to the rules on invalidity (the Law of Contracts Chapter III), the rules on breach, and the condition that the agreement can be honoured (“*impossibilium nulla est obligatio*”); the principle of the rule of negligence (*culpa*) must be understood subject to the objective grounds for responsibility (consent, self-defence etc.),²⁶ and the offer must be understood subject to the addressees’ status etc. In other words, legal rules are permissive or “defeasible”, that is to say susceptible to arguments which limit their general application.²⁷

²⁵ The decision 1991 UfR 43 caused an amendment of the Danish Marketing Practices Act; section 7 subsection 1 of the act now says: “A retail business must not put a ceiling on the number of units that a customer may purchase of a product. Furthermore, sale to a particular purchaser cannot be denied.”

²⁶ See, Stig Jørgensen, *Kontraktret 2*, Kbh. 1972, p. 6 f.

²⁷ Cf. H.L.A. Hart, *The Ascription of Responsibility and Right. Logic and Language*, Essays on Logic and Language, (A.G.N. Flew, ed.), first series, Oxford 1952, p. 145. See in this context the introduction to *Punishment and Responsibility* (1968).

Thus, legal rules are not stiff and conservative, but rather *relative*, i.e. they can be adjusted to reality and thus the development of society.

2.3 *Prioritizing Sources of Law*

Sources of law are binding, and seen from a court's perspective there is no rank order among them. Consequently, it seems to be possible in a legal decision to choose among the various sources of law. When looking at legal practice, this opinion will be confirmed to some extent, compare for example the above decision of the Eastern High Court 1983 UfR 453 assuming that a legal custom had been created which was contrary to a mandatory statutory provision. According to *Augdahl*,²⁸ however, society would fall into chaos, if the courts had free play regarding the legislation in such a way that the judges only followed the rules which found favour in their eyes. Naturally, greater importance is attached to legislation than to other legal sources, inasmuch as legislation is democratically legitimated in comparison to the other sources of law.²⁹ In legal literature there is general agreement that different weight is attached to the sources of law in the solution of legal problems.

It is widely held that legislation has a preferential position compared to the other sources of law.³⁰ In other words, the user of law must begin by examining if there are statutory provisions essential to the concrete example. If the user of law does not "find" any statutory provisions, he must look in the other sources of law. There is no indispensable rank order between legislation on the one hand and other sources of law on the other hand. The principle of the law's preferential position is rather an expression of the conception that the result can only in special cases be based on other sources of law.

Another principle is that the rule which can be deduced from the legal decision of a Supreme Court is important in similar cases, compare for example the above decision concerning price-marked goods, 1985 UfR 877, and 1991 UfR 43. Such principle is not always followed by the Supreme Court itself, compare the decision in 1996 UfR 1300, where a number of persons, according to the Supreme Court's conception, had a cause of action in proceedings claiming that the law on Denmark's accession of the EU Treaty was in conflict with the Danish Constitution's § 20. This decision is an amendment of the Supreme Court's own practice in similar cases.

In legal literature, these principles of priority are often referred to as "principles of the sources of law" i.e. guidelines which do not give direct answers to legal questions but which among other things give instructions as to how the sources of law should be put into order of priority.³¹

²⁸ See Per Augdahl, *Rettskilder*, 3. utg., Oslo 1973, p. 69.

²⁹ See Taxell, *Rätt och demokrati*, op.cit., p. 156 f.

³⁰ Cf. Augdahl, *Rettskilder*, op.cit., p. 69 f.; Magnus Aarbakke, *Harmonisering av rettskilder*, TfR 1966, pp. 501 ff.; Taxell, *Rätt och demokrati*, op.cit., p. 157; Eckhoff, *Rettskildelære*, op.cit., p. 15, and Wegener, *Juridisk metode*, op.cit., pp. 33 and 82.

³¹ Cf. Eckhoff, *Rettskildelære*, op.cit., p. 14, and Wegener, *Juridisk metode*, op.cit., pp. 33 and 81 ff.

2.4 Legal Pluralism

The law does not constitute a coherent and consistent system, but it has different functions, producers³² and reach, geographically³³ as well as with regard to the addressee.³⁴ In other words, law is pluralistic.³⁵

The fact that law is pluralistic is manifested clearly as the different legal actors in their activities stress different fields of the sources of law.³⁶ *The consequence of regarding sources of law as pluralistic is that they are broken up in just as many parts as the number of relations (legal actors).*

The legal case worker in the civil service is primarily oriented towards circulars, which are internal official orders and therefore binding. However, the judge and the private person are not bound by the circulars.

As mentioned above, it is often sufficient and necessary for *barristers and attorneys* to observe the courts' and other governmental bodies' application of the law in order to give their clients the best possible advice concerning the outcome of a case. However, this is not sufficient for the judge, who needs to know by what legal material he is bound. For the *prosecutor* it is also very important to observe the courts' application of the law.

In *jurisprudence* - which comprises legal dogmatics, comparative law (history of law, sociology of law, and international comparative law) and politics of law - it is necessary to bear in mind all these possible points of view. Part of the disagreement in jurisprudence is probably due to the fact that the problems are perceived from different points of view.

For *the private citizen* it is important to know what legal material is binding in relation to other private citizens (civil law), and what legal material is binding on the government / the civil service (public law and administrative law). In the latter situation it is important for the citizen that a classification and concretization of the unwritten legal doctrines and broad rules based on estimates give a better grounding when confronted with the civil service, i.e. increase the individual's security of life and property. As to the *courts* a classification and concretization of the unwritten legal doctrines mean that their field of application is restricted, which is detrimental to the general security of life and property.

³² We talk about sources of law (law, practice, custom, and the nature of things) and not about *one* source of law.

³³ See as an example the decision from Vestre Landsret (the Western High Court) 1980 UfR 427 dealing with a special rate of interest in the well-boring branch of trade.

³⁴ See as an example the decision from Østre Landsret (the Eastern High Court) 1983 UfR 453, where a mortgage-credit institute - notwithstanding the Danish Registration of Property Act section 40, subsection 4, 2nd sentence - by virtue of custom included interest on overdue payments in the calculation of a mortgage claim by forced sale.

³⁵ Cf. Stig Jørgensen, *On Justice and Law*, Aarhus 1996, pp. 109 ff., and Jørgen Dalberg-Larsen, *Rettens enhed - en illusion? Om retlig pluralisme i teorien og i praksis*, Kbh. 1994.

³⁶ Stig Jørgensen, *Law and Society*, Århus 1971, p. 87.

3 The Legal Method

The legal decision is a decision based on evaluations which means that the legal method is principally alogical and estimated. However, this is not to say that a legal decision can be described as discretionary. *Firstly*, different *means* have been made in order to reduce the element of estimate in the application of law, and *secondly* the legal decision is *verifiable* and must be *accepted* among others colleagues.

3.1 Means

3.1.1 Harmonizing Rules and Rules of Interpretation

Already in medieval Roman law, various *means* existed which could be used to reduce the element of discretion in the interpretation. In Roman law the conclusion by analogy and the conclusion per contra were drawn up in case of the absence of rules. For use in case of conflict of law, the rule was laid down *that* older laws are superseded by newer ones (“lex posterior”), *that* general rules are superseded by special rules (“lex specialis”), and *that* laws at lower levels are superseded by laws at a higher level (“lex superior”). Today, these rules are described as harmonizing rules.³⁷

Nowadays there is a number of different *rules of interpretation* for the legal practitioner, for example literal interpretation, objective/subjective purposive construction, interpretation by analogy etc. However, one must be aware that the application of the rules of interpretation covers up an evaluation because these rules give no guidance as to when the different rules of interpretation should be applied. Even if the rules of interpretation have no kind of rank order or order of priority but are co-ordinated, the choice between the different rules of interpretation is still not arbitrary. Older as well as newer theories of law presume that the interpretation of norms (rules of law, principles of law, contracts etc.) is based on the customary, natural understanding of the wording, i.e. the natural linguistic understanding in conformity with the usual meaning of the words.³⁸ It is therefore natural to conclude that the interpretation of wording precedes the other rules of interpretation.³⁹ However, the statement that the interpretation must be based on the wording is not an expression of the priority of the rules of interpretation but a recognition that the norm is a carrier of meanings, and that the whole object of interpretation is “to find a meaning.”⁴⁰ It is also essential that the interpretation of wording harmonizes with the demand

³⁷ See Magnus Aarbakke, *Harmonisering av rettskilder*, op.cit., pp. 501 ff.

³⁸ Cf. Lauritz Nørregaard, *Natur-Rettens første Grunde*, Kbh 1784, pp. 370 ff.; Ørsted, *Haandbog over den danske og norske Lovkyndighed*, I, op.cit., p. 296 f.; Kristian Huser, *Avtalotolking*, Bergen 1983, p. 216 f.; Stig Jørgensen, *Kontraktsret I*, Kbh. 1971, p. 181 f.; Peczenik (with Aarnio and Bergholtz), *Juridisk argumentation*, op.cit., p. 182, and Strömholm, *Rätt, rättskällor och rättstillämpning*, op.cit., p. 379 f.

³⁹ Cf. for example Taxell, *Rätt och demokrati*, op.cit., p. 279 f.

⁴⁰ See Strömholm, *Rätt, rättskällor och rättstillämpning*, op.cit., p. 380.

for law and order, i.e. in this context the demand for a predictable, uniform and consistent interpretation.

3.1.2 The Basic Values of Law

The choice of rules of interpretation is also restricted by the *political ideology* or the *basic value* in the individual field of law. The basis of *criminal law*, the principle of legality, i.e. the demand that a punishment must be under the provision of the law (“*nulla poena sine lege*”), therefore implies that subjective interpretation of intent in conflict with the wording of the law is impossible. In varying degrees the individual fields of law are affected by different basic values. *Administrative law* is influenced by the demand for the rule of law and equality, *constitutional law* is influenced by “the principle of authority” (The Danish Constitution § 3) and “human rights”, and the basic value of *civil law* is “private autonomy.” The knowledge of the basic value in the individual fields enables the legal practitioner to choose the correct basis for legal argumentation.

This question is treated in detail below in section 4. Only one example will be mentioned here: The Danish Rent Act is characterized by an intensive governance of the rights and duties of the landlord and the tenant. A dispute arises between the tenant and the landlord as to whether some particular contract terms which are not governed in detail by the Rent Act are valid or not. The question is if there is a premise of freedom of contract between the tenant and the landlord, which means that the agreement is valid, or if the premise is the opposite, which means that the agreement is invalid. Consequently, knowledge of the basic values of law is crucial for the settlement of the dispute. However, even if the statutory prescription is the most predominant *practical* principal rule, it does not imply that this is the principal legal rule. The fundamental value of the law of contracts is “private autonomy”, which means that this must create the basis for the settlement of the dispute.

3.1.3 Controllability and Acceptance

The citizens are subject to the same rules, i.e. equality before the law, and this equality - “identical cases will be treated identically” - can be called justice.⁴¹ Consequently, the legal practitioners and the courts must try to reach the same result, when they are presented with identical problems. It therefore seems probable that the judges will make the same evaluation of rules and facts. It is true that such evaluation is subjective, but it is not only an expression of the judge’s own personal evaluation or attitude as it is later on approved/disapproved by higher ranking courts. For the same reason, such evaluations are described as *intersubjective*. An evaluation can be more or less intersubjective, i.e. to a greater or lesser extent *generally accepted*.

Primarily, the decisions of the courts must be accepted by the parties to the case. If the decision is not accepted by the parties, it can be brought before a superior court, where the decision will be verified and possibly accepted, which

⁴¹ See Stig Jørgensen, *On Justice and Law*, op.cit., p. 96.

means that the superior court lets the decision stand. The court decisions are also verified by jurists outside the court system who either accept the decision or criticize it. In the end, the community in general must accept the decision.

Logic is the science of consistent sentences. In logic the doctrine of syllogism is presented, that is to say the consistent conclusion in which two assertions are unified.

- Example:
1. All human beings are mortal (premise 1)
 2. Casper Cator is a human being (premise 2)
 3. Casper Cator is mortal (conclusion).

Premises 1 and 2 are true, and the conclusion/inference is therefore consistent. That court decisions seem logic, is ascribed to the fact that they have a written form (syllogistic form): 1) choice of rule, 2) choice of facts and 3) conclusion/result. Accordingly, the evaluations and the arguments are systematized and placed into a context. Therefore, legal decisions seem logical, but the result is based on the judge's decision, i.e. evaluation. Consequently, the legal decision is not the result of a logical process; it is not logically true or false, but it can be *correct* or *incorrect* in relation to the legal source material.⁴²

The practical purpose of presenting the legal decision in a syllogistic form is to give the decision an authoritative character (effectiveness) and to create the possibility of *controlling* the user's decision (the rule of law). However, it is not unproblematic to use logic as a means of control because logic cannot make out whether the chosen premises (choice of rule and facts) are true or false. Logic cannot determine if the judge's choice of premise is only a "façade of legitimacy",⁴³ as the legal decision can be a logical consequence of the advanced premises, at the same time as the judge hides the elements which have actually motivated him. The difficulty of using logic as a means to control the legal decision is closely connected with the problem of intersubjectivity, i.e. the possibility that legal arguments are accepted inside and outside the legal system. Logic cannot be used to control the choice of rules or facts, but only to control the legal conclusion. Thus, the logical problem of control does not exist directly between the decision and the premises but between the premise and the conclusion.

*Logic can therefore be used as a means to control the legal decision so that self-contradictory arguments are opposed or totally avoided.*⁴⁴

⁴² Cf. Hart, *The Ascription...*, op.cit., p. 155, and Jes Bjarup, *Lidt om logik, retslig argumentation og fortolkning*, Juristen 1967, p. 415.

⁴³ See Ross, *Om ret og retfærdighed*, op.cit., p. 179.

⁴⁴ Stig Jørgensen, *Law and Society*, op.cit., p. 99 f.; Stig Jørgensen, *Gadamer's Universal Hermeneutics*, forthcoming in *Scandinavian Studies in Law*.

4 The Changes in the Basic Values of the Legal System

4.1 The Values of the Constitutional State

The constitutional state, i.e. the bourgeois, liberal state that was introduced in a number of European countries during the 19th century, is first and foremost characterized by the relationship between the state and the citizens which demand that the state protects the citizens against conditional and unnecessary intrusion (public law and criminal law).⁴⁵ This was realized primarily through the formulation of precise rules defining the individual citizen's legal position in such a way that it became predictable. Thus the constitutional state became the guarantor of due process.⁴⁶

In the field of *civil law*, liberalism and individualism - which dominated especially at the beginning of the 19th century - meant that the state did not govern the citizen's relations in property and contract.⁴⁷ Here "private autonomy" ruled. The limitations of the citizen's contract relations were a private affair,⁴⁸ and in the last instance they were laid down by the courts.⁴⁹ It is of importance to the following presentation to understand that the concept of "private autonomy" is not identical with the concept of "freedom of contract," and the concept of "freedom of property right". Freedom of contract and freedom of property right refer to certain political facts and the citizen's access to settle their legal matters within civil law, while private autonomy refers to the ideological basis of the freedom of contract and property right.⁵⁰ While it is a natural thing to talk about limitations in the freedom of contract (for example the Law of Contract's Chapter III) and in freedom of property right (for example the judge-made neighbour law) it is not possible in the same way to talk about limitations in private autonomy as private autonomy is a political, ideological premise or primary concept.

In the field of *criminal law*, the constitutional state developed a point of view on the relationship between the citizen and the state, which was manifested in among other things the principle of legality. This principle, which *Feuerbach* formulated in the Latin phrase "Nulla poena sine lege", no punishment without law, is the fruit of the enlightenment and was one of the guarantees that was

⁴⁵ See Dalberg-Larsen, *Retsstaten, velfærdsstaten og hvad så?*, Kbh. 1984, pp. 29 ff.

⁴⁶ Cf. accordingly Bornemann, *Samlede Skrifter I*, op.cit., p. 297.

⁴⁷ See Ragnar Knoph, *Utviklingslinjer i moderne formuerett*, Oslo 1934, pp. 8 ff., and Stig Jørgensen, *Træk af privatrettens udvikling og systematik*, Acta Jutlandica XXXVIII:1, Århus 1966, p. 38 f.

⁴⁸ For example by the creation of easements concerning the regulation of specific circumstances and later - at the end of the 19th century - concerning the regulation of urban areas, cf. Jens Ewald, *Dansk servitutret*, Kbh. 1992, p. 18 f.

⁴⁹ As an example can be mentioned the development of the judge created "neighbour law", cf. Knud Illum, *Dansk tingsret*, 3. udg. (ved Vagn Carstensen), Kbh. 1976, pp. 99 ff., and W.E. von Eyben, *Dansk Miljøret 4*, Kbh. 1978.

⁵⁰ See Stig Jørgensen, *Kontraktsret 1*, op.cit., p. 25 f.; Carl Jacob Arnholm, *Privatrett I. Almindelig privatrett*, Oslo 1964, p. 165 f.; Eugen Bucher, *Das subjektive Recht als Normsetzungsbefugnis*, Tübingen 1965, p. 87; and Heinrich Henkel, *Einführung in die Rechtsphilosophie*, 2. Aufl., München 1977, p. 76.

created for the protection of the individual's freedom.⁵¹ The principle of legality was first established in the Criminal Code of 1866 (§1) and was a reaction against absolutism, which recognized a possibility of deciding, judicially, that an act was criminal because of its "natural culpability" and its opposition to "the spirit and principles of the law" and the like.⁵² Criminal law was now seen as the citizen's protection against the conditional use of power.

In the field of *administrative law*,⁵³ this meant that governmental institution's authority could only be exercised according to defined rules of law, which in the final resort were covered by the jurisdiction of the courts.

The basic values of constitutional law are expressed in the "civic rights" or the "human rights" of the Danish Constitution. Section 3 of the Constitution, which is built on the classical doctrine of the division of power, establishes a fundamental constitutional principle.⁵⁴ The basic idea of a constitutional division of the functions (power to legislate, govern, and adjudicate) is to create a form of governance with a balance of powers between the supreme bodies of state which can then protect the citizen from conditional intrusion. The possibility of the legislative power to create valid rules of law rests on the principle of authority,⁵⁵ cf. section 3 of the Constitution. The doctrine of human rights should be seen in the light of the principle of authority.

The existence of natural rights ("human rights", "civic rights") for each individual, on which none of the power(s) of the state has any right to encroach, dates back to *Montesquieu's* reflections in his work *De l'esprit des lois* (1748), to *John Locke's* teachings on the social contract,⁵⁶ and to the doctrine of natural law in the 17th and 18th centuries.⁵⁷ No historical reality lies behind these ideas of the natural state and the social contract, but nevertheless the doctrine has had a decisive influence on the formulation of modern democratic constitutions. In Chapters VII and VIII of the Danish Constitution, a number of decisions on rights and duties are formulated, to which the constitutional founders have attached particular importance. These rights (and duties) are not necessary or "natural", as a matter of fact they were included under the influence of the doctrine of the individual's inviolable rights. These rights (and duties) can be seen as the basic values of our legal system.

⁵¹ See Brynolf Honkasalo, *Nulla poena sine lege*, Det 17. nordiska juristmötet, Helsingfors 1937, bilag II, pp. 3 f.

⁵² See Knud Waaben, *Strafferettens almindelige del I, Ansvarslæren*, 3. rev. udg., Kbh. 1993, p. 70 f.

⁵³ Administrative law and public law did not break through in Denmark until the 1920s with Poul Andersen's thesis *Om ugyldige forvaltningsakter* (1924) as an introduction to this era. So far, administrative law had not been systematically presented but had been based on broad decisions in acts and regulations. See for example *Næringsloven* (the Trade Act) from 29th December 1857 and *Bygningsloven* (the Housing Act) for Copenhagen from 1856.

⁵⁴ Cf. Alf Ross, *Statsretlige studier*, Kbh. 1959, pp. 23 ff., and Peter Germer, *Statsforfatningsret*, 2. udg., Kbh. 1995, pp. 13 ff.

⁵⁵ See also on this Stig Strömholm, *Aktuelle spørgsmål. Staten og juristerna*, SvJT 1995, p. 61 f.

⁵⁶ See John Locke, *Essays on Civil Government*, 1690.

⁵⁷ Cf. Johs. Andenæs, *Statsforfatningen i Norge*, 4. rev. utg., Oslo 1976, p. 45 f.; Peter Germer, *Statsforfatningsret*, op.cit., pp. 195 ff.; and Gorm Toftegaard Nielsen, *Politik og jura*, Kbh. 1994, p. 13 f.

4.2 *The Values of the Welfare State*

The transition from the constitutional state to the welfare state does not mean that the constitutional state's legal ideals of due process of law, "private autonomy" etc. should be rejected but that the considerations for legal security and for "private autonomy" will now compete with considerations for society and effectiveness. Legal security and effectiveness have many forms of expression and do not have exactly the same content within all branches of law. In this context legal predictability means that the individual should be able to know and predict his legal position in certain situations and by certain transactions.⁵⁸ The consideration for effectiveness is value-laden like the concept of legal predictability, and it easily conflicts with the concept of legal predictability. Therefore, this consideration alone is seen as a negative thing. I can only in part share this belief, as effectiveness in administrative law may result in for example savings, simplification or rational choices concerning the organization of the administration.⁵⁹ Here, the concept of effectiveness first and foremost means considerations, which are in contrast to and compete with the consideration for legal predictability. Of course, the starting point for the legal argumentation is quite important. As will be presented below, there has been a noticeable change in the basis of legal argumentation in the different fields of law.

The following treatment does not aim at being exhaustive.

4.2.1 Civil Law

4.2.1.1 Property Law

Especially since the 1970s the tendency within this field of civil law has been that private persons have had to tolerate general restrictions in their property rights. These general restrictions have not been accompanied by any entitlement to compensation. The restrictions are due to considerations for social planning and social welfare.⁶⁰ The intensive governance in the field of property law has caused a change in the perspective of the governance of property law. In certain fields, particular activities, such as building, winning of ground and surface water and commercial winning of raw materials, are basically forbidden, but specific permissions can set aside the general prohibition. In other fields, the unrestricted property right is in principle the theoretical basis, but in practice the prohibition/governance is the chief rule. This is the case for example by purchase of a farm, which makes special demands on the purchaser's knowledge, and by creation of easements, where the chief rule is that the

⁵⁸ Cf. Karsten Revsbech, *Nyere tendenser i dansk forvaltningsretlig teori - systemhensyn eller retssikkerhed*, Kbh. 1992, s. 14 f.

⁵⁹ See, Bent Christensen, *Effektivitets- och rättssäkerhetshänsyn i förvaltningen*, Det 26. nordiska juristmötet, Helsingfors 1972, p. 333 f.; and Mette Hartlev, *Effektivitet og modernisering*, Juristen 1993, pp. 237 ff.

⁶⁰ Cf. Stig Jørgensen, Orla Friis Jensen og Claus Haagen Jensen, *Ejendomsrettens udvikling*, Kbh. 1979, p. 18.

creation requires a permission of the authorities. Thus there has been a marked change in the basis for legal argumentation, the fact is that before 1970 restrictions in property rights (real property) were an exception. Today, we find the opposite view, at least when speaking about environmental law, where the public interest in protecting and developing a good environment is the predominant tendency. Very illustrative of this tendency was the change of the title of von Eyben's book, "Fast ejendoms regulering" (The Governance of Real Property) (3rd edition, vol. 1-4, 1971) into "Dansk miljøret" (Danish Environmental Law) (1977). According to the introduction to Volume 2, the change of title was made because of the growing public interest in protecting and developing a good environment. However, in the judicial decisions it is difficult to find examples of decisions which clearly show that the courts are giving higher priority to an effective pollution control than to the consideration for legal predictability. The courts are seen as the citizen's legal protection against an increasingly more intensive governance of property rights in the environmental field.

In the Danish Supreme Court's decision in the so-called Rockwool case, 1991 UfR 674, the question was whether the factory (Rockwool) or the public should pay the expenses for clearing the ground after a pollution that was not caused by the factory. It was the first time that this question was brought before the Supreme Court, and the court arrived at the conclusion that the costs must be borne by the public. The court stressed the fact that the pollution occurred before Rockwool purchased the property, and that Rockwool had no knowledge nor should have had knowledge of the pollution.⁶¹ In addition, the Supreme Court established that the legislative material to government publication No. 386 from 11 August 1980 and the existing rules on environmental liability do not provide the statutory basis for charging Rockwool with the expenses. In his dissent to this decision Justice Poul Sørensen rejected the idea - held by among others Gomard⁶² and manifested in the explanatory notes of the disposal act⁶³ from 1983 - that it is always possible to order the landowner to depollute the ground, if it contains something that threatens the ground water.

The decision illustrates in an excellent way, how the consideration for the individual is weighed against the consideration for the interest of the public to control pollution and also the fact that the courts are reluctant to encroach on the property right without a clear authority in law. Furthermore, the decision shows that in environmental matters concerning the question of who has to pay for the depollution of land there is a tendency to make the decision on the basis of civil law instead of environmental law.⁶⁴

⁶¹ The principle of fault is also used in other environmental decisions of a similar character, cf. UfR 1989.353 ØLD, UfR 1989.692 HD and UfR 1992.575 HD.

⁶² See Bernhard Gomard, in UfR 1978 B 53 ff.

⁶³ See FT 1982-83, tillæg A, Sp. 3815.

⁶⁴ See Søren Stenderup Jensen, *Formueretlige principper i den offentlige miljøret*, UfR 1994 B 413 ff.

4.2.1.2 Contract Law

As mentioned above, a great deal of contract law has moved from the *individual* to the *collective*. This is the case in the fields of leasing, renting, transportation, insurance, and labour etc., where private autonomy means that the individual is free not to enter into contract⁶⁵ but in other ways has no influence on the conditions of the contract, which are determined by opposite interest groups or by the public.⁶⁶ Besides, the development of contract law is characterized by the fact that contracts - to a still lesser degree - are formed according to contract law models. Instead, the conditions of the contract are decided by certain legal facts (socio-typical circumstances).

To say that “private autonomy” is the foundation of civil law, as I do in this article, is naturally a *simplification*, as the different fields of civil law have many different basic values/considerations, such as the consideration for the turnover and the distribution of risks in the law of contract and obligations, and preventive considerations in the law of torts etc. When it is discussed as to what degree civil law is oriented towards another basic value than private autonomy, it must be noticed that this discussion concerns a very small number of typical situations, first and foremost the relationship between business and consumers. *The central field of the law of property contract and tort, which is the mutual relations in commercial life, is not affected by the changes in the basic values of law described below.*

In the modern theory of administrative law there has, as mentioned in the following chapter, been an “almost imperceptible” shift in the balance point between the consideration for effectiveness and the consideration for legal predictability, whereas the situation is quite different in the so-called critical (civil) law theory in the Nordic countries. According to this theory, the basic value of civil law, private autonomy, is based on a liberalistic foundation which is outdated. Instead, an alternative ideology of contract law is formulated, which is based on the contracting parties’ social responsibility. Especially known for their criticism of private autonomy as the basic value, are the Finn *Thomas Wilhelmsson*, “Social civilrätt. Om behovsorienterade element i kontrakträttens allmänna läror” (Social Civil Law. On the Need Oriented Element in the General Doctrine of Contract Law) (1987), and the Norwegian *Hans Petter Graver*, “Sosiale rettigheter i gjeldsforhold” (Social Rights in Debt) (1990).

Common to both authors is that they try to formulate new basic values of contract law. I find that to some degree they confuse *social consideration* with “*socialism*” in their attempt to legitimate such new basic values. It is true that the trend within contract law has been towards conceiving the parties as co-contractors instead of opposing parties.⁶⁷ The recognition of a demand for loyalty in contract law is undoubtedly a result of the same development, which is not new at all. As early as 1934 it was described by *Knoph*.⁶⁸ However, the fact

⁶⁵ Of course with the exception of the fields of law that impose a duty to contract, such as in competition law.

⁶⁶ See Stig Jørgensen, *Contract as Form*, Scandinavian Studies in Law, 1966, p. 97 ff.

⁶⁷ See Palle Bo Madsen, *Loyalitetskrav i kontrakts- and konkurrenceretten*, UfR 1982 B 165 ff.

⁶⁸ See, Knoph, *Utviklingslinjer i moderne formuerett*, op.cit.

that still more (social) considerations are taken into account in contract law than ever before just shows that the law is *open and dynamic* and that the courts can make the law conform to reality so that social considerations are important arguments for the judicial decisions. This is formulated most clearly by *Taxell*⁶⁹ who rejects the possibility of drawing general principles from the individual protective acts.⁷⁰

In the decided cases there are no examples of a recognition, on the part of the courts, of a “social civil law”. On the other hand, there is a clear tendency to attach great importance to “social considerations.” Today, these “social considerations” are extensively standardized. The question of who is the weaker party and therefore needs legal protection is not a question of being economically and socially weak, but of proportionality between the strategic positions of the parties. Cf. the Danish Supreme Court’s decision, 1981 UfR 300, where a petrol company refused to exchange a letter of indemnity for a banker’s guaranty, as this refusal alone could be seen as the company’s desire to put pressure on the other party. The legislation in the field of consumer protection and section 36 in the law of formation of contracts (protecting people against contracts that are unfair or in conflict with honest conduct) apply to the student in debt as well as to the wealthy businessman.

4.2.2 Administrative Law

In his book “Nyere tendenser i dansk forvaltningsretlig teori - systemhensyn eller retssikkerhed” (Recent Tendencies in Danish Administrative Law Theory - Considerations for the System or Legal Predictability) from 1992 *Karsten Revsbech* (KR) tries to explain and analyse the development of the most important premises of value or ideological conditions lying behind the modern theories of administrative law in Denmark. KR finds that during the last couple of decades there has been an almost unnoticeable, but very important change in the dominant premises of value underlying the theoretical administrative law, that is the literature on administrative law. In KR’s opinion there has been a shift in the balance point of administration law theory between legal predictability and consideration for the system. According to KR, consideration for the system is to a great extent coinciding with the concept of effectiveness in a wide sense. His analysis is based on an investigation of the theory’s treatment of a number of general rules of administrative law and complexes of problems. Each of these rules and complexes of problems are examined with the intention of establishing how the theory about them balances the consideration for the system against legal predictability. KR does not give any certain answer but finds - despite divergences in the theory - that in general the Danish theory of administrative law has recently given higher priority to the consideration for the system which in most fields has been accompanied by a certain - but not quite corresponding - lower priority to the consideration for legal predictability. KR thinks that the

⁶⁹ See, Lars Erik Taxell, *Sociala drag i avtalsrätten*, Festschrift til Sjur Brækhus (Thor Falkanger, ed.), Oslo 1988, pp. 525 ff.

⁷⁰ See in this regard Claes Sandgren, *A Social Law of Contract*, Scandinavian Studies in Law, 1993, p. 157 ff.

reason for this development may be found in some social conditions of a structural nature. Modern society is very complicated and changes quite rapidly, therefore it has been necessary to intensify the governance, and there has been an increasing need for a steady and effective implementation of the many governing initiatives of the legislative power. At the same time, the size of the public administration has grown considerably as regards the number of tasks, the share of the national product and persons employed. In the light of this development there is, according to KR, a need for general administrative rules and solutions of problems, which can create a functional system out of the enormous administration machinery with all its different branches, including a need for a better control of the administrative bodies by the courts. KR finds that the administrative law theory's higher priority of the consideration for the system widely reflects the development in practice, including decided cases. In his opinion, the higher priority of the consideration for the system is understandable and acceptable, but unfortunately the changes in the balance between consideration for the system and consideration for legal predictability have happened unnoticed and gradually without careful reflections on the need and reason for changing the balance.

As mentioned above, KR assumes that the theory's higher priority of the considerations for the system largely corresponds to the development in case law. It is true that this development can be traced in decided cases, but - according to KR (who does not himself deal with case law) - there does not seem to be any unambiguous development as the direction of the development to some degree depends on which part of administrative law is considered. Even in the individual fields of administrative law, different trends of development are seen. Within *tax law* there are different tendencies, for example the courts have used strict interpretation⁷¹ in cases dealing with tax evasion, whereas in cases concerning allowances for home work places the courts have modified practice and to a higher degree shown individual considerations. This tendency also seems to have been accepted as regards allowances for transportation.

Cf. the decision of Østre Landsret (the Eastern High Court) of 9th February 1996, 1996 TjS 483, where the Minister of Taxation admitted allowance for transportation even though the car was registered not in the taxpayer's name, but in his father's name. According to previous administrative practice, the registration of the car was documentary evidence of the ownership for purposes of taxation. During the lawsuit, the taxpayer informed and showed that the registration in his father's name was pro forma because of the insurance.

The courts' recognition of the so-called principle of expectation, which means that the citizens can rely on direct or indirect prior statements from the tax authorities, also illustrates the fact that the courts give higher priority to the

⁷¹ Here primarily the courts' recognition of a principle of facts, cf. Jan Pedersen, *Skatteudnyttelse*, Kbh. 1989, p. 438. This principle enables to a higher degree the tax authorities to reject tax transactions which formally do not conflict with tax laws, but which actually cover up an unfair exploitation of the tax laws.

consideration for legal predictability than to the consideration for the effectiveness of administration.⁷²

4.2.3 Criminal Law

Even though the basic values of criminal law seem to be firm, and “the fight” for the basic values is expressed primarily in the special legislation, dealt with below, there has been an interesting development within criminal law during recent years. This development has resulted in the courts’ recognition of giving a higher priority to the consideration for the efficiency of the news coverage than to the consideration for the individuals right to due process, cf. the Danish Supreme Court’s decision 1994 UfR 988. According to the Danish Criminal Code section 264, subsection 1, No. 1, you will be punished if you force an entrance into a house or other private place, which is not accessible to everybody. During a demonstration taking place in a well-known politician’s garden, a woman journalist went into the garden in order to interview the demonstrators. The journalist was found guilty by the district court and by the High Court. For the Supreme Court there was no doubt that the journalist had forced an entrance into “a house or other private place”, see Criminal Code, section § 264, subsection 1, No. 1. However, the Supreme Court decided that the action was not “without licence”. The Supreme Court’s argumentation is interesting as the court by the determination of the words “without licence” uses a “*standard of balance*”, which the court has determined itself in two earlier cases, and which is in accordance with decided cases of the European Court of Human Rights. As far as the “*standard of balance*” is concerned, the Supreme Court finds that by its decisions 1987 UfR 934 and 1987 UfR 937 the principle has been established that there must be a balancing of the consideration for privacy and the consideration for news coverage. The balancing of these conflicting considerations leads to the decision that the consideration for news coverage must be given such weight that the journalist’s presence in the garden in order to cover the demonstration cannot be seen as being without licence. According to the Supreme Court, this result is in agreement with the European Human Rights Convention’s Article 10, and subsequently the court refers to the decision of the European Court of Human Rights on 23 September 1994 in the case *Jersild vs. Denmark*.

The formation of a “*standard of balance*” may be seen as a limitation of the term “without licence”, i.e. that the protection of privacy is limited by the consideration for the news coverage. At the same time, the formulation of a “*standard of balance*” illustrates that - according to the Supreme Court - the consideration for “news coverage” is part of the basic values of law (political ideology), which the courts must follow, and the formulation of these basic values is a general European formulation, cf. the reference to the European Human Rights Convention’s Article 10, dealing with the freedom of speech and the European Court of Human Rights’ decided cases. Thus, there is a conflict between two equal values: legal predictability vs. the effectiveness of news coverage.

⁷² See Jan Pedersen, *Individuelle forventninger på skatteområdet*, TfS 1996, pp. 504 ff.

4.2.4 Administrative Law and Criminal Law

In public law the legislation on regulation often opens up default powers. This will typically be the case if an order is neglected, or a prohibition is broken, or conditions of a permission are disregarded. The object of legislation on regulation in public law is not to impose sanctions on the citizens but - as the term indicates - to govern the citizens' behaviour as effectively as possible within the different fields of law. The question is therefore to what degree you may deviate from the basic values of criminal law, the principle of legality, out of respect for the effectiveness of administration, or if the principle of legality should be applied as strictly as it is in criminal law. In legal literature, there is general agreement that the principle of legality is valid also within the legislation on regulation in public law, but there is disagreement about the extent of the deviation from the principle of legality. On the part of administrative law, it is stressed that there must be a possibility of using a broad interpretation of the penalty clauses in order to make the governance as effective as possible.⁷³ On the part of criminal law, the principle of legality is maintained, so that penalty rules in administrative acts should be interpreted as strictly as the rules in criminal law.⁷⁴

With a few exceptions, *case law* seems to show a tendency to increase the demand for statutory authority, i.e. to give higher priority to the consideration for the legal security of the individual than to consideration for the effectiveness of the administration.

An exception to this is a recent Danish Supreme Court decision 1994 UfR 267 (Dansk Kabel Skrot, a recycling firm). The Supreme Court found that it was not decisive that an environmental permission might have had a more precise formulation in some respects. The owner of the recycling firm, which refined lead and copper from scrapped wires and cables etc., was therefore fined D.kr. 300,000.

5 Concluding General Reflections

In this article I have drawn attention to the fact that the descriptive theory of the sources of law - in an attempt to adapt the sources to the development of law - has made them relative, as the "legislative material" and "e contrario" are seen as sources of law, though this material is only intended as a guide for the courts. The descriptive theory of the sources of law fails to see or does not recognize the normative importance of the sources of law. The fact that the sources of law are normative, does not mean that they are rigid or fixed, as they are "defeasible", i.e. they may be influenced by arguments that limit their general field of application. The law is dynamic, i.e. open and flexible, which means that the law

⁷³ See Bent Christensen, *Forvaltningsret. Opgaver, hjemmel, organisation*, Kbh. 1991, pp. 239 ff.

⁷⁴ See Vagn Greve, *Om hjemmelen for administrative straffebestemmelser*, Festschrift til Johs. Andenæs, Oslo 1982, pp. 123 ff.

can constantly be adapted to the development. Though I have stressed the necessity for a normative theory of the sources of law in this article, I do not believe that it is a question of an either-or choice between a normative theory and a descriptive theory. These theories represent two different approaches to the sources of law, and both of these approaches must be born in mind. For the same reason, we talk about legal pluralism. The lawyer needs to know how the courts will judge, and the judge and the administrative lawyer need to know what legal material he or she is duty-bound to follow.

The transition from the constitutional state to the welfare state does not mean that we must throw away the basic values or political ideology of the constitutional state, which are legal predictability and “private autonomy” etc., but that the consideration for legal predictability and the consideration for “private autonomy” will now compete with other basic values, namely consideration for society and/or consideration for effectiveness. In this article examples are given of the basic values, on which the theory of law and judicial decisions are based within private law, administrative law and criminal law.

As has been said above, the article distinguishes between the sources of law and the legal method, i.e. how the sources of law are used (the procedure that must be followed by the courts and anyone who must make a decision on a specific question). The mingling of the sources of law and the legal method - as it is found in the descriptive theory of the sources of law - demonstrates that Andenæs’ famous statement that everything floats in the doctrine of the sources of law, is trustworthy. And it is of course difficult for anyone being interested in this field, to understand a “floating doctrine of the sources of law.”