Nordic labour law research – past, present and future

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Abstract

In this article the author looks at the history of Nordic labour law. His attempt is to explore the specific features of Nordic labour law in a historic perspective and to map the most influential legal scholars and their main thinking. The author divides the development of Nordic labour law into three historical periods: The *formation of labour law*, which mainly took place before the Second World War, the post war period of *consolidation of labour law*, and the *period of transformation* from the late 1970s and early 1980s up until today. Based on the overview he draws some significant conclusions on the specific features of the pluralistic Nordic labour law of today and tomorrow.

1. Introduction

For the first issue of a journal that has been given the prestigious name 'The Nordic Labour Law Journal', it seems appropriate to undertake some self-reflection. Does Nordic labour law research have certain specific features that distinguish it from labour law research in general? – If such features can be identified, are they primarily related to specific features of the Nordic welfare states or the so called Nor-

dic model? Or are they primary related to any paradigmatic aspects of legal and socio-legal research which are prevailing in the Nordic countries? My hypothesis is that some of the common features of Nordic labour law research must be explained by Nordic labour law and the labour market system. However, other common features can only be understood against the background of prevailing approaches within jurisprudence and social sciences.

In the following, I have made a historical periodisation of Nordic labour law into three historical periods: We can speak of the *formation of labour law*[1] which mainly took place before the Second World War in all the Nordic countries, while the post war period of restructuring can be described as the period of *consolidation of labour law* (mid 1940s until the end of the 1970s), and then the period from the late 1970s and early 1980s up until today can be characterized as the *period of transformation*.[2]

In this article I will paint a picture of the development of labour law research in the Nordic countries during these three historical periods. I have no ambition to cover the whole topic, but I hope to be able to point to some essential features in the development.

2. The making of labour law in the Nordic countries

2.1. Background

In all the Nordic countries, the development of the labour market and the formation of trade unions and employer organisations was the societal force that brought about changes in law and practice.

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1 The formation of European labour law in nine countries has been described by Hepple, Bob (ed.), The Making of Labour Law in Europe. Mansell publishing 1986.

2 The transformation of labour law in Europe has been described in the book Hepple, Bob – Veneziani, Bruno, The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945–2004. Hart Publishing 2009.

In the 1890s or shortly thereafter, we saw the formation of central organisations in all the Nordic countries. The requirements for improved labour conditions and the pressure placed on employers through industrial action formed the core of the agenda of the growing trade union movement.

We also saw the development towards collective labour relations taking place through conflicts and historical settlements, for example the September-agreement (forliget) in Denmark in 1899, the December-compromise in Sweden in 1906, and the 'landsoverenskommelse' in Norway in 1907. In Finland, a similar settlement took place much later in 1940 in the form of the so called 'January-engagement'. These compromises gradually expanded to become so called 'main agreements' concluded between the central organisations on both sides.

These historical compromises implied mutual recognition of the employers´ managerial prerogative and the workers´ freedom of association, right to form trade unions and to bargain collectively.[3] They also laid the ground for the development of institutions for dispute resolutions, labour courts and labour mediators. The distinction between conflicts of interest and conflicts of law (or conflicts of interpretation) was an important innovation that has become the basis for the Nordic approach to labour conflicts within the developed Nordic model for industrial relations.

The focus in this article is not on the history of labour law in itself, but on the history and development of labour law research.

3 See for instance Evju, Stein, Labour Courts and Collective agreements – the Nordic Model. Article published in Evju Stein, Utvalgte artikler 2001–2010. pp 77–86.

3. The formation and consolidation of Nordic labour law research

3.1 Background

During the period before the Second World War the main focus of labour law research was on the integration of the collective agreement into the national legal system in the respective Nordic countries.

The approach taken by legal research can be described as a *transplantation* of German labour law and the German understanding of collective agreements into the Nordic context. This of course took place in the different countries at different stages and in different ways, but in all the Nordic countries, the German influence was strong. I think it is reasonable to argue that the labour law research developed in two waves or periods. The first wave came at a time where labour market relations still were not established and where the researchers brought the international debate to the different Nordic States. The second wave came after the establishment of labour courts and at a stage where collective agreements had already been in use for some time.

3.2 The first wave

In Sweden, *Östen Undén* (later the Swedish foreign minister) defended his thesis 'Kollektivavtalet enligt svensk rätt' (the Collective agreement under Swedish Law) in 1912.[4] He also wrote articles on the topic and presented a comprehensive paper 'Om kollektivavtal mellan arbetare och arbetsgivare' (On collective agreements between workers and employers) at the eleventh Nordic meeting for lawyers that took place in 1919. Gustav Olin also published several publications on collective agreements around 1910.

In Denmark, professor *Carl Ussing* and professor *Frederick Vinding Kruse* were the first lawyers to deal with collective agreements. Ussing was also involved as a mediator and facilitator for the social partners

4 Unden, Östen, Kollektivavtalet.enligt svensk rätt. Lund 1912.

in shaping the fundamentals and basic principles of Danish Labour Law.[5]

In Norway, Ole Solnørdal wrote the first legal analysis of collective bargaining in a Norwegian context. Solnørdal was the president of the tripartite committe 'Voldgiftskomiteéen', which in 1909 played an important role in developing collective labour law in Norway.[6] *Sigurd Østrem* published a doctoral thesis in 1925 'De kollektive arbeidskampe efter norsk rett' (Collective industrial action under Norwegian law). Østrem has not been much quoted by later writers due to the fact that he was a quite close collaborator with the German occupation during the Second World War.

In Finland, *Toivo Mikael Kivimäki* published a study on strikes in 1927, but since the collective labour relations in Finland were almost non existent at that time, the perspective in the study was that of individual labour law and criminal law.

3.3 The second wave

Beginning from the 1930s, we started to see influential academics who dealt with collective labour law in a new manner. They could build on national practice which could be systematized and discussed, both from a practical pragmatic perspective as well as from a strict conceptual and theoretical German perspective.

In Sweden, labour law research was less active before the Second World War than in Norway and Denmark, but after the war we saw the upcoming new generation of labour lawyers becoming very vis-

5 See Hasselbalch, Ole in Labour Law Research in twelve countries. P. 13. Also Hj. V Elmquist was involved at an early stage in the development of Danish collective labour law. He wrote his thesis 'Den kollektive arbejdsoverenskomst som retligt problem' (Collective agreements as a Legal Problem) which built to a considerable extent on classic German studieslegal doctrine .

6 Ole Solnørdal´s work 'Nogle bemerkninger om fællesoverenskomster og deres retsvirkninger efter norsk ret' (1909) was published as an annex to the committee's report. See further Evju, Stein, Ufravikelighet og tariffbundethet – historisk og aktuelt. Arbeidsnotater 2013:1, Institutt for privatrett, Det juridiske fakultet, Universitetet i Oslo.

ible both nationally and internationally. Here we can mention the eminent professors *Svante Bergström, Folke Schmidt and Axel Adlercreutz*.

In Norway, *Paal Berg* published his book *Arbeidsrett* (Labour Law) in 1930.[7] Inspired by German doctrine, Berg shaped a systematic and comprehensive notion of labour law, which covered both individual and collective labour law. Following German doctrine, Berg limited the discipline of labour law to covering private law contracts of employment. Paal Berg never lost sight of Norwegian labour market practice in his academic activities and he also had a significant influence on Norwegian labour law practice as the president of the Norwegian labour court and later on even the Supreme Court.

In the 1950s, *Kristen Andersen* gradually took over the position of leading Norwegian labour law academic and judge. He had already become a professor at the law faculty in Oslo in 1939, then during the war he was in exile in Sweden and did some teaching in Uppsala, before coming back to Norway in 1945. During the 1950s and 1960s he published several books and articles on labour law topics. He retired in 1977.

In Denmark, professor *Knud Illum's* book *Den kollektive Arbejdsret* (The Collective Labour Law) was published in 1938.[8] This was an important book, integrating theoretical German understanding of collective agreements into Danish labour law practice. The important methodological approach in Illum´s book was that his starting point was Danish labour law practice, not theoretical dogmas, and his book became an important source of inspiration for later researchers in all Nordic countries. In the 1960s and 1970s, *Per Jacobsen* continued to publish the leading commentaries on collective labour law in Denmark.

In Finland, the consolidation of collective labour law only took place later, coming after the Second World War with *Jorma Vuorio´s*

7 Berg, Paal, Arbeidsrett. Oslo 1930.

8 Illum, Knud, Den kollektive arbejdsret. Kobenhavn 1938.

influential book[9] on the regulation on the employment relationship, published in 1955. Vuorio was able to build on the research from the other Nordic countries, but also on professor Arvo Sipilä´s important books from 1938 and 1946, in which Sipilä argued that labour law must be understood as a discipline in its own right, and also developed the distinct criteria for labour law inspired by the classical German authors Lotmar, Sinzheimer and others. Arvo Sipilä also became the first professor in labour law in 1952 when his chair of economic law at University of Helsinki was renamed as the chair of labour law.

3.4 The Swedish influence

During the rebuilding and restructuring after the Second World War, trade unions grew strong and collective bargaining became a widespread way of handling wages and working conditions.

During this period, research focusing on the labour market expanded, particularly in Sweden where both economists and lawyers found a shared interest in exploring mechanisms in this area of society.

Labour law was approached using traditional legal-dogmatic tools. A prominent Swedish representative of such an approach was professor *Svante Bergström* at the University of Uppsala. He published a book 'Kollektivavtalslagen' (The Act on collective agreements) in 1948 and another book regarding issues in collective labour law in 1950.[10]

The Swedish labour law scene became dominated however by labour law research inspired by social realities and social science, where professor *Folke Schmidt* is the most influential name, with professor *Axel Adlercreutz* as a prominent colleague. Folke Schmidt obtained a professorship in Lund in 1944, but he moved to Stockholm to become professor of labour law in 1951. Before that he had

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9 Vuorio, Jorma, Työsuhteen ehtojen määrääminen. Turku 1955 (published only in finnish).

10 Bergström, Svante, Om räckvidden av den s.k. 200-kronorsregeln i kollektivavtalslagen. Arbetsrättsliga spörsmål I. Stockholm 1950.

already published the first edition of the book 'Kollektiv arbetsrätt' (Collective labour law) in 1950.

Folke Schmidt had studied not only law, but also economics, and he was very interested in sociology and sociological methods. When he was interviewed in the daily paper Dagens Nyheter, after having been awarded a grant for a half year visit in the US in 1946, he proclaimed that he wanted to study sociology and sociological methods in the US, where sociological research was far much more advanced than in Europe.[11]

In the book 'Labour Law Research in twelve countries' Adlercreutz describes how he, together with Folke Schmidt, studied Swedish Labour Court decisions in their seminars in Lund during 1943. After the war, Adlercreutz went to the London School of Economics, where he studied under Dr. Otto Kahn-Freund who at that stage was still not yet a professor. After Folke Schmidt´s return from the US in 1947, Adlercreutz agreed with him to write a thesis on how collective labour law had grown and developed as the result of the trade union movement. The doctoral thesis was published in 1954.[12]

Folke Schmidt`s approach to labour law was analytical and realistic. He followed the analytical realists in his criticism directed towards 'begriffsjurisprudence'. He was realistic, both in the sense that he integrated empirical data in his reasoning, but also in the sense that labour market practice for him could sometimes be more important than legal doctrine and earlier case law. Folke Schmidt was also a forerunner in doing comparative research and especially comparative research together with researchers from other jurisdictions. He was a member of the famous international Comparative Labour Law Group which included labour law professors Benjamin Aaron

11 Dagens Nyheter 12/4/1946. 'Fick sitt USA-stipendium just som Amerikabåten gick'.

12 Adlercreutz, Axel, Kollektivavtalet. Studier över dess tillkomsthistoria. Lund 1954.

(USA), Bill Lord Wedderburn (UK), Thilo Ramm (West Germany), Gino Giugni (Italy) and Xavier Blanc-Jouvan (France).[13]

In an article in the 'Festskrift' honouring the Swedish professor Ekelöf, he defined the tasks of legal science as being threefold: 1) to provide an orientation about reality; 2) to provide a basis for legal decision making; and 3) to provide a background and argumentation for legal reforms.[14] He underscored the point that legal evolution takes place through continuous debate between different groups in society and that a legal scholar or academic should take an active part in this debate.

Schmidt had a clear view regarding the role of courts in legal development. He argued against judges and scholars claims that courts only apply existing rules and arguments, or what is called 'gällande rätt' in Swedish.[15] He argued that such a claim is ridiculous, because everyone can see that the content of judgments, for instance in the labour court, has changed over time. The only reasonable interpretation of the claim that courts apply existing law 'gällande rätt' is that for any new rule that is developed by the court, it must be supported by an accepted general principle of law or a social pattern of behaviour that has been prevalent well before the decision.

Schmidt emphasized that there should be limits to how far courts can go in developing law, since the legitimate lawmaker was to be found within the political parliamentary system. This view was clearly reflected in his position regarding political strikes. He argued that any restriction on a political strike must be introduced by legislation and that the courts lack the legitimacy to impose such a restrictive decision.

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13 In 1978 Folke Schmidt published the book 'Discrimination in employment : a study of six countries' by the Comparative Labour Law Group.

14 Schmidt, Folke, Bundna och öppna argument i rättsvetenskapen. I Festskrift till Per-Olof Ekelöf. Stockholm 1972. pp. 569–585.

15 Schmidt, Folke, Kring tjänsteavtalets rättskällor. I Minnesskrift utgiven av juridiska fakulteten i Stockholm vid dess femtioårsjubileum 1957. Stockholm 1957. p. 205.

Schmidt had a strong influence on labour law research in the other Nordic countries. It is evident that Ole Hasselbalch in Denmark, Henning Jakhelln[16] and Stein Evju in Norway, and Kaarlo Sarkko and Antti Suviranta in Finland, were strongly influenced by Folke Schmidt. So were Sten Edlund, Anders Victorin and Ronnie Eklund in Sweden.[17]

Folke Schmidt and his work in my view formed a kind of bridge between the traditional labour law and the transformative stage of labour law, starting from the late 1970s and early 1980s.[18] Schmidt was a forerunner in showing interest in discrimination law and human rights. The well known case Schmidt and Dahlström in the European Court of Human Rights was argued by him in the early 1970s, long before other labour lawyers even considered the possibility of bringing a national labour law case to an international court.[19]

4. The Transformation of labour law research

The traditional approach to labour law research underwent a significant expansion and paradigmatic development from the late 1970s onwards.

The aftermath of the 1968 student revolution and radicalisation of a new academic generation had strong impact on labour law. At the same time the development towards different paradigmatic approaches to labour law started to develop, not only as a result of

16 Henning Jakhelln is a Norwegian legal academic, and professor emeritus. In 1965, He became an Assistant Professor at the University of Oslo in 1965 and a full professor of law in 1990.

17 Edlund, Sten edited the important book 'Labour Law Research in twelve countries' in 1986. Stockholm 1986.

18 The last published paper by Folke Schmidt who passed away in 1980 was a rather positive review of the doctoral thesis of undersigned 'Kollektivavtal och rättsideologi'. See Schmidt, Folke, TfR 1980. 700 pp.

19 European Court of Human Rights (5589/72) - Commission (Plenary) - Report (31) - SCHMIDT AND DAHLSTROM v. SWEDEN.

new theoretical thinking, but also as a result of new developments in the legal system.

Different critical approaches emerged. At the same time, the nature of criticism became an important issue for many researchers. As we know, labour law scholarship may be critical in a narrow sense. Such criticism can be raised about various observed socio-economic outcomes. It can have concrete case law in focus, but it mainly regards 'better' and improved labour law as the principal mechanism for changing these outcomes. On the other hand, labour law scholarship might also be critical in a deeper, more fundamental sense, as Zoe Adams explains: 'critical not just of socio-economic outcomes, but of the structures that give rise to and explain those outcomes – including the role within those structures of law'.[20] The tension between labour law 'insider' criticism and 'outsider' criticism has played an important role in Nordic labour law since the 1970s.

The general take on labour law which became accepted during the transformative phase of labour law can be described as threefold: labour law had definitely become a discipline of its own; labour law´s emancipation from the private law logic that sustains the illusion of formal equality; and individual contractual freedom is manifested in its disciplinary independence. This conceptual view on labour law can be described as an emancipatory project, within which labour and work are regulated in a way that recognises the structural inequality between labour and capital and shapes the ordering of the market. Furthermore, labour law´s individual emancipatory potential lies in the fact that it constitutes 'non-market' institutions as trade unions, work-councils, codetermination committees etc. Finally, labour law

20 Adams Zoe, Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform. *Industrial Law Journal*, Volume 50, Issue 3, September 2021, pp 434–466.

also includes a collective emancipatory function, by constituting organised labour as a political actor.[21]

The Nordic labour law research during this transformative period certainly represented continuity. But we saw also new openings and new trends. I think it is possible to present a number of such trends, while remembering that researchers can do different types of research during their career. I have no ambition to cover the whole field of research here: I just present a few examples of what I regard as the most important main trends.

The 1970s and 1980s saw a boom for labour law research that was inspired by Marxist theories. In Sweden Per Eklund defended a thesis 'Rätten och klaskampen'in 1974 and for instance my own dissertation as well as the dissertation of Håkan Hydén were both much inspired by Marxist theory.[22]

Other forms of critical approaches also gained space: Dennis Töllborg introduced 'action research' as a way of doing labour law research, with hermeneutic thinking becoming common.[23] Anna Christensen´s normative theories[24] regarding justice became an important trendsetter influencing researchers as Ann Numhauser Henning and Jonas Malmberg and a whole labour law community in Lund.

An important new critical approach was represented by feminist research. Labour and social law were the focus for many of the Nordic pioneers in this field: Tove Stang Dahl, Kirsten Ketcher, Ruth

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21 This description here is borrowed from Bogoeski, Vladimir, Nonwaivability of aivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law
Industrial Law Journal, 2022;, dwac020, https://doi.org/10.1093/indlaw/dwac020.

22 Bruun, Niklas, Kollektivavtal och rättsideologi (1979) and Hydén Håkan, Rättens samhälleliga funktioner (1978).

23 Töllborg, Dennis, Personalkontroll. En ideologikritisk studie kring den svenska personalkontrollkungörelsen.

24 Christensen, Anna, Skydd för etablerad position – ett normativt grundmönster. TfR 1996 pp. 519–574.

Nielsen, Karin Widerberg and Pirkko K. Koskinen. The feminist approach to labour law began to a large extent as a questioning about equal rights and equal opportunities or in Swedish 'jämställdhet'. The tradition has however developed towards a more comprehensive critical and theoretical approach within jurisprudence and gender (genusrättsvetenskap), producing interesting labour law research.[25] Catharina Calleman, Laura Carlson, Susanne Fransson and Helga Aune can be mentioned as prominent researchers carrying this tradition forward.

Labour economics must also be regarded as a form of labour law research, since it not uncommonly deals with the economic consequences of the regulation. The liberal criticism directly towards the collective bargaining system focused on its tendency to create a divide between insiders and outsiders on the labour market. This insider-outsider theory is a theory of labour economics that explains how firm behaviour, national welfare, and wage negotiations are affected by a group in a more privileged position. The theory was developed by Assar Lindbeck and Dennis Snower[26] in a series of publications beginning in 1984. In the wake of this tradition, we have seen strong demands in many countries for the deregulation of labour law in order to fight unemployment and guarantee access to the labour market for all citizens.

The scope of labour law has gradually grown and this has also been reflected in labour law research. The human rights approach was for a long period regarded as something outside labour law, or an approach that could only be relevant on rare occasions, regarding questions related to discrimination or freedom of association. Here

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25 See Gunnarsson, Åsa, Svensson, Eva-Maria, Käll, Jannice och Svedberg, Wanna, Genusrättsvetenskap Lund 2018 and concrete research done by Calleman, Catharina and Carlson, Laura.

26 See Lindbeck, Assar, and Dennis J. Snower (1984), *Involuntary Unemployment as an Insider-Outsider Dilemma*, Seminar Paper No. 309, Institute for International Economic Studies, University of Stockholm, Sweden and Lindbeck, Assar, and Dennis J. Snower (1988), *The Insider-Outsider Theory of Employment and Unemployment*, MIT Press, Cambridge, Massachusetts.

too a paradigmatic change of understanding and approach has taken place: labour is now regarded as universalistic, regulating the world of work, not only the wage-earners who have a formal employment relationship. Many researchers have contributed to this inclusive approach: Petra Herzfeld Olsson, Matti Mikkola, Anne Hellum and others.

A specific new expanding labour law branch in the Nordic countries has been EU-labour law. This is the combined result of the expansion of EU labour law since the early 1990s on one hand, and, on the other, EU-membership for Denmark (1973), Finland (1995) and Sweden (1995) (EEA-membership for Norway and Iceland). Here, the Nordic pioneer is Ruth Nielsen, in Sweden she attracted a follower in Birgitta Nyström and later on Johann Mulder. In Norway, Stein Evju and Helga Aune have done much research in this field, as well as Jens Kristiansen in Denmark.[27] Equally the research which we did within the Arbetslivsinstitutet (Institute for Working Life) together with Brian Bercusson, Jonas Malmberg, Kerstin Ahlberg and many others was focused on EU labour law, until the Institute was closed down in 2006.

A new active generation of EU labour law researchers has also entered the scene lately: Ann-Christine Hartzen, Marianne J. Hotvedt, Caroline Johansson, Andreas Iossa, Hanna Petterson, Vincenzo Pietrogiovanni, Niklas Selberg, Erik Sinander, Erik Sjödin, and Natalie Videbaek Munkholm, among others.[28]

An interesting question is whether there differences have developed between the labour law research that is conducted in the different Nordic countries. On a general level, there is much interaction between the countries and many similarities in the general trend of

27 Jens Kristiansen defended his doctoral thesis in 1997; he became professor at the Copenhagen university in 1999.

28 These researchers have been characterized as the Laval-generation since they have undertaken their research after the CJEU issued its controversial Laval-judgment. See Sellberg, Niklas & Sjödin Erik (eds), Lavalgenerationen. 2010-talets doktorsavhandlingar i arbetsrätt. Iustus, Uppsala 2019.

taking up new topics relating, for example, to EU-law and discrimination law. There is perhaps a stronger trend of continuity in Norwegian labour law research than, for instance, in Sweden. In Norway, we find that several new generation researchers, such as Anette Hemmingby, Alexander Skjønberg and Kurt Weltzien, are taking up classical topics related to collective or individual labour law, which is not so common elsewhere. An open question is whether this has something to do with Norway being a non EU-Member State.

The extensive expansion of labour law research and its development towards methodological and paradigmatic pluralism can only be understood against the background of the development of labour law regulation towards multilevel governance on one hand, but also towards inconsistency and fragmentation on the other. The regulatory development has also been influenced by research and development in labour market practices. It is therefore important to describe and analyse the changes that labour law has undergone over time, both regulatory and conceptually, in order to understand the background of the changes within labour law research.[29] In the following I will therefore try to sketch briefly the main features in the development of labour law up to the 2020s.

5. The transformation of labour law

5.1 Introduction

During the period of the consolidation of Nordic labour law, it was usually taken for granted that labour law consisted of two main parts: individual and collective labour law. This was the most common starting point for authors of labour law text books and this approach is still relevant.[30]

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29 This interaction between the regulatory development and the labour law research becomes very clear in the different contributions in the book 'Labour Law Research in twelve countries (ed. Edlund, Sten), 1986.

30 Folke Schmidt´s books on indvidual (Tjänsteavtalet) and collective labour law (Kollektivavtalet) is an example often followed by others.

In the 1990, however, things began to change and today individual and collective labour law still form an important part of labour law, but there are new actors, new rules and new mechanisms in place, which have to be taken into account if we want to paint a clear enough picture of labour law as it stands today. I therefore want to present my take on how the contemporary foundations of labour law can be adequately understood and described.[31]

5.2 Human rights

The recognition of the significance of human rights on the labour market has grown considerably, first in the aftermath of World War II, but then also after the collapse of the Soviet Union and the Soviet bloc of states in Eastern Europe.

The protection of labour rights as fundamental rights regulates the world of work, partly directly and partly indirectly through some spillover effects. I think there is a large international consensus that the eight core labour Conventions of the ILO, as well as the relevant provisions in several UN fundamental rights instruments – starting with the UN Declaration of Fundamental Rights from 1948 – reflect a global consensus regarding core labour rights. A related development towards this emphasis on fundamental human rights is the introduction into working life of extensive non-discrimination legislative rules. Today many authors describe individual labour law as consisting of individual labour law and non-discrimination law, but in fact, the evolution of non-discrimination law has mainly taken place since the 1970s.

There are many critical views regarding the content and design of fundamental labour standards. For instance, one could ask why health and safety is not better protected as a fundamental right. However, this kind of architectural defects does not change the fact that there has been a paradigmatic shift in the national labour law constitution in

31 This part of the article builds essentially on my presentation in our book 'The New Foundations of Labour Law (eds. Ahlberg, Kerstin – Bruun, Niklas), Peter Lang 2017.

many countries, because of the enactment of different human rights instruments. And although we must bear in mind that the employment relationship is basically a two party relation between private parties, the State has taken on several obligations to make sure that these rights are respected and promoted and that there are sanctions in place against those who do not fulfil their obligations in this regard.

5.3 International trade agreements and labour standards

It has become a standard content of international trade agreements to include a chapter on trade and labour. Such a clause is standard in agreements in which the US as well as the European Union take part. The common denominator here is that ILO labour standards are referred to, and that parties to these agreements commit themselves to following ILO fundamental standards and to upholding existing levels of protection. In addition, the parties shall make 'continued and sustained efforts to ratify fundamental ILO Conventions if they have not yet done so'. [32] For example, Article 23.3 in the new trade agreement between Canada and the EU includes the statement that 'the Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization (the 'ILO') and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up of 1998.

The common criticism towards labour clauses in trade agreements is that the enforcement mechanism is often 'toothless'. A panel can be established, but there are usually no fines, no penalties and no possibility of trade retaliation.[33] These features, however, do not change the fact that clauses in trade agreements on fundamental labour standards can be an important element in bringing in formal or informal

32 Quoting here from the recent free trade agreement between Canada and the EU, the CETA-agreement, Article 23.3 p. 4.

33 This is the case in the CETA-agreement.

economic sanctions towards a trade party which does not fulfil its ILO obligations.

Public procurement is another context in which fundamental ILO standards are of importance. The EU Directive on public procurement of 2014 explicitly requires that, among others, subcontractors must respect ILO standards and that EU Member States must stipulate this in national law: 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'[34] In Annex X all of the eight core ILO Conventions are listed.

Free trade agreements and public procurement are driven by states or public authorities. Fundamental ILO standards, however, are also used extensively by private actors, which is an interesting new development.

The frequent references to ILO standards, both in Corporate Social Responsibility (CSR) codes of conduct and in transnational company agreements (TCA), are interesting in the sense that here private parties are using the ILO standards in order to declare commitment to certain basic values and to make such commitment visible.

The commitments in instruments such as the CSR-codes or the transnational company agreements are often described as soft law instruments, since their enforceability is often limited. They are often declarations of good intent and ambitions, but they do not normally entitle employees or trade unions to rights or benefits that could be enforced.

This new feature of international human rights based 'labour law' has led to the introduction of the concept of 'hybrid labour law' in

34 Article 18.2 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. See further *Upphandling och villkor enligt kollektivavtal. Delbetänkande av utredningen om upphandling och villkor enligt kollektivavtal* (SOU 2015:78).

order to describe the difference between 'hard' traditional labour law stipulating rights and obligations for employees and employers, and this new 'soft law'.[35]

5.4 Access to the labour market

The contemporary approach to labour law cannot be understood without taking into account the existence of a significant population that does not have access to the labour market. It is not controversial to see the reduction of social exclusion as one important goal for labour law. Work is important for people, not only for being dignified members of society, but also for being part of a community. Unemployment is a huge problem in the developed market economies, and together with competition for jobs between workers, it can create significant tensions.

For many years, economists have debated the difference between insiders and outsiders in the labour market, where the insiders are often described as employees who are active in trade unions and have good benefits and protection against dismissals, while the outsiders are those who circulate between short term contracts and unemployment.

Some of the labour law reforms that have been controversial for reducing the protection of employees have been justified by the legislator as attempts to actually improve access to the labour market for certain groups. Weaker protection against dismissals and less strict seniority rules might make it easier for employers to dismiss older employees and recruit younger ones.

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35 The concept 'hybrid labour law' has been developed by Ulrich Mückenberger. See U Mückenberger, *Civilizing Globalism: Transnational Norm-Building Networks as a Lever of The Emerging Global Legal Order*? Transnational Legal Theory, 1 (4) 2010 and U Mückenberger, *Hybrid global labour law*, in Roger Blanpain and Frank Hendrickx (eds): Labour law between change and tradition: Liber amicorum Antoine Jacobs (Bulletin of Comparative Labour Relations Series 78 Kluwer Law International 2011). See also N Bruun, *New Developments in Labour Law – towards a Hybrid Type of Labour Law*? In *Soft Law* (ed P Wahlgren), Scandinavian Studies in Law, Volume 58. Stockholm 2013. 63–74.

The reason why I think that we can speak of a fourth dimension of contemporary labour law is not only that it includes some regulatory elements that clearly aim towards inclusion and access for individuals to the labour market. In addition, my argument is that within the framework of contemporary law, the worker has been given a new role and new responsibilities. Earlier, the worker had rights and obligations towards the employer and towards the trade union within the collective bargaining system. These legal positions defined the role of the worker more or less exhaustively. Today, the worker has many obligations towards the state, and if these obligations are not fulfilled, then sanctions, mainly in the form of reduced unemployment benefits or social security, will be applied.

Today, the worker or jobseeker needs to be an active subject, looking for work in a systematic and controlled manner. There can be a legislated demand for an individual job-seeking plan combined with a study plan, and the worker should be prepared to take the job offered, even on less favourable terms. The worker should also continuously make sure that he/she remains employable, by upgrading different skills. Thus, in this new context the responsibility for working skills and flexible adjustments is primarily on the worker. There are different 'sanctions' in place for workers who neglect their obligations in this regard: they might lose benefits or further access to re-education.

The more radical form of this thinking argues that 'obstacles for access to work' must be removed by the worker him-/herself, and work providers (employers) supported and encouraged. Such support can be subsidies paid to employers who hire young workers etc.

The EU labour law and labour market regulation has significantly strengthened this new dimension of labour law. The EU labour market regulation is essentially about access to the internal EU labour market. The term 'access justice' has been launched by Hans Micklitz as a private law concept. He has argued that European regulatory private law is united by a social orientation and by a particular conception of justice, which sets it apart from typical national welfare

legislation.[36] The employability-pillar of the EU employment policy emphasizes the role of the individual, and the same is true for the other pillars as well, that is to say entrepreneurship, adaptability, and equal opportunities.

One example of the evolution of labour market access justice is the casualization of work, which has taken place in several member states of the European Union. Valerio De Stefano has done an extensive study on this and shows mechanisms for how casual workers are totally or partially excluded from labour protection in many instances. The main justification for these new mechanisms is that they create labour market access and work opportunities for vulnerable groups in the labour market and therefore severe decent work deficits can be accepted.[37]

The right to access the labour market forms a hybrid between social welfare law (labour law) and its traditional values, and market law and its economic rationale. In that sense, it can form part of the hybrid labour law, where soft regulation and the rationality of markets prevail.

The right to access justice is very state-oriented (or designed by global institutions). Social partners do not play any significant role. Within the European employment policy, some kind of role for social dialogue has been reserved, but it has clearly been an exercise where the EU institutions have interacted primarily with the Member States.

5.5 Contemporary labour law

In this chapter, I want to describe adequately the main elements in contemporary labour law. My argument is that the right to access the labour market forms an element of, and causes a tension within,

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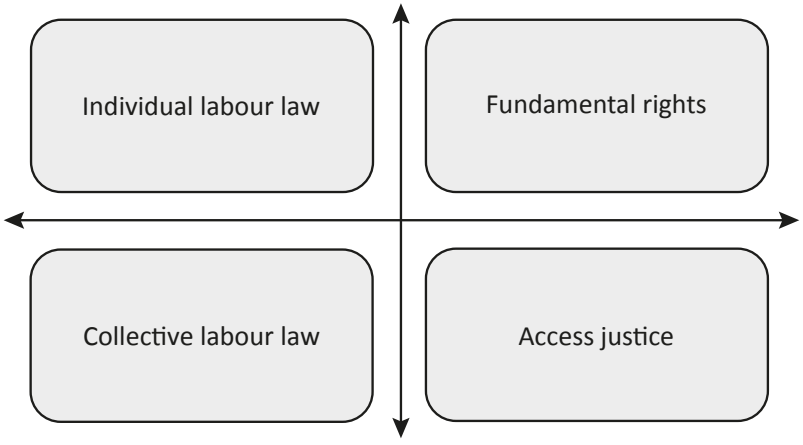
36 H Micklitz, *Social justice and access justice in private law*, in H. Micklitz (ed.), The Many Faces of Social Justice in Private Law, Elgar 2011, 3–60 (also published as EUI Working Paper 2011/2).

37 V De Stefano, *Casual work beyond casual work in the EU. The underground causalisation of the European workforce – and what to do about it*. European Labour Law Journal, Volume 7 (2016). No. 3. 421–441.

the labour law discourse in most developed western countries. If we want to understand the ongoing debates, we have to include all four dimensions of labour law within our discussion. Therefore, we cannot ignore access justice as the fourth labour law dimension. Furthermore, questions related to access justice seem to gain importance in the new 'gig' economy. Uber and other actors strongly emphasize that they provide access to the labour market for excluded groups, and the same is true for employers hiring employees on so called zero hours contracts.

In the figure below, I have tried to illustrate the four dimensions of contemporary labour law, the elements of the new hybrid labour law. Different labour law systems can position themselves in different ways within this four-dimensional field and, generally speaking, developed labour law for instance in the Nordic countries has historically moved from left to right in the picture, moving from a mix of individual and collective labour law towards a situation where emphasis is given both to human rights and also to an emphasis on rights for individuals to access the labour market. *Picture 1. The four dimensions of contemporary labour law*



6. A final note on future labour law research

After a historical exposé on the development of labour law research in light of the regulatory evolution in the Nordic countries, I come back to my initial question: Is there a Nordic model for undertaking labour law research?

I think we can answer this question in the positive, but I think that this means, above all, that there are some common sources of inspiration that are relevant in all Nordic countries, and that labour law research develops as a mixture of these. I briefly point to three factors:

1) The influence of a common legal analytical theory and sociology of law. This approach can be described as realistic. The starting point is that reality matters and is important.
2) Within labour law research, the influence from labour market practice and labour market parties, trade unions and employer organisations is taken seriously. The background for this is the high legitimacy given to collective agreements and solutions made by labour market parties in the Nordic societies.
3) International labour law aspects have gained importance. EU law, human right instruments and international agreements are important sources and therefore comparative aspects have also become an essential element for labour law research.

Labour law is no longer what it was when the Nordic fathers of labour law made and consolidated labour law in all the Nordic countries. The traditional labour law focussed on the employment relationship, which was understood in a rather narrow manner. During the course of time, the scope for application of labour law has been broadened. Furthermore, we must note that labour law today is not exclusively about regulating employment relations. Work defined as falling outside an employment contract is also relevant for labour law: starting with work for prisoners, migrant workers, domestic workers and others.

This is the territory in which future Nordic labour law has to develop further. I think we see promising trends that research is being conducted in the new areas.[38] My intention with this article is basically to show how labour law has been transformed during my years as an active academic. There is no way back to a narrowly defined labour law. On the contrary: labour law and labour law research should deal with all forms of regulation of the world of work. This regulation can take place on all levels and across many different subjects. There is much to explore, understand and change out there in the world of work.

38 See for instance *Mpoki Mwakagali* '*International Financial Institutions and Labour Standards: A Legal Study of the Role of These Institutions in the Promotion and Implementation of Freedom of Association and Collective Bargaining*.' Stockholm University 2018 and *Fabiana Avelar Pereira, Global Framework Agreements. A Response to Urgent Global Labour Concerns*, Lund University 2021.