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## Fifteen Years with the Norma Research Programme, Anniversary Volume

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2010

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*Citation for published version (APA):*

Numhauser-Henning, A., & Rönmar, M. (Eds.) (2010). *Fifteen Years with the Norma Research Programme, Anniversary Volume*. Faculty of Law, Lund university. [http://works.bepress.com/ann\\_numhauser-henning/10/](http://works.bepress.com/ann_numhauser-henning/10/)

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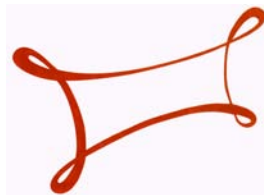
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Ann Numhauser-Henning and Mia Rönmar (eds)

# Fifteen Years with the Norma Research Programme

Anniversary volume



ISBN 978-91-979350-0-5

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The Norma Research Programme, Faculty of Law, Lund University

Lund University 2010

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# Notes on contributors

## Members of the Norma Research Programme

**Emma Holm**, Licentiate in Law, doctoral candidate at the Faculty of Law, Lund University, has been a member of the Norma Research Programme since 1998, when she started work as a research assistant to the late Professor Anna Christensen. Her research mainly concerns EU law and social security law (Regulation (EC) No 883/2004), in particular benefits relating to families. The impact of the Treaty provisions on European Union citizenship is also an important aspect in this research. She is participating in the European Commission's *Network for Training and Reporting on European Social Security (trESS)*.

**Andreas Inghammar**, LL.D., is Assistant Professor of Business Law at the Department of Business Law at the School of Economics and Management, Lund University. His research primarily covers comparative and national aspects of labour law, focusing on employment law and disability discrimination law, and most recently, also the legal situation of undocumented migrant workers under international, EU and national provisions. Inghammar is currently involved in a multidisciplinary research project monitoring Legal Empowerment of the Poor. He has been a visiting researcher at University of Warwick, United Kingdom, and the Institute for Labour Law, University of Göttingen, Germany.

**Jenny Julén Votinius**, LL.D., Associate Senior Lecturer in Civil Law at the Faculty of Law, Lund University, has been a member of the Norma Research Programme since 1997. She conducts research within the fields of labour law, EU law and social security law. Her works are oriented to a large extent towards questions of discrimination and gender relations, with a specific focus on pregnancy discrimination and parental rights in labour law. Currently she is involved in a project concerning labour law issues related to employees' cooperation in working life.

**Titti Mattsson**, LL.D., Associate Professor of Public Law at the Faculty of Law, Lund University, has written on issues concerning the legal and social position of children and youth. Several of her projects have dealt with different rights for foster children and youth in residential care. Another field of research for Mattsson involves issues related to e-government. She has published widely in monographs, anthologies and journals. She is an expert adviser for the Child Ombudsman of Sweden, and a member of several national and international research networks in the field of social law.

**Per Norberg**, LL.D., is Assistant Professor of Civil Law at the Faculty of Law, Lund University. His research is directed towards the conflict between market functional values and social values in law. He has worked with labour law, housing law and gender equality law, and is currently working also in social security law. He is a member of the European Commission's *Network of Legal Experts on Discrimination* and is involved in the steering group of a network of lawyers and economists interested in wage discrimination.

**Ann Numhauser-Henning**, LL.D., Professor of Civil Law at the Faculty of Law, Lund University, has been head of the Norma Research Programme since its start in 1996. She has written widely on labour law, especially employment law and non-discrimination law. A more recent field for her research is social security law in a European integration perspective. She is a member of the European Commission's *Network of Legal Experts on Equal Treatment between Men and Women*, the European Commission's *Network of Legal Experts for Training and Reporting on European Social Security* (trESS), and the European Commission's *European Labour Law Network* (scientific committee).

**Hanna Pettersson** is a doctoral candidate at the Faculty of Law, Lund University, working on a project concerning discrimination of part-time and fixed-term employees. The project also involves other labour law questions related to part-time and fixed-term work, as well as the position of part-time and fixed-term workers in relation to social security law.

**Eva Ryrstedt**, LL.D, Associate Professor of Civil Law at the Faculty of Law, Lund University, mainly teaches family law, which is also the focus of her research. She often conducts her research in the interface between social welfare law and family law. For some years after publishing her thesis, she worked mostly with child-related issues. She often works comparatively, and

has taken a special interest not only in the Nordic countries, but also England and Australia. Ryrstedt is now writing a new Commentary to the Marriage Code in Sweden. She is part of comparative and international research collaborations, and has published her research results in monographs and anthologies, as well as in international and national journals. Her international research network encompasses senior researchers from *inter alia* the Nordic countries, Australia, England, and the USA.

**Mia Rönmar**, LL.D., Associate Professor in Civil Law at the Faculty of Law, Lund University, has been a member of the Norma Research Programme since its start in 1996. She has written widely on Swedish, EU and comparative labour law and industrial relations. She is a national expert in the European Commission's *European Labour Law Network* and a national correspondent to *Revue de Droit du Travail* and the *European Labour Law Journal*. She has also been a visiting researcher at *inter alia* the London School of Economics and the European University Institute.

**Tatiana Tolstoy** is a doctoral candidate in Family Law at the Faculty of Law, Lund University since September 2010, when she also began participating in the Norma Research Programme. In addition to her law degree, she holds a Bachelor of Arts in literature from Stockholm University. She has also served as an office manager at a Swedish law firm in Moscow, Russia, and as an attorney at a law firm in Malmö, Sweden.

## Guest Professor of the Norma Research Programme

**Silvana Sciarra** is Professor of Labour Law and Comparative Labour Law at the Faculty of Law, University of Florence (*Chair Jean Monnet*). She is also former Professor of European Labour and Social Law at the European University Institute, and a Doctor *HC* in law at the University of Stockholm. She has performed research work at several universities, including UCLA, Harvard Law School (*Harkness Fellow* and *Fulbright Fellow*), Warwick University (*Leverhulme Professor*), Columbia Law School (*BNL Professor*), Cambridge University (*Arthur Goodhart Professor in Legal Science*), Stockholm University (*Visiting Professor*), and Lund University (*Visiting Professor*). She acted as an expert in several projects of the European Commission on comparative and European labour law issues. She co-edits



*Giornale di Diritto del Lavoro e di Relazioni Industriali* and is a member of the editorial board of the *European Law Journal* and *Comparative Labor Law and Policy Journal*. She is a member of the scientific board for the doctoral program on *Universalizzazione dei sistemi giuridici: storia e teoria*, under the auspices of the *Istituto italiano di scienze umane* (SUM), together with the Universities of Florence and Rome 'La Sapienza'.

## Guest Authors

**Thomas Erhag**, LL.D., Associate Professor in Public Law at the Department of Law, School of Business, Economics and Law, Göteborg University, has written widely on issues of social security and EU law. His later research has also focused on issues of nuclear waste management. Erhag is on the editorial board of *Nordisk Socialrättslig Tidskrift* and is a member of several national and international research networks in social security and European law.

**Sara Stendahl**, LL.D., is Associate Professor of Public Law at the Department of Law, School of Business, Economics and Law at Göteborg University. Within a framework of theories on legitimacy and justice, she has written on issues concerning social security law (health, disability, occupational injury, and unemployment). Within this area, Stendahl has also taken a special interest in the legal practices of courts and administrative bodies, an interest also visible in another track of her research, dealing with the regulation of spent nuclear fuel. Stendahl has published nationally as well as internationally, and has often worked on multidisciplinary projects. She is on the editorial board of the *European Journal of Social Security* as well as *Nordisk Socialrättslig Tidskrift*. She is Vice President of the European Institute of Social Security and Vice Dean of the Graduate School at the School of Business, Economics and Law at Göteborg University.

# Introduction

*Ann Numhauser-Henning*<sup>1</sup>

## 1. Introductory remarks

The Norma Research Programme started out fifteen years ago – in 1996 – at the Law Faculty of Lund University with funding from the Bank of Sweden Tercentenary Foundation. The programme was initiated by me and my former colleague Professor Anna Christensen, who sadly passed away in March 2001. Norma is short for ‘Normative Development within the Social Dimension, Studies on the Normative Patterns and Their Development in the Legal Regulation of Employment, Housing, Family and Social Security from a European Integration Perspective’. The purpose of the programme was to create a research environment where basic normative patterns and their development and relationship to the ongoing changes in society within the area of the Social Dimension in Europe could be studied in depth and from a long-term perspective. The research is conducted within a multi-disciplinary legal science framework, including a labour law, social security law, family law, competition law, Union law and comparative law approach, also encompassing legal theory. Furthermore, the programme draws upon a common body of economic and sociological research. As regards current research within the programme, focus can now be said to be on the interaction between changing labour market conditions, ‘sustainable’ social security schemes and new – more flexible – family patterns.

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<sup>1</sup> This introduction to the Norma Research Programme is an elaboration and follow-up of an earlier presentation in Norma 2003:2, *Normative Development in the Welfare State, Legal Studies of Employment, Family and Social Security within the Norma Research Programme*.

*The purpose of this publication is to present, in somewhat more detail, our research trajectories as well as ongoing projects for friends, colleagues, and others who might take an interest in our field(s) of research.*

## 2. On institutional developments

*Institutionally* speaking the programme thus originates from its successful application for project funding with the Bank of Sweden Tercentenary Foundation. A *sine qua non* was, however, the close professional cooperation between Anna Christensen and myself, which went back for nearly twenty years. Another ‘organisational’ factor was the restructuring of the study programme at the Law Faculty in Lund in integrated ‘blocks’ in 1993. The third such block in the compulsory first three years of the programme was named ‘Private Law in the Social Dimension’, where the legal regulations governing the areas of family, employment, housing and the related social security benefits were brought together, forming a compulsory course of studies of law, institutionalising ‘everyday life’. In today’s study programme at the Law Faculty, there is still such a block of compulsory studies in the third semester named ‘The Social Dimension of Private Studies’, and since 2002, there is the possibility to study integrated courses within the Social Dimension, offering three semesters (90 ECTS points) of more in-depth studies within the area. The ‘lecturing group’ of these courses was and still is at the core of the Norma Research Programme.

The Norma Research Programme thus started out with two senior researchers and long-term colleagues at the Law Faculty: Professor Anna Christensen and myself, Professor Ann Numhauser-Henning. I began and still serve as coordinator of the Norma Research Programme. The research environment was systematically developed through the recruitment of, at first, young student research assistants who later became Ph. D. students and, eventually, senior researchers within the programme. During the first phase of the Norma Research Programme there was also a ‘branch’ at the University of Göteborg, constituted by Professor Lotta Vahlne-Westerhäll – a former colleague of ours at Lund University – and the young senior researcher Ann-Charlotte Landelius, as well as then-doctoral student, Thomas Erhag. A considerable amount of research examinations and degrees have been carried out within the Norma Research Programme throughout

the years – 5 licentiates and 8 doctorates – and at the moment there are three ongoing doctoral projects.

The Norma Research Programme in Lund has thus grown and consolidated over the years, and now includes seven senior researchers; or, apart from Professor Ann Numhauser-Henning, three lecturers and associate professors (Eva Ryrstedt, Titti Mattsson and Mia Rönömar, all expected soon to become full professors), two lecturers (Per Norberg and Andreas Inghammar), and one associate senior lecturer (Jenny Julén Votinius). Andreas Inghammar holds his formal position at the department of Commercial Law at Lund University, whereas Jenny Julén Votinius only just has returned to the Law Faculty after spending some years at the University of Linköping. Currently our research environment is enriched by the guest professorship of Professor Silvana Sciarra, an esteemed colleague from the University of Florence, Italy, whose presence at the Faculty is financed by the Craaford Foundation. – Some of the doctors ‘produced’ within the Programme have chosen to continue their careers outside academia as practising lawyers, and Thomas Erhag is currently an associate professor and lecturer at the University of Göteborg.

Thus, during these first 15 years, the Norma Research Programme has undergone a period of initiation and growth, and is now entering an important phase of consolidation (with three promotions to full professorship *in spe*) and renewal.<sup>2</sup> A progressive structure among the researchers, with a mix of full professors, associate professors, senior lecturers, and doctoral students, provides a good basis for future educational and research initiatives. The programme has always been internationally oriented with many international publications, comprehensive comparative research, and studies abroad as an integrated part of doctoral education. The senior researchers have a manifest international standing reflected, for instance, in their participation in the European Commission’s different networks of legal experts consisting of distinguished scholars throughout Europe: Numhauser-Henning in the networks of Equality between Men

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<sup>2</sup> Regarding the different phases in the lifecycle of a research group, see the article ‘The invisible research group’, by Regnell et al at [www3.lu.se/pers/Jamstalldhet/AKKA\\_III\\_rapport2010.pdf](http://www3.lu.se/pers/Jamstalldhet/AKKA_III_rapport2010.pdf).

and Women (2001–), Non-discrimination (2004–2007), Training and Reporting on European Social Security (2001–), and, the European Labour Law Network (Member of the Scientific Committee 2007–), respectively, Norberg in the network of Non-discrimination (2007–), and Rönnmär in the European Labour Law Network (2007–). Already early on, Japanese scholar Michiyo Morozumi was integrated in the Programme as a two-year post-doc and the current guest professorship of Silvana Sciarra is an important exponent of the Programme's strategy for the future: to increasingly integrate international scholars and faculty, primarily as young post-doctoral researchers.

The Norma Research Programme has thus contributed comprehensively to the Faculty's doctoral programme in recent years, and was characterised by the Faculty itself as 'the most successful research program during the last decades at the Faculty of Law at Lund'.<sup>3</sup> In the large external evaluation of Lund Univers research RQ 08 carried out in 2008 by 14 external review groups, 'Panel 3' or 'Private Law II (the Social Dimension)' was given the highest score, or 'excellent', within the Law Faculty, with the evaluators explicitly stating that 'the success of the Norma Programme, in particular, leads to a very positive evaluation'.<sup>4</sup>

### 3. Areas of study

With regard to research *substance*, the Norma Research Programme can be said to have two common denominators or decisive elements. One is the 'social science approach' to legal studies, which Anna Christensen and I shared and which can be said to have been a constitutive element in our professional kinship. In the original project presented to the Bank of Sweden Tercentenary Foundation, this 'social science approach' had been concretised in the theory of law as normative patterns in a normative field combined with a functional approach, which lies at the heart of Anna Christensen's work and my own. The Norma Research Programme as a whole can be said to be characterised by an external perspective and a

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<sup>3</sup> Background documents to RQ 08.

<sup>4</sup> <http://www.lu.se/forskning/utvaerdering-av-forskning---rq08>.

structural/functionalist view on the studies of law. With such a perspective, the comparative approach is a natural companion. – The other decisive element is the material scope of the studies included. During restructuring of the study programme at the Law Faculty, the social dimension – i.e. regulation of family, housing, employment and social security – had been chosen for integrated studies. The concept of the social dimension was inspired by the European Union (EU). The Social Dimension was, in connection with the EU, long-time the established term used to describe the part of politics and legal regulations founded upon the citizens' social needs, as opposed to the functioning of the Internal Market. Central areas of regulation are the labour market, social security and family relations. At the national level, there are comprehensive regulations in each one of these areas, intrinsically interrelated with each other and also with general societal developments; together, they form the legal structures of 'everyday life'.<sup>5</sup>

Within the framework of this multi-disciplinary research programme and related parts of the law study programme, there has thus been a unique institutional advantage of close cooperation over the years among Anna Christensen (until her death in March 2001), myself and 10–15 younger researchers, doctoral students and – as it has turned out – now senior members of the research and teaching staff.

The original project funding from the Bank of Sweden Tercentenary Foundation lasted four years (1996–1999). There were three initial subprojects within the programme: the overall theme *Normative patterns and normative development – a study of the European legal development within the*

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<sup>5</sup> Union law only gradually intervenes with national law in accordance with the principles on enumerated powers and subsidiarity. There is a long-standing, considerable, and continuously growing bulk of community law regulating labour markets and working life, requiring the harmonisation of the national laws of the Member States. As regards social security, it is often said to be a matter for the Member States and the national legislator. Regulation (EEC) No. 1408/71 on the coordination of social security schemes – now replaced by Regulation (EC) No. 883/2004 – was, however, introduced at an early stage as a necessary means to guarantee the free movement of workers within the Union. The EU has since widened its ambitions – now, with the Lisbon Treaty, not only economic but also social integration is more than ever at the heart of European policy, combating poverty and social exclusion, and promoting economic and social cohesion in the European 'Social Market Economy'. Family law as such, however, is still within the sphere of the national legislator.

*Social Dimension, Discrimination Law and Labour Law* and, finally, *Flexibility in Employment*, each with different sub-studies. However, already from the start it was, a constitutive idea that within this environment, an undefined number of different projects should be initiated and carried out. The programme's organisational concept is thus built on a nucleus consisting of the senior research leaders, who continually pursue research as part of their professorial tenures, and a surrounding group of junior researchers. Within this environment, the results from the various themes are integrated into a deeper body of knowledge on the normative development within the Social Dimension. The programme has proven to provide a favourable environment for the recruitment of research students, and has also proven its ability to obtain external funds for its various sub-projects. The high standard of the ongoing research is thus reflected in the number of sub-projects that have evolved from the original programme, and the acceptance these projects have received as regards external funding and funding within (scarce) ordinary faculty means. The acceptance is also reflected in the great number of international invitations the group frequently receives to participate in projects and conferences, as well as the number of international and other publications (see the annexed publications list). This multi-disciplinary research programme has created a research environment unique to Swedish legal science. Moreover, though the studied area is of great importance to society and the subject of rapid change, its position within the Swedish legal science has traditionally been weak.

A subproject called *Discrimination Law and Labour Law* thus already operated initially as part of the Norma Research Programme. The equal treatment principle and non-discrimination law are crucial to the interplay between labour markets, social security, and social cohesion. The non-discrimination principle can be said to form a normative core in Union law. Initially, the Articles of the Treaty of Rome concerned non-discrimination on the grounds of nationality and sex, respectively; and the European Union Court of Justice's case law that developed on the basis of these articles represents the most well-developed areas of Union law, articulating fundamental principles of the utmost importance for the totality of Union law. Since then, the principles of non-discrimination and equal treatment have gained further ground.

The non-discriminatory issues are central to several of the Ph.D. research projects carried out within the programme. This goes for Mia Rönmar's study of *The Managerial Prerogative and the Employee's Duty to Work*, and for Annika Berg's study on *Temporary Agency Work, Flexibility and Equal Treatment*, but even more so for Andreas Inghammar's study *Disabled – with a Right to Work?* and Jenny Julén Votinius' study on *Parents at Work*, the latter also offering a valuable gender-theoretical framework. Non-discrimination is also at the heart of Hanna Pettersson's study concerning part-time and fixed-term workers within labour law and social security law. A clear-cut equal treatment study is also Per Norberg's somewhat later research project: *Illegitimate use of market powers – or how to come to terms with wage discrimination*. Here, Per Norberg analyses the 'market argument' – hitherto the reason why most wage-discrimination claims have been turned down by the Swedish Labour Court (see cases AD 2001 No. 13 and 76) – and its implications for wage differences in view of competition law as compared to traditional equality law.

Moreover, during the development of the Norma Research Programme, aspects of discrimination proved also to be crucial to sub-studies other than the one actually dealing with discrimination and labour law. This was quite in line with the theoretical base of the programme – the pursuit of a deeper understanding of basic normative patterns, and their manifestations, development and interrelations. An international conference to elaborate on and discuss the complex issues of discrimination law from a 'broader than usual' perspective, held in December 2000 in Lund, marked the end of the first five-year period of the Norma Research Programme. Despite being one of the organisers, I venture to say that those who participated in the conference were quite overwhelmed by the intellectually challenging, enthusiastic and energetic atmosphere and discussions that evolved. The presentations, comments, and – to some extent – discussions during that conference were published in the book *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law International, the Hague 2001).

In tackling the process of change in society and legal development, the Norma Research Programme has put particular emphasis ever since the start on the altered conditions for the functioning of the labour market and their significance for labour law and labour market policy. In Western Europe nowadays, it is the post-Fordist conditions of production which increasingly shape the contents of the legal system. Technical development, improved



communications and an increasingly globalised market have radically altered the conditions for commerce and the labour market compared with the previous industrial society. For more than twenty years, this discussion has been a part of the general labour market discourse under the heading of ‘*The Flexibilisation of Work*’. Changing conditions in the labour market are generally considered to create new conditions for labour law as well. Hence, current conditions are said to involve increased demands for flexibility and market adjustment. This entails an increase in part-time work, fixed-term work, temporary agency work and other unstable employment relationships – and a decrease in the group of workers offered permanent, relatively secure, traditional employment. These developments impose strains on labour law, in that they engender demands for the deregulation of traditional employment protection, and for conditions conducive to more flexible modes of employment – more lately expressed in the EU flexicurity strategy (see further below). In legal theory, there may be said to be two main different approaches to the causes of legal change: one emphasises precisely the external economic, political and industrial relations system factors just described, and the other stresses internal factors that are related to the legal system itself, and only indirectly influenced by economic developments. The theory of law as normative patterns within a normative field used in the programme can be said to combine these functional and normative approaches in a fruitful way. While legal innovations are likely to be reactions to social or legal consequences of previous legal regulations, the attraction of normative patterns ‘reacts’ to social change, just as societal conditions had an influence on the creation of existing basic normative patterns in the first place. – Within the programme, Mia Rönnmar has carried out a comparative labour law study on the managerial prerogatives and the functional or qualitative flexibility dimension, and is now involved with Ann Numhauser-Henning in a project on flexicurity. Annika Berg, on the other hand, concentrated on the numerical or quantitative flexibility dimension, and more specifically on the hiring out of workers or temporary agency work, whereas Hanna Pettersson deals with part-time and fixed-term work. Also, in her 2007 thesis, Jenny Julén Votinius related to flexibility research in a broader sense.

An important point of departure for the programme’s research is that the labour market and the *social security* system are two interacting systems, with the labour market being the dominant system. The basic function of social

security is to fill the gaps in maintenance inherent in the labour market order. The modern labour market cannot function as a societal order for distribution of resources without a supplementary distributive system, which guarantees a reasonable maintenance to those who, for a longer or shorter period, cannot earn their living in the labour market. Thus there is a relationship of mutual dependency between the two systems. All changes in the primary system will affect social security in one way or another. However, influence also goes in the other direction. The way social security is shaped affects both the labour market and the family, the latter traditionally being an important entity of social maintenance and, thus, a supportive 'distributive order'. Much of Anna Christensen's work in her last years were carried out in this area of the original programme. Here, the licentiate thesis of Mattias Malmberg in 2002 and the doctoral thesis of Nils Eliasson in 2001 should also be mentioned. Another doctoral project, that of Emma Holm, is connected to the coordination of social security systems within the EU, and more precisely, to the coordination rules of the Regulation 1408/71 (now 883/2004) and the Swedish parental benefits scheme in relation to the Union coordination rules, and in comparison with national solutions within other Member States. Also, Hanna Pettersson deals in her thesis with social security, i.e. social benefits in relation to flexible work.

The interaction between labour market change and social security draws our attention towards women workers and the changed family patterns and social security schemes reflecting these developments. At the outset, *family law* was only poorly represented within the Norma Research Programme. With the integration of Eva Ryrstedt and Titti Mattsson into the Norma Research Programme, conditions have changed significantly. – Ryrstedt started out writing her thesis *Division of Property and the Joint Dwelling*, using the concept of normative patterns and with me as her supervisor, well before the initiation of the programme. She has since carried out various projects in the borderland of family law and social law, within a comparative framework. The 'best interest of the child' concept is a common denominator in the study on *Children in Foster-homes and Residential Care*, carried out by Titti Mattsson.

Housing studies were an important part of the original research programme, and various studies were carried out by Lotten Karlén and Per Norberg – see further the annexed publications list. It was also in her book *Hemrätt i*

*hyreshuset* (1994) that Anna Christensen first outlined her theory on law as normative patterns in a normative field.

## 4. Theoretical framework

*The theory of law as normative patterns in a normative field* was developed by Anna Christensen. The theory is based on the thesis that different basic normative patterns can be distinguished in the multitude of legal norms. As social life is quite complex, these normative patterns do not make up the 'hierarchical legal system' we frequently imagine. Instead, these patterns are being put into play in a normative field as determined by the different basic patterns, which also act as normative poles. Amongst the important basic patterns (or poles) present in the normative field within the social dimension are, on the one hand, the Rights of Ownership and the Freedom of Contract – which together form the *Market-Functional Basic Pattern*, and on the other hand, *Protection of the Established Position* (i.e. the right to one's possessions, or, for instance, security of employment and the principle of compensation for lost income). A third basic normative pattern is *Just Distribution*, a distributive pattern related to social justice and solidarity. Within discrimination law, the pattern of *Belonging* and the pattern of *Integration*, respectively, are important elements, as is the pattern of *Just Distribution*. The other component of the theoretical framework is the *functional relationship between the legal system and the structure of society* and conditions of economic production, elaborated in my ownwork. The basic normative patterns are held to reflect normative practices functional to society and human relationships. They thus reflect – and codify – social normative conceptions and practices aimed at making long-lasting human relationships and sustainable societies possible, and they are closely related to societal conditions. Changes in the underlying conditions of production provide explanations for many of the movements in the normative field, and the new legal institutions that have arisen to satisfy fundamental normative demands. However, the basic normative patterns all represent enduring legitimate normative conceptions in society, and it is the task of legislators and courts to balance these conceptions within the framework of law. These two basic components interact very well, since changes in the conditions of production are used to explain the movements in the normative field, which thus can also be pictured as a functional field. Common for both these

components are also the possibilities to open up the national confine of legal science, as they both emphasise structures and patterns which are common to the different national legal systems within the European Union.

The theory of law as normative patterns in a normative field was inspired by Douglas Hofstadter and his analysis of AI (Artificial Intelligence) programmes,<sup>6</sup> as described by Anna Christensen in her article *Normative Patterns and the Normative Field: A Post-Liberal View on Law*.<sup>7</sup> Other sources of inspiration were Escher<sup>8</sup> and the way he illustrated in his work the magic of depiction – seeing ‘patterns’ in a complex reality, and, also, the ‘dissection’ of the concept of property as carried out in some of my own works.<sup>9</sup>

This theoretical framework provides for a basically *descriptive* method of law as empirical facts. What is described, however, is the *normative* contents of rules and regulations. The empirical facts of law in a certain area of society are thus analysed using the traditional ‘legal-dogmatics’ method, clearly within the realm of legal science. The theory’s model of law is one that lends itself to general application. The primary tasks of the Norma Research Programme, however, within the given theoretical framework, are to identify the basic normative patterns present within the Social Dimension, and, by means of comparative studies both between different areas of law and between legal systems in different countries, to delineate how these patterns manifest themselves in the legal norms and articulate societal conditions.

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<sup>6</sup> Douglas Hofstadter, *Metamagical Themes: Questing for the Essence of Mind and Patterns*, Basic Books 1985.

<sup>7</sup> Anna Christensen, Normative Patterns and the Normative Field: A Post-Liberal View on Law, in: Thomas Wilhelmsson and Samuel Hurri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*, Ashgate 1999.

<sup>8</sup> Maurits Cornelis Escher (1898–1972) was born in the Netherlands and became widely known for, among other things, his symmetry drawings. See also Douglas Hofstadter, *Gödel, Escher, Bach – An Eternal Golden Braid*, Brombergs 1985.

<sup>9</sup> See Ann Numhauser-Henning, *Rätten till fäderneslandet, Om jordförvärvslagen och dess funktioner mot bakgrund av jordbrukets utveckling i det svenska samhället*, Juristförlaget i Lund 1988 and Ann Numhauser-Henning, Om äganderättens funktion, in: *Tidskrift för Rettsvitenskap* 1–2/88 pp. 29–53.

These theoretical components have been elaborated upon in the work of Anna Christensen and myself. Anna Christensen studied the normative patterns in housing law (*Hemrätt i hyreshuset* 1994), social security law (*Normative Grundmuster in Socialrecht* 1997) and labour law (*Protection of Established Position: A Basic Normative Pattern* 2000). See also *Normative Patterns and the Normative Field: A Post-Liberal View on Law* 1999. Ann Numhauser-Henning discusses the normative/functional field of labour law in the 1997 article *Den framtida arbetsrättens förutsättningar*, and, with special regard to discrimination law, in the introduction to *Legal Perspectives on Equal Treatment and Non-Discrimination* (2001). The report *Pension Rights and the Coordination Rules on Applicable Legislation in the Light of Migration and Labour-Market Developments* of 2003 provides a normative and a functional analysis of European social policy and the coordination of social security.

Despite the ‘social science approach’ to law being an overall characteristic of the Norma Research Programme, other members of the group have used the theory of law I have just described in much ‘their own’ way (or not at all!). Ryrstedt wrote her thesis *Division of Property and the Joint Dwelling; financial independence or community* in 1998, using the concept of normative patterns. In his thesis on pension scheme reforms, Eliasson started out with the basic normative pattern Protection of the Established Position, and traced its ‘status’ in concrete German, Norwegian and Swedish reform processes (*Protection of Accrued Pension Rights* 2001). Malmstedt studied patterns of belonging and integration in *Tillhörighet och sociala förmåner, Från 1600-talets Laws of Settlement till Förordning 1408/71* 2002. Norberg used what he called ‘the Norma method’ in his thesis, in an attempt to predict legal application at the strands of labour law and competition law, within an otherwise broad and general description of the normative core of these two legal disciplines (*Arbetsrätt och konkurrensrätt* 2002). In his thesis *Funktionshindrad – med rätt till arbete?* (2007) Inghammar analysed labour market measures, employment protection devices and non-discrimination legislation from the perspective of disabled persons, as a balance between different competing interests or normative patterns in a comparative setting. Titti Mattsson has recently elaborated on the normative pattern of Protection of the Established Position in a novel way, in relation to the family’s right to a child and the child’s right to a family (Mattsson, *Rätten till familj inom barn- och ungdomsvården*, 2010). Finally, the theory of

normative patterns to be balanced in the normative field has proven very fruitful in Emma Holm's complex analysis of Union primary law, the Union's coordination regulation on social security benefits and the Swedish regulation of parental benefits, in her upcoming thesis *Fri rörlighet för familjer – En normativ analys av föräldrapenningen och EU-rätten* (2010).

The theory of law as basic normative patterns in a normative field has also attracted attention from others. A publication within the programme is Michiyo Morozumi's report on *Protection of the Established Position in Japanese Labour Law* (1998). Other examples include Håkan Hydén, who was inspired by the theory when developing his 'norm science' (*Normvetenskap* 2002, forthcoming in English), and the Norwegian legal scholar Stein Evju (*Arbeidsrett og styringsrett – et perspektiv*, in *Arbeidsret og Arbeidsliv, Bild 1 Hefte 1* 2003). Another example from the field of social security law is Professor Peter Köhler (*Normative Grundmuster im Sozialrecht: Entstehung und Reform der Alterssicherung in Deutschland und Schweden im Vergleich*, in *Festschrift till Anna Christensen* 2000). Yet another is the book *A European Work-First Welfare State* (2008), and especially so its concluding chapter, by our guest-authors Sara Stendahl and Thomas Erhag. Stendahl also used the theory in her doctoral thesis in 2003,<sup>10</sup> as did Carin Ulander Wänman in 2008.<sup>11</sup>

In conclusion, dealing with what might at first glance appear to be a number of quite disparate studies in the social dimension, it is our common experience that the Norma Research Programme provides an organisational 'melting pot' to our mutual benefit and inspiration. This has been reflected in the numerous publications originating from the milieu (see annexed List of Publications).

The Norma Research Programme has its own series of publications released by *Juristförlaget i Lund*, where dissertations and other books are published. As is reflected in the annexes, there is also a Norma Report Series. However, the programme and its participants have preferred to publish whenever

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<sup>10</sup> Sara Stendahl, *Communicating Justice Providing Legitimacy – The legal practises of Swedish administrative courts in cases regarding sickness cash benefits*, 2003.

<sup>11</sup> Se Carin Ulander-Wänman, *Företrädesrätt till återanställning*, Iustus 2008.

possible with internationally recognised publishers and journals as well as well Swedish journals of repute, and not necessarily in the report series itself.

## 5. Current research

Research within the Norma Research Programme today can be said to focus on normative interaction between changing labour market conditions, ‘sustainable’ social security schemes and new – more flexible – family patterns, from a European integration perspective. Today’s legal challenges emanate from changes in the underlying systems, including the changes in the productive sector, ‘the new economy’, the knowledge society, globalisation and increased competition, and changes in family patterns and demography. These challenges are, of course, reflected in current political strategies at both national and EU level. Of special interest is here the ‘in force-coming’ of the Lisbon Treaty, with its ‘discernable shift to recognizing a wider set of values within the constitutional base of the Union --- the European Social Model that is emerging ... is a mix of competition, free market, and solidarity based principles’.<sup>12</sup> There is also the EU 2020 Strategy for ‘smart, sustainable and inclusive growth’,<sup>13</sup> replacing the former Lisbon Strategy. The strategy is designed to enhance the European Union’s growth potential and deliver high levels of employment, productivity and social cohesion; its five headline targets include raising the employment rate for men and women to 75 % with greater participation of young people, older workers and legal migrants, improving education levels, and to promote social inclusion.<sup>14</sup> The strategy is then linked to the integrated guidelines for jobs and growth. It is our conviction that the multi-disciplinary research of the Norma Research Programme is very well framed to further the understanding of future EU normative developments reflecting the broader but also conflicting aims of the European Social Market Economy.

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<sup>12</sup> Erika Szyszczak, Antidiscrimination Law in the European Community, in: *Fordham International Law Journal* Vol. 32, 2009 p. 201.

<sup>13</sup> COM(2010)2020 pf 03.03.2010.

<sup>14</sup> See further European Council Conclusions 17 June 2010.

Questions of vulnerability and inclusion/exclusion are at the centre of the research of Andreas Inghammar and his current studies on legal and illegal migrant workers, as well as the broader project on 'Legal Empowerment of the Poor', in which he participates. Per Norberg is currently involved in a study on how the Swedish national health insurance system is interacting with the regulation of employment protection, other social security benefits' schemes, and processes of societal exclusion.

Today, flexicurity (flexibility and security) is, as was already indicated, a central notion in the EU legal discourse, including the EU 2020 Strategy, and encompasses flexible and reliable contractual arrangements, comprehensive lifelong learning, effective labour market policies, and modern social security systems. In December 2007, the European Council adopted common principles of flexicurity, which are now embedded in the integrated economic and employment guidelines as well as the newly adopted future strategy EU 2020. Research by Numhauser-Henning and Rönmmar – organically developed from their earlier research in the areas of employment protection, employment contracts, flexibility in employment and social security – in this area aims at studying and analysing the employment regulation and its content and development in the light of the flexicurity discourse (compare articles by Numhauser-Henning 2007 and 2010, by Rönmmar, forthcoming, and by both 2008 and 2010). The developments depicted as the flexibilisation of labour impose strains on labour law, in that they engender demands for the deregulation of traditional employment protection and for conditions conducive to more flexible modes of employment. Already back in 1998, the European Commission had drawn attention to the importance of striking a balance between flexibility and protection (COM(1997) 128 final). Since then, the general development of flexible work within EU politics can be depicted as a shift from resistance to acceptance. The notion of flexicurity encompasses deregulation of permanent employments and their labour law protection, equal treatment of different kinds of employments and a 'ladder' of legal protection, and the importance of lifelong learning, active labour market politics and – not least – employability. Also this time the studies will be carried out in a comparative setting, analysing the Danish, Dutch and British situations.

Globalisation of the economy challenges national labour law systems, and developments within the EU emphasise the key role of the social partners.



An important part of Rönmar's current research focuses on EU industrial relations and their interplay with national, especially Swedish, industrial relations. EU industrial relations constitute a new common European dimension of industrial relations, at the same time acting above, beside and within national industrial relations. The power relationship and interactions between the social partners within the framework of the social dialogue, the European Employment Strategy, the open method of coordination, information, consultation and worker participation and European integration, and free movement of persons and services form part of these EU industrial relations – and constitute an important, innovative research area. These questions were discussed at an international research workshop in Lund in November 2007, hosted by Rönmar, which resulted in an anthology (M. Rönmar (ed.), *EU industrial relations vs national industrial relations – comparative and interdisciplinary perspectives*, Studies in Employment and Social Policy, Kluwer Law International, the Hague 2009). The interplay between industrial relations – as fundamental collective labour law rights – and market concerns are now at the forefront in EU law, following the judgments of the European Union Court of Justice in the Viking Line and Laval cases, making this interplay a key concern also within the Norma Research Programme.

In the intersection between the studies of the flexibilisation of labour law and family law, and prompted by the changing character of the family, new research questions have evolved. The abandonment of the 'nuclear family', or what we would like to call 'the flexibilisation of families', came – in Sweden – before the flexibilisation of working life. A multidisciplinary analysis of the different but parallel processes of flexibilisation within families, labour markets and social security, and its functional inter-linkages, represents an exciting future research challenge to the Norma Research Programme. Jenny Julén Votinius continues to develop her orientation towards questions of discrimination and gender relations with a special focus on pregnancy discrimination and parental rights in labour law, though she has also broadened her research to include issues of employability and employees' cooperation in working life. Eva Ryrstedt is continuously studying family law and its interplay with social security schemes, frequently in a comparative setting. This research involves issues such as the effect of economic consequences on parents' decisions about their children, as well as gender and equality issues. Doctoral candidate Tatiana Tolstoy's thesis deals

with *Contemporary Parenthood*, highlighting the regulatory framework surrounding legal parenthood in an era of post-nuclear families and an ever-growing range of artificial methods for becoming a parent. Titti Mattsson focuses on child law and social law, especially issues concerning child protection and legal security for children, in a human rights perspective or in a comparative perspective.



# Free Movement of Families within the European Union – A Normative Analysis

*Emma Holm*

## 1. Introduction

I started to work as a research assistant for Professor Anna Christensen in 1998, after only three semesters of law studies, and was thus introduced into the Norma research environment. Already as a student I had a particular interest in EU law, which is why the Norma Research Programme with its European integration perspective was the ideal basis for my career as a researcher. Anna Christensen gave me and another research assistant the task to survey Swedish case law relating to the EU coordination rules on social security: Regulation (EEC) No 1408/71. There was not much, if any, research done in this area and the technical rules of the regulation could scare off even the most ambitious student. However, Anna's enthusiasm for this area of law and the interesting discussions we had with her – as well as the Norma-environment as a whole – inspired me to the degree that I later decided to write a thesis on the topic EU and social security law.<sup>1</sup>

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<sup>1</sup> *Fri rörlighet för familjer – en normativ analys av föräldrapenningen och EU-rätten (Free movement of families – a normative analysis of the Swedish parental benefit in relation to EU law)* (forthcoming).

In my research, the theory of law as normative patterns in a normative field has been central.<sup>2</sup> My thesis examines the Swedish parental benefit in relation to the EU principles on free movement – namely the Treaty provisions on free movement for workers and Union citizens – and more specifically, the secondary legislation on coordination of social security benefits – Regulation 1408/71<sup>3</sup> and its successor Regulation 883/2004.<sup>4</sup> The thesis shows how the EU rules are applied in the Swedish context and analyses the effects on the free movement of families. Problems in applying the EU rules in relation to the Swedish parental benefit have been seen to occur as regards families *moving to* Sweden in connection with parental leave, families *moving from* Sweden in connection with parental leave, and families *working and living in different states*, one of which is Sweden. Such problems naturally have a negative effect on the free movement of families. The theory of law as normative patterns in a normative field forms the basis of the analysis in the thesis, in order to systematise the norms examined and to discuss why problems of interpretation and application may arise. A main finding is that the normative structure of the Swedish rules on parental benefit has been difficult to reconcile with the normative structure of the EU rules on free movement and coordination of social security.

## 2. Normative patterns in social security law

The right to move freely within the European Union is a basic principle in EU law, and seems almost self-evident nowadays. Though the migration numbers are quite low, surveys show that many Europeans move for family reasons; for example, when a spouse follows a partner who starts working in

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<sup>2</sup> See Christensen, A., Normative Patterns and the Normative Field: A Post-liberal View on Law, In: Wilhelmsson and Hurri (eds.) *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*, Aldershot, Ashgate, 1999, pp. 83 ff.

<sup>3</sup> Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2.

<sup>4</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

another Member State.<sup>5</sup> The rights enshrined in the Treaty on the Functioning of the European Union, and further developed in secondary legislation, mean that there shall be no obstacles for persons making use of their right to free movement. An important aspect is that the movement shall not result in loss of social security benefits, such as benefits relating to childbirth and family costs. In reality, however, there are many obstacles to free movement in this area.

According to the theory of law as normative patterns in a normative field, legal solutions in the area of the social dimension – in this case the area of social security – may be said to oscillate between at least three basic normative patterns, or poles, in a normative field.<sup>6</sup> These are *the pattern protection of the established position*, *the market-functional pattern* and *the pattern of just distribution*. Rules based on income replacement represent the pattern of established position. A person who has established a certain position, for example by working, shall not be deprived of that position without a just cause. Work is normally a condition for receiving income replacement benefits, in which case the rules also represent the market-functional pattern. The market-functional pattern is the normative pattern underlying market economy, and includes the freedom of contract, the right of property and freedom of trade. Benefits based on need or implying a solidarity-based redistribution of resources represent the pattern of just distribution. Such benefits are normally residence-based. The idea is that resources shall be distributed and redistributed in accordance with some material principle of justice. Conflicts constantly arise between the basic normative patterns. They cannot be ordered into a hierarchy and there are no principles to determine which normative pattern shall be the most predominant. The Swedish provisions on parental benefits as well as the EU rules on free movement and coordination of social security can be placed in the normative field, whereby the tensions between these legal solutions may be seen.

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<sup>5</sup> European Commission Press release IP/06/389 Europeans move for love and a better quality of life.

<sup>6</sup> See Christensen (1999) pp. 83ff. See also Numhauser-Henning, A., *Freedom of Movement and Transfer of Social Security Rights*, Norma 2003:1, pp. 40ff.

### 3. Normative development in the area of coordination of social security

In order to make sure that migrating persons do not lose social security benefits such as pension, unemployment benefits, and child allowance, Article 48 of the Treaty gives the EU authority to adopt important regulations on the coordination of social security schemes. The first regulation was adopted as early as 1958, and in 1971 this was replaced by Regulation 1408/71. The latter was in force for almost 40 years, and though many changes were made during its existence, Regulation 1408/71 was quite outdated when the new Regulation 883/2004 was finally ready to be applied in May 2010. One of the main changes in Regulation 883/2004 is that it covers all Union citizens who are or who have been insured in a national social security system, as opposed to Regulation 1408/71 which was based on the original concept of free movement of workers (covering, however, also those who once *had* worked) and their family members. The secondary legislation in this area has thus moved from mainly reflecting the normative pattern of protection of established position toward reflecting the normative pattern of just distribution as well.

The overall goal of the coordination regulations has been to make sure that the different national social security systems work together in relation to moving persons, so that social security protection is not lost. Benefits covered primarily include sickness benefits, unemployment benefits, old age pensions, maternity/paternity benefits and family benefits. However, the national social security systems are still a matter for the respective Member States. These systems are based on a territoriality principle, meaning that only persons with a certain belonging, such as nationality or residence, are covered.<sup>7</sup> In order to make sure that migrating persons are not affected by such discriminatory conditions, the regulations contain coordination rules which are to be applied in each specific situation concerning a migrant person. There are rules on applicable legislation, meaning that the legislation of the work state (*lex loci laboris*) is applicable for active persons. Non-active

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<sup>7</sup> Cornelissen, R., The principle of territoriality and the Community regulations on social security (Regulations 1408/71 and 574/72), *Common Market Law Review*, Vol. 33, No. 3, 1996, pp. 439–471.

persons are to be covered by the legislation in the state of residence (*lex loci domicilii*). The state whose legislation is applicable is called the Competent State. In certain situations, benefits are to be paid from the Competent State, regardless of the person's place of residence. National residence conditions, therefore, may not be upheld. This is called the *exportability principle*. The regulations also contain a principle on *equal treatment*, which is a clarification of the basic treaty principle in Article 18. Another important principle is the *principle on aggregation* of insurance periods, meaning that a Member State must also take into consideration periods of insurance from other Member States when determining whether a national qualification time is fulfilled. This seems to presuppose that some insurance periods, for example periods of work, have been fulfilled in the Member State in question. A new principle in Regulation 883/2004 is one regarding *assimilation of benefits, income, facts or events* occurring in any other Member State, and treating these as if they had taken place in the state's own territory. The meaning of this new article is unclear, especially for persons not taking up work in the new host state. If interpreted broadly by the Court of Justice of the European Union, this principle may have a great impact on the territoriality principle.<sup>8</sup> Nevertheless, to a large extent, the coordination system is still granting rights to workers, and though all Union citizens are now covered by the personal scope of the regulation, the practical implications for non-active persons are unclear.

#### 4. The normative structures of the coordination rules relating to childbirth and families

Substantial problems have been encountered in the interpretation and coordination of benefits relating to childbirth and family costs. This became apparent when the Swedish parental benefit was to be applied in relation to the coordination regulation. Regulation 883/2004 makes a division between maternity/paternity benefits (the latter were not covered by previous

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<sup>8</sup> See Jorens, Y. and Van Overmeiren, F., General principles of Coordination in Regulation 883/2004' *European Journal of Social Security*, Vol. 11, Nos. 1–2, 2009, pp. 47–79. See also the reference for a preliminary ruling in case C-257/10 *Bergström* (pending).



regulations), and family benefits. The distinction between these types of benefits has been difficult to make and there are several cases from the Court of Justice of the European Union regarding this issue.<sup>9</sup> Classification of national benefits relating to childbirth and family is therefore complicated, but of great importance since the coordination rules on these types of benefits differ and may lead to different results for the individual person concerned. *Maternity and paternity benefits* are meant to cover national benefits connected to the individual worker's loss of income as a result of child rearing during the first period of a newborn child's life.<sup>10</sup> It is not possible for a family member to derive rights from the individual worker to receive income-based maternity or paternity benefits. Aggregation of periods is possible, but the Competent State may base the benefit only on income from work in its own territory. The individual worker has the possibility to export benefits from the Competent State as long as the insurance period lasts. These rules express a basic normative pattern of protection of established position as a result of employment. Those who have fulfilled the work condition are entitled to benefits, and enjoy a strong protection against losing insurance coverage. *Family benefits*, on the other hand, are seen as benefits granted to the family as a collective. The rules seem to be constructed to comprise flat-rate benefits, normally residence-based, such as general child allowance. Since such benefits normally do not require insurance periods, the role of the aggregation principle is unclear for this type of benefit. Family benefits are exportable in the situation where a person is working in one Member State and whose family members remain domiciled in another Member State. A husband and child living in Germany may thus be entitled to Swedish family benefits via the wife and mother, who is working in Sweden. According to the case law of the Court of Justice of the European Union, non-active persons (such as persons on parental leave who have ceased their employment) are not guaranteed export

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<sup>9</sup> E.g. case C-78/91 *Hughes* [1992] ECR I-4839, joined cases C-245/94 and C-213/94 *Hoever och Zachow* [1996] ECR I-4895, case C-333/00 *Maabeimo* [2002] ECR I-10087, case C-275/96 *Kuusijärvi* [1998] ECR I-3419.

<sup>10</sup> See p. 19 in the preamble of Regulation 883/2004. See also opinion from Advocate General Jacobs in case C-111/91 *Commission v. Luxemburg* and Paskalia, V., *Free Movement, Social Security and Gender in the EU*, Hart Publishing, Oxford 2007, p. 246.

of family benefits from the last state of employment.<sup>11</sup> The coordination rules on family benefits express the normative pattern of just distribution. They are meant to provide a basic protection for all families.

## 5. The normative structures of the Swedish parental benefit

The Swedish parental benefit<sup>12</sup> is designed to give – after only 29 days of maternity leave – both parents the possibility to combine work and family by granting the parent who stays at home to care for the child an *income-related*, work-based benefit. This presupposes that the parent is entitled to sickness benefit in cash, which is based on expected annual income from work in Sweden (*sjukpenninggrundande inkomst*). In order to receive the income-related benefit the first 180 days, the parent must also have been entitled to a sickness benefit qualifying annual income exceeding SEK 180 per day for 240 consecutive days *before* the expected delivery date (*240-days condition*). Once the person has fulfilled these conditions, there are many protective rules to keep the income-related level of compensation during periods of non-activity. The rules reflect the normative pattern of protection of established position as a result of employment. For those who have not worked, parental benefit on a *basic level* (*grundnivå*) is granted. This is a residence-based benefit. A number of the parental benefit days, however, are residence-based and granted only on a *minimum level* (*lägstnivå*), both for those fulfilling the work-condition and for those who are only residing in Sweden. The rules on minimum level and basic level parental benefit express the normative pattern of just distribution. The parental insurance is thus a mix of income-related and basic-level protection. Parents are granted a total (maximum) of 480 parental benefit days per child, which may be consumed until the child is eight years old.

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<sup>11</sup> Case C-275/96 *Kuusijärvi*. Compare to cases C-135/99 *Elsen* [2000] ECR I-10409, case C-28/00 *Kauer* [2002] ECR I-1343.

<sup>12</sup> See Chapters 11–12 and 25 in the Social Insurance Act (2010:110).

## 6. Tensions in the normative field

This thesis shows that, as regards parental benefit, there have been problems for *families moving to Sweden*. This particularly concerns the income-related benefit. Since parental benefit is granted for 480 days and may be taken out until the child is eight years old, families moving to Sweden with children often have days to claim. Sweden has seen a risk for social tourism in this regard. The Swedish view has been that at least one of the 240 days of insurance before the birth of the child, stipulated in Swedish legislation, must be fulfilled in Sweden. Families moving to Sweden after the birth of their children have thus been denied income-related parental benefit. Also, the requirement for a Swedish income has led to problems of interpretation, in relation to non-active persons moving to Sweden. The question has arisen whether these persons may count the income from another Member State as income in Sweden.<sup>13</sup> The new assimilation principle in Regulation 883/2004 may cause specific problems of interpretation in this regard.

*Families moving from Sweden* also risk losing their Swedish parental benefit. This became apparent after the *Kuusijärvi*-ruling (C-275/96) where the Court of Justice of the European Union stated that a non-active woman – she was unemployed after having worked in Sweden – moving from Sweden during parental leave could be denied further payment of parental benefit. The Court considered the Swedish parental benefit as a family benefit, and there was no provision in Regulation 1408/71 providing for export of family benefits in such a situation. The residence condition in Swedish legislation could thus be upheld. Though the woman in the case was to be covered by the legislation of the new Member State of residence, according to the *lex loci domicilii*-principle, she had probably not earned the right to income-based parental benefits in that country. Therefore, moving during parental leave could have drastic consequences and many persons – mostly women – have been affected. Regulation 883/2004 stipulates that persons receiving cash benefits because or as a consequence of their activity as employed or self-employed persons shall be considered to be pursuing the said activity (Article 11.2). This implies that work-based parental benefit may no longer be withdrawn, as in the *Kuusijärvi*-case. However, this provision may cause

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<sup>13</sup> Case C-257/10 *Bergström*, pending.

new problems of interpretation. Will the affiliation to the social security system of the last state of employment continue as long as there are some benefits left in that system? If so, the consequences for Sweden will be drastic, as Swedish parental benefit days may be saved and used until the child is eight years old. Also, which state is responsible for the payment of parental benefits if a family moves from the last state of employment *before* the birth of the child and parental benefit is not claimed until later? For the residence-based parental benefit, it is likely that the *Kuusijärvi*-ruling will still be upheld. The right to export Swedish parental benefit is thus still unclear, and this has an adverse effect on the free movement of families.

For *families working and living in different states*, for example when a family lives in Sweden and one parent works in Sweden and the other parent works in Denmark, specific coordination problems occur. Since the parental benefit is classified as a family benefit, the rules in Regulation 883/2004 concerning overlapping family benefits are applicable. These rules mean that in the case where the family is entitled to benefits (such as general child allowance) from more than one state, one of the states is primarily responsible, while the other state is only required to pay a supplement if its benefits are higher. This means that *all* family benefits from each state are summed up and compared. The inclusion of income-related benefits in this comparison is problematic. Not only is Sweden required to pay supplements to other Member States that do not consider their income-related parental benefits as family benefits, but the individual family may also be negatively affected. When income-related parental benefit days are deducted from flat-rate benefits such as child allowance in another, primarily responsible, state, such days may 'disappear', for example if this state has a higher child allowance. According to the proposal on a new multilateral Nordic convention,<sup>14</sup> income-related family benefits are not to be included in the calculation of supplementing family benefits, since this type of calculation has had a negative effect on free movement for families. This solution, however, concerns only the Nordic states.

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<sup>14</sup> Rapport från arbetsgruppen för översyn av den nordiska konventionen om social trygghet (projekt nr. 80389).

Many of the above-mentioned problems relating to the coordination of the Swedish parental benefit are connected to the fact that the coordination rules on family benefits reflect the normative pattern of just distribution, whereas the Swedish rules on income-related parental benefit reflect the normative pattern of protection of established position as a result of employment. The rules on maternity/paternity benefits, reflecting the normative pattern of protection of established position, may fit better for the income-related parental benefit, but are not suitable for the part of the Swedish parental benefit that is residence-based and granted on a basic or minimum level. Though many problems occurred under the application of Regulation 1408/71, the new Regulation 883/2004 takes no notice of the issue of coordination of parental benefits. In my thesis I therefore suggest a division of the Swedish parental insurance into two separate parts: one work-based, income-related benefit to cover loss of income during the first period of the child's life, and one residence-based, basic allowance for child-rearing. The former could be coordinated as a maternity/paternity benefit and the latter as a family benefit. This would facilitate the coordination of parental benefit. In the present state of things, the coordination of parental benefit will continue to be problematic. The new principle in article 11.2 in Regulation 883/2004, according to which a person is considered as employed in the last state of employment as long as a cash benefit based on work is paid, is difficult to reconcile with parental benefit as a family benefit. The question arises as to which state is responsible – the last state of employment, or the new state of residence. Since there are no specific limitations on aggregation of insurance periods for family benefits, as compared to maternity/paternity benefits, there seems to be a responsibility for the new host state to grant such benefits, maybe even if they are income-related. The new principle of assimilation in Regulation 883/2004 also may apply in such cases, though its limits are still unclear and the implications for non-active persons remain uncertain.

## 7. Concluding remarks

The theory of law as normative patterns in a normative field has been a useful tool in my thesis in order to make general conclusions in the technical and detailed area of social security. As far as the *overall normative development* is concerned, the rules on free movement and coordination of

social security benefits have moved from expressing a normative pattern of protection of *established position as a result of employment* toward also expressing a normative pattern of *just distribution*. However, the rules are constantly moving between the normative poles, depending on whether the person concerned is a worker or a non-active Union citizen, and depending on whether the benefit in question is a maternity/paternity benefit or a family benefit. This makes application in relation to national social security benefits, such as the Swedish parental benefit, unpredictable.



# ‘To those who have, more shall be given’<sup>1</sup>

Some aspects of ‘established position’ and the negative effect on outsiders

*Andreas Inghammar*

## 1. Introduction

Most of us have forfeited the idea of protecting the established position on a day-to-day basis. I do it very often when intervening between my children, when they fight about different toys or other such items. The ‘parental judgement’ usually corresponds to the pattern of established position; the child who first came into possession of the disputed toy is very likely to be promoted as the ‘legitimate possessor’ and the other child is left to wait its turn. Empirically, a number of legal standards of employment and social security law represent the same pattern. Those who already have a position (or indeed a toy) shall be given the possibility to exploit the various benefits of this position.

In my previous research, I have worked substantially with employment-related issues for people who, typically, have not been able to establish a significant position in relation to other employees. Summarising the results of this research illustrates the downside of too much emphasis on protection

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<sup>1</sup> The title refers to the verses of Matthew 13:12 and Mark 4:25 in the Bible.



of the established position – at least for certain, less privileged groups. So far, my main topics have dealt with disabled workers or job applicants,<sup>2</sup> undocumented migrant workers,<sup>3</sup> and, currently, the property rights-related struggle against poverty drafted on the writings of Hernando de Soto and expressed in the UN Millennium Development Goals.<sup>4</sup> Apparently, most of these research topics clearly connect to the more recent EU 2020 Strategy, which covers increased labour market participation and reduction of structural unemployment, as well as the promotion of social inclusion and combating of poverty.<sup>5</sup>

## 2. Protection of the established position – a normative pattern

In relation to my research areas, the identification of the various interests behind what is described as a normative pattern of protection of an established position serves a number of purposes. Primarily, after investigating the very nature of the protection of established position in different fields of (labour and social security) law, the ‘label’ can coordinate these various interests in relation to other recognisable, likewise potentially legitimate, normative interests or patterns. Secondly, the significance or

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<sup>2</sup> Inghammar, A., *Funktionshindrad med rätt till arbete? En komparativ studie av arbetsrättsliga regleringar kring arbete och funktionshinder i Sverige, England och Tyskland (Disabled – with a right to work? A comparative study of labour law regulations of work and disability in Sweden, England and Germany)*, Juristförlaget i Lund, Lund, 2007, as well as Inghammar, A., From a given – into a task. Aspects of labour market integration and employment strategies in relation to reasonable accommodation regulations and the individualized perspective of anti-discrimination legislation, In: S. Stendahl, T. Erhag and S. Devetzi (eds) *A European Work-First Welfare State*, Vasastadens bokbinderi Göteborg, 2009, pp. 157–164.

<sup>3</sup> Inghammar, A., The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law, *European Journal of Migration and Law*, Vol. 12, No. 2. 2010, pp. 193–215.

<sup>4</sup> De Soto, H., *The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books, New York, 2000, and also the *Making the Law Work for Everyone*, Report of the Commission on Legal Empowerment of the Poor, United Nations, New York, 2008.

<sup>5</sup> Guidelines (7) and (10) of the EU 2020 Strategy, respectively.

impact of the particular pattern in different legal settings, periods of time, or legislative traditions can be monitored and categorised in the research. Thirdly, when engaging in comparative legal research, the functions of the specific national (or for instance EU) provisions can be elaborated and described in a fruitful manner.<sup>6</sup>

The importance and impact of protection of an established position (regardless of whether this label is used) in most industrialised countries corresponds to the distributional efforts of the peacekeeping parents discussed above. By arguing in terms of legitimacy, those who have something will be entitled to keep it, at least in relation to others with the same or less relation to the specific 'good'. Whether or not this constitutes a fruitful, reasonable and fair position is dependent on a number of things; in this article and based on my previous research, I present some of the pitfalls of this pattern in relation to certain disadvantaged groups in society.

### 3. Disability and the protection of established position

The implications of protecting the established position, as applied to the employment provisions in relation to persons with disabilities, pinpoint the essence of what this article is all about. Employment law, such as provisions on employment protection, provides protection for the established position on at least two separate levels. First of all, in most countries, it reflects a general perspective of fairness of dismissal from the employer's side. For *employees* with disabilities, these standards will provide for certain risk reduction in relation to the employer's potential interest in dismissing less

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<sup>6</sup> It is important to underline that the model used to describe certain areas of law in terms of *normative patterns in a normative field*, in contrast to its label as 'normative' is a descriptive model, which does not at all provide any 'normative' position about preferences of certain patterns or interests, see, Christensen, A., Normative Patterns and the Normative Field: A post liberal view of law, in, Wilhelmsson, T., Hurri, S. (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*, Ashgate, Aldershot, 1999 pp. 83–98, and Christensen, A., Protection of Established Position: A Basic Normative Pattern, *Scandinavian Studies in Law*, 2000, pp. 285–324 and Numhauser-Henning, elsewhere in this publication.

able-bodied employees. The strength of this protection varies from country to country and over time, but the general picture shows the same structure in most European countries.<sup>7</sup> On the contrary, *non-employed* disabled persons trying to enter the labour market might recognise that a significant emphasis on protecting the established position for *employees*, is likely to prevent employers from employing ‘risk’ individuals from disadvantaged groups. Once an employee has an established position, such as a labour contract (or in social security law, a certain income), and becomes one of ‘those who have’, a fundamental change occurs in relation to ‘those who do not have’. Whereas in general, employer protection is seen mostly as a protection against the employer, the non-included disabled job applicant is likely to recognise it for being something quite different – namely, a threshold in relation to other, better established and well-positioned employees.

#### 4. Undocumented migrant workers and the protection of established position

A recently undertaken research project examines the international, EU and national standards and provisions for undocumented migrant workers.<sup>8</sup> The position of undocumented migrant workers forms an extraordinarily difficult field for legal intervention, owing to the significant underlying contradiction between combating illegal migration and ‘extralegal’ sector work<sup>9</sup>, in parallel to providing a shelter from the very exploitative working conditions often seen for undocumented migrant workers. The situation is by nature very different compared to that of disabled employees or disabled job applicants; however, there are still similarities worth addressing, and

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<sup>7</sup> See further, Inghammar 2007, where, among other topics, the unfair dismissal law relating to employees with disabilities is subject to a comparison between Sweden, England and Germany.

<sup>8</sup> Inghammar, A., The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law, *European Journal of Migration and Law*, Vol. 12, No. 2, 2010, pp. 193–215.

<sup>9</sup> The term ‘extralegal’ refers to the ‘shadow’ or ‘black market’ sector, see de Soto, H., 2000, p 155.

those similarities come together at the labour market pattern of protection of established position. The undocumented migrant workers are left with only partial, labour-related legal protection. Only general provisions and standards, such as the right to form and participate in trade unions, rights related to non-discrimination, fair remuneration for performed work, and employer duties related to health and safety at work are currently provided for under different legal instruments.<sup>10</sup> Apparently, none of the provisions or standards that embrace undocumented migrants intervene with the provisions of regularly employed, or the established position the regularly employed have in relation to their employers and other employees on the labour market. Major parts of ordinary employment legislation, such as employment protection schemes, are not – for what I would hold to be good reasons – applicable for undocumented migrant workers.<sup>11</sup> They are outsiders on the labour market owing to their legal status (some researchers would also elevate the importance of ethnicity), and therefore are left with significantly less legal bolstering than other employees.<sup>12</sup> However, the vulnerability that accompanies undocumented migrants and the massive exploitation of their work seen in the Western world (and indeed elsewhere) would reasonably call for some sort of legal protection and access to justice. The questions of how, who and by whom, that should be resolved, are still to be addressed. In the meantime, one can draw the conclusion that whatever position the ‘have-nots’ might have established, it is very unlikely that they can protect that position. To those who have not, such as undocumented migrant workers, very little is given.

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<sup>10</sup> See further, Inghammar, A., 2010, pp. 193–215 and SOU 2010:63 *EU:s direktiv om sanktioner mot arbetsgivare*.

<sup>11</sup> It would be an anomaly to provide ordinary employment protection for employments entered into in violation of the immigration legislation. Since the employer (and in Sweden also the employee) face criminal charges if caught in the act of employing persons without valid work permits, there could not possibly be a regulation providing for continuous employment, see also Swedish Labour Court decision AD 1979 nr 90.

<sup>12</sup> See also for reflection on the Greek *oikos* and *polis* in relation to undocumented migrant workers, Noll, G., Why Human Rights Fail to Protect Undocumented Migrants, *European Journal of Migration and Law*, Vol. 12, No. 2, 2010, pp. 241–272, particularly p. 269.

## 5. Legal empowerment of the poor

My final example of implications related to the protection of established position emerges from an ongoing research project related to the United Nations Committee of Legal Empowerment of the Poor. Some of the general ideas within the 'legal empowerment movement' are to provide access to legal protection for disadvantaged – or poor – groups and to recognise and develop legal rights for this group in relation to property, labour and business.<sup>13</sup>

When examining the legal position of poor people with the perspective of the report of the UN Committee, the lack of an established position, and in cases where there is such a position, the lack of legal protection of this established position, are obviously crucial. For those who have very little, the acceptance of legal rights in relation to certain defined areas is likely, or at least proposed, to generate an identified position in relation to the interests of others, such as landlords, employers, land exploiters and municipalities – but indeed also other poor people. In the longer perspective, this provision of an established position would form a legal basis for individual – and societal – development resulting in reduction of poverty. However, in many cases, the legal and practical acceptance of poor people's rights and established positions will intervene with already existing established positions of other stakeholders, like landlords or employers, hence generating a re-distribution of claims, or positions, to the disadvantaged groups. When the poor farmer calls upon property rights to the land he exploits, he calls for legal protection for establishing a position, and only by regulating this position will he be able to mortgage the property for further investments, sell it, or hand it down to future generations. Without any such established position, this development will be jeopardised, with effects on the reduction of poverty.

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<sup>13</sup> The concept of 'poverty' or 'poor' is primarily related to the standardised definitions of each individual making a living on less than 2 USD per day. See, for an overview of the four pillars of 'Empowerment', the Report of the Commission of Empowerment of the Poor, 2008, p. 27.

## 6. Concluding remarks

Significant legislation supports the protection of established positions in a variety of different legal areas. As is pointed out in my example of children fighting over toys, and indeed elsewhere,<sup>14</sup> this relates to a concept of formal justification. However, as I have pinpointed in the article, the legal emphasis put on protecting this particular normative pattern has its pitfalls. From the perspective of disadvantaged groups who have gained little or no established position, the conservativeness of legal provisions constituting this normative pattern will prohibit labour market integration, and also reasonable focus on skills and competences within the group of employees or job applicants (or indeed people living in poverty for quite different reasons). As a result of this, one could argue in terms of reducing the impact of this particular normative pattern, to gain results with less conservative effects. In relation to large parts of the industrialised labour market, such as the market in Sweden, this author would indeed be tempted to address such a shift in focus, for reasons discussed in relation primarily to persons with disabilities, but also partly to undocumented migrant workers. On the contrary, the establishment of any form of position for people living in poverty would possibly improve their situation and provide significant reduction in the overall poverty, primarily in developing countries. There are obviously at least two sides of this coin, and the message of this text reflects both of these sides. While the normative argument in the first two examples (disability and undocumented migrants) would be to reduce the protection of (other) people's established position, the argument of the latter (people living in poverty) would be to start creating such positions in the first place in order to promote the growth out of poverty. All this takes us back to the title of this article, and the discussion of to what extent *those* who already *have*, by the means of legal intervention, should be *given more*.

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<sup>14</sup> See further Norberg, P., *Arbetsrätt och konkurrensrätt. En normativ studie av motsättningar mellan marknadsrättsliga värden och sociala värden*, Juristförlagen i Lund, Lund 2002, pp. 20–22 and further references there.



# Normative Perceptions Twisting the Law

*Jenny Julén Votinius*

## 1. Introduction

The Norma Research Programme celebrates its fifteenth anniversary. I was still a student fourteen years ago when I was invited by professors Ann Numhauser-Henning and Anna Christensen to participate in the programme. In this intellectual setting, I was given rich opportunities to discuss and analyse questions of legal science long before my life as a full-time researcher had begun. Through the programme I also enjoyed the benefit of participating in conferences and getting to know legal scholars from around the world. For me, this unreserved admittance into the world of established researchers boosted my eagerness to go further and capture a place of my own in academic life. The Norma Research Programme thus became the avenue for me into legal science, just as it has been for other young persons with a strong interest in legal questions relating to the social dimension of law. Throughout the years the Norma research group has always been there, open for discussions and for company, and providing an important web of contacts in the legal research society.

The researchers active within the Norma Research Programme share a social science approach to legal studies, and a focus on areas of regulation belonging to the social dimension of EU law – i.e. the regulation of family, employment and social welfare. In my research, I start out from an internal perspective of the legal rules. I seek to explain and elucidate the legal argumentative structures with reference to external social practices that affect both labour law and working life in general. Like the proponents of critical



legal studies and feminist legal theory, I strongly believe in the value of legal studies that move beyond the traditional approach to law – studies that set the legal rules in a social perspective and whose analytic approach is oriented towards the interaction of legal and social principles.<sup>1</sup> Therefore, a central question my research is how well laws serve the social purposes for which they were designed, and one central aim in my research is to reveal discrepancies between theory and practice. In my work over the years, I have developed a clear orientation towards questions of discrimination and gender relations, and a specific focus on pregnancy discrimination and parental rights in labour law. Lately I have also started a project that moves somewhat in another direction, as it is concerned with questions of cooperation in the employment situation. Both these subjects fit in well with the common research area of the Norma Research Programme, described as the normative development within the social dimension in a European integration perspective.

## 2. Pregnancy discrimination

In *Dekker*,<sup>2</sup> the Court of Justice of the European Union established the pivotal principle that discrimination on grounds of pregnancy and maternity is to be considered as direct discrimination on grounds of sex.<sup>3</sup> The *Dekker* judgement, where the Court comments on several questions of principle concerning the application of the directive's provisions on access to employment, have been followed by a vast number of cases concerning the Equal Treatment Directive and the Maternity Directive. In these cases, the

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<sup>1</sup> Following the example of Carrie Menkel-Meadow, I chose here to use the lower-case 'critical legal studies' in order to avoid giving it privilege over feminism, see Menkel-Meadow, C., *Feminist Legal Theory, Critical Legal Studies, and Legal Education* or "The Fem-Crits Go to Law School", *Journal of Legal Education* Vol. 38, 1988, pp. 61–85. For an overview of the critical legal studies movement see Tushnet, M., *Critical Legal Studies. A Political History*, *The Yale Law Journal* Vol. 100, No. 5, 1991, pp. 1515–1544. A comprehensive work of reference on feminist legal studies is Conaghan, J. (ed.), *Feminist Legal Studies*, Routledge, London 2009.

<sup>2</sup> C-177/88 [1990] ECR I-3941.

<sup>3</sup> Julén, J., *Ett välsignat tillstånd? Om diskriminering av gravida arbets sökande*, In: A. Numhauser-Henning (ed.), *Perspektiv på likabehandling och diskriminering*, Juristförlaget, Lund 2000.

Court has developed jurisprudence on a very high level of protection against pregnancy and maternity discrimination. Since 2002, the case law on pregnancy discrimination has partly been codified in the Equal Treatment Directive, which states that any less favourable treatment of a woman related to her pregnancy or maternity leave is categorised as discrimination within the meaning of the directive.<sup>4</sup>

The pregnancy cases bring to the fore the conflict between a woman's right not to be discriminated against as a result of pregnancy and maternity leave, and the employer's concern for avoiding economic loss. This conflict of interests is the central theme for one of my articles, dealing with pregnant job-seekers in Sweden.<sup>5</sup> Here, I argue that in order to determine how well the law protects the pregnant woman's right not to be discriminated against, it is necessary to understand how the relevant legal rules operate in the social context where they are meant to work. The fact that there appears to be satisfactory legal protection against discrimination, does not always mean that the protection will actually work. To a certain extent, this has to do with how social reality limits the possibility to realise rights ensured by law. For example, in Sweden, a woman who wants to make a complaint against a decision concerning recruitment normally must initially turn to her union. Here she may find it hard to obtain sufficient support owing to union representatives' lack of knowledge and commitment, even if this is not how most union representatives will handle such a case. Another, more obvious, obstacle is that a woman who claims her right not to be discriminated against because of pregnancy and maternity leave can run a considerable risk that this will result in retaliation later, to the detriment of her career. On the legal level, the protection against discrimination may be undermined by defects in the legal system itself, such as insufficient transposition of EU law into national rules. In Swedish law, there has long been a transposition deficit of the rules on protection against discrimination on grounds of pregnancy and maternity leave, a problem that I have touched upon in two

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<sup>4</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>5</sup> Julén, J., A blessing or a ban? About the discrimination of pregnant job seekers, In: A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-discrimination*, Kluwer, The Hague 2001.

other articles.<sup>6</sup> As the Commission noted, the strong protection against discrimination of these workers that has been developed within European Union law on the basis of the prohibition of sex discrimination is not explicitly implemented in Swedish law.<sup>7</sup> The national legislation in no way reveals that the rules on direct sex discrimination are applicable for pregnancy discrimination. Instead, the protection against pregnancy discrimination in Sweden is ensured by way of interpretation and with reference to EU law.<sup>8</sup>

### 3. Reconciliation of working life and parental responsibilities

Along with the development of the protection of pregnant workers in EU law, increasing attention has been paid to the balance between working life and family life. Improved reconciliation of working life and family life is part of the guidelines of the European Employment Strategy. This theme also formed the priority topic in the 2002 calls for proposals launched under the fifth Community action programme on equal opportunities for men and women.<sup>9</sup> As noted by Stratigaki, the concept ‘reconciliation of working and family life’, which was introduced to encourage gender equality in the labour market, has gradually shifted in meaning from the feminist objective of sharing family responsibilities between women and men, to the market-

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<sup>6</sup> Julén Votinius, J., *Bristande införlivande i svensk rätt av skyddet för gravida och mammalediga*, *EU & arbetsrätt*, No 1 2008, and J. Votinius, Jenny, *Troublesome Transformation – EU Law on Pregnancy and Maternity Turned into Swedish Law on Parental Leave*, In: M. Rönmar (ed.), *Swedish Studies in European Law Vol 4*, Hart, Oxford 2011 (forthcoming).

<sup>7</sup> Letter of Formal Notice, 2006/2537. See further Julén Votinius 2011 (forthcoming).

<sup>8</sup> Julén Votinius 2011 (forthcoming).

<sup>9</sup> Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Annual Report on Equal Opportunities for Women and Men in the European Union 2002, COM/2003/0098 final, p. 20.

oriented objective of encouraging flexible forms of employment as it became incorporated in the European Employment Strategy of the 1990s.<sup>10</sup>

I have devoted most of my research so far to the study of the legal position of working parents in labour legislation and the protection that labour law offers to employees in their capacity as parent or soon-to-be parent. This is the subject of my dissertation *Parents at work. A gender-critical study on the position of parents of young children in labour law*.<sup>11</sup> My research shows that the rules in labour law concerning employees' parenthood, despite the fairly strongly formulated protection of their rights, has in a relatively weak normative position in practice in working life and in labour law. The weakness of the rules on parenthood can be explained as a result of a normative conflict, or incoherence, affecting the judicial sphere, which means that deviating norms and values encroach on the rules about parenthood and weaken their position. This normative conflict is elucidated and analysed against the background of an account of the content of the relevant legal rules, with special attention paid to the weakness of the rules on parenthood resulting from society's gender-related notions about employees and parents, and which are also expressed in the law and the legal argumentation.

The Swedish regulations applying today to employees with parental responsibility rest on the fundamental idea that parenthood should be a concern for both parents, *and* that it should be possible to combine working life with parenthood. This basic idea is expressed in the legislative history material and legal rules, but it is not uncontroversial and it does not always have support in social practices. The outlook represented in Swedish legislation, applying in particular to employees with parental responsibility, contrasts with a different outlook represented both in social practices and in legal rules other than those concerning parenthood. This leads to the fundamental conflict about the suitability and feasibility of combining work

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<sup>10</sup> Stratigaki, M., The Cooptation of Gender Concepts in EU Policies: The Case of 'Reconciliation of Work and Family', *Social Politics: International Studies in Gender, State and Society*, Vol. 11, No 1, Spring 2004.

<sup>11</sup> Julén Votinius, J., *Föräldrar i arbete. En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning (Parents at work. A gender-critical study on the position of parents of young children in labour law)*, Makadam, Stockholm & Göteborg 2007.

with parenthood. The view that parenthood is primarily the woman's concern, and the fact that the employer's market-oriented interest in principle cannot be combined with the employee's parental interest, are factors of crucial importance for the analysis of this conflict. To facilitate the analysis, I have framed a model where the arguments, social practices, and rules occurring in this conflict are divided into three normative categories. You can see some similarities between my model and the normative basic pattern approach. For example, they rest on a shared belief about the importance of considering how the social context and perceptions about social relations interact with the law. Whereas the model of normative basic patterns has been used primarily to conduct comparative studies between different areas of law and between legal systems in different countries, my model is designed to serve as a tool in a critical analysis of law, with particular importance given to gender issues. This model is used in my dissertation and it is described and discussed in a separate article as well.<sup>12</sup>

The rules in Swedish labour law concerning parenthood thus rest on the idea that parenthood should be considered equally important for both parents, and that it should be possible to combine work with parenthood. Arguments, practices, and rules supporting this idea express what I call the *norm of parenthood*. The norm of parenthood concerns both family life and working life, since it applies both to the division of parental responsibility and to the organisation of working life. However, the rules about parenthood are also understood against the background of arguments, practices, and rules which confirm the notion that children and parenthood are primarily the woman's concern. This is where what I call the *norm of motherhood* finds expression. In working life, the rules about parenthood are also understood in terms of arguments, practices, and rules which support the employer's market-oriented interest rather than the parental interest, and which mean that the employee's parenthood-related commitments should not encroach on the job. The norm expressed here is what I call the *norm of limited responsibility for caring*. This norm is simultaneously also an important part of the mentality that makes the male employee the yardstick in working life, and according to what emerged from my research, in labour

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<sup>12</sup> Julén Votinius, J., Normkonflikter i regleringen om arbetstagaras föräldraskap, *Retfaerd* hösten 2008.

law as well. In a separate article, I have conducted a deeper analysis of the typical male employee as a standard in working life relations.<sup>13</sup>

The conflict between the parenthood norm and the maternity norm is thus a matter of *how parental responsibility should be organised in family life*, while the conflict between the parenthood norm and the norm of limited responsibility for caring concerns *which interests should be prioritised – those of parenthood or those of working life*. This also raises the question of *who should decide* on issues concerning the organisation of parental responsibility in family life, and whether it is interests of parenthood or of working life that should be prioritised. Is it the state that should decide, or is it instead the parents or the parties in the employment contract? This question has important implications for an understanding of some of the arguments put forward in the discussion about division of parental responsibility and the space for parenthood in working life. However, in analytical terms, the question can instead be referred to the more general issue in the philosophy of law and politics, in terms of whether it is suitable and legitimate that the state should intervene at all through legislation. This large issue does in fact come up in every conceivable judicial context, giving rise to arguments about voluntariness and freedom of choice as opposed to state control. The norm of parenthood, the norm of motherhood, and the norm in working life of limited responsibility for caring capture the gender-related ideas, attitudes, and conceptions that have propelled the development of laws concerning work and parenthood. The three norms represent socially established ideas, but the meaning of these social norms has also been incorporated in the law in different ways and at different times, and has been manifested there in a concrete sense as legal rules and as part of the judicial argumentation.

The legal system harbours different interests that are in conflict, and the tension created in these conflicts always poses a risk of normative incoherence. In the legal areas that belong within the social dimension, the presence of conflicting interests is apparent, substantial and seemingly

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<sup>13</sup> Julén Votinius, J., On the Gendered Norm of Standard Employment in a Changing Labour Market, In: J. Fudge & R. Owens (eds.) *Precarious Work, Women and the New Economy: the Challenge to Legal Norms*, Hart, Oxford 2006.

everlasting. In European scholarship, Kenneth Armstrong describes how the discussions that have preceded the Europe 2020 Strategy reveal a clear conflict between the interest of the stronger social dimension represented in the coordinative discourses of *inter alia* the Social Protection Committee, the Employment Committee, and the Employment, Social Affairs, Health and Consumer Affairs Council, and the interest of a return to a trajectory of economic growth, in the discourse of the Economic and Monetary Affairs Council.<sup>14</sup> As mentioned earlier, the improvements in reconciliation of working life and family life form part of the guidelines on the European Employment Policies.<sup>15</sup> Another important feature of the European Employment Policies is the concept of employability, which simply put refers to certain skills, attitudes and knowledge that make a person able to gain and keep employment, and to obtain new employment.<sup>16</sup> While progressing with my research on parental labour law rights in coming articles, I have also recently started a new research project that partly belongs to the employability discourse.<sup>17</sup> In a broad sense, this project has some affinities with the project on flexicurity currently being carried out by the Norma Research Programme members Ann Numhauser-Henning and Mia Rönmar.<sup>18</sup>

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<sup>14</sup> Armstrong, K., *Governing Social Inclusion. Europeanization through Policy Coordination*, Oxford University Press, 2010, p. 269 ff.

<sup>15</sup> COM(2010) 193, Proposal of 27 April 2010 for a Decision of the Council on guidelines for the employment policies of the Member States – Part II of the Europe 2020 Integrated Guidelines, guideline no 7.

<sup>16</sup> COM(2010) 193, guideline no 8.

<sup>17</sup> One article on parental rights is Julén Votinius, J., *Missgynnande i fråga om ekonomiska förmåner som en nödvändig följd av föräldraledighet*, forthcoming in *Juridisk Tidskrift*, where I study how the Swedish Labour Court has argued in cases on detrimental treatment as a result of taking parental leave, with special focus on detrimental treatment that concerns economic benefits.

<sup>18</sup> See further Mia Rönmar's contribution elsewhere in this publication.

## 4. Cooperation skills and cooperation problems in the labour law context

The present study deals with labour law issues related to questions on employees' cooperation in working life. The demands on employees' ability to cooperate may be higher and more expressed today than ever before. Project work, changing team constellations and flat organisations are commonly used management models that require the employees to be flexible and to show other characteristics that facilitate social interplay. On the other hand, there is also a demand for qualities that are clearly individualistic, such as independence, enterprise and creativity. By corresponding to the demands of social ability in a way that contributes to the work results of the team, the employee safeguards his or her employability – a key notion in the labour market discourse. Employers are dependent in many ways on a workforce with a high capacity for social interaction, and seek to avoid cooperation problems in the workplace. However, actions that are perceived as cooperation problems by people in the immediate surroundings may be seen in an entirely different way by the employee involved. The employee may claim merely to be protecting his or her personal sphere and the right to express an opinion on different matters. The starting point of the present study is the increasing demands on employees' cooperation skills, which are resulting from the ongoing organisational changes in working life. Important questions involve the impact of these increasing demands on the understanding of cooperation difficulties at work, and on the understanding of how such difficulties are to be handled in a legal context. More specifically, these questions concern the demands in labour law on the employee and the employer in situations where cooperation problems occur or are said to occur. The legal analysis is interwoven with a discussion on underlying normative ideas that are expressed in the legal argumentation concerning questions on employees' duty and ability to cooperate.





# Family-Related Issues in Social and Welfare Law

Legal methods for research on children and families

*Titti Mattsson*

## 1. Introduction

Although the preconception of a researcher may often be a person working alone in his or her chamber, the truth is that the intellectual environment outside the chamber is central for good academic work. Most researchers cannot reach excellence through only reading and writing by themselves. This was most probably true already in a historical perspective, and it has become more and more a fact in modern times. Because of political and structural changes, the prominent research in different fields nowadays is often produced in research teams, or performed in collaboration with members in relevant national or international networks. In Sweden, legal research is a field that – though slowly compared to many other disciplines – has come to follow this trend. In the following, I intend to present my research in this context, with special focus on my participation in the Norma Research Programme at the Faculty of Law at Lund University for the last ten years. The research group constitutes an interesting intellectual environment for me. This essay is a story of this environmental influence for my career so far. I will focus on some central parts of the research I have done which relate to the Norma Research Programme in one way or another. More concretely, I will describe and elaborate on my way of using

multidisciplinary approaches for studying legal issues of power, recognition and respect for vulnerable groups such as children.

## 2. Multidisciplinary approach

The Norma Research Programme emanates from a multidisciplinary research project from 1996. In addition, owing to the theory of law as normative patterns in a normative field combined with a functional approach to law, many of the legal researchers have a social science approach and use multidisciplinary or comparative methods. Such methods have also become a trademark in my own research. Beginning with my dissertation, *The Child in Statutory Care Proceedings: Legal Security, Protection of Personal Integrity and Autonomy in Connection with Decisions on Statutory Care* (2002), I used a methodological approach to law that included qualitative as well as quantitative methods of studying judgements of the Administrative Courts in Sweden. Another part of the dissertation was a comparative study of care proceedings in Norway and England. These approaches to law as it is applied have been developed further in my research, and today much of my academic work can be characterised as having a multidisciplinary approach and a structural view on the studies of law. In addition, my interest in empirical methods has developed further by using discourse analysis. In one article, I analyse how different lines of developments in the way research views the status of the child affect Swedish child law.<sup>1</sup> The starting point for the article is regulation allowing child participation preceding decisions in courts concerning the children themselves, an issue that has been discussed in legal research and governmental reports during the 2000's – since this legislation is sometimes not applied by the institutions and the courts. By using discourse analysis, I investigate what approach to children is construed in legal acts, in preparatory works and in cases from the Administrative Supreme Court and the Administrative Courts of Appeal. I have also continued to use empirical methods in studying family patterns for foster

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<sup>1</sup> Mattsson, T., Rättighetssubjekt eller omsorgsobjekt – hand i hand eller stick i stäv? Exemplet barn i institutionsvård, *Retfærd* No 31, 2008, pp. 58–80.

children in civil court practice<sup>2</sup>, as well as comparative method in investigating public and civil child proceedings in Sweden and England, the latter together with Eva Ryrstedt.<sup>3</sup>

So far, the focus in much of my writing has been on the child care protection system. In 2008, nearly 23,000 children and young people in Sweden were subject to state care and support in the form of foster care or other placements outside the child's home.<sup>4</sup> For a welfare state with a population of approximately 9 million people (2 million children), this is a rather large amount of yearly out-of-home interventions in families to protect children.<sup>5</sup> The number of these out-of-home living arrangements has steadily increased from year to year during the last decade. Children's social services are integrated with other social services in the 290 municipalities, and provided for under the Social Services Act of 2001 and the Care of Young Persons Act of 1990. Children and young people normally come into care up to the age of 18 (except for a small number of young people who come into statutory care at the age of 18–20), and may remain in care until the age of 21. Unlike many countries, the Swedish social services system is also used for placement of young offenders. Social services for children include a range of different welfare interventions to support families in problematic situations and to assist them in the care of their children. Out-of-home placement is a commonly used intervention in Sweden. These placements may vary in length, depending on the family situation and the child's needs. While some children may return to their homes and families after a short time, other children will end up in long-term foster care for the majority of their childhood.

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<sup>2</sup> Mattsson, T., *Rätten till familj inom barn- och ungdomsvården*, Liber 2010; Malmö 2010 (2010a).

<sup>3</sup> Ryrstedt, E. and Mattsson, T., Children's Rights to Representation: a Comparison between Sweden and England, *International Journal of Law, Policy and the Family*, *Oxford Journals* No 22, 2008, pp. 135–147.

<sup>4</sup> Children and Youth Interventions 2008, Sweden's official statistics, Statistik socialtjänst, [www.socialstyrelsen.se](http://www.socialstyrelsen.se)

<sup>5</sup> For a description of social and welfare regulation in Sweden, see Mattsson, T., in, Social and Welfare Law, in Bogdan, M (ed.). *Swedish Legal System*, pp. 119, Norstedts Juridik, Stockholm 2010, pp. 119–148.

### 3. Protection of established position in relation to children

The basic normative patterns, according to Christensen's theory, all represent enduring legitimate normative conceptions in society, and it is the task of legislators and courts to balance these conceptions within the framework of law. I am especially interested in how such patterns manifest themselves in the legal norms in child law and articulate societal conditions for children and families. So far, I have focused on the normative pattern Protection of the Established Position, a conservative pattern that upholds traditional positions and positions gained by individuals. This pattern appears foremost in child law in the form of the custodian's strong position in relation to the child. The Protection of the Established Position may sometimes conflict with the pattern Just Distribution, which instead, in this context, stands for state protection of recognition of and respect for the child.

In a recent book, mentioned above, I apply this part of the theory of law as normative patterns in a normative field in relation to family law.<sup>6</sup> Using a quantitative method, I investigate different patterns in court practice in 77 custody and guardianship cases of foster children in the Swedish District Courts. My aim was to investigate how the concept of family is constructed by the courts in cases where children have been living in foster families for many years, and the Social Welfare Committees have petitioned for change of custody and guardianship in the best interest of the child. The intervention primarily aims to promote the best interests of the child and to ensure the child's right to family life. During the last decade, Swedish research and reports have shown deficiencies in these respects, for different reasons. For example, it has been argued that the long-term foster placement system is too heavily used, and that Swedish legislation does not take sufficient account of the rights-based approach to children required by the Child Convention and other international documents regarding human rights. Several government reports and committee studies have highlighted problems for children in foster care, both while in care and later in life. As a

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<sup>6</sup> Mattsson 2010a.

result, the Swedish legislation made a switch in the 2000's from a sole upholder of the idea to reunite the child and the biological parents, to a more lenient advocate of different solutions with a goal of fulfilling the best interest of the child. As a consequence, new legislation was amended, aimed at decreasing the large number of children in long-term foster placement.<sup>7</sup> The new amendment to the Social Services Act of 2001 implies that the Social Services Committees shall regularly evaluate the possibility of applying to the District Court for a change of custody and guardianship to the foster parents.<sup>8</sup>

The result of my study is that the normative pattern Protection of the Established Position influences the court practice in several ways. In short, in contentious cases, the courts do not seem willing to challenge the original family constellation, and the Social Welfare Committees may not even seem very willing to file petitions for such cases. On the other hand, a greater flexibility in the construction of new families occurs when the foster families are relatives of the child. These families seem to obtain an 'expanded established position', and are often permitted by the courts to become new custodians for the child. My contribution to the Norma theory deals with these legitimate normative conceptions in society of the position of a child in relation, on the one hand to , the position of the custodian, and on the other hand, to state intervention. The overall result is that the normative pattern of protection of established position influences the court practice in the understanding of the family concept. The study demonstrates that the custodian's position often dominates. However, in certain circumstances the child may gain and establish her own position in the foster home, demonstrated in the court's decision by allowing the child's rights and best interests to prevail.

## 4. Children and vulnerability

During my research, I have concentrated mainly on legal issues concerning children and their vulnerability. This approach has at least two advantages.

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<sup>7</sup> Prop. 2002/03:53.

<sup>8</sup> The Social Services Act Chapter 6 Section 8.

First, using the child as the study object allows in-depth studies of child law – connecting public law, civil law, human rights law and procedural law as well as other social sciences in different questions relating to children. By using a single study object in this way, it is possible to penetrate different and related issues without being hindered by traditional legal or scientific boundaries. This has been possible mainly because of my educational and professional background, as well as my engagement in several national networks and large research groups, such as the Norma Research Programme. In addition to my current position as Associate Professor in public law at the Law Faculty, I have experience working as Assistant Professor at a department in social work. I am currently tutoring several doctoral students in the discipline of social work. This background has permitted the broad use of theoretical and methodological approaches to my research on children's issues. In addition, within the legal discipline, I have attained a certain expertise in other legal fields outside my own, by teaching and tutoring in diverse subjects such as social welfare law, family law, procedural law and administrative law. The Norma environment stimulates me to continue in this track, for example by actively encouraging participation in both private family law and public social law issues in different ways.

Secondly, using children as my foremost study objects for legal research has allowed me to focus on vulnerability in a broader legal context than for only one specific group. I understand vulnerability as contextual, and claim that structural factors such as age, poverty and gender inequality promote exposed situations for the individual. Children constitute a vulnerable group, and as such this is an interesting group to study for discussing underlying, fundamental legal issues of different human rights, such as participation rights, personal integrity issues, right to autonomy and so forth. My research has thus an overall aim of not only pinpointing issues that concern children, but also to discuss problems surrounding vulnerability in general and to form legal arguments that apply not only to children but also to other vulnerable groups such as elderly people, people with disorders, and homeless people. In this context, I see vulnerability research as a challenging and exciting future field. I am in the beginning of developing this area outside the child group context. For example, in a recent article, I investigate and discuss e-government in social services, and the current technological development applied to municipalities engaged in

designing electronic services for older and disabled persons, with focus on vulnerability in a highly technologically advanced society.<sup>9</sup> The Norma Research Programme is an excellent environment in which to develop this vulnerability interest, in different fields related to people's everyday life in the years to come. This approach to the law also goes hand in hand with goals set out in the Europe 2020 Strategy of the Social Market of the European Union, prioritising *inclusive* growth alongside smart and sustainable growth.

## 5. Legal issues concerning power, respect and recognition

My research focus on children's legal position in relation to private and public actors may be viewed in such general terms as power, respect and recognition. I am interested in how these actors respectively observe the rule of law in relation to the dependent child who is exposed to different aspects of power, and is thus vulnerable. This interest also applies to other groups who are vulnerable in society. In legal terms, dependency and vulnerability may sometimes be balanced by legislation or other governmental activity, and in some cases may be solved in court. Already in my dissertation I investigated how the child could obtain legal security, increased autonomy and protection of his personal integrity. Subsequently, I have become increasingly interested in issues that in one way or another are related to the dependent and vulnerable individual's need for power, respect and recognition, and I have written about such issues. The terms I have elaborated upon are the child as a subject and as an active participant. For example, in one book I focus on foster children's status as subjects and participants<sup>10</sup>, in a report I investigate children's participation rights in legal matters during youth care<sup>11</sup>, and in an article I discuss the problem of

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<sup>9</sup> Mattsson, T., Socialtjänst och e-förvaltning. E-tjänster för äldre och personer med funktionshinder, *Förvaltningsrättslig tidskrift*, No 3, 2010, pp.255–270.

<sup>10</sup> Mattsson, T., *Barnet som subjekt och aktör. En rättslig studie om barn i familjehem*, Iustus förlag, Uppsala 2006.

<sup>11</sup> Mattsson, T., *Ungas delaktighet. Exemplet institutionsvård*, SiS Forskningsrapport 2, 2008



realising legal rights without associated procedural participation tools for children.<sup>12</sup>

One relevant question for many issues concerning power, respect or recognition for vulnerable and dependent persons is the practical implications of the legislation and the legal practice. By tradition, when investigating such issues, the focus is often on the individual. The idea behind such an approach is that a legal scrutiny of a person's acts can take place without considering the environment in which the person lives and acts. However, the focus on the subject, isolated from the setting, may have the consequence that social and other problems are interpreted on an individual level, and that structural explanations, such as age or sex, are not made visible. This problem certainly concerns administrative matters and legal proceedings with children, because they constitute a group with clear dependency to adults, both in a practical and a legal way. Also, the social welfare system of which the care proceedings is a part, is based on the principle that an inquiry into the individual's needs shall emanate from the surroundings of the person, for example the family, the school, the social life et cetera. In addition, applying the principle that the best interests of child shall be the primary consideration in the individual case, presupposes considering the structure surrounding the child, such as the cultural and societal environment. In one article I take the standpoint that both individual and structural elements are of concern in care proceedings, and I use some examples to demonstrate how such an approach makes visible certain flaws in the legal position of the child.<sup>13</sup>

This approach to the law, together with my interest in multi-disciplinary studies, is currently practised in cooperation with Assistant Professor in criminal law Ulrika Anderson. Our joint research project, financed by the Swedish Research Council, deals with juvenile crime and delinquency issues, in connection to gang activity. We are looking at how the courts treat these youth in public and administrative courts, in juvenile justice cases and in juvenile delinquency cases. Our interest is in how the fact that the youth are

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<sup>12</sup> Mattsson, T., Child Participation in the Decision-Making Process. Some reflections on a dialogical approach for children's recognition, in *Children in Law* (forthcoming).

<sup>13</sup> Mattsson, T., Några rättssäkerhetsaspekter rörande individ och struktur vid prövningen av omhändertaganden av unga, *Nordisk socialrättslig tidskrift* No 1, 2010, pp. 97–112.

part of a certain 'structure' – the gang – is discussed by the courts. We are thus focusing the already-mentioned interaction between the legal tradition of looking at the individual as separate from her surroundings and the practice actually including the surroundings, at least implicitly, in the discussion of evidence.



# Market Forces, Market Prices and the Market Functional Pattern

*Per Norberg*

## 1. Introduction

I started as a research assistant within The Norma Research Programme and completed my doctoral thesis with Anna Christensen as my supervisor (who was replaced by Ann Numhauser-Henning when she passed away in 2001). Anna Christensen was an inspiring person. She held the same intellectual affection for the market functional pattern as she did for the other patterns in the normative field. One important reason for this is that she understood that the notions of justice underlying this pattern are social, in the same sense as the values underlying protection of established position and just distribution, for instance, are social.

My first book was about the conflict between competition law and housing law, and it dealt primarily with rent regulation.<sup>1</sup> The second book – my doctoral thesis – was about the conflict between competition law and labour law regarding industrial action.<sup>2</sup> I used the theory of law as normative patterns in a normative field, and since competition law was involved, the

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<sup>1</sup> Norberg, P., *Konkurrenslagstiftning och bostadspolitik – En studie av den svenska hyresregleringens förhållande till EG:s och Sveriges konkurrensrätt*, Juristförlaget i Lund 1999.

<sup>2</sup> Norberg, P., *Arbetsrätt och konkurrensrätt. En normativ studie av motsättningarna mellan marknadsrättsliga värden och sociala värden*, Juristförlaget i Lund 2002.

market functional pattern was important. The more I worked with this concept, the more I realised how different the market functional pattern was from the concept of the market itself.<sup>3</sup>

In economy, the starting point is often a free trade between two persons resulting in a profit that can be shared. If we apply this sort of thinking to society at large, market forces would appear to be strong. Two persons striving to make a voluntary transaction on a market appear to be hard to stop. If market forces are perceived to be both strong and economically efficient, the state need not intervene to support markets. Nevertheless, the state may need to intervene to redistribute the wealth produced on the market.

However, if the starting point is not the transaction itself, the picture changes. Trade takes place when people trust each other. The market functional pattern describes the social values that must exist to create the trust necessary before the market can work its magic. These values are not stable in the sense that once people have agreed on them, they stick to them. Instead, these values need to be upheld constantly. Röpke puts it this way:

‘...economic integration – as far as its geographical extent and its intensity are concerned – always presupposes a corresponding non-economic “social” integration which provides the setting described. The economic integration cannot in the long run extend further than the social integration, and its intensity is also determined by the degree of the latter. This is the cardinal law which governs the rise and fall, expansion and recession of trade in the history of mankind’.<sup>4</sup>

If the values that underpin the market economy are not stable, the state needs to protect them, and intervene against powerful actors threatening these values. In this article, I will argue that more focus needs to be given to

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<sup>3</sup> A comparison can be made with Erhag and Stendahl – in particular, the part where Stendahl describes how she used complementary facts and theories to deepen her understanding of just distribution/social equality; see Stendahl’s contribution elsewhere in this publication.

<sup>4</sup> Röpke, W., *International Order and Economic Integration*, D Reidel Publishing Company, Dordrecht 1959, p. 72f.

the values creating the conditions that permit the market to work. These values are at the core of the market functional pattern.

## 2. The ordoliberal roots of EU competition law and free market legislation

The history of EU competition law and free market legislation started with a group of German scholars called the Ordoliberals. They based their analyses of society on the question of why Hitler could come to power in Germany, and how he could wield such power.<sup>5</sup> Between the two World Wars, cartels became the dominant feature of the German economic order. All Hitler needed to do was take over the organs steering the cartels, and order them to produce products necessary for his war.<sup>6</sup>

According to the Ordoliberals, competition policy and free movement legislation should not aim only for economic efficiency. It should also be understood as a bulwark against future Hitlers. Free trade and open borders were not only efficient. They also made countries dependent on each other. If countries had imported necessary products from their neighbours, wars would have been much harder to start. Cartels sealed off national markets, and demanded high customs as protection from foreigners; the state was typically not strong enough to resist such demands. Small companies could not wield political influence in the way big companies could. According to the Ordoliberals, a merger or a cooperation between undertakings should not only be judged against foreseeable economic effects today. The risk of a dominant firm or a cartel was not only that they could hurt competition, but also that they risked influencing the state itself improperly. Economic power and political power were understood as linked. Excessive

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<sup>5</sup> Norberg, P., *EG- konkurrensrätten och den sociala dimensionen – En Historik*, Norma 1998:1 p. 21f.

<sup>6</sup> Eucken. W., On the theory of centrally administered economy: An analysis of the German experiment part II, *Economica*, Vol 15 1948, pp. 173–193, p. 184.

concentration of economic power was therefore regarded as dangerous in itself.<sup>7</sup>

After the Second World War, the Ordoliberals were very influential, both in building the new Germany and in shaping the competition law and the free market legislation of the EU. Gerber puts it in the following way:

‘This conception of competition law focused attention on one core problem – private economic power. From the ordoliberal perspective, such power necessarily threatened the competitive project and the primary function of competition law was to eliminate it or at least prevent its harmful effects. The use of a broad concept of economic power as the prime structuring device is one feature of German and European competition law thinking that most clearly distinguish it from its analogues in US antitrust law’.<sup>8</sup>

In the EU, competition law was directed against companies and the market legislation was directed at the Member States. In the early years it was uncontroversial to state – as a matter of fact – that EU competition law should stop cartels and monopolists from sealing of national markets and the market legislation did the same when the legislation of the Member States sealed of national markets.

*Consten/Grundig* is one of several early cases where EU competition law has been interpreted in relation to the goals of the free market regulation. Grundig gave Consten an exclusive right to sell its product in France in return for marketing Grundig and building up a service organisation. As the advocate general pointed out, there could be no doubt that the agreement was in the interest of economic efficiency. Nevertheless, it was considered a violation of the cartel prohibition. The EU Court found arguments more important than that of economic efficiency:

‘Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers

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<sup>7</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe – Protecting Prometheus*, Clarendon Press, Oxford 1998, p. 240.

<sup>8</sup> *Ibid*, p. 251.

between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers'.<sup>9</sup>

The idea of national markets remaining open for economic operators in other countries is the self-evident goal of EU market legislation. But this goal is not important only in that context. It is such a fundamental goal that it must guide the interpretation of competition law as well, even if it works against the goal of economic efficiency.

In the free movement cases, the concepts of direct and indirect discrimination were created and were based on principles of open markets. Integration and non-discrimination became social values embedded in both the market legislation and in competition law, and could come into conflict with economic efficiency.

### 3. The Chicago School

The Chicago School<sup>10</sup> and ordoliberalism were opposites. According to the Chicago School, economic efficiency should be at the centre of competition law and other parts of the economic order. The Chicago School wanted to 'purify' antitrust policy; all social or interventionist elements should be taken away. This School held two basic assumptions. The first was that markets were robust and that competitive outcomes were likely to emerge without

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<sup>9</sup> Cases 56 and 58/64, *Consten and Grundig v. Commission*, ECR 1966 I-299 (page 340).

<sup>10</sup> The Chicago School was a name given in retrospect to a group of lawyers and economists who were very influential in the 1980-ties and 1990 ties. Aaron Director (1901–2004) was a celebrated professor at the University of Chicago. He taught antitrust courses at the law school and founded the *Journal of Law and Economics*. Many of the leading persons took his classes as students and testified to his importance for their understanding of competition law. When school expanded, important contributions also came from persons not in Chicago and not sharing Aaron Director's influence as a common denominator with the original group.



governmental interference; the second was that competition authorities and other governmental agencies were prone to make bad decisions.<sup>11</sup>

The book best describing the thinking of the Chicago School is probably *The Antitrust Paradox* by Robert Bork. He argues that monopolies often grow because they are efficient producers of goods and services. Bork claims that so many efficient cartels and monopolies have been attacked by the antitrust agencies that it would have been better if the authorities had made the opposite mistake and allowed all cartels and monopolies as non-dangerous to society.<sup>12</sup> Accepting big economic concentration today as a reasonable price for economic efficiency is at the heart of the Chicago School thinking.

There were many heuristic rules and principles in both EU and US competition law, dealing with measurements of economic power or the abuse of it. A presumption of dominant position applying to companies with more than 50 % of the market share is one example. Such rules were attacked by economist and legal scientists influenced by the Chicago School. They argued – for instance – that it was very difficult to raise prices even in oligopolic industries. Therefore, a company having 50 % of the relevant market could not be presumed to have pricing power.<sup>13</sup>

Disciples of the Chicago School were successful in persuading both the European Court of Justice and American Courts to rely less on heuristic rules measuring economic power or the abuse of it. Thus, it became harder to use competition law to fight economic power as such. Nevertheless, the Chicago School – though very influential – left some important principles in EU law intact.

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<sup>11</sup> Hovenkamp, H., *The Reckoning of Antitrust*, In: A. Cucinotta et al (eds), *Post Chicago Developments in Antitrust Law*, Edward Elgar Publishing, Cheltenham 2002, pp. 1–33, p. 8.

<sup>12</sup> Bork, R., *The Antitrust Paradox – A Policy at War with Itself*, The Free Press, New York 1978 (reprinted 1993), p. 8.

<sup>13</sup> *Ibid* pp. 101 ff and chapter 8. Compare p. 178 ‘If the leading firms in a concentrated industry are restricting their output in order to obtain prices above the competitive level, their efficiencies must be sufficiently superior to that of all actual or potential rivals to offset that behavior. Were this not so, rivals would be enabled to expand their market shares because of the abnormally high prices and would thus deconcentrate the industry’.

Firstly, the questions of when a company or a group of companies is too powerful and how this behaviour hurts society were as alive as ever. The post-Chicago economic literature has produced impressive arguments that certain types of collaborative activities are much more likely to have anti-competitive effects than the Chicago School imagined. For example, when proportions of inputs can be varied, vertical integration can be socially harmful. When information is not evenly balanced, anti-competitive strategic behaviour is possible. In the presence of specialised assets and economics of scale, even prices significantly above costs can be anticompetitive. Network externalities in some markets can give dominant firms decisive advantages, and help them even to beat superior technologies.<sup>14</sup> Competition law is always social in the sense that it identifies when certain actors have too much power. However, post-Chicago economics continued to be based on a strong bias towards leaving the markets alone. Interventions continued to be exemptions that must be motivated by economic reasoning in the individual case.

Secondly, the Chicago School's success in attacking heuristic rules does not mean that they have been abolished. It is well-known for instance that scale efficiencies have been used by the Commission and the EU Court as a factor relevant towards proving a dominant position. According to the Chicago School, scale efficiencies are one reason why a market may have only a few big companies and should thus not be seen as a competition problem, as big companies are what economic efficiency dictates. Superior technology is a similar example. Today, many of the previous rules of thumb cannot be relied on as before. Lawyers may convince the Commission and the EU Courts to disregard them in some cases, but they may be used in others.

The third is that – unlike in the U.S. – integration and the creation of a common market remained important in EU law. With regard to EU law, ordoliberalism was supposed to be as dead as the American rival of the Chicago School, the Harvard School. Instead, competition law was described as based on (Chicago School or post-Chicago School) economic thinking, but with a twist. The integration argument was obviously

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<sup>14</sup> Hovenkamp 2002, p. 5.

important to the EU Court, but apart from that it was pure economic reasoning.<sup>15</sup>

To summarise the fight between the Chicago School and the Ordoliberal School, the Chicago School has been successful in reducing the emphasis on using competition law and economic regulation as a mean of reducing private economic power. Several heuristic rules assessing private economic power or the abuse of it have been attacked in the name of economic efficiency. Many such rules cannot be used in a heuristic way anymore; instead, the use of them must be motivated in each individual case. Still, the Chicago School has not been able to make economic efficiency the sole aim of the EU market legislation. The integration argument is as important as ever.

Looking at EU competition law and EU market legislation, I clearly felt both areas to be value-based, and that integration and open markets were the core value. I definitely sided with the Ordoliberals. At the same time, I respected the Chicago School for its intellectual rigour. Post-Chicago thinking made deep analysis regarding when companies actually had market power in a sense that made it rational for them to behave in a way that reduced the overall effectiveness in the economy. They really worked hard to identify the exceptions to the general truth they believed in. I wanted to apply that kind of rigour with regard to wage discrimination.

## 4. Wages and sex discrimination

An important post-doctoral project was to study the market concept in competition law and in gender equality law.<sup>16</sup> In 2001, the Swedish Sex Equality Ombudsman was successful in the Swedish Labour Court case AD 2001 nr 13 in proving that a midwife and a clinical engineer did work of equal value. Thus, a presumption for discrimination arose. However, the

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<sup>15</sup> See for instance Glader, M., *Innovation Markets and Competition Analysis – EU Competition Law and US Antitrust Law*, Lund University, Lund 2004, p. 16.

<sup>16</sup> Norberg, P., *Marknadsbegreppet i Konkurrensrätten och jämställdhetsrätten – Om hur olika marknadsbegrepp påverkar rättslämpningen i lönediskrimineringsmål*, Iustus förlag, Uppsala 2007.

employer was able to disprove the presumption by showing that both wages were in line with the market wage for the two groups.

The Labour Court has consistently held that it is enough if the employer shows that wages paid to different groups are in line with market wages; the presumption for discrimination is then broken. This reasoning is logical if the employer only follows a force called the market. The Swedish economists Lars Calmfors and Katarina Richardson observed that the Swedish Labour Court tends to regard the market force as a separate objective factor influencing the wage formation process, independently of other objective factors such as skill and effort. As economists, they are strongly critical towards this perception.

‘It is not possible to make such a separation. There exist no wage influencing factors operating independently of the labour market, instead the market should be regarded as the mechanism where all other factors are integrated into a prevailing price.’<sup>17</sup>

To an economist, a market price is the sum of all factors influencing it. At least two Nobel prizes in economy have been awarded to persons who have made important contributions to labour economics and discrimination. The first is Gary Becker. In his book *The Economics of Discrimination*, he distinguishes between which actor has a preference for discrimination.<sup>18</sup> If the employer has a preference for discrimination, market forces will punish this employer and a non-discriminatory outcome is likely. However, if it is the employees or the consumers who have discriminatory preferences, the market outcome will reflect (and sometimes even reinforce) the discrimination of the society.

Imagine one establishment selling cars in a town and being the only seller of a particular brand. Imagine further that 10% of the male buyers are prejudiced enough to refuse to buy a car from a woman and that 90 % of the men and 100% of the women have no inclination to discriminate; and finally, that men and women buy cars to the same extent.

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<sup>17</sup> Calmfors, L. and Richardson, K., *Marknadskrafterna och lönebildningen i landsting och regioner*, Landstingsförbundet, Stockholm 2003.

<sup>18</sup> Becker, G.S., *The Economics of Discrimination*, Second Edition, The University of Chicago Press, Chicago 1971.

If this establishment has two salespeople, one male and one female, working side by side and being equally competent, the man would sell 10.5 % more cars than the woman.<sup>19</sup> Any wage system linked to performance would mirror this fact, and any promotion based on result would favour the man. In this example, only 5 % of the buyers act in a discriminatory way, but the market effects reinforce this initial discrimination, and result in a far bigger disadvantage to the woman.

The other economist was George Akerlof. He developed efficiency wage models of the labour market. The starting point for such models is that unemployment exists in all Western democracies. According to market theory, wages should then go down, so demand and supply can return to balance (the market clearing rate). But this does not happen. Why do employers find it unprofitable to cut wages in the presence of involuntary unemployment?<sup>20</sup>

Several answers are given to this question, and all the answers have one thing in common. They are based on the presumption that the employer wants to be in charge, be able to give orders and have them followed, and to choose which persons to hire. Suppose that all work and workers are similar and that all labour contracts are entered into at the market clearing level. If a worker is dissatisfied, she can resign and immediately get a new job. An individual employer who wants to avoid this can do so by paying above the market clearing rate. If all employers do the same, there is a market with wages above the market clearing rate and involuntary unemployment.

Akerlof himself presents a sociological model of wage setting. He describes the wage formation as partially an exchange of gifts between the employer and the employee. The employer gives a gift of a wage in excess of the market clearing rate, and the workers reciprocate by giving a work effort in

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<sup>19</sup> For every 100 cars sold, five would go to the man without competition and the remaining 95 would be split equally between them. The man would thus sell 52.5 cars and the woman 47.5 cars.

<sup>20</sup> Akerlof, G.A. and Yellen, J.L., Introduction, In: Akerlof, G.A. and Yellen, J.L. (eds), *Efficiency Wage Models of the Labor Market*, Cambridge University Press, Cambridge 1986, pp. 1–21, p 1 f.

excess of the minimal requirement.<sup>21</sup> Reciprocal gifts always follow a notion of 'fairness'.

This model is different from standard economics, as it is based on the workers' feelings rather than their calculations. But it has much in common with Anna Christensen's idea of normative patterns. It is important to both the employer and the employee to pay and receive a fair wage in exchange for a fair effort. Commutative justice is important. The sociological model is very relevant to analysis of equal pay cases, as it is based on a presumption that it is rational for employers to adapt to the workers' notions of fairness. If a group of male workers believe that a 40-hour working week shall render a wage big enough to support a family, the employer has good reason to adapt to the breadwinner standard of pay if he can. If a group of women regard their pay as complementary to that of their husbands, the employer does not need to pay them at a higher rate. The workers' notions of fairness thus independently influence the wage level.

Anna Thoursie describes the challenge for a legislator in this way:

'Discrimination between occupations dominated by men and women occurs to a large extent through market forces. We can not and we ought not to make an attempt to declare market forces illegal. They have to exist to signal changes in supply or demand. But we must become better to distinguish between this necessary signalling system and the signalling system reflecting gender stereotypes.'<sup>22</sup>

I could not agree more. Discrimination and male supremacy are embedded in the market process, together with important signals of demand and supply. Disentangling one from the other is a formidable task that requires law and economy to work together in a way reminiscent of competition law.

When Anna Christensen described the tremendous potential of the concept of indirect discrimination, she also said,

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<sup>21</sup> Akerlof G.A, Labor Contracts as Partial Gift Exchanges. In: Akerlof, G.A and Yellen, J.L (eds), *Efficiency Wage Models of the Labor Market*, Cambridge University Press, Cambridge 1986, pp. 66–92, p. 73.

<sup>22</sup> Thoursie, A., *Varför tjänar kvinnor mindre? Handbok i lönediskriminering*, Landsorganisationen i Sverige, Stockholm 2004, p. 76.

‘at the same time everyone knows that it will not do for a Court of law to question the most fundamental norms in the societal structure – for instance the structural dissimilarities caused by the free market – and that no court of law was ever intended to do anything of the kind’.<sup>23</sup>

Looking at the Labour Court in sex discrimination cases, the dissimilarities caused by the free market have indeed been perceived as something the Labour Court should not question. If the employer proves that the wages conform to market rates, there can be no discrimination. I believe that this state of affairs comes from the misperception of market forces used by the Labour Court and described by Calmfors and Richardson. If market forces are perceived as objective forces, courts should not question them.

Any person influenced by modern competition law economics would be likely to make the same mistake as the Swedish Labour Court. The basic starting point in such analysis is that markets have a great capacity to restrict the ability of undertakings who want to rig the market in their favour. Therefore, if intervention by the competition authorities is necessary, the burden of proof is on the person claiming that the intervention is necessary. There is a strong market bias in economic thinking in general, at least in the field of competition law.

With regard to labour market economics and discrimination, the opposite is true. Most economic models that I have come across, which assume that discriminatory preferences may exist, and are used to predict what the market outcome will be, end up predicting that the discrimination will affect the market price. Only under totally unrealistic assumptions, such as that it is only employers who hold discriminatory preferences, will market forces become powerful tools to combat discrimination. If somebody claims that a market price is unaffected by discrimination, the burden of proof must therefore rest on that person.

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<sup>23</sup> Christensen A., Structural Aspects of Anti-discriminatory Legislation, In: Numhauser Henning A. (ed), *Legal Perspectives on Equal Treatment and Non-discrimination*, Kluwer, Dordrecht 2001, pp. 31–60, p. 42f.

## 5. Law as social values

To Anna Christensen, all normative patterns were based on social values. If a set of normative values were problematic – for instance impeding economic efficiency given a new societal development – people would tend to abandon these norms and apply other more rational norms. Material rationality was embedded in the norm-creating process and was often the starting point for changes of norms.<sup>24</sup> Yet to the individual, freedom of contract is liberty and not efficiency; justly sharing a profit from a contract is what moral persons do when dealing with each other. Commutative justice is justice between individuals as opposed to justice on a societal level.<sup>25</sup>

When Anna Christensen described the market functional pattern, she described positive social norms that should be upheld. Market prices, on the other hand, are not norms. Market prices are what arise if the state facilitates buying and selling, but leaves prices alone. A normal market takes account of all the preferences of the actors. A customer's preference for buying a yellow car is equally important as a preference for buying the car from a man or an ethnic Swede. Market analyses in competition cases are based on the

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<sup>24</sup> Compare Christensen, A.; Normative patterns and the Normative Field: A Post-liberal View on Law, In: Wilhelmsson T and Hurri S (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisations and Private Law*, Ashgate, Dartmouth 1999, pp. 83–98, p. 94. 'The Market Functional Pattern has gradually pressed away other normative patterns in the labour relation itself. These patterns must then manifest themselves in some other system. There is a close relationship between normative patterns and social necessity'.

<sup>25</sup> Commutative justice is very hard to place in the normative field. On the one hand, it is a moral argument that can be used to defend a price regulation claiming that a strong actor presses unfavourable terms on a weaker counterparty, and under such circumstances it may be used in a way totally contrary to the values of the market functional pattern. On the other hand it is the prime moral value used by neo-liberals like Nozick to argue against distributive justice on the societal level. Suppose all resources were equally divided. Suppose further that a million person wants to see the performance of a superstar and that each pay 25 cent for it. The superstar will then have 250.000 dollars. If the society was just before the transactions and each transaction is voluntary, how can the inequality created be unjust? See Nozick, R., *Anarchy State and Utopia*, Blackwell, Oxford 1974, pp. 160–164. When someone argues for free prices, they tend to assume that both parties gain more or less equally from the individual transactions (that is what happens if the market is characterised by perfect competition). I regard commutative justice as a market functional value because of its close relation with perfect competition.



idea that consumers value gadgets and widgets, and whatever preferences they have, an ideal market shall satisfy them. An acceptable market argument in discrimination cases cannot be allowed to share that starting point. Therefore, lawyers active in this field must try to describe what market functions are acceptable according to discrimination law, and search for legal tools that can be used to distinguish between acceptable and unacceptable market functions.

The Market Functional Pattern is a good starting point. Why do societies want to create markets? Some would answer economic efficiency. Economic efficiency is about maximising utility between the persons entering into a contract. Every person decides for himself what utility he gets from a certain product. If the customer values a red car to be 1000 Euros more valuable compared to a black car, than this amount is her utility from a transaction involving repainting the car. Utility can also be derived from racist or sexist preferences. For instance, an apartment can be more valuable to a racist if the neighbours are of a certain ethnicity. A discrimination prohibition regulates what kind of utility should be disregarded, and is thus in opposition to a fundamental principle of economic efficiency. The principle of non-discrimination is in some cases clearly contrary to economic efficiency. That can be so every time a person receives utility from a prohibited preference. It is therefore obviously important if the principle of open markets is perceived as based on economic efficiency, or if the market functional principles are social values that should be upheld in and of themselves.

Describing legal conflicts using the model of law as balancing normative patterns within a normative field made me see similarities in all three books. The integration argument is basically the same when facing a foreign undertaking being hindered from entering the Swedish real estate market, through unfavourable treatment in the rent regulation, or if the problem is that of women or immigrants entering parts of the labour market where they have previously been excluded. All three problems are discrimination problems, which in EU law is regulated by common non-discrimination principles.

Any attempt to 'purify' competition law or the EU free movement rules, to be only about economic efficiency, is futile. Integration is a social value and

the non-discrimination principle is at its core. It is much too important to EU law to be regarded merely as an exemption from economic efficiency.

Together with Ann Numhauser-Henning, Anna Christensen has given all of us an analytic model where conflicts between the market functional pattern and other normative patterns can be analysed, without the market functional pattern automatically being put above the other patterns. The model also allows account to be taken for the complexities within the market functional pattern. At the individual level, the market functional pattern consists of values. Commutative justice is one important value and the importance of open markets through non-discrimination principles is another important value.

A market price is something different. A market price is the sum of all factors influencing it. Subjective feelings regarding the colour of a car or the colour of a person's skin are equally able to influence market prices. Recognising that market prices have very little in common with market functional values is easier if the two are kept apart. It is also easier to see that market functional values need support from legislative interventions, in the same way as other social values.

Anna Christensen and the Ordoliberals – independently of each other – did something important when they worked towards identifying the values necessary for the functioning of a market economy. These values uphold the market economy. Free trade and non-discrimination cannot be taken for granted. When they exist, they are effectively restricting the power of big companies within a nation. However, if they are not constantly upheld, the tide may turn again towards protectionism and closed national markets.

Therefore, the more success the Chicago School has in taking social values out of competition law and other market legislation, the less robust the framework for the market economy will become. The economic dimension is equally dependent upon the social dimension, and vice versa.



# Discrimination of Part-Time and Fixed-Term Workers

*Hanna Pettersson*

## 1. Introduction

I became a doctoral student, and came in contact with the Norma Research Programme, about halfway into the programme's current lifetime. To me, the Norma ambition has always appeared to be a 'non-dogmatic' approach to legal science and law, and an interest in the interrelations between law and society at large. For a postgraduate student in legal science, this naturally constitutes a good starting point.

My doctoral thesis concerns the EU directives on fixed-term and part-time workers<sup>1</sup>; in particular the prohibitions of discrimination against part-time and fixed term workers. I analyse these legal regulations within a framework inspired by *critical legal positivism*, as elaborated by Kaarlo Tuori.<sup>2</sup>

## 2. Critical legal positivism

Critical legal positivism is an instrument for 'internal' critique of law. This means that a critical analysis of individual court decisions, as well as general principles and legal doctrines, can be performed by employing internal, legal normative yardsticks.

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<sup>1</sup> Directive 97/81/EC (OJ [1998] L14/9) on part-time work; Directive 99/70/EC (OJ[1999] L175/43) on fixed-term work.

<sup>2</sup> Tuori, K., *Critical legal positivism*, Ashgate, Aldershot 2002.

In critical legal positivism, law is conceptualised as consisting of three vertical levels. Beneath the *surface level* – consisting of the continuous discussion resulting in the sources of law – Tuori speaks of *legal culture* and the *deep structure of law*.

These layers are more stable than the surface level, where the contents of law actually change every day. Indeed, the levels change continuously as well, since law is positive; it is a result of human action.

Legal culture consists of law's methodical elements; standards for interpretation and resolution of norm conflicts; and patterns of argumentation in legal decision-making and scholarship. Legal culture also comprises the general doctrines of different fields of law, as well as legal concepts and legal principles.

The deep structure of law is the most fundamental level of law, and also the most stable one. Unlike the surface level of law, the deep structure cannot be identified through any unambiguous criteria. However, it can be identified by reconstructive methods, as it is part of positive law.

In short, the deep structure contains a fundamental social theory of law. Unlike other levels of law, the deep structure is very clearly influenced by the 'social theory' of society in general. This is a precondition for law's legitimacy. In the current form of law – modern law – the deep structure is centred on concepts like legal subjectivity and subjective rights, mainly human rights. At its core is the view of people as autonomous individuals, free to form their own ties to other people according to their will.

Tools for internal, legal critique can be found within any of law's layers, but mainly on the deep structural level. I use the idea of individual autonomy as a central part of law's deep structure to analyse, and criticise, the inequality between employer and employee which is inherent in labour law.

As already mentioned, critical legal positivism is a means of 'internal' critique. I am not evaluating the practical effects of legislation or legal practices; nor do I claim to formulate legal strategies which could actually influence working life. My work concerns law as a social phenomenon. Nevertheless, critical legal positivism is clearly oriented towards broader questions of society, and deals with law as a part of society.

### 3. 'Atypical' grounds of discrimination?

When the fixed-term and part-time work directives were to be implemented within Swedish law, there was discussion about the discrepancies of the non-discrimination clauses, which are very central parts of the directives. In the law-making process, it was argued that discrimination of part-time and fixed-term workers should not be regarded as 'real' discrimination in the sense of, for instance, discrimination on grounds of sex. It was even discussed whether Swedish law should use the term discrimination at all.<sup>3</sup>

Of course, this raises the question of the nature of the common rationality – if in fact there is one – of discrimination law. In the Swedish discussion, several arguments were put forward which pointed to potential answers to this question.

Mainly, other discrimination grounds were said to be 'personal characteristics', while the status as a part-time or fixed-term employee was merely the result of a contract of employment. I argue that this proposed difference is exaggerated, as the individual legal subject, within contemporary law, is always conceived as shaped by social circumstances.

In my view, there is one common denominator for all discrimination law, which does not exclude part-time or fixed-term work at all: subordination. Discrimination law deals with the conflict between different types of subordination, and the deep structural demand for individual autonomy.

Since the labour law subject of the employee is clearly and formally subordinated in relation to the employer, it is not surprising that labour law has been such a dominant area for the development of discrimination law. Furthermore, it is not surprising that fixed-term and part-time workers – who are portrayed as less powerful and more subordinated than permanent, full-time workers in legal texts, and whose real-life counterparts actually are often less powerful and more subordinated, according to social science – have become the subjects of non-discrimination law.

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<sup>3</sup> See Proposition 2001/02:97, *Lag om förbud mot diskriminering av deltid arbetande arbetstagare och arbetstagare med tidsbegränsad anställning*, m.m., p. 31 and p. 98.

## 4. Direct or indirect discrimination?

As mentioned above, part-time and fixed-term work has been described as divergent in relation to other discrimination grounds. Also, these types of employment diverge in the sense that the construction of the non-discrimination clauses is technically different from previous EU non-discrimination law. The non-discrimination clauses appear as mixtures between the classical concepts of direct and indirect discrimination. They are targeted against less favourable treatment of part-time/fixed-term workers, which depends ‘solely’ on employment status – bringing the concept of direct discrimination to mind. On the other hand, they permit justification of this less favourable treatment by ‘objective grounds’. The latter is a clear divergence in relation to the orthodox conception of direct discrimination, according to which direct discrimination can never be justified.

This has been analysed as an example of an ongoing break-up of the boundaries between direct and indirect discrimination. In my view, it is rather a manifestation of what was actually already the case within discrimination law: discrimination needs justification at different levels, but not according to a dichotomy of direct/indirect discrimination.<sup>4</sup>

Thus, in my opinion it is neither possible, nor important, to categorise discrimination of fixed-term and part-time workers as either direct or indirect discrimination. Instead, the technical constructions of the non-discrimination clauses signal the level of the need for justification of different treatment.

## 5. Obscuring conflicts

Taking departure from this view of discrimination of part-time and fixed-term workers as a means of dealing with conflicts, in which working-life

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<sup>4</sup> Cf. Hervey, T., EC Law on Justifications for Sex Discrimination in Working Life. In: Blanpain, R. (ed), *Labour law & social security and the European Integration*, Kluwer Law International, The Hague 2003, pp. 103–152.

subordination lies at the heart, I have analysed the nature of these conflicts, as they are manifested within EU and Swedish case law.

The point that the legal-technical construction of non-discrimination clauses is not decisive is clearly illustrated by EU case law on discrimination of part-time and fixed-term workers. Though the clauses are identically formulated in both directives, the European Union Court of Justice seems to take a harsher position with regard to discrimination of fixed-term workers.

Especially concerning part-time workers, the rather heavy burden of legal-technical tools associated with discrimination law has actually served as a means of obscuring fundamental conflicts. Here, I will discuss the *Wippel* case,<sup>5</sup> which illustrates this, and several other points which are central to my project.

Nicole Wippel was employed ‘on demand’, meaning that she worked only if the employer saw the need for her work, and if she agreed to work at the moment in question. The question was whether the lack of a fixed income and fixed working hours were an expression of discrimination, in violation of the part-time work directive.

The answer provided by the Court demonstrated the limitations of discrimination law, as it is currently interpreted. The Court found that the different terms of employment did not constitute less favourable treatment of part-time workers, since there was no comparable full-time employee. First, it was argued that the employment conditions were fundamentally different, as those without fixed working hours were free to decline an offer of work, while full-time employees were obliged to work according to their contracts.

This clearly demonstrates the importance of the concept of individual autonomy within law; in this instance at the surface level. However, in *Wippel* the Court treated freedom as a concept disconnected from social circumstances, and unaffected by the subordinated position of the employee. An employee might not easily be able to decline when offered an opportunity to work; not only for economic reasons, but also because of a

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<sup>5</sup> C-313/02 *Nicole Wippel v. Peek & Cloppenburg GmbH & Co. KG* [2004] ECR I-09483.



need to be offered work in the future. These arguments are not unfamiliar to labour law, but they were not discussed in *Wippel*.

Apart from the possibility of refusing to work, all full-time employees at the undertaking had a fixed weekly working time – unlike Nicole Wippel. Thus, the Court concluded that her situation was not comparable to that of full-time workers in the same establishment.

In other words, the difference in treatment was justified with reference to the possibly discriminatory terms themselves. An analogous situation would be precluding sex discrimination against women on the ground that women and men belong to different sexes and thus do not find themselves in comparable situations.

Strange as it might seem, this is not a new mode of reasoning within discrimination law. The use of comparability as an ‘escape route’ in cases of possible direct discrimination is not uncommon. However, it is problematic, as it introduces the possibility for justification of less favourable treatment, where justification is not supposed to take place. In cases of classical prohibitions on direct discrimination, which ideally could never be justified, it opens up one possibility for justification.

Even if done carefully, addressing comparability in discrimination cases is by definition a delicate endeavour. Asking oneself whether the situations of two persons, who are treated differently by an employer, are comparable, automatically means taking the reasons for the different treatment into account, according to Sacha Prechal. In other words, it is difficult to avoid the balancing of interests, which is actually supposed to be done in a more transparent way; as an overt question of justification, are there any good, or acceptable, reasons for different treatment, which outweigh the right of the employee to equal treatment?

In cases like *Wippel*, where the directive in question actually addresses justification, it removes transparency and objectivity from the question of justification, which is supposed to be addressed under the heading of

‘objective grounds’ for less favourable treatment.<sup>6</sup> It can also change the burden of proof in favour of the employer.

One point, which is obviously important from the perspective of my study, is the lack of transparency in handling the conflicts which discrimination law involves. The decision of the Court in *Wippel* could be read as a decision to let the perceived needs of the employer outweigh employees’ wishes for foreseeability. Or was, in fact, the freedom of the employee to decline an offer of work decisive? Large parts of the reasoning of the Court remain unknown.

## 6. ‘Misuse’ of contractual arrangements

A clearer balancing of interests was made within the Advocate General’s opinion in *Wippel*.<sup>7</sup> Just like the Court, the AG did not actually discuss justification as justification; she did not conclude whether there were ‘objective reasons’ for less favourable treatment.

Nevertheless, a more exhaustive argumentation than the Court’s was developed, exposing the perceived interests of employees and employers, respectively, and their interrelation. Unlike the Court, the Advocate General did not have a problem with comparability regarding those employed on demand, like Nicole Wippel, and full-time employees. Instead, the AG found that no less favourable treatment had actually occurred.

The lack of fixed working hours was certainly detrimental to employees in need of a regular income, but not to others, who might only be willing, or able, to work irregular hours. The AG proposed the use of concepts ‘misuse’ or ‘abuse’ of work-on-demand arrangements. This was construed from the EU law objective of proper social protection. This objective was also given strong connections to the free will of the employee. For instance, the employee should make the decision to work ‘on demand’ in full knowledge

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<sup>6</sup> Prechal, S., Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes, *Common Market Law Review*, Vol. 41, No. 2, 2004, pp. 533–551.

<sup>7</sup> Opinion of Advocate General Kokott, delivered on 18 May 2004. *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*.

of the pros and cons of such an arrangement, and of whether these pros and cons were actually in accordance with his or her interests.

The concept of misuse of this type of employment contract was connected to the need for a counterweight to the unequal positions of the employer and the employee. Misuse or abuse occurs, according to the AG, for example if the employer systematically refuses to offer work to one employee, against the will of the employee and for no objective reasons.

If this argumentation is read with the idea of individual autonomy as a part of law's deep structure in mind, it offers a far more constructive approach than the argumentation of the European Union Court of Justice. According to such a reading, different conditions for part-time and full-time employees could be said to be 'suspect' whenever they are not in accordance with the genuine will of the employee, or if the bargaining positions of the parties are too strongly unequal. When the prohibitions on discrimination of part-time and fixed-term workers are understood as a result of the conflict between the subordination of the employee, on one hand, and the deep structure of law on the other hand, this appears as a given interpretation.

# Understanding Family Law

*Eva Ryrstedt*

## 1. Introduction

The contemporary notion of how a researcher works, at least to some extent, is that of an individual participating in a research team. However, the research team may be construed in many different ways, depending on the uniting factor for the group. In the Norma Research Programme, the unifying factor is the theory of law as normative patterns in a normative field, in interaction with a functional approach to the law. Thus, a social science approach to the law is shared by the researchers. Many of us have also worked with e.g. a comparative approach to the law, which is a quite natural development when using normative patterns to understand the complexity of the legislation and how it originates from society. The multi-disciplinary legal science framework that is a part of the research done within the Norma Research Programme constituted a basis for the program, even when the group was originally formed back in 1996.

During both my time as a doctoral candidate and as a senior researcher, I have been part of this research group. Already in my doctoral thesis on division and joint dwelling,<sup>1</sup> I worked with the theory of normative patterns – as I will describe in the next section. Always having willing colleagues to engage in discussion has also played an important role in my development as a researcher. The fact that the members of the research program work with

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<sup>1</sup> Ryrstedt, E., *Bodelning och Bostad; Ekonomisk självständighet eller gemenskap*, Juristförlaget, Lund 1998.

different areas in the law, but are united by their approach to the law, has broadened my legal vision.

In addition, I have also established extensive and long-term international contacts during the last ten years, which have led to co-authoring of papers, ongoing discussions with colleagues abroad, participation in international conferences, and different types of research collaboration – such as in the project ‘The nexus of law and biology for emerging technologies’, which was funded by the Australian Research Council (Linkage-International). I have also published papers in several international journals. As part of this research collaboration, I have also visited or held research seminars in many universities. An obvious interest in this context is the EU perspective; in terms of national family law, this primarily means a focus on harmonisation. The Commission on European Family Law (CEFL) has worked for several years with issues regarding harmonisation and has drafted principles in two different books.<sup>2</sup> However, it can be argued that far-reaching attempts to harmonise may be detrimental, owing to different religious views and an obvious difference in the conception of family and responsibility in families, but also because of economic differences among European countries.<sup>3</sup>

For my part, the social science approach has led to an interest in finding ways other than more traditional legal ones, to solve different research issues. I have often started out with the legal-dogmatic method, but also, sometimes implicitly, worked with e.g. the theory of normative patterns. Many of the issues I have worked with have also required empirical studies and a multi-disciplinary legal science approach. Some issues in family law are strongly influenced by economic considerations, often in the form of access to different benefits. Thus there is a strong connection between family law and social law. My international involvement has also led to an interest

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<sup>2</sup> Boele-Woelki, K., Ferrand F., Gonzáles Beilfuss, C., Jänterä-Jareborg, M., Lowe, N., Martiny D., Pintens W., *Principles of European Family Law, Regarding Divorce and Maintenance Between Former Spouses*, Antwerpen-Oxford, 2004 and *Principles of European Family Law, Regarding Parental Responsibilities*, Antwerpen-Oxford 2007.

<sup>3</sup> See Ryrstedt, E., Anmälan av: Boele-Woelki, Katharina, Ferrand Frédérique, Gonzáles Beilfuss, Cristina, Jänterä-Jareborg, Maarit, Lowe, Nigel, Martiny Dieter, Pintens Walter, *Principles of European Family Law, Regarding Divorce and Maintenance Between Former Spouses*, Antwerpen-Oxford, 2004, 170 s., and *Principles of European Family Law, regarding Parental Responsibility*, 331 s., to be published in *Juridisk Tidskrift*.

in how other countries have solved corresponding legal problems. The comparative perspective has made a thorough analysis possible, especially regarding how legislation on family law functions, but also as regards alternative solutions.

## 2. From matrimonial law and back again

Any topic involving legislation on spouses and cohabitants provides a wealth of opportunities for study for someone working with the law from a broad normative perspective. This legislation is full of individual rules that have society's evolution to thank for their formation. This is especially true for a subject such as the one I chose for my doctoral thesis. The thesis describes some of the important aspects of matrimonial law, and law regarding registered partnership and cohabitants, with an emphasis on joint dwelling. One aim with the thesis was to shed light on the normative structure of these relationships. I found the two basic normative patterns, 'community' and 'financial independence'/'individual ownership', in conflict with each other. The pattern 'community' is an old concept in matrimonial law, and is mainly evident in rules applied during a relationship and division of property upon dissolution of this relationship – even if the pattern 'financial independence'/'individual ownership' is also the starting point there, through the spouses' ownership. However, the latter pattern is most evident in the legislation that governs the relationship after the cessation of the relationship. The tension between the patterns also affects the equality between spouses. At the same time, the economic community during the marriage is what constitutes a factual economic equality regarding the standard of living!<sup>4</sup> It can thus be said that the community between spouses leads to material equality.<sup>5</sup> Moreover, equality ambitions are also maintained through the division of property upon the dissolution of marriage – only thereafter are the patterns of individuality allowed to dominate. Furthermore, in my thesis the content of the legal regulation is set in relation to the question of whether marriage and cohabitation are best

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<sup>4</sup> Compare Ryrstedt, 1998, p. 389

<sup>5</sup> Ryrstedt 1998, p. 401.

characterised as status or contractual relationships.<sup>6</sup> Pursuing my interest in the matters I describe above, I subsequently published some different papers (as book chapters) on cohabitantes from a comparative and critical perspective. Though I did not discuss the normative patterns in these papers, the understanding of these concepts was important for the conclusions I made, and for the criticism of the legislation in Sweden.

With the beginning of a new project, consisting of writing a Commentary to the Marriage Code, the circle is closed. After having focused for several years on issues regarding children, I have returned to the area of the family law where I started – marriages and their legal effects. Even if such a book does not give room for expansive methodological considerations, the theory and method of normative patterns are essential for drawing different conclusions as to how the law should be interpreted in this area. Of course, this is of particular interest when it comes to issues where no answer can be found by using the legal-dogmatic method. The ability to go forward in such a case is dependent on the use of other methods, such as the method of normative patterns, but also the comparative method.

### 3. A special interest in issues regarding children

Prior to this, however, my interest has mainly been issues regarding children. I have focused on the legislation on legal custody, residency and access, in relation to how to solve conflicts about children in a way that accommodates the best interest of the child.

The broadening of my research into the field of children and their relations to their parents meant dealing with legislation that was characterised by both older and newer ideas. Historically, society saw children as possessions, which of course was reflected in the legislation. Nowadays, we seem to be

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<sup>6</sup> See further Ryrstedt, 1998. The mapping of normative patterns is conducted in relation to the theory of normative patterns, developed by Anna Christensen, who also found a kinship between the theory of normative patterns and the model of status to contract, developed mainly by Max Weber. See e.g. Christensen, A., *Normative development within The Social Dimension*, Norma 1996:1, Lund, p. 7 and Weber, M., *Ekonomi och samhälle; förståelsesociologins grunder, del 2*, Lund, 1985, pp. 196–200.

moving towards recognition of children as individuals, whose views we are to take into regard. Naturally, when these two types of rules are to be used at the same time, there may be a clash.

Furthermore, there is a strong connection which needed to be explored, between these issues and issues related to economic considerations for social security benefit schemes. Thus, my research in this area, in the research project 'Barnbidrag/underhållsstöd/vårdbidrag – är reglerna om mottagare förenliga med regleringen om gemensam vårdnad, boende och umgänge?' (Child Benefits/Public Child Support/ Care Allowance – are the Rules on Recipients Consistent with the Legislation on Joint Legal Custody, Residence and Access?), was aimed at investigating how these different sets of rules interact. I also tried to establish the coherence – or lack of coherence – in the intersection of the two types of rules: rules on family law and rules on social law.

When trying to determine the effects of social security-related economic considerations for family law outcomes, neither the legal-dogmatic method nor the comparative one was enough. Thus, I started working with empirical data, collected through questionnaires directed towards different professional groups working with families with children. My main focus was to try to establish whether parents' considerations regarding e.g. children's residence were influenced by the constructing of the benefits – that is, by who would be the recipient of the benefits. The result of this part of the study was that economic considerations had quite an astonishing impact on the parents' considerations and thus on their decisions.

This study also encompassed issues connected to the demand for consensus between joint legal custodians, in a comparative perspective. In this part, I explored in depth some other countries' legislation on this particular point. This project led to several publications, both in Sweden and in international journals, as may be seen in my publication list. One paper – on joint legal custody<sup>7</sup> – must be mentioned here, since it was referred to in 'Every picture tells a story'. Report on the inquiry into child custody arrangements in the

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<sup>7</sup> Ryrstedt, E., Joint decisions – A Prerequisite or a Drawback in Joint Parental Responsibility? In *Australian Journal of Family Law*, 2003 Vol. 17, No 2. pp. 155–207.



event of family separation, House of Representatives Standing Committee on Family and Community Affairs, December 2003, Canberra.

The above mentioned research project raised issues connected to the Swedish National Registration. This is a technical institute designed to confirm where citizens reside and to register facts such as identity and family. However, this system has come to play an important role for regulation of benefits. The study tries to answer questions on how the rules on National Registration work, and how they directly affect the situation when persons receive different subsidies, especially those regarding children. The focus in the project 'Folkbokföringens betydelse för det sociala trygghetssystemet' (The Relevance of The National Registration for the Social Security System) was to analyse how the different types of legislation interact.

The overall aim in this project has been to investigate how the rules on National Registration affect the rules within the social security system, and thus family law. In this project, I worked with a comparative method and perspective, which enabled me to conduct an in-depth analysis of the way family law works together with the technical registration, in relation to how families live in reality.

It also became evident that National Registration had come to play a part in the definition of the family a child belonged to – though in a formal way, this is something that is a problem in itself. Today, the definition of a family is no longer a rather simple and straightforward task, especially if the best interest of the child is brought into the equation. My list of publications includes those written for this project.

In the two projects I just described, I found that the child appears to be an object, to which certain benefits are connected and for which parents fight for e.g. legal custody. The question becomes thus to what extent the child's opinion matters, and to what extent the child gets an opportunity to speak his or her mind. In Sweden, the child's right to speak is only one part of what is in the best interest of the child; this means that questions develop as to whether the best interest of the child is decisive in these matters, as the Swedish law has determined it to be. One of the papers in this project was written together with another member of the Norma Research Programme, Titti Mattsson, and dealt with the issue of accepting children as counterparts

in regard to their parents. The paper was thus multi-disciplinary, focusing on public and civil child proceedings, but was also comparative.<sup>8</sup>

Joint legal custody, even if the parents do not live together, was previously the norm under Swedish law. It is still common, even if a presumption longer exists. The Swedish system builds on the parents' consensus, which I dealt with in the first of my projects. Since there is no real dispute-resolving mechanism in Sweden, apart from issues regarding the legal custody itself, residency and access, and since we focus on the parents' reaching an agreement on issues regarding children, an emphasis is put on mediation (cooperation talks). In many cases, a failed mediation may lead to court proceedings. There, the question is to what extent the children are able to speak up in the investigations conducted by the social services authorities, but also how these wishes are expressed in the judgements. I explore these issues in the project 'Barnets bästa eller föräldrarnas – en studie av utfallet av alternativa beslutsmodeller rörande vårdnad/boende/umgänge' (The Best Interest of the Child – or that of the Parents? Decision-making Concerning Parental Responsibility/Residence or Access).

Here, in addition to using a legal-dogmatic method and a comparative method, I needed more advanced methods to help me answer the questions I posed. In the part dealing with mediation, I conducted an empirical study based on interviews of mediation participants. The interviews were analysed with a computerised text analysis tool called PERTEX.<sup>9</sup> In the part concerning the study of social services' reports and court decisions, I used an intuitive text analysis method.

The aim in Swedish mediation is for the parents to agree. However, an agreement might not always be in the best interest of the child, or correspond to each parent's wishes. The analysis leads to interesting conclusions; for example, that the mediation in fact seems to be a negotiation. It seems obvious that this might pose a hindrance to solutions

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<sup>8</sup> Ryrstedt, E. and Mattsson, T., Children's Right to Representation: a Comparison between Sweden and England, *International Journal of Law, Policy & the Family*, No 1/2008, pp. 135–147.

<sup>9</sup> See further for PERTEX e.g. Helersson, H. and Mattsson, J., Demonstrating Pertex: A New Method for Improving Text Interpretation, *Field Methods*, May 2001 Vol. 13 No 2, pp. 115–136.

in the best interest of the child. Regarding social services' reports and court proceedings, the results are important both in relation to mediation as such, and for the judgements themselves. Even if the children were always discussed in the reports, it did not seem that enough room was given to their views, or that they had been given the right to an 'informed' point of view. Neither the best interest of the child nor the child's wishes were always highlighted in an individual or detailed way by the courts.

Also, for this project, I refer to my list of publications for further details of the published papers.

As said in the beginning of this paper, I am now returning to matrimonial law and to a legal-dogmatic method. Nevertheless, I will no doubt continue to pursue my interest in the relations between parents and their children, not least in the context of my international network.

# Researching Normative Developments in Labour Law and Industrial Relations – in a National, Comparative and European Setting

*Mia Rönnmar*

## 1. Introduction

The Norma Research Programme has been truly constitutive for the development of my research career in labour law, both organisationally and intellectually. I have been a member of the Norma Research Programme since its very beginning in 1996, first as a research assistant, then as a doctoral student, and since 2004 as a senior researcher. However, my ‘abode’ in the Norma Research Programme has been dynamically complemented through the years by research visits to foreign universities, such as the London School of Economics, the University of Cologne, the University of Cambridge and the European University Institute. These visits were originally prompted by comparative research, and later linked to different forms of international research co-operation.

Though I have never directly applied *the theory of law as normative patterns in a normative field* in my research, the theoretical and methodological starting points of the Norma Research Programme have clearly influenced and enriched my research. The aim of this contribution is to reflect on some

of these influences and to relate them to my three main research projects, so far.<sup>1</sup>

*First*, the aim of my doctoral thesis is to analyse the legal regulation of the managerial prerogative (especially the employer's right to direct and allocate work) and how it relates to the employee's obligation to work in Swedish, English and German law in light of the increasing flexibilisation of working life. The focus is on functional flexibility, which is a matter of adaptability within permanent employment relationships and aims at varying the content of work.<sup>2</sup> *Second*, the research project on EU industrial relations aims at an exploration and analysis of both an evolving EU industrial relations system as such, and the relationship and interplay between EU industrial relations and national industrial relations, from a labour law perspective. The analysis focuses on aspects such as fundamental Treaty freedoms and fundamental trade union rights, information, consultation and worker participation and European social dialogue, and European collective agreements. *Third*, the research project on flexicurity aims at an analysis of Swedish employment regulation in light of the EU law flexicurity discourse. Flexible and reliable contractual arrangements, flexible work, and employment protection are at the centre of attention and notions of employability and equal treatment also come to the fore. Here, Swedish law is compared to Danish, Dutch, and English law.<sup>3 4</sup>

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<sup>1</sup> For information on my additional research, see the List of Publications.

<sup>2</sup> Cf. M. Rönmar, *Arbetsledningsrätt och arbetskyldighet. En komparativ studie av kvalitativ flexibilitet i svensk, engelsk och tysk kontext*, Juristförlaget i Lund, Lund 2004 and M. Rönmar, The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility, *Industrial Law Journal*, Vol. 35, No 1, 2006, pp. 56–74.

<sup>3</sup> The EU industrial relations project and the flexicurity project are both financed by the Swedish Council for Working Life and Social Research (FAS).

<sup>4</sup> The adoption and integration of Common Principles of Flexicurity into European employment policy and the European Employment Strategy are the recent, most clear, expressions of the EU law flexicurity discourse. The new Europe 2020 Strategy puts forward three mutually reinforcing priorities: smart growth, sustainable growth and inclusive growth. As regards inclusive growth – a high-employment economy delivering economic, social and territorial cohesion – a new flagship initiative 'An agenda for new skills and jobs' is introduced. Here, the Commission will work to define and implement the second phase of the flexicurity agenda, together with the European social partners, to *inter alia* adapt the legislative framework to evolving work patterns.

## 2. Analysing normative developments in labour law – legal dogmatics as a means to an end

In line with the theory of law as normative patterns in a normative field, my aim is to depict and analyse *general normative developments* in the field of labour law. The main interest of knowledge is not legal dogmatics, i.e. detailed knowledge of the precise content of legal rules at a given moment, but instead knowledge of the normative development and functionality of labour law in working life. Thus, legal dogmatics is a means to an end, not an end in itself.

This is evident in all my three main research projects. For example, it is true that the doctoral thesis encompasses an account and analysis of the legal regulation of several fundamental labour law issues, such as the managerial prerogative, the employee's obligation to work, variation of the employment contract, employment protection and information, and consultation and worker participation, in three different countries. This requires detailed studies of large amounts of legal materials, such as legislation, preparatory works, collective agreements, case law, and legal doctrine. However, the main interest is not knowledge of the actual content of these legal rules – but instead, knowledge and conclusions one could draw from knowledge of the content of the legal rules, as regards the overall normative development and functionality of the law in relation to the flexibilisation of work and functional flexibility.<sup>5</sup> Comparative studies, starting from the fundamental legal-functional approach, and the search for and analysis of similarities and differences also imply focusing on the overall normative development.<sup>6</sup>

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<sup>5</sup> The same is basically true for the flexicurity project, carried out together with Ann Numhauser-Henning, and building on insights from our previous studies of the flexibilisation of working life. In addition, this project is more clearly linking the legal developments in Sweden and other countries to EU law developments, and most specifically to the EU law flexicurity discourse. The project is in its initial phase.

<sup>6</sup> Cf., *inter alia*, K. Zweigert and H. Kötz, *Introduction to comparative law*, 3 rev. ed., Clarendon, Oxford 1998. Cf. also the doctoral theses of Andreas Inghammar and Annika Berg, encompassing comparative studies of labour law regulation of work and disability and temporary agency work, respectively, A. Inghammar, *Funktionshindrad med rätt till arbete? En komparativ studie av arbetsrättsliga regleringar kring arbete och funktionshinder*, Juristförlaget i Lund, Lund 2007 and A. Berg, *Bemanningsarbete, flexibilitet och*

### 3. Industrial relations and a ‘social science’ approach to labour law

Furthermore, an important characteristic of the Norma Research Programme is its multidisciplinary and ‘social science’ approach to legal research. In my research, this influence has manifested itself particularly as the integration of industrial relations perspectives. The concept of industrial relations is somewhat ambiguous and refers both to the actual industrial relations system and the relations between its actors, and to a multidisciplinary field of research, including academic disciplines such as economy, sociology, psychology, political science, history – and labour law. Within the Anglo-Saxon countries, industrial relations are a separate and independent academic discipline.<sup>7</sup>

In my doctoral thesis, the integration of industrial relations perspectives was necessitated by the comparative approach, and the need to provide a broader (socio-legal) framework and a societal and cultural ‘pre-comprehension’, in order to correctly and interestingly compare the different national labour law systems. The study of legal rules on information, consultation, and worker participation also required a description and analysis of the industrial relations systems in Sweden, England, and Germany. In addition, the industrial relations perspectives enabled me to draw interesting conclusions about the tension between law and practice, i.e. on the *legal* scope for

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*likabehandling. En studie av svensk rätt och kollektivavtalsreglering med komparativa inslag*, Juristförlaget i Lund, Lund 2008.

<sup>7</sup> I was first introduced to industrial relations in 1999 as a visiting doctoral student at the London School of Economics, which has a particularly prominent history in this field of research. Later I have co-operated with industrial relations researchers also at, *inter alia*, the University of Cambridge and the University of Sydney, and have participated in numerous international congresses (as invited paper presenter, chairperson etc.) organised by the International Industrial Relations Association (IIRA). In 2007 I arranged an international multidisciplinary research workshop at the Faculty of Law at Lund University, gathering labour law and industrial relations researchers from nine different countries, and resulting in a book, M. Rönnmar (ed.), *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives*, Kluwer Law International, Alphen aan den Rijn 2008.

*functional flexibility* and the *practical* conditions for the implementation of *functional flexibility strategies*. For example, both Swedish and English law provide a rather wide scope for functional flexibility (through, *inter alia*, a largely free right for the employer to direct and allocate work and an extensive obligation to work for the employee); the Swedish industrial relations system built on collectivism and social partnership forms a favourable background for the implementation of functional flexibility strategies. The English industrial relations system, on the other hand, with adversarial and 'individualistic' features, together with a lack of strong mechanisms for information, consultation and worker participation, renders an implementation of functional flexibility more difficult.

In the EU industrial relations project, the *industrial relations* perspective is the very thing! Alongside EU labour law, an EU industrial relations system is evolving. EU industrial relations constitute a new common European dimension of industrial relations, at 'another' level than national industrial relations in the Member States. The power relationship and interactions between the social partners within the framework of the European social dialogue, the European Employment Strategy, the open method of co-ordination, and information, consultation and worker participation form part of these EU industrial relations. EU industrial relations are multifaceted and relate to both the interactions between the European social partners at cross-industry and sectoral European levels, and the interactions between the social partners in transnational European companies.

The theoretical points of departure for the research project are John Dunlop's classical theory on industrial relations systems and theories of multi-level governance. According to Dunlop, an industrial relations system, at national or workplace level, includes three *actors*: employers, employees and the state, and their respective representatives. The relations between these actors are determined by three *contexts*: the technical, the market, and the power and status contexts. A *network of rules* governs the workplace and these relations, and constitutes the output of the industrial relations system. This network of rules consists of procedures for establishing rules – the substantive rules – and the procedures for deciding their application to certain situations. In addition, an *ideology*, i.e. the actors' shared beliefs about the industrial relations system and its function and content, helps to bind the system together as an entity, and according to Dunlop, is a necessary requirement for a stable system. Dunlop's theory of industrial



relations systems can be used as an ‘ideal-type’ of model in order to illustrate and analyse the interplay between labour law regulation and the industrial relations system and its different elements.

*EU* industrial relations distinguish themselves in many ways from *national* industrial relations. Though *EU* industrial relations can lay claim to principles, procedures and substantive outcomes – i.e. to a network of rules, such as Treaty provisions, directives, framework agreements and general principles of *EU* law developed by the European Union Court of Justice through its case law, many have found it difficult to ‘fit’ *EU* industrial relations into the exact ‘mould’ of an industrial relations system in Dunlop’s terms. For example, the actors at *EU* level, the European social partners, the *EU* institutions, and the Member States differ in many aspects from actors at national level. Furthermore, the subsidiarity principle and the exclusion of central aspects of the employment relationship and workplace governance from *EU* labour law (such as pay, right of association, right to strike and right to impose lock-outs, cf. Article 153.5 TFEU) limits both the interaction between the actors and the network of rules.

A complementary, and from a labour law perspective, useful and attractive way of discussing and analysing both *EU* industrial relations and their relationship to and interdependence with national industrial relations, is to point to an evolving *EU multi-level* industrial relations framework. This relates to a general debate on multi-level governance in *EU* law and polity. *EU* industrial relations are fundamentally based on European integration and an emphasis on transnational and supranational levels of industrial relations. A multi-level industrial relations framework emphasises the interplay between different levels, such as the workplace, company, multi-company, sectoral, national, and *EU* levels (the *EU*, the *EU* sector and the Euro-company). *EU* industrial relations are thus simultaneously acting *above*, *beside* and *within* national industrial relations.<sup>8</sup> – Through its labour law perspective, this research project, compared to more ‘social science-oriented’ industrial relations research in this area, presents an important and

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<sup>8</sup> Cf. *inter alia* Rönömar 2008 and M. Rönömar, Free movement of services vs national labour law and industrial relations systems: understanding the Laval case from a Swedish and Nordic perspective, In: C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007–2008, Hart Publishing, Oxford, pp. 493–523.

novel *legal* and *normative* analysis of the evolving EU industrial relations system.

The flexicurity project also integrates industrial relations perspectives, by way of employment protection and employability in collective bargaining and the industrial relations system. In focus here is, *inter alia*, the importance of bargaining structures, mechanisms for information, consultation and worker participation, ‘semi-compelling’ legislation, and collective bargaining solutions, such as Swedish so-called Employment Security or Transition Agreements. These agreements, concluded by the social partners, are an important complement to statutory employment protection regulation, and cover large parts of the labour market. These agreements give employees facing dismissal for reasons of redundancy various rights to severance pay, economic compensation and support, and possibilities for job-seeking and training.

#### 4. Conflicting normative patterns and legal ‘balancing acts’

A starting point of the theory of law as normative patterns in a normative field is the insight that the law comprises a multitude of – often conflicting – legal norms, and therefore forms all but a consistent and hierarchical legal ‘system’. Within this multitude of legal norms, a number of basic normative patterns can be distinguished. Anna Christensen emphasised:

‘It is no longer possible to argue that law constitutes a system free from internal contradictions. Law comprises several different basic principles, which cannot be arranged in a hierarchical order.’<sup>9</sup>

This ‘conflictual’ perspective and the need for legal ‘balancing acts’ are not least evident in today’s internationalised and Europeanised multi-level labour law and industrial relations framework, and have influenced my research. In the EU industrial relations project, the conflict between

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<sup>9</sup> See A. Christensen, Normative Patterns and the Normative Field: A Post-Liberal View on Law, In: T. Wilhelmsson and S. Hurri (eds), *From Dissonance to Sense. Welfare State Expectations, Privatisation and Private Law*, Ashgate, Aldershot 1999, pp. 83–98.

fundamental Treaty freedoms and fundamental trade union rights is at the centre of attention, and linked to the human rights discourse.

The emphasis on free movement and fundamental Treaty freedoms within the EU has resulted in important new case law from the European Union Court of Justice: the *Laval*, *Viking*, *Rüffert* and *Commission v. Luxembourg* cases.<sup>10</sup> The fundamental Treaty freedoms challenge national and European systems of collective bargaining, wage-setting, industrial action, and industrial relations, and thus form an important aspect of EU industrial relations. On a general level, this problem reflects the principal conflict between free market and social protection, and economic and social integration.

In the research project, the European Union Court of Justice case law is thoroughly legally analysed in relation to national industrial relations systems and to the evolving EU industrial relations system. Legislative reforms ‘post-Laval’ in the Nordic countries are discussed, as is case law on trade union liability for damages resulting from breaches of fundamental Treaty freedoms. As is evident from the *BALPA* case in the United Kingdom, this case law and the mere threat of trade union liability for damages will have a ‘chilling effect’ on industrial action and trade union activity. The controversial final judgment in the *Laval* case and the legal reasoning of the Swedish Labour Court (developing precisely a liability for damages for the trade unions for the breach of Article 49 EC (now Article 56 TFEU) and the freedom to provide services) is likely to ‘decrease the temperature’ even further.<sup>11</sup>

The reasoning of the European Union Court of Justice and the outcome in these cases challenge trade unions and their possibility to perform core trade union functions at different levels of the EU multi-level industrial relations system. The restrictions on the right to industrial action – despite recognition of industrial action as a fundamental right – limit trade unions’ possibilities to participate in the creation and development of the network of rules, be it expressing international solidarity, protecting workers’ interests

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<sup>10</sup> See Case C-341/05 [2007] ECR I-11767, Case C-438/05 [2007] ECR I-10779, Case C-346/06 [2008] ECR I-1989 and Case C-319/06 [2008] ECR I-4323.

<sup>11</sup> See Labour Court judgment AD 2009:89.

and counteracting social dumping, or establishing transnational regulation. The representation and regulatory functions of trade unions (aiming at negotiation and collective bargaining and information, consultation and co-determination) are central to the trade unions' influence on the network of rules, and have traditionally needed legal reinforcement (through ILO labour standards, other human rights instruments, or national constitutional or labour law regulation) of freedom of association, the right to bargain collectively and the right to industrial action. The way, according to the Court, in which the right to industrial action must be balanced against fundamental Treaty freedoms, and requirements for justification and proportionality must be met, runs counter to the traditional and inherent logic of national industrial relations systems. This logic is based, in the classical words of Kahn-Freund, on 'the inequality of bargaining power which is inherent and must be inherent in the employment relationship'<sup>12</sup> and the achievement of parity of bargaining power between employers and trade unions through the use of industrial action.

The important recent reorientation of the case law of the European Court of Human Rights regarding freedom of association and the possibly conflicting case law of the European Union Court of Justice and the European Court of Human Rights is important. In two landmark decisions from 2008 and 2009, respectively, the case of *Demir and Baykara v. Turkey* and the case of *Enerji Yapi-Yol Sen v. Turkey*,<sup>13</sup> the European Court of Human Rights has aligned its case law with *inter alia* ILO Conventions No 87 on freedom of association and protection of the right to organise and No 98 on right to organise and collective bargaining, and with the European Social Charter. The freedom of association, as protected by Article 11 of the ECHR, is now said to comprise also the right to bargain collectively and the right to industrial action. The Lisbon Treaty and the resultant possible accession of the EU to the ECHR (earlier opposed *inter alia* by the European Union Court of Justice) puts potential conflicting case law of these courts even more in the spotlight.

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<sup>12</sup> See O. Kahn-Freund, *Labour and the Law*, 2<sup>nd</sup> ed., Stevens & Sons, London 1977, p. 6.

<sup>13</sup> Judgment of 12 November 2008 and Judgment of 21 April 2009.

Thus, the research project relates not only to the conflict between fundamental Treaty freedoms and fundamental trade union rights within EU law and the European Union, but also to the (possible) conflicts between two European ‘legal orders’ and two European courts, and EU law and international labour law, respectively. The need to conduct and academically analyse legal ‘balancing acts’ is apparent.<sup>14</sup>

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<sup>14</sup> Likewise in the flexicurity project, focusing on the EU law flexicurity discourse, the balancing between two conflicting values – flexibility (for employers) and security (for employees) – is at the centre of attention.

# In the Best Interest of the Child – Contemporary Parenthood

*Tatiana Tolstoy*

## 1. Introduction

The purpose of this presentation is to briefly introduce the reader to my doctoral thesis. I am fairly new to my role as a doctoral student, but my contact with the Norma Research Programme started years ago when I began to work as a research assistant for Eva Ryrstedt, who is now my supervisor. Already in my examination thesis<sup>1</sup> I used the theory of law as normative patterns in a normative field for my analysis.

The theory and method of law as normative patterns in a normative field is likely also to form the basis of my doctoral research on legal parenthood. However, the first phase, among other things, is to systematise and structure the relevant material to detect the different normative positions. For this purpose I will use traditional legal-dogmatic method. In this context, I will also use a historical perspective to provide understanding of today's rules and how they have developed over time. Then, to deepen the study, I will add a comparative perspective to answer the question of on which ground or grounds legal parenthood should preferably rest. Comparison with other foreign legal systems concerning legal parenthood gives a very good understanding of how these systems have dealt with the issues concerned,

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<sup>1</sup> Tolstoy Kongstad, T., *Mater semper certa est?, En diskussion kring moderskapspresumtionen i svensk rätt och behovet av lagreglering rörande rättsligt moderskap*, Examensarbete vid Juridiska Fakulteten vid Lunds universitet, 2003.

and could therefore be a starting point for how to deal – or not to deal – with these issues in the Swedish legal system.

In my work I introduce four different types or concepts of parenthood, which I find essential for the understanding of my field of research. The first is a *legal parent*, a person who is identified as a parent and has thus received legal status with consequent legal rights and obligations. The second is a *biological parent*, a woman who has gone through a pregnancy and then has given birth to the child, or a man who has contributed through his sperm to the child's nascency. The person who, through her eggs or his sperm, has contributed to the child's nascency is a *genetic parent*,<sup>2</sup> and fourth, the person who takes care of the child is a *social parent*.

## 2. Family in change

Today, the family, which in many ways is seen as the basis of society, takes new forms. The nuclear family is no longer the obvious way to live together; even if this is still seemingly standard, many people live in so-called post-nuclear families. In addition, the right for registered partners or homosexual spouses to be considered for adopting a child and the possibility for lesbian couples to access artificial insemination create new types of families. In today's biomedical world, there are opportunities to create new life through a variety of artificial methods, such as egg or sperm donation. Our formal family types are changing to keep pace with different medical developments, even if this change sometimes seems to be rather slow. The motives behind the changes are not the same. The desire to start a family is mainly based on the nature of our biological identity, our desire for the survival of mankind, and the individual sense of living. The manner of family formation has traditional overtones and is based on social beliefs and norms.<sup>3</sup>

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<sup>2</sup> With this terminology, the genetically determined paternity will coincide with the biological.

<sup>3</sup> SOU 1981:85, p. 97. Cf. also Bengtsson, B., in *SvJT* 1978, p.705 ff. and Ryrstedt, E., *Bodelning och bostad, Ekonomisk själständighet eller gemenskap*, Juristförlaget i Lund, Lund 1998, p. 383.

Other social phenomena are also creating new family ties. One example is the phenomenon of children coming to Sweden with so-called false parents. These 'parents' are adults who declare to the Swedish authorities that they are the biological parents of the children. The children are registered through national registration and the registration is then the basis for both guardianship and custody of the children.

### 3. Reflections on the presumptions of legal fatherhood and motherhood

Current Swedish law on parenthood is clearly characterised by historical and biological factors. The regulation is based on the idea that biological relationship constitutes the basis for legal parenthood. However, this perception does not always correspond with reality.

In Swedish law, there are rules for stipulation as well as for revocation of paternity. Fatherhood is determined either by a presumption of paternity, in which a married man is presumed to be the father of the child his wife is giving birth to, or by confirmation or decree. The presumption seems to be pragmatically justified – more often than not it will be correct. Not long ago, paternity determinations were difficult and the outcome unreliable. Today the situation is quite different. Not only is it possible to revoke paternity without limitation in time, but also to determine with great certainty the biologically-based paternity. This may result in a presumed father who suspects or knows that he is not the rightful father, being able to choose whether or not he wishes to remain in the role. The child may 'lose' the legal father at any time in life. This ability to rescind paternity weakens the child's right to a sustainable fatherhood.

However, the Swedish law lacks rules for establishment and revocation of motherhood, except for the determination of motherhood when a child is conceived through egg donation. The ancient Roman legal presumption *mater est quem gestatio demonstrat*, 'the mother is the one who gives birth to the child', is albeit still valid. The presumption means that motherhood is considered legally established through giving birth. The basis for the presumption is the Roman maxim, *mater semper certa est*, 'it is always clear who is the mother'.



These presumptions are based on the biological relationship forming the basis for legal parenthood. However, this is not always accurate. What is worse, sometimes the biological and genetic relationships come into conflict with each other. In Sweden, surrogacy is not allowed. Nevertheless, a woman or a couple may travel to a country where surrogacy is offered. This does lead to complications with which our legislation has difficulties. One case from the Supreme Court<sup>4</sup> addresses this very issue. Swedish law identifies the surrogate mother (the biological mother) as the legal parent, as stated above. The social mother, who was also the genetic mother in this case, was refused on legal grounds (absence of consent) the right to adoption of the child. A case like this raises many questions, with a starting point in the best interest of the child. The answer lies in how legal parenthood is defined. However, it is uncertain how best to solve it.

From this perspective, the legislation on legal parenthood is obsolete. For the family to function, and ultimately, society as well, it is important that a modern regulatory framework in tune with current family formation patterns surrounds legal parenthood. It is also important to try to create conditions to make social parenthood sustainable.

#### 4. Reflections on other legal constructions concerning fatherhood and motherhood

As stated above, another problem is the social phenomenon in which children come to Sweden with adults who, without a legitimate basis, are purporting to be the biological parents. The registration is then the basis for both guardianship and custody of the children. This in turn legitimises the ‘false parents’ as legal parents. It is usually only when anomalies in the family become known to social service professionals, that the ‘false parenthood’ is detected.

The lack of clear rules regarding revocation of motherhood can lead to uncertain lawsuits and numerous hardships for the concerned child. Adding to this problem, we have the phenomenon of so-called dumped kids (media

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<sup>4</sup> See NJA 2006 p. 505.

coined this term) – children who are left in their former home countries by the ‘false parents’. These parents, who are also guardians, then return to Sweden. The children, though, cannot come home on their own accord, since the guardian's signature is required in the passport applications.

In the event that two gay men choose to privately have children with two lesbian women, it is only the biological mother and father who are the legal parents of the child. However, it seems common that all four persons in these relationships conceive themselves as, and act like, parents. The child then *de facto* has two additional parents, being regarded as merely social parents. These social parents may eventually opt out of further contact with the child. Through this ‘right’, the child may ‘lose’ a parent according to that parent’s discretion. Similar problems may arise, for example in relation to step-parents in so-called post-nuclear families. The problem is further enhanced since in these cases, the social parent also does not have a given right to spend time with the child.

A lesbian couple can of course also choose to have a child through private donation, without having the intention that the biological father is going to take an active part in the child's life. Today, an adoption in relation to the woman not bearing the child, must take place for her to become a legal parent. Otherwise, the biological parents remain legal parents and the problem of social parenthood is the same as the one described above.

However, if the lesbian couple chooses instead to have a child through artificial insemination in the hospital, in the way approved by Swedish legislation, the child will have two legal mothers, subject to the other woman having given her consent to the procedure. In these cases, the situation is the same as for a woman living in a heterosexual relationship. The child has the right, however, in such a case to know the donor's identity. In addition to the biological mother, the other parent becomes both a legal and social parent, with the consent as a basis.

## 5. The need for regulation in accordance with the best interest of the child *and* today’s society

Society today is very different than it was at the time when most of our current legislation came into force. While the presumptions reflect the

nuclear family as a concept and a standard, as well as the traditional method of having children through sexual intercourse, the reality is different. Nuclear families are not as stable as they once were. Since medical technology has made it possible to easily ascertain blood relationships and create new life by artificial means, the legitimacy of the presumptions of parenthood must be questioned. As interpreted in the United Nations Children's convention, if the expression 'in the best interest of the child' shall have real value, children must have a viable right to ascertain their origin.

A key question in light of societal developments is whether the contents of the father and motherhood presumptions currently function in the reality in which they are to be applied. Furthermore, the content of the expression 'the best interest of the child' is to emanate from the child's needs rather than that of their parents and society. Today this is not always the case, nor is this the case in the above addressed issues. A subsequent question becomes this: on what grounds should legal parenthood exist? If parenthood is still wrongly established, the question is whose interest would be served if a revocation is permitted, and if a time limit for revocation shall be stipulated.

Another issue is how to balance the child's interest in knowing its origin and the interest of sustainable parenthood with the parents' rights and the interests of society. The so often important social parenthood can already be converted into legal parenthood through adoption. The adoption institute, however, is not adapted to the diversity of family types that exist today. The question is thus how legislation should be constructed to meet today's new technological and medical advances. Regarding social parenthood in general, the question is what constitutes it, and how it can be made more durable, without it being necessary to enter into legal parenthood.

The principle of the best interest of the child<sup>5</sup> means that the child's perspective in various decisions relating to children should always be guaranteed. However, the content of the concept varies over time and from one society and culture to another. It also varies from one child to another,

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<sup>5</sup> Article 3 in the United Nations Children's convention.

but nonetheless there are certain fundamental rights which are universal and should be equal for all children worldwide<sup>6</sup>

According to article 7 of the Convention, a child has, to the greatest extent possible, the right to know who the parents are and to be cared for by these parents. This wording could imply a right for a child to know its genetic origin<sup>7</sup>. According to the Convention, a child also has the right to respect for its identity (article 8). This can be seen as clear support for the right to knowledge of origins, since this knowledge can be seen as a prerequisite for the individual's sense of identity<sup>8</sup>.

The child's right to a sustainable parenthood is primarily about the child's right to a sustainable *legal* parenthood. The regulation of legal parenthood is biologically based. It has a strong historical sense and the intent of the regulatory system has been that legal parenthood should be lifelong. However, it has been shown that this is not always the case; sometimes, legal parenthood is instead based on facts that can easily be removed, such as an incorrect presumption of paternity.

The actual custody will normally belong to the legal parents. The parental function is essential and disruption could harm the child. The parental functions may also be performed by any type of social parents. These are constituted mainly by factual conditions, for example in step-parenthood. In each case, the social parenthood may play a larger practical role in the child's everyday life than the legal parenthood. A certain degree of fragility still lies in the function of social parenthood. However, the social parenthood may become a legal parenthood, through adoption.

It is thus today particularly from a formal point of view, but also from a substantive one, primarily the legal parenthood that contains legal rights and obligations towards the child. The legal parenthood also holds, through its formal structure, a greater stability than the social parenthood.

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<sup>6</sup> See SOU 1997:116.

<sup>7</sup> See Ryrstedt, E., in *StJT* 2003.

<sup>8</sup> See Singer, A., *Föräldraskap i rättslig behysning*, Iustus förlag, Uppsala 2000, p. 402 f.

## 6. Concluding remarks

All of the reasons mentioned here illustrate the need for regulation of legal parenthood that meets today's technological and medical development and clarifies who is to be regarded as a legal parent. In addition, adoption needs to better harmonise with societal development and children's needs. Revocation of parenthood has now taken on a new and different meaning in relation to the mother in particular, when it is questionable whether the thesis *mater semper certa est* is still tenable. New legislation will have to balance the child's right to know its origin and its right to a sustainable legal parenthood with parents' rights and the interests of society. The focus must always be on the best interest of the child. A thorough analysis also needs to be carried out of the facts that characterise social parenthood and how social parenthood – without turning into a legal parenthood – can be made more stable and thus may provide greater sustainability for the child. A basis for the changes mentioned above, is a discussion of the problems and an analysis of the factors that govern parenthood at the levels most important for the expression 'the best interest of the child'. In addition, the meaning of the concept 'the best interest of the child' needs to be further investigated.

The family is the foundation of society and the question of who really is and should be defined as a parent is important; it creates many new questions. For the family – in its currently disparate design – to function, and ultimately society as well, there must be clear rules on family structures. It is therefore essential that there is an appropriate regulatory framework surrounding legal parenthood.

# Giugni, the Importance of Comparative Methodology and How Labour Law Developed in Italy: a Story from the Nineteen Sixties

*Silvana Sciarra*

## 1. Understanding changes: comparative approaches in labour law

This paper draws on my personal experience as a student of Professor Gino Giugni at the University of Bari in southern Italy. It attempts to describe the impetus he gave to labour law scholarship, starting from the nineteen sixties, and throughout his long and enriching academic career. It also establishes Giugni's innovative approach in adopting a non-formalistic legal method, open to the understanding of 'facts' in the world of collective bargaining, as well as in individual contracts of employment. His research paved the way for normative patterns in labour law, and built the preconditions for assigning a norm-making power to collective actors representing management and labour.

I argue that Giugni's scholarly input is very inspiring for the current discussion on 'global' labour law sources, and it is stimulating for further experiments in comparative studies. Comparative approaches enhance the understanding of changes taking place both in individual and collective

labour law. They also favour the spreading of knowledge on how legal institutions work, in pursuing their goals.

In this Italian narrative from the sixties, normative patterns in labour law originated through a highly sophisticated legal method, and at the same time, were supported by the observation of a free and dynamic system of collective bargaining. The latter is strictly intertwined with the birth of democracy, after the collapse of fascism and the entering into force of the 1948 Constitution.

It is useful to recall that the Coal and Steel Community, born before the European Economic Community, sponsored high-level comparative research in labour law and took a special interest in the evolution of collective bargaining. Giugni wrote a comprehensive comparative report on the subject, taking into account all six founding Member States.<sup>1</sup> This is yet another example of linkages established between academic research and institutional changes, taking place both at a national and supranational level.

The intellectual climate at the University of Bari, where I completed my law degree under Gino Giugni's supervision, was very stimulating and open to promoting comparative research. I chose to spend two years in the USA in the mid-nineteen seventies, under the very generous auspices of the Commonwealth Fund, as a Harkness Fellow. Professor Giugni's letter of reference allowed me to be accepted for one and a half years of work at UCLA, where I came in contact with Professor Benjamin Aaron – the inspirer, among other academics in that university, of a multidisciplinary environment in labour law and in industrial relations.

Both Giugni and Aaron were members – together with X. Blanc-Jouvan, T. Ramm, and B. Wedderburn – of the 'Comparative labour law group' (CLLG), later to become a landmark in the history of this legal discipline. Otto Kahn-Freund, who never actively took part in the work of the group, was, however, the one who best inspired its research agenda and encouraged the spreading of innovative comparative methodology.

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<sup>1</sup> CECA, *Alta autorità, L'evoluzione della contrattazione collettiva nelle industrie della Comunità 1953–1963*, Luxembourg 1967, also available in the other languages of the Community.

The inspiration guiding this group of scholars was to strengthen communication among academics coming from different legal backgrounds. This would enhance the understanding of differences, rather than forcing comparative analysis into ‘transplants’ of legal institutions. The aim was also to foster innovative legal policies, following a very rigorous method based on the understanding of reforms occurring over the years within national legal systems.

Professor Benjamin Aaron, based in the Law School at UCLA, acted as a coordinator in the first part of this challenging joint work.<sup>2</sup> In 1967, he also hosted the CLLG at UCLA, combining comparative research with teaching at the university. This again is a very valuable example of an early ‘globalised’ technique in the spreading of legal methods.

My personal experience was very fortunate. I landed in a place that was already established as a theatre of innovative work. Professor Aaron introduced me to the very active life of the Faculty and to the legendary Institute of Industrial Relations, where academic research was combined with high-level training activities, addressed to management and labour. This point needs to be underlined, in order to confirm that innovative legal methods are very often the product of interdisciplinary efforts.

Giugni was himself deeply influenced by John Commons and by other academics, such as Selig Perlman, belonging to the University of Wisconsin ‘school’ of institutional economics. He travelled to the USA as a Fulbright fellow in the early nineteen fifties, and was fascinated by links between law and economics. He translated Perlman’s book ‘The legal foundations of capitalism’ into Italian, in order to prove to Italian readership the solid ground of his innovative approaches. He also developed an interest in the work of John Dunlop and in particular in his book ‘The system of industrial relations’, later to become a point of reference for studies on collective bargaining.

However, it was Tullio Ascarelli, a leading Italian lawyer of Jewish origins forced to flee during fascism, who left the deepest legacy. His spectrum of

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<sup>2</sup> B. Aaron, The comparative labor law group: a personal appraisal, *Comparative labor law* 1977, 229 ff.; Gino Giugni: qualche ricordo allegro, *Giornale di diritto del lavoro e di relazioni industriali* 2007, 355 ff.



analysis ranged from legal theory to comparative law, and embraced many different legal fields, including commercial law.<sup>3</sup> The economic impact of legal institutions was pivotal in his work, and became yet another landmark in the shaping of Giugni's original scholarship.

At the time of my stay at UCLA, the CLLG was in the process of delivering what then turned out to be its last project, namely a book on discrimination in employment. The book was left in the capable hands of Professor Folke Schmidt, for editing and scientific coordination.<sup>4</sup> After many years, this book remains a significant accomplishment in the field of comparative labour law and is a crucial reference for future studies on discrimination law.

I was lucky enough to be introduced to the CLLG in Italy, on my return from the USA in 1976. The group held meetings in Bologna and Florence, comparing data and shaping the chapters of the book. I followed their work as an assistant, running to the library, whenever it was necessary, making photocopies and searching for materials.

Over the years, the CLLG had accomplished an imaginative and integrated methodology. Rather than working on national reports, followed by comparative conclusions, they assigned a theme to each member of the group, to be developed individually, while incorporating information coming from all other colleagues. Each legal system included in the project was thus presented and explained by the member of the group most familiar with the national system in question. This direct knowledge of the relevant law was then filtered through the interpretation of the writer, who took both personal and collegial responsibility for the ideas offered to the readers. Brilliant and very strong personalities melted together in the CLLG. The talented contributions they produced were even more magnified by this unusual combination of perspectives.

All these anecdotes are relevant – I hope – in the attempt to draft the contours of a very special historical phase in the evolution of labour law. I suggest calling it 'the phase of discovery'. Discovery of such a new methodology could occur because all the leading figures involved in the

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<sup>3</sup> T. Ascarelli, *Studi di diritto comparato e in tema di interpretazione*, Giuffrè, Milano 1952.

<sup>4</sup> F. Schmidt (ed), *Discrimination in employment. The comparative labour law group*, Almqvist & Wiksell International, Stockholm 1978.

group developed a very special curiosity about changes taking place in society. They concentrated their attention on the role and functions of organised groups representing management and labour, as well as on other legal institutions active in labour markets. This approach turned out to be very influential in legal theory, when the interrelationship among different legal and non-legal sources had to be contemplated.

For very different personal and cultural reasons, all the labour lawyers involved in the group – particularly those coming from a civil law background – intended to counterbalance legal positivism and to enhance democratic legal institutions by paying attention to social rules. They were eager to learn from the world of facts and not afraid to approach law from an economic and sociological perspective, because they were true believers in legal pluralism.

## 2. A creative interpretation of ‘private collective autonomy’ in Italian labour law

Gino Giugni was an innovator in the Italian scene. I am currently attempting an analysis of his work, starting from 1960, when he wrote a ground-breaking book in which he developed the notion of ‘private collective autonomy’ in a normative perspective.<sup>5</sup> I am also trying to connect his intellectual biography with a selection of his most relevant writings. This book will be part of a series on leading Italian legal scholars, who were active in different fields in the nineteen nineties.

I argue that Giugni’s work can profitably be proposed for a modern and stimulating comparative exercise, taking into account some of the most controversial legal issues in the current discussion. Giugni’s early contributions were influenced by North American and British perspectives, as well as by Hugo Sinzheimer, widely recognised as the founder of European labour law. The combination of these ideas led to the observation of ‘law in action’ from a socio-legal perspective.

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<sup>5</sup> G. Giugni, *Introduzione allo studio della autonomia collettiva*, Giuffrè, Milano 1960.

Giugni's work, both as a scholar and later in his career – as an active consultant in drafting legislation for labour and employment ministers – significantly influenced the transition to democracy in Spain.<sup>6</sup> Freedom to organise and the right to collective bargaining came to represent essential tools for the building of modern legal regimes. A Spanish translation of the above-mentioned monograph on private collective autonomy is available, including in the preface a thorough analysis of its theoretical underpinnings.<sup>7</sup>

Scandinavian legal realism is also in the background of innovative Italian scholars, though it remains to be ascertained how much it influenced labour law and how comparative research paths crossed each other in those years.

In the very special scenario of Italian labour law, normative patterns developed as a consequence of a lacuna in the legal system, namely the lacking intervention of the legislature on *erga omnes* enforceability of collective agreements. Private collective autonomy developed into a powerful social sphere, capable of setting standards enforceable *de facto* well beyond trade union membership. Furthermore, normative patterns in labour law gradually became a parameter for judges in their rulings on fair wages and working conditions.

Giugni's theoretical approach to collective autonomy went as far as proposing that a private order existed inside the state legal system. Its normative power ran parallel to its autonomy; its features were well-defined, so much so as to convince the largest trade unions that legal intervention was not desirable.

Looking into normative patterns in labour law, it can be argued that Giugni's theories link up in a rather extraordinary way with research on juridification of the social spheres, coordinated by Gunther Teubner in the mid-nineteen eighties.<sup>8</sup> Giugni took part in that discussion together with other labour lawyers – Spiros Simitis and Lord Wedderburn – bearing in

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<sup>6</sup> As acknowledged by a leading Spanish labour lawyer, M. Rodríguez Piñero, Gino Giugni giurista globale, *Giornale di diritto del lavoro e di relazioni industriali* 2007, 407 ff.

<sup>7</sup> *Introducción al estudio de la autonomía colectiva*, translated and edited by J. L. Monereo Pérez and J. A. Fernández Avilés, Editorial Comares, Granada 2004.

<sup>8</sup> G. Teubner (ed.), *Juridification of social spheres*, Berlin–New York de Gruyter 1987.

mind the crisis of welfare states and the urgent need to understand how deregulation would be translated into new regulatory tools. The emphasis was on ‘structural coupling’ between law and politics, so as to investigate how juridification put law in contact with autonomous or semi-autonomous social spheres. In such a prestigious comparative context, normative patterns in labour law emerged as the outcome of original national choices. Despite significant differences among the legal systems included in comparative analysis, similar trends were detected, all leading towards new regulatory regimes, which took into account a close relationship among legal and voluntary sources.

Notwithstanding a very different historical context, similar considerations can be brought forward, with regard to current – and not yet thoroughly developed – normative patterns in transnational collective bargaining. An increased mobility of companies and labour brings about new notions of collective interests and challenges traditional forms of solidarity. Standard-setting becomes a denationalised process and calls into question the role of transnational bargaining agents.<sup>9</sup> It is submitted that ‘private collective autonomy’ remains central as a heuristic tool, as well as a methodology to investigate the roles and functions of organised collective groups representing companies and labour. This may suggest that an Italian narrative from the nineteen sixties could become the starting point for new discourses in labour law.

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<sup>9</sup> S. Sciarra, Notions of solidarity in times of economic uncertainty, *Industrial Law Journal* 2010, 223 ff.



# The Need for Theory

*Thomas Erhag and Sara Stendahl*

This short text tells the story about how the theory on normative patterns, introduced by Anna Christensen, has contributed in different ways to work we have done together as well as separately. We begin with recollections of a project we worked on together, and then describe our respective doctoral projects.

## 1. A European work-first welfare state

During some of our busy post-doctoral years, the two of us struggled together in a project aimed at capturing what today we would call (re-)activation policies and their impact on social insurance systems in a European perspective. The study included three countries: Sweden, Germany and the United Kingdom. In one part of the project, we headed towards a comparative study of national systems.

Our approach was ambitious and included extensive readings on the challenges of legal comparison, as well as well-prepared visits to Germany and the UK to build up in-depth knowledge of the different systems. After a time, we thought we had created a solid framework; concepts had been chiselled out, delimitations seemed reasonable, research questions were manageable and, we believed, not too biased by our Swedish point of departure. However, after presenting our project at a memorable seminar at the Max Planck Institute in Munich, we headed home less confident that we had found a way of capturing the essential developments at hand. The comments we received at the seminar had been positive and encouraging, but also clarified the issue to the extent that our delimitations were challenged.

To make a long story short, it seemed at this point as if the re-activation policies we were interested in did appear in all countries as part of national policymaking and as policy aims at a European level. Still, at the grass-roots level of a legal study, we tend to be stuck with paragraphs and other hard-core legal material. On such a level our study seemed to demand a comparison including areas as disparate as the legislation surrounding the Swedish national health insurance, the German unemployment insurance and British labour law regulations.

It was in the aftermath of the Munich seminar and the realisation of the need to re-conceptualise our assignment that the theory of normative patterns proved resourceful. The shift in theoretical approach enabled us to include in our work the different systems and regulations that were relevant, but which were not possible to compare owing to their differences, by focusing on legal impact on an aggregated level. We became more interested in *how* law was used in policy implementation, and this opened up for a discussion on normative impact. Based on this change of approach, we wrote an edited book on the European work-first welfare state.<sup>1</sup>

Direct reference to Christensen's work is made only in the final chapter, but the impact of the shift of theoretical approach, from a more traditional comparative law standpoint to a study focused on legal strategies and normative change, is visible already in the outline of the book as well as in the work preceding it. The authors who were asked to join in the project were given instructions – but they were not asked to respond to a detailed questionnaire, or to describe their different systems in a pre-decided framework. The assignment given was to ‘...describe and discuss legal strategies used to increase labour market participation.’ The concept of legal strategies was influenced by readings of John Henry Merryman and his development of legal indicators as a basis for a quantitative study of law and social change.<sup>2</sup> The texts we received from the contributing authors reflected

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<sup>1</sup> Sara Stendahl, Thomas Erhag and Stamatia Devetzi (eds), *A European Work-First Welfare State*, Gothenburg 2008.

<sup>2</sup> Pierre Legrand & John Henry Merryman, ‘A Dialogue with John Henry Merryman’, *Am. J. Comp. L.*, 47, 1999, see also Merryman, John Henry, David S Clark & Lawrence Friedman, *Law and Social Change in Mediterranean Europe and Latin America [:] A handbook of legal and social indicators for Comparative Study* and Merryman, John Henry,

the differences we were aware of, but in a context where these differences no longer created a hindrance for a comparative discussion.

This said, it is also true that to some extent, the book we edited ended where we would have liked to begin. It is more an argument for how legal comparative work, with an interest in change and normative impact, could be carried out, than the presentation of an actual, full-fledged comparative study.

Apart from work done together, our individual work has also been influenced by the theory on normative patterns especially in our doctoral theses.

## 2. Freedom of movement and social security financing – Thomas Erhag

My thesis on the financing of social security<sup>3</sup> was written within the framework of the Norma Research Programme and during the aftermath of Swedish economic recession in the early 1990s. In Swedish social security, this was a time of reforms, beginning with considerably lowered benefit rates in sickness insurance, the introduction of employee contributions and a major pension reform. The legislator also used a new type of rhetoric in the *travaux préparatoires* with an increased emphasis on terms such as ‘contract’, ‘insurance’ and ‘rights’, in what we considered a new way. Combined with the Swedish membership in the European Union and the implementation of the European Convention of Human Rights, a new normative landscape took shape.

Anna Christensen’s theory on normative patterns proved to be an important tool for describing this new landscape, and is still a basis of my understanding of the changing role of social security law. The legal sources

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‘Comparative law and scientific explanation’, in *The loneliness of the Comparative Lawyer*, Kluwer Law International, 1999.

<sup>3</sup> Thomas Erhag, *Fri rörlighet och finansiering av social trygghet*, Santérus förlag 2002.



of social security are highly detailed and in constant change. Moreover, the legal area of social security is of a mixed character.<sup>4</sup> In the thesis it was apparent that the legislation on financing of social security had its normative roots in private insurance, later defined as social security and part of public law, but during the last twenty years treated as a distinct issue of tax law. When moving between border-regions of different legal areas or in the outskirts of a distinct legal field, it becomes difficult to find and analyse the relevant normative structures. The development dynamics of the normative patterns can clarify the broader lines of development in law.

In an essay published in 1997, Anna Christensen showed how the position of Swedish social insurance in the normative field had been pushed towards 'accrued rights' (intjänandeprincipen) and the market-functional pattern. Although Anna Christensen's model was not fully used in the 1997 essay, it proved important in my own description of normative change in the pension system.<sup>5</sup> Today's Swedish pension system shows a decreased ambition in securing a basic income level for 'weaker' groups and emphasis is put on protecting accrued rights based on earlier income. With Anna Christensen, this is an expression of normative change in Swedish social security where one has tried to 'purify' the basic patterns on which social insurance are based. Some systems are based on accrued rights/loss of income and others are based on the principle of solidarity/need.<sup>6</sup>

The conclusions of Erhag's doctoral thesis are in the same direction, though based on a comparative EU study on the financing of social security. On an EU level, there are no real competences, or positive legal forces, to counter the sometimes harmful adjustment of national legislation caused by fundamental economic EU law objectives. This is because the EU lacks the normative basis expressed in social security systems of the Member States, i.e. to build up 'fair' and 'just' social security with redistributive effects. National solidarity is not reflected by solidarity 'among the peoples of Europe'. I see great potential in using the Norma model, both in the further

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<sup>4</sup> Martti Kairinen, Socialrätten och rättssystemet, *Retfaerd* No 47, 1989. s. 65–75.

<sup>5</sup> Thomas Erhag, Socialförsäkringen och det nya pensionssystemet, in Vahlne-Westerhäll (ed.), *Rättssäkerhetsfrågor i socialrätten*, Norstedts 2002.

<sup>6</sup> Anna Christensen, Den EG-rättsliga likhetsprincipen versus den europeiska enförsörjarfamiljen, i Bernitz m.fl. (red) *Europaperspektiv Årsbok 1999*.

study of EU legislation in the field of free movement and social security. Indeed, there are indications of a normative shift on the EU level towards an increased emphasis on solidarity, partly owing to the dynamics of EU law.<sup>7</sup>

### 3. Communicating justice providing legitimacy – Sara Stendahl

In Stendahl's thesis, 'Communicating Justice Providing Legitimacy', the theory on normative patterns played an important part in enabling an analysis of basic welfare state values and their impact on societal conceptions of justice.<sup>8</sup>

Although my first, and only, face-to-face meeting with Anna Christensen came quite early in my career as a doctoral student, it took some years before I recognised the importance of her theory in relation to my own work. Anna Christensen and Ann Numhauser-Henning came to a seminar at the department of law, Göteborg University, in 1998 to honour Dennis Töllborg, who had become a full professor. The theme was property rights and the seminar was partly held across the street at the Social Sciences Department. At that time a newcomer to the academic research world, I listened to the comments from my more senior colleagues on the short walk to the other building. Anna Christensen was highly respected, but not uncontroversial in a Göteborg setting in the late 1990's.

More than a decade has passed since this seminar took place, and I will not pretend that I remember what was said. Still, some years later when I re-connected to the theory on normative patterns, I daresay I brought to the

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<sup>7</sup> Erhag 2002. Reference is here made primarily to the European Union Court of Justice case law on EU citizenship. Compare, however, Anna Christensen's sharp analysis of the development of the EU principle of equal treatment in relation to social security and the limitations of EU-law as long as it is based on a distinctly different normative pattern. Den EG-rättsliga likhetsprincipen versus den europeiska enförsörjarfamiljen, i Bernitz m.fl. (red) *Europaperspektiv Årsbok 1999*.

<sup>8</sup> Stendahl, Sara, *Communicating Justice Providing Legitimacy*, Iustus Förlag, 2004, pp. 253–307.

reading an approach to the study of law marked by my geographical residence – positioning myself at that point as a ‘critical realist’.

At the core of my doctoral dissertation were the legal practices of the Administrative Courts. The title represents a claim, or an argument: that the practice of law in courts provides legitimacy in case it communicates justice (and that this is something to strive for). It was in the midst of this work – in which I had set out to scrutinise hands-on legally argued decision-making – that the theory on normative patterns came to the rescue.

I ended up making frequent references to Anna Christensen, and in her theory I found a kinship in the marked interest for underlying patterns. Still, it was also clear that our approaches to the normative foundations of the Swedish welfare state differed – in aim, method and sources. In my text, the work of Anna Christensen becomes one of the sources used to describe prevailing basic welfare state values, along with writings of especially Bo Rothstein, but also the work of other empirically based social policy researchers. Nevertheless, the influence from Christensen’s work differs, and far exceeds, the other sources to the extent that her three main *basic normative patterns* recur in my text as three almost identical *clusters of values*. The input from Christensen thus had an impact on my analytical framework and not only on the content of values as such.

My reason for renaming the patterns and turning them into clusters was based on differences in aim and method. While Christensen studied law and found patterns, my aim was broader and my sources more manifold. By renaming the patterns, I was free to use Christensen’s work as one of the inputs and then add complementary facts and theories that helped in further exploration of the different clusters. This was especially true for my discussion on just distribution /social equality, the pattern that Christensen explores least.

In my post-doctoral work, I have remained interested in the practices of legal decision-making. In terms of method, this interest has led to more empirically based studies of court cases and permissions,<sup>9</sup> but also to studies

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<sup>9</sup> For example: Stendahl, Sara. (2009). Arbetsförmåga i rättstillämpningen. Prövning av rätten till kompensation för inkomstförlust efter en trafikolycka – en empirisk jämförelse mellan rättstillämpningen i allmän domstol och förvaltningsdomstol. Arbete och Hälsa. 43 (8) s.

where actors in the decision-making process have been interviewed.<sup>10</sup> As for theory, I have continued to explore the notions of justice and legitimacy in the provision of social security, often with reference to the work of Jerry L Mashaw,<sup>11</sup> but also – as connected to notions of basic values – to the work of Avishai Margalit.<sup>12</sup>

In my present work I have returned to studying the practices of Swedish administrative courts.<sup>13</sup> The extent to which I will once again apply the theory on normative patterns remains to be seen.

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1–86, and Cramér, Per, Erhag Thomas and Stendahl, Sara (2010) '*Ansvarstagande i kärnbränslecykelns slutsteg – ett rättsligt perspektiv*' slutrapport, Stockholm, SKB. (Forthcoming; peer-reviewed and accepted).

<sup>10</sup> Ibid, Stendahl, Sara. (2009).

<sup>11</sup> Mashaw, Jerry, L., *Bureaucratic Justice. Managing Social Security Disability Claims*, Yale University Press, 1983. Extensive reference to Mashaw is made in: Stendahl, Sara (2010) Arbetsförmedlingen och (hoppet om) byråkratisk rättvisa. Att studera rättslig praktik i välfärdsbyråkratins handläggning av ärenden – socialrättens möjligheter och möjliga begränsningar, *Nordisk Socialrättslig Tidskrift*, No 1–2.

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