

1

Introduction

MIA RÖNNMAR*

1. INTRODUCTION

This book is the fourth volume in this series of publications from the Swedish Network for European Legal Studies. This volume focuses on labour law and social security law, and contains peer-reviewed chapters aimed at spreading information about Swedish legal research on European law – including development, impact and reform of the law – to a broad international audience. The chapters provide knowledge about a range of highly topical and important legal developments, and their analysis uncovers new and interesting perspectives, thereby contributing to timely doctrinal debates. The chapters are written by distinguished legal researchers associated with Swedish universities. Some of the chapters are based on keynote speeches made at the international conference ‘Labour law and social security law in an enlarged Europe – a social dimension on the move?’, arranged by the Swedish Network for European Legal Studies in Stockholm on 3–4 November 2009. Sweden has been a member of the European Union since 1995, and EU law and European law perspectives have been well integrated into Swedish labour law and social security law research.¹ The chapters in the book illustrate this far-reaching and multifaceted ‘Europeanisation’ of legal science.

The book comprises three parts and ten chapters. The purpose of this introduction is to present the different chapters of the book, and to link them together. This introduction also contains the author’s personal reflections on these chapters.²

Within the European Social Model and the European Welfare State, Sweden (and to some degree the other Nordic countries as well) can be said to represent

* Associate Professor in Civil Law, LLD, Law Faculty, Lund University. Member of the Norma Research Programme, the ReMarkLab Research Programme, and the European Labour Law Network (ELLN), a legal expert network of the European Commission. This research is performed within the research project ‘Flexicurity – A Study of Swedish Regulation in a Comparative Context’, financed by the Swedish Council for Working Life and Social Research (FAS).

¹ See eg M Rönmar, ‘Anställningsskydd och anställningsavtal – aktuell arbetsrättslig forskning med ett europeiskt perspektiv’ (2007) 3–4 *Arbetsmarknad & Arbetsliv* 73.

² The author is of course entirely responsible for this introduction and the views and conclusions expressed here.

a specific system, as regards both labour law and industrial relations and social security law. In terms of influential comparative typologies or models (naturally ‘flawed’ by a certain element of vagueness and simplification, but also very helpful in analytical and pedagogical respects), Sweden has been described as a representative of inter alia a Nordic legal family, a Nordic labour law model, a social-collectivist industrial relations system, a consensual industrial relations system, a social-democratic welfare state regime, a Scandinavian social security law system (a ‘sub-group’ of the Beveridge system), and a coordinated market economy.³

The Swedish labour law and industrial relations system builds on self-regulation, cooperation between the social partners and autonomous collective bargaining. The trade unionisation rate is about 70–75 per cent and the collective bargaining rate is about 90 per cent. Wages and other terms and conditions are generally set by collective bargaining, which in turn is accompanied by strong mechanisms for, and well-developed regulation of, information, consultation and co-determination. Since the 1970s, labour law legislation is also frequent, and inter alia provides for employment protection. The well-developed Swedish social security law system is characterised by universalism and individualism. Each person must fulfil the insurance conditions in his or her own right, and family members cannot derive rights from a working person. All persons are covered by a basic protection (such as health care, social assistance etc), while work and rules based on income replacement form another important part of the system.⁴

Labour law and social security law have close links. Social security has developed as part of the industrial society, and can be understood as a complementary and dependent system to wage work. At an aggregated societal level, social security supplements wage work and its distribution of resources. Social security provides protection and maintenance in situations (against ‘risks’) when a person is unable to earn a living through wage work, owing to sickness, old age, unemployment or childbirth.⁵ Against this background, interdisciplinary legal research – studying both labour law and social security law – is particularly valuable and enables a deeper understanding of the functioning of the labour market.

At EU level, the concept of the *social dimension* also reflects this complementarity of labour law and social security law. The social dimension

³ See inter alia K Zweigert and H Kötz, *Introduction to Comparative Law*, 3rd rev edn (Oxford, Clarendon Press, 1998), GJ Bamber and RD Lansbury, ‘An Introduction to International and Comparative Employment Relations’ in GJ Bamber and RD Lansbury (eds), *International and Comparative Employment Relations. A Study of Industrialised Market Economies*, rev edn (London, Sage, 1998), G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge, Polity Press, 1990), and P Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (New York, Oxford University Press, 2001).

⁴ See inter alia E Holm, *Fri rörlighet för familjer. En normativ analys av föräldrapenningen och EU-rätten* (Lund, Juristförlaget i Lund, 2010).

⁵ See A Christensen, ‘Normativa grundmönster i socialrätten’ (1997) 78 *Retfærd* 69 and Holm, *Fri rörlighet för familjer*, above n 4.

refers to the part of EU politics and legal regulations connected to the citizen's social needs, social protection and social integration. The labour market, social security and families are central areas of regulation in the social dimension, forming the legal structures of 'everyday life'.⁶ EU labour law and national labour law interact as a result of the principle of subsidiarity and the limited legislative competence of the EU. Today, EU labour law covers regulation in the areas of fundamental rights, free movement of workers, non-discrimination, health and safety of workers, working and employment conditions, restructuring of companies and information, consultation and worker participation, as well as decision-making and processes within the framework of the European social dialogue, the European Employment Strategy and the open method of coordination. In principle, social security law is a matter for the individual Member States and the national legislation. However, the coordination of social security in the European Union (Community) and between the Member States was implemented early on as a way to facilitate the free movement of workers. Through the open method of coordination, aspects of social security (for example, old age pensions), social inclusion and social protection have been further developed. Following the Lisbon Treaty, a social market economy is one of the main aims of the European Union (Article 3 TEU), and the newly adopted 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 – the new flagship initiative an Agenda for New Skills and Jobs has been launched.⁷

2. LABOUR LAW, THE PROTECTION OF FUNDAMENTAL RIGHTS AND THE TENSION BETWEEN ECONOMIC AND SOCIAL INTEGRATION IN THE EU

In the first part of the book, four chapters approach the theme of labour law, the protection of fundamental rights, and the tension between economic and social integration in the EU.

In her chapter, *The ILO Acquis and EU Labour Law*, Petra Herzfeld Olsson provides a general overview of the position of the ILO acquis in EU labour law.

⁶ The social dimension of the EU is at the centre of attention for the Norma Research Programme, coordinated by Professor Ann Numhauser-Henning and of which the author is a member. The Norma Research Programme started out fifteen years ago at the Law Faculty of Lund University, with funding from the Bank of Sweden Tercentenary Foundation. The purpose of the Programme is to create a research environment where basic normative patterns and their developments and relationship to the ongoing changes within the area of the social dimension in Europe can be studied in depth and from a long-term perspective. See inter alia A Numhauser-Henning and M Rönningmar (eds), *Fifteen Years with the Norma Research Programme. Anniversary volume* (Lund, the Norma Research Programme, Faculty of Law, Lund University, 2010), found at www.jur.lu.se/norma.

⁷ See Communication from the Commission, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020.

She starts from the contradiction that recent ECJ case law⁸ is difficult to align with the freedom of association and the right to strike as protected by the ILO Core Labour Standards and Convention No 87, while at the same time other EU institutions, such as the European Commission and the European Parliament call on all EU Member States to ratify all up-to-date ILO Conventions.

After an introduction to the ILO and its mandate – highlighting inter alia the emphasis of recent years on Core Labour Standards and their universal recognition and application (through the 1998 ILO Declaration on Fundamental Principles and Rights at Work), the Decent Work Agenda and Fair Globalisation – Herzfeld Olsson reviews general commitments made by the EU in order to safeguard the respect for ILO norms within the EU (inter alia policy statements, the Community Charter of the Fundamental Social Rights of Workers, requirements in the Social Chapter of the TFEU and the EU Charter of Fundamental Rights). She also analyses the way in which references to ILO Conventions are made when EU labour law is developed, whether EU labour law normally fulfils ILO requirements, the use of ILO Conventions as interpretative guidance by the ECJ, and what happens when the ECJ is confronted with an ILO norm that contradicts EU labour law. In this last respect, Herzfeld Olsson discusses Article 351 TFEU (formerly Article 307), which states:

The rights and obligations arising from agreements before 1 January 1958, or for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member States or States concerned shall take all appropriate steps to eliminate the incompatibilities established, Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

According to the ECJ (in *Commission v Austria*⁹), the contradiction between a requirement stemming from an ILO Convention and EU law imposed an obligation on the Member State to denounce the ILO Convention. In relation to this, Herzfeld Olsson asks the important question of whether any ILO Convention will risk being treated in the same way. ‘Would it matter if one of the Core Labour Standards would have been at the centre of the case? One reasonable assumption would be that at least Conventions giving inspiration to the rights included in the concept of fundamental rights according to Articles 6.1 and 3 of the EUT would be treated differently. The case law from the ECJ in *Laval* and *Viking* however indicates that that not necessarily would be the outcome.’¹⁰

Thus, the analysis of Herzfeld Olsson reveals a complex situation as regards the status and impact of the ILO *acquis* in EU labour law. By way of conclusion,

⁸ See Case C-341/05 *Laval* [2007] ECR I-11767, Case C-438/05 *Viking* [2007] ECR I-10779.

⁹ Case C-203/03 *Commission v Austria* [2005] ECR I-935.

¹⁰ Herzfeld Olsson’s chapter p 53.

she emphasises that there is no legal requirement for the EU to respect the ILO *acquis* in its labour law-related internal activities. According to Herzfeld Olsson, the ‘situation would have been different if the ILO Conventions were to be part of the fundamental rights which form part of the fundamental principles of EU law (Article 6 TEU). In that case, it would have been necessary for the EU and the Member States to respect their content in the legislative process. Some of the ILO Conventions have been given this status by the ECJ.’¹¹

The ILO *acquis*, especially Conventions Nos 87 and 98 and the legal reasoning of the supervisory bodies of the ILO, is also discussed by Örjan Edström in his chapter, *The Right to Collective Action – in Particular the Right to Strike – as a Fundamental Right*. The aim is to analyse, especially from an EU law perspective, some normative systems that have had an impact on the right to collective action, and in particular, on the right to strike. Three normative legal systems are discussed and analysed, namely the ILO Conventions Nos 87 and 98 (ILO), the European Social Charter and the European Convention on Human Rights and Fundamental Freedoms (the European Council), and the Charter of Fundamental Rights of the European Union and the Treaty on European Union following the Lisbon Treaty (the European Union). The chapter ends with an analysis of convergence and divergence trends in law with regard to the right to collective action and the right to strike.

Edström describes how the fundamental right to collective action and the right to strike, are not explicitly dealt with in ILO Conventions Nos 87 and 98, but instead are considered as an integral component of the right to association. In his examination of the interpretations of the right to collective action and the right to strike made by the different Courts and supervisory bodies linked to the ILO, the European Council and the European Union, Edström highlights recent and much debated case law developments, such as the *Laval*- and *Viking*-cases, the *BALPA*-case and the *Demir and Baykara*-case.¹² In relation to the *Demir and Baykara* case from the ECtHR, Edström emphasises the important conclusion drawn by the Court that the right to collective bargaining is an essential element of the right of association. He also points to the fact that ‘critics of the Court’s former standpoints have noted that in *Demir and Baykara* the Court sends a signal that it may be shifting its position away from what the critics have seen as an unwillingness to use Article 11 of the Convention for strengthening trade union rights’.¹³

As a main conclusion, Edström finds that the right to strike as a fundamental right has been clearly strengthened in recent years – a convergence trend – following *inter alia* the adoption of the Lisbon Treaty in the EU and the case law of the ECtHR in *Demir and Baykara* and other cases. This development has been facilitated and influenced by the interplay between the three different normative

¹¹ Herzfeld Olsson’s chapter p 54.

¹² *Demir and Baykara v Turkey*, Judgment of 12 November 2008, ECtHR.

¹³ Edström’s chapter, p 66.

legal systems. The different Courts and supervisory bodies often make references to each other, and in doing so, according to Edström, they ‘seek to legitimise the status of their respective decisions regarding the fundamental right to strike’.¹⁴ Another factor promoting convergence is the explicit recognition of the European Convention on Human Rights and Fundamental Freedoms in Article 6(3) of the Treaty of the European Union. Edström also finds evidence of a divergence trend in the fact that the fundamental right to strike will continue to be subject to restrictions in different ways in the three normative legal systems, inter alia due to differences at the national level between industrial relations systems and traditions. According to Edström, one crucial issue for the future will be how the ECJ and the ECtHR interact and in practice link their two normative systems together. In this respect, the ‘proportionality tool anchored in both legal traditions provides a useful instrument for balancing the different perspectives’.¹⁵

The starting points for Jonas Malmberg’s chapter *Regulating Posted Work – Before and After the Laval Quartet* are the overarching questions of ‘What wages and working conditions are to be applied to workers who, within the framework of the transnational provision of services are sent to work temporarily in the territory of another Member State?’ and ‘How shall the right to take collective action within the single market be balanced against economic freedoms?’.¹⁶ The aim of his chapter is to analyse the legal responses at international level to the case law of the ECJ, the Laval Quartet.¹⁷ Malmberg provides an initiated account and analysis of posting pre-Laval, the Laval Quartet, and posting post-Laval – and there especially of the legal responses to the Laval Quartet by the European Court of Human Rights and the ILO Committee of Experts, and possible future amendments of EU law. He points to the fact that these legal responses at international (but also at national) level contain elements of both adjustment and resistance, and challenges to the doctrines established by the ECJ. In comparison with Edström (who emphasises the strengthening of the right to strike a fundamental right), Malmberg’s analysis is more focused on the problematic implications of the Laval Quartet as regards the right to strike, trade unions and national industrial relations systems.

Malmberg emphasises that the ECJ’s interpretation of the Posting of Workers Directive in *Laval* comes rather close to an understanding of it as a ceiling. Within the EU, collective actions – at least in cross-border situations – may be considered as a restriction of the freedom of services and the right to

¹⁴ Edström’s chapter p 72.

¹⁵ Edström’s chapter p 75.

¹⁶ Malmberg’s chapter p 77.

¹⁷ See Case C-341/05 *Laval* [2007] ECR I-11767, Case C-438/05 *Viking* [2007] ECR I-10779, Case C-346/06 *Rüffert* [2008] ECR I-1989 and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. Compare Malmberg’s analysis also of different national, especially Nordic, responses to this case law, see J Malmberg, *Posting Post Laval – International and National Responses*, Working Paper 2010:5 (Uppsala, Uppsala Center for Labor Studies, 2010).

establishment. In this respect, Malmberg concludes that the ‘Viking and Laval cases concerned various types of collective action, and the judgments imply that the protection of the right to different kinds of collective actions is not uniform but depends on the nature and aim of the action in question’.¹⁸

In a discussion of future possible amendments of EU law, Malmberg points both to different initiatives taken by the European Commission to increase the effectiveness of the Posting of Workers Directive, and to the proposals contained in the so-called Monti Report ‘A New Strategy for the Single Market’.¹⁹ He also discusses the (un)likelihood of a revision of the Posting of Workers Directive.

Finally, Malmberg points to three major issues brought to the fore by the conflict between economic freedoms and national industrial relations; namely, a new balance for competition and the level of protection of posted workers, closely linked to the ECJ’s understanding of the notion of unfair competition, supervision and enforcement of employment and working conditions, and the right to collective action. In this last respect, Malmberg concludes that the ‘restrictions on the right to collective action put up by the Viking and Laval cases have substantially limited the possibility for trade unions to protect the interests of their members in cross-border situations. The combination of making the lawfulness of collective actions dependent on a vague proportionality test, combined with a threat of action of damages, does have a manifest preventive effect on the possibility of exercising this fundamental right’.²⁰

The chapter *Public Procurement and Labour Law – Friends or Foes?*, by Kerstin Ahlberg and Niklas Bruun, relates to the general theme of the tension between economic and social integration in the EU and the interrelation between public procurement law and labour law. The chapter addresses the question of how to reconcile implementation of the EU rules on public procurement with labour law provisions, and also discusses the scope for social policy considerations in public procurement law in general. To start with, Ahlberg and Bruun point to the purpose of the EU rules on public procurement ‘to improve the function of the single market and eliminate the risk of national authorities favouring domestic agents and discriminating, directly or indirectly, against foreign undertakings in the course of their procurement’.²¹

In their chapter, Ahlberg and Bruun discuss and analyse the EU rules on public procurement in general, procurement procedure and the rules of the Directives, the general EU legal framework (including limitations of the EU legislative competence and implications of the Lisbon Treaty), and parallel application of public procurement rules and rules of labour law – and here focus on transfers of undertakings, posting of workers and collective bargaining, and public procurement.

¹⁸ Malmberg’s chapter p 79.

¹⁹ See M Monti, *A New Strategy for the Single Market at the Service of Europe’s Economy and Society: Report to the President of the European Commission José Barroso* (2010).

²⁰ Malmberg’s chapter p 87.

²¹ Ahlberg’s and Bruun’s chapter p 90.

In relation to transfers of undertakings – and through an analysis of case law from the ECJ and the Swedish Labour Court – they discuss the practically important and difficult situations and conditions in which the requirements and wishes for the transfer of personnel would be compatible with the rules on public procurement.

In a detailed and initiated analysis of the recent *German Pensions Case*²² – dealing with the implementation of public procurement rules for pension services based on collective agreement – Ahlberg and Bruun conclude that the ‘Court recognises that the right to bargain collectively and to conclude collective agreements are afforded special protection in international legal instruments, in EU law (Article 28 of the Charter of Fundamental Rights of the European Union and Article 152 TFEU) and in German Basic Law. The Court also emphasises that the German collective agreement at issue has a clear social objective’.²³ Despite this, the Court ruled that the management of collectively agreed pensions for public sector employees must be made subject to procurement. According to Ahlberg and Bruun, the ruling can be criticised for ‘having paid insufficient regard to specific considerations of labour law’. However, the ruling also ‘opens up possibilities of flexibly combining procurement with collective bargaining’.²⁴ (Pessimists may argue that this case has turned the Laval Quartet into the Laval Quintet.)

Finally, Ahlberg and Bruun emphasise that we have seen only the beginning of the legal development reconciling EU law on public procurement with labour law. In the future measures will be required from both Member States and EU institutions – and in that respect, they highlight the importance of respecting the distinctive characteristics of social policy solutions in the different national Member States.

3. EQUAL TREATMENT AND NON-DISCRIMINATION

In the second part of the book, three chapters discuss the theme of equal treatment and non-discrimination.

In her chapter *EU Equality Law – Comprehensive and Truly Transformative?*, Ann Numhauser-Henning analyses the evolution of EU equality law, and discusses whether the current state of affairs of EU equality law holds a promise of comprehensive and truly transformative equality – implying the dismantling of systemic inequalities, the eradication of poverty and disadvantage, and equality of capabilities and opportunities (as claimed *inter alia* by Bob Hepple²⁵).

²² See Case C-271/08 *Commission v Germany* [2010] not yet published in ECR, see OJC 233, 30.8.2008 p 27.

²³ Ahlberg’s and Bruun’s chapter, p 109.

²⁴ Ahlberg’s and Bruun’s chapter, p 111.

²⁵ See B Hepple, ‘Equality at Work’ in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945–2004* (Oxford, Hart Publishing, 2009) 129–63.

In a discussion on the origins of equality law, Numhauser-Henning starts from the important contradiction between formal and substantive equality – at the heart of all equality law – and describes the way in which bans on discrimination traditionally have been based on formal equality, the liberal tradition and the Aristotelian thesis of ‘what is alike shall be treated alike’. In addition, such bans are generally designed as individual rights and based on a complaint-led model. She emphasises that the goal of non-discrimination law is typically to change identified existing and discriminatory normative perceptions and to promote social justice and integration – at both individual and structural levels.

Numhauser-Henning reviews developments of EU equality law both in the ‘outer’ dimension, ie primary and secondary law instruments, and in the ‘inner’ dimension, ie normative perceptions often manifested in case law. In the latter case, she highlights key legal concepts and normative answers ‘bridging the conflict’ between formal and substantial equality, and discusses inter alia direct effect, direct and indirect discrimination, the reversed burden of proof, and positive action. The chapter covers developments from the first adoption of the Treaty of Rome to the adoption of the Lisbon Treaty and beyond.

In the case law of the ECJ, Numhauser-Henning finds some support for the proposition that EU equality law is already in a phase of transformative equality law. In *Coleman*,²⁶ the ECJ created the concept of ‘transferred discrimination’ and found that Ms Coleman had suffered discrimination when she was treated differently and harassed because of her son’s disability. In *Firma Feryn*,²⁷ there was no identified (and if so, only associated) victim, and the ‘Court found that a public statement made by an employer declaring that he will not recruit employees of a certain ethnic or racial origin constituted direct discrimination within the meaning of Article 2(2) of the Directive 2000/43/EC,²⁸ despite the wording of the Article that “direct discrimination shall be taken to occur when one person is treated less favourable than another”’.²⁹

In light, inter alia, of the Lisbon Treaty, the goal of social market economy, and the inclusion of the Charter of Fundamental Rights into primary EU law, Numhauser-Henning argues that the former market hegemony is no longer indisputable, and that there is ‘ground for certain expectations with regard to Union law, and within the realm of the current “liberal” equality regulation, for the further development of truly transformative, and thus substantive, equality’.³⁰

In Jenny Julén Votinius’ chapter, *Troublesome Transformation – EU Law on Pregnancy and Maternity Turned into Swedish Law on Parental Leave*, the focus is not on general EU equality law developments but more specifically on

²⁶ Case C-303/06 *Coleman* [2008] ECR I-5603.

²⁷ Case C-54/07 *Firma Feryn* [2008] ECR I-5187.

²⁸ Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, pp 22–26.

²⁹ Numhauser-Henning’s chapter p 134.

³⁰ Numhauser-Henning’s chapter pp 135 ff.

legal rules on discrimination of grounds of pregnancy, maternity and parental leave. It starts from the prohibition on less favourable treatment of workers on grounds of parental leave, introduced in the Swedish Act on Parental Leave in 2006. This prohibition was based on the EU rules against discrimination of pregnant workers and workers on maternity leave, and its explicit aim was to extend the period during which the worker is entitled to a high level of protection against deterioration of working conditions as a result of pregnancy, so that the same protection applies during the parental leave. However, in contrast with the EU rules, the Swedish national rules allow an employer to treat the worker less favourably because of his or her parental leave, when the less favourable treatment can be seen as a necessary consequence of the parental leave.

The aim of the chapter is to present and critically discuss the problematic nature of the legislative method used for the Swedish rules on protection of workers on grounds of parental leave – ie the difficulty of using EU rules on one issue as a model and point of reference for national legislation on another issue. Julén Votinius provides an account of the EU law protection of pregnant workers, the Swedish law protection of workers on parental leave, and a discussion of the use of EU law as a point of reference for national law. Her analysis covers EU law aspects, such as the strict prohibition on pregnancy discrimination, the absence of a need for a comparator to determine pregnancy discrimination, and the fact that pregnancy discrimination cannot be justified. From a Swedish law perspective, she analyses the way in which the less favourable treatment of workers on parental leave can be justified. In this regard, she argues that the exemption clause in the Swedish Parental Leave Act not only lacks an equivalent in the Equal Treatment Directive, but also that it ‘simply makes no sense’ in the context of EU law.

Julén Votinius illustrates how the categorisation of discrimination in connection with pregnancy and maternity leave as direct discrimination of women provides women with a strong legal protection, but also questions this emphasis of the biological fact, ie the sex of a person. When it comes to parental leave, Julén Votinius convincingly argues that ‘the right to take leave from work in connection with childbirth [is not] based on an unassailable law of nature, but on a social construction that, in contrast to natural law, can be changed. In a country, such as Sweden, where the national law on parental leave and parental benefit covers both parents, a male worker is as entitled as a female worker to take leave from paid work in order to care for a child. This means that it is equally possible for a man, and not only a woman, to suffer detrimental treatment due to absence from work when he has a child’.³¹

Finally, Julén Votinius concludes that the method of legislating used in the Swedish Act was not uncomplicated; that the introduction of the exemption clause changed the legal structure of the rules in a fundamental way, and thereby

³¹ Julén Votinius’s chapter p 142.

failed to respect the integrity of the EU rules. This turned out to be not only to the detriment of the rule of law and the legal protection of workers on parental leave. It also risks weakening the protection provided under EU law for pregnant workers and workers on maternity leave.

In the author's own chapter, *Flexicurity, Labour Law and the Notion of Equal Treatment*, the notion of equality and equal treatment is also at the centre of attention, as is, at least partly, the interaction between EU law and Swedish law. The starting point is the EU law flexicurity discourse. Flexicurity is central to European employment policy and to the 'modernisation' of EU labour law and labour law in the different Member States of the EU. Common principles of flexicurity have been adopted and integrated into the European Employment Strategy, the Lisbon Strategy and the Europe 2020 Strategy, and different pathways to flexicurity have been outlined. The aim of the chapter is to explore and critically discuss the different notions of equal treatment inherent in the EU law flexicurity discourse, and to point to some conceptual and analytical points of departure. Swedish law serves as the main national example.

Flexicurity is described at EU level as an integrated strategy to enhance, at the same time, flexibility and security in the labour market, and contains the following components: flexible and reliable contractual arrangements; comprehensive life-long learning; effective active labour market policies; and modern social security systems. Flexible and reliable contractual arrangements aim at reduced labour market segmentation and equal treatment of permanent employees and fixed-term workers and other flexible workers. Such equal treatment can be achieved through inter alia deregulation of employment protection, creation of a 'tenure track' approach, and progressive employment protection. Employability and labour market transitions are also in focus, as is a shift from job security and traditional employment protection to security by way of employability in relation to the entire labour market.

A common denominator for the different notions of equal treatment inherent in the EU law flexicurity discourse is the aim to reduce labour market segmentation. The author finds that the EU law flexicurity discourse and flexible and reliable contractual arrangements really entail different – partly conflicting, and also sometimes 'elusive' – notions of equal treatment, which are legally 'materialised' in a variety of ways. The different notions of equal treatment explored and discussed in the chapter are as follows: equal treatment, as in reduced labour market segmentation in general; equal treatment of permanent employees and fixed-term workers, as in increased protection for fixed-term workers and challenges to and reforms and deregulation of employment protection; equal treatment of permanent employees and flexible workers, ie part-time, fixed-term and temporary agency workers, as in principles of non-discrimination and equal treatment proper;³² and, finally, equal treatment, as in

³² Compare Council Dir 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC, OJ L 14, 20.1.1998, pp 9–14, Council

redefining the boundaries and personal scope of labour law and developing core labour rights (and connected to the work of the ILO on Core Labour Standards, the Decent Work Agenda and Fair Globalisation).

The EU law flexicurity discourse – and the flexicurity strategy in recent years – imply a shift of emphasis from employment *law* to employment *policy*. Equal treatment of permanent employees and flexible workers, as apostrophised in principles of non-discrimination and equal treatment proper, is most closely linked to general EU equality law developments and key concepts. However, equal treatment of permanent employees and flexible workers represents a somewhat different perspective on equality, mainly related to the flexicurity, employment policy and globalisation discourses, and not to the non-discrimination and human rights discourses. Equal treatment of flexible workers aims at increased protection of flexible workers and a move into stable contractual arrangements, but is also perceived as a way to promote employment and economic growth.

Equal treatment of permanent employees and fixed-term workers implies both increased protection for fixed-term workers, and challenges, reforms and deregulation of employment protection. This notion of equal treatment is thus potentially ‘revolutionary’, and at the very heart of employment protection regulation and the protective principle of the permanent open-ended employment contract as the main rule. Here the recent vague proposals in the Agenda for New Skills and Jobs seem to imply a far-reaching ‘reformulation’ of the open-ended employment contract, which remains to be followed and further analysed. However, a ‘tenure track’ approach and progressive build-up of rights (for example, as in, measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, regulated in the Fixed-Term Work Directive) can be seen as expressions both of *deregulation* and of *solidarity* and *redistribution*.

4. SOCIAL SECURITY LAW AND FREE MOVEMENT AND COORDINATION IN THE EU

In the third part of the book, two chapters relate to the theme of social security law and free movement and coordination in the EU.

The general aim of Emma Holm’s chapter, *The Swedish Parental Benefit in Relation to the EU Rules on Coordination of Social Security Benefits – Is Free Movement of Families Really Achieved?*, is to examine the Swedish parental benefit in relation to the EU principles of free movement, ie the Treaty provisions on free movement for workers and Union citizens and the secondary legislation

Dir 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by the ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, pp 43–48 and Dir 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, pp 9–14.

on coordination of social security benefits. Regulation 1408/78 and its successor Regulation 883/2004³³ are in focus, as are Articles 21, 45 and 48 TFEU. The application of the EU rules in the Swedish context is examined in terms of the effects on the free movement of families.

The *theory of law as normative patterns in a normative field* (originally developed by Anna Christensen³⁴) serves as a theoretical starting point. According to this theory, legal solutions in the area of the social dimension, and social security, can be said to oscillate between three basic – contradictory – normative patterns in a normative field, namely *the pattern of protection of established position*, *the market-functional pattern* and *the pattern of just distribution*. Rules based on income replacement represent the pattern of protection of established position, while benefits based on need (or implying a solidarity-based redistribution of resources) represent the pattern of just distribution. By placing the Swedish provisions on parental benefits and the EU rules on free movement and coordination of social security in the normative field, tensions and conflicts between the legal solutions are made visible.

In her chapter, Holm describes and analyses the rules (which in legal-technical and analytical terms are quite complicated) on the right to free movement in the EU, including the right to movement and social benefits in general, social security coordination and the main features of Regulations 1408/71 and 883/2004, and connections and tensions between the different EU norms, coordination of benefits relating to childbirth and family, the Swedish parental benefit, and the Swedish parental benefit in relation to the EU rules.

Holm shows how, in its case law, the ECJ interpreted Articles 45 and 21 TFEU in a broad way, and introduced the notion of a proportionality assessment in situations where free movement is restricted. A division is made in the coordination regulation between family benefits and maternity/paternity benefits, and the classification of national benefits relating to childbirth and family and the interpretation of the notion of family benefit have turned out to be difficult, not least in the Swedish context (cf *Kuusijärvi*³⁵). When it comes to the relationship between the Swedish parental benefit and the EU rules, and the free movement of families, Holm analyses important and existing problems in relation to *families moving to Sweden*, *families moving from Sweden* and *families working and living in different Member States*, and puts forward proposals *de lege ferenda* in order to better facilitate the coordination of the Swedish parental benefit. As for the overall normative development, Holm concludes that ‘the

³³ Reg (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, OJ L 149/2, 5.7.1971, pp 2–50 and Reg (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/1, 30.4.2004, pp 1–123.

³⁴ 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* (Aldershot, Ashgate, 1999) 83–98.

³⁵ Case C-275&96 *Kuusijärvi* [1998] ECR I-3419.

rules on free movement have shifted from mainly expressing a normative pattern of protection of established position as a result of employment towards also representing a normative pattern of just distribution'.³⁶ The same development can be seen in the area of coordination of social security.

In his chapter, *The Swedish Social Security Reforms of 2008 and their Impact on the National Sickness Insurance System: Some Reflections from an EU Law and Flexicurity Perspective*, Per Norberg focuses on a recent, interesting, and much debated Swedish social security reform in the area of national sickness insurance. The aim is to provide a description and critical analysis of the historical development of the Swedish national sickness insurance system, and to make some reflections from the perspective of flexicurity and the EU coordination regulation of social security.

The 2008 reform of the national sickness insurance included the introduction of two new rules. First, a requirement was established to seek new employment from day 180 of the sickness period. Otherwise, persons too sick to do their current work will then lose their sickness insurance benefit if they can perform any other normal work available in the national labour market. The person will receive unemployment insurance benefit while looking for a new job. Second, the reform established a temporary withdrawal of the sickness insurance benefit from day 915 in the sickness period. This cessation applies to people who are not permanently sick, but sick enough to be unable to perform any normal work available in the national labour market. The Public Employment Agency shall offer these people labour market activities for the 90 days they must subsist without sickness insurance benefit, before they can return to the sickness insurance system.

After having provided a brief account of flexicurity and the concept of sickness and invalidity in EU law, Norberg describes and analyses the rules on early retirement in the 1970s and 80s, the sickness insurance after the 1970s and 80s, the 'purification' of the Swedish sickness insurance in the 1990s and onwards, and the reform of the sickness insurance in 2008. He depicts, inter alia, how the notion of 'individual overuse' becomes important in the Swedish discussion and reform of national sickness insurance.

As regards the current Swedish concept of sickness, Norberg argues that Regulation 883/2004 is not designed to coordinate such a narrow concept. According to Norberg, in the future and if other countries choose to follow Sweden, the EU may need to adapt its social security coordination regulation to fit such a narrow concept of sickness/invalidity/incapacity to work.

One feature of the new Swedish system is the goal to move people from sickness insurance and early retirement to unemployment insurance and labour market activities. Norberg agrees that moving somebody out of sickness insurance into unemployment insurance can be seen as a step in the direction of

³⁶ Holm's chapter p 196.

future employment, and that creating a labour market flexible enough to allow sick persons to work will probably be good for the society as a whole. However, Norberg is also very critical of the implementation and effect of the 2008 reform. He argues that the 'new system is extremely complex and contradictory. It will need further reforms, and only after these reforms are in place is it possible to assess the protection provided by the social security system ... So far the best that can be said about the 2008 reform is that some potential disasters have been averted with legislative intervention in the last minute'.³⁷

5. CONCLUDING REMARKS

The question of fundamental rights and their protection is of increasing importance in both labour law and social security law. Several of the chapters in this book reflect on the important legal implications of the Lisbon Treaty as regards fundamental rights in the EU. The legally binding character of the Charter of Fundamental Rights, now constituting primary EU law, and the future accession of the EU to the European Convention (Article 6 TEU) is discussed inter alia in relation to the status of the ILO acquis in EU labour law, the right to collective action, and the right to strike, EU equality law and the coordination of social security in the EU and aspects of Union citizenship. Here, for example, Herzfeld Olsson points to the remarkable fact that the ILO Core Labour Standards are not mentioned in Article 6 TEU or in the explanatory document related to the EU Charter of Fundamental Rights.

One aspect of the future accession of the EU to the European Convention relates to the relationship between the ECJ and the ECtHR, and the way in which possible conflicts between case law from these courts (and between EU labour law and international labour law) have to be addressed and taken seriously. This aspect is discussed thoroughly by Edström and Malmberg (and touched upon also by Herzfeld Olsson) in relation to the Laval Quartet and the right to collective action and the right to strike.^{38,39}

In *Laval* and *Viking*, the ECJ recognised the right to industrial action as a fundamental right, with explicit reference not only to the European Social Charter, ILO Conventions, and the Community Charter of the Fundamental Social Rights of Workers, but also to Article 28 of the Charter of Fundamental Rights of the European Union.⁴⁰ However, the ECJ stated that the right to industrial action may be subject to certain restrictions, and went on to examine whether the industrial action at hand constituted a

³⁷ Norberg's chapter p 221.

³⁸ The Laval Quartet has been much debated and the literature in this area is voluminous.

³⁹ See eg P Syrpris, 'The Treaty of Lisbon: Much Ado ... But About What?' (2008) 37(3) *Industrial Law Journal* 2–50. Compare also G Harpaz, 'The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy, (2009) 46(1) *Common Market Law Review* 105.

⁴⁰ *Laval*, paras 90–91, and *Viking* paras 43–44.

restriction of the free movement of services (Article 56 TFEU) or the freedom of establishment (Article 49 TFEU), respectively, and if so, whether this could be justified. A restriction of the free movement of services (or freedom of establishment), constituting one of the fundamental principles of Community law, is warranted only if it pursues a legitimate objective compatible with the Treaty, and is justified by the existence of overriding reasons of public interest. If that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it. Finally, the ECJ found that the industrial action in *Laval* constituted a restriction of the free movement of services which could not be justified in the light of the public interest of combating social dumping and protecting workers. Similarly, in *Viking* the ECJ found that the industrial action constituted a restriction of the freedom of establishment. When it came to justification and proportionality, the ECJ (in contrast to *Laval*) left the assessment and a wider ‘margin of appreciation’ to the national court.

At the centre of attention now are the implications of the reorientation of the case law of the ECtHR – following the *Viking* and *Laval* cases from the ECJ – regarding freedom of association. In two landmark decisions from 2008 and 2009, respectively, the cases of *Demir and Baykara* and *Enerji Yapi-Yol Sen*,⁴¹ the ECtHR 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 collective action. In this respect, Malmberg critically remarks (and is, in principle, supported by Herzfeld Olsson and Edström) that ‘[t]he stance taken by the ECJ seems problematic for, if not directly clashing with, the position taken by the European Court of Human Rights and the ILO Committee of Experts. This puts a considerable pressure on the ECJ to reconsider its position on the balance between the economic freedoms and national social regulation’.⁴²

The BALPA case in England – discussed by both Edström and Malmberg – relates to the question of trade union liability, damages and enforcement, and illustrates that the case law of the ECJ and the mere threat of trade union liability for damages will have a ‘chilling effect’ on industrial action and trade union activity.⁴³ Likewise, the final judgment of the Swedish Labour Court in the *Laval*

⁴¹ See *Enerji Yapi-Yol Sen v Turkey*, Judgment of 21 April 2009, ECtHR.

⁴² Malmberg’s chapter p 85.

⁴³ Compare KD Ewing and J Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39(1) *Industrial Law Journal* 2–50 and K Apps, ‘Damages claims against trade unions after *Viking* and *Laval*’ (2009) 34(1) *European Law Review* 141–54. In this regard Edström concludes that ‘[b]y turning to the ILO Committee of Experts, the British trade union has compelled the ILO to balance the freedoms founded on the Treaty of the European Union and their status against the right to strike as interpreted by the ECJ in *Laval* and *Viking*. However, while the statement from the Committee of Experts is critical, it is not binding for the EU’, Edström’s chapter p 73.

case⁴⁴ – much debated and also criticised – concern the question of trade union liability for damages. From a more general EU law perspective, it also relates to important and controversial legal questions on horizontal application of Treaty provisions and Directives, and liability for damages for private parties. For these reasons an English translation of this judgment is enclosed as an appendix to this book.

Laval made claims for financial damages (around 140 000 Euro) and punitive damages (around 135 000 Euro, plus interest) for the breach of EU law that the industrial action taken by the Swedish Building Workers' Union and its local branch and the Swedish Electrician's Trade Union constituted. The Labour Court assessed Laval's claims for damages on two different legal grounds: first, whether the fact that the industrial action taken by the trade unions constituted a breach of the Treaty freedom to provide services, giving rise to liability for damages (violation of EU law), and second, whether the industrial action violated provisions in the (1976:580) Co-determination Act and gave rise to liability for damages (violation of Swedish law). The Labour Court found that Laval had not succeeded in providing evidence of financial loss, and therefore the claim for financial damages could not be approved. However, the Labour Court ordered the trade unions to pay punitive damages – both on grounds of a violation of EU law and Swedish law – of approximately 55 000 Euro (around 20 000 Euro for the Swedish Building Workers' Union, 20 000 Euro for its local branch and 15 000 Euro for the Swedish Electrician's Trade Union).

The judgment was not unanimous, but decided by a majority of the judges of the Labour Court. Three (out of seven) judges presented dissenting opinions. Many critical questions can be raised since the Swedish Labour Court entered 'uncharted territory'. There is no case law from the ECJ establishing liability for damages between private parties on grounds of a violation of Article 49 EC (now Article 56 TFEU).⁴⁵ The Swedish Labour Court built heavily on established case law on *Member State* liability, but in the absence of guidance from the ECJ, is it necessarily the case that these criteria apply when deciding on liability for damages for private parties, including trade unions, and if so, in what way? What factors, for example, should be taken into account when establishing a 'sufficiently serious breach' (*Brasserie du Pêcheur and Factortame*)? The Labour Court referred to *Courage* and *Manfredi* (cases from the competition law area, where Treaty provisions are clearly directed towards companies and private parties), and relied heavily on the case of *Raccanelli* (decided by the

⁴⁴ Labour Court judgment AD 2009 No 89. For a more extensive discussion on this judgment, see M Rönmmar, 'Laval Returns to Sweden. The final judgment of the Swedish Labour Court and Swedish legislative reforms' (2010) 39(3) *Industrial Law Journal* 280–87.

⁴⁵ Compare S Prechal and S De Vries, 'Seamless web of judicial protection in the internal market?' (2009) 34(1) *European Law Review* 5–24, K Apps, 'Damages claims against trade unions after Viking and Laval', above n 43, and N Reich, 'Horizontal liability in EC law: Hybridization of remedies for compensation in case of breaches of EC rights' (2007) 44 *Common Market Law Review* 705–42.

Fifth Chamber), whose authority must be questioned. *Raccanelli* relates to free movement of workers and Article 45 TFEU.

As regards the relationship between the ECJ and the ECtHR, Holm points to the different interpretations of the notion of family (and the right to family and privacy) made by the ECJ and the ECtHR, and how this may influence the free movement of families and persons within the EU.⁴⁶

Generally, EU membership and EU law has led, at least from a Swedish perspective, to an increased importance of courts and case law.⁴⁷ European courts – national courts, the ECJ and the ECtHR – and their case law are essential for the development of the European social model and EU labour law and social security law. As regards the relationship between national courts and the ECJ, many have pointed both to a relationship characterised by dialogue, cooperation and discourse, and to the active and central role played by the national courts – particularly through the preliminary rulings procedure – in developing and enforcing EU law.⁴⁸ The role of the ECJ in interpreting Treaty provisions and Directives and developing general principles of Union law is crucial. ECJ case law in substantive labour law areas (such as sex equality law, non-discrimination and transfers of undertakings) and as regards the free movement of workers and Union citizens and the coordination of social security in the EU, has in some ways strengthened the protection of individual employees and persons. The ECJ has also – frequently in labour law and social policy cases – developed general principles of law, ensuring the effective enforcement of Union law; ie the principle of primacy of Union law, the principle of direct effect, the principle of consistency of interpretation, and the principle of state liability for breaches of Union law.⁴⁹

The Laval Quartet has resulted in a critical discussion of the role of the ECJ and a ‘democratic deficit’. Malmberg discusses the important political implications of the Laval Quartet by way of weakened support for the European integration project as such. Elements of resistance are discernible in national responses to the Laval Quartet, and Malmberg emphasises that resistance against the doctrines of the ECJ are often silent and not fully visible.

In principle, all the chapters discuss the tension between economic and social integration in the European Union, and the implications in this respect

⁴⁶ See also Julén Votinius’ chapter.

⁴⁷ See eg N Bruun and J Malmberg, ‘Arbetsrätten i Sverige och Finland efter EU-inträdet’ in K Ahlberg (ed), *Tio år med EU – effekter på arbetsrätt, partsrelationer, arbetsmarknad och social trygghet*, Arbetsliv i omvandling 2005:5 (Stockholm, Arbetslivsinstitutet, 2005) 7–45, X Groussot et al, *Empowering National Courts in EU Law*, SIEPS 2009:3 (Stockholm, SIEPS, 2009) and U Neergaard, R Nielsen and L Roseberry (eds), *The Role of Courts in Developing a European Social Model. Theoretical and Methodological Perspectives* (Copenhagen, DJØF, 2010).

⁴⁸ See S Sciarra, ‘Integration through Courts: Article 177 as a Pre-Federal Device’ in S Sciarra (ed), *Labour Law in the Courts. National Judges and the European Court of Justice* (Oxford, Hart Publishing, 2001) p 1. Compare also C Kilpatrick, ‘Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ’ (1998) 4(2) *European Law Journal* 121–47, and Groussot et al, *Empowering National Courts*, above n 48.

⁴⁹ See C Barnard, *EC Employment Law*, 3rd edn (Oxford, Oxford University Press, 2006) pp 33 ff.

of the Lisbon Treaty and the new goal of the European Union to aim for a *social market economy* (cf Article 3.3 TEU). In both the *Laval* and *Viking* cases, the ECJ emphasised that the Community has not only an *economic* but also a *social* purpose, and that the rights under the EC Treaty on the free movement of goods, persons, services, and capital must be balanced against the objectives pursued by social policy, such as improved living and working conditions. However, despite these declarations by the ECJ, the Court appears to have put fundamental freedoms first, and fundamental rights, such as the right to collective action, second. Thus, the debate on the ‘decoupling’ of economic and social integration (with the latter relegated to the national level) linked to the European integration project is likely to continue.⁵⁰ Here, Numhauser-Henning refers in her chapter to Article 119 and the gender-related pay clause in the Treaty of Rome, originally aiming at promoting economic rather than social integration, through a prevention of unfair competition with low wages paid to women. Thus, the rules on non-discrimination in the Treaty of Rome were basically ‘market rights’. In a prediction of future developments, Numhauser-Henning is rather more optimistic, however, and points to different ways in which the ‘market hegemony’ in the field of equality law – inter alia against the background of the Lisbon Treaty – has and can be challenged.

In relation to the right to collective action and the right to strike (and the *Laval Quartet*), both Edström and Malmberg emphasise the argument that the balance between fundamental Treaty freedoms and trade union rights may have to be struck differently today in light of the Lisbon Treaty and the goal of a social market economy.⁵¹ The analysis of the relationship between public procurement law and labour law by Ahlberg and Bruun highlights the increased focus on the intersection between labour law and different areas of economic law, and the challenges this poses to labour law.

Many of the chapters also reflect today’s *multi-level governance* of labour law and social security law, closely linked to the ongoing globalisation of the economy and the internationalisation of law. Labour law and social security law are governed nowadays by a multitude of legal sources at different levels, such as the global, EU/European/regional and the national level. National regulatory hegemony is long gone, and for example, Malmberg has earlier argued that ‘[u]ltimately, it is to a large extent supranational courts ... that decide what is feasible and permitted within national industrial relations systems’.⁵²

⁵⁰ Compare eg F Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40 *Journal of Common Market Studies* 645 and D Schiek, ‘Transnational Collective Labour Agreements in Europe and at European Level – Further Readings of Article 139 EC’ in Mia Rönnmar (ed), *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Alphen aan den Rijn, Kluwer Law International, 2008).

⁵¹ See eg Monti, *A New Strategy for the Single Market*, above n 21.

⁵² J Malmberg, ‘Enforcement of Labour Law’ in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945–2004* (Oxford, Hart Publishing, 2009) pp 286 ff.

In earlier work, this author has analysed EU labour law developments and EU industrial relations, and their relationship to and interdependence with national industrial relations, in terms of an evolving *EU multi-level industrial relations framework* (employing also Dunlop's classical theory on industrial relations systems).⁵³ 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 coordination, 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.⁵⁴ EU industrial relations are fundamentally based on European integration and an emphasis on transnational and supranational levels of industrial relations. An EU multi-level industrial relations framework encompasses (at least) the workplace, the company, the multi-company, the sectoral, the national, and the EU. European integration introduces three specific supranational levels: the EU, the EU sector, and the Euro-company. EU industrial relations are thus simultaneously acting *above*, *beside* and *within* national industrial relations.

One exponent of the multi-level governance of labour law is the increased focus in recent years on the ILO acquis. Herzfeld Olsson describes inter alia how ILO Conventions have been used as inspirational sources when developing EU fundamental rights and have served as interpretative guidance for the ECJ. According to Herzfeld Olsson, including a direct reference to ILO Conventions and Recommendations in a recital in the Preamble of a Directive could be an important step in promoting ILO influence on EU labour law.^{55,56} However, Herzfeld Olsson also critically points to the fact that '[t]he recognition of ILO Convention No 87 as an inspirational source for rendering the right to collective action fundamental right status has however in *Laval* and *Viking* not protected it from limitations going beyond the ILO requirement. The limited impact of ILO provisions in this regard is illuminated by the weak qualified formulation

⁵³ See eg M Rönömar (ed), *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Alphen aan den Rijn, Kluwer Law International, 2008), compare JT Dunlop, *Industrial Relations Systems*, rev edn (Boston, Harvard Business School Press, 1993).

⁵⁴ See eg P Marginson and K Sisson, *European Integration and Industrial Relations. Multi-level Governance in the Making* (Basingstoke, Palgrave MacMillan, 2004) and R Hyman, 'The Europeanisation – or the Erosion – of Industrial Relations?' (2001) 32 *Industrial Relations Journal*.

⁵⁵ See also T van Peijpe, 'If Vaxholm Were in Holland: Interest Conflicts and EU Labour Law in a Comparative Perspective' in M Rönömar (ed), *EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Alphen aan den Rijn, Kluwer Law International, 2008) 193–16.

⁵⁶ Both Herzfeld Olsson and Ahlberg and Bruun, from partly different starting points, discuss ILO Convention No 94, the Labour Clauses (Public Contracts) Convention, and the interaction between the ILO acquis and EU law in the area of public procurement law and labour law.

of the right to collective action and collective bargaining in the EU Charter. An inclusion in the EU Charter is no guarantee for extensive protection'.⁵⁷

Edström, Malmberg and Herzfeld Olsson all reflect on how, in the multi-level governance of labour law, different Courts and supervisory bodies often make references to each other. In *Demir and Baykara* the Court, in the words of Malmberg, 'stresses that the interpretation of the ECHR can and must take into account elements of international law other than ECHR (such as ILO Conventions), the interpretation of such elements by competent organs, and the practice of European States reflecting their common values'.

According to Edström, this interaction contributes to a convergence trend in law as regards the fundamental right to collective action and the right to strike. The theme of *convergence and divergence* has long been present in industrial relations research. In a comprehensive comparative project and classical book, '*Industrialism and Industrial Man. The Problems of Labor and Management in Economic Growth*',⁵⁸ Dunlop developed (together with inter alia Kerr) a well-known, but much debated, *convergence thesis*. Bamber, Lansbury and Wailes describe how their 'core proposition is that there is a global tendency for technological and market forces associated with industrialisation to push national industrial relations systems towards uniformity or "convergence". This conclusion is based on the view that there is a *logic of industrialism*, that as more societies adopted industrial forms of production and organisation, this logic would create "common characteristics and imperatives" across these societies'.⁵⁹ The book gave rise to an intensive debate on *convergence* or *divergence* between different national industrial relations systems. The critics argued (and turned out to be right) that the divergence between different national industrial relations systems will continue, owing to inter alia institutional, political, social, cultural and ideological differences between the countries. The relationship between the national and international has been central also in more recent debates on the impact of globalisation on national patterns of employment relations. While emphasising the significance of the national level and the role of institutional arrangements, industrial relations researchers have put forward evidence not of convergence, but rather of continuing national diversity in employment relations. Similarly, the influential *varieties of capitalism* approach, developed by Hall and Soskice, rejects the notion of globalisation creating irresistible pressures for convergence of capitalist economies. Instead, it is possible to identify at least two institutional settings – liberal market economies and coordinated market economies – resolving the problems associated with a market economy.⁶⁰

⁵⁷ Herzfeld Olsson's chapter p 55.

⁵⁸ See C Kerr et al, *Industrialism and Industrial Man. The Problems of Labor and Management in Economic Growth* (London, Heinemann, 1960).

⁵⁹ See GJ Bamber, RD Lansbury and N Wailes (eds), *International and Comparative Employment Relations: Globalisation and the Developed Market Economies*, 4th edn (London, Sage, 2004) p 13.

⁶⁰ See P Hall and D Soskice, 'An Introduction to Varieties of Capitalism' in P Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (New

The right not to be discriminated against is a fundamental human right, and as such is protected in different international documents. In an analysis of the evolution of equality law in Europe between 1945 and 2004, Hepple describes a development and process from legal assertion of the right to equality in international instruments, to formal equality, to substantive equality, to the dawn of comprehensive and transformative equality. This development is closely connected to the human rights discourse and the value of human dignity – but also to the influence and dynamics of EU law and the interventions by the ECJ. In particular, the chapter by Numhauser-Henning and the chapters by Julén Votinius and this author, relate to and analyse different notions of equal treatment and equality (as regards EU equality law in general, discrimination on grounds of pregnancy and maternity, and the EU law flexicurity discourse), and the fundamental tension between formal and substantive equality and the realisation of transformative equality.

In this respect, Schiek has commented on the tension between formal and substantive equality, and has held that ‘EU non-discrimination law is multidimensional in its conceptual approaches, which continue to oscillate between form and substance, individual and group, and equality of treatment and result’.⁶¹ Hepple has discussed alternatives to the notions of equal treatment and equal opportunity that have been put forward in the debate, and has described how ‘Hugh Collins argues that “social inclusion” provides a more satisfactory intellectual basis for anti-discrimination legislation than approaches based on substantive equality. Catherine Barnard suggests that the law needs to be underpinned by the values of “solidarity” in order to achieve the objectives of integration and participation of disadvantaged groups’.⁶² The notion of social inclusion is linked to the very notion of the *social* market economy, the Europe 2020 Strategy and the EU law flexicurity discourse, discussed inter alia by Holm, Norberg and this author. The notion of solidarity is already used by the ECJ inter alia in case law on the integration of migrant workers and EU citizens.⁶³

In relation to the EU law flexicurity discourse and equal treatment of flexible workers, it is interesting to note the fundamental differences as compared to ‘traditional’ equality and non-discrimination legislation. Equal treatment of part-time workers, fixed-term workers and temporary agency workers is not based on the employee’s personal characteristics, such as sex, race, or sexual orientation, and related to the human rights discourse, but is instead based on the employment contract and its form and content. There are also greater

York, Oxford University Press, 2001) 1–68 and M Rönmmar, ‘Det svenska arbetsmarknadssystemet i teori och praktik’ in K Ahlberg (ed), *Vänbok till Ronnie Eklund* (Uppsala, Lustus, 2010) 495–514.

⁶¹ D Schiek, ‘From European Union Non-discrimination Law towards Multidimensional Equality Law for Europe’ in D Schiek and V Chege (eds), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (London, Routledge/Cavendish, 2009) 3–27, p 3.

⁶² B Hepple, ‘Aims of Equality Law’ (2007), pp 19 ff.

⁶³ See Hepple, ‘Aims of Equality Law’, above n 63.

possibilities for the employer to justify *prima facie* discriminatory, also direct, behaviour when it comes to these flexible workers. This begs important and critical questions: can this spread of the principle of equal treatment risk diluting the strength of the principle of equal treatment itself, and thereby counteract the battle for substantive and transformative equality in other areas? Similarly, Numhauser-Henning highlights the fact that within the EU, sex equality law is mainly argued in a (*de facto*) equality discourse, while the other non-discrimination grounds (covered by Article 19 TEU) are argued within a framework of non-discrimination.

In relation to comprehensive equality, Single Non-Discrimination Acts draw attention to the importance of the intersection between labour law and other areas of law. In Sweden, the (2008:567) Single Non-Discrimination Act from 2008 not only gathers different discrimination grounds but it is also (like *inter alia* Council Directive 2000/43/EC) applicable outside the realm of working life; for example, in public employment services, education, health care, social services, and social security. For Swedish labour law, building on a special tripartite Labour Court and a special labour law dispute resolution system, this means expanding, in a novel way, equality law and the legal interpretation of fundamental legal principles, concepts and rules on the burden of proof beyond labour law and labour courts to general courts. Thus, this adds to the continuous legal dialogue between the ECJ and national courts, discussed above. It remains to be seen whether uniform and dynamic or incoherent and divergent jurisprudence will follow. In this regard, Numhauser Henning has warned that ‘legal intervention is focused on formal equality as the common minor denominator, instead of meeting the real needs of equality of different groups’.⁶⁴ At the same time, Numhauser-Henning points to the ‘open’ ban against discrimination of protected groups in Article 21 of the EU Charter of Fundamental Rights, and how it may open up new possibilities in the area of multiple discrimination.

The importance of legal developments in the area of pregnancy discrimination and the characterisation of pregnancy and maternity discrimination as direct discrimination lies at the heart of Julén Votinius’ chapter and argument. However, Numhauser-Henning clarifies that these developments are important also from a more general EU equality law perspective, when it comes to ‘bridging the gap’ between formal and substantive equality. Julén Votinius depicts the exceedingly vague Swedish legislation in this area, and describes how ‘the national legislation in no way reveals that the rules relating to direct discrimination on the basis of sex are applicable to pregnancy discrimination. Instead, protection against pregnancy discrimination is governed by reference to and interpretation of EU law’.⁶⁵

⁶⁴ Numhauser-Henning’s chapter p 114.

⁶⁵ Julén Votinius’ chapter p 138.

The importance of the notion of family in the area of free movement and coordination of social security in the EU is highlighted by Holm and has been discussed above. Likewise, the analysis of Julén Votinius illustrates how the notion of parenthood is closely linked to legal rules relating to pregnancy, maternity, paternity and parental leave.⁶⁶ These notions differ between Member States in the EU, and depend on inter alia the continued impact of the male breadwinner model.

In her analysis of free movement and the coordination of social security in the EU, Holm starts from the theory of law as normative patterns in a normative field, and analyses the different expressions of – and conflicts between – the normative patterns of protection of established position and just distribution. Likewise, in her discussion on the origins of equality law, Numhauser-Henning relates to normative developments, and emphasises that non-discrimination legislation is closely connected to processes of normative and material change. Both Holm and Numhauser-Henning point to the importance of *belongingness*. Numhauser-Henning emphasises that any ‘legal system implies perceptions of belonging and exclusion’,⁶⁷ and Holm refers to the fact that ‘the national social security systems remain the province of the respective Member States. These systems are based on a territoriality principle, meaning that only people with a certain belonging, such as nationality or residence, are covered’.⁶⁸ Basically belongingness is also at the centre of attention in the debate on equal treatment, the boundaries and the personal scope of labour law and the notion of an employee, linked both to the EU law flexicurity discourse and the ILO’s efforts in the area of Core Labour Standards, Decent Work and Fair Globalisation.

The EU law flexicurity discourse has been approached and discussed both by Norberg and this author. While Norberg’s analysis of the development of the Swedish national sickness insurance emphasises social security, the importance of transitions, and active labour market policies, this author’s exploration of different notions of equal treatment instead highlights labour law and flexible and reliable contractual arrangements. The focus on employability and labour market transitions links employment protection and security for employees in crucial ways to the other flexicurity components, namely comprehensive lifelong learning, active labour market policies, and modern social security systems. The EU law flexicurity discourse could be said to entail an emphasis of labour law and social security law as complementary systems. Thus, a more comprehensive analysis – and understanding – of the EU law flexicurity discourse requires an interdisciplinary study of both labour law and social security law.

Finally, in the broader context of EU labour law and its relationship with globalisation, De Vos interestingly argues that the evolution of EU labour

⁶⁶ See also J Julén Votinius, *Föräldrar i arbete. En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning* (Göteborg/Stockholm, Makadam, 2007).

⁶⁷ Numhauser-Henning’s chapter p 115.

⁶⁸ Holm’s chapter p 187.

law can be described as a development from national labour law as *market correcting* (starting from the basic inequality of bargaining power inherent in the employment contract and the need to protect workers), to original EC labour law as *market making* (in (mainly) promoting free movement) and further to the EU law flexicurity discourse, strategy and labour law as *market embracing*.

This has been an attempt to present the different chapters and to link them together – and to partake in the discussion on future developments and challenges in the fields of labour law and social security law.