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Introduction

ANN NUMHAUSER-HENNING AND MIA RÖNNMAR

I. INTRODUCTORY REMARKS

THIS BOOK AIMS to explore the normative and legal evolution that has taken place in the last decade or so within the social dimension—in terms of labour law, social security law and family law—of the European Union and its Member States. The book analyses this development from a multitude of theoretical and legal-substantive perspectives. It represents an innovative and important interdisciplinary approach to the analysis of EU law, Social Europe, and future social policy developments linked to crucial societal and demographic changes in Europe as well as to EU law, policy and strategy.

A background factor of obvious importance from the overall perspective of this book is the coming into force of the Lisbon Treaty in 2009, implicating a new aim of creating a social market economy (Article 3(3) TEU), a legally binding EU Charter of Fundamental Rights, and a future accession to the European Convention on Human Rights (ECHR) (Article 6 TEU). Well before this, partial steps of great importance were taken, such as the introduction of EU Citizenship (already in the Maastricht Treaty, and now Articles 20–23 TFEU); the adoption of the EU Charter of Fundamental Rights as a soft law instrument in 2000; and the broadened competences as regards non-discrimination measures in the Amsterdam Treaty (now Article 19 TFEU). The Lisbon Treaty is in itself a basis for claiming that the former market hegemony is no longer indisputable, and that there is really no longer any basis for the ‘decoupling’ of the social and the economic forces within the Union.¹ On the other hand, the Court of Justice of the European Union (CJEU) case law in the so-called *Laval* Quartet² (and the

¹ Compare D Schiek, ‘Transnational Collective Labour Agreements in Europe’ in M Rönmar (ed), *EU Industrial Relations v National Industrial Relations. Comparative and Interdisciplinary Perspectives* (Alphen aan den Rijn, Kluwer, 2008) and P Syrpis, ‘The Treaty of Lisbon: Much Ado ... But About What?’ (2008) 37 *Industrial Law Journal* 235.

² 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.

subsequent proposal for the Monti II Regulation,³ later withdrawn, however) have formed the basis for a comprehensive discussion about the conflict between fundamental collective labour rights and fundamental Treaty freedoms, bringing the ECHR and the European Court of Human Rights (ECtHR) into the overall picture as well. EU Citizenship has broadened the fundamental freedoms of the European Union to encompass not only the economically active but also EU citizens generally, a feature reflected not only in important case law by the CJEU, but also by the broadened scope of Regulation (EC) 883/2004 on the coordination of social security systems ('Coordination Regulation'), which has replaced the old Regulation 1408/71. Since the substantive contents of social security law as well as family law are left to the Member States, basically, the developments concerning fundamental and basic social rights and the right to a family has evolved around the case law of the CJEU applying the Coordination Regulation, and the case law of the ECtHR. Finally, the new Treaty basis for non-discrimination initiatives and the EU Charter of Fundamental Rights have evolved into a new set of both primary and secondary law instruments, making EU equality law more comprehensive and transformative⁴ than in the past.

A factual as well as political, institutional, legal and strategic change of the utmost importance during the last decade is, of course, the enlargement of the European Union to now include 27 Member States that possess considerable economic, political and legal differences. In combination with demographic developments such as unsustainable fertility rates and a rapidly ageing population, EU faces severe challenges—for societies and economies, culturally and organisationally, and from a legitimacy point of view. There are worries about how intergenerational solidarity and living standards will be affected, as each worker has to provide for the consumption needs of a growing number of elderly dependants in the form of pensions and health care.⁵ Demographic projections have been made ever since the 2001 Stockholm European Council and now feed into EU strategies at all levels. In 2010, the Lisbon Strategy was replaced with the Europe 2020 Strategy for smart, sustainable and inclusive growth.⁶ This overall strategy can be said to combine the concerns for a greener, more resource-efficient and more competitive economy based on knowledge and innovation, with social concerns of an inclusive growth fostering a high-employment economy delivering social and territorial cohesion. For some years EU social policy has been greatly influenced by a flexicurity discourse, also much debated. The European Council

³ Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012)130 final.

⁴ Compare 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), and the period 2000–04.

⁵ Compare, for instance, the 2012 Ageing Report, Economic and Budgetary Projections for the 27 EU Member States (2010–2060), Joint Report prepared by the European Commission (DG ECFIN) and the Economic Policy Committee (AWG) (21 May 2012).

⁶ COM(2010)2020 final.

has adopted Common Principles of Flexicurity, which are handled within the context of the European Employment Strategy and the Europe 2020 Strategy, and Directives on part-time work, fixed-term work and temporary agency work have been adopted. The aim of flexicurity is to reduce labour market segmentation, but also to increase economic growth and Europe's competitiveness in a global perspective. Flexicurity includes flexible and reliable contractual arrangements, effective and active labour market policies, reliable and adaptable systems for life-long learning, and modern social security systems. Employment and economic growth are also dealt with in common Integrated Guidelines,⁷ drawing attention to the interdependency between social issues, such as employment quality, social cohesion and economic growth, thus making us revisit the Treaty provision of the EU social market economy and 'the million-dollar question' regarding future market or social dimension hegemony within the European Union.

The question is all the more pressing as the European Union has experienced the deepest recession in decades, followed by the euro and sovereign debt crisis, putting an unprecedented stress on workers and enterprises and resulting in a major negative impact on public finances. The responses to the crisis have varied among the Member States, and have come in different phases. Many Member States first put crisis-related measures in place, such as internal flexibility, short-term working arrangements and wage concessions. The subsequent euro and sovereign debt crisis led not only to fundamental financial and governance reforms at EU level, but also to far-reaching austerity measures, deregulatory labour law and social security reforms in many Member States. These measures targeted, for example, employment protection regulation, collective bargaining, wage-setting and pension systems. Member States that were given 'bailout' packages by the 'Troika' were particularly affected. In several Member States these reforms were introduced hastily, without recourse to democratic and participatory procedures.⁸

In addition, changing family structures, the successive integration of women in paid work, and the need for reconciliation between economic activities and family and social life pose severe challenges for the EU social dimension.

The themes to explore are thus multifaceted and intertwined in complex ways. Both the book and this Introduction are structured to include different parts on Law as Normative Patterns and Other Theoretical Perspectives; Protection of Established Position and Normative Development; Market Functionalism and Normative Development; and Just Distribution and Normative Development, respectively. This way of organising the different issues at stake was inspired by the late Anna Christensen's theory of *law as normative patterns in a normative*

⁷ Council Decision 2010/707/EU of 21 October 2010 (EUT L308/46, 24 November 2010), later extended to 2011 and 2012, compare Council Decision 2012/238/EU of 26 April 2012.

⁸ See C Barnard, 'The Financial Crisis and the Euro Plus Pact: a Labour Lawyer's Perspective' (2012) 41 *Industrial Law Journal* 98; S Clauwaert and I Schömann, *The Crisis and National Labour Law Reforms: a Mapping Exercise*, ETUI Working Paper 2012:04 (Brussels, ETUI, 2012); and S Laulom *et al*, *How has the Crisis Affected Social Legislation in Europe?*, ETUI Policy Brief No 2/2012 (Brussels, ETUI, 2012).

field, and focuses on normative patterns that have proven to be crucial to legal development in the social dimension.⁹

The purpose of this Introduction is to link together the different chapters and issues in an attempt to highlight common traits, differences and thematic interrelations between the chapters, as well as normative and legal challenges for the future. This Introduction represents nothing more than our own understanding of the different topics and interrelated issues, and what is presented here can thus by no means be ascribed to the respective authors of the individual chapters.

II. LAW AS NORMATIVE PATTERNS AND OTHER THEORETICAL PERSPECTIVES

This initial part focuses on different theoretical perspectives on law and society. It begins with a chapter on Anna Christensen's theory of *law as normative patterns in a normative field*, written by Ann Numhauser-Henning. This is only natural, taking into consideration that this book has its origins in the Norma Research Programme, of which Christensen was a founder and Numhauser-Henning is now the coordinator.¹⁰ The theory is by no means a common denominator for studies within the Norma Research Programme, but its application has proven to be very fruitful in various studies of the social dimension within this programme.

Christensen's theory is thus based on the thesis that different basic normative patterns can be distinguished in the multitude of legal norms—much like in a drawing by Escher—or as Hofstadter has described human thinking, attempting to distinguish and describe certain patterns. Christensen's analysis of law in the social dimension served to identify such crucial basic normative patterns within this area of law, and these patterns underlie every legal system; they are a part of those cultural values upon which society is built. Among the important basic patterns 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 pattern; and on the other hand, Protection of Established Position (ie the right to one's possessions, or for instance, security of employment and the principle of replacement of lost earnings). A third basic normative pattern is Just Distribution, a distributive pattern related to social justice and solidarity. As social life is quite complex, these normative patterns do not make up the 'hierarchical legal system' we frequently imagine.¹¹ Instead, these patterns are put into play in a normative field as determined by different basic patterns, which also act

⁹ See further Ann Numhauser-Henning, Chapter 2.

¹⁰ See further www.jur.lu.se/norma.

¹¹ Compare Christensen who argues that '[l]egal theory ... has been trapped in that Kelsean dream about a consistent, hierarchical system. This eternal arranging and rearranging of the different parts of the assembly of norms in order to make them fit into a system seldom brings about any new insight'. A Christensen, 'Polycentricity and Normative Patterns' in H Petersen and H Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot, Dartmouth, 1995).

as normative poles. The ‘origin’ of the patterns differs according to the values they are set to protect, and thus, typically speaking, there is tension between different patterns. Societal change is what effects the ‘attraction’ behind the poles over time, and thus also legal change. Changes in the underlying conditions of production provide explanations for the movements in the normative field. However, the basic normative patterns all represent enduring and legitimate normative conceptions in society, and it is the task of legislators and courts to balance these conceptions within the framework of law. Another crucial component of the theoretical framework is the *functional relationship between law and the structure of society*. The thesis that social structure (material conditions, principles of organisation, modes of production and societal conflicts) determines, inter alia, the content of the law underlies the writings of both Christensen and Numhauser-Henning. The basic normative patterns are thus held to reflect normative practices functional to society and human relationships. Changes in the conditions of production as well as other structures, institutions and conditions crucial to society are thus used to explain the movements in the normative field from time to time, and can also be pictured in a *functional field* in which these two components interact. Common for both of these components are also the possibilities to open up the national confines of legal science, as they both emphasise structures and patterns which are common to many different national legal systems, not least within the European Union.

This chapter by Numhauser-Henning thoroughly describes the evolution of Christensen’s theory and also its application throughout the years (mainly within the Norma Research Programme) in the various legal fields of labour law, social security law and family law. The labour law studies deal, inter alia, with non-discrimination regulation and the flexibilisation of labour markets, whereas the social security studies tend to focus on pension issues—but also parental benefits—from both domestic and EU perspectives. In family law, we are acquainted with the normative patterns guiding marital property regimes, as well as their implications with regard to ‘the right to a family’ in social policy custody cases.

The theory of law as normative patterns in a normative field is a theory about normative perceptions within law and legal science itself, but it is also a theory addressing law as a societal—and basically functional—phenomenon. As Tuori puts it, Christensen’s theory is not about legal solutions in the sense of being right or wrong from an internal legal interpretative perspective: ‘the solutions can only be found at a political level’.¹² This underpins the theory’s basically empirical character. Its theoretical framework provides for a basically *descriptive* theory/method of law as empirical facts. What is described, however, is the *normative* content of rules and regulations. In this regard, as is indicated throughout Numhauser-Henning’s chapter, the theory of law as normative patterns in a normative field does of course relate to a vast theoretical background of classic

¹² See Kaarlo Tuori, Chapter 3.

works within sociology and other disciplines, such as those of Weber, Habermas and Durkheim.

There are, of course, also relations to a number of other legal theories and scientists. Some of these are briefly touched upon in the chapter itself. Here, we will also relate to the currently very influential *autopoiesis theory* of law, with Gunther Teubner and Niklas Luhmann as its most prominent representatives, and to Kaarlo Tuori and his theory of *critical legal positivism*.

The autopoiesis theory¹³ is a theory of law and its limitations when considered as an agent of change. Perceiving law as an instrument of change or political steering has been accused of ignoring the problem of the law's integrity as a specific mode of reasoning, discourse or system of communication 'on its own'. The theory is a highly abstract theory providing a conception of law as a system confronted by its environment. Its central claim is that law is to be considered as an essentially self-referential system of communication. Law has its own understanding of things, such as efficiency or truth. Legal communication is essentially in terms of right and wrong, legality or illegality. This theory thus basically produces a binary output, and around this characteristic form of legal communication a whole apparatus of distinctive concepts and modes of reasoning develops. Law as a system is cognitively open but normatively closed. It can and does routinely recognise and respond to economic, scientific, political or other events or phenomena. However, it can only 'observe' its environment in relation to its own categories of evaluation and interpretation. It is thus normatively closed in the sense that it can, and does, operate only with its own imperatives as a system of communication.¹⁴ Direct communications are possible only within communication systems and not between them. Different forms of communication (such as law, economics and science) are self-referential in the sense of being maintained not by inputs from their environment, but through the specific discursive criteria that they endlessly reproduce.

According to our understanding, the theory of law as normative patterns in a normative field is at least partly compatible with the autopoiesis theory as regards *normative reproduction*, in that it claims that law reacts to societal needs and perceptions. However, it transforms these influences in terms of normative patterns and other internal criteria inherent in the normative structure, and thus also limits the outcome. It is said that the autopoiesis theory encourages us to examine 'how law thinks'—and, that is precisely what we do when we identify and understand basic normative patterns in the multitude of legal norms(!) On the other hand, there is Christensen's conception of *basic* normative patterns as 'codifications' of social and also moral customs and practices in society. This may seem distant

¹³ See, eg G Teubner, *Autopoietic Law: a New Approach to Law and Society* (Berlin, de Gruyter 1987) and N Luhmann, *A Sociological Theory of Law* (E King-Utz and M Albrow (trans), London, Routledge, 1985).

¹⁴ 'Law's responses are not to an environment that in some way impacts directly on it, but to an environment that law itself constructs intellectually in its own terms, and understands in terms of its own communicative criteria,' see R Cotterrell, *The Sociology of Law: An Introduction*, 2nd edn (London, Butterworths, 1992) 67.

from the view of law as a basically self-referential system of communication. However, the autopoiesis theory does hold the view that the autonomy of law arises from the character of the society in which law exists. The nature and limits of that autonomy cannot be understood except by analysing law as an aspect of society—in other words, in terms of a social theory of law.

To our understanding, there is also a kindred relationship to a considerable extent between Christensen's theory of law as normative patterns in a normative field and Kaarlo Tuori's way of analysing law in terms of its different layers.¹⁵ In his chapter, Kaarlo Tuori places Christensen's theory in a broader context, analysing it in relation to the Norwegian legal philosopher David Doublet's theory on law's evaluation foundation as well as his own theory on *critical legal positivism*.¹⁶ This is an analysis of 'law's hidden premises', or as this contribution is titled, 'law beyond law'. Tuori characterises Christensen's starting point of law as 'an assemblage of legal norms with a rather weak systems character', a consequence of the fact that legal norms have emerged in diverse manners and at diverse times. He then refers to Habermas' famous dichotomy between law as an institution and law as a medium, concluding that Christensen's basic normative patterns belong to the domain of law as an institution rather than that of law as a medium. Tuori then turns to a presentation of Doublet's thinking about law's evaluation foundation as a notion enabling us to overcome the dichotomy between legal positivism and natural law: the evaluation foundation is said to be an immanent normative yardstick of law implicit in law itself, an endeavour said to be 'a kind of synthesis of Habermas and Luhmann'. Crucial to Doublet is his distinction between positive and valid law. Positive law is law as it appears in traditional legal sources, whereas valid law is 'the end product of legal interpretation'. In the process of producing, reproducing and interpreting law 'the legal communicative community' is crucial; the evaluation foundation is said to offer normative criteria for assessing both positive and valid law (interrelated functions of criticism, boundary-drawing, legitimation and constitution) and seems to stem from the doctrine of legal sources, including both intra- and extra-positive values.

Tuori then turns to his own theory on critical legal positivism, describing the legal order as multi-layered: (1) the surface level, where modern law and its conscious aspiration to achieve social changes through legislation entails a tendency to disengage the past from the future; (2) the legal cultural level, which represents the memory of law and keeps alive the connection to the past of the law including the theory of legal sources as well as 'common law', but also typical juridical patterns of thought and argumentation, legal concepts and general legal principles of a certain field creating a 'tacit pre-understanding' of law; and (3) the deep structure of law (as a historical type of law). The question is how to combine the two

¹⁵ Compare Christensen, 'Normative basic patterns are situated beyond the surface of legal-technical rules'. A Christensen, 'Anställningsskyddet och besittningsskyddet—en komparativ undersökning' in T Hästad *et al* (eds), *Festskrift till Anders Agell* (Uppsala, Justus Förlag, 1994) 75. See further K Tuori, *Critical Legal Positivism* (Aldershot, Ashgate, 2002).

¹⁶ See Tuori, *Critical Legal Positivism*, above n 15.

apparently incompatible features of the law: its positivity and its multi-layered nature. This is done in critical legal positivism by pointing to the relation of sedimentation prevailing between the law's multiple levels in legal practices.

Tuori thus concludes that there is 'law beyond law'—'law as a normative entity is not exhausted by surface level positive law'—thus also differentiating between law as a symbolic-normative phenomenon (legal order) and a social phenomenon (legal practices). Legal scholars participate in two communicative systems and are members in two communicative communities: legal and scientific practices. Both Tuori's own and Doublet's view of law are said to create a 'critical reflexive instance in law', 'replacing' (the function of) natural law in legal thinking. Tuori also understands Christensen's view on law as accepting the idea of legal cultural layers, and situates Christensen's normative patterns at his own 'second level'—legal culture representing the 'memory of law'.

An important conclusion by Tuori regarding Christensen's view on law is that despite her identification of normative patterns, 'the coherence they engender is not of total but merely local character. No internal hierarchy exists, among basic normative patterns, nor any higher-rank principle of definitive legislative resolution of conflicts'. Neither normative patterns nor principles should be 'understood in the sense of directly applicable'—instead, they are 'assigned a legal cultural sense, alluding to the sub-surface normative premises of various fields of law'. Here, there is said to be a difference as compared to both Tuori's own theory and Doublet's, emphasising the corrective rule of second or deep-culture level norms overcoming horizontal contradictions in law. Tuori states that, for Christensen, 'no *legal* [emphasis added] solution exists between divergent normative patterns. The solutions can only be found at a political level'. This is why her theory, despite studying the normative contents of different norms, represents a basically external view of law in society: 'a hidden social theory as it were'. Christensen's way of employing the term 'normative' implies a moral connotation, according to Tuori, who compares her normative patterns to Savigny's legal institutions combining a legal form and a social substratum of life relationships.

Tuori situates Christensen's theory in the social dimension, or at least states that she 'has developed her own proposal for bringing order into legal norm material with a view to what she calls the *social dimension*; legal norms regulating relationships which directly involve almost everyone in their daily life, and pursuing the function of protecting and developing this daily life'. Simon Deakin, in the debate at the international symposium preceding this book, also suggested that Christensen's theory was perhaps 'a theory on the nature of law in modern market democracies'. It is true that the studies Christensen carried out were situated in the social dimension. She did, however, claim her theory to be of general application. In our opinions, there is reason to believe that an exploration of basic normative patterns in other areas such as consumer law¹⁷ but, for instance, also parts of

¹⁷ Compare the works of Thomas Wilhelmsson.

public law and criminal law, would be very interesting for a better understanding of positive law. However, this is yet to be proven.¹⁸

As Christensen, and Tuori, rightly put it, ‘different ways of ordering (legal norm material) illuminate different aspects of legal norms’. At least Christensen leaves it open to politicians and legislators to present solutions to societies’ problems after analysing and revealing the conflicting patterns offered to us hitherto in legal culture.

There is also room for private actors, however, and this is precisely what Silvana Sciarra’s chapter is about. She focuses on the developing role played by transnational law-making through the social partners at EU level as a result of the ‘unprecedented economic and financial crisis [on the one hand], and on the other hand ... an increasing mobility of companies and labour’. She starts out with Gino Giugni and the Italian example of recognition of ‘autonomous’ collective bargaining as a legitimate normative source as early as the 1960s, linking it to the current need to adapt such concepts of ‘autonomy’ of private governments—ie collective bargaining—to emerging transnational social spheres in the European Union. She presents us with the history of collective bargaining strengthened by ‘structural coupling’ of law and politics in the area of labour law, this specific ‘social sphere’, eventually ending up considerably ‘juridified’ (in the terms of Teubner). The challenges now faced by transnational labour law, Sciarra argues, recall the theoretical questions from the 1960s. She suggests that the transnationalisation of sources as ‘a phenomenon affecting labour law as well as other legal disciplines, could be the effect of a lost centrality of nation states’. Developments emerging from transnational practices in collective bargaining give rise to new questions of the enforceability and legitimacy of bargaining agents, tending, she argues (after referring to Mireille Delmas-Marty’s ideas on ‘ordered pluralism’ as well as Peter Lindseth’s notion of/reasoning on ‘constitutional legitimacy’) to ‘re-nationalise’ these issues in the hands of legitimate collective actors at national level. This is a process ‘which should be accompanied by an impetus in re-building legitimacy of collective bargaining agents’, ie of transnational collective labour law in action. She argues that ‘a reflection on the search for new legal pluralism of sources should be enhanced within the EU’ and that ‘collective actors should be openly and transparently empowered, to facilitate processes of transnational standard setting and make them enforceable beyond nation states’.

Sciarra makes her inspirational and forward-looking argument concerning the social partners as a sort of integrative ‘fore-runner’ in EU collective labour law and practices in close relation to the ideas of legal pluralism and ‘normative circles’ or ‘collective spheres’ at the heart of not only Giugni’s writings but also of Christensen’s theory of law as normative patterns in a normative field; she

¹⁸ See A Christensen, ‘Protection of the Established Position: a Basic Normative Pattern’ (2000) *Scandinavian Studies in Law* 285. Compare also HP Graver, ‘Normative mønster i EF-retten’ in C Henrichsen *et al* (eds), *Lovens Liv. Till Jørgen Dalberg-Larsen på 60-årsdagen 19. September 2000* (Copenhagen, Jurist- og Økonomforbundets forlag, 2000).

concludes that ‘a widespread sense of “belonging” to transnational groups should be the outcome of current trends in the construction of new supranational bargaining agents’.

III. PROTECTION OF ESTABLISHED POSITION AND NORMATIVE DEVELOPMENT

This part focuses on normative development that reflects protective devices, and their strengthening or deterioration, for crucial societal players. This development can be in the form of employment protection for workers and its transformation in the flexicurity discourse, or the broadening of the concept of marriage to embrace same-sex partners. The normative pattern of Protection of Established Position can be said to be especially powerful in labour law due to its traditional character of protection for the weaker party. Through the years, it has also gained significant importance in social security law. Its status of a significant normative pattern in the whole of the social dimension (also in family law) is reflected in Titti Mattsson’s contribution.

In his chapter, Niklas Bruun sets out to analyse the normative development of labour law in the new millennium, focusing on three strong features: the relationship between EU Treaty freedoms and fundamental collective labour rights following the *Laval* Quartet; the dominating general developments of EU labour law; and constitutional implications of the economic crisis. Bruun pictures the outcome of the *Laval* case as a battle between economic values/market functionalism and the social dimension in terms of the Protection of Established Position of Swedish trade unions. The legislative outcome—the Swedish *Lex Laval*—‘clearly restricts the freedom of association or collective bargaining rights of the Swedish trade unions: they cannot demand more favourable terms and conditions than the minimum standards prescribed in Article 3.1 of the Posting of Workers Directive, they cannot raise demands concerning any other matter than those explicitly regulated in Article 3.1 and they cannot demand any collective agreement at all if the posted workers already enjoy terms and conditions that essentially are at least as favourable as those which apply in accordance with Swedish law and the applicable general collective agreement’.

Quite contrary to the general approach of discussing these situations in terms of the discrimination of transnational service providers, Bruun characterises the outcome as the introduction of ‘a specific, strong protection for transnational service providers as employers’—‘the requirement for equal treatment of employers has been turned upside down’. National employers can be forced to apply more favourable conditions (compared to the minimum standard in the Directive) and also conditions outside the hard nucleus of the Directive if they are not bound by a collective agreement. This can hardly be depicted as an expression of the Market-Functional pattern; rather, it can be seen as the Protection of Established Position of the transnational service provider. The rationale, however, is to strengthen internal

market integration and efficiency. As regards general labour law developments, Bruun points to the fact that wage-setting is being decentralised by and even substituted with minimum wage legislation, implying a strong shift towards the Market-Functional pattern. He also points to the fact that developments are characterised by a 'fragmentation' within labour law, depriving it of its general character as a 'protection for the weaker party'. These developments are manifested in growing groups of flexible workers, such as part-time workers, fixed-term workers and temporary agency workers, but also contracted labour outside the scope of labour law. 'Rules are adapted to accommodate the need of employers in a dynamic and changing business environment.' To this we can add the economic crisis.

This change of perspective in labour law—from protection to a market-oriented focus considering different groups of workers' positions in the internal market—is even more accentuated when it comes to posted workers. They are not perceived as workers where they perform their work, but 'as a kind of institutional link of the service providers, taking advantage of the right to freely provide cross-border services'. Then there are third-country nationals linked or unlinked to the internal market, also labelled to an increasing extent in accordance with their position in the internal market: scientific workers, highly qualified workers, seasonal workers and intra-corporate transferees. Bruun depicts this order as an expression of a Market-Functional order, genuinely incongruous with the (general) labour law tradition. In the last part of his chapter Bruun describes in some detail the European Union's answer to the recent economic crisis in the cases of Greece, Ireland and Portugal, highlighting its far-reaching impact on social policy in the Member States at issue, as well as the incoherence of this development with international labour standards and the Lisbon Treaty itself.

Bruun's conclusions are quite pessimistic, claiming that labour—quite contrary to the fundamental principle of the ILO—is growing into a commodity on the internal market, as reflected in recent EU developments, and that the 'disruptive' features of this development do not really lend themselves to an evolutionary analysis in the normative field of labour law. Lack of political commitment has led us to a situation of an extreme Market-Functional pattern. As Christensen herself already suggested, Bruun acknowledges as an alternative the interpretation that what we are witnessing is a movement in the borders between different normative fields, or as he puts it, 'the borders between the field of labour law and social (security) law are being blurred'. Protection of Established Position is being replaced by a pattern of Basic Subsistence, be it in the form of (labour law) minimum wage regulations or (social security) basic benefits.

Mia Rönnmar focuses in her chapter on the legal situation of the elderly in terms of fundamental rights, age discrimination, mandatory retirement and employment protection. Her interest in the elderly originates in the demographic shift implied by an ageing population and she situates these aspects in the normative developments within EU law and policies. Important features are, of course, the Lisbon Treaty and the new status as primary law of the EU Charter on Fundamental Rights, as well as developments concerning non-discrimination law,

including a ban on age discrimination. In addition to these legal developments are policy and strategy developments, such as the EU 2020 Strategy, multifaceted employment policies, and the social inclusion and pension processes within the open method of coordination. Added to this are the frequent release of Ageing Reports and the decision to make 2012 the 'Year of Active Ageing'. Following a broader introduction to the Treaty basis of the current legal and social protection of the elderly in the European Union, Rönnmar thus makes her analysis in terms of fundamental rights, age discrimination and mandatory retirement, and employment protection, respectively. Despite the fact that fundamental rights or human rights, on the one hand, and social protection in terms of social security (such as pension schemes), on the other, are said to belong to 'two different normative traditions', Rönnmar succeeds in relating the complex developments sketched here not only to the normative pattern of Protection of Established Position, but also to the hegemonic normative perceptions behind the poles of the Market-Functional pattern and Just Distribution.

The normative picture that evolves is as complex as the developments referred to in this chapter. The increased emphasis on fundamental rights, generally, Rönnmar interprets as a movement towards Just Distribution. Through pension reforms and austerity measures in the wake of the current economic crisis, pension developments are steering away from Protection of Established Position, making room for Just Distribution in the form of guaranteed or minimum pensions. Here, however, the battle is not clear-cut. Pension reform developments are also characterised by an increased importance of the Principle of Accumulated Entitlement, at the same time as the principle of accrued (pension) rights may be precisely what challenges the down-turn of the Protection of Established Position. In addition, the increase in minimum pension schemes does not necessarily reflect an up-turn of the normative perceptions behind the pattern of Just Distribution; rather, it is a 'necessary evil' in the wake of a stronger Market-Functional pattern. As regards employment protection, and as Rönnmar describes, stronger protection for the position of older workers in particular (and especially if we go so far as to prohibit mandatory retirement as an illegitimate, discriminatory practice) may threaten to hollow out employment protection, making way for using decreased working ability as just cause for dismissal.

In addition, when it comes to the elderly, the relation between the normative fields of labour law and social security law are complementary; normative developments may, as Bruun suggested, 'transfer' a labour law problem to be solved in the field of social security or vice versa. But in the elderly context, the tension is still 'on'. The major future social challenge is the high cost of pensions for an ageing population, but so far, neither EU law nor the CJEU has succeeded in strengthening the employment protection of workers of pensionable age to ease the pressure on pensions. Mandatory retirement is still accepted, despite extensive bans on age discrimination.

Under the heading 'Participation and Flexibility for All?', Titti Mattsson discusses modern family structures and children's rights. From these perspectives, the

pattern of Protection of Established Position does not seem to have a significant impact. Nowadays, nothing about modern families seems to be very established. Despite family being ‘the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children’, according to the United Nation Convention of the Rights of the Child, changing family structures keep reconstructing this entity throughout people’s lives. Giving us a brief presentation of the modern research conceptualisation of families, and also of recent case law on the subject by the ECtHR, Mattsson ends up with the Beck’s and Beck-Gernsheim’s definition of family as an individualisation process, a meeting place for individuals to fulfil their goals and interests. Given this high level of flexibility and negotiated relationships, children’s participation rights are, of course, crucial when it comes to families. Despite the current stage of child care policy developments being identified as a paradigm of ‘children’s rights and child liberation’, children’s rights as they are currently applied are still characterised by a fairly weak position, whereas parental rights have long had a strong tradition. This was shown in Mattsson’s study of custody claims following long-term foster placement in Sweden, where Mattsson interpreted the reluctance on the part of the courts to consider a formal change of custody to the foster parents whenever the biological parents disagreed; this was an expression of respect for the Protection of Established Position of such a parent in regard to his/her biological family. Quite contrary to socio-political ambitions revealed in the relevant *travaux préparatoires*, there was also an unwillingness on behalf of social authorities even to initiate a custody case, should the biological parents not agree, seemingly casting aside the assessment of ‘the best interest of the child’. However, recent developments related to the United Nations Convention on the Rights of the Child, implying the adoption of a new optional protocol that would introduce a complaint system for violations of child rights, are being put forward as a way to strengthen child participation and the implementation of children’s rights.

IV. MARKET-FUNCTIONALISM AND NORMATIVE DEVELOPMENT

This part focuses on law as a well-known institution for ‘constitutionalising’, as well as restraining market concerns and expressions. The regulation of ‘innovative’ work contracts, and the balancing of markets and fundamental collective labour rights, as well as pension reforms, are but a few examples among recent developments, as is the issue of family and work reconciliation: balancing family concerns with the demands of working life. Simon Deakin’s chapter focuses on the conceptual understanding of markets in economics and in law. It could just as well have been situated in the introductory part of the book concerning theoretical perspectives. It is, however, a wonderful example of how the market depends on the legal system (ie the market notion in the labour law discourse as balanced in the broader normative field of labour law) to instantiate certain social values essential for market operation. The analysis is founded on the premise that

an inquiry into the nature of social institutions can be informed by studying the terms used by the legal system to describe those institutions, ie that the notion of the market in labour law discourse has ‘wider potential applications’. Deakin’s starting point is that ‘in the social sciences, empirical data are mediated through theories and models which in many ways resemble the conceptual constructs which are used to shape legal reasoning ... In both cases, fitting data to models, and adjusting the models in the light of the data, are among the techniques used to manage and process information drawn from an open-ended and complex social reality’. Like Christensen, Deakin is of the opinion that ‘when mutations in ... concepts [such as the market] are studied over time and in relation to the parallel experiences of other legal systems and their societies, the analysis is likely to be ... revealing’. Starting out with a presentation (and a critique) of hegemonic market concepts in economics such as the ‘Walrasian’ model of a market as a mechanism of resource allocation, and as a spontaneous order for the coordination of private action, Deakin then turns to Hayek’s model, recognising a role for the legal system in underpinning economic relations (however, founded on the principle of individual autonomy under abstract rules of just conduct in decision-making, resulting also in a ‘spontaneous’ order), and argues that these concepts or models ‘are not intrinsically superior to conceptions of the market derived from within legal discourse itself’. Both the economic theories concerned are said, wrongly, to ‘assume away entirely the role of institutions’. ‘Legal scholarship can contribute to the formulation of a better (in the sense of more empirically grounded) set of models of the market ... to inform policy choices’. Legal analysis is suggested to promote a better understanding of (i) a market having a normative base, (ii) not being self-equilibrating, and (iii) being institutionally bounded. Categorising a ‘market’ as not being a legal term of art, Deakin argues that an understanding of the nature, scope and limits of labour market relations is an intrinsic part of legal concepts such as *wage*, *employee* and *collective agreement*.

(i) The normative base of the (labour) market (not visible or adequately captured in the Walrasian and Hayekian models) is an understanding of the employment relationship as based on reciprocity and a basic trade-off between subordination and protection. ‘As such, the legal concept is evidence for a model of the labour market in which “rational” economic behaviour is framed by conventional understandings of what is “fair” treatment in employment.’ Moreover, Deakin argues that ‘it would be equally plausible to see the duty of mutual trust and cooperation along with other legal expressions of fairness norms, as a device permitting more effective coordination, and thus more efficient contracting, in the context of the employment relationship’. (ii) Assuming that the idea of a perfectly competitive labour market is a contradiction in terms refuted by empirical evidence, labour law regulation is argued to be ‘endogenous responses to market failures’ of a much more complicated nature than mere external commands interfering with spontaneous private ordering. (iii) Legal doctrine is known to ‘stress the limits of the market and its interdependence with societal institutions displaying a different logic’ as there are ‘other competing, and in some cases, superior

values'. Thus, there are both state and civil society institutions there to limit as well as support the market.

Deakin's conclusion is that there is a pressing practical need, as well as an intellectual one, for a new theoretical synthesis in both economics and law. 'Labour law must be understood as a mode of market governance which provides the basis for sustainable economic development.' With a reference to the CJEU's judgments in the *Laval Quartet*, Deakin concludes that this cannot be done simply by subordinating 'social' values to 'economic' ones; rather, it requires the acknowledgement of the idea 'that as the labour market setting has a normative foundation, it cannot effectively operate in the absence of the "fairness norms" and values of solidarity to which labour law gives expression'. This is a view parallel to that of Anna Christensen, understanding labour law regulations as necessarily, and simultaneously, balancing market-functional concerns and other normative perceptions such as just distribution and protection of established positions.

If Deakin's chapter is a powerful argument for social values as a constitutive part of the market notion, Per Norberg demonstrates in his chapter how social normative perceptions can prove to be stronger than market incentives when it comes to both trade union behaviour and pension decisions. He presents us with two recent Swedish social security reforms, where the legislator has used market forces or mechanisms to stimulate certain behaviour on the part of the social partners or the general public. The first reform concerned the Swedish unemployment benefit scheme. In 2007–2008, there was a reform of the method of financing the income-related Swedish unemployment insurance, an insurance administrated by the specific trade unions' unemployment funds. To make the labour market work smoothly—and to keep costs down—the goal of the legislator was to steer unskilled unemployed workers towards accepting jobs with lower pay. As wage-setting is considered a task for the social partners, the legislator chose an indirect way to achieve the goal, by creating a system where high wages for unskilled workers would become so costly for the members of the unemployment funds that the trade unions would adapt by lowering wages in occupations with high unemployment. 'The unemployment insurance financing reform became like private insurance in the sense that the unemployment funds needed to take fees from their members reflecting the individual fund's costs for unemployment.'

The second reform concerned the Swedish public pension scheme, in which a major reform took place in 1997 to make pensions more sustainable in the long term. One important goal was to make people retire later. This was, however, not done by raising the pensionable age, but by introducing the life-time-earnings principle, making each additional year of work contribute to higher pensions, and giving people the right to delay retirement, thus making early retirement costly. In addition, part of the pension scheme was individually pre-funded, bearing a great resemblance to private 'bank savings'. Employment protection was also extended to 67 years. 'Using one's own money was supposed to make persons retire later.' However, this reliance on market mechanisms failed in both cases, in that they did not result in the intended behaviour. As regards unemployment insurance,

trade unions continued their traditional ‘solidarity wage-setting’—trade unions with low wages got above-normal wage increases, regardless of unemployment levels. The underlying logic is this: if employers provide work that has such low productivity that it can only be done at low wages, the jobs will disappear, the members will become unemployed, and later on they will be re-employed in another sector. Trade unions ‘may well pay the market price to uphold their convictions (preferences)’. With regard to pensions the system was thus designed to make it a freedom—and financially rewarding—for the individual to choose more working years instead of a lower pension. Figures now show that people use the flexibility within the pension scheme to take early pension rather than to retire later, and most people still choose to take pension at the age of 65. This pattern of behaviour is not the result of individuals acting rationally in the market. Instead, Norberg finds the explanation in the following idea: by presenting people with a choice rather than a direct social norm on later retirement (that is, increasing the pensionable age), the individual ‘is allowed to satisfy their preference as far as their financial resources admit ... If the system provides them a pension that is exactly matched to their lifetime contribution and expected remaining lifetime, no one else should have any moral objection if their preference is to retire early rather than buying a new luxury car. Calculating lifetime earnings exactly creates a normative frame where taking pension early is a consumer decision like any other.’

Leaving active ageing (in the sense of longer working lives) to individual choice, backed up by economic incentives, has thus turned out to be less effective in the Swedish setting. This can be supposed to relate to the fact that the Swedish welfare system is still rather generous and pension levels still relatively high. One can afford to keep normative perceptions—‘pension norms’—based on ‘a right’ to retire (even early) and have a long and satisfying life as a pensioner.¹⁹ Then again, should conditions change, as they can be expected to do given the demographical trends towards a rapidly ageing society that will force the individual to work longer for a decent pension, behaviour can be expected to change. Intergenerational conflicts will grow stronger, and the importance of protection against (old) age discrimination will increase, as will the added need for employment protection at an advanced age. As Rönmmar argues in her chapter this can, however, be expected to be far from a linear process(!)

In her chapter, Jenny Julén Votinius addresses the normative conflict behind labour law intended to promote and support the reconciliation of family and working life, on the one hand, and on the other, modern labour law as an expression of market concerns. Julén Votinius argues that behind the protection of parenthood is the value of *work-family balance*, whereas the value of the employee’s *work life commitment* is central for labour law in general. The study is carried out in a setting which provides for a comparative reflection over how the balance

¹⁹ Cf A Numhauser-Henning, *Labour Law in a Greying Labour Market—in Need of a Reconceptualisation of Work and Pension Norms*, Keynote Paper on the occasion of the Fifth Annual Legal Seminar, European Labour Law Network, 11–12 October 2012.

is struck between the protection of parental needs and the interest of market efficiency, in EU and Swedish labour law, respectively. Julén Votinius' analysis is related to Christensen's theory of law as normative patterns in a normative field. It is a novel application of this theory, building on what Julén Votinius labels 'the heuristic aspects' of the theory, here allowing her to identify the missing gender dimension. The differences between EU law and Swedish domestic law are identified as being informed by two different value sets: that of the *uniqueness of motherhood* (EU) and that of *shared parental responsibility* (Sweden), respectively, in turn reflections of the 'missing' additional basic normative pattern Gender Difference, according to Julén Votinius.

This is a thought-provoking analysis. It reveals that Swedish law, with its fairly substantial period of paid parental leave, is far more powerful in supporting the value of work-family balance than EU law in general, notwithstanding the fact that EU law is more stringent (and thus powerful) when it comes to the protection of employment and employment conditions. This makes one recall Bruun's and Fudge's arguments in their chapters, on the 'amalgamation' of the two normative fields of labour law and social security law as a way to balance market-functional needs with a social dimension in our times. As for the normative pattern Gender Difference, Julén Votinius states that 'the further implications of this additional pattern remain to be explored'. In this context she is also pointing to the pressing issues of the flexibilisation of work and changing family structures, which are also touched upon by Fudge.

V. JUST DISTRIBUTION AND NORMATIVE DEVELOPMENT

This part focuses on distributive normative elements, at the heart of the Welfare State—and arguably at the heart of the European Social Model or Market. How, for example, do increasingly differentiated work relations, flexicurity, equal treatment principles and social cohesion aspirations, as well as 'the European Union integration project' as such, influence legal developments in terms of solidarity and social justice?

In recent years, the flexicurity strategy has been presented as a significant feature of EU social policy. In her chapter, Judy Fudge scrutinises the flexicurity strategy in relation to labour-market segmentation and precarious work. Fudge's chapter implies a novel application of the theory of law as normative patterns in a normative field, effectuating a kind of 'actors' analysis'. It is the discourse of flexicurity in an institutionalised EU setting that is being normatively analysed. According to Fudge, 'seeing flexicurity as a normative field constructed by actors and institutions through a range of processes allows us to appreciate the conflicts between normative patterns and differences in power relations that help to explain specific positions and understandings'. Flexicurity is found to have a deep affinity with the Market-Functional pattern, but 'nonetheless, Just Distribution is a strong competing norm since it is flexicurity's commitment to social protection

that distinguishes it as a policy agenda from flexibility, which focuses exclusively on the market as the only legitimate norm of distribution'. These days, however, social justice is defined as 'employability', says Fudge, and as the key distributive conflict on the flexicurity agenda is labour market segmentation, the commitment to the Protection of Established Positions is minimized at this stage of development. To speak in terms of Deakin and Bruun, we are witnessing a shift from a conflict between labour and capital to a conflict between workers(!) Fudge pictures a rather unbalanced development, so far, favouring flexibility over the disadvantage of workers' security, since 'the OMC does not promote social protection and solidarity because the process is embedded in a specific economic agenda that emphasises deregulation and a governance structure at the EU that provides limited protection for social rights from downward harmonization'. She also refers in this context to the 'deregulatory bias' in the case law of the CJEU, manifested in the *Laval* Quartet (despite some more social rights-based case law concerning precisely the atypical work Directives), and EU enlargement 'creating conditions for a race to the bottom for wages and labour standards'. At best, it is an open question whether the extent to which precarious work in the forms of non-standard work has the potential to operate as bridges into the labour market and labour market participation, or whether it will rather function as a trap. 'The challenge for labour law is to develop a new standard employment contract, with new social rights and social obligations, and not simply to adapt atypical work arrangements to the old model', concludes Fudge. In the discussions following her conference presentation, she convincingly argued that flexicurity implies the actual amalgamation of the two normative fields of labour law and social security law, much in the same way as Bruun does.

Just as Norberg, Thomas Erhag refers in his chapter to the Swedish public pension scheme reform in the late 1990s. Now, however, focus is on pensions, EU Citizenship and the right to free movement. The Just Distribution pattern in the form of basic pension schemes becomes a centrepiece of social security, as flexible work increasingly becomes the rule; this is a real challenge for the internal market and free movement. Of course, this is especially true when it comes to 'free movement' of non-economically active EU citizens (and also resident third-country nationals), such as pensioners. The general trend in public pension schemes 'from emphasis on basic protection and hence Just Distribution towards acquired rights and the normative pole of Market Function' has proved 'to make the social situation for persons outside market labour increasingly difficult' and has also exacerbated the situation for those marginalised on a heavily segmented labour market. The chapter focuses on this normative shift, illustrating it with free movement examples. Traditionally, 'solidaristic community' and redistributive patterns such as basic pension schemes are framed by the nation-state: compare what was said above about 'normative circles' in relation to Sciarra's chapter. Through the principle of free movement for persons and not only workers, the European Union and its internal market are forcing the Member States 'to give up their old national right of refusing entry and residence to migrants'. This is, however, only partially

true. Through EU Directive 2004/38, which lays down the conditions under which a Member State may deny an EU citizen the right to stay in the country, Member States have retained the right to proportional demands for sufficient economic means and sickness insurance coverage. It is in relation to these possibilities that crucial lacunae present themselves as regards the application of the Directive in relation to the Swedish systems of both pensions and health care.

As a consequence of EU requirements on the coordination of social security systems and the then-basic Swedish *folkpension*, Sweden introduced a reform which pro-rated this basic pension benefit, making 40 years of residence a requirement for the full pension. The (intended) consequence is that late-working-life immigrants may fall under the subsistence norm and find themselves in need of social assistance. In order to fill in this 'gap', the Maintenance Support for Elderly was introduced in line with Swedish Welfare State ambitions to provide minimum subsistence for all its residents. However, this benefit is not exportable, and thus requires residence in Sweden. A crucial issue discussed by Erhag is whether this Maintenance Support can be relied upon when claiming residence rights in Sweden under Directive 2004/38, since it is a national tax-financed solidarity benefit not traditionally regarded as 'social assistance' proper. Another problem occurs in relation to the Swedish model of organising health care, relying not on a right to care but on a duty for the authorities to provide such care for all locally resident persons, which makes it awkward for the Swedish administration to uphold sickness insurance as a requirement for residency. It is obvious that these issues imply a serious challenge, not only for Sweden but also in the bigger picture for social Europe, requiring a substantial degree of solidarity between the EU Member States and all EU citizens—and eventually requiring us to 'rethink the purpose and normative foundations of social security law' as a nationally restricted 'normative circle', instead giving way to a greater community, the European Union, where all who belong are treated in an equal manner.

The last chapter in this book reflects on normative patterns in the context of Swedish divorce law. Contrary to labour law, family law has not hitherto proved to lend itself to any more far-reaching harmonisation at EU level. There are still too many significant differences throughout Europe, which create a strong impact on the content of family law. These differences can be seen in family structures and culture and traditions, individualism or collectivism, gender equality and the development of the Welfare State. Even so, an independent group, the Commission on European Family Law (CEFL), is investigating whether a harmonisation of family law in Europe is possible. One additional important and difficult challenge in this respect is the development of a common conceptual framework. Against this background, Eva Ryrstedt has opted in this chapter for an in-depth presentation and analysis of the Swedish regulation surrounding divorce, and the principle of divorce as a 'clean break', but against a background regulation reflecting 'Community' as the dominant normative perception of ongoing marriage. The clean-break principle is characterised by free and unilateral access to divorce and total economic independence afterwards, exempting alimonies and making family

reshaping a realistic option for any of the parties. The ‘strange mix of rules’ thus combines a perception of marriage as a ‘free contract’ when it comes to entrance and dissolution, but with a strong notion of Community during marriage reflected in the rules on maintenance during (but thus not after) marriage and the equal division of all the spouses’ assets upon divorce as a primary rule. (And this division takes place despite individual ownership as the formally organising principle.)

The normative setting of Swedish divorce law can be said to confirm Deakin’s suggestion that the more developed the Welfare State, the stronger the contract dimension can be allowed to be. (The impact of the notions of Community and the normative pattern of Protection of Established Position reflected in the equal division of the spouses’ assets should not, however, be underestimated in this context.)

VI. CONCLUDING REMARKS

The social dimension of the European Union, Social Europe and European Welfare States are currently experiencing times of change and challenge. The general trend, depicted in basically all chapters of this book, is towards an increased influence of the Market–Functional pattern and a weakening of Protection of Established Position (though not coupled with a concomitant and robust strengthening of Just Distribution). The Lisbon Treaty of 2009, with its aim of achieving a social market economy and strengthening of fundamental rights through the legally binding EU Charter of Fundamental Rights and the future accession to the ECHR, implies increased *legal* possibilities for developing and strengthening the social dimension of the European Union and the rights of not only workers but also EU citizens more generally. However, economic, social and political realities, including the enlargement of the European Union and the current economic crisis, complicate and can even endanger such a development, and at the moment the outlook is rather bleak and pessimistic. The economic crisis, and the far-reaching austerity measures and deregulatory labour law and social security reform in its wake, affecting employment protection, collective bargaining, wage-setting and pension systems, etc, rather strengthen the Market-Functional trend. In addition, the case law of the CJEU in the *Laval* Quartet has already paved the way for market dominance and ‘deregulation’ in the labour law field, by placing free movement and economic freedoms first and fundamental trade union rights and social protection second. In recent years, not least after the 2004 and 2007 enlargements of the European Union, it has also become increasingly difficult to reach political agreement on ‘hard law’ solutions and EU legislation in the social dimension. Instead, there has been a continued emphasis on ‘soft law’ mechanisms and new modes of governance, such as the European social dialogue and the open method of coordination, and an increased importance of the courts and case law.

As was mentioned initially in this Introduction, and is touched upon in several chapters in the book, the demographic trend of a rapidly ageing population is one

of the greatest future challenges for the European Union in terms of a sustainable society. It challenges both the functioning of labour markets as we know them, as well as pension and health care systems, and indeed all important parts of the social dimension. In this respect, a closer examination of the Japanese model would be interesting, as it represents an early example of an adaptation of existing lifelong employment and senior-wage-setting practices in terms of ‘flexicurity’, as a response to labour market flexibilisation and the need for active ageing. Whether it is an example to follow is, of course, quite another thing. Nevertheless, it should put developments in an interesting perspective.

A successful strategy to develop active ageing requires the adoption of a life-course perspective to many of the social issues of our interest. In addition, a future continued, and much needed, emphasis on work-life balance should focus not only on families with children and the caring obligations in relation to children, but also on the caring obligations in relation to elderly relatives. An adjustment of the working situation and working environment of elderly workers, enabling them to work longer, is also an important future element of work-life balance. All this relates in turn also to changing family structures and the need to accommodate the reconstruction of the ‘nuclear’ family and the formation of new and pluralistic families—the basic unit of Belonging—not only in different Member States, but also in an integrated European Union providing free movement across borders. The achievement of free movement across borders is, of course, a common challenge for labour law, social security law and family law, expressing itself in difficulties experienced in attaining, applying and interpreting a harmonisation and coordination regulation fit for a social market economy.

One important conclusion of this book is the fact that the boundaries between different normative fields—labour law, social security law and family law—are increasingly blurred or even ‘amalgamated’. Thus, Christensen’s thesis that the normative patterns are constant, but moving between different normative fields, is confirmed. For us, the ‘amalgamation’ of the normative fields depicted in the different chapters of this book is rather a reflection of the strengthening of Market-Functionalism and the weakening of Protection of Established Position, in terms of a restriction on the groups covered, and a minimum of solidarity rights in terms of Just Distribution to go with it. The problem with the elderly in this context is the need to move them *from* the complementary social security system and a reliance on pensions, *back* to the world of work, or, in other words, from the normative field of social security to the normative field of labour law. The (re-)integration of older workers in the labour market has proved a difficult task. At stake is the need for a strengthened Protection of Established Position in labour law by way of a ban on mandatory retirement, as well as the need for a weakened Protection of Established Position in social security law as benefits and accumulated entitlements are lowered or withdrawn.

All in all, these normative developments call for an interdisciplinary research approach, and the need to analyse labour law, social security law and family law together, which is precisely the aim of this book.