The Future of Nordic Labour Law

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1 Introduction

The overall impression the reader of the contributions included in this publication might get is that continuity and stability are the characteristic features of Nordic labour law. The reader might also note that the main fundamentals of Nordic labour law are the same today as they have been for many decades. The turbulence around the adaptation of EU-based regulations does not change this general picture of an almost idyllic, well functioning, traditional, industrial relations system based on collective bargaining.

This general picture holds true when we are focussing on the institutional and structural framework of Nordic labour law. We should, however, not forget, that huge changes are taking place in the economic and societal framework in which Nordic labour law develops and that this will have an important impact in the future, on both its content and form. The aim of this last article in the volume presenting current Nordic Labour Law is to discuss the prospects for Nordic labour law in the future, as well as to point to some possible policies that could influence this future. After all, as labour lawyers we are also helping to shape the future and the author does not regard the destiny of Nordic labour law as predetermined.

2 The Changes

2.1 Introductory Remarks

We live in a world of rapid change. In the following, I try to map some of the most important trends that should be seriously assessed when we try to evaluate the future economic and societal environment for labour law. I have structured the presentation under headings such as globalisation, enlargement, the transformation towards a knowledge society or information society, demographic changes, and changes in family patterns.

2.2 Globalisation and Europeanisation

There is a widespread common understanding that a very significant trend in the development of international capitalism today can be described as a process of globalisation. The changes behind this description are the increased concentration and impact of big multinational companies on the world economy. Moreover, the amount of foreign investment and cross-investment has grown, and barriers to the free movement of capital and financial services have been removed. However, globalism can also be traced to cultural patterns, consumption behaviour, etc.

There are different opinions on the assessment of this development. Professor Lars Magnusson from Sweden distinguishes between three groups of positions in the ongoing debate.[1] According to him, the hyperglobalist position claims that this development represents a revolutionary transformation of the economic and political system. According to this position globalisation means the end of the nation state as we know it today. The second position is very sceptical about the factual relevance of the on-going changes. According to this view, the globalisation process is merely ideological, a political tool for economic liberalism.[2] The claim is that the economy was already global one hundred years ago and that very little, in fact, has changed. The third and middle position, that Magnusson seems to subscribe to himself, is the transformation thesis: The process of globalisation represents a fundamental change, but there is still an important part to play for nation states although they have to adapt to the on-going changes.

There are also very different opinions when assessing the impact of globalisation on the welfare state and national labour relations. Among those against a deregulation of the national labour market, we find a wide variety of views. The defensive attitude tries to retain national control over the welfare state, while others claim that this is an impossible project and that trade unions and labour relations have to become transnational and global. Others claim that new national policies such as "competitive corporatism" can be the solution in the tough environment of international competition.[3]

From a Nordic perspective, it is, however, evident that the leading actors in the economy are global players. The Nordic countries might offer a good home base for these big actors who operate worldwide. The number of mergers between significant Nordic companies in banking, insurance, tele-communications, paper and pulp, etc. is huge.

The institutional perspective for such a global company can never be just the national level. Still the traditional Nordic Model for industrial relations presupposes somehow that the national level is the significant one. The European level has, however, become very important, at least for those countries that have joined the European Union.

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1 *See* Magnusson (2000) at 36-48.

2 Hyman refers to the same position as seeing globalisation as a myth. European Journal of Industrial Relations (1999) at 90-93.

3 Rhodes (1998) at 178-203.

When assessing the challenges of the globalisation and Europeanisation of labour relations, the most evident and easily traced things are to be found on the institutional level: European works councils in so-called Eurocompanies, social dialogue in the European Union, wage coordination in the Economic and Monetary Union, etc. In the coming years, we will get a new form of company, the European company which will operate throughout the European Union without having to set up any subsidiaries in different Member States.[4] The consequences, that are the indirect results of a hardening competition, are much more difficult to assess.

2.3 The Enlargement

The Enlargement of the European Union will have a significant impact on labour relations in the European Union Member States. The new Member States will offer a competitive alternative for economic activities by EU-based companies, especially activities involving considerable labour costs.

We will witness greater movement of workers within the European Union. Cross border temporary agency work will increase, in particular.

It is still an open question how labour relations will evolve in the states applying for membership. It is not out of the question that they will opt for a somewhat US inspired model, although they must have the basic EU regulation in place when joining to the European Union.

2.4 The Knowledge Society

We do not have to read many official documents from the European Union to learn that we live in the information society, network society, knowledge society, etc. The development is due to changes in both technology and the ways in which the economy is organised.

The important point here is that the number of people needed for the production of goods is decreasing and that the number of people who are involved in the service sector is continuously growing. The number of people involved in the production of information and within the digital environment has been increasing.

Recognition of this development is important. There are good reasons for arguing that the leading paradigmatic model on how to behave in the labour market and as part of a labour relationship today should be taken from the service sector, not from industry.

Furthermore, concepts like lifelong learning, employability, etc. become relevant in an environment where information is important and crucial, and where knowledge must be continuously updated.

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4 *See* the Council Regulation (EC) No 2157/2001 (8.10.2001) on the Statute for a European company (SE) *and* the supplementing Directive 2001/86/EC with regard to the involvement of employees.

2.5 New Family Patterns and Demographic Trends

We are facing an ageing population in Europe with new family patterns spreading from north to south. This pattern consists of a one-generation family and presupposes two wage earners in the family and the existence of public service childcare. The model with one wage earner in the family and a housewife is clearly returning.

There is also clear evidence that today's efficient working life creates problems for several groups. The significant increase in sick leave is one serious indicator of the fact that the competitive and intense modern ways of working also come at a rather high price.[5]

2.6 Conclusions

In this context, it is only possible to hint at the encompassing debates and developments that are to be found behind each one of the trends briefly presented above.

The point of this short outline is to underline the fact that the reality behind the relatively unified Nordic model for the regulation of labour relations is fragmented and multifaceted. We really live in a changing world where old and new patterns can both be found side by side in the labour market.

This starting point makes it understandable why it is difficult for a simplistic, unified labour law system to prevail. The complicated reality also creates a tendency towards *fragmentation* of the system. This tendency can be dealt with in different ways; one can try to decentralise the system in order to find flexible solutions, and another solution is to make different rules for separate groups in the labour markets. We can create categories for workers and entrepreneurs (self-employed).

The result is that labour law today, including the Nordic countries, is a complicated system built on multiple sources and layers of rules. We can actually describe the situation in terms of several labour law systems existing side by side within one national jurisdiction. This, of course, makes lawmaking and policy discussions difficult because the various groups are in a different legal position from the outset.

3 The Advantages of the Nordic Traditions

There are many reformers that demand a profound renewal of Nordic labour law. Usually, they refer to the radical changes that have taken place in the organisation of work and in the labour law environment, and to the fact that Nordic labour law today is actually intended for an industrial society that was very different compared to that of today.

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5 *See* SOU 2002:5, *Handlingsplan för ökad hälsa i arbetslivet*. (State Committee for Health in Working Life).

This is no reason to deny that the Nordic labour law system of today has shown an important capacity to adapt to changes and that it has several comparative advantages that must be emphasised.

Firstly, the system has been able, to a large extent, to guarantee labour peace. In Sweden and Norway, in particular, the cost of open labour market conflicts has been very low comparatively speaking. In all the Nordic countries, the high level of affiliation to labour market organisations seems to create organisations that are responsible and do not resort to open industrial action very easily.

Secondly, the link between economic policy and employment policy on one hand, and the labour law regime on the other, seems to function in a reasonable way in the Nordic countries. The labour law regime clearly accepts the closing down of unprofitable companies – without providing too many tools for those wanting to prevent a plant closure – and is, therefore, a factor promoting an economically efficient market. On the other hand, the active labour market policy intends to take care of those individuals suffering because of the economic restructuring.[6]

Thirdly, the Nordic system seems to strike a reasonable balance between the need for legal protection for the individual and efficiency in the implementation of the rules in labour law and collective agreements. The strong role for the organisations in the procedures relating to collective agreements seems to create an effective system, where the rights and benefits that are provided for in the collective agreements will also actually be given to the employees by a system of effective enforcement. The risk that the individual might be overridden by the organisation is there, but the cases where a significant denial of legal protection has taken place are quite rare. On the whole, the system of collective bargaining seems to save significant transaction costs.

Furthermore, I want to stress that the Nordic Labour law system seems to be comparatively good at administering changes in the work place. Changes usually can be handled in negotiations on a collective basis without having to regard every minor change as an amendment to the individual labour contract.[7]

Finally, the Nordic labour law system is quite flexible in two different ways. First, the collective bargaining system allows for deregulation and decentralisation. As has been pointed out in several presentations above, one of the most important changes within Nordic labour law in the last few years is that a decentralisation has taken place within the labour law system. The local level has become much more important regarding decision-making on wages, working time, etc. The problem with collective bargaining that is often underlined by the employers is that it might be very difficult to get rid of "old-fashioned" solutions that were earlier agreed upon. There is a strong negotiating culture implying that new benefits should be additional to older ones.

When we compare the Nordic labour law models with other systems, we find several comparative advantages. There is a clear risk that a radical change in the system, for instance, in order to decrease the power of the trade unions, might

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6 *See* Hellsten (2001) 6 *and* Arbetsmarknadsstyrelsen i samverkan med Arbetslivsinstitutet. *Kartläggning av det europeiska rättsläget vad gäller arbetsgivarens ansvar vid företagsnedläggelser* (2002).

7 The Finnish tradition might not completely fit the Nordic pattern on this point.

lead to a huge increase in litigations, etc. Therefore, one should be cautious about changing the fundamental principles of labour law, The author believes in what has been called a sustainable labour law, that is, a labour law that has broad acceptance and legitimacy and that can create an atmosphere of trust and fairness at work.

4 Why and How to Adapt to Change?

4.1 Introductory Remark

Building on traditions can also be done together with a necessary renewal of the traditional labour law. Such a renewal is important and necessary, but as I already underlined I think we should draw heavily on earlier Nordic traditions.

The Nordic labour market is multifaceted. That is one good reason for allowing for more special solutions when so required.

One huge field of adaptation will certainly be related to the problems evolving from the relationship between international business and decision-making within the national labour law. This is a huge area where only the problems related to decision making in big multinational companies (which can have different legal forms) will create many types of problem. One can point at the fundamental question of who should be regarded as being the employer in the first place.

4.2 Collective v. Individual Labour Law

The traditional Nordic collective labour law has, however, met with some structural challenges during the 1990s. International development has created some individual elements that cannot very easily be integrated into the national legal traditions. One must, however, remember that internal differences between the various Nordic countries make the situation different in many respects in, for instance, Finland compared to Denmark.

The problems relate to the individual oriented approach of EC labour law. An example might be taken from the principle of equal pay for the same work or work of equal value. The Nordic approach traditionally has been that such a comparison can only be made within the same collective agreement, and that if different collective agreements apply, there could be an acceptable justification for differences in wages. In this respect, the practice of the ECJ went in the other direction.[8] Similarly, there is friction between the Nordic right for trade unions to undertake so-called sympathy actions and the right for individual companies to be able to benefit from and exercise the fundamental freedoms in the Treaty (free movement of goods and services especially).

Another area where we can trace friction between the Nordic traditions and the continental European and EU traditions concerns the significance of

8 *See* ECJ Case C-127/92 *Enderby* v. *Frenchay Health Authority and the Secretary of State for Health* [1993] ECR I-5535.

fundamental constitutional rights within labour law. The Nordic approach to labour law has primarily been a private law contractual notion and the regulation of collective agreements is also seen as a *sui generis* private law contract with some very special legal effects in relationship to "third parties" or members. The special constitutional status for collective agreements has played a very small role in the Nordic countries. This influence is, however, now felt through different international instruments and also here there is friction between the collectivistic Nordic tradition compared with the more individual approach of the fundamental rights discourse.[9]

The third tendency is the far-reaching juridification of labour law. While the Danish tradition, especially, has been to avoid legislation and favour solutions in collective agreements, it has been necessary to use legislation in many instances. New areas have also been regulated as data protection and personal integrity of the employees, discrimination law prohibiting discrimination on a number of grounds, etc. Such a regulation requires national legislation. It is evidently a problem to integrate such a regulation into national law; too often we see examples of the piecemeal approach where a new directive leads to a new separate national Act, the relation of which to earlier national law remains anything but clear.

4.3 Labour Law in the Risk Society

The post-war industrial society was marked by the building of the welfare state. Both labour law and the welfare state were primarily national projects and important elements in a policy based on a firm belief in stable growth and the reconstruction of Europe.

The uniform labour law with long-term stable employment contracts and labour relationships formed the basis of the evolving modern labour law during this period. The task of the labour law was to guarantee the weaker party, the employee, some protection against arbitrariness and some basic benefits (the right to paid vacation, overtime pay, etc). When the legislation was in place, we had, however, already been transformed into the post-modern risk society or, if we prefer another term, a global information society.

As several researchers have pointed out, this transformation brought about a fundamental change in the way the labour market functions. Some researchers have called the new labour market the transitional labour market.[10] This is, in my view, a very good description, because it indicates that there is a permanent change and restructuring going on among the companies, that is, employers. These changes also have serious consequences for the employees and their legal position. It is very difficult to guarantee real security or stability for the employees in such situations, because unprofitable companies cannot be obliged to continue as employers.

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9 *See* Bruun (2000) at 114.

10 *See* the Report of the High Level Group on Industrial Relations and Change in the European Union (2002) at 14-15.

The destiny of the employee in such a transitional labour market is to adapt to change through using different options that employers and the welfare state can provide. The employee, thus, can shift from being an employee to becoming an entrepreneur, he can go from employment to unemployment, from part time to full time, from being fully or partly free to take care of the children to returning to work, from retirement to work and vice versa, and finally from vocational training to work or, for instance, from unemployment to vocational training.

In such a system, the task of the labour law is to provide smooth transitions for the individual from one role to another. Furthermore, the labour law can provide the employee with some rights that provide him with some real choices and alternatives in different situations. Furthermore, labour law can provide some general principles and guidelines that make it possible for the employee to continuously try to keep himself "employable" through life-long learning and other popular means.

4.4 Paradigmatic Changes in Nordic Labour Law

One can formulate the question how have the changes made themselves felt within the Nordic labour law? Can they be classified as paradigmatic changes? Have the fundamental principles of labour law undergone any adaptation to the changes that have taken place?

Labour legislation is always based on a normative view on how people should behave and be treated in the labour market and in relationship to their employers.

The *first paradigmatic shift* in Nordic labour law brought in organisations as parties to the collective agreement and accepted collective agreements, collective bargaining, and also regulated collective action as a legitimate means of labour law. New institutions were created such as the labour courts, etc. All this happened during the first half of the last century, first in Denmark around the turn of the century, considerably later in Finland due to special circumstances.

The *second paradigmatic shift* took place during the seventies when the ideology of democracy and participation was brought into the labour law creating institutions and tools on a collective level. We use terms like "*medbestämmande"* or codetermination in Sweden, etc. In the Nordic countries, the "codetermination" was closely linked to the collective bargaining system and no dual channels like the "*Mitbestimmung"*-system in Germany were created.

The *third paradigmatic shift* has partly taken place, but the author´s prediction is that it will make its breakthrough during the coming years. Here we can note that at the level of general principles very little has happened within individual labour law in the Nordic countries. The level of protection has, of course, improved significantly with the introduction of modern legislation on protection against unlawful dismissals and other similar measures. The idea of protection of the weaker party is, however, not new, the same starting point having been accepted since the early days of Nordic labour law more than one hundred years ago.

The novelty, however, is how to assess the individual relationship between the employer and employee. Until now, the general starting point has been that this is a clear relationship of subordination and that the employee has to be subordinated to the employer that supervises the work. This element has been regarded as so important that one important characteristic feature of a labour contract is the presence of this feature.

Ruth Nielsen argued in her dissertation that the prohibition of discrimination against women already had an impact limiting the free discretion of the employer who was no longer completely free to choose who to hire.[11] With all the legislation containing prohibition against discrimination on different grounds, there is, nowadays, a significant restriction on the employer's freedom. But still today the right to supervise the work and the obligation to obey orders is regarded as the essence of the individual employment relationship.

This starting point is now rapidly changing. This does not mean that the employer's right or competence to make decisions is denied or questioned, but it indicates that the way in which this decision-making is exercised has to fulfil some basic requirements of modern responsive and mutual communication.

The starting point is that the dignity of the employee as an individual human being is also respected at the workplace. The parties in the employment relationship have an obligation to show each other mutual respect and also to cooperate in order to achieve the best results. This best result is not only efficient production and high quality but also quality of the work and opportunities for the employee to get vocational training, retraining, and to get promotion when possible.

The procedural element in labour law becomes increasingly important when assessing the employment relationship as a mutual relationship of communicative dialogue and respect. This notion implies that the employer has to enter into a dialogue before making decisions and that the individual worker must be provided with a real chance to express his views on the matter. It also implies a demand that the parties must take into account the position and interest of the other party.

The thoughts expressed above are actually quite familiar in Nordic labour law. They have, however, predominantly been seen as some kind of separately regulated special cases. We know that the employer, in a situation where there is a shortage of work, has to make every effort to see whether the employee could be retrained for some new tasks or transferred to another part of the company. We have several similar examples within Nordic labour law. They are usually presented as the exceptions to a general rule according to which the parties in an employment relationship only have to fulfil their direct obligations and duties. The paradigmatic shift, as I see it, will make these exceptions the main rule and the general normative pattern of behaviour. A deviation from such behaviour must then be separately justified by specific reasons.

The predicted paradigmatic shift indicates a shift towards more emphasis on the individual person as an employee. This is an inevitable development, but, in my opinion, it is not impossible to link the individual and collective element of

11 Nielsen (1996, this volume is an English shortened version of the dissertation).

labour law together so that they support each other. This is, however, the big challenge for future Nordic labour law.

5 Legal Doctrine

What about the role of labour law research in the future? An interesting observation might be that lately very little research has been done in the field of collective labour law in the Nordic countries. This is strange against the background in which collective labour law plays such a predominant role.

On the other hand, it seems that one strength of this system is its relatively low degree of juridification, that it is a system of negotiations on a collective level where professionals on both sides are able to find working solutions to conflicts that also have a high degree of legitimacy.

We should, however, bear in mind that legal doctrine and academic impact played a significant role in the constructive phase of collective labour law, although different in the national context of the Nordic countries. We can refer to the grandfathers of Nordic labour law such as Carl Ussing, Knud Illum, Per Berg, and Folke Schmidt. Perhaps Håkan Hydén is right when he claims that legal doctrine takes on the role of design science in periods of transition, but concentrates on interpretation and systematisation during periods of stability.[12]

We agree with Kaarlo Tuori who claims that the most important task for legal doctrine in the division of labour for legal practice at large is to maintain and promote the internal rationality and coherence of the legal system.[13] This is a very challenging task today within Nordic labour law where new elements are introduced, especially through the European Union.

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12 Hydén, Retfaerd 94 (2001) at 3-19.

13 *See* Tuori Svensk Juristtidning 2002 at 332.

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