ASCERTAINMENT OF LAW AND DOCTRINE OF PRECEDENT IN THE SWEDISH LABOUR COURT

BY

TORE SIGEMAN

Professor of Private Law,
with special reference to Labour Law,
University of Stockholm

ASCERTAINMENT OF THE LAW DURING THE INITIAL PERIOD

1. The Swedish Labour Court was established by statute in 1928 and commenced its activities, which have continued without interruption ever since, on January 1, 1929. The Court was then, as it still is, composed partly of legally qualified judges and partly of representatives of organizations on both sides of the labour market.[1] Its task originally was to decide disputes concerning the content and effects of collective agreements. The jurisdiction has since been extended to embrace certain other disputes between employers and employees.. Normally the Court adjudicates as the first and only instance, but in some disputes it has (since 1974) the position of second and final instance.

The position of the Labour Court in the first years of its operation was unique in one respect: in deciding cases it was bound only to a small extent by statute law or other fixed norms. The organs of the state had, by means of the Collective Agreements Act of 1928, established a framework for a system of rules, but they had on the whole abstained from making detailed regulations. The legislation on contracts of employment was only fragmentary. Ever since the time, after the turn of the century, when regulation by collective agreement began to be comparatively common, labour disputes had been more or less consistently withheld from the courts. Consequently, there was for long a paucity of decided cases in the field of labour law. The sparse occurrence of unambiguous rules of undoubted validity meant that the Labour Court had considerable freedom to choose its role on the legal scene.

In fulfilling its primary and inescapable task of deciding all disputes that had been lawfully initiated, the Labour Court could have confined itself to reaching its decisions in a casuistic fashion. A terse statement of the reasons for the judgment could have been restricted to the actual circumstances which the Court had found decisive. A person reading the judgment would then have been unable to form any reliable conception

[1] The cases are normally tried by a court consisting of seven persons, viz. a chairman and two other state officials, two employer members and two union members.

whether the decision was based on this or that general principle. The Court did not, however, content itself with such an unobtrusive role. On the contrary, it took pains to give clear information in the statement of reasons for the decision as to the rule of law on which the decision was based. The Court seemed to have no hesitation in making *obiter dicta* in order to shed light on the legal position. Accordingly it sometimes made pronouncements which were not in themselves necessary for the purpose of deciding the case before it. The principles enounced in this way were often strikingly precise in content. They would take the form of complete rules, which laid down conditions for use as well as stating consequences and which appeared ready for practical application in much the same way as statutory rules. Even if the Labour Court had no wish to create an impression of fulfilling any function other than the traditional one of a tribunal applying the law, it is evident that it consciously assumed the position of a norm-maker.

The Court could have moulded its role as a norm-maker in either of two fundamentally different ways. A comparison with the regular lawmaker is relevant here. Legislative organs can, on the one hand, confine themselves to *codification,* i.e. the summing up and precise definition of the legal position in a particular field, without making other than minor changes in the existing state of the law as gathered from sources of a more inaccessible nature. But they can, on the other hand, take upon themselves the task of *innovation,* i.e. that of actually reforming the system of rules, thereby remoulding social behaviour in the areas concerned.

> By way of illustrating this matter from the period in question, mention may be made of two statutes concerning the law of succession. One of the draftsmen of these statutes was Arthur Lindhagen, the first President of the Labour Court and a former member of the Swedish Law Commission. The two statutes differed in character precisely in the way indicated above. The Intestate Succession Act of 1928 was a piece of legislation containing several innovations of considerable importance, such as the abolition of the rule that any kinship with the deceased, however remote, could entitle a person to take by way of inheritance. The Wills Act of 1930, on the other hand, was largely a codification, and a much-needed one, of rules which had been evolved in the case law over a long period. The task of its drafters—as the Law Commission stated in its report—had then only been "to supplement and clarify the existing law and thereby, as far as possible, to minimize those causes of disputes and legal uncertainty which are frequent in this field of the law".[2]

A study of the Labour Court's activities in the important initial period reveals that the Court by no means acted as an innovator. The judicial

[2] *SOU* 1929: 22, at p. 70.

members of the Court probably took the view that the Court ought to function as a sort of deputy lawmaker, but one vested only with temporary powers. Though the Court had authority to clarify the state of the law in order—in the above-cited words of the Law Commission—to "minimize those causes of disputes and of legal uncertainty which are frequent in this field of the law", it was considered that it ought not to usurp the functions of the legislature by making true innovations. The solutions were chosen so as to harmonize with principles that had found expression in the existing law and consequently tended to be based on values which were not always in harmony with the current thinking, in the sense for instance of corresponding to the prevailing views of the parliamentary majority.

Among the norms laid down by the Labour Court in the early thirties, the one which attracted most attention and received most criticism was the rule that the employer was free to give notice of termination without assigning a reason, provided that the contract of employment was not for a definite term and the parties had not agreed otherwise. In the decision in question (reported as AD 1932: 100), the majority of the Court described the rule as a general tenet of law which was beyond doubt; a reference to any source of law was regarded as superfluous. Apart from more or less far-fetched analogies with rules applicable to other types of agreement indefinite in time, mention could here have been made of a decision in 1926 of the Central Arbitration Board (an arbitral tribunal, established by the state, whose jurisdiction was confined to disputes referred to it by agreement of the parties). Indirect evidence that the rule was supported by a comparatively widely held notion as to the state of the law on this point might conceivably have been found in the circumstance that in a number of termination disputes before the courts of general jurisdiction the employees had only claimed wages for the period of proper notice and had not questioned the employer's free right of termination.[3]

In clarifying the meaning of vague legislation, the Labour Court acted with considerable independence in at least one area. The Collective Agreements Act of 1928 had banned industrial action undertaken with a view to effecting changes in the current collective agreement. The boundaries of the area thus pacified were staked out by the Labour Court in a spirit favouring the peace obligation; in this connection the Court made use of the legal technique of extending the concept of a collective agreement so as to cover not only its express terms but also certain unexpressed

[3] See, e.g., 1928 NJA 188 with references to previous cases. As regards the criticism of AD 1932: 100, see in particular Geijer in Geijer & Schmidt, *Arbetsgivare och fackföreningsledare i domarsäte* ("Employers and Trade Union Leaders on the Bench"), 1958, pp. 135ff., cf. rejoinder by Conradi in *Sv.J.T.* 1958, p. 382.

rules which could be implied therein. The right of the employer to manage the business, which is an implied term in the contract of employment, was found in AD 1930: 52 to be an implied term in the collective agreement as well, and was accordingly considered to be covered by the peace obligation. It is true that there was support in the *travaux préparatoires* of the Collective Agreements Act for the method of implying terms and combining them with a peace obligation, but the choice of particular matters to be protected in this manner was, in principle, made by the Labour Court itself and primarily in order to further industrial peace.[4]

As will be demonstrated in greater detail below (section 13), there can be discerned in the case law concerning the application of collective agreements a category of rules which might be designated *standard interpretations* of certain clauses or sets of clauses. The category in question consists of implied rules of a more specialized kind than those which have reference to the general types of contract. A standard interpretation may be evolved in decided cases by first, in one decision, interpreting a clause with the aid of circumstances peculiar to the case in hand. This first decision is then regarded as a conceivable prototype when a similar clause later on comes up for consideration by the Court. Finally, when similar clauses have received the same interpretation on several occasions, a principle is regarded as having been firmly established, and no deviation from it is possible unless strongly warranted by the circumstances of the case before the Court.[5] Sometimes, however, a rule of the kind in question emerges in a more direct manner. In its very first year of activity, the Labour Court by its decision AD 1929: 29 determined a question as to what particular work was covered by the collective agreement for the paper-mill industry, and the character of the decision was such that it has functioned and may be regarded as a standard interpretation. In the reasons given, the Court quite briefly declared that the collective agreement must be taken to mean that a worker bound by it was obliged, in consideration of the wages applicable to the job on which he was employed, to carry out "all such work for the employer's account as is naturally connected with the activities of the latter and may be regarded as falling within the general occupational qualifications of the worker". The case did, of course, concern the interpretation of a particular collective agreement, but no special circum-

[4] In the *travaux préparatoires*, see mainly *Prop.* 1928: 39, p. 95. As regards the case law, see, in particular, AD 1933: 159 and also references in *SOU* 1975: 1, pp. 393 ff. Cf. Suviranta in 9 *Sc.St.L.*, pp. 177 ff. (1965). The implied-term device was also used by the Labour Court in respect of consequences of the collective agreement other than the peace obligation; see, e.g., AD 1934: 51 on the employer's duty to respect the right to organize.

[5] Cf. Schmidt, *Arbetsrätt* ("Labour Law") I, 1972, pp. 158 f., concerning so-called decisions of principle.

stances or other arguments whatsoever were mentioned in support of the interpretation, and the decision creates the impression of being based on some legal tenet of a more general character. This principle concerning the employee's duty to work was, of course, highly advantageous for employers. Only as regards one aspect of the proposition could the Labour Court, it seems, have fallen back on traditional sources of law. The requirement that the work must fall within the framework of the general occupational qualifications of the worker corresponded to a statutory rule, namely sec. 15, subsec. 3, of the Ordinance on Freedom of Trade of 1864, which was still formally in operation in 1929. As regards the remaining element in the definition of the duty to work, namely that this duty encompasses all work naturally connected with the employer's activities, a free-hand construction seems to have been applied, although some support can be found in certain traditional terms of agreement of an earlier period.[6] That the new rule was promotive of industrial peace is obvious.

Another rule, which likewise was favourable to the employers and dealt with an important question, was laid down in the case AD 1934: 179. This was the rule that, in a dispute concerning the scope of the duty to work, the employee was bound, in principle, to obey the orders of the employer, pending a judicial determination of the question at issue. The propriety of this rule, creating as it did a *prima facie* preference for the employer's interpretation, was far from self-evident, since it was at variance with the rule generally applicable in the law of obligations, according to which, in a dispute concerning performance, each contracting party normally—if he is prepared to run the risk of being held liable for breach of contract—is entitled to insist on the correctness of his own interpretation by refusing performance until an authoritative decision has been obtained.[7] The rule chosen in the decision of 1934 was described by the Labour Court as being more or less a consequence of the rule implied in the contract of employment that the employer has the right to direct and distribute the work. By way of practical argument it was stated that, in general, it would probably be more difficult afterwards to compensate damage arising from the non-performance, due to the refusal, of work properly ordered to be done than to put right damage arising from the fact that the employees had been obliged to undertake work which they were not under a duty to

[6] Cf. Schmidt in *Minnesskrift utgiven av Juridiska fakulteten i Stockholm* ("Commemorative Volume Published by the Stockholm Faculty of Law"), 1957, pp. 220 ff., and Geijer in Geijer & Schmidt, *op. cit.* (*supra*, note 3), pp. 290 ff.

[7] Cf. the earlier pronouncement by the Labour Court in its decision 1930: 93 (p. 417) that a worker cannot be regarded as in breach of the agreement if he abandons the work without leave, when the employer wrongly refuses to exempt the worker from overtime work.

perform. It was moreover pointed out in the reasons for the judgment—though without any further development of the line of thought—that often a refusal to work was to be classified as industrial action carried out in order to exert pressure in the interpretation dispute itself. This reference to a connection between rules of preferred interpretation and rules of peace obligation would seem to demonstrate that in the present decision, as in so many others, the majority of the Labour Court chose a solution dictated by its concern for industrial peace.

Although, as already remarked, the solution chosen in AD 1934: 179 departed from the general principles of the law of obligations (cf. *SOU* 1975: 1, pp. 584 f.), it cannot be described as a legal innovation, for it had counterparts in the labour law of an earlier period.[8] Judicial innovations were not, however, completely absent in the cases decided by the Labour Court during the period in question. It may be mentioned in this connection that the Labour Court considered itself free to direct employers to reengage workers who had been dismissed in contravention of rules concerning the right to organize or contrary to other contractual obligations, see, e.g., AD 1931: 107. It may be pointed out—even if the comparison, owing to differences in the remedial systems, is not completely adequate—that thirty years later the Supreme Court of Sweden was not prepared to take the corresponding step (see the case reported in 1960 NJA 63).

Even if the Labour Court, taking a general view, cannot be labelled as an innovator in its role as a rule-maker during the initial period, it cannot, on the other hand, be justly claimed that the Court put the clock back. When in 1932 a respected jurist who had close ties with the labour movement—namely Östen Undén—reviewed the cases so far decided by the Court, his estimate of the Court's contribution was, on the whole, favourable.[9]

THE ADHERENCE TO PRECEDENTS AND THE CRITICISM THEREOF

2. By and by, as the number of decided cases increased, the main *principles for ascertaining the applicable law* used by the Labour Court could be dis-

[8] See Schmidt, *Tjänsteavtalet* ("The Contract of Employment"), 1959, pp. 170 f.

[9] Undén, "Från arbetsdomstolens praxis" ("Highlights in the Case Law of the Labour Court"), in *Uppsala universitets årsskrift* ("Yearbook of the University of Uppsala"), 1932. Undén was professor of private law at Uppsala and for many years a member of Social Democratic Governments.

cerned. I have in mind rules as to the types of sources which may or should be considered in deciding what the law is on a particular point, and, further, rules determining the relative weight which ought to be assigned to the various sources of law, a process which may assume significance when materials or arguments derived from different sources indicate opposite solutions. We are concerned with a kind of norms for constructing rules of substantive law. These norms, too, should be regarded as legal rules, though they are less amenable to definition and often vaguer than ordinary rules of substantive law, since they rarely find expression in statutes or similar authoritative texts. That the Court's own decided cases were accorded a high position in the hierarchy of sources, coming immediately below statute law together with the *travaux préparatoires* pertaining thereto, emerges clearly enough from the case law of the Court. The settled case law of the Court was apparently given a considerably higher degree of preference than other sources of law, such as considerations that could be extracted from legal rules in associated fields. In the statements or reasons given in the judgments, the principle that decided cases should have a fundamental position in the doctrine of sources was never expressly proclaimed or even argued. But the Court did quote its own previous decisions and in 1946 President Lindhagen, by a pronouncement in a committee memorandum, acknowledged that the Court, precisely through its previous decisions, was becoming "more and more firmly wrapped up" as time went on.[1]

3. Opinions may differ as to whether the solutions chosen by the Labour Court in its rule-making activity during the initial phase were in all respects inescapable and socially justified or otherwise to the purpose. To the extent that the solutions were sanctioned by precedents, the Labour Court did, however, in principle adhere to them in the course of the ensuing decades. According to the doctrine of sources embraced by the Court, decisional law could only, in normal cases, be supplanted by legislation, and since the legislative authorities were inactive—a fact which will be touched on below—the law on many important points became fixed as it stood around the year 1930.

It cannot be disputed that to a great extent the Labour Court continuously adhered to norms which had been adopted at an early stage. In proof of this there may be mentioned some comparatively recent decisions in certain fields mentioned above when examples were given of the activity of the Court as a rule-maker.

[1] *Prop.* 1947: 224, p. 14; see also Dahlman in *Sv.J.T.* 1954, p. 2.

As late as in judgment AD 1967: 17 the Court quoted its own pronouncements, made in its decision 1932: 100, as to the employer's unrestricted right to give notice of termination; and it declared that the pronouncements were still valid.[2]

The principle of the employee's provisional duty to obey in case of a dispute concerning the scope of the obligation to work was affirmed—apparently without hesitation—in judgment AD 1968: 9, without the Court's quoting, in support thereof, any material other than its own repeated decisions of the point on previous occasions. In this connection AD 1974: 20 may also be mentioned.

As to the prohibition laid down by the Collective Agreements Act enjoining any party bound by a collective agreement not to resort to industrial action in order to achieve any amendment thereof, the Court has, by pronouncements in several judgments, demonstrated its continued support for the principle that the peace obligation embraces not only the matters expressly regulated by the collective agreement but also anything covered by certain implied rules which are regarded as being generally connected with such agreements, whose contents they supplement. In this connection reference may in the first place be made to the instructive summary of the legal position given in the statement of reasons for the first decision on the peace obligation to be rendered after the assumption of office of a new president in 1964, namely AD 1964: 5. In this particular case the issue was whether the peace obligation encompassed the right of the employer to manage his enterprise and accordingly to fix its organization and determine its forms of activity.

As one of many decisions exemplifying the Labour Court's practice of adhering to the pattern for determining the scope of an employee's contractual liability to work that was originally formulated in the judgment in AD 1929: 29—the so-called "29/29 principle"—mention may be made of AD 1965: 21. The issue was whether certain carpenters who had been assigned work above ground during the whole course of their service with a mining enterprise were obliged to work below ground. It is true that the Court's finding—that there was such an obligation—was influenced, in part, by the fact that the contracting parties found themselves in agreement as to the general interpretation of the contract; but the interesting

[2] Part of the case decided by the judgment of 1967 was reopened by order of the Supreme Court, see 1969 NJA 195; but this did not affect the pronouncements concerning the free right of termination. It should be added that the precedential value of these pronouncements has not been particularly high in any case. They took the form of *obiter dicta* and the case was decided with the Court's Vice-President (who holds his post only as a sideline) in the chair. In the judgment in AD 1970: 24, which concerned the part of the case which had been reopened, no corresponding remarks were made. Cf. AD 1976: 33 III.

thing in this connection is that the Labour Court, in the opening lines of the statement of reasons in the judgment, recapitulates its 1929 pronouncements without questioning them. It may be added, with regard to cases concerning the duty to work, that the special circumstances of the case sometimes decide the interpretation, but that the reasons for the judgments generally demonstrate that the Court uses the pattern of the 1929 decision as a starting point. AD 1971: 5 may be mentioned by way of example.

4. In recent years the Labour Court has frequently been criticized for adhering too strictly to its own decisions from the early days of its activity.

In a private members' bill at the 1971 session of the Parliament urging reforms in labour law, the propriety of ascertaining the applicable law by reference to decided cases was touched on in connection with the problems concerning the peace obligation.[3] The bill stated that it was not a foregone conclusion that the peace obligation should have the extensive scope assigned to it in the case law of the Labour Court, and the introducers of the bill intimated that the Court had allowed itself to become too firmly tied to its own decided cases, which were now comparatively old. It should be possible for the Court, they said, "to allow changed attitudes, the prevailing conditions on the industrial scene, and current social development to be reflected in the activity of adjudication". The bill led to the appointment of the so-called "Labour Law Committee", whose report was published in 1975 (*SOU* 1975: 1) and in turn led to the passage of the 1976 Act on the Joint Regulation of Working Life ("The Joint Regulation Act"). This statute has replaced the Collective Agreements Act of 1928 and has reformed the law of collective agreements in important respects.[4] The exposition will return later on to the Committee's terms of reference and its report (see section 5 *infra*).

At the 1971 Congress of the Swedish Confederation of Trade Unions (*Landsorganisationen,* the LO) resolutions were moved proposing various reforms of the law of collective agreements. In its comments on these resolutions the Secretariat (the executive body of the LO) declared, *inter alia,* that the organization of the Labour Court and its methods of applying the law should be reexamined and that it was an important aim "to prepare the ground for a method of ascertaining the applicable law that would be less characterized by adherence to precedents dating from times when other attitudes and conditions prevailed on the labour market". The of-

[3] *Motion* 1971: 155, p. 3.

[4] As to the background and content of the Joint Regulation Act, see Schmidt, *Law and Industrial Relations in Sweden,* 1977. The statute text is appended to the book.

ficial who presented the matter to the Congress declared that it was naturally a major desideratum that the Labour Court should free itself from all obsolete case law and thenceforth become "more flexible and progressive in ascertaining the law".[5]

Sten Edlund—a legal scientist who for a period was adviser to the LO—has in several writings passed criticism on the principles of the Labour Court for ascertaining the applicable law. In particular there should be mentioned his wide-ranging essay entitled *Perspektiv på arbetsdomstolen* ("The Labour Court in Perspective").[6] It is pointed out there that the Court's method for applying the law in a number of respects had given support to the positions of the employers: "Attitudes and patterns of behaviour which grew up at an early stage and were dominated by the interests and social outlook of the owners of capital have been subjected to a fortifying influence as a result of the Labour Court's method of creating norms." The author goes on to say that it is unfortunate that the Labour Court should use the traditional approach of the general courts "instead of assuming its place as a flexible element in a large system which is in the course of development"—by which the author probably means that the Court ought to be more receptive to the development which might take place as a result of agreements reached in negotiations on the labour market. Certain reforms are suggested in Edlund's essay, such as a basic change of attitudes which could be promoted by "a general power and recommendation to the Court from the legislature to consider, from case to case, the need for and feasibility of legal reform within such limits as may be considered to be set by statute law, agreements and other regulations in force". The essay does not, however, contain any specific proposals for a new doctrine of precedent.

The Labour Court's dependence on precedents has been discussed in other connections, too.[7] For example, the topic was debated at the meeting of the Labour Law Association (*Arbetsrättsliga föreningen*) in Stockholm on October 31, 1972. The present writer opened the discussion on that occasion and, among other things, dwelt on the possibilities of attaining in the Court a more dynamic method for ascertaining the applicable law by means of such organizational changes as establishing divisions of the Labour Court and holding plenary sessions when a departure from an

[5] Congress Minutes 1971, part 2, pp. 660 f. and 664.

[6] In *Tvärsnitt, sju forskningsrapporter till LO:s 75-årsjubileum* ("Cross Section, Seven Research Reports Published on the Occasion of the 75th Anniversary of the Swedish Confederation of Trade Unions"), 1973, pp. 455 ff. By Edlund, see further, e.g., *Tvisteförhandlingar på arbetsmarknaden* ("Negotiation Procedures in Labour Disputes"), 1967, pp. 65 ff.

[7] See, e.g., Eklund, *Rätten i klasskampen* ("The Law in the Class Struggle"), 1974, ch. 14.

existing case-law principle was contemplated.[8] Reforms of that nature have now been effectuated by virtue of the Act on Litigation in Labour Disputes of 1974.

In a general way it may be said of the criticism of the Labour Court's strict adherence to precedents that it has not been very constructive; specific suggestions for new source principles have been scarce. In large measure the criticism was apparently prompted by the fact that the substantive rules clung to by the Labour Court were considered disadvantageous to employees. But it should be mentioned, in this connection, that no proposals have been made in the course of the discussion for the introduction of new types of general norms with the object of furthering an administration of justice in the interests of particular groups.

AN OFFICIAL STUDY OF THE COURT'S APPLICATION OF THE LAW

5. In the terms of reference issued by the Government to the Labour Law Committee, it was said that the fundamental problems connected with the ascertainment of the law with the aid of decided cases were deserving of particular attention in the work of the Committee. The Minister who formulated the terms of reference drew attention to the criticism of the Labour Court for being, on many occasions, too rigidly tied to principles once these had been established. At the same time he dissociated himself to some extent from the criticism by stressing that a certain amount of sluggishness was an inevitable consequence of the method of creating legal rules through decided cases instead of legislation. The Committee was, however, requested both to consider what justification, if any, there might be for the criticism and also, if such a course was found warranted, to suggest ways of improving the prerequisites for attaining a flexible method of ascertaining the law which would be in harmony with developments in the field of industrial relations.

In the Committee's report, the activity of the Labour Court in developing the law is treated in a comparatively extensive section,[9] where, however, the exposition is of rather a vague character. This is due to the fact

[8] Cf. Sigeman in *Sv.J.T.* 1973, p. 323, where the method of recruiting the judicial members and its importance for the dependence on precedents is also touched on. As to plenary sessions, see the rule in ch. 3, sec. 9, of the Act on Litigation in Labour Disputes, referred to below in section 6 of the text.

[9] *SOU* 1975: 1, pp. 565–600.

that the Committee has not made a serious attempt to establish what doctrine of precedent has, in fact, been applied by the Labour Court, or, indeed, generally by Swedish courts and authorities. A study carried out by the Committee of parts of the case law emanating from the Labour Court appears to have been done merely as in duty bound. The Committee avoids expressing a definite view on the question asked in the terms of reference as to the justification for the criticism directed against the Labour Court, although it does indicate that the Court might have reached a different decision in isolated cases where there had been room for a comparatively free assessment.[1] However, the absence of any clear repudiation of the Court's practise of adhering to previous decisions inevitably creates the impression that the Committee has, on the whole, accepted the Court's rules for ascertaining the law, and among these the principle that established case law ranks high in the hierarchy of the sources of law. And the Committee expressly states that, when a dispute touches the cornerstones of current labour law, the need for an overall view and for the relative appraisal of various considerations points to legislation as the proper means of developing the law.

As regards the second matter which the Committee was asked to consider by its terms of reference—how to improve, if warranted, the conditions for using a flexible method of ascertaining the law, in conformity with developments in the field of industrial relations—the Committee states its opinion more explicitly. It asserts very emphatically that it is primarily by means of legislation concerning the various problems of substance that the content of the rules should be amended and developed. The legislator must not, the Committee says, shift over to others his task of guiding the development of the law by relying on the capacity of those administering justice to make an independent contribution. It is evident that the Committee, in accordance with the general Swedish doctrine of the sources of law, considers not only the statute texts but also the *travaux préparatoires*—and not least its own pronouncements in the comprehensive review of the industrial relations legislation carried out by the Committee—to be a very important means of directing the development of the law. The Committee points out that some legal rules leave it to the courts to shape the administration of justice in its particulars (e.g. the rule that there must be an objective ground for giving notice of termination of a contract of employment) and that such rules not infrequently offer wide scope for discretion and for taking into account changed values on the industrial scene. In other respects the Committee does not seem prepared to allow

[1] See *SOU* 1975: 1, pp. 581 ff.

the Court any considerable opportunities of making an independent contribution in developing the law. The Committee treats with indifference the idea of enacting special statutory rules concerning the methods available to the Court for ascertaining the law. It says that even if such rules could be constructed at all—which it doubts—they might well result in differences in relation to the courts of general jurisdiction. The consequences of such disparities would be difficult to foresee, *inter alia* by reason of the fact that the Labour Court now constitutes the second instance in certain categories of cases which are first tried by the district courts. The conclusion is that the Labour Court's methods of administering justice should not be interfered with, at any rate for the time being.

Three out of the eleven members of the Committee registered dissenting opinions on this question. These three members, representing the two largest employee confederations in Sweden, considered that the study of the cases decided by the Labour Court should be extended.[2] They argued that the Court should be provided with facilities for "renewing its own case law" and noted that the majority of the Committee had refrained from any attempt to furnish constructive proposals as regards the technique for carrying out any such renewal. On the lines of Edlund's previous suggestions, the minority indicated, as a fairly obvious means of renewal, some form of general authority and recommendation given by the legislature which would stimulate the Court in each case to consider the need for and possibilities of change. When various institutions were invited to express their opinions on the Committee's report, the dissenting members received the support of the large employee confederations on this question. The LO maintained, among other things, that the Labour Court's methods for ascertaining the law should be marked by a more flexible and more open social outlook than had obtained previously and that the judgments should reflect current social values. The LO went on to express as its definite view that the rules concerning the authority of the Labour Court's decisions and as to its methods of contractual interpretation should be reviewed and amended.[3]

In the Government Bill proposing the Joint Regulation Act, the Minister concerned made a short statement as to the methods of the Labour Court for ascertaining the law.[4] The idea of introducing rules by legislation concerning the Court's methods in that regard is passed over in silence. In other respects, too, the Minister seems to accept the views of the Commit-

[2] *SOU* 1975: 1, pp. 956 ff.
[3] *Prop.* 1975/76: 105, app. 1, pp. 181 f.
[4] *Op. cit.* (preceding note), pp. 319 f.

tee majority that it is for the legislature to direct the development of the law in essential respects by means of legislation on the questions of substance. And it is clear that he, like the Committee, attaches great significance to pronouncements in the *travaux préparatoires* as a means of guiding the development. Accordingly, the Minister stresses the importance that the decisions of the Labour Court should reflect that conception of a renewal of industrial relations which, among other things, had found expression in the bill. On one point, however, he seems to agree with the views of the employee confederations. He states that it should be the task of another committee to try to evaluate the reform about to be effected and he adds that it would be natural if that committee should suggest amending legislation "if it is found that the intentions of the legislation fail to pervade the administration of justice".

The problems concerning the doctrine of precedent were not made the subject of any decision by Parliament in connection with the passing of the Joint Regulation Act.

A new Labour Law Committee was appointed in 1976. In conformity with the statements in the Government Bill, the new Committee has been requested to watch the application of the law in the Labour Court. The following is said in the relevant part of the terms of reference:

> In their comments on the report of the Labour Law Committee (*SOU* 1975: 1), the employee organizations criticize the method of administering the law which has developed in the field of labour law. This method is said to have favoured the employers. The conditions have, however, undergone a radical change on account of the legislative work in the area of labour law in the last few years. Those values which find expression in the legislation should also have effects in the domain of labour law at large. As part of its task of observing the carrying into effect of the Joint Regulation Act, the Committee should also describe the development of the case law.

The decision to charge a committee with the task of continuously following the administration of the law in a court—while adjudication, so to speak, is still in progress—seems to be unique in the Swedish legal tradition. The measure could, no doubt, be interpreted as an expression of distrust of the Labour Court, but it appears in a different light when account is taken of the fact that the Committee has also been requested "more generally to observe the introduction and application of the new legislation". The interesting aspects from the point of view of the doctrine of sources of law are, however, that the measure indicates a degree of readiness on the part of the legislator and that the reasons for the measure are based on the view that new law should primarily be made by means of

legislation and pronouncements in the *travaux préparatoires* and that in cases of doubt a court should be guided by those values which have found expression in the *legislation*, i.e. values which have been accepted in the recognized forms of a democratic constitution.

IN WHAT CIRCUMSTANCES WILL PREVIOUS CASE LAW CEASE TO HAVE EFFECT?

6. An attempt will now be made to give a brief description of the main traits of the doctrine of precedent which may be presumed to be the one adopted by the Labour Court. The primary aim of the exposition will be to try to specify the conditions for regarding a legal rule based on precedent as being no longer in force.

As was pointed out above (section 2), the doctrine of precedent is made up of a kind of legal rules, though these exist on a higher level of abstraction than do the ordinary rules of substantive law. The rules of the doctrine are occasionally to be found in the traditional sources of law. A statutory rule of this kind is to be found in ch. 3, sec. 9 of the Act on Litigation in Labour Disputes, according to which a case or a particular question of law may be referred for decision to the Labour Court in plenary session if the Court, during deliberations as normally constituted, finds that the prevailing opinion is at variance with a legal principle or statutory interpretation adopted by the Court on the last occasion when the point came up for decision. The rule, while presupposing that a precedent ought to be respected, at the same time indicates a method of depriving it of its validity. But the most important source of the labour-law doctrine of precedent appears to be the Labour Court's own case law, and particularly cases decided in recent times. The principles of the doctrine of precedent which can be derived from the case law may in the main be considered to have been accepted by the Labour Law Committee; at any rate they have not been contradicted by anything that has occurred in the course of the preparation and passage of the joint-regulation legislation (see above, section 5). Within the framework of the rules allowing the Supreme Court to reopen a case where the law has been obviously misapplied or other exceptional circumstances have come to light (ch. 11, sec. 11 of the Instrument of Government—the basic constitutional enactment—and ch. 58 of the Procedural Code), the Labour Court assumes an independent position in relation to the Supreme Court. But there are nevertheless reasons for believing that the Labour Court, in principle,

subscribes to the same doctrine of precedent as the courts of general jurisdiction. It should be mentioned in this connection that in certain kinds of labour disputes the district courts, which normally form part of the hierarchy of courts in which the Supreme Court constitutes the final instance, function as courts of first instance below the Labour Court.[5] There is no authoritative exposition of the general doctrine of precedent in Swedish law, but its principles have been described, at least summarily and in patches, in legal writings.[6] The principle that the judgments of the Supreme Court are to be followed is particularly clear after the 1971 amendments of the rules in ch. 54 of the Procedural Code, which set limits to the right to appeal to the Supreme Court; the amendments are based on the idea that the Supreme Court should, in principle, have as its sole object that of functioning as a court of precedent. It is also quite clear that the general doctrine of precedent assigns to the decisions of the highest instances a very high rank in the hierarchy of sources. It is even a common opinion that only norms derived from legislation or precedents form part of the law currently in force.[7]

In support of the rule that precedents ought to be followed, various practical arguments are invoked, among these being the claim that the security of transactions—or, in other words, the rule of law—will be furthered, since the application of the law will be foreseeable and uniform. The need for foreseeability is manifest not least in the law of collective agreements, where court decisions may have repercussions for a very large number of individual relationships and where sets of contractual rules may, in their capacities of coherent systems, be sensitive to dislocations.[8]

[5] Ch. 2, secs. 2–4 of the Act on Litigation in Labour Disputes, 1974.

[6] See, *inter alia,* Strömberg, *Inledning till den allmänna rättsläran* ("Introduction to Jurisprudence"), 1976, pp. 51 ff., Strömholm, *Allgemeine Rechtslehre,* Göttingen 1976, pp. 184 ff., *idem* in *Forhandlinger på det 25. nordiske juristmøte* ("Proceedings of the 25th Meeting of Nordic Legal Professions") 1969, pp. 465 ff., Hjerner, *Om rättsfallstolkning* ("On the Interpretation of Decided Cases"), 1973, pp. 8 f. and 23 ff., Agge, *Huvudpunkter av den allmänna rättsläran* ("Leading Principles of Jurisprudence"), 1972, pp. 57 ff., Peczenik, *Juridikens metodproblem* ("The Methodological Problems of Legal Science"), 1974, pp. 121 ff. (cf. Sundberg in *Sv.J.T.* 1975, p. 538), Erenius, *Oaktsamhet* ("On Criminal Negligence"), 1971, pp. 129 ff., Schmidt in *Festskrift till Ekelöf* ("Essays Dedicated to P. O. Ekelöf"), 1972, pp. 569 ff. Cf. Bernitz and Strömholm in *Sv.J.T.* 1976, pp. 89 ff. and 368 f. In *Sc.St.L.,* see papers by Schmidt (vol. 1, 1957, p. 155), Beckman (vol. 7, 1963, p. 9) and Bolding (vol. 13, 1969, p. 59).—On Danish and Norwegian doctrine of precedent, see von Eyben, *Juridisk Grundbog* ("Basic Book on Law") III, *Retskilder* ("Sources of Law"), 3rd ed. Copenhagen 1975, § 26, and Eckhoff, *Rettskildelære* ("The Doctrine of the Sources of Law"), Oslo 1971, chs. 6–7, and von Eyben in 3 *Sc.St.L.,* pp. 53 ff. (1959).

[7] See Frändberg, *Om analog användning av rättsnormer* ("On Analogical Use of Legal Norms"), 1973, pp. 24 f.

[8] In Danish and Norwegian law relating to collective agreements, the dependence on precedents has been considered to be relatively strong, see von Eyben, *Juridisk Grundbog* III (*supra,* note 6), pp. 731 f., and Gaarder in Nissen *et al., Den dømmende makt* ("The Judicial Power"), Oslo 1967, p. 254.

The rules of the doctrine of precedent are not normally subject to sanctions in the same sense as ordinary rules of substantive law.[9] The problem of the sanctions must, however, be passed over in the present exposition.

7. According to an often-quoted pronouncement made in 1947 by Parliament's First Standing Judicial Committee, the importance of precedents should be limited to the extent that "only the weight of the reasons referred to by the Supreme Court in support of the actual order of the Court should be decisive as regards the influence of the Supreme Court on the administration of the law in the lower instances".[1] Whether the pronouncement amounts to a realistic description of the approach of the courts of general jurisdiction is a debated question and may here be left open. As far as labour law is concerned, it seems obvious that the Labour Court does not strictly observe any limitation of the nature indicated. Even decisions which merely lay down a rule without stating any detailed reasons are regarded as potentially directive in character.

> As a very recent example there may be mentioned the treatment of the question whether or not the right to damages for loss of a non-pecuniary nature would be extinguished when an employee dies in the course of an action before judgment has been given. In the decision of the Labour Court in the case AD 1964: 28, which concerned a claim for damages for a violation of the right to organize, the claim of the estate of the deceased employee was refused without any reason being given except that the question of compensation for non-economic loss had lapsed, since the employee had died during the consideration of the case. When a corresponding case arose in AD 1976: 87 with regard to a claim for compensation for non-economic loss occasioned by a violation of the rule in sec. 7 of the Security of Employment Act of 1974 (to the effect that termination of an employment must be based on an objective reason), the Court declared that the claim could not be granted and gave the same general reason, referring to the decision of 1964. In view of the fact that damages of the kind claimed in the 1976 case under the Security of Employment Act have, to a great extent, been justified by reasons of prevention, it could not have been obvious in the 1976 case that the employer should escape liability only because the employee's death had occurred before judgment. It is therefore clear that the previous decision has been recognized as a precedent although it did not contain any real reasons of substance. It is, however, obvious that isolated decisions of this kind cannot be accorded too much significance in the doctrine of sources.

[9] See, e.g., Peczenik, *op. cit.* (*supra*, p. 194, note 6), pp. 48 ff. and 121 ff. Cf. *Prop.* 1975: 78, p. 180, where it is taken for granted that the exercise of administrative or judicial power contrary to principles that follow from such sources of law as *travaux préparatoires* and precedents may in certain cases expose the person making the decision to criminal liability.

[1] *Första lagutskottet* 1947: 1, pp. 3 f. (Report of Parliament's First Standing Judicial Committee).

8. It is universally acknowledged that legal principles based on precedents are nullified by irreconcilable *legislation*.

Pronouncements found in the *travaux préparatoires* which define the purport of the legislation also nullify the effect of precedents, provided the pronouncements have not been contradicted by other pronouncements in the *travaux préparatoires* or constitute the last word uttered on the topic in the legislative process. As regards the importance of the *travaux préparatoires* according to the doctrine of sources, a multitude of different borderline cases may, of course, arise.[2] Normally attention is not paid to utterances made after the consideration in committee during the parliamentary stage of the legislative process, but exceptionally and under special circumstances pronouncements made, e.g., by the chairman of a committee in the course of the actual debate in the chamber may be accorded significance as a source of law.[3] It sometimes happens that an organ forming part of the machinery of legislation makes a pronouncement in order to clarify an enactment issued previously. It is then far from certain that the statement will be given the same weight as an original pronouncement in the *travaux préparatoires*.[4] Quite generally, it may, however, be said here that the case law of the Labour Court is characterized by a strong dependence on the *travaux préparatoires*.[5] And the Labour Law Committee takes it for granted without discussion that its own comments on various legal questions in the course of the preparatory work on the Joint Regulation Act will be respected by the Labour Court and accordingly supersede the previous case law to the extent that deviations therefrom are recommended; and the Committee regards this attitude as applicable even where old statutory provisions (to which the case law has reference) have been reenacted in the new statute. The Committee says that its task has been to carry out a complete review of the industrial peace legislation and of the cases decided by the Labour Court in the whole field in question. And it goes on to state:

> On points where the Committee has found changes of the present law warranted, its task has in the first place been to consider amendments of or additions to the legislation. When the Committee has found that it should not suggest any such amendment or addition on a particular point, this has in principle meant that the Committee either has considered that it can accept the existing law on the point, or has found that the question may be left in the

[2] As to the importance of pronouncements in the *travaux préparatoires*, see papers in *Sc.St.L.* by Schmidt (vol. 1, 1957, p. 155), Ekelöf (vol. 2, 1958, p. 75) and Strömholm (vol. 10, 1966, p. 173).

[3] See AD 1970: 9, pp. 96 f.

[4] Cf. AD 1961: 30, pp. 303 f.

[5] See, e.g., Schmidt in *Sv.J.T.* 1970, p. 707.

> hands of the Labour Court for further development in decided cases according to standards which have already been evolved or, in certain cases, in accordance with considerations which are set out in the Committee's comments on the proposed legislation. On the basis of these premises, the legal problems here in question have, in other words, one common feature, namely that the legislative authorities are not, in principle, prepared to give the Labour Court a free hand, in the proper sense, in its application of the law. Either the problem will be regulated by express statutory rules, whose detailed import and application is described in the comments of the Committee, or else there will be scope for further development of the previous case law. Expression has thereby in one form or another been given to the evaluation of the Committee with regard to each particular problem.[6]

As the approach of the Committee in the present respect has not been repudiated—at any rate not from authoritative quarters—during the later stages of the legislative process, it must be regarded as acknowledged. It is another matter that the recommendations of the Committee regarding various questions of substance were not accepted on all points by the legislative organs. As far as the principle itself is concerned, there is reason to believe that the Labour Court will prove very receptive to pronouncements in the *travaux préparatoires* in connection with the Joint Regulation Act and will allow them to rank above previous case law. It may be mentioned, by way of illustration, that certain judicial decisions to the effect that collective agreements should have a more general character[7] have been superseded by pronouncements in the *travaux préparatoires* stating that it should be possible to make collective agreements concerning even the individual conditions of a particular employee.[8]

The Labour Court will, of course, respect *norms that are binding by virtue of references in statutory provisions*. Most important in this respect are the norms of collective agreements. It may be pointed out in this connection that a great many of the decisions which have been referred to as specimens of the Labour Court's adherence to precedents should, in fact, be regarded as expressions of the Court's respect for the autonomy of the parties to a collective agreement. If the Labour Court has, by means of interpretation or implication of terms, provided an agreement with a particular meaning,

[6] *SOU* 1975: 1, p. 586.
[7] AD 1939: 107 and 1959: 24.
[8] *SOU* 1975: 1, pp. 313 f., *Prop.* 1975/76: 105, app. 1, pp. 370, 490, 532. A recent example which clearly demonstrates the Labour Court's keen ear for pronouncements in the *travaux préparatoires* is offered by the judgment in AD 1976: 2 concerning the question whether an employer should be restrained from laying off workers if the shortage of work can be expected to be of long duration. In the judgment the Labour Court follows a pronouncement in the responsible Minister's exposition in connection with the Security of Employment Bill which is not reflected in the statute text.

and the parties have since renewed the agreement without altering it in the part with which the dispute is concerned, then normally the parties probably will and certainly ought to adapt themselves to the notion that the agreement has the meaning once settled by the Court. The legal situation may be expressed by saying that the assumption from which the parties may be supposed to have proceeded when the agreement was renewed thenceforth becomes an element of the agreement which must be respected by the Court. As an illustration chosen at random, it may be mentioned that the Labour Court in the judgment 1962: 2 found that the above-mentioned 29/29 principle for ascertaining the scope of a collective agreement[9] could provide guidance for interpreting the national agreement applicable to the engineering industry and that later on the same principle was without discussion allowed to provide the basis for the decision in the judgment AD 1974: 20, which had reference to the same agreement.

A note may also be inserted at this place concerning the background to the fact that the Labour Court has, so strictly and for such a long time, adhered to those general legal principles that were established in its earliest cases. One very important factor must have been the understanding which, from the end of the nineteen-thirties until about 1970, existed between the large organizations of the labour market on the one hand and the state on the other, whereby the former would endeavour to prevent such industrial action as was detrimental to third parties or to the community while the latter would in return be restrictive as regards statutory interventions in the labour market. This understanding may be described as a *social contract,* although its terms were never enshrined in any one document. The Basic Agreement of 1938, made between the LO and the Swedish Employers' Confederation, had for its manifest purpose precisely the furtherance of industrial peace and at the same time the prevention of governmental interference in industrial relations.[1] It became clear in many ways that the organs of the state for their part were willing to observe their obligations under the bargain by refraining from legislative interventions in the domain of labour law—apart from social security legislation in a limited sense. That the long passivity of the legislative authorities was part of a deliberate policy was made particularly evident in some matters when

[9] *Supra,* pp. 182 f. and 186 f.

[1] See, in particular, the general statement of reasons by the Labour Market Committee for the Basic Agreement, quoted by Sölvén & Gustafsson, *Huvudavtalet* ("The Basic Agreement"), 5th ed. 1966, pp. 42 f. Cf., e.g., Schiller in *Tvärsnitt* (*supra,* p. 188, note 6), pp. 283 ff., and Hadenius, *Facklig organisationsutveckling. En studie av Landsorganisationen i Sverige* ("The Development of Trade Union Organization. A Study of the Swedish Confederation of Trade Unions"), 1976, pp. 45 ff.

the Swedish ratification of certain international conventions requiring legislation was being considered. The following ministerial pronouncement in Government Bill 1962 no. 175, at p. 10, concerning Sweden's accession to the European Social Charter may be mentioned as an example:

> In conformity with a view which has been consistently asserted in other situations of a similar nature, the Swedish tradition as regards the fixing of wages and salaries and the regulation of certain other questions by the parties on the labour market without state intervention prevents the ratification of certain provisions in the Charter which concern terms of employment and conditions of service.

Reference could also be made to a number of private members' bills proposing the introduction of statutory guarantees for security of employment. These bills were for a long period rejected by Parliament on the ground that the problems ought in the first place to be solved by collective agreement and not by legislation.[2] Thus the attitude of the legislative authorities was undoubtedly that the creation of norms applicable to the labour market should, in principle, be the responsibility of the organizations. It would not have been consonant with the considerable degree of loyalty exhibited by the Labour Court towards the legislative authorities during the whole period of its activity, if in this situation the Court had, by overruling its own precedents, intervened in the established law and displaced one or other of the basic tenets of Swedish labour law.

In labour law as well as in other branches of private law, account must be taken of the fact that precedents may also be set aside when there appears new legislation which, though not directly applicable, bears on proximate areas and which is based on values differing from those expressed by the precedent. Dislocations of the case law on the ground of such *analogies* may occur as a result of the Joint Regulation Act and other recent labour-law legislation. The account given above of pronouncements—in the Government Bill concerning the Joint Regulation Act and in the terms of reference of the New Labour Law Committee (above, section 5)—with regard to the future administration of the law by the Labour Court demonstrates that the Minister expects that those values which have found expression in the new labour-law legislation should "also have effects in the domain of labour law at large" and that the case law of the Labour Court should reflect the attitudes towards a renewal of industrial relations which have

[2] See *Andra lagutskottet* 1968: 67 (Report of Parliament's Second Standing Judicial Committee), with references.

manifested themselves in the joint-regulation legislation. It is not possible within the framework of the present paper to embark on further discussion of the problems which are of importance in this connection.[3]

A CLEAR CASE OF CHANGE IN THE CASE LAW

9. What circumstances—apart from new legislation and pronouncements in the *travaux préparatoires*—will make a principle based on precedents ineffective cannot be stated with precision, since the material for expressing a definite view is fragile. It is really in one matter only that the Labour Court has broken radically with the previous case law.

The matter referred to concerned the question whether forcing a worker to belong to two organizations was a violation of the right to organize pursuant to the 1936 Act on the Right of Association and Negotiation. The problem had arisen in the nineteen-forties in connection with the use of a so-called organization clause, i.e. a provision in a collective agreement aimed at securing that all the employees of an employer covered by the agreement should be members of the contracting employee organization (union shop). An employer, relying on such a clause had tried, by threatening dismissal, to induce a worker who was a member of an organization other than the contracting one to join the latter organization. In a series of six decisions from 1945 and 1946, the Labour Court had found that the conduct in question did not amount to a violation of the worker's right to organize, provided that the worker was entitled to continue as a member of his old association when he joined the new one.[4] Although the number of cases was not insignificant, the authority of the Court's holding remained small, since not only in the first, but in all six cases all the judicial members registered dissenting opinions to the effect that a requirement of double membership was a violation of the right to organize. The precedential value of the Court's holding was later seriously shaken when the Parliamentary Ombudsman—in a submission to the Government requesting legislation aimed at confirming that double membership could not be required—asserted that the decision of the Court was at variance with the principles upon which the current provisions on the right to organize were based.[5] And when, some time later, the same problem was again brought up in the Labour Court, the Court in its decision AD 1948: 21 deviated from the previous decisions and declared that it found—"pursuant to the principles underlying"

[3] Concerning arguments based on analogy, reference may be made generally to Frändberg, *op. cit.* (*supra*, p. 194, note 7).

[4] AD 1945: 35, 36 and 77 and AD 1946: 41, 59 and 64.

[5] *JO:s ämbetsberättelse* 1948, pp. 185 ff. (the Annual Report of the Judicial Ombudsman). As to the ensuing treatment of the submission to the Government, see *JO:s ämbetsberättelse* 1949, pp. 233 f.

sec. 3 of the Act on the Right of Association and Negotiation—that an employer is guilty of a violation of the right to organize if, while threatening dismissal, he demands that a worker who already is a member of one organization should join another, and that he is so guilty even if he does not require the employee to resign from the organization to which he already belongs. The decision was unanimous, and in a special statement for the record the President declared that there was reason to believe that the opinion to which the judgment gave expression would, during the foreseeable future, hold good as a legal principle or statutory interpretation accepted by the Court. The new principle has since been upheld without exception.

As regards the doctrine of precedent, the principle which can be derived from the decision AD 1948: 21 seems to be merely that a pronouncement as to the legal position made by an outside authority concerned with the administration of the law, such as a Parliamentary Ombudsman, may be sufficient to displace a precedent whose position has been undermined as a result of repeated dissenting opinions by a strong minority within the Court. The circumstances surrounding the particular instance of overruling now in question were, moreover, peculiar in several respects. As indicated, the majority in the six decisions consisted only of the members nominated by the labour-market organizations, and even if the decisions were not in open conflict with the wording of the statutory provision, the substantive reasons for a different result were strong enough to lead the Parliamentary Ombudsman to indicate that he had considered taking action—probably in the form of a prosecution for dereliction of duty—against the responsible members.[6]

The fact that a change of legal principles is brought about by a decided case instead of legislation entails a greater risk of inequitable consequences in the particular legal situation, since in the former case, but not in the latter, the change will, in principle, have *retroactive* effect. This effect is due to the theory that the court is applying the current law even where a decision constitutes a breach of the established case law; and the parties concerned are not in the normal case given an opportunity of adjusting their positions in accordance with the changed legal situation. When, on the other hand, the change is made by legislation, inequitable effects can be obviated by assigning a suitable date for the coming into operation of the changed rule or by introducing special transitional provisions. The decision in AD 1948: 21 illustrates the complications resulting from the creation of law by means of precedents. The worker concerned had,

[6] *JO:s ämbetsberättelse* 1948, pp. 213 f. (the Annual Report of the Judicial Ombudsman). Applications were made for reopening four of the six cases, but the applications were not considered by the Supreme Court, as they had been lodged too late, see 1949 NJA 176.

according to the new legal principle which the Labour Court found applicable, been wrongly dismissed by reason of her organizational situation. She should therefore have been given compensation for the wages which she had lost during the period when she was out of work in consequence of the dismissal. But the employer maintained that he had based the dismissal on the opposite finding which had been reached on the same question in the previous Labour Court cases, and accordingly the Court found that it would not be reasonable to make him liable to pay compensation. This result, implying that retroactive effect could be avoided, was reached by the Labour Court by resorting to the artificial device of classifying the claim of the employee, not as a claim for wages, but as a claim for compensation for lost wages. For the latter, but not the former, category of claims would, it was said, admit of adjustment.[7] It is likely that the problem of retroactivity can be solved with the aid of similar devices in but few situations of the type in question.

The authority whose pronouncement probably led to the change in the case law which took place in AD 1948:21 was, as we have seen, the Parliamentary Ombudsman; the statement of reasons in the judgment does not, however, contain any reference to his pronouncement. Any criticism which is well founded should naturally be capable of bringing about a change in the case law, regardless of the formal position occupied by the critic. In this connection mention may be made of the fact that the Labour Court, in its statements of reasons, sometimes makes reference to pronouncements of governmental committees as to the current law. By contrast, it has only been on extremely rare occasions and to a smaller extent than the ordinary courts that the Labour Court has quoted and discussed pronouncements made in *legal writing*, a circumstance which has not served to reduce the impression of unreceptiveness with which the Court has sometimes been associated by its critics. On this point a greater degree of openness seems recommendable, even if, according to the doctrine of sources, pronouncements in legal writings are not to be accorded any greater importance than is warranted by the actual weight of the arguments adduced.

10. The change in the established case law in 1948 also demonstrates the *importance of dissenting opinions* for the development of the law. The dissenting opinions in the six previous decisions must be said to have paved the

[7] By virtue of sec. 38 of the Security of Employment Act, there cannot now be any question of an adjustment of the wages during the period of notice or of any perquisites to which the employee may be entitled under the Act, see *Prop.* 1973:129, p. 282.

way for the change, and generally such opinions may, of course, be instrumental in furthering flexibility in the ascertainment of the applicable law.

Even if flexibility in the case law is not seen as a goal in itself, there is nevertheless reason for recommending that questions of principle should be discussed in the Labour Court more openly than at present, in the form of dissenting opinions or special statements made by members of the Court in order to expound their views. It should be observed in this connection that it occurs more seldom in the Labour Court than in the Supreme Court that a member registers a dissenting opinion merely in regard to the statement of reasons for the judgment and also that a special statement expounding an opinion is made. Such opinions and statements may be useful in the practical application of the law in and out of court, for instance by shedding light on the functions of a rule laid down in a decision or on the limitations in its scope. One explanation of the infrequency of such opinions and statements in the Labour Court seems to be that all the members, apart from the President, hold their posts on a part-time basis and therefore normally have little time to spend for drafting separate opinions, etc.

DISTINGUISHING

11. It is not usual to regard it as a change of settled case law that a court *distinguishes* a new case from previous ones on the ground that the circumstances in the new one are special. Typically, the scope for distinguishing is particularly great when in the reasons given for the previous judgments the court has relied only on the actual circumstances as determining the outcome. But even when—as has been common in the Labour Court—a general principle has been formulated as a link in the reasoning behind a judgment, there will be justification for speaking of distinguishing and not of a change in the case law where, in a new case with different circumstances, the Court departs from such a principle by establishing exceptions or more precise definitions without undermining the principle in its essentials. Distinguishing has been a rather common phenomenon in the decided cases of the Labour Court. One example will be mentioned below. Distinguishing in the sense described can probably take place without the provision (in ch. 3, sec. 9 of the Act on Litigation in Labour Disputes) requiring a plenary session of the Labour Court becoming applicable, as long as the old decisions and the contemplated new one can be fitted into

an imaginary set of general norms without intrinsic contradictions. The fact that the new decision is incompatible with a literal interpretation of a legal rule formulated in a previous case ought not, by itself, to necessitate the convening of a plenary session.

The case law of the Labour Court was, it seems, particularly characterized by flexibility during Bengt Hult's presidency (1964–73)—paradoxically enough, at the same time as the criticism of the Court for excessive adherence to decided cases received strong expression—and it is from that period that the following example of distinguishing is drawn.

AD 1964: 12 concerned the right of a trade union branch bound by a collective agreement to commence sympathetic action in support of industrial action—which in itself was lawful—initiated by another branch against the employer of the sympathizing branch for the purpose of inducing the employer to make a collective agreement with reference to work which was regulated by the collective agreement already in force at the place of work. According to the basic statutory rule concerning sympathetic action in sec. 4, first para., rule 4, of the Collective Agreements Act of 1928 (corresponding to sec. 41, first para., rule 4, of the present Joint Regulation Act of 1976), sympathetic action would be lawful despite the fact that the association in question was bound by a collective agreement, if the principal action was lawful. But the Labour Court had, in a number of previous cases (e.g. AD 1934: 59 and 1938: 90) upheld a principle to the effect that sympathetic action in support of an outside branch was unlawful if the action, having regard to the purpose of the principal action, formed part of an attack against the employer's right to have work carried out in accordance with the conditions of the collective agreement already concluded. For in such a case the sympathetic action was in conflict with the general duty of the sympathizing organization (pursuant to rule 2 of the provision referred to) not to attempt to bring about by industrial action a change in its own collective agreement. In the 1964 case, however, a departure was made from this principle and the sympathetic action was declared lawful. The chief distinguishing circumstance seems to have been that the organization carrying on the principal action had previously and for a long time back been bound by collective agreements with the employer with reference to the work in question, while in the earlier decisions the attacking outside organization had not had any such relation with the employer. In addition, the principal action in the 1964 case did not involve any claim for a monopoly on the work.[8]

[8] As to AD 1964: 12, see further *SOU* 1975: 1, pp. 409 ff., and Schmidt, *Law and Industrial Relations in Sweden*, 1977, pp. 171 ff.

RULES OF CONSTRUCTION AND STANDARD INTERPRETATIONS

12. Cases concerning the *interpretation of collective agreements* involve —apart from the semantic analysis and other interpretative activities in a limited sense—the application of a kind of *legal rules,* in relation to which the problems of the doctrine of precedent in themselves may become relevant. The rules referred to are the general principles for the construction of contracts, and collective agreements in particular, e.g. the rule of interpretation *contra proferentem*—that an ambiguous or vague clause should be construed to the detriment of the party formulating it. Although each of these general rules of construction, which have been developed exclusively in decided cases, has a fairly great degree of precision, the doctrine of interpretation is nevertheless to a certain extent wrapt in obscurity, since the rules do not seem to be firmly marshalled in a hierarchical system; more than one rule may, taken separately, be applicable in a particular case and then, if the rules lead to different results, it is by no means always obvious which rule is to prevail. It is not the custom of the Labour Court expressly to indicate what principles of construction have found application in a dispute; it usually confines itself to stressing the specific circumstances which have been found decisive. In view of this, an attempt to plot the development of the case law encounters especial difficulties in this area, and in this paper the problems of the doctrine of precedent and the general principles of construction will be passed over. It is apparently a widespread opinion, however, that the changes (if any) in the case law concerning these principles cannot have been particularly great.[9] A tendency may possibly be discerned in the last few years for the Labour Court to lay more stress than previously on the purpose, in a more general sense, that the parties may be presumed to have intended to promote by using the wording in dispute and it would seem that this purpose has, more clearly than previously, been allowed to provide a guidepost for the application of agreements in individual cases.[1] In connection with the labour-law reform, the questions concerning the Labour Court's methods of contractual interpretation have also been debated.[2] But that discussion—which, *inter alia,* has had reference to the question of legal policy whether the Labour Court should be given power to balance the interests of the parties against each other in a freer fashion than before—has had its

[9] Cf. Lind in *Sv.J.T.* 1968, p. 106, and Schmidt, *op. cit.*, (preceding note), pp. 130 ff.
[1] See, e.g., AD 1974: 30.
[2] See Edlund in *Tvärsnitt* (*supra,* p. 188, note 6), pp. 480 ff., with references, and *SOU* 975: 1, pp. 596 ff.

centre of gravity located at some distance from the problems of principle connected with the doctrine of precedent.

13. As regards the adherence to precedents in regard to those legal rules which have been referred to above as *standard interpretations* and which constitute presumptions for ascertaining the purport of certain clauses (see above, section 1), it must be recorded that no small degree of flexibility has been manifested. We here encounter, albeit in the early case law of the Labour Court, at least one clear example of a change in the decisional law which had reference to contractual clauses concerning the order of priority to be observed when notice had to be given on account of a shortage of work.

> Priority clauses were originally construed narrowly, so that the employer was considered as having a free right of termination so long as there was no shortage of work.[3] As has been established by Geijer,[4] a certain change took place in the case law as a result of special circumstances in some cases during the late thirties, and a definite reversal then occurred in the early forties. In consequence, a new standard interpretation was established, to the effect that the employer must show reasons acceptable to an unbiased mind even if notice was given in circumstances unconnected with any shortage of work.[5]

Other implied rules of a similar nature have also undergone, if not complete changes, at any rate modifications or enlargements as a result of the development of the case law.[6] Moreover, it is not surprising that flexibility should be met with to a particularly great extent in this field. We are operating near the area of construction in the ordinary sense, and it is therefore logical that a court should be prepared to allow individual circumstances to overthrow a standard interpretation in a proper case. Adjustments of the case law as regards a standard interpretation are probably, in general, possible without resorting to the plenary-session rule in ch. 3, sec. 9 of the Act on Litigation in Labour Disputes.

It is possible to regard as a standard interpretation the principle consistently maintained by the Labour Court that, unless a contrary intention is clearly evident, clauses on a time limit for claims in procedural agreements

[3] E.g. AD 1933: 94 and 165.
[4] See Geijer & Schmidt, *op. cit.* (*supra*, p. 181, note 3), pp. 172 ff.
[5] AD 1941: 48, 71 and 113.
[6] This applies, *inter alia*, to the 29/29 principle, see Geijer & Schmidt, *op. cit.* (*supra*, p. 181, note 3), pp. 290 ff. Concerning the set-off judgment in AD 1931: 114 and how this decision and the principle enounced therein seem later on to have been ignored by the Labour Court, see Sigeman, *Lönefordran* ("The Wage Claim"), 1967, pp. 343 f., notes 17 and 19.

will bind not only the organizations entitled and bound to negotiate but also their individual members as constituting part of the contract of employment.[7] It may be mentioned in this connection that in 1976 the Labour Court began to treat limitation as a question of substance and not as a jurisdictional bar as had long been the practice previously. In consequence of the new approach, questions of limitation will be decided by judgment and not, as hitherto, by an order of the Court confined to the question of jurisdiction.[8] The alteration has been made without having recourse to a plenary session of the Court and in all probability does not reflect a changed attitude concerning the legal consequences of limitation.

Probably the most important of all the rules that may be characterized as standard interpretations is the 29/29 principle, referred to several times above, for determining the contractual duty to perform work. The principle has not, in itself, been changed by the Joint Regulation Act, 1976. Several pronouncements in the *travaux préparatoires* take it for granted that—unless otherwise agreed or mutually assumed—employees will normally in the future, too, be bound to carry out all work which is naturally connected with the activities of the employer and which may be regarded as falling within the general vocational qualifications of the employee.[9] The Joint Regulation Act does, however, prepare the ground for a more vigorous production of new law and probably also for adjustment in the case law on this matter. In case of a dispute as to the duty of an employee to perform certain work, the principle pursuant to secs. 34, 36 and 37 is that the trade union party to the collective agreement has the right to decide the interpretation provisionally pending a determination of the dispute in court or otherwise.[1] The rules have transferred to the employer the onus of taking the initiative for obtaining a judicial determination of an interpretation dispute, and this will probably lead to a more varied and also a more flexible development of the law. It is also conceivable that employers in certain industries may prove acquiescent in the employee organizations' use of their priority of interpretation; and if the acquiescence is repeated in relation to the same question of interpretation and if the ensuing application of the agreement is reported to the parties to the collective agreement without their reacting adversely, then such acquiescence may give rise to a legally relevant contractual usage which in the area in

[7] See, e.g., AD 1972: 33 with references and 1975: 73.

[8] See the judgments 1976: 19 and 69, and by contrast, e.g., the orders 1971: 29, 1972: 33 and 1975: 73.

[9] See *SOU* 1975: 1, pp. 332, 637, 652 f., *Prop.* 1975/76: 105, app. 2, pp. 118 f., 214 f. Cf. *SOU* 1975: 1, p. 959, where a minority criticize the failure of the Labour Law Committee to study the Labour Court's case law in disputes concerning the duty to perform work.

[1] For details, see Schmidt, *Law and Industrial Relations in Sweden,* 1977, pp. 151 ff.

question will displace the 29/29 principle.[2] And if divergent contractual practices become fairly widespread, then the principle may lose its position as a general implied rule. The legislative authorities seem, in fact, to have expected that the existence of the new rules on priority of interpretation would induce parties to make clear and well-considered contractual rules regulating the duty to perform work.[3]

RULES OF GUIDED DISCRETION

14. A special position according to the doctrine of precedent is occupied by such legal rules as may be called *rules of guided discretion*. This term is here used to denote norms which leave it to the court to shape the application of the law, acting to some extent at will though taking into consideration some extrajudicial patterns of activity such as the accepted usage in the area in question or some similar guideline.[4] It follows from the very structure of these rules that the application of the law is not fixed once for all and that there is room for the court to adjust its case law when the indicated pattern changes as well as when in other ways new values appear which should be taken into consideration.[5]

As an example of statutory rules which have considerable scope for more precise definition and further development through decided cases, there may be mentioned the rule in sec. 7 of the Security of Employment Act that any notice of termination given by the employer must be "based on an objective reason". In the Minister's discussion of this rule in the Bill it is expressly said that what is to be regarded as an objective reason will "depend on the development and on changes in current values" and that it is quite conceivable that the development will lead to the scope for giving notice becoming increasingly smaller as time goes on.[6] This amounts to an invitation to the Court not to consider itself too firmly tied by its own developing case law. The Minister's discussion fails to indicate what changes in "current values" should be taken into account or how their occurrence is to be established. As to these problems, which are of a

[2] Cf. *SOU* 1975: 1, pp. 594 f., *Prop.* 1975/76: 105, app. 1, p. 261, Schmidt, *op. cit.* (preceding note), pp. 137 and 156.
[3] *Prop.* 1975/76: 105, app. 1, p. 256.
[4] Cf. Sundby, *Om normer* ("On Norms"), Oslo 1974, pp. 237 ff., with references.
[5] Cf. *SOU* 1975: 1, p. 588, where further examples are given.
[6] *Prop.* 1973: 129, p. 122.

general character, I shall confine myself to the following remarks. It is reasonable to take into consideration such values as find expression in usages in considerable sections of the labour market; it should hardly be necessary in these cases to review the usage to ascertain whether it is acceptable or not. Values which have been accepted in the recognized democratic forms—above all, values which have been reflected in legislation in adjacent fields and which can thus be applied by analogy—should also be considered. It should not, however, be sufficient that a new standard of values has been expressed in the Government's terms of reference to a state-appointed committee of investigation, nor that an opinion poll appears to show that the standard is shared by a majority of the population.

It should be noted in this connection that certain unwritten norms in labour law are usually formulated as rules of guided discretion, which include references to extrajudicial patterns. Thus, when a contract of employment is in need of amplification, the courts will sometimes seek guidance in trade usage or local custom. As an example there can be mentioned the manner of fixing reasonable periods of notice before the introduction of statutory periods in 1974. Normally this was done in accordance with the contractual usage manifested in the most proximate collective agreements.[7] When the extrajudicial pattern changes in such cases, the rules applicable to those employment relations which are indirectly concerned will also change. This may create the impression that the methods for applying the law have also undergone a change, but the rule applicable according to the doctrine of precedent has been the same all along, namely the rule of guided discretion. It is true that, by comparison with the courts of general jurisdiction, discretionary rules of the type in question were far less frequently applied by the Labour Court, but this should not be taken as evidence of a lower degree of receptivity on the part of the Labour Court. It is quite simply a consequence of the rules of jurisdiction, which before 1974 rarely gave the Labour Court occasion to try disputes other than such as directly concerned the content and application of collective agreements. The position is now different, and as a recent example of the application by the Labour Court of discretionary rules of the type discussed, AD 1976: 65 may be mentioned. The case concerned the fixing of overtime compensation when a contract of employment which lacked provisions on the matter was not covered by a collective agreement. As regards the amount of an overtime allowance, the Labour Court declared that guidance might be sought in the current practice in

[7] See, e.g., 1948 NJA 799 and 1954 NJA 230.

the trade in question, particular attention being paid to the collective agreement whose application would be closest at hand.

EXCURSUS CONCERNING THE LEGAL POSITION IN 1977

15. Finally, I shall briefly touch on the legal position in 1977 in those fields from which examples of the Labour Court's dependence on precedents were taken in the opening part of this paper. As regards the 29/29 principle and the present situation, reference is made to what has been said above in section 13.

In so far as matters regulated by collective agreement are concerned, the rule on the employee's provisional duty to obey in case of a dispute as to the obligation to perform certain work according to the agreement has been replaced by new rules in secs. 34, 36 and 37 of the Joint Regulation Act,[8] to the effect that in certain situations the employee will be relieved of his duty to obey by virtue of a declaration by the branch of the contracting union that no such duty is applicable. Before such a declaration has been made, in principle the same rule as previously applies and it also remains in force at those workplaces in respect of which no collective agreement has been concluded.[9]

The principle giving the employer a free right of termination has been replaced by rules on the security of employment in accordance with legislation adopted in 1974. It is not entirely clear to what extent the old principle remains in effect as regards employees who are not protected by the new statute, e.g. those in a managing or similar leading position, but a relatively free right of termination must, on the whole, be assumed to apply in these cases. A notice of termination on grounds which in wide circles are regarded as improper will probably, even as regards these employees, be open to annulment as being contrary to fair practices on the labour market.[1] And it is quite conceivable that the tendency in the development of the law, governed by the usage on the labour market, is moving in the direction of making terminations on weak grounds challengeable in other

[8] The rules must, of course, be read in conjunction with the provisions establishing sanctions for non-observance of the rules; sec. 59, para. 2, of the Joint Regulation Act should, *inter alia*, be noted. See further Schmidt, *Law and Industrial Relations in Sweden*, 1977, pp. 152 ff.

[9] *Prop.* 1975/76: 105, app. 1, pp. 256 and 390 ff.

[1] See, e.g., *Prop.* 1975/76: 133, p. 64, as to termination on account of marriage or pregnancy, after the repeal of a special statute on this topic.

cases, too, in so far as the category of employees in question is concerned, although such far-reaching sanctions as are laid down by the Security of Employment Act will not follow.[2]

As regards the prohibition on industrial action aimed at effecting an amendment of the current collective agreement—which prohibition is expressed in sec. 41, first para., rule 2, of the Joint Regulation Act—the Act does not involve a general abrogation of the principle, established in the early case law of the Labour Court, that the protected area extends to the ground covered by some of the rules which are implied in collective agreements generally.[3] There is even good reason for holding that the principle has attained a more solid position in the doctrine of sources than it had previously, since it is now taken for granted in the statute text, which was not the case with the preceding statute, the Collective Agreements Act. To be more precise, a new provision in sec. 44 of the Joint Regulation Act, concerning the so-called surviving right of industrial action, is based on and can only be understood against the background of the rule established in the case law of the Labour Court, according to which the employer's rights of management and direction are implied in the collective agreement and have legal effects as regards the peace obligation even if the agreement does not expressly regulate the question. The provision in sec. 44 states that if during negotiations for an ordinary collective agreement (regarding wages, etc.) a trade union makes a request that the agreement should also deal with any question relative to rights of employee participation in decisions concerning management or the direction of the work, but the question is nevertheless not expressly dealt with in the collective agreement, then the question is not to be regarded as covered by the peace obligation as a result of the agreement concluded. The provision invites the reader of it to draw the antithetical inference that a peace obligation takes effect with regard to such a question even if it is not expressly regulated, provided a collective agreement is concluded without such a request being made as is described in sec. 44. In the specific case, however, the nature and wording of the particular collective agreement, as well as the circumstances surrounding its conclusion, will decide whether one or

[2] Cf. *Prop.* 1971: 107, pp. 62 f., 86 f., 118, *SOU* 1973: 7, p. 147, *Prop.* 1974: 88, pp. 116 and 189 f., AD 1976: 33 III.

[3] See, in connection with the matters discussed below in the text, *Prop.* 1975/76: 105, app. 1, pp. 244 f., 276 f. and 408 f., cf. *SOU* 1975: 1, pp. 393 ff., Schmidt, *Law and Industrial Relations in Sweden*, 1977, pp. 170 f. and 176, and Bergqvist & Lunning, *Medbestämmande i arbetslivet* ("Joint Regulation of Working Life"), 1976, pp. 223 and 237 ff.—The New Labour Law Committee has been requested to investigate certain questions concerning "the so-called negative provisions in collective agreements"; it would seem that this task must embrace certain problems concerning the rules implied in collective agreements.

the other of the rules of implication is to be read into the agreement, with its corresponding effect on the peace obligation. Among the circumstances that should be taken into consideration in the specific case, there may also be reason to reckon with new points of view and values which may have been embraced by the parties when the collective agreement in question was entered into.[4]

[4] Cf. judgment AD 1975:63, where the Labour Court, when construing a collective agreement entered into in 1974, allowed the interpretation to be influenced by the circumstance that it must have appeared strange for the employee party "at the time in question" to conclude a collective agreement having the effect of extending the employer's right to direct and distribute the work. Cf. further AD 1972:7, pp. 140f., from which it follows that the general powers of the employer which can be implied in collective agreements without support in the text of the agreement are confined to those that were commonly accepted at the time when the agreement in question was entered into (and not at the earlier time when a previous agreement of the same tenor was first adopted by the parties).