Rule of Law Discourses in Swedish Labour Law

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1 Introduction

The theme of this contribution is the rule of law in Swedish labour law and industrial relations. Labour law is a dynamic legal area where national, EU, European, and international law interacts to set the regulatory framework for working life and its actors. While a very pronounced rule of law discourse has been distinctive and even defining in some countries and in some areas of law, this is not really the case for either Sweden or for labour law. One could think that this would mean that key features within the rule of law discourse have been left uncommented by Swedish, or labour, law scholars. This is not the case. In the labour law discourse, aspects like legality, access to justice, and equality before the law are central and frequently addressed, although such matters are not always framed in terms of the rule of law.[1] Rather, they have been addressed in primarily other terms and sometimes in contexts that may at first glance appear concern something else.

The present contribution applies as the starting point the reasoning and ideas developed in Swedish scholarship on *law-state thinking*, while considering the notion of the rule of law in EU, European, and international law.[2] [3] The notion of the rule of law is well established in many parts of the world and is considered fundamental to the understanding of the legitimacy of legal systems. Despite this, the notion does not have a fixed meaning; it has been used in different ways throughout history, and its content and emphasis varies between countries and legal cultures. This volume contains a number of contributions which provide in depth discussions on the notions of the rule of law and law-state thinking, the notion commonly used in the Swedish national discourse related to the rule of law. This is because Swedish labour law and industrial relations belong to the national legal context in Sweden, which in turn is to be understood in the light of the EU and European law, as well as at international level manifested in the work of the International Labour Organization (ILO). The present contribution is not intended to add to the conceptual development of the rule of law, but rather to make visible aspects of the rule of law in developments and discourses of labour law.

Principles central for the discussion in this contribution are primarily legality, the separation of powers or functions, impartiality, independence of different

[1] See, however, C Kilpatrick, On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts. Oxford Journal of Legal Studies (2015) 35, 325.

[2] For a comprehensive overview, including principles and values embedded in the general Western understanding of the rule of law as well as in Swedish state-law thinking, see K Celie, 'Rule of Law: A Fundamental Concept Without a Coherent Meaning: Analysis of the Swedish and Chinese Understandings' (2022) 9 European Journal of Comparative Law and Governance 287.

[3] L Peach, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule Law 107; A Zemskova, The Rule of Law in Economic Emergency in the European Union (Lund Media-Trick 2023); X Groussot and J Lindholm, 'General principles: taking rights seriously and waving the rule-of-law stick in the European Union' in KS Ziegler, JP Neurone, V Moreno-Lax. (eds.), Research Handbook on General Principles in EU Law (Cheltenham, Edward Elgar Publishing. 2022); T Constancies, The Rule of Law in the European Union. The Internal Dimension (Oxford, Hart, 2017); K Tori, European Constitutionalism (Cambridge, Cambridge University Press, 2015).

institutions, access to justice, right to a fair hearing and the possibility to appeal, although the matters raised also relates to other aspects of the rule of law.

The contribution is structured as follows. Section 2 presents the Swedish regulatory framework for labour law and industrial relations. Sections 3, 4 and 5 discuss three examples where important aspects of the rule of law have been brought to the fore: dispute resolution in the Swedish Labour Court, the role and activity of the Equality Ombudsman, and the legislative process that preceded a recent major employment protection reform. Finally, Section 6 concludes the contribution.

2 Swedish Labour Law and Industrial Relations

The key elements of Swedish industrial relations are self-regulation, cooperation between the social partners and autonomous collective bargaining. Strong social partners sign collective agreements that cover the whole country, and there is veritably no state intervention in the negotiation or application of collective agreements. The regulatory framework is extensive and detailed, and has a uniform scope. Normally, the same legislation applies to all employees irrespective of labour-market sector, position and duration of employment contract. With the exception of wages, most areas of labour law are statutorily regulated. The comprehensive body of labour law legislation covers areas like employment protection, workplace health and safety, non-discrimination, working time, co-determination, freedom of association, collective bargaining and collective action. However, most of the legislation is 'semi-compelling' in the sense that otherwise mandatory rules may be deviated from by collective bargaining. Collective agreements regulate the majority of the working conditions and hold a significant position as a legal source in Swedish labour law.

Although there is no procedure to extend collective agreements to apply *erga omnes*, virtually the entire labour market is regulated by collective agreements. Approximately 90 percent of Swedish employees work for an employer who has signed a collective agreement. About 70 percent of all employees are members of a union, but there is an increasing difference between white-collar and blue-collar workers.[4] Among blue-collar workers, six out of ten are unionized and in some large sectors the figure is significantly lower; in retail only half of the workers and in hospitality less than four out of ten workers are trade union members. Employers bound by a collective agreement are required to apply the agreement for all employees, regardless of whether or not they are union members. Even in workplaces with no collective agreement, terms in the industry agreement may still be applied, as the expression of established custom and practice.[5] However, these workplaces are relatively few, as, in fact, nine out of ten employees are covered by a collective agreement.

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[4] Swedish National Mediation Office, Annual report 2022 (Medlingsinstitutets årsrapport 2022) (Stockholm 2023) 148.

[5] O Bergqvist, L Lunning and G Toijer, Medbestämmandelagen: lagtext med kommentarer. (Stockholm, Norstedts, 1997) 310; J Malmberg, Anställningsavtalet. Om anställningsförhållandets individuella reglering (Uppsala, Iustus, 1997), 144.

The industrial relations system operates on three levels – the national intersectoral level, the industry level and the local, workplace, level. For a long time, wage agreements were closed at the national intersectoral level, but since 1981, wage bargaining takes place at the industry level. Today, there are only a few collective agreements on national intersectoral level. These agreements are however of crucial importance; as they provide the outer framework for the cooperation between the social partners and for collective bargaining, these agreements form the very base in the structure of industrial relations. With respect to wages and other working conditions, the most important collective agreements are concluded on industry level. Industry-wide collective agreements cover all sectors in the Swedish economy and sets the framework for the negotiations at the local level, the workplace, where the employer and the employee representatives safeguard the compliance of the industry and local agreements.

The local level is also where individual labour disputes are initiated and, in most cases, resolved. The dispute resolution model reflects the importance of industrial relations and the autonomy of the social partners in Swedish labour law. The very starting point in this model is that the parties shall make comprehensive efforts to solve the dispute though grievance negotiations. If the parties fail to settle a dispute at the local level, it is brought to negotiations on the sectoral level. Only if these negotiations also fail, which is unusual, the dispute may be submitted to the Swedish Labour Court.

Also in the Swedish Labour Court, the social partners play a fundamental and decisive role, as the court is a joint body in which the majority of the members are representatives of the social partners.[6] The Swedish Labour Court was established in 1928. It has exclusive jurisdiction for virtually all labour disputes in the organized part of the labour market and is appellate instance to the district court in most disputes between non-unionized parties.[7] In addition, it has exclusive jurisdiction for cases on discrimination in working life brought by the Equality Ombudsman.

The Equality Ombudsman is a national administrative authority tasked to promote equal opportunities and counteract discrimination. In 1978, Sweden introduced its first law on the prohibition of sex discrimination in working life. This was long before the matter of a Swedish EU-membership was on the political agenda, but coincidently, the very same year, the principle of equal treatment and non-discrimination of men and women in working life was put into effect within the EU as this was the year when the Equal Treatment Directive was to be implemented by the member states. During the more than forty years that have passed since then, the scope of non-discrimination law has significantly expanded and, subsequently, the number of protected grounds has increased. A comprehensive body of legal rules and adjoining case law on different regulatory levels has developed in the area. Today, EU and Swedish law covers the grounds

[6] In most cases, the court convenes with seven members, including two professional judges (the chairperson and the vice chairperson), one neutral expert on the labour market, and two members representing the interests of the employer and the employee interests, respectively.

[7] The exceptions regard bankruptcy and company restructuring cases, cases concerning damages for criminal injuries where the action is brought in conjunction with the prosecution of the offence, cases concerning compensation for industrial injuries, and cases regarding certain matters in public employment, Ch. 1 Sec. 2 of the Labour Disputes Act (1974:371).

gender, ethnicity, religion or belief, disability, age, and sexual orientation. In addition, Swedish law includes the ground transgender identity or expression, whereas EU law protects trans persons under the ground of gender. The field of responsibility of the Equality Ombudsman spans over many sectors in society, but it was initially established to safeguard equal opportunities in the labour market. Much of the activities performed by the Equality Ombudsman are proactive and include the production and dissemination of information and reports. Besides these proactive activities, the Equality Ombudsman monitors compliance with the law and offers support to individuals in discrimination cases. The authority provides information services and guidance to individuals and has the competence to represent claimants in settlement negotiations and before the court.[8]

The following sections will highlight a number of examples in three different areas where the developments in national Swedish labour law have prompted discussions on issues related to the rule of law. The first area concerns proceedings before the Swedish Labour Court; a subject which since long has been a source of discussion about impartiality and independence, as well as about access to justice. The second area regards the activities of the Discrimination Ombudsman, and the examples relate to a specific procedure that the Equality Ombudsman has been applying for about ten years now; here too, the discussion has revolved around access to justice but also around questions relating to the principles of legality and of the right to a fair hearing. The most recent example stems from a third area, which concerns the role of the social partners in the legislative process; this discussion has raised questions of legality and legal accountability.

3 Court Trials in Labour Law Cases

Over the years, the composition of the Swedish Labour Court has been the source of much discussion among scholars and legal practitioners, stemming from the fact that the majority of the Court's members are representatives of the social partners. The core question of these discussions has been whether the Swedish Labour Court in all situations can be considered to meet the requirements of *impartiality* and *independence*. These requirements are key to the rule of law, and they are also codified in Article 6 (1) of the European Convention of Human Rights.[9] In a number of cases, the European Court of Human Rights has ruled that a system whereby members nominated by an organization act in Court as

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8 However, as trade unions always have the right to bring action in labour disputes on behalf of their employees, for trade union members, the Ombudsman can only act if the trade union has made clear that it refrains from representing its member in the dispute, Ch. 6 Sec. 2 of the Discrimination Act (2008:567).

9 T Sigeman, 'Är arbetsdomstolen egentligen en domstol?' (1989–90) Juridisk Tidskrift, 193; R Eklund, 'Arbetsdomstolen i ljuset av Langborgerfallet' (1989-90) Juridisk Tidskrift, 390; K Källström, 'Om rättslig integration i arbetsdomstolens rättstillämpning', in R Eklund, R Fahlbeck, K Källström and H Stark (eds.), Studier i arbetsrätt. Festskrift till Tore Sigeman (Uppsala, Iustus, 1993); R Fahlbeck, 'Tankar om arbetsdomstolen – hädiska och andra', in B Nyström (ed.), Den svenska arbetsrätten i ett nytt Europa. Vänbok till Sten Edlund (Stockholm, Carlssons, 1993); Sigeman Tore, 'Arbetsdomstolen i internationellt perspektiv', (2004) Svensk Juristtidning, 561.

judges alongside legally trained judges is not in itself contrary to the Convention, but that the participation of such members may, in individual cases, call into question the independence and impartiality of a court.[10] In the *Kellerman* case, the Swedish Labour Court was subject to review under Article 6 (1).[11] The majority of the judges in the European Court of Human Rights considered that the Swedish Labour Court met the requirements of independence and impartiality.[12] The requirement of independence was met because the interests in the individual case were considered to be balanced. It is possible that the outcome would have been different if the case had regarded a matter where the interest members of the Swedish Labour Court had a clearer shared interest, especially in light of the fact that the ruling of the European Court of Human Rights was not unanimous.

Besides the general discussion on the impartiality of the Swedish Labour Court, special concern has been given to the matter of impartiality in cases of discrimination in working life. When representing an employee, the Equality Ombudsman has own legal standing and can bring action directly before the Swedish Labour Court as the counterpart of the employer who is accused of discrimination. In the late 1990s, scholars and legal practitioners began to draw attention to the potential risk of a negative bias from the representatives of the social partners towards the employee represented by the Equality Ombudsman – an administrative authority coming from outside the industrial relations relationship to litigate within the joint dispute resolution system that is normally reserved for the parties only. This risk was identified as particularly high in cases regarding discriminatory effects of collective agreements, such as wage discrimination. This is because in these cases, where the content of a collective agreement is subject to review, the social partners can be expected to have a general common interest to collectively defend agreed provisions.[13] Following the debate, the matter was addressed at the political level resulting in a legislative change adopted in 2009. The new rules prescribed a particular composition of the Swedish Labour Court in discrimination cases to eliminate the risk of potential bias.[14] Instead of the usual seven member-setting where the majority of the Court are the representatives of the social partners, in cases regarding discrimination, the Court is reduced by one member from employers' side and one member from the employee side. Thus, in these specific cases only, the other judges – and not the representatives of the social partners – are in the majority in the Swedish Labour Court.[15]

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[10] For Sweden, the *Langerborger* case on rental tribunals is of particular importance, ECtHR judgement *Langborger v Sweden*, app. no. 11179/84, 22 June 1989.

[11] ECtHR judgement *AB Kurt Kellerman v. Sweden*, app. no. 41579/98, 26 October 2004.

[12] Two of the judges of the Chamber considered that the composition of the Swedish Labour Court was contrary to Article 6 (1).

[13] Legal Procedure in Discrimination Cases etc.: Debate in Lag & Avtal 2001-2002 (Lag & Avtal 2002).

[14] Government Bill Prop. 2008/09:4 Changes in the composition of the Labour Court in discrimination cases (Ändrad sammansättning i Arbetsdomstolen i diskrimineringstvister).

[15] Ch. 3 Sec. 6a of the Labour Disputes Act (1974:371). The usual composition is two professional judges, one neutral expert on the labour market, and two members representing

Another, and closely related, aspect of the rule of law in Swedish labour law concerns *access to justice* for non-unionized employees.[16] This aspect has drawn increased attention in light of the decline of trade union membership rates, particularly in certain sectors of the labour market, and an increased number of migrant workers.[17] The regulatory structure for individual labour disputes rests on the assumption that the employee belongs to a trade union which represents its member in grievance negotiations and, if necessary, in court proceedings. For trade union members, the union bears all the costs associated with the dispute. Employees who are not members of a trade union, on the other hand, must normally bring an individual action.[18] The legal costs are often significant and can become a heavy burden if the case is lost, as the losing party must pay the litigation costs for the winning side in addition to his or her own litigation costs.[19] Public financial legal aid is provided for persons who have a very low income and who do not have valuable property, but this only covers a very limited part of the costs.[20] Taken together, non-unionized employees have considerably less access to the core mechanisms of the system. The level of unionization differs significantly not only between different labour market sectors, but also between groups in the labour market. Among the groups which stand out with notably lower unionization rates we find young employees, employees with fixed-term employment contracts, and employees born outside the Nordic countries. The limited access to justice for non-unionized employees has been highlighted as a weakness of the Swedish model.[21] The matter has drawn particular attention in discrimination cases. This is partly related to a shift in the approach of the Equality Ombudsman, which will be discussed in the following section.

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the interests of the employer and the employee interests, respectively. This setting shall also be applied in discrimination cases the parties so request.

[16] L Carlson, ‘Access to Justice in Labor Law – The Key to Social Welfare’ in L Carlson, P Herzfeld Olsson, V Pietrogiovanni (eds.) Labour law and the welfare state (Uppsala, Iustus, 2019); L Carlson,’ Sweden - Balancing Corporatism and Access to Justice’, in L Carlson (ed.) Equality. Scandinavian Studies in Law Volume 68 (Uppsala, Iure, 2022).

[17] P Herzfeld Olsson, ’Konsten att inkludera arbetskraftsmigranter i den svenska arbetsrättsliga modellen’ (2019–20) 3 Juridisk Tidskrift, 638.

[18] Cases where the employee is not represented by a trade union are brought before the District Court and appealed to the Swedish Labour Court. As will be discussed below, in discrimination cases, the employee may to be represented by the Equality Ombudsman.

[19] Chapter 19 Section 1 of the Swedish Code of Judicial Procedure (1942:740). When parties reach an amicable settlement after the dispute has been brought before the court, they normally bear their own litigation costs. Recently, some trade unions have provided support in certain situations to non-unionized migrant workers, see A Iossa and N Selberg, ‘Socio-Legal Aspects of Labour Market Segmentation in the Agri-Food Sector in Sweden: Spatio-Temporal Dimensions’ (2022) 24 European Journal of Migration and Law, 241.

[20] Act on Financial Aid in Legal Disputes (1996:1691).

[21] J Julén Votinius, ‘Sweden’, in M Ebisui, S Cooney & C Fenwick (eds.) Resolving individual labour disputes: A comparative overview (Geneva, International Labour Office ILO, 2016); L Gunnars, ’Försäkringen bör täcka arbetstvisten’ (2010) *Lag & Avtal:* R. Lundgren, ’De ungas utsatthet på arbetsmarknaden ökar’, *Göteborgsposten* 2015-06-10; A. Norrby, E Örnerborg, ’Special. Skenande kostnader i AD’ (2013) *Lag & Avtal*; A Wahlgren, ’Förlorade i AD: Davids kamp kostar honom miljoner’ (2015) *Lag & Avtal*.

4 Individual Supervisory Decisions of the Equality Ombudsman

Along with the other Scandinavian countries, Sweden ranks high in gender equality and in non-discrimination. Although different governments have put different emphasis on these questions, there has been a very clear political commitment to maintain and further develop public governance in this area. At times, and especially when the pace of change has been high, the development and expansion of non-discrimination and equal treatment law has provoked normative tensions relating to matters key to the preservation of the rule of law. One example is the discussion on the composition of the Swedish Labour Court in discrimination cases, discussed above. Another, more recent matter, has regarded the functioning and working methods of the Equality Ombudsman. In 2014, the Equality Ombudsman introduced a fundamental change in how it deals with complaints from persons who claimed to have been subject to discrimination. The authority moved away from the previous approach which included investigation, settlement negotiations or, ultimately, taking the matter to court. Instead, it began to deal with complaints primarily within the framework of its supervisory powers, through the development and introduction of a procedure called individual supervision. This procedure means that the Equality Ombudsman makes an independent assessment of whether the person – in the context of working life, the employer – reported for discrimination has violated the law. The decisions in these cases are not legally binding, cannot be appealed, and they do not provide any compensation to the complainant.

The Equality Ombudsman has issued a substantial number of individual supervision decisions in the area of working life. Among these, there are decisions where the Equality Ombudsman has concluded, for instance, that job applicants have been subject to discrimination by being denied employment, and that employees have been subjected to discrimination by being relocated, by being denied the opportunity to apply for a scholarship, by being denied skills development training, and possibly even by a dress code that was justified on infection control grounds. There are also decisions finding that the employer has failed to fulfil the legal obligations to investigate harassment of an individual employee. [22] In three separate cases, the authority has issued decisions concluding that the employer has violated the prohibition of direct discrimination in a situation where there was no individual victim, even though these situations are not covered by the ban on discrimination in the Discrimination Act.[23]

The supervisory decisions do not provide any compensation to the complainant. Instead, it informs the individual of the possibility of pursuing their own legal action to obtain compensation for discrimination. Legal scholars, the public debate and governmental reports have highlighted that the changed procedures at the Equality Ombudsman have resulted in a weakened *access to justice* in discrimination cases.[24] In relation to the decreased number of cases

[22] Supervisory decisions of the Equality ombudsman: TIL 2018/203; TIL 2019/221; TIL 2021/2; TIL 2020/53; GRA 2017/77, ANM 2016/1704.

[23] Supervisory decisions of the Equality ombudsman: GRA 2017/26; GRA 2017/75; TIL 2018/506,

[24] Carlson, Access to Justice (2019); Carlson, Sweden (2022); L Svenaeus, Tio år med Diskrimineringsombudsmannen. En rapport om nedmontering av diskrimineringsskyddet,

brought by the Equality Ombudsman, in 2016, a government inquiry on better protection against discrimination concluded that the possibility of pursuing a private lawsuit is normally not a real option in these cases.[25] As discussed above, the financial risk related to litigation costs should not be underestimated; it can become very expensive. In the context of working life, the decline in access to justice in discrimination cases is a tangible problem, particularly for employees who are not trade union members. It is therefore important to note that trade union density is particularly low precisely in some of the groups that typically run a higher risk of being exposed to discrimination, primarily on the grounds of ethnicity, religion, and age.

The procedure of individual supervision has also been criticized for going beyond the statutory supervisory power of the Equality Ombudsman; this discussion relates to the principle of *legality*.[26] Neither the Discrimination Act nor the preparatory works give the Equality Ombudsman the power to decide whether discrimination has taken place in individual cases, this can only be ruled upon by a court. It is true that the authority has never purported to deliver a legal ruling; on the contrary, the decisions specifically state that they are not binding (it has been noted, though that sometimes the decisions are written in a way that resembles a judgement from a court).[27] However, for the parties involved, this does not exclude that the decisions may have consequences which, at least in some respects, may be as significant as those of a court ruling. This applies both to the person seeking redress for discrimination and to the party accused of discrimination. For the complainant, there is always a risk that the authority will incorrectly conclude in a decision that discrimination has not taken place. Here, whereas court trial would have led to redress, instead, the supervisory decision gives the discriminated party the sense that his or her claim is unfounded, and the person will likely refrain from bringing an individual action. This is, again, an argument relating to access to justice.

For employers, on the other hand, the supervisory decisions can be discussed within the ideational realm of the *right to a fair hearing* or a fair trial. The legal protection of this right only applies to court trials, and only to trials which meet certain criteria.[28] Supervisory decisions from the Equality Ombudsman in individual cases thus well fall outside the scope of the legal provisions: they are not stemming from a court trial, and they are not even legally binding. However,

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(Stockholm, Arena Idé, 2020); L Svenaeus, E Schömer, L Viklund, 'DO sviker diskriminerade', Svenska Dagbladet 2014-04-15; I Hamskär and L Svenaeus, 'DO en myndighet på reträtt från sitt uppdrag', Arbetet 2017-06-29. See also Government Inquiry Report SOU 2016:87 Better protection against discrimination (Bättre skydd mot diskriminering), 219.

[25] Government Report SOU 2016:87, 223.

[26] Svenaeus, Tio år med Diskrimineringsombudsmannen (2020).

[27] It has been noted, though that sometimes the decisions are written in a way that resembles a judgement from a court, Government Report SOU 2016:87, p. 196.

[28] E Bylander, 'Regeringsformens krav på alla rättegångars genomförande rättvist och inom skälig tid', (2017) Svensk Juristtidning, 370; H Wenander, 'Administrative Constitutional Review in Sweden: Between Subordination and Independence, (2020) 26, European Public Law, 987. Art. 6(1) of the ECHR covers decisions by a court relating to the civil rights and obligations of the individual or to criminal charges. Chapter 2 Section 11 of the Instrument of Government (1974:152) requires that legal proceedings shall be carried out fairly.

although not binding, a decision issued by the competent public authority which concludes that discrimination has taken place can have significant consequences for the employer who is being singled out as a violator of the law. In the case of the Equality Ombudsman, all supervisory decisions considered to be of public interest are openly published on the authority's website and, for decisions made before early 2021, the published version contains the name of the party against whom the complaint is directed, in other words: the employer. The name of complainant is not published.

Moreover, since supervisory decisions from the authority cannot be appealed, there is no way by which employers can clear themselves from being publicly labelled as discriminators by the Equality Ombudsman.[29] The *right to appeal* is one element in the idea behind the principle of the right to a fair hearing, and thus fundamental for the rule of law. It is worth noting that, in respect to the possibility to appeal, a supervisory decision leaves the employer in a considerably worse position compared to an employee or a job seeker. Although it may become expensive, the employee nevertheless has the possibility to bring an action before a court to seek justice. This option is completely unavailable to the employer, since the supervisory decision cannot be appealed.

The non-appealability of the supervisory decisions of the Equality Ombudsman has also been mentioned in the discourse on the legitimacy, or legality, of the procedure of individual supervision.[30] The essence of this argument is that when the legislator decided that all supervisory decisions should be non-appealable, the power to issue such decisions were never intended to be used in individual cases of alleged discrimination. In the preparatory works, the considerations on the appealability of the Equality Ombudsman's decisions mention the following decisions as non-appealable: decisions to initiate or not initiate proceedings, decisions not to investigate a complaint, and decisions not to promote a settlement between the parties.[31] The mentioning is intended to provide examples and not to be an exhaustive list. Nevertheless, it is hard to ignore that the examples in the preparatory works are of a very different nature from a decision in a case of individual supervision where the authority identifies a specific employer as a discriminator in a particular case. The use of non-appealable decisions in cases of alleged discrimination can also be questioned in the light of the case law from the Swedish Supreme Administrative Court, which states that there might be a scope for a direct review also of non-binding decisions, as long as the decision has factual effects on individuals.[32]

In 2021, the Discrimination Ombudsman initiated a reorientation of its activities, with the aim of investigating more individual complaints in order to pursue compensation claims and to increase the number of cases brought to

[29] Chapter 6 Section 6 of the Discrimination Act (2008:567).

[30] Svenaeus, Tio år med Diskrimineringsombudsmannen (2020).

[31] Government Bill Prop. 2007/08:95 A stronger protection against discrimination (Ett starkare skydd mot diskriminering) 376.

[32] Swedish Supreme Administrative Court case RÅ 2004 ref 8. H Wenander, 'Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism', (2021) 12 *European Journal of Risk Regulation* 127.

court.[33] The procedure of individual supervision will be retained, but it is possible that it will be used in fewer cases in the future. In relation to the procedures and activities of the Discrimination Ombudsman, much of the discussion has focused on how the authority has interpreted its mandate and whether it has gone beyond the limits of the law. This is essentially a discussion about the principle of legality. A quite different discussion relating to the principle of legality has emerged following a recent major reform of the employment protection legislation. This is the subject of the following section.

5 Drafting of Legislation by way of Collective Bargaining

Employment protection is an area of constant political debate. For many years now, there have been discussions on increased freedom for employers to choose which employees to terminate in cases of redundancy as well as on adjustments of the regulatory framework and reduction of costs in cases of justified dismissals for personal reasons. The trade unions have called for increased protection for fixed-term employees and for a more extensive transition support model.[34] Since 2007, the social partners at national level have made several attempts to reach a cross-sectoral main agreement on these issues, but these negotiations have been unsuccessful. The negotiation round initiated in 2017 was still running when the new government took office in January 2019; a coalition government which had secured the support of two more parties through a comprehensive and detailed political agreement. Among other things, this political agreement outlined significant reforms of the employment protection regulation. In addition, it specified the drafting process for the regulatory changes to come: a parallel process of a government inquiry and negotiations among the social partners. In spring 2020, a government inquiry submitted its report with proposals for changes to the Employment Protection Act (1982:80). At the same time, the Government called upon the social partners to intensify and conclude their negotiations to reach an agreement with a joint proposal on how the legislation could be changed. Should the parties be able to agree later the same year, their proposal would likely be adopted into legislation. However, should the parties fail to find a joint solution, the Government would instead proceed with the proposal delivered by the inquiry.

This was not the first time that the social partners were given the opportunity to have significant influence on the design of legislation. Instead, the call to the social partners was just another step in a development that has been going on for a number of years. In 2008 and 2017, the social partners negotiated together with the Government on collectively bargained solutions to certain pressing labour market needs, and these solutions were then supplemented by the Government with statutory regulation and state financial support: short-term work and establishment employments.[35] While both these cases concerned the interaction

[33] The Equality Ombudsman, Annual Report of the Equality Ombudsman 2021 (Diskrimineringsombudsmannens årsredovisning 2021), 2022.

[34] P Herzfeld Olsson, 'Den svenska modellen i en ny era' (2021–22) 3 Juridisk Tidskrift, 783.

[35] The cases concerned short-term work to deal with the effects of the 2008 and 2009 economic crisis, and establishment employment to promote labour market participation for long-term unemployed and newly arrived migrants Act (2013:948) on Support for Short-time Work and

between collective agreements and state aid measures, the following step in the development concerned the rules on the right to strike and competing unions. After a lengthy industrial conflict in the port of Gothenburg, the Government initiated a legislative process to amend the regulation on collective action. The major social partners were dissatisfied with the legislative proposal that was presented. On their own initiative, they jointly submitted an alternative legislative proposal, which the Government chose to proceed with in the exact wording that the social partners had submitted.[36]

In the fall of 2020, an agreement was reached between some of the social partners; the private employers' Confederation of Swedish Enterprise and the white-collar confederation PTK, shortly followed by the blue-collar federation LO. The social-partner agreement contained a draft for a new cross-sectoral collective agreement to be concluded provided that certain conditions were met by the Government, including the introduction of partly publicly funded transition support and transition study aid, and the adoption of new legislation on employment protection drafted in the agreement.[37] The Government decided to base the legislative reforms on this social-partner agreement and appointed inquiries to transform the agreement into legislative proposals.

The legislative process preceding the employment protection reform has been called into question for being at odds with constitutional requirements for legislative procedure. This criticism draws on the principle of *legality* and on the principle of *separation of powers or functions*. In Sweden, laws are enacted by the elected political majority in the Parliament following a proposal from the Government in the form of a Government Bill.[38] This is an embodiment of the democratic principle that underpins the entire system of government: the principle of government of the people.[39]

In Sweden, the legislative process involves a number of different steps and actors. First, the Government appoints a governmental inquiry, or a group appointed internally within the ministry, to investigate the matter and propose legislation in the form of a inquiry report. The inquiry report is referred for consultation to a large number of authorities, agencies, municipalities and

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Regulation (2022:807) on State Compensation for Work in Establishment Jobs. See also Government Inquiry Report; Ds 2019:13 Establishment jobs (Etableringsjobb); Government Bill Prop. 2019/20:117 Preconditions for establishment jobs and certain control issues in labour market policy activities (Förutsättningar för etableringsjobb och vissa frågor om kontroll inom den arbetsmarknadspolitiska verksamheten).

[36] Government Bill Prop. 2018/19:105 Extended obligation of peace in workplaces with collective agreements and in legal disputes (Utökad fredsplikt på arbetsplatser där det finns kollektivavtal och vid rättstvister). The changes amended some of the rules of collective action in the Co-determination Act (1976:580) and clarified and restricted the right to collective action of trade unions not bound by collective agreement.

[37] The agreement introduced comprehensive support for transition and life-long learning and proposed important changes of the Employment Protection Act (1982:80) in relation to among other things the notion of objective grounds for dismissal, the selection of employees in redundancy dismissals, the procedures for dismissal disputes, the use of fixed-term employment contracts, and the transition from fixed-term to permanent employment.

[38] Chapter 1 Section 4 of the Instrument of Government (1974:152) and Chapter 9 Section 2 of the Riksdag Act (2014:801).

[39] Chapter 1 Section 1 of the Instrument of Government (1974:152).

organizations.[40] Next, on the basis of the inquiry report and the consultation, the Government prepares a draft for a legislative proposal which is referred to the Council on Legislation for a non-binding but authoritative judicial preview of the proposed legislation. The Government then develops the draft into a final legislative proposal (*proposition*) which, after preparation in the parliamentary committee in charge of the matter, is presented to be voted upon by the Parliament.

In the legislative process before the changes in the Employment Protection Act, the inquiry report was entirely based upon the social-partner agreement. The inquiry report specifically stated that since the proposal represents an agreement between parties and is the result of a negotiated process, it must be implemented in its entirety. In principle, nothing could be removed or added without disturbing the balance of the agreement.[41] In the subsequent judicial review of the legislative proposal, the Council on Legislation commented on this and remarked that the legislative process in this case had enabled some of the largest labour market organisations to have a decisive influence on the drafting of the legislation.[42] This criticism is to be understood against the background that not all social partners were part of the negotiations and the agreement.[43] The Council on Legislation noted that this fact matter raised concerns in relation to the central objectives in the preparation of any legislative matter, but considered nevertheless that the preparation procedure met the requirements of the Instrument of Government. A Government Bill was presented and voted upon by the Parliament. In October 2022, the changes to the Employment Protection Act (1982:80) came into force.

As has been noted in the discussion that has followed, in this case, there has been a blurring of roles between the state and the social partners.[44] The discussion has not only concerned that the intervention of the social partners has been a deviation from how laws should be made.[45] It has also been noted that the strong influence of some of the social partners in the drafting of the legislation may entail challenges in relation to the new rules in the long run. An important reason for this consideration is that the new rules are grounded in the

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[40] Chapter 7 Section 2 of the Instrument of Government (1974:152).

[41] Government Inquiry Report Ds 2021:17 A reformed labour law - promoting flexibility, transition and security in the labour market (En reformerad arbetsrätt – för flexibilitet, omställningsförmåga och trygghet på arbetsmarknaden), 63.

[42] Law Council Referral, January 2022 and Law Council Opinion, March 2022.

[43] The bargaining process was pursued by a few powerful parties in the private sector. Initially, the social-partner agreement was signed only by the private employer Confederation of Swedish Enterprise and the white-collar confederation PTK. Several trade unions in the blue-collar federation LO considered that the agreement brought deteriorations for their members without providing anything substantial in return. Later, a couple of large LO unions joined the social-partner agreement and then the entire LO, but each member union would choose LO whether to sign the national cross-sectoral collective agreement that would result from the social-partner agreement. The national cross-sectoral collective agreement was signed in the summer of 2022.

[44] Herzfeld Olsson, Den svenska modellen i en ny era, (2021–22).

[45] N Selberg, 'Lagstiftningsläran och anställningsskyddet: Något om att ändra en generalklausul tillika avvägningsnorm' (2021-22) 4 Juridisk Tidskrift, 891.

social-partner agreement and that, in contrast to what normally applies, their underlying rationales cannot be traced back in the preparatory works.

In the Swedish legal system, the *travaux préparatoires* or preparatory works are key to the interpretation and application of the law. Their function has been described as complementary, but necessary, to ensure the full effect of the legislation.[46] There is no statutory requirement to consider the preparatory works when interpreting the legislative acts. Instead, the legal basis for acknowledging the preparatory works' status as a source of law is the customs established by the courts in their adjudicative activities. The preparatory works are not binding but guiding; they may only be deviated from where there are reasonable grounds to do so.[47] The importance given to the preparatory works is connected to the structure of the legislative process. The final legislative proposal, the Government Bill, consists of a comprehensive part presenting the general background and arguments for the law and the proposed provisions, along with a concentrated part which addresses the separate provisions one by one, giving more or less detailed explanations of the content of each provision and indicates the intentions of the legislator as regards its interpretation and application.

As regards the recent changes to the Employment Protection Act (1982:80), the legal provisions were shaped in the social-partner agreement, which also contain comments explaining the intentions of the parties in relation to each provision. In the interpretation of collective agreements, general principles for interpretation of contracts apply. Within legal scholarship there are different opinions as to whether interpretation of collective agreements deviates from the interpretation of other contracts.[48] In case law from the Swedish Labour Court, special importance is attached to the intention of the contracting parties at the time of the conclusion of the collective agreement. When a joint intention of the parties cannot be decided, the Court tends to rely mainly on the wording of the collective agreement. Emphasis is also on determining which of the parties that should bear the responsibility for any unclear terms in the agreement. Other aspects that are of importance for the interpretation are customs between the disputing parties, the purpose of the agreement, and reasonableness of the interpretation.[49]

Against this background, questions have been raised about how to understand the nature of the new rules.[50] These questions do not only concern the method of interpretation in unclear cases, but also touch upon long-term issues. For

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[46] A Peczenik and G Bergholtz, 'Statutory Interpretation in Sweden', in D N MacCormick and R S Summers (eds.) Interpreting Statutes: A Comparative Study (Dartmouth, Aldershot, 1991), 298; Jacob Sundberg, Från Eddan till Ekelöf: repetitorium om rättskällor i Norden, 232 (Studentlitteratur, 1978).

[47] O Svensson, 'Att avvika från lagmotiven. Några tankar om bevisbördans placering', (2016) Juridisk Tidskrift, 741. To the extent that a preparatory work is in contravention with international conventions, EU law or general principles of law, the Court must disregard it. Preparatory works are also set aside when they are too old.

[48] F Schmidt, 'Typfall, partsavsikt och partsculpa – riktpunkter för avtalstolkning', (1959) Svensk Juristtidning, 497; M Hansson, Kollektivavtalsrätten (Uppsala, Iustus, 2010); B Lehrberg, Avtalstolkning: tolkning av avtal och andra rättshandlingar på förmögenhetsrättens område (Iusté, 2014).

[49] Hansson, Kollektivavtalsrätten (2010); Lehrberg, Avtalstolkning (2014).

[50] Herzfeld Olsson, Den svenska modellen i en ny era (2021–22).

instance, the clear statement in the preparatory works that any removal or adding in relation to the regulation would disturb the balance of the agreement raises concerns about how to understand the mandate of the legislator to make future changes to the regulatory framework and if such changes must be accepted by the parties who negotiated the rules. Another question that has been raised concerns accountability as regards the quality of the regulation. These concerns about the predictability and quality of the regulatory framework, and about accountability of the lawmaker, along with the questions about legality and the separation of powers which have been raised following the deviations from the established path in this legislative process are all about the rule of law and its implication in the field of labour law.

6 Concluding Remarks

The overall objective of the rule of law is to limit or reduce the abuse of authority by creating clear common rules for the organisation and use of power.[51] Some of the examples from the field of labour law that have been discussed in this contribution deal with the matter of powers in a very direct way. One such example relates to the Equality Ombudsman's self-initiated extension of its procedure for issuing individual supervisory decisions to assess whether discrimination has occurred in a specific case. Here, it may be worth asking to what extent the very exercise of power may sometimes result in the acquisition of more power. A public administrative authority introduces a procedure which, in its content and much of its wording, gives the impression that the powers of the authority go beyond what actually is the case. If this procedure is perceived as authoritative and people act on or are influenced by it, the procedure can be expected to have real consequences that go beyond the scope of the authority's powers. The question is then whether this does not also mean that the limits of the authority's actual – not legal – power have in practice been extended.

Another such example is the recent legislative process that led to the amendments to the Employment Protection Act. The legislative reforms in the field of employment protection and the new cross-sectoral collective agreement on security, transition and employment protection represent a strengthening of the autonomous collective bargaining system and social partnership in Sweden. This development has not been accidental but rather the result of a long-term strategy by the social partners, where the successful cross-sectoral negotiations on short-term work, establishment employments, along with the drafting of the revised rules on industrial action have been described as ‘test balloons’ which opened the way for the involvement in the legislative reforms on employment protection and for the cross-sectoral national collective agreement on security, transition and employment protection.[52]

[51] Å Frändberg, Rättsordningens idé - en antologi i allmän rättslära, (Uppsala, Iustus, 2005).

[52] M Rönnmar and A Iossa, (2022). CODEBAR. Comparisons in Decentralised Bargaining: Towards New Relations between Trade Unions and Works Councils? Swedish Country Report (2022), 47.

Other aspects of the distribution of power in the field of labour law relate to the context of EU and European law.[53] While not specifically highlighted in this contribution, these aspects are present in all the areas discussed here. It is natural that EU law and the considerations of the European Court of Justice and the European Court of Human Rights have an impact on the scope of action of the Swedish Labour Court. The developments in EU law are equally relevant to questions of the Equality Ombudsman's competences and powers. The most recent proposal for a Directive on Equality Bodies envisages an extension of the powers of these bodies, not least in relation to the investigation of discrimination cases, where the language and content of the proposed Directive at times recalls the role of the prosecutor in criminal investigations.[54]

Labour law is to a large extent about the allocation of power and decision rights in the relationship between employer and employee. This is achieved through semi-mandatory statutory legislation on working conditions and through legislation to support social dialogue. The idea of the rule of law as an underpinning principle for society includes a recognition that denial of access to justice, exposure to abuse of authority, and ambiguity and unpredictability in the legal framework will not only hurt the individual being exposed but also, in the long run, society at large. In a similar way, weaknesses in the rule of law arising in the context of working life will not only impact on the relations between the individuals in the particular employment relationship. Ultimately, such weaknesses will impact on the notion and understanding of the employment relationship as such, as well as on the power balance between employers and employees, on the role of the social partners and, consequently, also on role and function of labour law.

This, if nothing else, is why the rule of law it is essential to the analysis of labour law.

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[53] There is a growing concern, particularly among the social partners, that EU law will bring about a reduction of the autonomy of the social partners that forms the foundation of the Swedish labour market model. The potentially negative impact of EU law on the Swedish model has been criticized by the social partners on a number of occasions, most recently in relation to the Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (Minimum Wages Directive) and to the and the very recently adopted Pay Transparency Directive, see Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final.

[54] COM(2022) 689 final Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC; 2022/0400 (COD) Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU.