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CONSTITUTIONAL LAW AS AN INSTRUMENT FOR SOCIAL PROTECTION IN SWEDEN?*

1. Introduction

Social protection could refer to both social security and labour rights. From a Swedish perspective the notion social protection in the first instance refers to social security rights. This paper will in the main deal with social security rights, but some words will also be said about labour rights.

1.1. Background

At the moment Europe is trying to recover from the economic and financial crisis and at the same time trying to cope with the migrant and refugee crisis. The economic crisis has led to cuts in social standards and have affected living and working conditions for the citizens. Economic stability seems to be an overriding interest to social policy considerations. Cuts in different kinds of social standards have in many cases been directed towards those that are the most vulnerable. The economic crisis also highlights the conflict between the exercise of economic freedoms and the exercise of fundamental rights by trade unions and workers. Sweden is a member of the European Union since 1995, and from the Swedish perspective it is especially obvious that economic rights prevail over labour rights following the CJEU's decision in the *Laval*-case 2007 (see further below).

Sweden is not a part of the Euro-zone, and is one of the countries where the economic crisis not has been so obvious. Sweden suffered from an economic crisis in the early 1990s. Back then a social democratic government succeeded in reducing the state budget deficit through heavy cuts in the public sector and increased taxes. The parties on the labour market, under the leadership of an experienced mediator, agreed to moderate wage increases. These arrangements brought down inflation almost to zero. Between 2007 and 2014 a coalition of non-socialist parties was in power and they started immediately to reduce public costs by savings in labour market policy and cuts in unemployment and

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sickness benefits. The aim of these changes was in the first instance to raise employment. This has been fairly successful, and the measures during the 1990s and the beginning of the century is seen as important reasons behind that Sweden not has – compared to most EU countries – been affected so much from the economic crisis that began in 2008. The coalition between the Social Democrats and the Green Party, which came into power at the end of 2014, has not introduced any considerable changes in budget policy. But the refugee crisis has caused considerable strain on Swedish society, including the social security system, education, housing, health care etc. Sweden is the European country that has received most refugees per capita.

All kinds of social security benefits have during the last years been under discussion in Sweden and in 2010 a Parliamentary Commission was appointed. The Commission (Inquiry) should examine if it was possible to coordinate different kinds of social security benefits in connection with sickness and unemployment, discuss appropriate levels etc. The Inquiry presented its final results in 2015.¹ The report proposes a number of improvements in health insurance (including support for a return to work), in work injury insurance and in unemployment insurance. The purpose is to safeguard confidence in social insurance and make insurance sustainable. A priority is to increase the upper ceiling for different kinds of social benefits. The Inquiry's work has not yet resulted in any new legislation.

1.2. *The Swedish Constitution*

Like most other democracies Sweden has a written Constitution which has a special position in the hierarchy of norms. The Constitution consists of four fundamental laws: the Instrument of Government (*Regeringsformen*), the Act of Succession (*Successionsordningen*), the Freedom of Press Act (*Tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*).

A fundament in the Swedish Constitution is that public administration power shall be governed under the law (Instrument of Government Section 1 Article 1).² This is called the principle of legality. The principle of legality is the very ground for decision-making in Swedish public administration.

In Section 1 Article 9 of the Instrument of Government the principle of objectivity prescribes that courts, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and observe objectivity and impartiality. This rule is applicable both in situations between citizens and authorities or courts, and between the public employee and the public employer. According to the Constitution Section 12 Article 5 appointments within the state administration shall be based only on objective factors such as service merits and competence.

¹ SOU 2015:21 (*the Swedish Government Official Reports*) Mer trygghet och bättre försäkring (*A more secure and better insurance*).

² SFS (the Swedish Code of Statutes) 1974:152, 2010:1408, 2011:109.

There were no provisions in the Swedish Constitution concerning labour rights until a new Constitution was passed in the 1970s. In Section 2 of the Instrument of Government, under the title “Fundamental rights and freedoms” every citizen is in relation to the community secured freedom of opinion, freedom of expression, freedom of assembly, of association and of demonstration (Section 2, Article 1).

According to Section 2 Article 14 of the Instrument of Government a trade union or an employer or employers’ organizations shall have the right to take industrial action unless otherwise provided for in an act of law or under an agreement.

Discrimination is dealt with in Section 2 Articles 12 and 13 that prescribe that no act of law or other provision may imply unfavourable treatment of a citizen because he/she belongs to a minority group by reason of ethnic origin, colour or sexual orientation. No act of law or other provision may apply unfavourable treatment on grounds of gender.

According to the Freedom of Press Act and in the Fundamental Law on Freedom of Expression there are additional rights regarding freedom of expression and the right to anonymity, a ban to inquire into the identity of persons that have communicated information, and to apply any form of sanctions to those who have communicated information.

All these provisions are regarded more as statements of existing law, as a codification and a solemn declaration of fundamental democratic principles, than an expression of the intention to establish new legal principles.

The European Convention on Human Rights was implemented as a new Act in Sweden in 1995.³ It has had a growing impact as a source of law in Sweden. According to the Instrument of Government Section 2 Article 19 acts and other legislative measures shall not be in contradiction with the Convention.

1.3. Protection against discrimination

The Swedish Constitution codifies protection against discrimination in Section 2 Articles 12 and 13 of the Instrument of Government. These rules are accompanied by anti-discriminatory legislation, especially in the labour market field. Anti-discrimination legislation emerged rather late in Sweden, the first area where it was introduced concerned equal opportunities for men and women at work in 1979. Hereafter, the area was developed and expanded and in the beginning of the 2000s there were numerous laws against discrimination on different grounds, but almost all of them were amalgamated into the 2008 Discrimination Act.

The 2008 Discrimination Act, which entered into force on 1 January 2009, suspended almost all earlier legislation concerning equal opportunities, discrimination on grounds of ethnic origin, disability and sexual orientation. At the same time the earlier Ombudsmen in different fields were amalgamated into the Equality Ombudsman.

The purpose of the 2008 Discrimination Act is to combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age. Both direct and indirect discrimination is prohibited.

³ SFS 1994:1219.

The Act covers working life, education, labour market activities and employment services not under public contract, starting or running a business and professional recognition, membership of certain organisations (for example trade union and employers organisations), supply of goods, services or housing to the general public, health and medical care and social services, social insurance system, military service, unemployment insurance and financial aid for studies.

Beside the prohibition on discrimination the 2008 Discrimination Act entails provisions regarding active measures on the labour market and in education. Harassment and sexual harassment are prohibited.

The Equality Ombudsman is to supervise compliance with the Act. The Ombudsman has to try in the first instance to induce those to whom the Act applies to comply with it voluntarily. The Ombudsman may bring a court action on behalf of an individual who consent this. Damages would be the normal sanction in cases like this, but when the 2008 Act was issued a new sanction “discrimination compensation” was introduced, which is supposed to amount to larger sums than damages normally do.

European Union law has influenced this area in Swedish legislation and case law to a large extent.

1.4. How Sweden is governed and margin of appreciation in local decision-making

Sweden is a parliamentary democracy that is governed nationally, regionally, and at a European level by membership in the EU.

At national level, the people are represented by the Parliament (*Riksdag*), which has the legislative power according to the Constitution. The Government governs the nation, implements the decisions of the Parliament and proposes new laws or amendments to legislation. It is assisted in its work by the Government Offices with a number of ministries, and some 300 government agencies.

The task of the government agencies is to implement the decisions that have been taken by the Parliament and the Government. They are autonomous in the sense that they act on their own responsibility, according to the Constitution. But they must of course follow the principle of legality according to the Constitution Section 1 Article 1.

At regional level, Sweden is divided into 21 counties. Each county has a county administrative board, which is the Government’s representative at the regional level. The county administrative board’s responsibilities include supervision of the municipalities’ social services, traffic safety, environmental work and nature conservation, to name just a few.

At county level there is also the county council, whose decision-makers are directly elected by the population of the county. By far the most important field of responsibility for the county council is health and medical services. Activities are financed primarily from taxation and to some extent from fees and government subsidies.

At local level Sweden is divided into 290 municipalities. Each one has an elected council that has the power over most matters of local administration such as schools, preschools, care of the elderly, social services, housing, roads, water supply etc. Activities at this level are financed primarily from taxation and some extent from fees and government subsidies.

1.5. How the Swedish labour market is organized

The Swedish state has always avoided involving itself in dealings between the social partners whenever possible. The state has sought to remain neutral and tried not to introduce unnecessary measures. The system is based on the fundamental principle that it is the social partners that are responsible for bargaining and collective agreements. The traditional Swedish model for regulating employment relationships is through collective agreements.⁴ An important principle is that the social partners have the possibility to use industrial action in order to exercise pressure on the other party in collective bargaining.

In 1905 the first nationwide collective agreement was concluded between the Metal Workers' Union and the Swedish Engineering Industries. In 1906 a very important step was taken when the Trade Union Confederation (LO) and the Employers' Federation (SAF) agreed that the employers should accept employee unionism, and in turn the employee side accepted that it was the employer who directed and distributed the work as well as to hire and fire workers (the "December compromise"). In 1928 legislation regarding collective agreements and the Labour Court was introduced and in 1936 an Act about freedom of association and collective bargaining. In 1938 LO and SAF, under the threat that the state should regulate the right to industrial action, concluded the Basic Agreement or the so called Saltsjöbaden agreement. The agreement contains rules about bargaining procedures prior to industrial action, restrictions in industrial action, for example rules to protect neutral third parties and procedures for bargaining. Parts of the agreement are still in force.

Although the principle of self-regulation still is the point of departure, legislation in the labour law area has grown rapidly since the 1970s. In the 1970s several new laws were enacted in order to increase the rights of employees and trade unions and for example legislation on security of employment was introduced. The 1976 Co-determination Act⁵ replaces the Act from 1936 and the legislation on collective agreements from 1928 and adds new rules about participation rights for trade unions. Pre-existing legislation was revised and a long succession of completely new enactments was introduced. Since 1995 when Sweden became a member of the EU legislative measures to implement EU labour law has extended the area of labour legislation even more.

The social partners have a strong position in the fields of industrial conflict and the resolution of industrial disputes. It is the trade unions that are responsible for the control of compliance of legislation. It is only concerning the work environment that there is a public agency; the Labour Market Authority.⁶ To combat wage dumping the normal way is for the trade union to ask the employer to negotiate for a collective agreement, and to use industrial action if the employer does not want to negotiate or if he/she does not sign an agreement.

The rate of unionization has always been very high in Sweden, but as in other European countries it has been on the decline during the last 20 years. Today, the average rate of unionization is about 70 per cent. Employees in the public sector are more unionized

⁴ Nyström, B., The evolving structure of collective bargaining in Sweden (1990–2003). Report to the EU Commission 2004–09–16.

⁵ SFS1976:580 *Lag om medbestämmande i arbetslivet*.

⁶ www.arbetsmiljoverket.se.

than those in the private sector. Some of the blue-collar unions affiliated to the LO have seen the membership rates decrease from over 90 per cent to almost 60 per cent. The coverage of collective agreements is still very high, about 90 per cent, due to a high rate of organization on the Swedish employers' side. In the public sector collective agreement coverage is 100 per cent. It is not possible in Sweden to extend a collective agreement by some kind of decree or legislation in order to cover all employees, but the employer is obliged to apply the main rules in the collective agreement also to non-unionized employees and employees that belong to other unions than the signatory.

2. Constitutional guarantees for labour rights

It is the State that has to secure the rights for the citizens mentioned in the Constitution, these rights are not constructed as civil rights. But it is possible for public employees to maintain rights in the Constitution towards their employer.⁷

2.1. Freedom of association

Freedom of association was already in the December compromise 1906 considered to be a right that should be safeguarded both for employers and employees. "The right of association shall be left inviolate on both sides."

Freedom of association is in relation to the community secured in Section 2 Article 1 p. 5 of the Instrument of Government. (It could be restricted according to Section 2 Article 20 Instrument of Government.) Freedom of association between private subjects on the labour market is dealt with in the 1976 Co-determination Act. It is not possible to deviate from the rules on freedom of association in the Co-determination Act. Here, the right of association is defined as the right of employers and employees to belong to an employers' organization or a trade union, to make use of such membership and to work for the organization or for its formation. Freedom of association was already secured in the blue-collar sector by the December Compromise in 1906. In 1936 Freedom of association was confirmed in legislation, and these rules are now found in the Co-determination Act. Trade union representatives enjoy special protection through the 1974 Act on Employees' Representatives at the Workplace (the Shop Stewards Act).

Freedom of association is not questioned on the Swedish labour market.

2.2. Industrial action

The right to take industrial action is, as mentioned above, protected in the Swedish Constitution, Section 2 Article 14 of the Instrument of Government. Trade union or an employers or employers' organizations have the right to take industrial action unless otherwise provided for in an act of law or under an agreement. The constitutional right

⁷ See AD 2011 No. 74 (the Labour Court's judgment number 74 done 2011). The Labour Court's decisions can be found on www.arbetsdomstolen.se (only in Swedish). In AD 2011 No. 74 a dismissal of a policeman who had used the constitutional freedom of speech was declared invalid.

is equal for both sides of the labour market. It protects trade unions, employers and employers' organizations, not individual employees.⁸ The right in Section 2 Article 14 is an exception from the main rule that a constitutional right only is applicable towards the community; Section 2 Article 14 is applicable also to private subjects. The Labour Court has accepted industrial action according to Section 2 Article 14 because there were not grounds, neither in legislation nor in collective agreements to limit this right.⁹

The limitations according to law is mainly found in the 1976 Co-determination Act, but there are also a few minor limitations in the Act on Public Employment concerning those employees that exercise public authority.¹⁰ The most important limitation in the Co-determination Act is that there is as a main rule a peace obligation during the life of a collective agreement.

There are a number of limitations according to collective agreements, the *Saltsjöbaden* agreement has been mentioned above, section 1.4. There are also agreements for the different sectors on the labour market where the parties have agreed on arrangements when industrial action dangers vital interests. Further, for the main of the industry sector there is the so called Industry Agreement, where the parties have agreed on a certain order to follow regarding collective bargaining and made arrangements for private mediators that have a more active role than the state mediators; all with the aim to conclude collective agreements without industrial action.¹¹

The outcome in the *Laval*-case¹² has led to new Swedish legislation that limits the right to industrial action for trade unions. It is no longer possible for Swedish trade unions to resort to industrial action in order to force the employer to sign a Swedish collective agreement in a situation where an employer has posted workers to Sweden and already is bound by a foreign collective agreement. Further, trade unions can only use industrial action towards an employer posting workers to Sweden in order to demand minimum conditions within the so called "hard core" of minimum employment conditions mentioned in the Posting of Workers Act.¹³ The CJEU's interpretation of the Posting of Workers Directive in the *Laval*-case has been widely discussed and criticized. Also the Swedish legislative amendments in response to the outcome are controversial. The ILO Committee of Experts on the Application of Conventions and Recommendations has criticized the amendments with respect to the ILO Conventions No. 87 and 98.¹⁴ The European Committee of Social Rights has found the amendments to be a violation of

⁸ It is also trade unions, employers and employers' organizations that have the right to bargaining and that can be parties to collective agreements.

⁹ See AD 2003 No. 46, AD 2006 No. 58. See also AD 2003 No. 25, 2001 No. 89, 2008 No. 34 (concerning political strikes).

¹⁰ SFS 1994:260 *Lag om offentlig anställning*. The main rule in the public sector is that industrial action is permitted to the same extent as in the private sector.

¹¹ The Industry Agreement has, like the *Saltsjöbaden* agreement, become pattern agreement for other sectors of the Swedish labour market.

¹² Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetarförbundet et al*, 18 December 2007.

¹³ SFS 1999:678 *Lag om utstationering av arbetstagare*, which has implemented the Posting of Workers Directive 96/71/EC in Sweden.

¹⁴ International Labour Conference, 102nd Session, 2013.

several articles in the European Social Charter.¹⁵ The Swedish Government appointed in 2013 a Parliamentary Committee (Inquiry) to review possible options to solve the conflict between EU labour law and Swedish labour law in order to prevent social dumping. The Inquiry reported in 2015,¹⁶ and makes a number of proposals to safeguard the Swedish labour market model and the status of collective agreements in situations involving posted workers.

2.3. *Whistle-blowers*

There is no specific regulation in Swedish law for the protection of employees who report or disclose wrongdoings in the workplace. Employees in the public sector are protected by the Instrument of Government Section 2 Article 1 and further by the Freedom of Press Act and the Fundamental Law on Freedom of Expression. The constitutional right to anonymity applies to all citizens, but the ban to inquire into the identity of persons that have communicated information and the ban to apply sanctions on those who have communicated information do apply only to public employers. An employer in the private sector is, for example, free to try and find out which of his/her employees that have reported information to the press or public authorities and can also impose labour law sanctions, which in very serious cases could mean dismissal because of disloyalty.

Studies show that employees who observe wrongdoings often do not report this. This is due to several reasons, one is that the employees are afraid of retaliation; another is that they are uncertain about their legal protection.

Recently a Governmental Inquiry has proposed new legislation in this field in order to strengthen the protection for employees (especially in the private sector) who blow report and disclose serious wrongdoings in the employers' organization.¹⁷ This report has recently (March 2016) lead to a Government proposal suggesting an entirely new law regarding the protection for employees in this field.¹⁸

2.4. *Protection of employment and wages in times of crises*

From the above mentioned it is quite obvious that very few labour rights are protected by the Swedish Constitution. In this section, we will mention some developments in Swedish labour law that could be of interest in the fundamental rights perspective.

There is no legislation concerning wages in Sweden. Not even minimum-wages. This is a question entirely for the labour market parties to regulate in collective agreements

¹⁵ Swedish Trade Union Confederation (LO), and Swedish Confederation of Professional Employees (TCO) v. Sweden. Collective Complaint No. 85/2012.

¹⁶ SOU 2015:83 Översyn av Lex Laval (*Review of Lex Laval*). The report contains a summary in English.

¹⁷ SOU 2014:31 Visselblåsare (*Whistleblowers*). The report contains a summary in English.

¹⁸ Prop. (Government Bill) 2015/16:128 Ett särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden (*Special protection for employees that blow report and disclose serious wrongdoings*).

and individual labour contracts. Free movement of workers and services has led to discussions about unfair competition that will lead to a wage race-to-the bottom or so called social dumping. These worries have also to be interpreted in the light of the CJEU's decision in the *Laval*-case (see section 2.2.).

In 2008, due to the economic situation in Swedish industry, the social partners in the manufacturing industry reached a unique collective agreement which allowed local agreements meaning that working hours, and thus salaries, were reduced by up to 20 per cent. The hours when work was not performed could be used for vocational training in order to improve the company's competitiveness. Few local agreements were concluded.

In 2012 the social partners in industry submitted a proposal to the Government concerning how future severe economic crisis could be met. This suggestion led to new legislation in 2014 about so called short-time work. According to the Act on short-time work the State can under certain circumstances subsidize short-time work arrangements in the private sector of the labour market. The aim is that the State, the employer and the employees should share the costs for shorter working hours in times of deep crisis. Short-time work can be agreed in collective agreements and under certain circumstances also in written agreement between employer and employee.

The 1982 Security of Employment Act¹⁹ imposes certain restrictions on the possibility to conclude employment contracts for limited periods. The main rule is that employment contracts should be for indefinite periods. During the 1990s the possibility to conclude short-term contracts was extended. The amount of fixed-term contracts has increased, especially for young people. The possibility to use combinations of different types of fixed-term contracts for long periods raised concern from the EU Commission about the Swedish implementation of Directive 1999/70/EC regarding the framework agreement on fixed-term work. As a result changes have been made to the Security of Employment Act that somewhat limits the possibilities to use combinations of different types of fixed-term contracts. The changes enters into force in May 2016.²⁰

Demands for a more flexible labour market have not only resulted in more fixed-term contracts, also agency work has been more frequent.²¹ Agency work was in principle forbidden in Sweden until the early 1990s, but nowadays agency work is in principle treated as any other kind of employment. Regular labour legislation applies as well as special legislation due to the implementation of the EU directives 91/383/EEC regarding health and safety for temporary employees and 2008/104/EC on temporary agency work. Already in the 1980s (before agency work was legalized!) the social partners concluded collective agreements adapted to the special triangular situation concerning temporary agency work. Today, over 90 per cent of temporary agency employees are covered by collective agreements that contain some kind of wage guarantee between assignments.

¹⁹ SFS 1982:80 *Lag om anställningsskydd*.

²⁰ Prop. 2015/16:62 *Skärpta åtgärder mot missbruk av tidsbegränsade anställningar (More stringent measures against the abuse of fixed-term contracts)*, SFS 2016:248.

²¹ The agency sector has expanded quickly, but includes only about 1,5 per cent of Swedish employees.

In cases of redundancy there are redundancy program agreements between the social partners for different sectors on the labour market.²² These programs are financed by employer's contributions and governed by agencies that are owned by the social partners. The aim is to help employees that are in danger of being redundant, or already are becoming redundant by economic support and professional advice, which could include redundancy benefits, vocational training, studies or other kinds of professional help to find a new job.

3. Social security rights

Social security rights could be defined as the financial security that a society provides to individuals and households, particularly in cases of old age, unemployment, sickness, invalidity, work injury, parental leave or maternity. The principle is to ensure the lost of income to a certain level. In this section we will give a very short overview of the most important social security benefits in Sweden and their development during the last years. This is not a complete account of social security rights, for example housing benefits, activity support, survival's benefits are not included.

The social insurance system is administered by the Swedish Social Insurance Agency (*Försäkringskassan*).²³ The Agency administer among other things pensions, sickness benefits and occupational injury insurance. Family allowances are also administrated by the Social Insurance Agency, but they are mere transfers, not based on insurance principles. Unemployment insurance is still in the main based on the old system of unemployment benefit societies, connected with the trade unions, but they are to a considerable extent financed by government grants and regulated by special legislation.

The social insurance scheme has during almost 100 years been increasingly extended. It provides a safety net, but is also intended to preserve a decent standard of living. It is primarily funded by statutory contributions from employers and employees. The social insurance cover all Swedish residents. Generous benefits and high replacement rates have been characteristic of the Swedish social insurance system for a long time. A report from the Swedish Social Insurance Inspectorate in 2014 shows that many of the social insurance benefits have not followed the changes in prices or wages after the economic crisis in the 1990s when benefit levels were cut or frozen. An increasing share of the working population has an income that exceeds the income ceilings in some of the insurances.²⁴

If a person is not satisfied with a decision on social security rights it is possible to appeal to the Administrative Courts.

²² Westregård, A., Changes in the Swedish Sickness Insurance System and Labour Law due to the Influence of Flexicurity, *EuZA Bd, 7(2014) S. 30–50*, pp. 42–45; Sebardt, G., Redundancy and the Swedish Model. Swedish Collective Agreements on Employment Security in a National and International context (diss.), Iustus Förlag, Uppsala 2005.

²³ www.forsakringskassan.se.

²⁴ ISF Report 2014:4. In 2010 nearly half the men and a quarter of the women aged 20–64 years had an income that exceeded the income ceiling in the sickness insurance. The corresponding figures in 1992 were 14 per cent of men and 2 per cent of women.

3.1. Sickness benefit

The system of sickness benefit has recently undergone considerable changes. During the period 2000–2009 Sweden faced structural problems in the form of high sickness rates and many early retirements. The number of people on long-term sick leave started to increase during the economic crisis in Sweden in the beginning of the 1990s. It was decided that something has to be done in order to get people back to work.²⁵ The rules regarding sick pay have gradually become stricter from 2008 in order to reduce sickness absenteeism and measures have been directed towards rehabilitation efforts.

No sick pay is due for the first day. The employer pays sick pay (*sjuklön*) as from the second up to the 14th day of illness at 80 per cent of wages up to a certain ceiling. This was introduced by an Act in 1991²⁶ with the aim to increase the employers' interest in the working environment and also to make the control system more efficient. The Swedish Social Insurance Agency (*Försäkringskassan*) pays sickness cash benefit as from the 15th day in a period of illness. The remunerations here depend on the yearly salary up to a certain ceiling. This ceiling has in practice been more or less constant during the last 20 years²⁷ with the result that very few employees today receive 80 per cent of their income. It is not uncommon that the employer pays an addition on top of sick wages or sick pay according to a collective agreement. Also, several trade unions have arranged for an additional voluntary insurance for their members to top up the sick pay.

After 90 days with sick pay the Social Insurance Agency tries to see if there is some other work the employee can perform at the ordinary workplace and only if this is not the situation the employee gets continued sick pay. After 180 days the employee's ability to work should as a main rule – if it not is considered unreasonable – be tested on the whole labour market. If the Agency is of the opinion that the employee can take any job somewhere on the Swedish labour market, the employee gets no more sick pay and is instead sent to the Public Employment Service.²⁸ Sick pay is as a general rule, if it is not considered to be unreasonable, terminated after 365 days. After 365 days an employee's ability to work shall always be tested on the whole labour market.

3.2. Unemployment benefit

It is not compulsory to be a member of an unemployment benefit society, but those who are not insured receive very small benefits if they are unemployed.

The unemployment benefit insurance consists of two parts. A basic insurance providing a flat-rate benefit for those who are not voluntary insured. And a voluntary

²⁵ Government White Paper, Fokus på åtgärder – En plan för effektiv rehabilitering i arbetslivet (*Focus on Measures – a plan for rehabilitation in working life*). SOU 2006:107 pp. 71 ff, and Government White Paper, Mera försäkring och mera arbete (*More insurance and more work*), SOU 2006:86 pp. 57ff. See also Westregård, A., changes in the Swedish Sickness Insurance System and Labour Law due to Influence of Flexicurity. *EuZA*, Bd7 (2014), pp. 30–50.

²⁶ Law on sick pay (*Lag om sjuklön*) SFS 1991:1047.

²⁷ ISF (the Swedish Social Insurance Inspectorate) Report 2014:4 The Development of the Swedish social Insurance since the 1990s.

²⁸ www.arbetsformedlingen.se.

insurance administrated by the trade unions providing an earnings-related benefit financed by membership fees and tax money contributions. It is possible for unemployed persons to receive economic social assistance or housing benefits in addition to unemployment benefits. The benefit levels were not increased for many years, but the Social Democratic/Green Party coalition that came into power at the end of 2014 decided in 2015 an increase in the daily allowances and the ceiling of the unemployment benefits.

An attempt by the non-socialist government in the early 1990s to establish an unemployment insurance system outside the trade unions was abolished by the next Social Democratic Government. The non-socialist coalition that came into office in 2006 immediately issued changes in the rules regarding unemployment benefits. One of them was to strengthen the financial contributions from the insured with the aim of underlining the connection between high unemployment in a branch and higher membership fees. Another suggestion was to make membership of an unemployment insurance association compulsory, but this suggestion was not successful. The increased membership fees lead to a large decrease in membership of the unemployment societies but had apparently no effects on unemployment rates or wage demands. In 2013 the rules were changed again, almost back to the earlier situation

3.3. Old age pension

The basic and most important system of pension provisions is the state social insurance which is compulsory for the entire population. The general legislation about retirement benefits was entirely revised just before the turn of the century. The new system is extremely flexible. It is built upon three parts of benefits; an earnings-related retirement pension, a premium pension and a supplementary pension. General age pension benefits can be used at the earliest at the age of 61 years, but no upper limit is set for the age at which take-up must commence. Guarantee pension could be used at the earliest from 65 years of age. Retirement benefits could be used only partial; it could be combined with paid work. There is no upper age limit for earning pension benefits in the state social insurance system. According to the Security of Employment Act an employer has the right to retire off an employee at the expiry of the month in which he/she reaches the age of 67 years. The retirement benefits are estimated on the ground of the prospected average life time of the group of people born that year, so the pension will be considerably lower if it is drawn at 61 instead of, for example, at 66.

Guarantee pension is a kind of a minimum pension. Very few receives full guarantee pension, but it is rather common that people get some reduced guarantee pension to reach a minimum pension level because they have earned small pension benefits during their working life. (Guarantee pension is rather often combined with housing benefits for elderly).²⁹

²⁹ The Swedish old age pension system is described in the CJEU's decision in *case C-141/11 Torsten Hörnfeldt v. Posten Meddelande AB*.

General retirement pensions under the state social insurance system are supplemented by various schemes established under collective agreements. Many employees also have supplementary voluntary private pension schemes.

3.4. Disability pension

For persons who are young and will probably not be able to work full time for at least one year due to illness, injury or disability can receive activity compensation from the Social Insurance Agency. Working capacity shall be diminished by at least one fourth in all jobs on the entire labour market. This also includes jobs that are arranged for persons with disabilities, such as employment with salary grants. Activity compensation may be income-related or in the form of guarantee compensation. The right to compensation is re-examined regularly.

3.5. Parental leave, maternity benefit

Parents' allowances are according to the Social Insurance Code 2010 (*Socialförsäkringsbalken*)³⁰ essentially the following. In connection with child birth parents are entitled to allowances for a total of 480 days. The mother has this right as from the 60th day before the assumed date of birth. After the child has been born it is the parent who takes primary care of the child who is entitled to the allowance, but during the child's first year it is possible for both parents to use the allowance and take leave at the same time for a few days. Parents' allowance can also be used for occasional care of a sick child not yet 12 years of age, for up to 60 days per child and year (temporary parental benefit).

Parental benefit has three different compensation levels depending on how many days of parental leave that is used and if the parent has had any income before child leave. The most important part of the allowance is in principle the same amount as sickness benefit.

There are different arrangements in collective agreements to extend the support to parents.

3.6. Personal assistance, health care and social security for disabled

The cornerstone of the Swedish disability policy is the principle that every person is of equal value and has equal rights. In Section 2 Article 12 of the Instrument of Government protection against discrimination in the meaning that no act or norm are legal if someone can be mistreated or discriminated due to disability at work, at school or elsewhere in the society is granted. General efforts to improve accessibility in the community are central to achieving the goals of inclusiveness and equality.

Actions such as housing with special services for adults, or daily activities for those who are inactive and not enrolled in education are regulated by the Act Concerning Support and Service for Persons with Certain Functional Impairments.³¹ County councils

³⁰ SFS 2010:110.

³¹ SFS 1993:387 *Lag om stöd och service till vissa funktionshindrade*.

and municipalities are responsible that health care assistance is provided in the form of rehabilitation and habilitation.

Persons with disabilities who are in need of individual support and service from the community have the right to aid to ensure a good living standard. The state, municipalities and county councils are jointly responsible for this aid with the aim that people with disabilities receive good health, economic and social security.

County councils and municipalities are responsible for health care, rehabilitation and habilitation. The municipalities are responsible for personal assistance, housing with special service, or daily activities for those who are inactive and not enrolled in education according to the Act Concerning Support and Service for Persons with Certain Functional Impairments. The Swedish Insurance Agency is responsible for economic security and cost for personal assistance more than 20 hours per week.

3.7. *Work injury*

The first act giving the employer special responsibility when a worker has been ill or injured due to accidents or injuring effects of work came already in 1916. Today the rules about compensation for incapacity due to industrial accident or other injurious effects of work (occupational disease) are found in the Social Insurance Code 2010. With few exceptions such incapacity is treated in the same way as illness in general. Those who have incurred permanent incapacity to work may be awarded special life annuities.

Special insurance arrangements by collective agreements give the employees extra allowances when they are injured by work.

3.8. *Social assistance*

Social assistance is a financial support under the Social Service Act,³² and it is the social service office in the municipality that is responsible for persons that are in need for assistance. Each application for social assistance is assessed individually and the social worker looks at what the social services can do to help persons to become self-supporting. In the meantime a person can receive support for upkeep and for other items needed in order to have a reasonable standard of living. If the person is unemployed he/she must be registered with the employment office and actively looking for a job. If the person is ill and are on sick leave the social services can demand to see the doctor's rehabilitation plan and contact the Social Insurance Agency office and the employment office to find out what help the person need to become self-supporting. The social services do not usually grant social assistance to students during semester time. The students are assumed to be able to manage on study allowance or other study assistance.

People who are in the need for social assistance can receive help for upkeep and for other items that a person need to have a reasonable standard of living. Help with upkeep is called income support and consists of a standard sum (the national standard) plus reasonable costs for other common needs such as housing and household electricity. The

³² SFS 2001:453 *Socialtjänstlagen*.

Social Services will assess the situation in each individual case but the national standard is based on calculations from the National Council for Consumer Affairs.

Under the Parental Code³³ parents have a duty to support their children until their 18th birthday. If the child is still at school (upper secondary) after 18 years of age, this obligation is extended. It then applies until the child have left school, but not after the child's 21st birthday. That means that young people aged 18–20 who have left school can apply for social assistance on their own behalf. Young people who want to move out of the family home can only receive assistance with their housing costs when there are strong reasons for them to move. The usual assumption is that young people will not move out until they can provide for the costs for their own home themselves.

In certain cases persons can receive assistance, which is to be repaid, for example under an occasional situation.

4. Constitutional guarantees for social security rights

The legal right to social security is created by political decisions at national level. According to the Constitution it is only the Parliament that has legislative power.³⁴ Rules regarding social protection are however not regulated in the Constitution but instead laid down in national legislation according to the Constitution. Then the social security rights are advocated by authorities which are by law given the competence to make decisions in individual cases.

The principle of legality is one of the cornerstones of the Swedish Constitution.³⁵ The principle of legality means that the exercise of public authority and public administration shall be managed under the law. This principle is a question about realization of justice in social and welfare legislation that is depending on the legal system and the rule of law. In other words, the first Section Article 1 of the Instrument of Government underlines that the power of public administration shall be governed under the law (good administration).

The rule of law is by the principle of legality expected to guarantee a fair and equal treatment for the individual before the law. Due to the fact that two cases never are identical in all aspects it gives the judges and the administrators a relatively high degree of discretion in determining the rights and benefits. There is always a margin of appreciation in local decision-making depending on the large diversity of humanity and social facts in each case. Theories on public administration reveals that discretion is neither good nor bad, it is how the discretion is used by the administrators in the decision-making process that is vital.³⁶ Discretion can be abusive in a number of ways; the clients can be categorized to fit standardized definitions and administrators use organizational and administrative guidelines instead of legal rules and principles.³⁷

³³ SFS 1949:381 *Föräldrabalken*, Section 7.

³⁴ The Instrument of Government Section 8 Article 1.

³⁵ The Instrument of Government Section 1 Article 1.

³⁶ See for example Brandon T., *Street-level Bureaucracy: dilemmas of the individual in public services*, *Classic Review, Disability & Society* Vol. 20, No 7, December 2005, pp 779–783.

³⁷ Erlandsson, L., *Law, Norms and the Rule of Welfare Law*, *Lund Studies in Sociology of Law* 44, 2014, p. 158.

The intent of social security rights is that citizens should be ensured protection for civil rights as well as decent standard of living and help and support in situations where the individual has a casual or a permanent need for aid. There are many dilemmas in the decision-making process and at worst, the administrators may give in to favouritisms, stereotyping, convenience, and routinizing – all of which serve their own or the authority's purposes.³⁸ Organisational and administrative guidelines can also be used instead of legal rules and principles.

The organisation can develop guidelines and rules of their own within the system and studies show that the authorities in practice do this.³⁹ Law in action therefore becomes something else than the law in the books. Local guidelines could in times of economic problems easily be influenced by economic arguments. If there is an interaction between how the administrators work with discretion and the development of local guidelines we have a problem which the legislators have to deal with. Different authorities seem to have different opinions on similar cases, depending on local guidelines and standards that often are in contrast with the political aim of the legal act.

For example, the legislative intent of the law is that persons with functional impairments should be ensured good living standards. In the individual case it is the bureaucrats in the local authorities that are the decision-makers regarding the right to support and services according to the law. The local authorities have to deal with individual aspects to achieve the objectives of the legislation. Even if the law sets up rights to support and service, the legislation is goal-oriented and gives the bureaucrats a high degree of discretion in deciding the rights in individual cases. Therefore, the decision-makers must have knowledge about legal method but also about social work in order to achieve the legislative intent of the legislation, and that is not always the case. Instead of using legal method and implementing the goal-oriented legislation in each individual case, there is often an element of institutionalized processing. The decision-making process is governed, not by the legislative intent of the legal act, but by other circumstances, such as the authority's own internal documents and internal decision-making processes. The decision-makers come from different professions, with different educational backgrounds, some of them are lawyers and some are not. Some have an educational backgrounds in social science and social work and some have other background.

Empirical studies shows that there are different norms used in different arenas on similar cases and a parallel norm creating process is a reality.⁴⁰ The municipalities refer to different standards when applying rules and principles in the decision-making process. Although internal norms and rules exist and are used in the municipalities, the decisions are in general goal-oriented and the decision-makers try to fulfil the legislative intent of the legislation. The Swedish Social Insurance Agency uses internal norms and guidelines and the bureaucrats working here are loyal to the organization's voluminous internal documents rather than to the legislative intent. The findings from the regional Administrative

³⁸ Lipsky, M., *Street-level Bureaucracy*, Russel Sage Foundation, New York 2010, p. xiv.

³⁹ Erlandsson, L., *Law, Norms and the Rule of Welfare Law*, Lund Studies in Sociology of Law 44, 2014, pp. 107 ff.

⁴⁰ Åström, K., *Parallel Norm Creating Processes*, Ed. Baier, Social and Legal Norms, Ashgate England 2013, pp. 71 ff.

Courts of Appeal do not show a fixed number of legal standards but they almost always refer to the law in question and other legal documents in their decisions.⁴¹

To sum up, it is the Parliament that has the legislative power in the light of the Swedish Constitution, but it is the local authorities that have the power to make decisions in individual cases. Therefore, there is a problem when local standards sometimes are in conflict with the law and different authorities apply different standards on similar cases. Parallel norm creating processes is the result when the principle of legality doesn't come in to play the main role. Further there are no sanctions when local authorities use internal norms instead of the legal sources and as a consequence good administration under the Constitution is not fulfilled.

5. Conclusions

From the above follows that in Sweden the constitutional protection for social and labour rights has developed rather late. When it comes to fundamental labour rights the constitutional rules are more of a confirmation of a state of things that had developed in practice and legislation long before these rules appeared in the Constitution. The constitutional protection is also rather weak. In fact, the protection of fundamental freedoms and rights has traditionally not had a strong position in Sweden. The Swedish welfare state has had other points of departure than fundamental rights.

Constitutional law is not a strong instrument for social protection in Sweden due to the fact that social and welfare law is governed by different local authorities and the administrators are not lawyers. Judicial review according to the principle of legality are therefore often in conflict with local norms and guidelines.

Constitutional rights are rarely mentioned in Swedish courts. The administrative courts do not refer to the principle of legality in their judgments. The Swedish Labour Court has during the last 20 years in a couple of judgments referred to the Constitutional right to take industrial action. When we looked at the table of contents in several text books concerning labour law and social law, constitutional law was not mentioned at all under the heading "Sources of law".

The restrictions regarding industrial action and collective bargaining introduced in Sections 41c and 42a of the Co-determination Act implement the CJEU's decision in the *Laval*-case where the Court gave preference of economic rights to labour rights.

For labour market rights the social partners uphold a system of additional benefits and a surveillance system. In the main, it is the trade unions that are responsible for controlling both that collective agreements and labour legislation are followed. It is the social partners that by means of collective bargaining and collective agreements give extra benefits such as additional sickness pay, additional parental benefits, redundancy arrangements etc. In times of declining union membership this system could be in danger. Still, because of high rate of unionization on the employers' side the coverage of collective agreements is about 90 per cent.

⁴¹ Erlandsson, L., *Law, Norms and the Rule of Welfare Law*, Lund Studies in Sociology of Law 44, 2014, pp. 137 ff.

The changes in social security rights, on the other hand, are results – more of awareness of misuse with human resources and misuse of tax money – than results of economic restrictions. Also political convictions about the possibility to move people from passive benefit receivers to active workers earning money and paying taxes by means of decreased social benefits play an important role. Nevertheless, we can conclude that the benefit level of at least some of the social insurance benefits not have followed changes in prices and wages and the cuts in sickness and unemployment benefits during the last years have had the effect that the part of the Swedish population depending on social welfare or different kinds of private insurances (often through the trade unions) has grown. Measures taken have had a greater impact on the most vulnerable groups.

In the introduction we mentioned that Sweden not has been very much affected by the economic crisis. In Sweden there is still a trust in the strong welfare society, and regarding labour market questions also trust in the labour market parties' competence to bargain and conclude collective agreements. This could, of course, be some of the reasons for the Constitution playing such a minor role in Swedish social and labour law. It is not foreseen that the Constitution will have a larger role, at least not in the near future. In a longer perspective it is probable that constitutional rights will play a more prominent role. The main reason though for the few threats on social security and labour rights is the consensus in the Swedish society that although there might be a need for economic restrictions the welfare society should be protected.

Summary

Social protection could refer to both social security and labour rights. From a Swedish perspective the notion social protection in the first instance refers to social security rights. The paper in the main deals with social security rights, but some words will also be said about labour rights.

Keywords: Sweden, social security rights, constitution