«Privatization» of Swedish Labour and Employment Law in the Public Sector and Its Impact on Public Servants – The Long and the Short of It

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Having served as a public servant in Norway for a long time it may be of some interest to my long time colleague, Professor Stein Evju, to evaluate the development of «privatization» of labour and employment law and its impact on public servants in Sweden.[1]

In the following the main themes refer to public servants employed in government departments and agencies.

1 Present Situation

1.1 Constitutional provisions to be considered

A number of provisions found in the Swedish Instrument of Government must be highlighted first of all.[2]

Chapter 1 Article 1 provides inter alia: «All public power in Sweden proceeds from the people.» The same Chapter, Article 9 provides: «Courts of law, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality.» The same principle is known under the name of «objectivity principle» in Swedish administrative law.

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1 With respect to the past, refer, for example, to Myrberg, Israel, Om statstjänstemäns oavsättlighet 1930; Larsson, Åke, Om kommunaltjänstemän och kommunalarbetare 1948; Jägerskiöld, Stig, Svensk tjänstemannarätt, Pt 1, 1956, Pt 2:1, 1959, Pt 2:2, 1961; and Ekenberg, Otto, Den svenska statsförvaltningens avlöningsväsen, Pt I-III, 1952, 1955 and 1960; Elvander, Nils, Intresseorgansiationerna i dagens Sverige, 1966, pp. 118–136; and Tobisson, Lars F., Framväxten av statstjänstemännens förhandlingsrätt, En studie av en beslutsprocess, 1973. A comparative study with respect to Norway and Sweden and the development of the law of public servants, highlighting both similarities and differences, is found in Seip, Åsmund Arup, Rett til å forhande. En studie i statstjenestemennenes forhandlingsrett i Norge og Sverige 1910–1965, 1997.

2 The text that follows comes from the website of the Swedish Parliament where the Instrument of Government is published in English.

Chapter 2 Article 6 provides in part: «Everyone shall be protected in their relations with the public institutions against any physical violation …» The same Chapter Article 14 provides: «A trade union or an employer or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement.»

Chapter 11 Article 7 refers to the legal status of permanent salaried judges/sovereign appointments. It is held: «A person who has been appointed a permanent salaried judge may be referred from office only if: 1. he or she has shown himself or herself through a criminal act or through gross or repeated neglect of his or her official duties to be manifestly unfit to hold the office, or 2. he or she has reached the applicable retirement age or is otherwise obliged by law to resign on grounds of protracted loss of working capacity. If organisational reasons so dictate, a person who has been appointed a permanent salaried judge may be transferred to another judicial office of equal status.»

Chapter 12 Article 5 regarding appointments to posts of administrative authorities provides: «When making appointments to posts within the State administration, only objective factors, such as merit and competence, shall be taken into account.» This is another aspect of the so-called objectivity principle contained in the Instrument of Government. Furthermore, and lastly, the same Chapter, Article 7 provides: «Basic rules regarding the legal status of State employees … are laid down by law.» «Law» refers here to statutes – whether public law statutes or private law statutes seems to be irrelevant.

1.2 Legislation currently in force with respect to public servants employed by the State

The following statutes or ordinances govern the various terms and conditions, as well as other matters as applied to State employees:

- The Act on Public Employment (1994:260), as amended, originally 1976:600, replacing the Act on State Employment (1965:274).[3]
- The Act on Sovereign Appointments (1994:261), as amended.
- The Ordinance on Employment (1994:373), as amended, originally 1965:601.
- The Ordinance on Collective Agreements (1976:1021), as amended, originally 1965:465.
- The Ordinance on Time-off from Work (1984:111), as amended.
- The Ordinance on Employee Representatives in State Authorities (1987:1101), as amended.

3 The numbers relate to the Swedish Code of Statutes (henceforth SFS).

What is found in the above mentioned statutes/ordinances are either derogations from, or supplementary provisions to what should have otherwise been the law as applied to State employees. The major provisions today, however, which apply to State employees are found, inter alia, in the Act on Employment Protection (1982:80, as amended), originally 1974:12, and the Joint Regulation Act (1976:580, as amended).

2 Once Upon a Time

It all started in the 1930s when the Act on the Right to Organise and the Right to Negotiate was enacted in 1936 in Sweden.[4] The Act applied to employees in the private sector. The statute was basically meant to sustain the salaried employees' position on the labour market. The blue-collar workers in industry did not need a statute to safeguard their rights. Their right to organise and to negotiate had already been safeguarded by means of collective agreements. However, blue-collar workers employed by the State and the municipalities were embraced by the 1936 Act. Those workers could be found in large numbers in public utilities, such as railways, telecommunications, energy, postal services, etc.

The 1936 Act did not apply, however, to public servants under official responsibility employed by the State and the municipalities. Another Government Commission was appointed in 1935 to investigate the matter.[5] The outcome was a «halfway house». No collective agreements were supposed to be concluded. The right to take industrial action was not even on the agenda. The scheme introduced, however, an embryonic framework for possible future development.

2.1 The 1937 Ordinance on the Right to Negotiate for State Officials

The essence of the 1937 Ordinance on the Right to Negotiate for State Officials was, that a state agency would have to negotiate over any issues involving terms and conditions of work for public servants, and in case of a proposal which was considered to be of major importance with regard to employment conditions, the agency would

4 See SOU (Government Commission Report) 1935:59, Bill 1936:240, SFS 1936:506. A further amendment was made with respect to the right to organise by means of SOU 1939:49, Bill 1940:106, SFS 1940:332, wherein only the positive right to organise was recognised. A comprehensive description of the coming into force of this statute and the many views submitted is given in Schmidt, Folke, Kollektiv arbetsrätt, 1950, pp. 120–139.

5 See SOU 1936:41, Bill 1937:128, SFS 1937:292.

also have to submit such a proposal to the public servants' trade unions.[6] Such negotiations were quite frequent in many state agencies at the time, in particular in the public utilities sector. In some cases, it was also foreseen that negotiations could be conducted under the guidance of the central Government.[7] The concept of «negotiation» was chosen because it had achieved a standing within this segment of the labour market. In fact, «negotiations» were really only «consultations», since a given state agency or the Government remained in charge of the final decision-making process. The parties were not on an equal footing at the negotiating table, as compared with the parties in the private sector of the labour market.

With respect to the right of association for public servants, it was held in the preparatory materials that a state agency would hardly act in contravention of the public servants' right to organize.[8] The right of association of the public servants had not been acknowledged by law, however.

A special procedure was set up in order to allow only the bigger and more representative trade unions to reach a position when they would be able to negotiate with state agencies. It indicated that the Government should «recognize» these trade unions, so that every state agency would know beforehand which of the many trade unions the agency should negotiate with. This procedure was amended in 1954. It was held to be difficult to determine which of the many trade unions were to be considered as «bigger» and more «representative». In the Bill, the Minister of Civil Affairs held: «It should not be up to the State to try to regulate the way in which state employees should be organised».[9] Henceforth, it was enough that a trade union notified a state agency about its existence (certain restrictions remained).

2.2 The 1940 Act on Municipal Officers

A similar framework was set up for municipal officers in 1940.[10] Model staff regulations applying to the cities and county councils were very varied at that time. The National Social Welfare Board was given the powers to determine which of the so-called national trade unions should have a legitimate right to negotiate with local

6 Actually, the issue of the public servants' position in relation to State agencies came before Parliament for the first time as matter of «right of co-determination» already in 1911.

7 In a later context (see Bill 1954 no. 61, p 3) it was acknowledged that negotiations were in fact conducted between the Government and the public servants' trade unions outside the scheme of the 1937 Ordinance. This was the main track until 1965 when the Ordinance was repealed.

8 Bill 1937 no. 128, p. 44.

9 Bill 1954 no. 61, SFS 1954:120. This was the only amendment to this Ordinance until it was repealed in 1965.

10 See SOU 1938:56, Bill 1940 no. 4 and SFS 1940:331.

governments (cities, county councils, etc.). The solution was determined based on the fact that trade unions representing municipal officers were organised in national trade unions, or their subsections. This was also considered to contribute to a unified application of the regulatory framework.[11]

2.3 Further developments in the 1950s and 1960s

Those two decades brought with them a lot of changes. Three Government Commission Reports were presented in 1951, 1960 and 1963. One of the more decisive actions was taken in 1950 when the Ministry of Civil Affairs was created, as an outsourced unit from the Ministry of Finance.[12] The new Ministry came to mastermind the forthcoming events.[13]

The 1951 Report[14] provides an analysis of the entire field of Civil Service Law. The report suggested, among other things, that a special statute be enacted with regard to public servants employed by the State and by local authorities, and it even recommended the establishment of a public servants court (like the already existing Labour Court). These suggestions have never materialized. The constitutional aspects referring to public officials under penal sanctions and their irremovability, could not be dismantled just like that. The Commission opened, however, the possibility to conclude collective agreements if the parties should opt for it. The employer would nevertheless be in charge of appointments and dismissals, the right to manage work and the obligations of public officials. It was firmly stated, however, that no traditional industrial action, including refusal to work overtime, would be permitted.[15] The one

11 This framework lasted until 1965 when the 1940 Act was repealed. Only one amendment was made during this period, see Bill 1954 no. 67 and SFS 1954:131, with reference to SFS 1954:130, entailing that municipalities had the right to delegate to an employer organisation of their own the right to conclude binding collective agreements or similar arrangements applying to municipal employees. This special so-called «delegation act» was a necessity while paying regard to the local government's «self-governance» principle of long standing (refer now to the Instrument of Government, Ch. 14 Section 2, SFS 2010:1408). The delegation right was used to a very limited extent; see Ryman, Sven-Hugo, Förhandlings- och strejkrätt inom den offentliga sektorn, in Arbetsmarknad & Arbetsliv 1999, p. 263. The 1954 «Delegation Act» can now be found in the Act on Certain Municipal Powers, chapter 6, section 3, see Bill 2008/09 no. 21 and SFS 2009:47.

12 Refer to a note in a memorandum from the Ministry of Civil Affairs, 1964:1, p. 11.

13 Tobisson, p. 123.

14 SOU 1951:54.

15 At that time trade union membership levels among public servants were rather high, amounting to more than 80 per cent for public servants employed by the State. Union membership rates were, however, asymmetrical in that in the State sector 155 trade unions had been «recognised», whereas only 38 trade unions had been «recognised» in the municipal sector following the 1937 Ordinance and the 1940 Act.

opening left to public officials was to give them the right to end their employment relationship through *massive terminations* in order to put pressure on the public employer. Public trade unions would also be able to launch so-called *employment blockades* (which was a frequent device then in use). If massive terminations on the part of the employees were used, the public employer would be entitled to prolong in response any period of contract termination until up to six months, so as to preserve «essential services» of the public sector.[16]

The 1951 report was bound to fail – it was a paper product. The report came under a barrage of criticism from various interested parties.[17]

For this reason another Government Commission was appointed in 1956, which delivered its report in 1960.[18] In the directives the Minister of Civil Affairs submitted the view that the former report (1951) «dealt with a comprehensive, complicated and to a large extent unexplored complex of problems».[19] The 1960 Report focused solely on public servants employed by the State. It also gave a broad description of the way in which «negotiations» or «consultations» had been conducted between the Government representatives and the respective public trade unions, outside any legal framework. This was a development that could not be ignored. The Report acknowledged that there was no necessary link between official responsibility of public servants and the right to conclude collective agreements.[20] However, even if collective agreements relating to the bulk of the public servants were accepted, some aspects were not supposed to be subject to bargaining with public trade unions. These issues related, among other things, to the obligations of public servants, their appointments and dismissals. As regards public servants who were irremovable, these could not join a strike, or be subject to a lockout. They had a duty to discharge their obligations connected with their appointment, and they were also given a life guarantee with respect to their wages. The public good played a decisive role here. If these public servants absented themselves from work due to their participation in a strike, their conduct was considered to amount to a breach of contract, and they could be removed from office following penal law proceedings in a general court. Accepting mass terminations, as the 1951 Report suggested, was not

16 Seemingly inspired by a similar provision to be found in the Norwegian Act on Public Servants from 1918, see Seip, pp. 106–107.

17 See Bill 1954 no. 67, p. 14, SOU 1960:10, p. 7. Tobisson, p. 105 concludes that the results of the 1951 report were very modest.

18 SOU 1960:10.

19 SOU 1960:10, p. 7.

20 Professor Folke Schmidt advanced the same view in an article published in 1945; refer to «Om kollektivavtal för stats- och kommunaltjänstemän», in Förvaltningsrättslig Tidskrift 1945, pp. 121–135.

acceptable either.[21] Any remaining administrative disciplinary procedures should be governed by public law, which is why the Commission did not accept that this issue could be handed over to the collective bargaining parties.

After the 1960 Report was submitted, intensive «negotiations» between the representatives of the Ministry of Civil Affairs and the respective public trade unions ensued, resulting in a third Government Commission Report.[22] This report constitutes the final countdown and a breakthrough as regards the reform of Swedish Public Service Law.

In the 1963 Report a troika of higher officials and eminent experts employed in the Department of Civil Affairs, i.e. Ingmar Lidbeck, Georg Normark and Sven-Hugo Ryman,[23] stated that the time was ripe for applying private law-based legislation to public servants. No objections were raised against such a change-over.[24] With respect to the very highly contested issue of irremovability of state public servants, the Commission submitted the view that the fundamental vantage point should be that such a state public servant could not be removed from office unless he or she had committed a crime or been negligent. It was argued that the fact that a state public servant stopped working while participating in industrial action did not necessarily imply that the employment relationship had to be considered to have ended.[25] As regards the wage guarantee for state public servants, which, according to the general opinion, prevented the State/employer in the past from using the lockout tactics on such employees, the Commission argued that the wage guarantee was not necessarily to be linked with the issue of irremovability.[26]

Even though a private law-based legislation paved the way for a new regime, certain issues remained, however, as employer prerogatives, for example, the appointment and dismissal of state public servants, the determination of their obligations and the activities of state agencies, as well as the right to manage work. The Commission argued that this followed from «constitutional and administrative principles», which were equivalent to what applied to any other private employer's prerogatives.[27]

In the main, the Government Bill presented before Parliament followed suit.[28]

21 According to Seip, p. 271 the Commission Report led up a blind alley. I do not agree. Rather, the Report paved the way for the next step.

22 SOU 1963:51 and Tobisson, pp. 158–197.

23 The troika also wrote the leading commentary on the new legislation, Lidbeck, Ingmar, Normark, Georg & Ryman, Sven-Hugo, Statens tjänstemän. Kommentar till 1965 års lagstiftning 1970.

24 SOU 1963:51, p. 39.

25 SOU 1963:51, p. 55.

26 SOU 1963:51, p. 56.

27 SOU 1963:51, pp. 60, 81–82.

28 Bill 1965:60.

A decisive factor in drafting the Bill was the conclusion of two major collective agreements, one for the state sector in 1963, and another for the municipal sector in 1964, wherein the respective parties agreed upon a special procedure for dealing with labour disputes, following the model from the 1938 Main Agreement between the Confederation of Trade Unions (LO) and the Confederation of Swedish Employers (SAF) and, secondly, that they would settle labour disputes relating to essential services. Such conflicts should be avoided; they should be limited and terminated. The respective parties committed themselves to set up joint bodies in order to prevent such conflicts.

3 Two Issues at Stake

For a long time there were two issues at stake. The first one was the irremovability of higher officials. In truth, the numbers of those officials had fallen, since other types of employment forms had come into use.[29] The idea was that a state public servant could not unilaterally terminate his or her employment relationship unless the State accepted it. Ultimately, the 1965 reform entailed that state public servants' irremovability was deemed to have nothing whatsoever to do with the wage guarantee or their participation in industrial action.

The second issue related to the public servant's official responsibility under penal law in case of his or her breach of duty or malpractice. A general view was that a public servant could not participate in strike action because it would amount to a breach of duty.[30] The majority of the public servants were subject to both penal law provisions, and administrative disciplinary measures.[31] These issues were left unaltered by the 1965 reform. A major reform in this area was introduced in 1975, where disciplinary procedures were based on private law principles.[32]

29 See SOU 1951:54, p. 69.

30 Tobisson, p. 254. In respect of the 1965 reform amendments were made to penal law in that a public servant who participated in industrial action was no longer considered to have committed a crime under penal law.

31 SOU 1963:51, Annex no. 2.

32 See SOU 1969:20, SOU 1972: 1 and Bill 1975: 78, pp. 106, 139, 140. The old public servants' official responsibility under penal law was abolished, apart from cases of improper exercise of public authority, bribes and breaches of the obligation of secrecy. A public servant may instead be subject to a warning, wage deduction or summary dismissal following the supplementary provisions of the 1965 Act on State Employment, or to dismissal pursuant to the provisions of the Employment Protection Act. It is also concluded that «privatization» of disciplinary procedures took place at that time, Bill 1974:174, p. 45.

4 Stepping Stones

The two stepping-stones to the future were thus: The Act on State Employment[33] and the Act on Municipal Officers.[34] The old regimes from 1937 and 1940 were repealed. The right of association, as laid down in the 1936 Act, was hence fully recognized to apply to public servants.

This did not mean the end to the changes in the area. A special committee set up by the Ministry of Civil Affairs was appointed in 1963. The committee held 18 meetings in order to «translate» the old administrative regulations in force into collective agreements. This task was completed by the new Collective Bargaining Agency for State Employees (*Statens Avtalsverk*) when new collective agreements for state public servants were signed before the end of 1965.[35]

5 Implications of the 1965 Reform

In the first place, the right to sign a legally binding collective agreement was introduced.[36] That right did not imply, however, that a trade union might force the public employer to sign a collective agreement.[37] Another important thing was that a collective agreement was supposed to apply to all employees, even those who did not belong to the union. This was made clear in the Ordinance on State Collective Agreements.[38]

Secondly, the right to take industrial action was introduced, being limited, however, to strikes and lockouts. So-called employment blockades were still permitted. Restrictions were laid down with respect to sympathy strikes and political strikes.[39]

Thirdly, as indicated before, restrictions with regard to certain non-negotiable mat-

33 SFS 1965:274. The transition to the private law-based system also meant that a specific act concerning limitations on the right of public servants or municipal employees to institute proceedings against a public employer was promulgated (the Act on the Limitations on the Right to Bring Suit against a Public Employer's Decision) in cases when a suit could be brought before the Labour Court. Refer to SFS 1965:276, as amended 1987:439.

34 SFS 1965:275.

35 See Tobisson, pp. 209, 231 No special memorandum from the 1963 Committee has been found in the archives.

36 Bill 1965:60, p. 103.

37 Refer in this connection to Labour Court Judgment 1946 no. 68, and also Labour Court Judgment 1972 no 5. In fact, this standpoint is a logical necessity in the Swedish system, which has not discarded the principle of freedom of contract by introducing provisions stipulating compulsory arbitration in disputes of interest.

38 SFS 1965:465, Section 4, SFS 1976:1021, Section 7, which is still in force.

39 Bill 1965:60, pp.110–111, 173, and Lidbeck, Ingmar et al., pp. 111–112.

ters were laid down, such as the issue of the activities of the state agency, the right to lead and allot work and to allocate working time.[40] Some of these restrictions were, however, partly abolished in 1971[41] and 1974.[42]

In the fourth place, the 1965 reform made it clear that a public servant had the right to terminate his or her employment, which was not always accepted practice in the past.[43]

Another result of the reform was that a special Government Agency for Collective Bargaining was set up in 1965 to deal with issues relating to collective bargaining and collective agreements, as well as other matters related thereto.[44] It implied centralization of the bargaining structure in the State sector.[45] In the 1964 Memorandum it was held that one of the advantages of setting up a separate Government agency was that the highest political level would become «in principle» independent from the negotiating parties, in particular when industrial action was taken. Also, it was felt to be unacceptable that Government representatives should be involved in the interpretation of collective agreements or application of the law in specific labour disputes which might be subject to a court decision.[46] These considerations were not addressed, however, in the ensuing Government Bill. This was not a good omen.

With hindsight, we know that industrial action occurred on many occasions in the public sector since 1965. To name a few cases, we can look at the following examples. The first action occurred already in 1966 and involved teachers.[47] Another action took place in 1971. In both cases strikes and lockouts were involved. The latter forced the Swedish Government to intervene by way of legislation (which is exceptional) in order

40 The Act on State Employment, Section 3.

41 The amendment related to the allocation of working hours for public servants; refer to the Memorandum from the Ministry of Finance, Fi 1970:8, Bill 1970:164 and SFS 1970:715 and 716.

42 The amendment relates to the employer's right to lead and allot work and grant leave of absence other than holidays; refer to the Memorandum from the Ministry of Finance, Fi 1971:10, and Bill 1973:177, SFS 1973:969 and SFS 1973:970. The amendment with respect to the right to lead and allot work was only a cosmetic change. It was held in the remarks in Bill 1973:177, p. 37 that if no collective agreement could be reached on that issue, it followed from the Labour Court's case law that the public employer had the right to lead and allot work (similarly to the situation in the private sector of the labour market).

43 Refer to SOU 1963:51, p. 100 and Bill 1965:60, p. 217.

44 The basis is found in a Memorandum from the Ministry of Civil Affairs, 1964:1, and in the ensuing Bill 1965:77, SFS 1965:462 and 1965:642.

45 Two other State agencies were abolished. The two agencies were the (Swedish) Government Board for Collective Bargaining, SFS 1947:397, and the National Swedish Advisory Board on Government Employees' Salaries, SFS 1950:347.

46 Memorandum Fi 1964:1, p. 18.

47 An account is given by Schmidt, Folke in Eftermäle till lärarkonflikten, in Förvaltningsrättslig Tidskrift 1967, pp. 1–26.

to ensure the enforcement of expired collective agreements regarding professional academics for another six weeks.[48] In 1986 doctors and nurses became involved in another major conflict.[49] For a long time, the Government was highly involved in the negotiation issues, playing a kind of dual role.[50]

Not until another reform of the National Agency for Collective Bargaining in 1994[51] did the Government adopt a different approach. It was quite a dramatic change. A new state agency, the Swedish State Employer Agency *(Arbetsgivarverket)*, was set up. The agency is a membership organization for Government agencies, funded by the membership fees of its member agencies (a so-called *uppdragsmyndighet*). It is governed by a collegiate body consisting of the highest representatives of the member agencies. Collective agreements were henceforth concluded by the Swedish State Employer Agency (with a few exceptions), and they had no longer to be approved by Parliament and the Government. In fact, since then extensive delegation of the State's employer personnel policy has taken place. In 2002, a Commission Report held that a «shift of systems» had occurred.[52]

Finally, a Parliamentary Wage Delegation was set up in 1965 in order to give Parliament a greater say in wage rounds, instead of it having to face a fait accompli, since every appropriation of the wages of state public servants was ultimately dependent on a budget decision by Parliament.[53] The Minister in charge of the wage rounds would have to consult the Wage Delegation before a final agreement was reached with the public trade unions. However, the Wage Delegation was abolished in 1984.[54]

48 Bill 1971:50, SFS 1971:43. See further, Nycander, Svante, Kurs på kollision. Inblick i lönerörelsen 1970–71, 1972.

49 This led one of the authors of the 1965 public service reform to make the following observation, Ryman, Sven-Hugo, Förhandlings- och strejkrätt inom den offentliga sektorn, in Arbetsmarknad & Arbetsliv 1999, p. 262 (my translation): «It used to be said that after a war the generals plan the next war in the light of the former war, without having the fantasy to think up new scenarios. This thesis struck us all who were involved in the planning of the 1965 reform. We were naïve with respect to the growth of the public sector. The main focus of the wage rounds would shift from the private to the public sector. The right to stop strikes, i.e. strikes involving a limited number of employees in key positions, turned out to be a stronger weapon on the employee side than the employers' right of lockout.»

50 See article by Nycander, Svante, «Dyrt när politiker hoppar in» in Svenska Dagbladet January 8, 2003.

51 SOU 1992:100, Bill 1992/93:100 Annex 8 and Bill 1993/94:77, SFS 1994:272, now SFS 2007:829. A fuller account of the transition is given in SOU 2002:32, pp. 196–206.

52 SOU 2002:32, p. 201. An impetus in this direction is given already in a bill on the guidelines for the State personnel policy, Bill 1984/85:219.

53 Bill 1964:140, SFS 1965:49.

54 Bill 1984/85:83 Annex 2, SFS 1985:866, based upon DsC 1983:2 where pp. 107–133 describe the way in which the wage delegation was involved in the wage rounds. It was concluded that the wage delegation had exaggerated expectations regarding gaining a decisive say in the wage rounds.

6 Conclusions

The 1965 reform established a legal basis for a privately set up regime with respect to wages as well as terms and conditions of work for state public servants and local government public servants. A lot of work still remained to be done, so that a number of memoranda were issued by the Ministry of Civil Affairs and the Ministry of Finance. One of the important steps was the Ordinance on Public Servants Employed by the State, covering all state employees and thus eradicating the old distinction between white-collar employees and blue-collar workers.[55] The Ordinance paved the way for a future joint collective agreement covering all state employees.

7 Next Step 1974

Due to the coming into force of the 1974 Employment Protection Act (EPA),[56] several adjustments were made to the 1965 Act on State Employment with respect to seniority rules and the re-employment provisions of the EPA.[57] In both cases it was held that one should focus on certain domains of the public sector, and in particular that the rules should promote the best interests of the citizens and that it was in the best interests of the citizens that the exercise of public activity should be performed without bias.[58] It is to be noted in this context that the Instrument of Government already includes provisions concerning employment of public servants (see above at 1.1).

The seniority rules in redundancy situations applying to public servants should not be restricted so much to the workplace, as provided for in the EPA; rather than that, they should be based on the comparability of the working tasks of the employees affected by redundancies at the State agency.[59] Such an approach is, of course, extremely employer-friendly, since fewer employees will be included in the seniority unit. But even that was not enough. It was also held as very important that a public agency should fulfill its duties in upholding justice and in correct performance of its administrative functions when considering a redundancy. In a particular case an agency may be therefore justified in making a departure from the main rules. Such exceptions should be applied with caution, however.[60]

55 SFS 1971:940. The basis for this change is found in a Memorandum, Fi 1971:10.
56 SFS 1974:12.
57 See SOU 1973:56, Bill 1974:174, SFS 1974:1008–1009.
58 Bill 1974:174, pp. 24, 47.
59 Bill 1974:174, pp. 50–59, in particular p. 54.
60 Bill 1974:174, p. 56. This aspect was upheld as regards the major revision of the 1976 Act on Employment in 1994, see Bill 1993/94:65, p. 63, now to be found in Section 12 of the 1994 Act

Another derogation from the EPA was that a redundancy dismissal which was in violation of the seniority rules could be nullified, whereas the EPA provided that only damages would be granted in such a case. This adjustment was based on past practice of the administrative courts with respect to public servants. It was held in the Bill that no curtailment of employment protection with regard to public servants could be accepted.[61]

It took some time till the next episode concerning redundancies occurred. In 1984 another collective agreement was concluded with respect to redundancies and the right to re-employment between the parties in the state public sector. It contained in the main the same provisions as those entailed by the previously mentioned derogations laid down in the 1965 Act on State Employment (as amended in 1974).[62] It was a kind of a «trade off», since the public trade unions managed to sign at the same time four other agreements concerning employment security of state employees.[63]

8 A Further Step – 1976

A major reform of the collective labour law system took place in Sweden in 1976 when the Joint Regulation Act was enacted, repealing the old laws,[64] and at the same time expanding co-determination powers of the trade unions. It also made possible coming into force of new legislation concerning public employment relations, i.e. the Act on Public Employment, where a few provisions were also made applicable to municipal employees.[65] In the main, however, the new Act on Public Employment reflected the laws of the past.

However, the 1976 collective labour legislative reform called into question the

on Public Employment. Only two cases have been dealt with in the Swedish Labour Court with regard to this provision, AD 1996 no. 48 and 1997 no. 33 (concerning redundancy of junior judges of the Administrative Court of Appeal)

61 Bill 1974:174, pp. 59–61.

62 It repealed (SFS 1984:112) the Ordinance on Certain Questions Regarding Order of Selection in State Regulated Employment, SFS 1976: 865 that was issued close to the major reform on joint regulation in Sweden when also a new Act on Public Employment (SFS 1976:600) was issued in 1976. It is doubtful whether the 1984 collective agreement complies with the constitutional provisions stipulating that the very basic provisions concerning public servants should be governed by law, see above at 1.1, and also Bill 1974:174, p. 49.

63 See Sebardt, Gabriella, Redundancy and the Swedish Model. Swedish Collective Agreements on Employment Security in a National and International Context 2005, pp. 352, 382–383. Karl Pfeifer, chief legal counsel of the Swedish State Employer Agency confirmed this point of view at a seminar held on Stockholm 30 March, 2015.

64 Bill 1975/76:105, SFS 1976:580.

65 SFS 1976:600.

issue of whether it could be applied to the public sector. In the main, the answer was affirmative. In that context the former non-negotiable matters, as laid down in the 1965 Act on State Employment, excepting appointment matters with reference to constitutional considerations (see above at 1.1),[66] were removed.[67] One such example included the duties or the working tasks of a public servant, which were formerly regulated by the provisions of Section 10 of the Act on State Employment.[68] The Minister in charge anticipated that collective agreements would be concluded on these issues. That has never been realized, however. When these issues came before the court, the general rules governing the employee's duty to perform work were applied, following the model used in the private sector, with the proviso that if a change implied that a public servant was in fact assigned a totally different post, such a change would amount to summary dismissal.[69]

As already indicated, the major issues in 1976 had, however, a constitutional dimension. The main question was how «political democracy» was to be protected if collective agreements could be concluded in this area. It was a unanimous opinion that «political democracy» should be treated like a sanctuary.[70] It also follows from the Instrument of Government that «all public power in Sweden proceeds from the people» (Chapter 1, Article 1). The Bill made it clear that issues relating to the aim, direction, scope and quality of the public sector activities should not be governed by collective agreements.[71] Issues relating to the exercise of public authority could, naturally, never be subject to negotiations.[72]

The pivotal point in this context was, however, that a number of public employers and public employee trade unions concluded a Special Basic Agreement in March 1976. The Agreement provided that peaceful negotiations should be carried out and that industrial action should be avoided with respect to the issue of «political democracy». A special board was established, composed of 13 members, with politicians, i.e. members of Parliament in the majority, to act as watchdogs over issues connected with «political democracy».[73]

66 Bill 1975/76:106 Annex 2, p. 206.
67 Bill 1975/76:105 Annex 2, p. 154.
68 Bill 1975/76:105 Annex 2, pp. 212–216.
69 See, for example, Labour Court judgment 1994 no. 77 (a municipal chief officer was assigned very different working tasks carrying far less responsibility).
70 Bill 1975/76:105 Annex 2, pp. 141–142, 144 and 153.
71 Bill 1975/76:105 Annex 2, pp. 150–152. Already in a Memorandum from Fi 1971: 10, p. 19 the same demarcation line was drawn up.
72 Bill 1975/76:105 Annex 2, pp. 141–142, 165.
73 Bill 1975/76:105 Annex 2, pp. 155–156, 206–209.

To my knowledge, the Board has convened only once since its establishment.[74] Only a few cases have been dealt with by the Swedish Labour Court relating to the same issue.[75]

9 The Final Step Taken so Far, 1994

A major overhaul of the 1976 Act on Public Employment was made in 1994.[76] The new Act has been dramatically reduced in terms of the number of provisions – it contains only 42 sections. The main precept here was to simplify the rules regarding state employees. The purpose of the Act was, in the light of its past history, to guarantee both efficiency and the rule of law.[77] The Minister in charge held: «The primary purpose of a special order for state employees should not be to regulate the relationship between employers and employees. The objective being instead that such an order should serve the public interest in the exercise of state activities.»

Accordingly, many of the old provisions of the 1976 Act on Public Employment were wiped out. For example, the former provisions regarding dismissal by reason of redundancy which were in violation of the seniority rules in the state sector were abolished. In the interest of application uniformity the general provisions of the EPA came to apply instead, e.g., that only damages could be incurred (in spite of protests from some public trade unions).[78] Also the summary dismissal provisions of the EPA were made applicable directly to state employees, instead of the old provisions found in the 1976 Act on Public Employment.

Rules on periodic health examinations were also introduced. The basis for them was found in the Labour Court judgment 1984 no. 64, wherein the Court held, with reference to the Instrument of Government, Chapter 2, Article 6 (see above at 1.1),

74 Decision 1995-12-06 (relating to the allocation of working hours in the Swedish Prison and Probation Service; the Board held that a collective agreement on this issue was in violation of «political democracy»).

75 In AD 1980 no. 150 it was held that it was a political matter to issue guidelines with respect to a teaching plan for the elementary schools; it was thus a subject which fell outside the purview of the Joint Regulation Act of 1976. Different outcome in AD 1988 no. 23 (reorganization of health care in a country council) and AD 1993 no. 180 (transfer of shares from a municipally owned company to a third party). A fuller account of this issue is submitted in Bergqvist, Olof, Lunning, Lars & Toijer, Gudmund, Medbestämmandelagen. Lagtext med kommentarer 2nd ed. 1997, pp. 57–71.

76 See SOU 1992:60, Bill 1993/94:65, SFS 1994:260.

77 Bill 1993/94:65, p. 32.

78 Bill 1993/94:65, pp. 62–64.

that the employer (State Railways) could not force one of its bus drivers to undergo a medical examination.[79] It was especially important that this rule be observed in the transportation sector for reasons of security. Such provisions were also found in other statutes, as well as in a collective agreement for municipal employees.

In 1994 the Act on Sovereign Appointments pertaining to tenured judges and other high-ranking state officials, was promulgated in this context.[80] This Act contains rules which secure the independence of the judiciary in accordance with the constitutional provisions (see above at 1.1).

After 1994 only few amendments have been made to the 1994 Act on Public Employment. One amendment concerned the Swedish Church when it was finally separated from the State in 2000.[81] Another amendment was made in 2001 in order to issue provisions on so-called «incidental employment» (*i.e.* sideline occupations applicable to public servants) more transparent.[82]

All in all: The 1994 Act on Public Employment applies to all state employees. However, some of the provisions apply also to local government employees, especially those regarding industrial action and so-called «incidental employment».

10 Summary

To sum up, the «privatization» process of the Swedish public sector labour and employment law has been, on the whole, a fascinating study. It took some time to get there – it was a long and bumpy journey. However, there is still room for improvement and further simplifications of the legal framework, but space restrictions do not permit a more elaborate discussion of these issues.

79 Bill 1993/94:65, pp. 109–112.
80 SFS 1994: 61.
81 SOU 1997:44, Bill 1998/99:38, SFS 1999:289.
82 Bill 2000/01:147, SFS 2001:1016.