EMPLOYEE PRIVACY IN SWEDEN

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I. BACKGROUND

Employee privacy is part of the law of privacy in Sweden at large. Before addressing the present legal situation, however, a few initial observations are necessary.

Authorities in Sweden have traditionally kept a close eye on the population, and their knowledge about the private and family lives of citizens has always been extensive. Under the 1686 Church Act, in force until 1992, priests held yearly interrogations in every household on various matters and kept detailed records.[1] The importance and use of these interrogations and records diminished during the nineteenth century, as did societal control of the population generally. However, the traditional attitude of citizens and authorities alike survived and has been replaced in the twentieth century by various other means of obtaining information and exercising control. Perhaps the most important of these are recurrent population censuses and yearly income tax returns.

Past and present practices by the government to gain access to extensive information about citizens are both benevolent and sinister in nature. On the benevolent side, the latter-day welfare society model provides an explanation and is relevant to earlier times as well, though admittedly much less so. On the sinister side, are the role of yearly interrogations in conscription to the armed forces in old times, and the

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† In 1991, I published an article in English entitled *Employee Privacy in Sweden*, JURIDISK TIDSKRIFT 1991-92, at 41. Some parts of the present article draw heavily upon that article, but the present text is nevertheless essentially new. An almost incredible number of amendments to existing statutes has seen to that, if nothing else! Thanks are due to Ms. Eva Bergström Miles (LLM, Upsala University) and Ms. Annamaria Johansson (LLM, Lund University) for valuable research assistance.

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1. Incidentally, there seems to be a rather striking similarity between these records and the Japanese household registers, *koseki*. Unlike the Japanese *koseki*, the Swedish registers (*husförhörslängder*) are no longer kept.

heavy taxation of the population in modern times. In short, the Swedes have not had much privacy from the authorities; the notion that "Big Brother knows everything" is pervasive.

In working life, much of the same was true until the emergence of industrialism and an industrial working population. Under the master and servant regulation, which was in force for nearly five hundred years from the mid-fourteenth century, employees (servants) lived with their masters and were subjected to continuous supervision and control. Modern industrialism separated employers from employees, and the privacy issue became largely irrelevant since employees were considered a means of production, subject to termination at will by the employer. Privacy as an issue in manual work has resurfaced only recently. In businesses such as banking and insurance where confidentiality requirements are stringent—and in white collar work generally—employee privacy issues have long been present. The attitude that such employees are linked closely to the employer and enjoy positions of trust have been traditionally very strong. Today, privacy issues in working life have become standardized, and distinctions between employees along stratification lines (for example, blue collar, white collar, professional employees) have waned. Currently, privacy issues relate to the requirements of the job performed.

The point of departure for an analysis of privacy in Swedish law is the core statute of Swedish constitutional law—the 1974 Instrument of Government.[2] It affords much nominal protection of privacy, but considerably less substantive protection.

In its first two chapters, the Instrument of Government deals with foundations of public governance (chapter 1) and basic liberties and rights (chapter 2).[3] Chapter 1, article 2 states that "the public administration shall . . . protect the private and family lives of the individual."[4] Though not legally binding in the sense that it can be enforced in court, the rule sets a goal for society. Given what was said initially, it should come as no surprise that the rule had no equivalent in the previous constitution of 1809 and that it is somewhat anomalous in the Swedish landscape, both from a historical and a contemporary perspective.

Chapter 2 of the constitution contains two rules of relevance.[5] Article 3, second paragraph, states that "[c]itizens shall be protected to

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2. SWED. CONST. (Instrument of Government, 1974); *see* CONSTITUTIONAL DOCUMENTS OF SWEDEN (Ulf K. Nordenson trans., The Swedish Riksdag, 1990) (English translation).

3. *See* SWED. CONST. (Instrument of Government, 1974) chs. 1 & 2.

4. *Id.* at ch. 1, art. 2.

5. *See id.* at ch. 2.

the extent determined in detail by law against any infringement of their personal integrity resulting from the registration of information about them by means of electronic data processing."[6] Again, the rule is a declaration of aim rather than of substance. Protection is afforded only to the extent that violations of privacy are unconstitutional if they contravene explicit statutory rules. The 1973 Data Protection Act[7] and the 1990 Act on Surveillance Cameras[8] are the two most important statutes in the field.

Article 6 of Chapter 2 states that

> [a]ll citizens shall be protected in their relations with the public realm against compulsory bodily measures . . . . Citizens are also protected against physical searches, house searches and similar intrusions and against examination of mail or other confidential correspondence and against secret tapping or recording of telephone calls or other confidential communications.[9]

This rule gives the impression of being more than a declaration of aim since it does not refer to the actual contents of statutes. The impression is misleading, as article 12 of the same chapter generally permits limitations of the rights previously spelled out in the chapter, albeit only "to achieve a purpose acceptable in a democratic society."[10] Provisions in the 1965 Criminal Code[11] and the 1942 Code of Procedure[12] provide the bulk of the protection.

The constitution contains nothing more of relevance in the privacy area. Obviously, it does not provide much. In vivid contrast to elaborate "Bills of Rights" in many modern constitutions, the Swedish Constitution looks—and is—somewhat of a pauper in this respect. Why is this the case? The historical tradition briefly mentioned above provides some background. Also, Sweden has never experienced periods when basic human rights were massively violated. This means that the issue of basic human rights has never been at the core of societal concern. The 1974 Instrument of Government originally contained no constitutional protection of privacy whatsoever, and the subsequent, successive enactments of constitutional safeguards of basic human rights met with relatively little interest among the Swedish

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6. *Id.* at art. 3.

7. Data Protection Act, 1973 SVENSK FÖRFATTNINGSSAMLING 289 [hereinafter Data Protection Act].

8. Act on Surveillance Cameras, 1990 SVENSK FÖRFATTNINGSSAMLING 484.

9. *See* SWED. CONST. (Instrument of Government, 1974) ch. 2, art. 6.

10. *Id.* at art. 12.

11. PENAL CODE (1965) (Swed.); *see* THE PENAL CODE OF SWEDEN (Thorsten Sellin trans., Fred B. Rothman & Co., 1972) (English translation).

12. CODE OF PROCEDURE (1942) (Swed.); *see* THE SWEDISH CODE OF JUDICIAL PROCEDURE (Anders Bruzelius & Krister Thelin eds., Rev. ed., 1979) (English translation).

people. Generally speaking, politicians also have not shown much enthusiasm for formal rules regarding human rights. This lack of interest on the part of both rulers and the ruled is the main reason for the fact that constitutional rules, with few exceptions, are conditioned by statutory law.[13]

Is the legal terrain of human rights likely to change significantly now that Sweden has become a member of the European Union? The two most important changes in this respect are first, that Sweden is now subject to the European Community Court and its jurisdiction in the field of human rights, and second, the incorporation as domestic law of the 1950 European Convention of Human Rights.[14] It would seem that the latter in particular, should prove important. For various reasons, however, it is doubtful whether that will be the case. For example, the convention has been given only the status of an ordinary statute, inferior to the pieces of legislation that enjoy constitutional status. Additionally, the incorporation of the convention was done without much conviction—in some political quarters with outright reluctance. The convention has always been somewhat of an embarrassment in Sweden since Swedish law has been in nonconformance with it on numerous occasions.

Generally prevailing principles of law (*allmänna rättsgrundsatser*) play an important role in Swedish labor law. The Labor Court—the final arbiter in labor litigation[15]—has made generous use of such principles, often fashioning them itself. One overriding principle requires actions by employers to comply with "good labor market practice."

Sweden has ratified the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data adopted in 1980 by the Council of Europe.[16] The 1980 OECD Guidelines Governing the Protection of Privacy and Transborder Flow of Personal

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13. In one instance, constitutional rights may even be set aside by means of collective agreements. Under chapter 2, article 17, the constitutional right to engage in industrial actions can be curtailed by a collective agreement. *See* SWED. CONST. (Instrument of Government, 1974) ch. 2, art. 17.

14. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; *see* CLONS C. MORRISON, JR., THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM 155 (Martinus Nijhoff, 1981).

15. Under exceptional circumstances, an appeal can be taken to the Supreme Court (i.e., if the ruling by the Labor Court is "obviously inconsistent with the governing legislative provision." CODE OF PROCEDURE (1942 (Swed.) ch. 58, art. 1, para. 4); *see* THE SWEDISH CODE OF JUDICIAL PROCEDURE (Anders Bruzelius & Krister Thelin eds., Rev. ed., 1979) (English translation). Such instances, however, are very rare. For information about labor grievance handling and labor litigation in Sweden, see generally Reinhold Fahlbeck, *The Role of Neutrals in the Resolution of Shop Floor Disputes*, 9 COMP. LAB. L.J. 177 (1987).

16. *See* Government Writ to Parliament 1981/82:53.

Data also have been adopted by Sweden.[17] The Recommendation on the Protection of Personal Data Used for Employment Purposes was adopted in 1989 by the Council of Europe with the support of Sweden.[18] Neither of these two recommendations is legally binding, but acceptance without reservation implies a commitment to follow the recommendations and, if need be, to change domestic legislation. Much attention is given to the 1989 recommendation. It is closely studied in the ongoing reform of the Swedish Data Protection Act, and the Data Protection Agency relies on the recommendation in administering the Act. Finally, Sweden supports the 1993 ILO Guiding Principles on Drug and Alcohol Testing, and they play an important role in Swedish labor law.[19]

One factor that might strongly influence privacy matters in the future is the increasing trend toward a two-tier manpower system at places of work. The first group consists of core employees, hired for an indefinite period (permanent employees). The second group comprises all others working at the same workplace, for example temporary employees, temporary manpower, and employees working for subcontractors. It is perfectly conceivable that permanent employees will face increasing encroachment on their privacy rights in exchange for the comparative advantages of their positions.

Under the "Swedish model" of labor and industrial relations, the rule of law and of employee protection against violations by employers has been—and still is—informal. Unions are very strong, with unionization rates reaching eighty or even ninety percent of the working population. Unions consider their mission to be a broad one, encompassing the entire working situation of their members. Furthermore, unions consider themselves to be in the vanguard of employee interests rather than the mere executors of membership wishes. The result is that unions provide informal, yet quite effective, protection in lieu of courts and other more formal channels of protection. Employers and unions enjoy far-reaching discretion in regulating conditions at places of work. The potential for abuse is tremendous but allegations of abuse are—and always have been—few and rather marginal. Factors such as basic decency, mutual respect, and absence of rampant profiteering are fundamental components of the "Swedish model," as are compromise,

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17. OECD. *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, adopted by the Council, September 23, 1980.

18. *Protection of Personal Data Used for Employment Purposes* (Council of Europe, 1989).

19. ILO. *Guiding Principles on Drug and Alcohol Testing in the Workplace*. Adopted May 14, 1993. *See infra* part II.E.2.

moderation, and avoidance of open conflict.[20]

In summation, generally prevailing principles of law are of import. Sweden has accepted international standards in the field of human rights and citizen privacy. The Swedish Constitution affords only little substantive protection in privacy matters. The constitution is determined by statutes, rather than the reverse.

II. SUBSTANTIVE ISSUES

A. *On-the-Job or On-Premises Conduct Regulation*

Swedish employers typically do not try to regulate matters relating to employee personal appearance and behavior at the workplace. Informal understandings prevail. The character of the job is the deciding factor; for instance, service sector jobs impose certain behavior per se.

With few exceptions (for example, the military), statutory grooming or apparel regulation is non-existent. Precious few collective agreements contain rules, and if they do, they tend to deal with the question of whose responsibility it is to pay rather than with the substantive aspect. Bank employees, to mention one example, traditionally have been expected to dress conservatively and inconspicuously. There is nevertheless much room for personal preferences. Recently, the only issue of dress relates to turbans worn by Sikhs. The courts have been faced with two such cases, one handled by the Labor Court and one by a trial court.[21] Both involved municipal employees who, under the applicable collective agreement, were required to wear a uniform. In one case, this requirement included a cap with the company emblem visible in front. Both employees had job tasks that made them highly visible to the public (streetcar conductor and subway ticket vendor). Both of the employees wanted to wear a turban and agreed to pin the company emblem on the front of their turbans. Both pleaded religious considerations as an excuse. The Labor Court found for the employer because the parties to the collective agreement agreed that it was within managerial discretion to transfer the employee to a worksite where no uniform cap was needed. The trial court took a completely different view and found for the employee on grounds of religious freedom and

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20. The notions of "lagom" ("just right", "just enough", "sufficient") and "lagom är bäst" ("enough is enough") permeate Swedish social fabric. Dull though such attitudes may be for social life, they accurately explain the comparative peacefulness of the country and the concomitantly lesser need for stringent regulation of human rights and private matters.

21. *See* Labor Court 1988:11; Stockholm Trial Court DT 1987:536.

tolerance.

There have been no reported instances of clashes between Muslim dress codes and working life, nor are there any reported cases of female employees protesting clothing of a sexually provocative nature. Furthermore, there are no reported cases involving a conflict between health and safety regulations and employee dress preferences.

Neither personal grooming (e.g., the wearing of beards) nor expressions of personal freedom such as the wearing of insignia have been contested issues before any court. By and large, Swedish employers take a non-committal position in this area. Swedes do not generally wear conspicuous insignia, however, so it is not surprising that there are no reported court cases here.

In case of a controversy, however, the legal rule to apply with regard to attire would be the generally applicable standard of "good labor market practice" or, in the words of an older standard, "not contrary to *bonos mores*." It follows from one of the "turban cases" that the joint opinion of the social partners is of great importance.

Solicitation of co-workers regarding political activity, union membership, charities, or other causes is, from a strictly legal point of view, not allowed at private places of work unless accepted by the employer. However, workplace solicitation is not an issue in Sweden, including union membership solicitation. No modern court cases have been reported. This means that there simply is no equivalent to the enormous body of case law in the United States in this field. As long as solicitation does not interfere with the work process, employers do not care much about this type of activity (with the exception of political solicitation).

It goes without saying that the use of alcohol and narcotics at places of work is prohibited, although there are no rules of general application to that effect, statutory or contractual. However, in recent years many employers have adopted programs and policies for a drug-free work environment. In the same vein, the Tobacco Act entitles employees to a smoke-free work place.[22] In both respects, enforcement is difficult.[23]

By and large, romantic relationships or marriage between co-workers are considered private matters and not the concern of the employer, provided that there is no interference with job performance. In some professions, for example banks or the police force, issues

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22. The Tobacco Law (No. 581), 1993 SVENSK FÖRFATTNINGSSAMLING 581; *see* 44 INT'L. DIG. HEALTH LEGIS. 624 (English translation of law).

23. See discussion of drug testing *infra* part E.

concerning disqualification, integrity, and probity arise, but there are no statutory or generally applicable contractual rules or reported court cases.

Sexual harassment has attracted wide attention recently. By and large, sexual harassment is a crime under the Criminal Code. Also, sexual harassment by an employer violates "good labor market practice." The only relevant statutory rule to date in labor legislation is a provision in the Equal Opportunity Act,[24] which addresses sexual harassment only indirectly. It provides that employees are prohibited from harassing an employee for rejecting sexual advances by the employer or filing a complaint against the employer for gender discrimination.[25] Harassment by one employee of another is a breach of the employment contract and would constitute just cause for dismissal if it is of a serious nature and the employee does not discontinue such behavior. Short of dismissal, the employer is obliged to try to stop such harassment by other means, for example through transfer of the perpetrator.

B. *Off-the-Job Conduct*

Employers have no authority under statutory law or generally prevailing principles of law to issue binding regulations covering the off-work conduct of employees. The very idea that employers should be thus entitled would strike the Swedes as unacceptable, and exceptions are therefore very narrow. For example, a company may forbid employees to wear company emblems or insignia when not on duty. Another example, much more sensitive, are rules regarding where employees can live or stay during non-regular working hours. There are a few instances of contractual rules to that effect, but they are concerned with stand-by duty rather than employees who are completely off duty. Not even employees in highly sensitive positions, for example pilots (military or civilian), police officers, or fire-fighters, can be subjected to such requirements by unilateral employer decisions and there are virtually no statutory or contractual rules to such effect. Also, political jurisdictions have no right to decide where their employees can live.

However, this does not mean that employee off-duty conduct is of no relevance. Responding to a female employee who took the position that it was for her to decide how to spend non-working time, the Labor

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24. Equal Opportunity Act (No. 433), 1991 SVENSK FÖRFATTNINGSSAMLING 433, art. 22; *see* LABOUR LAW DOCUMENTS, Swe-1 (1991) (English translation of act) [hereinafter Equal Opportunity Act].

25. *Id.*

Court bluntly stated that this "obviously is not the case."[26] Generally speaking, employees are free to spend non-working time as they like only if it does not interfere with the proper performance of the employment contract. This means, inter alia, that conditions depend greatly on the position of the employee. What a construction worker can do, a religious minister may not necessarily be at liberty to do (e.g., in terms of romantic adventures). Employers' confidence in their employees is another relevant factor, and employers are entitled to set reasonable standards in this respect. The employee duty of loyalty is also important, and that duty does not end at the factory gates. Off-duty conduct becomes a matter for the courts in instances where the employer has disciplined the employee for such conduct. Under Swedish law, dismissal is permitted for just cause only.[27] The just cause requirement for disciplinary dismissal is extremely strict on employers in most situations, such as on-duty misconduct of any kind.[28]

Whether or not case law concerning dismissal for off-duty conduct is strict on employers cannot be assessed per se; there are no comparative studies in this field involving Sweden, so any statement here must be subjective. This said, my impression is that case law is rather strict on employees in the sense that there is not a large difference between the consequences of on-duty and off-duty behavior. There certainly is a divide between the two, but it is not immense. The same is true with regard to what second jobs (moonlighting) are allowed, specifically, but not exclusively, when these involve activities that are, or near, competition with the employer. Recreational and leisure avocations are private and should not interfere with job performance.

Illegal off-duty trafficking in drugs would justify disciplinary dismissal (with or without notice) in many instances, as would many other criminal activities, even though they are not job-related. In this respect, there is much more room for employer discretion.

Life-style choices—such as co-habitation outside marriage, sexual preferences, decisions regarding childbearing and sterilization—are most definitely outside the realm of employer influence. Interference here by the employer would be viewed as outrageous. Sweden does not have much experience with gay or lesbian teachers, for example, but my impression is that the law would act strongly against employers that

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26. Labor Court, 1982:29.

27. Employment Protection Act, 1982 SVENSK FÖRFATTNINGSSAMLING 80, art. 7; *see* ILO LEGISLATIVE SERIES, Swed. 1 (1982) (English translation) [hereinafter Employment Protection Act].

28. *See generally* Reinhold Fahlbeck, *Employment Protection and Labor Union Interests: A Union Battle for Survival?*, 20 STAN. J. INT'L L. 295 (1984) [hereinafter *Battle for Survival*].

base disciplinary measures on such factors alone. Only if such factors could be proven to affect job performance negatively and seriously would corrective employer action of a disciplinary nature be legal.[29] The same is true with regard to religious and political preferences. By and large there are few militant or extremist political organizations in Sweden. With the exception of the leftist movement in the 1960s and 1970s, membership in such bodies has not been much of an issue (other than in security clearance for positions where national security is at stake).[30]

C. *Personnel Data*

1. Overview

Two issues must be dealt with separately when discussing personnel data. First, what data may be collected at all, and what data may be relied on in personnel management? Second, what data may be processed and stored? The Data Protection Act provides the answer.[31] The Act must be discussed at some length since it heavily influences what types of employer behavior are lawful with regard to personnel data.

2. Collection and Use of Data

a. Private Sector Employers

Employers in the private sector are entitled to hire at will. Generally speaking, this means that the recruitment process is in the hands of employers, although extensive exceptions exist. Most importantly, considerations based on gender and race are not lawful.[32] Here objectivity must prevail and judicial review is possible. But absent exceptions in statutory law or case law, employers are still in command. There is no statutory law or case law regarding what personal questions employers may ask. Employers are at liberty to ask anything and everything.

Asking questions is an exercise of freedom of speech and freedom of expression. Both are protected by society. Constitutionally protected freedom of speech and freedom of expression are, however, limited to

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29. In one case the Labor Court accepted the transfer of a female prison warden to clerical work when she took up co-habitation with a former inmate. *See* Labor Court 1982:29.

30. *See infra* part C.2.b.

31. *See* Data Protection Act.

32. *See* Equal Opportunity Act art. 22; *see also* Act Against Ethnic Discrimination, 1994 SVENSK FÖRFATTNINGSSAMLING 134 (with a 1986 predecessor).

the relationship between "the public realm" and citizens. There is no constitutional or even statutory support for these freedoms in the relationship between citizens (e.g., between employers and employees). Therefore, although they are recognized as fundamental social values, their legal nature is uncertain. Under Swedish law, restrictions on these freedoms are legally recognizable and enforceable between private citizens by means of private law instruments, such as contracts, explicit or implicit.[33]

Legislation against gender and race discrimination is relevant because considerations of this kind, which influence employer data collection policies in the sense that only women and immigrants are asked sensitive questions, often will amount to violations of antidiscrimination legislation. If all applicants, however, are asked the same questions, there will be no such violation.

Rules of general applicability regarding the right of privacy in relationships between private citizens do not exist in Sweden.[34] Scattered provisions certainly can be found here and there, but not in employment law. Job applicants who claim such rights during the application procedure will face difficulties in substantiating their claims. The constitutional rule[35] is a declaration of aim, not a rule of substance.[36] The European Convention on Human Rights is part of Swedish domestic statutory law.[37] It is too early, however, to say what effects the convention will have on the employment relationship.

With only a few exceptions, collective agreements do not contain any rules for employee privacy and data collection, although some collective agreements regulate employee participation in decisions regarding automatic data processing. A greater role for collective agreements in the future is conceivable. In the ongoing work to amend the Data Protection Act, reference often has been made to the potential for regulation by means of collective agreements. This would be consistent with the views expressed in the 1989 recommendation by the Council of Europe.

The "good labor market practice" standard certainly applies to the application process. Suppose, then, that some questions were considered to violate that principle. With the exception of discriminatory behavior, job applicants have no case against the employer since there is no legal

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33. *See, e.g.*, Labor Court 1994:79.

34. *See generally* SWEDISH GOVERNMENT WHITE PAPER, SKYDDET FÖR ENSKILDA PERSONERS PRIVATLIV [PROTECTION OF THE PRIVACY OF INDIVIDUALS] Ds 1994:51.

35. SWED. CONST. (Instrument of Government, 1974) ch. 1, art. 2.

36. *See supra* part A.

37. *See Id.*

relationship between them, and there are no generally applicable statutory or court rules on which to rely for redress. Conceivably, a court might issue an order to the employer to cease and desist, but no court can order the employer to continue the recruitment process.

The "good labor market practice" standard might mean that employers are entitled to try to obtain information relevant for the position but not more. In the first place, however, this standard is not very helpful since it is not operational. Second, employers are entitled to hire at will. Part of that prerogative is that—absent discriminatory considerations—they are at liberty to bar any objecting applicants from pursuing the application process. One question this raises is: what about inquiries concerning the propensity of applicants for illness and their sick leave record? In a way, knowledge regarding this is relevant for any and all positions. Present Swedish law provides no answer, but my suggestion would be that the employer is entitled to bar an objector from pursuing the application process. Again, the "good labor market practice" standard has little or no force in the present context.

At least one exception to the weakness of Swedish law in this respect exists. Suppose that an applicant has lied to the employer when answering a question about, for example, having a driver's license or not having a criminal record. Can the employee be disciplined or dismissed? Discipline short of dismissal is not common in Sweden. Dismissal is only for just cause and standards are very strict on the employer.[38] The mere fact that the employee lied during the application process does not per se constitute just cause for dismissal. In this case, an overall assessment is made by the court. One important factor is whether the employee will be able to perform his/her job properly in the future. Another important factor is whether the employee has behaved in such a way that the employer is justified in no longer having confidence in the employee. The consequences of the fact that the job applicant or employee lied will depend greatly on the propriety and relevance of the question to the job. If the applicant has lied about something that is decisive in hiring, there often will be just cause for dismissal.[39] Women lying about not being pregnant seem to be protected against dismissal in most instances.[40]

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38. *See* Employment Protection Act, art. 7.

39. The Labor Court twice has accepted the dismissal of applicants/employees who lied about a decisive factor. *See* 1979:143 and 1980:89. In addition to employment legislation, the Court referred to principles of fraud and material breach under contract law.

40. In the only reported case, the Administrative Court accepted the dismissal of a woman for lying about her pregnancy, but the employment was temporary, so her pregnancy made impossible the very *raison d'être* of the employment. *See* Administrative Court (Regeringsrätten), 1968:78.

There appears to be a vague but general consensus that some areas within the realm of privacy are exempt, namely—in most instances—family matters (including sexual habits), as well as political and religious beliefs.[41] If so, that consensus is of the character of a gentlemen's agreement rather than solid law.

The very idea that employers could collect family data would strike Swedes as an undignified and unacceptable invasion of privacy. However, there are signs that employers increasingly do ask questions about family matters, although no comprehensive information is available. The situation is different with regard to positions involving access to information of relevance for national security.[42] Also, employees on the fast career track will have to endure much more sensitive interrogations, including questions regarding family matters, but it is believed that they accept this as a payment for the prospects of a rapid career path.

Employers have no authority to impose mandatory reporting by their employees of personal or family matters of any kind. Should an employer impose such a duty—something that, to the best of my knowledge, has never happened—employees would by and large not be obliged to obey. Legally speaking, noncomplying employees would not face any risk of retaliation, and dismissal would be null and void.

Swedish employers presently obtain no information about their employees from private investigators, and most Swedes would likely find such action reprehensible. However, there seems to be an increase in the use of recruitment firms.[43]

Where does all of this lead us? We are faced with uncharted land, terra incognita. There simply are no statutory or contractual rules concerning what types of personal information may be requested in the job application procedure. Is this a very serious problem and an equally serious flaw in legal protection in Sweden? So far, probably not. Unions have not complained much about abuses in this field, which strongly indicates that there has not been much dissatisfaction on the part of job applicants and employees. Another factor that points in the same direction are the findings of a 1989 government White Paper on data commonly found in data registers on employees. The conclusion was that registration of data about individual employees by and large is

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41. Under Norwegian law, employers are expressly enjoined from asking certain questions (e.g., on employee political leanings), but there is no equivalent statutory rule in Sweden. *See* Work Environment Act, art. 55 A (Nor.); *cf. infra* text accompanying note 47.

42. *See infra* note 44 and accompanying text.

43. *See infra* part E.1.

confined to standard data for personnel administration purposes.[44] In addition, the White Paper states that registration is confined to data closely related to the employment relationship itself. However, there are ominous signs that the situation may change for the worst as employers become increasingly more inquisitive.

In personnel management employers may make use of any health-related or other data at their disposal (e.g., for promotion or job assignment). Under the traditional notion of employer prerogative in managing a business, there was little an employee could do to contest employer decisions. However, the advent of equal opportunity and anti-discrimination legislation has brought considerable change to the legal vista. Under that legislation, the employer must base decisions about personnel matters on objective considerations. Many factors that previously may have been decisive for employers are not objective under this body of law. Considerations that directly involve gender and race are nonobjective as a matter of course. The same is true with regard to at least several other considerations. For example, employers might consider an employee's health record when deciding about his/her job status, promotion, and so forth. However, employees must not be treated negatively for having been ill; being ill is a natural phenomenon and as such a human "right." The use of health-related information can work as indirect discrimination (e.g., a decision not to promote). In many instances such a decision would violate equal opportunity and anti-discrimination legislation, because an employee's past record of absence due to illness probably is not an objective factor under this body of law. In other situations, the employer's prerogative to manage the business prevails.

b. Public Sector Employers

Although the employment relationship in the public sector is considered to be part of private rather than of public law, public sector employers face a different situation. State governmental bodies are subject to strict statutory rules that exclude hiring at will, and instead mandate hiring based exclusively on objective considerations.[45] In addition, all public bodies, central and local alike, are subject to a standard of objectivity.[46] The wording of the objectivity standard in

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44. See SWEDISH GOVERNMENT WHITE PAPER, DATATEKNIKEN OCH DEN PERSONLIGA INTEGRITETEN I ARBETET - EN KARTLÄGGNING [DATA TECHNOLOGY AND PERSONAL INTEGRITY AT WORK - A SURVEY] Ds 1989:24 [hereinafter DATA TECHNOLOGY]. A reference group of representatives from employer and employee organizations assisted the committee.

45. SWED. CONST. (Instrument of Government, 1974) ch. 11, art. 9.

46. *Id.* at ch. 1, art. 9.

the Instrument of Government clearly shows that it applies to public bodies regardless of whether they act in a private law or in a public law capacity. With regard to the collection of information in the employment field, this standard must mean that only questions that are objectively relevant and justified may be asked. To mention just one example, the objectivity standard precludes questions concerning political opinions unless political creed is relevant for the job.[47]

> Special problems arise in connection with positions that are classified as sensitive from the point of view of national security. Here a stricter control of applicants take place. Security clearance may also include family members. A government White Paper proposes that strict security clearance procedures should also encompass employees at places of work that are likely targets for attacks by terrorists, e.g., airports and nuclear power plants.[48]

c. Storage of Data and the Data Protection Act[49]

At the present stage, a distinction must be drawn in Sweden between data processed in some automatic way and data processed manually. Automatic data processing is allowed only for the specific purposes spelled out in the 1973 Data Protection Act, which covers all kinds of personal registers. There is no legislation specifically addressing personal data used for employment purposes. The proposed new Data Protection Act[50] contains some rules specifically aimed at the employment relationship. They primarily concern exceptions to the generally prevailing requirement of prior consent by the person affected by data collection as well as advance information to the employee concerned and to his/her union.

Manual registers fall outside statutory coverage, but this may change as a result of European Community law.[51] A government White Paper stated that "there is no reason to extend the coverage of the

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47. 1979-1980 OMBUDSMAN FOR LEGAL AFFAIRS ANN. REP. 459.

48. SWEDISH GOVERNMENT WHITE PAPER, SÄKERHETSSKYDD [SECURITY PROTECTION] SOU 1994:149; *see also* SWEDISH GOVERNMENT WHITE PAPER, SÄPO. SÄKERHETSPOLISENS ARBETSMETODER, PERSONALKONTROLL OCH MEDDELARFRIHET [SÄPO. THE STATE SECURITY POLICE, WORKING METHODS, SECURITY CLEARANCE IN PERSONNEL MATTERS AND RIGHTS OF INFORMANTS] SOU 1990:51.

49. A caveat is called for right at the very outset. The European Community has been at work for many years to adopt a directive on personal data processing and integrity. The process might result in a directive in 1995. Regardless of when the directive is adopted, it will influence heavily data collection and processing in member countries. As of this date, see Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, COM (92) 422 final - SYN 287.

50. *See* SWEDISH GOVERNMENT WHITE PAPER, EN NY DATALAG [A REFORMED DATA PROTECTION ACT] SOU 1993:10 [hereinafter REFORMED DATA PROTECTION ACT]. Because of the forthcoming EC directive, preparations for a new statute are shelved for the time being.

51. Manually collected and/or processed data is covered by the proposed EC directive.

Data Protection Act to cover . . . strictly manual personal registers as well."[52] The reason given was that manual data banks are few and that "the contents of manual registers [do not] appear to be of any importance or involve any significant security risks."[53] There are no rules in other statutes concerning manual data banks kept by private employers, but the 1980 Official Secrets Act[54] provides for confidentiality in some instances.

To date, court rulings concerning privacy and data storage are nonexistent, which is due in part to the structure of the Data Protection Act. Day-to-day administration of the Act is entrusted to the government's Data Protection Agency. Furthermore, until recent changes and prior to 1995, appeals from decisions by the Agency were taken to the government—not to courts.[55]

If an employer wants to keep an automatic data processing register for employment purposes, a permit is required in most instances when the data to be stored is considered sensitive in nature. Performance and productivity data are considered sensitive in most instances, as are judgmental and health data.[56] The same standard applies to the interconnection of files.

Furthermore, the sensitivity test is rather strict on employers with permits granted by the Data Protection Agency. The Agency is entitled to issue instructions regarding the use of the registers "to the extent needed to prevent risks for illegitimate infringements of personal integrity."[57] The Agency is further authorized to enjoin employers from using data in their registers for specified purposes. In a well-publicized decision, the Data Protection Agency in November, 1990 enjoined a consultant firm from using data in its computer files for individual performance evaluations. No interconnection of files was planned. The data in question was provided by the employees themselves, who fed the computer continuously with information about the

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52. *See* SWEDISH GOVERNMENT WHITE PAPER, 'SKÄRPT TILLSYN - HUVUDDRAG I EN REFORMERAD DATALAG' [STRICTER SUPERVISION - MAIN FEATURES OF A REFORMED DATA PROTECTION ACT] SOU 1990:61 [hereinafter STRICTER SUPERVISION, pp. 11 and 142. *See also* REFORMED DATA PROTECTION ACT at 76.

53. *See* STRICTER SUPERVISION, *supra* note 52, at 142.

54. Official Secrets Act, 1980 SVENSK FÖRFATTNINGSSAMLING 100.

55. *See* Government Bill 1993/94:217; *cf.* proposed EC directive, *supra* note 49, at art. 22. *See* Data Protection Act, art. 25.

56. Without exception, registers storing employee health data used to be subject to prior authorization. In 1992, employers took over part of the administration of sick leave benefits and were also made co-responsible for the rehabilitation of sick employees. This necessitated an amendment to the Data Protection Act to allow employers to maintain employee health registers in these areas without authorization. *Cf.* part E.2.

57. Data Protection Act, art. 6.

exact use of their working time. The data was used to invoice clients, which was the main purpose of the register, but the same data was sufficient for evaluating employee performance based on the percentage of employee time at the workplace spent on billable work. The Agency found that the production of such information "risk[ed] . . . illegitimate infringement on personal integrity."[58]

What is required to obtain a permit? A balance between opposing interests must be struck by the Agency. The overriding consideration is to ensure that there is "no reason to believe that . . . illegitimate infringement on the personal integrity of the registered will result."[59] Only data that is relevant in the context is allowed. The Agency pays great attention to the 1989 recommendation by the Council of Europe.[60] To obtain a permit, it is not necessarily sufficient that advance information to employees regarding the registration under consideration is guaranteed, nor is passive employee consent.[61] The Agency commonly requires active employee consent, which must be given specifically before registration.[62] Unions are routinely asked for their opinions; although their opinions carry great weight, they do not amount to veto power. A body of decisional law of some magnitude has emerged. One principle under that body of law precludes data on employee union affiliation from being registered for purposes other than the payment of union dues by the employer ("union check-off").

It has been common knowledge for years that many registers have existed without proper advance authorization from the Data Protection Agency. Due in part to this, the Data Protection Act was amended in 1994[63] to allow the Agency to issue binding regulations of general applicability concerning personal registers, thus exempting many registers that previously required authorization. Such regulations will cover many registers that until recently have been kept illegally and subject them to a comprehensive legal regime. The idea is to free the Data Protection Agency from the time-consuming task of issuing permits to a fairly limited number of registers, thus enabling it to conduct more efficient supervision of all existing registers.

The employer cannot decide unilaterally to start and keep such

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58. Data Protection Agency, Nov. 30, 1990, Dnr 6880/90, personnel register "TOP."
59. Data Protection Act, art. 3.
60. *See* discussion *supra* part A.
61. Passive consent means that registration is allowed unless the individual concerned specifically forbids it.
62. The 1989 recommendation calls it "express and informed consent." The Data Protection Agency has adopted this expression.
63. Government Bill 1993/94:217.

registers. The 1976 Act on the Joint Regulation of Working Life[64] by and large outlawed unilateral employer decisions, instituting instead a system of negotiations between management and labor.[65] Employers are obliged to initiate negotiations with unions about all decisions of import to the business or to the working conditions of employees. Personnel registers certainly are of major concern to employees, so decisions to start such a register cannot be made unilaterally by the employer. Unions enjoy no veto power, and if an agreement is not reached during negotiations the employer may decide unilaterally. There is no appeal against employer decisions. Of course, the employer is restricted in its freedom of action by applicable regulations under the Data Protection Act. Furthermore, if a union feels that the register would violate the Act, the union may bring the matter to the attention of the Data Protection Agency.

Access to data in automatic data files is restricted to the employer and the employee concerned. Unions have no per se right to access. However, unions often become privy to secret information about employees (for example, because of rules to that effect in collective agreements). Rules in various statutes provide for confidentiality under pain of financial and punitive damages; however, no recorded case of union breach of confidentiality exists. One statute which contains rules on confidentiality is the Data Protection Act. Under the Act, violations are subject to both civil and criminal penalties. By and large, the Act also prohibits disclosure of data to third parties. Rules on confidentiality and on disclosure of data also extend beyond the termination of the employment relationship.

When no longer needed for its purpose, data must be deleted unless statutory rules—or administrative decisions based on such rules—dictate otherwise.[66] The older the data, the less need there is for it. For example, because very old instances of misconduct can no longer be invoked in dismissal proceedings, continued storage might be in violation of the Data Protection Act.

Sweden has accepted the 1989 recommendation by the Council of Europe on the protection of personal data for employment purposes.[67] No statutory changes were considered necessary. Do Swedish legal regulation and practice meet the high standards of the 1989 recommen-

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64. Act on Joint Regulation, 1976 SVENSK FÖRFATTNINGSSAMLING 580.
65. *See generally* Reinhold Fahlbeck, *Labour Law*, part 3.3.5.2 *in* Cronhult et al., SWEDISH LAW (Juristförlaget 1994).
66. Data Protection Act, art. 12.
67. *See* discussion *supra* part A.

dation? An intergovernmental committee of civil servants reported that "the provisions of the Data Protection Act and the rulings of the Data Protection Agency can be said to be in basic agreement today with the requirements laid down in the recommendation."[68] Furthermore, the committee believed that there was no need at that time to investigate more closely data handling and integrity matters at places of work.[69] There is room for doubt as to whether this rosy conclusion was justified.[70]

D. *Methods or Process of Investigation*

1. Surveillance on the Job

a. Television Surveillance

Surveillance by means of closed-circuit TV cameras (and similar devices) is regulated by the 1990 Act on Surveillance Cameras which replaced a 1977 predecessor. The Act applies to all places where surveillance through optical means is done, including places of work. The purpose of the Act is to protect the personal integrity of individuals. Article 2 states that surveillance cameras "must be used with proper respect for the personal integrity of individuals." The Act contains rules on such matters as providing information about surveillance, obtaining permits to use TV surveillance, and confidentiality.

Employers need no permit if the place of work is closed to the public. A permit is required, however, if it is open to the public. If the workplace is partly closed and partly open, a permit is required to monitor those portions open to the public. This provision may be surprising. Given the purpose of the Act, one might think that employee privacy interests are the same regardless of whether or not the public is admitted. Rejecting criticism to that effect, the government (and subsequently the statute) took the position that employee interests are sufficiently safeguarded by two other rules. First, TV monitoring must be well-advertised. Hidden surveillance of employees is forbidden and, in fact, constitutes a crime punishable by a fine or prison sentence. Second, employers must negotiate with employee unions before

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68. *See* DATA TECHNOLOGY, *supra* note 44, at 33.

69. The conclusions of the committee did not meet with much criticism. Unions voiced concerns about various aspects but there was only mild criticism even from the unions.

70. Such doubts are strongly reinforced by the fact that the requirements of the proposed EC directive, *cf. supra* note 49, would necessitate sharply increased protection for the employee.

initiating surveillance.[71] Unions have no veto power, but the Act takes the position that employee interests are nonetheless sufficiently protected because there is nothing to indicate that the system of negotiations between employers and unions does not work satisfactorily.

The Act specifies several requirements that must be met to obtain a permit. The overriding consideration is whether the employer has a justified interest in monitoring that cannot be met equally well in some other way. Union participation is part of the application procedure. First, the employer must negotiate before applying for a permit. Second, a permit will not be granted unless a statement from the union (or some other employee representative[72]) is attached to the application. This requirement does not amount to an employee veto power, so a permit can be granted over even the objections of the employee representative. If so, the union(s), but no other employee representative, can appeal the decision.

How common is television surveillance of workplaces? No statistics exist. A 1987 White Paper reports that a total of 2,507 permits had been issued through September, 1985. That number is probably only the tip of the iceberg since no permits are required at workplaces not open to the public.[73] However, complaints about misuse are rare, and unions typically do not ask for such regulation in collective agreements.

b. Telephone Monitoring

Telephone monitoring has diverse meanings, including (1) tapping of tele-messages (telegrams), (2) monitoring calls to and from company phones or extensions (telephone surveillance), and (3) registering the number and cost of tele-messages. Telephone monitoring covers calls, text sent by fax, telexes and tele-messages, whether transmitted wireless or by using conventional wires.[74]

The Swedish legislature considers the administration of the rules on secret telephone tapping and surveillance to be so important that it has commissioned the Swedish government to submit an annual report on the subject. Though the practice is of recent origin, starting in the early

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71. In most instances the employer must negotiate with more than one union since unionism in Sweden is divided into three movements among blue-collar, white-collar, and professional employees. *See supra* note 65 and accompanying text.

72. The Swedish labor market is heavily unionized. However, there are many nonunionized workplaces, in particular small ones.

73. OPTISK-ELEKTRONISK ÖVERVAKNING("OPTICAL-ELECTRONIC SURVEILLANCE"), SOU 1987:74.

74. 1993 Telecommunications Act, art. 1. *See generally* Government Bill to Parliament 1993/94:200.

1980s, it is now well-established.

c. Telephone Tapping

Tapping of telephones means listening to or making recordings of tele-messages transmitted by a public telecommunications network. Secret tapping is a crime when done without permission.[75] Permission can be granted only by a court and even then only in exceptional circumstances, primarily for criminal investigations. External tele-messages, either to a company phone from outside the company or from a company phone to an outside phone, are transmitted by a telecommunications company, so such tapping by an employer is in violation of the Criminal Code. Permission can never be granted for routine tapping of employee tele-messages. Even tapping of internal tele-messages, those from one company extension to another, violates the Criminal Code when done secretly. Express employee consent, however, makes monitoring lawful, both externally and internally.

d. Telephone Surveillance

Telephone surveillance means monitoring incoming and outgoing tele-messages without actually listening to or recording them. An employer, in this case, simply wants to know the origin of incoming, and the destination of outgoing, tele-messages. Is such telephone surveillance lawful in Sweden? Some years ago the government stated that "even if secret telephone surveillance normally is not as serious an encroachment on personal integrity as telephone tapping, it must nevertheless be emphasized that such surveillance can constitute a serious encroachment on the private life of individuals."[76] Clearly, under this view, telephone surveillance must be severely restricted. The Code of Procedure provides that secret telephone surveillance is allowed only as part of a criminal investigation and under specific circumstances, subject to approval by a court.

The rules mentioned with regard to telephone surveillance do not apply to private telecommunications networks such as internal employer-owned exchange networks. Is secret surveillance by the employer lawful? I think it is safe to assume that secret surveillance is unlawful, because the employer is not entitled under Swedish law to decide unilaterally an issue as important as secret surveillance of employee

75. *See* CRIM. CODE ch. 4, arts. 8, 9a; *see also* the constitutional rule referred to *supra* part I (i.e. ch. 2, art. 6 of the 1974 Instrument of Government).

76. Government Bill to Parliament 1988/89:124 at 49.

phones. Under article 11 of the 1976 Joint Regulation Act,[77] the employer is required to negotiate with the union(s) of the employees concerned. If an agreement is reached, express employee consent is not necessary. What if the employer and the union(s) agree to keep negotiations confidential and not inform the employees? First, it seems inconceivable that a union in Sweden would agree to such an arrangement. Second, surveillance would be unlawful anyhow. If telephone calls can be traced to specific persons, surveillance results in a personal data register under the Data Protection Act. Since the data stored is sensitive, a permit would be required. If so, the employees will be informed about the surveillance as part of the process of granting a permit.[78] If, on the other hand, no such direct link can be made—and that is probably the most common situation since company phones can be used by different persons, at least occasionally—there should be no violation of the Data Protection Act. What then? I would suggest strongly that secret surveillance violates "good labor market practice" even in the very unlikely event that the union agrees to it.

Does this kind of surveillance of phones used by employees occur in Sweden? No statistical data exists, but the fact that unions do not ask for regulation in collective agreements indicates that monitoring is rare, or at least not seen as a problem. One highly publicized incident occurred in the mid 1970s. Volvo, the Swedish maker of cars and trucks, wanted to monitor all calls at its facilities in Gothenburg. After an outcry from unions and employees alike, the company scrapped its plans.[79]

e. Tele-Message Registration

The third kind of telephone monitoring referred to above occurs when the number and cost of tele-messages from a phone (or an extension) is registered. Such limited monitoring undoubtedly results in a personal register under the Data Protection Act if a definite link can be made between a phone and a specific person. However, it would seem far-fetched to maintain that there is "an illegitimate infringement of the personal integrity of the registered."[80] This should mean that there is no legal obstacle to such monitoring. Nor is there, in my opinion, any obligation on the part of the employer to inform employees

77. *See supra* note 65 and accompanying text.
78. *See supra* part C.2.c.
79. The proposed monitoring was found not to be covered by the Data Protection Act. Ministry of Justice, Dnr 3029/74, and Government Decision 1975:7.
80. Data Protection Act, art. 7.

about it or to initiate negotiations with employee unions.

f. Electronic Mail

Confidentiality regarding e-mail has yet to be regulated by statute in Sweden. There is full awareness of the integrity aspects involved. The prevailing attitude, however, is probably that e-mail is comparable to postcards, which makes confidentiality very difficult. However, it seems rather obvious that employers are not authorized to gain access to employee e-mail files without cause. At the very least, the "good labor market practice" standard should apply. It seems reasonable to go further and treat monitoring of e-mail files in the same way as telephone monitoring.[81]

2. Other Forms of Surveillance

A vast and ever-expanding array of opportunities for employee surveillance exists, including traditional entry and exit controls; traditional cards for clocking in and out; magnetic cards ("smart cards") to be used when passing through doors at the workplace; electronic cash registers; portable computers for registration of place of work; work performance data; breaks; and mobile telephones for continuous communication.

In many instances, monitoring by means of devices such as these is covered by the Data Protection Act. In theory, then, employees should enjoy the protection afforded by the Act. Yet, much surveillance occurs without even considering the Data Protection Act, thus depriving employees of their rightful protection.[82] However, this does not in any way imply that employers intentionally disregard the Act. In many instances, it simply does not enter into anyone's mind that the use of a new electronic device produces registers which fall within the purview of the Data Protection Act.

E. *Testing of Employees and Job Applicants*

1. Non-Health-Related Testing

Personality tests are not the norm in Sweden, but they are common enough to have caused union and employee concern. No legislation on

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81. Several government committees are investigating the legal implications of "the information superhighway," specifically the Internet. *See, e.g.*, Government Directives 1994:42 (establishing the committee on "Legal Considerations Concerning Information Technology"); Government Directives 1994:104 (for the committee on "New Media and Constitutional Law"). So far no committee reports have been presented and no specific legislative initiatives have been considered.

82. *See supra* part C.2.c.

the subject exists, and there are no court rulings. Also, there are no collective agreements authorizing personality tests. Unions have taken a negative position on these tests, often referred to as psychological tests. In a 1981 report, the Central Organization of Salaried Employees (TCO)—the dominant national federation of white collar employees—all but condemned personality tests, stating that only in very special and rare situations where truly particular qualifications were needed would the organization accept them.[83] Furthermore, quite a few additional requirements would have to be met; for example, personality tests must be shown beforehand to be capable of obtaining better background material for the decision, and it must be shown that the result could not be achieved reasonably by other means. The report also argues that unions should be authorized to veto the use of personality tests on an ad hoc basis.

Collective agreements themselves may contain restrictive rules on personality tests. For example, the national master agreement on participation and joint regulation for state government employees singles out various aspects of the recruitment process as suitable matters for local collective agreements, among them psychological tests. Under the agreement, unions in some instances can veto employer plans to use psychological tests "not needed for security reasons or specified by law."[84]

Employers sometimes turn to consultants or headhunters during the recruitment process. In such instances, unions are in a less favorable position to influence employer behavior because sensitive parts of the recruitment procedure such as aptitude or personality tests may be performed by the consultant. The 1981 TCO report advocates a union veto power against resort to headhunters. The veto rules in the national master agreement cited above do not specifically address employer recourse to headhunters, but they reasonably can be construed to authorize unions to veto such arrangements if it is known in advance that personality tests will be used by the headhunter. General aptitude tests are not traditionally common in Sweden, but headhunters may use them and often do. Yet, there are signs that both personality tests and aptitude tests are becoming more common, as is the use of recruitment firms.

With regard to both personality tests and aptitude tests, it should be

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83. Psykologiska test - fackliga synpunkter och krav ["Psychological Tests - Union Points of View and Demands"], TCO 1981.

84. Ordinance (1978:592) on Joint Regulation in State Government Employment, art. 8. For constitutional reasons, parts of the master agreement were incorporated into a public ordinance.

noted that the 1982 Employment Protection Act allows for an initial six-month period of probation. No conditions have to be met. The employer can terminate the probationer for any non-discriminatory reason during, and at the end of, the period. Absent exceptional circumstances, courts cannot review employer decisions regarding probationary employment, which is very common and obviously reduces the need for personality and aptitude tests. Hiring out/hiring in of manpower (temporary work) has also increased as a result of the 1991 lifting of the long-standing statutory ban on temporary work.[85] Polygraph and honesty tests are virtually unknown in the Swedish labor market. There is no legislation in this field and no court rulings. To the best of my knowledge, there are no recorded instances of such testing, either. This does not mean that they have not been practiced here and there, but rather that they have not caused a sufficiently strong reaction among employees to be noteworthy.[86]

2. Health-Related Data and Compulsory Medical Examinations and Physical Tests

Health-related employee data has become one of the central issues in Swedish employment law in recent years. The main issue is the extent to which employers can submit employees to medical examinations and physical tests aimed at checking employee job fitness and detecting drug abuse. What information related to an employee's health are employers authorized to collect and store? The point of departure for an answer to this question is the method through which data can be collected from non-consenting employees. Two main avenues exist. First, employees on sick leave must report to the employer not only that they are sick, but also the nature of their ailment. The employer can file and subsequently process such data, as well as store everything that has been reported to him from the employee and attending physicians. A permit from the Data Protection Agency is no longer required.[87] Under no circumstances can the ailment be used as a basis for denying sick leave. Neither alcoholism nor AIDS can be treated differently than other ailments for the purpose of sick leave.

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85. *See generally* Reinhold Fahlbeck, *Employment Exchange and Hiring Out of Employees in Sweden*, 4 TIDSSKRIFT FOR RETTSVITENSKAP (1995).

86. As mentioned *supra* part C.2.b., special problems arise in connection with positions that are classified as sensitive from the point of view of national security. Here, one might expect polygraph testing to be common practice. However, that is not the case. Screening is primarily a matter of checking files, in particular police intelligence files. Polygraph tests are not used; only occasional informal talks take place. It has been suggested that screening should be called "register checking" rather than "personnel clearance." GOVERNMENT WHITE PAPER, SOU 1994:149.

87. Data Protection Act, art. 2a, para. 5.

Second, the testing of employees on orders from the employer also will result in data banks. Here, the situation is completely different. The reason is that testing is done by medical personnel and they are under statutory obligations to maintain confidentiality. The employer will gain knowledge about testing results only to the extent that employees voluntarily agree. However, nonagreement may result in transfer or conceivably even in dismissal; no statutory law or case law concerning the effects of noncompliance exists. However, dismissal is for just cause only. Indeed, employee protection is substantial in instances of disciplinary dismissals.[88]

Compulsory medical testing of job applicants and employees has become very common in Sweden in recent years. Virtually no day passes without some report in the news media about testing. By and large, testing is aimed at detecting abuse of alcohol or other toxic drugs. Formal "drug and alcohol policies" have become commonplace, often as a result of a common effort by the employer and union(s). The dominant employer federation in the private sector—SAF—has issued a publication which deals primarily with preventive and curative matters. It stresses the joint responsibility of the company and its employees to participate in preventing abuse.[89] The lodestar under a widely shared societal consensus is to help abusers rid themselves of their destructive habits. Curative measures are considered the appropriate way of dealing with these habits. Elaborate programs offering assistance such as counseling, treatment and self-management programs are available. Dismissal is the ultimate resort, but is considered an unfortunate exception to the prime goal of rehabilitating the abuser. The abuser is looked upon as a victim rather than a villain. This policy is aptly summarized in a popular slogan: "Let the employee stay, get rid of the abuse!"

How common is drug abuse among employees? In a 1994 study covering a sample of 3,500 employees chosen randomly from 100 companies of different sizes and lines of business, about two percent tested positively (i.e. showed signs of using, or having used, drugs). This figure was much higher than the expected figure of 0.5 percent.[90] Cannabis was the most frequently used drug, followed by heroin and amphetamines.

Gene tests are probably still very uncommon, and so far there is

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88. *Cf. Battle for Survival, supra* note 28.

89. SAF, *Abuse in Working Life; Views on Alcohol and Drugs* (1991, ISBN 91 7152 583 1).

90. For a summary of this study, see, e.g., Arbetarskydd 1994:11, the monthly report published by the Board on Health and Safety in Working Life.

little knowledge about their use. The Board on Health and Safety in Working Life, a government agency, does not completely rule out such tests.[91] The 1991 Act on the Use of Gene Technology in Health Examinations restricts the use of such technology, but it does not address conditions in the labor market.

In 1994, the government appointed a committee to undertake a comprehensive survey of the occurrences, risks, problems, and needs associated with medical testing in the labor market.[92] The committee was also commissioned to present proposals that it considered necessary. Referring to the 1993 ILO Guiding Principles on Drug and Alcohol Testing in the Workplace, the government highlighted the ethical aspects and the sensitive privacy issues involved, particularly those in gene technology.

a. Pre-hire Medical Testing of Job Applicants

What are the rules regarding job applicants and examinations or tests? Here, as with the collection of data generally, the situation differs from the post-hiring period in the sense that job applicants can avoid any examinations or tests by simply not applying (or by not pursuing the application process). In this sense, all examinations and tests are voluntary. Does that mean that anything is permissible? Once again, Swedish law is silent. Statutes provide no answers and the courts still have not been asked to provide them. This is surprising because testing has become very common as a result of a ruling by the Labor Court concerning post-hiring tests.[93] It would appear to be obvious that employers are entitled to require job applicants to submit to the same type of test during the application process.

However, the 1991 holding was rather narrow. What should be the law of the land outside its scope? "Good labor market practice" must be observed, but what does that mean? Swedish law is based on the principle that employers enjoy the right to "hire at will." Though much of that principle has eroded, it is still of considerable importance in the present context since employers can ask all applicants to undergo examinations. Does this mean that "good labor market practice" would accept that employers are entitled to require anything and everything? Certainly not. A balance must be struck, similar to the one struck by

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91. *See, e.g.*, statements made to that effect made by a spokesperson for the Board, Arbetarskydd 1994:11.

92. Medicinska kontroller i arbetslivet [Medical Checks in Working Life], No. 111 Committee Directive (1994) (Sweden).

93. Labor Court 1991:45; *see also infra* part E.2.b.

the Labor Court in 1991.[94] The interests of employers should probably be given more weight.

One example which highlights the delicacy of making statements regarding testing arose when Scania, the Swedish producer of trucks and other heavy vehicles, decided to test job applicants for drug use by means of a urine test. No fewer than three different bodies of the highest standing were asked to review this practice. The first body was the Delegation for Medical Ethics of the Swedish Society of Physicians. In a 1987 statement, the delegation unanimously found no obstacle to such a practice from the point of view of medical ethics. The delegation provided no explanation for its conclusion.

In 1988, the Advisory Panel for Ethical Matters of the Government Board for Social Matters [*Socialstyrelsen*] came to the opposite conclusion after balancing the opposing interests involved. The point of departure for the Panel was its finding that "testing of this type is undoubtedly an infringement of privacy."[95] The Panel noted that a refusal to submit to the test could result in serious problems for the individual on the labor market (and consequently posed an indirect threat that such person's drug abuse, if any, might in fact increase). As a result, the Panel took the position that it was doubtful whether "true freedom of choice for the individual could be said to exist if the test were a prerequisite for employment."[96] The Panel also noted, however, that the interests of the employer—safety at the place of work—were of such magnitude that they conceivably could outweigh the interests of the employee. Nonetheless, the Panel found that in the case at hand this was not so, primarily because testing was not recurrent, and only recurrent testing could satisfy the legitimate interests of the employer. One member dissented.

In 1989, an Arbitration Board issued an award concerning the admissibility of the Scania testing under the 1976 Master Agreement on Work Environment and Safety at Places of Work. The Board consisted of representatives of the leading organizations on both sides of the labor market and was chaired by a former chairman of the Labor Court. Of interest are some statements *obiter dicta*. Noting that every applicant had been informed about the testing and that applicants enjoyed confidentiality in the sense that the application procedure could be discontinued, the Board stated that the testing "in any case did not constitute such an infringement of the privacy of the individual that on

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94. *See infra* part E.2.b.
95. Advisory Panel, statement October 18, 1988.
96. *Id.*

this basis alone it is a violation of 'good labor market practice.'"[97] The Board also stated that employers, as part of their right to hire at will, are entitled to require that applicants submit medical affidavits showing that they do not abuse drugs. A requirement of that kind "cannot . . . be considered to violate 'good labor market practice.'"[98] In a concurring opinion, the employee representatives took exception to the majority view that applicants enjoyed full confidentiality, noting that only those who tested positively (or feared to do so) discontinued the procedure. However, these members concluded that "to go so far as to say that the test means that the entire procedure is in violation of 'good labor market practice' is not justified by company hiring routines."

b. Post-Hire Medical Testing of Employees

The point of departure for a discussion of the physical or mental examination of employees is a rule found in the Instrument of Government.[99] This rule protects individuals against "compulsory bodily measures" undertaken by "the public realm," subject to limitations in statutes "to achieve a purpose acceptable in a democratic society."[100] The constitutional rule is not confined to examinations for traditional medical purposes (i.e., to find out whether a person is suffering from a medical ailment). Rather, it encompasses other tests including blood tests (e.g. alcohol testing) or urine tests (e.g. drug testing). Statutory rules providing for medical examinations are few and strictly circumscribed; the best known is the rule authorizing alcohol tests of motorists. The 1977 Work Environment Act requires employers to conduct medical examinations in some instances.

The constitutional protection applies to state government employees when the government acts as "the public realm" vis-à-vis its employees, or when its acts constitute an exercise of public authority. That, in turn, is the case when there is an element of compulsion involved, though compulsion may mean "just" a threat.[101] Prior to the 1994 Public Employment Act, there was no statutory support for compulsory medical examinations of employees by public employers. In a widely discussed ruling, the Labor Court in 1984 declared recurrent medical examinations of state railway employees unconstitutional on grounds that they were not based on a statute—as prescribed by the 1974

97. Arbitration Board SAF-LO-PTK, arbitration award December 12, 1989.
98. *Id.*
99. SWED. CONST. (Instrument of Government, 1974) ch. 2, art. 6.
100. *Id.* at art. 12.
101. *See* Labor Court ruling 1984:94.

Instrument of Government—but on a unilaterally adopted state railway agency ordinance.[102] The outcome caused quite some stir because similar examinations were rather common at many state agencies. It took society ten years to react with the 1994 Public Employment Act. Whereas its 1976 predecessor contained no rules on recurrent medical examinations for routine checks of physical fitness, the 1994 act does. The authorization is limited to employees in sensitive positions from the point of view of life, safety, health, property, or the environment.

Constitutional protections also apply to local government employees when the employer exercises public authority.[103] Long-standing contractual rules authorize local government employers to conduct various medical examinations. Given that the employees concerned also enjoy constitutional protection, the rules are questionable on constitutional grounds. With regard to recurrent medical examinations, doubts have been laid to rest by the 1994 Public Employment Act. Figure 1 presents a succinct summary of medical examinations of employees.[104]

What is the extent of the protection for private sector employees? The point of departure here is that the constitutional rule referred to above—the 1974 Instrument of Government, chapter 2 section 6—does not apply. That provision is limited to the relationship between citizens and "the public realm." In some instances private employers are authorized, or indeed even obliged, to conduct medical examinations regardless of employee consent. The overriding reason is that employ-

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102. *See id.*

103. Close to 40 percent of the working population in Sweden is employed in the public sector, primarily in the local government sector.

104. *Figure 1. The law and medical examinations of employees*

Examination	*State government*	*Local governments*	*Private*
Periodic examinations (both physical and mental)	Employees with positions related to health and safety; 1994 Public Employment Act, art. 30	Ditto	Ditto, as an outflow of the employment contract; 1991:45 ruling by the Labor Court
Examinations triggered by employee misconduct	Employee consent is required except for confidential employees; see statute 1994:261, art. 10	Authorized under a collective agreement, but the authorization is questionable on constitutional grounds	Probably not lawful without consent by employees, yet they are often done in order to prevent transfer or dismissal
Extraordinary (or random) examinations	No legal basis for such examinations	As above	Nothing can be said for sure; no statutory law or case law
Voluntary	No restrictions	No restrictions	No restrictions

Note: Periodical examinations are recurrent or subject to an established policy, while extraordinary examinations are those conducted randomly or on an ad hoc basis for some specific reason; misconduct examinations are aimed at finding out whether there is a medical basis for employee misconduct or other shortcomings.

ers have far-reaching obligations to provide safety at places of work and to prevent occupational diseases. They have corresponding duties to conduct medical examinations to detect work-related diseases. They also are responsible for rehabilitating employees after illness or accidents, work-related and otherwise.[105] To some extent, examinations are expressly called for in statutory rules such as the 1977 Work Environment Act.[106] In other instances, they are not called for, but employer obligations may mandate, or at least permit, examinations because of the overriding duty to provide a safe place of work. Much depends on the workplace and the purpose of the examinations.[107] Since the constitutional requirement is met that "compulsory bodily measures" have support in a statute (here the Work Environment Act), public sector employers are as entitled as their private counterparts in this respect.

However, statutory rules authorizing private employers to subject non-consenting employees to medical examinations are rare. The truly pertinent issue, thus, is what authority they have in situations where no explicit statutory rules exist. The constitutional protections for employees do not apply to private employment relationships. I have often advocated, however, that they should. Although neither the legislature nor the Labor Court has addressed the issue of indirect protection in its entirety, as of today it seems to be accepted that indirect constitutional protection does not apply in the most common situations (i.e., recurrent examinations of a routine nature, either pre-hire or post-hire). The leading case here is Labor Court ruling 1991:45.[108] The ruling of the court and its statements *obiter dicta* have had wide ramifications and are accepted as the law of the land today.

In this case two employees were dismissed because they refused to submit to a urine test for cannabis. There were no rules regarding drug testing in the collective agreement, and the employees had not agreed to any tests in their individual contracts of hire. The court decided the case by relying on implied obligations in the contracts of hire, considered to be vested in the Work Environment Act. The court reasoned that while employers are responsible for safety at places of work, employees also have responsibilities.[109]

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105. *See supra* note 56.

106. *See, e.g.*, Work Environment Act, 1977 SVENSK FÖRFATTNINGSSAMLING xxx, ch. 4, art. 5 (dealing with medical examinations "if a particular type of work entails a risk of ill health or accident").

107. *See* Labor Court ruling 1991:45, *supra* note 94.

108. *Id.*

109. Under chapter 3, article 4 of the Work Environment Act, employees "must help to create a satisfactory work environment. They must observe current regulations, and they must use the safety

The case arose at a construction company, where testing was aimed at ensuring safety for those tested as well as for other employees. The court stated that a balance must be struck between the interests and needs of the employer, and the individual and collective employee interests. For a variety of reasons, the court found that the balance tipped in favor of the employer. Among the reasons cited were (a) the objective need for drug testing at the workplace in question; (b) that urine tests are considered an adequate and reliable testing method; (c) that the test constituted only a minor infringement; (d) that prior warning had been given in a general way (albeit without specifying the particular day for testing); (e) that the employer acted in cooperation with the union and with its consent; (f) that confidentiality with regard to test results was safeguarded;[110] and (g) that employees were not made to submit to the test in any coercive way.[111]

The court also questioned whether it was lawful to include rules in collective agreements or individual contracts of hire with regard to employees' obligations to submit to urine tests to detect drug abuse where such tests were aimed at ensuring safety. In unequivocal terms, the court endorsed the legality of such rules. Without citing any legal justification, the court, in so doing, brushed aside objections by the employees that the constitutional rule[112] created an overriding principle of law barring such contractual stipulations. However, the court also stated that while such rules could not be enforced specifically, noncompliance made employees liable to dismissal. The court was anxious to point out that its decision was limited to the case at hand, stating that "the Labor Court by this decision has not expressed an opinion on either what rights employers should be considered to have to perform various acts of control or how to decide a dispute concerning drug testing under circumstances other than those at hand in the present case." The court continued by saying that "it seems appropriate that such matters be settled in collective agreements or . . . through legislation."

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devices and in other respects exercise the caution required for the prevention of ill health or accidents." Legislative history shows that employees ultimately face dismissal in cases of non-compliance.

110. The court did not resolve the issue of what the employer can do if a test reveals an influence of drugs, but the employee in question does not step forward voluntarily to discuss the matter with the employer. Can statutorily protected medical secrecy be broken? It seems quite certain that medical secrecy cannot be broken but that the employer may take corrective action nevertheless. Employer managerial prerogatives would undoubtedly justify transfer of the employee to some job where the employee would pose no risk to himself or others. Ultimately, the employee can be dismissed.

111. In the final analysis the court found for the employees. Though ruling for the employer on matters of principle, the court took the position that the employer had acted too quickly in dismissing the unobliging employees, who should have been given time to reconsider their positions.

112. *See* SWED. CONST. (Instrument of Government, 1974) ch. 2, art. 6.

3. Physical and Bodily Searches

Compulsory physical and bodily searches of employees upon the initiative of the employer present serious problems of privacy, and once again, the Instrument of Government provides the starting point.[113] The prohibition against "compulsory bodily measures" undertaken by "the public realm" is subject to exceptions only "to achieve a purpose acceptable in a democratic society."[114] Exceptions can be found in the Code of Procedure, which contains severely circumscribed rules regarding two forms of enforced physical examinations—physical search and bodily search—both in connection with criminal investigations.[115]

Physical search[116] is the less extensive of the two and is restricted to an examination of a person's clothes and personal effects, both what the person carries on himself (e.g., wallets and back-packs), and brings with himself (e.g., cases, bags and baby carriages). Bodily search[117] means an inspection of the human body, including its cavities, and the extraction and analysis of specimens from the human body.

The constitutional protection applies directly to public sector employees when their employer acts as "the public realm." However, in Sweden the employment relationship in the public sector is considered to belong to private law and thus is based on private law rules. Only when public employers exercise public authority do public law rules apply.[118] In those instances, constitutional protections also apply. Since there are no statutory exceptions in employment law to constitutional protection, public employers are not allowed to subject their employees to such searches if they act as "the public realm." Nothing else is certain and incontestable; statutory law does not provide answers and the courts have yet to be asked for them. Although this may sound strange and unsatisfactory, the state of the law with regard to physical and bodily searches of employees by private employers and public employers when acting under private law simply cannot be stated with certainty.

For years I have argued that these constitutional safeguards must

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113. *See id.*
114. *See id.* at art. 12.
115. The present statutory definition of these searches is of very recent origin, in fact dating from 1993 only, but both have long been part of Swedish law. *See* 24 Government Bill to Parliament (1993/94) (Sweden).
116. *See* CODE OF PROCEDURE, ch. 28, art. 11.
117. *Id.* at art. 12.
118. *See supra* part E.2.b.

apply indirectly, as "good labor market practice."[119] Although I still believe this, I am less affirmative in this belief than I once was. Still, it seems unworthy of a nation that proclaims the principle of due process of law not to protect people against involuntary searches by others. In addition, it seems inconceivable that employers should be authorized to perform searches only because they act under private law rather than under public law. However, private law contracts can set aside constitutionally protected rights in many fields. This has long been accepted with regard to such protected freedoms as those of speech and of the press.

In a 1994 ruling, the Labor Court forcefully reiterated long-standing principles to that effect.[120] Because that is the law of the land and because employers in some instances may subject employees to involuntary medical tests—though such tests are in violation of constitutional protection if they are performed by "the public realm" without statutory authorization—the law may be that employers may subject employees to searches, as well.[121] The underlying premise is that such searches—if and to the extent that they are considered admissible—form part of the employment relationship, even though they have not been explicitly stated.

As of today, I would tentatively say the following bodily searches constitute a substantial infringement of personal privacy, and "the public realm" is severely restricted in subjecting people to such searches. It simply cannot be that employers, when acting in a private capacity, are authorized to do what "the public realm" is authorized to do only in truly exceptional situations. An argument that such authority can be derived from the employment contract forces on that contract a function very remote from today's realities. True, such searches would not be alien to the precursor of today's employment contract (i.e., the master and servant regulation of yore), and much of today's employment regulation does, indeed, have its roots there.[122] But many of the strictly personal elements of that regulation, for example those parts regarding co-habitation and corporal punishment, were repealed or went out of practice when the employment contract of today's industrial age came into existence.

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119. *See, e.g.* Reinhold Fahlbeck, *Employee Privacy in Sweden*, JURIDISK TIDSKRIFT (1991) at 59.

120. *See* Labor Court 1994:79.

121. *See supra* parts E.2.a. and E.2.b.

122. See my arguments in COLLECTIVE AGREEMENTS - A CROSSROAD BETWEEN PRIVATE LAW AND PUBLIC LAW (Lund, Sweden, 1987) at 28. See, alternatively, an article version of the booklet, Reinhold Fahlbeck, *Collective Agreements - A Crossroad Between Private Law and Public Law*, 8 COMP. LAB. L.J. 268, 276 (1987).

Physical searches also constitute a serious infringement of personal privacy, but less so than bodily searches. However, it is difficult to accept that employers should be authorized to subject non-consenting employees to such searches as an outflow of the employment contract. If courts were to accept such searches, one must assume that they would do so only under special circumstances, subject to a delicate balancing of opposing interests.

Present case law does not provide any clear guidelines.

> The Labor Court has decided two cases involving personal search. In a 1943 case, the court explicitly accepted unilateral employer rules on personal search. However, this ruling is considered generally to be of little or no consequence today, because the court relied upon exceptional circumstances surrounding the case to reach its decision. First, though Sweden was neutral at the time, the court could not overlook the fact that Europe was at war and that the Swedish company involved produced ammunition.[123] Also, the case was decided long before the advent of the constitutional protection now in force. In a 1979 case, the court seemingly accepted rules on personal search in a collective agreement for the state monopoly liquor company.[124] However, the court was not asked to rule on the validity of that regulation, nor did the court specifically rely on it when deciding the case. Essentially, the ruling does not lend itself to any conclusions as to what the court would have decided if called upon specifically to rule on those provisions.[125]

Obviously, the legal situation changes completely if employees consent to searches; but what form of "employee consent" is required—strictly personal consent, or consent by a bargaining agent in a collective agreement? The focal issue is whether rules in collective agreements are binding upon non-consenting employees. This author is of the opinion that unions have little or no authority under Swedish law to act as agents for their members in this respect, at least regarding bodily searches.[126] It may be that rules in collective agreements have some validity, as in justifying transfers of noncomplying employees and providing for nonfinancial (punitive) damages in the event of employee noncompliance or of employer transgressions.

Do collective agreements contain rules on bodily or physical search? By and large, the answer is no. Exceptions exist, but they are

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123. *See* Labor Court 1943:77. *Cf.* statements made by the Labor Court in its ruling 1991:45, *supra* note 93.

124. *See* Labor Court 1979:150.

125. It is noteworthy that the Labor Court did not even refer to this decision, in a recent case involving drug testing, where the court did refer to, and even discussed, its 1943 ruling on personal searches. This indicates that the court does not consider its 1979 decision precedential in the context of personal searches. *See* Labor Court 1991:45, discussed *supra* part E.2.b.

126. Note that collective agreements are virtually never submitted to a binding membership vote before signature. By and large, union democracy in Sweden is indirect.

marginal and few.[127] Occasional reports in the media explain company policies concerning searches, etc., but they are infrequent, as are public complaints from employees. Similarly, unions do not demand regulation of searches in collective agreements.

Evidently, orders from employers to comply with explicit or implicit rules on searches cannot be specifically enforced. Employees are not immune from employer reactions in cases of noncompliance, however. At least at workplaces where a legitimate need for control exists, or where the employer has obtained prior employee consent in collective or individual agreements (not in violation of "good labor market practice"), a refusal on the part of the employee may constitute a breach of the employment contract. Here, as in the case of medical examinations and physical tests, the employer may be entitled to take action, such as transferring the employee to a less sensitive or nonsensitive position.[128]

F. *Concluding Remarks*

Technological advances have contributed greatly to the sharply increased focus on employees' privacy and physical integrity.[129] The awareness of the dangers posed by more sophisticated methods and devices for surveillance and infringement of privacy has grown considerably stronger. The tremendous number of statutory amendments in the privacy field in the past five years testifies to the increasingly central role of privacy issues. The considerable number of government-appointed committees working with privacy issues points in the same direction. In some respects, there is an evolution towards greater privacy rights for employees in Sweden. However, there are also countervailing trends, for example the growing tendency to subject employees to medical tests, an increasing use of personality and aptitude tests, and more sensitive recruitment questionnaires. In any case, it is imperative to keep in mind that employees in Sweden have enjoyed considerable de facto privacy during most of this century. If there has been a certain reduction of privacy, that does not mean that employees have been deprived of many privacy rights or that much of their privacy is at the employer's disposal.

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127. In 1991, I examined roughly thirty industry-wide agreements covering retail stores and supermarkets (i.e., sectors where one might expect to find such rules), but not one agreement even as much as mentioned searches. Many agreements refer to local employment rules, stating that "employees are obliged to comply with employment regulations not contrary to this agreement." Rules on examination of employee bags, etc., would not be contrary to the industry-wide agreements studied.

128. *See* discussion *supra* note 110.

129. *See generally supra* note 34.