

Social Security as a Cornerstone of the Welfare State – Reflections from the Editors

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1. Introduction – social security in the spotlight

The primary objective of this special issue is to bring to light the role the social insurance system has as a cornerstone of the Swedish welfare state. The legal configuration of this system is consequently often significant for individuals in order for them to attain economic and social stability. Through its regulation of access to various benefits, including sickness allowances, pensions and non-monetary benefits such as rehabilitation services, social insurance can profoundly influence an individual's capacity to navigate financial adversities across different life stages. Furthermore, it serves as a pivotal mechanism for social justice through its objective of equitably allocating resources and protection. Consequently, the configuration of social insurance benefits shapes not only individuals' interaction with the welfare state but also their relationship with society at large.

Given that the modalities and enforcement of social security benefits dictate the tangible impact of the welfare state on individuals, social security law stands as a domain of significant political scrutiny and constant evolution. These transformations are propelled by the dynamic

interplay between societal shifts as well as changes in societal aspirations and norms. Today it is also intimately linked to European law that in turn adds its own parameters, conceptual definitions and sources. Despite this critical role, social security law often remains on the periphery of legal scholarship. One objective of this thematic edition consequently is to also bolster the discourse surrounding social security law and to offer insights into its intricate dimensions from both legal and societal standpoints.

2. The shape and shaping of social security amidst societal changes

The articles in this thematic issue highlight how the legal design of social insurance affects, as well as is affected by, societal changes through the interplay between legal and social dynamics.¹ The pandemic is a clear example of this interplay, with tangible effects on both the utilisation patterns for social insurance and on the conditional design of benefits. In addition to the higher utilisation rate and temporary legal changes, particularly to forms of benefits relating to illness and sick leave, the pandemic also led to a significant increase in teleworking that has since persisted.

As also shown in this special issue, the European impact on the national legal setting has had implications. Teleworking has turned out to be a major challenge in cross-border situations. According to Regulation (EC) no. 883/2004, guaranteeing that persons moving within the EU/EES retain the social rights and the advantages acquired and in the course of being acquired, the main rule is that the country where the employee works is responsible for social insurance. However, the social insurance legislation of the country of residence applies when a significant part of the work is actually performed in that country, specifically 25% or more of the total working time. This means that teleworking in itself may lead to a change of applicable legislation.

1 This thematic issue is the result of a collaboration between legal scholars interested in social security law across different universities in Sweden. Drafts and ideas for the contributions have been exchanged and developed at a joint workshop in January 2024, funded by Umeå University.

As a response to this challenge, the Framework Agreement regarding telework from another state within the EU/EEA/Switzerland came into effect on 1 July 2023. This Agreement aims at establishing a general framework at the European level concerning the employment conditions of teleworkers and at reconciling the needs for flexibility and security shared by employers and workers. The Framework agreement encompasses persons who habitually work in the State where the statutory seat of their employer is established and telework in their State of residence, without pursuing other activities than telework there. It grants teleworkers the same overall level of protection as workers who carry out their activities at the employer's premises.

In her contribution, *Telework in Relation to the Conflict of Laws Provisions of Regulation 883/2004* Distansarbete i förhållande till lagvalsbestämmelserna i förordning 883/2004, Emma Holm addresses the Framework Agreement and a Guidance Note on Telework published by the Administrative Commission. She explores the path resulting in these two documents as well as the type of limitations that ought to be done and possible future challenges. Her lens is one of a practitioner. Holm concludes that the Framework Agreement is a rather revolutionary development. The exploration of possible future challenges shows, however, that problems of interpretation are likely to occur. Still, both the Framework Agreement and the Guidance Note on Telework are not obligatory for all member states, they only apply to situations where both the state of the employer's seat and the state of residence are signatories.

Jaan Paju's contribution, *A Study in Scarlet? – The Role of the Administrative Commission in the Aftermath of the Pandemic* En studie i rött? – Administrativa kommissionens roll i efterdyningarna av pandemin, discusses the Guidance Note on Telework in more depth, and specifically the Administrative Commission from a constitutional perspective. The contribution highlights that other institutions may also play an important role in the area of social insurance. Paju argues that the position of the Administrative Commission raises important questions about legal certainty and transparency, and is quite critical, pointing out that the EU risks losing legislative power to a non-legal body not having such explicit powers.

Katia Ceije's contribution, *Social Security Affiliation in Cross-border Commuters' Work from Home – The new Framework Agreement: a Model for the Future or a Toothless Tiger?* Socialförsäkringstillhörighet vid gränsgångares arbete från bostaden – Det nya ramavtalet: en modell för framtiden eller en tandlös tiger?, also explores the issue of teleworking, with a focus on the Framework Agreement. A major challenge for cross-border workers is that the Framework Agreement only addresses the applicable legislation regarding social insurance, but not where income tax is levied. Moreover, the Framework Agreement does not remove obstacles for employers, as in many cases they need to pay income tax and register as an employer in the worker's country of residence. The contribution points out that these administrative burdens should not be underestimated. One solution might be to designate one state as responsible for levying taxes and fees. Such a solution would likely make it easier for several employers and workers. Here, the Framework Agreement may inspire future solutions.

Another clear societal shift impacting the administration of social insurance addressed in some of the contributions is rapid technological advancements. Increasing digitalisation and automation of citizen interactions, case management, and decision-making, have transformed the conditions and methods of implementing social insurance schemes. Technology now plays a significant role in mediating the exercise of power over individuals within social insurance administration.

Clara Bergstrand's contribution, *Requirements Regarding Individuals' Insight in the Digital Administration – a Review of Sickness Benefit Reclaim in the Light of Website Information* Krav på enskildas insikt i den digitala förvaltningen – en granskning av återkrav av sjukpenning i ljuset av hemsideinformation, illustrates how the Swedish Social Insurance Agency's increasing digitisation of services and information regarding social insurance benefits has been accompanied by an expectation from the agency that individuals actively utilise the information provided on its website. When assessing whether the Swedish Social Insurance Agency can make a repayment claim in cases of erroneous sickness benefit payments not triggered by the individuals themselves, the agency has established a practice of referring to general information on its website regarding the compensation criteria to determine whether the individual should have realised that the payment was incorrect (a prerequisite for making

repayment claims). By attributing significance to the accessibility of the agency's digital information in the assessment of the individual's insight into the payment's accuracy, the agency has tilted the power dynamics further away from individual claimants, placing greater demands on them for active information seeking. While the website serves as a source of updated information on rules and legal status, it also is more temporary, compared to analogue, agency information. For instance, updates can occur without direct notification to the individual. In an era where digital channels are increasingly dominant in interactions with authorities, this contribution underscores how an individual's ability to navigate and comprehend digital information is becoming a crucial factor in the effective exercise of rights.

In addition to investing in digital information channels, the Swedish Social Insurance Agency also is a frontrunner among Swedish government agencies in automating either whole or parts of case management. This development has been underpinned by arguments that combine both efficiency (faster and cheaper processing) and legal security (uniform processing without the influence of subjective perceptions or knowledge deficits of case administrators). However, as automated exercises of power carry inherent risks, including the potential introduction of systemic biases or the obscuring of decision-making rationale, the technical norms governing the system's functionality risk being in conflict with the legal norms as outlined in the benefit criteria. Remaining vigilant as to the types of changes that the automation of administrative procedures may bring to the application of benefit criteria in individual claims therefore becomes crucial.

Lena Enqvist's contribution, *Black Boxes and Blind Spots? Legal certainty and AI-based Decision Support in the Swedish Social Insurance Agency's Administration of Sickness and Activity Compensation Svarta lådor och blindade fläckar? Rättssäkerhet och AI-baserade beslutsstöd i Försäkringskassans handläggning av sjuk- och aktivitetsersättning*, by way of example, explores the Swedish Social Insurance Agency's utilisation of an AI system called SAMU (structured analysis of medical records) to aid administrators in evaluating claimants' work ability through assisting the assessment of information in medical certificates. Enqvist examines its potential impact on a comprehensive evaluation of an individual's

work capacity, as well as its implications for legally correct and secure decision-making. When doing so, Enqvist adopts a sociotechnical perspective, considering the mutual influence between society and technology and the resulting framework that shapes the decisions of caseworkers in the realm of automation-related risks in case management.

3. The eternal questions in social security law

In addition to new societal developments, the social insurance system also grapples with timeless issues of enduring importance from a legal perspective. The configuration of social rights in the form of social insurance benefits must continuously be anchored in the overarching social contract, where the social and the economic intertwine. This configuration is also deeply intertwined with policy in a manner that perhaps surpasses that found in many other areas of law. The dual nature of social security renders it both a legal framework for individual protection and an implementation tool for broader policy objectives. Consequently, social security, whether viewed through a policy or legal lens, is inherently value-laden. As the values materialised through the configuration of benefits change with circumstances, such as the above-exemplified societal changes and other shifts in political norms and economic priorities, the social security system historically has also been in a constant state of change.

Against this backdrop, several contributions shed light on the variability of social insurance both in terms of its legal configuration, as well as in terms of the Swedish Social Insurance Agency's application practices regarding established benefit criteria or standards of proof. As social security benefits are primarily rights-oriented, this variability especially raises questions regarding their stability, predictability, and accessibility for those reliant on them. The continual fluctuations, whether prompted by intra- or extra-legal factors, can create uncertainty and challenges for individuals as to adequately planning and relying on benefits to meet their needs. The overall trust in the system can also be affected, including its ability to fulfil its fundamental purpose of protecting and supporting individuals through various life stages and situations.

While the dynamic nature of social insurance can be interpreted as an ability to adapt to evolving societal needs and circumstances, the system's perceived legitimacy ultimately depends on the transparency, accountability, and fairness of its administration. Without adequate monitoring, due process and implementation of safeguards, the risk of undermining the crucial foundations of solidarity and legitimacy upon which the social security system relies becomes evident.

In Ruth Mannelqvist's contribution, *Proving Reduced Work Capacity – Burden of Proof, Means of Proof and Evidence Requirements for Sickness Benefits* Att styrka nedsatt arbetsförmåga – bevisbörda, bevismedel och beviskrav för sjukpenning, the reader's attention is drawn to how compensation for loss of income due to sickness should be handled. The Swedish national sickness insurance system requires that the worker's capacity to work be reduced in order to receive the benefit. The burden of proof, medical certificates as evidence and evidential requirement regarding working capacity within the sickness insurance are analysed and problematised in this chapter from a legal perspective. Mannelqvist demonstrates how the burden of proof rests primarily on the insured, and that medical certificates are required to contain such information so that it is possible to assess the consequences of a disease, which the work task's ability should be assessed against, and how the consequences affect the ability to work. She concludes by finding that the concept of working capacity, and how it should be understood and assessed, will continue to be the subject of ongoing discussions and investigations in the future.

Martina Axmin's contribution, *Social Security Precedents – Is there any Guidance Available?* Prejudikatbildningen inom socialförsäkringen – finns det någon vägledning att få?, provides an historical overview of various legal tools used to promote judicial precedent within social security. The Social Security Court of Appeal was abolished in the 1990s, with such claims then made under the umbrella of the administrative courts and the general ombudsman for social security as established. Axmin describes how this field of law is characterised by a high level of amendments as well as a broad scope for assessments, and accordingly, in need for more judicial precedent within social security law as a fundamentally important tool strengthening legitimacy. The article concludes with a

comprehensive discussion and analysis of the development of judicial precedents within the area and highlights key challenges.

Lotta Vahlne Westerhäll's contribution, *The Care Allowance for Children with Special Needs – Where is the Novelty?* Omvårdnadsbidraget – variligger det nya?, highlights how reforms of benefit criteria, aimed at improving the conditions for submitting a more legally-certain application, can result in a more restrictive application at the agency level that goes beyond the legal manifestation of the changes. The introduction of a new care allowance for children with special needs, replacing the previous childcare allowance, was intended according to the legislator to create a clearer, more legally-certain, predictable, and modern form of support. However, the actual changes implemented were minor and did not address the fundamental challenges of the previous childcare allowance benefit. The contribution, however, shows that a clear effect of the reform is that the application of the benefit criteria has become significantly more restrictive, likely aimed at cost reduction. Meanwhile, this change has not resulted in increased legal certainty. Instead, the contribution demonstrates how the restrictive application, lacking clear connection to regulatory changes or guidance in preparatory works to the reform, has undermined legal certainty and increased uncertainty for the parties involved.

Lotti Ryberg Welander's contribution, *The Investigative Responsibility at the Swedish Social Insurance Agency – The Example of Sickness Compensation* Utredningsansvaret hos Försäkringskassan – exemplet sjukersättning, emphasises the importance of fostering an intra-agency culture that strives to ensure due process and fairness in case management and decision-making regarding social insurance benefits. The article approaches this overarching theme by examining more closely how the Swedish Social Insurance Agency has interpreted as well as implemented its investigative duty regarding sickness allowance claims through the creation of internal guidelines or the establishment of fixed procedural steps. The contribution highlights how independent legal assessments prioritise loyalty to rules over policy goals, yet still shows that policy goals have evidently influenced the Social Security Agency's application of benefit criteria. An intra-agency culture that leads to administrators relying on internal guidelines rather than primarily the legal sources increases the

risk of prioritising policy objectives over legal compliance. One key point is emphasising the importance of the agency securing good administration practises through educating its administrators in independent legal assessments, particularly of relevant case law in order to support a more-nuanced and legally sound application of the benefit criteria.

Through its focus on susceptibility to fraud and incorrect payments within personal assistance benefits, Therese Bäckman's contribution, *The Vulnerability of Personal Assistance Allowance to Fraud and Error* Den personliga assistansens sårbarhet för fusk och oegentligheter, highlights the importance of balancing individual rights with considerations of the system's legitimacy from a perspective of collective interests. The contribution analyses the vulnerabilities and weaknesses associated with fraud and incorrect payments in the administration of personal assistance benefits. Against the backdrop of an identified discourse that primarily links the susceptibility to wrongful payments to the design of the benefit criteria (and thus to the design of the right to personal assistance), the contribution emphasises the importance of supplementing this perspective with a focus on how to secure effective administrative control at the agency level. Greater attention also needs to be given to fraud and incorrect payments within social security law research. Otherwise, there is a risk that political solutions to tackle fraud primarily will resort to restricting individual rights, disproportionately affecting those genuinely in need of support.

4. Closing reflections and a call for continued discussions

Overall, the contributions in this thematic issue underscore the intricate dynamics inherent within the Swedish social security system, as well as reveal its nuanced interplay with both domestic and international, legal as well as societal, contexts. While primarily configured at the national level, the Swedish social security apparatus is not immune to broader transnational influences and obligations. This leads to challenges on how to approach this field from a methodological point of view. Different legal topics are involved in these questions, demanding thorough and genuine scientific discussions and dialogue as well as deep insights in many fields

of law, both national and international. Acknowledging the significance of enhancing Nordic scholarly discourse on the legal configuration of social security and its impacts is thus crucial. Through sharing experiences and perspectives, we stand better prepared to leverage insights and aid in fostering more resilient and effective social security systems. We therefore hope that this issue will contribute to enriching such a dialogue and open up for new comparative exchanges, to further facilitate the exchange of ideas and best practices not only within the Nordic region, but also beyond.

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