1 **Labour Court Judges and Social Policy**

a) In what areas do judgments of your or other courts in your country pertain to social policy by either implementing or creating policies?

<table>
<thead>
<tr>
<th>Possible areas:</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>- freedom of association</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- collective bargaining</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- strikes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- prevention of collective conflicts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- equality at the work place</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- the definition of “employee”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- the definition of who is the “employer” of people performing certain types of work</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- the application of labour law to irregular, disguised, or ambiguous working relationships</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- education or occupational training</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- freedom of occupation and non-competition clauses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- work safety</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- protection of vulnerable groups (such as unskilled people, foreign workers, disabled people, etc).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"Social policy" is, at least in Swedish terminology, a very wide concept which is not used very often in the field of labour law. However, as I understand this question, judgements of the Labour Court pertain to all the mentioned possible areas with two exceptions: education/occupational training and work safety. The Labour Court also deals with disputes...
that do not fit in under the categories mentioned in the questionnaire, but those disputes probably can not be described as pertaining to social policy.

b) What has been, in general, the contribution of the labour courts in your country to the development of social policy? (Please see under (c) before answering this.)

The contribution of the Labour Court in this field is difficult to describe in a general way. Even if Sweden has a mainly statutory law system, case law has played an important role in implementing social policy decided by the legislator, i.e. the Parliament. In a few specific cases, the Labour Court has created new principles without support in existing statutory law, see c).

c) Relating specifically to freedom of association, what has been the labour courts’ role in developing and/or implementing your country’s social policy?

Relating specifically to freedom of association, the Labour Court has doubtless played an important role. In the beginning of the 20th century, there were no statutory rules in this field. In 1906, the Confederation of Swedish Enterprise and the Swedish Confederation of Trade Unions made a collective agreement (Main Agreement), which meant i.a. that parties on both sides were obliged to respect the freedom of association. The case-law of the Labour Court (the court was created in 1929) meant that the Main Agreement was interpreted rather extensively, so that the obligation to respect the freedom of association really had practical effect. Statutory rules on freedom of association were introduced only in 1936 (with amendments in 1940). Those rules confirmed the case-law of the Labour Court.

d) Describe briefly some labour court judgments which have implemented or determined social policy; if possible, relating to freedom of association, including the protection or encouragement of trade unions and collective agreements.

In this context one may mention the important judgements that deal with the burden of proof in cases concerning freedom of association. Many of those cases deal with the situation where an employer has taken some measure against an employee. It may have been a dismissal or any other measure to the detriment of the employee. Such a measure is deemed to be a violation of the freedom of association only if the employer has had a purpose to prevent the employee from enjoying his freedom om association. But how can one prove someone’s purpose with a certain action? In cases of this kind, the Labour Court has established that the burden of proof should be divided between the parties: The employee (or, in practice due to Swedish procedural law, the pertinent trade union) has to show facts that makes probable that the employer had such a purpose. If this has been made probable, the employer has to prove (full burden of proof) that he indeed did not have a forbidden purpose with his action. This principle of divided burden of proof is still valid.

e) Have there been instances in which labour court decisions relating to social policy have been incorporated into statutes, changed by statutes, or adopted by the general courts?

The Labour Courts judgements described above under d) were incorporated into the 1936 Freedom of association. Quite certainly, the case-law of the Labour Court has had an influence on general courts. One obvious example is the definition of "employee", which is important not only in labour law disputes. The concept of employee is relevant in insurance
policies and in many other cases.

f) Is there a connection between social policy and social justice in labour court judgments? Please explain.

If I understand this question correctly, there is a strong link between social policy and social justice in the Labour Court judgements. These judgements implement statutes with the express purpose to create what may be described as social justice (protection of employment, co-determination on the work-place etc.).

2 Labour Court Judges and Access to Justice

a) What has been the contribution of the labour courts in your country to effectively ensuring the appearance before the judge on truly equal terms for all parties involved? To what extent is this contribution related to aspects such as cost (for instance, exemption from certain court costs for the financially weaker party); the possibility for workers to receive professional assistance by a lawyer or to be represented by other experts (for free?); the possibility for trade unions to appear in court (on their own behalf, as representatives of their members, and under what conditions if any); and the burden of proof?

As far as labour law disputes are concerned, access to justice has been provided quite efficiently by the Swedish legislator. In the Labour Court procedure, the pertinent trade union acts as a party on behalf of its member. This means that the trade union provides free legal aid (most unions have their own specialist lawyers). The trade union also pays the employer’s costs caused by the trial, if the employer wins the case. - If the employee is not member in a trade union, he has of course to act on his own. He will in most cases be entitled to legal aid according to the 1996 General Legal Aid Act. But even if he has been granted legal aid, he will have to pay the employer’s costs if he loses the case.

b) In what manner and to what extent is the labour court able to reconcile careful analysis leading to well-founded and impartial rulings, with the need, strongly felt in the area of labour law and social protection, for a rapid delivery of judgements? (This may include a discussion of issues such as the use of new technologies; “out-sourcing” of certain tasks (formerly) performed by judges; shortening of deadlines; oral procedures.)

There is no question that, when the Labour Court was created in the nineteen-twenties as a one-instance court with professional and lay judges, the key factors was the need for a procedure with both expertise and swiftness. Sometimes, the Court has to deliver interim decisions or judgements after a very quick procedure, sometimes in cases concerning very complicated legal problems. It is really up to others to decide to what extent the Labour Court is able to reconcile careful, well-founded rulings with the need for rapid delivery of judgements. However, it seems that no errors have been made due to lack of time. In other words, even if many judgements of the Labour Court are widely discussed, there seems to be no special criticism concerning those decisions or judgements which have been delivered rapidly due to the nature of the dispute. - In cases where there is a need for rapid procedure, the Court often decides a day for a main hearing as soon as the case has been started. Even as I write this, the Court is preparing for an oral hearing concerning a strike in all Swedish harbours. The case was submitted to the court this morning. The oral hearing will take place
The strike is due to start one day later. The Labour Court will pronounce its decision whether the strike in accordance with Swedish law before the outbreak of the strike. From a legal point of view, the dispute is quite complicated and the decision of the Court will be an important precedent.

c) Do you consider, in this regard, that the requirement of an efficient labour court raises the question for the judge to also develop personal managerial qualities?

Managerial qualities are of course of utmost importance for the management of the court as a workplace. In many important respects, a court works more or less in the same way as any other authority or even as many private enterprises. Management encompasses the leading of other people and creating motivation for the staff, so that the court works well and is a workplace where people do what they should do and are quite happy about that.

Managerial qualities probably are not a requirement for the actual judging. Of course, personal authority is a good thing for commanding the procedure, especially the oral procedure, but that is in my view not necessarily the same thing as managerial qualities in the strict sense of the word. A judge may be very good at judging, he may be a probing lawyer, but not necessarily a good managing director for the court.

3 Labour Court Status and Social Policies

a) Is the role of your court, or other courts in your country, limited to the implementation of social policy set in statutes? Or do your court’s judgments include judge-made law regarding social policy?

As I have understood the concept of Social Policy, the role of the Labour Court is on the whole limited to implementation of social policy set in statutes. There is of course a grey zone where the question arises whether the Court is merely implementing statutory law or makes new law of its own, but that is the case with most Courts of the last instance (even in non-Common law systems).

b) In your opinion, should labour courts adopt a role of “judicial activism”, especially relating to judge-made social policy?

In Sweden, the role of a Court primarily is to implement statutory law. In some cases, the Court has to fill the gaps when that seems required for the consistence of the legal system as a whole. But nowadays there is not much room for an activist approach without support of legislation. ”Politics are for politicians”.

4 The Judge’s Personal Condition and Social Policy

a) What is the role of individual judges’ personal values, philosophy and outlook on life in their judgments? What is their role (personal influence) in deciding social policy issues?

This is of course a very difficult question to answer truthfully. The general view among Swedish lawyers is that the judge’s personal values and outlook should not influence the actual decision-making. According to this view, the judge should ideally work as a tool for
the implementing of statutes decided by the democratically elected parliament. If the
decision-making concerns a problem that is not covered by statutory law, the judge should try
to find the solution that harmonises best with principles in adjacent fields of the legal system
as a whole. So, the judge’s personal outlook in the strict sense of the word is not really meant
to influence his decision-making. However, if this is a truthful description of the reality is of
course quite another thing. Even a judge who really makes an effort not to let his personal
values influence on the judgement may unconsciously slip from the accepted path. After all,
judges are human beings.

b) How do judges learn about social problems, social issues at the workplace and
social values? In other words, how are judges trained to deal with social
policy?

In Sweden, there is no special education for judges in the field of social policy. The
professional judges working in this field have mostly been professional judges, who have
started their career in the general court system. They have later come to serve as junior judges
in the Labour Court and even later to participate as member (mostly vice chairman) of the
Court. With these experiences of labour law, the judges later have been able to deal with the
cases in the capacity of chairman of the court.

c) Is this adequate in your view, and how should they be trained?

Judging may very well be described as a life-long education, and the experiences that the
judge makes from a long row of cases certainly serves well as an education in itself. Of
course, other activities, for instance seminars dealing with different topics (like this one!) are
extremely valuable. But the most important education probably is the actual judging.

5 Lay Judges, Professional Judges and Social Policy

In case your labour courts have professional and lay judges:

a) What is the role of lay judges (public representatives) in implementing and
making social policy and deciding issues relating to social policy?

The Swedish Labour Court in session consists of seven judges: The Chairman, Vice
Chairman and a third "Civil Servant Member", plus four members (lay judges). Just like the
professional judges, the laymen are appointed by the government after nominations made by
the central organisations on the labour market (two lay judges from the employer side, two
lay judges from the employee side). The lay judges are sworn judges, and are expected to
participate in the decision-making in the same objective way as the professional judges. The
difference between the two categories lies in their professional background. The laymen
may nowadays quite often have legal education, but what is more important is that they have
exactly the kind of experience of social policy matters that has been dealt with under item 4
above. Their role may very briefly described so that they participate in the same way as the
other members of the court.

b) What is the lay judges’ contribution to the judgement itself, if any? (Would they
be able to overrule the professional judge, for example?)
All seven persons in the court in session have one vote. Therefore, the four laymen may in theory overrule the three professional judges. This has happened only once in history (that was in the 1940’s). The laymen’s contribution is only to cast their vote. The judgement is written by the chairman (with assistance by a junior judge assistant, who has no vote).

c) Are the perspectives and ideas of lay judges on social policy different than those of the professional judges?

As stated under a) above, the laymen have exactly the kind of experience of social policy matters that has been dealt with under item 4 above. Their outlook may for this reason be different from that of the professional judges. The most important thing is that the lay judges may contribute with their experience of everyday practice in workplaces and in negotiations between organisations. Even if most lay judges do not have legal education, they are often remarkably well trained in the kind of “formal thinking” which is sometimes needed, for instance when dealing with disputes concerning the interpretation of a collective agreement.

d) Are there any patterns in the way lay judges decide on matters relating to social policy? For example, do lay judges representative of labour usually vote to implement social rights while lay judges representative of management vote to oppose them?

Lay judges from the employer side may of course have other attitudes than lay judges from the employee side. But the differences should not be emphasised. In most cases (circa 85 per cent), the judgement of the Labour Court is unanimous. The important thing is that the court consists of well-informed persons with different experiences. The discussions within the court clearly benefits from this.