COLLECTIVE AGREEMENTS: A CROSSROAD BETWEEN PUBLIC LAW AND PRIVATE LAW

REINHOLD FAHLBECK

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REINHOLD FAHLBECK*

My aim here is to analyze the contractual versus the legislative aspect of collective agreements. What factors distinguish public law statutes from private law agreements? In this report the public-private law dichotomy will be used to distinguish between features that characterize legal instruments created by public authorities when acting unilaterally as supreme rule-makers in their field of activity, and features that characterize legal instruments created by private actors who strike bargains and arrive at agreements by joint decision-making procedures. My approach is the functional one of considering legal rules governing collective agreements primarily within their industrial relations context.

The institution of collective agreements came into existence approximately one century ago. In terms of age it has undoubtedly acquired some maturity. One ought to know by now what collective agreements are. The stupor and the puzzlement that our late 19th century jurist predecessors felt when confronted with collective agreements should have subsided. Lucidness should reign. The collective agreement, however, remains elusive. To some extent, the reason seems to be that it assumes different shapes in different surroundings. For example, the typical collective agreement in the U.S. differs sharply from its counterpart in, for example, Sweden, though each is a collective agreement under the laws of its country and would remain a collective agreement even if laws of the two countries were suddenly interchanged. In short, collective agreements are true chameleons in the world of legal creatures.

Industrial relations systems and the legal character of collective agreements

Every society has an industrial relations system[1] whereby human

* Professor of Labour Law, University of Lund, Sweden. This article is a shortened version of the General Report presented to the Twelfth Congress of the International Academy of Comparative Law, 1986.

1. "Labour relations system" would be a more adequate term since systems for putting human

labour is put to work. Such a system performs three main functions: the procurement of labour, the setting of compensation for work done and, finally, the rule-making to regulate the workplace.[2] These issues occur at all levels of economic life, e.g., in a nation as a whole, in various branches of industry and at individual workplaces. Systems of this sort are not necessarily confined to a nation; for example, multinational enterprises tend to develop transnational industrial relations systems for the entire enterprise irrespective of national borders.[3] But in the present context the national industrial relations system is of primary interest since this is the system most closely related to the legal regulation of collective agreements.

Collective agreements are integral to all three of the main functions of industrial relations systems. Agreements are influenced by various factors in the system, while at the same time influencing it. For example:

In many countries there is a wish to arrive at uniform standards of compensation for employees. In countries where union membership is low or medium-high, such as France or West Germany, one way to achieve uniformity is to provide for the extension of collective agreements to those not originally covered by them. In countries where union membership is high, such as Israel or Sweden, the need for extension is less, so sometimes there are no rules on extension.[4] In this way, union membership proportions may influence the existence or non-existence of rules on the extension of collective agreements. On the other hand, it seems fair to assume that rules on extension have some bearing on union membership rates. The incentive to join unions is less because non-members will receive the same compensation as members.[5]

This example also illustrates a feature of importance when discussing legal characteristics of collective agreements. Collective agreements

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labour to work antedate industrialism, and also because such systems are not confined to industry proper.

2. *See generally* J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (1977).

3. Transnational collective agreements do exist but are very rare.

4. Sweden is an example of this. On the other hand, Israel does have rules for the extension of collective agreements despite a very high union membership rate.

5. To the best of my knowledge there is no study on the effects on union membership rates of the extension of collective agreements. To illustrate the dilemma presented in the text, see M.A. HICKLING, NATIONAL REPORT FROM CANADA (COMMON LAW) (1986)(REPORT ON FILE AT THE UNIVERSITY OF LUND LAW LIBRARY), DISCUSSING LABOUR STANDARDS LEGISLATION VERSUS COLLECTIVE AGREEMENT REGULATION OF AN INDUSTRY-WIDE CHARACTER. He concludes:

> Thus collective bargaining has a direct and important impact upon the determination of minimum wages and maximum hours. Indeed, in giving evidence to the House of Commons Standing Committee on Labour and Employment in 1966, an International Brotherhood of Electrical Workers stated "the day I sign an agreement for an electrician every electrician in the province will get that rate." He complained of the detrimental effect this had upon unionization in the province. Why should people join when the union rate is guaranteed by the governmental?

Id., at 74, note 326.

dwell in the borderland between private law contracts and public law statutes. It is obvious that the extension quality belongs to the public law realm. In countries where collective agreements can be extended, for example in France, collective agreement regulation takes on a certain statutory character. But how about countries that have no statutory rules on extension? Is collective bargaining law less statutorily oriented because of this?

To be sure, collective bargains can be treated as private law contracts without further ado, but the very fact that collective agreements by virtue of their own force cover a high percentage of employees lends them a certain statutory aura. From a functional point of view collective agreements can more closely approach statutes in countries that have no mechanism for the extension of collective agreements than in countries that have. This is particularly the case in countries, such as Israel where bargaining is very centralized.

The example also illustrates yet another salient feature of industrial relation systems, namely that they are influenced by overriding principles in society. In the example, an underlying principle is whether or not society should aim at uniformity in terms and conditions for work. The United States presents an interesting contrast to most other countries in this respect. Efforts of a legislature to achieve uniformity in terms and conditions of work run counter to the very structure of the country and basic principles of voluntarism which dominate collective bargaining law in the United States.[6] Consequently, there are no legal rules that allow collective agreements to be extended beyond the realm of the contracting parties. On the other hand, labour law in the United States is based on the principle of exclusive representation by the majority union. Majority rule means that members as well as non-members are covered by collective agreements entered into by the majority union. In a way that *is* extension![7] But this extension rule is of a completely different tenor. The rule is not primarily concerned with uniformity in employment matters. Instead, it has deep roots in overriding political principles (ranging back to the Pilgrim Fathers' Mayflower Compact) concerning how best to establish democratic rule among men.

The industrial relations system of any nation, in fact, is part and

6. *Cf.* Herzog, *U.S. National Report*, § 9, in THE LEGAL NATURE OF COLLECTIVE AGREEMENTS (1986)(report on file at the University of Lund Law Library).

7. Incidentally, Argentina has a system that is stunningly similar to the U.S. system. *See* Fernandez-Giannoti, *Argentine National Report*, in THE LEGAL NATURE OF COLLECTIVE AGREEMENTS (1986)(report on file at the University of Lund Law Library). Dr. Fernandez-Giannoti has answered in the negative my question of whether the Argentine regulation on majority rule and exclusive representation is of U.S. origin. Letter from E. Fernandez-Giannoti to R. Fahlbeck (Dec. 30, 1985)(letter on file at the University of Lund Law Library).

parcel of that nation's structure and characteristics to such an extent that components of the system cannot be easily compared with its counterparts in other countries. This, in turn, explains the common observation[8] that industrial relations institutions cannot easily be transplanted from one country to another.[9]

Collective agreements are by their very idea collectivist. The willingness to accept attitudes as well as regulation by means of such instruments should be related to identification criteria among people, such dichotomies as individualism versus either class or society at large. For example, society in the United States is a society where the idea of individual "pursuit of happiness"[10] is at the very roots. The lonely rider setting off on his horse to create a new life for himself and his family is the very archetype of an American. Sweden, on the other hand, is a country where class and society as a whole have always been very important identification criteria. People look upon themselves as members of society rather than as one of those who make up society and they find solace in class membership. The U.S. Supreme Court once referred to "the levelling process . . . of unionism" as something alien to people "who have demonstrated their initiative, their ambition and their ability to go ahead."[11] The clearly contemptuous reference to unions (and by implication to collective regulation) tells much about a mood prevalent in one country (the U.S.) but virtually non-existent in another (Sweden). Given such characteristics it should come as no surprise that regulation by means of collective agreements is generally accepted in Sweden but not in the U.S.

This example and its ramifications may seem simple, even obvious. Still, there are problems here. New Zealanders regard themselves as "rugged individualists."[12] Nevertheless, New Zealand has developed a system of compulsory unionism, something which does not exist even in countries where collectivism is an important identification criterion, such as Israel or the socialist countries. New Zealand has also adopted a sys-

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8. *See, e.g.*, Dunlop, *supra* note 2, at 27. Israel Judge Zvwi Bar-Niv once said on this subject:

> By all means—don't copy, don't transplant foreign institutions; to study foreign institutions—yes; to compare—yes; to be open to influence—yes; to transplant or copy—no! Transplanting something which cannot become an organic part of the economic-social-political system will cause "rejection", even more severe than in medical transplants of a foreign organ in a human body.

9. Still, rather much transplantation work is undertaken, sometimes with great success. One prime example is the adoption in Australia of rules on compulsory arbitration, very similar to those enacted in New Zealand. Why did this transplant succeed? The Australian National Reporter (McCallum) does not discuss this.

10. The Declaration of Independence (U.S. 1776).

11. N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 281 n. 11.

12. Szakats, *New Zealand National Report*, § 1.3, in THE LEGAL NATURE OF COLLECTIVE AGREEMENTS (1986)(report on file at the University of Lund Law Library).

tem in which collective regulation in terms and conditions of employment not only prevails but is centralized and legalistic in a way that is surpassed by only few other "western" nations. The system means that often parties to a collective agreement "in fact legislate by their agreement, by private contract, and superimpose it on organisations and persons not privy to the underlying settlement achieved under the guidance of a conciliation council."[13] On the whole the situation seems to be pretty much the same in neighboring Australia. Why this is so is outside the scope of this report to analyze. The National Reporters from Australia and New Zealand both point to the devastating effects of industrial unrest in their countries at the turn of the century. This does not explain, however, why both countries have retained a system that seems at odds with many other features in their society.[14]

Further examples in which the "identification criteria test" will cause trouble can easily be found. The principle of exclusive representation for majority unions in the United States has led to a state of affairs that more or less blocks individual employees from access to the legal machinery where they have a grievance under the collective agreement. Although individual employees are not completely barred from acting on their own, they are still to a great extent "prisoners of the union". Regulation in the United States here is probably unparalleled in its collectivism.[15] It gives the impression of being very much at odds with the "solitary rider shaping his own future" image and also with access to justice rules prevailing elsewhere in the society.[16]

At the very heart of any industrial relations system (and the issue of what basic functions collective agreements have) is the role of the government and the labor market parties in regulating wages and other conditions of employment. Sheer *étatisme* has long prevailed in the non-market socialist countries. Collective agreement regulation is apparently gaining ground, spurring a debate on the legal status of collective agreements not unlike the one raging in Europe at the turn of this century. *Étatisme* bordering on absolute state power in the labour market seems to prevail in Brazil and also largely in Argentina. Collective agreements in these countries are firmly embedded in government economic planning despite their nominally private contractual character. At the other end

13. *Id.*, at § 9.4.

14. E.g., the systems of both countries are very centralized. This seems to be in disaccord as well with society at large.

15. To what extent the weak position of individual employees vis-à-vis the majority union has kept down union membership rates in the U.S. is not known. However, it seems reasonable to suspect that the relationship may be a rather definite one. After all, who likes to be cut off from free access to the legal machinery?

16. I intend to discuss this and other matters in a forthcoming study on labour law and industrial relations in the U.S., expected to be published in 1987-88.

of the scale is the U.S., where government intervention in determining the outcome of collective bargaining is very low. Still, an overall impression is that a certain narrowing of the gap between nations is taking place in the distribution of power to make rules for places of work. A gradual increase in regulation by the labour market parties in heavily state regulated countries—and a gradual decrease of it in countries without traditionally strong state regulation—seems to be an international trend.

It is my impression that the role of collective agreements from a functional point of view is becoming rather similar in socialist countries and in capitalist countries like many Western European countries. In the West there is a need to coordinate the various sectors of the economy, which calls for state intervention into the collective bargaining process. We are increasingly facing a three-tier bargaining process, i.e., bargaining between employers and employees with the participation of the state. Centralization is the common result. In socialist countries there is a need for decentralization. This need has paved the way for the resurgence of collective agreements. Of course, the systems have not yet reached a point where they can be said to represent an equal amount of state intervention versus enterprise freedom of action. However, we seem to march to that goal but from different points of departure.

An interesting observation here is that a high degree of activity by public authorities need not exclude a high degree of activity by the labour market parties. One very telling example is Australia. Here public authorities, the Australian Commission and one State Industrial Tribunal in each of the six states are at the forefront, providing much of the rule-making in employment matters. On the other hand, there is also much vigorous collective bargaining going on. The technical mechanism that makes it possible for both private parties and public authorities to exercise so much influence is described by Professor McCallum in the following way:

> The vigorous Australian trade union movement has . . . engaged in a high level of collective bargaining with employers and with their employer associations. In most countries, such bargaining results in the conclusion of binding collective agreements between the parties, but in Australia this legal function is undertaken by certified agreements and by consent awards which are handed down by the tribunals, by above award contractual bargaining and, in some instances, by common law collective agreements which I have suggested are unenforceable in the courts.[17]

Belgium and Israel provide other prime examples of intense activity

17. McCallum, *Australian National Report*, § 9, in COLLECTIVE AGREEMENTS AND COLLECTIVE BARGAINING WITHIN THE AUSTRALIAN REGIMES OF COMPULSORY CONCILIATION AND ARBITRATION (1986)(report on file at the University of Lund Law Library).

by the labour market parties and by public authorities alike. Labour market rule-making is no zero-sum game in the sense of there being room for only a specific amount of activity.

The functionally misleading classification that collective bargains are often given by the law is sharply illuminated by comparison between Australia and Belgium. In Australia, legally speaking, there are no collective agreements at all of an industry-wide application but many industry-wide awards by the Australian Commission and the various state tribunals are certified agreements and consent awards. Here the authorities in effect do little more than rubber stamp agreements reached by the parties. The ensuing awards are legally not collective agreements but they are *de facto*.[18] "If the definition of a collective agreement is broadened . . . then such memoranda of agreements and consent awards should be called collective agreements."[19]

In contrast, agreements by the labour market parties in Belgium are regarded as collective agreements in spite of the fact that they can be applied nationwide and are concluded in the Labour Council, and even if the agreement has been declared mandatory by the King.[20] The Belgian experience exemplifies the labour market parties functioning as "a kind of social parliament" under rules laid down by law.[21]

There is not much difference in form and substance between collective bargains in Australia and Belgium. Yet, in Australia these bargains become public law regulations of a statutory type whereas in Belgium they are considered private law contracts. From a functional point of view, the collective agreements in most relevant aspects seem to have the same legal consequences, e.g., field of application, mandatory force, enforcement and sanctions. The difference in legal status appears to be of no consequence.

Collective agreements can have legal consequences that make them come close to ordinary statutory regulation instruments—or even turn them into *de facto* instruments of that kind—despite the fact that collective bargaining law treats them as private bargains. Apart from the Belgian experience just mentioned this is very conspicuous in Canada and

18. *See id.*, at § 7(A). The Canadian National Reporter, Professor Hickling, reports about a system in Canada that comes very close to the Australian experience, only that in Canada the bargains become legislation rather than awards. This system for industrial standards legislation used to be an important one but its importance has declined due to the introduction of other ways of obtaining uniform regulation. *See* M.A. HICKLING, *supra* note 5, ch. VII, § 4(4).

19. Letter from R. McCallum to R. Fahlbeck (Feb. 12, 1986) (letter on file at the University of Lund Law Library).

20. *See* Magrez, *Belgian National Report*, LA NATURE JURIDIQUE DES CONVENTIONS COLLECTIVES DE TRAVAIL, ch. III. *See also* Blanpain, *Belgium*, in INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS (R. Blanpain ed. 1985).

21. *See* Blanpain, *supra* note 20, at ¶320.

the U.S. On the surface, collective agreements in these two countries are considered private law contracts since they are voluntary, no subjects are mandatory and there is no requirement to submit them to a public agency for approval. Voluntarism seems to be unmitigated. On closer look, however, North American collective agreements are in fact far from that, especially from the point of view of the employees.

Exclusive representation of all employees in the bargaining unit by the majority union turns the union into a *de facto* legislator under a system—an industrial democracy, as it were—where legislation is the joint responsibility for the majority party and the executive. All employees are subject to this rule-making, even those who voted against the union. The majority union enjoys a considerable amount of discretion in representing employees,[22] although it must deal with employees in a fair and honest way, showing honesty of purpose and freedom from discrimination. However, as long as the union acts in this way, individual employees cannot successfully challenge decisions by the majority union, however harmful to their interests. Direct contacts between employees and their employer are prohibited in most instances, much like the ban on direct popular actions in representative democracies. It can come as no surprise that the underpinning for this system is an analogy with society at large. "Democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guarantee of political liberty that mankind has yet discovered."[23]

To conclude the discussion, an overriding impression is that the dichotomy between public law statutes and private law contracts does not make much sense legally or functionally in the field of labour market regulation. Another overriding impression is that the legal status of the bargain is elusive. Why all these difficulties and uncertainties? The prime reasons, I think, are historical, to be found in the genesis of collective agreements as an institution and in the timing of state intervention to regulate them. Another important reason is that the functions of collective agreements have shifted over the time.

Origins of collective agreements and state regulative intervention

The collective agreement as a specific legal institution has existed for slightly more than one century. It seems justified to say that it came into existence to fill the vacuum left by the collapse of the regulative structure

22. The traditional way of looking upon the union's position here is to describe the limitations imposed upon unions, e.g., the duty of fair representation. *See generally* MCKELVEY, THE CHANGING LAW OF FAIR REPRESENTATION (1985).

23. *See* 50 Cong. Rec. 79:7571 (1935).

in labour relations in force in Europe up until the advent of the 19th century liberal state. That regulative structure was partly a state regulation, partly a state supervised regulation by the various guilds in the towns. One of main characteristics of this structure was uniformity.

A wish to establish or to maintain uniformity became an important employee goal in the 19th century for a variety of reasons. In the first place uniformity was part of the historical heritage. Another reason was employee efforts to establish some kind of minimum income to offset the effects of competition for work between workers caused, *inter alia*, by the tremendous increase in population throughout the 19th century in Europe and by increased worker mobility.

The function of the collective agreement regulation that emerged was basically the same as that of previous times, i.e., the establishment of uniform standards. One function was added, namely that of preventing industrial actions. But similarities do not end here. There also was—and still is—much similarity in substance between the emerging regulation and the previous master and servant regulation. I refer here solely to the normative rules governing the relationship between individual employers and their employees.[24]

Normative rules in early collective agreement regulation (as well as in today's labour law) were very much indeed akin to the master and servant regulation, imposing obligations on employees to be loyal to their employer, to obey him to perform work as ordered by him and to submit to discipline administered by him. The 19th century employment-at-will doctrine, however, was new. But as of today there is not much left of the fire-at-will doctrine in Europe and the hire-at-will rule is no longer quite as potent as it used to be. So in fundamental employment matters the emerging collective agreement regulation to a great extent simply adopted previous statutory rules. In short, the subservient position of employees remained, and remains the hallmark of employment law.

The earlier form of statutory regulation in Europe covered all employers and employees, a mode of regulation similar to the emerging collective bargaining regulation. Coverage of collective agreements for a long time lagged considerably behind the previous regulation, since collective bargaining of necessity started at a local level. Later, coverage by collective regulation spread but never achieved total coverage on its own. In some countries, such as Israel or Sweden, the goal has nearly been reached, but in most countries it has been necessary to intervene by rules on adhesion and extension so as to further total coverage.

24. To the best of my knowledge there is no study comparing master and servant regulation with today's regulation of individual employment contract regulation. My statement is based upon my own knowledge in this field.

The discussion thus far can be summed up in this way. Collective agreement regulation filled the vacuum left in Europe by the fact that the statutory regulation, in effect for many centuries prior to the advent of the liberal state, had become defunct. The collective regulation that emerged had much the same functions as the previous form. In substance, this new form of regulation was very similar to the previous master and servant regulation, though with less encompassing coverage. The difference, however, is quantitative rather than qualitative, since both systems aimed at total coverage.

Given all these similarities, it would not be surprising to find that collective agreement regulation had also assumed the same legal status as previous regulation. Historically speaking, the answer, from a European perspective, is that it did not. The reason, I suppose, is because the leading principle of the liberal state was non-intervention in human affairs. Because of this, state regulation of the employment relationship was dismantled. Uniform regulation of this relationship, thus, had to be carried out by means of agreements between actors in the labour market itself. The push to achieve uniformity was strong within the employee community and gave rise to collective agreements. However, the contractual status of collective uniformity was originally, I suppose, immaterial, unintentional and accidental from the point of view of the employee community. But contracts were amiable to the 19th century liberal state. Since their standard of living was more important to them than legal qualifications, workers accepted the contractual nature of the collective bargain. Here, it seems to me, is the very root of the confusing dichotomy of contractualism versus legalism in connection with collective bargaining agreements. Here, in other words, is where the public/private law tension in collective bargaining law and industrial relation originates. The purpose of collective efforts by employees to uniformly regulate their working conditions had nothing in common with private law contract ideas in general. On the other hand, private law contracts were the only permissive means of establishing uniform working conditions.

It is interesting to note that countries, other than those European countries where collective agreements first came into being, seem not particularly concerned about the statute versus contract dichotomy. Collective agreement regulation in these countries is firmly embedded in an overriding legal regulation of collective bargaining and collective agreements.

Does this mean that the dichotomy is of no consequence? In some countries perhaps it is. Nowhere is this more conspicuous than in some Eastern European countries. Professor Kunz, for one, notes that in the German Democratic Republic collective agreements have the character

of state normative acts, just as have laws (*Gesetze*) and ordinances (*Verordnungen*). But not all Eastern European countries have relegated the dichotomy to the legal junkyard. In fact, it is very much the other way around. First, there is much discussion in reports from these countries concerning whether collective agreement rules represent authentic rule-making or are simply a way of implementing the only authentic rules existing, i.e., statutory rules. Second, there is an emerging discussion on the "nature" of collective agreements, to which I shall return later.

Another factor that should have much bearing on the legal qualification of collective agreements concerns the stage at which society intervened by enacting statutory rules on collective agreements. Attitudes by the ruling political parties towards joint efforts by employees to collectively regulate their conditions of work were, generally speaking, very negative at the time when the liberal state was at its zenith in the various countries. Individually negotiated private contracts was the leading principle. Gradually, attitudes have become less hostile in this respect, partly because trade unions have influenced public opinion. This should mean that the earlier legislative intervention occurred, the more private notions are likely to be found in collective bargaining law and, the later it came, the more there ought to be of notions that deviate from those of private contract law. The patterns, however, are not consistent. In Austria and New Zealand state intervention came at a very early stage in the development of the countries and yet intervention was of a very legalist character.[25] Not suprisingly, there is a relationship between the relative role that the state reserves for itself and the seriousness of the situation that triggers off state intervention. The same is true with regard to the degree of legalism in collective bargaining law. Prime examples here are Australia, New Zealand and the U.S. But such relationships are by no means without exception. Germany has seen two collapses in this century, but the role of the state is nevertheless not very predominant in the Federal Republic of Germany and collective agreements are not considered statutory type instruments.[26] Perhaps the reason is that, unlike Australia, New Zealand and the U.S. the upheavals were not caused by factors in economic life or by labour market conditions. Countries where there has been no government intervention prompted by a crisis seem to have collective agreement regulation of a predominantly private law nature, or no

25. A hypothesis presented by John Dunlop as one important factor in the shaping of an industrial relations system goes long to explain the Australian experience, though Dunlop does not refer to Australia. "When transformation proceeds . . . major breakthroughs rather than by more gradual processes, there is likely to be more centralization, and less regional and industrial autonomy, in the industrial relations system." Dunlop, *supra* note 2, at 315.

26. *Cf.* Hirshberg, *Federal Republic of Germany National Report*, ch. 8, in THE LEGAL NATURE OF COLLECTIVE AGREEMENTS (1986)(report on file at the University of Lund Law Library).

regulations at all, as in Great Britain. The Nordic countries provide examples of this.

Function of collective agreements: Western Models

In this section I shall present some models concerning the functions which collective agreements fulfill. The purpose is manifold. One is to illustrate the complexity of the role played by collective agreements. Another is to illustrate the principle that collective agreements assume different legal shapes according to the functions they have to perform. These three models deal with collective agreements in market economies of a "Western" type. I shall try to present a fourth model applicable to socialist countries.

The first model is of American origin. First presented in 1951 by Neil Chamberlain, it was subsequently restated in 1965.[27] The model is concerned with the United States labour market alone. It presents three concepts: (1) the marketing concept with the agreement as a contract; (2) the governmental concept with the agreement as law; and (3) the concept of industrial relations with the agreement as jointly decided directives. Professor Chamberlain summarized as follows:

> The marketing concept looks upon collective bargaining as a means of contracting for the sale of labor. It is an exchange relationship. Its justification is its assurance of some voice on the part of the organized workers in the terms of sale. The same objective rules which apply to the construction of all commercial contracts are invoked, since the union-management relationship is conceived as a commercial one. If a situation is covered by the terms of the agreement, the answer to the specific problem is logically derivative from the agreement.
>
> The governmental concept views collective bargaining as a constitutional system in industry. It is a political relationship. The union shares sovereignty with management over the workers and, as their representative, uses that power in their interests. . . . Interpretation of the terms follows from the logic of experience and morality, so that the agreement becomes in fact modeled to the dominant operational needs of both parties and their social setting, rather than the reverse.
>
> The industrial relations concept views collective bargaining as a system of industrial governance. It is a functional relationship. The union joins with company officials in reaching decisions on matters in which both have vital interests. When the terms of the agreement fail to provide the expected guidance to the parties, it is the joint objectives, not the terms, which must control.
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> As has already been suggested, it would be erroneous to consider these three approaches as sharply distinguished from one another or as mutually exclusive.[28]

27. N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING (2d ed. 1965).
28. *Id.*, at 136-38.

In an article published in 1977 I approached collective agreements in a somewhat different way.[29] Whereas the Chamberlain model deals with collective agreements at company level, I approached them at the level of the entire labour market. My model is concerned with a highly industrialized, northern-hemisphere "Western"-type labour market. I presented three concepts: (1) the private law concept; (2) the labour market concept, with the agreement as industrial code for an entire sector of the labour market; and finally (3) the constitutional concept, with the agreement as an instrument of government.

Under the first concept, two parties bargain for the sale of labour and for other terms of employment. The agreement is limited to members of the bargaining parties. The relationship is a commercial one spelled out in its entirety by the agreement. It is not even necessary that there be any legally enforceable contract at all if the parties can enforce the agreement by some extra-legal mechanism. Furthermore, there is no need that the parties to a bargain be representative or meet any other specific legal standards. Nor is there any need that the subject-matter of a bargain to be prescribed.

Under the labour market concept, the parties likewise contract for the sale of labour and for other terms of employment. However, the agreement purports to cover the entire sector of the labour market to which the agreement relates, not only members of the contracting parties. The relationship between parties here transgresses the purely commercial and assumes a legislative tenor. The relationship is not spelt out in its entirety in the agreement itself since local adaptations and supplements may be necessary. There is the need that the collective bargain has legal status, primarily because the bargain applies to employers and employees not privy to the original agreement. Further there is a need for assistance from society, again because the applicability of the bargain to "outsiders". This assistance may consist of courts considering the original agreement as representing good practice for all employer and consequently held to be implied terms, or the more common societal assistance, in the form of extension. Under this concept there is a need that the parties to the original bargain be representative and that the original bargain conform to certain substantive standards. The agreement assumes a "nature" that makes it virtually indistinguishable from statutes-at-large.

Under the constitutional concept, the parties do more than simply contract for the sale of labour and for other terms of employment, pro-

29. Fahlbeck, *Kollektivavtalets verkningar för utomstående. Kollektivavtalets roll i en ny miljö*, in ARBETSRÄTTEN I UTVECKLING. STUDIER TILLÄGNADE FOLKE SCHMIDT (1977).

viding for some kind of industrial democracy. Whereas the two first concepts concern essentially the relationship between employers and individual employees, the constitutional concept adds rules to govern the relationship between employers and the entire employee community. The employee side has some kind of co-responsibility for the running of the business, as a minimum the right to be consulted before management decides. The relationship between the parties encompasses the legislative and assumes an executive tenor as well. In other words, the relationship is of a markedly political nature. Under this concept, there is at least one additional requirement that unions, as well as employer organizations when these take part in decisions that affect individual employers, discharge their rights and duties regarding co-responsibility in a manner that is objective and impartial. From the point of view of individual employees and individual employers, the collective agreement here becomes virtually undistinguishable from a statute that confers authority on some public agency.

The third model for the functions of collective agreements was presented in 1984 by Professor Folke Schmidt, together with Alan Neal in their contribution to the International Encyclopedia of Comparative Law.[30] The Schmidt-Neal model is the broadest of the three models in the sense that it also deals with one aspect of collective bargains not covered by the other two, the cease-fire aspect. The Schmidt-Neal model is primarily concerned with highly industrialized "Western"-type labour markets of the Northern Hemisphere. The model does not deal with a variety of collective agreement concepts but discusses instead various functions of a hypothetical "Western" country standard collective agreement.

> The process of collective bargaining and the collective agreement serve the following five basic functions:
> (1) a cease-fire agreement, or a treaty securing industrial peace;
> (2) an instrument for the employees to control the supply of labour, and to protect the individual employee, as the weaker party to the contract of employment, against pressures from the employer;
> (3) a form of standard conditions; rather like a form for an insurance policy, or a bill of lading;
> (4) an instrument of co-operation between the *Sozialpartner;*
> (5) an industrial code, *i.e.*, a method of regulating wages and other conditions of employment, comparable with a statutory enactment.[31]

The cease-fire aspect of collective bargains is viewed as important in many non-socialist countries. As always, the United Kingdom is unique.

30. Schmidt & Neal, *Collective Agreements and Collective Bargaining*, in XV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 12 (1984).
31. *Id.*, at ¶16.

Given the fact that collective agreements are not enforceable by courts in that country, one important enforcement mechanism there is that of "industrial action, or the threat thereof."[32] In other countries covered by the present review the cease-fire flows directly from the collective agreement rather that from specific statutory regulation of the legal consequences of a collective agreement. In West Germany "it is generally agreed that the parties to a collective agreement are bound by an implied term of the agreement not to resort to industrial action before the expiration of the agreement."[33] In Israel the Labour Court has ruled that a peace obligation is implicitly included in every collective agreement whenever it is not so explicitly provided. The cease-fire is accepted as the *quid pro quo* of the bargain.[34] Under U.S. labour law a somewhat similar *quid pro quo* doctrine has been very influential. Some of the cease-fire effect comes about because of mandatory rules in the National Labor Relations Act,[35] but disputes concerning the application and interpretation of collective agreements ("disputes over rights") are not covered by these statutory rules, nor are many types of industrial actions of a sympathetic nature. It is the collective agreement which can provide, and often does, for industrial peace, in particular with regard to disputes over rights where the arbitration clause is the *quid pro quo* for peace.[36]

In the Australasian world the picture looks different. Here conciliation and arbitration processes are set in motion when industrial peace is threatened, although industrial actions are not forbidden. When mandatory conciliation fails in New Zealand and the arbitration process is not invoked it seems that nothing prevents either party from resorting to direct action.[37]If there is an agreement or an award, on the other hand, then industrial actions "are prohibited and amount to breach of the law". Professor Szakats rates the peace function as one of the two least important functions mentioned in the Schmidt-Neal model.

Of the remaining four functions mentioned by Schmidt-Neal, "Western" reporters basically agree that functions (2), (3), and (5) are applicable. However, there are exceptions. One, of course, is the United Kingdom. The other is Brazil, where collective agreements are uncommon, and where there is no substitute similar to the Australian consent award. The remaining ten reports vividly testify to the industrial code aspect. In other countries, collective agreements either apply directly to

32. *Cf.*. Schmidt & Neal, *supra* note 30, at 28.
33. Hirschberg, *supra* note 26, ch. 5, at 18.
34. Ben-Israel, *Israel National Report*, §5(A), at 15, in THE LEGAL NATURE OF COLLECTIVE AGREEMENTS (1986)(report on file at the University of Lund Law Library).
35. National Labor Relations Act, §8(d).
36. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
37. *See* Szakats, *supra* note 12, ch. 4, at 12.

all employees within their scope, an *erga omnes* effect, or can be made to apply to all of them by means of extension.

With regard to the role of collective agreements as an instrument of cooperation, seven of eleven reporters do not mention this function at all (Argentina, Australia, Belgium, Brazil, Canada, Mexico and the United Kingdom). In West Germany there is legislation on cooperation which takes this matter out of the realm of collective agreement regulation. The cooperation aspect is relevant for the U.S. because of "the absence of detailed legislation in the United States mandating cooperation".[38] In Israel the collective agreement is also the vehicle for regulation concerning "the employer's prerogatives".[39]

Functions of Collective Agreements: The Socialist Model

The function of collective agreements in socialist countries must be discussed separately. Regulation in Yugoslavia differs very much from that of the other socialist countries[40], but the other states also differ from each other in many ways. Still, it is clear that collective agreements fulfill basically the same functions in all of these countries. It is also clear that there are important differences between socialist and non-socialist countries despite the fact that functions (3), (4), and (5) in the Schmidt-Neal model are part of collective agreement regulation in socialist countries as well. However, one should observe that all reports from the socialist countries deal extensively with collective agreements as instruments of cooperation at the place of work for the realization of true industrial democracy. The reports show further that collective agreements there also serve to some extent to protect the individual employee. This is so despite the ubiquitous statement that collective agreements are concluded between parties who are not adversaries but, between those who share " a basic and growing community of interest".[41]

However, the overall impression of the functions which collective agreements have in socialist countries is that their main thrust lies elsewhere. I recognize that I am embarking on a perilous undertaking, I will do my very best to avoid becoming political, or being lured into any kind of propagandistic overtones. I want to be objective while looking

38. *See* Herzog, *supra* note 6, ch. V, at 38 n. 97.

39. *See* Ben-Israel, *supra* note 34, §5(D), at 21.

40. Brajc, *Yugoslavia National Report*, in COLLECTION AGREEMENTS AND SELF-MANAGEMENT REGULATION OF LABOUR RELATIONS IN YUGOSLAVIA (1986)(report on file at the University of Lund Law Library).

41. Kunz, *Nationaler Berich de D.D.R.*, ch. 5, at 19, in DER RECHTSCHARAKTER VON KOLLEKTIVEN VERTRÄGEN. The original text reads as follows: "eine grundlegender und noch wachsende Ueberinstimmung der Interessen [.]" (report on file at the University of Lund Law Library).

through the "Iron Curtain", both as a "Westerner" peeping eastward and as an "Easterner" peeping westward.

In non-socialist countries collective agreements focus on the employer, primarily containing rules that oblige employers and impose limitations on an otherwise existing employer freedom of action. In socialist countries collective agreements focus on the employee, but also do more than that. The emphasis, it seems to me, is on rules that oblige employees and put demands on them. True, many rules spell out the rights of employees such as pay, vacations, seniority and regulation of an industrial democracy type. However, the rules to a great extent impose obligations, stressing the need for efficiency, discipline and fullfillment of the plan, often suggesting that the plan be surpassed. Also, rules are ideological, concerned with fostering comradeship, encouraging mutual help and generally promoting "the formation of the new man, conscientious and morally high-standing".[42] Thus, in place of functions (1) and (2) in the Schmidt-Neal model one should perhaps add the following two functions as characteristics of collective agreements in socialist countries: (1) an instrument to inform employees of the goals of the enterprise and to obtain their support in reaching these goals, and (2) an instrument to prescribe the cooperation required of every employee to fulfill, and if possible to surpass, the plan.

The production of goods and services necessarily demand a certain amount of discipline and subordination. Truly efficient production demands more. In any production unit there are managers who exercise authority, and there are those who are managed. The degree of subordination of employees does not necessarily depend who owns the production unit or who appoints managers, in short on the economic system. Subordination in a privately held unit aiming at maximum long-term profit can conceivably be not only greater but also less than in a state- or even employee-owned unit. The same is true of the rough handling of employees and the "exploitation" of them. It all depends on how conditions really are.

The question now arises: What is the function of collective agreements in the process of organizing efficient production in socialist countries and in non-socialist countries? Considerations concerning efficiency are conspicuously absent in the Schmidt-Neal model. The critical reader might suspect that these scholars are trying to conceal the harsh realities of market economies. In contrast, reports from the socialist countries all

42. Ghimpu & Florescu, *Rapport National*, §2, at 5, LA NATURE JURIDIQUE DES CONTRATS COLLECTIFS DE TRAVAIL DANS LA RÉPUBLIC SOCIALISTE DE ROUMANIE. The original text reads as follows: "la formation d'un homme nouveau, ayant une conscience avancée et des hauts traits moraux" (report on file at the University of Lund Law Library.

make repeated references to efficiency and discipline as important ingredients of collective agreement regulation. In fact, they even mention ugly things like illicit absenteeism or: "the active cooperation of workers and employees in applying the scientific organization of work, elaborating technically based norms and output-requirements, introducing wage-forms, stimulating better outputs."[43]

In his book on "The Socialist Collective Agreement", Professor Nagy shows that clauses of this type are common in the collective agreements of socialist countries. For example, in Czechoslovakia the following matters are considered appropriate for insertion in collective agreements:

> the consolidation of discipline in work and technology; the better utilization of working hours; the stabilization of workers and employees; the reduction of unjustified absenteeism and undesirable mobility; the better utilization and placement of workers and employees; the ensuring of the defence of the assets in socialist property.[44]

In Romania the Labour Code states that:

> the aim of the collective agreement is to promote the high-level organization of work; to consolidate discipline; to mobilize all forces in order to fulfill the plan, and continuously improve working and living conditions within the territory of the country. To achieve this, according to Art. 76, sec. 2, the enterprise collective agreement contains the measures for the realization of which the workers' cooperatives and authorities of the country pledge themselves to the better utilization of production capacity; to raise the productivity of work; to reduce specific consumption and production costs; to achieve savings and profit surplus to plan; to improve the quality of products; and to increase the effectiveness of economic activity.[45]

Whoever has seen clauses like these in any collective agreement of any "Western" country? A union official signing a collective agreement with clauses of this sort would not last long. What is there to explain such truly staggering differences between the socialist countries and the non-socialist countries? Is collective bargaining in socialist countries an exercise of "exploitation" of workers, despite the professed abolition of all kinds of exploitation of men by their fellow men? Is collective bargaining in the non-socialist countries free of "exploitation" of the workers? Does the ancient maxim *Homo homini lupus* not apply here?[46]

The differences just referred to, in my estimation, point at a difference in the structure of labour law at large between socialist and non-

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43. L. NAGY, THE SOCIALIST COLLECTIVE AGREEMENT 89 n.5 (1984).

44. *Id.*, at 85. The text relates to directives for the conclusion of collective agreements in Czechoslovakia.

45. Labour Code art. 76, §1 (Romania).

46. Platus (+184 B.C.), Asinaria 495.

socialist countries. In non-socialist countries employers enjoy much managerial freedom in the sense that employers generally are free to run the business and to organize work as they see fit. Efficiency criteria are set by employers just as are other standards of performance. This managerial freedom of action is not created by collective agreement regulation. It is part and parcel of the legal set-up in "Western" countries with its roots in the master and servant regulation which antedates collective agreement regulation.[47] It is often expressed in collective agreements but usually in very general terms. When not specifically mentioned it is implied.[48] Because of this overriding principle of law, labour law is concerned with establishing checks to prevent employer abuse of its managerial freedom of action. On the other hand, there is no need in "Western" countries to establish rules aiming at efficiency. The harsh realities of competition in market economies, coupled with their insistence on high yields on the money which investors have invested, take care of that. "Western" labour law is concerned with excesses by employers in their struggle to "stay in business", and that is the focus of collective bargaining.

In the socialist countries the situation is completely different. A stiff market economy is lacking, as are the ever-demanding private investors of "Western" countries. There are no overriding managerial privileges there. But there is a highly powerful state. All this means, I submit, is that labour law, and by implication collective bargaining regulation, particularly at the plant level, is faced with tasks there of a different nature than in market-economy "capitalist" countries. There is no need to establish checks to prevent employer abuses of managerial privileges. On the other hand, there is a need to establish rules aiming at efficiency.

These differences in basic economic structure between socialist and non-socialist countries help explain, I submit, the profound difference between them in the orientation and substance, as well as functions, of collective agreements.[49] On the other hand, these differences have nothing to do with the degree of subordination of individual employees. The somewhat grim impression conveyed to "Western" observers of collective agreements in the socialist countries is offset by the realization that the "Western" principle of managerial privileges is equally grim to the "Eastern" observer.[50]

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47. *See supra* note 24.

48. *See generally* Suviranta, *Invisible Clauses in Collective Agreements*, 9 SCANDINAVIAN STUDIES IN LAW (1965).

49. *See supra* note 42.

50. It is outside the scope of this report to discuss whether there is any difference in substance in the respect referred to between "Eastern" socialist countries and "Western" market-economy countries.

Collective Agreement: Private or Public Law

Turning now to the two models presented initially in this section (the Chamberlain model and my own model) the question arises as to the extent to which they are verified or falsified by the various National Reports. The two first concepts in each model, the marketing concept and the private law concept, have few analogues in the real world, perhaps only one, the United Kingdom. Seen in a genetic perspective, the private law concept is basically a relict from the founding years of collective agreement regulation. In the early days of collective bargaining, any collective bargain was suspect in the eyes of the law since it was intrinsically in restraint of unmitigated freedom of trade. Efforts to achieve applicability beyond the parties to the bargain were particularly suspect and were often, in fact, considered criminal conspiracies.[51] Since applicability beyond these limits was one prime aim of the parties to the bargain, the private law concept was at odds with the philosophy of collective bargaining regulation. This means that the private law concept was doomed when collective regulation by actors in the labour market became accepted by society as a suitable method for the regulation of entire sectors of the labour market. More and more countries have adopted this attitude, which has brought on the gradual downfall of the private law concept. As of today it only survives in the United Kingdom.

It is appropriate here to make a few comments on the situation in the Nordic countries, typified by Sweden. Sweden clings to the private law concept, although collective agreements in Sweden differ profoundly from their British counterparts. Union membership rates are high, rising to or above 90 per cent of the working population. This means that collective agreement coverage is fairly universal by its own force. The structure of collective bargaining is extremely centralized. Coupled with the ubiquitous pledge by the employer party to apply the collective agreement to all employees regardless of their union status, the Swedish system makes collective bargains look as much like statutes in terms of applicability as they do in most countries where they are considered to be of a statutory or quasi-statutory nature. Ever since the advent of a fair amount of industrial democracy—channelled through majority unions only so as to make the public law aspect doubly sure—the publicly proclaimed private law concept of collective agreements in Sweden has looked downright anachronistic. The *de facto* public statutory character of today's collective agreements is vehemently repudiated by the majority unions, and to some extent by employer federations. The main reason, I submit, is the on-going debate in which corporatism has been equalled

51. *See* M.A. HICKLING, *supra* note 5, §II.1 (for a discussion of conspiracy doctrines).

with fascism. This august linkage explains why public debate in Sweden on the legal status of collective agreements has become stifled.

The labor market and industrial code concept looks upon collective agreements as instruments for the regulation of entire sectors of the labor market or of the labor market in its entirety. This concept corresponds to the situation of most countries and "Eastern" socialist countries.[52] This means that labor legislation in most countries does have all the mechanisms necessary for the good functioning of collective agreements as instruments for industry-wide regulation. As mentioned earlier, the agreement made must be a binding and enforceable contract, parties to the contract must be representative, the contract must conform with statutory rules concerning the subject-matter of collective agreements purported to have general applicability, and there must be rules to govern how general applicability is to be achieved. Rules in the different countries differ enormously in all these four respects, but their fundamental purpose is everywhere the same, as is their essential result, that of general applicability. State participation in the bargaining process, though it is omnipresent, also differs enormously from one country to another, for example, from Argentina and Israel at one end of the scale to the Federal Republic of Germany at the other. In some countries such as in Australia and New Zealand there is even a four party bargaining structure with independent public agencies for conciliation and arbitration in addition to direct government participation. In Argentina consumer interests apparently participate to some extent in the bargaining process.[53]

Given the predominant role played by collective agreements of an industry code type it is not surprising to find statements to the effect that collective agreements are of a statutory nature. But here again countries differ considerably. Perhaps Mexico and New Zealand are at one end of the spectrum. Mexico has three different types of collective agreements.[54] The most important of these, in terms of applicability and mandatory force, is called a "contract statute" (*contracto-ley*). Though this designation would be perfect for collective agreements of similar type in other countries, no country other than Mexico seems to have had the realism (or perhaps the courage) to introduce it! In New Zealand, collective agreements "are not only comparable with a statutory enactment but

52. In most countries enterprise agreements supplement industrywide or nationwide agreements.

53. *Cf.* Fernandez-Giannoti, *supra* note 7, ch. 10, at 28.

54. *See* Barajas Montes de Oca, *Summary of Mexican National Report*, in THE LEGAL NATURE OF COLLECTIVE AGREEMENTS (1986)(report on file at the University of Lund Law Library). *See also* Del Castillo, *Mexico*, ch. IV, §5, in INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS (R. Blanpain ed. 1978).

have been juridically described as 'a species of legislation' ".[55] Other reports use other descriptions and metaphors. Indeed, metaphoric language is common.

Looking at the various countries from the point of view of other factors that distinguish statutory from contractual regulation the picture is also one of enormous diversity. Only a few glimpses of this can be provided here. There are countries where enforcement procedures can be initiated *ex officio* by public authorities. For example, in New Zealand, collective agreements are legally enforceable but not as contracts in private law. They cannot be classified as contracts for the breach of which remedy may be obtained in an ordinary court of law under common law".[56] In most countries, however, enforcement of collective agreements is the exclusive privilege of the parties to the original agreement or their members. Sanctions for the breach of agreements are of a non-punitive type in the majority of countries, but there are many exceptions. Penalties can be imposed, for example, in Argentina, Belgium and Mexico. In Belgium those infringing on extended collective agreements are in fact liable to imprisonment. In New Zealand the procedure for recovery of penalites "is a quasi-criminal one".[57] In socialist countries criminal sanctions and procedures are common as well. In Nordic countries sanctions are primarily of a pecuniary nature, classified as private law damages. However, apart from traditional damages for actual loss, punitive damages can be imposed. Amounts differ between the various Nordic countries but a common feature is that the damages are meant to be punitive. Indeed, in some of the five countries the legal designations involved have a distinctly criminal flavour. There are still other countries in which the media tend to refer to such damages as "penalties".

With regard to the interpretation of collective agreements Israel seems unique. Rulings by the Israeli Labour Court prescribe that "normative provisions . . . must be interpreted in compliance with rules of interpretation are applicable to statute" but contract interpretation techniques apply to contractual (obligatory) rules.[58] Many other countries apparently follow the same principle. It is probably fairly universal to heed with great care the intentions of the framers of a collective agreement. With regard to gaps and loopholes it is probably fairly universal to try to eliminate those by means of interpretation.

In one important respect, however, the contractual character of col-

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55. *See* Ben-Israel, *supra* note 34, § 8, at 25.

56. *See* Szakats, *supra* note 12, ch. 8, at 21.

57. *Id.*

58. Letter from R. Ben-Israel to R. Fahlbeck (Dec. 10, 1985)(letter on file at the University of Lund Law Library).

lective bargains seems to prevail in all countries, namely the power to terminate the agreement. The power rests with the parties to the agreement. This also applies to agreements that have been extended by public authorities.

The erosion of the strictly private law concept of collective agreements and the concomitant rise of industry-wide and nationwide collective agreements have given rise in some countries to an interesting phenomenon, that of "collective arrangements." These are agreements that do not meet the requirements set for industry code-type agreements. The reason in all the four countries that report the existence of collective arrangements (Argentina, Belgium, Canada and Israel) seems to be that the parties to the arrangement are not entitled to enter into statutorily recognized collective agreements. The reports that mention these agreements are in the description given by Professor Ben-Israel which is very informative.

> The institutionalization of collective agreements within the framework of the Collective Agreements Law, 1957, does not of itself invalidate any other collective ways and means of regulating working conditions of a group of workers, which in one way or another cannot meet the legal requirements embodied in the statute in order to be recognized as collective agreements. These collective ways of regulating working conditions of a group of workers were legally termed as "collective arrangements". Under the Israeli legal system the coexistance of collective agreements alongside other collective arrangements is recognized. The legal recognition of the coexistence of both agreements and arrangements does not mean that both must be dealt with equally, or by using the same yardstick. The truth is quite the contrary. While collective agreements are interpreted in light of the Collective Agreements Law, 1957, collective arrangements are dealt with under general contracts law. The result is that the status of collective arrangements is lower than that of collective agreements. For example, the provisions of a collective arrangement, in variance to those of the collective agreement, not only lack a normative effect, but do not have even a compulsory nature. The most significant distinction between collective agreements and collective arrangements is expressed in the matter of their binding aspect. According to the Labour Court's ruling, collective arrangements are considered as gentlemen's agreements, unless an expressed provision was included whereby it was otherwise stipulated."[59]

It is interesting to note that legal characteristics of collective arrangements make them closely related to the original type of collective agreements that still exist today only in the United Kingdom. In Argentina, Belgium and Israel the reason for the creation of such agreements seems to be a certain rigidness in collective bargaining structure. Bar-

59. *See* Ben-Israel, *supra* note 34, § 8, at 25.

gaining there is very centralized and is confined to representative organizations, which creates tensions that give rise to spontaneous and flexible initiatives.

Collective Agreements As Industrial Constitutions

Returning now to other components of the models for collective agreement presented at the outset of this section, I shall say a few words about the constitutional concept (Concept 3 in my model). When applied at a company level it probably comes close to the industrial relations concept of the Chamberlain model. When I presented this concept in 1977 I had my own country (Sweden), and also the United States, in mind. That which distinguishes this concept from the industrial code concept is its conception of the employee union's participation in management decision making procedures. The issue of such participation was a burning one in Sweden at the time, and still is today, as in many other countries. My interest was focused on what to require of unions taking part in the area of co-responsibility. A suitable point of departure seemed to me to be the American doctrine of the union's duty of fair representation.[60] Though far from clear, this doctrine appeared to have the potential of providing guidance. In Sweden today, on the other hand, precious little has happened to clarify the obligation of unions. In other countries the same seems to be true. Perhaps this is not surprising as regards "Western" market economy countries since co-responsibility—what there is of it—often is channelled through employee representatives elected for that purpose rather than through the unions. Co-responsibility is not linked to existence of a collective agreement at the work place. To some extent this state of affairs is perhaps due to union's fears of becoming too aligned with management.

The constitutional concept regards unions as cooperators rather than opponents of management. Perhaps the legislative role that unions assume when participating in industry-wide collective agreement regulation is as far as they are willing to go in terms of abandoning their original role of fighting bodies. The additional role of administrator which the constitutional concept presupposes might be one step too many along the road towards complete demolition of the original private law character of collective agreements. This could mean that the constitutional model is not well suited to these countries, although the constitutional model is still fairly well suited for some "Western" countries, such as Sweden and the United States.

In the Eastern European countries the situation is different. Here,

60. *See* McKelvey, *supra* note 22.

union representatives speak for the employee community in matters of co-responsibility. The nature of the relationship between management and union is political. By and large, however, the constitutional concept seems to fit the situation in the Eastern European countries perfectly well.

In conclusion, several ideas have appeared throughout this discussion. (1) Collective agreements serve as instruments for uniform and universal regulation of the terms and conditions of employment, thus serving as normative instruments. (2) Collective agreement regulation is mandatory from the point of view of individual employees, and employers as well, in the case of supra-employer agreements. (3) Regulation comes about in a setting that can best be seen as representing tri-partite bargaining. (4) The labour market parties to bargains must be representative. (5) Industry-wide collective agreements prevail, supplemented in many countries by agreements at the enterprise level.

The Interplay Between Statutory Regulation and Collective Bargaining Regulation

Regulation in the field of labour and industrial relations can be achieved by means of legislation. The labour market parties often fear legislation because they see it as an encroachment upon the freedom of the labour market. From the legislator's point of view it may conceivably be better to have regulation carried out by means of collective agreements than by legislation, because collective agreement regulation will be more acceptable to the labour market parties or because it can be done in a more flexible way taking into account special needs. This includes several considerations such as: (1) legislation and collective agreements as two separate avenues to an all-comprehensive (or sufficiently comprehensive) regulation of any issue in the labour market, (2) deliberate choice between legislation and collective agreements has been made, (3) *the reliance on collective agreement regulation* over statutory regulation (4) the collective agreement regulation as a means that—from a functional point of view—is equal to statutory regulation. It was thought that discussions on these matters in the various National Reports might to some extent summarize the reports and perhaps even represent their crowning achievement, providing various insights. Most National Reports have declined the invitation, however, to undertake the task in such a manner.[61] Many examples of phenomena which are of interest in the present context have been given in preceding sections. One further observation may be made. Virtually all National Reports testify to an intense and

61. This is a statement of fact, not of criticism!

intimate interplay between legislation and collective agreement regulational Professor Hickling of a Canada refers to this interplay as a "symbiotic link".[62]

Professor Hirshberg of the Federal Republic of Germany concludes his discussion on the relationship between statutory regulation and collective bargaining regulation noting

> On the whole, I would think it to be a simplistic statement to say that collective agreement regulation is equal to statutory regulation. It may be equal to it, it may be superior to it because of its adaptability, and it may be inferior. This would seem to depend largely upon the matters to be regulated, upon the frame-work of the collective bargaining parties and their respective strength, and last but not least, upon the economic situation of the country.[63]

This comment seems to have rather general applicability.

Legal approaches to collective agreements: A Summary

In the introduction I stated that this report would mainly focus on three areas: (1) the functions of collective agreements, (2) legal approaches to collective agreements, in particular those approaches involving the distinction between private contracts and public statutes and (3) the interplay between private collective agreement and public statutory regulation. Although the matters discussed cannot be considered again in any detail, there is a need of trying to sum them up briefly.

(1) Collective agreements bear a wide variety of designations, ranging from "contract-statutes" at one end of the spectrum to quite simply "contracts" at the other, usually without fundamental differences between them. (2) In many countries the formal legal classification of collective agreements looks accidental, in particular when compared with corresponding classifications in other countries. (3) Metaphoric language is commonly used in describing collective agreements. It seems fair to say that this is based on the fact their formal legal designation as contracts corresponds poorly with their substantive legal, social and economic role. For the same reason, a discussion on the legal status of collective agreements faces the risk of turning into a play of words. (4) The reason for private contract law vocabulary being used at all in connection with collective agreements is one of historic necessity, unrelated to the substance and functions of collective bargains. This, if true, is rather ironic, since the hostile attitude towards collective agreements shown by both the judiciary and society in general when they came into existence in the 19th century, was to a great extent based on the idea that these

62. *See* M.A. HICKLING, *supra* note 5, § VII:4:(3), at 71.
63. *See* Hirschberg, *supra* note 26, ch. 10, at 30.

agreements amounted to legislation. (5) Discussion on the legal "nature" of collective agreements is far from dead, in particular as regards the public statutory versus private contract conception of them. (6) The tendency in most countries is towards an increase in government participation in the bargaining process, which makes collective bargains to a great extent a tripartite phenomenon. (7) Regardless of their formal legal denomination, collective agreements show much more kinship to statutory regulation than to ordinary contract regulation. (8) Finally, in view of these observations, the private/public law dichotomy does not make much sense. Although collective bargaining regulation remains somewhat elusive it seems fair to say that it has basically a statutory character, albeit pretty much *sui generis*. In short, normative collective agreements are "contract-statutes".

These observations concern primarily the non-communist countries that have participated, all of them "Western" market-economy countries. Much of what I have said is also true, however, with regard to the Eastern Europe countries participating in this project. To illustrate, there seems to be a certain rapprochement between the countries on the two sides of the "Iron Curtain".[64]

> It is made perfectly clear, I suppose, by the previous analyses that in the sphere of the creation of law a new development is taking place. As a consequence of this, apart from the traditional category of the rules of law, a new group of norms is taking shape. These differ from the traditional category of the rules of law inasmuch as their creator is not necessarily an organ of the State power or administration, and the way of making them often also differs from that of the rules of law. At the same time they are similar to the rules of law inasmuch as:
> —they relate to social relations;
> —they are created on the basis of authorization by the State;
> —within the framework and according to the aims of this authorization, they express the will of the ruling class; and finally,
> —in order to enforce them, the State generally places at their disposal the same coercive powers as in the case of the traditional category of the rules of law.
> A comparison between the rules of law and the new norms viewed from the point of content shows that identical or similar characteristics preponderate, while differences lie mainly in their forms. The identity of contents refers to the fact that the new norms fall more within the scope of creating law, alongside the traditional rules of law. The common traits, the theoretical and practical conclusions and inferences to be drawn from these should still be summarized by jurisprudence. This is first of all the task of the theory of the State and law and of that of labour law. From the point of view of the subject now investigated

64. *Compare* Letter from R. Fahlbeck to L. Nagy (Nov. 16, 1985) *with* Letter from L. Nagy to R. Fahlbeck (Dec. 9, 1985) (letters on file with the University of Lund Law Library).

we may be satisfied by establishing that the collective agreement, determining the rights and duties that arise from the labour relations, also belongs to this group. The type of collective agreement is not rule of law but falls within the category of the making of law.