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Strikes, Lockouts and other Industrial Actions

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The Swedish Experience

Section 1

Overriding principles for the regulation of industrial actions generally

One of the characteristics of Swedish collective labour law is the notion that there should be equality between the employee and employer side in the sense that they should have the same rights and obligations. This idea permeates the entire structure of collective bargaining law. It is the matter of course that the legislator is aware of the differences in importance, functions et cetera of various rules in the industrial relations setting. Sweden has a market economy based on private ownership coupled with a free labour market in the sense that those operating there (employers/"buyers" of work and employees/"sellers" of work) have the freedom to enter into contracts with whoever they want – or to refrain from entering any contracts at all. In a society of that kind the right of association in industrial relations is much more important to the employee side than to the employer side as is the right to engage in industrial actions. Nevertheless, Swedish legislation adheres as strictly as possible to the principle of equality in legal rights and obligations. In other words, society has refrained from actively promoting the interests of either side through collective bargaining legislation. This

may sound grim to the foreigner. Should one not try to promote equality by actively supporting the weaker party?

The answer of the Swedish legislator to this question would undoubtedly be that one should and that this has indeed been done in Sweden to the extent needed. Comparatively speaking, however, there has been relatively little need for intervention by the legislator. Several factors combine to explain this. Probably the single most important factor is that employers accepted employee unionism at an early stage in the development of modern Swedish industrial relations. The milestone in this respect is an accord in 1906 between the all-dominant employers federation in the private sector – SAF – and the all-dominant employee blue collar federation – LO. Another important factor is the fact that employers at an equally early stage decided to accept collective agreement regulation of wages and other terms of employment. Industry-wide collective agreements became standard rather than exclusive company or plant agreements. The centralized system for bargaining also helped reduce the need for legislative intervention since collective agreement regulation by and large covered all employees in the industry. This outcome was greatly helped by the fact that the degree of unionism in the blue-collar sector rose rapidly in the early decades of this century and later often reached levels of 75 per cent or more of workers. The extremely high degree of unionism can partly be explained by the benevolent attitude of employers but it also helped reduce the need for outside intervention.

In spite of these favourable conditions industrial conflicts were common. Even from an international point of view the level of industrial strife in the Swedish labour market was rather high until late in the 1930's. A new epochal accord between SAF and LO in 1938 aimed at averting an impending intervention by the legislator to reduce the occurrence of industrial conflicts. The accord contains rules to that effect, primarily by introducing mandatory procedures for bargaining prior to any industrial action, and rules to protect neutral "third parties". Combined with stiff rules in the by-laws of SAF and LO limiting the right to those affiliated with SAF or LO to resort to industrial actions without prior approval from SAF (or LO, whichever the case may be), the regulatory structure by 1938 was such that the legislator decided to refrain from intervening. Much more important than the formal rules in accords between the labour market parties was the spirit of cooperation that the 1938 agreement engendered. The 1938 agreement marked the coming of age of the Swedish model for industrial relations and one of the characteristics of that model has been the notion that the labour

market parties share a common responsibility, to the extent possible, towards society to reduce industrial strife and to handle their power to inflict harm through industrial actions in a balanced and responsible way.

By and large the law of industrial actions is customary law in the sense that society has accepted the social philosophy adopted by the labour market parties and the concomitant rules laid down by them.

Despite this, Swedish legislation on collective bargaining law does regulate industrial actions to some extent and has done so ever since the first comprehensive legislation was enacted in 1928. The present legislation dates from 1976 (with some later amendments) and is found in the Act on the joint Regulation of Working Life.[1] The regulation is skeletal at best and moulded primarily on rules that the labour market parties had devised and put into operation well before legislative intervention.

The Labour Court has had to rely heavily on traditions in the labour market both when administering statutory rules and when fashioning rules for unforeseen situations. Case law has played a much more important and creative role than statutory law.[2] Reference can be made to important rules in areas where the labour parties have been unable to establish rules by themselves, e.g. conflicts with an international background or involving foreigners. Important principles have also been created by the courts in situations where two (or more) unions with conflicting interests are involved, e.g. traditional jurisdictional disputes (or border disputes as they are referred to in Sweden) and disputes of a more sophisticated jurisdictional kind where two unions have members among the same group of workers at a workplace and both want to sign a collective agreement to represent them all.[3]

As explained above Swedish legislation on collective bargaining is based

[1] The most accurate translation into English of the designation of the act would be "The Co-Determination Act". This designation can be used – and is used quite often – but it makes one think of German type *Mitbestimmung*, which is misleading since Swedish *joint regulation* differs sharply from German *Mitbestimmung*. Thus, the 1976 act will be referred to by using the words "joint regulation" (which is a perfectly adequate translation of the Swedish designation as well). Admittedly, this designation is a manifest misnomer since the act entails virtually no mandatory joint regulation at all (but then again any reference to co-determination would be equally misleading).

[2] The Labour Court is the prime creative force here. The Supreme Court has had an important role too. Epochal rulings by the Supreme Court are such as a 1935 ruling, NJA 1935 s. 300, declaring that actions that are permissive *per se* do not become unlawful just because they are undertaken collectively, and a 1974 ruling, NJA 1974 s. 36, laying down the rule that only actions organized by a union are lawful employee actions.

[3] There is no US type majority rule under Swedish labour legislation nor is there any exclusivity rule. However, a collective agreement is traditionally applied to all employees (*erga omnes*) regardless of whether they are members of the contracting union, some other union or not organized at all.

on the notion of equality. In the context of industrial actions this equality translates into a system whereunder the parties are supposed to dispose of the same kinds of tools and weapons to exert pressure on each other. Three examples to illustrate already at this early stage! (1) The prime employee weapon is the strike. Strikes can be used as an offensive weapon against the employer. Consequently, the employer side should dispose of a corresponding weapon and so the offensive lockout is a legitimate employer weapon. (2) Partial strikes are allowed, for example a concerted refusal to perform overtime work or a decision to call only a few key employees on strike. Similarly, partial employer actions are allowed, e.g. a refusal to collect union dues (which would otherwise be done pursuant to a "check-off clause"). (3) Sympathy strikes (solidarity strikes) to support lawful primary actions are permitted. Consequently, so are sympathy lockouts. – There are exceptions to this principle of symmetry but they are few and, with one exception, not very important. A very important exception is that only actions decided by a union (or at least sanctioned by it) are lawful on the employee side, making all concerted actions by individual employees illegal as "wildcat strikes", regardless of whether these employees belong to a union or not. On the employer side no equivalent rule exists.[4]

Another common feature is that statutory regulation of industrial actions covers employee and employer actions alike. The Swedish constitution – the 1974 Instrument of Government – takes the lead. Chapter 2, article 17, states: "Any trade union or employer or association of employers shall be entitled to strike or lock-out or resort to any similar measure unless otherwise provided by law or arising out of an agreement". Similarly, the 1976 Act on the Joint Regulation of Working Life deals with all industrial actions in the same context (articles 41 and 42) and rules are basically identical regardless of whether it is an employer or a union action. It should be noted that the constitutional rule is of very recent origin. Prior to its enactment in 1974 no equivalent rule existed and there were no strong feelings of urge to have one either, for that matter. Mirroring this somewhat off-handed attitude the present rule is not of much significance since its actual scope depends, not on constitutional rules, but on statutory rules (or even rules in agreements). A joint committee of the Swedish Supreme Court and the Supreme Administrative Court recently noted, quite correctly in my opinion,

[4] Of course, it can be argued that this is not an exception to the symmetry principle at all since most employers are collectives ("ownership associations") in the first place. The parallel is halting, however.

that the constitutional rule is of "very limited reach".[5] Particularly noteworthy in the present respect is that the constitutional rule applies to employer actions just as much as to employee actions. From an international perspective such equality of constitutional protection is probably rather outstanding!

One aspect of the constitutional rule is that resort to industrial actions is a right rather than a freedom under Swedish law.

Industrial actions have always been discussed in terms of a right, the *right* to strike *et cetera*, rather than a freedom. This might suggest that lawyers in this country share the British (or Anglo-Saxon) way of thinking in this respect[6] but that is not the case. Indeed the very distinction between *right* and *freedom* in this respect is basically alien to present day Swedish law. The reason probably is that Swedish law already at an early stage in the industrialisation process adopted the position that industrial actions are lawful unless specifically prohibited. Once this approach has been taken there was no need for the distinction between *a right* versus *a freedom* in this respect.

A third common denominator in Swedish regulation of industrial actions is that rules on such actions are the same in the private sector of the economy regardless of branch. There are no special rules for, say, the construction industry, or indeed for any branch of the economy. Also, despite some limitations, by and large rules for the public sector are the same as those for the private sector. This is in accordance with another overriding principle of Swedish labour law, i.e. to minimize to the extent possible differences in labour regulation between the public sector of the labour market and the private; see further section 5.

Yet another feature is that the Swedish labour market is covered by a network of some twenty "master agreements". To a lesser or higher degree they are all modelled after the 1938 master agreement between SAF and LO (cf. above). The agreements typically deal with matters such as procedures for the negotiation of new agreements on wages and other employment conditions, grievance procedures and regulation of industrial actions (both procedural, e.g. on negotiations prior to industrial actions, and substantive, e.g. on national emergencies). Here, again, regulation is basically the same for the two sectors of the labour market.

A further important common denominator of Swedish regulation in this field is that industrial actions are lawful unless specifically prohibited by the

[5] The Law Council (Lagrådet) in a statement submitted to the Labour Market Committee of the Swedish legislative body, the *Riksdag*; AU 1989/90:24 s. 12.

[6] See e.g. Kahn–Freund, Otto, Labour and the Law, second ed 1977, chapter 8 section 1.

law. On the whole, statutory restrictions are few and not far-reaching, with the exception that by and large industrial actions are unlawful during the lifetime of a collective agreement.[7] This means – inter alia – that the spectrum of permissible actions is extremely broad. It also means that actions can be used against neutrals on the opposite side, i.e. a neutral employer or a neutral union, since such actions are not specifically prohibited (except in some rare instances). The distinction between primary and secondary actions – which is so important in some countries, e.g. the USA – is not unknown in Sweden but it is of limited import and also operates in ways that differ sharply from other countries (e.g. the USA).

Closely related to the state of the law now discussed are other common features in the regulation of industrial actions in Sweden. One is that there are no rules on social justification as a requirement for legal acceptance of industrial actions. Similarly, there is no requirement that industrial actions be proportional to the action it is to counter. Nor do industrial actions have to be effective in the sense that they will – or at least have the potential to – achieve the result wanted by the party undertaking the action. Indeed, many union actions in Sweden are ineffective in this sense and become effective only if coupled with sympathy action by some other union (against neutral employers doing business with the employer hit by the primary action; cf. section 8 below). The labour market parties have voluntarily assumed certain responsibilities to use the industrial weapon in a balanced and responsible way (cf. above) which makes statutory rules on social justification or on effectiveness less needed. The idea is that the labour market parties will refrain from the actions that are not socially justifiable or just plainly ineffective. Industrial actions of harassment are basically unknown in Sweden. Signs that this voluntary social compact is no longer honoured in some sectors of the labour market has caused considerable strain in Swedish society in the past 15 to 20 years, calling for intervention by the legislator or a renegotiated social compact; see further section 9 below.

Under Swedish law an industrial action is defined in the very broadest way. The same definition applies to all industrial actions. The definition is composed of two components: an action and a purpose.

The action can be of any kind. The only requirements here are that the

[7] There is one truly important exception to this rule. The existence of a collective agreement does not prevent secondary actions of sympathy (if the primary action is lawful in itself). Though benefitting both sides, employers rarely take advantage of this exception. Unions, on the other hand, use it frequently and in most instances with success; see further section 8 below.

action has a collective/concerted character/background and that there must be something that can be properly described as an *action*. Something concrete must happen. Vague threats or criticism do not meet the requirement but serious threats do, in particular if coupled with notification that a specific action will start at a specified time. Acts that are unlawful *per se* also constitute actions under the definition but such acts will render the industrial action unlawful. In other words, unlawful acts are never excused just because they are part of an industrial action, however legitimate. One example: workers who physically block the entrance to a place of work or who block the operations at the workplace commit a crime.[8]

The purpose typically is to exert pressure on the opposite party in a work related dispute between the two parties to the dispute. However, there is one very important exception to this rule. Sympathy actions (solidarity actions) are very common in Sweden. Here the purpose is to help someone on the same side "of the fence", this and nothing else. If the purpose is mixed the action becomes unlawful in its entirety. However, many sympathy actions are lawful; cf. section 5. The purpose of an action can also be to take revenge on the opposite party for something that happened in the past, e. g. during industrial actions that were part of recently ended contract negotiations. Actions of this kind are frown upon in Sweden and virtually never happen.[9] To a great extent they are unlawful because they violate explicit or implicit rules of behaviour in the labour market.[10]

Politically motivated actions must be treated separately; cf. section 5.

1 Strikes

A. Legal Sources and Classifications

As was explained in the Introduction the legal sources in Sweden on strike law are: the 1974 constitution, the 1976 Act on the Joint Regulation of

[8] Criminal acts in connection with industrial actions are very rare in Sweden. The police are virtually never called in to maintain or establish order; there simply is no need for that. The last reported incidents where the police were called in date back to 1980 and 1982 and those instances were the first of their kind for many years. The conflicts in both instances involved ports and longshore-men.

[9] This is not to say that hidden actions to take revenge do not happen now and then. They probably do though unions will never officially acknowledge them, much less support them. But then again, the distinction between a hidden go slow action and poor work performance due to plain sulking is not easy to make and unions are known to point out that unforthcoming employers make for less enthusiastic employees!

[10] The 1938 master agreement between SAF and LO prohibits some actions where the purpose is to take revenge. No reported cases on these prohibitions exist.

Working Life, case law and collective agreements, in particular master agreements such as the 1938 agreement between SAF and LO. As was also explained the role of the constitution is small, even negligible. The 1976 statute and case law are of great importance, in particular case law, but by and large the law on industrial actions is customary law in the sense that society has accepted philosophies and rules adopted by the labour market parties. To strike is a *right* rather than a *freedom*. Again, this was discussed in the introduction.

B. Definition, Types and Patterns

As was discussed in the Introduction an industrial action is defined as consisting of two interconnected components: an action and a purpose.

The strike is the traditional industrial action by employees, in Sweden as elsewhere. The *action* involved in a strike is a refusal to work. Traditionally, the strike is a collective walk-out by all employees involved in the dispute. The striking workers leave for the duration of the strike, thus crippling operations. Strikes of that kind have become rare in Sweden. By and large there is no need for measures that drastic! What happens is that a few key employees are called on strike by the union. When these employees leave, operations are severely crippled since the employer cannot fill the vacancies left by the striking employees. That is so for two completely different but concurrent reasons. First, non-striking employees cannot be ordered to perform the work of the striking employees since they are not obliged to perform stricken work. Rules in master agreements (or elsewhere) specifically spell out that non-striking employees enjoy *neutrality*, which means that they are excused from performing stricken work (with only limited exceptions). Second, hiring of temporary replacement is practically impossible; see further section 6.

Strikes today are partial in most instances. They take two different forms, a total walk-out of a few selected key employees or a refusal by all employees to perform work in full accordance with their contractual obligations. The mode of operation of the former type was briefly described supra. Such actions are very common. They are attractive to unions for several reasons. One obvious attraction is that strike benefits will have to be paid to a limited number of people only, thus ensuring that demands on union strike funds are kept at a minimum. Another attraction is that the unions do not face that much of a risk to look like "the bad guys" in a dispute since the number of people actually called on strike by them is rather insignificant. In fact,

unions can even hope to gain sympathy in some instances. This is how that would work. By calling key employees on strike unions can more or less cripple any place of work, be it this factory or that service center or those hospital wards. Stricken employers often ask the union to except *them* but such requests may not carry much clout since every employer wants to be excepted. The situation becomes different altogether if the public at large cries out, asking for exceptions. In those circumstances – and they are rather common – the union stands to gain popular support just by exempting that particular workplace!

Partial strikes can also mean a concerted refusal by all employees to perform certain tasks. No one will walk out altogether. The single most commonly used method is the collective refusal to work overtime. Ingenuity to find other methods to pinch the employer is remarkable, however. Here are some examples! Employees may refuse to go on business trips (e.g. the salespeople), to drive during working time (e.g. the delivery people or the travelling service mechanics), to work on Fridays (when demand is at its peak), or refuse to work according to any workschedule other than the one in force before the outbreak of the dispute. Another example is concerted refusal by train conductors to sell and to check passenger tickets (Labour Court ruling AD 1986:111). Yet another example is concerted refusal by flight controllers to have anything to do with airplanes of one particular airline company (Labour Court ruling AD 1983:129). These and other similar forms for partial actions are lawful *per se* under the doctrine prevailing in Sweden that everything that is not specifically prohibited is lawful (cf. Introduction).

Sympathy actions are very common as well; cf. section 8.

2. Lockouts

A. Legal Sources and Classifications

Legal sources in Sweden on the law of lockouts are the same as those for all other industrial actions, i.e. the 1974 constitution, the 1976 Act on the Joint Regulation of Working Life, case law and collective agreements. The lockout is a matter of *right* rather than a *freedom*. Both these issues were discussed in the Introduction (cf. also section 1.A).

B. Definition, Types and Patterns

A lockout is an industrial action and the same definition applies to lockouts as to other industrial actions, i.e. an action with a specific purpose (cf. Introduction).

The lockout is much less multi-faceted than the strike. The lock-out is total in most instances. Partial lockouts are conceivable but uncommon.

The purpose of the employer usually is to put pressure on its employees and their union. Sympathy lockouts – and the concomitant purpose to put pressure on someone else – are lawful in Sweden but are very rare. Lockouts with the purpose of revenge or reprisal are by and large unlawful, just as are strikes with similar aims (cf. Introduction).

Swedish law makes no distinction between defensive and offensive lockouts. Both are lawful to the same degree and there is no social disapproval of offensive lockouts *per se*. The law here reflects one of the basic principles of Swedish collective bargaining law, i.e. equality between the two sides in terms of statutory rights (cf. Introduction). Since the employee side is entitled to use the strike weapon offensively, the employer is correspondingly entitled to use its prime weapon. Similarly, no distinction is made between preventive lockouts and others.

Offensive lockouts in the strict sense of the word do not occur, nor do preventive ones. Employers simply do not need them. Lockouts in Sweden are defensive but more often than not laden with a heavy dose of offence! In order to understand this one must be familiar with strike patterns. As was described in section 2.B strikes in Sweden are no longer total in most instances. Unions call out just a few key people, thus often effectively crippling the workplace, or they use other forms of partial actions that may severely hamper work. The employer is faced with a dilemma. How can it defend itself, how can it respond effectively? Some partial responses are available to employers to put pressure on the opposite side, e.g. to cease collecting union dues, but by and large these are not very effective as counter-measures (cf. section 8). There are, thus, only two options, continued operations or a total lockout. If the employer decides to continue operating it is reduced to operate as best it can and only with the manpower at hand since it cannot hire temporary replacement (cf. section 6). If the employer decides to continue operating, costs will be nearly as high as during normal operations but output will be much reduced. Business opportunities may be lost under circumstances that are hard to explain to customers since the workplace is operating, in a way. The other alternative for the employer is to declare a total lockout. That shuts down the workplace completely, which is bad. The employer faces the risk of being branded as "the bad guy", which is also bad. However, the lockout hurts the employee side as well, perhaps even harder than the employer. The burden on union coffers

is heavy. Unions face the risk that employees become dissatisfied for a variety of reasons, e.g. because union actions unleashed the employer response, strike benefits are low, strike coffers have to be replenished once the dispute is over and, besides, being locked out is not necessarily all that much fun.

Faced with this dilemma employers often opt for the total lockout. Many of the most spectacular labour market conflicts in recent years – decades even – have started as partial strikes but turned into all out battles when employers responded with total lockout.

3. Legal Effects of Strikes and Lockouts

A. Legal Effects on the Individual Contract of Employment

Employees do not have to give notice to terminate their employment contracts before going on strike. A strike does not mean that the employment contract is automatically terminated. On the contrary, the employment contract continues to be in force during the strike, albeit suspended. Employees are temporarily relieved of their contractual obligations, both those of the individual contract of hire and those stemming from the collective agreement. The strikers remain employees. They are entitled to return once the strike is over and also obliged to do so. Refusal by the employer to take back returning employees is tantamount to summarily firing without just cause in violation of the 1982 Employment Protection Act.[11] Such behaviour has been unknown for the past several decades. A refusal by discontent employees to report back to work after a settlement has been reached would amount to voluntary termination without notice in violation of the 1982 Employment Protection Act.[12] There have been no reported instances of such refusals for decades.

By and large, employers are relieved of their obligations towards employees during the strike. Most importantly, they have no obligation to pay any remuneration for the duration of the strike. However, employers are prohibited from responding to a strike by refusing to disburse wages earned by employees before the outbreak of the strike that become due during the strike.[13]

[11] Swedish law distinguishes between dismissal with or without notice. Dismissal without notice constitutes summary firing and can be done only under extraordinary circumstances. A refusal to take back lawful strikers most definitely violates the 1982 statute.

[12] Similarly, Swedish law distinguishes between termination with or without notice by employees. Termination without notice by employees is allowed only under extraordinary circumstances.

[13] This prohibition was enacted in 1984 to overrule a Labour Court decision to the contrary;

Employees cannot be fired for taking part in a lawful strike nor can they be ordered to pay damages, financial or punitive. These are consequences that follow from the lawfulness of the strike. There is one exception. Employees can be terminated in some unusual and exceptional circumstances related to the future of the employer's business. Lawful industrial actions are supposed to last only for relatively short period of time.[14] If a strike goes on for a very long period of time it can jeopardize the financial health of the company. This may make it lawful for the employer to dismiss the strikers. Just how long a strike must go on cannot be said for sure since that will depend on the financial situation of the company. In the one and only case that has ever come before the Labour Court the situation was a little different (AD 1983:65). The strike had gone on for one month. The industrial action threatened to become permanent since neither party was willing to budge from its position. Furthermore, the employer had reached the conclusion that the strike had ruined future business prospects so it decided to close down the stricken operations definitely. The Labour Court accepted the dismissals. Whether employees in circumstances like these will forfeit the priority right to rehiring under the 1982 Employment Protection Act enjoyed by employees who have been dismissed by the employer for economic reasons has not come before the courts. My opinion would be that this right is preserved.

What has now been said about the legal effects of a strike on the individual contract of employment applies – mutatis mutandis – to the effects of a lockout on the individual employment contract as well.

B. Legal Effects on the Collective Agreement.

The collective agreement is temporarily suspended during industrial actions. This is the general principle of Swedish law on industrial actions and the point of departure for what happens during an industrial action. However, the situation in actual life is considerably more complicated than that. The actual scope of suspension depends on several factors, primarily what type of industrial action is at hand and what contractual relationship is at stake.

Unions and employers in Sweden in most instances are parties at the same time to several collective agreements covering the same employees. The agreement on pay and other conditions of employment is one of them. This

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AD 1980:94. The Labour Court had relied – quite correctly, in my opinion – on the general principle that industrial actions not specifically prohibited are lawful; cf. Introduction.

[14] See e.g. Labour Court rulings AD 1975:31 and AD 1983:65.

agreement is opened for renegotiation at more or less regular intervals. Industrial actions occur most commonly during these negotiations. In addition to the contract on pay other contracts exist, no less important but of a less temporary character. "Master" agreements have been referred to in the Introduction. They typically contain rules on negotiations for new agreements on pay and other employment conditions, on industrial actions and on grievance procedures, sometimes also on national emergency disputes. Other overriding agreements may deal with work environment, working time, vacation and union security (e.g. time off for union work or a check-off clause for union dues). By and large an industrial action will not suspend other contractual relations than those at stake during the negotiations that triggered the industrial action. If, for example, the negotiations for a new contract on pay and other employment conditions reach an impasse and the union calls a strike, all other collective agreements will remain in force and most obligations under these agreements must be fulfilled during the strike.

When a collective agreement on pay and other employment conditions expires, a new agreement in most instances has already been signed or is in the process of being negotiated. Only very rarely is the relationship between the parties terminated for good. The period between the termination of the previous agreement and the signing of the new is often very short, a few weeks or so at the most. Collective agreements on pay and other employment conditions often contain rules on matters not immediately related to pay but to employment conditions in general, say daily and weekly working time and working time schedules. Those rules often deviate from statutory rules of a non mandatory nature. By and large those rules remain in force during a temporary vacuum between two agreements. If all employees have not been called on strike, such rules will continue to apply to those still working.

The collective agreement is an instrument of labour peace. Perhaps the most important function of collective agreements is to provide industrial peace for the duration of the agreement [15] It is outside the scope of this article to discuss the peace obligation flowing from the collective agreement

[15] For discussions on the functions of collective agreements see e.g. Fahlbeck, R, Collective Agreements – A Crossroad Between Public Law and Private Law (Acta Societatis Juridicae Lundensis, 1987 IBSN 91-544-1931-X), or Schmidt, F. & Neal, A, Collective Agreements and Collective Bargaining (International Encyclopedia of Comparative Law, 1984, volume XV, chapter 12).

in Sweden. Let it just be said that the statutorily vested peace obligation is extensive and covers most situations. There is one important exception, namely sympathy actions.[16] The existence of collective agreements does not bar such actions. Rules to that effect would be perfectly lawful but do not exist. The labour market parties have opted not to waive the statutory exception for sympathy actions during the lifetime of a collective agreement. Unions use the sympathy weapon rather frequently (cf. section 8).

C. Striker's Tort Liability.

Strikers have only very limited liability under torts in Sweden.[17] If the industrial action is lawful there is never any liability. If the action is organized by the union, employees have no personal liability either, even if the action is unlawful.[18] Personal liability occurs only in case the action is a "wildcat strike". Few labour law issues have been discussed more passionately is Sweden than personal liability in torts for employers taking part in "wildcat strikes". These discussions are not without elements of unreality, however. The reason is that the amounts that employees can be ordered to pay are very low. Statutory rules on liability were introduced in 1928 and a maximum amount of 200 Swedish kronor was written into the statute. At the time that amount was quite stiff, corresponding to one months salary for a blue-collar worker. (Today, 200 Swedish kronor correspond to US $ 25, or the pay for some 1 to 2 hours of work for blue-collar employees!) That amount remained in the books until 1984, when a very cautious amendment was made to the effect that higher amounts can be awarded under rather exceptional circumstances.

Employers in Sweden had long called for an increase in the maximum amount of "strike panalites" for wildcat strikers. To some extent their wishes were met in 1992 when the ceiling was completely removed. However, a maximum amount of 2,000 Swedish kronor (approx US $ 250), adjustable to inflation, is considered appropriate. This means that damages will remain low, albeit no longer just symbolic but much less stiff than in 1928![19]

[16] 1976 Act on the Joint Regulation of Working Life, sec. 41 p. 4, *e contrario*.

[17] For a survey of financial liability of strikers in Sweden and the other Nordic countries see Sigeman, T, Damages and Bot, Remedies for Breach of Collective Agreements in Nordic Law, in Scandinavian Studies in Law, 1985.

[18] 1976 Act on the Joint Regulation of Working Life, sec. 59.

[19] Government Bill 1991/92:155.

4. Procedural Restrictions.

Swedish unions have traditionally made little use of ballots, membership votes and the like. On the whole democracy in Swedish unions is indirect, exercised through elected representatives. Membership votes, whether binding or not, represent something alien under that tradition. Votes are very uncommon and strictly non-binding, when they exceptionally occur. No Swedish union has mandatory rules on balloting before calling a strike or before ending it.

Mandatory statutory restrictions of a procedural nature on industrial actions do not exist in Sweden at the present time and never have. The government does provide mediation (or conciliation, the words are used interchangeably in Sweden) but mediation is never compulsory. Even when a mediator is called in – which has not been all that uncommon – mediation remains fundamentally voluntary because mediators have virtually no real power.[20]

The reason why no mandatory rules exist is that by and large there was no need for them during the roughly 30 years of the "golden age of the Swedish model", i.e. from the late 1930's until the late 1960's. Master agreements contain rules aimed at preventing industrial actions from happening before negotiation procedures have been thoroughly exhausted. Provisions in the by-laws of the top federations in the labour market work in the same direction. From the time those rules came into effect – i.e. the late 1930's – until the late 1960's "unjustified" or "unnecessary" industrial actions were rare. There was little serious uneasiness in the country about the way the labour market parties handled industrial actions. By and large they were considered to live up to the responsibility that they were considered to have under the unwritten social compact in force (cf. Introduction). Government intervention seemed superfluous. The last twenty years or so have witnessed a change in this respect. Demands for procedural restrictions are heard and discussed; see further section 9.

5. Restrictions on Industrial Actions.

No employees in the private sector are barred by statute from taking part in industrial actions. In other words, there are no exemptions for people like foremen, supervisors, managerial employees, confidential employees or

[20] See generally Fahlbeck, R, The Role of Neutrals in the Resolution of Interest Disputes in Sweden, Comparative Labor Law Journal, volume 10 (1989), pp 391 *et seqq.*

professional employees. Some very limited exemptions for top managerial employees exist in collective agreements. (In the public sector the situation is somewhat different but only slightly so; cf. below) There are no general exemptions for employees in sensitive sectors of the economy, e.g. essential services.

Industrial actions involving essential services sometimes occur in Sweden. They may result in national emergencies. On the whole, actions resulting in emergencies have been relatively few, though there is much alarm in society that they are on the increase. It must be noted in this context, however, that Swedes seem to accept rather stoically even serious disruptions without calling them emergencies. Just one example to illustrate! Early in 1990 industrial actions in the banking sector (a partial strike followed by a total lockout) led to the complete closure of *all* banks in the entire country for several weeks! No emergency was considered to exist![21]

Industrial actions involving essential services are lawful *per se,* even if they threaten to result in – or have already caused – a national emergency. As has been pointed out several times Swedish law takes the position that all industrial actions that are not expressly prohibited are lawful. No statutory prohibition on industrial actions involving essential services exists. In fact, there are no statutory rules of any kind to tackle such situations. This is true even with regard to industrial actions in such sensitive areas as the police, fire fighting or sick care (including emergency wards). Case law does not provide any guidelines since not even one single case dealing with a national emergency caused by an industrial action has ever been brought before any court of this land!

All this may convey the impression that Swedish society has taken the somewhat surprising route of declining all responsibility for national emergencies caused by industrial actions, relying instead on the labour market parties to show restraint and responsibility!

Such an impression is wrong but there is nevertheless something to it. The labour market parties have in fact agreed on rules in some sectors of the economy. The 1938 master agreement between SAF and LO (cf. Introduction) was the first to deal with national emergencies and it has served as a

[21] Can a modern society function without any banks? No cash could be withdrawn, many payments could not be made, activities at the stock exchange came close to a standstill *et cetera.* People had hoarded cash before the lockout came into effect. During the closure people were able to manage, for example because shop-keepers found themselves loaded with cash that they could not deposit (since deposit boxes were not operational) so they willingly accepted personal checks in exchange for money!

model for similar regulation in most other master agreements. The rules do not expressly prohibit industrial actions that interfere with "important societal functions" but they provide for negotiations to prevent or stop them. If, nevertheless, such an action occurs the master agreements contain no rules that allow the signatories to intervene on an *ad hoc* basis to stop it, not even to impose a temporary cooling-off period. However, if the parties to the master agreement agree that the action poses a threat to society the action has so far always been called off. If no such agreement is reached there is nothing to stop the conflict from starting or continuing. However, there is consensus in Swedish society that the legislator can intervene in the final run and put a stop to such actions. That has happened only once.[22] In other instances the government has intervened by dealing directly with the disputing parties to bring about a settlement, using anything from appeals to threats and serious arm-twisting.[23]

In the public sector industrial actions are limited in some respects compared to the private sector. As was pointed out in the Introduction an overriding principle in Swedish labour regulation is to minimize to the extent possible the differences between the private and the public sector. That is true also for industrial actions so the bulk of what has been said previously in this text applies to public sector employees as well. For example, virtually all public sector employees can go on lawful strikes and can be locked out lawfully. That also applies to civil servants, like judges, diplomats and officers of the armed forces.[24]

Existing statutory limitations in the public sector are not far-reaching, in particular not in the municipal sector (which employs the great majority of public sector employees). Limitations have to do with the supremacy of political democracy over employee and trade union rights (industrial democracy) as well as the exercise of public authority. Issues of a political nature may deeply affect the work situation of public sector employees. There is no explicit statutory ban on employee actions to influence decisions on such

[22] It happened in 1971 to put an end to extensive industrial actions in the public sector; Government Bill 1971:50. see e.g. Schmidt, F, Law and Industrial Relations in Sweden (1977), pp. 35 and 196.

[23] This happened both in 1980 and in 1985. Direct government interventions are questionable from a constitutional point of view. They may constitute encroachment on constitutional authority vested exclusively in the legislative branch of government. The issue has never been raised before the Supreme Court (or any court, for that matter).

[24] On one memorable occasion the government, acting as employer, notified a majority of Swedish officers that they were to be locked out. The impending lockout was called off only at the very last minute!

issues but it is an implicit understanding that they should not occur. Purely political strikes on domestic issues are unlawful for public sector employees.

Statutory limitations on industrial actions in the public sector are so minimal that master agreements have been concluded to impose further limitations. These further limitations primarily aim at excluding key personnel from taking part in industrial actions at all. No statutory reference to these limitations exists. The reason why the limitations are spelled out in agreements rather in statutes probably is that they are less odious to unions when embodied in purportedly voluntary agreements than in a statute. Despite these "voluntary" limitations industrial actions in the public sector have been common in the past 15 to 20 years. There is a growing dissatisfaction with the way public sector unions handle the strike weapon; see further section 9.

Industrial actions with political aims are extremely uncommon in Sweden. Only a handful have occurred since WW II. By and large they are frowned up. The reason is that the labour market parties in Sweden have an array of means other than industrial actions at their disposal to voice their opinions. On the other hand it is out of the question in a free society to completely outlaw politically motivated actions since strong feelings among citizens resulting in industrial actions must not – indeed cannot – be quenched by legislative fiat. Still, political actions are treated with great circumscription by the law. Statutory rules do not exist (other than for the public sector) but guidance is provided by the legislative history of the 1976 Act on Joint Regulation as well as a handful of rulings by the Labour Court. Only actions of a short duration are permissive, in particular when protesting against a domestic political issue.

To the best of my knowledge there has never been a politically motivated industrial action initiated by employers. There can be no doubt however that the law pertaining to such actions is basically the same as the law on employee political actions. Probably the Labour Court would show even less understanding since employers can take to the streets without locking out their employees.[25]

[25] This they did in large numbers in 1983 to protest against the government bill to initiate a system with "wage-earners funds", controlled (ostensibly) by Swedish wage-earners (employees) and funded by a tax levied from privately owned companies. The funds have now been dismantled, following the victory of non-socialist parties in the September 1991 election. The 1983 action by furious employers/industrialists did not in any way directly hit their employees so it was not an industrial action at all, political or otherwise.

6. Strike Breaking

Attempts by employers to break strikes by hiring strike breakers were not at all uncommon in the early decades of industrialization in Sweden and well into the 20th century. Today such practices are virtually non-existent. Employer organizations would not endorse attempts by member employers to hire strike breakers, indeed they would discipline any member who tried it. Statutory rules do not exist.[26]

It is correct to say that this change has come about primarily as a result of the "spirit of cooperation" between the labour market parties that was heralded by the 1938 master agreement between SAF and LO. Rules in that agreement to some extent prevent employers from strike breaking (e.g. by prohibiting transfer of employees to positions vacated by striking employees; cf. section 1.B). Similar rules on neutrality exist in other master agreements. It is standard procedure when employees go on strike to couple the strike with a blockade against new hirings by the employer. This action aims at preventing employers from hiring strike breakers or replacement. As of today the idea that an employer of any size should attempt to hire strike breakers seems out of touch with reality. The same goes for attempts to hire temporary replacement to keep operations running until the strike is over. Though perhaps not unlawful such actions would be more or less infeasible because of the uproar that they would cause both among non-striking employees at the workplace and among unions generally throughout the land. Quite apart from that it would be virtually impossible to find willing applications. In other words, there is no equivalent in Sweden to *Mackay* type counter-actions by employers in the US![27]

7. Injunctions and Other Kinds of State Intervention

Injunctions to stop industrial actions are not part of the Swedish legal system nor have they ever been. This categorical statement is correct (though one can probably find instances where courts erroneously issued injunction type orders against strikes during the early years of the industrialization process in Sweden).

[26] Mention should be made of one statutory rule. Those receiving unemployment benefits are not obliged to accept work at a workplace where a lawful industrial action takes place; 1973 Unemployment Insurance Act, sec. 5 p. 3. It is obvious that this rule greatly reduces the availability of potential strike breakers.

[27] In *Mackay* the US Supreme Court found that employers are entitled to hire replacement during an economic strike to continue to operate; NLRB v Mackay Radio k Telegraph Co, 304 US 333 (1938). Permanent replacement will stay on even after the strike, effectively keeping returning strikers out of a job.

"Wildcat" strikers can be ordered back to work by the courts. Failure to obey the order can result in damages or even dismissal, but nothing else. Damages are not high (cf. section 3.C). Failure to pay will result in a visit by the bailiff, nothing else. There is no such thing as *contempt of court* in Swedish labour regulation on industrial actions.[28]

As was discussed in section 5 industrial actions that pose a threat to essential services or result in national emergencies can be put to an end by the legislator.

8. Other Kinds of Hostile Actions

Boycotts and blockades are common in Swedish industrial relations. Distinctions between "strikes", "boycotts" and "blockades" are blurred.

Many partial actions mentioned in previous sections are called "blockades" in Sweden. This is the case with most of the partial actions mentioned in section 1.B. Some examples! Concerted refusal to work overtime is "an overtime blockade" and refusal to go on business trips is "a blockade against business trips".

"Blockades" in the traditional sense of cutting off the opposite party from something, exist as well. The most commonly used "blockade" occurs in conjunction with a strike (total or partial). It is common practice to couple the strike with a "blockade" against hiring of new employees. This action does not in any legal way prevent employers from hiring new employees – temporary or permanent – but attempts by the employer to do so would cause an uproar (cf. section 6). Blockades against hirings occur rather often as independent actions as well without being connected to a strike. Unions use it as a "starter" together with the "overtime blockade" to show their seriousness of mind, hoping not to provoke any serious reprisal by the employer.

Blockades by employers are common as well. By and large employers do not hire employees who are on strike or who are locked out. Blockades of this kind are not announced as industrial actions in most instances. Employers are entitled to "hire at will" and also to refrain from hiring.

Sympathy actions by employees are very common in Sweden. The traditional form involves two unions, one engaged in a primary action against the employer and a second union. The members of the second union work for an employer doing business with the primary employer (say an oil company delivering petroleum products to a gas station). The sympathy action means

[28] There is an equivalent of sorts in Swedish law to the Anglo-saxon *contempt of court* – "förvandling av vite till fängelse" – but it has no bearing on the issue discussed here.

that workers taking part in that action refuse to have anything to do with the primary employer (i.e. to deliver anything to the gas station, in the example chosen). In other words: there is a blockade against the primary employer. Sympathy actions are usually very effective from the union point of view since the primary employer often finds itself completely cut off (from supplies, or whatever the case may be). The rate of unionization is very high in Sweden and the union movement is united so a call for sympathy from one member union will usually be honoured by all other unions of the same federation. Sympathy actions are often very short, in fact often never go into effect since the targeted employer realizes what lies ahead and gives in.

The purpose of a sympathy action on the employee side is to help another union and its members, this and nothing else. In case other purposes are involved as well, e.g. to demand that the secondary employer (i.e. the employer of the employees undertaking the sympathy action) cease to do business with the primary employer, then the action is no longer considered a sympathy action but a (primary) action against the employer. If so, the action in most instances is unlawful. It is obvious that it is difficult to distinguish between lawful sympathy (secondary) actions and actions that purport to be in sympathy but really are of a primary nature. The case books provide ample testimony to that. Still, lawful sympathy actions are very common in Sweden.

Sympathy actions by employers are lawful but occur only very rarely.

Work-to-rule actions are quite uncommon in Sweden as are overt slow-downs. Slow-downs are never authorized by unions and work-to-rule actions only under exceptional circumstances. The lawfulness of such actions has not been squarely put before the courts but is seems reasonably to believe that they are lawful, if overt. There is nothing unlawful *per se* about them so the general principle of lawfulness should apply.[29]

Concerted quitting by employees, often coupled with ads in newspapers in the "jobs wanted" section, is not that uncommon but never authorized by unions. It is a risky business, however, since the employees may be considered to have given legally binding notice to quit and thus may find themselves without a job if the employer does not want them back. Concerted reporting for sick leave is not than uncommon either but the lawfulness of such actions can be questioned since they may involve fraud. Unions never authorize them so they are anyhow unlawful since unauthorized actions always are (cf. Introduction).

[29] Work-to-rule situations have been before the courts in some cases but their lawfulness was not an issue, Supreme Court case NJA 1970 p. 216 and Labour Court case AD 1967:9.

Picketing is rare in Sweden. There is nothing unlawful about it when done peacefully but it just is not often used as an industrial action. Violence on the picket line is extremely rare, virtually non-existent. As was pointed out in the Introduction in connection with the discussion on the definition of industrial actions, unlawful acts are never excused just because they form part of an otherwise protected activity.

Actions aiming at taking revenge on the opposite party – or someone aligned with the opposite party – are conceivable. As was pointed out in connection with the discussion on lawful and unlawful purposes of industrial actions, actions of this kind are frowned upon in Sweden (cf. Introduction). They virtually never occur and are unlawful because they violate explicit or implicit rules of behaviour on the labour market.

9. Outlook for the Future.

During the years of "the golden age of the Swedish model" between the late 1930's and the late 1960's industrial actions were rather uncommon in Sweden. From an international perspective the Swedish labour market was one of the most peaceful.[30]

The last twenty years or so have witnessed a change in this respect. Perhaps beginning with the introduction in 1965 of collective bargaining (and industrial actions) for public employees a new militancy among unions has emerged. Society has been particularly concerned with the way public sector unions have used the strike weapon. Starting in 1971 society has intervened several times to stop industrial actions that have threatened to cause unacceptable disruption (cf. section 5).[31]

There is now considerable uneasiness in Sweden about the use of industrial actions. Swedish competitiveness in the international marketplace has eroded for many years. There seems to be common agreement that wages have increased too much in nominal terms over the last period of some 15 to 20 years.[32] Two devaluations of the Swedish currency gave temporary respite but did not manage to seriously tackle the underlying causes of deteriorating competitiveness. The might of unions, the potency of the strike weapon and the willingness to unleash that weapon are factors that are

[30] For a comparison of strike statistics see e.g. Clegg, H, Trade Unionism Under Collective Bargaining: A Theory Based on Comparisons of Six Countries (1976).

[31] Apart from the 1971 intervention there were massive interventions in 1980 and again in 1985; cf. section 5.

[32] Real incomes have gone up only very little during the same period.

generally considered to play important roles in the *malaise* that has beset Swedish economy.

The 1980's and these first years of this decade have witnessed strange and unorthodox events. Just two examples! The country has heard its labour government (until 1991) openly and in the strongest possible way exhort and encourage the *employer* community to stand firm and not give in too easily to union demands! Early in 1990 the (then) labour government proposed a temporary ban on all industrial actions and a wage freeze. Those were remarkable proposals for a labour government. *It* met with defeat so *it* rather than the labour market parties had to bow down.

Voluntarism (albeit coupled with some very heavy arm-twisting by the government) was again brought to the fore in 1990 in order to bring about something new. A temporary solution was the appointment of "the Mediator of the Realm". The task of this super-czar among mediators was to persuade the labour market parties to agree to modest wage increases. Model agreements were presented by "the Mediator of the Realm". Very hard pressure indeed was put on recalcitrant unions to sign agreements in accordance with the model agreements. For some time voluntary bargaining was substituted by "guideline bargaining *cum* social reprobation for the recalcitrant"! Signs are that this drastic cure has brought temporary relief. No one seriously suggests that "guideline bargaining" under the close supervision of a "Mediator of the Realm" should – or indeed could – continue for long so more permanent remedies are called for.

Several government white papers have suggested solutions. Early in 1991 a government committee, headed by a very respected (by then retired) trade union leader, made some recommendations, albeit very cautious ones.[33] Mandatory mediation is one but mediators would not get increased powers to settle disputes. A cooling-off period is also recommended but the period would extend to only one week!

These are very modest proposals. However, it might well be that they are sufficient to act as catalysts for a renegotiated social compact in Sweden. This time the compact would have to comprise all sectors of the economy, private as well as public. No one seriously wants the role of society to increase but both society – i.e. the powers that be – and the public at large are growing increasingly impatient. Squeezed from two sides the labour market parties might be able to negotiate some new social compact –

[33] Government White Paper SOU 1991:13 (ISBN 91-38-10736-8, Spelreglerna på arbetsmarknaden, "The Rules of the Game in the Labour Market").

explicit or implicit – rather than face some intervention of a permanent character by society. It happened that way in the 1930's. It can happen again. A near collapse of financial markets late in 1992, drastic economic cures by the government and a record devaluation of the Swedish currency – the third in less than 15 years – and unprecedented unemployment rates have paved the way. Qui vivra, verra!