8th Meeting of European Labour Court Judges, Jerusalem, 3 September 2000

Labour courts and autonomy

Should labour courts maintain separateness from other courts of law ?

Stein Evju
Special Adviser, the Labour Court of Norway

I. Introductory remarks

The term "labour court" means different things in different jurisdictions. That is a matter of course. It is worth recalling, nonetheless. It holds true even for the Scandinavian labour courts frequently conceived to be similar institutions. Siblings they may be, but triplets they are not. The Scandinavian labour courts differ in their historical and legal foundations, in composition and in terms of jurisdiction.[1] The same is true even more when the perspective is widened. While in some national jurisdictions there are specialized courts or tribunals for labour or employment law disputes, in others there are not. Moreover, the relation between specialized labour courts and other courts of law differs very considerably.

Our topic here thus is a complex one. It ties in, also, with a far more wide-ranging topic, that of the "particularity" or "autonomy" of labour law in the legal order, recurrently in debate throughout the post-war period, in parts of Europe at least,[2] however firmly rooted in earlier legal development and doctrine.[3] Depending on the approach, the issue of specialized or separate "labour courts" may be seen as an intrinsic part of or as a sidebar to that general topic.

---

[1] For some brief observations on this, see S. Evju, "Courts and jurisdiction in labour rights disputes in Norway", 10 *The Jagellionian Yearbook of Labour Law and Social Policy* 1998/99, 247, at 252-254.

[2] Starting, in France, with Paul Durand's 1945 essay, P. Durand, "Le Particularisme du Droit du Travail", *Dr. Soc.* 1945, 298. Since, the debate in France has been more or less continuous; and the topic has been the subject of considerable discussion also in a number of other countries.

[3] From the Norwegian perspective it may be pointed to R. Knoph, *Norges rett*, Oslo, 1934, who in a broad general context underlined the "distinctive characteristics" of labour law, in part on account of the role and function of collective agreements; *see*, in particular, 263, 267.

Even in the more specific context it is addressed here, the topic gives rise to a number of questions. It involves not only the organization and jurisdiction, broadly speaking, of "labour courts" but also the structure and organization of the court system in general. And it calls for an investigation into a key concept in its very formulation, that of "separateness".

I shall return to the latter issue in the final section of this contribution (III). First, and in keeping with the questionnaire, I shall briefly outline the "labour court system" and its position in the general system of courts in the Norwegian context.

Brief outlines on labour courts have been presented previously, at the First Meeting of European Labour Court Judges, 1984; see *The Labour Courts in Europe* (Ed. by Bert Essenberg), Geneva, 1986. At subsequent ELCJ Meetings, some more specific issues also within the ambit of the present topic have been broached. See, in particular, the publications from the 1987 and 1989 meetings, *European labour courts: Current issues* (Ed. by Werner Blenk), Geneva, 1989 [ILO Labour-Management Relations Series, No. 70], and *European labour courts: Industrial action and procedural aspects* (Ed. by Werner Blenk), Geneva, 1993 [ILO Labour-Management Relations Series, No. 77].

For Norway, my article referred to in note 1, *supra*, offers a more comprehensive and up-dated contribution. To keep this presentation short and succinct, as foreseen, I restrict myself to referring generally to that work and shall not elaborate on the points that are also taken up here.

II. The Labour Court and the ordinary courts

1. *The labour court system*

The Norwegian Labour Court was established in 1915, by statute. Building on a prior collective agreement based system for collective labour disputes resolution, but departing from it, the 1915 Labour Disputes Act (which entered into force on 1 January 1916) laid down a statutory regulation of the collective agreement as a contract and conjoint dispute resolution machinery, the Labour Court being one essential pillar in the latter.

The 1915 Act was superseded by the 1927 Labour Disputes Act, which maintains all basic features of the system and is still in force. The system, and consequently the Labour Court's field of jurisdiction, was expanded on – extended to cover also state civil service, essentially – with the 1958 Public Service Labour Disputes Act, also still in force.

The Norwegian judicial system is otherwise basically uniform, consisting of a three-tiered hierarchy of general, or "ordinary" courts – the Municipal Courts, Courts of Appeal and the Supreme Court – which in general have jurisdiction in all areas of law.

Some specialized jurisdictions exist at lower instance levels.[4] As a common denominator, however, their decisions are on appeal to an ordinary court, be that a first instance court, a Court of Appeal or, as the case may be, immediately to the Supreme Court. Thus the specialized courts are integrated in the general court system. That is *not* the case for the Labour Court (see in particular item 3, *infra*).

The Labour Court hence is a *special court* in the strict sense and in that capacity it is unique in the Norwegian judicial system.[5] It was, initially, set up as a single-tiered court of (first and) final instance with exclusive jurisdiction within its remit.

This was added to in 1937 with the introduction of "local labour courts", i.e., the ordinary Municipal Courts acting in a special capacity as courts of first instance in certain cases that would otherwise pertain to the Labour Court.

The Labour Court is independent of and not integrated in the general court system as such. Whereas the ordinary courts in fiscal and administrative regards are within the remit of the Ministry of Justice, the Labour Court in those regards is attached to the Ministry of Local Government and Regional Development (formerly named the Ministry of Local Government and Labour), under whose remit falls also the major part of labour and employment law legislation, including, i.a., the Labour Disputes Act and the 1977 Working Environment and Worker Protection Act (WEA).

2. *Categories of disputes - Jurisdiction*

The dispute resolution machinery in collective labour disputes is based on the fundamental tenet of a distinction between disputes of interest and disputes of right. Whereas interest disputes are a matter for collective bargaining, possibly mediation and recourse to industrial action, in rights disputes industrial action is essentially precluded – rights disputes are subject to being resolved judicially.

The Labour Court's jurisdiction is, essentially, confined to *collective* disputes of right. The Labour Court has jurisdiction in disputes concerning the interpretation, application and validity of collective agreements, in cases of breach of agreements and of the – contractual or statutory – "peace obligation" and in cases of claims for damages resulting from such breaches.

---

[4] A recent "white paper" - NOU 1999: 19 *Domstolene i samfunnet* [The Courts in Society] – in Chapter 12 (p. 359 *et seq.*) provides a survey of existing specialized courts.

[5] Another similar institution, the Boycott Court, was in existence pursuant to special rules in the Labour Disputes Act in the years 1933 to 1947. In 1947, however, that court was disbanded and jurisdiction in boycotting matters was returned to the ordinary courts by the 1947 Boycotting Act.

Accordingly, the Labour Court does *not* have jurisdiction in individual rights disputes, viz., in cases concerning the rights and obligations of an individual on grounds other than a collective agreement, such as employment contract or dismissal disputes, social security, administrative or criminal law matters. All such disputes pertain to the ordinary courts. For certain types of cases, however, special procedural rules apply. In particular, dismissal disputes pursuant to the WEA – under which "dismissal disputes" include disputes on whether an employment relationship exists - are subject to special rules designating a limited number of Municipal Courts as competent courts of first instance and on the composition of courts – to include lay assessors – in the first and second instance, as well as special rules on time limits etc.

Within the ambit of the Labour Court the "local labour courts" have a more limited jurisdiction. They are competent only in disputes concerning collective agreements – not in disputes on breach of the statutory "peace obligation" – and only where the collective agreement in question is of a local or regional character, viz., where the party on the employer side is not a national employers' association. Such agreements however play a very minor role in practice. Predominantly, collective agreements are concluded at the national (sector or industry) level[6] and disputes then belong immediately under the Labour Court.

3. *Appeals*

Pursuant to Article 88 of the Constitution the Supreme Court "decides in the last instance".[7] Thus in principle, all decisions by other courts should be on appeal to the Supreme Court. The constitutional provision itself however foresees that restrictions on the right of appeal to the Supreme Court may be laid down by laws (Acts of Parliament).

Under the labour disputes Acts[8] decisions by the Labour Court are *final* and enforceable on par with Supreme Court decisions. Hence, there is *no* appeal on Labour Court decisions – with the exception of "forum disputes": A decision by the Labour Court to dismiss a case on grounds that it does not belong under the Court's jurisdiction may be appealed to the Supreme Court. Appeal is also

---

[6] Likewise predominantly, they are added to by *follow-up* bargaining and agreements at local, or enterprise, level. Jurisdiction-wise, however, such follow-up agreements are considered as a part of the national collective agreement pursuant to which they are concluded and hence, to belong under the immediate jurisdiction of the Labour Court. – For an illustration, see ARD [*Dommer og kjennelser av Arbeidsretten*] 1987, 111.

[7] Constitution of Norway, 1814. The present wording of Article 88, first paragraph, was adopted by constitutional amendment in 1911.

[8] I.e., the 1927 Labour Disputes Act and the 1958 Public Service Labour Disputes Act.

possible on the grounds that the Labour Court has decided a case that does not fall under its jurisdiction.[9] The Supreme Court in such cases is vested only with deciding the forum issue; it may quash a decision but in no case it is empowered to review or decide on the substance matter of a dispute that falls under the jurisdiction of the Labour Court.

Decisions by "local labour courts" are on full appeal to the Labour Court. Appeal here is by right; no form of "screening" or leave to appeal applies.

Under the general rules on civil procedure, decisions by a court of first instance are on full appeal and so are, at the outset, decisions by a Court of Appeal. Appeal is at the outset by right, subject, however to rules on *summa appelabilis*.[10] Further, appeals to the Supreme Court are subject to a form of "screening" and leave being granted by the Supreme Court Appeals Committee, a body within the Supreme Court itself which may dismiss an appeal or limit it in scope pursuant to rules and criteria laid down in the Civil Procedure Act.[11]

4. *Composition of courts*

The Labour Court is composed of *seven* judges (all of whom are technically referred to as "members") and sits with a full panel of seven members in all cases.[12] Three members are professional judges. The President and the Vice President, who shall have the qualifications required for Justices of the Supreme Court, are in full time positions; the third professional member now in practice is a full time appeal court judge who sits in the Labour Court in a part time position. The remaining four members are lay judges, appointed upon nomination by the major trade union and employers' organizations (two from each side). It is a prerequisite for appointment as lay judge that they do not hold office in or are in regular employment of a trade union or an employers' association.

---

[9] The number of appeals of both kinds since 1916 totals no more than nine; none have been successful.

[10] The amounts are currently NOK 20.000 (abt. € 2.470) for an appeal to the second instance, and NOK 100.000 (abt. € 12.345) for an appeal to the Supreme Court. Leave to appeal may be granted if the amount in dispute is less, by the court to which an appeal is made.

[11] For procedural law issues and certain interlocutory decisions the rules are somewhat different. Generally, such decisions are on appeal, no *summa appelabilis* applies, but decisions by a Court of Appeal in the second instance are only on appeal to the Supreme Court (Appeals Committee) on points of law.

[12] For all members a number of substitute members are also appointed. This and the particular rules on the Court's composition in the individual case I leave aside here.

All members are appointed by the King (Cabinet in Council), as is the case for judges in the ordinary courts. [13] However, whereas judges in the ordinary courts have tenure all members of the Labour Court are appointed for a three-year period. For that period, they are permanent members; lay members thus are not appointed on a case-by-case basis. Appointments may be extended for new three-year periods. For the professional judges that is also the established practice; in particular, no President (or Vice President) has not been reappointed unless by his own volition or when having reached the retirement age (which for judges in general is 70 years).

As regards terms and conditions otherwise, the President of the Labour Court is on par with Supreme Court Justices and the Vice President has terms similar to senior Appeal Court judges. The third professional judge and the lay members are remunerated on the basis of hours worked.

When a Municipal Court acts as a "local labour court" it sits with one of its regular professional judges and two lay assessors. The lay assessors are appointed, one from each side, upon nomination by the parties to dispute at hand.

Otherwise, the ordinary courts of first and second instance may or may not sit with lay assessors,[14] drawn by lot from a panel appointed for a four-year term. In dismissal cases, it is the main rule that courts shall sit with lay assessors – two alongside one professional judge in the Municipal Court, four alongside three professional judges in the Court of Appeal. Lay assessors for those cases are drawn from a separate panel appointed specifically for dismissal disputes.

The Supreme Court does not sit with lay assessors.

5. *Parties*

For Labour Court cases, it is the starting point and general rule that only the parties to the collective agreement in dispute have a right of action. Further, it is only the *superior party* to the agreement that may act as plaintiff or defendant;[15] subordinate organizations or individual members bound by the agreement may

---

[13] Pursuant to the Constitution and the relevant legislation, the power to appoint judges formally is vested with the King; in practice it is exercised by the Cabinet "in Council", i.e., a specific formal procedure. In practical terms, decisions on appointments are mainly made by the Minister of the Ministry concerned (i.e., the Ministry of Justice but for the Labour Court the Ministry of Local Government and Regional Development).

[14] Leaving aside criminal law cases, where special procedural rules apply.

[15] This is of considerable practical importance on account of the prevalence in practice of collective agreements being concluded by main (confederation) organizations at the national level. See also note 5, *supra*.

not. The competent parties appear and act in their own name as well as on behalf of their members and may in that capacity pursue claims on members' behalf, e.g., for payment of wages or the recovery of damages. As a main rule, members (associations or individuals) in such cases do not have standing as parties in the proceedings.[16]

However, suit may be filed *also against members*, e.g., to declare a decision by an employer null and void or for damages to be paid by individual members. In these cases, the relevant member must be sued alongside the organization party and then has full standing as a – separate and independent – party in the proceedings.[17]

The rules sketched out above apply, pursuant to Section 8 of the Labour Disputes Act (LDA), to disputes "concerning a collective agreement". Modifications obtain for disputes (solely) on breach of the statutory "peace obligation". It is a moot point whether individual members in such cases have a right of action independent of the organization to which they are affiliated. Further, it is a moot point whether the LDA procedural rules can be conceived to unreservedly preclude "third parties" from challenging the legality (validity in relation to inderogable law) of collective agreement provisions in the Labour Court.

Before the ordinary courts, the right of action rests with the individual; the organization to which they may be affiliated is not empowered to act for or on behalf of its members.[18]

6. *Complementary mechanisms*

Pursuant to Section 18 No. 2 of the LDA, it is a requirement that prior to filing a complaint with the Labour Court the issue(s) in dispute should be the subject of negotiation – commonly called "dispute bargaining" – between the (superior) parties to the collective agreement concerned. As a rule, the Labour Court shall dismiss a case (or parts thereof) if "dispute bargaining" has not been conducted or the complainant at least has made serious attempts to engage the defendant party in negotiation on the issues at hand.

---

[16] For illustration, see ARD 1986, 168 and Rt. [*Norsk Retstidende*] 1987, 98 = 7 *I.L.L.R.* (1989), 12, and also ARD 1993, 147, 168-169 (on recovery of damages).

[17] ARD 1993, 147 is illustrative also of this point.

[18] But may, of course, support a member by providing legal aid or assistance; in certain cases the organization may also act as intervener in the proceedings.

Beyond this, no specific pre-trial procedures apply. The Court cannot at any stage order the parties to go to conciliation or mediation. The Court may however at any stage request the parties to explore a possible amicable settlement and may, also, assist in its attainment. No specific rules apply to such procedures. It is in practice up to the President of the Court to act according to his judgment at the preparatory stages of a case; at the stage of a hearing the possibility of a friendly settlement may be explored on the initiative of the Court but then, also, normally it is only the President who is directly involved in the talks with and between the parties.

In cases pertaining to the ordinary courts a requirement of conciliation, before a (lay) Court of Conciliation, exists as a prerequisite to filing suit in a Municipal Court but with numerous exceptions. Dismissal disputes under the WEA are wholly exempt from this requirement; the WEA itself contains rules on prior "dispute bargaining" which however is not a mandatory precondition to filing a complaint.

7. *Procedural aspects; costs*

The procedure in practice, at the preparatory stages and at the hearing, is in all essentials similar in Labour Court cases to proceedings before the ordinary courts.

There is, however, a major difference as regards costs. Firstly, in ordinary court cases the plaintiff (or appellant) is required to pay a court fee when filing suit.[19] In Labour Court cases, no court fees are charged. Secondly, pursuant to provisions of the general Civil Procedure Act as a main rule the winning party in litigation shall be awarded costs. In Labour Court cases, on the other hand, where it is mainly the labour market organizations that appear, it is well established in case law that costs are normally not awarded in ordinary disputes concerning collective agreements.[20] In disputes on the lawfulness of industrial action, however, the common practice is that costs are awarded against a "guilty" party.

8. *Case load; statistics*

The Labour Court, on average over the last ten years, receives some 40 – 45 new cases annually. The great majority of cases are on issues of interpretation and

---

[19] An exception applies for employees bringing proceedings against their employer; however not for suits filed by an employer against an employee. (Court Fees Act, 1982, Section 10 No. 10.)

[20] The Civil Procedure Act provisions do not apply as such; LDA Section 45 No. 2 contains a rule on costs, the historical interpretation of which is the foundation that this case law is built on.

application of collective agreements. Cases on industrial action and damages for breach of collective agreement are comparatively few, on the average not more than two – three per year.

Local labour court cases are quite uncommon. The historical average since 1937 is less than three cases per year for the country as a whole. In later years, on average less than one of the new cases received by the Labour Court is on appeal from local labour courts.

In the ordinary courts, the predominant number of labour related cases are dismissal disputes. They total several hundred annually; reliable aggregate statistics are however not available. The Supreme Court, hearing a relatively limited number of civil law cases on appeal in substance, decides not more than one to four employment law cases per year on average.[21]

9. *Alternative dispute resolution*

In the field of labour law, alternative dispute resolution is uncommon. That is true for collective labour rights disputes as well as for employment law issues. There is, with minor exceptions, no set institutional machinery for ADR in either field. Generally, parties may submit rights disputes to arbitration, pursuant to provisions set out in the Civil Procedure Act, in which case the decision by the arbitration panel is final and binding.[22] Presumably, the cost factor is a major reason why recourse to arbitration is not taken more frequently; generally, the parties will have to cover the full costs, including the fees of panel members, of arbitration proceedings, which easily exceed by far the costs incurred in litigation in the courts.

10. *Changes in the labour court system?*

The Norwegian "labour court system" in the narrow sense has experienced few changes since its inception in 1915. Apart from the changes already noted – the addition of a first instance level "local labour courts" in 1937, and the extension of the system with the 1958 PSLDA (see item 1, *supra*) – the major change was the enlargement in 1927 of the Labour Court from a five member (one President, four lay judges) to a seven member court. Also, there has been few and mainly marginal changes in substantive law rules on collective agreements, etc., of consequence to the Labour Court's jurisdiction and the system as a whole.

---

[21] The Supreme Court Appeals Committee however decides a far greater number of cases dealing with interim issues in dismissal law.

[22] It may however be quashed on appeal to the ordinary courts or, as the case may be, to the Labour Court on certain grounds of grave error in law or procedure.

There has been no call in recent years, or for as long as anyone may be able to recall, for substantial changes in the labour court system. During the last decade the preoccupation has been with possible reform of the LDA substantive law rules on collective bargaining, collective agreements, industrial action, etc., however thus far not resultant.[23] Largely, the court system as such or procedural law issues have not been addressed. To this, two specific issues represent the exception.

First, a Government-appointed Commission on the Judiciary tabled a "white paper" in 1999 proposing, i.a., the establishment of a body independent of the Government to be in charge of fiscal and administrative matters pertaining to the courts, and a revised procedure for the appointment of judges.[24] As regards the Labour Court, the Commission expressed itself in favour of transferring the administration of the Court to the new administrative body but did not take a firm stand on the issue, referring it to further examination.[25] That examination has yet to be commenced. Likewise, the Commission referred the question of an "adjustment" of the rules concerning the appointment of judges to the Labour Court to such further examination.[26]

Second – picking up on the second of the above points without awaiting a more extensive examination – the Ministry of Local Government and Regional Development in April 2000 put out for comment a proposal on possible amendment of the rules on appointment of judges in the Labour Court, on two different counts. In view of international law standards on the independence of the judiciary, in particular Article 6 (1) of the 1950 European Convention of Human Rights,[27] it is proposed that the full time judges (the President and the Vice President) of the Labour Court should not be appointed for a determinate

---

[23] A tri-partite commission 1996 "white paper" suggesting "principles for reform" of the LDA – NOU 1996: 14 *Prinsipper for ny arbeidstvistlov* – was in effect shelved. Currently, a 1999 Government-appointed commission is working with a view to tabling a "white paper" on possible reform in early 2001. Reform concerning the Labour Court and procedure in rights dispute are however not within the commission's terms of reference.

[24] See NOU 1999: 19 *Domstolene i samfunnet* [The Courts in Society]. A substantive minority in the Commission proposed maintaining administrative responsibilities within the Ministry of Justice but in a revised form. The follow-up process on the Commission report is still on-going and no decisions have been made yet.

[25] See *ibid.* at 376.

[26] See *ibid.*, at 379.

[27] The 1950 Convention, along with the two 1966 UN Covenants, is now incorporated into Norwegian domestic law, by the Human Rights Act of 21 May 1999 No. 30 which entered into force on 1 July 1999.

time period but have tenure. For other members of the Court it is proposed that they be appointed for a five-year term. At present, the fate of these proposals remains to be seen.

As regards the ordinary courts, the system of special procedural rules for dismissal disputes – in existence since 1977 and having been amended on several counts since then – has been called into question, but specific proposals on change have yet to be elaborated.

III. Should labour courts be separate from other courts?

1. *A prefatory note*

Returning to my introductory remarks (in I, *supra*), the questionnaire formulation of the topic triggers a slight reservation at first. When asking whether labour courts should "maintain" separateness from other courts of law, it is implicitly assumed that, in some form or other, "labour courts" exist. Granted, that is the case for a majority of jurisdictions within our purview. But it need not be the situation. In a general perspective our topic thus is only a facet of the broader issue, of whether there should be specialized or "separate" courts for labour rights disputes, or even more generally, for any specific field of law.

It is not feasible in the present context to delve into that subject in a general way or in-depth. The focus here is on labour courts. Adhering to this, I shall broach some aspects of the issue and proceed mainly on the basis of the current national context. Still, the connection with the more general problem should not be lost from sight.

Before proceeding, however, I shall pick up on my second general remark in the introduction.

2. *"Separateness" – particularity, autonomy, or what?*

The term "separateness" is not an unambiguous one. It may be understood to denote something that is individual, different and distinct from something else. Or, in a more narrow sense, something that is apart from and *not connected with* something else. The latter approaches the concept "autonomy", which strictly speaking means "subject to it own rules", the most important sense of which however is the more exclusive, *not* being subject to *anyone else's* rules, or influence.[28]

---

[28] See D. Howarth, "The Autonomy of Labour Law: A Response to Professor Wedderburn", (1988) 17 *I.L.J.* 11.

A first observation is that "separateness", like "autonomy", must be viewed as a *relational* concept.[29] That is clearly its nucleus. And it is evidently the case here, the point at issue being whether labour courts should be separate from – or, to put it in other words, in relation to – other courts of law. That narrows the topic down, certainly, but it may still involve number of different aspects.

A second observation, linked with this, is that it may be useful to consider "separateness" as a *relative* concept.[30] The "separateness" of labour courts may be strong or it may be weak, and it may be more or less extensive, in terms of the organization of the court system as a whole and in other regards. The differences that prevail between national systems could readily be used to illustrate this (as I briefly touch upon below).

My third observation is a general one. Labour law is part of the legal order as a whole. It may considered as being, or that it should be, more or less "particular" or "autonomous". It remains, nonetheless, that labour law is but one part of the general legal order and cannot escape having relationships with other parts of the same legal order.[31] This is self-evident, of course. But then, it is equally self-evident that it is a point that should not be left out of consideration when considering whether and in what form courts entrusted with labour law matters should be separate from other courts.

Then, finally, I turn to some more specific observations.

3. *Administrative affiliation?*

Posit the existence of a specialized labour court, or a system of labour courts, should it be linked with other courts in administrative regards? I bring this up first since the issue is topical in Norway (see *supra* at note 24).

If a separate labour jurisdiction exists, arguably a separate administrative body may be more conducive to attending to the particular needs and circumstances of the special court or courts. If joined with other courts in a larger setting, there is on one hand a risk that requisite needs in terms of resources may take a back seat in competition with those of other courts, and that circumstances particular to the specialized court are not fully or properly appreciated. On the other hand, however, a joint administration of all courts may contribute to recognition and regard for the specialist jurisdiction and also enhance mutual understanding and possibilities for "cross-court" contacts, opportunities for further education and

---

[29] Here, I draw on Howarth's analysis of "autonomy"; see D. Howarth, *ibid.*

[30] Again I am drawing on Howarth; see D. Howarth, *l.c.* 12-13.

[31] See Lord Wedderburn, "Labour Law: From Here to Autonomy?", (1987) 16 *I.L.J.* 1, 2-3.

training, etc., and thus counter the risk of "disciplinal isolation" from other areas of law on the part of the specialist judges.

An assessment is contingent also on other factors. One is that of jurisdictional scope. The wider the scope of the specialized jurisdiction, and thus its potential involvement with adjacent legal issues, the stronger the reasons may appear to group the courts in a common organization. Another factor is that of institutional size. A small specialist court may be in stronger need of a separate administrative affiliation than a large-scale special judiciary (like for example the German *Arbeitsgerichtsbarkeit*). The administrative arrangement itself should also be taken into account, e.g., its degree of independence from the political sphere, its powers in general and in particular the safeguards against intrusion on judicial affairs.

On which side of the fence one should take refuge is in no way evident. Systems differ, and attitudes may differ with them. The way a given system has evolved and actually is, tends to embed value conceptions that as such cannot be totally disregarded when change is up for consideration.

As for myself, having considered and reconsidered the question, before and after the Commission report on courts was put forward, I am inclined towards the view that as far as the Norwegian Labour Court is concerned a separate administrative affiliation still appears preferable. In deference to the forthcoming examination of the issue, though, I should add that the outcome is not obvious, not even to me.

4. *Should there be special labour courts?*

When turning to this, the "substantive" part of the problem, one can hardly avoid to note that the questions rests, fundamentally albeit perhaps implicitly, on an assumption that in the field of labour law special considerations are at stake and need to be attended to. If there were none, there would be little reason whatsoever for having special courts in the field.

That assumption may be open to debate and indeed has been in debate, formerly as well as in recent years. But here is not the time and place to enter that arena. It would lead too far, moreover, to elaborate on which are the special considerations pertaining to labour law and how they should be viewed in relation to or in context with other areas of law and the interests manifested in them. We shall proceed here on the assumption that at least there are some special considerations that may merit having special courts for labour rights disputes.

Echoing Lord Wedderburn's lament,[32] we could note at the outset that the mere creation of courts with a labour jurisdiction does not in itself resolve the problem. The functioning of an institution hinges on, among other factors, those vested with discharging its functions – in our context the judges or members of the court.

It is a commonly used argument that in the field of labour law there is a need for expertise in the courts.

One possibility then may be to refer disputes to certain specific courts (in the first or more instances), limited in number, among the ordinary courts, on the assumption that dealing with a larger number of cases they would more easily develop expertise in the field. That argument played a part when the specialised procedural rules for dismissal disputes under the WEA (see II, 2, supra) were adopted in 1977.

A second option may be to establish a specialised jurisdiction – again in one or more instances – with the possibility of appeal to a higher general court(s). The U.K. employment tribunals (previously termed "industrial tribunals") system exemplifies one variety of this approach.[33]

Another element, which may or may not be combined with either of the two preceding alternatives, is that of expert representation on the court(s). As regards courts in the field of labour law, this is – metaphorically speaking – something they are imbued with from infancy. They should be composed of or at least include persons having expert knowledge of the legal field or industrial relations practice. To this may be added the view that the composition of courts including members that have a background and experience from actual industrial relations practice is conducive to the parties' confidence in the court system and hence to their relying on adjudication instead of taking recourse to other measures, industrial action in particular.[34]

The other side of the coin is that expert courts may be prone to what I have dubbed "disciplinal isolation", risking evolving a sub-culture out of tune with the surrounding legal order. Further, in particular in a smaller context or a system that otherwise relies on a generalist judiciary, specialist courts may not be

---

[32] See Lord Wedderburn, *l.c.* 14, and also 27.

[33] As do, in a wholly different field, the Norwegian (first instance) special land division courts.

[34] These concerns, too, were essential to the special WEA dismissal disputes procedural system (*supra*, II, 2), let alone to the rules concerning the composition of the Labour Court.

considered as attractive career-wise and face problems in recruitment of the requisite personnel.

Accessibility and swiftness are also considerations frequently quoted in favour of specialist courts. Access to court without undue formalities is instrumental to upholding rights. But that is true generally, not merely in labour law. Swiftness is equally important, in labour law perhaps in particular in the field of collective labour relations with collective agreements that come up for renewal at relatively short intervals, industrial action, etc.[35] Swiftness is however a two-sided sword, as the British experience with interlocutory injunctions may be taken to illustrate.[36]

None of the three – expertise, accessibility and swiftness – is in itself decisive for whether there should be specialist courts, neither separately nor taken together. All of these considerations may be catered to by means of procedural law. For example, and as I have already pointed to, generalist courts may be reinforced with specialist members or lay assessors when hearing cases in which expertise is deemed requisite, or they may be granted power to summon experts to appear before them.

Norwegian experience in the field of dismissal law suggests that there is reason for some scepticism, however. It is a central concern underlying the substantive law provisions that dismissal disputes should be settled quickly and that courts should expedite proceedings. But, the courts are dealing also with a variety of other cases where swift adjudication is considered essential and are not so readily prepared to give priority to dismissal cases at their expense. Further, with a special composition of the court or other arrangements to the same effect being required, which in essence is the case for dismissal disputes,[37] this gives rise to jurisdictional problems.[38]

Issues concerning jurisdiction certainly are important when considering whether there should be special labour courts.

---

[35] In the preparatory work to the WEA, the argument of expedite handling of dismissal disputes is also relied heavily on to underpin the system of a limited number of courts competent in the first instance. See, in particular, Ot.prp. nr. 41 (1975-76) [the Bill to Parliament], 85.

[36] See, e.g., Lord Wedderburn, *l.c.* 20-21.

[37] See II, 2, *supra*.

[38] That was abundantly evident prior to amendments to the WEA in 1995 and 1997 when the scope of issues to be adjudicated pursuant to the particular procedural rules of the Act was expanded. The objective of the amendments was to alleviate the considerable problems that beleaguered courts and parties alike.

First, dividing jurisdiction between different courts unavoidably results in a borderland being created, giving rise to issues of which court is competent in a given case. This may be more or less problematic, depending on how clearly the subject matter jurisdiction of one or all courts is delineated and also on procedural law arrangements.[39] Any division of jurisdiction should not be arbitrary but should well considered with a view to counteract inconsistency on issues of substantive law and to attend in a coherent way to the interests and considerations that are in play.

Second, the scope of the jurisdiction accorded to the individual court or court system is a factor. This is related to the previous point but encompasses an additional facet. A special court (system) is maybe more easily acceptable if its subject matter jurisdiction is limited, in particular if the field in question is viewed as having distinguishing characteristics. The wider the jurisdiction, the sooner the question arises of the demarcation line between what is a labour law problem and what is not. For example, should a labour court finding that obligations to consult workers in a corporate takeover process are broken also have the power to bar the takeover from proceeding?[40] – One may perhaps view the Norwegian Labour Court (and the Danish) as characterized by having a narrowly defined jurisdiction in this regard. On the question put, the answer is in the negative. However, the Court may easily – and occasionally is – confronted with issues of law that may also, in a different procedural setting, be brought before the ordinary courts.

Third, the position of special courts in the court system at large is a factor. Here, both the relational and the relativity aspect of the concept of "separateness" come clearly in view. It is one situation if special courts appear only at the first or lower instance levels and their decisions are on appeal to general courts. That is the case for example in Norway with some specialized jurisdictions[41] and, within the field of labour law, for the U.K. employment tribunals system.

A further Norwegian example may be cited. Until an amendment of the Act in1981 (clearly for reasons of the Supreme Court decision referred to here), decisions by municipal courts in dismissal disputes under the WEA were on appeal to the Labour Court, pursuant to the rules of the LDA; i.e., the Labour Court then under the relevant legislation was the *final* instance. In a much-heralded decision by the Supreme Court – Rt. 1980, 52 – it was argued that a specialized court system for dismissal disputes is incompatible with Article 88 of the Constitution and that the plaintiff, a dismissed teacher, thus should have the right to bring his action in the otherwise competent court of first instance. The Supreme Court, holding, in effect, that a constitutional

---

[39] See note 38.

[40] The example draws on Lord Wedderburn, *l.c.* 22.

[41] See in II, 1, *supra*.

issue did not arise until a possible appeal on a decision by the Labour Court, rejected that argument. The Supreme Court however lucidly expressed itself, albeit as an *obiter dictum*, to the effect that it is not consistent with Article 88 to wholly exclude *dismissal* disputes from being on appeal to the Supreme Court.[42]

The situation is a different one if specialized courts pervade all instance levels, as is the case in principle in Germany with the three-tiered *Arbeitsgerichtsbarkeit* and also, but in a quite different way, in the Swedish labour jurisdiction system.

This is closely linked with the fourth issue, that of unity in the legal order. This again has two facets.

Obviously, it must be avoided that a matter in dispute becomes a shuttlecock between jurisdictions. It is paramount that some way or another, a final and binding decision as to which jurisdiction a case belongs may be obtained. That, I should think, is common ground. The question then is how this should be attained. Different solutions are conceivable; the Norwegian "model" (see II, 3, *supra*) may be pointed to as one.

Another matter is that of unity in substantive law. Division between courts of subject matter jurisdiction may well entail the possibility of identical issues being brought before different courts in different contexts. It suffices here to refer to the Norwegian situation.[43] Arguably, it is desirable to avert that the same law is applied differently. From this it may be argued, and some have forcefully argued, that there needs to be a final and superior instance to which appeal is had with a view to obtaining or maintaining uniform application of the law of the land. Or, in other words, that "separateness" cannot or should not be maintained to the very end.

To the question at issue, there is in my view no set answer in general. A number of considerations need to be taken into account. The weighing of arguments hinges not only on the arrangement being considered as such, but also on the national context in terms of historical development and current legal institutions.

Clearly, it is one situation where a specialized labour jurisdiction exists, in one form or the other. The question then would be whether it should be maintained, adjusted – perhaps expanded - or discarded. If on the other hand no special labour jurisdiction already has been set up, the issue may be whether one should

---

[42] For a discussion of this and other aspects of the Supreme Court decision, see S. Evju, "Arbeidsrettenes domsmyndighet" [The jurisdiction of the labour courts], *Lov og Rett* 1980, 253.

[43] For illustration, see ARD 1986, 168 and Rt. [*Norsk Retstidende*] 1987, 98 = 7 *I.L.L.R.* (1989), 12; and ARD 1990, 118 = 10 *I.L.L.R.* (1992), 63.

be. Either way, no "golden formula" or *open sesame!* asserts itself. It may be recommendable from the point of view of those that have specialized labour courts to reflect on whether one's experience with that system is such as to render it recommendable to others. Here, again the outlook no doubt will differ depending on the system and prevailing attitude to labour law and industrial relations in the societal context.

Modestly attempting to summarize[44] I would suggest that a – in essence *the* – primary question is, what should be the precise limits of the labour court(s)' subject matter jurisdiction. Firstly, it is essential that it be as clearly defined as possible, with due regard to the various forms of disputes that may affect the rights of employees or industrial relations actors. Secondly, it is paramount that it is made clear to what extent the labour court(s) should be a "closed circuit", in two regards: Should a labour court be the final instance within the jurisdictional sphere, or should appeal be had to a general court of law? And should the labour court(s) have the final word on their jurisdiction or should there be some instance – a superior general court, a constitutional court, or another body – to decide "forum disputes"?

Further, it merits being reflected on which are the objectives that may warrant a specialized labour jurisdiction. At the outset, this may seem self-evident: Workers' rights, the interests of collective bargaining parties, or both. It should however also be taken into account what is appropriate in order to attend to or protect the interests of others, e.g., the unemployed, consumers and "third parties" in general.

Moreover, some thought should be given to the role and function of labour courts in the industrial relations context. If courts are to have some form of expert or interest representation, then for what purpose, and in what proportion? Should the courts be mainly "passive" in their function, reflecting prevailing industrial relations practice at a given time, should they be responsive to changes in such practice, or should they play a role – more or less active – in shaping future industrial relations practice?

In short, there is an array of questions to ponder.

From a personal point of view I would only add the following observation.

A specialized court or court system in the field of labour law with expert representation from labour market actors may be conducive to the smooth functioning of industrial relations and thus beneficial to society at large. But this

[44] In so doing, I again draw on D. Howarth, *l.c.* 24-25.

is endangered if expert representation by (lay) members of the judiciary is conceived of as a means to achieve power or influence over court behaviour, perverting expertise to partisan representation. At the end of the day, the crucial point is not whether courts are specialized or separate; it comes down to the substantive legal norms, the procedural order and the attitudes and action of those who are vested with applying and developing the law.

5. *What about the Labour Court?*

The Norwegian Labour Court, as I have already pointed out, is a special court *strictu sensu*. To place it in the framework of my preceding analysis, the Labour Court certainly enjoys "separateness" in administrative regards, and also procedurally. Even if the procedural rules applicable to cases within the Court's jurisdiction largely correspond to those of general civil procedural law, they are distinctly different and "separate" on important points, not least as regards the (active and passive) right of action (see II, 5, and also 6, *supra*). Also, the composition of the Labour Court, with permanent lay members that are not drawn from a panel on a case-by-case basis, differs from how the ordinary courts are composed when sitting with lay assessors. And the Court is – still – distinguished from the other courts in that it members, the full time professional judges included, are appointed for a limited time period.

Turning to the Labour Court's position in terms of subject matter jurisdiction, here as well the Court enjoys "separateness". And that is, in the terminology I have suggested, a form of *strong* separateness. This characterization is founded on two points in particular.

As I have also pointed out above (see in particular II, 3, *supra*), under the legal regime as it stands today the Court is the final instance within its sphere of jurisdiction. There is no higher authority to review its decisions even if the issues concerned may be put to the ordinary courts in other contexts.

Moreover, within its field the Labour Court is placed in a *superior* position *vis-à-vis* other courts. By virtue of Section 9, second paragraph, LDA a decision by the Labour Court on the construction of a collective agreement has a general force of law – it is binding for all employment relationships concerned. Hence, a decision by the Labour Court is binding also for the ordinary courts – including the Supreme Court – should they be confronted with employment contract issues in which the application of the collective agreement comes into play.[45]

[45] Occasionally, cases in the lower instance ordinary courts call for a reminder on this point. See, e.g., ARD 1998, 1 and 215. – The procedural intricacies that may be involved in this context I leave aside here.

A certain reserve or scepticism towards specialized courts may perhaps be discerned in my analysis above. To the extent that is so, it should be ascribed to national prejudice and experience.

In closing, let me then add on a personal note that I am certainly not prepared to outright reject the notion of separate and specialized courts in the field of labour law. On the contrary, had that been the case I would not have devoted more than 15 year to presiding in a special labour court. And I still have faith in the viability of the Labour Court as a specialist institution within the Norwegian judiciary. It needs being tended to, however, to conform to present-day needs and standards and to fulfil its societal function in a continuously changing environment. The uniqueness of the Court as a *judicial* institution needs to be heeded, by all those concerned, and should be guarded.