

Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features

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1 Origins: Historical Background

In 1899 Denmark was rocked by a labour market conflict of enormous proportions that lasted for some one hundred days. Indeed, it might even be that it “constituted, relative to the size of the workforce, the single biggest industrial dispute in Europe of the nineteenth century.”¹ It was fought between the then infant labour market confederations, the employers’ DA, founded in 1896, and the employees’ confederation (now LO), founded in 1898. It started as a series of local strikes but escalated into an all out confrontation as the DA declared a massive lockout. It is often said that the “Hundred Days War” was followed by “Hundred Years of Peace and Order”. It ended with a basic and rather comprehensive agreement, the September Compromise, that is the foundation upon which Danish collective labour law is built. Very broadly speaking and without too much exaggeration it can even be said that nothing much has happened in Danish collective labour law since 1899 (other than elaboration of the principles spelled out in the agreement).² Nothing much has been needed!

Developments in the two other Scandinavian countries, Norway and Sweden, follow the Danish pattern, albeit much later and not at all with the same finality. In Norway the years 1902 and 1935 are defining. 1902 saw the first national agreement between the employer (now NHO) and union (LO) confederations but its impact proved temporary or at least not at all of the same import as the Danish 1899 agreement. Only in 1935 was the first national, multi-industrial basic agreement concluded between these parties. The corresponding years in Sweden are 1906 and 1938, both involving the employers’ confederation SAF, founded in 1902, and the employees’ LO, founded in 1898. The 1906 ‘December Compromise’ is the founding stone of Swedish industrial relations. Its principles are still valid but it is much less comprehensive than the Danish 1899 accord. The 1938 Saltsjöbaden Basic Agreement completed the process and heralded the advent of the much admired ‘Swedish Model’. Why Norway and Sweden lagged considerably behind Denmark is open to debate. One factor probably is that Denmark in 1899 had a considerably higher GNP per capita than in particular Sweden. In mid or late 1930s the situation has changed with Norway overtaking Denmark and Sweden reaching parity with Denmark.

The Danish experience is even more remarkable in another aspect as well. Orderly and “modern” rules were introduced in the labour market arena ahead of the political arena, in 1899 and 1901 respectively. In the other Nordic countries the opposite was true as in most countries. A democratic latecomer as Sweden was a latecomer in the labour field as well. When breakthrough finally came in 1938 extensive industrial warfare and imminent legislative intervention had prompted it. Furthermore, the 1938 agreement to a large extent was a blueprint of legislation under consideration. The fact that the agreement became a huge success must not obscure this.

¹ Crough (1993), at 99.

² Discussing the 1899 September Compromise and subsequent amendments Steen Scheuer has the following to say: “However, its basic planks are essentially those established in 1899, and in the main, the workings of the Danish system of industrial relations date back to this compromise”. Scheuer (1998), at 150.

Finland is a case apart in the historical perspective. Collective labour market relations did not take off until WW II. When the country gained independence from Russia following the communist counterrevolution late in 1917 the country was plunged into a civil war between the “White Guards” and the “Red Guards” (as they were actually called). Capital and work thus found themselves in bloody battlefield confrontation. The wounds took long to heal, effectively preventing mass unionism and collective labour relations from occurring in the 1920’s and 1930s. Only when the country faced annihilation did the two sides come together. The 1940 ‘January Marriage Engagement’ heralded the change at a crucial time in history when Finland fought a desperate war of national survival after the November 1939 sneak attack on the country by the Soviet Union. This “engagement” was succeeded in 1944, months before the end of the second war with the Soviet Union, by a more elaborate Basic Agreement. It signified the starting point for the dramatic growth in trade union membership and union density from insignificance to one of the highest in the world. It laid the foundation upon which Finland has built its post-war industrial relations system much similar to those in the Scandinavian countries, in particular Sweden.

These epochal agreements are all still in force (albeit in Denmark, Finland and Norway now incorporated in successor agreements). They are all national and multi-industrial. They have all achieved a public status right at the heart of the national socio-economic and political system. Albeit with certain differences, they all erect a nucleus regime for self-government by the labour market parties, complete with a legislative, an executive and a judicial branch.

The 1899, 1935 and 1938 Basic Agreements are all based on compromise, co-operation and, to some extent, equality of strength. The compromises initiated a tradition of self-regulation and a spirit of compromise. Coupled with this are features such as mutual recognition, mutual acceptance of certain basic rules for co-operation and co-existence as well as union acceptance of certain employer prerogatives. However, being the result of bitter confrontations they all also proceed from opposing standpoints. Though both sides accepted to deal with each other in a spirit of mutual understanding and respect these attitudes are coupled with a strong dose of ideological divide. The legacy of the bitter labour market conflicts that forged them are largely overcome but not totally forgotten. At times antagonism flares into downright confrontation and all out industrial warfare, e.g. in Sweden in 1980 and in Denmark in 1998. The 1944 Finnish agreement came about under different circumstances marked by a common wish for unity when the country desperately fought a war for national survival. However, these basic agreements – and the multitude of collective agreements of all kinds that exist concurrently in the Nordic countries – have all created a ‘marriage’ of sorts. It is a ‘marriage’ of convenience or perhaps of compulsion rather. On the other hand, these ‘marriages’ have proved to be durable, ‘marriages’ without resort to ‘divorce’, as it were!

Despite this somewhat cosy relationship there is little collusion between the parties and “featherbedding” is unknown to Nordic industrial relations. By and large the parties proceed from opposing sides and keep their distances while at the same time managing to maintain a “marriage of reason”.

The historical ties may help explain why an east-Nordic bloc and a west-Nordic bloc are sometimes discernible in the labour and industrial relations systems of these countries. Denmark and Norway were united in a political union for centuries until 1814, though under Danish dominance. So were Finland and Sweden until 1809 with Sweden as the dominant partner. The close relationship between Denmark and Norway was broken for nearly 100 years when Norway was part of a union with Sweden, again dominated from outside, until it gained independence in 1905. Finland was ceded to tsarist Russia in 1809 but was allowed to keep much of its Swedish institutions, among them the legal system. It gained national independence after the communist counterrevolution in 1917. To sum. The regime of self-regulation and comprehensive regulation of collective labour interaction at the hands of the labour market parties came about as a result of bitter confrontation or, in the case of Finland (and to some extent Norway), struggle for national independence. The ensuing spirit of co-operation, compromise, mutual recognition and respect are consequences of these events, not prerequisites.

2 The Nordic Model for Industrial Relations

The 1899 September Compromise instituted and subsequently epitomises several characteristics of the Nordic model for labour law and industrial relations. Additions have been made, for sure, but the extent to which the 1899 Compromise has proved viable over time is truly remarkable.

2.1 *Neo-corporatism*

Corporatism is the single most conspicuous trait of the Nordic model for labour law and industrial relations. The term refers to a societal model where the political sphere is not the exclusive arena of professional politicians but where organised groups are accepted as legitimate political actors in their own right as well. Such groups are not reduced to act as pressure groups only but are co-opted into the political system. A closely-knit mesh of contact points is established, partly fusing private and public spheres and indeed blurring the very notion of these as two separate realms. It is based on a dynamic and continuous interaction between actors in the various fields of society. Thus, the labour market parties become full members of public various bodies. These may be legislative, as for example the boards of regulatory state agencies, e.g. work safety and environment agencies. Or they may be executive bodies, as is the case again with work safety and environment agencies. Finally, these agencies may be judicial, as is the case with the labour courts in the Nordic countries. These all have an important element of labour market party representation. A system of this kind calls for powerful, articulate and responsible labour market organisations, at national, branch and local level.

Denmark was not only “the first country to develop a bipartite national institutional structure of industrial relations”.³ It was also a forerunner on the path towards tripartition. The first Danish experience occurred in the 1870s when representatives of the labour market parties participated in a state government committee on labour conditions. The 1899 September Agreement was concluded without political participation and strongly endorsed self-regulation. However, it called for support from the legislature to ferment the agreement. The 1910 legislation was primarily a follow-up and engaged the state in a tripartite formula that has changed little since. The other Nordic countries also instituted such structures. As in Denmark the labour market parties participate in virtually all labour market institutions, sometimes even *de facto* running them (as is the case in Denmark, Finland and Sweden with the unemployment funds).

The strong neo-corporatism peaked in the 1960s and 1970s. In the 1990s it has fared somewhat differently in the Nordic countries. In an effort to distance itself from it the Swedish private sector employer community and its (then) peak organisation, SAF, early in the 1990s decided to withdraw from all public bodies where it held seats. Its some five thousand (sic!) representatives all resigned. This led to a 1992 decision by the Swedish Parliament to abolish all participation by labour market organisations on government agency boards. The Labour Court and the Pension Insurance Funds remain the only prominent state bodies where organisations still are represented. In that sense neo-corporatism has come to an end in Sweden. However, the change is not all that big. First, representatives from the employer and union sides still serve on state boards but they are no longer officially nominated by organisations. Second, the employer community has not withdrawn from participating in public life. It has shifted its focus to work as a pressure group and with increased emphasis on information and public debate. Norway has experienced an opposite movement in the 1990s, back from a less centralised system introduced by non-social democrat governments in the 1980s. The 1992 ‘National strategy for increased employment in the 1990s’, commonly called the ‘Solidarity Alternative’, was a resolute return to tripartite co-operation at national level.⁴

Finland presents a picture of virtual fusion of political life and national collective bargaining. It is standard practice that the top labour market confederations deal directly with the government as part of the bargaining process. “There is a strong political element in the system of collective bargaining”, one observer notes, adding that “(G)overnments have facilitated agreements by promising measures such as tax reforms, changes in labour laws and improvement in social security”.⁵

What brought about this neo-corporatism? The guild system is often referred to as an important factor. Under that system important administrative and regulatory functions were in the hands of the city guilds, i.e. organisations in the various trades of masters and certain of their employees. That system, or at least

³ Crouch, at 95.

⁴ See generally Dölvik & Stokke (1998).

⁵ Lilja (1998), at 175 *et seq.*

its remnants, had not faded into oblivion when industrialism started in the Scandinavian countries.⁶ In sharp contrast to many countries the emerging industrialisation process in the Nordic countries never saw a ban on organisations of tradesmen or employees like the 1791 loi Le Chapelier in France or the 1799 and 1800 Combination Acts in Britain. A neo-corporate system was a natural continuation of a previous system that had never completely ceased to exist.⁷

Perhaps a helping factor to shape the system has been the fact that the Nordic countries have small and fairly homogeneous populations. Traditionally there has been virtually no ethnic or religious antagonism. The all-dominant protestant church never presented any challenge to state authority, being more of a prolonged arm of the state. This, in turn, may have contributed to a willingness on the part of the state to co-operate with non-state bodies since by tradition state authority had not been challenged. Also, centralised political governance has been a hallmark of all Nordic societies for centuries.

2.2 *Centralisation and Decentralisation*

A somewhat puzzling characteristic of the Nordic model is that it is both strongly centralised and at the same time markedly decentralised.

On the one hand systems for industrial relations in the Nordic countries are very centralised. Centralisation here means decision-making authority (e.g. concerning industrial actions or signing of collective agreements) of and participation in collective bargaining by top confederations and/or industry-wide branch organisations. A recent survey of seven comparative studies on centralisation shows the Nordic countries close to the top (always after Austria) in all studies.⁸ A process of decentralisation has been underway for some ten years in all Nordic countries, most markedly in Sweden. The employer community initiated the process. It is a “centralised decentralisation” since it is led from the top and controlled by the top. Though this process has brought about rather much decentralisation, the industrial relations system is still very centralised even in Sweden and has, just like Norway, in some respects seen a process of re-centralisation in recent years. *See further* section 6 at 2/ *infra* and Malmberg in this volume.

On the other hand the systems are also very decentralised. Decentralisation here means that there is much local union activity, i.e. company and/or shop floor level.⁹ Local union bodies and/or shop stewards have always played a very active role in representing employees in dealings with the employer. The tradition goes back to the 1899 Danish Basic Agreement. Regardless of whether

⁶ The guilds were abolished in Denmark, Finland, Norway and Sweden in 1862, 1868, 1869 and 1864 respectively.

⁷ For a penetrating and persuasive study on the influence of pre-industrialism structures on post-industrialism industrial relations *see* Crouch (1993).

⁸ Crouch (1993), Table 1.1 at 14.

⁹ *See generally e.g.* Kjellberg (1998) and (2000). *Cf* the “articulation dimension” used by Crouch (1993), e.g. at 242 and 286.

local employee participation is heavily based on statutes, as in Finland and Sweden, or primarily based on collective agreements, as in Denmark and Norway, it is a fact that Nordic trade unionism has a very broad and solid base at the various places of work. With the exception of the smallest places of work, local union bodies exist at all places of work. Also, employees are usually represented on company boards of directors. These representatives are drawn from the shop floor level.

The distribution of work tasks between the different union levels is fairly similar in the four countries, with emphasis on day-to-day participation at local level and collective rulemaking at higher levels. The ever-stronger trend in the Nordic countries to increase personal elements in individual employment contracts, e.g. concerning pay, to some extent means a corresponding expansion of the role of local unions. These have also always served as channels for recruitment of union officials. The typical presidents of all Nordic LO confederations and their member organisations started their professional lives as blue-collar workers. They subsequently became elected union representatives at their workplace and began to climb in the union hierarchy, before reaching the top. In this sense blue-collar union management has always been in the hands of the rank and file, fermenting strong links between top and bottom, and also ensuring a strong role for local unions.

2.3 Self-regulation

Self-regulation is another outstanding feature of the Nordic model for labour law and industrial relations. The self-regulation tradition started with the 1899 September Compromise. One conspicuous expression of self-regulation is that no public regulation of any kind exists concerning pay, not even on minimum wages. State income policy where the state tries to impose some pay structure is anathema in the Nordic countries. Ironically, however, state intervention is not all that uncommon, in particular in Denmark and Norway, when the parties have reached an impasse. In line with the tradition of self-regulation, intervention in such instances virtually always means that some regulation arrived at by the parties is imposed, e.g. by prolonging an existing collective agreement or adopting a final mediation proposal prepared by a state mediator in close cooperation with the parties concerned. In Finland, close cooperation, if not downright collusion, is common between the government and the labour market parties (*cf* section 2 at 1 *supra*).

Self-regulation may seem somewhat surprising in a neo-corporatist environment. However, it is a fact that the labour market parties have been eager and encouraged to participate in state affairs but resolutely declined reciprocity! When the state has intervened this has often been at the request of the labour market parties, or at least by one side. Also, in many instances the labour market parties have made sure that state organs are just as much their own organs as those of the state. The Labour Courts of all the Nordic countries are prime examples of this since party representation is considerable and the “neutral” members cannot perform their duties properly unless they enjoy the confidence

of the labour market parties. State mediation in Denmark, Norway and Sweden (at least until mediation reform in 2000) and state arbitration in Norway present perhaps even more striking examples (*cf infra* and section 6 at 3).

Thus, “the freedom of the labour market parties” is a cherished notion in the Scandinavian countries. Until the 1970s the role of the state in Sweden was “perhaps the least interventionist in the western world”.¹⁰ Today it is by far upheld most vigorously and most consistently in Denmark. For example, statutory law is non-existent on many issues where it exists in the other Nordic countries, e.g. most conspicuously concerning collective agreements. Finland is at the other end of the spectrum with Norway somewhere in between and Sweden since the 1970s strongly leaning towards the Finnish position. Self-regulation, in particular in Denmark, is considered to prevail despite that fact that there is a close interaction between the legislator and the government, on the one hand, and the labour market on the other. Compulsory state mediation is a central element of Danish industrial relations and has been so ever since the enactment in 1910 of the first statute on state mediation. However, state mediation is not necessarily seen as an external element but as an extension of the 1899 agreement. It is often said to have become part of the interaction between labour and capital to the extent that it has been more or less internalised. Much the same is true with regard to the state court established by statute the same year (now the Labour Court). Legislative intervention to break impasse in collective bargaining by imposing a solution on the parties, e.g. by prolonging existing agreements or by adopting the final proposal of the state mediator as law, is not necessarily considered external either. First resorted to in 1933 (the so-called ‘Kanslergadeforliget’, ‘Chancellor Street Compromise’), interventions are conducted in close co-operation with the parties concerned. A legislative intervention is sometimes even the result of a deliberate choice by the labour market parties.

Statutory regulation is more prevalent in Norway than in Denmark and so is overt tripartite co-operation. As in Denmark intervention by the legislator to break bargaining deadlocks is not uncommon. First introduced by ad hoc legislation in 1916 it has become a standard feature, generally in the form of compulsory arbitration. But these interventions have become so ingrained in the structure of Norwegian industrial relations and they are conducted in such a way that they are considered part and parcel of the very system itself.

Self-governance in Sweden was partly abandoned by the unions in the 1970s. A union triggered legislative avalanche followed. State intervention in the bargaining process also increased, reaching astounding proportions in the 1990s. The final years of the 20th century have seen a marked tendency towards a return to self-regulation in the collective bargaining field. However, responsibility for making rules of a generalised nature has not been resumed, since private sector employers favour legislation over regulation in collective agreements (*cf infra*).

¹⁰ Nycander, S, *Lagreglerna och den allmänna rättsuppfattningen*, Svensk Juristtidning 2001, at 115. Danish scholars would perhaps assert that Denmark should be singled out even long before the legislative avalanche in Sweden in the 1970s. See e.g. generally Due, J, & Madsen, J S (2000).

2.4 *Political Connections*

Another factor of overriding importance for understanding Nordic labour market realities is the close relationship between the main blue-collar confederations in the three Scandinavian countries – the LO of Denmark, Norway and Sweden – with a political party, the Social Democratic Workers Party (SAP) of the three countries respectively. In each of the three countries these two organisations are the two (main) components of the “workers’ movement”. Compulsory membership for LO unions and their members in SAP have existed in various forms at various times though it is now more or less a thing of the past.

In its centennial celebration publication the chairman of the Swedish LO proudly states that “(W)e even formed a political party in order to be able to pursue our demands in Parliament, the Swedish Social Democratic Party, a party which proved to be the most successful of all Swedish political parties in the twentieth century”.¹¹ The SAP has been in power for most of the time since the mid 1930s. The notion of the “workers’ movement” is a socio-political concept, a non-organisational phenomenon. However, it has very strong emotional and attitudinal substance indeed. It constitutes a frame of mind and of thinking that permeates Swedish social fabric. By and large the ideological platform of these two organisations is the same. They have divided work among themselves, assigning to SAP the ‘political’ field and to LO the ‘professional’ field. This has greatly helped the labour market parties maintain a system of self-regulation. What LO wanted at the bargaining table the government also wanted as a matter of state policy so there was little need for the government to intervene, as it were!

Much the same is true in the other Scandinavian countries as well. However, there is a difference. Social democracy has not played quite as dominant a political role there as in Sweden. Perhaps that can even help explain why neo-corporatism has been even stronger there than in Sweden. Governments have been in greater need of support there than in Sweden!

Finland differs to some extent. For historical reasons the union movement has been less homogenous in political respect with important elements of communism. The ties between the union movement and social democracy have been correspondingly less strong. Also, Finland has had a strong communist party for most of the post WW II era.

White-collar unionism has much less of a political agenda. Still, in Sweden, for example, the white-collar confederation TCO often sides with the social democratic party. By and large professional unionism has maintained strict neutrality in political matters.

2.5 *State Supervisory Agencies*

Another aspect of the Scandinavian self-regulation regime is that there are few state supervisory bodies in labour matters. Safety at work and work environment

¹¹ Jonsson, B, *World Wide Workers* (Stockholm 1998, ISBN 91-574-5395-0), at 14.

is the exception to the rule. Powerful state agencies play a crucial role both as rule makers and as supervisors in this field. Apart from these the Scandinavian countries know of virtually no state control. The unions perform the necessary supervision. Another way of looking at this is that labour law in the Scandinavian countries is private law. Elements of public law are rather few (*cf* further section 3 at 8 *infra*). Finland differs from its Scandinavian neighbours in both these respects. However, common for all the Nordic countries is that there is no state agency that deals with matters such as union recognition or certification, bargaining units, contract or strike ballots or internal union affairs such as election of union officials. By and large such matters are part of bipartite or unilateral self-regulation. The role of the public realm in administering day-to-day labour relations is insignificant. This means that there is no body such as the National Labor Relations Board in the USA. The labour market parties would not accept it. Furthermore, there simply is no need for one.

2.6 Interplay Between Legislation and Contractual Regulation

Yet another facet of self-regulation is the following. Labour regulation shows an intricate and close interplay between legislation and collective agreements. This is so in particular in Sweden and probably also in Norway. In most instances legislation is very general and provides for minima only, leaving detailed matters to be regulated by the labour market parties. Furthermore, statutes, though binding upon individual employers and employees in most instances, can to a large extent be set aside by the labour market parties by means of collective agreements. The most important provisions, to be sure, usually cannot be superseded since they reflect the political will of the legislature but the implementation of these rules is often left to the labour market parties. This all means a delegation of *de facto* legislative authority to the labour market parties, strengthening their self-governance.

2.7 Social Responsibility of the Labour Market Parties

Hand in hand with neo-corporatism and self-regulation goes the notion that the labour market parties shoulder social responsibility. They form part of the rule-making authority of society. That implies an obligation to discharge the task in a way that takes into consideration society at large. The labour market parties have assumed such responsibility. The Basic Agreements are the prime examples of this. On the other hand, the labour market parties certainly also pursue their own interests and these are not necessarily always in accordance with those of society at large. State compulsory intervention in the bargaining process, particularly frequent in Denmark and Norway, has often proved necessary precisely because the labour market parties simply demonstrated lack of social responsibility. An expression of a different, yet kindred, kind is the policy pursued since the early 1990s by Swedish private sector employers (SAF, since 2001 Confederation of Swedish Enterprise). While previously always preferring self-regulation with the unions a shift towards preference for state legislation has taken place. The

employers believe that the legislator will be less one-sided than their union counter-parts.

To sum. Neo-corporatism is strong in the Nordic countries. It has declined in Sweden but risen in Norway and remains very high in Denmark and Finland. Part of the explanation for the system is the close relationship between (parts of) the union movement and social democracy, the strongest political element in the Nordic countries. On the other hand, neo-corporatism is somewhat of a one-way road. The labour market parties participate in public government while at the same time jealously and on the whole successfully guarding the principle of “the freedom of the labour market parties”. However, self-governance lives in a curious symbiosis with the state in Denmark and Norway where compulsory state intervention is considered almost an expression of party self-governance! Sweden has experienced a steady decline in self-governance since the 1970s, in the 1970s at the hands of unions and, ironically, in the 1990s at the hands of the private sector employer community. Resumption of self-governance in collective bargaining has taken place in the final years of the 20th century.

3 Other Overriding Characteristics

3.1 *Continuity*

Labour and industrial relations in the Nordic countries, in particular the Scandinavian trio, all present a picture of continuity. Nowhere is that more conspicuous than in Denmark. The substance of the 1899 September Agreement is still the law of the land and the philosophy and basic structure of the 1910 legislation on mediation (in particular after the 1934 amendments) remain unmolested.

Swedish 1906 legislation on mediation remained substantially unchanged until 2000 but the 2000 amendments have brought far from radical change to the century old structure. The 1906 December Agreement remains the founding stone of Swedish industrial relations practice and law (albeit now incorporated in the 1976 Co-Determination Act). The 1938 Saltsjöbaden Basic Agreement still represents much of the etiquette, practice and law of collective labour behaviour, both within its legal field of application and outside as general principles of law, quite apart from emulation in numerous other agreements.

In Norway the 1915 Labour Disputes Act was replaced in 1927 by a revised, similarly called, act. The main elements of the 1915 act were retained in 1927 (and in the amended version of 1935) and are still the core of regulation in the field.¹²

For historical reasons Finland is a relative latecomer in this respect. Collective labour and industrial relations really started only in the 1940s. However, as if eager to catch up Finland has ardently embraced continuity. “Despite the tensions, continuity is still the strongest feature of the Finnish

¹² Cf Stokke (1998), at 151, or Evju, in Sigeman *et al.* (1990), at 234.

industrial relations system”, one scholar notes.¹³ One expression of this is that the 1946 Basic Agreement is still in force (albeit with some amendments).

3.2 *Mutual Acceptance*

One focal aspect of the agreements and compromises reached during the formative years of industrial relations in the Scandinavian countries at the turn of the 20th century was mutual recognition by the parties. Obviously employer recognition of employee unionism was *the* important aspect here. Employers further recognised the rights of employees to form, belong to and make use of unions. Since then this undertaking has never been questioned. One consequence of this is that concerted employer efforts to eradicate unionism have never taken place. Industrial warfare was rampant during the first decades of the 20th century, sometimes escalating into all out battles, but they never aimed at unionism as such. Employer commitment did not extend to giving organised workers preferential treatment over non-organised workers. For example, in the early days employers often tried to break union warfare with strikebreakers. Though such practices did not contravene the letter, or perhaps even the spirit, of the basic agreements they gradually became less and less common and are more or less non-existent today.

Today’s legal regulation of the right of association is based upon these early agreements (*cf* section 5 *infra*).

3.3 *Employer Prerogatives*

Labour law in the Nordic countries is based on a set of far-reaching employer prerogatives. Such prerogatives give employers the right to decide unilaterally according to their own preferences without employee access to judicial scrutiny. In the Scandinavian countries these prerogatives were formalised at the turn of the 20th century, first, and most comprehensively, in the 1899 Danish September Agreement and subsequently in the 1906 December Compromise in Sweden. In the Swedish context they were phrased in the following way: employers have the right to (1) hire and fire at will and to employ workers whether unionised or not and (2) to direct and distribute work. In the latter respect reference is made to management of the business and to day-to-day decisions on the administration of work.

These managerial prerogatives have been upheld by courts and are perceived as “generally prevailing principles of law”. The 20th century has seen the partial dismantling of these unilateral rights. The process started very early in Denmark. Already around 1910 the labour court restricted the right to fire at will by demanding that there be some kind of objective justification. Perhaps the process has gone further in Norway than in any of the other Nordic countries, e.g. in redundancy situations. In Sweden it took until the 1974 Employment Protection Act to arrive at just cause requirement. (*See further* Sigeman in this volume.)

¹³ Lilja (1998), at 187.

The introduction of legislation on equal opportunity and non-discrimination has had a profound effect on hiring and firing as well. (*See further* Roseberry in this volume.) Rules on information, consultation and employee participation have radically influenced employer rights to manage the business. However, employers still have the right to decide unilaterally if no agreement is reached on the specific matter under discussion. A union veto right on outsourcing exists in Sweden but its reach is very limited and confined to illegal or otherwise unacceptable practices. (*See further* Edström in this volume.)

Absent other rules employers still enjoy their traditional managerial prerogatives. Since most of those have survived what assault there has been on them, which is not much except in Sweden, employers by and large still command the terrain.

Indeed, the employee side has not seriously challenged employer prerogatives in any country other than Sweden. A common rallying slogan for decades in Sweden was “get rid of employer prerogatives”. The 1970s saw legislative intervention to achieve that, in particular the 1976 Co-Determination Act. However, the act has not achieved that at all, indeed may have fortified employer prerogatives. The reason is that the act is based on the existence of employer prerogatives, thus giving them the stamp of approval from the legislature that they had never had before. The act also provides that the employer retains the right to decide unilaterally in the final run, subject to negotiations prior to making a decision. (*See further* Edström in this volume.)

Under the 1976 act, the dismantling of employer prerogatives and the introduction of industrial democracy is to be achieved through self-regulation by the labour market parties. So far very little of that has materialised. After years of haggling the labour market parties in the private sector (SAF, LO and PTK¹⁴) in 1982 concluded “The Development Agreement”. The agreement is light-years away from what unions initially asked for. It is a Song of Songs in praise of co-operation, mutual understanding and accommodation as well as of business efficiency. It vibrates with the dynamism of change but also with the optimism of change. It stresses the need for business flexibility and the concomitant continuous process of adaptation, both for companies and for employees. It underlines the necessity of continuous learning and skill formation but at the same time acknowledges the legitimacy of employee expectations to experience a rewarding and fulfilling professional life. Indeed the employer side could justifiably say that “a compromise was reached largely on their terms”.¹⁵

3.4 Business Efficiency and Technological Change

The 1982 “Development Agreement” just mentioned can be said to typify long held union attitudes in all the Nordic countries towards business efficiency and technological change. Unions have been concerned with these matters ever since

¹⁴ PTK is a bargaining cartel composed of private sector unions belonging to SACO and TCO.

¹⁵ Kjellberg (1998), at 113.

they were formed. They have consistently accepted the necessity of both. However, they have consistently demanded to be involved in decisions concerning the effects of business efficiency and technological change. Basic Agreements and – in Finland and Sweden – legislation ensure this. However, as part of employer prerogatives the final decision on these matters rests with management. This is true also in Norway. A body composed of representatives of management and employees (*bedriftsforsamling*; *see further* Edström in this volume) is authorised to make final and binding decisions in these respects but the employee side is always in a minority position.

3.5 Collectivisation

Industrial relations in general and labour legislation as well are characterised by being collectivist. Previously the employer had extensive rights to decide unilaterally in a number of matters now subject to statutory regulation or employee participation by means of consultation. In either case unions have far-reaching rights to enter into collective agreements of vital importance for the individual employee. Even statutes to a large extent fail to provide employees with such “rights” as cannot be disposed of by the union(s) together with the employer (*cf* section 2 at 6 *supra*). For example, the Swedish 1976 Co-Determination Act does not provide employees with any “rights” within the domain of joint regulation at all nor does it substitute employer freedom to direct and distribute work with any specific, detailed rules regarding the direction and distribution of work. Instead, the Act invites established unions to participate at their own discretion in the dynamic process of directing and distributing work. The previous unilateral discretion of the employer has been partly replaced by bilateral discretion of the employer and the established union(s). The collective interest of the employee community prevails over the interest of the individual employee.

As is natural, the collectivisation is less pronounced in employment law than in collective labour law proper. However, even employment law is imbued with collectivisation to a large extent.

3.6 Mutuality

Labour law is often seen as legislation to protect “the weaker party”, i.e. the employee. Collective labour law is no exception. Right of association, collective bargaining and industrial actions are of little interest to employers *per se*. Capital manages quite well without them. Only if the employee side has them or at least resorts to them do they assume value to the employee side. The employer community will want to have as much as possible, no less than the employee side.

Characteristic for legal regulation in the Nordic countries is its mutuality. What one side has, the other also has. This is most conspicuous in the area of industrial action law. The principle of mutuality is strictly upheld despite the radically different positions of the two sides. Two examples to illustrate! Since

the employee side has the right to engage in secondary/sympathy actions so has the employer side. Since the employee side is entitled to launch offensive strikes so is the employer side in its full right to launch offensive lockouts. Indeed they have often done so. Perhaps the most notorious example happened in Denmark in 1899 (*cf* section 1 *supra*). Norwegian employers have been less prone to resort to offensive lockouts but important exceptions can be noted, primarily in 1933 and 1986.

3.7 *Inter-party Law, not Intra-party*

Nordic collective labour law is concerned virtually exclusively with the relationship between the two labour market parties, not with matters relating to either of them. For example, there is virtually no regulation on the inner workings of organisations on either side or on conflicts between employees trying to make use of collective labour law protection, e.g. the right to join unions. *See further* section 5 *infra*.

3.8 *Private Law Character of Labour Law*

Constitutional protection of labour law is weak in the Nordic countries, ranging from virtually non-existent in Denmark and perhaps also Norway to some coverage in Finland and Sweden. However, protection in these constitutions is skeletal at best. Basically it is limited to declarations and provides virtually no substantive regulation. Matters of substance are referred to regulation by statutory law

By and large labour and employment law is considered to be private law rather than public law. It follows that legal rights and obligations are private, as are remedies and sanctions for breach. To some extent this is an outflow of the self-regulation tradition. The practical implications are enormous and felt in all fields. By and large the state will keep out unless specifically called for. If called for, the role of the state is to assist the parties, not to rule them or impose itself upon them. Speaking about federal labour law in the US and its administration by the NLRB, a court of appeals there once said: “NLRB is charged with serving the public interest to enforce labor relations rights which are public, not private rights”.¹⁶ In the Nordic countries the public interest may be the same but it is pursued primarily by private rights, not public.

Exceptions exist. Health and safety regulation is the most prominent example. Regulation of certain categories of public employees is another. Finnish labour and employment law is heavily imbued with public law elements. Perhaps this is a legacy of the pre-war period when collective labour regulation was virtually non-existent. The Norwegian 1947 Act on Boycotts, covering both labour market boycotts and other boycotts, provides for criminal law sanctions in case of violation.

¹⁶ NLRB v Hiney Pinting Co, 733 F 2d 1170 (1984), at 1171. For similar statements from the US Supreme Court *see e.g.* UAW v Scofield, 382 US 205 (1965), at 218.

However, deregulation in recent decades has reduced the size of the public realm. One prime example is hiring out of employees and private employment exchange. Sweden, for example, maintained a very strict ban in these two respects for decades but legislation in the 1990s has completely changed that, turning a previously predominantly public law domain into a predominantly private one. (*See further* Eklund in this volume.) Labour and employment law in the public sector is another example, in particular in Sweden. Law in the public sector in these fields is now almost totally of private law character in Sweden. (*See further* Källström and Malmberg in this volume.)

3.9 Absence of General Principle of Proportionality

A principle of proportionality entered Danish labour law at an early stage. It relates to industrial actions and in general terms requires that there must be a reasonable relationship between the action and the result sought. The principle has been developed in case law with no specific foundation in statutory law. The other Nordic countries pointedly have had no equivalent, leaving the matter to self-regulation by the labour market parties. However, these have pointedly refrained from limiting their freedom of action. Subjecting themselves to some kind of principle of proportionality would also entail jurisdiction by the courts in assessing industrial actions undertaken by them. They have not wanted that either. A proposal in Sweden in 1998 to introduce a statutory principle of proportionality in industrial action law was rejected.

Under the influence of European law the notion of proportionality is now emerging as a general principle of law. Case law under the 1950 European Convention on Human Rights and by EU Court has been instrumental in this respect and Article 5 EC (ex Article 3b) requires proportionality. (*See further* Nielsen *supra*.) However, these are very novel developments. The absence during most of the 20th century, with an exception for Denmark in one respect, of a general principle of proportionality is very much a common characteristic for the Nordic countries.

4 Survey of Collective Labour Law Regulation

No Nordic country has comprehensive legislation covering the entire labour and employment law field. Neither has any country comprehensive legislation covering collective labour law. In all the four countries legislation is somewhat of a patchwork. In addition, legislation is often non-existent and relevant regulation is either contractual or implied. All Nordic countries show an intricate and close interplay between legislation, collective agreements and labour market practices having achieved the status of generally prevailing principles of law. Case law is also of great importance. The Labour Court (and its predecessors) in every country is the main actor here and has created a voluminous body of law in each country.

All the four Nordic countries have legislation on mediation, in Denmark (1910 as amended, in particular in 1934) and Finland (1962) in separate statutes. All countries have statutes on a Labour Court, in Norway as part of the focal 1927 Act on Labour Disputes, which also provides for mediation. All have legislation on safety and work environment, including rules on employee participation in safety work. The Norwegian statute has a wider coverage and deals with employment security as well. All the Nordic countries have legislation on state government employees. However, in contrast to its Nordic neighbours, Sweden has almost completely eradicated the public law status of civil servants, indeed abolishing the very notion of a civil servant as distinguished from other employees, and (with few exceptions) turned public civil servant law into private employment law. Norway comes rather close to the Swedish extreme. All the Nordic countries have legislation on employee (minority) representation on company boards, in Norway and Sweden since 1972, in Denmark since 1973 and in Finland since 1990. Norway, as the only country in the Nordic region, has legislation on company councils (*bedriftsforsamling*), similar to the German *Betriebsversammlung*, with decision making authority, superseding ownership control at general assemblies with shareholders. The employee side has a one third representation on these councils. However, unlike their German counterparts neither these Norwegian councils nor any other bodies other than labour unions proper are authorised to sign collective agreements. In other words, Nordic labour law knows of no equivalent to a German *Betriebsvereinbarung*.

Short surveys of additional legislation had better begin with Sweden since statutory regulation is most comprehensive there in the collective labour field, thus offering the most extensive picture. Five statutes rule this area, the 1974 Workplace Union Representatives Act, the 1976 Co-Determination Act, the 1994 Public Employment Act and its corollary the 1994 Sovereign Appointment Act and finally the 1987 Act on Private-Sector Employee Representation on the Board. Replacing four previous statutes dating from 1920, 1928 and 1936 but adding several rules aiming at introducing employee participation in managerial decision-making, the 1976 Act is the focal piece of Swedish labour legislation and governs virtually the entire area of collective bargaining and industrial relations. When introduced it was hailed as an epochal turning point in the running of private enterprises but experience has proved such expectations to be wrong. The Act does introduce a scheme for consultation but final decision-making powers remain firmly in the hands of management. The designation of the Act is a misnomer and the Act should rather have been entitled e.g. "Act on Collective Labour Relations and Employee Consultation".

The 1976 act covers most of the collective labour law area but it is nevertheless a framework statute. It applies to all employees, private as well as public, regardless of employee status and rank. It equally applies to all employers, whether private or public, making only minor exceptions for activities governed by principles that supersede the employer-employee relationship. The act here singles out those of a religious, scholarly, artistic or otherwise voluntary nature and those that focus on forming public opinion and

debate on issues concerning co-operative, labour market, political or otherwise public matters.

The first chapter of the act deals with the (positive) right of association. Adjoining are definitions of labour market organisations at confederate, industry-wide branch and local levels. The next chapter contains rules on bargaining, i.e. collective bargaining generally, usually aiming at concluding a collective agreement, grievance bargaining, aiming at settling a dispute over rights, and finally bargaining as part of employee participation at the place of work. Rules on employee right to obtain information follow. The collective agreement is dealt with next, adjoined by a chapter on collective agreements on employee participation. The subsequent chapter deals with union priority rights of interpretation of collective agreements, something with no equivalence in the other Nordic countries and an invention by the 1976 act. Yet another innovation follows, union rights of veto in certain situations concerning outsourcing. (*See further* Edström in this volume.) Chapters on peace obligation, industrial strife and mediation follow. The act ends with chapters on sanctions, remedies and dispute handling.

The 1974 Workplace Union Representatives Act, the first of its kind, provides comparatively detailed regulation. Shop stewards of the Danish or Norwegian kind do not exist in Sweden. Employee representation is (almost) totally in the hands of established unions. The 1974 Act applies only to established unions (*cf* section 5 at 5 *infra*). Office-holders representing established unions enjoy extensive privileges and benefits. Apart from employment protection they are entitled to fully paid time off “for the purposes of trade union activities at the workplace”, provided that such time off “is necessary for the union mandate” and of “reasonable” proportions. Regional union officers attend to small workplaces where no plant union exists.

Denmark has the least legislation in the region. No legislation exists on employee and employer right of association, collective bargaining, collective agreements, peace obligation, industrial actions or shop stewards. The reason is that the 1899 September Basic Agreement – and its successors, now 1993 - explicitly or implicitly contain rules in these respects. These rules have achieved the status of generally prevailing principles of law and apply – where applicable – even outside the coverage of the Basic Agreement. Denmark has no legislation corresponding to the Swedish Workplace Union Representatives Act for the simple reason that trade union representatives do not enjoy any specific privileges or benefits other than those afforded to all shop stewards. Employee participation is entirely a matter for contractual regulation. The 1986 Basic Agreement on Co-operation, between DA and LO, is the focal regulation here. The 1948 Act on White Collar Employees does contain rules in certain of the respects now mentioned, as does the 1969 Act on Public Servants. In addition to these statutes and the legislation mentioned above, the 1982 Act on Protection against Dismissal in Violation of the Freedom of Association provides protection. Scattered statutory provisions are found in various other pieces of legislation.

In Norway the 1927 Act on Labour Disputes is the focal piece of legislation on collective labour law. It contains rules on collective agreements, industrial actions, mediation and sanctions. It was amended in 1934 but has remained

virtually unchanged since then. Several matters not regulated in that statute have been dealt with in the 1935 Basic Agreement NAF – LO (now Basic Agreement 2002, NHO – LO), for example secondary/sympathy actions, show stewards, balloting and collective dismissal. The comprehensive 1947 Act on Boycotts contains public law rules on this specific form for industrial warfare, providing for criminal law sanctions in case of violation. The 1952 Act on Arbitration in Labour Disputes provides a mechanism for parliamentary intervention to order ad hoc compulsory, binding arbitration when collective bargaining has failed to produce a new collective agreement on pay and other terms and conditions of employment. Legislation 1958 on Public Employment Disputes regulates state collective bargaining and collective agreements.

Finland is somewhat of a case apart. As has been noted collective labour regulation by and large started during WW II and gained momentum in its immediate aftermath. This probably explains the comparatively strong influence of administrative regulation and control as well as the rich flora of statutory regulation. Finland has a statute of general coverage on associations (1989, first 1919), applicable on labour market organisations (*cf* section 5 at 3 *infra*) and separate statutes on collective agreements (1946) and mediation (1962). The 1978 Act on Co-operation in Enterprises is partly modelled after the 1976 Swedish Co-Determination Act. Public white-collar employment is ruled by public law and is not considered part of labour law, although often providing parallel regulation, e.g. on collective agreements.

As this short exposé shows legislation does play an important role, albeit to a varying degree. However, deregulation in recent decades reduced the size of the public realm; *cf* section 3 at 8 *supra*.

5 Labour Market Organisations

5.1 Union Structures – Union Density Rates – Union Strategies

By and large union structures are uniform in the Nordic countries. Some three or four union confederations dominate the union scene. They are associations of nation-wide, branch organisations in the various fields of the economy, e.g. steel manufacturing, metal industry, transportation, retail stores, banks *et cetera*. In turn, these branch organisations are associations of individual workers/employees. They have regional branches. Locals, company or shop floor based unions, are their smallest units.

Speaking first about Sweden where the structure is the most pure in terms of social stratification, unionism is divided into three main confederations, one for blue-collar employees, one for white-collar employees and one for professionals. Today this division is largely an anachronistic remnant of a more class-oriented society. In the blue-collar sector workers belong to some 20 odd industry-wide unions, mainly of the industrial type, federated into the Swedish Confederation of Trade Unions (founded in 1898 and known as LO after the abbreviation of its Swedish name). With a membership of about 2.1 million in 2002 LO accounts for approximately 50 % of all employees in Sweden. Some 1.2 million (2002)

white-collar employees are unionised and belong to industry-wide industrial unions, mainly federated into the Central Organisation of Salaried Employees (TCO, founded in 1944 but tracing its history back to the 1930s). Some 500 thousand (2002) professionals belong to national craft unions amalgamated into a central confederation, SACO. It was founded in 1947 but many of its member unions trace their history as friendly, professional societies well back to the 1800s.¹⁷

Union structure in the other Nordic countries resembles the Swedish but is less socially stratified. As in Sweden the Danish and Norwegian LO confederations, founded in 1898 and 1899 respectively, are the main union organisations, particular in a historical perspective.¹⁸ The Danish LO is even more dominant than its Swedish counterpart since it accounts for some 70 percent of all unionised employees (1995). It organises many white-collar employees that in Sweden belong to TCO-affiliated unions. The Norwegian LO organises approximately the same percentage of unionised workers as its Swedish counterpart. Common for all the three LO organisations is that they have seen their share of unionised employees decrease very significantly as white-collar and professional unionism has surged. For example, in 1945 Danish LO accounted for some 96 percent of unionised employees. The dominant confederation in Finland, SAK (or FFC), accounted for nearly 55 percent of organised employees in 1995.¹⁹

Private sector unions have traditionally dominated within the LO families. The metal workers unions have traditionally been the biggest and single most influential unions (as have their employer counter-parts). The Metal Engineering Agreement in Denmark, Norway and Sweden respectively (first concluded in 1900, 1907 and 1905 respectively) was long by far the leading collective agreement in these countries. Strong growth in public sector employment after WW II has meant a concomitant increase in public sector unionism. Private sector membership still accounts for more than 50 percent of total membership. However, the single biggest union by far within the Swedish LO family is now a public sector union, the Swedish Municipal Workers' Union.

Unionism in Finland, Norway and Sweden is predominantly industrial. Craft or professional unions exist, in particular among professionals, but LO in both Norway and Sweden opted for industrial unionism at an early stage. Denmark differs in that craft unionism still plays an important role. So in particular do general unions that organise without regard to skill, education or position. They account for nearly 50 percent of unionised employees. This is in sharp contrast to the other Nordic countries. In Sweden, for example, no general union of importance exists at all.

¹⁷ SACO has been described as “the world’s oldest professional peak organisation”, Heidenheimer, 1976, quoted from Kjellberg (2000), at 531.

¹⁸ The official names are *Landsorganisationen i Danmark* and *Landsorganisationen i Norge* respectively. The Danish organisation, signatory to the epochal 1899 September Agreement, was called *De samvirkende Fagforbund*, DsF (Association of Co-operating Unions) at the time.

¹⁹ SAK is the acronym for *Suomen Ammattiliittojen Keskusjärjestö* (or FFC, which is the acronym for its name in Swedish, *Finlands Fackförbunds Centralorganisation*).

Confederations, in particular LO, have experienced a radical decrease in the number of affiliated unions. Mergers between affiliated unions account for virtually the whole decrease. Inter-confederation mergers have been very few. For example, Danish LO in 1946 was composed of 72 member unions but the number today (1998) is just 22. The corresponding figure for the Swedish LO is 19 member unions today (2002) versus 46 in 1945.

By and large, independent unions, not affiliated to any confederation, are few in all the Nordic countries. By and large such unions play a very marginal role on the labour market. In most instances independent unions are also minority unions. Still, some very powerful unions are independent, for example the unions in Sweden of foremen and supervisors as well as that of airline pilots. These two unions also enjoy unchallenged majority status in their sectors.

Parallel union movements structured along religious or political affinity do not exist in the three Scandinavian countries. Finland has experienced union movements with a predominantly communist or social democratic inclination but on the whole that is a thing of the past, social democratic unionism by and large winning the day (SAK/FFC). A small but rather vocal, independent, syndicalism union movement operates in Sweden but its overall labour market influence is marginal.

Competition between unions belonging to different confederations, *jurisdictional disputes*, is rare, with the exception of Finland and to some, but lesser, extent Norway. In Sweden, for example, quite a few demarcation agreements between unions belonging to different confederations are in force. Tensions have existed, for sure. For example, SACO in Sweden has had considerable difficulties in being recognised as a confederation in its own rights and of equal standing with LO and TCO. For example, it was only in 1997 that SACO was admitted as a member of the European Trade Union Confederation (ETUC) and the Council of Nordic Trade Unions (NSF). One reason for this is that SACO organises employees that some TCO affiliated unions think that they should organise, e.g. privately employed engineers. Danish union structure is more complex than the Swedish with less clear demarcation lines between unions. Still, competition is uncommon as is poaching. The reason has to do with the unemployment system. It is virtually completely financed by the state but administered by union insurance funds. The Danish Ministry of Labour has to approve the field of action of each such fund “and thus a union cannot recruit members in what is clearly another union’s domain since it cannot legally pay such a member unemployment benefits. Existing demarcations are therefore institutionalized”.²⁰

Intra-confederation competition is not common either. For example, demarcation agreements between unions belonging to the same confederation are common. Still, instances of demarcation disputes are not unheard of in Scandinavia. In Sweden actions of this kind has not haunted the country to any truly disquieting extent so calls for legislation to curb them have gone unheard. In most instances a settlement is reached short of open conflict involving

²⁰ Scheuer (1998), at 154.

employers and employees. Swedish LO has authority to make binding decisions. TCO and SACO can do so only if authorised by the disputing parties.

No public agency in any of the Nordic countries has authority to interfere, much less to settle a bargaining agent issue. None of the Nordic countries has a regime of exclusive representation for a majority union.

Union density rates are very high in the Nordic countries, among the highest in the world, if not the highest. Table 1 gives a snapshot overview.

	1980	1985	1990	1995
Denmark	75	77	76	76
Finland	67	67	72	78
Norway	57	57	57	56
Sweden	78	81	82	85

Table 1: Overall union density rates in the Nordic countries, percentage of all employees²¹

The figures allow for several observations. Only two will be made here. Norway stands out since membership rates there are considerably lower. One explanation for that is that unlike the three other countries the unemployment insurance fund system is administered by the state without union involvement. In the other three countries non-unionised employees can join the unemployment fund system and are entitled to the same benefits as unionised employees.

Another observation is that union density has increased rather than decreased which very much indeed has been the international trend. Here explanations are harder to come by and are more nebulous.²² Factors such as these seem relevant. Unions have shown remarkable adaptability to new conditions, e.g. the rise of female employment and the massive emergence of atypical employment. Unions have also demonstrated that they are both willing and capable of constructive inventiveness. One outstanding example here is the collective agreements in Sweden covering the temporary work agencies and their hiring out of employees. The agreements here have contributed enormously to social acceptance of temporary work and to the rapid increase of temporary work. (*See further* Eklund in this volume.)

Another contributing factor is that the agenda of Nordic unions is very broad. As far as working life is concerned unions offer a total package “from cradle to grave”, as it were. Though collective action even now is at the heart of union

²¹ Source: Kjellberg, A, *Fagorganisering i Norge og Sverige i et internasjonalt perspektiv*, in *Arbeiderhistorie, Årsbok for Arbeiderbevegelsens Arkiv og Bibliotek* (Oslo, Norway, 1999, ISBN 82 – 90759 – 16 – 9). Similar statistical data can be found elsewhere, e.g. Crouch (1993) or OECD statistics. Figures always differ somewhat between different data presentations but the overall picture is the same.

²² For an extensive discussion of the Swedish vista *see e.g.* Fahlbeck (1999). Much of the analysis there is valid for the other Nordic countries as well.

activity it is equally true that concern for individuals is at the heart of such action. In other words, unions in the Nordic countries have always and consistently pursued an agenda focusing on the interest of their members, not for example political action or class confrontation. In line with this tradition unions play a very important role indeed even in the administration of statutes dealing with individual employment matters, for example legislation on employment protection or working time.

Furthermore, unions also assist members in their capacity as consumers. For example, the Swedish LO offers comparatively cheap insurance policies and loans to members as well as, surprisingly, e.g. household utilities such as electricity, and an (affiliated) undertaking branch. This makes membership financially interesting for people. In addition, the union platform has both a public, society-oriented side and a private, member-oriented side, all in all encompassing many areas that do not intimately relate to the labour market. For example, the Swedish LO in 1998 listed some 450 bodies where it was represented!

This all means that unions participate in virtually all aspects of civic society. Obviously this mightily contributes to union growth. Not to be a member means less potential to influence matters in social life generally. Since “everyone” is a member and since members face no hostility from employers the decision to enter a union requires no courage or even personal commitment. No to be a member does, however!

Speaking in general terms the following characteristics emerge. Union membership is fairly evenly distributed among the three main sectors of the labour market: private, local government (municipal) and central (state) government, though it is higher in the public than in the private sector. Unionisation rates are somewhat higher among white-collar than blue-collar employees. Among professionals the unionisation rate is somewhat lower in the private sector than in public service where it often reaches the 90 % level. The size of the company is not much of a factor, nor is branch of industry. Age and place of living are reflected since unionisation rates are higher the older the employees become and also in smaller versus bigger communities. In particular the decreasing unionisation rate among young people was observed in the 1990s but in the very recent past the trend might have been reversed as a result of the failure of the “new economy”. By and large employee gender is immaterial, women in fact being unionised to a slightly higher degree than men. The unionisation rate among part-time employees is around the average, only slightly higher. Fixed-time employees are unionised to a lower, but still very high, degree. Temporary workers, i.e. people working for temporary work agencies, are organised to approximately the same degree as the average.

Broadly speaking union strategies in the Nordic countries have always been characterised by pragmatism. In the present context that means behaviour like the following. Unions have always talked and interacted in other ways with the employer side. Unions have always been prepared to sign legally binding agreements with employers and employer organisations. Unions have accepted employer prerogatives, technological change and business efficiency. The pragmatism of Nordic unions must be seen in connection with their close

relationship with a major political party. The option to refer broader issues of an ideological type to the political wing of “the workers movement” has always existed. There simply has not been all that much need to raise ideological issues in contacts with the employer community.

Unions, in particular blue-collar unions, certainly have a highly ideological platform. The ideological element is much less pronounced today since much of what unions set out to achieve a century ago has been achieved. Until fairly recently the statutes of most blue-collar unions called for the transfer of the means of production to the state. That goal was never pursued with any true vigour, in particular not after WW II. Swedish unions for some time pushed hard for establishing union controlled “wage-earner funds”. Companies would make compulsory contributions to these funds. The funds, in turn, would buy stocks in listed and unlisted companies. Legislation establishing such funds was enacted in 1983 and funds began operating. However, enthusiasm for the project had more or less vanished already at the very start of the project. It was discontinued in 1991/92 with subsequent dissolution of the funds. Nothing similar was introduced in any of the other Nordic countries, nor did any important actor there seriously advocate it.

At the same time a process of union enrichment is taking place. Already from their inception union started building strike funds to support members on strike or on lockout. These funds were humble at the outset and often depleted in the early decades of the 20th century. As conflict levels decreased sharply after WW II in the Scandinavian countries the strike funds began to swell. As of today (2001) unions in the Scandinavian countries have become very wealthy indeed. Unions have become capitalists in their own right. Investment strategies of unions have become important not only to members but for capital markets as well. Unions have also assumed the role of venture capitalists. Not a few upstart companies have unions among their most important stock holding financiers.

One example to illustrate! SIF (the Swedish Association of White-Collar Employees in Industry) is the biggest member-union of TCO. In fiscal year 1998, the net result of financial transactions accounted for some 65 percent of total income. In the same year SIF posted a 150 million kronor deficit (approximately 16.6 million euro), excluding financial net. That represented some 425 kronor (approximately 47 euro) per member in a union that charged an average of some 2.400 kronor (approximately 266 euro) in yearly dues per member. Financial net represented some 2.000 kronor per member (approximately 220 euro). These figures are probably higher than in most unions but they are characteristic for a common trend.

5.2 Structure of Employer Organisations. Density Rates. Employer Strategies²³

Employers in the private sector are organised in much the same way as are employees. Powerful employer confederations exist in all the Nordic countries,

²³ For extensive information about employer organisations in the Nordic countries see *Arbejdsgivere i Norden* (2000) listed in the Bibliography.

in Norway and Sweden only one confederation. By and large these organisations were established as defence organisations and as insurers of members' losses in case of industrial conflicts. In Denmark, exceptionally, the employer confederation was founded ahead of the workers' confederation (1896 and 1898 respectively)! Employers belong to industry-wide branch organisations affiliated to the confederation. These branch organisations represent virtually every facet of private industry though some branch organisations operate independently. For example the Swedish SAF consisted of nearly forty member-organisations before its merger in 2001 with the leading trade organisation, The Swedish Association of Industry, forming the Confederation of Swedish Enterprise (Föreningen Svenskt Näringsliv). In 1996 the Danish DA (Dansk Arbejdsgiverforening, Danish Association of Employers) had twenty-eight member-organisations and so had its Norwegian counterpart that same year.

Mergers between employer organisations and organisations for industry and trade have become common in recent years. It happened at top level in Sweden in 2001 but had been preceded by a corresponding merger a few years earlier in the engineering industry. Norway started the merger round at top level in 1989 when NHO (Naeringslivets Hovedorganisasjon, Confederation of Norwegian Business and Industry) was formed. Finland followed suit in 1993 with the formation of TT (Confederation of Finnish Industry and Employers). In particular in Sweden the merger aims at radically reducing the employer role at top national level of the business community. Significantly, the periodical of the new Swedish organisation is called *Entreprenör* (Entrepreneur), when, not long ago, the periodical of SAF was called "The Employer".

Firms belonging to employer organisations in Sweden cover some 75 percent of all private sector employees. The corresponding figures in Denmark and Norway are much lower, around 50 percent in both countries. Figures of rates of employers belonging to an employer organisation are not available. Many small employers do not belong to an organisation (though they may be bound by a collective agreement, an adherence/application agreement; *cf* Malmberg in this volume). For information about coverage rates of collective agreements *see* Malmberg.

The most conspicuous trait of Nordic employer strategies in the industrial relations domain is that they have accepted unions and the right of association of their employees. This happened right at the very beginning of formalised contacts between the two sides. The Danish 1899 September Agreement is based on that and so are the Norwegian 1902 agreement between the top confederations and the 1906 December Compromise between SAF and LO in Sweden. For historical reasons Finland had to wait until 1940, "the January Marriage Engagement". No determined all-out attacks to destroy unionism have ever been waged in the Nordic countries. Employers have not engaged in protracted opposition to unions or devised overall, persistent strategies to undermine unions. For sure, employers have waged industrial warfare on a mighty scale against unions. The ground-setting basic agreements in the Scandinavian countries were all preceded by massive employer lockouts. Since unions specifically accepted employer prerogatives as part of these agreements and have never reneged on that (with the exception of Swedish unions during the

1970s), the employer community has been able to concentrate on “bread and butter”. Thus, massive warfare at later times have not aimed at destruction of unionism but at winning “bread and butter”-type concessions at the bargaining table.

Employers have even welcomed employee involvement in the running of the business. This is particularly salient in Denmark and Norway, most prominently manifested in the shop steward institution. (*See further* Edström in this volume.) Again, this institution was part of the original accords between labour and capital in these countries. Though Sweden waited some seventy years until 1976 for formal rules, Swedish employers had long before welcomed employee input. There is an important difference between Denmark and Norway, on the one hand, and Finland and Sweden, on the other. In Denmark and Norway the shop stewards are not union officers which their counterparts are in Finland and Sweden, most conspicuously in Sweden. Why this difference between Denmark and Sweden? One observer sees important differences in the social fabric of these two countries at the turn of the 20th century. “Whereas Denmark became a liberal state relatively early, the Swedish state remained rather rigid and authoritarian until the end of the nineteenth century. --- Sweden rivalled Germany in the rigidity of its class structure and perpetuation of late – medieval organic political forms”.²⁴ If so, perhaps the Swedish employer community held more authoritarian views than its Danish counterpart, explaining why formal rules on employee participation arrived so much later.

5.3 *Legal Status of Labour Market Organisations and Internal Rule-making*

Labour market organisations are voluntary, non-profit organisations. There is no legislation of general application for such organisations in the Nordic countries with the exception of Finland (statute 1990 replacing a 1919 statute). No Nordic country has legislation specifically dealing with labour market organisations. A Danish 1984 statute dealing with foundations and associations contain certain rules that apply to labour market organisations but they are few and very general. Formal, legal requirements to form a legally recognised organisation – be that a labour union or an employer organisation – are minimal, making it extremely simple to form one. Neither prior nor posterior public authorisation is required and only Finland requires registration but registration is automatic if basic, minimal requirements are met.

Some common law type general principles of law apply but apart from these, organisations enjoy far-reaching freedom of self-regulation. Internal rule-books and bye-laws prevail. Confederations routinely lay down certain criteria that member-unions and unions applying for membership must meet. In addition, confederations may adopt model or standard rule-books. The Swedish LO has done so but these are not binding upon members. Industry-wide branch organisations routinely adopt model, standard rule-books for sub-branches and these are often binding. Rule-books deal with such matters as the distribution of

²⁴ Crouch (1993), at 318 *et seq.* Reference omitted.

powers and functions between the different levels of authority within the organisation, the mode to appoint office holders, balloting, strike votes *et cetera*.

In Denmark and Norway collective agreements sometimes contain rules on membership balloting, e.g. acceptance or rejection of a proposed collective agreement. Such contractual rules are binding, of course, and limit union self-regulation. On the other hand, members may have accepted the rules on some previous occasion.

Courts apply existing general principles of law. Foremost among these is the principle of equal treatment. Courts have also examined rules on entry and expulsion. Since membership of a labour union can be of vital importance to an individual, courts have not confined their jurisdiction to formal matters only but will rule on the substance as well, e.g. whether there was justification for expelling a member or for refusing entry. The total number of cases is very low in all Nordic countries. For example, the Swedish Supreme Court has decided only one case where an employee who met membership requirements was denied entry (1948). The court ruled in favour of the employee. Two cases deal with expulsion of a member (1945 and 1946), both concerning members accused of political activity deemed unacceptable by the union. In recent years unions in Sweden have expelled quite a few members accused of neo-nazism. So far, no such instance has reached the Supreme Court.

Nordic labour law has not developed a legal doctrine of fair representation, i.e. a body of law concerning the way unions are authorised and obliged to represent their members and what constitutes unfair or discriminatory representation. Occasional conflicts between unions and disgruntled members, who feel that they have been represented by their union in a negligent, discriminatory, unfair or otherwise unsatisfactory way, occur and are sometimes reported in the media. However, apart from the scant case law just referred to no issues concerning fair representation have ever been decided by Nordic courts of last instance.

Allegations of abuse of the wide-ranging right of self-governance have been comparatively few and on the whole not concerned with instances of truly serious misconduct or wrongs. Calls for statutory regulation of labour unions have nevertheless been frequent, e.g. in Sweden, but unions have consistently and adamantly resisted them. Given the strong position of unions in the Nordic countries (in Finland after WW II), whatever impetus there has been at any given time to legislate has never gained any significant momentum.

Unions charge fees. Unions decide the amounts and, excepting instances of discrimination, the courts have no jurisdiction. No reported case on discriminatory fee structures exists. Failure to pay dues will result in expulsion from the union. Unions are free to decide how to use member dues. Nothing prevents them from using money for purposes other than strictly union business, e.g. political contributions, unless the money has been collected for some specific purpose (which e.g. happens in the construction industry in Sweden). Employees cannot join unions on the condition that his/her dues are not spent in such a way, i.e. there is no equivalent to an American type “agency shop”.

Union democracy, i.e. the distribution of authority between members and their representatives, is an internal matter and subject to self-regulation. By and

large the constitutional regime of Finnish and Swedish unions is one of indirect democracy. Membership votes are uncommon, rarely compulsory and usually consultative rather than binding. In Denmark and Norway the regime entails a strong element of direct democracy with compulsory, binding balloting. This is so in particular with regard to industrial actions and adoption of collective agreements. In particular in Denmark membership votes on collective agreements are of great importance. As in all Nordic countries Danish collective agreements are peace agreements. However, no statutory rules to that effect exist so by adopting an agreement, members personally endorse the peace obligation.

5.4 Right of Association

All Nordic countries protect the positive right of association of employers and employees in the private and the public sector (though perhaps with some minor exceptions in Denmark and Norway). Explicit constitutional protection exists in Denmark, Finland and Sweden. In Norway there is no explicit constitutional protection but it is considered a basic principle of law so protection is no less far-reaching or effective, at least in the private sector.

The right of association was a main component in the early accords between labour and capital that forged the structure of industrial relations in the Scandinavian countries, e.g. the 1899 September Agreement in Denmark and the 1906 December Compromise in Sweden. The principles of the accords have assumed status of general principles of law. Because of that no statutory regulation of general purport has been considered necessary in Denmark given the unequivocal wording of the 1899 September Compromise. One part of an article dealing with the right of association in the 1976 Swedish Co-Determination Act is a verbal excerpt from the 1906 December Compromise. The Act specifies four separate elements, i.e. the right to belong to a labour market organisation, to make use of the membership, to work for the organisation and to work to establish such an organisation. Any violation makes the malefactor liable to damages (financial as well as non-financial, “punitive”). Improper acts are void.

General statutory protection also exists in Finland. It applies not only to the employer – employee relationship but also among employees (*cf* section 3 at 6 *supra*). White-collar employees in Denmark enjoy statutory protection (1948).

The negative right of association, i.e. the right not to join a union or else to refrain from using the positive right of association, enjoys no explicit statutory protection in any of the Nordic countries. Unions have adamantly opposed adoption of protective legislation. Though voluntarism prevails and no one can be legally forced to enter a union (or an employer association) those who decide to remain outside may face reprobation by members and retaliation of a non-legal nature. Also, “outsiders” face the risk of suffering discriminatory treatment in the form of less favourable benefits. Such discrimination is common in Sweden in the public sector, in particular in local (municipal) employment.

Closed shops (or other clauses on union preferential rights in employment, e.g. union hiring halls) are legal *per se* in all Nordic countries but the closed shop by and large does not exist because employers have successfully resisted

them. Limiting the coverage of collective agreements to union members is also legal but not common either. Unions initially insisted that collective agreement standards should apply to non-members as well to avoid competition from non-members. Today employers accept the principle but unions, who no longer have to fear competition from non-members because of the high unionisation rates, sometimes obtain exclusivity, though not from private employers belonging to one of the leading private sector confederations.

All Nordic countries offer protection of the negative right in one respect. To dismiss an employee for not belonging to a union, or a specified union, is illegal.

Pan-European law is changing the legal vista, in particular the 1950 European Convention on Human Rights. Case law developed under this convention protects the negative right of association and this case law is binding upon the Nordic countries since they have all ratified it, quite apart from the fact that it is part of EU law as well. One case brought before the European Court involved a Swedish employer, alleging violation of his negative right of association under the Convention.²⁵ Though he lost the Court confirmed the negative right of association. (The Commission had found a violation his negative right of association, in violation of the Convention, and so did one of the judges.)

Labour market organisations do not *per se* enjoy legal protection under right of association law. Direct attacks on an organisation, e.g. verbal attacks in the media, do not constitute actionable infringements of any labour rights. Nor does a refusal to sign a collective agreement with it despite mutual understanding on all issues.²⁶ However, under Swedish law an organisation is considered wronged if a member's right has been violated, entitling the organisation to non-financial damages.

5.5 Union Recognition, Majority Status, Majority Rule, Basic Union Rights, Established Unions

Union recognition is not much of an issue in any of the Nordic countries. With very few exceptions²⁷ all bona fide unions²⁸ enjoy basic representation rights as bargaining agents for their members by force of statutory fiat or labour market

²⁵ *Gustafsson case*, Gustafsson v Sweden, European Court of Human Rights, 25 April 1996, R.J.D, 1996-II, No 9.

²⁶ See e.g. rulings 1969:14 and 1972:5 by the Swedish Labour Court. Reference should also be made to a ruling by the European Court under the 1950 Convention. It involved the Swedish union that had lost the 1972:5 case, Swedish Drivers' Union v Sweden. The Court (February 6, 1976, series A:20) found no violation of the Convention. See e.g. Fahlbeck, *Gewerkschaftsfreiheit und Diskriminierungsverbot im Fall Schwedischer Lokomotivführerverband und im Fall Schmidt und Dahlström. Anmerkungen*. Grundrechte. Europäische Grundrechte-Zeitschrift, 3 Jahrgang, 1976, Hefte 23.

²⁷ Limited exceptions exist in Denmark and Norway in the public sector, reserving bargaining rights to certain labour unions.

²⁸ Employer dominated unions or unions otherwise not independent or bona fide have never been much of an issue in the Nordic countries. At least since WW II instances of "yellow" unions are unheard of.

practice having status of a general principle of law. This means that no representation elections to decide whether or not to have a bargaining agent are needed. Employees express their preferences by joining the union of their choice. It is quite another matter that there more often than not is no or only little real choice since by and large only one powerful union represents any particular group of employees. Nordic regulation also means that no certification is needed. The role of society is very limited. Self-regulation prevails.

The state of affairs now described reflects the union structure established in the first decades of the 20th century in the Scandinavian countries. Unified unionism rather than pluralistic unionism became the tradition, in particular in Norway and Sweden, Denmark having a less unified union structure. The attitude that emerged and that still prevails is that union multiplicity ultimately is detrimental both to the employees concerned and to society at large. This attitude, in turn, partly reflects the strength of the dominant unions. They have managed to master the field both in terms of actually unionising employees in their various sectors of the labour market and also in terms of creating an atmosphere where union multiplicity is frowned upon.

Labour unions all enjoy the same basic rights. Generally speaking every union is the exclusive representation for its members but only for its members, a principle of proportional representation, as it were. There is no equivalent to the principle of majority rule or exclusive representation under US labour law. The Nordic experience here probably mirrors its system for political representation. Proportionality plays an important role in political life.

Under Swedish legislation some unions have additional rights. That is the case with every union that is part to collective agreement with the employer. By and large only such *established* unions take part in joint regulation under the 1976 Co-Determination Act and other forms of statutory imposed or encouraged co-operation between employers and employees. Representation on company boards under the 1987 legislation (and its 1972 predecessor) is reserved for established unions. So are privileges under the 1974 Workplace Union Representatives Act (*cf* section 4 *supra*). Generally speaking, established unions organise the majority of employees in their sector of the labour market. Though Swedish law does not provide for exclusive representation, established unions *de facto* often speak for the entire employee community. The reason is that matters discussed by the employer and the established union often concern all employees, e.g. production methods.

The fact that there is no majority rule may lead to the conclusion that unions represent their members exclusively not only legally but also *de facto*. However, that is not at all the case. Most collective agreements are entered into by unions enjoying *de facto* majority status in the sense of organising the majority of the employees concerned. As will be discussed in the article by Malmberg, employers by and large have to apply the collective agreement (or its norms), usually as a minimum, to non-members as well. This *erga omnes* or extension effect is the result of market practices, though it now has the sanction of the law and will be applied by courts. In that sense a majority rule does apply *de facto*. This is reinforced by the fact that employee co-operation with the employer is virtually totally in the hands of unions that have signed collective agreements in

Sweden and by and large also in the other Nordic countries (though less so in Denmark and Norway).

The fact that there is no exclusive representation or majority rule in combination with the fact that union recognition is automatic and the ease to form unions (*cf* at 3 *supra*) might lead to the conclusion that the Nordic systems to some extent favours minority and splinter unionism. However, many other factors strongly militate against multiplicity. In Sweden one reason is that legislation strongly supports established unions. Common for all the Nordic countries is the fact that all labour market confederations actively combat multiplicity, e.g. because it poses a threat to them and their member unions. Common is also that employers greatly favour having to deal with as few unions as possible and in addition much prefer unions that belong to powerful confederations that can police member unions behaviour. Since employers are under no obligation to sign any agreements with minority unions or splinter unions such unions often find themselves in the cold and tend to fade away rather soon. The net result is that there is very little of minority and splinter unionism, in particular in Sweden.

5.6 Centralised Decision-making Authority

Common for Nordic employer and employee organisations since the early beginnings in the late 19th century has been that decision-making authority is centralised.²⁹ The initiative came from the employer community. Unions pursued a decentralised strategy in their struggle against employers. These were faced with a multitude of unions, branch, regional and local. Union strategies were to strike one employer after the other. Employers had difficulties defending themselves against this strategy. Employers wanted to utilise their full fighting force by launching massive, co-ordinated lockouts. In order to do so they needed centralised employer organisations and centralised collective bargaining controlled by the top confederations. The Danish employer community set out to achieve these latter two goals in 1899. The resulting September Agreement did not give them all they wanted but collective bargaining became more centralised and overall centralisation was obtained in 1934 by amendments to the Mediation Act. Equivalent centralisation came later in the other Nordic countries but it came!

The most important issues involved here are decisions such as starting, conducting and ending industrial strife, conducting collective bargaining, signing collective agreements and controlling strike and lockout funds.

The degree of internal centralisation in labour market organisations differs somewhat between the Nordic countries and has also varied considerably over time. Organisations in Denmark and Norway have been – and still are - more centralised than in Finland and Sweden. For example, the Danish employees' confederation (now LO) has authority to make basic agreements that are binding upon all member-unions but its Swedish counterpart has not. To illustrate,

²⁹ For short historical overviews *see e.g.* Due & Madsen (2000) or Sommer (2000).

reference can be made to the 1899 September compromise in Denmark and the 1938 Saltsjöbaden Basic Agreement between SAF and LO. The former became automatically binding on all member-unions but the latter had to be specifically adopted by member-unions. Some decided not to, e.g. in construction and road transportation, so the agreement still does not legally cover the entire SAF - LO area.

Today the employer community wants to decentralise industrial relations, including internal decision making structures and authority. The Swedish SAF in particular has advocated such a policy shift and has resolutely taken itself out of wage collective bargaining completely.

5.7 *Symbiosis*

In the Nordic context the labour market parties have lived in a kind of symbiosis, each developing in close contact and continuous interaction with the other side. As unions were formed and developed into effective fighting machines, employers formed defensive organisations. Remarkably, however, in Denmark the employer confederation, DA, was formed in 1896, two years ahead of the union confederation, now LO, in 1898. As employer organisations grew stronger so did unions, and vice versa, as if nourished by a common “mother”. As employers in the formative years opted for centralised organisational and bargaining structures, union structures and bargaining tactics followed suit. As unions grew stronger and more complex, they called for more comprehensive employer organisations. Centralised and continuously stronger union movements also increasingly interacted with the state, initiating, nurturing and strengthening corporatist structures.

6 **Collective Bargaining. Disputes of Interest**

6.1 *The Law of the Right and Duty to Bargaining Collectively*

Statutory rules of general application exist only in the 1976 Swedish Co-Determination Act (incorporating rules originally enacted in 1936). In the other Nordic countries scattered statutory rules can be found but ultimately it is union strength that decides whether an employer can be forced to the bargaining table. By threatening an industrial action by giving advance notice, recalcitrant parties can be forced to the bargaining table at the summons of a mediator. However, in all the four countries rules on bargaining in basic agreements cover most of the labour market. The net result is that rights and duties are basically the same in all the Nordic countries but organisations that are not party to a bargaining agreement are de facto in a better position in Sweden. The Swedish regulation means that every labour union is entitled to bargain collectively with an employer employing at least one of its members. All such unions have a corresponding duty to bargain with the employer at its request. In other words, the right (and duty) to bargain is reciprocal.

Bargaining rights under Swedish legislation extend to all levels of trade union hierarchy and the corresponding hierarchy on the employer side. This generally means that negotiations take place at several levels, local (company or plant), regional, branch and national level between confederations. By and large the same applies under collective agreements in the other Nordic countries.

The aim of contract collective bargaining is to regulate matters concerning the relationship between the negotiating parties, generally (but not necessarily) by means of a collective agreement. The subject matter under Swedish legislation is the widest possible in that it covers all questions relating to the relationship between employers and employees (including unions). With some very marginal exceptions (sec. 2 of the 1976 Act; *cf* section 4 *supra*) there are no managerial exemptions. The duty to bargain is limited, however, in terms of what it entails. There is no obligation to sign a contract (even if agreement has been reached on all substantive matters; *cf* note 26 *supra*), nor is there any obligation to compromise or even to show willingness to compromise or to reach common ground. Strength at the bargaining table does not stem from legal requirements on bargaining behaviour but on willingness and ability on the part of unions to resort to industrial action. There is, in other words, no equivalent to the requirement in some countries, e.g. the USA, of good faith bargaining.³⁰ However, given the co-operative and understanding attitudes of Swedish employers towards unions, bargaining tends to produce a settlement short of industrial strife, in particular with established unions (*cf* 1.2). By and large the situation is the same in the other Nordic countries.

Breach of the duty to bargain is a violation of the 1976 Co-Determination Act. It sanctioned by damages, financial, if any, and non-financial/punitive. In the other Nordic countries the sanction is the same as for other breaches of a collective agreement. (*See further* Malmberg in this volume.)

Unlike many other countries refusal to bargain on the part of employers is uncommon in the Nordic countries. The annual number of court cases is infinitesimal.

6.2 Collective Bargaining Structures

One of the most outstanding features of industrial relations in the Nordic countries is the structure of collective bargaining. Bargaining is very centralised. Few nations with a market economy and privately owned industry have equally centralised bargaining. As has been pointed out several times centralised bargaining came about at the initiative of the employer community, unions

³⁰ Two EC directives specifically require bargaining with a view of reaching agreement, i.e. Directive 75/129/EEC on collective dismissals and Directive 77/187/EEC as amended by directive 98/50, now consolidated in 01/23, on transfers of undertakings. The position of the Swedish government, though by all likelihood not acceptable if tested by, e.g. the EU Court, is understandable. Swedish labour market parties tend to conduct negotiations in a co-operative spirit. The situation with regard to these directives and the duty to negotiate is much the same in the other Nordic countries.

resisting. For example, it was part of the employer agenda during the 1899 general lockout in Denmark.

Traditionally bargaining in the private sector has taken place at three levels, *national* between the top confederation on both sides, *industry-wide* at branch level between industry-wide organisations on both sides and *local* at company or shop level between the company and the local union. No recourse to industrial action is available in most instances during bargaining at local level.

In Sweden the centralised structure reached its peak in the first decades after WW II. By then LO, the blue-collar confederation, had come to accept centralised bargaining. It was ideally suited to LO's post WW II union wage formation policy, "the solidaristic wage policy". This policy aimed at reducing pay differences between different branches.

The private sector employer community, in particular in Sweden, today advocates less centralisation. The union movements in all the Nordic countries are against decentralisation. They strongly defend the centralised system, at least at branch industry-wide level. To some extent decentralisation has already materialised, in particular in Denmark and Sweden. Unlike its Nordic counterparts the Swedish employers' confederation SAF (since 2001 the Confederation of Swedish Enterprise) in the 1990s resolutely took itself completely out of negotiations on terms of conditions of employment. But the trend towards decentralisation in Sweden is not clear-cut. In a reverse movement large sections of private industry at branch level in an epochal 1997 agreement with unions have agreed on bargaining procedures that involve a high degree of de facto centralisation. Known as the "Industry Agreement" this regime calls for co-ordinated bargaining in most key branches of private industry on a scale never seen before in Sweden.³¹ Reform of mediation law has worked in the same direction, at least to some extent (*cf* section 6 at 3 *infra*).

Denmark has also experienced rather much decentralisation. Indeed "(D)ecentralisation and 'flexibility' have been the industrial relations watchwords of the 1980s and 1990s".³²

In the mid 1980s Norway experienced decentralisation under a non-social democratic government. When the social democrats returned to power in 1986 a move towards re-centralisation to confederation level began together with a revival of tripartite co-operation. The 1992 "Solidarity Alternative" was a five-year accord between the social democratic government and the main labour market parties at top level.³³ The developments have been described as a "return to normality".³⁴

³¹ For a presentation and analysis *see* Fahlbeck (2000:2).

³² Scheuer (1998), at 146.

³³ Several government committees have put forward proposals to support and strengthen centralised collective bargaining as well as coordinated wage formation, last in 2001; NOU 2001:14 *Vårens vakreste eventyr ...?* For an analytical legal survey *see* Evju 2001, at 9 - 24. So far none of the proposals have resulted in any major statutory amendments.

³⁴ Dølvik & Stokke (1998), at 132.

Finland has also experienced decentralisation, e.g. from national level to industry-wide branch level. The employer community has “expressed no desire to move away from industry-level collective bargaining”.³⁵

Decentralisation has brought about primarily three changes. First, national bargaining between confederations has ended in the private sector, as in Sweden, or declined, as in Denmark. Second, industry-wide bargaining has changed in character. Industry-wide agreements become less detailed and increasingly serve as frames for local bargaining. Much stronger emphasis is placed on bargaining at local level, either on a collective or on an individual basis, as employment terms become more individual. The process may continue but given the very centralised nature of Nordic societies at large it may not proceed all that far. Third, the decentralisation process is primarily a private sector phenomenon. The extreme centralisation of the public sector has decreased, as employment contracts become increasingly more individual. Nevertheless, the overall bargaining system remains as centralised as before.

6.3 State Intervention in the Collective Bargaining Process: Mediation, Arbitration and Social Compacts

As has been pointed out repeatedly self-regulation is a hallmark of industrial relations in the Nordic countries. As has also repeatedly been said the Nordic regimes are neo-corporatist, although the labour market parties, while eagerly playing on the state’s turf, have tried to keep the state out of their own. Furthermore, the somewhat paradoxical observation has been made that compulsory and binding state intervention nevertheless is not at all uncommon but takes forms that the labour market parties heavily influence. Such state intervention is always on an ad hoc basis, no Nordic country having stand-by mechanisms for it. Binding, ad hoc state intervention is by far most common in Denmark and Norway.

In Denmark binding intervention first happened in 1933. It initiated a close tripartite regime that is still very much part and parcel of Danish industrial relations. The 1933 intervention took the form of prolongation of collective agreements for one year. The mechanism most often used in Denmark is the promulgation of a final proposal by a state mediator as the new collective agreement. On at least one occasion the Danish parliament made itself the rule-maker. That happened in 1998 to end a massive and crippling labour market conflict that called for intervention at the very highest level.

A distinction must be made in all countries between standing mediation without authority to make binding settlements and ad hoc imposition of binding settlements. The most powerful standing mediation rules are found in Denmark, followed by Norway. Sweden had the least powerful state mediation until reform legislation in 2000 but is still far behind Denmark and Norway.

Standing Danish mediation regulation goes back to the turn of the 20th century. The 1910 Mediation Act was amended in 1934 following the 1933 state

³⁵ Lilja (1998), at 179. *See also* at 171.

intervention. It gives state mediators a very strong position. Mediators can intervene on their own initiative and the parties concerned are under statutory obligation to appear before the mediator and participate actively in attempts to arrive at a peaceful solution. Mediators have the authority to postpone industrial actions once for a fortnight and another two weeks if important societal interests are at stake or if the action seriously impairs a settlement. No industrial actions can lawfully start unless prior notice has been sent to the state mediation agency. The mediator is authorised to make proposals for a new agreement that the parties are obliged to submit to members for balloting. Mediators also have the authority to bundle up proposals concerning several different bargaining areas and submit all these proposals as a package to the aggregate membership for balloting. This makes it very difficult for recalcitrant unions to obstruct bargaining rounds. However, this poses problems with regard to compliance with ILO conventions. Denmark has been requested to amend its legislation.

State participation by compulsory mediation and by binding, ad hoc settlements has become institutionalised to such an extent in Denmark that it can be considered to have become internalised. This result has been greatly favoured by two circumstances. First, mediators are appointed in close consultation with the labour market parties who nominate candidates. Second, mediators do not make final proposals unless both parties agree.

The Norwegian situation is kindred, yet distinctly different. Binding, ad hoc state intervention first happened already in 1916. It took the form of binding arbitration. In 1952 a permanent National Wage Board was established with five permanent members. Two members are nominated by the labour market parties, one for each side. They have no voting right. However, the parties to proceedings before the Board each nominate one member and these two have voting rights. Voluntary arbitration is encouraged but very rare. The Board is authorised by Parliament (or by the Government when Parliament is not in session) on an ad hoc basis to perform binding arbitration. In the period 1952 until 1996 the Board has arbitrated some 130 disputes.³⁶ However, just as in Denmark, mandatory, binding arbitration undermines free collective bargaining and gives rise to serious questions about compliance with ILO conventions and the 1961 European Social Charter (*see further* Stokke in this volume).³⁷

Standing state mediation under the 1927 Labour Dispute Act is usually compulsory. Industrial actions cannot lawfully start before notification to the state mediation agency. Mediators can postpone notified actions for fourteen days but longer periods are common as the parties accept requests by mediators for further postponement. The mediator is authorised to make proposals for an overall settlement but cannot order membership balloting on his/her own initiative. It is standard practice that the parties accept a request by the mediator to submit the proposal to a membership vote (or some other procedure laid down in the bye-laws of the union). Collective agreements often contain rules on membership ballots. If, but only if, the parties agree to a vote, is the mediator

³⁶ Dölvik & Stokke (1998), at 126.

³⁷ For a short discussion *see e.g.* Evju, *op.cit.* footnote 33 *supra*.

authorised to bundle up, as in Denmark, several separate proposals and submit them to an overall vote.³⁸

Sweden does not have a tradition with ad hoc, compulsory, binding state intervention. For sure, state intervention there has been but it is much less institutionalised than in Denmark and Norway and thus has much more of an ad hoc and experimental character. Indeed, only one time has a binding solution been imposed (1971). It took the form of compulsory prolongation of the existing collective agreement. Arms twisting by the government and threats to intervene have been used on other occasions.

Sweden got its first mediation act in 1906. With only minor amendments the standing, state mediation regime laid down in that statute lasted until 2000. Though compulsory mediation was part of the regime, by and large mediation was weak and in reality voluntary. Mediators had very little power. Following very unruly conditions on the labour market in the 1990s that saw state intervention on a scale never seen before, state mediation was reformed in 2000. Under the new regime mediation is considerably stronger, yet still less powerful than in Denmark and Norway. For example, mediators have no authority to order or ask for membership voting. Indeed, since the adoption by LO in 1941 of new statutes balloting on collective agreements is not mandatory and has become very rare. This, *inter alia*, means the compulsory co-ordination that is possible in Denmark (and quasi-compulsory co-ordination in Norway) is out of the question in Sweden. In addition, under the new rules and subject to meeting conditions laid down by these, state mediation can be set aside by parties who agree on a private mediation regime. The previously mentioned 1997 'Industry Agreement' in private manufacturing has done so (*cf* at note 31 *supra*). Similar agreements exist in several other bargaining branches as well, both public and private. "Impartial chairmen" appointed by the parties under the "Industry Agreement" fulfil the role of mediators and "wise men". They have powers exceeding those of state mediators but cannot order membership votes.

Binding arbitration in collective bargaining disputes (interest disputes) is not part of the Swedish model. It exists in a few branches as part of voluntary undertaking by the parties to a collective agreement. Where it exists, it is either compulsory or voluntary, depending on the agreement.

As in Sweden, Finland has no tradition with ad hoc, compulsory binding state intervention. Only once (1978) has a binding settlement been imposed by act of Parliament. It took the form of extension of an agreement reached by certain, but not all, labour market parties concerned. Extensive contacts of a horse-trading character between the government and the labour market parties concerned have become the most common route to reach agreement in national and branch collective bargaining impasses.

The 1962 Mediation Act is rather similar to mediation law in Sweden at that time (*cf supra*). This means that mediation is weak legally speaking.

³⁸ The rule on joining together different bargaining proposals has been at the centre of labour law and industrial relations in Norway ever since its enactment in 1934 and a Labour Court decision in 1982, effectively limiting the authority of mediators. Proposals to change existing rules and practices one way or the other have been numerous but have so far led nowhere. See generally Evju, *op.cit.* footnote 33 *supra*.

7 Disputes of Rights

7.1 Interest Issues and Rights Issues

The distinction between these two concepts was part of the 1899 Danish September Compromise. It is based on German law. The distinction has had a profound impact on legislation, institutions and labour market practices in all the Nordic countries. Despite this no definition of these two concepts can be found in any statute, collective agreement or otherwise authoritative source. Not even case law has hammered out a clear-cut definition. Nevertheless, the borderline has caused only little disagreement. Disputes concerning the proper classification of any given issue are rare.

In general terms right issues concern any matter where a legal basis is available to determine them. Interest issues concern all other matters. In right disputes the ruling factor is what is legally correct. Once that has been established the parties agree to accept that finding. In interest disputes no such ruling factor exists.

Disagreement on the meaning of statutes, agreements, collective or individual, and other legally recognised phenomena constitute disputes over rights. Judicial bodies, i.e. courts or legally acceptable arbitration, settle disputes of rights.

Common to all the Nordic countries is that before litigation most disputes over rights must be preceded by negotiations between the parties to the dispute. This means that the handling of most disputes over rights consists two distinct stages, grievance negotiations and litigation.

7.2 Grievance Procedure

The legal foundation of grievance negotiations differs. In Denmark it is strictly contractual, as is by and large the case in Norway as well. The Swedish 1976 Co-Determination Act contains some provisions on grievance handling but detailed rules are found in collective agreements. An important body of case law has been developed by the Swedish Labour Court.

The orderly and peaceful handling of grievances is a hallmark of Nordic labour relations. By and large a two step grievance procedure prevails, local handling by the parties directly involved at the place of work where the dispute originated and central handling by representatives of the industry-wide branch organisations on both sides. Unions represent their members but they have only little legal authority to process grievances as they see fit.

Individual employees have no standing in the grievance procedure. However, without exception and subject to no conditions, e.g. prior grievance negotiations between the union and the employer, unionised employees are entitled to take their grievance to court at their own initiative. This is the case where no amicable settlement is reached during grievance negotiations and the union declines to take the grievance to court or where the union has declined to represent the member in grievance negotiations altogether. Non-unionised

employees also have standing to go to court if they fail to persuade the employer to settle with them.

7.3 *Labour Courts and Other Courts*

All four Nordic countries have a Labour Court. The Danish is the oldest (1910), followed by Norway (1915), Sweden (1928) and Finland (1962). They are very similar in most respects and differ radically in only one aspect, their jurisdiction. The extremes here are Denmark and Sweden.

(a) Jurisdiction of the labour courts. The Swedish Labour Court has the widest jurisdiction by far. Under the 1974 Act on Litigation in Labour Disputes (replacing the original 1928 statute) the court has jurisdiction in all labour disputes. That means that its authority covers both disputes concerning collective agreements and collective labour legislation (*cf* section 3 *supra*) and disputes concerning individual employment contracts. As a consequence ordinary courts have only limited jurisdiction in labor matters, e.g. disputes between labour market organisations and their members. First instance trial courts also have jurisdiction in all disputes involving employees not belonging to an established union (i.e. a union that is not party to a collective agreement; *cf* section 5 at 5 *supra*) and when a member of an established union goes to court without being represented by his/her union. However, unlike other labour related disputes handled by ordinary courts, appeal is taken to the Labour Court.

The Danish Labour Court has comparatively limited jurisdiction. It handles cases concerning basic agreements, breaches of collective agreements, legality of industrial actions and disputes whether there is a collective agreement or not. Disputes concerning the interpretation of collective agreements are matters for arbitration, usually the arbitration board under the collective agreement (*cf* at 4 *infra*). Courts of ordinary jurisdiction handle disputes other than those now mentioned.

The courts in Norway and Finland form the middle. They both handle all disputes concerning collective agreements and collective labour law. As the only Nordic country Norway has a system of local labour courts. These have rather limited jurisdiction. Appeals are taken to the Labour Court

The labour courts are courts of last instance so there is no appeal (other than in the unlikely instance of obvious miscarriage of justice).

(b) Composition of the labour courts. The labour courts of the four Nordic countries are composed in basically the same way. They are tripartite bodies where members representing the two sides of the labour market form the majority. Professional judges (and in Sweden experts on labour market matters) represent society. The government appoints all members in Norway and Sweden but in Denmark it is done by the Minister of Labour and in Finland by the President. The labour market parties nominate their representatives and these are always appointed. The professional judges are independent of the parties but cannot function properly without support from them. The chairperson/president usually is or must be a judge of Supreme Court stature. The chairpersons/-presidents are the only persons who serve full time on the court. The

chairpersons/presidents enjoy no particular statutory authority, but have a considerable de facto authority. The terms of all members are short, five years in Denmark and three years in Finland, Norway and Sweden, but members can be re-appointed any number of times. Some chairpersons have served for decades, achieving legendary status in the process.

When hearing cases the courts are usually composed in such a way that the lay judges form a majority. Decisions are taken by simple majority. More often than not the decisions of the courts are unanimous. Conceivably, the lay members can unite and overrule the professional members. That happened in Sweden some five decades ago but only in a few cases (concerning the right of association where an independent union was involved). Two recent Danish cases have attracted considerable attention. Very similar situations concerning transfer of undertakings were treated differently by the Labour Court, the most striking difference between the cases being that in one of them a LO affiliated union was a party on the employee side whereas in the other the union was independent.³⁹ This led to changes in 1997 in the rules regarding the composition of the court in cases where a party is not a member of any of the organisations that nominate members on the court. Upon request from the union, no lay judges will participate.⁴⁰

(c) Role of the labour courts. All the labour courts have played central roles in forming labour law and the industrial relations systems ever since their inception. They have all created important bodies of case law. They have formulated quite a few of the most important legal principles in the field. The Swedish Labour Court, for example, was created primarily to be instrumental in promoting industrial peace and it certainly has done so. Nevertheless it seems justified to say that its most prominent contribution has been in the area of employment law rather than labour law (for which it was created). The reason is that the court has been called upon to rule on the scope of employer prerogatives. In doing so, the court originally accepted the de facto state of affairs in this respect in the days of its inception in 1928. At that time the process

³⁹ Labour Court rulings 1990:193 (LO-union) and 1990:328 (independent union).

⁴⁰ The composition of the Nordic labour courts has been questioned with regard to Article 6 § 1 of the 1950 European Convention of Human Rights. Since participating lay members represent only certain labour market organisations, parties and organisations not affiliated with these organisations have questioned whether a court so composed is an “independent and impartial” tribunal under the convention. So far the Court has not been called upon to rule on the issue and in all cases so far the Commission has found complaints against the Swedish Labour Court inadmissible; see *Dyrwold and others v Sweden*, App. No. 12259/86 (1990), *Stallarholmen and others v Sweden*, App. No. 12733/87 (1990), *YOM-TOV v Sweden*, App. No. 12962/87 (1990) and *Smeeton-Wilkinson v Sweden*, App. No. 24601/94 (1996). However, in a 1989 judgement the European Court had found that the composition of the Swedish Housing and Tenancy Court did not meet the standard of the convention in a particular case; *the Langborger case*, June 22, 1989, Series A No 155. That court had a composition similar to that of the Swedish Labour Court. No changes in the composition of the Swedish Labour Court were found necessary as a result of the Langborger case.

Labour court composition has also been questioned in connection with cases concerning equality and non-discrimination, in particular gender discrimination. Here criticism is more varied involving e.g. the gender of judges or the suspicion that representatives of the labour market parties are biased in favour of existing conditions in the labour market for the simple reason that these parties to a great extent have created those.

of dismantling these prerogatives had not yet started. By accepting these prerogatives, indeed finding them to be general principles of law, the court profoundly influenced the balance of power between the labour market parties and the rule making structure.

(d) Role of organisations. The labour courts primarily serve the interests of the parties to collective agreements, usually organisation on both sides. This is true for the Swedish Labour Court even after the 1974 broadening of its jurisdiction to also cover individual employment disputes. One consequence of this is that the organisations concerned always have standing at the court. Another consequence is that individual members either have no standing at all before the court, as e.g. in Denmark, or must initiate litigation at a trial court of ordinary jurisdiction, as in Sweden.

(e) Role and character of labour courts. Legally speaking all the labour courts are courts of justice. Because of their composition and role played by the lay judges, many of which have no legal education, they are at the same time just as much or perhaps even more arbitration boards. Asking whether they resemble a court more than an arbitration tribunal is akin to asking if the zebra is white with black stripes or black with white stripes!

However, the labour courts all act as other courts in administering justice. With limited exceptions, all the Nordic labour courts apply standard civil procedural rules. Elements involving bargaining, compromise or other features not part of civil procedural law are out of the question. Furthermore, attempts by the labour courts to mediate between the parties and find a solution short of litigation are probably less prominent than by courts of general jurisdiction at first instance. The reason is that grievance negotiations precede labour court procedures so the parties have already explored the possibilities to reach an amicable settlement. Another distinguishing feature is that labour courts intervene more actively in proceedings in order to clarify issues than courts of general jurisdiction do in civil litigation. One reason is that labour courts are courts of both first and last instance. Another reason is that the rulings of labour courts often have important repercussions for the entire labour market. Thus, a more active role is called for.

Another characteristic, at least for the Swedish Labour Court, is a strict adherence to precedent. By and large, the Swedish Labour Court has also been very sensitive to wishes, practices and opinions of the labour market parties, acting much more like a servant than a ruler. This can come as no surprise since a majority of the judges represent these parties. On the other hand, coupled with this, at least as far as the Swedish court is concerned, is strict adherence to the intentions of lawmakers (as expressed in the legislative history, the *travaux préparatoires* of legislation).

Another way of characterising the Nordic labour courts is to say that they are a natural part of the corporatist structure of labour market relations in these countries. They blend organically into that structure, maintaining and strengthening it. Small wonder that the Swedish employer community, despite its deliberate exodus from most of this aspect of Swedish society, still participates in the activities of the Swedish Labour Court (short of seeing it abolished altogether, as is its want)!

Proceedings before the courts are public. The rulings of the courts are published.

7.4 *Arbitration*

With only limited exception arbitration as a final and binding method for settling labour disputes is permitted in disputes concerning rights. The arbitration statute of each country rules proceedings. However, with the most significant exception of Denmark, arbitration is not much used in the Nordic countries to settle disputes involving individual employers and employees. On the whole it is confined to some few sectors of the labour market, e.g. the printing industry in Finland and banking in Sweden, or to some specific issues, such as piece-rate disputes.

Disputes between labour market organisations and between labour market organisations and their members are commonly referred to arbitration. However, such disputes are rare, in particular involving union members (*cf* section 5 at 3 *supra*).

Denmark differs radically from its Nordic neighbours. Binding arbitration is very much part and parcel of the labour dispute settlement regime there. It is of long standing, going back to the early 20th century. As was pointed out *supra* (at 3 a) the jurisdiction of the Danish Labour Court is comparatively limited. Disputes concerning the interpretation of collective agreements fall outside its jurisdiction. These are submitted to arbitration. Most collective agreements provide for an ad hoc arbitration board. In the absence of satisfactory contractual rules, statutory rules prevail (statute 1972). These are based on a 1908 agreement, the Norm, between the top confederations (*see further* Hasselbalch in this volume).

The arbitration boards are composed of an equal number of representatives from the parties and a neutral chairman, usually a judge serving on the Labour Court or as a state mediator. Proceedings are of a strictly legal nature. The board is considered a court or tribunal under EC law.⁴¹ Proceedings are speedy and very informal. With few exceptions rulings by the arbitration board are final and binding upon the parties.

Awards by arbitration boards are often made public in Denmark but not in the other Nordic countries. Indeed one reason for using arbitration is to escape from publicity. However, not even in Denmark are there any publications of the kind found in some countries, e.g. the Labour Arbitration Reports in the USA. Nor is there any professional association for labour arbitrators like e.g. the (US) National Academy of Arbitrators.

⁴¹ *Danfoss case*, C-109/88 *Handels-og-Kontorsfunktionærers Forbund i Danmark v Dansk Arbejdsgiverforening* (acting for Danfoss) /1989/ ECR 3199.

8 Labour Law versus Competition Law

Trade unions are in the business of taking labor out of competition. The aim of collective agreements is to standardise terms and conditions of individual contracts of hire.⁴² Closed shop clauses monopolise employment access. In all these respects, to name but three, important elements of collective labour activity fly in the face of competition law. Still, they are all lawful under Nordic labour law.

Ever since competition law was introduced in the Nordic countries, starting in Norway in 1926, competition legislation has exempted agreements concerning pay and other terms and conditions of employment. That has eliminated competition law from most of employment law.

The close to complete deregulation of state rules on the activities of enterprise and labour in the wake of industrialism and the liberal state opened the field for concerted actions by employees. As has been said before (section 2 at 1) the Nordic countries never saw restrictions of the kind introduced in many states, e.g. France (*loi le Chapelier*, 1791) and the United Kingdom (Combination Acts of 1799 and 1800). This means that unions have never faced oppressive legislation in the Nordic states, nor has union self-rule or the combined exercise of such self-rule by employer and the employee communities, e.g. closed shop arrangements. (It is quite another matter that private sector employers never accepted such clauses since they limit employer prerogatives; *cf* section 5 at 4 *supra*). As has been pointed out previously “featherbedding” or other kinds of collusion between the labour market parties have been extremely uncommon. As a consequence, limitations caused by such practices are not found either in statutory law or in case law (*cf* section 1 *in fine, supra*). The negative right of association might introduce restrictions on self-regulation but that has not really yet happened (*cf* section 5 at 4 *supra*).

Restrictive covenants limiting employee freedom of choice after termination of employment, e.g. limiting his/her freedom to accept new employment or prohibiting her/him to compete with the former employer, are subject to judicial review under the Contracts Act of each Nordic countries. Nearly identical rules in the Nordic countries all accept restrictive covenants but only insofar as they are not undue. In addition, restrictions in collective agreements are rather common.

As soon as agreements between the labour market parties venture beyond the employment area proper the terrain becomes much more hazardous for employers and unions. What, for example, if a collective agreement prohibits the employer from subcontracting or provides that it may use only subcontractors that the union accepts? What if it prescribes the prices employers are to ask for their services or stipulates that employer offered utilities, e.g. group health insurance, must be furnished by one specified provider only, thus blocking other

⁴² For extensive discussion about collective agreements and competition law in the EU *see* Bruun, N, & Hellsten, J, editors (2001) with national reports concerning Denmark (R Nielsen), Finland (J Hellsten) and Sweden (J Malmberg).

insurance companies from competing for that business?⁴³ Here competition law often applies. However, the Nordic countries have not embarked on the tortuous route that many countries have travelled to map the exact configuration of the two areas of law. Specific legislation does not exist and case law is meagre at best.

9 EU and the Nordic Model

So far, and quite understandably, EU law in labour matters is not much concerned with collective labour law. Nor is it likely that it will be in the near future. As is well known some matters are even explicitly excluded from its legislative authority, e.g. strikes (Article 137 EC). On the other hand several EU directives have been adopted within the labour law field. These have to be implemented.

Can the Nordic system of self-regulation by the labour market parties accommodate that requirement? These and other matters concerning the Nordic model and the EU are discussed in Nielsen *supra*. As will be discussed there the Nordic model is not necessarily quite in accord with EU models. This has led to an increased role for the legislator and for statutory law. The role of the social partners and collective agreements have decreased, though not at all as much as the expansion of legislation might lead one to believe.

How is that so? It is a well-known fact that structures and institutions in the field of industrial relations show considerable tenacity. Once established they are not prone to change. In addition they are concerned with power structures in society. They are at the heart of social fabric. By and large they are also immune to rapid change. Introduction of new elements are often resisted and more often than not rejected.⁴⁴ EU regulation has not been rejected, of course. However, statutory implementation has been carried through in a way that takes into account the role of the social partners and collective agreement regulation.

Is it likely that the Nordic model(s) will undergo radical changes in the near future? No, it most definitely is not. Despite the influence of EU regulation and other factors, e.g. increased individualism among people, it seems rather unlikely that any serious change will occur. Experience in the recent decade, e.g. the drastic increase of atypical work, outsourcing and hiring out of workers, demonstrates that the Nordic models(s) are quite capable to accommodate changed circumstances without any significant structural change, e.g. decrease unionisation rates, collective bargaining or coverage of collective agreements (*cf* section 5 at 1/ *supra*). Chances are that nothing much will fundamentally alter the Nordic model(s) for industrial relations despite changes in the environment. “Plus ça change, plus ça reste le même”, as it were!

⁴³ For an extensive treatment of a 1999 ruling by the ECJ concerning such an agreement *see op. cit.* previous footnote.

⁴⁴ The seminal text in this respect is Kahn-Freund, Otto, *On the Use and Misuse of Comparative Law*, *The Modern Law Review*, volume 37, 1974.

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