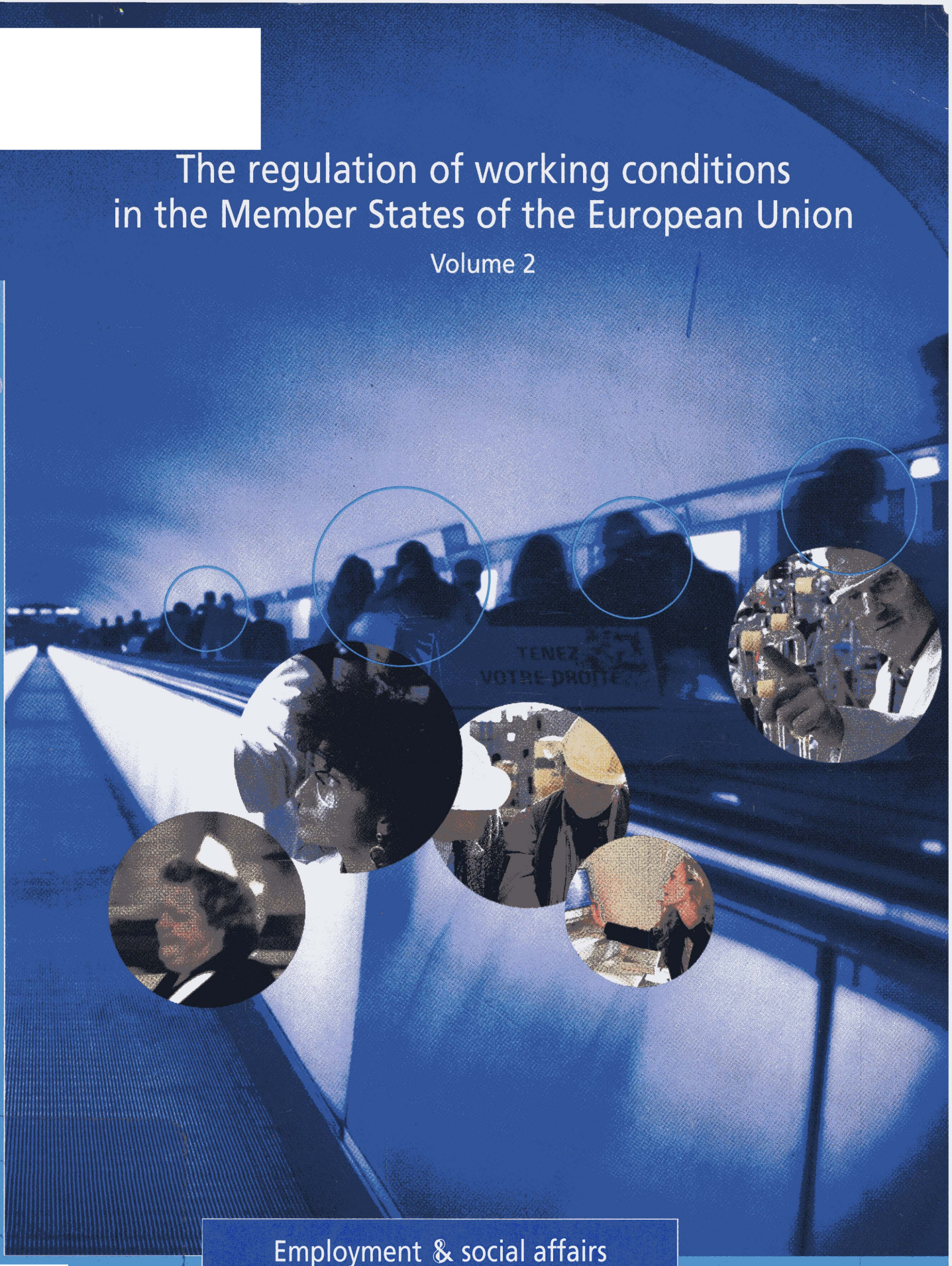
The regulation of working conditions in the Member States of the European Union

Volume 2

Industrial relations & industrial change



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The regulation of working conditions in the Member States of the European Union

Volume 2

The legal systems of the Member States; a comparative perspective

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Industrial relations and industrial change

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TABLE OF CONTENTS

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BELGIUM

M. Stroobant

1. Background

The actors participating in the production process are roughly three: employers, workers and the State.

A brief outline of their respective legal position and their role is set out below.

The first point to make is that these actors perform not only singly, as individuals, but also as part of a group. Another is that there have been changes in the course of time, both in terms of their legal position and in terms of their function in the labour process.

With regard to the group aspect, we need to study the rules which govern their actions as such and identify their global role.

We shall look in turn at:
- union freedom;
- workers' organisations;
- employers' organisations;
- the public authorities.

CHAPTER I: UNION FREEDOM

SECTION 1: FREEDOM TO ASSOCIATE AND UNION FREEDOM

2. Legislation

Freedom to associate is enshrined in the *Belgian Constitution*. Union freedom is regarded as an aspect of this right, although it is not actually spelt out as such. The basic legal text is the *Act of 24 May 1921*. In addition to this text, there is the collective labour agreement No 5 (CNT *of 24 May 1971*, MB, 1 July 1971).

Other key texts in this area include:

- the *Act of 19 August 1948 on benefits of general interest in peacetime* (MB, *21 August 1948*);
- the *Act of 19 December 1974 on relations between the public authorities and civil service unions* (MB, *24 December 1974*).

Belgium has also ratified the following documents pertaining to international law:

- ILO *Convention No 87 of 1948 on freedom to associate*;
- ILO *Convention No 98 on the right to organise collective bargaining*;
- the *European Declaration on Human Rights*;
- the *United Nations Pact on Social Rights (1966)*.

Belgium has not yet ratified the *European Social Charter*.

3. The principle

Article 20 of the *Constitution* stipulates that Belgians have the right to congregate. They may not be prevented from doing so through any means.

This article has been interpreted in such a way as to guarantee the freedom to associate at all aspects of social life, including labour relations[1].

Article 1 of the *24 May 1921 Act* specifies that no-one may be forced to join or not to join an association. In other words, both negative and positive union freedom are guaranteed by law.

Although the principle of union freedom is formulated in absolute terms, without a single restriction, such restrictions obviously exist.

4. Definition

There is no definition of the concept *"union organisation"*, *"occupational union"* or *"union"* in Belgian law. In general, these terms are used to designate workers' organisations, but the word union refers likewise to organisations representing the employers, the professional classes and farmers.

Workers' organisations currently play an extremely broad-ranging role in Belgian social affairs. They defend the interests of their members at corporate level and in the higher echelons of society.

They fulfil a similar function vis-à-vis the political authorities.

Hence the need to adopt a broad definition of the term *"union organisation"* in Belgium, along the lines proposed by J.M. Verdier. *"A professional organisation is a group made up of natural and legal persons with a professional activity which, with a view to defending their interests, improving their existence and representing their profession through collective action, question or participate in the organisation of their profession, and participate in framing and developing economic and social policy at national level"*[2].

5. Contract of association

Anyone joining a union concludes an agreement, a contract of association. Usually, provision would be made for such a contract in the *Civil Code*. This is not the case in Belgium. The only form of association covered by the Belgian *Civil Code* concerns companies, in other words, profit-making associations. Non-profit-making associations are not referred to. They are covered by special regulations.

In legal terms, the easiest way of analysing the contract of association concluded by a union member is by *a contrario* deduction, taking the corporate model as a guide[3]. Association, then, as a specific contract, features the following elements[4]:

1. the will of two or more individuals to unite in order to achieve a stated object;
2. the pooling of goods or services;
3. the intention to achieve the object described in the contract on a non-profit-making basis;
4. allowing all members to participate in the results obtained without implying their participation in profits or losses.

1. MAST A., and DUJARDIN, J., *Grondwettelijk recht*, Ghent, Story-Scientia, 1985, p. 583.

2. VERDIER, J.M., *Traité de droit du travail, Syndicats*, Ed. Dalloz, 1966, p. 209.

3. Article 1832 CC.

4. HORION, P., *Nouveau précis de droit social belge*, Liège, Faculté de droit, 1969, p. 121 et seq.

SECTION 2: THE INGREDIENTS OF UNION FREEDOM

6. Foreword

Three key aspects of union freedom need to be highlighted: the relationship between unions and the individual worker; the relationship between organisations and the relationship between organisations and the State[5].

7. Positive and negative union freedom

No-one may be forced to join or not to join an organisation (*1921 Act, Article 2*).

Union freedom is non-compulsory and pluralist. One may join the organisation of one's choice.

This principle is confirmed by ILO *Convention No 87, Article 2* and by ILO *Convention No 98, Articles 1 and 2.*

All that is needed is that members should abide by the statutes of the association (*1921 Act, Article 2*). They may not be refused on grounds of *"sex, colour, race, religion or nationality"*[6].

Can people be rejected on account of their political creed? The answer is yes, if that creed clashes with the union's views on policy. May the organisation bring up other reasons for refusing membership? May they reject a person manifestly intending to obey the statutes but who refuses to cooperate? Apparently, they may. Concluding a contract of association assumes that there is *"a will to cooperate" (affectio societatis).*

Article 2 of the *1921 Act* provides extra protection for the individual vis-à-vis third parties seeking to debar that individual from joining their organisation[7].

Nevertheless, the protection of the individual vis-à-vis organisations (for example, the right not to be excluded) remains a difficult problem, particularly now that workers are increasingly represented by a dwindling number of organisations, i.e. the most representative among them. Belgian legislation is not watertight in this respect.

Last but not least, there is *Collective Agreement No 5* of *24 May 1971* on union delegation. The multi-industry employers' organisations which are party to the agreement explicitly undertake to advise their members not to put pressure on their staff to prevent them from joining a union and not to hold out any inducements to non-union workers which would put them at an advantage over their union colleagues. They also undertake not to interfere, either directly or indirectly, with the freedom of association[8].

8. The nationality requirement

Do only Belgians enjoy union freedom or is this a right accruing to anyone resident in Belgium?

a) *Article 20* of the *Constitution* explicitly recognises this right for Belgians. On the other hand, the *24 May 1921 Act* on the right to associate does not mention nationality at all. Comparing the two texts, the Belgian legislator certainly appears to have intended to guarantee freedom to associate to Belgians only[9].

   International social law has overturned this trend. Belgium has ratified the *European Convention on Human Rights* and ILO *Conventions No 87 and 98 on union freedom* as well as ILO *Convention No 111 on non-discrimination.* Our country has likewise ratified the *UN Pacts on political rights and on social and economic rights.*

b) *Article 14* of the *European Human Rights Convention* stipulates that the rights and freedoms spelt out in the Convention must be extended to all without distinction, particularly on the basis of nationality. Yet the principle of non-discrimination does not stop the State from imposing restrictions on the political activities of foreigners[10].

c) *Article 2* of ILO *Convention No 87* stipulates that workers and employers may, without any discrimination whatsoever, join the organisation of their choice. Any discrimination on the grounds of nationality, sex, political creed or profession is excluded[11]. Restrictions may be imposed in the armed forces, the police and suchlike[12]. Non-discrimination applies equally to the public and private service sectors[13].

   The question whether the principle of non-discrimination also applies to activities in the social field needs to be studied on a case by case basis, taking the local situation into account.

d) Finally, EEC *Directive No 15 of 1961* stipulates non-discrimination with regard to trade union membership of EEC nationals[14].

9. The repercussions of membership

Each individual who joins an association thereby agrees to obey the rules and decisions taken in accordance with the regulations (*1921 Act, Article 2*; ILO *Treaty No 87, Article 2*).

This clause raises the problem of the union's powers vis-à-vis its members. The problem is twofold:

- to what extent can a union take decisions binding on its members: i.e. the question of statutory power;
- to what extent can a union force its members to adopt, as members of a group, a particular line of conduct: i.e. the question of disciplinary power.

5. BLANPAIN, R., *De syndicale vrijheid*, in: *Arbeidsrecht*, CAD, III, p. 19 et seq.
6. VALTICOS, N., *Traité du droit du travail, Droit international du Travail*, Dalloz, Paris, updated 1973, p. 24.
7. BLANPAIN, R., *De syndicale vrijheid in België*, De Standaard, Antwerp, p. 93.
8. Article 3, CCT no 5.
9. MAST, A., and DUJARDIN, J., *Overzicht van het Belgisch grondwettelijk recht*, Ghent, Story-Scientia, 1985, p. 583.
10. CEDH, Article 11. MAST, A. and DUJARDIN, J., *Overzicht van het Belgisch grondwettelijk recht*, op. cit., p. 584.
11. VALTICOS, N., *Traité du droit du travail. Droit international du travail*, Dalloz, Paris, updated 1973, p. 24.
12. ILO Convention No. 87, Article 9.
13. *La Liberté syndicale*, in: *Round-up of the decisions and principles of the Committee on union freedom of the International Labour Office in Geneva*, BIT, 1985, No 210.
14. PB, 26 August 1961.

10. Statutory powers: internal and external competence

Article 2 of the *1921 Act* confers statutory powers on occupational organisations within the framework of their social objective: as members of the organisation, workers or employers are bound by the decisions taken in compliance with the statutes. What is the meaning and scope of this clause?

Action undertaken by a union cannot be effective unless group solidarity is given free rein. The organisation needs to speak for all its members. It must be sure that its decisions will be respected. The union can only accept those who will not imperil the bond of solidarity.

At this point we must differentiate between the organisation's internal conduct (vis-à-vis its members) and its external conduct (vis-à-vis the outside world).

Clearly, in matters internal, the organisation must be the sole arbiter of the conduct it adopts.

The situation becomes less clear-cut when the organisation's decisions also affect the individual's life outside the group, particularly his non-occupational life. After all, the occupational organisation is not the only body which defends the interests of its members. First of all, the individual himself will want to defend his occupational and personal interests regardless of any group affiliation, as part of his individual labour relations. Then there is the possibility of non-organised collective activity outside the unions, indeed sometimes against the unions. So is it permissible to prevent a worker from defending his interests outside the union framework by reason of his membership of that union, if the latter fails to fulfil its obligations?

Pursuant to *Article 2* of the *1921 Act*, the principle of legal compulsion should be applied to the decisions of occupational organisations. Since anyone who joins a union is in fact concluding a contract, the same legal consequences as those applicable to contracts under the *Civil Code* should be made to apply.

For decisions to be binding, they must fulfil the following conditions[15]:

1. steps taken by the organisations may not breach the peace (*Articles 6 and 1133* of the *Civil Code*) or infringe binding legal regulations;
2. clauses must square with the social objective;
3. they must comply with statutory provisions, with special emphasis on respect for the individual rights of members as enshrined in binding law and the statutes;
4. decisions are binding not only on those who were members at the time when they were taken, but also on those who joined afterwards;
5. if the organisation is not a corporate body, the question whether rules decided in due form are binding needs to be resolved by applying specific legal interpretations or by law. The legal interpretations of the *Civil Code* (business management: *Article 1372* CC, provision for third parties: *Article 1121* CC, *"nameless contract"*, mandate: *Article 1984* CC) fall short of what is needed.

15. BLANPAIN, R., *Handboek*, Story-Scientia, Ghent, 1968, p. 127.

11. Disciplinary powers[16]

Disciplinary sanctions are not the same as legal penalties[17]. A disciplinary offence is a violation of professional rules or a transgression against professional propriety and fair dealing if these rules have not been codified.

The principle of the non-retroactiveness of penal law does not apply[18].

The organisation may take disciplinary action against its members provided it tallies with the statutes.

What kind of infringements exist and what are the penalties attached to them? In principle, any act detrimental to the social objective of the association may carry sanctions, unless the parties involved have clearly voiced their intentions to the contrary.

The organisation can take action against the offending member only in ways with a material or moral bearing on his membership. The union has no power to act beyond this sphere. Possible penalties include reprimands, warnings, fines, financial forfeit, forfeit of voting rights, suspension[19].

It would be logical to assume, given the contractual nature of the association agreement, that both infringement and penalty would be established on a statutory basis. Law and order and morality still mitigate penalties. All the same the union is an institution and it is generally accepted that both statutory and non-statutory measures may be taken[20].

Although legally sound, this point of view hardly seems justifiable on social grounds.

The two parties may start legal proceedings for failure to meet contractual obligations, always bearing in mind the problems that can arise from the lack of corporate identity on the part of the unions.

SECTION 3: PROTECTION OF UNION FREEDOM

12. Protection

Both the *1921 Act* and *ILO Treaty No 98* afford such protection. Each individual is protected against acts of violence, threats and particularly against interference with his right to employment resulting from the exercise of his right to associate. The relevant penalties derive from the *1921 Act*.

The right to associate may also be interfered with in ways other than those spelt out in the *1921 Act*. In such cases, civil rather than legal sanctions will ensue. The inclusion in a collective agreement of a clause giving substantial, exclusive financial benefits to members of a trade union constitutes an unlawful means of pressure and runs counter to law and order principles. It is therefore considered null and void. An employer who applies it is in breach of the law and will have to compensate for damages. Compensation will equal

16. Ibid., p. 131.
17. VANHOUDT, C.J., and CALEWAERT, W., *Belgisch strafrecht*, 3 volumes, Story-Scientia, Ghent, 1968, p. 912.
18. MAST, A., *Overzicht van het Belgisch Administratief Recht*, Story-Scientia, Ghent, 1971, p. 135.
19. BLANPAIN, R., *Handboek*, Story-Scientia, Ghent, 1968, p. 129. PIRON, J., and DENIS, P., *Le droit des relations collectives du travail en Belgique*, Larcier, Brussels, 1970, p. 15.
20. BLANPAIN, R., *De syndicale vrijheid*, De Standaard, Antwerp, 1968, p. 19 and 23.

the amount of the bonus paid out to the privileged union members[21]. In other words, both common law and penal law have a hand in protecting union freedom.

SECTION 4: THE LIMITS ON UNION FREEDOM

13. Preface

Neither the *Constitution* nor the *1921 Act* restrict union freedom or impose conditions on the way it is applied. All the same, there are restrictions deriving either from common law or from specific or international sources.

We need to differentiate between direct and indirect restrictions.

Direct restrictions prevent people from joining or not joining a union; indirect restrictions circumscribe the organisation's means of action or its rights.

14. Indirect restrictions

Some provisions contain indirect restrictions of the freedom to associate, yet do not infringe the actual principle of the freedom to associate: the union's means of action are restricted or the exercise of certain rights denied.

Strike action and back-up measures are a union's chief means of action. The maintenance of law and order necessarily restricts these activities, a restriction comparable to the 19th century's *Article 310* of the *Penal Code*.

Particular cases in point include:
- legislation on mining, open-cast mining and quarrying;
- civil and military requisitioning;
- penal rules and regulations[22];
- preventive action in respect of the safety of strategic and vital areas and strengthening of law and order enforcement;
- public sector strike regulations.

A union may be denied the exercise of certain rights, for example:
- the problem of corporate personality;
- the concept of *"most representative organisation"*;
- the procedure rendering binding a collective labour agreement;
- the settlement of social disputes;
- Indirect restrictions, vital needs.

15. Indirect restriction - vital needs

The *Act of 19 August 1948* establishes, with regard to the private sector, an obligation on joint committees or the King to take whatever steps are necessary to supply certain vital needs or to have certain tasks carried out[23].

Members of staff designated for this purpose must accomplish these tasks, which are defined beforehand. Failure to do so carries penalties provided for by law. The workers thus singled out are on regular duty during this period.

Article 6 of the *Act of 19 December 1948* stipulates that they are entitled to all social laws during this period. The Act further lays down the procedures which must be applied.

16. Direct restrictions - general legal principles

The contract of association is subject to general legal principles. For example, the principle of contractual autonomy applies. This implies that every individual has the right to negotiate membership of an association freely and without constraint. Similarly, *Article 6* of the *Civil Code* must be upheld. This Article bans the conclusion of any special agreement which departs from law and order regulations and morality laws.

17. Direct restrictions - clauses on union security - the concept

The clauses on union security are either spelt out in a collective labour agreement or are part of legislation. They confer certain benefits on union organisations or on their individual members by virtue of their union membership (*"Zekerheidsclausules"*, *"Organisation-Klausul"*, *"Union Security"*).

Such clauses are included in order to put pressure on workers to join the trade union. In principle, therefore, they run counter to *"negative"* union freedom. Indeed, the legal argument rages unchecked, even in terms of statute law[24].

18. Union security clauses - conditional legality

The *1921 Act* does not explicitly address the question of legality of the security clauses. The problem needs to be placed in the current social and economic context. It certainly never surfaced in 1921[25]. Union security clauses are an inducement to workers to join a union.

To what extent does this clash with union freedom as protected by Belgian law?

The *1921 Act* is clear on this point. For there to be infringement carrying legal penalties, the act (in this case the security clause) must be perpetrated *"with deliberate intent to violate the freedom to associate"* (*Article 4*). The clause as such is not prohibited.

Some authors argue that its lawfulness depends on certain conditions being met[26].

In order for the clause to be acceptable, they say any extra benefits to union members can only pass muster if:

1) the organisations are all treated alike. Statute law is actually changing in this respect. The *Supreme Court of Appeal* ruled in 1981[27] that union bonuses might be paid out only to workers affiliated to a given organisation. In our view, the Court's interpretation runs counter to our union legislation. This does in fact accept discrimination between representative unions on the one hand and non-representative unions on the other, and allows certain special advantages to accrue to the former.

21. Labour Court, Brussels, 19 February 1973, RW 1972-73, p. 1633 v. Labour Court, Antwerp, 24 June 1971, RW, 1972-73, p. 1499.
22. The Penal Code lists sanctions for the following offences, among others: State security, infringement of rights guaranteed by the Constitution, law and order, public safety, persons, property.
23. MAGREZ, M., *Régime des prestations d'intérêt public en temps de paix*, JT, 1963, p. 685 et seq.
24. LENAERTS, H., *Inleiding tot het sociaal recht*, Story-Scientia, Ghent, 1973, p. 320.
25. PAPIER-JAMOULLE, M., and DAVID, A.F., *Conventions collectives et avantages réservés aux syndiqués*, JTT, 1972, p. 113 et seq.
26. BLANPAIN, R., *Handboek*, Story-Scientia, Ghent, 1968, p. 173.
27. Supreme Court, 27 April 1981, RW, 1981, 1982 et seq.

However, the law does not in general accept (or if so, only in very exceptional cases) that there should be discrimination between the most representative unions as such;

2) they have actually contributed to social peace and economic growth[28];
3) the pressure on non-union members is such as to reassure them they can resist it. Concretely, this means that the benefits may not be much more substantial than the amount of the union contributions[29];
4) entrenched rights are respected. Any advantages previously granted to all workers may not suddenly apply to union members only[30].

The *Conseil d'Etat* has ruled likewise[31], adding that the advantages granted to union members do not run counter to the principle of equality spelt out in *Article 6* of the *Constitution* because unionised workers are part of a category which can be objectively determined. All individuals in the same circumstances enjoy these advantages.

19. Restrictions deriving from external law

Restrictions can also follow from international acts ratified by Belgium. These basically imply that national legislation can decide for itself to what extent and on which terms union freedom shall be recognised. The *United Nations Treaty of 16 December 1960*[32] stipulates (*Article 8*) that laws may be brought in to impose such restrictions as are needed to maintain a democratic society, national security, law and order and the rights and freedoms of other citizens. ILO *Convention No 87* stipulates (*Article 9*) that it is up to national legislation to decide the union freedom of the police and armed forces.

20. Conclusion

Belgian legislation effectively guarantees union freedom. Such restrictions as apply are limited in scope. They apply to tasks of common interest which must be performed.

CHAPTER II: THE LEGAL POSITION OF TRADE UNIONS

21. Preface

The problem of determining the legal position of occupational organisations has always proved tricky in the case of workers' organisations. The problem of employers' organisations has not been nearly as intractable.

In respect of workers' organisations, the question has arisen as to how their integration into the existing legal structure would affect their raison d'être. At the same time, these organisations have had to deal with the problem of legal incapacity. As organisations, they were unable to perform the legal acts needed for their survival.

28. Conseil d'Etat, 8 February 1967, no 12206, Dec. R. v. S., 1967, p. 167.
29. Labour Court, Brussels, 19.2.1973, RW, 1972-73, p. 1633. Industrial Tribunal, Ghent, 25.6.1965, TSR, 1966, p. 359.
30. Industrial Tribunal, Antwerp, 17.5.1960, TSR, 1962, p. 83 with notes by BLANPAIN, R.
31. Conseil d'Etat, 3.2.1967, Les patrons teinturiers-dégraisseurs de Belgique, 12.205, RDS, 1967, p. 252.
32. Belgium ratified this Convention by an Act dated 15 May 1981 (MB, 22 May 1981).

The Belgians have solved this problem in the shape of a compromise which seeks to strike a fair balance between legality and *de facto* reality.

22. Partially regulated organisations

Workers' organisations are regarded as de facto organisations. This is not the correct way of looking at things. Indeed, occupational organisations are mentioned in so many legal texts, decrees, collective labour agreements that we should accept the principle that they are partially regulated. It is true that Belgian trade unions are not corporate bodies and that they are under no obligation to obtain such legal status.

The fact of their legal incapacity and that they cannot act as legal entities means that they cannot have rights and duties as such. They cannot acquire assets of their own. They cannot bring a legal action. They cannot conclude agreements.

But the law does offer the opportunity for them to acquire legal identity[33].

Two measures have been taken to solve the problem:

- we have introduced the concept of functional legal entity;
- we use the notion of *"representative organisation"*.

23. Functional legal entity

Special laws have been drafted with specific scope to give trade unions limited legal identity[34]

In modern legal thinking this is taken to mean that the legislator grants limited legal identity only for the purpose of carrying out a well-defined task. Hence the notion of functional legal entity. It gives the trade unions leave to take legal action.

Not everyone agrees with this interpretation, however. There is considerable support for the idea that unions should be given global legal identity.

Another point is that the law tends to recognise this functional legal identity only in the case of the most representative organisations.

In this sense, unions can only take legal action in cases restrictively prescribed by law[35].

A key issue recently surfaced in the debate on whether the legislator had made any provision for the possibility of taking trade unions to court in the case of a strike. Some take a negative stance on this question, arguing the legal incapacity of unions. Others opt for the reality theory, arguing that the very fact of their existence gives the unions legal

33. Act of 31 March 1899 on professional associations, MB, 8 April 1899. Act of 27 June 1921 on non-profitmaking associations, MB, 1 July 1921.
34. LENAERTS, M., *Inleiding tot het sociaal recht*, Story-Scientia, Ghent, 1973, p. 335.
35. For example, the union might go to law in respect of:
    - the operation of works councils (Act of 20 September 1948 on the organisation of economic life, Art 24, MB, 27/28 September 1948);
    - compulsory implementation of collective labour agreements (Act of 5 December 1968 on collective labour agreements and joint committees, Art 4, MB, 15 January 1969).

identity. A third trend applies the theory of implicit attribution of competence. Their argument is that whoever is regarded by the law as empowered to conclude collective agreements is implicitly entitled to take legal action to guarantee that these agreements are kept[36].

For the time being, a majority still tend to support the first argument (legal incapacity).

24. Representative organisations

a) The concept

A range of criteria needs to be taken into account in deciding how representative a trade union is. As far as the law is concerned, the prime concern is to identify those criteria which best reflect the unions' ability to mobilise the workforce. There are quantitative and qualitative criteria. For example:

- the number of affiliated members (quantitative);
- the kind of organisation (qualitative).

Legislation in Belgium will generally tend to heed political considerations in judging the degree of representativeness of a trade union (participation in managing the country: for example, whether it is a member of the *National Labour Council* or not). The drafting stages of the *Act of 5 December 1968 on collective labour agreements* (CLA) were eloquent in this respect. The *Senate committee* stated that a trade union could not be recognised as a valid partner unless it supplied proof of its stability, authority and ability to command respect.

Otherwise, it could not guarantee that it could fulfil the obligations contracted in the collective labour agreements and hence could be regarded as capable of living up to its responsibilities. The CLA *Act* also expects representative organisations to play a stabilising role and that they will keep wildcat social action in check. The draft bill on social solidarity[37] states that the only employers' and workers' organisations recognised as being representative are those which meet the following requirements:

- their actions must extend to the whole of Belgian territory;
- the members of the employers' organisations must between them employ an average of at least 200,000 workers; the workers' organisations must total an average membership of at least 200,000;
- the members in question must pay their dues;
- the organisations must prove that their leaders were elected by free ballot of all members.

The concept of *"representative organisation"* turns up again in an *Order-in-Council dated 9 June 1945* on the status of the joint committees.

Belgian social law does not give a uniform definition of the concept of *"most representative occupational organisations"*.

The fact that Belgian trade unions are not legal entities and that their legal position is only partially regulated means that the State has had to find other solutions. The authorities have had to find ways to enable the unions to work within the legal system, at least to some extent. They have also had to think up ways of forcing the unions to stick to the rules of society.

On the latter point, the selection between different organisations would appear to be working well as far as achieving the desired objectives is concerned. The public authorities only talk to and negotiate with organisations which are able to guarantee that the obligations contracted will be respected, not only vis-à-vis members but also vis-à-vis non-members.

This has fostered the idea that it is better for the State to talk only to representative organisations.

This is certainly the approach taken by the *Council of State* when it calls those organisations representative which *"may be considered as wielding sufficient authority to represent the people concerned"*[38].

Apparently then, it is possible for several organisations to be representative at once.

Although legislation, legal doctrine and case law alike often use the concept of *"most representative organisation"*, it would be a mistake to conclude that the Belgian legislator actually accepts the idea that one organisation may be more representative than another. There is no room for monopoly positions in Belgium legislation.

This is all the more true as the legislator does not define the concept of *"representative organisation"*. We must turn to doctrine and statute law for guidance in this matter.

b) The legal criteria

There are a number of legal provisions which mention some of the conditions that trade unions must meet in order to be regarded as representative, but these are in no way exhaustive. Some laws use the following criteria for occupational organisations[39]:

a) they must be situated throughout the country;
b) they must be represented on the *Central Economic Council* (CEC) and the *National Labour Council* (*NLC*);
c) workers' organisations must have at least 50,000 members.

There are no legal conditions attached to membership of the *CEC*. In order to be represented on the *NLC*, the organisation need only show it *"has nation-wide links"*[40].

As for occupational federations, the only criteria for their representativeness is that they should be *"affiliated to or be part of an multi-industry organisation"*[41].

The issue of representativeness again comes up in the World War II draft bill on social solidarity which lays down the following criteria:

a) the organisations must be nation-wide and address themselves to all companies or salaried trades;

36. STROOBANT, M., *Stakingsvrijheid en Stakingsverbod: naar een nieuwe jurisprudentie*, ITT, 1987, p. 435. DEMANET, Réflexions sur le droit de grève dans le secteur privé, ITT, 1988, p. 400.
37. This was drafted during World War II following clandestine talks between workers and employers.
38. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit., 1973, p. 325.
39. *Article 31* of the *Collective Agreements Act*; par 4b) of the Workers Safety Act; Article 188 of the Royal Decree of 18 February 1971 on works councils.
40. Article 2(2) of the Act of 29 May 1952 instituting the NLC (MB, 31 May 1952).
41. *Article 3(2)* of the *Collective Agreements Act*.

b) they must prove that they have at least 200,000 paid-up members;
c) occupational federations must represent at least 20% of all workers in the companies or trades concerned;
d) the statutes must mention that the organisation seeks to develop the principle of joint consultation between the social partners and the State;
e) the leaders must be freely elected by all members;
f) the leaders must report to members on a regular basis.

25. Union Freedom and the Public Utility Services

Trade unionism in the public sector is largely governed by its own rules. There are very few provisions common to the private and public sector.

Among these shared provisions, however, are those which describe the freedom to associate as a fundamental social and economic right (e.g. *Article 20* of the *Constitution* and the *Act of 24 May 1921*). Similarly, *Article 11* of the *European Convention on Human Rights* applies equally to the public and to the private sector. Still, the said Article immediately goes on to open the door to specific arrangements[42].

The State was openly hostile to trade unionism in the public sector throughout the 19th Century, *Article 20* of the *Constitution* notwithstanding. It was not until the *Act of 24 May 1921* was brought in that things began to change[43]. Civil Servants gradually won the right to associate, but their right to strike is curtailed[44] to this day.

The *Royal Decrees of 14 December 1937* (MB, *15.12.1937*), *11 July 1949* (MB *27.7.1949*) and *20 June 1955* (MB, *22.6.1955*) instituted rules to govern the trade union links of civil servants. One feature of the system in force is that no prior authorisation is needed to set up a trade union. The State must recognise the union if the latter is to exercise its powers. The authorities may withhold or withdraw recognition. The union basically has advisory powers.

This regulation was not valid for all public services. In fact it only applied to the Kingdom. The provinces, the communes and semi-public services did not come within its scope, unless the authority involved decided otherwise.

Trade unionism in the public utility services is today governed by the law. The *Act of 19 December 1974* regulating relations between the State and the civil service unions[45] applies to the public sector as a whole instead of just to the Kingdom. The law is carried out progressively[46].

The central feature of the new regulations is that the advisory powers have given way to the right to consult and the right to negotiate. These rights are exercised by the committees that have been set up at various levels.

The right to negotiate within the meaning of the *Act of 19 December 1974* is a procedure whereby the representative organisations obtain the right to vet any major measures which the State intends to promulgate with a view to regulating the working conditions of its staff. The negotiating procedure is a substantial requirement which the authorities must respect. It must feature an in-depth discussion between the parties. The results are put down in a *"protocol"*. The State only has a political commitment to honour the agreement[47].

Consultation is a procedure applicable to less important measures concerning the regulation of working conditions for State civil servants. Again, it is a substantial requirement. The results are set down in a reasoned opinion[48].

The negotiating committees are the following:
- the general committee common to all public utility services;
- the committee for the national, *"Community"* and regional services;
- the committee for each provincial and local service;
- the sectoral committees;
- the special committees.

The consultation committees are the following:
- high-level consultation committees;
- intermediate consultation committees;
- basic consultation committees;
- the special committees.

A *Law of 11 July 1978* regulates relations between the State and unions of military personnel in the land, sea and naval air forces and medical services and of gendarmerie personnel[49]. There is also the *Law of 14 January 1975* setting out the first disciplinary regulations governing the armed forces[50].

CHAPTER III: THE TRADE UNION MOVEMENT IN BELGIUM

26. Introduction

A number of factors have played a part in the development and growth of union structures in Belgium. Belgian trade unionism as it exists today dates back to the first half of the 19th century. Its history has been a chequered one.

27. Features

a) The origins and growth of the trade union movement are closely linked to those of the political movement. Socialist trade unionism saw the light of day as a subsection of the *Belgian Workers' Party*[51]. This highlights a first important feature of Belgian trade unionism, i.e. its links with political structures. These links are of a

42. Article 11/ECHR says that *"this article does not preclude legal restrictions on the exercise of this right by members of the armed forces, the police force or the civil service"*.
43. MAST, A. and DUJARDIN, J., op. cit., p. 588.
44. Ibid., p. 148-150. HUBERLANT, C., *Apercu des étapes de l'obtention de la liberté syndicale pour les agents des services publics*, RDJA, 1968, p. 58.
45. MB, 24.12.1974 amended by the Act of 20 June 1975 (MB, 16.9.1975), 1 September 1980 (MB 10.9.1980) and 19 July 1983 (MB 4.8.1983).
46. Royal Decree of 28 September 1984 (MB 20.10.1984), implementing the Act of 19 December 1974 on relations between the State and the trade unions of its staff, amended by Royal Decree of 17 July 1985 (MB 24.7.1985).
47. *Het nieuw syndicaal statuut van het personeel in de Overheidssector*, Ghent, Story-Scientia, 1985, p. 178.
48. Ibid., p. 178.
49. MB, 18 August 1978.
50. MB, 1 February 1975.
51. CHLEPNER, BS, op. cit., p. 144.

structural as well as an ideological nature. While it is true that the unions possess independent structures, there are institutional[52] or informal[53] links.

b) A second feature is pluralism. This pluralism has been shaped by two factors, i.e. the ideological division mentioned above and philosophical factors. The ideological division led to the growth of a socialist and a liberal trade union movement. This mirrors a vision of society. It also led to the establishment of a Christian movement. The latter is obviously also an ideological choice.

c) A third feature is that Belgian trade unionism is structured by industrial sectors, with weaker multi-trade or multi-industry structures. An organisation covering an industrial sector is known as a confederation. These confederations are headed by a national multi-industry organisation. Belgium has three national multi-industry organisations, the FGTB (*Belgian General Federation of Labour*), the CGSLB (*Federation of Liberal Trade Unions of Belgium*) and the CSC (*Confederation of Christian Trade Unions*).

d) Belgium has no industrial unions. Manual workers, white-collar workers and professional and managerial staff are affiliated to different trade confederations. Professional and managerial staff may belong to a specific section within each union. At the same time, however, there is a separate union organisation for professional and managerial staff, the CNC (*National Confederation of Professional and Managerial Staff*).

e) Alongside the national multi-industry organisations there are smaller category organisations. These are small unions to which only certain categories of employee belong. The employee's occupation is often the criterion for admission.

f) The sixth feature is the high degree of unionisation. Approximately 70% of employees belong to a union[54]. It is not, however, compulsory in Belgium to belong to a trade union[55].

g) The three organisations recognised as the most representative play a central role in Belgian industrial relations. The others play a smaller role.

52. The socialist union, the FGTB, acts in common with the socialist parties.
53. The liberal unions, CGSLB and SLEP, have informal links. The Christian movement has more formal links with the Christian parties although it does not act jointly with them in any real sense.
54. BLANPAIN, R., *Syndicale vrijheid in België*, op. cit., p. 93.
55. The number of members in Belgium is: (1985) CSC 1,367,589 members (1985); FGTB 1,097,594 members (1980); CGSLB 200,000 members; see: ARCQ, E. and BLAISE, P., *Les organisations syndicales en Belgique*, suppléments I et II; SLOMP, H. and VAN MIERLO, T., *Arbeidsverhoudingen in België*, Utrecht/Antwerp, Tome I, p. 219 and Tome II, p. 264 (Aula-boeken).

28. Internal structures: FGTB, CSC, review[56]

The FGTB and the CSC are national multi-industry organisations. They take precedence over the trade confederations which are national organisations based on industrial sectors or occupations. The FGTB and the CSC, like the national trade confederations, are geographically structured at the following levels:

- local or by regional enterprise
- provincial
- national
- international (at European and worldwide level).

The multi-industry structure includes all occupations and all industrial sectors in both the private and the public sectors. Multi-industry structures are very disparate and not very logical. There is a historical explanation for this.

The development of the Belgian trade union movement has been uneven and has been shaped by various needs and possibilities. As little power as possible has been conceded. Any change to what might be termed trade union boundaries has led to difficult negotiations between the various national bodies. Relations between the multi-industry organisations and confederations are determined very simply. The trade confederations set great store by their autonomy and try to give up the smallest possible amount of this autonomy to the multi-industry organisation.

In the multi-industry structure, with the exception of the public sector, a distinction is made between manual and white-collar workers. There is a horizontal structure for white-collar workers covering all occupational sectors. A vertical structure has been established for manual workers.

SETCA (a national white-collar union affiliated to the FGTB), the LBC and the CNE (respectively Flemish-speaking and French-speaking white-collar sections within the *Confederation of Christian Trade Unions*) are occupational unions covering all sectors of activity. The various industrial sectors have a specialist internal structure.

Manual workers are grouped by industrial sector or by a number of industrial sectors, for instance the *Confederation of Belgian Metalworkers*, the *General Confederation*, the *Confederation of Textile and Clothing Workers*, etc. This applies both to the *FGTB* and to the CSC.

All public service employees belong to their own trade confederation: the *General Confederation of Public Service Employees* (CGSP-FGTB) and the *Christian Confederation of Public Service Employees* (CCSP-CSC).

Reforms of the State have also had an impact on union structures. For understandable reasons union restructuring has not taken place at the same speed as the restructuring of political structures. Socio-economic issues are felt to be more important than cultural issues within the workers' movement. Moreover, there is now an awareness in union circles that the social struggle would be better served by solidarity between Flemish and Walloon workers. Reforms of the State also seem unlikely to make industrial relations

56. EEC, *De Belgische vakbeweging*, EEC, *Europese documentatie*, série d'information syndicale, Brussels, 1968, p. 1. SPITAELS, G., *Le mouvement syndical en Belgique*, Institut de Sociologie, ULB, Brussels, 1967, p. 29. ARCQ, E. and BLAISE, P., *Les organisations syndicales en Belgique*, op. cit., p. 10.

more democratic. The social struggle would remain the same.

The restructuring which has finally been set in motion started from the idea that the existing structures should be kept. These structures would have a coordinating function. At the same time new regional structures would be set up within the organisation in order to meet the requirements imposed by reforms of the State. The multi-industry organisation, with the exception of the LBC/CNE, was the first to be restructured. This has been followed by the trade confederations. This restructuring has not yet been completed.

The main change has been the creation of inter-regional structures for Flanders, Wallonia and Brussels.

A general overview shows that the FGTB places less emphasis than the CSC on an occupational category structure. The administrative organisation of enterprise is more important for the FGTB. The CSC places more emphasis on the domicile of the member.

29. The internal structure of the CGSLB

In contrast to the FGTB and the CSC, the CGSLB is divided into sections containing a mixture of occupational and multi-industry aspects.

The division in this case is geographical rather than a division by branches of industry, with the exception, however, of public service employees. The latter were grouped in an independent confederation: the *Liberal Union of Public Service Employees* (SLASP)[57]. Following the *1971 Law on union status in the public services*[58] these two unions decided to merge[59]. This agreement led to the creation of the *Free Public Service Union* (SLFP), the only occupational union within the CGSLB.

30. Regionalisation

The progressive division of Belgium into communities has entailed a progressive adaptation of union structures. As political structures have been modified, unions have had to follow suit. The transfer of powers in social and economic matters from national level to the community executives has also changed the level at which negotiations take place between the public authorities and the social partners.

A feature of the trade union movement is that adaptation to the establishment of communities has taken place through an internal division of national structures. The latter retain a coordinating function. New independent regional bodies have not been established.

31. Union personnel

Union officials may be divided into two groups: on the one hand activists at enterprise level and on the other hand union staff members.

Activists, who are union members at enterprise level, form a union delegation. In larger enterprises this delegation operates as an association with a general assembly and a management committee. Some members of the delegation may be exempted from all or part of their work duties so that they may perform their union functions. Each union has a union delegation in each enterprise. These delegations may act separately or jointly. The person acting as the spokesperson in dealings with the employer is known as the chief delegate.

Union staff members may be divided into two groups. These include executive personnel who are employed under a contract of employment. Union staff members may also come from the ranks of activists. They too are bound by a contract of employment and are paid by the union, but in contrast to the executive personnel, determine the organisation's policy.

32. International and European links[60]

The representative Belgian organisations (FGTB, CSC, CGSLB) are affiliated to their respective international organisations. The FGTB belongs to ICFTU, the CSC to WCL and the CGSLB to WFTU (*World Federation of Trade Unions*). At European level, the FGTB and the CSC are both members of ETUC.

33. Legal structure of the unions

The legal status of Belgian unions is partly regulated. They do not possess legal personality and as such do not therefore possess legal capacity. In practice, they possess a partial functional legal personality[61].

The main management has been set up with a specialist division for each level at which the industry wishes to exert influence. The administration is designed flexibly so that it has considerable capacity for adaptation and so that it can follow rapid changes in economic and social life.

Working parties have been established.

There are very close links with organisations in other countries. The FEB (Federation of Belgian Enterprises) represents only industry and commerce. Agriculture and small businesses are affiliated to other organisations. The FEB has reached an agreement with these organisations in order to achieve a distribution of functions for the purposes of national and multi-industry negotiations. The FEB is, however, the most influential organisation.

Only industry-level federations may be affiliated to the *FEB*, not individual employers. There are some 40 federations representing approximately 35,000 enterprises.

The FEB also has active and non-active members. The latter take part only in the work of certain research committees.

34. Regionalisation

Reforms of the State have had the same impact on employers' organisations as on employees' organisations. In contrast to employees' organisations, employers' organisations have independent and specific organs acting as spokespersons. The FEB has not as yet implemented an internal division.

In Flanders the *Vlaams Ekonomisch Verbond* (VEV) and in

57. The SLSP existed together with it and was part of the CGSLB.
58. Draft law of 18 February 1971, Chamber 1970-71, Parliamentary Document, p. 889.
59. This took place on 10 June 1972.
60. BLAISE, P., *Les structures du syndicalisme international*, in: *Courrier hebdomadaire*, Brussels, CRISP, 1986.
61. See no. 39 above.

Wallonia the *Union Wallonne des Entreprises* (UWE) act as spokespersons.

CHAPTER IV: THE STRUCTURE OF THE PUBLIC AUTHORITIES

35. Introduction

The role of the State in establishing industrial relations is of primordial importance. The nature of this role has changed over the years.

In the context of a free economy, most emphasis is placed on the idea that the public authorities have a supplementary, or possibly, where necessary, a policing role. Stress is placed on the function of the State as a policing body. There is now a movement away from this perception of a supplementary and coordinating role towards the idea of independent action. The State takes the place of individuals.

Nowadays State tasks include all these functions, i.e. coordinating, supplementing, regulating and maintaining order.

This complex task has had an impact on the structures set up to enable the public authorities to fulfil their obligations.

These structures include:

- structures needed to carry out the regulatory function, i.e. the *Ministry of Employment and Labour*;
- the structures needed for the supervisory and policing function: the inspection services;
- the structures required to encourage negotiations between workers and employers: bargaining structures;
- the structures needed to provide the parties with logistical support: the *Ministry of Employment and Labour*;
- the structures enabling the State to settle disputes, i.e. conciliation boards and labour courts.

36. Legal nature of structures

The above-mentioned structures may be public services pure and simple[62].

Some have a certain autonomy. They carry out their duties under State control but themselves retain the essential features of a public service[63]. In Belgium these are known as semi-public institutions. They are covered by public law.

A third group of institutions is covered by private law. These institutions are instructed by the State to carry out tasks of general interest, under State control[64].

37. The *Ministry of Labour and Employment* - the regulatory function[65]

This Ministry prepares the regulatory work of the Executive authorities. It provides at the same time support for citizens within the limits of its competence. For this purpose it has specialist services. It also supervises a number of public utility institutions answerable to it.

62. For instance the *Ministry of Employment and Labour*.
63. For instance the *National Labour Council*, the *National Employment and Placement Service*.
64. For instance the union organisations, which pay out unemployment benefit.
65. For the historical context, see: DELVAUX, G., et al, *Honderd jaar sociaal recht in België*, Bruylant, Brussels, 1987, p. 155.

Following the State reforms, regional and community structures have been established.

38. Supervisory and policing duties of the authorities - the settlement of disputes

These functions are entrusted to a number of inspectorates which are answerable to various departments and semi-public bodies. They work in close cooperation with the judiciary, although they have an administrative character and also possess special status[66]. The courts are also competent to deal with industrial relations. Civil aspects are dealt with by the labour courts and tribunals. Criminal aspects come under the jurisdiction of the ordinary courts[67].

39. Encouragement of collective bargaining

The State offers its services in order to make social concertation possible. Public institutions through which the social partners can organise social concertation have been set up. These structures may be of a joint[68] or tripartite[69] nature.

Social concertation often takes place in a non-institutionalised way, although the public authorities may play a supporting role in these cases as well.

40. The settlement of disputes

This is the task of the judiciary. The courts are competent to deal with individual disputes.

Collective disputes are dealt with by conciliation boards answerable to the public authorities or established independently[70].

CHAPTER V: LEGAL INSTRUMENTS

SECTION 1: REVIEW OF THE SOURCES OF LAW

41. List

Legal theory includes the following sources of law[71]:

- law in the broad sense;
- international treaties and regulations;
- collective agreements;
- the individual contract;
- custom;
- case law;
- legal opinion;
- natural justice.

French doctrine supplements these with a further three sources:

- the unilateral decision-making powers of employers;

66. These inspection services - of which there are many - are not coordinated. André Nayer has examined the operation of some 24 different labour inspectorates: NAYER, A., *Les inspections sociales en Belgique*, Brussels, Vie Ouvrière, 1980, p. 14.
67. PETIT, J., *Arbeidsgerechten en sociaal procesrecht*, APR, Ghent, Story-Scientia, 1980.
68. For instance the *Joint Committees*: institutions in which social dialogue is institutionalised.
69. For instance the *National Committee for Economic Expansion*.
70. For instance the conciliation boards of the *Joint Committees* and the *Office of Collective Labour Relations* of the *Ministry of Employment*.
71. BLANPAIN, R., *Handboek van het Belgische Arbeidsrecht*, in: *Collectief arbeidsrecht*, Story-Scientia, Ghent, 1968, p. 21.

- the general principles of employment and social security;
- the overall legal system within which employment and social security has its place.

42. Legislation

In contrast to other branches of law where *Parliament* has power over legislation, employment and social security is often established after wide-ranging and in some cases compulsory consultation between the social partners, for instance within the *National Labour Council* or the *Central Economic Council.*

Most legislative provisions are of a mandatory and protective nature. Collective labour agreements are taking over from the law in the broad sense. These agreements make it possible for the bargaining parties to adapt regulations so that they are more in keeping with the actual needs of industrial life, industrial sectors and enterprises.

43. International agreements

International regulations are an important source of law. Obvisiously, in accordance with the principles of sovereignty, every international regulation must be ratified by a national decision.

In accordance with *Article 68* of the *Constitution*, treaties are concluded by *Royal Decree*. If these treaties are likely to *"bind the State or to bind Belgians individually they are effective only after they have received the approval of the legislative chambers".*

When there is a conflict between a national regulation and an international regulation which has direct effect in national law, the regulation set out in the treaty takes priority[72].

Conventions concluded within the *International Labour Organisation* have no effect as such. Pursuant to *Article 68* of the *Constitution* they must first be ratified by *Royal Decree* and by *Parliament*. In principle these conventions make it necessary for the State to adapt its national legislation. Ratification does not automatically entail the repeal of a contradictory national law. The ratified convention may repeal the effects of existing legislation only within the limits of its own scope of application[73].

This does not apply to EEC *Regulations*. The *Treaty* establishing the EEC provides independent powers for certain bodies. National parliaments cannot then intervene[74].

44. Custom

Custom covers a rule of life, accepted by a certain group, which has not acquired the characteristics of a rule of law. In this latter case we speak of custom.

It has certain characteristics[75]:

- it is not written;
- it is used repeatedly;
- it is accepted by the majority of the social group;
- it needs a certain period to be prescribed.

These characteristics are indispensable for a rule to acquire the general nature needed for legal stability.

The notion of established practice which the law uses is equivocal, although it is also used in the *Civil Code* (*Article 1135*).

Established practice cannot be a source of obligation when an agreement excludes custom, even implicitly[76].

45. Natural justice

According to *Article 1135* of the *Civil Code*, natural justice is also accepted as a source of law in civil law. It is perfectly possible to defend this opinion in civil issues. The parties can define their cooperation almost completely through the contractual relationship over which they have full control. It is therefore understandable that contracts are not only binding as regards their express stipulations, but also as regards all the consequences which law, custom or natural justice attach thereto.

The employment law relationship is determined only to a certain extent by the contractual relationship of the parties.

A number of basic factors are not covered by the agreement. Judging the consequences of an agreement on the basis of natural justice in the contractual sphere could lead to flagrant injustices in the general context of the employment relationship. There is in effect a fundamental socio-economic inequality in this case.

Natural justice can be considered – with the necessary reservations – as a source of law, but solely in relation to the individual employment relationship.

SECTION 2: CONFLICTS BETWEEN SOURCES OF LAW

46. Hierarchy of sources of law

Article 51 of the *Law of 5 December 1968*[77] ended discussions on the hierarchy of sources of law which had come about as a result of the shortcomings of the *Laws of 4 March 1954 and 11 March 1954* on collective agreements for manual and white-collar workers[78].

47. Current legislation

The *Law of 5 December 1968* introduced the following hierarchy:

1. The mandatory provisions of law;
2. Collective agreements which have been decreed generally applicable, in the following order:

72. Supreme Court, 27 May 1971, JT, 3 July 1971, p. 471.
73. DEPREZ, U., *De bronnen van het arbeidsrecht in België*, EC Commission, Brussels, 1973, p. 20. Supreme Court, 21 September 1959, Pas. I, 1960, p. 98. Supreme Court, 27 May 1971, Pas. I, 1971, p. 886 with the conclusions of the director of public prosecutions Ganshof van der Meersch. MAST, A. and DUJARDIN, P., *Overzicht van het Belgisch grondwettelijk recht*, Story-Scientia, Ghent, 1985, p. 346.
74. DEPREZ, U., *De bronnen van het arbeidsrecht in België*, Story-Scientia, Ghent, 1973, p. 22.
75. GILISSEN, J., *Historische inleiding tot het recht*, VUB, Brussels, 1972, Tome II, p. 155.
76. Supreme Court, 3 April 1978, JTT, 173; Walloon Region, 1977-78, 2441 with MP ruling.
77. *Collective Agreements and Joint Committees Act of 5 December 1968*, MB, 15 January 1968.
78. MB, 12 March 1954 and MB, 20 March 1954.

- agreements concluded within the CNT (National Labour Council);
- agreements concluded within a *Joint Committee*;
- agreements concluded within a *Joint Subcommittee*.

3. Collective agreements which have not been decreed generally applicable, where the employer is a signatory to the agreement or is a member of an organisation that is a signatory to the agreement, in the following order:
   - agreements concluded within the CNT;
   - agreements concluded within a *Joint Committee*;
   - agreements concluded within a *Joint Subcommittee*;
   - agreements concluded outside any joint body.
4. Individual written agreements, where the employer, although not a signatory to the agreement nor a member of a signatory organisation, operates in an industry covered by the joint body within which the agreement has been concluded.
5. Works rules.
6. Supplementary provisions of the law.
7. Individual oral agreements.
8. Established practice.

48. Hierarchical order

The following comments may be made as regards this hierarchy:

1. A detailed description of the position occupied by the various collective agreements is given.
2. Collective agreements which have not been decreed generally applicable but which employers have stated that they will respect by their direct or indirect (through their membership of a signatory organisation) signature are ranked above individual written agreements.
3. A distinction is made between written and non-written individual contracts. The latter rank lower than non-generally applicable collective agreements concluded within a joint body and works rules.
4. *"Established practice"* ranks lowest.
5. Collective agreements concluded outside any joint body rank above non-generally applicable agreements concluded within a joint body covering an industry in which an employer operates who approves the collective agreement either directly via his signature or indirectly by belonging to a signatory organisation.
6. Neither custom nor natural justice, nor the general principles of law are mentioned.
7. International rules of law are not dealt with separately.

49. The mandatory provisions of law

The notion of *"law"* must be understood in its formal sense. The provisions of a collective agreement which are contrary to the mandatory provisions of the law, decrees and international treaties and regulations which are binding on Belgium are null and void[79].

Decrees enacted by the community and regional councils should also be added here[80].

In order to determine the hierarchy of legal instruments, the general rules of public law and human rights are applied. This also applies when determining the relationship between international and national instruments.

50. Collective agreements

Collective agreements which have been decreed generally applicable are ranked second. Collective agreements which have not been decreed generally applicable are ranked third. Collective agreements which have been made generally applicable have the same legal force as a *Royal Decree* enacting the law, bearing in mind that the official procedure is carried out by *Royal Decree*[81].

They carry penal sanctions[82]. *Article 10* of the *Collective Agreements Law* lays down a hierarchy of collective agreements depending on the level at which they are concluded: the CNT, a *Joint Subcommittee* or outside any joint body.

A lower-level collective agreement cannot be decreed generally applicable if it conflicts with an existing agreement which has been decreed generally applicable. If a lower-level collective agreement which has already been declared generally applicable conflicts with a subsequent collective agreement which is decreed generally applicable, the general applicability of the lower-level collective agreement may be repealed by *Royal Decree*[83]. Its conflicting provisions become null and void, but the agreement as such continues to exist. The courts refuse to apply the conflicting provisions of a lower-level collective agreement[84].

51. Collective agreements (continuation)

Agreements which have not been decreed generally applicable take precedence over individual agreements and works rules, provided that the employer has signed the collective agreement or is a member of a signatory organisation.

If these conditions are not satisfied, the collective agreement has subsidiary applicability and ranks below the individual written agreement but above works rules.

The *Laws of 4 March and 11 March 1954* have therefore been amended. They stipulated that all collective labour agreements which had not been decreed generally applicable had subsidiary applicability.

52. Works rules

The provisions of works rules may not be contrary to current collective agreements. This applies to both generally applicable and non-generally applicable collective agreements.

Article 4(2) of the *Works Rules Law*[85] states that employers and their employees are bound by the provisions of works

79. 79.LENAERTS, H., *Inleiding tot het sociaal recht*, Ghent, Story-Scientia, 1985, p. 145.
80. LENAERTS, H., *Inleiding tot het sociaal recht*, Ghent, Story-Scientia, 1985, p. 145.
81. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit., p. 146.
82. *Collective Agreements Act, Article 56.*
83. *Collective Agreements Act, Article 34*; al. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit., p. 146. The author defends the opinion that the King is obliged to repeal the royal decree making the collective agreement generally applicable.
84. *Constitution, Article 107.*
85. *Works Rules Law of 8 April 1964, MB, 5 May 1965.*

rules. This implies that works rules take priority over individual contracts of employment[86].

On the other hand, *clause 3* of the same *Article* sets out the possibility of departing from works rules in individual cases, provided that regulatory and legal provisions are observed.

Moreover, *Article 51* of the *Collective Agreements Law* states that individual contracts of employment take precedence over works rules[87].

53. Employer's unilateral decision-making powers

The *Collective Agreements Law* gives employers authority over employees. This authority means that employers may in numerous matters unilaterally decide how and in what conditions the work should be provided. There is no trace here of contractual agreements.

Only in a limited number of cases are employers required to take account of the wishes of the other party, i.e. the employee.

Otherwise, employers alone decide on the production process as a whole, including human work, although with the exception of the mandatory rules imposed upon them by regulations and collective agreements.

54. General principles of law

Case law has developed a series of general rules in order to fill the gaps in the legislation. These rules are considered to be general principles of law. They provide a legal foundation allowing the courts to pronounce the law even when there are shortcomings in the written statute law.

This source, likewise, is not mentioned by *Article 51* of the *Collective Agreements Law* but is generally accepted[88].

55. Binding force of the hierarchy

During preparatory parliamentary work the question has often arisen as to whether the hierarchy set out in *Article 51* of the *Collective Agreements Law* can be waived[89]. The original draft law provided for this possibility. Lower-ranking sources of law could derogate from higher-ranking sources even in the case of mandatory provisions. This was possible only for provisions which were more advantageous for employees.

The *Council of State* rejected this possibility, arguing that it would not always be clear whether a provision was actually more advantageous or not for employees and whether a provision advantageous for employees would be detrimental to the community at large.

The *Council of State* opinion appears to be accepted in case law[90]. It should be borne in mind that the mandatory provisions are often minimum standards and that other regulations may be provided. This cannot be considered as a departure from the hierarchical rules[91].

56. Sources of law not mentioned in *Art. 51*

The list in *Article 51* is relatively complete but does not contain all the sources of law. It does not for instance mention decisions of *Joint Committees*, irregular collective agreements, collective agreements which do not qualify for formal status as collective agreements, individual agreements which are not an employment contract, unilateral obligations and natural justice.

Legal opinion and case law give a place to each of these sources[92].

The decisions of *Joint Committees* have the value that the law attributes to them in each specific case[93].

Irregular collective labour agreements have the value of a written individual agreement or of established practice[94].

Collective agreements which cannot be considered as formally recognised collective agreements may not take priority over individual written agreements[95].

57. Fundamental socio-economic rights

Title IV of the *Belgian Constitution* deals with Belgians and their rights. This title does not set out fundamental socio-economic rights. It lists the fundamental political rights of a democratic political system. Certain of these fundamental rights may also apply to industrial relations. These include:

- the principle of equality set out in *Article 6* of the *Constitution*;
- the principle of non-discrimination set out in *Article 6(a)*;
- the right to assemble in a peaceful and unarmed manner set out in *Article 19*;
- the freedom of association set out in *Article 20*.

Since the Second World War some ten or so measures have been taken to introduce a coherent set of socio-economic rights into the *Constitution*. These have remained without effect[96]. This does not mean that the Belgian legal system does not contain any fundamental socio-economic rights. General principles may be deduced from the legislation and in some cases from ratified international regulations. This would be the case for instance after ratification of the *European Social Charter* which has yet to take place.

CHAPTER VI: INDUSTRIAL DISPUTES

58. Introduction

The history of industrial relations in Belgium has been very eventful[97]. Both occupation of the workplace and strike

86. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit., p. 148.
87. *Supreme Court, 18 December 1974, JIT, 1975, p. 53*, with comments by LENAERTS, H. *Supreme Court, 20 April 1977, JIT, 1977, p. 184*, with comments by LENAERTS, H.
88. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit.. LAMERLYNCK, G.H., LYON-CAEN, G. and PELISSIER, J., *Droit du travail*, op. cit., p. 43.
89. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit., p. 148.
90. Ibid., p. 152.
91. VAN EECKHOUTTE, W., *De hierarchie van de arbeidsrechtelijke normen in: RIGAUX, M. Actuele problemen van het arbeidsrecht*, (ed.), Antwerp, Kluwer, 1987, p.219.
92. VAN EECKHOUTTE, W., loc. cit., p. 240.
93. LENAERTS, H., *Inleiding tot het sociaal recht*, op. cit., p. 148.
94. VAN EECKHOUTTE, W., loc. cit., p. 241.
95. Ibid., p. 242.
96. MAST, A., *Overzicht van het Belgische grondwettelijk recht*, Story-Scientia, Ghent, 1985, p. 508.
97. CHLEPNER, S.B., *Cent ans d'histoire sociale en Belgique*, Brussels, ULB, 1972, p. 417. DELVAUX, G., DURIEU, J.L. and SERE, H.,

action have been used in industrial conflicts. Over the last ten years their numbers and extent have decreased substantially. There have been few national multi-industry strikes. Despite this historical social movement, it can be seen that situations of industrial conflict are covered by few regulations. If a regulation does exist, it is to a large extent collectively agreed and optional. It should be noted that since the beginning of the social crisis, the situation is tending to change. Employers are more likely than in the past to take their case before the judicial authorities in the event of a dispute.

59. Procedures for the peaceful settlement of disputes

Belgium has a network of procedures intended to prevent and resolve industrial disputes.

a) Informal procedures entail the appointment of a person who may, with authority, negotiate with the parties in question. This person may be an ordinary citizen or a political personality. No regulations exist on the matter.

b) The question of whether collective disputes may be resolved by the courts also needs to be examined. The answer is no. The situation is particularly clear when collective disputes of interest are involved. The courts are not competent. Opinions are divided in the case of disputes of rights[98].

c) Some public servants may, because of their function, undertake conciliatory action, either individually or acting as a board. There is, for instance, a conciliation board within the Joint Committees and the *CNT*. Labour inspectors and employment inspectors have conciliation tasks alongside their supervisory tasks.

   There is also a specific department within the *Ministry of Employment and Labour* which has to take action in the case of collective labour disputes[99].

d) In Belgium three procedures may be used: arbitration, conciliation and reconciliation. The difference between these three methods is the increasingly important role of the third party in the settlement of the dispute. Conciliation and reconciliation are used in particular in Belgium. These may be made compulsory by law or under collective agreements. Arbitration is used very rarely. Compulsory arbitration does not exist.

60. Dispute situations: strikes, factory occupations and lock-outs

Industrial disputes are only partly regulated:

a) Many laws refer to strikes, but legislators have avoided overall regulations. Moreover, strikes are often dealt with by the terms of agreements. The *Belgian Supreme Court of Justice* has ruled that strikes are not governed by law, but that they are covered by the Belgian legal system[100]. This applies in particular to the private sector but is not fully extended to the public sector. It is generally accepted that public servants in principle have the right to strike. There is no prohibition on strikes. Exception is made for certain security services[101]. It should be borne in mind that Belgian courts are not competent to deal with collective disputes.

b) Occupation of the workplace is not dealt with as a special form of collective dispute. It is considered as a form of strike. There are no special regulations. The courts are not normally competent. In practice, employers often make use of possession injunctions based on the violation of their rights of ownership in order to obtain eviction of the employees.

c) There is no legal regulation of the lock-out. There are, however, some collective agreements which deal with this problem.

d) The consequences of collective disputes on individual employees from the point of view of labour law and social security law are generally governed by legislation or by case law.

61. Limitations of the right to strike

The exercise of the right to strike is subject to a variety of different limitations.

These include prior notice of strike, the cooling-off period, compulsory conciliation, the peace obligation inherent in collective agreements, the compulsory performance of tasks of vital importance, military and civilian requisitions[102].

CHAPTER VII: THE PROSPECTS UNDER COMMUNITY LAW

62. Introduction

This general outline of Belgian labour law provides for a comparison with *EC* law as it stands at present and even to some extent with its probable development from the point of view of the completion of the *Single European Market* in 1992. As regards the current situation, it should be noted that the legal framework established by the EC is relatively limited as regards industrial relations. Attention has been paid in particular to the free movement of workers, the repeal of binding measures, equality between men and women and the problem of safety at work. Attention has also been drawn to other aspects of social relations. Legislative activity in this area is largely centred on the encouragement and coordination of national legislative work. Because of its expansion and greater cross-border integration, the Europe of 1992 will have new consequences. It is difficult to predict what the main ideas of European bodies will be in future years. It is, however, possible to indicate the convergences and divergences between Belgian national legislation and possible developments of EC law.

63. From the point of view of the actors

It seems that there will be no divergence from the principle of trade union freedom. Problems will probably arise as regards clauses relating to union security, given that Belgium pays considerable attention to *"negative"* trade union freedom. Another point of friction could be the notion of the

98. RIGAUX, M., *Collectieve arbeidsconflicten*, in: Reeks arbeidsrecht, Brussels, CAD, III-15-15.
99. RIGAUX, M., *Collectieve arbeidsgeschillen*, op. cit., III-15-28.
100. Supreme Court, 21 December 1981, Bulletin 3, Brussels, VUB, Centrum Arbeidsrecht, 1982, et seq.
101. MAST, A. and DUJARDIN, J., *Grondwettelijk Recht*, op. cit., p. 334.
102. RIGAUX, M., *Staking en bedrijfsbezetting*, op. cit., p. 165.

"most representative organisation". Belgian opinion tends to restrict the number of social partners. The stress is placed on their multi-industry nature. A point of major discussion could be the problem of the legal personality of unions. Unions are strongly opposed to any obligation to take on legal personality.

64. From the point of view of legal instruments

Serious disagreement should not be expected as regards the hierarchy of sources of law. The same does not apply when looking in greater depth at the legal structure of collective agreements. There could be differences in two areas. The first is the mandatory force of collective agreements which have been decreed generally applicable, along with the possibility of obtaining their enforcement before the courts. The second issue relates to the legal force and significance of the peace obligation clauses contained in collective agreements. Attention should also be paid to the fact that the provisions of collective agreements are not integrated into individual contracts of employment, but form a higher-ranking legal source according to Belgian law.

65. From the point of view of collective disputes

A problem might arise here because of the fact that in Belgium the settlement of disputes is mainly covered by the terms of agreements and is regulated by law only to a lesser extent.

It is of crucial importance for Belgian trade unionism that the unions cannot be declared liable in the case of collective disputes. A serious problem could arise as regards the lack of jurisdiction of the Belgian judiciary over collective disputes.

DENMARK

R. Nielsen

CHAPTER I: ACTORS

1. General characteristics

Danish labour law is traditionally subdivided into three parts:

- collective labour law
- individual employment law
- public labour law

The different parts of labour law have different main actors: the parties to collective agreements in collective labour law, the parties to individual contracts of employment in individual employment law and the state and the municipalities as administrative bodies in public employment law.

The collective actors play a more important role in Danish labour law than the individual actors, and at collective level, the enterprise level is of secondary importance compared to the level of the organizations.

Collective labour law deals with the rights and duties further to collective agreements, which under Danish law are legally binding both for the parties (organizations) who have concluded them and members of the parties, e.g. the individual workers and the individual employers.

Individual employment law deals with the rights and duties of the parties to individual employment contracts.

Public labour law is the law on the working environment and those parts of social security law which are closely related to the labour market, e.g. the rules on unemployment and sick benefit. Major parts of the Danish social security and social welfare system are tax financed and not closely linked to paid employment.

2. Trade unions and employers' associations

The two main organizations in the private sector – the *Confederation of Trade Unions* (LO) and the *Danish Employers' Confederation* (DA) – were, as mentioned in the introduction, both founded in the late 19th century. They are umbrella organizations.

The employers are in the main organized by branch of industry but some employers are individual members of the *Danish Employers' Confederation* (DA).

The structure of the trade unions has been a matter of debate for about a century. There are about 30 trade unions that are members of the *Confederation of Trade Unions*. The criteria for drawing borderlines between them vary. Some trade unions are for skilled workers in a particular craft. Others are for both unskilled workers and skilled workers in an industry. Unskilled workers who do not belong to one of these unions are organized according to sex, in that Denmark still has a women-only union for unskilled female workers. Men doing the same work or other unskilled work are organized in another union.

In Denmark, both the employers' and the employees' organizations are preparing to make radical structural changes during the nineties. The *Confederation of Danish Trade Unions* (LO) is planning to divide its 30 member unions into five cartels covering the industrial sector (400 000 workers), the trade/service sector (350 000), the construction sector (200 000), the municipal sector (300 000) and the governmental sector (100 000).

The purpose is to abolish the existing structure where each trade union in principle stands alone when bargaining with the employer. Thus the steady disintegration of demarcations has resulted in increasing competition between trade unions with contiguous areas. Furthermore it should be seen as a countermeasure to the amalgamation as of 1.1.1990 of the two large(st) employers' associations within the industrial sector (*Jernets Arbejdsgiverforening and Industrifagenes Arbejdsgivere*).

Traditionally general issues are negotiated at central/national level and more specific demands are negotiated at workplace level.

Apart from the two abovementioned main organizations there are other main organizations for employees with higher qualifications. Vocational training is the main criterion for membership in the trade unions in these organizations.

The *Danish Constitution* protects freedom of association. However, it outlaws only intervention that freedom by the legislator. There is a statute law prohibiting dismissal on grounds of membership or non-membership of trade unions but as regards aspects of the employment relationship other than dismissal an employer in the private sector is probably free to discriminate against workers because of their trade union membership unless this is prohibited by collective agreement. Closed shop agreements are lawful in Denmark.

Since most private employers are covered by collective agreements and all collective agreements are construed as containing an implied term prohibiting discrimination on grounds of trade union membership, the main practical rule is that it is unlawful for a private employer to interfere with the freedom of association.

A public sector employer is required to make objective decisions on all matters including employment matters. Discrimination on grounds of trade union membership is therefore prohibited in the public sector[1].

3. Employers – individual workers – enterprise level

The freedom to recruit and dismiss is usually described in Denmark as part of the employer's prerogatives. The concept of managerial prerogatives is used in a broader way in Danish labour law than in some of the continental European countrie where it refers only to an aspect of the individual employment relationship.

The managerial prerogatives of the employer are recognized in collective agreements and case law. They are not laid down by statutory provisions. The scope for managerial freedom in the employment relationship is therefore of varying extent according to which collective agreement the individual employer is bound by.

The borderline between contractual matters that are settled by collective agreement (or individual contract) and management issues in the employment field that are decided

1. See in particular U 1986, 898.

unilaterally by the employer is blurred. The employer or the employer's organization may *"sell"* the managerial prerogatives by collective agreement. The freedom to dismiss without fair reasons is, for example, limited by collective agreements protecting against unfair dismissals.

The existing case law on the employer's managerial prerogatives deals with the following themes:

- freedom to select workers and employees for recruitment and promotion
- freedom to dismiss workers and employees
- power to issue works rules
- power to direct and allocate work
- power to monitor the performance of work
- power to determine working hours subject to collective agreement restrictions
- the employer's right to interpret collective agreements

In 1960, provisions against unfair dismissal were introduced into the Basic Agreement.

It follows from case law that the employer has authority to lay down works rules, for example concerning safety at the work-place or the conduct of the worker in matters of smoking, drinking and the like. Works rules are only lawful managerial instructions if there are reasonable grounds to issue them.

The employer has wide authority to give instructions as to how the work is to be done. He can decide what technical equipment is to be used, distribute the work between the workers and give the individual worker directives regarding his work.

The employer may also introduce measures of supervision, e.g. time and motion studies, checks working time, etc.

The arrangement of working hours within the limits set by the collective agreement is also a managerial prerogative.

Finally, Danish employers have a right of interpreting collective agreements. Conflicts concerning the interpretation of collective agreements are in the last resort settled by arbitration. In the period until the arbitral award is made, the workers are under an obligation to abide by the employer's interpretation of the collective agreement (even in cases where it is wrong and the workers' union subsequently win at the arbitration board).

4. Workers' participation - Enterprise-level

Denmark has no general legislation on co-determination. Workers' participation is primarily channelled through: working environment legislation, collective agreements on shop stewards, collective agreements on co-operation and works councils, and company legislation.

The *Working Environment Act* provides for an institutional set up, which comprises both a public monitoring system and a safety organization at enterprise level[2].

In enterprises with ten staff or more, safety representatives must be elected among the workers. When there are more than 20 staff, a safety committee must be formed. The safety committee is to plan, direct, advise, disseminate information about, and monitor the work carried out at enterprise level relating to safety and health.

Safety representatives are entitled to training paid by the employer, time off to fulfil their functions, and are protected against dismissal in the same way as shop stewards, i.e. they cannot be dismissed unless there is a *"compelling"* reason for so doing.

Rules about shop stewards are found in collective agreements[3]. A shop steward is elected by his fellow-workers.

Only unionised workers are eligible as shop stewards. All workers (whether union-members or not) are entitled to vote. The election must be approved by the union which is a party to the collective agreement in question. An elected shop steward is regarded as the local representative of the trade union and may for example conclude collective agreements with the employer.

The shop steward's main task is to further the interests of his colleagues, but he also has a duty to work with the employer. He must work within the confines of the collective agreements, which in Denmark entail a wideranging peace obligation. A shop steward can therefore not call for industrial action in support of the claims made by the workers.

A shop steward (who keeps the rules) has stronger protection against dismissal than ordinary workers. A shop steward cannot only be dismissed unless there is a compelling reason for the dismissal. Redundancy is not sufficient cause to dismiss a shop steward if ordinary workers could have been dismissed instead of him. In the event of unlawful dismissal, the shop steward is entitled to re-instatement or damages.

In 1947, the *Confederation of Trade Unions* (LO) and the employers' organization concluded a central level collective agreement on co-operation and works councils. This agreement was later developed further. The present agreement is from 1987. Similar agreements exist in other areas of the labour market, e.g. the public sector[4].

According to the co-operation agreement enterprises should be run in a way that encourages cooperation in order to ensure the competitiveness of the undertaking and the job satisfaction of the workers.

The agreement provides for works councils in industrial and craft enterprises employing 35 workers or more when recommended by either the employers or a majority of the workers.

The works council is a joint body consisting of a management group and an employee group. Shop stewards are ex officio members of the employee group. The size of the committee is determined by the number of employees in the enterprise concerned.

The task of the works council is to preserve good and stable working and employment conditions, to improve the employees' welfare and security and their interest in improving the efficiency and competitiveness of the enter-

2. See for details NIELSEN, RUTH, *Arbejdsmiljøret*, Copenhagen 1993.

3. See for details HASSELBALCH, OLE, *Tillidsmandsret*, Copenhagen 1987.

4. See for details NIELSEN, RUTH, *Lærebog i Arbejdsret*, Copenhagen 1994.

prises. The works council is entitled to co-determination on principles governing the enterprise's personnel policy. In this lies an obligation on the employer to strive for agreement on such questions, i.e. a duty to negotiate in good faith. Furthermore the works council has, in accordance with the agreement, a right to exercise co-influence, that is a right to exchange viewpoints and proposals in respect of policies of day-to-day organization of production and work and as regards implementation of any major change in the enterprise.

Finally, if it is agreed, discussions may be held about the principal structure, mode of operation and applicability of wage systems designed to improve production and the possibility of establishing funds for educational and social purposes.

The council receives information from management on the enterprise's financial position and future prospects. This information must be presented in such a form as to enable the council to understand the situation.

In 1974, provisions which ensured employee representation on company boards were introduced into company legislation. This right was extended in 1980 and 1987[5].

In companies with 35 or more staff the employees are entitled to elect one third of the members of the supervisory board. The elected members are protected against dismissal in the same way as shop stewards.

Danish joint stock companies are structured in accordance with the two-tier system, i.e. the company has a supervisory board of directors and a board of management. The board of directors must consist of at least three members elected by the general meeting. It is responsible for the general policy and proper management of the company. Decisions of significant importance cannot generally be taken by the management without the special authorization of the supervisory board of directors.

There are no statutory provisions on consultation and information of the social partners. The above mentioned rules on consultation and information operate at enterprise level.

As creditors employees are entitled to the same information, etc as other creditors.

The main provisions on the legal position of creditors in the case of bankruptcy are found in the *Bankruptcy Act*. Irrespective of their role as creditors, employees have under section 14 of the *Bankruptcy Act* a limited right of participation in decisions in cases where a firm has suspended its payments. The *Bankruptcy Act* does not generally provide for workers' participation in decisions concerning the bankrupt estate beyond the rights that follow from the employees' role as creditors.

5. The state

5.1 The state as legislator

The legislator has not interfered much in the labour market. There is almost no legislation on collective labour law issues, and no general employment legislation covering individual contracts of employment for all categories of workers. There is, however, legislation for specific groups of employees, notably the *Salaried Employee's Act* (in Danish *Funktionærloven*). There are also statutory acts covering specific issues, such as the *Work Environment Act*, the *Equal Pay Act*, the *Equal Treatment Act*, the *Act on the Retention of Workers' Rights in the event of Transfer of Undertakings* and other examples could be mentioned. (*See below in chapter II*).

It is a general feature of Nordic labour law that statutory provisions are usually enacted at the request of – or at least with the consent of – the major labour market organizations. The single most outstanding exception from this general pattern is the equality legislation which has been adopted during the last 15-20 years by the politicians against the opposition of the labour market organizations.

In this area the politicians have thus deviated from their normal behaviour in labour market matters and chosen legislation without support from the labour market organizations, which would have preferred self-regulation by collective agreements.

The Danish laws were adopted in order to fulfil Denmark's obligations under the EC *Treaty*. It was the general opinion that Denmark had no choice. Danish collective agreements have limited coverage in that only employees or employers who either individually or through their organization are parties to the agreement are protected by them. This leaves a number of employees without collective agreement protection and Denmark would have violated the EC provisions had the *Equal Pay Act* and the *Equal Treatment Act* not been enacted. So the Danish politicians complied with the EC provisions – some reluctantly, while others saw an opportunity to use the EC as a lever for reform.

5.2 The State as employer

The public sector employs around one third of the total Danish labour force, and about half the female work-force.

Employment in the public sector is governed both by principles of public administrative law and by labour law. Different categories of employment relationships exist in the public sector.

A minority are *"civil servants"* (in Danish *tjenestemænd*). Their terms of employment are partly fixed by legislation, partly be agreements which, however, are not ordinary contracts. If no agreement is reached the employer decides what terms shall apply. Civil servants are not entitled to strike or use other forms of industrial action to obtain an acceptable agreement.

The majority of public sector employees are employed under ordinary collective agreements. If the employer is a public authority, however, it must observe general principles of public administrative law, e.g. the duty to be impartial and objective, including when making employment decisions. The managerial prerogatives of the public sector employer are therefore more restricted than those of the private sector employer.

5. See for details e.g. GOMARD, BERNHARD, *Aktie-og anpartsselskabsret*, Copenhagen 1987.

6. Legal actors and gender

In the Nordic countries, equality between the sexes has progressed to a certain extent, but not fully.

In the Scandinavian countries, in the development towards equality between men and women, some types of openings are more accessible to women than others. There is a comparatively high proportion of women in parliamentary bodies in the Nordic countries - between 1/4 and 1/3, whereas women's precense in decision-making bodies in the labour market organizations is below 10%[6]. This may account for some of the differences in the views on equality legislation between politicians, of whom about 1/3 are women, and representatives of the labour market organizations are predominantly male.

Women also gain influence in legal studies and the judiciary (especially in the first instance courts) before they gain an equal share of the decision-making positions in the labour market organizations. In most EU countries, national labour law is probably less favourable to women than international law and EU law, a fact which is motivating some judges to push for the integration of Community law into national law by putting questions to the *European Court of Justice* under Article 177(2) of the EC Treaty[7]. The *European Court of Justice* has shown considerable willingness to deliver *audacious* judgments[8] in the field of labour law, not least in matters concerning women and equality.

The Danish trade unions were reluctant to invoke Community law until the mid 1980s. But then a trade union with more than 80% women members (but very few women in decision-making positions) broke the consensus and asked the Danish judicial bodies to refer questions concerning equal pay[9] and equal treatment[10] to the *European Court of Justice* for preliminary rulings.

CHAPTER II: INSTRUMENTS - SOURCES OF LAW

1. Outline

It is characteristic of Danish labour law that the *Constitution* and international law have been of very little importance and that there are very few statute laws. Collective agreements, case law and unwritten principles of law constitute the main sources of law. There is, however, a trend towards increased statutory regulation of the managerial relation between the employer and the staff partly as a result of Denmark's membership of the EU, see below.

Denmark's entry into the Community has led to a shift away from collective agreements towards legislation and it has confronted Denmark with the developments in employment protection that occurred in a number of other EU-countries during the 1970s as well as with the fundamental rights protected by international conventions which Denmark has ratified but traditionally not taken very seriously. The concept of collective redundancies was introduced into Danish law in order to implement the collective redundancies directive. The legal significance of the enterprise was increased by the *Directive on the safeguarding of acquired rights in the event of the transfer of undertakings*. *(See on the impact of Community law below in chapter IV).*

2. Constitutional law and social rights

The Danish *Constitution* contains only few provisions of relevance to the labour market. There is e.g. no ban on discrimination on grounds of sex, race, ethnic origin and the like in the Constitution and there is no constitutional protection of the right to strike. There is, however, as mentioned in *chapter I*, some protection for freedom of association.

Cases have been brought before the *Courts*[11] where employees have claimed that a public employer has violated the *Constitution* e.g. by dismissing an employee on grounds of membership or non-membership of a trade union. So far, no such claims have been successful. It is a matter of discussion whether this is because the *Constitution* cannot be invoked in the employment relationship or because the particular cause of action by the employer was not in contravention of the *Constitution*.

It is, however, clear that from a practical point of view that the *Constitution* plays a very limited role as a source of Danish labour law.

3. Statutory regulation

Traditionally statutory regulation has played a secondary role compared to collective agreements.

There is almost no legislation on collective labour law issues, and no general employment legislation covering individual contracts of employment for all categories of workers. There is e.g. no general statutory prohibition against unfair dismissal.

There is, however, legislation for specific groups of employees, notably the *Salaried Employees Act* (in Danish *Funktionærloven*). There are also statute laws covering specific issues, such as the *Work Environment Act*, the *Equal Pay Act*, the *Equal Treatment Act*, the *Act on the Safeguarding of Workers' Rights in the event of the Transfer of Undertakings* and the provisions on collective redundancies in the *Act on Unemployment Benefit*. An Act prohibiting discrimination on grounds of race, colour, religion, political opinion, national extraction or social origin is expected to be proposed by the Minister of Labour in autumn 1995.

Issues closely related to social security, e.g. unemployment benefit and sickness benefit, are also governed by statute laws.

6. See on the difference between women's representation in the parliamentary and the corporate channel: *Det uferdige demokrati. Kvinner i nordisk politikk*, Oslo 1983.
7. Cf SIBYLLE RAASCH, *Der Einfluss des Rechtes der europäischen Gemeinschaften auf die Perspektiven der Richter im Arbeitsrecht zum Bereich Frauen und Arbeit in der Bundesrepublik Deutschland*, 1988 (unpublished research paper).
8. Cf RASMUSSEN, HJALTE, *On Law and Policy in the European Court of Justice*, Dordrecht 1986.
9. Case C-109/88 Handels-og-Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] ECR 3199.
10. 179/88, Handels-og Kontorfunktionærernes Forbund i Danmark on behalf of Birte Vibeke Hertz versus Dansk Arbejdsgiverforening on behalf of Aldi Marked[1990] ECR I-3979.
11. in particular U 1986,898.

Apart from the work environment legislation most of the labour legislation of the last 15 years has been adopted to implement EC directives. Danish collective agreements cannot be used as the only means to implement EC directives, see below. The development at EC level is therefore resulting in a shift in the traditional pattern of sources of labour law in Denmark away from collective agreements towards legislation.

4. Government regulatory power

In matters of work environment[12] statutory instruments play an important part. The same is true as regards unemployment benefit. In other labour law areas statutory instruments are of minor importance.

5. Collective agreements and individual employment contracts

A collective agreement in Denmark is an agreement (a contract) between on the workers' side a collectivity, typically a trade union, and on the employer side either a collectivity or an individual employer concerning working conditions, e.g. wages, and/or the relationship between the parties.

There is no statutory definition of a collective agreement in Danish law. The above definition is in accordance with the general view in the literature on labour law[13].

It is not a requirement in Danish law that a collective agreement must be in writing. Oral agreements are as binding as collective agreements. The borderline between collective agreements and custom is therefore blurred.

Collective agreements are legally binding and make up a considerable - maybe the most important - part of Danish labour law.

It is usual to say that a Danish collective agreement has both a contractual content and a normative content.

The contractual content is its binding effect on the parties to the agreement. One of the most important aspects of the contractual content is the peace obligation, *see below*.

The normative content is its binding effect on individual contracts of employment entered into by an employer covered by the collective agreement.

The Danish employer must comply with the agreement on the terms and conditions he offers all workers and employees doing work under the agreement, regardless of whether the individual worker is a union member or not.

If, for example, the employer underpays a non-unionized worker, he has committed a breach of the collective agreement towards the trade union which is a party to it and is likely to be brought before the *Labour Court* and sentenced to pay a fine (*bod*) to the trade union which is a party to the agreement.

Around 2/3 of all workplaces in Denmark are estimated to be covered by collective agreements. A collective agreement is binding as a contract. On the employer side the party may be either an organization or an individual employer.

On the workers' side a Danish collective agreement must be concluded by a collectivity, typically a trade union. In principle any collectivity of workers may be party to a collective agreement. This includes workers' representatives but it is in practice unusual for them to conclude collective agreements on behalf of their colleagues.

The general rule is that it is a question of power not of law whether a trade union can make an employer negotiate with it. There are almost no statutory provisions in Danish labour law requiring the employer to recognize a trade union or to negotiate with it.

In a conflict of interest a trade union can take industrial action (strikes, etc.) in order to force an employer to negotiate a collective agreement with it. If the trade union is strong enough it will succeed, if not it will fail. It is perfectly lawful for the employer to refuse to discuss the matter with the trade union. Because of the high degree of unionization most employers cannot afford to refuse to negotiate. It is therefore from a practical point of view unusual for an employer to be unwilling to negotiate with a trade union.

As mentioned earlier, even in conflicts of interests strikes, etc. are only lawful if they have a reasonable purpose and if there is a reasonable degree of proportionality between the means used and the ends to be obtained.

If an employer is already covered by a collective agreement with one trade union and another trade union wishes to enter a collective agreement with him covering the same work, the second trade union will not be free to take industrial action to obtain a collective agreement if the two competing trade unions are members of the same umbrella organization, typically the *Confederation of Trade unions* (LO). In this situation one could say that the trade union which got a collective agreement first has obtained a sort of recognition and right of negotiation which excludes other trade unions from the same confederation.

It is also possible for an employer to give special recognition to one particular trade union by collective agreement in that he promises this trade union not to negotiate with others.

In special circumstance, e.g. collective redundancies, there are statutory provisions concerning negotiation.

Collective agreements exist at different levels. The basic principles of collective labour law are laid down in collective agreements between the main organizations, e.g. in the basic agreement concluded between the two main organizations: the *Confederation of Trade Unions* (LO) and the *Danish Employers' Confederation* (DA). These collective agreements are framework agreements which cover the whole country and different sectors of the economy.

Another example of framework agreements is the co-operation agreement. The agreement provides for works councils in industrial and craft enterprises employing 35 work-

12. See for details NIELSEN, RUTH, *Arbejdsmiljøret*, Copenhagen 1993.
13. See for example JACOBSEN, PER, *Kollektiv arbejdsret*, Copenhagen 1994; OLE KRARUP, *Arbejdsretten*, Copenhagen 1980; HASSELBALCH, OLE, *Kollektivarbejdsretten*, Copenhagen 1987; and ALLAN RISE & JENS DEGERBØL, *Grundregler i dansk arbejdsret*, Copenhagen 1983.

ers or more when recommended by either the employers or a majority of the workers.

Terms and conditions of work, e.g. relating to wages, are laid down in collective agreements concluded between the trade unions and the corresponding employers' organization. These agreements usually do not cover the whole country but only a specific sector or branch.

Different wage systems are used in Denmark. The most important ones are the *"normal wage system"* where the collective agreement lays down the pay rate that is actually paid for the kind of work covered by the agreement. In the so-called *"minimal wage system"* the collective agreement lays down a wage rate in addition to which most employees receive extra payment based on a very wide variety of criteria. During the 1990s a *"minimum wage system"* has developed where the collective agreement does not require the employer to pay any specific wage rate but guarantees that the end result for the individual worker cannot fall below a level fixed in the collective agreement. In the latter two systems, the individual wages are fixed at enterprise level in principle as a result of individual negotiation but in practice the negotiation is very often carried out by the shop steward.

There is no regional bargaining in Denmark and bargaining at enterprise level usually occurs only when the enterprise is not a member of the relevant employer's association. Questions on the timing of the daily working hours are often negotiated on a local basis between the shop steward and the management if the collective agreement leaves room for manoeuvre.

A collective agreement is binding upon an employer who either individually or because he is a member of an employers' organization which has concluded it, is a party to the agreement. The employer must comply with the agreement on the terms and conditions he offers all workers and employees doing work under the agreement whether the individual worker is a union member or not.

Extension of agreements is not possible under Danish law. A Danish collective agreement is only binding upon an employer who, either individually or because he is a member of an employers' organization which has concluded it, is a party to the agreement. It is not binding upon others and cannot be extended to cover outsiders.

Danish collective agreements are therefore never sufficient as the sole instrument to implement EEC-directives which guarantee minimum rights for all workers. Denmark therefore has to introduce legislation in traditional collective agreement areas when the EC adopts directives providing for minimum rights in these areas.

Equal pay has for example for many years been a traditional collective labour law issue in Denmark that was settled by the organizations by collective agreement without statutory intervention.

The problem whether or not to adopt legislation on equal pay was raised in Denmark before entry into the *Community* (as of 1.1.1973). A vast majority in Parliament rejected proposals for equal pay legislation in the late 1960s and early 1970s[14]. The main argument was that the collective autonomy of the labour market parties should be respected and the issue left to regulation by collective agreement. Denmark's membership of the EU changed this view.

There is no statutory definition of a contract of employment in Danish law. In the literature it is usual to regard a contract as a contract of employment when a person (the worker or the employee) who is subject to the instructions of another (the employer) undertakes to do work against some kind of remuneration.

The employment contract is becoming differentiated: in the 1990s, there is not one, but several employment contracts. The concept *"employment contract"* is no longer as clear as it used to be, because the development of new forms of work has resulted in the emergence of several kinds of employment contracts. One finds the part-time contract, the fixed-term contract, the temporary work contract, the job-sharing or job-splitting contract, and others could be mentioned.

In connection with the development of new forms of employment contracts, the employment contract, in particular non-standard types of it, is becoming surrounded by formal requirements in a number of EEC Member States[15]. In many countries, the contract must have a written form and must contain some compulsory stipulations.

Danish law requires agreement between the offeror and the offeree as to the terms of the contract, but there are very few requirements of form.

According to *"Christian den Femtes Danske Lov"* from 1683 *"[...] everybody is bound by his promise, be it made by word of mouth, by hand or by seal [...]"*. According to this provision informal contracts are binding and promises oblige the promisor even if they are not supported by any cause or consideration. The *Council Directive on an employer's obligation to inform employees of the conditions applicable to the contract of employment or employment relationship*[16] was implemented in Denmark in 1993 through the adoption of an Act requiring the employer to provide information on

a) the identities of the parties;
b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;
c) i) the title, grade, nature or category of the work for which the employee is employed; or
   ii) a brief specification or description of the work;
d) the date of commencement of the contract or employment relationship;
e) in the case of a temporary contract or employment relationship, the expected duration thereof;
f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the

14. See for more details RUTH NIELSEN: *Kvindearbejdsret*, Copenhagen 1979.
15. See for details NIELSEN, RUTH, *Form and Proof of the Contract of Employment, report for the EEC-Commission*, 1989.
16. 91/533/EEC.

information is given, the procedures for allocating and determining such leave;

g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice;

h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled,

i) the length of the employee's normal working day or week;

j) where appropriate:

   i) the collective agreements governing the employee's conditions of work;
   or

   ii) in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.

As far as the requirements of cause and consideration are concerned the difference between Danish law and French and Anglo-American law is conceptual rather than practical. Anyway it is of no practical importance in relation to employment contracts that Danish law in principle accepts contracts without cause or consideration. A contract of employment is as mentioned a contract where work is exchanged for remuneration in a way that subordinates the worker to the employer.

If the employer is bound by a collective agreement covering the work in question he is under an obligation towards the union which is a party to the collective agreement to observe all its terms and conditions when entering into individual employment contracts regardless of whether the individual party to this contract is a union member or not. There is therefore a presumption that the individual contract contains the terms and conditions of the collective agreement even when there is no explicit reference to it.

6. Case law

The case law in labour matters stems from different courts and tribunals. Conflicts about collective agreements are settled in a special part of the procedural system, which has nothing to do with individual employment conflicts or public labour law conflicts. Individual employment cases are usually heard by the ordinary civil courts, whereas public labour law conflicts are usually dealt with by the criminal branch of the (ordinary) courts.

Danish collective labour law is – apart from collective agreements – mainly based upon case law developed within the framework of the special procedural system set up to solve collective labour conflicts (*see below in chapter III*), i.e. industrial arbitration and the *Labour Court*.

The material from the *Labour Court* is publicly available, but arbitral awards belong in principle to the parties, i.e. the labour market organizations.

A number of labour law writers in Denmark are employed with or otherwise connected with the organizations. Other writers hold research positions in the universities and similar institutions. It is in practice sometimes difficult for academic researchers to gain access to source material which is the property of the organizations. This is, in my view, a considerable impediment to independent research. There is a need for public access to the sources of law[17].

The ordinary court judges who have ruled in labour law cases in Denmark seem to view the cases from the points of view of the law of contract, the law of civil procedure and public administrative law. Judges are mainly concerned with the law as a means of protecting individuals.

Case law from the *European Court of Justice* plays a growing role in Danish labour law. This applies both to case law stemming from other EU countries and to European case law developing from Danish cases.

The *European Commission* took infringement proceedings against Denmark in 1983 over the then *Equal Pay Act*[18].

7. Custom and practice

Custom and practice is an important source of law in the collective labour law part of the procedural system but seems to play only a minor role in the other parts of the system.

8. International Law

In respect of international law Denmark has traditionally adhered to the so-called dualistic theory. International conventions ratified by Denmark are not regarded as part of Danish law unless they are in some way incorporated into Danish law. In labour law matters, especially as regards fundamental human rights, there are discrepancies between Danish law and the international minimum standards.

Denmark has for example ratified a number of international conventions on human rights but they are only regarded as binding upon the state as *"state"*. They are not (yet) transformed into national labour law and are usually not considered binding upon public employers or private employers. It has for example until very recently been the general view that a private Danish employer is free to make racist recruitment decisions. An Act prohibiting discrimination on grounds of race, colour, religion, political opinion, national extraction or social origin is, however, expected to be proposed by the Minister of Labour in autumn 1995.

As another example the following conclusion concerning the Danish implementation of the *European Social Charter* may be mentioned: *"it is evident that the Danish governments have at no time had any intention of adhering strictly to those principles, if this would mean a necessity to abolish traditional principles of the Danish labour market. ... This means that the Charter cannot get a strong profile in the national state of law, and it must also necessarily*

17. Cf KRARUP, OLE & MATTHIASEN, JØRGEN, *Afskedigelseret*, 1984.

18. Case 143/83, Commission versus Denmark, ECR 1985, p. 427.

mean that the national state of law on certain points may be in violation of the principles of the Charter."[19].

The dualistic theory has, however, been contested during recent years[20].

9. Conflict of rules - hierarchy of sources

There is a strong tradition of *"realistic legal theory"* in the Nordic countries[21]. This results in academic researchers trying to give an account and analysis of all the sources of laws in legal practice. This view leads to a focus on the traditional sources of law: collective agreements, case law, unwritten principles of law etc.

In labour law matters, especially as regards fundamental human rights, there are discrepancies between Danish law and the international minimum standards.

In respect of international law, Denmark has as mentioned traditionally followed the dualistic theory so that international conventions ratified by Denmark are not regarded as part of Danish law unless they are incorporated into Danish law. The dualistic theory has, however, been contested during recent years and it has been argued that international conventions ought to be considered law at a higher level than domestic law.

The problem of possible discrepancies between the Constitution and Danish law has not arisen in Denmark due to the marginal role played by the *Constitution* in Danish labour law. The implementation of EEC directives is leading to a change in the traditional pattern of sources of law away from collective agreements towards legislation, *see below in chapter IV.*

CHAPTER III: INDUSTRIAL ACTION AND DEALING WITH DISPUTES

Danish labour law is as mentioned often subdivided into three parts:
- collective labour law
- individual employment law
- public labour law

The procedural system in Danish labour law is subdivided along the same lines. Disputes about collective agreements are settled in a special part of the procedural system, which has nothing to do with individual employment conflicts or public labour law disputes. Individual employment cases are usually heard by the ordinary civil courts, whereas public labour law disputes are usually dealt with by the criminal branch of the (ordinary) courts.

What sanctions are available depends on where in the procedural system a case is heard.

1. Collective labour law

In 1908-1910, the basic principles for the settlement of disputes of conflicts relating to collective agreements were laid down as mentioned in the introduction. A fundamental distinction was drawn between conflicts of interest and conflicts of right.

A conflict of interest arises in areas where no valid collective agreement applies. This may be because the matter in dispute has never been covered by a collective agreement, e.g. due to the employer being non-affiliated to an employers' organization; or it may be because a previously existing collective agreement has been terminated. In conflicts of interest the parties are free to take industrial action: strike, lock-out, blacking and boycott.

A conflict of right arises where the matter in dispute is already covered by a collective agreement.

A Danish collective agreement entails a peace obligation, i.e. a duty on the parties to the collective agreement and their members not to take industrial action over a matter covered by the agreement. In the event of a conflict of right, there is only in very few cases a right to resort to industrial action (strikes, etc.).

The exceptions from the peace obligation are:
- cases where the employer does not pay the wages
- cases where it is necessary to stop working in order to protect the health and welfare of the worker
- cases where the employer requires the workers to do work that is not covered by the collective agreement in force
- cases of lawful sympathetic strike or other industrial action.

In Denmark there is legal parity between the workers and the employers in the sense that the employer has the same right to lock-out as the workers have to strike.

In the event of a conflict of right, there is virtually never a right to resort to industrial action, e.g. to lock-out.

The only exception from the peace obligation that is relevant for employers is cases of lawful sympathetic industrial action, i.e. lock-out.

In conflict of interest situations there is freedom to take industrial action rovided there is a reasonable degree of proportionality between the goal to be obtained and the means used to obtain it.

The freedom applies both to the workers and to the employers.

A lawful lock-out does not suspend the individual contract of employment under Danish law. It terminates it. After the lock-out the collective parties usually agree upon reinstatement. If they do not and if the employer does not enter into a new individual contract with a particular worker, this worker is no longer employed with the employer.

An unlawful lock-out is a breach of the collective agreement. It will usually result in the employer being sentenced to pay a *"bod"*. It neither suspends nor terminates the individual contract of employment.

As an alternative to industrial action, a procedural system has been set up to enable aggrieved parties to obtain a judicial settlement of the dispute.

19. JACOBSEN, PER, in: JASPERS and BETTEN (eds), *25 years European Social Charter*, Kluwer 1986, p. 81 pp.
20. Cf ESPERSEN, OLE, *Indgåelse og opfyldelse af traktater*, Copenhagen 1970, p. 163.
21. See on this theory: ALF ROSS, *Ret og Retfærdighed*, Copenhagen 1953.

This procedural system has been subdivided into two branches: industrial arbitration and the *Labour Court*.

In broad terms, conflicts over the interpretation of collective agreements are settled by arbitration, whereas conflicts over an alleged breach of the collective agreement, e.g. strikes in violation of the peace obligation, are dealt with by the *Labour Court*, which can impose a fine (*"bod"*) upon the workers or others who have violated the agreement.

A standard grievance procedure for the handling of conflicts by industrial arbitration was laid down by collective agreement in 1908 (*Normen for behandling af faglig strid*). The first Act on the *Labour Court* was passed in 1910. The Act presently in force dates back to 1973.

In collective labour law there is a special sanction, the so-called *"bod"* which is an amount of money the *Labour Court* can sentence a party to a collective agreement (or members of that party) to pay to the other party in the event of breach of the collective agreement.

When workers strike in violation of the peace obligation entailed in any collective agreement each of them is sentenced to pay a *"bod"* which is calculated on the basis of the number of working hours they have been on strike. The normal *"bod"* is 27 DKK per strike hour (approximately 3,5 ECU) for unskilled workers and 32 DKK (approximately 4 ECU) per strike hour for skilled workers. If the organization has made itself responsible for the strike it will in addition be sentenced to pay a *"bod"* which can be a considerable amount of money. The organization is regarded as responsible both if it has taken an active part in the strike and if it has not done enough to prevent the workers from striking.

When workers strike, a meeting between the organizations must be held at the request of the employer or the employers' organization, usually within 24 hours. If the workers go back to work before this meeting or follow a suggestion from this meeting to resume work they are as a rule not liable to pay a *"bod"*.

Cases are brought before the *Labour Court* by the most comprehensive organization, typically the two main organizations on the Danish labour market: the *Confederation of Trade Unions* (LO) and the *Danish Employers' Confederation* (DA) and never by the individuals whose rights might have been violated.

If for example an employer violates his duty under a collective agreement to pay a woman equal pay, the trade union – provided it is not a member of a more comprehensive organization – which is a party to that collective agreement can bring the case before the *Labour Court*. The individual woman who is being discriminated against can do nothing. If the trade union is a member of a more comprehensive organization, e.g. the *Confederation of Trade Unions* (in Danish *LO*), it is up to the more comprehensive organization to decide whether or not to bring an action.

Industrial arbitration cases are usually dealt with by arbitration tribunals set up *ad hoc* for each individual case. The tribunal consists of a chairman and usually two representatives of each party to the collective agreement[22]. In dismissal cases there is, however, a permanent unfair dismissal arbitration board.

In 1960, provisions against unfair dismissal were introduced into the Basic Agreement (which is a collective agreement, see above) between the *Confederation of Trade Unions* (in Danish *LO*) and the employers' organization. Following this, similar provisions were introduced into the *Salaried Employees Act* (in Danish *Funktionærloven*) in 1964. The basic principle of the unfair dismissal provisions is that termination of employment shall not take place unless there is a valid reason for termination connected with the capacity or conduct of the worker/employee or based on the operational requirements of the enterprise.

Section 4.3 of the above basic agreement prohibits arbitrariness in the dismissal of a worker or an employee. A dismissed worker or employee with at least 9 months of continuous employment with the employer is entitled to request a statement of the reasons for dismissal.

If the employee/worker asserts that the dismissal is unreasonable and not founded in the conduct of the worker/employee or the circumstances of the undertaking, local negotiations between representatives of management and staff may be demanded. If no agreement is reached by local level negotiation, the interested union may demand negotiations between the organizations. If this does not result in agreement, the trade union may bring the case before an unfair dismissal arbitration board set up by the main organizations (i.e. the *Confederation of Trade Unions* (LO) and the employers' organization)

Redundancy is always sufficient cause for dismissal. In the event of redundancy, the employer may choose at will which workers/employees to dismiss. This discretion is not subject to arbitration or judicial control. Danish employers are not under an obligation to follow objective rules for the selection of workers to be dismissed where economic necessity requires a reduction in the labour force.

A wide range of causes related to the worker/employee may render a dismissal fair, for example refusal to obey orders, sickness (in certain cases) and lack of capability or qualifications.

The basic agreement between the main labour market organizations provides for two types of remedies for unfair dismissal:

- re-instatement, and
- monetary compensation

It is a precondition of re-instatement under the basic agreement that the interested trade union chooses to invoke this remedy and that the relations between the worker/employee and the employer have not been damaged in a way that renders continuance of the employment inexpedient.

The amount of money that may be awarded as compensation cannot exceed 52 weeks pay.

22. A Danish industrial arbitration Tribunal has asked the European Court of Justice questions under art 177 of the EEC-Treaty in case 109/88.

Unfair dismissal provisions in other sources of law usually only provide for monetary compensation, but not reinstatement.

An example of this is the *Salaried Employees Act sec. 2b*. The concept of unfair dismissal in this Act is understood as in the above basic agreement.

Most workers/employees are covered either by collective agreement provisions against unfair dismissals or the *Salaried Employees Act sec. 2b*.

There is legislation against dismissals of workers in special circumstances, for example safety representatives.

There is no general statutory minimum period of notice under Danish law. For certain groups, notably salaried employees covered by the *Salaried Employees Act*, the length of notice, is, however, laid down by statute. For other groups, the length of notice depends upon collective agreement. It is very common for collective agreements to contain provisions on this matter. In the absence hereof the length of notice may be determined by custom or by individual contract. If the length of notice cannot be fixed by any of these sources of law, a reasonable period of notice is required. What length this is depends on the circumstances of the individual employment relationship.

In the case of gross misconduct on the part of the worker/employee the contract of employment may be terminated by the employer without notice. Such dismissals are always regarded as fair and reasonable under the above provisions concerning unfair dismissal. In other cases, the employer must both observe the applicable period of notice and have a fair reason for dismissing the person in question.

There are no formal rules on the necessity to give a warning before resorting to dismissal. In the case of minor offences, warnings are required in order for the dismissal to be considered fair.

2. Individual employment law

There is no system of conciliation, mediation and arbitration concerning conflicts relating to individual employment contracts in Denmark.

Conflicts arising out of individual employment contracts or concerning the interpretation of legislation governing such contracts are dealt with by the ordinary civil courts. The *Labour Court* does not hear individual employment cases.

Denmark has, in contrast to most other Western countries, no special labour or employment courts or tribunals to handle cases concerning individual employment conflicts.

In employment cases the complainant may invoke all the remedies usually available in the law of contract, e.g. the court may declare the rights of the parties, the injured party may rescind the contract in the event of a fundamental breach of the contract, and the court may award damages for economic loss and, where there is special provision for this remedy, also compensation for non-economic loss, e.g. injured feelings.

As regards employees in the public sector the law of employment contracts applies along with public administrative law. A public authority has a duty to be impartial and objective - including when functioning as an employer. Decisions made by public bodies which violate this principle are - under administrative law - invalid. As a consequence an unfair dismissal in the public sector may be invalid (because of administrative law), whereas a similar dismissal in the private sector only entails a duty on the employer to pay damages. If the unfair dismissal is covered by collective agreement the case is different, see above.

3. Public labour law

Public labour law disputes are usually dealt with by the criminal branch of the (ordinary) courts. Cases are brought by the public prosecutor. The typical sanction is a (small) fine for violation for example of the *Working Environment Act*.

The *Labour Inspectorate* has nothing to do with individual employment contracts in Denmark except as regards the *Holidays Act*.

CHAPTER IV: NATIONAL LAW IN AN INTERNATIONAL CONTEXT

1. Danish labour law compared to the labour law systems of other EU countries

There are major variations[23] between the Member States as regards the legal regulation of collective agreements in respect of negotiating rights and duties, levels of collective bargaining, binding effect of the collective agreement, the right of the workers to strike when a collective agreement is in force, extension of the normative effect of the agreement and its duration and coverage.

The 15 EU countries can be[24] divided into three groups:

- 10 countries (Austria, Germany, France, Belgium, the Netherlands, Luxembourg, Spain, Portugal, Italy and Greece) belong to the Roman-Germanic system
- 2 countries (the United Kingdom and Ireland) belong to the Anglo-Saxon system,
- 3 countries (Denmark, Finland and Sweden) belong to the Nordic system of labour regulation.

Denmark was until 1.1.1995 unique in an EU context by being the only representative of the Nordic labour law tradition[25]. In broad terms this tradition places a stronger emphasis on collective labour law than is the case in other EU-countries. The Nordic workforce has the highest degree of unionization (around 80-90%) in the EU. The strong position of the trade unions may be due to the fact that they like, their Scandinavian counterparts, tend to work very closely with the employer.

As mentioned in the introduction, the two main organizations on the Danish labour market, the *Confederation of*

23. Cf EEC-COMMISSION, *Summary Report on the Comparative Study on Rules Governing Working Conditions in the Member States*, SEC(89) 926, Bruxelles 1989, no 45-52.
24. Cf EEC-COMMISSION, *Comparative Study on Rules Governing Working Conditions in the Member States, Part 1, General Aspects*, Bruxelles 1989.
25. BRUUN, N., FLODGREN, B., HYDÉN, H., HALVORSEN, M. and NIELSEN, R., *The Nordic Labour Relations Model*, Aldershot, Dartmouth, 1992.

Trade Unions (LO) and the *Danish Employers' Confederation* (DA) concluded a basic agreement, the so-called *September Agreement* (*Septemberforlig*), in 1899 where the employers recognized the right of the workers to unionize and LO in return recognized the managerial prerogatives of the employer. Similar agreements were concluded in the other Nordic countries at the beginning of the 20th century but do not exist in the other EU countries where the trade unions have traditionally have contested the managerial power of the employers[26].

Denmark has, in contrast to most other Western countries, no special labour or employment courts or tribunals to handle cases concerning individual employment conflicts.

In addition, Danish labour law is rather old-fashioned due to the fact that Denmark has not (yet) adopted comprehensive employment protection legislation comparable to that enacted in a number of other countries during the last 20 years or so.

2. Private international law and determination of law applicable

2.1 Rules on conflict of labour laws in general

In 1968, the *Convention of the Member States of the EEC on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* was signed[27]. Denmark became signatory to the convention in 1978 and has transposed the *Convention* into Danish law by *section 247* of the *Act on Court Procedure* and by a special Act[28] incorporating the *Convention* into Danish law as of 1.11.1986.

In the case of a legal dispute, venues can be established in several Member States, both under national law and under the EC *Judgment Convention*. It was therefore, in the opinion of the Commission, necessary to harmonize the conflict of labour law rules of the Member States.

In 1972, the *European Commission* proposed a *Regulation on conflicts of laws in employment relationships* within the Community[29]. To reflect the opinions of the *Economic and Social Committee* and the *European Parliament*, an amended proposal was presented in 1976[30].

In 1972, the *Commission* also submitted a *Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations* which among other matters contained provisions on the choice of law in employment relations.

The above draft Regulation on the choice of law in employment relations has never been adopted, whereas the draft Convention in an amended form (omitting the non-contractual obligations) was signed in 1980 as the *European Communities' Convention on the Law Applicable to Contractual Obligations*[31].

The main difference between the draft Regulation on the choice of law in employment relations and the *Convention on the Law Applicable to Contractual Obligations* relates[32] to the degree to which party autonomy is permitted.

In the explanatory memorandum to the amended proposal for a Regulation the *Commission* points to the fact that the conflict of law rules of the Member States of the EU vary greatly. In broad terms there are two opposing systems.

Under one system the binding provisions of national labour law are considered to be 'lois de police et de sûreté', so that precedence is given to national labour law in intra-Community employment relationships.

Under the other system, precedence is given to the ability of the parties to choose the applicable law.

The proposed Regulation stipulated the place of work as the binding criterion in most cases. It allows a free choice of law by the contracting parties only within certain limits bound to objective criteria. In addition the minimum protective legislation at the place of work should always be valid. The draft Regulation thus outlawed party autonomy in most cases in employment matters.

The *Rome Convention* allows party autonomy as the main rule in all contractual matters including employment relations. If the parties to a multinational collective agreement want to create legal uniformity within the firm by means of the collective agreement, they may rely on the party autonomy of private international law and achieve their goal by means of a choice of law clause or a forum clause.

Denmark put the *Convention* into force on 1 July 1984. The *Convention* has been incorporated into Danish law as it stands as an appendix to the Danish Act[33] which introduces it.

It follows from *Article 9* of the *Rome Convention on the Law Applicable to Contractual Obligations* that a contract, e.g. a contract of employment, is valid as regards form if it fulfils either the law of the *lex loci contractus* or of the *lex causa*.

If, for example, an employer whose place of business is in France recruits a Danish engineer who lives in Denmark at the time of contracting to do work at a plant in Italy and the contract of employment includes a choice of law clause in favour of Italian law, the contract of employment will,

26. Compare SUMMERS, CLYDE, *Comparisons in Labor Law: Sweden and the United States*, in: *Svensk Juristtidning*, 1983 p. 589 ff.
27. See for a commentary O.J. 1979 C 59.
28. Act no 325 of 4.6.1986.
29. J.O. 1972 No C 49/26. The text of the draft Regulation is also published in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1973, p. 585.
30. COM(75) 653. This text is reprinted in: *Bulletin of Comparative Labour Relations*, Deventer 1976, p. 288.
31. See on the convention: LANDO, OLE, *The EEC Convention on the Law Applicable to Contractual Obligations*, in: *Common Market Law Review*, 1987, p. 159.
32. See for commentaries and comparisons of the two instruments: HEPPLE, B.A., *Conflict of Laws on Employment Relationships within the EEC*, in: LIPSTEIN, K. (ed), *Harmonization of Private International Law by the EEC*, London 1978; *Philip, Allan, Contracts of Employment in the Law of Conflict of Laws in the EEC, in Internationales Recht und Wirtschaftsordnung, Festschrift für F A Mann*, München 1977; and GAMILLSCHEG, FRANZ, *Intereuropäisches Arbeitsrecht. Zu zwei Vorschlägen der EWG zum internationalen Arbeitsrecht*, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1973, p. 284.
33. Law nr. 188 of 9.5.1984.

according to *Article 9* of the *Rome Convention*, be valid as regards form if it fulfils either the requirements of French law, or of Danish law or of Italian law.

It will therefore often be somewhat difficult to assess whether an employment contract with connections to different EEC countries does or does not fulfil the requisite formal requirements. Harmonization of formal requirements will consequently add to the legal certainty surrounding employment contracts.

2.2 Choice by the parties – limitations on freedom of choice: imperative law

Article 3 of the *Convention* provides that a contract shall be governed by the law chosen by the parties. However, in individual employment contracts the employee is protected by the mandatory rules of the law which would govern the individual employment contract in the absence of a choice of law by the parties, *see Article 6 of the Convention.*

According to *Article 6(2)*, this is the law of the country in which the employee habitually carries out his work or, if the employee does not habitually carry out his work in any one particular country, the law of the country in which the place of business through which he was engaged is situated. If it appears from the circumstances of the case that the contract is more closely connected with the law of another country, the contract shall be governed by the law of that country.

2.3 The law applicable in the event of failure to choose

Article 4 of the *Convention* contains the general rule that contracts shall be governed by the law of the country with which they are most closely connected.

Individual employment contracts are, according to *Article 6(2)*, *prima facie* governed by the law of the country in which the employee habitually carries out his work or, if the employee does not habitually carry out his work in any one particular country, the law of the country in which the place of business through which he was engaged is situated.

The *prima facie* rule in *Article 6* is a presumption of some strength. It applies unless it appears from the circumstances of the case that the contract is more closely connected with the law of another country. In that case the contract shall be governed by the law of that country.

3. Movement within the Community of workers within the same enterprise or group of enterprises

3.1 Definition of a multinational enterprise

The ICFTU[34] *Charter of Trade Union Demands for the Legislative Control of Multinational Companies*[35], says that for trade union purposes[36] a multinational enterprise is one which carries on activities other than marketing its own products in more than one country.

The OECD *Guidelines for Multinational Enterprises* provides in *paragraph 8* of the *Introduction* that *"A precise legal definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others."*

The IME-*Committee*[37] clarified the definition of a multinational enterprise in the C&A *case*[38] dating from 1984 where the *Committee* concluded: *"While it is not the intention of the Committee to change its position, as reflected in the text of the Guidelines, that, for the purpose of the Guidelines, no precise definition of a multinational enterprise is required, the Committee considers that the sharing of knowledge and resources among companies or other entities would not be in itself, i.e. in the absence of other relevant circumstances, a sufficient indication that such companies or entities constitute a multinational enterprise."*

For labour law purposes there is no need for a more precise definition of a multinational enterprise than that contained in the OECD Guidelines. With respect to collective labour law, the decisive difference between a multinational enterprise and a one-country company is that in multinational enterprises there is some degree of central control over major managerial decisions, especially concerning investment and plant location.

This gives the multinational employer the power to transfer activities and money from one country to another. The result sometimes is that the workers are faced with a national subsidiary as employer which is closing down due to a decision by central management on which they have had no real influence, and which does not have sufficient financial means to meet the obligations under national law towards the workers being made redundant[39].

3.2 International and Community provisions

Many provisions in international labour law and EEC-labour law deal with individual employment law but only few with collective agreements[40]. This is probably due to

34. I.e. the International Confederation of Free Trade Unions.
35. ICFTU, *Charter of Trade Union Demands for the Legislative Control of Multinational Companies*, in: *Bulletin of Comparative Labour Relations*, Deventer 1976, p. 405.
36. See on the trade unions and multinationals: RIDDLE, JOHN, *The ICFTU and the Multinationals*, in: *Bulletin of Comparative Labour Relations*, Deventer 1976, p. 327.
37. I.e. the Committee on International Investment and Multinational Enterprises set up by the OECD on 21 January 1975. The IME-Committee is competent to clarify the Guidelines. The clarifications have the same status as the Guidelines: they are voluntary and not legally enforceable.
38. Reprinted as case no 10 in the OECD chapter of: BLANPAIN, R. (ed), *International Encyclopedia for Labour Law and Industrial Relations. Case Law*, Deventer 1985.
39. See the case law reproduced in: BLANPAIN, R. (ed), *International Encyclopedia for Labour Law and Industrial Relations. Case Law*, Deventer 1985.
40. See e.g. ILO-convention no 87 and 98, which, however, are not relevant to the problem discussed here.

the fact that it is easier to harmonize individual employment law than collective labour law[41].

The recommendations[42] contained in the ILO-tripartite declaration on multinationals and the OECD Guidelines on Multinational Enterprises[43] are not binding. They contribute to the development of a code of good practice requiring multinationals to respect national practices, to abstain from misuse of their power to transfer jobs and money from country to country and to provide workers with information and give them access to consultations with real decision-makers. Non-binding clarifications of the OECD Guidelines can, as mentioned earlier, be given by the IME *Committee*.

The one collective labour law issue that has been most intensely dealt with at international level is information, consultation and worker participation.

The question of whether or not – and if so how – to establish cross-frontier rights of information and consultation in relation to multinational employers has, during the last 20 years or so, been the subject of discussion and proposals both at Nordic[44] and EU level[45].

At EU level two different models of increasing workers' involvement in the life of the undertaking have been attempted.

One model is worker participation in management bodies of the undertaking. This model underlies the draft *Regulation for a European Company Statute*[46] and the draft *5th Directive on Company Law*[47].

There are no Danish provisions in statute laws or collective agreements providing for workers' rights to information from or consultation with non-Danish parts of their employer. Workers' participation in Denmark operates only within Denmark.

How to establish cross-frontier rights to information and consultation in relation to Nordic multinational employers was the subject of a report published in 1988[48].

The employers' organizations were strongly opposed to cross-frontier rights to information and consultation and took the view that information and consultation should be channelled through the local (national) e.g. Danish employer. Danish workers should therefore not be entitled to *"go over the head"* of their Danish employer and seek information and consultation with e.g. the Swedish part of the employer.

The trade unions took the opposite view and called for collective agreements providing for cross-frontier rights to information and consultation. Due to the lack of agreement nothing has come out of it so far. It is consequently not likely that the Danish leading organizations, the *Confederation of Trade Unions* (LO) and the *Danish Employers' Confederation* (DA), will in the near future be able to agree upon a collective agreement solution to the problem of securing rights to consultation and information within multinational groups.

As mentioned, in 1974, provisions which ensured employee representation on company boards were introduced into company legislation. This right was extended in 1980 and 1987[49]. One possibility would be to develop these rules so as to cover multinational groups.

3.3 Cross-national collective agreements

Foreign elements can affect collective agreements in two different ways.

On the one hand, there is the question of the applicability of national collective agreements to situations with foreign elements, e.g. the applicability of a Danish collective agreement to foreign workers doing work in Denmark. This question is not dealt with in this paper.

On the other hand, there is the question of international (here European) collective agreements, i.e. agreements concluded between parties from different countries.

Collective bargaining at European level could be of two major types:

- Europe-wide framework agreements laying down basic principles which are then to be incorporated into national collective agreements. For practical purposes no such collective agreements exist[50]. This is probably due to the low degree of internationalization of the labour market organizations. This type of European collective agreements is not discussed further here;
- enterprise level cross-border collective agreements in multinational firms. A few such agreements exist. In this paper the term multinational agreement refers to this type of European collective agreements.

Consideration is given below to whether similar effects in different countries can be obtained by relying on similarities of national legal systems, by means of private international law, or by means of supranational (international labour law or EEC labour law) provisions.

Since collective labour law is fundamentally different from country to country within the EEC, multinational enterprises which choose to operate by way of multinational collective agreements will be faced with the problems of private international law, i.e. the question of which law is applicable, in what countries can venue be established and

41. cf: KAHN-FREUND, OTTO: *On Uses and Misuses of Comparative Law, Selected Writings*, London 1978 p. 294.
42. See annex 1 and 2.
43. cf: BLANPAIN, R., *Guidelines for multinational Enterprises and Labour Relations*, in: BLANPAIN, R (ed), *Comparative Labour Law and Industrial Relations*, Deventer 1987 p. 133.
44. cf: *Koncernfackligt Samarbete i Norden*, Nordisk Råd 1988.
45. cf: DOCKSEY, CHRISTOPHER, *Employee information and consultation rights in the Member States of the European Communities, Comparative Labor Law*, 1985, p. 32 ff and: DOCKSEY, CHRISTOPHER, *Information and Consultation of Employees: The United Kingdom and the Vredeling Directive*, in: *Modern Law Review*, 1986, p. 281.
46. *EC Bulletin*, Supplement 4/75, COM(88) 320.
47. Amended Porposal for a Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs, O.J. 1983 C 240, EC Bulletin Supplement 6/83.
48. *Koncernfagligt Samarbejde i Norden*, Nordisk Råd 1988.
49. See for details e.g.: GOMARD, BERNHARD, *Aktie-og anpartsselskabsret*, Copenhagen 1987.
50. cf: ROGER BLANPAIN, *Report on collective agreements*, p. 12 for the EEC-Commission's project on *Rules Governing Working Conditions in the Member States*, Bruxelles 1989.

is a judgment delivered in one country enforceable in another[51].

3.3.1 Law applicable

As mentioned an individual employment contract is governed by the law chosen by the parties.

However, in individual employment contracts the employee is protected by the mandatory rules of the law which would govern the individual employment contract in the absence of a choice of law by the parties, see *Article 6* of the *Convention*.

According to *Article 6(2)* of the *Rome Convention on the Law applicable to Contractual Obligations*, which as mentioned is incorporated into Danish law, this is the law of the country in which the employee habitually carries out his work or, if the employee does not habitually carry out his work in any one particular country, the law of the country in which the place of business through which he was engaged is situated. If it appears from the circumstances of the case that the contract is more closely connected with the law of another country, the contract will be governed by the law of that country.

If the Danish part of a multinational enterprise is party to a Danish collective agreement, this agreement must be complied with by the employers as regards the wages and terms of employment offered to all employees in Denmark, including employees coming from other EEC-countries. Danish collective agreements are to be observed by the employers bound by them, in respect of both members and non-members of the union which is a party thereto, provided they do work covered by the agreement.

3.3.2 Which law is applicable as the proper law of a multinational collective agreement in the absence of a choice of law by the parties?

Collective agreements at enterprise level are not very common in Denmark but it is possible for the Danish part of a multinational firm to conclude a collective agreement containing provisions on the cross-frontier movement of workers within the firm including provisions on the law applicable.

Article 4 of the *European Communities' Convention on the Law Applicable to Contractual Obligations of 1980* provides that contracts shall be governed by the law of the country with which they are most closely connected. The article contains the general presumption that in transactions that are not business transactions, the law of the habitual residence of the party who performs the characteristic obligation applies prima facie. In business transactions, the law of the principal place of business of the party who performs the characteristic obligation is prima facie applicable. If the characteristic obligation is to be performed by a subsidiary, the law of the place of that establishment applies prima facie.

According to *Article 6* of the *Convention*, employment contracts are prima facie governed by the law of the country in which the employee habitually carries on his work or, if he does not do that in any one country, by the law of the country in which the place of business through which he was engaged is situated.

The question arises whether multinational collective agreements are governed by *Article 4* or *Article 6* or perhaps fall outside the scope of the *Convention*. Since *Article 6* expressly limits its scope to (individual) employment contracts the relevant provision, if any, will be *Article 4*.

Under Nordic and Continental European law, collective agreements are binding contracts, whereas this is not the case under English law.

In *Article 2* of the abovementioned draft Regulation on choice of law, collective agreements were explicitly included in the term 'law' if they were binding on the parties. This means that continental and Danish collective agreements but as a general rule not British collective agreements were included.

Since the prevailing rule in the EEC area is to treat collective agreements as contracts, it seems most reasonable to regard them as covered by the choice of law Convention without distinction as to the nature of their legal effects.

In support of this interpretation, the judgment of the EEC Court in the infringement proceeding against the UK[52] about the violation of the *Equal Treatment Directive* by the UK *Sex Discrimination Act* may be referred to. In this case the *Court* ruled: *"The directive thus covers all collective agreements without distinction as to the nature of the legal effects which they do or do not produce. The reason for that generality lies in the fact that, even if they are not legally binding as between the parties who sign them or with regard to the employment relationships which they govern, collective agreements nevertheless have important de facto consequences for the employment relationships to which they refer, particularly in so far as they determine the rights of the workers and, in the interests of industrial harmony, give undertakings some indication of the conditions which employment relationships must satisfy or need not satisfy".*

The criterion stipulated in the presumption in Article 4 (the place of business of the party performing the characteristic

51. The literature on collective labour law aspects of private international law is much more limited than the literature on the individual employment contract. See on collective labour law in particular: WALZ, STEFAN, *Multinationale Unternehmen und internationaler Tarifvertrag. Eine arbeitskollisionsrechtliche Untersuchung*, Baden-Baden 1981, GAMILLSCHEG, FRANZ, *Internationales Arbeitsrecht*, Tübingen 1959, p. 355 and: MORGENSTERN, FELICE, *International Conflicts of Labour Law*, Genève 1984, p. 95. See also: BIRK, ROLF, DAS INTERNATIONALE ARBEITSRECHT DER BUNDESREPUBLIK DEUTSCHLAND, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1982, p. 384; BIRK, ROLF, *Mitbestimmung und Kollisionsrecht, Recht der Internationalen Wirtschaft*, 1975, p. 589; BOGDAN, MICHAEL, *Den svenska internationella arbetsrättens grunder*, Svensk Juristtidning 1979, p. 81; LANDO, OLE, *Arbejdsforhold og international privatret*, TFR 1979, p. 1; LYON-CAEN, GÉRARD, LYON-CAEN, ANTOINE, *Droit social international et européen*, Paris 1980; GAMILLSCHEG, FRANZ, *Conflict of Laws in Employment Contracts and Industrial Relations*, in: BLANPAIN, R., *Comparative Labour Law and Industrial Relations*, Deventer 1987, p. 95.

52. Case 165/82, EEC-Commission v United Kingdom of Great Britain and Northern Ireland, Reports 1983 p. 3431.

obligation) will in the case of a multinational agreement most often not point to any country at all.

The party performing the characteristic obligation of a multinational collective agreement is the trade union(s) and the workers. In a multinational collective agreement the party on the workers' side that signs the agreement will normally be some kind of joint committee representing trade unions from the different countries covered by the agreement.

If the agreement covers, for example Denmark, the UK and France the party to the agreement (which is composed of the trade unions involved) very often has no principal place of business anywhere. The trade unions of each country have a principal place of business, but if there is only one agreement, the party to that agreement typically has no principal place of business.

The general rule in *Article 4* (that the agreement shall be governed by the law of the country with which it is most closely connected) points to the country where the multinational agreement has its centre of gravity socially and economically. This may be any of the countries covered by it. The court will have to take all connecting factors into consideration and in some cases it will be difficult to predict which country a court will regard a multinational agreement as most closely connected with.

The centre of gravity method provided for in *Article 4* does – as a starting point – result in a multinational agreement being subject to one and only one legal system, but according to *Article 7(2)* nothing in the *Convention* may restrict the application of the mandatory rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract. Under *Article 16* of the *Rome Convention* the application of a rule of the law of any country specified by the *Convention* may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

3.3.3 Party autonomy

Article 3 of the *Rome Convention* provides that a contract shall be governed by the law chosen by the parties.

Under *Article 17* of the *Judgment Convention* the parties to a contract may choose the forum. The EEC *Court* ruled in the *Sanicentral case*[53] that this provision applies to individual employment contracts. The *Court* has never been asked whether it applies to collective agreements, but it seems fairly obvious that the answer would be in the affirmative.

The problem dealt with here is whether the above provisions enable the parties to a multinational collective agreement to create uniform legal effects in different EEC countries by making a party reference or putting a forum clause into the agreement.

The answers to questions concerning party autonomy as regards the choice of the proper law of a multinational collective agreement and the relevant forum are somewhat uncertain. There is no case law and only few authors have expressed an opinion.

Stefan Walz[54] is of the view that West German law on conflict of rules before the incorporation of the *Rome Convention* did not allow the parties to choose the proper law because German collective labour law would be regarded as mandatory on its territory. A forum agreement on the other hand would be lawful.

There is nothing in the *Rome Convention* that prevents the parties from choosing the applicable law. The problem is (as with *Article 4*) that if the chosen law is incompatible with basic collective labour law principles of the forum country those principles will be applied under *Article 7(2)* (or in rare cases under *Article 16*) of the *Convention*. If a choice of law clause is to produce legal uniformity in all countries covered by a multinational collective agreement it is therefore necessary to choose the law of a country whose law is not too unacceptable in the other countries covered by the agreement.

If, for example, a multinational agreement of an enterprise operating in Denmark and the UK contains a choice of law clause in favour of English law and the employer underpays Danish workers working in Denmark, will the Danish trade unions then, notwithstanding the choice of law clause in favour of English law according to which the agreement has no binding effect, be able to claim wages in accordance with the agreement and *"bod"* under Danish law under a litigation before the *Danish Labour Court*?

If, however, the Danish trade unions in this example prefer English law and arrange a strike under such circumstances that would be lawful under English law (but not under Danish law) can the employer then, notwithstanding the choice of law clause, go to the *Danish Labour Court* and invoke the Danish peace obligation, i.e. the prohibition against strikes when a collective agreement is in force?

If one looks at the binding versus non-binding effect of a collective agreement, it is possible in the UK to conclude a binding agreement. The choice of a legal system under which the agreement is binding would therefore (probably) be acceptable in the UK, whereas the *Danish Labour Court* for example would presumably not accept a collective agreement as non-binding.

4. Danish labour law and Community law

Provisions on the free movement of workers are primarily found in Denmark in the legislation on aliens, whereas provisions on social policy form part of the labour legislation. Most of Danish case law is about equal pay, equal treatment and transfer of undertakings[55].

53. Case 25/79, Sanicentral GmbH v René Collin, Reports 1979 p. 3423.

54. WALZ, STEFAN, *Multinationale Unternehmen und internationaler Tarifvertrag. Eine arbeitskollisionsrechtliche Untersuchung*, Baden-Baden 1981.

55. See on this subject: NIELSEN, RUTH: *The effect of community law on the labour law of the Member States, Danish report for the 1988 FIDE congress*, printed in the congress report, Vol 2, p. 49-68.

4.1 Free movement of workers and employment

Directives 221/64/EEC and *360/68/EEC* are implemented in Denmark mainly by the *Aliens Act* and the statutory instruments issued in pursuance of it.

The *Aliens Act section 2.2* provides that restrictions on aliens following from *chapters 3-5* of the *Aliens Act* only apply to aliens covered by the EEC rules in so far as they are compatible with these rules. The *Danish Aliens Act* is intended to be in accordance with the EEC provisions, but should it turn out, e.g. through an interpretation by the *European Court of Justice*, that the EEC provisions contain requirements that are not fulfilled by the text of the *Danish Aliens Act*, the Act gives priority to the EEC provisions.

Even though regulations are directly applicable in Member States, some of the provisions of *Regulation 1612/68* and *Regulation 1251/70* on the free movement of workers and the right to remain in a Member State after having been employed there are - in order to clarify the legal situation in Denmark - repeated in the statutory instruments issued in pursuance of the *Danish Aliens Act*.

The *Danish Constitution section 27* provides that Danish civil servants (*tjenestemænd*) are required to be Danish citizens. Civil servant status is used in jobs falling outside the exception in *Article 48(4)* of the EC *Treaty*.

In practice it is not always clear why a position is filled either by an employee covered by a collective agreement or by a civil servant. Apart from the nationality requirement for civil servants the main difference between the two forms of employment is that civil servants are not allowed to strike whereas there is some freedom of industrial action for employees under collective agreements. If it is considered desirable that a group of workers should have a very low strike frequency this is often the reason why the public employer prefers civil servants (*tjenestemænd*). As a side-effect the jobs can then only be filled by Danes because of the nationality requirement in the *Constitution*. This may lead to violations of *Article 48(4)* of the EC-*Treaty* which according to the *European Court of Justice* should be interpreted narrowly[56]. To avoid this problem it has been argued that EU citizens are entitled to employment under the relevant collective agreement instead of employment as a civil servant (*tjenestemænd*) in cases where it is unlawful under EEC law to exclude non-Danes[57]. There is no Danish case law on this issue.

56. Case 152/73, Giovanni Maria Sotgiu v Deutsche Bundespost, case 149/79, Commission v Belgium, Case 307/84, Commission v France, case 225/85, Commission v Italy, case 147/86, Commission v Greece.
57. cf: HAGEL-SØRENSEN, KARSTEN and GULMANN, CLAUS, *EF-ret*, Copenhagen 1993.

4.2 Equal pay

A statute *Law on equal pay* was adopted in 1976[58] to implement the *Equal Pay Directive*[59]. Originally the wording of the Act did not mention work of equal value. The *European Commission* brought an action against Denmark on this ground claiming that Denmark had failed to comply with the *Equal Pay Directive*. Denmark lost[60]. The Act was then amended in 1986. A new amendment of the *Equal Pay Act* was made in 1989. It enables the *Equal Status Council* to demand disclosure of information from employers in equal pay cases. In 1992 the *Equal Pay Act* was again amended, adapting the text of the Act to developments which had taken place in case law[61].

Danish case law on equal pay has developed thorugh the 1990s. There are some 20 arbitral awards and two judgments from the ordinary courts. In the *Danfoss Case* questions were put to the *European Court of Justice* concerning problems relating to the burden of proof[62]. In the *Royal Copenhagen Case* a preliminary ruling was requested from the EC on the application of the equal pay principle in relation to piece work[63].

All Danish collective agreements on wages provide for equal pay rates for men and women unless the opposite is expressly stated. Compliance with the equal pay principle is regarded as an implied term, but it does not mean that all equal pay problems in collective agreements have been solved. Broadly speaking there remain two types of problems:

- problems related to different collective agreements laying down different pay conditions;
- problems related to the minimal or minimum wage systems and other individual wage agreements.

Different collective agreements

Unskilled workers

Denmark has a women-only trade union (*Kvindeligt Arbejderforbund*) for various categories of unskilled women workers. Unskilled male workers doing the same work (or work of equal value) will be members of a different male-dominated union (SiD). In some cases the two unions have concluded joint collective agreements, in other cases they are parties to separate collective agreements. These parallel agreements covering the same work (or work of equal value) do not always provide for the same pay; sometimes the male agreement provides for extra pay in situations where the women's agreement does not. In these situations women and men doing the same work (or work of equal

58. Act no 32 of 4.2.1976 as amended by Act no 65 of 19.2.1986. The amendment in 1986 was adopted to fulfil the judgment of the EC-Court of 30.1.1985 in case 143/83 where the EC-court ruled that Denmark had failed to comply with the equal pay directive by not mentioning work of equal value in the original wording of the equal pay Act.
59. 75/117/EEC.
60. Case 143/83.
61. Consolidation Act no. 639 of 1992 on Equal Pay.
62. Case C-109/88 Handels-og-Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] ECR 3199 .
63. Case C-400/93 Specialarbejderforbundet i Danmark v Dansk Industri for Royal Copenhagen A/S, Judgment of 31 May 1995, nyr.

value) will receive different payment. This is a violation of the equal pay principle both under EEC law and under Danish law as it is interpreted in judicial practice.

It also happens that the women's agreement allows part-time work while the men's agreement prohibits it, resulting in men being barred from part-time work in situations where it is open for women (see below under equal treatment).

There are two arbitral awards - one from 1977[64] and another from 1987[65] - ruling that unskilled male and female workers doing the same work or work of equal value must receive equal pay. The fact that they are covered by two different collective agreements cannot be used as an excuse for different payment of women and men where the workers are unskilled.

Skilled workers

According to Danish practice the situation is different where skilled workers are concerned.

In a case concerning *Vejle Amts Folkeblad* (a local newspaper) the problem was whether male skilled typographers and female skilled clerical workers doing the same work (typing advertisements) who were covered by two different collective agreements (one for graphic workers and another for clerical workers) should receive equal pay. The graphic workers agreement provided for better pay (irrespective of the sex of the graphic worker) than the clerical workers agreement did (likewise irrespective of the sex of the clerical worker). In Denmark most graphic workers are men and most clerical workers are women.

The arbitral award[66] from February 1985 (two weeks after the EEC-judgment against Denmark in *case 143/83*) was in favour of the employer. It stated that where skilled workers are concerned each collective agreement should be looked at separately and that no comparison can be made across collective agreements.

After the *European Court*'s judgment in the *Danfoss-II-case*[67], it is likely that any new case similar to the *Vejle Amts Folkeblad* case would reach the opposite result. In the *European Court*'s judgement it is explicitly stated that differences in vocational training must be of relevance to the work actually performed in order to justify differences in pay between men and women. The onus of proving this is on the employer.

Better payment to members of a male dominated group doing the same work as members of a predominantly female group due to their being covered by different collective agreements constitutes indirect discrimination and is incompatible with the EEC *Directive on Equal Pay* and the practice of the *European Court of Justice*[68].

Minimum wage system

The general pattern is that male dominated groups get more extra payment than predominantly female groups - a fact that makes it likely that this wage system serves as a cover for indirect discrimination.

This is, however, difficult to prove. In Denmark the full burden of proof, until the *Danfoss-II Case*, was on the employee side. In an arbitral award from April 1985 in the *Danfoss-I-case*[69], it was stated that the employees had not proved that the wage difference could not be due to reasons other than sex. Consequently the arbitrator found in favour of the employer. The burden of proof placed upon the employees in this case is in practice impossible to discharge. The result in this case is incompatible with the *Equal Pay Directive* and with the policy statements on the burden of proof contained in the EEC action programme on equality[70].

If the EEC draft proposal[71] for a directive on the burden of proof in equality cases is adopted, Danish law on this point will need to be changed.

The *Danfoss-I* arbitral award was the reason why the trade union brought a new case on the same issue and asked the chairman of the arbitration board to put questions to the *European Court of Justice*[72] concerning the burden of proof under the EEC rules. The *European Court* answered that the burden of proof is on the employer in cases where the wage system is not transparent and the employee shows that men and women doing work of equal value on average receive different payment.

Similar problems arise where the wage is fixed by individual contract in jobs where no collective agreement applies. One such case has been brought before the courts in Denmark[73].

4.3 Equal treatment

The *Danish Equal Treatment Act*[74] was enacted in 1978 in order to implement the *Equal Treatment Directive*[75]. The Act was amended in 1984 in order to make the EC *Commission* withdraw its infringement procedure against Denmark in *case 149/83*. New amendments were made in 1989 mainly to strengthen the role of the *Equal Status Council* and to bring together the *Equal Treatment Act* and the *Act on Parental Leave*. The Act was further amended in 1994 to implement the *Pregnancy Directive (92/45/EEC)*. The *Equal Treatment Act* contains a ban on direct and indirect sex discrimination.

Equal treatment is practically never dealt with by collective agreement. Accordingly the Danish case law on equal treatment stems from the ordinary courts. Most of the cases are about dismissal of pregnant women[76].

64. Arbitral award of 8.12.1977 in the FDB case.
65. Arbitral award of 29.4.1987 in the Premier Is-case.
66. Arbitral award of 11.2.1985, published in Arbejdsretligt Tidsskrift 1985, p. 185.
67. Case 109/88.
68. See in particular the Bilka-case, case 170/84. See for a critical assessment of the Danish practice on equal pay: NIELSEN, RUTH and KIRSTEN PRECHT, *EF-regler om ligeløn- perspektiver for Dansk ret*, U 1988, B, p. 169.
69. *Arbitral award of 16.4.1985 in the Danfos-I-case*, published in: *Arbejdsretligt Tidsskrift* 1985, p. 197.
70. COM(85) 801 p. 6.
71. V/1611/87.
72. Case 109/88.
73. U 1990, 871.
74. Consolidation Act no. 875 of 17.10.1994 on equal treatment.
75. 76/206/EEC.
76. See for details: ANDERSEN, AGNETE and NIELSEN, RUTH, *Ligestillingslovene med kommentarer*, Copenhagen 1990.

As is the case in equal pay matters, there are problems in Denmark concerning indirect sex discrimination under the *Equal Treatment Act*.

The judgment of the *Danish Supreme Court* in the *Danpo-case*[77] illustrates this. The case is about a factory where unskilled men and women workers did the same work (or work of equal value). They were covered by a joint collective agreement between on the one side the employer and on the other side the two above mentioned sex-segregated unions for unskilled workers *(Kvindeligt Arbejderforbund* and SiD). Until 1976 they had been covered by two separate collective agreements. The joint agreement contained a provision enabling the employer to send workers home without pay in certain situations if they were doing work that before 1976 was covered by the collective agreement with the female workers union. In the same situations workers who did work which before 1976 was covered by the collective agreement with the male-dominated union could not be sent home without pay. It was beyond dispute that in practice nearly everyone working under the unfavourable provision in the agreement was female and nearly everyone covered by the more favourable provision was male.

The women workers union (*Kvindeligt Arbejderforbund*) claimed that the collective agreement was incompatible with the *Equal Treatment Act* and consequently was partly invalid.

The majority in the *Supreme Court* found that there was no discrimination in the wording of the collective agreement and therefore no violation of the *Equal Treatment Act*. In principle men could do work which before 1976 was covered by the agreement with the women workers' union and women could do work which before 1976 was covered by the agreement with the male dominated union. In practice they did not.

The minority in the *Supreme Court* found that the *Equal Treatment Act* had been violated.

In my view, the majority finding in the *Danpo-case* is incompatible with the EEC *Equal Treatment Directive*, in particular the prohibition of indirect discrimination.

In another case[78] a male student who (for a period) wanted to work part-time as an unskilled worker brought an action against his union (SiD) and his employer because the collective agreement did not allow part-time work. Had he been a woman he would have *"belonged"* to the *Women Workers Union (Kvindeligt Arbejderforbund)* whose collective agreement covering the same work allowed part-time. The *Court* found that the collective agreement arrangement as a whole was incompatible with the *Equal Treatment Act* but the *Court* did not find that the *"male"* collective agreement seen in isolation was in contravention of the Act and therefore (partly) invalid. The plaintiff consequently lost his case. In Denmark there are different opinions as to whether it is favourable or unfavourable for the workers that the collective agreement empowers the employer to choose part-time employment. In the above case the *"male"* union claimed that their collective agreement was better than the female collective agreement. If any of the collective agreements were invalid it was the women's.

77. UfR 1983, 379.
78. U 1982, 484.

4.4 Collective redundancies

The *Collective Redundancies Directive*[79] was originally implemented in Denmark by *chapter 5A* of the *Act on Unemployment Benefit*. In 1994, a new *Act on Collective Redundancies* was adopted to implement the *Directive from 1992*[80] amending the *Collective Redundancy Directive*. The Act applies only when the redundancies are substantial. Within a period of 30 days they must amount to:

- at least 10 in a firm which normally employs above 20 and less than 100 employees.
- at least 10% of the number of employees in firms which normally employ 100 and under 300 employees.
- at least 30 in firms which normally employ at least 300 employees.

If an employer intends to make redundancies on this scale, he must begin negotiating as soon as possible with the employees of the firm or their representatives if any.

The purpose of the negotiation is to reach an agreement on either how to avoid the redundancies or how to limit their number and also on how to alleviate their effects.

The employer has an obligation to give the employees or their representatives all the information necessary. He must give written information at least of the reason for the redundancies, of the number of employees who are to be made redundant, the number of employees who are normally employed in the firm and also in which period the redundancies are to be effected. A copy of this written information must be sent to the labour market board.

If the employer still wants to carry out the redundancies after the negotiations he must send written information about this to the labour market board. As soon as possible and at the latest 10 days after the above mentioned information has been sent to the labour market board, the employer must give information about who is to be made redundant. These persons must get the information at the same time.

As mentioned above, the redundancies are effected 30 days after the information has been sent to the labour market board. Violations of negotiations and warning obligations are punishable by payment of a fine. In addition an employer who does not send the information to the labour market board must pay compensation to the employees in question equivalent to 30 day wages.

One Danish court has asked a question under *Article 177* of the EC *Treaty* concerning the *Collective Redundancies Directive*, namely whether it covers situations where an employer does not actually make collective dismissals but continues until he is unable to pay the wages, which in Denmark results in the workers stopping work collectively. The answer by the *European Court of Justice* was in the negative[81].

79. 75/129/EEC.
80. Directive 92/56/EEC, Danish Act no 414 of 1.6.1994.
81. Case 284/83, Dansk Metalarbejderforbund og Specialarbejderforbundet i Danmark v H. Nielsen og Søn, Maskinfabrik A/S.

4.5 Transfers of undertakings

The *Directive on the Retention of Acquired Rights on Transfers of Undertakings*[82] is implemented in Denmark by the *Act on Transfers of Undertakings*[83].

Under the Danish Act contracts of employment and collective agreements are not terminated by the transfer of the undertaking. All the transferor's rights, duties, powers or liabilities under individual employment contracts or collective agreements are automatically transferred to the transferee.

The provisions on information and consultation are sanctionable by a fine.

The transfer of a firm to a bankrupt estate is not covered by the *Act on transfers of undertakings*, whereas sale and other transfer of the firm *from a bankrupt estate* is covered by the Act.

Before the implementation of the EC *Directive on Transfers of Undertakings* the solution in Danish law was the opposite. Individual contracts of employment and collective agreements were terminated by the transfer of the undertaking unless the parties agreed to enter into new contracts and agreements.

The general aim of the EC *Directive* is to improve employment protection. The Danish way of implementing it is, however, not solely to the benefit of the workers. Danish collective agreements impose a peace obligation on the parties, i.e. a duty not to take industrial action.

Before the implementation of the directive, Danish collective agreements were terminated by the transfer. There was therefore no peace obligation. Workers who did not approve of the transfer were entitled to take industrial action, e.g. to strike, in order to influence the decision of management on whether or not to transfer the undertaking. Under current Danish law workers have to accept the decision of management without being able to influence it by industrial action. This is not a necessary consequence of the directive, which only requires Member States to ensure that the duties[84] of the employers to observe the terms of collective agreements are transferred. There is no need to transfer the rights of employers under collective agreements (in Denmark the most important employer right is the peace obligation on workers) but the Danish Act implementing the Directive does that.

The Directive gives Member States the option to choose whether there shall be joint and several liability of the transferor employer and the transferee employer or whether all liabilities shall be transferred to the transferee employer. The Danish Act has chosen the latter solution. The transferor can thus discharge himself of all obligations towards his employees by transferring the undertaking. The possibility that this may give rise to abuse, e.g. in bankruptcy cases, has been discussed in the literature[85].

82. 77/187/EEC.
83. Act no. 111 of 1979.
84. See art. 3.2 of the directive.
85. See e.g.: SVENNING ANDERSEN, LARS, *Lønmodtagernes retsstilling ved virksomhedsoverdragelse*, Copenhagen 1990, with further references.

Danish courts have asked questions under *Article 177* of the EC *Treaty* concerning the content and interpretation of *Directive 77/187/EEC* in a number of cases[86].

4.6 Insolvency of the employer

The *Directive on Protection of the Employees against the Insolvency of the Employer*[87] is not implemented in Denmark by special legislation. Denmark has an *Act on the Employees Guarantee Fund* which dates back to 1978 and which is usually regarded as sufficient to fulfil the requirements of the Directive.

4.7 Conclusion

Denmark's entry into the *Community* has generally led to a shift away from collective agreements towards legislation and it has confronted Denmark with the developments in employment protection that occurred in a number of other EU countries during the 1970s as well as with the fundamental rights protected by international conventions Denmark has ratified but traditionally not taken very seriously. The concept of collective redundancies was introduced in Danish law in order to implement the *Collective Redundancies Directive*. The legal significance of the enterprise was increased by the *Directive on the Retention of Acquired Rights by the Transfer of Undertakings*.

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86. Case 19/83, Knud Wendelboe m fl v L J Music, case 324/86, Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S, case 287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, case 101/87, P. Bork International A/S under konkurs v Foreningen af arbejdsledere i Danmark, and Jens E. Olsen, Karl Hansen m fl. samt HK v Junckers Industrier A/S and case 105/84, Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar.
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GERMANY

M. Weiss

INTRODUCTION

The structures as sketched in the previous edition have remained relatively stable in Germany. The impact of the structural change on the system of labour relations in Germany was less dramatic than in most other countries. This system has even survived the reunification. However, the task of reconstructing the economy in Eastern Germany has increased the challenge for the actors and institutions. This accelerates adaptation processes that otherwise might have started much later.

The trade unions of the former German Democratic Republic (GDR) were dissolved. Employers' associations any way had not existed in the former GDR. The West German trade unions and employers' associations, therefore, have extended their scope of activity to the territory of the former GDR.

Disregarding few exceptions and transitional rules of minor importance for a limited period the system of the West-German labour law and all its institutions as a whole was transferred to the new East German states. Thereby also the system of institutionalised workers' participation, a characteristic feature of the German labour law, was established in these new states as well as the system of labour courts. All this meant a substantial change for the East German population and consequently could not take place without difficulties.

Still productivity differs in both parts of Germany, being distinctly lower in the East. This causes difficulties in adapting the working conditions to an equal level in the two parts of the country.

CHAPTER I: THE MAIN ACTORS

In addition to the individual workers and individual employers there are mainly four actors to be taken into account if sketching the basic structure of the German system: the trade unions, the works councils and the workers representatives in supervisory boards of big companies on the one hand and the employers associations on the other hand. Among the tripartite bodies the *Federal Labour Office* is playing a dominant role. As far as State authorities and Government institutions are concerned the *Federal Ministry of Labour and Social Affairs* is the decisive organ.

1. Trade Unions

At least as a general pattern there is no political or ideological fragmentation between different unions. Different political and ideological wings are amalgamated in one and the same association. This principle of amalgamated unions, established after the second World War is still strong and powerful even if meanwhile specific Christian unions are existing. They play a very marginal role so far.

The second important characteristic of unions in the Federal Republic is the fact that they are organised on an industry basis. This means that the union is open to all employees in the industry concerned no matter which trade or occupation they are engaged in. This again implies that there is only one union for all of the industry. Industry in this context should be understood in a very broad sense. Thus, for example the metal union covers the automobile industry as well as for example the electrical industry, the shipbuilding industry, the machine building industry and the computer industry, to mention just a few. Again there are unions which do not fit in this industry-based pattern. The most important example in this context is the white-collar employees' union (DAG). This union is not confined to any one industry, it is open to white-collar workers of all industries. This leads to the fact that as far as white-collar employees are concerned the white-collar employees' union competed with the industry-based unions. Another important exception is the union of education and science (GEW) which is not open to all employees of an establishment but only to those who have specific professions and occupations in the system of education and science.

The most important associations of employees in the Federal Republic of Germany are the individual unions organised in the *German Federation of Trade Unions* (DGB). Members of this Federation are not individual employees but unions. According to the standing rules of the DGB, member unions must co-ordinate their fields of organisation. These can be altered only in agreement with the union or unions concerned and with the DGB itself. To quote an example: when in 1978 the police union (GdP) became member of the DGB, the union of public services, transport and traffic (ÖTV) was asked to recommend to its members, working for police departments, to transfer to the GdP. At the same time, the police union recommended to its members, not in the police service, to transfer to the ÖTV.

Thus overlapping and competition is eliminated between unions organised in the DGB. There is one exception to this principle. As already mentioned the union of education and science (GEW) is open to employees employed in establishments covered by the union of public services, transport and traffic, thus a certain amount of competition is inevitable.

In the future the number of DGB member unions will continue to drop. The current policy tries to equalize the power of the various individual unions by way of merger. Further reorganizations will follow and lead to a significant change of the balance of power within the DGB.

Due to the already implemented privatization of the railway system the railworkers union is no longer related to the public but to the private sector. The same will apply to the union of employees of the German mail when the privatization of the postal services will be completed. This shift from the public to the private sector, however, does not have a significant impact on the structure of those unions.

According to their standing rules and programmes, the DGB and its member unions are politically neutral, that is they are not organised along party lines and do not adhere to any ideology. But it should be mentioned that in reality the DGB unions are politically closer to the Social Democratic Party than to any other party.

The DGB, financed by dues paid by the individual unions, has a mainly policy-making function, although the member unions are not bound by its policies. The DGB does not conclude collective agreements, these are handled by the member unions individually. It can mediate in inter-union disputes if asked to do so. Its main function should be seen as a spokesman for the labour movement on the one hand

and as a coordinator of the policies of the member unions on the other.

The organisational structure of the DGB and its member unions is uniform on all important aspects. The member unions are national associations and are divided into federal, district and local levels. Some unions also have a state level organisation sandwiched between the district and federal levels. Others also have local plant branches.

Governing bodies of the individual unions, at every level, are the assemblies of delegates or members, the executive board and, at federal level, the executive council. The highest governing body of each individual union is the federal convention, which meets every three or four years. Ideally, this should reflect the membership structure of the individual unions. But in practice, this is often not the case. Women, for example are under-represented at the convention in proportion to their numbers on the membership rolls. It is the function of the convention to elect the Federal Executive Board, to vote on changes in the standing rules and to formulate the basic principles of union policy. It is very doubtful to what degree the convention actually performs this last function. The assumption that union policy is more likely to be determined by the executive board than by the delegates is not entirely without foundation, the board has a multitude of opportunities to influence the formation of opinion within the convention.

Between convention sessions the Federal Executive Board is the ultimate authority. It consists in almost all unions of delegates elected at district conferences and members of the federal executive board. The administration is carried out at federal level by the executive board, on lower levels by subordinate state or district boards and local administrative boards.

The DGB consists of a federal association, state associations, district associations and numerous local branches. According to its guidelines, local branches are to be organised in all places with more than 200 union members.

At every organisational level of the DGB there is an executive board and an assembly of delegates (at local level an assembly of members). The assembly of delegates is made up of members from the individual unions.

The federal convention of the DGB is, like that of the individual unions, the highest governing body. It is an assembly of delegates elected by members of all the unions, meeting every three years. Individual unions are represented according to their membership strength. This means that large unions, such as the metal union and the union of public services, transport and traffic, have the strongest positions.

Between the federal conventions the executive council is the highest decision-making body of the DGB. It consists of 100 members nominated by the individual unions, the Federal Executive board and the district chairman of the DGB. The authority of the executive council is so far-reaching that it may be regarded, more or less, as the main decision-making body of the DGB.

As in the individual unions the daily business of the DGB is carried out by the executive board. The federal executive board of the DGB comprises the managing board (eight members and a chairman) and the chairman of each of the DGB member unions.

In 1993 about 10.8 million out of the employed work-force of about 25.5 million and about 4.0 million unemployed persons were organised in DGB member unions. The figures for the white-collar workers' union (DAG) (about 0.6 million) and the Christian unions (about 0.3 million) are comparatively small. The same is true for the different unions of leading personnel whose umbrella organisation is the *Association of Leading Personnel* (ULA) (about 20,000). The rate of unionisation remained relatively stable, somewhere between 30 to 40%. In 1970 on the average 30.5% of the workforce were organized in the DGB, in 1990 these were 31% in 1990 (the several per cent organized in unions not belonging to the DGB not included). After reunification the rate climbed up to 38% due to a bigger amount of unionization in the former territory of East Germany. In the meantime there is a significant loss of membership throughout the union movement.

The role of unions as organisations representing the workers' interests is generally accepted and uncontested in the Federal Republic of Germany. The trade unions are not only factually integrated in society but they have quite a few institutionalised rights of participation. These rights are not only limited to matters of the labour market but go far beyond this. The unions to a more or less limited extent are integrated on boards dealing with educational and cultural matters, on boards of mass media, in institutions dealing with economic and social security matters, in the system of labour courts and social security courts, to give some idea of the multitude of their activities.

Among the many challenges the trade unions presently are facing the following may be the most important one. Traditionally German trade unions not merely understood their role as being a spokesman of the members but of the workers as a whole. In times of full employment during the booming periods from the mid-fifties to the mid-seventies it was no problem to keep up this image: frictions between members' interests and non-members' interests did not become evident. This has changed. Nowadays the promotion of members' interests may increase the barriers for those belonging to peripheral groups and especially for those who are unemployed. Due to their traditional self-understanding trade unions have no choice but to integrate members' interests and non-members' interests, including the interests of those who are unemployed. The tensions created by this difficult attempt of harmonisation of heterogeneous interests has become most evident in the controversy on the question whether reduction of working time should be reached with or without full compensation of wage: should members give up part of their income in order to reduce labour costs and thereby give the enterprises a chance to hire unemployed persons or should unions simply focus on maintaining or improving the income situation of their members? Recently in East Germany as well as in West Germany the problem arose that more companies had difficulties to cope with the minimum conditions as laid down in the collective agreements. This led to the need to flexibilize the collective agreements and to empower the actors on plant and enterprise level to deviate within certain limits from these minimum standards. The effect is a decentralization of

bargaining power and bargaining activities, at least to a certain extent. The works councils as bodies of institutionalized workers' participation thereby are integrated in the structure of collective bargaining. These examples show the dilemma the unions are put in. It is important to stress that the awareness of this dilemma among the population as a whole has grown and has led to a very intensive discussion on the trade unions' role. In short: it has become one of the political key issues in the FRG.

While it was rather easy for trade unions to respond to the homogeneous interests of the traditional core membership of full timers being employed for an indefinite time, this has changed in view of the increasing variety of heterogeneous interests among the membership. Since German unions are big organisations, centralised on a national level, it is extremely difficult for them to maintain solidarity throughout the membership and at the same time respond to the specific interests of specific groups within the membership. So far German unions are meeting this need only to a very marginal extent. This explains why those who belong to the peripheral groups of the labour market are still much more reluctant to join the unions than the traditional core groups and why the membership has dropped after having risen at first so drastically in the former GDR after the reunification. Unions not only have difficulties in integrating the peripherical groups of workers and meeting the specific interests of the employees in the former GDR, they in addition still have problems to become attractive for white-collar workers. While the overall rate of unionisation amounts to almost 40%, the rate of white-collar unionisation not even reaches 20%. This shows clearly that the unions at least up to now could not overcome the image to be an organisation mainly for blue-collar workers. While unions until recently simply ignored the specific interests of peripherical groups and white-collars, this has changed. Now they make all kind of efforts to become attractive also for those groups. It however turns out that this policy of adaptation only can be performed very slowly in view of the fact that the traditional core groups still are very strong and are determined to defend their position within the unions.

2. Works Councils

Workers' participation by works councils is somehow the backbone of the German system of industrial relations. Originally in 1920 the system of institutionalised workers' participation in the private and in the public sector was governed by the same law. This is no longer the case today. The relevant law for the private sector is the *Works Constitution Act of 1972*. The *Federal Staff Representation Act of 1974* covers the public sector. It should be stressed that for the personnel of the different states the *Federal Staff Representation Act* is specified by the respective *State Staff Representation Acts*. These State Acts, however, may not exceed the frame provided by the Federal Act. However the difference between the regulation in the private and in the public sector may be neglected in the context of this report. In order to illustrate the basic structure it may be sufficient to sketch the model for the private sector.

Contrary to many other countries, works councils in the Federal Republic of Germany are exclusively made up of workers' representatives. Works councils act as counterparts of the management on the side of the workers.

Works council members are elected by secret ballot by all workers of the plant over 18 years of age. Workers over 18 years of age and who have been employed for at least six months, may be elected. The term of office for works council members is four years. Re-election is possible and not limited in any way.

Every plant with more than five employees over 18 years of age, three of them having been employed for at last six months, is required by law to establish a works council. Nevertheless, many small and medium-sized plants do not have a works council. Only larger enterprises fully comply with the law. According to estimates, only around 20% of all plants required to establish a works council have in actual practice followed the legal requirement. It is up to the workers of the plant whether they want to establish a works council or not. There is no sanction, if they fail to do so. But obviously employees who do not establish a works council voluntarily abandon all the rights given to the works council by law.

In principle and according to the law works councils are still separate institutions from trade unions. They represent all workers of a plant whether they are union members or not. But in spite of the institutional separation between unions and works councils there are close links. Meanwhile the unions have succeeded in influencing the composition of works councils, the large majority of works council members are union members.

The size of the works council depends on the number of workers in the plant. In plants with up to 20 employees it is only one member, in plants with between 21 and 50 employees it should be three members and finally in plants with between 7,001 and 9,000 employees it reaches 31 employees. Above this level two more members must be added for each additional part of 3,000 employees.

Blue-collar workers and white-collar workers are treated as separate groups. The proportion of representatives of each group in the works council depends on the proportion of each group of the total work-force of the plant.

If works councils are established in different plants of a multiplant enterprise, they must form a general works council. Each individual works council appoints two of its members (a blue-collar representative and a white-collar representative) to the general works council. The works councils of the individual plants are not subordinated to the general works council. The general works council is only authorised to deal with matters which cannot be regulated at plant level or which are delegated to it by an individual works council.

It is up to the general works councils of enterprises belonging to a group to establish a group works council at the level of the parent company. Each general works council would have to appoint two of its members (one blue-collar representative and one white-collar representative). But even if the *Works Constitution Act of 1972* opens this channel to establish a group works council, it only plays a marginal role in actual practice.

Specific rights are ascribed to the works councils by law, ranging from the mere right to information or the right to be consulted through the right of control and veto, to the most important right of all: the right of co-determination.

Co-determination in this context means that management cannot take any decisions without the consent of the works council. In the absence of a consensus, any move by management would be judged to be illegal. But co-determination goes even further. It gives both sides an equal voice in the decision-making process. Therefore either side – at least in principle – can take the initiative and call for a new settlement.

3. Representative Body for Executive Staff

According to the *Works Constitution Act* executive staff is not covered by works council's representation. Members of this group are neither permitted to participate in the election of works council members nor can they be elected. In many enterprises the group of executive staff, excluded from works council's representation, had established its own representative body on basis on an agreement between the group and the employer. There was no homogeneous pattern of the organizational structure and the rights of these representative bodies. These bodies existed in about 330 enterprises. In all cases they only dealt with matters concerning the group of executive staff.

In 1989 an *Act on Representative Body for Executive Staff* was passed. Thereby a legal basis for executive staff's representation now is provided. According to this Act a representative body for the executive staff may be elected in establishments regularly employing at least 10 executive staff members. It is up to the executive staff whether such a body is to be formed. If an establishment has fewer than 10 employees classed as executive staff, they are counted towards the number employed in the geographically nearest establishment of the same company in which the quorum is met. A general representative body for executive staff must be formed if there are several such bodies at the individual establishment level. A group representative body for executive staff can be formed with the agreement of the general executive bodies of the group member companies together employing at least 75% of the executive staff employed by the group of companies as a whole.

Representive bodies of executive staff are confined to information and consultation rights. They neither dispose on rights of veto nor on co-determination rights. Whether the formally weak position, however, corresponds with a weak position in actual reality is an open question. So far empirical evidence is lacking.

4. Workers Representatives in the Supervisory Board

Workers' participation in the supervisory board was built into the traditional corporate framework and simply altered the previous position of the corporate governing bodies. The two-board system, with both a supervisory and a management board, existed before the introduction of workers' participation. Both boards retain their traditional functions under the new system but, since workers have the right to representation on the supervisory board, these boards are no longer composed solely of persons guided by the interests of the owners. Workers are represented only on the supervisory board, which has purely control functions. The supervisory board elects the management board and monitors its activities, but does not perform management functions itself.

The law distinguishes three different forms of participation. The first applies only to particular sectors: the coal mining, iron and steel industries. This law was introduced in 1951.

The 1951 statute adopted a participatory model based on equal representation of shareholders and workers on the supervisory board, the chairmanship being reserved for a *"neutral"* person, elected by a majority vote of both workers' and shareholders' representatives. The 1951 statute goes slightly beyond the level of the supervisory board. It allows some sort of worker representation on the management board for the first, and so far the only, time. One member of the management board must be a *"Work director"*, in charge of all social and personnel affairs. This means that he cannot be elected against the votes of the majority of the workers' representatives on the supervisory board but, once elected, the work director has the same legal status as all the other members of the management board.

The second model of workers' representation, introduced by the *Works Constitution Act in 1952*, does not relate to a specific sector, but applies only to enterprises having a minimum number of employees. Any company employing more than 500 people must admit workers' representatives to the supervisory board, but only one-third of that board's members must be employees' representatives.

The third and last model, the *1976 Co-determination Act*, represents an attempt to close the gap between the two previous models and to ensure increased participation for all workers. Companies with at least 2,000 employees must allow equal representation on the supervisory board. Unlike the steel and coal model, this law does not provide for a *"neutral"* chairman, but leaves his election to the majority of the board: in case of a deadlock, the law leaves it to the shareholders' representatives to elect the chairman. The chairman must therefore be acceptable to the owners' representatives. Since in cases of deadlock the chairman has the deciding vote, the final word is always with the shareholders' representatives.

The three models differ very much in their answer to the question of who should represent the employees on the supervisory board. None of the models requires that all representatives have to be employees of the particular enterprise (so called internal delegates). According to the law of 1952 a certain proportion of external delegates is allowed, but the appointments are the sole responsibility of the employees of the enterprise. The unions have no formal influence whatsoever. The two other models give the union a right to nominate the external delegates. But there is a very important difference between the two: contrary to the steel and coal model, the Act of 1976 provides that the workers of the enterprise are entitled to reject any candidate proposed by the unions.

5. Relationship between those Actors on the workers' side

While the formal structure gives the impression that there is no connection between the works council's participation and

the workers' representation in the supervisory board, this is significantly different in practice. In most cases the majority of the workers' representatives in the supervisory board that are recruited among the employees are at the same time are works council members. It has become the normal pattern that at least the chairman and the vice-chairman of the works council (or of the central works council in a multi-plant enterprise) also represent the workers in the supervisory board.

This interconnection obviously leads to a strengthening of both systems of institutional workers' participation. In quite a few companies this interrelationship has led to the establishment of informal channels. And in many companies management tends to discuss critical questions with at least the internal workers' representatives in informal meetings before information is given to the supervisory board. The intensity of these informal communications appears to be the strongest in the case of the coal mining, iron and steel industries, where the *"Work director"* functions as an important link. Since however these industries are becoming less and less important, this very model is playing less and less a role. Only due to legislative activities to be described below it could be kept alive to a relevant extent.

Due to the fact that decentralisation has become a necessity (*see below*) works councils are becoming more and more powerful. In spite of the fact that most works council members at the same time are union members, works councils very often tend to act very autonomously. Their micro-perspective is not necessarily identical with the trade union's macro-perspective. Especially in the former GDR works councils quite often are not satisfied by the way the specific needs of the East German economy and labour market are dealt with by the trade unions. Consequently tensions between trade unions and works councils no longer can be ignored. Whether cooperation or rivalry between these two actors will be the pattern of the future, is still an open question.

6. Employers' Associations

Private employers are united in trade associations as well as in inter-industrial organisations. The trade and inter-industrial associations exist independent of one another, most employers are members of both.

Like the employees' trade unions, the employers' trade associations are also, as a rule, organised on three levels: local or district, state and federal. Just as on the employees' side these associations are organised on an industry basis. Thus the employers in the same industry (e.g. metal industries) form associations on a local or district level. These local or district associations are united on a state level and the state associations are united on a federal level in a central organisation. The inter-industrial employers' associations are divided into local or district associations and, as a rule, on state level organisations.

The majority of the central trades associations and the inter-industrial state organisations of the employers belong to the *German Confederation of Employers' Associations* (BDA).

Although it is difficult to obtain exact figures on the organisation rate of employers, there is no doubt that this exceeds by far the employees' rate of unionisation. In the manufacturing industry, in banking and in insurance the average organisation rate is estimated to be between 80% and 90%. This average figure comprises industries with a much higher rate. Thus the rate in the chemical industry is estimated at 100%. Lower rates are to be found in the engineering industry with about 70%.

The BDA covers the employers' associations of practically all economic sectors. In addition to manufacturing industries it includes mining, crafts, agriculture, commerce, private banking, private insurance, private transport and various other trades.

According to its standing rules the function of the Confederation is to represent the socio-political interests of employers beyond the scope of one state or economic sector. The members are not bound by its policies. Neither the BDA nor the inter-industrial associations, participate in collective bargaining. This is exclusively the responsibility of the individual employers' trade organisations. The Confederation does make recommendations as to strategy when bargaining with the unions.

There are two associations in the public sector, one for the states, the associations of German States, and one for the municipalities, the union of municipal employers' associations. The latter is a confederation of ten member associations mainly organised within the region of a state.

Employers' associations in the private sector traditionally have tried to be an organisation of all enterprises, irrespective of their size. Small and medium sized enterprises were supposed to have the same influence and to get the same rewards as big business. Due to the crisis and to the increased international competition labour costs have become a decisive factor influencing competivity. It has turned out that – at least in general – increases of labour costs easier can be absorbed by big enterprises than by small and medium sized companies. Therefore employers' associations are attacked by their small and medium sized members as well as by many members from the former GDR as to be much too generous and to merely represent the interests of big business. Groups of small and medium sized enterprises even discuss whether they should step out of the traditional employers' associations and found new organisations. It can be predicted that this will not happen. However the tensions within the employers' associations have become strong enough to make a redefinition of the relationship between smaller and bigger enterprises within the employers' associations inevitable. May be that employers' associations will have to give up the policy of unified standards for all members, replacing this policy by specific standards for big enterprises on the one hand and small and medium-sized enterprises on the other hand.

The employers associations' self-understanding of their role also has been significantly affected by the structural change. On the one hand employers' associations are inclined to promote the companies' flexibility and autonomy in order to increase their adaptability to market needs. On the other hand employers' associations cannot follow this trend too far without loosing the basic justification of their very existence. In other words: in order to legitimise their function as bargaining opponents of the unions they by necessity have to

emphasize at last a minimum of centralised collective regulations. For this very reason employers associations' always have opposed proposals to make it possible to hire unionised workers under conditions below the level guaranteed in collective agreements. In short: employers' associations as well as trade unions are interested very much in maintaining the traditional system of region-wide or industry-wide collective bargaining.

7. *Federal Labour Office*

The *Federal Labour Office* is organised as a tripartite body. It has subsidiaries on regional and local levels. It is by far the most important agency in the field of labour administration. The Labour Office not only administers the system of unemployment insurance, but has quite a task to actively intervene on the labour market. It had until July 1994 the monopoly of placement service, it organises and finances training and retraining programmes, it can provide temporary employment for unemployed persons, it can stimulate employment by providing subsidies to enterprises etc. The functioning of the Labour Office is regulated in detail by the law.

8. Private placement service agencies

In August 1994 the monopoly of the Federal Labour Office was revoked. Thus private placement service agencies for the first time have appeared on the German labour market. Due to the short period of time having elapsed since, it is not yet possible to predict what impact these agencies will have in future.

9. *Federal Ministry of Labour and Social Affairs*

The *Federal Ministry of Labour and Social Affairs* is not only drafting the Acts in the area of labour law and social security law but it also has a far-reaching competence to regulate specific matters itself. This power is based on laws empowering the Ministry. In addition to these formal functions the Ministry is promoting a considerable amount of research in the field of labour and social security. In addition the Federal Ministry has the competence – on request of at least one contracting party – to extend the application of collective agreements on non-unionised workers by way of declaration of general binding. Finally the Ministry has the very important task to supervise the activities of other institutions, among them the *Federal Labour Office.*

CHAPTER II: THE MEANS OF REGULATING WORKING CONDITIONS

1. The Constitution

The constitution is the top in the hierarchy of sources. It plays a dominant role in the field of labour law. This is especially true for collective labour law where legislation is very fragmentary. The problems not regulated by the legislator have to be solved by recourse to the constitution. Thus for example all the rules on industrial conflict were developed by interpretation of principles laid down in the constitution. But the constitution also plays an important role in individual labour law. It should be borne in mind that many legal provisions, concerning the contractual relationship, originate from a totally different period, namely from the turn of the century. They are embedded in the *Civil Code of 1900.* Thus many of those provisions are no longer compatible with basic principles laid down in the constitution. This is why the constitution, also in the area of individual labour law, is shaping the legal framework to a great extent. Since the principles laid down in the constitution are very vague and unspecific, the leeway for interpretation is rather wide. Thereby it is evident that this recourse to the constitution is increasing the powers of the interpreting agencies, particularly the courts.

In labour law mainly two articles of the constitution are of predominant importance: art. 9 section 3 guaranteeing the freedom of association and art. 14 guaranteeing the private property, including the private property of means of production.

Freedom of association in the German context has three dimensions: the individual's freedom to set up an association, to join an association, to remain in an association, and to be active in an association (so called *"positive"* freedom of association) as well the individual's conflicting freedom not to join an association or to leave an association (so called *"negative"* freedom of association). The borderline between those two conflicting freedoms happens to be one of the most difficult and most controversial problems of German labour law. The third dimension refers to the so called collective freedom of association understood as a guarantee of the association's existence as well as of its activities.

The constitutional guarantee of private property on means of production is understood to be the legal basis for management's prerogatives. It again is one of the most difficult tasks to draw the borderline between the scope of collective bargaining and workers' participation on the one hand and the scope of this constitutional guarantee on the other hand.

2. Ordinary Legislation

In spite of what has been said on the dominant role of the constitution, it should be pointed out that in the FRG the level of protective legislation is comparatively high. Thus ordinary legislation is particularly important in so far as it sets minimum standards for all workers, whether they are union members or not. Since the competence to legislate in the field of labour law is given to the Federal Legislator, it is almost exclusively Federal legislation which has to be taken into consideration. In spite of the federal structure of the Republic this evidently leads to a homogeneous pattern of labour law in all the different states. If constitutions of the states or ordinary laws contain provisions on labour law, they are only applicable in so far as they do not contradict Federal law. Federal law always takes priority even if the Federal source has a much lower standard than the state source. For example, ordinary Federal legislation always takes priority over state constitutions.

The problem is that the various legal provisions, stemming quite often from very different periods, are spread over so many specific Acts that it is difficult, even for the expert, to oversee the whole structure. This is why, in the seventies, an attempt was made to combine at least the principal rules of individual labour law into one single code. Thus with the participation of all the groups involved during seven years,

from 1970 to 1977, a draft of an *Act on the Employment Relationship* was prepared which tried to combine the existing rules, and which at the same time tried to reform the whole structure. This turned out to be a futile attempt. The draft has remained a draft until the present day. The reason for this is simple: it has become impossible for the legislator to obtain the necessary majority for comprehensive codification in this area. Thus the legislator, as it seems, is only able to legislate on specific problems and even here it is becoming increasingly difficult.

In the former GDR a comprehensive *Labour Code* containing all the rules of labour law had existed. According to *Article 30 para. 1 No. 1* of the *Unification Treaty*, the parliament of the unified Germany is supposed to codify as soon as possible, *"the law referring to the individual employment relationship as well as the protective standards referring to working time, work on Sundays and holidays and the specific protection of women"*. No. 2 of the same paragraph extends this legislative program to the codification of health and safety standards. In the meantime the legislator has fulfilled its task in reference to working time.

In 1992 a group of labour law professors from East and West Germany elaborated a draft for an *Act on Employment Contract Law*. The *German Law Association in 1992* with an impressive majority recommended legislative measures on the basis of this draft. For a long time, however, it looked again as if nothing would happen. In May 1995, the government of Saxony has presented a draft for such an Act in the Federal Council. Other state governments plan to follow this example with respective drafts. Nevertheless, doubts whether these initiatives will lead to a Federal Act are justified. It is very unlikely that such a comprehensive codification will be achieved. The mechanism of legislation, being constrained by diverging pressure groups, seems to have great difficulties in gaining the necessary majority for such an ambitious project. In addition it is questionable whether in view of the European integration it is desirable to increase the rigidity of the national law by such a codification.

The legislator, in many cases, delegates the power to regulate a specific matter to administrative agencies or other bodies. The constitution requires that such a delegation should be exactly circumscribed in the law in order to eliminate the danger that the administrative agency, or another body, in fact is playing the role of the legislator. Basic decisions cannot be delegated by the legislator.

3. Court Decisions

Court decisions play a very important role in the field of labour law. This is not only true where the courts specify the general clauses and general terms of law, but also where they have to fill in the gaps left open by the legislator. According to the *Act on Court Procedure in Labour Matters* the *Federal Labour Court* has the sole power to develop the law further. In fact the *Federal Labour Court* has become at least as important as the legislator as far as regulations in the field of labour law are concerned. Thus it is not surprising at all that a big discussion on the proper role of the courts, compared to the legislator, is going on in the Federal Republic. The question is how far the actual role of the courts, especially the *Federal Labour Court*, is still in accordance with the principle of separation of legislative and judicial power as laid down in the Constitution.

4. Collective Agreements

Collective bargaining in the Federal Republic of Germany almost exclusively takes place on a high level, be it region-wide or for a whole industry. Before the reunification the latter used to be nation-wide but now separate collective agreements are concluded for the eastern and the western part of the country. Within those two parts the segmentation between different regions - at least to a great extent - is merely formal. Thus, to just give an example, in the metal industry the territory of the whole industry is divided in regions. Collective bargaining separately takes place within each region. In reality however these bargaining activities are highly centralised: they are coordinated by the headquarters and (for the reasons described above) the claims are very much the same. In addition it turns out that - at least in the big majority of the cases - the results reached in one area more or less become the model for the other areas.

Even if in Germany inter-industry agreements do not exist it would be a wrong perception to understand the collective agreements in the different industries as being totally disconnected from each other. The big unions are acting as a sort of trend setter. This especially applies to the margin of wage increase. Consequently the homogeneity of collective bargaining results exceeds by far the limits of one industry. Since - at least in principle - the topics of bargaining in the public and in the private sector are very much the same, this trend setting role may be performed by a big union of the public or the private sector. Since the trend-setting role is interchangeable between private and public sector it is evident that there is - at least to a relevant extent - homogeneity between bargaining results reached in both sectors.

The normative part of collective agreements (in contrary to the obligatory part which deals with rights and duties between the contracting parties) directly affects the individual employment relationship. In other words, if rights embedded in normative clauses of collective agreements are violated, the individual worker or the employer to whom these clauses apply, has recourse to court assistance. But it should be kept in mind that, at least in principle, such clauses only cover union members being employed by an employer who himself is a member of the employers' association which signed the collective agreement.

The relationship between legislation and the normative part of collective agreements is rather complicated. If there is an Act which stipulates a minimum standard, the collective agreement cannot fall below but only rise above this standard.

If the law does not set a minimum standard but only provides regulation put at the disposal of the contracting parties, it is possible for the collective agreement to disregard such a regulation. Often, however, the legislator does not expressly declare whether a law is setting a minimum standard or whether it is at the disposal of contracting parties. This can only be determined by interpretation.

Finally, the legal provision may be such that no deviation whatsoever is allowed, whether it is for the better or for the

worse of the worker. Again, it has to be determined by interpretation where such a provision exists.

The relationship between collective agreements and court decisions is even more complicated. This is not a problem where the courts are merely specifying general clauses and general terms. Here they are supposed to explain the legal provision, therefore it is evident that the relationship is the same as the relationship to the respective legislation. The real problem arises where the courts are setting standards not simply implicated by existing legislation. This judge-made law sets minimum standards and thus, in principle, excludes clauses in collective agreements which fall below this standard.

In Germany the normative provisions of a collective agreement can be extended to those employers and workers who are not members of the respective organizations: by the declaration of general binding. Thereby minimum standards can be guaranteed for all workers employed in the respective branches or regions. However, this does not apply for enterprises from other EU-member countries acting on the German territory with their own workers. They still are entitled to employ their workers on lower conditions. Especially in the construction industries this has led to unrest due to the high unemployment rate among German workers of this sector. The dumping practice of such enterprises is considered to be unfair competition. Therefore, the German government has pushed very much the project of an EU-*Directive on the Posting of Workers*.

5. Work Agreements

The works council and the employer may sign work agreements containing normative clauses, having basically the same effect on the individual employment relationship as normative clauses of collective agreements. There is an important difference though, work agreements always cover all the work-force whether they are union members or not. This basic disparity creates enormous problems of harmonisation between the two sources of law. The relationship between collective agreements and work agreements is, for many reasons, one of the most difficult problems of labour law.

Work agreements dealing with remuneration or other working conditions are only allowed when the same matter is not treated in a collective agreement. For work agreements to be unlawful, the fact suffices that the specific matter is usually regulated in collective agreements in the region and branch.

If a collective agreement exists, it is sufficient that it covers the region and the branch, no matter whether it applies to the specific establishment and to the employment relationships within this establishment. This implies that, even in establishments where neither the employer is a member of the employers' association nor the workers are union members, remuneration or other working conditions cannot be regulated by work agreements.

This very rigid rule only applies to work agreements on matters where the works council has no right of co-determination. In these cases, as already mentioned, the works council has no power to induce the management to sign such an agreement. The reason is to prevent the works council competing with the unions. Such a competition is considered to endanger the strength of the collective bargaining system. Should the system of collective agreements break down, then there would be no adequate substitute at plant level when work agreements cannot be enforced by the works council. Therefore, in order to safeguard the strength of the system of collective bargaining, the prerogative of regulating working conditions must be reserved to the parties of the collective agreement.

According to the law, it is up to the parties of the collective agreement to decide whether or not, in spite of the general rule just explained, work agreements supplementing and specifying the collective agreement are allowed. This may be done by including a so called opening clause through way of collective agreement.

In matters where the works council has a real co-determination right the conflict between collective agreements and works council's power must be solved in a different way, otherwise the provisions of the collective agreements would only lead to the expansion of management's decision-making powers and diverge from the intent of the *Works Constitution Act*. Therefore, conflicts are solved as follows: it is still the prerogative of the parties to the collective agreements to regulate matters themselves, but once they have dealt with a matter it does not mean a complete loss of the power of the works council. First, the position of the works council is affected only if the plant is covered by a collective agreement. Secondly, co-determination is only excluded when the collective agreement is so detailed and specific that no margin is left for alternative decisions. For all aspects where the collective agreement leaves a leeway for alternative decisions by management, the works council's co-determination right must be respected.

6. The Structural Change of Collective Bargaining

Today collective bargaining in Germany faces three major problems: The fighting against unemployment and loss of the existing jobs, the maintenance of Germany as an important industrial site and the rising of the working conditions in East Germany to the western level.

Since 1984 the reduction of working time has become the most important measure in fighting unemployment by collective agreements. The employers do not oppose this strategy any longer. The reduction of working time as such is no longer the controversial issue but the trade-off to be paid for this goal. Employers strive for more flexibility. This implies the possibility to regulate working time patterns differently for individual workers and groups of workers within a certain margin predetermined by the collective agreement. And it especially implies a flexible distribution of working time throughout the week, including at least in principle Saturdays and Sundays as far as this does not contradict with the law. This concept has so far been the basis for a number of collective agreements and this is reflecting a general development. The even more important change in the agreements on working time reduction, however, has been the fact that the unions' doctrine of *"working time reduction without reduction of wages"* had to be given up. Lately the development has shown that a wage

reduction is inevitable. This is a challenge for the trade unions' legitimacy. It only can be met if the same agreements contain job guarantees at least for a certain limited period. This has been achieved in some pilot agreements.

This policy has led to a new structure of collective bargaining. Since flexibility can only be achieved by taking account of the specific circumstances of specific plants, the implementation of such agreements by necessity has to take place on the decentralised level of the plant. Therefore, the collective agreements provide only a general framework and have to be specified by work agreements. This leads inevitably to an ever increasing integration of works councils into the collective bargaining structure. Thereby the works councils get a chance to improve their image and to gain more power. How this power increase may be reduced and how it will be possible to more effectively limit the works councils' activities by clauses in collective agreements presently are key issues to be discussed by labour lawyers and in trade union camps.

In addition the traditional system of centralised bargaining in Germany has come under pressure by the fact that more and more enterprises (especially on the territory of the former GDR, but also to a smaller extent in the West) are unable to cope with the minimum standards guaranteed by the collective agreements In the new East German states this became especially evident in the context of a collective agreement concluded in 1991 for the metal industry. This agreement provided for a gradual annual wage increase to reach an equalisation with the conditions in West Germany after a few years. I very quickly turned out that many enterprises could not keep up with these minimum standards. Therefore, the agreement had to be modified. The time frame has been extended and - more important - a specific clause was embedded into the agreement according to which exceptions are allowed under certain very restricted conditions. The decisive force leading to this change was the fact that in spite of the original collective agreement works councils and employers in quite a few enterprises agreed to undercut the minimum conditions for the sake of the survival of the enterprise. Such practices ignoring the collective agreements also can be found in West-Germany. This has led to a discussion on the question whether collective agreements should expressly allow works councils and employers to set up lower standards by work agreements within a certain margin defined in the collective agreement. The main problem in this context consists in the question of what the parties to the collective agreement can do to maintain the control of what happens. It seems as if this discussion will go on for some while, solutions are not yet in sight.

7. The Function of Individual Labour Contracts

Evidently the individual labour contract remains to be the exclusive source of law in cases where neither protective laws nor collective agreements and/or work agreements apply. This may especially be the case for leading personnel. White collar employees above a certain income level - at least as a principle - are beyond the scope of collective agreements. For them the individual contract is an important instrument of regulation.

The second important function played by the individual contract has to be seen in the extension of standards regulated in collective agreements on those who are not covered by those agreements: the non-unionised workers. Even if according to the law the normative clauses of collective agreements only cover those who are unionised, this in actual practice most often does not mean that non unionised workers would be treated differently. They practically always get the same. The instrument to achieve this goal is the individual labour contract.

Finally and most important: the individual labour contract serves mainly to improve the individual working conditions already guaranteed by other sources in favour of the employee.

CHAPTER III: CONFLICT RESOLUTION

1. The *Federal Constitutional Court*

The *Federal Constitutional Court* verifies the compatibility of legislative acts, as well as court decisions of other courts, with the constitution. The *Federal Constitutional Court* consists of two chambers, each having eight judges. Half of the judges of the *Federal Constitutional Court* are elected by the *Federal Parliament*, the other half by the *Federal Council*. The term of office is 12 years, re-election is not possible. Quite a few of the most characteristic traits of labour law are due to the Federal Constitutional Court's decisions. This refers especially to the regulations for strikes and lock-outs.

2. *The Labour Courts*

In the Federal Republic of Germany, the *Labour Courts* are the dominant mechanism for resolving conflicts of *"rights"*, in individual as well as in collective labour disputes. The roots of the system date back to the 19th century. But the real starting point of Labour Courts as a special branch of the court system, was the *Labour Courts Act of 1926*. Until then the common courts for civil law matters were competent for labour disputes.

The German Labour Court system comprises three levels: *Labour Courts* of the first instance, *Appellate Labour Courts* and the *Federal Labour Court*. The courts of the first two levels are state institutions. The Federal Labour Court is a Federal institution. There are in the Federal Republic of Germany 124 Labour Courts at present. The number of Appellate Labour Courts is 18: North Rhine-Westphalia and Bavaria have two each, in each of the other states there is only one Appellate Labour Court.

The *Labour Courts* and the *Appellate Labour Courts* are financed by the states. The individual states are responsible for the establishment of the courts and for the delineation of the districts after consultation with the major unions and employers' association in the respective states. The Labour Courts and the Appellate Labour Courts are administered by the *Ministry of Labour* in the state in which they are located. The Federal Labour Court was created in 1953 by express order of the constitution of 1949. It is administered by the *Federal Minister of Labour*.

The *Labour Courts* are composed of one or more panels, each with a professional judge as chairman and one lay judge

each from the employer and employee sides. In courts with more than one panel, the jurisdiction of the individual panels is determined by an organisational chart set up by the courts themselves.

The *Appellate Labour Courts* are authorised exclusively to hear appeals against decisions of labour courts in the first instance. As in the Labour Courts, they also have panels composed of one professional judge as chairman and one lay judge each from the ranks of employers and employees.

Under certain conditions, judgements handed down by the *Appellate Labour Courts* may be appealed to the *Federal Labour Court*. The Federal Labour Court at present comprises ten divisions called senates. Each senate has three professional judges and one lay judge each from employer and employee sides.

The professional judges of the Labour Courts and the Appellate Labour Courts are appointed by an authority under state law, usually the state Minister of Labour. They are jointly selected by the Minister of Labour and the Minister of Justice who are assisted by an advisory committee. The advisory committee is tripartite and consists of an equal number of representatives of the state's major trade unions, employers' associations and the labour judiciary. The committee is established by the state Minister of Labour who selects its members from lists of candidates proposed by the unions and the employers' associations. The committee members representing the labour judiciary are appointed by the Labour Minister in consultation with the Minister of Justice.

The professional judges of the *Federal Labour Court* are appointed by the President of the Federal Republic from proposals made jointly by the Federal Labour Ministry and the electoral committee for judges. This committee is composed of all state Labour Ministers and an equal number of members elected by the Federal Parliament. The Federal Ministers of justice and the body which represents the interests of professional judges of the Federal Labour Court must also be consulted, although neither has a veto power. The employers' and employees' associations have no institutionalised right to participate in the selection of the professional federal labour judges.

All judges, whether they are professional or lay judges, have an equal vote. Thus, in theory, the professional judge in the Labour Court and in the Appellate Labour Court could be overruled by the lay judges, since the decisions are made by majority vote. But in fact it is the professional judge who normally dominates the panel by virtue of his status as a legal expert. Professional judges at all three court levels are appointed for life. They cannot be recalled or transferred.

3. Mediation

While compulsory arbitration in collective bargaining was a significant feature of the Weimar period, this mechanism does no longer exist and is even understood to be incompatible with the constitutional guarantee of freedom of association. Compulsory arbitration was replaced by voluntary mediation. This means that it is up to the parties of the collective agreement whether they establish a mediation procedure and it is also up to the parties to decide on the effects of mediation. Meanwhile mediation agreements are concluded for practically all areas of the private and the public sector. There is however, no homogeneous pattern to such agreements. They differ from industry to industry.

4. Strike and Lock-out

The absence of compulsory arbitration has increased the importance of strike and lock-out as conflict resolving instruments. Even if in Germany practically no statutory provisions refer to industrial action, there is nevertheless a detailed legal regulation on this matter. Law on industrial action almost exclusively is judge made law.

According to the Federal Labour Court, industrial conflict must be exclusively understood as complementary to collective bargaining. To put it differently: industrial action is only allowed in so far as its purpose is the achievement of a collective agreement and the achievement of aims that can be regulated by collective agreements. Any industrial action for other purposes, whatever it may be, is understood to be illegal from the outset. A very important implication of this interrelationship between collective bargaining and industrial action is the fact, that a strike only can be carried out by a party competent to conclude a collective agreement, a union. Thus it may be said that the right to strike in the Federal Republic of Germany is a union's right and not an individual's right. Even if in the past the number of strikes and lock-outs has not been very high, this does not mean that those instruments are unimportant. The mere threat of industrial action leads to compromises which otherwise would not be reached. This preventive effect of industrial action only can be understood in the context of the general attitude in Germany: each disturbance of the normal course of production more or less is perceived to be a danger for the well-being of the national economy as such.

It has to be stressed that in recent years industrial conflict in Germany significantly has changed its face. In times of high unemployment it evidently is difficult for trade unions to motivate their members to go on strike. Thus unions developed a strategy which not simply puts pressure on employers but which on the one hand helps to mobilise the members and on the other hand minimises the strike activity of those who participate in industrial action. This strategy is called *"new mobility"*. During the negotiations the unions call for short strikes which, day by day, are shifted from one establishment to another within the region to be covered by the collective agreement. This strike has another advantage for the unions: while unions in *"normal"* strikes have to pay rather remarkable strike benefits this does not apply in the case of *"new mobility"*. In other words: while due to financial reasons the union could not afford to perform the *"normal"* strike for an extended period of time, there is no such limit for the strategy of *"new mobility"*. While the Federal Labour Court at least in principle has legitimised this new strategy, this very question still is pending in the Federal Constitutional Court. Its decision will have a tremendous impact on strike practice in Germany.

As already mentioned in Germany remarkable strike benefits are paid to workers that are on strike ore are locked out. This does not apply to workers indirectly affected by a strike or lock-out. According to the jurisdiction of the Federal

Labour Court their employers are not obliged to pay their wages. This leads to a strong pressure on the union to end the strike. For this reason the question whether the *Federal Labour Office* has to pay unemployment benefits to those workers who temporarily are without remuneration has become an important one. The formerly generous provision was changed in the late eighties. Now such payments only very exceptionally are to be made by the Federal Labour Office. Whether this is violating the unions' constitutionally guaranteed right to strike has been a controversial issue. The Federal constitutional Court has recently denied this question, but it made at the same time clear, that the future development might as well lead to a different understanding. How the employers will use the lock-out in the future will be an important factor in this discussion.

5. The Arbitration Committee

Strikes and lockouts as means of resolving conflicts between works council and employer are expressly prohibited by law. Therefore a special dispute resolving body, called an arbitration committee, is provided for.

Under the law there are two possibilities: the establishment of a permanent arbitration committee or an ad hoc arbitration committee for each case as required. In practice, the permanent committee is never used because it is believed that actions of a permanent body could be predicted if one knows the persons on the committee in advance.

The arbitration committee consists of a certain number of members appointed by the employer, an equal number appointed by the works council, and a neutral president who chairs the committee.

If the employer and the works council cannot agree on a matter being subject to co-determination, either side may request a decision of the arbitration committee. The committee's decision is binding on the parties and has the status of a work agreement. However, the committee's decision may still be subject to review by the Labour Court. Since the Labour Court's powers in so far are rather limited, the arbitration committee's decision in actual practice most of the time is the final word.

CHAPTER IV: THE INTERNATIONAL CONTEXT

To a significant extent international sources are shaping labour law and industrial relations in Germany. They not only comprise the regulations and directives promulgated by the respective organs of the EEC but also the *Charter of Human Rights* of the *European Council*, the *European Social Charter*, the *International Treaty on Economic, Social and Cultural Rights* and many conventions of the International Labour Organisation. These international sources either apply indirectly by way of implementation through national legislation or directly (as in the case of EC-regulations).

It is almost exclusively the Federal legislator being involved in adapting the legal framework to the standards fixed in international sources. The focus of the parties to the collective agreements, to the work agreements and to the individual contracts - at least so far - is not on the international scene but almost exclusively on resolving problems within the domestic framework. In other words: in order to learn whether the national legal order in Germany corresponds with the requirements of international sources it is necessary to analyse the development of the domestic legislative framework, including the interpretation given by the Courts. On the whole correspondence with international sources does not lead to big problems in Germany. The reason for this is simple: in most areas the standards in Germany anyway are above the level of international standards. Thus conflicts only can arise in exceptional cases. This, however, happens in reference to important questions.

To quote an example: It is not quite clear whether the unlawfulness of strikes not organized by a union or the fact that strike is banned for civil servants no matter what function they perform is in accordance with the *European Social Charter* or the ILO-*Conventions Nr. 87 and 98.*

It is only recently that the implementation of European Directives causes difficulties. The provisions of the *Treaty on Freedom of Movement* were quickly and fully implemented in Germany. The same is true for the three directives of the seventies on protection of workers in case of transfer of undertakings, collective dismissals and insolvency. Especially as far as the *Directive on Transfer of Undertakings* is concerned the Federal Labour Court has gone far beyond the standards requested by the Directive. Nevertheless, the German jurisdiction had to face corrections by the European Court of Justice (*"Christel Schmidt"*). This has led to a widespread discussion in Germany.

Due to a clear signal from the *European Court of Justice* the Federal legislator in 1994 corrected still existing deficiencies regarding the Directive on *equal opportunities for men and women*. It, however, should be mentioned that the Federal Labour Court has gained merits in faithfully implementing the ban on indirect discrimination. But even there recently dissentions with the European Court of Justice have arisen, still being subject to controversy.

The *Directives on the Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract of Employment Relationship* and on *Working Time* are already implemented in Germany: by the *Act on Documentation of the Employment Relationship of 1995* and by the *Act on Working Time of 1994*. The *Framework Directive of 1989* and the *Directive on European Works Councils* have also been implemented.

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GREECE

Y. Kravaritou

CHAPTER I: THE ACTORS

1. The three main actors in the Greek system of industrial relations: the State, the employers and the workers

The *State*, with its myriad institutions and governmental organisations, occupies a key position not only because of the multiple roles it plays as a public authority, as a major employer and as a negotiating partner, but particularly because it is the State which does most of the regulating when it comes to working conditions. The *workers* have trade unions which speak for them at various levels, as do their works committees, general assemblies and even the strike committees and action committees. The *employers* take part in the regulation process as individuals, through the employer's prerogatives which are theirs by law, and collectively, within the employers' associations which have the right to conduct negotiations and conclude collective agreements.

The word *'actor'* is not a concept used in classical texts on labour law. Greek legal tradition and jurisprudence hold that it is the State which determines the framework and the limits of the rules established by the social partners, hence the notion of actors such as it exists in Anglo-Saxon countries is wholly foreign to them. In recent years, studies introducing the notion of *'industrial relations'* do not employ the term *'actors'* but prefer the word *'agents'* when referring in particular to the workers' trade unions and the employers' professional organisations.

2. The actors and their institutional organisations

The following is a very brief outline of the workers' trade unions, taking in the political unions which play a crucial role in labour relations, especially in the private sector, and of the employers' associations. Although civil servants have their own trade unions separate from those in the private sector, the role of the State, always a redoubtable actor in Greece, all-present and quasi all-powerful, is not always very clear. The fact that the civil service unions have no bargaining rights helps to push this actor into the background where the various studies and analyses are concerned. However, there are now vigorous demands for collective labour agreements to be extended to the public sector, which seems to be in keeping with the present Government's action programme which includes promoting the debate on the recognition of the right of civil servants to collective bargaining.

(a) The trade unions

(i) Introduction

Before going into the structure of the Greek trade unions, we need to define the global framework within which *'official'* trade unionism acts. Trade unions in Greece have a sort of dual structure at national level. There is an official structure i.e. generally recognised by the government, and an unofficial structure, backed by the opposition parties. This peculiarity - which surfaced shortly after the unions had organised themselves nationally in 1918 - occasionally goes into abeyance for a brief but happy spell in which unity has a chance to prosper. This happened recently, for example, from 1982-1985. So, while Greece has a single trade union confederation, the *General Confederation of Greek Workers*, which styles itself the supreme and unifying force which brings the majority of the country's trade unions under one national umbrella and which represents the interests of all workers, in reality, Greek trade unionism is far more complex. Existing side-by-side with the single Confederation are trade unions which maintain very close links with the main political parties but which have no corporate status and are not officially recognised by the Government. These political trade unions make up the *opposition union movement*. They have no right to engage in industrial action and collective bargaining, so they press their claims through the professional organisations which belong to the movement. They have considerable real impact, particularly the ESAK-S, which is close to the communist party and has a great following among industrial workers, construction workers and accountants. The political unions close to the two revamped communist parties, although numerically smaller, are well-supported in the service sector: all echelons of the education system, banks, hospitals. The same applies to the union close to the Conservative Party which until 1982 was the sole official representative of the interests of Greek workers (DAKE).

The two-tier structure of Greek trade unionism actually shows that it is far too dependant on the political parties - whether in government or not -, that it has little say in the regulation of working conditions and that it is motivated in its efforts not primarily by the real interests of the workers as such, but by political expedience in a *'politicians' world'*. Leaving aside the historical reasons - and others - which have combined to forge this Greek version of trade unionism (dictatorships, civil war, lagging industrialisation, the importance of farming for the economy), there is one permanent feature which it is hard to explain: the Greek unions' financial dependence on the State. The legal system previously in force prescribed that the large sums of money collected through the system of compulsory contributions entirely unconnected with any form of affiliation were not managed by the unions but by the *Ministry of Labour*. The Ministry distributed a tithe to the unions according to its own criteria which very often tended to work out in favour of the union closest to the party in power[1].

Finally, *Law 1915/1990* provided for the total abolition of State intervention in the funding of trade unions from 1992.

(ii) Structure and Organisation

Most Greek trade unions are organised by trade or by professional category. Organisations based on occupational or industrial branch are now few and far between. Trade unionism at company level, which used to be virtually unknown, has been developing fast since 1974, but particularly after 1982.

1. On the subject of: financial dependence, see G. KOUKOULES, *The Greek trade unions: economic autonomy and dependence 1938-1984*, Athens 1984; legal provisions allowing State control of trade unions, see P. KRAVARITOU-MANITAKIS, *Droit du Travail, démocratie et crise*, loc.cit. p. 116-121.

The hierarchy of the trade unions is as follows: *Article 1(3)* of *Law 1264/82* identifies trade union organisations at three levels: organisations of the first degree include unions which have acquired corporate status under the *Civil Code* (there are now 4000 of these), groups of individuals formed in companies with fewer than 40 employees and the local branches of larger or pan-Hellenic trade union organisations. Second-degree trade union organisations are federataions made up of at least two trade union organisations from the same branch of economic activity or trade and workers' centres comprising at least two trade unions or local trade union branches with their headquarters in the same region.

The federations, which are normally formed at national level, represent the vertical union structure, while the workers' centres organised locally (towns with their peripheries) make up the horizontal structure. The powers and activities of these two structures overlap and their relationship tends to be rather fraught. Third-degree organisations include the confederations made up of at least two second-degree trade union organisations, i.e. the union federations or the workers' centres. The most representative confederation is the *General Confederation of Greek Workers* (GSEE). The other four confederations are fairly insignificant. There are 90 federations and over 100 workers' centres. Works unions have their own federation of works unions in industry (OVES).

The number of trade union organisations in Greece is very high, partly because their basic structure is outdated, archaic and anarchical and partly because some of them do not engage in real union activities. Their *raison d'etre* is to serve, support and enhance the prestige and power of the political trade unions.

The bodies of the *General Confederation of Greek Workers* are the pan-Hellenic Congress (this is the supreme body made up of representatives of the workers' centres and the federations; it meets once every three years), the General Council, which takes the place of the former, the 35-member Board of Directors, the Executive Committee and the Supervisory Committee.

Union membership is around 30%. Although *Law 1264/82* prohibits dual union membership, which of course doubles membership figures, there are as yet insufficient data on this question. In the private sector, particularly in the small and medium-sized firms, union membership is very low. Yet the phenomenon of falling union membership observed in other countries over the past ten years has not been observed in Greece. Quite the contrary: union membership in Greece has risen slightly.

Trade unionism in State-run enterprises - either governed by the *'socialisation' Law 1365/83* or not - and in the banking sector presents a number of special features (e.g. union membership of between 85-100%, dynamism of proper union activity). Despite the fact that there are a large number of unions organised round a trade both in the State-run *Electricity Board* (DEHI), in the *Telecommunications Board* (OTE) and elsewhere, these nevertheless manage to have a considerable say in the regulation of working conditions thanks to their majority affiliation to a second-degree union organisation. Trade unionism in these enterprises is currently in the vanguard of the social struggle in Greece.

Sailors: the merchant navy is a key sector of the Greek economy. Workers are organised by trade: captains, engineers, sailors, electricians, cooks. The sea-farers' unions are affiliated to the *Pan-Hellenic Maritime Federation* (PNO), set up in 1920. The PNO is the official spokesman representing the interests of all seafaring categories. Since Greek legislation on corporate participation bodies and procedures does not apply to the merchant navy, sea-farers have no works committees on their ships and have no union rights in the workplace.

(b) Public sector: the *higher administration of civil service unions* (ADEDY)

Salaried employees contracted under administrative law, i.e. employed by the State, the communes and other corporate entities in administrative law, have their own trade union organisations distinct from those in the private sector. Still, the civil service unions are structurally very similar to the private sector unions. The *Higher Administration of Civil Service Unions* - set up in 1945 - is the union organisation which represents all public sector employees and is the official spokesman vis-à-vis the government. Its 70-odd members include branch federations, pan-Hellenic unions or branch associations, and the most representative local unions. ADEDY's administrative bodies are the pan-Hellenic Congress, the General Council, the Executive Committee and the Supervisory Committee.

Trade unionism in the civil service has much the same problems as its private sector counterpart, though they tend to be less serious. Membership figures in the grassroots unions, financial independence of all organisations and the high level of training of trade unionists in the public sector are the main differences with the private sector. The civil service unions do, however, have problems making up their minds on whether to stand united or divided: frequently - in times of crisis - the union organisations either pull out of the Higher Administration or else set themselves up, de jure or de facto, as coordination committees which form a sort of union opposition to the official organisation and are active in their own right. Although it is true that these tend to be more dynamic, they are inevitably steeped in the political machination which dogs Greek trade unionism generally.

(c) The employers' professional organisations

(i) The *Federation of Greek Industries*

Greek employers do not have a single organisation which represents them all. This is due to the fact that employers' unionism is organised on the basis of economic activity, i.e. industry, trade, craft trades, the merchant navy. Within each area of activity, employers' organisations look after their own branch of activity. In industry, the *Federation of Greek Industries* (SEV), founded in 1907, takes pride of place. SEV is partly a straightforward association, partly a union of first degree associations. Its members include 8 local industry associations, 40 associations of industrial branches and over 300 individual firms. SEV is associated with UNICE and IOE and represents Greek em-

ployers at the ILO. It is supposed to represent the interests of Greek industry as a whole at the highest level. Some of the largest Greek companies are not members but they harmonise and bring their activities into line with SEV decisions, generally collaborating in friendly understanding. A substantial proportion of small and medium-sized firms are not members either, but often oppose the Federation's social, economic and institutional rulings, being unable to carry them out. The main bodies of the Federation are the Board of Directors which is responsible for management and budget administration and also represents disciplinary authority, and the Members' Assembly, the highest body which decides any matter not within the province of another body, of which there are several secondary ones[2].

(ii) The *Association of Industries in Northern Greece*

This is an employers' organisation – set up in 1915 – which operates in Northern Greece and represents some 250 industries in the region. The *Association of Industries in Northern Greece* (SVEE) does not belong to the *Federation of Greek Industries*, but works hand in hand with this body while representing the interests of industry in its own region nationally.

(iii) Trade, the merchant navy and others

There are several organisations in the trade arena, of the first, second and third degree. These include the *Chambers of Commerce* in the principal cities, the *League of Joint-Stock* and *Limited Liability Companies*. The leading organisation in the Merchant Navy is the *Union of Greek Shipowners* (EEE), a first-degree organisation representing over 100 shipowners which first appeared in 1916. Only shipowners with vessels exceeding 1500 tons can be members of EEE. There are also a number of unions of the same degree – owners of cargo and transport vessels etc. – which represent their own sector for collective bargaining purposes. The banking sector is represented by the *Banking Union*; the hotel and catering sector by the *Pan-Hellenic Federation of Hotel Keepers*, etc. Unlike the large trading firms, small and medium-sized commercial enterprises and craft trades are organised on the same lines as the workers' trade unions, with separate unions, federations and confederations which operate nationally.

While the absence of a central organisation bringing all employers under one umbrella is made good by the *Federation of Greek Industries*, in other areas this lacuna does complicate the regulation of working conditions.

3. Organisational and operational bases and guarantees

The organisational and operational bases and guarantees for actors on the social and economic stage are rooted in a triad: individual union freedom (positive and negative), the freedom to form unions and the freedom to operate as a union. The legal foundations of the organisational and operational activities of professional organisations are enshrined in the *1975 Constitution*, while *Law 1262 of 1982* on *'democratisation of the trade union movement and guarantees for workers' union rights'* regulates a number of issues.

According to the constitutional clauses on the right to associate (*Article 12*), Greeks have the right to set up unions and non-profitmaking associations in full compliance with the law, which may not impose prior authorization. The right to associate is recognised by the *Constitution* both in respect of worker's organisations and employers' organisations. It is worth noting that the law on the *'democratisation of the trade union movement'* applies to workers' organisations only. While the right to associate includes recognition of union freedom, as indeed it always has in Greece in previous Constitutions, the 1975 *Constitution* goes a step further in that it obliges the State to take all requisite measures to protect union freedom and the free exercise of the rights connected with it. For example, *Article 23(3)* of the *Constitution* dissociates union freedom from the right to associate – while guaranteeing it – to turn it into a separate, independent right. This applies to union freedom in all its aspects: as a positive right, as a negative right and in the pluralist sense.

4. Function, roles, powers and responsibilities in the private and public sector

(a) The private sector

With Greek trade unionism locked into a two-tier structure at national level, the workers' unions form an alternative power structure both within and outside the official institutions. This function is at its most manifest in the (industrial) actions organised by trade union opposition. At the same time, the single Confederation represents the interests of all workers vis-à-vis the Government; it has sole collective bargaining power and engages in a number of other activities: e.g. it participates in the framing of policies of interest to the workforce.

There are several laws which provide for and regulate the participation of trade unions in various national, regional or local bodies which are expected to submit opinions, proposals, reports. The unions also help to manage some of the workers' funds and take part in the tripartite committees to resolve collective labour disputes. Legally established workers' organisations actually enjoy considerable legal prerogatives at the national, regional, local and, since 1982, at company level, since their activities are both promoted and backed by the law and may be improved through negotiation. In recent years, company unions have seen their bargaining position as champions of wage claims and in other areas more firmly established. All the same, the bargaining agenda is restricted at all levels to wages and benefits. The most recent (1991) nationwide collective agreement with an institutional content deals with the contribution of employers to vocational training, the setting up of the *Institute for Health and Safety at Work* (ELINYAE) and the reform of the operational structure of public bodies under the Ministry of Labour's authority. It must be borne in mind that the Greek unions have nothing like the bargaining powers or the general function of unions in countries like Italy – which have a say in issues such as fiscal policy, rent rules, health policy and the like – or even France and the Federal

2. *The social and professional organisations in Greece*, p. 19 and on.

Republic of Germany. This *'weakness'* of the Greek unions is largely linked to the question of trade union unity.

The duties of the employers' organisations include representing their members' interests, taking part in collective bargaining and participating in bodies responsible for the resolution of collective disputes. They are also members of the various tripartite and bipartite committees involved in framing policies, advisory and consultative duties and formulating proposals.

(b) The public sector

In the public sector, it is important to separate the role of trade unionism in the civil service sector and that of the trade unions in the public sector of the economy, since the two are very different. Trade unions in the civil service, particularly those affiliated to the civil service union (ADEDY), chiefly focus on the civil service statute, career opportunities, the disciplinary powers of the administration, their participation in the various decision-making fora of immediate concern to themselves. The trade union organisation in the public sector have no bargaining powers. Yet they usually formulate proposals preparatory to the national budget debate and organise collective actions in support of their claims. In addition, the public sector unions, often those in the *'trade union opposition'*, formulate opinions and take action in areas of wider interest, such as fiscal policy, health policy or anti-inflation policy. The role of trade unions acting for public corporations and public utilities goes well beyond their right to bargain and to conclude collective agreements, indeed to their right - unique as it is - to call strikes. They are highly dynamic, very effective and set an example to other sectors. Although *Law 1363/1985* on the socialisation of public-sector companies, whilst associating the workers with the management and supervisory bodies, was intended to promote the participation, not of the unions but of individual staff members, the trade unions, though weakened, continue to play an important role .

5. Representativeness of the actors at different levels

The representativeness of professional organisations is a fundamental concept in Greek law. The prerogatives conferred by the law are only valid for so-called representative organisations. This rule applies both to the workers' and to the employers' organisations. Under the old legal system (*Law 3239/1955* and *Decree-law 186/1969*), repealed in 1990, only two unions could be recognised as representative. One was called the *'most representative'*, the other simply *'representative'*. This differentiation, which first surfaced in 1937 - under the Metaxas dictatorship - was revived in 1955 by the *Law on collective dispute settlement* and again by *Decree-law 186/1969*, itself amended to become *Decree-law 73/1974*, now in force. According to the clauses in question, only representative trade organisations had the right to start a dispute or engage in bargaining. A maximum of two organisations could have representative status in each branch. None of the other organisations had negotiating powers or other functions.

Law 1876/1990 on free collective bargaining introduced a new type of representativeness without, however, adopting the principle of trade union pluralism: on the contrary, it has imposed the concept of the single, majority trade union. Thus, a single organisation is recognised as being representative at each negotiating level, depending on the number of trade union members who voted at the last elections to appoint the trade union's board of management.

Whether or not representativeness exists is determined whenever it is called into question. Any organisation authorised to sign a collective agreement and whose representativeness at that level is challenged may appeal within ten days after the start of negotiations. The appeal is examined by a special committee for the protection of trade union representatives (*Article 15* of *Law 1264/1982*), which gives a ruling at the first and final instance.

It is important to emphasise that in Greece the concept of competence of trade unions is different from the concept of capacity. It is not enough for the trade union to be representative (capacity) in order to conclude a valid collective agreement. It must, in addition, in accordance with its statute, be competent at the level - local, sectoral, trade or company - at which negotiation is taking place.

Third-degree organisations - the most representative at national level - are laid down by law. These are: the General *Confederation of Greek Workers* for the workers, the *Association of Greek Industries* and the *Chambers of Commerce* of Athens and Thessaloniki for the employers. The most representative organisations at branch and local level are those with the highest membership. A similar scenario applies at company level: union rights and facilities are only granted to the most representative company union. The limited number of organisations which may be regarded as representative and the fact that only numbers are taken into account in determining this gives rise to well-deserved criticism.

6. The functions of the joint and tripartite bodies

Greece has several tripartite bodies on which employers, workers and the State are represented. The State generally has the most delegates. These play an advisory role, but their interventions are sometimes decisive. The tripartite bodies may be of:

(a) general interest:

- the *Higher Labour Council* which advises on social policy issues, on the need to extend a collective agreement *erga omnes* or on the temporal extension of a collective agreement and on working hours;
- the *Advisory Council for Social Policy and Labour Relations*, which advises on all written questions dealing with labour relations, tabled by workers' and employers' representatives alike, and liable to be settled by law; on questions returned by the relevant Minister on social policy or social security, and on any draft bill or decree dealing with the aforementioned subjects;
- ESAP, the *National Council for Development Policy*, a body which has taken over from the *Social and Economic Policy Council* with much the same func-

tions and powers: advising on and formulating proposals for the government with respect to economic and social policy and national development; or of

(b) specific interest:

- bodies set up at the *Ministry of Labour* or social services such as the *Technical and Vocational Training Council*, the *Social Security Council* and others. They have advisory powers;
- representations to independent bodies such as the *Labour Force Organisation*, the *Workers' Centre*, the *Workers' Housing Centre*, ODEPES and others;
- bodies or committees responsible for settling collective labour disputes or other labour conflicts and disputes in the field of insurance. These include the mediation and arbitration body, the tripartite cooperation committees, the committee which rules on trade unionist dismissals, the various committees of the *Social Security Board* and other, less important organisations.

7. The national administrations and the government institution as actors in the social and political arena and as employers

In their role as employers, the national administrations and government offices are heavyweights by virtue of the sheer number of people they employ. The State is one of the largest employers in Greece, giving employment to some half a million workers. Of course, there is a difference between the national administrations (these include the various ministries and the civil service in general) and such government offices as the *Telecommunications Board*, the *Electricity Board*, the *Greek Railways*, the *National Bank of Greece* and the *Agricultural Bank* and indeed the port authorities, the *National Tourist Board*, the *Productivity Centre*, and others.

It is generally felt that the national administrations employ too many workers (this is certainly true if we compare their number with the number of civil servants employed in other, larger EEC countries, but at the same time it is also a traditional way of solving some employment problems) and are by definition slow and bureaucratic. They are a force which seldom takes the initiative in the social and economic arena. This may have something to do with the salaries paid to government employees, which are none too generous except in the very highest echelons. Yet civil service jobs have always been coveted in Greece because of the job security they offer (*kratikodieti*). There is in the civil service a kind of resigned acceptance of the low productivity and often dubious efficiency of their work. There is a general lack of initiative and dynamism. Given that working hours in national administrations extend from 7.00 in the morning to 14.00 or 15.00 in the afternoon, and that income is inadequate to cover real and superficial needs, many people, particularly men, have a second job, which is, of course, undeclared.

For this reason, the present Government is promoting a draft bill to modernise public services in Greece. The bill, which seeks to reduce the public deficit, increase the competitiveness of those public services now open to competition, while at the same time improving the quality of service offered to users and rendering the public sector flexible, functional and profitable, is based on three main principles:

- modification of the legal status of public services;
- adoption of *'enterprise plans'* lasting 3-5 years;
- changes in appointment procedures for the board of directors and the managing director.

Productivity bonuses for staff, as well as the possibility of rewards or penalties for the board of directors in the light of the results obtained are also under consideration.

It should also be stressed that since Greece became a member of the *European Community* (1981), a fresh wind has been sweeping through the services of the Ministry and bodies which come into contact with and collaborate with their EC counterparts. This is certainly true of the *Ministry of Labour*, the social services in the Health Ministry, employment organisations such as OAED (*Employment Board*) and other bodies involved in vocational training, health and hygiene and women's affairs.

The atmosphere in Government institutions is very different, given the nature of their work and their production, which requires a different organisation of work, different working relations and a certain amount of dynamism. This dynamism may be detected in particular in public sector enterprises and public utilities in which, in spite of the fact that the State is in overall control, employer-worker relations are completely different. There is a creativity and richness which is totally lacking in the civil service. However, these are attributable in particular to the initiatives of the staff and not so much to the qualities of the employer. Of course, the latter has not had the same reactions and the same opposition to the development of the trade union movement and workers' demands as the employer in the private sector, which has allowed staff in public sector enterprises and public utilities to obtain this power which some regard as formidable. In addition, the company *'socialisation'* act of 1983 has given staff in these institutions an important role in social, economic and even political terms: they are required to take steps to promote the economy, boost productivity, foster national and regional development and look after the environment.

'Socialisation' is an experiment which, through its assemblies representing local government, trade unions, service users or the products of these institutions is of great significance and may open up new prospects for all of these actors, all of whom still somehow owe allegiance to or are controlled by the omnipresent Greek State.

CHAPTER II: THE MACHINERY OF REGULATION

1. Sources of regulation: a summary

Greek labour law took shape in the early years of this century, in the form of legislation on subordinate labour adopted at the instigation of the State. Since then, the regulation of working conditions has developed multiple sources. In addition to *'law and custom'*, all legal acts, no matter what their origin - State, professional or international - which have a regulatory character are regarded as sources of labour regulation. The *1975 Constitution* recog-

nised this plurality, although it still occupies a preponderant place itself as a source of labour law.

The Greek legal order naturally recognises the category of sources comprised of legal acts of professional origin such as collective agreements and arbitration rulings, as we shall see below. Their impact in terms of regulation is well-defined (worse, the hand of the State is clearly discernible). In Greece therefore, State rules constitute an overwhelming source of regulation of working conditions and of professional and trade relationships. At company level these have come to be regulated or rather, set down in detail by a series of laws of recent extraction. Greece is still labouring under what can only be called a form of atavism stemming from the way in which the first rules on working conditions came about. In effect, this was designed to prevent the social actors from establishing their own rules on labour relations even within the established order. In this respect and within these limits, the situation in Greece is certainly diametrically opposed to that in Italy.

International law ranks high in the hierarchy and as such plays a leading role, not least in the promise it holds out for the future. Similarly, jurisprudence is gaining in importance, although not specified as a source of law in Greece. The same applies to company practice which, however, is regarded as a source of labour law.

2. The Constitution and Social Rights

The current *Constitution*, voted in 1975 after the fall of the dictatorship, is a watershed compared to its predecessors. It recognises social rights (*Articles 21-24*) and lists a number of general principles which enshrine fundamental rights (*Article 2(1), 4, 25* and *106*). The Constitutional clauses on labour law fall into two main categories:

- those which, having a direct impact on labour law, also form its constitutional basis;
- those which indirectly affect this branch of the law while forming its general constitutional basis.

Provisions directly connected with labour law include those referring to labour law, to equal pay for equal work, to recognition of the right to collective bargaining and collective agreements, to the abolition of forced labour (*Article 22*), to the protection of union freedom, to the recognition of the right to strike (*Articles 23 and 12*).

Social rights:

Labour law as laid down in *Article 22(1)* of the *Constitution*, stipulates that:

(a) work is a right protected by the State;
(b) the State must take whatever steps are needed to create an economic climate conducive to employment;
(c) the State must regulate the economic and social position of urban and non-urban workers in order to ensure a regular improvement of their material and moral well-being.

Greece has a free market economy, but this does not mean that its provisions have no legal consequences for workers, particularly for wage-earners. The real potential of labour law and the ways in which it is used as a legal instrument to preserve the status quo, foster social progress (position) or restrict employers' prerogatives have yet to be fully explored. The same applies to the State's obligation to take the necessary steps to keep the labour market healthy and to the right of workers' organisations collectively to negotiate problems concerning employment and their right to strike, to protest and to assert their right to work if the powers-that-be default.

The right to equal pay for equal work is a principle enshrined in *Article 22(1)* of the *Constitution*. The right to equal pay applies to all workers irrespective of sex or *'other distinctions'*: nationality, race, religion etc.

The right to associate and to union freedom is confirmed by *Articles 12* and *23(3)* (*see Chapter 1, paragraph 3 above*).

The right to collective autonomy. According to *Article 22(2)* of the *Constitution*, general working conditions are laid down by law, *'supplemented by freely negotiated collective labour agreements and, where these fail, by the rules laid down by arbitration'*. Although it is not yet clear to what extent collective agreements count in laying down general working conditions, free collective bargaining is constitutionally guaranteed. The *Constitution* also recognises the normative part of collective agreements, but in its reference to arbitration, the last in line, no mention is made of the word *'compulsory'*.

The right to strike is guaranteed by *Article 23(2)(1)* of the *Constitution* which stipulates that striking is a right, a right exercised by legally constituted trade union organisations with a view to protect and promote workers' economic and professional interests in general. The right to strike is extended to civil servants and the staff of public-sector enterprises and public utilities except that here the right to strike is subject to restrictions defined by special laws, which may not, however, abolish the right to strike or prevent it from being legally exercised (*Article 23(2)(3)*). Only magistrates and members of the national security forces are forbidden to strike (army, fire brigade, rural police, *cf. Article 23(2)(2)*).

Then there is the ban on forced labour of all descriptions (*Article 22(3)(1)*), a clause which strengthens the freedom to work deriving from other provisions, i.e. *Article 22(1)* (right to work) and *5(1)*. The same article lists a number of exceptions.

The ban on forced labour stipulates that special laws govern the requisitioning of personal services in the event of war or mobilisation or in order to organise the country's defence or meet other needs arising from a disaster or liable to endanger public health. The same applies to the provision of personal labour to the local authorities to meet local requirements (*Article 22(3)(2)*). All these exceptions are rigorously restrictive.

The *Constitution* also recognises the right to social security. According to *Article 22(4)*, the *'State takes care of workers' social security, as prescribed by law'*.

This brief outline of Constitutional provisions dealing with social rights and clauses indirectly affecting the right to work does not do justice to their full scope and importance

for labour relations and working conditions generally. However, it does show how important and indeed, how rich, if unplumbed, a source of labour law and the regulation of working conditions the *Constitution* and its specific provisions really are. Of the aforementioned provisions, some have direct impact on the labour relationship, either individual or collective (equal pay, right to strike), whereas others refer to the legislator to regulate these relations in keeping with Constitutional intent (e.g. the right to work, the right to collective bargaining and the right to conclude collective agreements).

Part II of the *Constitution* on individual and social rights ends by stipulating that the rights of Man, as an individual and as a member of society are placed under the protection of the State, all of whose bodies and offices have an obligation to ensure free exercise of these rights *(Article 25(1))*. This Article also stipulates that the State has the right to demand of all citizens that they do their duty in terms of social solidarity *(Article 25(4))*; and finally, the law is now interpreted as meaning that constitutionally guaranteed individual and social rights must be upheld against all threats and all comers. These rights are protected vis-à-vis the State and its organisations on the one hand and vis-à-vis third parties on the other, since the latter are vulnerable not only to abuses of State power, but also to the overwhelming economic and social force of the private sector.

3. Legislation: the powers of parliament and the prerogatives of legislative regulation

Legislation, the second source of State and domestic labour law in Greece is known as ordinary legislation. This has been the most important source of labour law since its inception until this very day. Although *Article 26(1)* of the *Constitution* places the legislative function with the *House of Deputies* and the President of the Republic, the very same *Constitution* gives the country's *'executive bodies'* powers normally reserved for the legislative, on an exceptional basis and on terms laid down by the law itself.

Legislation may come in the shape of laws, decrees, ministerial orders or orders from another regulatory administrative body. The formal laws (and indeed, material laws in so far as they lay down rules of law) passed according to the rules by the House of Deputies and published by the President *(Article 42(1))* include framework laws *(Article 43(3))*. These are voted by the House in full session only. They are intended to lay down a general framework and outline directives. More specific regulations are subsequently brought in by decree.

Article 44(1) of the *Constitution* also provides for the promulgation of emergency laws: *'in exceptional circumstances when there is urgent and unexpected need, the President of the Republic may, acting on a proposal by the Council of Ministers, promulgate acts with legislative content'*. These acts must subsequently be forwarded to the *House of Deputies* for ratification. The *Constitution* forbids any delegation of the power to pass regulatory acts by administrative bodies - other than the President of the Republic - except in order to regulate issues of more specific, local, technical or highly detailed import *(Article 43(2))*. Legislative delegation must therefore be special, limited and if need be subjected to specific conditions and restrictions.

The rules it issues with respect to labour law are secondary. Greek labour legislation is made up of a wide variety of texts, some of which go back to the early years of the century when labour legislation first raised its head, and they suffer from a certain lack of coherence and coordination. Greek labour legislation is riddled with inconsistencies, dogged by a lack of precision, the indiscriminate spread of provisions over a wide range of heterogeneous texts, clogged with a surfeit of detail or, by contrast, parsimonious to a degree, it expresses itself in rough-hewn demotics; no wonder that it has so far defied any attempt at codification, though not for lack of trying (a concerted effort was made to draw up a labour code between 1964 and 1967). In 1978, when Greece was preparing for EEC membership, Greek labour legislation for salaried workers was brought together and codified for publication in 1981. Had a proper labour code been drafted, it would of course have had to specify the *'general conditions of labour'* as laid down by *Article 22(2)* of the *Constitution*, in line with the programmes announced by the Conservative Labour Minister on the eve of elections (but he did not win through). To complete the collection, we must mention the new regulations on worker participation in the enterprise, which will effectively replace some of the old rules such as those on union rights.

Limitations and trends

The limitations of State regulatory power have fuelled a very intensive legal debate in Greece, particularly since the introduction of austerity measures and a wage freeze in 1983 and 1985. The main thrust of the debate was provided by the *Legislative Act of 18.10.1985* which banned all collective wage bargaining - when this was effectively the only kind of bargaining common in Greece anyway - until the end of 1987. The resulting jurisprudence and literature are extremely interesting.

The act was adopted by special procedure as laid down by the *Constitution* (*Article 44*), without prior consultation of the social partners or indeed without any form of social dialogue or attempt at consensus whatsoever.

The question which legal pundits posed was: *"To what extent do special circumstances, as mentioned in the Constitution, warrant a procedure designed to restrict union freedom and collective bargaining rights as guaranteed by the Constitution (Article 22(2)), by means of a legislative Act of Government"*[3].

Jurisprudence was divided: some lower courts argued that the *"more general social and economic interest"* principle did not justify intervention and restriction of the right to collective autonomy. Otherwise, the majority view in the legal profession held, any impediment to State omnipotence might be lifted and at the same time annihilate collective autonomy. But the highest legal echelons, includ-

3. A. MANITAKIS, *Collective autonomy as an individual right and a constitutional institution. Comments on the legislative Act of Government of 18.10.1985, Constitution and labour relations*, Athens 1987, p. 201 and on.

ing the *Council of State*, did not go along with this reasoning. Their position drew criticism on two counts: one on the way they interpreted constitutional rules and the other on their traditionalist stance in support of government wage policies.

Then the doctrine[4] puts forward some interesting arguments, stressing that *"restrictions arising from legislation which represent the right of trade union organisations to speak out independently do not deprive them of their bargaining powers nor do they abolish their right to fight - by striking - to defend their professional interests"* while recognising that a ban on negotiating a wage freeze and suchlike is only justified if it is the outcome of negotiation, of a social dialogue between the State and the social partners.

Also, a word about the regulatory role of the civil service: the civil service increasingly passes administrative acts by delegation, such as statutory decrees, executive decrees or ministerial orders, to put the finishing touches to labour legislation. While there are indeed objective grounds for this - regulation of special cases, need for technical know-how etc. - Greece does appear to be making rather excessive use of this technique.

One explanation may be the *"desire of the State to keep a close watch on issues concerning labour law"*, proof if anything of the importance of the State in labour regulation. In other EEC countries, such issues are generally handled independently by the social partners. Greece on the other hand appears to have an *'unfortunate'* tendency to hand more regulatory power to the State.

4. Collective agreements

(a) Conclusions, scope, range of application, *erga omnes* effect

Foreword. Until recently, collective agreements, while a source of labour law (*Article 22(2)*) of the *Constitution*), were not of overriding importance in Greece when it came to establishing rules on working conditions. This was due, among other things such as the weakness of the trade unions, to the very limited aim imposed by the archaic rules in force, i.e. *Law 3239/1955*. This text also forged too close a link between bargaining and compulsory arbitration, which was still a key institution in the functioning of collective labour relations in Greece. The legal rules underpinning collective bargaining and collective agreements came in for sharp criticism on the part of the trade unions, which had been arguing for years that they were the chief impediment to the development of the instruments of negotiation and were long overdue for reform.

Law 1876 of 1990 on free collective bargaining represents a departure from Greek law on the subject and from its history, even though this is not obvious to a European lawyer reading the laws in force on collective agreements. The law actually puts an end to the tradition of vigorous State interventionism, the delimitation of the objects of negotiation, the rigidity of procedures: flexibility was one of the main principles behind this reform. The Greek law on collective agreements may therefore be described as an extension of the objects of negotiation, a new negotiating procedure with a reorganised structure and new functions which go hand in hand with the strengthening of the legislative autonomy of trade unions which has never been seen before.

In Greece, collective agreements are governed by legal statute. They are defined as a written agreement signed between *representative* workers' organisations and *representative* employers' associations or *a single employer.* The object of the negotiation and the collective agreement may include individual reports, collective reports and the financial decisions of the company which affect working relations.

The law distinguishes between five categories of collective agreements: general national collective agreements which cover all employees in the enterprise; branch collective agreements applicable to all wage-earners in enterprises or establishments in one town or region in that branch; company collective agreements applicable to all staff; national collective agreements by trade applicable to all workers in that trade; local collective agreements by trade applicable to workers in that trade working in a given town or region.

Collective agreements comprise a compulsory section and a normative section. The compulsory section concerns the obligation to reach a settlement, which must be expressly provided for, the obligation to apply the collective agreement to members of the signatory organisations and the obligation to negotiate in good faith. The normative nature of the collective agreement is apparent from the automatic, direct, compulsory manner in which the collective agreement is applied *ipso facto* to individual contracts, opposing clauses being void and automatically replaced by more favourable clauses of the agreement.

In principle, collective agreements are binding only on members of the professional organisations which took part in the negotiations, but there are two exceptions to this. Firstly, the general national collective agreement applies to all wage-earners in the country. Secondly, if the employer is bound by a collective agreement, he is obliged to apply it to individual contracts he concludes with his employees, regardless of the trade union membership of his staff (*Article 8(3)* of *Law 1876/1990*).

Trade union organisations and employers who are not bound by a collective agreement may become party to it provided that they fall within the territorial or professional scope of the agreement, and give written notice of their accession to the signatory organisations and are subject to the same formalities required for entry into force of the agreement.

On the basis of an order from the Minister of Labour and after seeking an opinion from the *Higher Labour Council* a collective agreement may be extended to all workers in a branch or profession, provided that the employers in question employ at least 51 % of the wage-earners in the branch or profession involved. The extension does not alter the scope or the content of the collective agreement concerned, and takes effect after publication of the order relat-

4. Op. cit. p. 207 and on.

ing to its extension and remains in force for the duration of the extended collective agreement.

(b) The link between legislation and collective agreements (bargaining)

The relationship between the law and collective agreements is covered by *Article 22(3)* of the *Constitution* which, as we have seen, stipulates that general working conditions must be laid down by law and supplemented by free collective bargaining. Doctrine and jurisprudence concur that this clause restricts the common legislator's omnipotence as regards the regulation of working conditions. At the same time it guarantees the professional organisations' regulatory powers, indirectly it is true, but unmistakably nevertheless. The problem, which Greek jurisprudence and legal doctrine have still not resolved, concerns the scope and confines of collective autonomy.

(c) New trends towards decentralisation of collective bargaining

As a result of the reform of 1990, there has been a major reorganisation of collective bargaining: the law has added two new levels of negotiation - company and branch level - to the existing professional and multisectoral (national) levels of negotiation. The rule of hierarchy between the various levels of collective bargaining has been abolished. Disputes between the various levels are settled by the *'favour'* principle. Comparisons are drawn on the basis of a set of contractual clauses: there are two sets - clauses relating to wages and other contractual provisions. Comparison must be comprehensive.

The law (*Article 10(2) 1876/1990*) defines the *'favour'* principle in only one case: company and branch collective agreements introduced under the reform may amend a collective agreement concluded at professional level, not only in a manner which is more favourable, but also in a manner less favourable to workers.

Legislative decentralisation of negotiation has not been accompanied by an expansion of negotiation at company level. Collective agreements at company level have retained their traditional content.

Even productivity bonuses, which are a common occurrence, are not expressly part of a collective agreement. The same backwardness is found in the *'social plans'* which accompany restructuring and collective redundancies and have a normative effect. Although provision was made for these in *Law 1387/1983*, trade unions and works councils still refrain from concluding them or are far from considering them as alternative measures to redundancy or as measures for the support and reintegration of employees.

However, even companies which meet all the requirements necessary for concluding collective agreements continue to apply other atypical methods of negotiation between employers and employees, taking as a basis the professional agreement to which they are bound.

It could be said that the collective bargaining system is going through a transitional phase: it bears the stigma of the unproductive methods of a not-so-distant past, which keep repeating themselves, and is at the same time seeking to explore the opportunities offered by the new institutional framework which the actors view with uncertainty.

5. The role of the tribunals: jurisprudential law and constitutional jurisprudence

In the Greek legal order, the tribunals have no statutory powers. The effects of legal decisions are confined to the *'matter judged'*. Jurisprudence is not a source of legal regulation. Yet all agree that jurisprudence plays a key role and has decisive impact on the formation of the rules of labour law. Jurisprudence has, in time, enabled Greek labour law to build up a body of concepts - such as the working relationship - and principles - such as equal treatment - and establish itself as a source of protection of the wage-earner. The *'regulation'* on the termination of employment contracts is another such example. It is thanks to jurisprudence, drawing on *Article 281* of the *Civil Code* on abuses, that workers are now guaranteed the right to employment. In other areas of collective labour law, jurisprudence has played a more restrictive role: the object and scope of collective bargaining is a case in point. The *Council of State* concluded very early on that questions of an institutional nature should be excluded, thereby depriving labour law of a rich source of development through the machinery of collective autonomy.

Another point to bear in mind is that there are no labour tribunals in Greece (save for the *'arbitration tribunals'*, *cf. Chapter III, C/b*). Social cases are judged by civil courts sitting as labour tribunals. In our view, the shortage of specially trained judges well-versed in the logic of labour law coupled with the more general lack of *'industrial culture'* and the German influence on Greek doctrine and jurisprudence mean that Greek court rulings in the field of labour law tend to be rather out of step with *'modern times'*. This is true in the legal sense as far as the provisions and the spirit of the *Constitution* are concerned, and also in the economic sense, in view of the economic crisis and the new problems created for labour law and for workers. Broadly speaking, and although there are some exceptions, a narrow *'civilist'* attitude continues to prevail.

By and large, the same comments apply to *'constitutional jurisprudence'*. The Greek system set up to keep an eye on the constitutional purity of its laws is very similar to that in force in the United States: all courts and tribunals, including the courts of first instance (county courts), exercise *'control of the constitutionality'* of the law. In constitutional jurisprudence, which chiefly concerns *Article 22(2)* of the *Constitution*, the very diversity of interpretation finds expression in the existence of this democratic system of control which enables the higher courts to offer their own interpretation. There is also a special *Supreme Court* for these issues which has no great significance.

6. Custom and practice as a source of regulation

Industrial customs constitute a source of labour law in Greece by virtue of *Article 1* of the Greek *Civil Code* which stipulates that *'rules of law are contained within laws and customs'*[5]. Industrial customs which supplement the prescriptions of written law give no trouble: they are

5. MITSOU, op. cit. p. 89 and on; KARAKATSANIS, op. cit. p.48.

used as rules of law in individual employment relationships. Industrial customs liable to do away with or change a public order rule are another matter. If *"the custom does not do away with a law"*, the ban must be implemented with discernment in labour law: an industrial custom which runs counter to a *jus cogens* rule will be null and void, but a *'most favourable'* custom which is in the nature of a provision is valid and can take its place. The supremacy of industrial custom *'most favourable to the workers'* in legal terms also applies to local custom or special customs already in existence, save where the law expressly stipulates otherwise.

Yet the importance of industrial custom as an unwritten source of labour law is very limited and of no real significance. The emergence of new industrial custom is likewise very restricted. On the other hand, industrial practice is more highly developed and plays a more important role in the Greek business world.

Industrial practice or custom – or company practice – though widespread in Greek legal tradition and jurisprudence, have no regulatory force, opinia necessitatis is lacking and they are not generally applicable. Industrial practice is really no more than working conditions tacitly agreed between the employer and his staff, and these may be replaced[6] at any time. Yet a minority of the legal profession take the view that industrial practice is a source of law with regulatory force because:

a) it determines *de facto* the content of individual employment contracts in a general and abstract sense;
b) it is compulsory by mutual and tacit consent of the employer and his workers.

In fact, what we are dealing with is company custom, which only differs from traditional custom in so far as it arises and operates within a single company or establishment. The minority view would appear to be more in step with the peculiarities of the formation of sources of labour law.

7. International law and its regulatory impact in the national context

According to the Greek *Constitution*, the rules of recognised international law and international agreements and conventions duly ratified and implemented are part and parcel of Greek domestic law and take precedence over any contrary provisions of the law (*Article 28(1)(1)*). Thus international labour conventions (ILO) as well as bi- and multilateral agreements take precedence over Greek domestic labour law and invalidate any contrary provisions in national law unless the latter are more favourable to the workers. Although the rule of international law is applied to both individual and collective labour law, and takes automatic and mandatory effect, the country's two supreme legal authorities (the *Council of State* and the *Court of Appeal*) are taking their time to comply with constitutional imperative. The *Court of Appeal*, in a 1980 ruling on ILO *Convention No 98* recognised – taking its cue from jurisprudence formulated prior to the establishment of the *Council of State* – that the rule spelt out in *Article 4 "was not a rule of law but merely a guideline for domestic legislation in the countries acceding to the convention"*. This interpretation has come in for stinging criticism by the legal profession as a body and it is unlikely to be upheld.

By far the most original of the internationally-inspired provisions of the Greek *Constitution* is *Article 28(2)(1)* and *(2)*, which stipulates that it is possible, with a view to serving the national interest and promoting cooperation with other States, to grant – by means of a treaty or agreement and a three fifths majority – the powers normally granted by the *Constitution* to the bodies of international organisations. This clause was included when Greece was preparing to join the *European Community*, but it goes much further than mere compliance with EEC rules. It stipulates that Greece can freely, by voting a law by absolute majority of all deputies, restrict national sovereignty provided this is in the national interest, does not infringe human rights nor undermine the foundations of democratic rule, and on condition that it upholds the principles of equality and reciprocity (*Article 28(2)(3)*). *Law 945/1979* ratifying Greece's accession Treaties to the *European Communities* was adopted by the majority stipulated in *Article 28(2)* (which also covers the majority stipulated in *Article 28(3)*. In effect, this means that Community law, and by extension Community social law is now part and parcel of the international sources of Greek law. Now that the Greek State has accepted these restrictions to national sovereignty, the rules of law spelt out in the Treaties and in the acts passed by Community bodies – in so far as they are binding and statutory as regards working conditions – are incorporated into Greek domestic law, take automatic and compulsory effect and take precedence over any contrary provision in Greek domestic law.

8. Conflicting rules and the hierarchy of sources

(a) Conflicting rules

Wherever a particular working condition is regulated by rules stemming from different sources, the resulting conflict is solved by reference to the hierarchy which applies to the sources of labour law and the principles underpinning them[7]. In essence, these say that the lower-ranking rule must be compatible with the higher-ranking rule. The lower rule may not be different if the higher rule is a jus cogens rule. However, if they are jus dispositivum, they are subject to the principle of the most favourable rule (for wage-earners). This squares with the object of labour law, which is to ensure minimum protection. The principle of the most favourable rule – or the most favourable condition for the worker where individual employment relationships are concerned – is fundamental to Greek labour law: it is upheld both by Greek legal tradition and by the courts. All the same, this principle is sometimes breached in favour of the principle of specificity or even of the principle of order, in the case of corporate in-house regulations where they regulate working conditions for the staff as a whole. This principle is a fairly recent one and is upheld by part of the legal profession. It has had some impact on jurisprudence in the *Council of*

6. MITSOU op. cit. p. 93 and on; KARAKATSANIS, *Company practice* (in Greek), *Xenion Festschrift für P. Zepos*, v. III, Athens 1973, p. 62 and on; KOUKIADIS, op. cit., p. 132.

7. MITSOU, op. cit. p. 119 and on; KARAKATSANIS, *Labour Law* op. cit., p. 60 and on.

State (it only applies to public-sector enterprises) but is not rooted in Greek positive law[8].

(b) The hierarchy of sources

The hierarchy governing the sources of labour law is largely founded in the *Constitution*, which formally *"puts each rule in its place"*. In principle[9] the hierarchy is as follows: Community rules top the list and, in each of the areas they cover, they take precedence over any other rule, including constitutional rules. Constitutional labour provisions come second, and international labour regulations, which operate on an *'infra-constitutional'* yet supra-legislative basis, rank third. Ordinary legislative labour provisions take fourth place, followed by collective agreements, arbitration rulings and in-house regulations. These have their own internal hierarchy, which reflects their legal impact and their scope. Sixth in line are corporate rules based on in-house regulations drawn up by the employer. The seventh and last echelon is taken up by industrial custom and practice. All the rules at all levels are governed by the principle of the most favourable rule for the workers.

9. The working relationship and the different sources of regulation in a dynamic perspective

While all the aforementioned instruments have some impact on labour relations, it has recently been shaped primarily by European law, labour regulations, by jurisprudence and corporate practice (and more change is no doubt to come, with bills on atypical employment and collective agreements, but nothing specific yet). In-house regulations will become even more important, since they will henceforth be drawn up jointly by the works council and the employer. Jurisprudence means more flexible employment relationships through its effect on State legislation. Labour contracts on the other hand still have little or no impact on the shaping of employment relations in Greece, unlike other countries. Corporate practice however - in many large and medium-sized companies at any rate - does have important implications for the employment relationship and the employer's powers.

CHAPTER III: INDUSTRIAL ACTION AND METHODS OF CONFLICT RESOLUTION

1. Industrial action and major causes of conflict

Nationwide industrial conflicts, with attendant general strikes, mobilisation and workers taking to the streets en masse have long been a traditional feature of Greek social and political life. Their objectives are not strictly speaking economic or social in the accepted sense, and the stakes are higher than can be resolved by *'mere'* collective bargaining. Rather, they are broad-based, extended disputes which are used as a vehicle for criticising or condemning specific areas of government policy. In the Greek social tradition, this type of industrial action is usually organised by the union opposition. In the majority of cases, such action is highly politicised, in other words, kept under tight party control. Yet in recent years, there have been fewer purely political strikes and more strikes for wider social and economic reasons.

Industrial action for collective agreements at branch or professional level in Greece has always been restricted in scope. It usually focuses on wage claims, benefits, the reduction of working time. Only in rare times of great social unrest (particularly the period 1974/77) has there been any action for industrial democracy or worker participation. Yet in recent years there has been a steady increase in the number of collective disputes at company level against the threat of redundancy, for jobs and against company closures.

In Greece, strikes are often ill-prepared and inadequately organised. They are often spontaneous expressions of a heroic struggle, as was the secondary school teachers' strike in June 1988. Heroic, because most Greek unions lack the strike funds and machinery to sustain such action, especially when it erupts without proper planning. This lack of planning - or of resources - meant that an admittedly small number of companies became locked in lengthy and costly strikes in the early 1980s in hopes of securing their *'socialisation/nationalisation'*. This was at a time when ideas such as *'self-management'* and *'workers' control'* still had some credibility with the workers who were hoping to achieve public sector employee status. In the end, the sole result of their struggle was to weaken the position of their respective companies which were then plunged into serious financial difficulties. This type of action has since disappeared, and the emphasis at present is very much on safeguarding employment rather than on pay claims in these struggling companies — which have been placed under State control on an ad hoc basis.

Collective action in public sector enterprises and in the banking sector is quite another story: in the banking sector especially, it is well-organised and to the point. The unions have sufficient strike funds and often take the lead in corporate bargaining in the public sector; public-sector employees being regarded as earning the highest wages and having the reputation of a strong corporatist mentality.

Industrial action for the renegotiation of company agreements in Greece starts in late autumn or early winter, with one company being singled out as an example - possibly a company in the industrial zone of Thessaloniki. The resulting agreement will set the tone for others to follow. This is also the time when the global collective agreement comes up for *'review'*, with the branch-level and professional agreements following suit. This schedule is by and large followed in most years. Then again, Greek labour relations are still imbued with a degree of anarchy which, coupled with unforeseen developments, has been known to result in unexpected collective action and social unrest.

2. Strikes and lock-outs

(a) The different kinds of strikes and their relative importance

It should be noted first of all that strikes are a very frequent phenomenon in Greece. The country has the third-

8. MITSOU, *Sources*, op. cit. p. 122.
9. Some authors put the Constitution in first place. Cf. KARAKATSANIS, *Labour Law*, vol. A, p. 59. Others give equal rank to international rules and ordinary labour legislation. Cf. DELIYANNIS-KOUKIADIS, *Labour Law*, op. cit., p. 106.

highest number of industrial conflicts in the European Community[10]. Although declining in recent years, the number of strikes brought before the courts[11] is still considerable. The whole phenomenon of industrial action being brought within the legal sphere is highly characteristic of Greek labour relations. On the other hand, most strikes tend to be brief, which somewhat atones for their number.

Most Greek strikes are union strikes. The *Constitution* itself grants union organisations the right to decide to call a strike: *Article 25(2)(1)* says that *"to strike is a right exercised by legally constituted union organisations"*, a principle reiterated in *Article 19(1)* of *Law 1264/82*. *Article 20(1)(j)* of the same Act extends this right to associations of persons which fulfil the conditions required for them to be regarded as company-level union organisations. Wildcat strikes, which have become increasingly rare in recent years, are not considered legal[12].

In the case of strikes in the private sector, the law stipulates that 24 hours' notice must be given. The trade union organisation or the employer may, before or during the strike, invite the opposing party to a conciliation procedure called a *'public dialogue'* because it is open to representatives of associations, professional organisations, the administration and the press. The public dialogue, which does not imply suspension of the strike, takes place within 48 hours of the invitation being announced and is presided over by a mediator selected from the list drawn up by the mediation and arbitration body. If the parties do not reach an agreement, the mediator issues his report during the next 24 hours; this may be published in the press (*Article 3 of Law 2224/1994*).

Political strikes in the broad sense, directed against the State and its bodies – to take or refrain from measures involving the protection or the promotion of the economic, professional or union interests of the worker or his safety – are legal in Greece and the unions make liberal use of them. A case in point were the strikes against *Article 4* of *Law 1365* on the *'socialisation'* of enterprises when it was put to the vote in 1983. This was intended to restrict the right to strike: Article 4 was abolished in 1988. On the other hand, political strikes in the narrow sense are not regarded as legal, except in extremely rare cases where they are called to defend constitutional institutions and rights and national independence.

So-called *'joint'* strikes – strikes combining professional and political motives – have a major impact in Greece. These are strikes directed at the employer but which require State involvement before they can be solved. In 1983, joint strikes triggered by the Government's austerity measures and wage freeze fuelled impassioned debates. In a very important ruling (920/1983), the Athens *Court of First Instance* had recognised the strike to be legal, a view shared by a majority in the profession. Yet the jurisprudence which followed declared the strike to be illegal. The interpretations given are closely related to the whole issue of *'more general interest'* as spelt out in *Article 106* of the *Constitution*. The problem resurfaced in the autumn of 1985 when the government unilaterally adopted the legislative act of government without first consulting the unions, negotiating with them or even informing them.

In Greece, socio-political strikes are as a rule general strikes conducted by the opposition unions, but there have been cases where they have been decided and conducted by all unions across the spectrum. The January 1987 strike in the private and public sector in support of multi-sectoral bargaining was such a strike, calling for the abolition of the 1985 austerity act.

Greek law recognises the solidarity strike: such a strike may be called to protect and promote the legitimate interests of workers in general as spelt out in *Article 19(1)* of *Law 1264/82*. But a solidarity strike may also be called in support of the workers in different companies or establishments belonging to the same multinational firm as the workers coming out in sympathy. In this case, the main strike must have immediate impact on the economic or professional interests of Greek workers and it must be called by the most representative third-degree professional organisation, i.e. by the *General Confederation of Greek Workers* (GSEE).

It is worth taking a closer look at the legal regulation of the solidarity strike as spelt out in *Article 19(1)(b)* of *Law 1264/82* because, although too seldom used in practice, it is nevertheless of great interest to European labour relations. Temporary stoppages are the most widespread form of worker mobilisation in Greece. The advantages to the workers are several: their pay packets are only minimally affected, they are usually effective and (according to *Article 20(1)* of *Law 1264/82*) may be called following a decision by the union council. Another recent trend, particularly in enterprises, and only in the case of strikes, not of stoppages, is the increasing number of sit-ins during the strike and indeed a general rise in staggered strikes and go-slows. (Finally, it is worth bearing in mind that legal studies on the strike phenomenon abound, but Greece has no social/economic surveys on the subject.)

(b) Safety service and minimum service

Trade unions which call a strike are obliged by law to provide *'safety'* staff to ensure the safety of installations and to prevent damage and accidents during the industrial action. The law formally prohibits the hiring of staff to replace striking employees during the strike.

In addition, in the case of public services and public utilities, trade unions must also provide a minimum service to satisfy the public's essential requirements (*Article 21(2)* of *Law 1264/1982*, as amended by *Articles 3(1)*, *2* and *4(1)* of *Law 1915/1990*) during the strike. The list of staff responsible for providing the safety service and the minimum service is negotiated between the employer of the establishment and the most representative trade union organisation. The parties must reach an agreement by 25 November of the current year, which will enter into force the following year. Failing this, the parties must initiate

10. Léon DASSIOS, *Labour law, the strike*, Vol. B/II, Athens 1984, p. 794 and on.
11. Nikitas ALIPRANTIS, *Strikes and employer's reactions*, op. cit. *Dikaio ke politiki*, 8, 1984, p. 209 and on.
12. Except *ex post facto* where they are taken up by the competent union (cf. L. DASSIOS, op. cit., p. 809 and on, bibliography and jurisprudence quoted).

the mediation procedure which begins within 15 days in the event of failure, and must refer to the committee for the protection of trade union representatives.

(c) The lock-out ban

The *Constitution*, while recognising the right to strike, is silent on lock-outs. *Law 1264/82* on the other hand, unlike previous regulation, formally prohibits lock-outs (*Article 22 (2)*). In effect this means that the employer no longer has the right to decide a *'defensive lock-out'* in retaliation against brief stoppages, a right previously recognised in jurisprudence and by part of the profession.

However, the spirit and the objective of the ban have not yet quite penetrated Greek jurisprudence which still comes up with debatable rulings on acts such as dismissal, withholding pay, paying anti-strike bonuses and other employer reactions against strikes[13].

3. Conflict resolution

(a) The machinery for dispute settlement

The main method of resolving collective disputes in Greece was until recently compulsory arbitration. This procedure involving State intervention, which was introduced during the Metaxas dictatorship, was governed by *Law 3239/1955*, which was repealed in 1991. Now, the aim of the new *Law 1876/1990* is to resolve conflicts through the principle of collective autonomy.

Recourse to compulsory arbitration, the direct result of which was the suspension of the right to strike, hindered any attempts by the parties involved to solve the conflict and, at the same time, transferred responsibility for solving the conflict to the State. This allowed the State to apply its incomes policy via arbitration rulings, the number of which was equal to the number of collective agreements. Arbitration courts comprised a judge, an official from the *Ministry of Labour* and a representative of the employers' and workers' organisations. The *Ministry of Labour* had the right to demand compulsory arbitration directly without any prior attempt at conciliation.

The rigid structure of this conflict-solving procedure led, even before the introduction of *Law 1876/1990*, to the creation of a kind of voluntary arbitration open to workers' representatives and employees in large companies. The conflict was resolved through the intervention of the *Ministry of Labour* and its representatives, always on ministerial premises. This procedure was followed for the conclusion of national multisectoral general agreements. The *Ministry of Labour*'s principle was not to let an arbitration ruling replace a collective agreement at national level, but in most cases workers' trade union organisations demanded application of the compulsory arbitration procedure.

The new method of solving disputes introduced by *Law 1876/1990* is in direct contrast to the previous regulations: voluntary procedures provide the basis for the settlement of a collective dispute. Provision is made for conciliation and mediation procedures and for voluntary arbitration in stages. Any dispute, either individual or collective, may be the object of conciliation. The arbitrator is a *Ministry of Labour* official whose role is to reconcile the opposing opinions of the parties in order to settle the conflict as quickly as possible. The new mediation procedure is particularly interesting because, for the first time in the history of the Greek system, opposing parties become regulators of their own conflict since they have the power to determine contractually the conditions for mediation and arbitration. Only in the event of disagreement does the law provide for recourse to the mediation and arbitration body (OMED) and the selection of a mediator - or the drawing by lot in the absence of an agreement - from the list drawn up.

Arbitration is the last resort for settling disputes. Voluntary arbitration is the main method, and this procedure may be applied at any stage of negotiation by joint agreement of the parties or unilaterally if the opposing party refuses to reply to an invitation to mediate or by the trade union organisations when the employers' side rejects the mediator's proposal. The arbitrator is selected or drawn by lot from a list established by the OMED, as in the case of the mediator. The OMED is a legal entity governed by private law whose headquarters are in Athens. It is administered by a board of 11 members. The main weakness of the above system is the possibility of unilaterally requesting arbitration, which is tantamount to compulsory arbitration, which, moreover, is open to any company in the public or private sector. However, the statistics show that the OMED operates quite effectively: it has so far received 99 requests for mediation in 1992, 128 in 1993, 116 in 1994 and 112 in 1995. Half of these conflicts resulted in the signing of a collective agreement via a mediator. Each year a small number of these (between 40 and 48) are referred back for arbitration, resulting in a compulsory ruling.

CHAPTER IV: ESSENTIAL CHARACTERISTICS AND PARTICULARS

1. The national situation in an international setting: key features of the national system

In order to understand the essential features of the Greek national system governing the regulation of working conditions, several points need to be borne in mind:

- The regulation of working conditions in Greece is largely statutory.
- The Greek system of regulation which differs substantially from that of other Member States, chiefly because of a number of peculiarities and indeed lacunae in the field of collective action, yet belonging to the same legal family as that in some other continental systems (France, Germany), has undergone significant change and innovation over the past fifteen years. Sweeping changes were introduced by the *1975 Constitution*, which features a large number of social rights and guarantees for Greek workers, and further modifications attended Greece's accession to the Common Market, particularly the legislation passed post-accession to comply with *'EC social law'*.

13. cf. Nikitas ALIPRANTIS, *Strike*, op. cit. Some members of the profession question the legality of the ban (cf. KARAKATSANIS).

- Collective autonomy is very limited in the regulation of working conditions. At the national level, social dialogue has hardly got off the ground.

The object of negotiation is severely restricted by a two-fold legal obstacle: a new legal regulatory framework with which the actors have not yet familiarised themselves and jurisprudence erring heavily on the side of state regulation, thus undermining the autonomous sources of regulation of working conditions, despite constitutional provisions.

The question is, should these legal impediments be blamed on the lack of unity displayed by Greek unions and on the party, in particular the Communist party, (government and opposition) stranglehold on the Greek trade union movement? There is little doubt that the political dependence of Greek trade unions and their inability to agree among themselves on even a modest joint platform, on joint collective action and a joint stand for purposes of social dialogue has severely inhibited their bargaining activity. While the legal obstacles are undoubtedly due to a variety of reasons, less economic (importance of farming and late and limited industrial development) than political and historical (civil war and dictatorship), the very real and deep divisions and the fact that unionism remains a burning issue are hardly conducive to modernising bargaining structures. A case in point is the much-vaunted reform of the *1955 Act on Collective Employment Agreements* which has seen the birth and demise of a string of working parties and draft bills. The systematic exclusion of certain political unions from membership of the single Confederation and the lack of some other framework or tradition for social dialogue at this level has meant that the opposition unions have tended to reject and criticise a whole phalanx of government proposals on principle (the principle of opposition) because this is their tried and tested way of exerting pressure and maintaining their profile. Clearly this is a vicious circle stemming from the simple fact that there is no machinery for consensus, which would bring in all the social forces and all the parties involved at an early stage, and one which has meant that the *'traditional'* authoritarianism of the Greek State has firmly taken root in the regulation of working conditions.

The democratisation of company structures is a very recent phenomenon in the Greek system of employment relationships. The exercise of union rights on the shop-floor was only instituted in 1982, health and safety committees were not brought in until 1985 and the works councils act was adopted only a few years ago (May 1988). The new legal framework which introduces new participative bodies and procedures in Greek enterprise is largely Community-inspired, consolidating a practice adopted in several large Greek companies since 1974. Overall, however, worker participation and the democratisation of company structures are still anything but common fare in the Greek social context today. Resistance to the regulation of participation structures in private-sector enterprises – not in public sector companies – is due in equal measure to the survival of the old mentality (so-called cultural resistance) on the part of both employers and workers and to the changes precipitated by the economic crisis: restructuring, dismissals, introduction of new technologies and new forms of employment, decentralisation in the workplace and the rise of sub-contracting, home working, piece work, *'invisible'* work for industry, etc.

As a result, the Greek system of legal regulation of working conditions (possibly as archaic as Portugal's compared to the other Member States) has in the past decade had to deal with changes of two orders, running neck-and-neck. One course has led to its modernisation. It has introduced participation structures, incorporated the bulk – mostly novel and innovative in Greek terms – of EC law. This has brought the Greek system largely in line with the main currents of regulation in other Member States regarded as well ahead in the social stakes.

At the same time however, the economic crisis has been a destabilising factor in the pursuit of the participative mode. It strengthens the old *'civilist'* mentality in the Greek courts. Greek jurisprudence has in recent years shown clear signs of undermining the protection granted to wage-earners and of interfering with vested rights. Judgements often reflect the dire economic situation currently faced by Greek enterprise. At the same time, in practice the employment relationship is beginning to evolve in ways not bargained for by the legal regulation of working conditions, which remains largely true to its historical roots. Of course, atypical employment, often not based on any contractual arrangement, has always been a feature of the Greek economy, but it is now on the increase, very often in the form of a second, undeclared job. Greek legislators have regulated some flexible forms of employment and working time, although others are rapidly gaining importance. The most appropriate form of regulation is being sought in this case, which does not seem to be an easy matter.

2. Elements of convergence and divergence in the EC context

(a) Elements of convergence

Greek labour law belongs to the same family of Civil Law operating in France and Germany, so, to begin with, it already shares a number of key features with its fellow European countries. The Greek system of regulation of working conditions certainly obeys the tenets of international law — as represented by the international Treaty on Economic, Social and Cultural Rights or the International Labour Conventions, although Greece has perhaps not signed and ratified as many of these as could be wished. The same applies to European social law, as enshrined in texts such as the *European Social Charter*, in addition to Community law proper.

Secondly, the implementation of Community Directives in Greek domestic law has fostered substantial change in areas such as the free movement of workers and the protection of Member States' citizens. Greece is well on the road to coordination and harmonisation. Yet in Greece something more is involved: the structure and the development of Greek law now bear the unmistakable imprint of EC membership. And in the third place, its new, modernising legislation owes much to the efforts to bring Greek labour law in line with the regulations in force in other Member States. Quite apart from the legislative scope

afforded the national legislator, both the government and the social partners are engaged upon a wide-ranging debate on Community Europe, which is beginning to shape new ideas and sometimes, forge new practices. These, in a nutshell, are some of the elements of convergence.

(b) Elements of divergence

(i) The predominance of State regulation

Working conditions in Greece are largely State-regulated. While other EC countries may similarly experience a high degree of State regulation, it is of a quite different order: in Greece, there is little room for collective autonomy and, where collective agreements are concluded, these have virtually no impact on the regulation of working conditions.

(ii) The difficulty in establishing social dialogue and obtaining a consensus

One element of divergence is the difficulty which the Greek system experiences in establishing a nationwide social dialogue which would bring together - apart from the State - employers' representatives (there is no problem with these) and delegates from all the Greek *'political'* unions to draw up or negotiate a joint policy on working conditions.

Following the experience of the 1991 national multi-sectoral collective agreement, there has been a tendency for the Greek social partners to adopt a strategy well-known in Italy, France and Spain: negotiated laws: commissions comprising workers' and employers' representatives study the institutional aspects of work-related issues and present their conclusions in the form of draft laws. In this way, the social partners express their interest for the promotion of the social dialogue. For its part, the present Government is also seeking social dialogue and intends to attempt to conclude tripartite agreements as has been done in Italy.

On the institutional front, the belated creation of Greece's *Economic and Social Committee* (OKE) by *Law 2234/1994* provided the basis for the consolidation of the social dialogue. Its duties involve formulating a reasoned opinion on fundamental issues concerning labour relations, social security, taxes and socio-economic policy, particularly in the field of regional development, investment, exports, consumer protection and competition. With regard to the above-mentioned matters, the OKE must be consulted before the laws are adopted by Parliament. The OKE comprises a President and 48 members, and is made up of three groups which represent the employers, workers and other professional categories, respectively.

(iii) Representation and participation in Greek enterprise: first steps

Although union representation at company level and some participation procedures date back to 1974, which saw the birth of a *'corporate movement'* in some of the larger companies in Athens and Thessaloniki, the company and its participative institutions did not get onto the legal map until 1982, when *Law 1264* on the democratisation of the union movement was passed. This Law, which constitutes a major step in Greek labour law, recognises union rights in the workplace and provides for *'supportive'* arrangements instituting facilities for union activity in the workplace. For the very first time, employers were required to meet with representatives of the unions in the company - at their request - to listen to them and to take the necessary steps to solve any problems thus brought to their notice. Coupled with these first participative procedures, there is the possibility of in-house bargaining to improve union rights.

Law 1365/1983 on the *'socialisation'* of business focuses on labour relations in public-sector enterprises and public-utilities and introduces worker participation in corporate management, planning and control. The workers, together with the State, local government and other social groupings cooperate in formulating fundamental options and decisions attuned to the national interest and the needs of society as a whole. One third of the delegates on the supervisory bodies - such as the representative social supervisory assembly and the board of directors - are made up of workers. Workers' representatives can become members of the management committee. In public-sector enterprises, new representative bodies - Workers' Councils - have advisory powers.

In 1985, *Law 1568* on the health and safety of workers made legal provision for the first time for health and safety committees in companies employing more than 50 workers. Companies employing between 20 and 50 workers have a workers' representative with substantial consultative powers to deal with health and safety issues. Finally, the *Law on the Works Council* was implemented only a few years ago in the spring of 1988. This law was passed at the same time as the *International Labour Convention (no 135) on the Protection of Workers' Representatives in the Workplace.* This new law makes provision for the institution of a second representative body in private-sector enterprises employing at least 50 workers and in those employing more than 20 workers provided there is no company union. The Law provides for a whole set of participative rights: information, joint discussion, consultation, joint decision-making even, among other things, on matters such as the drafting of the in-house regulations by common consent. What matters is that Greek companies have suddenly gone from an almost total absence of regulations on representation and participative procedures to a situation where there are several such bodies. Predictably, these lack the experience and the tradition which would help them to function dynamically, to take root and to develop. In other words, the legal framework exists where its offshoots often do not. Health and safety committees have developed significantly over the past two years, but company unions are less securely implanted now that works councils are beginning to emerge. The works council, still in its infancy, seems less threatening to employers: at all events, the Greek system is still finding its feet and we shall gave to wait and see how things develop.

In the meantime, the old-style authoritarianism which traditionally helped to shape labour relations and working conditions - an attitude equally manifest on the part of the State and on that of the employer and aided and abetted by the unions'- and workers'- failure to provide an alternative - is dogging attempts to impose the new legal

framework in a country which manifestly has still not come to terms with its industrial culture.

(iv) Legislation regulating new, flexible types of employment

New types of employment have proliferated very quickly in Greece in recent years, yet legislation or even collective negotiation on the subject between the social partners is still wanting. This has resulted in an unusually high number of fixed-term contracts, apprenticeships and probationary contracts, not to mention sub-contracting which has become a veritable rage even among multinationals. Temporary work is banned in Greece, yet some temporary working exists in specific areas such as tourism, congress organisation, etc. Home working has also taken great strides, as has piecework performed outside the enterprise. This work is often intended for industry and export and is done mostly by women. This category of worker, highly dispersed and ill-organised, tends to be regarded as self-employed although they are as a rule in a position of effective dependence. There is also the problem of inspecting the health and safety conditions in which they work.

As we have already seen, the employment contract plays an important role in Greek employment relationships. The protection which it was possible to develop for workers was based in particular on the open-ended employment contract: the employment relationship is usually stable. The guarantees inherent in open-ended employment contracts mean that the Greek system is very rigid.

However, in reality, flexibility of employment in Greece is different from the image portrayed in legal texts: flexibility does exist, but most often in the form of employment without a contract, particularly in the form of sub-contracting, outside processing, homeworking and pseudo-self-employed employment relationships. The result is a contrast in Greece between rigid regulation of the employment contract and the lack of intermediate flexible contracts (excluding fixed-term contracts and part-time contracts) on the one hand, and the extreme degree of flexibility in practice on account of flexible types of employment without a contract.

Greek legislation on flexible contracts consists of: (a) ancient legislation from the 1920s relating to the fixed-term contract, for example, or from the 1950s, such as legislation on shiftwork or homeworking; (b) very new legislation introduced by *Articles 38-41* of *Law 1892/1990* on part-time work, shiftwork and the organisation of working time. However, these provisions are inadequate and do not fully regulate the flexible contract which they introduce — moreover, they are contained in a law devoted to development and constitute only a small part of this. They have been adopted hastily and without sufficient preparation in order to give urgent recognition to incomplete regulations on flexible employment. At the end of the 1980s, under a Socialist government, at least two bills were presented on the recognition of new types of employment and flexibility. However, these bills were withdrawn in the wake of fierce opposition from trade union organisations of all ideological/political colours. The Conservative government quickly adopted the above-mentioned legislation as soon as it came to power. Thus Greek law on flexible contracts is not at all comprehensive, and does not appear to be a real modern body of legislation on flexible employment contracts, since these are always placed on an equal footing with stable employment contracts.

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SPAIN

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CHAPTER I: THE ACTORS

1. The main parties involved in the regulation of working conditions include not only the trade unions and employers' associations but also the organisations representing workers at company level, such as the workplace branches of trade unions and, most importantly, the unitarian elected bodies (works councils and staff delegates) and individual employers themselves.

In the Spanish industrial relations system, leaving aside for the moment the importance of national legislation and case law, which will be discussed later in this document, autonomous regulation of working conditions is essentially by means of collective bargaining and agreements and mechanisms providing for worker participation at company level. Collective bargaining at a level above that of the company is the exclusive preserve of the trade unions and employers' associations, and participation in negotiations is subject to a minimum representativeness requirement. There is, however, a form of collective bargaining at company level which is quantitatively significant and gives the workplace union branches, the works councils and staff delegates certain negotiating opportunities. In practice, it is these workplace representatives, who are elected rather than being an integral part of the official union structure, who have the real responsibility for collective bargaining at company level. Over recent years, however, it has gradually become more common, in certain large firms, for the union representatives themselves, particularly the branch members, to take over responsibility for the negotiation of company collective agreements. An assessment of the parties involved in the regulation of working conditions can therefore not be restricted to the unions and employers' associations, but must also cover the works councils and staff delegates and, as mentioned, the important role played by individual employers.

Company-level agreements, for which there is legal provision in respect of certain areas of negotiation (mainly: important changes in working conditions, suspension of employment contracts or collective redundancies; but since the 1994 legal reforms, extended to other areas such as job classification, promotions, itemised pay statements, one-off bonuses, reduction of staff representation in line with staff cutbacks, etc.), play an important role in industrial relations, being an expression of the will of the workers' representatives within the company and therefore of the above-mentioned elected bodies at the workplace. The weight of individual agreements is, however, limited, except in the case of definition of specific working conditions for the highest-skilled workers. There are starting to be more individual agreements between employers and the workers concerned, which provide a means of changing the existing statutory or contractually-agreed working conditions. Serious doubts have been expressed, both in principle and in actual case law, as to the legitimacy of changes introduced through such agreements. While it is true that there is a tendency to regard them as invalid because they represent a stopgap measure where in fact a collective agreement (with the workers' representatives) is required in order to alter working conditions established by collective agreement, there is another school of thought which considers that any individual innovation in working conditions is acceptable provided it is not prejudicial to the statutory minimum protection guarantees.

Be this as it may, although the employer, given the collective bargaining structure described above, still has an important role to play in regulating working conditions, the move, observed in other countries, towards more individual agreements in the definition of working conditions has, as yet, had little impact in Spain.

The employers' associations, which are organised by branch of activity at provincial or Autonomous Community (or regional) level, are part of a central Spanish confederation of employers' associations (*Confederación Española de Organizaciones Empresariales* - CEOE). Its role as the leading representative body for employers in Spain in undisputed and it covers both the public and private sectors. There is therefore no separate association for public sector employers. The *'representativeness'* of the CEOE and its affiliated associations is fully acknowledged at all levels of employer representation and the functioning of the employers' associations overall is relatively well integrated. There is only one organisation specifically for small and medium-sized businesses, in the form of the CEPYME. This organisation is, however, also affiliated to the CEOE, with which it maintains a close cooperative relationship. Although representation through the CEPYME is formally distinct from that of the CEOE, in practice there is no difference, the similarities being such that employer representation can reasonably be regarded as a unified whole, and there is no need for further clarification of its internal organisation.

The trade union structure, on the other hand, has traditionally been much more heterogeneous. There are two main national confederations: the Trade Union Confederation of Workers' Commissions (*Confederación Sindical de Comisiones Obreras* - CCOO), which originally had links with the Communist party but has gradually developed an autonomous policy while emphasising its internal diversity, and the General Workers Union (*Unión General de Trabajadores* - UGT), which historically has links with the Socialist party, although relations and communications between the two have gradually cooled over the past few years. The representative weight of these two unions is very similar, as will be seen later, and far exceeds that of the other organisations. One of these, the ELA-STV, occupies a special position - attached to the *Basque Nationalist Party* (PNV) and having Christian Democrat leanings, it operates only within the Autonomous Basque Community where, as explained below, it enjoys majority status and thus has powers of action which are normally reserved for the most representative national organisations. There are other trade union organisations which operate only within a specific Autonomous Community and are the most representative union within that Community, but which do not have the same kind of majority as the ELA-STV. One of these is another Basque union (the LAB, which maintains close links with the Herri Batasuna political coalition, itself closely associated with the ETA terrorist organisation; another example is the *Galician Trade Union Association* (*Converxencia Intersindical Galega* - CIG), which is linked to the Galician nationalist faction (*Bloque Nationalista Gallego* - BNG), and the third most representative

union in this Autonomous Community, after the CCOO and UGT.

Alongside these organisations there are other national unions which carry a certain weight in some sectors or geographical areas without quite achieving a prominent degree of representativeness. Examples are the Workers' Trade Unionist Confederation (*Unión Sindical Obrera* - USO), which began as a Christian movement advocating self-regulatory Socialism, and later lost its ideological references, and the General Confederation of Labour (*Confederación General de Trabajo* - CGT), which took over from the anarchist union CNT, historically important but, because of internal problems and its radical union policy, unable to attract enough voters and therefore permanently among the ranks of the minority unions. The CGT has, however, recently become more active and participated in various electoral procedures sometimes with considerable success, as in the case of the SEAT company. An important role is also played by certain unions many white-collar sectors, such as the Independent Trade Union Confederation of Public Servants (*Confederación Sindical Independiente de Foncionarios* - CSIF), which seeks to protect the professional interests of civil servants. With no obvious ideological bias, it represents almost 30% of public administration staff, thereby ranking as highly as the CCOO and UGT in this sector.

The unions are structured geographically and by branch or activity sector. Normally, they are divided into provincial branches which all belong to the corresponding national federation, this in turn forming part of a confederation. Sometimes they are organised by Autonomous Community or by region (this, of course, only in the case of the national unions). For certain occupations, however, the relevant occupation-based unions have a particular importance, normally dealing strictly with matters concerning the defence of the profession. They have no organic external links or are at most allied to other trade union organisations in other sectors defining themselves as independent. In the fields of health, education, transport and air traffic control, these unions have a decisive role.

Since the *1985 Trade Union Freedom Act* (LOLS), it has been possible to set up company-based trade union branches operating at the level of the individual production unit. However, such branches exist alongside the unitarian elected bodies intended to represent all workers, i.e. either the staff delegates or the works councils, depending on the size of the company. In the Spanish industrial relations system, the main representative role within companies is assumed by the staff delegates or works councils, who are, generally speaking, also responsible for collective bargaining and the conclusion of collective agreements at company level and are party to the specific agreements provided for by law in certain cases. Furthermore, as explained below, despite the fact that works councils and staff delegates have obvious links with the trade unions and play a key role in the organisation and implementation of their electoral procedures, they do not formally belong to the trade union structure. They therefore operate to a large extent on an individual basis and are not always controlled or influenced by the unions. This factor is a source of tension within Spanish industrial relations, the conflict between the two systems of representation manifesting itself frequently.

The works councils and staff delegates represent solely and directly the interests of all workers within the company, with no representation of employers' interests. Their members are appointed for four years via an electoral procedure based on a direct, universal and secret ballot. Their activities, and therefore also the election procedure, are based on the individual workplace, which means that companies operating on various different sites have several different representative bodies. In workplaces with between 6 and 49 employees, representation is by means of elected staff delegates, whereas where there are over 50 employees, it is via works councils. The law makes explicit provision for specific representation covering all the sites on which the company operates, in the form of a Multi-Plant Committee, the establishment of which depends on appropriate provision being made in the applicable collective agreement, which also defines the powers and rules of procedure of that Committee. There is no longer a need to make provision for such a committee at group level, since in early December 1994 the government presented a bill on implementation in national law of *Directive EC/94/45 on European Works Councils*.[1]

In the Spanish industrial relations system, the importance of the election of works councils and staff delegates goes beyond the appointment pure and simple of workers' representatives within individual companies and plants. These elections also reflect affiliation to the various unions sufficiently accurately for their results to be used as a basis for direct calculation of the degree of representativeness of the union confederations.

2. Trade union and employers' association activities are based on constitutional and legislative recognition and on rights which, in the case of the trade unions, stem from a considerable number of existing legal guarantees.

Article 7 of the *Introductory Section* of the *Spanish Constitution* makes specific reference to trade unions and employers' associations, implying a degree of institutional recognition which makes them key elements in the constitutional system. It is no coincidence that *Article 7* follows immediately upon the Article recognising the political parties as an expression of political pluralism, as a means of giving a voice to the public will and as an essential vehicle for political participation.

Under *Article 7* of the *Spanish Constitution*, the trade unions and employers' associations contribute to defending and promoting their own social and economic interests. Quite apart from the explicit recognition of these organisations as such and of their importance, they are recognised as performing an essential function in defending and promoting social and economic interests, which means that their existence and powers of action must be authorised in a broad range of fields. They are therefore free to set up and operate, obviously within the limits of the *Constitution* and the law, the only condition being that their operation and internal structure must be democratic.

1. This Act is currently (March 1997) in the final stages of adoption by Parliament, and could enter into force next month.

Section 1 of the *Constitution*, covering fundamental rights and duties, provides for the right of union association (*Article 28*) as well as a general right of association (*Article 22*). Freedom of union association is explicitly recognised, both positively (everyone has the right to join the union of their choice) and negatively (less strongly worded: no citizen can be forced to join a trade union). The right of union association thus expressly includes the right to found a trade union, the right to join the union of one's choice and the right of unions to form confederations and to found international organisations or to join them. *Article 28.1* of the Spanish *Constitution* makes no express mention of union activity as a legal right inherent in trade union freedom, but there have been various rulings by the *Constitutional Court* categorically stating that union activity is an essential element of trade union freedom seen from a constitutional point of view. This is important for legislative development, the actual practice of union activities and the viability of legal action in the form of appeal to the *Constitutional Court* on the grounds of unconstitutionality.

With regard to the persons covered by the concept of freedom of union association, the *Constitutional Court* has finally declared, after several years of debate on the legal principles, that *Article 28.1* of the *Constitution* refers solely to trade unions representing employees and does not extend to the employers' associations. The constitutional basis for the latter is the ordinary right of association, which is recognised as a fundamental right on the same footing as freedom of union association. Although there is absolutely no difference between the organic content of this right and that applying to the trade unions, the relevant provisions are at different points in the *Constitution*, which could lead to differences in treatment, particularly in respect of trade union activity and the provision of public funding.

Public servants are expressly protected by the right of trade union association in the terms of *Article 28.1* of the *Constitution*. Provision is, however, made for the form that freedom should take to be specified in the implementing legislation. The *1985 Trade Union Freedom Act* established a single system covering both workers on employment contracts and public servants, making no distinction in the essential content. There are nevertheless considerable differences in the supplementary rules on worker representation, strikes and, particularly, collective bargaining.

Specific rules have been laid down for certain public service categories. Judges, magistrates and public prosecutors, for example, are excluded from freedom of union association within the meaning of *Article 28*. They do, however, under *Article 127* of the Spanish *Constitution*, have the right to set up their own professional associations under conditions which prevent them from affiliating themselves to the general trade unions and exclude them from certain forms of union activity. *Article 28* also provides for legal restrictions on the right of union association in the armed forces or other armed services and bodies subject to military discipline; today, legislation implementing the *Constitution* excludes all bodies subject to military discipline, including the *Civil Guard*, from freedom of union association. For the police (national, regional and local), specific regulations have been drawn up distinct from the general system.

Because of its inclusion in the *Constitution*, trade union freedom enjoys an extremely high degree of protection. *Constitutional* rules are directly applicable and must be implemented by means of an *'organic'* law (adoption of which requires an absolute majority in Parliament). This means that action for violation of the right to the freedom of union association can be brought before the ordinary courts via a priority summary procedure, with entitlement to subsequent appeal to the *Constitutional Court* for the safeguarding of constitutional rights (of citizens or of associations who consider that their constitutional rights have been violated).

This high level of protection is very fully applied by the *1985 Trade Union Freedom Act*, which governs workers' right of union association (including that of members of the public service and workers under contract to the public authorities), both individually and collectively. It includes the right to form federations and confederations and found international trade union organisations, or to join such bodies; the right of such bodies to draw up their own internal rules and structure, and a guarantee that they cannot be suspended or disbanded except by a court decision on the grounds of serious breach of the law. Trade union freedom also includes the right to engage in union activities at the workplace or outside it, which means a permanent right to engage in collective bargaining, to strike, to publicise individual disputes and to stand for election to the organisations representing workers within the company.

For individuals, the right of union association includes the right to found a union without prior authorisation (and to suspend or disband it provided the proper democratic procedures are respected), to join the union of one's choice (the only conditions being compliance with the union's internal rules and the right to resign membership, since membership of a union cannot be made obligatory), and to engage in trade union activities. The concept of trade union association as applied to individuals in legislation includes the right of trade union members to freely elect their representatives within the union – on this point, trade union freedom is equated with the union's internal democracy.

With regard to the persons covered by the freedom of union association, self-employed workers who do not themselves employ other workers, the unemployed, retired persons and disabled workers may join or remain members of a union but are not entitled to found a union organisation with a view to defending their own interests as such.

The legal obligations to be met by trade union organisations are not defined in detail, any more than the obligation for their articles of association to be lodged with the appropriate public authority for the location concerned for registration and publication in the *Official Journal* for that region. Certain information on the union's identity, its internal organisation and the election of its leaders (in accordance with democratic principles), the legal status of its members and its financial system constitute the mini-

mum compulsory content of a union's articles of agreement. Acceptance of these articles can only be refused if one of these obligations is not fulfilled, in which case the points concerned can be corrected. The trade union organisation acquires legal status with full powers 20 working days following lodging of its articles of association. However, the public authorities or any other party which can prove a direct legitimate and personal interest may request the legal authorities to declare the articles of association unlawful.

On the question of trade union responsibility, the existing legal requirements are very succinct. The trade unions are responsible for any action taken or agreements concluded by their statutory organisations but not for any individual action by their members unless such action is undertaken in their capacity as union representatives or it can be proved that they were acting on behalf of the union. Irrespective of the circumstances, contributions paid by union members cannot be confiscated. This rule, coupled with the fact that organisations representing workers within a company, staff delegates and works councils, which are empowered to negotiate or to call workers out on strike and play a major role in negotiations and in the settlement of in-house disputes, are not formally part of the trade union structure and do not have any direct link with or dependence on the trade unions, leads to a situation in which the latter find themselves almost completely devoid of responsibilities.

A further element in the system for recognition of trade union freedom is the extensive legally sanctioned scope for trade union action. Before going into any further detail, however, it must be emphasised that the law on the right of union association applies only to employees and not to employers. Employers' associations are still covered by the *Law of 1 April 1977* rather than by the *Trade Union Freedom Act* (LOLS).

3. Briefly, the extent of the unions' legally recognised powers and freedom of action depends heavily on their degree of representativeness. Spanish legislation has expressly introduced the concept of *'most representative trade unions'* which enjoy special legal status in terms of both institutional participation and trade union activity.

As previously stated, the official system for determining the degree of representativeness is based on support won in electoral ballots. The representativeness of each trade union association is determined objectively according to the results obtained by the candidates it puts forward for election to works councils or staff delegations, including the equivalent positions in the civil service. Although still recent, this legal formula is firmly established in the Spanish system, and enjoys the full support of the unions, employers and public authorities because it is well suited to the Spanish approach to industrial relations. The neutrality and objectivity of this criterion, its simplicity and the ease with which the weight of each union can be calculated, the standardisation of the election procedures for all employees, transparency in the development and control of these election procedures and the regular four-yearly reassessment of trade union influence enable the system to function smoothly. Exact calculation of trade union influence is based on the number of representatives elected per union (if none, no direct account is taken of the number of votes obtained by each union). There is generally a fairly direct link between the number of representatives and the number of votes (not always necessarily the case), which tends to mean that the vote can be assessed more accurately in a small firm than in a large one. Until 1994, the degree of representativeness of each union was assessed every four years, to coincide with the new term of office of the staff representatives. However, this created certain tensions in the practical running of the system, mainly because it concentrated the election procedure into a very short period of time, thereby making for a confrontational electoral campaign which tended to destroy good relations between the main unions. It was largely for these reasons that certain changes were made to the statutory system in 1994, one of the results of which was to stagger the elections: following the reforms, there was no longer a set date for calculating the degree of union representativeness, the current system being based on constant updating of statistics on the representativeness of individual unions. To this effect, the *Trade Union Freedom Act* provides that designation as *'most representative'* or *'representative'* shall be notified when the union concerned takes up its functions, at which time it shall produce the appropriate documentary evidence supplied at its request by the relevant administrative department.

In view of the foregoing, the unions can, from a legal point of view, be divided into four categories:

1) The *'most representative unions'* nationally are those which obtain a minimum of 10% of the seats in the organisations representing the employees of a company (including public authorities). A further criterion is that of *'influence'*, according to which the status of *'most representative union'* is extended to all the organisations affiliated, federated or confederated to a national union with this status. Since this system was introduced, the only organisations which have achieved this designation at national level are the CCOO and the UGT.

2) The most representative unions within the Autonomous Communities are those which, operating only within the Autonomous Community concerned (and therefore not belonging to a federation or confederation with other national unions), obtain within that Community at least 15% of the seats in the workers' representative organisations, and have a minimum of 1 500 representatives. On this basis, not all the Autonomous Communities have unions with *'most representative'* status; in fact, the only Autonomous Community-based unions are in Galicia (the CIGA) and the Basque region (the ELA-STV and the LAB). Again, the *'extent of influence'* criterion means that unions which are affiliated, federated or confederated with a wider trade union organisation at Autonomous Community level acquire *'most representative'* status in accordance with the criteria described above.

3) Trade unions which, while not having *'most representative'* status according to the above criteria, enjoy at least 10% support in their specific field are considered to be representative in that field. (Through this criterion, it has been possible to recognise the representativeness in

their field of the main professional trade unions in sectors such as the civil service, health, education, transport and air traffic control). In this case, only the strict criterion of election success is taken into account, and not that of the extent of the union's influence via affiliated organisations.

4) The minority unions, i.e. those which do not belong to any of the above-mentioned categories as they do not meet the representativeness criteria described.

The official powers and scope of the activities of the unions vary according to their respective degree of representativeness:

- All unions are guaranteed a general right to engage in union activities within or outside the company, including the power to call a strike, participation in industrial disputes, the right to set up company-based union branches, to stand as candidate for election to the organisations representing the company's workers, and to participate in collective bargaining. In the latter case, the union concerned must meet the conditions, i.e. minimum representativeness of 10% in the particular geographical area or occupational field covered by the collective agreement.
- The most representative unions nationally have the following powers *'in all geographical areas and occupational fields'*: institutional representation to the public authorities; collective bargaining in any geographical area or occupational field covered by the collective agreement, irrespective of their degree of representativeness in that field; participation in non-judicial channels for the settlement of industrial disputes; organisation of elections (not only nomination of candidates) to the organisations representing the company's employees; usufruct of public premises and any other representative function.
- The most representative unions at Autonomous Community level have the same powers within the territory of their Community, plus the right of institutional representation to the national public authorities. They are entitled to participate in the negotiation of national collective agreements. (The fact that the trade unions in the Autonomous Communities have these powers where other trade unions which are more representative at national level, but which do not have *'most representative'* status, do not is legally acceptable because of the particular status of the Autonomous Communities in the national administrative structure.)
- The most representative unions in a specific occupational field or specific region have the same powers in that occupational field or region as the other *'most representative unions'*, with the exception of the right of institutional representation to the public authorities and the right of usufruct of public premises. These exclusions have, however, been diluted by various court decisions.
- The *Constitutional Court* has issued a closer definition of the criteria for designation of the *'most representative'* national unions recognised by the law *'in all geographical areas and occupational fields'* to prevent misinterpretation. To this effect, it has ruled that the law at no time authorises a union to act in a field other than its own and that its powers of representation in a specific field are subject to a certain degree of representativeness in that field. According to this line of thought, although proof of representativeness is not compulsory and even where the requisite degree of representativeness is not achieved, powers of representation are still subject to a certain degree of representativeness, which leaves the meaning rather vague. This is the case, for example, with the requirements for participation in collective bargaining, which allow a union to be considered as most representative at national level (whether this applies to the organisation itself or to its extended influence through affiliation to other organisations), even where that union does not meet the representativeness conditions under the general requirements for participation in negotiations. Looking at the rulings issued by the *Constitutional Court* as a whole, there is a strong tendency for the first three of the above-mentioned trade union categories (most representative nationally, most representative within a specific Autonomous Community, representative unions within their specific geographical area or within a specific occupation) to be placed on an equal footing, which tends to mean that powers of action are extended to all unions. The only difference is in the extent to which the powers are implemented, which is still dependent on the degree of representativeness. There are specific decisions on this point, concerning such matters as the cession of publicly-owned property, subsidies and economic assistance under the general State budget (*Presupuestos Generales del Estado*), participation in the public authorities' advisory bodies, etc.

The most representative national unions following the last elections are, at national level, the CCOO (37.8%) and the UGT (34.71%); at Autonomous Community level (Basque region), the ELA-STV in first place with 3.62% of the national total and 39.44% of the Basque total, and, in fourth place, the LAB; in Galicia, the CIG (1.77% of the national total and 25.93% of the total for Galicia). Of the specialised unions at occupational level, the CSIF, representing the civil service, occupies a prominent position.

On this legal basis, there has in practice been a sharp increase in institutional participation by the unions with recognised powers. These unions are represented in various industrial and social security organisations: the social security and unemployment office, the *National Advisory Committee* for collective agreements, the advisory bodies in the Autonomous Communities, etc., economic organisations such as the Central Committee on Prices, and administrative bodies such as the *National Schools Council* and the university governing bodies. These organisations must be consulted before certain government decisions are adopted, whether such decisions are regulatory or executive (annual setting of the national minimum wage, regulations on special working hours, etc.).

Given its importance, particular mention should be made of the *National Economic and Social Council*, composed of representatives of the most representative unions and employers' associations and of other socio-economic organisations (farmers, fishermen, consumers and users' orga-

nisations, cooperatives and workers' limited companies, etc.), as well as independent experts. This Council is essentially a consultative body advising the Government on social, economic and employment matters, particularly the drafting of bills or regulations.

The most representative trade union organisations have also received aid in the form of subsidies from the general State budget (where applicable via the Autonomous Community budgets). Originally, these were selective and restricted to the most representative trade unions. In 1985, the *Constitutional Court* ruled that the granting of subsidies solely to the most representative unions was unconstitutional, as a result of which the Government withdrew this condition and the subsidies are now available to all unions, scaled according to their degree of representativeness.

The State also provides support by granting the unions the right of usufruct of publicly-owned property. This practice actually began before it was legally sanctioned and, in 1983, the *Constitutional Court* ruled that it was not unconstitutional as it did not prejudice trade union freedom because the right was unconditional. The Court did, however, demand that differences in treatment between unions in this regard must be justified objectively. The *Trade Union Freedom Act* recognises the right of the most representative unions to this privilege, but the *Constitutional Court* takes the view that the other unions should not be excluded. In 1986, specific legal rules were drawn up on the subject, making it possible for the right of the usufruct to be granted to the unions and employers' associations, priority being given to the most representative organisations. The aim is to respond directly to the occupational and organisational needs of the unions, particularly those which, because of their greater degree of representativeness, have more responsibilities under the *Trade Union Freedom Act* and the other relevant legal provisions. The law also provides for a national advisory body to be set up comprising representatives of the public authorities, employers' associations and the most representative trade unions. A separate issue is the *'compensation'* awarded to the UGT and, to a considerably lesser extent, to the CNT for property confiscated after the Civil War.

In addition to these powers and responsibilities and State support, the unions have wide scope for action within companies. All the unions are entitled to set up workplace branches, which have the right to organise meetings, recruit new members and campaign on behalf of the union outside normal working hours and provided the company's normal activities are not disrupted. Workplace branches of unions represented on the works council, or which have a staff delegate among their members, or otherwise meet the criterion of greater representativeness, are empowered to negotiate collective agreements within the company (provided negotiation is via unions which, combined, represent the majority of the members of the Workers' Committee or of the company's staff delegates). These workplace branches are entitled to their own notice board and, in companies with more than 250 employees, to specific premises for their activities. In such companies, the workplace branches of unions represented on the works council (therefore not necessarily the most representative unions, if they are not represented on the council) may appoint one or more union delegates (up to a maximum of 4 in companies with more than 5 000 employees). The status of the union delegates, as regards rights and guarantees, is basically the same as that of the workers' elected representatives described below, and they are also entitled to attend, but not to vote at, meetings organised by the company Workers' Committee (or, for public-sector employees, by the relevant representative organisations) and by the in-house health and safety organisations. These delegates have the right to be consulted in advance on any company measures of a collective nature affecting the workers in general and the union members in particular, especially in cases of dismissal or disciplinary measures concerning them.

The rights of the union representatives of the most representative organisations elected at local, national or Autonomous Community level are as follows:

- the right to take time off without pay as often as necessary to perform their duties;
- the right to take an extended period of leave in order to perform their duties, with a guarantee that their job will be kept open for them and that they will keep their seniority within the company;
- access to all workplaces for the purposes of carrying out their union activities or representative functions, provided the employer is informed in advance and there is no disruption of normal work.

In addition, the union representatives (irrespective, generally speaking, of the type of representation or the nature of the union) have the right to take paid leave in order to participate in the bargaining committees negotiating collective agreements, provided that their own company is affected by the negotiations in question.

Finally, the unions can request the employer to transfer union dues directly from the salary of members, provided the prior consent of the workers concerned is obtained.

Completing the picture in respect of protective legislation, provision is made for penalising malpractice at work: any regulation, agreement or decision (whether pro- or anti-union) of a discriminatory and unilateral nature concerning the unions is declared null and void; and workers or unions who consider that their trade union freedom rights have been violated are authorised to seek legal protection via the procedure for the safeguarding of fundamental human rights (the union of which the worker concerned is a member, or any other organisation meeting the *'most representative'* criterion, may assist workers lodging individual complaints). At all events, any promotion or support of unions controlled by the employer or by an employers' organisation is regarded as anti-union activity. If the court upholds the complaint in respect of violation of rights, an order is made for the immediate cessation of the unacceptable practices concerned and rectification of their consequences. The case is then referred to the public prosecution department to establish any liability arising from possible criminal practice (the penal code provides for penalties for the prevention or restriction of the legitimate exercise of union rights or the right to strike).

4. As already stated, the Spanish industrial relations system has a complex set of rules governing the roles of the employers' associations and most representative trade unions. Many organisations at national and Autonomous Community level have a tripartite structure comprising representatives of the public authorities and of the most representative trade unions and employers' associations. Some of these organisations have a purely advisory role, which does not, however, mean that they have no influence or practical impact, while others have administrative and decision-making powers.

During the 1980s, an extensive series of general negotiations got under way, which resulted in various agreements, some bipartite and some tripartite (government, employers, unions), sometimes with the participation of both of the most representative unions (*Trade Union Confederation and Workers' Commissions* - CCOO and the UGT), sometimes only with the UGT. There was a precedent for these agreements in the form of the 1979 agreement between the UGT and the CEOE, which resulted in a very comprehensive agreement on the regulation of collective bargaining in 1980. Subsequent agreements had a decisive impact on the development of industrial relations and made possible a great many tripartite agreements in this field. The first of these was the *National Employment Agreement* signed in June 1981. 1983 saw a return to a bipartite agreement, and in 1984 (during which there were no general agreements at all and the number of industrial disputes soared) the main instrument was signed in the form of the *Economic and Social Agreement* (hereinafter referred to as the ESA) between the Government, the UGT and the CEOE. This Agreement was in force in 1985 and 1986.

As from the 1985 ESA, relations between the trade unions and the Government and between the trade unions and the employers' associations have become more complex and, to some extent, more contentious. This, along with certain other political, social and legal factors, probably accounts for the fact that there have since been no new agreements arrived at by social consensus. The fact is that general agreements on income and pay rises have disappeared completely from the social dialogue in Spain. Possible reasons for this are the number of decisions taken at the highest level by union leaders and employers, the strategies adopted by the most representative unions and the general policy of wage restraint.

Otherwise, the lack of any general multisectoral agreement does not reflect a general lack of dialogue. In the mid-1980s, dialogue, including the social dialogue, underwent a general change of direction. General agreements were replaced by more pragmatic experiments based on multisectoral agreements in specific areas. Some examples are: the December 1992 national agreement on continuing training, the tripartite agreement on continuing training for employed workers, the October 1994 agreement replacing the *'Labour Ordinances'* of the Franco regime with collective agreements, and the 1996 agreement on out-of-court settlement of industrial disputes[2]. Most of these are bilateral agreements between the trade union and employers' confederations, with no direct government participation. The actual implementation and development of these agreements, however, very often requires government cooperation, in the form of consent or reform of certain national legal provisions, and, particularly, the provision of public funds to finance them. For this reason it has become customary for bilateral agreements to contain a government approval clause and petitions made for government support with the aim of achieving a consensus on specific legislative reforms, subsequently submitted to the government in the form of a bill. This was the case with the January *1990 Government-Union Agreement* on certain aspects of employment and recruitment, which gave rise to *Law 2/1991 on the Information Rights of Workers' Representatives in Matters of Recruitment*, and with the September 1992 agreement on the electoral system and union representativeness, which later gave rise to a revision of this aspect of the *Workers' Statute*. There have been other agreements of this type concerning the major production sectors, including, for example, the June 1993 agreement for the public metalworking companies within the INI/TENEO group. Similarly, in some of the Autonomous Communities, agreements concluded via social dialogue have become quite common over the past few years.

Certainly, this development has boosted active participation by the public authorities and government institutions in the management of socio-political affairs. The Government has in no way abandoned this role and constantly issues guidelines and directives concerning the essential problems involved in the development of industrial relations, thereby having a crucial impact on working conditions. (This does, however, create a further element of tension in the already difficult relations with the trade unions.) Basically, the Government is intent on pursuing a wage restraint policy, which has been a key factor in boosting economic recovery and growth. Action by the Government, in its capacity as employer not only of the civil service but also of other public sector workers, has taken the form of setting a legal maximum (in the general State budget) on wage increases in the public sector. This same public-sector has, however, also provided the backdrop for certain key events which, by means of agreements to which we shall return later, have re-established union participation in the administration of public enterprises.

CHAPTER II: THE INSTRUMENTS

1. The regulatory sources applicable to industrial relations as defined in law (*Article 3* of the *Workers' Statute*) are: Government legislation and regulations, collective agreements, the will of the parties concerned as manifested in the employment contract, and standard practice in the occupation or geographical area concerned. Before going into detail about each individual source, the following points concerning the Spanish legal code should be noted:

- the past importance, still in evidence today, of the sources of national regulation and, particularly, the extreme importance historically of the Government's legal powers, which have only recently begun to be contested;
- the status of collective agreements, which are recog-

2. This practice has continued under the new conservative government of the *Partido Popular*: reform of the public pensions system (1996), updating of the vocational training agreement (1997), labour market reforms (1997).

nised as having full legal force and occupy the corresponding rank in the hierarchy of official sources;
- the absence of any consideration of the individual will of the parties concerned in the employment contract in drawing up the regulations governing the contract;
- the limited role of customary practice, which, in the majority of cases, is very minor.

The *Constitution* heads the list of national regulatory sources. The 1978 Spanish *Constitution* gives particular priority to social, and particularly collective, rights. The importance of their role in regulating industrial relations has increased steadily, essentially for two reasons:
- firstly because, in many cases, the *Constitution* not only provides the basis for ordinary legislation by establishing the principles with which such legislation must comply, but also lays down specific obligations which are directly applicable and can be cited as such before the courts;
- secondly, because Spain has an appeals procedure for the safeguarding of constitutional law, which enables individuals who feel their fundamental constitutional rights have been prejudiced to appeal to the *Constitutional Court* once the usual appeals channels have been exhausted. As will be seen later, these fundamental rights include a substantial body of employment rights which have enabled the *Constitutional Court* to formulate a coherent set of principles pertaining to employment, with the result that constitutional principles are a major guiding force in the regulation of industrial relations.

In the field of social rights, the *Constitution* contains three sets of general principles and a series of provisions conferring specific rights. These are further subdivided into three sections according to the nature of the obligation concerned and the protection envisaged (which determines the degree to which it is binding in industrial relations practice and the level at which it is applied).

These general principles are found in *Articles 7, 9(2)* and *129*. As explained earlier, *Article 7* provides for constitutional recognition of trade unions and employers' associations, the institutional role of these organisations being explicitly conferred in the *Introductory Section* of the *Constitution* setting out the political bases for the organisation of the State. This recognition follows immediately upon that of the political parties and is intended to defend and promote the social and economic interests of the trade unions and employers' associations. The importance of such recognition needs no explanation. The trade unions and employers' associations occupy an important position in the State's legal and political structure – they are responsible for defending and promoting social and economic interests and are guaranteed absolute freedom to define and implement their activities. The only demand made on them, other than that they should comply with the *Constitution* and the law, is that their internal structure and functioning must be democratic. It therefore comes as no surprise that *Article 131 (2)* of the *Constitution* should provide for participation by the unions and employers' associations (in the form of their *'opinion and cooperation'*) in the drafting of an economic plan by the Government and the constitution of committees to that end. So far, however, the Government has drafted no such economic plan.

In fact, the Committee provided for in *Article 131.2* of the Spanish *Constitution* was never set up by the Government because it was linked to a general economic planning model which was never implemented by the Government and the creation of such a Committee would therefore have been pointless. What was created, however, in 1991, was the *Economic and Social Council* to which reference has already been made. The basis for this was not *Article 131*, but the broader framework of the principle, enshrined in the *Constitution*, of promoting and facilitating participation by citizens in the economic and social life of the country. The *Economic and Social Council* was set up to serve these objectives. It has 61 members, 20 of whom represent the trade unions, 20 the employers' organisations, 3 the agricultural sector, 3 the sea-fishing sector, 4 the social economy sector and 6 independent experts. The Council serves as an advisory body in socio-economic and employment matters, on which it is empowered to issue an opinion. Consultation of the Council is obligatory in the case of bills intended as national legislation, and relevant legislative decrees and decrees considered by the Government to be of major importance in this field. Consultation on the draft general State budget is completely excluded. The Government can also request the Council's opinion on specific subjects or on techniques used, e.g. to gauge the opinion of the social partners on the first report on the labour market reforms in 1993. The Council drafts and submits to the Government an annual Memorandum on the socio-economic and labour situation in the country. It can also, on its own initiative or at the request of the Government, draw up a wide variety of reports or studies as the basis for certain conclusions or recommendations. The Council has, in fact, drawn up on its own initiative reports of some significance concerning such matters as the socio-economic situation of women in Spain, the independent procedures for settling industrial disputes, or the situation and prospects of Spanish industry, the priorities of the Spanish Presidency of the EU *Council*, the principle of cooperation by the economic and social intermediaries in Community structural policy, the employment situation for the disabled and potential ways of integrating them into the labour market, etc.

Furthermore, *Article 9(2)* (which clearly takes its inspiration from *Article 3(2)* of the Italian *Constitution* but refers to *'citizens'* rather than *'workers'*) compels the State to encourage the appropriate conditions for full and effective exercise of the right to freedom and equality, to eliminate the obstacles preventing or hindering the achievement of these objectives and to facilitate participation by all citizens in political, economic, cultural and social affairs. Despite the rather general wording of this principle and its reference to *'citizens'* without any further distinction, the *Constitutional Court* uses it as an interpretative criterion in its decisions on the correct application of the legislative function and activities of the public authorities in the field of labour law.

Finally, *Article 129* provides for social security participation by the persons concerned and instructs the public authorities to encourage the various methods of financial par-

ticipation in companies and facilitate access by workers to ownership of the means of production (as well as promoting cooperatives).

Following the general rules set out in the Introductory Section of the Spanish *Constitution*, *Section I*, which enumerates a whole range of fundamental rights and duties, is concerned largely with social rights, particularly collective social rights. As explained above, these rights are applicable at three different levels and give varying degrees of protection; in practice, then, their importance and implications vary.

a) The first level, which constitutes the core content of the *Constitution*, includes the recognition of trade union freedom and of the right to strike. These are the social rights which enjoy the most extensive recognition and the greatest degree of protection, and they are included in the category of fundamental rights and public freedoms. They are protected by the priority summary procedure in the ordinary courts and by the possibility of appeal to the *Constitutional Court* under the procedure for the safeguarding of Constitutional law. This means that the holders of these rights, whether workers or organisations with legal personality (particularly trade unions), can, if their rights are in any way violated, request the protection of the courts via a special priority summary procedure. They are also entitled, once all other appeals channels have been exhausted, to appeal to the *Constitutional Court* requesting restitution of the violated right(s), supporting their claim solely on the basis of an infringement of the constitutional principle in question. This protection (added to the fact that a) application is compulsory under laws adopted by an absolute majority in Parliament and b) that a two-thirds majority must be obtained before the corresponding constitutional principle can be amended, and the legislative chambers must subsequently be dissolved) has given the *Constitution* an important role in the organisation of industrial relations and has spawned a full and a detailed body of constitutional case law, which will be discussed later. As has been seen, recognition of trade union freedom, both individual and collective, is very extensive and the only limitations on the right to strike are those dictated by the need to maintain a skeleton staff to keep essential public services operational. In recognising the right of workers to strike, the *Constitutional Court* is seeking to protect the rights of the individual rather than of the group or trade union, which has important implications which will be examined later in this document.

   This level of application also includes other essential rights which, while not specifically social, are of undeniable importance in the field of industrial relations. One example, enshrined in the *Constitution* and for which a legal definition exists, is a broad anti-discrimination rule which is constantly cited in the courts and is the focus of a considerable proportion of the *Constitutional Court*'s case law.

b) The next level of application covers the rights and duties of citizens in respect of which there is no special appeals system nor any possibility of appealing to the *Constitutional Court* on the grounds of safeguarding Constitutional law. Protection of these rights is through the ordinary courts and ordinary procedures, the *Constitutional Court* being involved solely and exclusively where the constitutionality of the laws applying the corresponding rules is called into question either through an appeal on the grounds of unconstitutionality, which is not a possibility open to private individuals, or if constitutionality is queried by the courts. These rights and duties must be implemented by law, respecting their *'essential content'* (this being the main subject of any examination of their constitutionality by the *Constitutional Court*).

   The said rights include the right to work and the duty of work, the right to freedom of choice of profession or job, and the right to remuneration adequate for the needs of the worker and the worker's family, with no discrimination according to sex. As can be seen, the extent of individual rights is relatively modest, both in terms of the wording and as regards the protection afforded. In compensation, the *Constitution* explicitly stipulates that a *Workers' Statute* must be drawn up having force of law. The systematic inclusion of this obligation in the text of the *Constitution* and the principles to which it gives rise implied that a legal text was needed to establish unambiguously the individual rights of workers and application of the fundamental freedoms in the field of industrial relations. Legal application of this constitutional obligation (the *1980 Workers' Statute*, to which reference has already been made) is, however, simply a new version, with adaptation to the *Constitution* where necessary, of the earlier Act regulating employment contracts, employee representation within companies, collective bargaining and the basis of the labour authorities' disciplinary powers.

   Apart from these individual rights, the *Constitution* provides for collective rights at this level, making express reference to the enforceability of collective agreements (providing the basis on which their legal validity is recognised and ensuring that they are binding in the same way as any other legal provision, going beyond the degree of obligation applying to a private contract). The right of employers and workers to take action in the event of industrial disputes is also recognised. This was with a view to establishing constitutionally the right to take industrial action, apart from strikes, and, more particularly, to recognise lock-outs, although this is not expressly mentioned. The law may restrict this right as it deems fit (provided the requirement for maintenance of essential public services is maintained).

   Unlike the social rights recognised and guaranteed by the *Constitution* in the terms described, the rights and obligations of citizens also include those of the market enterprise, which places an obligation on the public authorities to protect the functioning and productivity of such enterprises in keeping with the impera-

tives of the economy in general and, where applicable, of economic planning. There can be little doubt as to the importance of this recognition of the freedom of enterprise and the explicit support for the market economy system, and of the commitment to promote productivity, which is positively reflected at constitutional level.

c) Finally, there is a third level comprising general, social and economic principles. These rules are obviously set out in the much more general form of *'principles'*. Claims arising from these constitutional rules can only be asserted in the ordinary courts and only on the basis of the laws implementing them. Even given some degree of constitutional control over these laws, obligations under the Constitution are obviously very general and the legislature therefore has considerable leeway in interpreting them. This applies, for example, to the commitment to implementing a full employment policy, promotion of vocational training and retraining, inspection of health and safety at work and guaranteeing minimum rest periods for workers by limiting the working day and establishing regular paid holidays, the commitment to supporting an adequate public social security and pension system, and the obligation on the State to safeguard the social and economic rights of Spanish workers abroad and make appropriate provision for their return.

2. This extensive constitutional regulation of social rights is supplemented by a similarly extensive system of legal regulation. The Constitution itself compels the legislature to draft a *'Workers' Statute'* and adopt implementing legislation in certain fields, including collective bargaining, industrial disputes, trade union freedom, the right to strike, the right to a minimum wage. As a result, there are two legal instruments of major importance in the industrial relations field:

- The *Workers' Statute*. This contains extensive and detailed regulations on individual contracts and the employment relationship, as described in part II of this report. It also regulates the mechanisms for (non-union) worker representation in companies, and all matters concerning collective bargaining and collective agreements.
- The above-mentioned *Trade Union Freedom Act*, implementing the recognition of trade union freedom in the *Constitution*, defines the concept of *'most representative trade unions'* and makes provision for their presence in production units (via company-based union branches).

This has gone some way towards counterbalancing the previous predominance in the Spanish legal code of laws of governmental, non-parliamentary origin. The requirement for implementing legislation prevents the Government from legislating on certain subjects, and the use of decree-laws has also been restricted so that the procedure is now only possible in cases of extreme urgency and is subject to subsequent ratification by Parliament; it is banned altogether for regulating any matter concerning the rights, freedoms and obligations of citizens included in *Section I* of the *Constitution* (including the social rights referred to above). There are, however, certain important areas, such as the right to strike and industrial disputes, for which legislation is still inadequate, and in such cases the legal code in existence prior to the *Constitution* (and adopted by decree-law) is still in force, with the amendments and repeals introduced by the *Constitutional Court*.

It is important to remember that the national Parliament has exclusive legislative competence in the social field, the regional Parliaments having no powers in the area of labour legislation. While the latter is the exclusive competence of the State, however, its implementation may be delegated to the Autonomous Communities. Furthermore, where the *Constitutional Court* is concerned, the term *'legislation'* must be interpreted in its broadest sense, as it includes not only laws but also the implementing regulations that go with them. According to the *Constitutional Court*, this is precisely because the point of these constitutional rules is to standardise the system of labour regulation, which would otherwise be impossible. The executive and legal powers of the Autonomous Communities are therefore restricted to the organisational aspects, including the administration's internal structure. The only leeway for innovation in the legislation they have developed has been in certain areas of employment policy, essentially through the granting of subsidies or tax and social security concessions in return for the creation of jobs.

3. The State's regulatory powers have, as already stated, tended to concentrate on the issuing of legislation when establishing working conditions in the Spanish legal code. These powers, which have considerable impact, are exercised not only by the Government but also by individual ministers (particularly the *Minister of Labour*) and the administrative authorities responsible to various government departments. The *Constitution* has restored the balance between these two sources of legislation and removed the legislative powers of individual ministers (and, of course, the departments under them), who are now only entitled to adopt regulations implementing higher-ranking legislation and generally only where they are expressly authorised to do so. Regulatory powers are therefore restricted to the Government. Nevertheless, despite the preeminence of the law, the Government has, over the past few years, issued a considerable number of regulations, most of which implement legal provisions on matters connected with remuneration, working hours, special working hours and the various forms of employment, or concern the regulation of areas not covered solely by legislation, particularly matters concerning employment policy. In the latter sector in particular, the Government-generated regulations still play an important role and the law only provides a general reference framework.

In some instances, case law itself has helped to maintain the balance between legislative and government regulations. The decree regulating breaches of the law by employers in the field of industrial relations, for example, was cancelled by the *Supreme Court*, which led to subsequent adoption by Parliament of a law in this field.

Furthermore, with regard to collective bargaining, the possibility of government regulation of working conditions by branch of activity has practically disappeared from

the Spanish legal code. Only where a particular aspect is not covered by the law and there is no possibility of access to another collective agreement or of its extension, is the Government entitled to regulate working conditions within a specific sector. So far, however, this possibility has never been implemented in practice.

It would therefore appear that a new balance has been struck on a permanent basis between legislation and government-generated regulations, the role of the latter being to implement the former in the fields expressly provided for by the appropriate legislation, which limits their *'independent'* regulatory function to various aspects of labour relations, particularly those concerning employment policy, with an emphasis on employment promotion measures.

4. In the Spanish legal code, as already stated, collective agreements are one of the sources of labour law. Constitutional recognition of collective bargaining includes recognition of the binding nature of collective agreements, which has provided the basis for legal recognition of their validity, according them greater legal force than any obligation under a private contract. The *Workers' Statute*, as the ordinary implementing legislation, further gives such agreements *erga omnes* force, making them directly applicable to all workers and employers covered by the agreement in question. At all events, the reliability and representativeness of the negotiating parties is assured by the stipulation of certain conditions as regards the majority required to elect the members of the negotiating committee, the valid constitution of that committee, and the final adoption of the agreement negotiated. Collective agreements are therefore genuine and legitimate legal instruments and as such have their place in the hierarchy of legal sources. The need to ensure that obligations arising from collective agreements are observed in the same way as any other laws and that any breach of them is correspondingly penalised has therefore been emphasised in jurisprudence (the law provides, for example, for administrative penalties for employers failing to comply with the legal clauses (*'normativos'*) of collective agreements).

Traditionally, collective agreements have always had the function of regulating, in accordance with legal guidelines, matters which cannot be covered by general regulations but are of a nature to require an approach specific to the activity sector, geographical area or company concerned. Another of their roles is to *'improve'* legal procedures where the balance of powers and the situation of the sector or company concerned allow. In both cases, but, logically, especially in the second, the traditional attitude was that collective agreements should be completely subordinate to the law, which meant that obligations under the law (or government regulations) could not be ignored, as this would partially invalidate the agreement, the clause concerned being overridden by the obligation with which it failed to comply. This primacy of the law is still possible, even in the case of laws adopted after the collective agreement, if the content is directly relevant to that agreement. In adopting this view, the courts are essentially regarding the protection of workers' rights in the same light as the protection of individual rights by the courts themselves. That is why specific individual appeals for the application of legal obligations which have been ignored or violated by collective agreements are often examined without the need for prior annulment of the agreement in question via the established procedures.

The majority of recent case law has, however, increasingly reflected a new interpretation of the relationship between collective agreements and the law. Based on constitutional recognition of collective agreements and their new role in industrial relations, the view now is that the content of collective agreements, as representing the free will of the parties concerned and as an expression of the constitutional right to collective bargaining, must comply with the minimum requirements of labour legislation (i.e. it must be advantageous to the worker in terms of improvements in working conditions). There are, however, certain cases in which collective agreements are permitted to derogate from national provisions. While generally applying the principle of the most advantageous provision, legal practice does, in fact, allow for certain elements of agreements to be less favourable, provided that the overall impact remains favourable to the worker.

The 1994 legal reforms, also known as labour market reforms, had an even more decisive impact and gave rise to a major shift in the balance of power and influence in respect of the various sources of law, which had a particular impact on the role of the collective agreement. The reforms hinged around significantly reducing State legislation, prompted by a desire to make collective agreements of central importance in establishing the regulations governing employment, both individually and collectively – a reduction produced in pursuit of an objective which was also intended to increase flexibility and the adaptability of jobs to change, and increase company productivity and competitiveness. This brought about a considerable trimming of State legislative machinery, both quantitatively and qualitatively. On the quantitative side, apart from a general streamlining of State legislative instruments, provisions of an essentially regulatory nature are implicitly expanding the scope of collective bargaining procedures. On the qualitative side, the nature of State regulations is changing as a result of various legislative mechanisms: a reduction in the inviolability requirements with corresponding amendment of the basic institutional principles, and more recourse to collective bargaining, opening up the scope for collective agreements, other types of regulation, etc.

These legislative reforms are intended to give much more weight to collective bargaining, particularly in terms of expanding its scope and removing certain formal obstacles to the conclusion of collective agreements. If State intervention is to be reduced in favour of collective agreements, it is not enough simply to remove existing guarantees or to reduce them quantitatively. The formulae employed to this effect under the reforms are much more varied than might be supposed. As a result, the relationship, ever complex, between the law and collective agreements, which is seen as a main source of employment regulation, is taking on various new facets. The complexity of the interrelationships in the regulatory system is increasing as certain expressions which were hitherto relatively marginal acquire general currency: the supplementarity of

State provisions, *ex novo* referral to collective agreements, increased innovative capacity in the complementarity relationship, etc. Elsewhere, the distinction between the various ways in which the relationship between the law and collective agreements operates is becoming blurred, with the result that they can be difficult to classify into the traditional theoretical types. New types of relationship are emerging, along with the possibility of transposing *Community Directives* via the collective bargaining process.

The scope of collective agreements extends to all employers and workers in the fields concerned, who thus form part of the corresponding bargaining unit. The *vis expansiva* of the scope of agreements has also been emphasised in jurisprudence, extending to cover activities closely linked with those expressly included. Definition of the bargaining units is left to the discretion of the negotiating partners themselves. Generally speaking, collective agreements are negotiated for the company or branch or activity sector concerned, and in the latter two cases this can be at local, provincial, regional, Autonomous Community or national level. Where a collective agreement has been duly negotiated in a particular sector and geographical area, the agreement subsequently applies to all employers and workers in the field concerned, whether or not they are *'represented'* by the parties concluding the agreement. General validity of the collective agreement is therefore a legal requirement; the *erga omnes* applicability of the agreement is guaranteed by law and the negotiating parties have no power to oppose it. Collective agreements without general applicability, applying only to the employers and workers represented by the negotiating parties, are, however, permitted by law. This is the case where bargaining takes place outside the legally-defined requirements or by individuals who are not empowered to negotiate generally applicable collective agreements. In practice, however, such *'extra-statutory collective agreements'* are almost indistinguishable from the *erga omnes* collective agreements, for two main reasons: applicability may extend *de facto* to all employees because the employer offers the remaining workers the possibility of subscribing to its content individually, and in some cases this has even been seen as a legal obligation on the grounds that there would otherwise be discriminatory treatment of those excluded; the second reason is that, while the validity of such extra-statutory collective agreements is disputed in legal theory and practice, it is now generally recognised that the content of these agreements has a legal force which overrides individual autonomy to the extent that any individual agreement which derogates from the provisions of extra-statutory collective agreements is automatically considered invalid/unlawful.

The structure of collective bargaining remains largely decentralised. Over 4,000 collective agreements are negotiated each year (the exact figure varies - in 1995 there were - 4,713). The number of workers concerned is quite high, the total figure for the same year being 7,467,100, which represents almost all employed workers. The most important aspect of the collective bargaining structure is that the statistics reflect a high degree of atomisation of collective bargaining units. Furthermore, the Spanish collective bargaining system has traditionally been notable for the extreme brevity of the period for which its agreements remain in force. There appears to have been some progress here over the past few years, however, the duration of agreements tending to increase. In 1995, for example, 42% of collective agreements remained in force beyond the year in which they were concluded, and concerned 70% of workers. The degree of decentralisation of collective bargaining is due to the number of collective agreements applying to a limited number of workers, the most common type of agreement being provincial, and tending to concern a production sector with a limited number of companies: in the reference year, 1,088 provincial sectoral agreements were concluded, representing 85.4% of all sectoral agreements and covering 4 105 856 workers, or 61.4% of all workers covered by sectoral agreements. Company agreements within relatively small firms are even quite common. Of all collective agreements negotiated in 1995, 72% were company agreements and 28% were more extensive in scope, although the number of workers included in that scope varied: 86.34% were covered by sectoral agreements and only 3.61% by company agreements. The average number of workers covered per collective agreement is also quite high: the reference average in 1995 was 1,612 workers; but this rate varies depending on the type of agreement, the average being only 305 workers per company agreement and 4,977 per sectoral agreement.

The Spanish collective bargaining system is, therefore, still marked by excessive dispersion of the bargaining units despite a gradual tendency towards greater concentration and recent attempts at centralisation. There are difficulties in negotiating general collective agreements by branch of activity and at national level. A further problem is that differences in income levels in the various Autonomous Communities hinder the standardisation of working conditions.

Over the past few years, there have been attempts to remedy this situation by means of intersectoral agreements intended to serve as reference guidelines for collective bargaining. This type of agreement and the role it plays have already been described above. Within certain sectors there are also framework or general agreements which have provided an opening for collective bargaining on a national scale, which has been particularly important for the sectors within which collective bargaining at provincial level has tended to predominate, and has also established in these sectors certain rationalisation measures for their own collective bargaining structure by specifying which aspects should be regulated at national level and which can be either fully or partially delegated to lower negotiating levels. Examples of such experiments are found in the national general agreements in the construction and metalworking sectors. Furthermore, at the end of December 1994, the *'Labour Ordinances'* introduced under the Franco regime were completely abolished along with the sectoral regulations which for many decades acted as a substitute for national collective agreements. With the abolition of these *'Labour Ordinances'*, a new negotiating process is emerging which could lead to the creation of new national-level bargaining units able to concentrate and rationalise the collective bargaining structure in Spain in identical terms.

Furthermore, the new demands brought about by technological change and new structures within industry, and by the relatively centralised collective bargaining model operating in such areas as the establishment of working conditions, are making a means of adapting abstract conditions to the specific situation of individual companies or simply coping with the daily changes within individual production units increasingly essential. As stated, the 1994 legislative reforms provided for this alternative via the conclusion of company agreements of varying content and scope as regards the possibility of changing arrangements negotiated during the collective bargaining process proper. The matters covered are quite extensive, including aspects such as job classification, promotions, itemised salary statements, non-standard working hours, one-off bonuses, transfers, changes in working conditions, suspension of the employment relationship, collective redundancies, adaptation of worker representation to staff cutbacks. In most cases, these are *'subsidiary'* agreements in that they are intended to cover gaps left by collective agreements and cannot contradict any aspect of those agreements. However, there are situations in which company agreements concluded between the company management and employee representatives may change the provisions of a collective agreement. This is the case, for example, with situations such as substantial changes in working conditions in terms of the distribution of working hours (but not the duration of the working day), shift work, the system (but not the amount) of remuneration; another example is the case of companies whose economic stability may be threatened by the pay increases provided for in the sectoral collective agreement, in which case they may opt out of the agreed system by negotiating another specific agreement with the workers' representatives via a company agreement to exert greater control over pay increases.

5. In Spain, the courts play an important role in defining labour relations. Assessment of the right to legal protection (as conferred by the *Constitution*) and the tendency to view worker protection mainly from the angle of legal protection in these terms means that there is a high degree of court involvement in working conditions and the courts play an important role in interpretation.

The *Supreme Court*, at the head of the judicial hierarchy in ordinary law, deals with possible conflicts between rulings by the lower courts or between these and the rulings of the *Supreme Court* via the appeals procedure, which enables it to establish a uniform interpretation of labour legislation. The rulings of the *Supreme Court* are not purely on questions of principle, but are directly applicable to the parties concerned by the particular dispute in question.

The *Constitutional Court* also has considerable influence on the way in which the law affects working conditions. It has an important interpretative function, particularly through its rulings on appeals in respect of the individual safeguarding of constitutional rights, to which reference has already been made, by looking beyond the immediate case in question to determine the criteria for application of labour law.

'Customary practice' is still a source of labour legislation, although the lowest-ranking of all the sources. To be regarded as a basis, such practice must be both *'local'* and *'occupational'*. Sometimes, express reference is made in legislation to customary practice as a subsidiary source. This applies, for example, to establishing the amount of work which can be demanded of an individual worker, the date and time of payment of wages and allowances and the compulsory notice period in the event of resignation by the worker. Customary practice plays only a very limited role in defining working conditions in general.

International legislation, on the other hand, plays an important part in the Spanish system. The courts frequently refer to international regulations and their detailed examination. It is important to realise that the rules contained in international collective agreements and treaties are directly applicable in Spain, once they have been incorporated into national legislation following ratification and publication in the national *Official Journal*. It has been maintained in some areas of legal theory and practice that these instruments have an executive power above that of the law itself (at least in cases where the collective agreements go beyond setting out general principles, laying down an obligation to promote national policy and legislation in line with its prescriptions). Furthermore, since the *Constitution*, international legislation has increased in importance, being regarded as of extreme significance for the purposes of interpretation, since it is stipulated that the rules on fundamental rights and freedoms recognised by the *Constitution* must be interpreted in accordance with the *Universal Declaration of Human Rights* and the international conventions and treaties in these fields which have been ratified by Spain. This significance has already been extensively reflected in the case law of the *Constitutional Court*, which does indeed refer to the *Universal Declaration of Human Rights* in interpreting rules on the fundamental rights and freedoms recognised by the *Constitution*, as well as to international treaties, particularly the ILO conventions ratified by Spain, the interpretative value of which is clear in the light of the Constitution. The ILO recommendations are also examined and taken into account by the *Court*, which, while emphasising the difference between these and the collective agreements, allows that they can serve as useful criteria in interpreting or clarifying the latter agreements, while having no executive force.

The *Constitutional Court* also, however, takes account of the case law of the courts or other bodies responsible for the interpretation and application of these rules, and the resulting evaluation. The decisions of the ILO *Committee on Trade Union Freedom*, for example, are systematically examined, as is the case law of the *European Court of Human Rights*, whose interpretation is regarded as being of crucial importance for Spain because of the reference made in the *Constitution*. Such examination goes somewhat beyond what is required, in that interpretation of the international rules does not necessary imply acceptance of the interpretations made by the courts and other bodies examining them. The *Constitutional Court* also affirms the need to interpret the legislation as well as the constitutional principles by making reference to international sources.

6. With regard to the *Workers' Statute*, the hierarchical structure of the legal sources is as follows:

a) Firstly, the national legislative and government sources in their usual order of importance.
b) Secondly, the collective agreements.
c) Thirdly, the will of the parties, applying the principle of the inviolability of workers' rights, which means that working conditions which are less favourable than those provided for in legislation or collective agreements are unacceptable.
d) Finally, local and occupational customary practice, which can only be invoked where there is no relevant agreement or legislation, and only with the agreement of the parties concerned, which means that, under the contractual agreement established between the latter, they can be annulled unless there is a testimonial or express reference is made to the above-mentioned customary practice.

Where conflicting rules are applicable, whether national or contract-based, the decision is generally in favour of those which are, overall, most beneficial to workers (and not the most favourable provisions of each), involving an annual calculation of the items which can be quantified. The minimum inviolability requirements must be respected in all cases.

The main problems arise in connection with the respect in collective agreements of these minimum legal rights. On this point, case law traditionally makes collective agreements entirely subordinate to the law. It is only recently, and then only with a great deal of caution, that collective agreements have acquired a certain right to override legal procedures and, as we have seen, they are beginning to be used in preference to legislation, except where they have been contested and subsequently declared invalid in accordance with the established procedures. Be this as it may, this tendency towards a system based on trade union or collective protection rather than legal protection, which as a result is more adaptable and more flexible, means that the legal data on which conventional case law is based should be reviewed.

A further point is that the will of the parties concerned by the employment contract has very little say in the Spanish system. Legal practice has only recently begun to accept, on the basis of civil law, the idea of an individual agreement between employer and worker amending the working conditions established by law or by an agreement. Agreements in which the worker concerned appears to have been pressurised into relinquishing his rights are, however, unacceptable.

7. In the Spanish industrial relations system, individual disputes are, almost without exception, settled by the courts. There is a great deal of court activity surrounding working conditions, and out-of-court settlements are rare. There is also frequent intervention by the administrative authorities via the Labour Inspectorate in an attempt to settle a dispute by imposing an administrative penalty on the employer if there is prior evidence that the applicable rules have been breached. This type of intervention is, however, increasingly being contested and is disapproved of by the courts, as it often impinges on their own jurisdiction.

Private procedures for settling industrial disputes have, under the Spanish industrial relations system, so far shown a revealing degree of impotence. The reasons for this were essentially the degree of State intervention, bordering on the excessive, in industrial disputes, the lack of collective autonomy, the distrust of the social partners in this respect, and the inadequacy of the relevant regulations. All this, however, changed radically with the 1994 reforms, which included certain fundamental innovations allowing the development of effective conciliation, mediation and arbitration procedures. There had already been certain experiments at regional level in the form of multisectoral agreements in some of the Autonomous Communities (Basque region, Galicia, Catalonia, Valencia, etc.) with a view to establishing settlement procedures for disputes of this nature. The biggest step in this direction is the national multisectoral agreement of January 1996 concluded between the most representative trade union confederations and employers' associations. This agreement provides for out-of-court settlement of industrial disputes and has made centralisation of the conciliation, mediation and, to a lesser extent, arbitration procedures in the event of differences between the various representatives a real possibility. The fact that, via this agreement, an undertaking by both parties to submit to a compulsory mediation procedure is assumed where one of the parties so requests, before any pressure is exerted via strike action, is a major step forward.

As far as the methods used to force a solution to disputes is concerned, there has been a significant move away from strikes in the private sector but an increase in this form of action in the public sector. Certain types of strike are considered illegal, and specific legal measures have been put in place to guarantee security, maintenance and essential public services. These are currently the main concerns as far as strikes are concerned. The vast majority of strikes are viewed on a par with collective bargaining and implement the right to strike in the traditional way.

Lock-outs are authorised only as a policing measure or to protect persons, goods or company installations.

In practice, however, particularly during certain types of strike (intermittent or in strategic sectors), they are also authorised as a legitimate weapon in industrial disputes and are considered as such, though not expressly. by the courts.

8. Seen in an international context, the Spanish system still depends heavily on the law and the Government in the regulation of working conditions, and the role of collective bargaining is still quite limited, despite the predictions as to its future development. Traditional legal practice, which is individualistic and probably leads to overregulation of industrial relations, still predominates. There are major elements of convergence in a Community context. The main protagonists in the field of labour relations are perhaps insufficiently willing to take on the role which is theoretically theirs, along with all its consequences. Without wishing to deny this general characteristic of the Spanish legal system, the importance of the 1994 legislative reforms of the labour market must also be stressed. As described above, these reforms have meant a considerable

reduction in State intervention in terms of both the amount and the nature of State legislation, and of action taken by the labour administration. As stated in the recitals of one of these Acts, reforms in the labour field must maintain the differentiating elements of traditional European policy in terms of trade union freedom, collective bargaining and social protection. Preserving these values is compatible with greater competitiveness, but means reviewing the institutional framework of industrial relations as well as the negotiating practice of the social partners, to ensure that in these two areas guaranteeing workers' rights is compatible with the development of the employers' activity and the capacity to adapt. This will provide the necessary conditions for flexible management of human resources geared both to the economic situation of the company and to the fluctuations in the market concerned.

FRANCE

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CHAPTER I: THE ACTORS

1. The concept of actors

The concept of actors has no place in French legal tradition. The reasons for this are twofold. To begin with, and notwithstanding the pronouncements of some schools of thought on the "*creative force of the law*" (pronouncements with very limited impact anyhow), regulation is held to be the work of one or several *authors* rather than actors. In other words, the emphasis is clearly on the instrument or body to which a rule can be attributed. The fact that a law is negotiated, for example, is not taken into consideration as such. The idea of studying actors is one propounded by sociologists and political scientists and rather goes against the grain of legal tradition, which has little time for the complexities of rule gestation. On the other hand, while the doctrine of labour law has indeed long recognised the fact that the State has no monopoly over the legal regulation of working conditions, it nevertheless regards the State as having supervisory powers over the production of rules by forces other than itself. Collective bargaining and rule-making by employers are recognised, regulated and sometimes even prescribed by law. The State creates order and establishes a hierarchy of rules. This view, which in France certainly seems to be justified in principle, nevertheless has one drawback: it means we cannot really study the groups, bodies and subjects which between them produce the rules.

We need only use the concept of actors if we turn away from employment relationships as such to look more specifically at *industrial relations* and if, in studying the rules, we concentrate on some of them, i.e. *those on the creation of normative rules.*

2. Identification of the actors

It is convenient to refer to the quasi-classic trilogy: the three types of actor - employers' organisations, trade unions and government organisations - which between them make up the system of industrial relations. But things need to be clarified in more detail.

On the business front, employers' organisations alone will not do. *Entrepreneurs* are undoubtedly actors in the regulation stakes, in that they are real and legitimate agents in collective bargaining, management prerogatives being recognised by the State as sources of regulation *(see section 29 below)*. With regard to workers, the actors may, for simplicity's sake, be grouped together as trade unions. But here too, we must beware of the relative lack of clarity in this formulation. This is because French history - though not alone in this respect - has produced a wide variety of actors, or *collective forms of organisation of workers*. There are coalitions *(manifest in strike committees or coordination committees during disputes, for example the nurses' strike in October 1988)*, trade unions, works councils (the historical alternative to the trade union), workers' delegates (representation by a single person), workers' assemblies, trade union sections and shop stewards.

Finally, *"government organisations"* is a catchall expression for a complex reality. Government organisations are complex in structure, especially considering that the *State* is also an employer, an administration with the prerogatives of public power and both the subject and the object of the bargaining process.

SECTION 1: EMPLOYERS' ORGANISATIONS AND TRADE UNIONS

§1. DESCRIPTION AND ORGANISATION

A. Employers' organisations

3. The structure of employers' representation

The *Conseil National du Patronat Français* (National Council of French Employers) (CNPF), which has association status, is a union of territorial groups and professional federations. These groups and federations, as well as their affiliated organisations, represent approximately one million commercial and service enterprises employing over three quarters of all employed workers, according to the CNPF's own figures.

The *Confédération générale des petites et moyennes entreprises* (General Confederation of Small and Medium-sized Businesses) (CGPME), an offshoot of the CNPF, maintains close links with the latter.

The role of the CNPF in collective bargaining with the trade unions was very limited until the end of the 1960s. A few powerful federations, such as the *Union des industries métallurgiques et minières* (mining and metalworking employers' union) (UIMM), had the upper hand in local branch negotiations (i.e. at regional, departmental or town level), and the CNPF's rules did not empower it to commit its members. This obstacle was lifted in 1969, and the CNPF declared that it represented not only the employers but also the undertakings themselves[1]. Since then the authority of the CNPF over its members has grown. Either by cause or effect, nationwide multi-sectoral bargaining has also developed quite considerably since 1968, and has been particularly in evidence over the last two years.

That is not to say that the federations have completely lost their autonomy or indeed that firms adopt common policies. The French system continues to be characterised by the influence of the federations (or at least by some of them) and by marked disparities between the social policies pursued by individual companies. The main consequence of the influence of the federations is often the maintenance of *branch-level* bargaining in its historical framework, i.e. split according to membership of the federations. In general, federation membership is not organised on uniform sectoral lines, an important point to remember from the Community perspective.

B. Trade unions

4. The structure of the trade union movement

Broadly speaking, the French trade union movement presents a three-tier structure, comprising:

(a) *primary units* - trade, occupational, business or industrial unions;

(b) *associations* - which may be either geographical and multi-sectoral, with local, departmental or regional groupings, or else be coordinated on occupational lines,

1. F. SELLIER, *La confrontation sociale en France, 1936-1981*, PUF, 1984, p. 63.

focusing on groups of activities or on a product market, with the professional federations;

(c) *national multi-sectoral groups* – the confederations.

Within a dynamic perspective, four aspects must be emphasised.

(a) The classification of unions by *trade* or occupation category has gradually become less relevant. Unions organised by craft/trade, where they survive, tend to be affiliated to the large confederations, some of them having managed to hang on to a little autonomy. There are some important exceptions, however. There are still some unions, organised by trade or occupation, which do not belong to a confederation, e.g. in the transport industry, municipal transport, railways, air transport, and the civil service.

An even more special case is the *Fédération de l'Education Nationale* (National Education Federation) (FEN), one of the largest in membership terms, which covers all groups of teachers and auxiliary staff in education. Following the post-war split between the CGT and the CGT-FO, it refused to join a confederation *(see section (c) below)*. The decline of groupings organised by trade or occupational category may be the reason why the trade unions find it difficult to organise workers in the event of disputes confined to a particular trade or occupation (such as the 1986 rail dispute or the nurses' and health workers' dispute in 1988).

(b) Trade unionism among *white-collar workers* is to some extent peculiar to the French system. Each major confederation has its own federation of white-collar workers, but there has also been a separate confederation of white-collar workers since 1944 – the *Confédération française de l'encadrement-Confédération générale de cadres* (French White-Collar Confederation – General Confederation of Managerial Staff) (CFE-CGC). Its membership is falling, but it helps to keep alive the idea of the white-collar worker as one of the cornerstones of the French system of industrial relations.

(c) In addition to the CFE-CGC *(see (b) above)*, there are four major multi-sectoral groupings or confederations: the *Confédération générale du travail* (CGT), which was set up in 1895; the *Confédération française démocratique du travail* (CFDT), established as the secular extension of the *Confédération française des travailleurs chrétiens* (CFTC) (1964); the *Confédération générale du travail-Force ouvrière* (CGT-FO), the result of a split in the CGT in 1947; and the *Confédération française des travailleurs chrétiens* (CFTC), which was created in 1919. There are other multi-sectoral groupings but, with few members, a limited area of activity and a lack of clearcut policies, they do not carry much weight.

(d) New groupings have recently seen the light of day. One of them, the *Fédération Syndicale Unitaire (FSU)*, basically brings together the white-collar workers' unions, some of which have been excluded from the FEN *(see (a) above)*. Another, still in the process of being formed, was able to pull its weight during the extensive strike action in the public sector towards the end of 1995. It is being set up as a reaction to the policies of certain confederations *(see (c) above)*.

5. Organisation of the large multi-sectoral confederations (CGT, CFDT, CGT-FO, CFTC)

(a) There is no doubt that *membership numbers* are falling in France, at least in the case of the CGT and the CFDT. Why this is so is not entirely clear. There are two sets of figures for the CGT. According to the CGT itself, it had 2.3 million members (active and retired workers) in 1977 and about 1.7 million in 1984, whereas the Metal Industry Employers' Federation (UIMN) puts its number of active members at over 1.6 million in 1977 and 835 000 in 1984[2]. The CFDT, which had more than a million active members between 1974 and 1979, admits to having lost between 100 000 and 200 000 since then. It claimed to have 900 000 active and retired members at the end of 1986. The CGT-FO boasts relative stability, even a slight growth in membership since 1974, and at the end of 1984 claimed nearly 1.2 million active and retired members. The corresponding figure for the CFTC at the end of 1986 was 160 000.

A battle of figures, then, but also a fundamental fact of life in the French trade union movement: compared to other EU countries, trade union membership in France is low, between *9% and 15%* according to some sources. But this has always been the case, except for the period immediately following World War II[3].

All sorts of explanations have been put forward to explain this phenomenon, including union ideologies, the conflict inherent in pluralist unionism, and changes in the means of production. We shall confine ourselves to just two considerations.

To begin with, French trade unionism has a militant tradition.

Union membership has a high value in itself, given that it does not bring any particular advantages. Collective agreements are generally applicable, and it would probably be unlawful for members of a signatory union to be granted special privileges *(see section 23 below)*. The unions do not directly manage social security/protection institutions, so union membership does not make a worker better off in social welfare terms. Finally, the union does not usually make payments to strikers during an industrial dispute.

Secondly, in contrast to the low rate of union membership, the confederated unions boast a strong following, which can be illustrated by two examples. In company-level industrial elections, the unions affiliated to the major confederations receive around *two thirds* of the votes cast, though the figure is steadily declining. The lists comprising non-federated unions or non-union candidates received less than 18% of the votes in 1966-67, 23% in 1976-77, 28% in 1986-87 and 34.7% in 1992-93. In elections for the *Industrial Tribunal* in December 1992, which were marked by a high rate of

2. See: *Liaisons Sociales*, No 10071 of 15 October 1987.
3. H. BOUZONNIE, *L'évolution des effectifs syndicaux depuis 1912: essai d'interprétation*, Revue fr. des affaires sociales, 1987, No 4.

abstention (60%), the lists presented by the five largest confederations (CGT, CFDT, CGT-FO, CFTC and CFE-CGE) obtained 93% of the votes cast. The contrast between strong electoral response and low membership is obviously significant for the development of trade unionism, but it also shows that the problem of representativeness is more than a matter of membership figures alone.

(b) How and where is the power located in these union organisations? Broadly speaking, the large confederations have identical structures. The highest authority is the congress, which brings together all shop stewards. In practice, the national council or committee, made up of the departmental or regional unions and the federations, plays a more active role if only because it meets more frequently and is made up of the people who form the backbone of the confederation machinery.

Management structures vary from one confederation to another, but all feature a larger *"committee"* - type body and a smaller *"executive"*, appointment to which is governed by procedures in which more or less overt co-option is allied to the need for relatively homogeneous management.

The confederation formula was originally intended as a lightweight structure. This is still essentially true of the CGT-FO, although power does increasingly tend to become personalised. In the other confederations, centrist trends have emerged, as a result of the shrinking of the militant basis and more cumbersome administrative, supervisory and coordination machinery. Yet it would be wrong to underestimate the strength of intermediary organisations, unions or federations whose representation on the national committee or council is proportional (with certain limitations) to their membership levels. On several occasions in recent years, these organisations (the CGT as much as the CFDT) appear to have had a decisive hand in influencing and even changing the policies adopted by the confederated organisations.

§2. THE BASES AND GUARANTEES UNDERLYING ORGANISATION AND ACTION

6. French law distinguishes between three different dimensions

(a) *Individual* trade union freedom is that which has the strongest base and the firmest guarantees. This is the freedom to join or not to join a union and the freedom to take part in trade union activity.

Individual union freedom is enshrined in the Constitution. The preamble of the *Constitution of 27 October 1946*, to which the *1958 Constitution* refers, states that *"anyone may defend his rights and interests through union activity and join a union of his choice"*.

Taken literally, this formula gives the broadest possible meaning to who exactly enjoys trade union freedom: i.e. everyone, or rather all workers and all entrepreneurs. The legislative formulae are stricter: *Article L. 411-5* of the *Code du travail* (Labour Code) recognises that any employee has the right to join a union and Article L.411-6 spells out the right to participate in the administration or management of a trade union. But it is a fact that trade union freedom is the right of everyone, for the defence of work-related interests. Furthermore, employers' groups often have the same legal form as a trade union. The *Code du travail* sometimes gives employed workers more extensive guarantees of the right to exercise this freedom.

The wording of the Constitution would probably suffice to condemn any legislative initiative which sought to question the individual right to join a union or take part in union activity. More specific guarantees have been enacted against employer interference, comprising criminal penalties in the case of discrimination on the grounds of union membership or union activity and civil penalties rendering null and void any action on the part of an employer that runs counter to trade union freedom (see *Articles L. 412-2* and *L. 481-3* and *L. 122-45* of the *Code du Travail*). Finally, French law prohibits any form of coercion vis-à-vis the unions (see *Article L. 413-2* of the *Code du Travail*).

(b) The right to *set up a union* was granted by law in 1884 (*Act of 21 March*). The current *Article L. 411-2* of the *Code du Travail* incorporates the original text: *"unions... may be freely established"*. The only stipulation is a procedural one: the unions's articles must be registered (see *Article L. 411-3* of the *Code du Travail*).

So the legal requirement is the same for trade unions and associations. This makes sense since the *Conseil constitutionnel* (*Constitutional Council*) has already decreed that any law which seeks to subject the establishment of an association to prior authorisation by the administrative or statutory authority is in breach of the *Constitution*[4]. The only limit to this protection stems from the concept of *"union"* itself: a union must have a work-related aim *(see (c) below)*, and its members must exercise a similar or connected activity. However, this concept only applies to *"primary"* unions, not to groupings of trade unions, which under the law enjoy the same freedom of establishment (see *Articles L. 411-21* to *L. 411-23* of the *Code du Travail*).

On the other hand, no special provisions protect the trade union's freedom to *operate*. This is inferred from the freedom of establishment and from the principles which apply to groups set up under private law. However, judges tend to apply these same principles - sovereignty of the members' assembly, the general principles of disciplinary law - when dealing with cases involving a trade union decision.

(c) In France, the bases and guarantees of the trade union's *freedom to act* are formally restricted to individual freedom to act (*see*: *Preamble* to the *1946 Constitution*: *"anyone may defend his rights and interests through union activity"*; on the guarantees of individual freedom, *see (a) above)*.

The main thrust of the debate on the bases and guarantees of trade unions' freedom to act focuses on two

4. *Constitutional Court*, 16 July 1971, in: *Official Journal*, 18 July 1971.

issues. First of all, the legal framework of trade unionism has no connection with the right to strike and the right to collective bargaining, even though the law stipulates that representative trade unions are the sole agents of collective bargaining. French law simply has no comprehensive arrangements for collective action.

The other issue is that trade unions are regarded as groupings set up under private law, enjoying *legal status* and pursuing a *special objective*. This special objective is the *"study and defence of rights and the material and moral interests, both individual and collective, of the persons referred to in its articles"* (*Article L. 411-1* of the *Code du Travail* based on the *Act of 21 March 1884* and amended by the *Act of 28 October 1982*) and it supposedly sets the limits of union activity. In practice, however, it is quite impossible to define these limits with any accuracy. Yet trade unions are also legal entities and as such may be held responsible for the damaging consequences of any wrongdoing. A number of trade unions (*"primary"* unions, associations, federations and confederations alike) have been the target of civil liability proceedings in the recent past, following labour disputes which they had orchestrated or otherwise supported.

The concept of union *immunity* has not yet found its way into French law, although an abortive attempt was made in 1982 to formulate a more precise definition of civil liability in labour disputes, on the understanding that the assets which a union needs in order to operate cannot be seized (*Article L. 411-12(2)* of the *Code du Travail*).

§3. FUNCTIONS, ROLES, PREROGATIVES AND RESPONSIBILITIES IN THE PUBLIC AND PRIVATE SECTORS

7. Workers' organisations

The functions of the trade unions vis-à-vis their members and the State can be outlined in a simple analysis. In their relations with employees, the French unions, while continuing to handle claims, have increasingly turned into forces of countervailing power. In handling claims they do not enjoy any special prerogatives. Apart from in the public sector, French unions have no legal powers relating to the organisation of disputes.

They do, of course, have a role to play in that respect *(see section 35 below)*, and there is the matter of their civil responsibilities, but they have neither been granted nor indeed asked for special prerogatives. As a countervailing power, on the other hand, they enjoy considerable statutory prerogatives, ranging from recognition of their monopoly right to negotiate collective agreements with general *(erga omnes)* effect (which is now being eroded, *see section 21 above*), through participation in a variety of expert institutions (e.g. the *Conseil Economique et Social*), advisory bodies (at national, regional and local level), management bodies (e.g. administration of the social security system) and organisations set up to resolve disputes (e.g. *conseils de prud'hommes*, which are first-instance industrial tribunals with joint representation), to the statutory promotion of their activities at company level.

The French trade unions' relations with the State are apparently simple and complex at the same time. Their role in the regulation of working and employment conditions would appear to be confined to bargaining on anything not covered by France's close-meshed network of statutory rules and regulations. Yet appearances can be deceptive, and the trade unions' links with the State are a case in point. Their actual complexity is borne out in at least two ways. For one thing, the State encourages trade union activities, a stand amply illustrated by the legal prerogatives granted to the unions. Secondly, centralised bargaining has taken great strides in France over the past twenty years. Depending on the aims pursued, such bargaining may be institutional or legislative in scope. An example of institutional bargaining would be the negotiations on the establishment and then on the reform of the unemployment insurance scheme. Examples of legislative bargaining can be found in the sphere of vocational training, redundancy, working hours, and even insecure employment. These are areas in which national collective agreements paved the way for changes in the law, which by and large has taken the outcome of negotiations on board.

Turning to the dynamics of the trade unions' functions, the underlying trend appears to be an upsurge in the unions' representative and rule-making activities. The larger unions have grown into fully-fledged work authorities, almost semi-public bodies. In some ways the situation is something of a paradox: the extension of the trade unions' functions and of the corresponding prerogatives took place at the very time when their real representativeness was on the wane. Could there be a causal link between the development of prerogatives and the decline in representativeness?

However, caution must be the watchword in comparing the extension of the French trade unions' role with the situation in other EU countries. In France, the purpose of central bargaining is still almost exclusively the management of the labour market and the regulation of working conditions. The unions still have little or nothing to do with the State's fiscal, monetary and health policies. The battle against inflation is still largely waged through public sector decision-making, in which the unions have little say.

8. Employers' organisations

By and large, what goes for the trade unions goes for the employers' organisations where the increase in representative and normative functions is concerned. The difference is essentially one of interpretation.

Another significant difference springs from the economic role played by the employers' organisations. They have no specific statutory prerogatives in the economic policy sphere (in the widest sense), but they can bring plenty of other *"resources"* into play.

The phenomenon is too well-documented in the European Community to dwell on at any length. Let us just draw attention to the important role played in France by the expert, supervisory and even regulatory committees and bodies in which the employers' organisations are represented or to which they appoint either representatives of the *"work environments"* or other experts.

9. The public sector

The role and prerogatives of the trade unions in the public sector are rather original. A word of warning, however. The "public sector" is scarcely a monolithic entity when it comes to labour law and industrial relations. Above all, we need to distinguish the civil service and the public sector. The latter in turn makes a distinction between bodies and enterprises which carry out administrative tasks on behalf of the State or public authorities, and those engaged in economic activities governed, in principle, by private-sector labour law.

Trade unions in the civil service are closely involved in defining the status of officials. Their institutional presence in joint bodies means they have a say in civil servants' careers and the administration's disciplinary powers. The general status of civil servants includes the *"right to conduct preliminary nationwide discussions with the Government in relation to pay increases"*. In practice, a formula has been introduced in which preliminary talks are held with the unions before the State budget is drawn up. The unions' position is essentially the same in bodies and enterprises entrusted with administrative functions, with minor adjustments where necessary.

In the public economy sector (often referred to as the industrial and commercial sector), which was considerably enlarged by the nationalisation of, in particular, the major banks and insurance companies in 1982 and then reduced again by privatisation operations in 1986 and again after 1993, the essential difference, in addition to the common-law regulation of industrial relations, stems from the presence of elected staff representatives in the administrative and supervisory structures. Although the unions have no monopoly in presenting electoral lists, trade union sponsorship has been the rule since these participatory mechanisms were reformed by the *Public Sector Democracy Act of 26 July 1983*.

Various studies carried out show that the trade unions have not really gained much influence through co-administration and shared supervision.

The *Act of 13 July 1963* gave the trade unions a special role and added responsibility in the management of labour disputes. They alone have the power to call a strike, in return for which they must respect a procedure, the mainstay of which is advance notice of strikes. Note, however, that the scope of this special system is not defined by reference to the civil service or to the public sector, but by reference to a concept which is wider than the former and different from the latter, namely *"public service"*.

§4. REPRESENTATIVENESS OF THE ACTORS AT DIFFERENT LEVELS

10. Representativeness of the trade unions

The concept of representativeness lies at the very heart of the French industrial relations system. The main prerogatives (*see sections 8 and 10 above*) are reserved by law for the *representative* unions. Thus, representativeness means both the capacity to respond to the ambitions and represent the interests of groups of people, and participation in the social order.

What makes the concept of representativeness a truly crucial one, however, is the fact that it accommodates both social history and the possibility of future change.

For example, French trade union history being one of division, representativeness *à la française* means pluralist rather than majority representation. By the same token, viewed against a backcloth of pluralism and low membership figures, representativeness in France is understood to be relative and proportional, not absolute. All this sounds as though the French concept of representativeness is fairly flexible, but this is not entirely true. In fact, *historical representativeness* very much takes pride of place. A few concrete details will help to illustrate what we mean by this.

At national level, a Government Act (*Decision of 8 April 1948*, amended by *Decree of 31 March 1966*) declared five confederations to be representative. Four of these (CGT-FO, CFTC, CFDT) were multi-sectoral while the fifth (CFE-CGC) represented a single category. Originally, the sole purpose of the Act was to specify which organisations were entitled to negotiate collective agreements capable of extension. Today however, the Act is regarded as having an absolutely general effect. The limited list of representative organisations applies to all the nationwide prerogatives connected with representativeness. However, since 1968 a new rule which highlights the importance of historical representativeness has gradually been applied. At all levels other than national level, i.e. branch level, regional level, departmental or local level, and company level, affiliation to one of these five nationally representative confederations brings with it representative status and the right to exercise prerogatives as important as the conclusion of collective agreements, pre-election negotiations at company level and the presentation of first-round ballot lists, and allocation of resources for trade union activity in the company. Clearly, representative status stemming from affiliation to a confederation does not necessarily reflect the union's real following at its own level. It is also the channel through which support for confederated unionism is enhanced.

The system does not prevent other trade union organisations from obtaining representative status at other levels. Independent and non-confederated unions, for example, have representative status in the civil service. But it is for these unions and these alone that the concept of representativeness on pluralist and relative grounds comes into play. Both the administration, when it comes to appointing members of a committee or a public body, and the judiciary, when it is a matter of industrial elections, the exercise of trade union activities at company level or participation in collective bargaining, will almost invariably want to know whether the trade union applying for representative status has a sufficient following among the workers it represents compared to other unions.

11. Representativeness of employers' organisations

Employers' organisations or groupings need not be representative for the purpose of bargaining or the conclusion of collective agreements. The scope of agreements will just depend on the size of the organisation's membership.

Representativeness is, however, required of employers' organisations for the purpose of negotiating collective

agreements capable of extension (i.e. multi-sectoral or branch agreements) and for the establishment of public advisory or management bodies at national or regional level (*see sections 12 and 13 below*).

SECTION 2: FUNCTIONS OF JOINT OR TRI-PARTITE BODIES

12. Private joint bodies

The law and collective bargaining in France have combined to give birth to *joint* institutions at national, local or company level.

One such national institution which sprung from collective bargaining activity is the management board of the association which runs the national unemployment insurance system, UNEDIC. Others include certain disciplinary committees at company or branch level. The Industrial Tribunal, which is an industrial court of first instance, is also a joint body. The works council (a statutory institution) in some respects would seem to be a joint body in France, as it consists of members elected by the workforce and the head of the company. However, this is misleading, as it is chaired by the head of the company, which means it is not a joint institution. It votes only on a very limited range of issues.

The underlying principle of joint institutions in France is a dual one. On the one hand, the aim is to extend *agreement-based activity in the field of social protection.*

Where there is an agreement-based system of protection, it is usually managed by a joint institution. However, as a protection system gradually becomes an instrument of labour market management (the unemployment insurance system is a case in point), problems are likely to arise in respect of the autonomy of the system and its management machinery. Experience with the unemployment insurance system over the last ten years certainly bears this out. On the other hand, joint representation also means that some attempt is made to institutionalise the *methods for resolving labour disputes*, based more or less on negotiation. This reasoning explains the level at which, or the framework within which, joint bodies responsible for setting labour disputes are formed.

13. Bipartite and tripartite public bodies

Neo-corporatism, or the *State-manager* syndrome, the proliferation of public bodies in which representatives of the *"world of employed labour"* get together with the *"world of business"* is a salient feature of the French system.

Such bodies are usually *tripartite* and play an *advisory* role. They include – to name but a few – the *Conseil Économique et Social* (CES), the *planning committees* (CGPs), the *Commission nationale de la négociation collective*, the *Comité supérieur de l'emploi*, and the *Conseil national de la formation professionnelle.* Their role is an advisory one, and the final decision lies with the government (or administration). Yet this is really taking too narrow a view.

In some cases, consultation is compulsory (e.g. the *Commission nationale de la négociation collective* in its role concerning the extension of collective agreements or fixing the minimum wage), and the expertise of some of these bodies carries considerable weight in the social debate.

Tripartism and consultation are words which do no more than describe a general trend. The organisations responsible for managing the social security system are bipartite in structure and their role goes much further than mere consultation.

However, it is true that the administration exerts strong control, and the organisations' autonomy is further curtailed by the fact that their activities are prescribed by public choice. Public control and the extension thereof are at the heart of the major reform started in 1996. Further inroads are made into tripartism when the bodies concerned also have important organisational, regulatory, supervisory and economic functions. In the realm of credit, banking, stock market operations and consumer protection, to name but a few relevant examples, organisations have been set up with often extensive regulatory and supervisory powers. Their composition must reflect the dual principle of representation of interests and technical competence, which does not necessarily ensure union participation in a manner equal to that of other interests.

SECTION 3: PUBLIC ADMINISTRATION AND GOVERNMENT BODIES AS ACTORS AND EMPLOYERS

14. Public authorities

There are many ways in which the State can intervene. It draws up an economic policy, of which wages and costs form an integral part. It has a policy of regulating working conditions through the action it takes to shape the framework for negotiation. Last but not least, the State is an employer (*see section 15 below*).

Despite the fact that wage-fixing properly belongs to collective bargaining and individual negotiation, the public authorities often have a decisive impact on the level and structure of pay. Trade union opposition to State control of pay has often been said to be stronger in France than in other Community countries.

Yet on two occasions during the past 15 years such opposition has failed to stop a direct wage freeze which results suggest was even more successful than anticipated. The State also uses the public sector as an instrument of global wages policy. The motive force of the public sector is never more evident than when private-sector operators refer to government decisions to justify their own choices. However, in the public sector (i.e. all State-controlled activities), power is much more balanced than in the private sector. The rate of union membership is higher, as is the level of job security. The major disputes at the end of 1995 started in the public sector, but all observers agreed that private-sector workers reacted to the actions of public-sector workers with a degree of support verging on solidarity.

Relations between the State and the large employers' organisations and trade unions are complex. The power of the State, which is rooted in the strength of its administration and the semi-presidential political system, means that even if agreement between the organisations sometimes succeeds in bringing about a change in government policy or legislation, negotiations are frequently spurred by government initiative or the threat of government intervention.

15. The State as employer

Any assessment of the importance of the State as an employer depends on whether we consider only the individuals employed by the State or public authorities, or whether we add to this the vast number of people employed by state-controlled enterprises. In all, these are generally considered to amount to more than one-third of all employed workers. In order to highlight the role of the State in regulating economic activity, we should have to gauge the strategic weight of certain sectors dominated by so-called public-sector enterprises (aeronautics, electronics, computers, telecommunications, heavy electrical engineering, banking and insurance), in the last three cases taking account of recent privatisation.

The State's ambitions to act as a role model in its capacity of employer go back a long way. Many social innovations have originated in the public sector (*lato sensu*) and, as we have seen (*see section 14 above*), global wage policy generally takes its cue from the public sector.

CHAPTER II: THE INSTRUMENTS OF REGULATION

16. The sources of regulation: a summary

The French system of regulation of employment relationships and industrial relations still owes much to the economic conditions prevalent at the end of the 19th century. This was when the *State* began to issue rules to regulate employed labour (as opposed to self-employment).

The fact that regulations of State origin were given pride of place no doubt owes as much to political compromise as to the needs of the economy and the workers' desire for greater protection.

Although political compromise is no longer as topical, its impact on French social culture persists - and indeed, it seems difficult even now to envisage any radical questioning of the role of the State without causing considerable upheaval. This statement, although perhaps over-simplistic, does explain why *deregulation* has been much less in evidence in France, or rather why the State has produced rules to bridge the gap wherever it has decided to withdraw from central stage.

State rules relate not only to labour (working hours, working conditions), but also to the organisation and representation of the interests of the partners in industrial relations. This means that union activity within the company, collective bargaining and the conclusion and implementation of collective agreements, and workforce representation in the company are the subject of often very detailed State rules. In other words, French legislation is not only *protective*, but it also constitutes in itself a genuine body of *industrial relations law*.

Important though it is, State regulation is not the only source of regulation. *Collective agreements are an increasingly important source of regulation*, judging from the number of agreements concluded. *Custom* and the *unilateral regulatory powers* of employers are also regarded as sources of law.

The predominance of State regulation is nevertheless decisive, not only on account of its scale but also because it introduces an *order* between the different sources. Indeed, it controls the non-State production of rules by reason of the very regulations which it establishes (e.g. the way in which the law fixes the rules on collective bargaining and the legal effectiveness of collective agreements), by its recognition of certain sources (e.g. custom), and sometimes even by prescribing the use of non-State rules (e.g. the obligation on companies to produce in-house regulations).

SECTION 1: STATE SOURCES

§1. CONSTITUTIONAL LAW AND SOCIAL RIGHTS

17. Principles of constitutional law: identification and effectiveness

The preamble to the 1946 Constitution, to which the present Constitution of 1958 refers, contains a number of statements which mark a break with a more formal understanding of democracy. It describes as *"principles particularly relevant to our times"* the right to work (everyone has both a duty and a right to work, without discrimination on grounds of origin, opinions or beliefs), union rights (*see section 6 above*), the right to strike (exercised within the framework of the laws regulating it), the right to engage in collective bargaining and monitor company management (all workers may participate via their delegates in determining working conditions and running the company), the right to social security, and equal treatment for men and women. But the *Constitutional Council* used different formula from the preamble, which refers to the fundamental principles recognised by the laws of the Republic, principles which are considered to have received legislative approval before 1946, such as the principle of freedom of association, to which must be linked the principle governing the right to set up a union *(see section 6.b above)*.

These principles do more than just set the tone. The right to work, for example, which of all principles might appear to be the least liable to direct legislative effect, was invoked by the *Constitutional Council* to indicate the limits of an attempt at legislative action which, for the sake of work-sharing, would prevent certain people from gaining access to employment (*Conseil Constitutionnel*, 28 May 1983 and 16 January 1986). It is also sometimes invoked by the courts, one of which for example managed to invalidate a clause of a collective agreement which set a maximum age limit on recruitment[5].

Strictly speaking, the effectiveness of constitutional principles is restricted by the very system set up to keep watch over the constitutionality of the law. This system confines the role of the Constitutional Council to the prior assessment of laws, i.e. before they are promulgated. French law does not yet recognise the legal exception of unconstitutionality. A law once promulgated is said to be irrefutably in keeping with the *Constitution*. There is regular talk of changing the system to enable individuals to appeal to the *Constitutional Council* (safety checks would be provided) and allow the exception of unconstitutionality to be brought into play. But nothing has happened as yet.

To gauge the effectiveness of these principles, however, more than a simple check on the constitutionality of laws is

5. Cour d'Appel Versailles, 11 March 1985; *Revue trimestrielle du Barreau de Versailles*, 1986, no 1, p 108.

needed. Administrative and legal courts not infrequently refer to constitutional principles. The former check the legality of regulatory activity, the latter vet private initiatives. For example, the Council of State has made it clear that no statutory power may prevent foreign workers from living in France with their families, and it has done this by referring to a constitutional principle, namely the right to lead a normal family life[6]. Since then, the Council of State has agreed to apply various provisions of the *European Convention on the protection of human rights*, including *Article 8*. Another example: the *Cour de cassation*, in view of constitutional recognition of the right to strike, has ruled that collective agreements which regulate and therefore limit it, are null and void[7]. While not nearly as animated as in other Community countries such as Spain or Italy, the constitutional debate in France on the right to work has gone beyond academic argument.

It is easy to see that French reluctance to pass legislation on the right to strike may well be connected with a fear of constitutional censure.

§2. LEGISLATION AND OTHER STATE OR PUBLIC SOURCES

18. Legislation – parliamentary competence

In France, statutory sources remain pre-eminent. That is not to say that the social partners, e.g. trade unions or employers' organisations, play a secondary role. Bargaining is playing an increasing (and more or less formalised) role in the legislative process (*see section 7 above*).

The *Constitution* for its part seeks to define what, in the State's normative action, falls within legislative (parliamentary) competence, and what is part of regulatory competence. According to *Article 34* of the *Constitution*, it is up to the law to lay down rules concerning the fundamental *principles* of labour law, union law and social security legislation. Other rules come under the aegis of regulatory power. Establishing a dividing line has without doubt reduced the role of legislation, as intended. However, the actual dividing line is difficult to trace (the concept of *"fundamental principle"* being rather flexible), and this is one of the tasks of the *Constitutional Council*, although its decisions do not contain any clear guidelines in this respect.

Three further points must be borne in mind. First of all, even if the rules regarding fundamental principles fall within parliamentary competence, this does not mean that legislation will not be both very detailed and highly diversified. The law includes special measures for certain sectors and categories of workers, provides for a complex typology of the different types of employment contract and working time arrangements, and uses many different workforce size categories (several hundred) to modulate workers' rights and guarantees, the resources granted to trade unions and, more generally, employers' obligations.

Secondly, most State, legislative and regulatory provisions are incorporated in the *Code du Travail* (Labour Code) to which trade unions and employers' organisations alike attach considerable symbolic value. The former regard it as a system for protecting workers, whereas the latter have at times denounced it for being too rigid. Both are correct to some extent.

The code is non-exhaustive *compilation* of texts. Many State provisions on employment relationships are missing (laws on employees' inventions or on ailing industries, texts from the *Civil Aviation Code*, the *Rural Code*, the *Maritime Labour Code*, etc), but these gaps do not prevent the *Code du Travail* from being regarded as the bible of rules on paid employment.

The third point is that the total sum of French legislative rules specific to employment relationships (whether codified or not) can hardly be regarded as *self-sufficient*. Employers' organisations, trade unions and indeed experts in labour law have a tendency to affirm the *autonomy* of the special rules which make up that branch of law called labour law. However, the *Code du Travail* and the courts still refer to civil law, particularly where contractual and non-contractual obligations are concerned. The exact impact of civil-law rules and principles is not easy to define, but the links between civil law and labour law of State origin are not far removed from those existing between general and specific law.

19. No normative competence for regions and departments

The decentralisation movement which got under way in 1982 has not affected the sources of labour law, or rather the levels at which labour law is formed. Nevertheless, the regions and departments did acquire new powers in two areas likely to affect labour law: vocational training and social action and assistance.

Yet decentralised normative competence is still weak in these areas, as the basic principles of legislative competence remain unchanged (*see section 18 above*) and because existing State legislation has been upheld despite the transfer of competence.

20. Regulatory power: limitations and trends

The division of power between legislation and regulation, in accordance with the *Constitution* (*see section 18 above*), has enhanced the role of regulation, though it remains secondary to legislation.

Two trends highlight the importance of regulatory powers (i.e. the regulatory power exercised by the Prime Minister by means of decrees, or special regulatory powers exercised through ministerial or prefectural decree). The first of these dates back a long way, to when the legislative order made provision for different procedures for administrative intervention. The most classic example of this is the ministerial decree extending collective agreements, which gives the Minister of Labour a means of control over collective bargaining. There are also, however, enabling regulations for setting up specific regimes to govern the duration of working time or for identifying the sectors in which jobs are usually subject to fixed-term contracts, not forgetting authorisation procedures, usually to permit individual initiatives on the part of employers (in this case, the administrative act does not lay down a general rule) or for working arrangements

6. Conseil d'Etat, 8 December 1978, GISTI, *Droit social*, 1979-57.
7. Cass. Soc. 7 June 1995: *Droit social*, 1996, 37.

which do not comply with the statutory model (e.g. Sunday opening hours). These government measures usually involve the representative organisations (*see section 7 above*) in the decision-making process.

The second trend originates from the State's selective intervention on the labour market. State intervention is first of all financial and is also subject to enabling legislation of a budgetary nature. However, the generosity of this enabling legislation leaves plenty of regulatory power for the administration.

The main thrust of labour policy, notably where it relates to so-called *"social policy for coping with unemployment"* (which encourages early retirement for older workers and, through grants and reductions in costs, the recruitment of unemployed young people), conforms to this model and more money is being spent on it.

In 1993 spending in this field, not counting public financing of unemployment benefits, rose to more than FRF 165 billion (as against FRF 120 billion in 1986), and a debate began on the reorganisation of these *"employment aids"*. As part of this employment policy, the exercise of regulatory power in the shape of decrees and orders is cut back in favour of a process which uses *memoranda* and internal procedures, a system which allows for both precision and flexibility and recognises (as well as disciplines) the powers of discretion. This has produced an important though somewhat unstable combination: an multi-sectoral collective agreement which draws on this type of State intervention or budgetary enabling legislation, and a range of administrative rules to provide organisation and give direction.

SECTION 2: SOURCES OF AGREEMENT

21. Uniformity and variety of collective agreements

A special feature of the French system is that the collective agreement has *legal status*. The collective agreement is State-regulated first, a source of law second. It is a highly effective instrument in law (*see section 13 below*), yet subject to a number of basic legal rules, the first of which is that the representative trade unions have a monopoly to negotiate and conclude agreements which are then legally effective. There is, however, a new trend, the implications of which are not yet clear. An multi-sectoral agreement signed on 31 October 1995 (*see section 24 below*), which needs to be incorporated into the law (under discussion), states that collective bargaining in undertakings with no trade union representation may be carried out by elected representatives, but qualifies this dispensation from trade union monopoly by imposing supervision by a joint committee, in principle at branch level. This trend has deeply divided the confederations (*see section 4 above*).

The fact that the collective agreement has legal status raises two questions: one concerns the importance attached to collective bargaining, which takes places outside the legal framework, the other the effectiveness of agreements concluded outside this framework.

In practice, undertaking-level bargaining with elected workforce representatives (works council and workforce delegates) is extremely widespread, even though such representatives have no legal power to negotiate agreements producing the same effects as *"trade union"* agreements. Yet the effectiveness of these so-called *"atypical"* agreements is undeniable. When their legal effect is questioned, the courts will not put them on a legal par with trade union agreements, yet they do not hesitate to ensure their implementation, regarding them as unilateral commitments on the part of the employer or as common law agreements whose provisions have been accepted by employees. The trend described above should lead to recognition, subject to certain conditions, of elected representatives' ability to conclude collective agreements.

The law itself now distinguishes between collective agreements (*"conventions"*) intended to regulate employment and working conditions and social aspects as a whole, and specific collective agreements (*"accords"*) covering just one or more of these aspects (*Article L 132* of the *Code du Travail*). However, in practice this distinction means little.

While the status of the specific agreement is established by law, the *level* at which bargaining takes place is a matter for collective autonomy. The social partners usually step in here, at least with regard to working time (*see section 24 below*). There are in fact three main levels of collective bargaining: *branch* level (where bargaining may be departmental, regional or national), a format largely rooted in the way the employers' organisations are constituted (*see section 3 above*), *multi-sectoral* level and *undertaking* (or establishment) level.

By the same token, specific collective agreements themselves can be differentiated according to their status (specific agreements as defined by law, and other specific agreements), their content (agreement or contract) and the level at which they are negotiated. This study will only deal with collective agreements and specific agreements as defined by the law.

22. Relationship between the law and collective bargaining

The link between the law and collective bargaining should be studied first in a formal, then in a dynamic perspective.

(a) To define the *formal relationship*, three questions must be answered. First of all, is there an area where the law holds exclusive sway and permits no negotiation? This question was examined in a now famous opinion of the *Council of State*[8], which still serves as a reference.

In principle, no agreement can alter imperative provisions or principles extending beyond the confines of labour law (powers of public officers, fixing of penal charges, restrictive legislation on index-linking, etc). The concept of "absolute law and order" legislation not liable to change by an agreement has, however, lost some of its explanatory quality as centralised legislative negotiation has gathered momentum (*see section 7 above*). This has sometimes encouraged the social protagonists to agree on legislative change when in fact they were in no legal position to do so (e.g. the multi-sectoral agreement of 20 October 1986 on dismissal procedures, which lays down the powers of the employment administration), changes subsequently endorsed by Parliament. Secondly, is there an area which is the

8. Opinion of 22 March 1973: *Social Law* 1973.514.

exclusive prerogative of collective bargaining, not subject to the law? This question has never really been properly addressed in France, though it might have been when the law froze the effects of collective agreements on wage levels (in 1977 and 1982). But there appears to be an implicit consensus that the law can do anything (i.e. can intervene wherever it sees fit). Finally, what happens when the law and negotiation clash in areas where they both play a role?

The principle in France is that the *rule most favourable to employees should take precedence* (*Article L. 132-4* of the *Code du Travail*). Yet this principle has been fraying slightly at the edges since 1982, in what is still a firmly restricted area: the organisation of working time. The law itself recognises that a collective agreement may depart from the statutory model without the employees necessarily gaining any advantage from this. These so-called *overriding* agreements are subject to special rules and have met with a certain degree of success. They do constitute a break with convention, but it is necessary to consider the nature of the fields they cover; since 1936 working time in France had been the subject of detailed State rules. The procedure of overriding agreements reflects the desire for diversification in working time arrangements, subject to certain conditions. The aim behind such diversification in some cases is to safeguard and create jobs, in others to boost the competitiveness of undertakings.

(b) The *dynamic* relationship between the law and collective bargaining is fairly clear. The law appears to restrict collective bargaining by forbidding any change in *"absolute law and order"* rules and by confining the right to conclude collective agreements producing a general effect to representative trade unions. In fact, these apparent restrictions have little or no impact on the actual bargaining itself. On the contrary, the French system seems geared to encouraging and promoting collective bargaining.

There are a variety of ways in which French legislation promotes collective bargaining. It encourages negotiators by backing the representative trade union organisations, and promotes negotiation itself by making it a legal duty to negotiate on certain issues. Chief among these, at company level, are effective wages and working time negotiated annually (*Article L. 132-27* of the *Code du Travail*) and at branch level, minimum wages (annually) and grading (every five years), *Article L. 132-12* of the *Code du Travail*).

23. Implementation and effect of collective agreements

Collective agreements have legal status, which means their legal effects are the same as those of the law. To be effective, they must be signed by *one* representative trade union. This stipulation actually gives some trade unions considerable power regardless of their actual position in the area covered by the negotiations. This is because French unionism is pluralistic, trade union membership is low, and a union may be regarded as representative by the simple fact of being affiliated to an organisation regarded as representative at national level.

So what exactly is the legal effect of a collective agreement? In fact it is two-dimensional: it ranges in scope and density. As regards scope, the collective agreement applies to all workers in the companies covered by the agreement, whether they belong to a trade union or not. This is what is known as a *general* or *erga omnes* effect. Collective agreements must state which undertakings are covered, whereas this obviously is not necessary in the case of undertaking-level agreements. The scope of branch-level agreements is defined partly by membership of one of the signatory employers' organisations and partly through the company's (main) activity, which places it in the area of activity covered by the agreement. These two conditions are as a rule cumulative. All the same, the first condition, membership of a signatory organisation, is not necessary where the agreement is the subject of an extension order by the *Minister of Labour*. As regards density, collective agreements are remarkably effective since the law grants automatic and imperative effect. They need not be incorporated into individual employment contracts and their provisions take undisputed precedence over any contractual stipulations less favourable to the worker. No derogations are allowed.

This system, which evolved over the years and was enshrined in its current form in an Act passed in 1950 and updated in 1971 and 1982, incurs little serious hostility on the part of either employers or trade unions, so that it is safe to regard it as one of the cornerstones of French law. Only the *Confédération de l'encadrement* (*see Section 4 above*) has recently questioned the virtues of this structure.

24. Centralisation and decentralisation in collective bargaining

(a) Collective bargaining has traditionally taken place mostly at *occupational branch level*. This is due to a wide variety of structural and strategic factors. These include the way in which employers' organisations and trade union federations used to be constituted, the employers' interest in establishing minimum conditions for competitiveness between businesses, and the workers' interest in forging solidarity, etc. However, in the 1970s this level of bargaining looked set to lose ground to centralised multi-sectoral bargaining and company-level negotiation.

A look at the figures suggests that in the end this did not happen. 15 basic collective agreements were concluded in 1995 (compared with 13 in 1994), together with 14 specific agreements (41 in 1994) and 939 supplementary or amending agreements (880 in 1994)[9]. However, an analysis of the sectors or branches concerned and the contents of agreements suggests that not too much should be read into these figures. For example, the new collective agreements cover small sectors or update existing agreements. Specific agreements (on one or several topics) are relatively few in number. The number of supplementary agreements above all reflects the desire of employers' federations to update existing agreements.

(b) *Company-level bargaining* has blossomed although not in an entirely linear manner (8 550 agreements regis-

9. *State of collective bargaining 1995*, Ministry of Labour 1996.

tered with the Ministry of Labour in 1995 as against 7 450 in 1994, excluding agreements on financial participation by workers). But there are some fairly considerable disparities, as only 40% of these agreements have been concluded in industry and only 29% in the tertiary sector, which has more employees. Pay and working hours are by far the most common subjects of negotiation.

(c) *Multi-sectoral* negotiation plays a role which is now becoming essential. It is not the number of specific agreements signed which is the most significant aspect (five agreements in 1995 compared with two in 1994, 37 supplementary agreements in 1995 as against 61 in 1994), but rather it is their content and scope which count. Two of the agreements signed in 1995 (both dated 31 October) should be singled out here.

The subject of the first is collective bargaining itself. Its primary aim is to define the roles of the different levels. Extensive functions are attributed to branch negotiations, but a large measure of autonomy is left to undertaking-level negotiations. It is the branch which is required to organise representation of workers employed by small and medium-sized businesses. The logical extension of these arrangements, with a certain degree of control by the branch organisations, will be collective bargaining with elected representatives in undertakings with no trade unions (*see section 21 above*).

The subject of the second agreement is employment and the reorganisation of working time. The principal aim is to employ bargaining to establish rules on working time which combine the interests of competitiveness with the maintaining or increasing of employment levels. This multi-sectoral agreement states that negotiations should be held in all branches, and specifies time limits. Since July 1986 12 branch agreements have been concluded in a sample of 128 branches (out of the 330 listed by the *Ministry of Labour*), without employment as such normally being an explicit subject.

(d) Clearly, the relationship between the levels of negotiation is a major concern of the large organisations. The agreement of 31 October 1995 bears witness to this. But their desire to consolidate the role of branch negotiation, particularly in dealing with employment problems linked to the organisation and duration of work, encounters many obstacles. In any event, multi-sectoral bargaining causes two concerns for the large organisations (or at least some of them); it is necessary to separate collective bargaining and follow-up action, and to make problems of work organisation the focal point.

25. Future trends

The forecasts established nearly ten years ago remain valid. First of all, the possibilities of adapting the collective bargaining system are diverse, which testifies to its capacity to adapt, or its relative versatility. Secondly, the fringe system is evolving towards a certain separation of collective bargaining or, at least, a desire expressed by certain organisations to limit the ascendancy of the law.

In fact, the continuing pressure of unemployment on wage trends does not help fortify branch-level bargaining. On the contrary, it encourages undertaking-level autonomy. The new aspect, in which there is still some uncertainty, lies in the efforts made by the large organisations to construct a bargaining space around problems of work organisation and employment. This space is unsuited to branch-level bargaining, as it is difficult to develop new models. Some employers' organisations attempt and reach agreements on greater working time flexibility, possibly with compensation in the form of shorter working hours. However, in the context of high unemployment, the branch barely manages to be the negotiating level at which rules on the sharing of productivity gains are laid down.

Obstacles to developments are the resistance of workers to the growing sacrifices demanded of them and of the State's general role as protector of groups hit by unemployment and structural changes.

SECTION 3: THE ROLE OF JUDGES

26. Which judges?

To begin with, it should be borne in mind that the machinery for resolving *"social"* disputes in France is highly dispersed. This dispersal is manifest in the *judiciary*, which comes under the overall regulatory control of the *Cour de cassation*, or Supreme Court. Individual labour disputes are settled by the *Conseils de prud'hommes* (industrial tribunals), which are joint bodies consisting of equal numbers of members elected by workers and employers, whose decisions can be referred to the Courts of Appeal (*Cours d' appel*) made up of professional judges. But disputes over in-house workforce elections are brought before a professional judge in the district court (*tribunal d'instance*), while disputes between companies and trade unions, particularly where they concern collective agreements, fall within the competence of the regional court (*tribunal de grande instance*), also made up of professional judges. Prosecutions for infringing rules carrying legal penalties are common, and are also brought in the regional court.

There is also dispersal between the judiciary and the administrative orders. Since the administration often has to take action on matters concerning industrial relations and employment relationships, these are regulated by a vast array of administrative acts, any disputes on which have to be settled by administrative judges (administrative tribunals and *Council of State*).

Constitutional case law must be mentioned with caution, since the *Constitutional Council* (*see Section 17 above*) is strictly a supervisory authority which monitors legislative activity.

27. Legal activity and production of rules

Case law is a thriving sector in France. But what exactly do we mean by case law?

There is no need for a precedent in order to refer a matter to court. Neither the law nor any self-imposed principle of justice requires the judges themselves to follow their own earlier rulings. All the same, the practice of overturning case

law – changing the content of legal opinions – is not devoid of importance.

Yet there are a number of reasons why jurisdiction is widely acknowledged as a source of regulation. For one thing, judges want their decisions to be coherent. For another, the regulatory, unifying function of the Supreme Court and the Council of State is well-developed and is given added weight by the publication of selected examples of their rulings in official anthologies.

Finally, and indeed above all, the *legal profession* itself (judges, lawyers, barristers, company and trade union solicitors), by commenting on judges' rulings and by systematically and rhetorically referring to their decisions, acknowledges that judges hand down decisions which help to create rules. The fact that students of labour law are made to study judges' rulings extensively and the very way in which specialist literature is set out are also linked to the role of case law in France.

Judges' influence is, however, restricted by the existence of a close-webbed network of State regulations and contractual rules.

But these rules are often couched in terms that leave them open to interpretation. The proliferation of standards and framework-concepts (a real and serious cause of dismissals, for example) bears witness to this. Above all, this is one of the channels most commonly employed in the judge-led production of rules.

SECTION 4: CUSTOM AND ENTREPRENEURIAL POWER TO REGULATE

28. Custom as a source of regulation

Custom is widely recognised as a source of regulation; the law refers to it for example in matters connected with giving notice. Judges regard custom as a source, and it is they who have defined the conditions for identifying customs and their legal framework, which is closely related to that for collective agreements.

There are some instances of multi-sectoral custom (for example, the three-month period of notice for white-collar staff), but generally speaking the scope of custom is restricted to the undertaking, establishment or workshop. It is especially relevant when it comes to fixing *wages* and wage increases, to the organisation of *working time*, and to the exercise of union activities by the undertaking's workforce representatives. The judges' definition of custom is a habitual practice which is endorsed by the employer.

29. Entrepreneurial power to regulate

Employers unilaterally decided many of the rules in force at undertaking level, indeed they are sometimes required to do so by the law. *Internal regulations* are a case in point. These constitute the undertaking's disciplinary charter (and must include the health and safety rules in force).

In addition to the internal regulations, a more or less loosely-framed set of unilateral rules deals with wages, the payment of bonuses, worker mobility and suchlike. When called upon to intervene, either by the employer or by one or more workers wishing to restrict the discretionary nature of the employer's prerogatives, judges will acknowledge that they are effective, pronouncing them, as the case might be, to be part of employment contracts or of the unilateral commitments made by the employer.

SECTION 5: INTERNATIONAL LAW

30. The importance of international sources and their effect in the domestic order

Globally speaking, rules laid down by international, multilateral and bilateral agreements in force in France are respected. This does not mean of course that their interpretation is always straightforward or that there are never any disputes over implementation, though this is probably less true of Community rules arising from the Treaties or secondary legislation.

In fact, international rules can be divided into different categories according to their purpose. If they have *domestic conditions* in view and if they seek to align or harmonise State legislation, then French labour legislation very rarely clashes with them. But where rules arising from international sources seek to regulate *international* aspects (for example the position of immigrant workers and their families), they are far more likely to come into conflict with French domestic law. In such cases the legal effect of international agreements in the domestic order has been questioned.

The effect of international agreements is regulated by *Article 55* of the *Constitution* which stipulates that *"properly ratified or approved treaties or agreements upon publication take precedence over the relevant domestic laws, provided each agreement or treaty is implemented by the other party"*. The final part of the text, which imposes a condition – reciprocity – is an area of difficulty.

According to one much-followed school of thought[10] and the case law of the *Supreme Court* (First civil chamber, not followed in this by the other chambers)[11], only the government can invoke lack of reciprocity.

At the heart of the debate is the conflict between a treaty and a law, which may sometimes be settled by conciliation; the law after all has to make provision for the situations targeted by the treaty. However, this is not always the case, and the scope of *Article 55* of the *Constitution* has long been a bone of contention.

The *Conseil d'Etat* (Supreme Administrative Court), after previously referring to an earlier law on a treaty[12], recently handed down a ruling which has attracted much attention[13] and in which it abandons this stand and falls into line with the Supreme Court, which guarantees priority application of the treaty[14].

10. See P. LEGARDE, *La condition de réciprocité dans l'application des traités internationaux: son appréciation par le juge interne*, in: *Revue critique de droit international privé*, 1975.25.
11. See: *Cass. civ. 6 March 1984*, in: *Journal de droit international*, 1984.859, *Revue critique de droit international privé*, 1985.109.
12. See: *Conseil d'Etat*, 22 October 1979: in: *Actualité juridique de droit administratif*, 1980.39, 30 April 1982, *Dalloz* 1983;48.
13. *Conseil d'Etat*, 20 October 1989, in: *Actualité juridique de droit administratif*, 1989.788.
14. *Cass. Ch. mixte*, 24 May 1975, *Dalloz* 1975.497.

However, this does not mean that the *Conseil d'Etat* has modifying its stand on the relationship between a directive and a law.

In another ruling which made many waves, the *Conseil d'Etat* denied the right of a citizen of another EC Member State to invoke a directive (in this case the so-called *"law and order"* directive of 25 February 1964, as interpreted by the *Court of Justice*) against a law[15], even though the Court of Justice had ruled that at least some clauses of this particular directive had statutory force. However, without abandoning its position, The *Conseil d'Etat* ensures that the administrative authorities comply with Community directives. Thus it ruled[16] that those authorities, after expiry of the time-limit set for transposition of a directive, cannot continue to remain contrary regulations or adopt new, conflicting regulations[17].

SECTION 6: THE HIERARCHY OF SOURCES IN A DYNAMIC PERSPECTIVE

31. Hierarchy of sources

Sources are multiple, yet they obey an order imposed by the State. The law expressly stipulates that agreement-based sources must respect the minimum requirements of State regulation. Modifications by collective agreement are possible, save where the State rules are of the "absolute law and order" variety *(see section 22 above)*, and provided the changes are more favourable to the worker. The principle of law and order, known in France as *"social public order"* has both a hierarchy and ways of combining with others. Judges have extended its application to other sources and a hierarchical structure is beginning to emerge: the law, collective agreements, custom, unilateral regulatory powers of the employer. Any combination between these sources must obey the principle of most favourable treatment of workers.

This hierarchical structure is not formally breached if the collective agreement or custom is enabled by the law to set rules. It is breached however, when the collective agreement is empowered by the law to set aside a State rule without the outcome necessarily being favourable to the workers. Such is the case with overriding agreements *(see section 22(a) above)*. The thing to remember is that the most favourable treatment principle is in this instance suspended by the law itself. In any event, overriding agreements raise one major question: how to monitor their proliferation. Only two aspects of this question have been addressed so far. Should overriding agreements be recognised at all *levels* - branch and company? Ought not the negotiating parties to be more *representative* than they are now? In order to make essential derogations relating to the organisation of working-time, an *Act of 28 February 1986* stipulated that a specific branch-level agreement had to be extended by ministerial order. A later *Act (19 June 1987)* removed this requirement, putting undertaking-level agreements on a par with branch-level agreements in this respect.

As to whether negotiating parties should be more representative, this question has so far given rise, in undertaking-level bargaining, to a rather delicate and little-used mechanism which gives the *most representative* trade unions (those having gained over 50% of the votes cast in the most recent union elections in the company) the right of opposition. The principle of majority has thus become established, though in terms of opposition to the enforcement of a rule rather than its making.

32. Sources in a dynamic perspective, and the employment relationship

Legislation has been taking more of a back seat in recent years. This has not resulted in fewer State rules but rather in State rules of a different order. This development has been especially marked in the regulation of *working time* and *forms of employment*. State law has perceptibly, if only partially, changed its stand on this issue. Rather than opting for (relative) standardisation of labour relations, the State has preferred to encourage diversity to the point of incorporating it into its own machinery. It has explored three main avenues which highlight the dynamic development of sources. One such avenue has been to limit, through legislation, the ascendancy of labour law; this new attitude is reflected in policies on the *"social treatment"* of unemployment, with in-house training formulae which largely fall outside the realm of labour law. This approach is less often used today. Another avenue has been State regulation of certain types of employment (temporary employment, fixed-term contracts, part-time contracts, seasonal or intermittent work recently replaced by the *"annualised part-time formula"*). This means denser State regulation, but in a different direction, since it offers new options under appropriate supervision. Finally, the law now allows specific collective agreements (which must be concluded according to well-defined rules) to organise the diversification of working time, using the machinery of *"overriding"* agreements. Such flexibility as this supposes is very much flexibility *à la française*, with more rather than less State regulation. Clearly, it is hard to get away from the concept of the preeminence of the law, which, even as it stimulates rather than blocks diversity, must still keep a *close watch* on future development.

CHAPTER III: DISPUTES

SECTION 1: THE DIFFERENT KINDS OF STRIKES AND LOCK-OUTS

33. Strikes

The French legal order first recognised the right to strike in 1946. The preamble to the *Constitution*, to which the *present Constitution of 1958* refers, stipulates that *"the right to strike is exercised within the framework of the laws which regulate it"*, thereby indicating that the law would have the monopoly in strike regulation. Legislative action has been confined to defining the impact of strikes on individual contracts of employment (*Article L. 521-1* of the *Code du Travail*) and establishing procedures and a set of substantial rules governing strikes in the public service sector (amended *Act of 31 July 1963*, included in *Articles L. 521-2 et seq.* of the *Code du Travail*).

The legal framework of the right to strike is therefore in the main supplied by case law. The case law definition of what

15. *Conseil d'Etat*, 22 December 1978, *Dalloz*, 1979.156.
16. *Conseil d'Etat*, 3 February 1989, in: *Actualité juridique de droit administratif*, 1989.387.
17. *Conseil d'Etat*, 28 February 1992, in: *Actualité juridique de droit administratif*, 1993.141.

constitutes a strike permits an initial legal classification of the type of strike: a strike is a concerted stoppage of work in support of work-related claims. The right to strike is therefore determined by the conditions in which the strike is initiated and by its objective.

On the circumstances in which a strike is initiated, there has to be a stoppage of work (thereby excluding working-to-rule and go-slows), and the stoppage has to be a concerted act, which means minority strikes are authorised but not individual strikes, at least not in principle, unless they are part of a general strike movement. The objective of the stoppage must be to support work-related claims, which means that extended political strikes in the strict sense are excluded. However, after some hesitation, the Supreme Court has decided that it is not the task of judges to assess the content of claims or whether they are justified. A strike is conceived as an instrument of pressure, a piece of bargaining machinery. Nor does French law refuse to see a strike as a means of expression.

But what is really important is the comparative latitude enjoyed by workers regarding the right to strike. Strikes may be nationwide, or they may be confined to a single branch, undertaking or factory. They may take place anywhere. They may be token strikes, sustained strikes, repeated strikes, and strategies may vary endlessly. No prior notice is required except in the public sector. Provided the objective is work-related – which is difficult for judges to monitor precisely – all manner of quantitative or qualitative claims may be included, regardless of whether or not they are connected with collective agreements.

The protagonists are very attached to this legal concept of strikes. Although there is the occasional call for more State regulation, the proposals put forward so far have been vague, with only minority backing.

34. Trends

Global statistics need to be handled with care. The *Ministry of Labour* tries to monitor the number of *strike days* (individual working days lost), but there are many other instruments of industrial action for which no statistics are available at all. Moreover, where they do exist, they are compiled on the basis of records kept by labour inspectors.

If we accept this way of measuring the incidence of industrial action, four basic facts emerge.

(a) From 1977 to 1986, measured in terms of the number of individual days lost, the incidence of industrial action fell sharply. The number of stoppages, the number of workers involved and the length of stoppages all declined. This trend underwent an abrupt turnabout in 1987 and 1988, with a resurgence of protracted, hardcore strikes.

Another fall was then followed as from 1992 with another increase in conflicts. The end of 1995 saw what is already being referred to as a real *"social spasm"*.

The triggering factor was the government's announcement of far-reaching social security reforms, giving rise to considerable discontent. Over a one-month period demonstration followed demonstration, and many public companies and administrations were hit by strikes. A knee-jerk reaction from workers with good jobs and favourable conditions? Or a deep crisis of confidence? Interpretations vary. What is clear at the moment is the consideration achieved by certain trade union organisations. It was also a whole generation's first experience of social crisis.

(b) A substantial proportion of strikes are in the industrial sector, where the number of jobs is in decline but which is still the traditional stage for overt conflict, and in the public sector.

(c) Statistics attempt to classify strike action according to motive. From 1977 to 1986, the number of disputes over jobs gradually caught up with pay disputes. But between 1987 and 1991, pay disputes returned to their traditional position in centre-stage. This alternating of reasons has continued since (jobs in 1992-93, pay in 1994). The social crisis at the end of 1995 showed the futility of such classification, in that the movement was the result of an accumulation of grievances.

(d) Not all disputes stem from union activity. Almost one in five owes nothing to union initiative, while the role played by the different trade unions varies considerably. The CGT is the most likely to be involved. Only about a quarter of all strikes involve more than one trade union. The action at the end of 1995 gave the organisations back their prominent role, especially in terms of their decentralised structures.

The economic situation is again very tight, after years of wage austerity, particularly in the non-market public sector. Today's political economy is marked by scandals, large and small. And the last elections promised change. All these factors have led to a situation in which industrial relations seem to be rediscovering a taste for conflict.

Yet conflict comes in many guises. Disputes over pay are beginning to lose ground to other disputes over the safeguarding or recognition of occupational identities. Not to mention movements which denounce the impotence of governments and emphasise the lack of credibility in their actions and promises.

35. Lock-outs

French law does not recognise the lock-out as such. Nor do the employers' organisations seem anxious to secure any legal recognition for it. It is true that under French law, or case law as here, the employer's powers of organisation in the event of a strike remain intact, which means that in practice he has plenty of scope for palliative action, such as moving production to another site, subcontracting work, using non-strikers, etc.

It is also true that French trade unions do not provide financial support for strikers, so employers are not tempted to prolong a dispute in the hope of bringing the unions to their financial knees. In practice, the reason why employers sometimes decide to shut up shop, or close part of their operations, is to avoid having to continue paying *non-strikers*. In other words, lock-outs in France will rarely be preventive. Some are retaliatory in intent, but by far the

most usual reason is simply to stop production for the duration of the dispute. The *Supreme Court* has proved understanding of this entrepreneurial initiative when non-strikers have attempted individual action to secure payment of their wages.

36. The machinery for conflict resolution

French law features three specific and *optional* procedures for the settlement of collective labour disputes. *Conciliation*, which involves bringing the protagonists before a committee in search of agreement, *mediation*, where a person is appointed to devise the basis of an agreement and put it to the parties involved, and *arbitration*, which involves appointing someone to settle claims equitably or according to the rules of the law, with the possibility of final appeal to the *Higher Court of Arbitration* (made up of professional magistrates).

These non-compulsory legal procedures are rarely used. During the period 1975-1987 (figures supplied by the *Ministry of Labour*), 28 disputes were brought before the *National Conciliation Committee* (7 agreements), 325 disputes were brought before the regional committees (84 agreements), and 48 cases were submitted for mediation (19 agreements following recommendations by the mediator). The number of cases of arbitration is not known, but 13 cases were brought before the *Higher Court of Arbitration* (though there has been none since 1985).

Do judges play an important role? *Industrial tribunals* have no direct hand in disputes, but are involved only when individual legal action is brought as a result of a dispute. Yet the courts do play a role in disputes. Their interventions can take several original forms. Rulings are made by *summary* civil procedure, by injunction or on evidence at very short notice. Many judges, when asked to examine a request for expulsion of strikers occupying premises or a trade union appeal for the lifting of a lock-out, an expert's report or the preservation of evidence, will appoint a qualified third party (variously known as the consultant, representative, technician or conciliator) to propose a compromise which the judges feel may lead to a settlement. And indeed these initiatives, though not easy to assess in global terms, seem to bear out the judges' hopes. They give full rein to *negotiation*, which is the main way of resolving disputes and thus these help to pave the way for a settlement.

Some agreements actually themselves provide for the procedures and institutions of conciliation. Here the emphasis is on *prevention*. Such agreement-based machinery now exists in several branches and some of the larger companies. Its growth, however, is hampered by continued reluctance on the part of trade unions and employers' organisations alike.

CHAPTER IV: FRENCH LAW IN A COMMUNITY CONTEXT - SOME CONSIDERATIONS

37. The impact of the Community framework on French law

(a) In assessing the impact of the Community framework on French labour law, it is customary to look at how Community Acts are implemented in domestic law and whether they have given rise to a substantial change in domestic rules. In this case we find the situation much as expected.

The Community's efforts to promote coordinate, approximate or harmonise national labour legislation have been well-received in France. In part, this is because France traditionally regards the law as preeminent. Difficulties might have arisen over the ways in which French law was adapted, but in fact they did not - although the main reason is more political, in that the French government only contributed to the establishment of EC rules in areas where French law had already reached the level envisaged by the Community. This explains why French resistance has been most marked in the area of free movement of workers and the social status and levels of protection of citizens of other Member States, since these are the areas in which France has the most ground to make up.

(b) If we are to appreciate the full impact of EC law in France we need to push our investigations further. To what extent are the structures and development of French labour law a response to its inconsistency with the national law of other Member States?

This question certainly seems relevant in France, since *"Community Europe"* has in recent years become a kind of catchall grounds for either promoting, restricting or opposing change.

38. Characteristics of the French system of regulating working conditions

(a) Compared to other countries, the French system of regulating working conditions is constructed on markedly juridical lines. That is not to say (and indeed that is not what the French legal tradition, which prizes juridical composition as an instrument of interpretation, intends) that French law is qualitatively strong on worker protection. What it does mean is that State regulation is, more than elsewhere, a feature of industrial relations.

"Legislation" affects not only individual employment relationships, but also work-related relations in general. By and large, only collective labour disputes are exempt from this form of State regulation, but this is made good by the application of rules established in case law.

There is little prospect of any substantial lessening of this juridical imprint, since it has the support of all the actors - support that is somewhat ambiguous, as at least some trade unions rather regard the system as an extension of the *"republican compromise"* underlying the political, economic and social order which emerged at the end of the 19th century, while entrepreneurs are well aware that it gives them ample scope for new initiatives and enables them to exercise unilateral prerogatives. Yet support there is, and two examples will illustrate this. One is a reminder. The diversity of conditions of employment is an established fact and is no doubt becoming more pronounced. In some EC Member States it rests on the decentralisation of the sources of regulation.

In France, it takes the form of juridical organisation of different types of employment (enrichment of the legal typology of contracts) and legally-supervised approval of the variety of agreement-based models for the organisation of working time *(see section 22 above)*. The second example is drawn from the law on industrial relations. There was strong left-wing pressure in 1981 and 1982 to enshrine in legislation both the fruit of experience and the rulings of case law in the realm of worker representation in the enterprise. This codification subsequently ran into criticism from employers and the conservative opposition. Yet not once was the principle questioned between 1986 and 1988, when that opposition again had a parliamentary majority.

(b) Do the French have the same unshakeable confidence in collective bargaining as others have? It is true that collective bargaining has taken great strides in France over the past 20 years.

Yet conflicting union pluralism, the fact that trade unions have problems attracting membership, the influence of the State in central bargaining, and the qualitative disparity of topics addressed by branch-level and company-level bargaining tend to undermine its solidity. Voices emanating from the business world, the machinery of State and indeed the fringes of trade unionism are calling for *modernisation* bargaining, whereas most trade unions are calling for the rekindling of *distributive* bargaining. With the different hypotheses as to how collective bargaining will develop, it is difficult to make a prediction.

These brief reminders suggest two highly tentative conclusions.

The development of collective bargaining in France seems to be affected by the experience of other countries. It is in this area therefore that Community comparisons seem most effective. The achievements of the *"European social dialogue"* and a knowledge of the scope, levels and outcome of bargaining in other countries are two factors which could help to steer the French bargaining system. On the other hand, there is but little hope of convergence in the identification of actors and the role of the different instruments. If anything, matter rather than manner can produce convergence.

IRELAND

F. Von Prondzynski

CHAPTER I: INTRODUCTION

Irish industrial relations are governed by a number of relationships between the following parties:

- the State, as represented by the government t of the day;
- the various State-owned organisations with regulatory powers or acting as employers;
- the private sector employers;
- employers' organisations;
- the trade unions within the *Irish Congress of Trade Unions*;
- the smaller number of trade unions outside the ICTU; and
- other pressure groups, such as the farmers' organisations.

All of the above groups and organisations influence working conditions, and the regulation of working conditions, in Ireland. However, as we shall see below, the relative importance and strength of these bodies and groups has changed somewhat in recent years, leading to noticeable changes in industrial relations behaviour and trends.

The State and public sector employment

Despite some reductions in the workforce in recent years, Ireland still has a fairly large public sector. Broadly for the present purposes the public sector comprises the civil service (i.e. employees working within government departments and ancillary services), local government (i.e. employees employed by county councils and other local authorities), the public sector industries (including for electricity and transport), and public sector administrative/ research organisations.

Apart from the civil and public service, which comprises the largest group of employees in the country, the public sector also contains some very significant industrial and service employers. Examples would include the *Electricity Supply Board*, *Board na Mona* (which cuts and processes turf and peat products), An *Post and Telecom Eireann* (the postal and telecommunications services respectively), *Aer Lingus* (the national airline), and *Coras Iompair Eireann* (the national bus and train transport company). Some institutions formerly in the public sector have been wholly or partially privatised, and further plans are now being discussed in this context.

The local government system, although fairly strictly controlled by central government, nevertheless has a large workforce which is locally administered. The number of employees in local government is estimated to be in the region of 35,000.

It is clear therefore that, quite apart from the State's role both as employer and as legislator, it has a considerable influence on working conditions generally because of the sheer size of its workforce and its spread throughout almost all sectors; in other words, the State's treatment of its own employees can and frequently does have a *'knock-on'* effect on the employees of other organisations.

Although precise figures are hard to come by, it is generally estimated that the State and the various State bodies employ over 10 per cent of the national workforce[1].

Employers' organisations

A number of employers' organisations exist in Ireland, but there is really only one association which caters for the entire range of employers' both public and private sector, both industry and services based: that is the *Irish Business and Employers' Confederation* (IBEC). IBEC was extablished in the early 1990s through a merger of the *Federation of Irish Employers* and the *Confederation of Irish Industry*; the *Federation of Irish Employers* was in turn formed in the early 1940s (then as the *Federated Union of Employers*) as a result of the *Trade Union Act 1941*; this provided in *Section 6* that all organisations which intend to carry on *'negotiations for the fixing of wages or other conditions of employment'* are required to obtain from the *Minister for Labour* a so-called *'negotiation licence'*[2] we return to this later. This provision meant that employers' associations needed to register themselves as trade unions in order to be able to engage in collective bargaining, and as a result the FUE was formed and registered.

There are also some other employers' organisations, such as the *Construction Industry Federation*, the *Irish Printing Federation*, and the *Electrical Contractors' Association*. As their names suggest, these bodies are concerned with certain sectors of the economy, and apart from their role as employers' associations, they also act as pressure groups and advisers in their specific sectors.

Trade unions

Ireland is still a strongly unionised country, with a comparatively large proportion of the national workforce in trade union membership. The majority of union members are in trade unions which themselves are affiliated to the *Irish Congress of Trade Unions*, a central umbrella body established in 1894[3]. The ICTU has a number of functions: it gives advice to member trade unions, it represents them in legal or other proceedings if desired, it carries out a research and training function for trade unions, and it organises inter-union relations. So, for example, the ICTU has a comprehensive framework of regulations, contained in its constitution, which govern transfers between trade unions; these regulations are designed to prevent trade union, *'poaching'*, i.e. the attempts by one trade union to recruit existing members of another union. The ICTU also has, as we shall see in later chapters, rules governing the conduct of industrial action, and picketing in particular.

1. See: FERDINAND VON PRONDZYNSKI and CHARLES MCCARTHY, *Employment Law*, 1989, p. 14-15.
2. See: FERDINAND VON PRONDZYNSKI, *Freedom of Association and industrial Relations*, 1987, Mansell Publishing Ltd., p. 25-26; and: A. KERR and G. WHYTE, *Irish Trade Union Law*, 1985, Professional Books, p. 50-62.
3. See: CHARLES MCCARTHY, *Trade Unions in Ireland: 1894-1960*, 1977.

The overall trade union membership figures for the Republic of Ireland are as follows[4]:

Total no. of trade unions	60
Total membership	477,900
No. of unions in ICTU	52
Membership of ICTU unions	441,300

Largest trade unions:

Services Industrial Professional Technical Union (SIPTU)	199,000
IMPACT (public sector trade union)	27,000
Amalgamated Transport and General workers' Union	20,000

It is estimated that trade union members make up nearly 50% of the national workforce.

Of the trade unions affiliated to the *Irish Congress of Trade Unions*, 10 unions, with a total membership of approximately 70,000, have their headquarters in Great Britain. However, their Irish branches operate on a largely autonomous basis.

Finally, although there are in total 60 trade unions in Ireland, the membership is by no means evenly distributed. As can be seen from the above table, the three largest trade unions have over half of the total national trade union membership, while a total of 26 trade unions have less than 2,000 members each and together have less than 5 per cent. of the unionised labour force in membership.

Freedom of association

As we shall see in later chapters, trade unions and their members are protected by a variety of legal measures. Broadly these are:

- *Article 40* of the *Constitution;*
- the *Trade Union Acts 1871-1941*;
- *Section 6* of the *Unfair Dismissals Act 1977*;
- the *Industrial Relations Act 1990.*

Article 40.6.1.iii of the *1937 Constitution* protects *'the right of the citizen to form associations and unions'*[5]. This means that every citizen has right to form, join and take part in the activities of a trade union, subject to the right of trade unions to refuse to accept into membership anyone whom they do not wish to see joining. The *Constitution* also appears to give a right not to join trade unions, but we shall return to this point in Part III.

The *Trade Union Act* gives some protection to trade unions which have registered and which have acquired from the *Minister for Enterprise and Employment* a *'negotiation licence'*. The *Industrial Relations Act 1990* provides in *Section 13* that a trade union cannot be sued in tort in the context of industrial action: i.e. a trade union cannot be sued for defamation, negligence, nuisance and other torts, and trade union funds cannot be used for the payment of damages in such actions, where the cause of action relates to a trade dispute; however, union officials and members can be sued. Finally, *Section 6* of the *Unfair Dismissals Act 1977* provides that a dismissal for trade union membership and/or activities is unfair and thus illegal: we return to this in Part II.

There are a number of institutions in Ireland with the task of mediating or adjudicating in the case of disputes between employers and employees. The most significant are the following:

1. *The Labour Court*. The Labour Court, which set up under the *Industrial Relations Act 1946* (but which is not actually a *'court'* in the judicial sense), has a number of roles, but the most important one is mediation in trade disputes. We shall look at these roles in Part III, Title II. The Court also helps to administer certain bodies such as *Joint Labour Committees* and *Joint Industrial Councils*, which are special bodies with functions in the area of collective bargaining. The *Labour Court* also adjudicates in disputes concerning equality of opportunity in employment under the *Anti-Discrimination (Pay) Act 1974* and the *Employment Equality Act 1977.*
2. The *Labour Relations Commission.* The Commission was established under the *Industrial Relations Act 1990.* It has a number of roles, including conciliation in trade disputes, the maintenance of an industrial relations advisory service, the drawing up of codes of practice, the organisation of the *Equality Service* (under which *Equality Officers* make recommendations in the first instance in employment equality cases), and research.
3. The *Employment Appeals Tribunal.* The EAT adjudicates in disputes involving legal rights of employees, particularly in the area of dismissal. Disputes under the *Redundancy Payments Acts*, the *Minimum Notice and Terms of Employment Act 1973*, the *Unfair Dismissals Act 1977* (as amended), the *Terms of Employment (Information) Act 1994*, and the *Maternity Protection Act 1994* are taken to the EAT.
4. The *Employer-Labour Conference.* The ELC was set up in 1970 to administer centralised collective bargaining arrangements between the employers and the trade unions. Under its auspices the *National Wages Agreements* and the *'National Understandings'* of the 1970s were negotiated. Although the centralised agreements negotiated since 1987 have not been under the auspices of the ELC, it still exists as a forum for discussions between the social partners.

There are also some other institutions with research and advisory functions, such as the *Economic and Social Research Institute* and the *Irish Productivity Centre.* These bodies have a membership made up of trade union, employer and government nominees.

Industrial conflict

Ireland tends to have a reputation for having large numbers of strikes, but this reputation is not entirely deserved. In particular, it is worth noting that since the mid 1970s there has been a steady decline from year (with only two exceptions) in the number of working days lost annually due to strikes. In 1978 there were 170 strikes with a total of 449,187 days lost; in 1991 there were 52 strikes with 85,300 days lost. In other words, the number of days lost dropped

4. Source: Department of Enterprise and Employment.
5. For a detailed analyses of this constitutional provision, see: FERDINAND VON PRONDZYNSKI, *Freedom of Association and Industrial Relations*, 1987.

by 80 per cent during this period. The evidence is that this trend is continuing.

Industrial action is regulated principally by two statutes: the *Conspiracy and Protection of Property Act 1875* and the *Industrial Relations Act 1990*. The basic approach of these statutes is not so much to grant a right to strike, but rather to protect trade unions and their members from legal action if they were engaged in a genuine strike or trade dispute and were not in breach of other laws (such as trespass, obstruction, etc.).

As already mentioned, the *Labour Relations Commission* and the *Labour Court* are available to provide either conciliation (conducted by so-called *Industrial Relations Officers*) or mediation (called the *'investigation of disputes'*, in which the *Labour Court* makes a recommendation as to how the dispute might be resolved). Overall, the success of these institutions in securing a resolution of disputes has been quite impressive.

CHAPTER II: THE ROLE OF LABOUR LAW

Since the late 1970s, the nature and purpose of labour law have been subjected to radical change, the true extent of which is still only partly visible. At that time the general view, accepted alike by academics and practitioners of both law and industrial relations would have been that the low should adopt an abstentionist role in relation to collective bargaining and industrial action, while supporting the individual employment relationship with a safety net of rights and obligations. This general picture was in part a reflection of the influence of a small number of British academics, in particular Sir Otto Kahn Freund[6] and Allan Flanders[7], whose views dominated the Report of the *Donovan Commission* in the United Kingdom in 1968[8]. The latter report summarised the position as follows:

"Until recent times it was a distinctive feature of our system of industrial relations that the State remained aloof from the process of collective bargaining in private industry. It left the parties free to come to their own agreement. It imposed some, but few restrictions on the right of employees to strike or of employers to resort to a lock-out(...)"[9].

This British abstentionist consensus – frequently described as *'voluntarism'* – fond much support in Ireland as well, particularly amongst the trade unions. So in 1979 the *Irish Transport and General Workers' Union* published its opinion that the law should avoid *'direct intervention'* in industrial relations and confine itself to *'supporting agreed standards of practice'* of protective legislation for workers[10]. This was also underlined by the *Commission of Inquiry on Industrial Relations* in its 1981 Report:

"Industrial relations both in Ireland and in Britain have to a large extent been characterised by a commitment to legal abstention, sometimes referred to as 'voluntarism'. *It is generally assumed that our system is a voluntary one, by which we mean that the parties to the industrial relations process are free to agree, or not to agree, on the substantive principles which are to govern their mutual rights and obligations and to regulate their behaviour, without the intervention of the State"*[11].

The changed economic and political conditions of the 1980s and 1990s have more or less shattered this voluntarist consensus. Various factors have contributed to this: growing pressure from employers to regulate industrial relations conduct by law; political pressures to restrain the perceived inflationary effect of free collective bargaining; and the growing emphasis on legal, rather than trade union, protection of employees' rights and interests. So far this has not significantly changed the substance of labour law in Ireland (in marked contrast with Britain[12]; but there is no longer a consensus in favour of legal abstention, and it is known that government departments are now keen to analyze both labour law and industrial relations practice in terms of the likely or possible macro-economic effects. More tangible changes in the law will probably follow.

The 1980s probably marked the beginning of a new phase in our understanding of labour law[13]. The trend was set by the *Commission of Inquiry*, the report of which was drawn up without trade union participation since Congress withdrew from its deliberations. The *Commission* declared in its report that it had reached the following conclusions:

i) voluntary means alone are incapable of imparting the required degree of order to the collective relations between unions and management;
ii) the many serious consequences of the failure of existing voluntary arrangements have made it imperative that some alternative source of order be established[14].

The *Commission*'s report, partly because of the ultimate absence of trade union participation, was never implemented, but it was not totally uninfluential. The *Federated Union of Employers* in particular, in numerous statements since 1981, called for a new legal framework in which the right to take industrial action would be severely circumscribed in return for the growing corpus of employment legislation protecting workers' individual rights. The gist both of the Commission's report and of the FUE position was that the law should be used to formalise and standardise industrial relations procedures, and that disputes should either be channelled through compulsory dispute-settling machinery or be resolved through judicial or tribunal awards. These views have not as such been adopted in legislation, but the *Industrial Relations Act 1990* does reflect a slightly more interventionist legal approach, for example in its requirement that a secret ballot must be conducted before industrial action may lawfully be conducted.

6. See in particular: *Labour and the Law*, the published version of Kahn-Freund's 1972 Hamlyn Lectures; the most recent edition is that edited by PAUL DAVIES and MARK FREEDLAND, 1983, Stevens.
7. See: *The Tradition of Voluntarism* (1974) 12 *British Journal of Industrial Relations*, 352.
8. *Royal Commission on Trade Unions and employers' Associations*, 1968, Cmnd 3623.
9. Ibid, para. 39, p. 10.
10. ITGWU, *Submission to the Commission on Industrial Relations*, 1979, p. 11.
11. 1981, Pl. 114, para. 24, p. 10.
12. See e.g.: LORD WEDDERBURN OF CHARLTON, *Labour Law Now: A Hold and a Nudge* (1984) 13 ILJ 73.
13. See: FERDINAND VON PRONDZYNSKI, *The Changing Functions of Labour Law*, in: PATRICIA FOSH and CRAIG R. LITTLER (ed.), *Industrial Relations and the Law in the 1980s*, 1985, 176.
14. Op. cit., para. 621, p. 205.

It seems likely therefore that the scene is set for increased legal intervention in industrial relations. A large part of the justification for this is that the law will not only preserve order but also protect the interests of individual workers against abuses by employers. If this is so, then it becomes the more important to analyze the substance of employment law to determine the extent to which the law is currently fulfilling this function. As will become clear from the ensuing discussion, there is a lot which still needs to be done by the *Oireachtas* (Parliament).

Collective bargaining

The overwhelming majority of Irish workers have their terms and conditions of employment settled through collective agreements. This applies not just to unionised employees but to others as well. It has been a long tradition in Ireland that employers will tend to adopt the general collective bargaining trends in granting pay increases, even if they don not directly bargain with trade unions.

Furthermore, there has since 1987 been a series of national, tripartite agreements governing both pay and consitions on the one hand, and economic and social policy on the other. In October 1987 the government, the Irish *Congress of Trade Unions*, the employers' associations and some other interest groups concluded an agreement, to last for a three year period, on economic and social developments including pays. This agreement was called the *Programme for National Recovery*. This was followed by the *Programme for Economic and Social Progress* in 1991, and the *Programme for Competitiveness and Work* in 1994. Since this process of national agreements began the overwhelming majority of localised agreements between employers and trade unions have followed the pay terms set nationally.

In Ireland there is some uncertainty as to whether collective agreements are legally enforceable documents. Until 1977 it was generally thought that the English *High Court* decision of *Ford Motor Co. v. Amalgamated Union of Engineering and Foundry Workers*[15] applied in Ireland as well; in this the judge had held that in collective agreements there was no intention to create legal relations and that such agreements were therefore not enforceable in the courts. But in the case of *Goulding Chemicals Ltd. v. Bolger*[16] two out of five *Supreme Court* judges in obiter dicta indicated that collective agreements did have legal force. There have been no further cases directly on this point. There is still some uncertainty therefore as to what the position is, with most academic opinion still favouring the view that such agreements are unenforceable. In any case, under *Section 4* of the *Trade Union Act 1871*, agreements between trade unions and employers' associations (as distinct from agreements between) are always unenforceable.

The contract of employment

Largely as a result of the tradition of voluntarism, as explained above, there is in Ireland relatively little of what on the continent of Europe would be described as *'collective labour law'*. This means that the regulation of the employment relationship takes place largely at the individual contractual level. The basis therefore of the substance of employment law tends to be the contract of employment.

Irish employment law is therefore to some extent an extension of the law of contract. This is true even to the extent that statutory provisions with what one might call a collective intent (as for example the provision which protects workers from being dismissed because of there trade union membership or activities) introduce the protection they provide through collective bargaining is hardly reflected in the law at all. Apart from one peripheral reference, there is no statutory provision dealing with or defining collective agreements, but almost all statutory provisions in the employment area are based on the contract of employment.

This has meant that normal contractual doctrines, such as repudiation, frustration and fundamental breach, have been imported into the employment setting as well with odd results. For example, the effectiveness of the protection against unfair dismissal has been seriously compromise because this protection was based on the existence of contracts of employment and depended on the interpretation and application of contract law. In other words, because the contract of employment has been treated by the courts and tribunals as if it were just any kind of contract - with the same rules, for example, as a contract for the sale of goods - it has proved to be quite unsuitable in the context of labour law.

CHAPTER III: THE COMMON LAW

The main thing to be noted about Irish employment law is that it is part of a legal system which comes from the common law tradition. In other words, it initially developed through case law and court decisions rather than through the development of legal codes or statutes. This meant also that the original provisions of employment law were largely judge-made, and largely fell under the heading of contract law. The common law tradition was of course a British phenomenon, and was applied to Ireland by virtue of the fact that, until 1922, Ireland was part of the United Kingdom. Even after 1922 the Irish legal system has continued to be a common law one.

As we have already noted, the problem with the common law in the employment context was that the ordinary contractual principles were used in developing the idea of the contract of employment, with some undesirable effects, particularly in the context of dismissal law.

Statutory framework

However, from the mid-19th century onwards there was also a growing body of statutes dealing with employment. Initially these statutes were passed to protect sections of the workforce which were thought to be particularly vulnerable, such as women and children working in factories, or persons who were not getting money payment for their work, and similar groups. The first protective statute was passed to compel employers to pay workers in cash rather than through benefits-in-kind. This was swiftly followed by the first *Factory Act*, designed to introduce greater measures of safety at work.

15. [1969] 2 QB 303.
16. [1977] IR 211.

However, the main body of statute law relevant to employment was passed in the 20th century. This body of law falls into two sections:

1) the statutes dealing with trade union organisation and industrial conflict, such as the *Trade Union Acts 1871, 1941, 1971 and 1975*, the *Trade Disputes Act 1906*, and the *Industrial Relations Acts 1946, 1969 and 1990*; and
2) the statutes dealing with the individual employment relationship such as the *Conditions of Employment Act 1936*, the *Redundancy Payments Act 1967, the 1974 and 1977* statutes dealing with equal opportunity in employment, the *Unfair Dismissals Acts 1977 and 1993*, and so forth.

On the other hand, there is still no comprehensive code of employment law, and many aspects of the employment relationship are still not governed by statutes at all. For example, the interpretation of the contract of employment, remuneration, and other matters are not generally the subject of statutory collective bargaining or collective agreements, and as we have noted above, collective agreements are still generally considered not to be binding documents.

The *Constitution*

It is also necessary to point out that Ireland, unlike the United Kingdom, has a written *Constitution*. This document was passed by popular referendum in 1937, and has since been amended on a number of occasions. It has some relevance to employment law, particularly in relation to its protection of freedom of association. It can also be used to query the constitutionality of statutes, which happens from time to time.

Overall, however, it must be said that the *Constitution* has been used only rarely in the context of employment law, and where it has been used it has not been very helpful to industrial relations practice. This is so particularly in the sense that the judges have interpreted the *Constitution* as giving primacy to individual freedom, even to the extent of allowing individuals to opt out of collective arrangements agreed by the majority of employees. On the other hand, some constitutional judgements – such as that apparently ruling that the *'closed shop'* is unconstitutional[17] – seem by and large to be ignored by employers and trade unions, and they have thus had little impact on industrial relations practice.

International influences

Ireland is, of course, a member of the *European Union*, and some of the body of Irish employment law has been influenced by EU membership. This is particularly true of the law relating to sex discrimination, maternity rights, collective redundancies, and the rights of employees during transfers of undertakings. For the most part the Irish government and parliament have been quick to implement *Community Directives*, although the content of the Irish regulations has not always been entirely adequate.

Ireland is also a member of other relevant international bodies, such as the *United Nations*, the *International Labour Organisation* and the *Council of Europe*. Furthermore, Ireland has ratified a number of conventions passed by these international bodies; however, very often the effect in domestic law has been slight. For example, the *Committee of Independent Experts* of the *Council of Europe* regularly describes a number of provisions of the *European Social Charter* relevant to employment of which Ireland is in breach[18]; usually the government does not respond to these comments, and no statutory amendments are undertaken as a result.

In terms of international comparisons, it might finally be said that Ireland has a system of labour law which has, since the 1960s, developed a fairly extensive statutory framework of individual protection of employees, but which still has relatively little law dealing with collective labour relations. Even in the context of individual employment law, the Irish system has far less substance than that of most other member States of the *European Community*.

17. *Educational Company of Ireland v. Fitzpatrick*, [1961], IR 345.
18. See e.g.: COMMITTEE OF INDEPENDENT EXPERTS, COUNCIL OF EUROPE, *Conclusions X-2*, 1988, Strasbourg, Part II, chapter 5.

ITALY

T. Treu, revised by G. Primo Cella

Introduction

Certain features of Italy's economic and social framework strongly influence industrial relations, and should be taken into account when assessing the development of these two trends, including procedures for *"harmonization"* of the Italian system at European level.

One of the most significant general characteristics is the wide variety of Italian industry, which - as is well known - began to develop relatively late, especially the service sector.

The present growth of the service sector in Italy, though significant, does not seem likely at present to gain the upper hand over the industrial sector. The industrial relations system and the practices of the partners are still almost exclusively modelled on the industrial sector, with the result that the development of labour relations more suited to the different situations of the public and private service sector seems very complex.

The economic structure of the labour market is extremely fragmentary, owing to the high percentage of small and very small production units.

This traditional nature of Italian industry, linked to the delay in the development of a free-market system, has been borne out and given a new look by recent tendencies towards decentralization and the miniaturization of production not just in the service sector but in industry as well.

Although the proliferation of small units does not necessarily imply a fragile economy, it does reveal a weak point in industrial relations and labour law (not only in Italy), as both have always been related to workforces in large-scale industry.

The fall in the average size of production units below the threshold for the application of national and contractual labour law (which varies from country to country) has gradually restricted most of this law to relatively small groups of employees working in the private sector, even though it was originally intended to regulate the sector as a whole.

This gap has been widened by two further employment trends. The first is the proliferation of self-employment relationships, which have reached higher levels in Italy than in other countries, judged by some to be anomalous, as it indicates occupations of doubtful status and social usefulness, some being partly or completely within the black economy. The second trend is the great variety of types of employment compared to the prototype of traditional full-time permanent employment (i.e. part-time work, fixed-term contracts, training and work experience contracts, quasi-permanent, cooperative, and also casual work in the black economy).

These trends are tending to damage the traditional patterns of industrial relations by altering them, or depriving them of significance, without so far supplying any stable alternatives (not even as regards the regulation of individual relationships). Such tendencies are in fact part of wider-reaching changes affecting the quantity and quality of the workforce which Italy nowadays shares with the majority of industrialized countries: the growth of the service sector, the increasing complexity of labour markets, changes in occupational skills brought about, among other things, by the new technologies; the change in the proportions of working men and women, different age-groups and the employed and unemployed; and the resultant supply of casual work, which is not wholly determined by demand.

This heterogeneity is accompanied by other examples of dualism, which strongly affect the regulation of labour relationships. The disparity between the North and South of Italy, which can be seen from all the economic and social indicators, continues to be the greatest contributor to national imbalance, and to date we see no sign of a turnaround in this tendency. Statistics on unemployment - mainly concentrated in the South - are just the tip of the iceberg.

However, dualism between the private and public sectors in labour relations is common to all countries, even if it has tended to decrease in recent years. This dualism is particularly accentuated in Italy, largely because of the enormous size of the public sector. The percentage workforce in public employment is average to high by international standards. This figure has to be supplemented by employees in publicly-owned industries which, though regulated by the legislative provisions of private labour law, have always had a special role, and often a controversial role compared to private industry, in the evolution of industrial relations.

In the last few years the distinction between public and private labour relations, which has been only partially rectified by the legal recognition of collective bargaining in public employment, has revealed signs of increasing contradiction - and not only in Italy. It has allowed the survival of rigid and formalistic rules of workforce management which make no provision for the monitoring of efficiency and effectiveness and are actually an impediment to them. This trend can also be seen in certain areas of the service sector - such as banks and insurance companies, which have always had rules differing from those regulating industry as they are not exposed to international competition.

It is no coincidence that fiercer international competition and the run-up to the Single European Market placed this separatism in a critical position and subjected standard rules and practices in these sectors to much greater tensions than in industry. In fact, the regulation of labour relations in public administration has recently been the subject of a wide-ranging and complex legislative reform (*Legislative Decree No. 29 of February 3, 1993*), which has the objective of bringing labour legislation governing the public sector as much as possible into line with legislation governing the private sector. This decree in fact not only recognises collective bargaining as the regulatory source of labour relations in the public sector, but also extends to the public sector, albeit with some adaptations, the rules governing individual private labour relations: this has prompted talk of *"privatisation"* of public employment.

The turbulent economic climate undoubtedly affects industrial relations, but social and political issues also play their part. The fragility of the pillars supporting Italy's industrial relations, starting with trade unions and bargaining, the traditionally highly strife-ridden nature of the system and its lack of institutionalization can be linked to the strong ideological and political polarization in Italy. This polarisation continues even after the political events of the last years, which led to the dismemberment of the two cardinal parties of the so called *"first republic"* (the Christian Democrats and the Socialists), and to the transformation of the major opposition party (the Communist Party) into a reformist party, member of the Socialist International (PDS: Democratic Party of the Left) and a minority neo-communist party (*Rifondazione Comunista*). The elections of March 27, 1994 saw the country's traditionally strong political polarisation reflected in a confrontation between a progressive front represented by the PDS and a conservative one guided by the businessman Silvio Berlusconi, who founded his own party for the occasion (*Forza Italia*), including the ex fascist party *Alleanza Nazionale* (National Alliance).

The victory of the right wing block was soon reflected in industrial relations. The new government's attempt to push through a reform of the pension system without the consent of union organisations awakened old political chain rattling and strong opposition which to a large extent was instrumental in bringing down the government.

The traditionally high degree of exposure, or rather the dependence on politics and parties of the Italian trade unions is of political significance. Despite a certain increase in union autonomy and thus in unity during the growth of pluralism, there has not been a corresponding strengthening of union-party links similar to those prevalent in other European countries with long traditions of reformist political representation of labour. In politics, unresolved splits, a certain amount of fragility and fragmentation of civil society and the pluralist relations associated with these mean that the political parties have undue influence over society and institutions, including those which control the economy.

The recent profound changes in the political framework are likely to be reflected in union-party relations as well. The consequences of these changes cannot be foreseen as yet. If the main union confederation (CGIL) still has a strong point of reference in the PDS Party, the same is not true of the other two major union confederations, CISL and UIL, orphaned of their political backing which came from the Christian Democrats and the Socialists respectively. According to observers this scenario may offer new impetus to unions' unity.

CHAPTER I

1. The institutional framework of labour relations

The most important point to bear in mind in any analysis, and also at European level, is that the Italian trade-union system (in the private sector) is still among the least regulated and perhaps the most independent in the industrialized countries with market economies. None of its main constituent bodies, union freedom, the union as an organization, the collective wage agreement or mechanisms of self-protection are regulated by legislation. Italian trade-union law has evolved outside any legislative framework, diverging significantly from the constitutional model which, while recognizing unions as basic components of a pluralist organization, places them in an institutional category *"with roles and functions established by a clear regulation of powers"*.

The net result is at odds with neighbouring systems, from the point of view of the various bodies mentioned. Regulation is less important and less detailed and the function of the bodies is shaped in different ways. This bears out the fundamental importance of the autonomist principles already mentioned, and classifies Italian legislation as a rare example of a loosely regulated system.

A similar form of legislative abstentionism in industrial relations which promotes but does not regulate union activity is linked to the country's union and political harmony. This harmony initially hindered legislative intervention (which was not in fact necessary given the substantial weakness of industrial relations); but later on a strengthening of the unions became necessary, both for employers and employees as the economy was growing fast and political tension was high. This slow growth was partly to blame, however, for the lack of institutionalization of Italian industrial relations. Moreover, due to the lack of legislation the *"rules of the game"*, whether contractual or practical, that have given support to industrial relations in other countries when pluralism was on the increase, thus tempering the instability and strife-ridden nature of these relations, have been slow to develop in Italy.

The lack of regulatory provisions persists, despite the fact that Italian trade unions - as all other industrialized nations - have for some time been subject to disciplinary and special measures which differentiate them from all other private associations. These include provisions to support union activity in the workplace in compliance with the *Workers' Statute* (*Law 300 of 1970*); provisions already in place at the pre-corporative stage but which grew steadily in number in the late post-war period, giving the most representative of the unions the power to designate their representatives in public bodies with varying functions, mostly of an administrative nature (CNEL - *National Council of the Economy and Labour*, the main social security bodies, the government placement offices, and so on); the recognition of the union as spokesman with government bodies in compliance with the *Workers' Statute* and with constitutional case law (which legitimatizes strikes for economic and political reasons), and with the practice of government bodies themselves.

From 1976 onwards, relations between the social partners and the State became more complex, giving rise to some cases of tripartite concertation, mainly intended to tackle the serious inflation of that period. Among other things, this resulted in legislation placing direct controls on labour costs (especially the scala mobile - the pay indexation system) and consequently curbing the collective autonomy of the social partners which had up until then been the arbiters in this area. This undoubtedly represented a shift

away from the abstentionist model and continued for a long time as regards the limits on indexation, but gradually lost its importance as inflation went down.

The demand for greater institutionalization of industrial relations, which is coming from many sectors as a reaction to the increasing instability of the economy and society, focuses more on the legal regulation of various aspects of industrial relations (disputes, union representation, bargaining) than on types of regulation agreed by the social partners.

This autonomist tradition will have to be borne in mind if realistic and successful action, which will not cause adverse reactions, is to be taken. This is also true of intervention at EC level and European harmonization, which will presumably require regulatory machinery agreed between different nations and social partners. This machinery will therefore vary according to national systems and partners.

Unlike collective relations, individual labour relations have been subject right from the start to strict regulation by both the State (legislation and case law) and by collective bargaining. Bargaining rules which effectively regulate relations have grown up alongside legislation providing widespread protection, usually entailing improvements. This wealth of measures has been reinforced by a growth in the activism of the judiciary, supported by more efficient procedures in the wake of *Law 533 of 1973*.

2. Individual and collective aspects of labour law

There are two basic aspects of the Italian labour law system - the individual and the collective.

These two aspects have always been present and overlap to some extent in all modern labour law systems. In the Italian system, the collective dimension overshadows the individual, as collective organization was born of the necessity to offset the employee's weak position in the labour relationship; more specifically, collective autonomy constitutes the main source of actual regulation of the individual relationship, particularly in the private sector but now increasingly in the public sector as well, where its weight is likely to be increasingly felt after the *Civil Service Reform of February 3, 1993 No. 29* (*see above*).

Conversely, the collective organization of interests, traditionally expressed by the trade union, has its foundations in the laws inspired by the principle of union freedom and the legally recognized position of employees as trade union activists

This overlap between the two aspects is symptomatic of the complexity of labour regulation: this not only means a greater number of different sources acting as a regulatory reference point for collective issues, but makes the creation of regulations complex as they are the result of mediation between individual and collective interests.

It is this complexity which causes moments of tension - or even real conflict - which can also happen in the most stable of legal systems and historical periods, but which become more acute in times and places characterized by rapid changes.

The most acute, and in some ways most worrying, are those cases which are the result of a reaction of the individual towards the collective, especially where the latter predominates. In union law, the critical area is the right of individuals - recognized in some instances by the law and in others by case law - to control the decisions of an organization and to react to provisions considered harmful to individual and democratic interests.

In the law on collective bargaining, the critical issue is the extent to which collective partners can make use of subjective individual situations during the production of regulations and in particular during the actual operation of the agreement.

Tension between the individual and the collective is reflected in corresponding tension between the sources of labour law, particularly between autonomous sources (collective bargaining and rules governing union conduct) and heterogeneous sources (law and case law).

Such opposition assumes different forms in the various systems depending on the respective historical roles of the individual and the collective, and depending on whether sources are autonomous or heterogeneous. In fact, legislative intervention is recurrent, especially that which protects individual rights from collective powers (as in bargaining and/or union action) which are held to be potentially too ample. By the same token, case law has often given greater credence to the individual than to the collective standpoint.

However, there are cases where the reverse is true. In many of the more firmly established regulations governing industrial relations (including Italy and the former Federal Republic of Germany) legislation has favoured the development of collective bargaining, in some cases endorsing the monopolistic positions of collective partners in the negotiation and application of contractual regulations. A significant example is the United States, though this also happens in Europe where the most representative of the unions are privileged.

In recent times, and not only in Italy, emergency legislation has made it possible for bargaining to diverge from previous norms, especially where important issues of rights were at stake, with previously established rights being challenged.

Even case law, despite its strong inclination to safeguard employees' rights, has supported these trends, giving credence to the organization's case rather than the individual's. Examples of this are cases of indirect discrimination and disciplinary measures for unions (where there have been virtually no test cases), which endorsed rulings made in collective bargaining aimed at giving greater flexibility to labour law in crucial issues like pay, the relationship between the different levels of bargaining, and worker mobility.

3. Principles of collective labour law

As has been mentioned, the Italian union system is one of the most loosely regulated of industrialized countries. National law in this area is essentially *"promotional"*. This can be seen first and foremost in the recognition (under

constitutional law) of certain types of collective freedom common to all modern labour law - union freedom and hence pluralism (*Article 39 [1]* of the Italian *Constitution*); the freedom to take industrial action, which becomes a right in the event of a strike (*Article 40* of the *Constitution*), while lock-outs are not recognized as a right; and the freedom of collective bargaining, now recognized in much of the public sector. These forms of collective freedom were enhanced and made effective under *Law 300 of 1970*, which is still the fundamental reference for union rights in the workplace. Compared to similar legislation, the *Workers' Statute* stresses the types of support for union action in the workplace, which can become highly strife-ridden. These include the recognition of the right to assemble at the workplace; effective procedural machinery for the suppression of anti-union conduct; the extension of protection in cases of anti-union conduct by work-providers to all employees, even those not belonging to a union (in accordance with the concept of general, non-monopolistic union representation); the limits of application of Title I of the law on the employer's organizational powers, and also one disadvantageous point - the lack of participatory bodies in the company.

Another difference in the Italian system is the balance between support the union as an organization and protection of the individual employee's rights - both as a party to the labour relationship (*Title I* of the *Workers' Statute*) and as a protagonist of union activities (*Titles II* and *III*). Union freedom, recognized at constitutional and international level and under Italian law, took a great deal of time to be translated into inter-private partner relations, and is given by these provisions particular effectiveness against the powers of the employer, inclined as Italian law is to favour the rights of the individual.

The Italian style of union is supported but not regulated and is fairly stable, as evidenced during this long post-constitutional phase. Furthermore, to date it has not been affected by the *"interventionist"* tendencies of emergency labour law which has curbed labour costs but has not regulated these issues.

This does not mean that tension does not occur in this system. The most serious kind derives from the dualism mentioned at the beginning: public-private, small-large, and the crisis in union representation, especially in certain sectors (*see below*).

In small companies support for the Statute is virtually non-existent, giving rise to a situation of laissez-faire together with substantial de-unionization, which is becoming increasingly widespread.

In public employment, more direct support legislation (because it covers bargaining) has been translated into complex regulations, with strong government intervention especially towards the contracting parties. The scope and incisiveness of heteronomous regulations has always characterised public sector employment in Italy with respect to private sector employment: this is confirmed by the above mentioned reform passed with *Legislative Decree No. 29 of February 3, 1993*.

4. The social partners: trade unions and employers' associations

The least regulated area of collective labour relations is that of the partners concerned: unions and employers' organizations.

a) The fact that these organizations are among associations that are not recognized does not stop them from being the sole reference point for the principal legal relationships - so they can stipulate collective agreements, call strikes and be legitimate parties to legal action. In fact, this has helped to keep them out of the scope of case law intervention in internal relations, which in this case has meant greater self-restraint than in other aspects of collective relations, and explains the long-standing diffidence typical of unions towards State intervention.

The rejection of State intervention in internal union affairs and activity has been the basis of traditional opposition, established for both social partners by *Article 39* of the *Constitution*, which made legislative support and especially *erga omnes* bargaining power conditional on unions having rules and obtaining official recognition, in addition to single representative action being based on the number of members.

The absence of legal rules also affects union representation at company level, for which the State recognizes certain rights in the workplace, but without establishing any organizational model.

The only prerequisite for legislative support in this case, as in others mentioned above, is that union representation must be within the framework of unions defined as representative in compliance with a number of specific criteria, some legislative and some from case law (membership, union activity, territorial representation, representation of different sectors, and so on).

Thus, the concept of union representativeness has become a filter for identifying those which should benefit from special legislative support procedures, in place of registration, which was envisaged by *Article 39* of the *Constitution*. Owing to similar preoccupations, Italian legislators did not recognize that unions should have a general right to negotiate, with a mutual obligation on the part of employers.

Legislators held that a sanction of this kind would have almost inevitably required a legislative definition of the partners and procedures of negotiation, and thus (to a greater or lesser degree) of the union organization itself. In fact, this has occurred in the public sector, which does envisage an obligation of this kind (a recent development, in *Outline Law 93 of 1983* and now in *Legislative Decree No. 29 of February 3, 1993*).

With regard to plant level union structures, the *"Statuto dei lavoratori"* (*Workers' statute, Law no. 300*), which governs union representation (*Article 19*), was the subject of a referendum in June 1995 aimed at its partial abrogation. This referendum was promoted by smaller unions and was successful. The article in question was therefore amended to allow the constitution of union structures in the workplace regardless of the degree of representative-

ness of the unions involved as long as these are party to the collective agreements applied at the company in question.

This attitude of promoting union action without regulating it was to encourage, after the post-war rebuilding period, a substantial growth in union organization and collective bargaining, which became particularly intense between 1968 and 1978.

Unionization has now reached average-to-high levels in Europe, while previously it was extremely low.

b) The organizational pattern of Italian unions was based right from the beginning on a combination of vertical (federations at sectoral level) and horizontal structures – employees' associations and unions at territorial level culminating in the Confederation. This is quite an unusual combination, which has something in common with Swedish unions.

The presence of a strong horizontal component is no longer a sign of weakness as it was originally, though it still is today in the French system. Its function is to follow up union initiatives which extend as far as economic policies and control of the negotiating independence of sectors of employment.

Union representation at the workplace, traditionally weak in Italy, strengthened towards the end of the 1960s especially in industry, with the proliferation of union representatives and works councils. The organization followed a model similar to that of the single union pattern channel (shop-stewards). The transformation which has taken place in recent years, due to the changing workforce and the difficult relations between the various unions, has seriously affected this single representation.

Recent years have seen increasing efforts on the part of the unions to overcome their growing crisis of representativeness through the identification of new models of organisation at plant level. One of the outcomes of these efforts is the tripartite agreement reached in July 1993 between unions, government and enterprises which addressed, among many others, the issue of union representation at plant level.

This agreement calls for the constitution of unitary plant level structures with a mixed composition. The composition, in fact, depends for 2/3 on election by all the workers in the plant, regardless of whether they are union members or not. The remaining seats (1/3) are assigned to the unions which signed the industry-wide collective agreement applying to the company involved, and distributed among these in proportion to the votes they receive.

This original new model of union plant level representation confirms the traditional preference of Italian unions for *"single channel"* representation. It was in the promoters' intentions to see the model reinforced by a law modifying *Article 19* of the *"Statuto dei lavoratori"* (Workers' Statute). After the referendum which partially abrogated *Article 19* there has been much disagreement on the expediency of legislation governing plant-level union representation, and prospects are still vague and uncertain.

The difficulties encountered in the past years by plant level union structures reflect a crisis in representation which affects the whole of the trade-union movement. Signs of this have been a fall in the number of members in the traditionally strong area of blue-collar employees in medium and large industry, which has been hit by restructuring; moreover, there has been little support in traditionally under-represented areas which are now growing, like middle and top white-collar staff, employees in the service sector and in small production units. In the service sector the threat comes from the spread of autonomous types of representation – strongly linked to sectoral and occupational interests (virtually non-existent in Italy to date) which express their claims with considerable immediacy and criticize the traditional union movement for excessive mediation as regards *"general"* objectives and interests.

The difficulty experienced in responding effectively to such social and industrial changes is common to unions in all the industrialized countries. In Italy, this is aggravated by political divisions between the three major union confederations which result in uncertainty, at times in strategic inflexibility and also in delayed action. These results are all the more evident when seen in the context of fresh initiatives on the part of companies and their organizations as regards industrial relations.

c) The organization of employers' associations is traditionally modelled on that of unions – not only in Italy – and this has resulted in the same dual structure: vertical and horizontal.

The horizontal component (territorial) has traditionally played a prevalent role, which has been greater than in the case of employees' unions, though for different reasons. In effect, only a few sector-level federations of *Confindustria* (the Italian Manufacturers' Association) – *Federmeccanica*, *Federchimici* and *Federtessile* – conduct independent union activity, which is in any case supervised by the Confederation.

Generally speaking, it is significant that the solidarity of employers' associations, their control over affiliated companies and the initiative they are capable of showing in industrial relations are all traditionally small-scale. This reflects to a large extent the dualism mentioned above affecting the economic composition of the country and the associated differences of interests among the various sectors of employers.

Also significant – and typically Italian – is that employers' associations are not just structured by large sectors of the economy or company size (cf *Confindustria*, *Confcommercio*, *Confagricoltura*, *Confapi*, *Confederazioni dell'Artigianato* and *Coltivatori Diretti*), but also by type of ownership, in the wake of the withdrawal in 1957 of publicly-owned companies from *Confindustria* and the establishment of Intersind (publicly-owned companies in the engineering industry) and ASAP (publicly-owned companies in the petrochemical industry).

The role played by these latter associations has been independent and significant, especially in the 1960s when they helped to promote industrial relations that were far more open to collective bargaining than previously: this role, on

the other hand, appears likely to be less relevant due both to the present process of privatisation which public enterprises are undergoing and to the reduction of State intervention in the economy. This new activism, which is a relatively new development on the part of employers in industrial relations and largely reflects the crisis of union representation, appears to be supported by initiatives from individual employers rather than by the various associations. It is also partly for this reason that the way forward and the intervention machinery are still not well defined, though a basic objective is to achieve a more flexible management of human resources in response to fiercer international competition.

The possibility of establishing labour relations without a union is seen as realistic only in certain types of small and high-tech companies. Elsewhere, entrepreneurial policies seem to fluctuate between attempts at involving unions in *"participatory"* relations (as symbolized by the IRI protocol discussed below) and at limiting in an *"opportunist"* fashion the influence of union associations and therefore the scope of collective industrial relations.

5. The role of the State in collective labour relations

a) The State as a legislator of industrial relations and labour relations in general has already been discussed, with emphasis on its traditional role as the *"guarantor"* of minimum standards for working conditions and support of union activity (especially in the workplace) with little intervention to regulate institutionalization. It has also been mentioned that no change of course is predicted, along the lines of greater legislative intervention, either in individual labour relations (where deregulation is in fact being almost universally mooted) or in collective relations, where types of institutionalization which are autonomous and/or agreed upon by the partners are now being sought.

Moreover, in Italy various public institutions have traditionally played an important part in different areas of industrial relations; in particular, in the management of the labour market, vocational training, social security and in the settlement of industrial disputes.

b) Most of these institutions are tripartite, with one of the social partners predominating - i.e. one of the unions representing the two partners - motivated principally by the type of interests at stake.

A similar institutional configuration has been the norm in all Italian union and political bodies, which have also been disinclined to accept other forms of organic participation, especially at company level.

It appears that participation in public institutions with powers over social and labour issues has been considered more feasible and less compromising than participation at company level. To judge from their powers, the importance of such tripartite institutions is quite considerable, especially in matters such as the administration of social security and the labour market. Their action has contributed to the establishment of routine procedures for these issues in which the social partners participate, and to the dissemination of managerial and administrative skills among hundreds, even thousands, of union representatives. In fact, these institutions are present not only at national level, but are also decentralized. As regards social security, administration is decentralized at provincial level, while for vocational training and the labour market there is greater decentralization to the regions, which have become increasingly involved in such issues over the last few years.

The experience acquired in these institutions by union representatives has helped to persuade them to accept the risky process of flexible management of the labour market. It has also ensured that unions keep control of the fabric of small companies which cannot be reached by direct union action.

The potential influence of these institutions has been reduced by a series of obstacles: the limits which the law imposes on the independence of their decision-making (especially in the case of the social security bodies); the labourious bureaucracy of structures, which has affected organizational efficiency; the prevalence of bargaining or dispute practices which in certain cases have impaired smooth functioning and the opportunities for cooperation between the sides. Despite all this, these forms of institutional participation at both national and territorial level have proved to be useful for the stability of Italian industrial relations, and thus will undoubtedly be of great value in the European framework.

c) Intervention by the State has played an important - though at times novel - role in Italian history, as a direct agent for industrial relations in the cases of social concertation at top level which occurred in Italy between 1970 and 1993. These cases include:

- the 1977 settlement and subsequent legislation on the cost of labour;
- the tripartite (*Scotti*) agreement of 22 January 1983;
- the settlement protocol and the decree on the pay indexation system of February 1984; and to a certain extent
- the agreement between the unions and *Confindustria* in 1986;
- the tripartite protocol of July 23, 1993 between government, union organisations and *Confindustria* (the confederation of employers).

One of the common features of these cases, as in other settlements in Europe, is the direct and decisive intervention of the State through public resources (tax relief for employees, partial relief for social security contributions paid by employers, and active labour policies) to facilitate the consensus between the social partners, considered necessary for greater economic stability; and particularly to encourage self-regulation as regards wages and industrial action, in addition to the acceptance of employers' needs for greater flexibility and productivity.

The turbulent events of 1984-85 (i.e. the refusal of the Communist CGIL union to come to an agreement with the government on 14 February 1984, and the organization by the PCI - the former Italian Communist Party - of a referendum to repeal the law on the pay indexation system) showed the political and economic hazards of such attempts at concertation. Afterwards the practice of concertation went through a period of relative slowdown,

even if relations between government and the social actors remained open, albeit limited to specific issues (as for example the reform of the wage indexing system).

More recently, concertation at the highest level was the centre of an extraordinarily significant event, the tripartite agreement of July 23, 1993. The importance of this agreement lies in the fact that it addresses, in innovative terms, the main issues of the Italian industrial relations system. In fact this agreement not only outlines new methods of negotiating wages to replace the wage indexation mechanism which was abolished in July 1992, so ending a long controversy between social actors; it also defines a new collective bargaining structure (*see below*) and new methods of constituting union representation in the workplace (*see above*).

The agreement also outlines specific commitments from the Government: promoting a more flexible labour policy to favour employment, especially youth employment, support to the production system by favouring research and technological innovation and the reform of vocational training system.

The relevance and scope of the issues faced in the tripartite agreement of July 1993 explain why it has been defined as the *"constitution"* of the Italian industrial relations system.

d) The State's role as employer is considerable, due to the large size of the public sector (which has already been mentioned), and to the correlation between the strategies and treatment of the public sector in comparison with the economy as a whole (shown by the recognition of collective bargaining in public employment, this being confirmed and reinforced by the provisions of *Legislative Decree No. 29 of February 3, 1993*).

In fact, this trend is common to many industrialized countries. A good example was the agreement in November 1985 on indexation in public employment which – for the first time – set the pattern for the private sector, subsequently followed by the public sector (wage indexing in the public sector has been abolished, just as the tripartite agreement of July 1993 abolished wage indexing in the private sector). Finally, and potentially important for the economy as a whole, are the directives the public sector employer must follow in respect of wage negotiation, in compliance with government budgets which set the annual ceiling for increases in the cost of labour deemed to be compatible with economic stability.

However, the public-sector compliance with these directives has been disappointing in the renewal of agreements in 1984 and particularly in 1988. This proves that binding provisions are more flexible for public employment than the constraints of international competition in collective bargaining in the private sector.

To try and remedy this distortion, legislative decree no. 29 of February 3, 1993 called for the constitution of an *Agency for the negotiating representation of public administrations* (ARAN), with the task of representing public employers in collective bargaining. ARAN acts on the basis of directives it receives from the Government, especially with regard to the total funding available for renewal of collective agreements.

The first experiences in collective bargaining subsequent to approval of legislative decree 29/1993 seem to demonstrate that the directives are being strictly applied and show ARAN to have a substantially different negotiating attitude than previous negotiators on the public side, often too compliant.

CHAPTER II

1. An overview of regulatory sources

Regulatory sources in Italian labour law generally follow the typical pattern of Continental systems, starting with hierarchy: at the top are the constitutional sources which determine the fundamental principles, then routine government legislation, regulations and regional laws.

First of all, there are certain specific features which need to be pointed out. The Italian *Constitution* contains guidelines which are particularly significant, both regarding union matters and individual labour relations.

The union rules set out in *Articles 39, 40* and *46* have not for the most part been implemented for political and union reasons. This still hinders the evolution of Italian law, especially in view of possible adaptation to a European system. In fact, an explicit proposal has been made that *Article 39* be reviewed where it requires the recognition and registration of a union.

Conversely, *Article 36* – which deals with fair pay – has exerted considerable influence especially in case law, as it has provided the opportunity indirectly to ratify the *erga omnes* application of minimum wage rates (approved by collective agreements and *Article 37*) which has laid the foundations for fair pay for men and women, minors and adults.

Routine legislation is extremely important in respect of individual labour law. In recent years, it has also affected regional legislation, as vocational training is the province of regional government. However, regional government has intervened – at times through legislation – and dictated provisions for the organization of the labour market, as an incentive to employment.

Traditional labour law, seen as a form of protection for the employee as the weaker of the two contracting parties, can usually not be waived unless it is in favour of the employee (called the *principio del favor*). The minimum standards covering the different aspects of the labour relationship are usually improved by collective bargaining, which dictates the effective regulation of the relationship.

2. Relations between legislation and collective wage agreements, focusing on labour market regulation

In recent years the traditional relationship between the law and collective wage agreements has undergone a two-fold change.

Previously it was impossible to waive protective provisions unilaterally, but this is now changing. Different types of exemption are now admitted including those *in pejus* on the part of collective autonomy, which aim at relaxing constraints considered insupportable in the management of the labour relationship at company and market

agement of the labour relationship at company and market level.

On the other hand, legislative machinery for the control of bargaining autonomy has been introduced, by means of provisions *in melius* that cannot be waived, usually regarding the cost of labour.

One area where flexibility and consequently modification of the relationship between the law and wage agreements is urgently required is in the regulation of the labour market. In Italy regulation has always been rather strict, due in part to the typical imbalance in employment. At the heart of this strict regulation is the system of government placement offices, which are the compulsory channels for recruitment. Traditionally, the principle is that the employer has to forward an application to the placement office stating the number of employees to be taken on (a rule aimed at distributing employment vacancies according to impartial criteria, such as seniority of registration on *"placement"* (i.e. *"unemployment"*) lists). However, the inflexibility of the system compounded by the inefficiency of local labour offices has exacerbated the inadequacy of this rule, which was first evaded *de facto* and then gradually modified by the legislator until it was finally superseded by *Law 223 of 1991*.

Law 223 substituted the old principle according to which employers were sent workers from the employment office on the basis of a numbered roll call with a new system according to which employers could turn to the employment office and request the worker they intend to hire by name. *Decree Law No. 326 of August 4, 1995* takes this a step further: employers can now employ people directly themselves, provided they notify the employment office of the name of the person hired within five days of hiring them. This area of labour law can therefore now be considered substantially deregulated. For the rest, Italian law has been remarkably cautious in attempting to deregulate long-standing provisions for the protection of employees. Certain departures from the law have been allowed, but on condition that there is an agreement between the partners, for example on the issue of the prohibition of night-work for women (*Article 5, Law 903 of 1977*) and limitations to the fixed-term contract (*Law 56 of 1987*). The agreement between the partners often needs to be combined with administrative measures or supplemented by these, the exemption being the ultimate responsibility of administrative measures - for example, exemptions from the inviolability of seniority in the transfer of an undertaking (new *Article 2112* of the *Civil Code*), and exemptions to placement provisions entrusted to the *Regional Commission for Employment* (*Laws 140 of 1981* and *56 of 1987*, now superseded by *Law 223 of 1991*).

The most common proposals are not for total deregulation, but rather modification of provisions usually referred to as *"re-regulation"* in an attempt to cut down the body of regulations and make them more flexible, supported by the joint contribution of the partners and the public authorities.

An essential system for the regulation of the labour market - many consider it the main one - is the *Cassa Integrazione Guadagni* (lay-off fund), which guarantees 80% of basic earnings for employees in companies and sectors in difficulty or undergoing restructuring. The *Cassa Integrazione* has been a very effective way of safeguarding income and employment, thus assisting companies going through a bad phase and their employees. In this sense, it has been an indirect way of protecting employees from dismissal due to staff cutbacks, which have been few in number (despite the fact that Italy did not comply with EC directives on this matter until *Law 223 of 1991*). The lay-off fund also indirectly encouraged flexibility in employment, as it contributed to large-scale structural changes in Italian industry without the need to resort to mass redundancies. Similarly, it helped to safeguard union presence and action in cases of industrial restructuring.

Recourse to the lay-off fund has been largely undifferentiated, with parties using practices outside the law for the obvious mutual benefits which can be gained from resorting to this social *"buffer"*. Consequently, various proposals have been made to redress these extremes and improve the control of lay-off funds leading to recent reform of this issue by *Law 223 of 1991*.

This model of flexibility, negotiated and supported by public bodies, appears sufficiently well-established and amenable to the social partners to be able to last. Thus, it is unlikely that it will be seen by the Italians as a key issue as regards the harmonization of European rights.

The regulation of the Italian labour market has always been marked by two critical issues - particularly on the European front - with regard to a) small and very small companies and production units, and b) the efficacy of protective provisions in general and their relationship with *"promotional"* provisions.

3. Legal protection and its scope: the issue of a minimum threshold

The traditional reference point of Italian labour law and its various components is the large industrial company and, in parallel, white-collar staff in the public service. This dominance of the large-scale dimension tends to overshadow small production units and their growing importance. This has two consequences: firstly, the formal extension - as undifferentiated as it is ineffective - of many systems modelled on large industry to small units; secondly, the exemption of small units from various aspects of routine regulations (an unduly broad formal exemption ranging from immunity from other liabilities under the law to the non-application of collective wage agreements in the black economy).

Such opposing tendencies have precluded until recently any adaptation and specialization of regulations to the specific situation of smaller units. Consequently, the fall in the average size of production units below the threshold for the application of labour law to public employment and bargaining (which varies from country to country) has progressively restricted the scope of labour law.

The consequences have become even more serious, given the fact that the law has shown little inclination or capacity to address the labour market as such, by going beyond individual relations and companies.

These trends are common to all industrialized countries and have little by little impaired the regulatory capacity of labour law, which is more serious than forms of explicit deregulation or the selectivity of safeguards. This trend is only partly countered by *Law 108 of 1990*, which provided for (financial) protection against unfair dismissals, even in the case of employees from small production units (which had previously been excluded from any kind of protection).

It is therefore evident that the very concept of minimum protective regulation must be rethought, so it can address practical issues, in order to make it more effective. This is all the more important on the European scene, where the issue at stake is how to flesh out a realistic and acceptable basic social threshold.

It is unlikely that such a threshold can be built up from a combination of the different minima in the various countries. Selection is necessary, but which does not sacrifice standards held to be essential.

On the subject of content, this would appear to concern not only the basic principles (at European level too) of health and safety, but also social security standards; the safeguarding of jobs, by ensuring against unfair dismissal; and the safeguarding of professionalism (even where mobility is necessary).

Regarding the machinery of intervention, which is essential for effectiveness, recent debate has provided some general indications which may be significant.

a) A minimum *"safety-net"* for mobility within the existing labour market is only feasible outside the individual labour relationship, if it is to work on the principle of a *"fail-safe"* mechanism. Such a system is barely feasible where tenure of employment is rigidly guaranteed, while it can benefit from a series of different measures: services and incentives for mobility, professional retraining and re-employment through the proper bodies (e.g. recruitment agencies); machinery for public and collective control over restructuring and thus over external mobility; control over decision-making processes which strongly influence conditions of employment at company level and in the labour market; and types of income support, for example in cases of redundancy not caused by dismissal to replace the present system of unemployment benefit. Reform of this kind is all the more urgent for social security benefits, following the crisis of the welfare state system which has spread to many industrialized countries. The recent pension reform, implemented with approval of *Law No. 335 of August 8, 1995*, falls in this context. Said reform is centred around a change in the method of calculating pensions: from being based on the wages a worker receives it is now based on the actual social security contributions paid in.

It has been suggested that labour law be divided into two *"bands"*: the first would include guaranteed minimum wages and legal provisions (strictly regulated in Italy), but also reappraisal of contents and recipients; the second would not be based so much on fundamental provisions – legal or collective – as on guidelines and rules of procedure. This would provide more room for flexible forms of bargaining and collective participation – also individual bargaining, especially on the part of employees with average-to-high qualifications for whom the freedom to negotiate employment conditions is a realistic prospect. A review of the external and internal limitations of labour law would imply a change not only in the method of establishing standards, but also in control and disciplinary machinery.

b) The effectiveness of the first *"band"* of provisions (minimum safeguards) is doubtful, due to the changeability and excessive fragmentation of the labour market. The disciplinary method has proved to be most ineffective where violations are being examined, especially penal ones. Awareness of this ineffectiveness explains the growing recourse (even in Italy) to incentive and control methods which condition the eligibility of companies – especially small ones – for various kinds of benefit, and the observance of collective bargaining and legal standards. These include *Article 36* of the *Workers' Statute* (the prototype of this method), measures to boost employment of young people (*Law 863 of 1984*); provisions under financial law for assumption by the government of part of employers' social security contributions, and rules on the eligibility for national and European funds directed at vocational training. The effectiveness of these types of regulation for such issues depends on the existence of machinery to monitor compliance with the required conditions. Owing to a scattered labour market, it is less likely that this task will be carried out effectively by the local labour inspectorates than by associations of the partners and the many territorial bodies with mixed participation that administer such services and benefits, supported by the compulsory exchange of information where required between the public bodies responsible for paying out the benefits and union organizations.

c) On the other hand, if the minimum social threshold is to be really adapted, it will have to contain more than just basic protection standards, by promoting better work conditions and opportunities.

The notion of labour law which not only protects but also promotes goes well back into history, but it has been used very little in practice. Most provisions (and not only in Italy) have focused on the safeguarding of jobs and employees' working conditions, and the (partial) protection of redundant employees' incomes. Less attention has been paid to the creation of new jobs, the provision of job opportunities for the unemployed, the fight against discrimination and a better distribution of existing work.

This is the new objective of labour law, at both national and Community level.

An increasingly important part is being played by legislation aimed principally at fighting sex discrimination in the workplace (*Law 903 of 1977* and more recently *Law 125 of 1991*, with new methods such as affirmative action).

d) However, the need to redistribute and improve work opportunities is now also affecting various groups of underprivileged workers in the labour market: young people, those living in depressed areas like the South of Italy, and also elderly people. The rapid increase in the number of

elderly people will undoubtedly pose a number of novel problems for labour law and social security, altering both the lifetime work cycle, and also the traditional canons which determine unfitness for work.

In the past fifteen years this issue has become significant in other countries, pointing to the need to reduce such an unusually high rate of unemployment. It is no longer merely a question of improving opportunities for limited groups of employees but of redistributing the few vacancies that are available, and promoting new jobs both in permanent employment and self-employment.

One proposal is to look differently at the question of reduction and re-organization of working hours, as a means of redistributing work and not (simply) of safeguarding workers' health.

Another proposal is to overhaul the system of incentives used to date, due to the different scale on which it is applied. Better selection criteria and machinery for managing and controlling incentives are now needed, in addition to new kinds of support - especially for the self-employed (services, etc.). For this purpose, labour law machinery must interact with company law and fiscal law and public economic legislation, both at central and local level. In reality, this is a whole new area of labour law, which will mean its extension from the individual relationship to the labour market as a whole, and also to company law and the economy.

4. Activities of the partners: an overview of collective bargaining

The collective wage agreement is part of private law in the Italian legal system, and is not usually considered a source of law. However its prescriptive function - now widely recognized - is expressed in the regulation (whose provisions cannot be waived except in favour of the worker) of individual labour relationships. The political importance of this is such that it is the main government procedure, used for nearly all key aspects of the labour relationship.

This is true in practice (with complete agreement on this by the social partners) and also under the law, as the Italian system gives great importance to the collective wage agreement, to the extent of making it virtually the only procedure used for regulating individual and collective labour relations. In fact, Italian law has always been *"one-track"* from this point of view. Incidentally, neither the use of participatory procedures for solving individual and collective problems by means of cooperation nor theories propounded on them have ever played a significant role.

It is no coincidence that *Article 46* of the *Constitution*, which ratifies employees' rights to participate in company management, is the weakest, or rather the *"emptiest"*, provision in the *Constitution*.

It has only been in recent years that interest has started to grow in types of collective action that differ from collective bargaining. Due to its central position, collective bargaining is affected by the lack of institutionalization and uncertainty concerning its legal status, also common to other aspects of industrial relations.

Collective bargaining in the private sector has traditionally been conducted outside specific rules with regard to procedures, subject, and actors. This high degree of informality has been modified in part by the provisions of the tripartite agreement of July 23, 1993. The collective wage agreement as such has acquired a legal identity on the basis of common law principles deriving from *"creative"* case law. The effectiveness of the agreement cannot be waived, and is valid only for those belonging to stipulated (employers') associations - the only case of this kind in Europe.

The legal fragility of this system with the absence of *erga omnes* application (due to lack of implementation of *Article 39* of the *Constitution, discussed below*) was offset by the astounding development of unionization in the 1960s and 1970s, after which the general application of collective wage agreements began to appear feasible.

However, in recent years the situation has become critical again, due to serious economic problems and the profound changes in labour relations already mentioned. This state of affairs has called into question the scope of actual application of the agreement on account of the weakening of union representation. Thus there is now a pressing need for legislation which would guarantee if not the *erga omnes* application of collective agreements (necessitating a review of *Article 39* of the *Constitution*) at least basic minimum wages for sectors where collective agreements are not used (such as small companies and marginal sectors). Changes have even affected the prescriptive scope of collective agreements, since their contents do not always achieve improvement but merely alteration, at times worsening wage rates and regulations. Furthermore, this affects areas of the traditional labour relationship - the domain where employers exercise power (*see below*).

The low level of institutionalization of industrial relations in Italy can be seen just as clearly in the lack of development of and lack of sanctions as regards the binding part of a wage agreement: clauses of peaceful conduct by unions, and clauses of coordination at the various levels of bargaining.

Only recently has a change in tendency been noted, with attention turning again to the use of bargaining clauses as a means of laying down the rules of the game and procedures agreed upon between the parties (for example on the subject of cooling off and the prevention of industrial action, *discussed below*).

In this perspective there was also a kind of dualism as regards the public sector, where conversely collective agreements were strictly regulated by *Law 93 of 1983* in respect of various aspects including procedures, partners, content and efficacy.

This regulation, though it has ensured the nominal validity of prescriptive effects, has not contributed to the speed or certainty of procedures (laborious due to endemic delay) nor has it strengthened the reliability of the partners or the development of procedures to prevent industrial action. With approval of *Legislative Decree No. 29 of February 3, 1993*, the model of collective bargaining in the public sector was brought closer to the one adopted in the private

sector. However collective bargaining in the civil service still rests on detailed regulations, especially with regard to actors and procedures.

5. The structure of collective bargaining

The complexity of the Italian system of wage agreement and its precarious equilibrium are evident from the structure of bargaining, which is conducted at three levels – inter-confederal, sectoral, company and at times, territorial – a structure which is unique to Italy.

The importance of the different levels and their reciprocal relations have altered over the years. The role of inter-confederal bargaining grew during the post-war re-building period, then between 1975 and 1985 alongside high inflation. Thus, this level is characteristic of times of crisis. It has, in fact, had a mainly protective function in defining minimum prescriptive standards for pay or rights within large sectors of the economy (for example, in the early post-war period, the agreements on collective and individual dismissals, on internal councils, and later on the *Cassa Integrazione* lay-off fund and the pay indexation system).

This system may even extend to political bargaining with the State, as has happened in some cases of concertation already mentioned, such cases taking on functions of control and calming of bargaining at lower levels.

National sectoral agreements have been the focal point of the system since the 1950s, and their content relates to most pay and working conditions, for which they lay down standard regulations which may be supplemented by companies.

During the 1970s, bargaining was extended to include qualitative aspects in the management of the labour relationship (i.e. environment, workloads, staff, mobility, overtime) and company policies (with the introduction of union rights to information on and monitoring of investments, industrial restructuring, etc.). Bargaining at company level proved decisive during the strong progression and innovation of the system between 1968 and 1975. It was decisive for the negotiation of agreements on pay conditions and extra provisions in addition to standard national provisions, linked to specific production situations and the ability to pay of individual companies, with no hard and fast limits in these areas. Attempts to pre-empt bargaining by deferment clauses in the national agreements were usually unsuccessful due to union resistance or opposition. Only recently has there been renewed interest in better coordination between levels of bargaining (*see below*).

It is evident that the Italian system tends towards structural bipolarism at two major levels. During the period of growth between 1968 and 1975, these two levels were national and company-level bargaining, while in the following decade the inter-confederal approach tended to replace the sectoral level in the wake of the gradual centralization of the whole system.

After 1985, the trend swung towards a (further) decentralization of bargaining, which reduced the importance of inter-confederal bargaining, and according to some, seemed set to overshadow the role of national sectoral agreements.

This decentralization reflected general trends in the economy, encouraged by the new and flexible industrial technologies. It often appears to have been fostered by entrepreneurial initiative, in spite of what happened between 1968 and 1975 when entrepreneurs tried to resist bargaining decentralization by imposing limits on the issues which it could tackle.

However, on this occasion the move towards decentralization was also checked and controlled by the centre. Employers' associations themselves recognized the continuing importance of the national agreement as an element of stability for the system. This was particularly true in the case of the multitude of small companies which constitute most of Italy's industrial structure and for which bargaining at national level is really the only possible solution.

Though there are few data on the percentage cover of the different levels of bargaining, analysis of pay differentials shows that figures are high – from 30 to 40% – from the point of view of company size, which is also a consequence of the varying extent of company-level bargaining.

The multiplicity of contractual levels and above all the absence of a precise functional coordination between these, understandable during a period of growth in the system, has progressively become an element of instability and an obstacle to its development. This explains why the social actors were basically in agreement on the need to define new rules, as evidenced by the outcome of the tripartite agreement of July 23, 1993.

The chapter of the agreement dedicated to bargaining structures calls for two bargaining levels: a) industry-wide national collective agreement and b) a second decentralised company or territorial level agreement (when fragmentation of a specific industry sector makes plant level bargaining impracticable). This does not prejudice the role of the interconfederal level as a general political guideline for the system and a forum for concertation with the government.

The tripartite agreement also establishes the duration of industry-wide agreements, set at four years for the provisions governing non-wage aspects of labour relations and two years for those provisions governing wages. The fact that wages can be renegotiated every two years is an effort to find a substitute for the old wage indexing system which was abolished in a preceding interconfederal agreement in July 1992. According to the new provisions, wage levels are set by industry-wide collective wage agreements with reference, among other things, to the forecast inflation rate. To protect real wages it has been established that when wages come up for review every two years this negotiation will take into account any differences between programmed inflation and real inflation. The second level collective agreements also last four years and can be stipulated on the basis of timing and subjects established by national collective agreements. These allow for different wage levels to be set in relation to productivity and profitability parameters of the company.

The agreement of July 23, 1993 also sets a number of procedural rules to support the collective bargaining process. Specifically it calls for the negotiating platforms to be presented at least three months before agreements' expire: this period and the month following the expiry date is to be a *"cooling-off period"* during which no form of union conflict is permitted.

Legislative Decree No. 29 of February 3, 1993 outlined a similar bargaining structure for the public sector.

It is also quite likely that the harmonization of European systems will have to proceed with extreme caution, without trying to force collective issues like bargaining, which - even more than legal structures - are deeply rooted in the tradition and socio-political equilibrium of each individual country. Tentative efforts by the partners to establish transnational forms of bargaining (possibly by means of Community guidelines) would appear more likely to produce uniform bargaining practices than inflexible legal measures.

6. Labour case law

From the formal viewpoint, court decisions are not considered a source of law, but rather ways of enforcing existing laws. However, it is important to bear in mind that decisions relating to enforcement generally contain plenty of room for manoeuvre. In labour law the flexibility of case law has been considerable, especially in the more critical areas of collective relations, where there has been no legislation. These areas include the regulation of the right to strike, consequences of collective bargaining and minimum wage rates, and even matters where legal provisions are particularly elastic, like union rights (as under *Law 300 of 1970*), protection against dismissal, and equal pay.

7. International sources

International conventions are not self-executory in Italy, in principle.

If they are to be effective in union and labour law, they have to be ratified with subsequent amendments of Italian legislation.

In some cases, the concept of amendment may be fairly flexible, in so far as international directives are generic and can be implemented in different ways.

For example, Italy ratified the *International Labour Organization* convention on minimum wage rates in the 1930s, when it was possible to guarantee minimum levels under the existing system of erga omnes collective agreements.

Subsequently, the corporative regime declined and collective wage agreements became effective only between the partners (and their associates), so it is doubtful whether the ILO directive can still be considered valid, despite the fact that there are various ways of extending the scope of agreements reached via collective wage agreement, first and foremost by case law on *Article 36* of the *Constitution* (*see below*) regarding fair pay.

The nature of direct prescriptive sources derives from certain rulings made by Community authorities, without the need for national legislation. This is true of regulations and rulings on specific issues, while directives are not a direct source, for the reasons mentioned above. In any case the vertical effectiveness of Community directives, subject to the conditions set forth by the *Court of Justice*, is well understood.

The influence of directives - and more generally of the EEC - on national law is on the increase, but for the present it is still hindered by the distinctive characteristics of national labour law.

CHAPTER III

1. Industrial disputes: features and limitations

One of the traditional features of the Italian legal system, which is a consequence of factors mentioned above, is its intensely contentious nature.

In reality, this tendency towards conflict has always been among the strongest on the international scene. It is only loosely controlled from the institutional point of view, given the lack of procedural rules, and is regulated only to an insignificant degree by economic trends - political events possibly having a greater influence.

In the past, unofficial strikes were widespread. These included lightning, on-off and staggered strikes, used by the unions to maximize repercussions for industry while minimizing the costs for employees. This trend is also explained by the lack of financial protection for striking employees in Italy, such as strike funds, which are common in other countries.

Equally widespread in Italy is the practice of political strikes (or rather economic-cum-political ones), which aim at achieving economic and social reform by Parliament and the government. This practice is very much in line with the vocation of the Italian unions, which goes beyond unionism and has been given authoritative endorsement by the *Constitutional Court*, as it is seen as an expression of political activity on the part of the unions and thus an integral part of democratic representation. This practice was again applied in a spectacular way when nation-wide strikes were held in the fall of 1994 to protest against the pension reform drafted by the Berlusconi government.

From the legal point of view, the Italian system is marked by a lack of systematic legislation on disputes; this contingency is provided for in *Article 40* of the *Constitution* but has never been resorted to. In reality, legislative abstentionism is also common in other European countries which have failed to establish comprehensive legislation for strikes, perhaps mindful of earlier experiences and certainly hindered by the unions. Consequently the limits of industrial action, in Italy as elsewhere, are characterized by complex legal regulations.

Case law has identified a number of limits on strikes, making use of more or less explicit guidelines in the legal system, such as the general principles of contract law or extra-contractual liability, especially in the case of unofficial strikes. These principles derive from existing criminal

and administrative provisions, also used under Italian law, though with substantial modification by the *Constitutional Court*.

Some legal trends have proved to be relatively tolerant towards strikes – though not towards lock-outs – more tolerant in fact than other systems. Also significant is the fact that the right to strike is recognized as being an entitlement of employees and not of the union movement as such, in accordance with a traditional view held both by Italian case law and jurisprudence. Consequently, it is impossible to outlaw wildcat or unofficial strikes as such.

Another typical feature of the Italian legal system is that case law – like prevailing legal commentary – has always refused to accept an *"implicit"* obligation of peaceful conduct by a union, essential to the nature of the collective agreement seen as a *"peace treaty"*, which guarantees that unions (if not employees) will refrain from direct industrial action aimed at achieving a premature review of the terms negotiated.

Furthermore, in Italy forms of consensual control (i.e. cooling-off, conciliation and arbitration clauses) and negotiated prevention of industrial action have been slow to evolve. The cooling-off clause for conflicts called for by the tripartite agreement of July 23, 1993 (*see above*) is a significant though limited innovation in this regard. A framework for self-regulatory mechanisms, only recently tried out to any great extent, is also lacking. Public mediation in labour disputes is more widespread.

These features are part and parcel of the same basic reasons which have kept Italian industrial relations informal, unstable and relatively free from regulation. This has hindered the growth of the binding and institutional part of collective agreements, and even more the development of bipartite mechanisms for negotiating agreements, forms of social concertation and participation at company level. From this point of view as well, the tripartite agreement of July 23, 1993 could represent a turning point, the implications of which will be measurable in the coming years.

There have also been some significant modifications to the forms and regulation of industrial disputes in the last few years, caused by changes in the socio-economic framework and the general attitude of the partners towards industrial relations.

The most important point is the downward trend in all the indicators of industrial action (duration, intensity, participation) with a particularly marked decrease in political confrontations. Conversely, there has been minor disputes not controlled by unions, which are implicitly or explicitly contrary to union rulings, especially in the public and private service sector. These are fuelled by organized groups of employees who contest the leadership of the confederal unions as representatives.

Both these trends are common to other countries, even if the rate and features of industrial action are still unique in Europe.

2. Control mechanisms and prevention of disputes

Equally significant among recent developments is the search by the social partners for mechanisms to control and prevent industrial action, supported by the public authorities (and encouraged by public opinion).

These are new efforts, which are part of a general trend towards greater regulation of Italian industrial relations and thus towards consensual stabilization.

One particularly noteworthy example in this sense is the machinery set up by the IRI protocol, which has been imitated by some sector-level agreements.

In the case of disputes regarding important technological and organizational innovations, the partners are committed to suspending direct action (i.e. strikes by the union and changes to the status quo by the company) until every attempt has been made at conciliation under the agreement. The agreement also sets out a form of quasi-arbitration, entrusted to a group of experts (three chosen by the union, three by IRI) to whom the partners may turn in any dispute regarding the application of the protocol. If the experts do not reach an agreement among themselves, the parties may appeal to a commission of three *"super-experts"* (former presiding judges of the *Constitutional Court*). However, the experts' ruling is binding only in respect of the framework of industrial relations set out in the protocol itself, and therefore cannot be enacted in law. This fact reflects the caution which partners have shown in entrusting the settlement of disputes to third parties. The procedure actually worked in the few cases in which it was tried out (in fact, the experts' ruling was unanimous) and was accepted by the partners and there was therefore no need to bring in the three *"super-experts"*.

The effort to find control mechanisms for disputes is particularly difficult in the public sector and public services in particular. The 1983 *"outline law"* on public employment went no further than requiring of prior notice of strikes and encouraging a self-regulatory code on the part of the unions, making this a condition for the eligibility of unions for negotiations with public sector employers.

The rise in self-regulatory codes, though significant, has obviously come up against problems of scope, as codes are only binding on employees represented by the unions adopting them.

These codes have been impaired by the contentious behaviour of groups of employees which are sometimes very small – but whose position is critical and may strongly affect users of their services. These employees usually represent a wide range of interests, which are frequently very different to the traditional image of staff represented by the major union confederations.

The next step was the enactment of *Law 146 of 1990*, approved by union agreement and aimed at strengthening control machinery for disputes in public services. The law entrusts union bargaining with the task of setting minimum service standards, which all employees and companies must be able to guarantee to safeguard users. This law also makes the established practice of *precettazione* (i.e. legally requiring employees on strike to present them-

selves for work) more effective, a measure which has to be taken when minimum standards are not respected. Finally, *Law 146* gives monitoring and mediation powers to a commission of experts (*see below*).

3. Public mediation

Mediation by public authorities - the *Ministry of Labour* and its local bodies, the *prefetti* (government officials at provincial level) and regional offices - all play an important role in settling disputes.

Mediation is conducted informally; there is no restriction on the freedom of action of the partners, and effectiveness is largely dependent on the authority of the mediator, the pressure exerted by public opinion and the specific context.

"Political" mediation conducted by the *Ministry of Labour* in cases of national disputes, or by other ministries for disputes in specific sectors, is of major significance. A crucial role in mediation is also played by regional government inspectors, especially in disputes relating to industrial recession and restructuring which have serious consequences on the locality.

In many cases, political mediation of this kind has virtually become arbitration - and such *"persuasive"* tactics cannot in practice be refused by the partners. Mediation is almost always *"guided"*, meaning that public authorities tend to favour settlements of disputes in keeping with objectives that are generally considered to be politically desirable. An example of this was the control of inflation in the major disputes of the 1970s, and the need to reconcile the safeguarding of jobs with the need for economy in disputes over industrial restructuring and recession.

The imprecise definition of the responsibilities and powers of mediators, the frequent overlapping of such powers and the informal nature of intervention are also symptomatic of weaknesses in the current mediation procedure. The situation has reached the point where urgent requests for reform have been made by various parties, which would produce a clearer definition of mediators' powers, enhance the role of regional-level mediation and above all encourage the setting up of an independent specialist public body for conciliation and arbitration, run by a professional staff.

Up to now these proposals have not been acted on. The creation of an effective system for mediating conflicts is still one of the priorities in order to modernise the Italian industrial relations system.

One significant step forward in this sense was made by *Law 146 of 1990* on strikes in the public services. The *National Safeguards Commission*, set up by this law, is empowered to mediate and to assist the partners in reaching settlements on minimum service standards which should be guaranteed during strikes, to assess the adequacy of the agreements reached and to monitor the behaviour of the partners during disputes. The commission must make a proposal, in the case of dissent between the partners, on the minimum standards of service to be guaranteed during strikes - though this would not be formally binding - and the proposal would be raised to the level of quasi-arbitration as far as these minimum standards are concerned. In the light of the first five years of application of *Law 146/1990*, the fact that the mediation powers awarded the *Safeguards Commission* are concerned only with the definition of basic services which must be guaranteed has turned out to be a major limitation. In fact labour conflicts in public services, especially within the transportation sector, continue to weigh heavily on services' users. This explains why many observers are calling for a reform of *Law 146/1990* to give the above Commission greater powers of mediation in disputes involving public services.

CHAPTER IV

1. An overview of the Italian system in the European framework

On the whole, Italian industrial relations follow a pattern of weakly organized pluralism. This is subject to recurrent bouts of tension caused by external factors (such as economic and political problems) and internal factors (principally political divisions among unions). The indeterminate nature of laws governing industrial relations in Italy and the apparent fragility of the economy are exacerbated by difficult relations with the political system, which in the last years have been aggravated by the uncertain perspectives of the system itself.

In view of such factors, it is not surprising that the difficulties encountered everywhere with pluralist models (especially from the mid-1970s onwards) have been compounded in the Italian system, and remedies tried in other contexts have proved to be hard to implement.

a) Despite all this, Italy has managed to uphold a strongly consensual policy, which can be seen in the fundamental role played by collective bargaining as a procedure for regulating labour relations.

This is a typical feature of many European systems and will undoubtedly have a profound influence on the prospects for harmonization within the Community. In fact, despite serious problems in recent years the consensual participatory and bargaining procedure has remained a solid point of reference for industrial relations in many countries.

The methods of collective bargaining, starting with sectorial bargaining at national and regional level, have been able to resist moves towards decentralization and fragmentation. The margin for negotiation left for individual labour agreements (and the individualization of labour relations) has been correspondingly limited.

These trends, opposing though they are, would seem to indicate that the collective and voluntary dimension of industrial relations remains the crucial factor in the European social sphere.

If this is the case, social partners will play a key role in building up this sphere.

b) A list follows of areas where the trend towards negotiated settlements has developed in a particularly innovative way in Italy (in common with other countries):

- the development of combined forms of reduction and re-organization of working hours and times;
- management of active labour policies, including the promotion of mobility and vocational training/re-training; and the many initiatives which aim to support employment, especially within underprivileged groups and areas. This is probably the issue which most parties agree on, even if few concrete results have so far been achieved;
- the recent introduction of new technologies and, more generally, of innovations into companies. In reality, the use of participatory methods is controversial and lacking in uniformity in several countries, with a marked preference for the effects of innovation on labour relations rather than innovative options themselves, which are still the exclusive province of management. Consequently, participation in this sense is limited to information. Despite this, the consensual procedure enjoys popularity, especially when compared with models prevalent overseas.

c) Another point to stress is that the different forms of flexibility as regards working conditions and the labour market are largely based on agreement and social control, with pure and simple deregulatory solutions remaining unpopular, in line with a trend typical in Europe.

The common objective of flexibility has meant adjustments and reductions in the core of labour law that cannot be waived. There are still controversies between the partners over the acceptable limits of flexibility and the ways of adapting protective machinery, for example the diversity of positions in Europe on the issue of fixed-term contracts. However, the choices made (not only in Italy) have eliminated from the core of protective measures under labour law those more obsolete parts and those which are exposed to market forces and innovation (i.e. types of labour relationships, mobility, etc.) but the core itself has not been abolished, nor is this a likely development.

Given this, the prospects for harmonization at European level of labour relations would seem to be based on the retention of a single core of irrevocable law - which remains a safety-net for the Community worker - while this minimum can be enhanced by subsequent rules negotiated by the social partners or worked out by participation and consultation procedures.

d) It is more difficult to identify specific ways in which the consensual procedure might, broadly speaking, develop in the future. Particularly uncertain is the relationship between bargaining, industrial disputes and participation.

A common observation is that the Italian system does not seem to possess the right or typical conditions to evolve towards participatory models, which would necessitate a united union movement, strong control by central organizations (unions and employers) over the grass-roots, a stable government committed to promoting labour, and a public administration able to guarantee the achievement of objectives arising from political exchange.

Such peculiarities have not stopped the system (at least since 1976) from repeated attempts at participatory management of industrial relations, firstly at macro-economic level and subsequently at company and market level.

These attempts have succeeded in providing the system with some stability. On the basis of this success, increasingly wide sectors of the union (and political) world have opted for this line as the basis for modernization and Europeanization of Italian industrial relations.

At the macro-economic level there appears to be no alternative to the method of social concertation in the eyes of the social actors and of the State, as confirmed by the tripartite agreement of July 23, 1993. The very recent pension reform undertaken by the Dini government, to a great extent pre-negotiated with union organisations, is an example of the practical application of this approach. At company level, participatory practices still encounter much opposition and have only been partially successful. However, they seem increasingly to meet with the approval of most of the union movement, especially the non-Communist members, who are looked upon favourably by the public authorities and viewed with cautious interest by the major employers' organizations.

The obstacles which hinder the development of participatory procedures are still deeply rooted in the way the system is conceived and in the attitudes of some of the partners.

There are elements which leave changes in Italian industrial relations rather exposed to laissez-faire trends. However, although there are openly laissez-faire trends, there are also opposing ones, deeply rooted in the history of Italy (and other European countries): the interventionist tradition of public authorities, supported (for a variety of reasons) by the majority of political and social partners, including employers; the lack of solidarity and hegemonic inclinations of the latter; the continuing widespread power of the unions and their penetration of institutions; and the importance and positions of the political parties closest to the unions.

It would be simplistic to conclude that the Italian system of industrial relations is tending only towards participatory models. Instead of such a prospect there could be a stalemate situation, which has happened before. Alternatively, there could be trends towards dualism, i.e. differing patterns of industrial relations in the various sectors of the system. For example, participatory trends in certain sectors of medium and large companies, or even medium and small companies, which have a long traditions of union and managerial dialogue and are supported by a uniform political and civil framework, types of individual relations with the marginalization of unions in other sectors, especially high-tech industries; and finally, a tendency towards industrial unrest which is widespread in certain sectors of public services or in declining industrial areas.

2. Points of convergence and social dialogue in Europe

The European framework could significantly influence trends in the Italian system towards greater participation.

Similar points of convergence are already visible and have been discussed in comparative studies. However much will

depend on initiatives by private and public partners at both national and Community level.

At the level of European social dialogue, the role of the public authorities would seem to be essentially promotional in respect of any active co-operation between the partners, rather than directly regulatory (although this cannot be ruled out).

Social dialogue could lead to proper agreement-based conventional relations, as envisaged under *Article 118b* of the *Treaty*, and now highlighted in the new text approved at Maastricht. Social dialogue (and perhaps bargaining at European level) should serve as a means of reconciling divergent points of view, encouraging the emergence of common or convergent behaviour between the partners, and drawing useful conclusions for the Community itself (whose initiative can now be considered as pre-empted by European bargaining).

Experience in Italy during recent years indicates that a realistic approach to European harmonization must be gradual and flexible, taking into account the peculiarities and traditions of different national practices but pursuing objectives of greater uniformity. Consequently, an inductive plan of action would seem to be the most appropriate way of achieving a series of limited objectives step by step rather than via established legal models and standardized solutions. This will probably also influence the role of Community institutions, which may play the part of a *"fourth"* party in industrial relations, but its main purpose would be to guide and support national partners, rather than (just) the legislators. This kind of progressive harmonization could make use of a variety of mechanisms, in addition to traditional ones - i.e. agreements between the partners with the participation of national governments, but also *"four-party agreements"* at transnational and European level promoted by the Community.

One final point should be made. The transition from basic guidelines - as defined by the Community - to their actual implementation may make it necessary for the partners, supported by public authorities, to select certain priorities for the difficult task of *"Europeanizing"* labour relations. This would mean that potential areas of application and results could be tentatively defined by establishing which levels and issues are the easiest to achieve.

Such a commitment would be most useful in areas where positive outcomes for the partners appear more likely, and where, as in some countries, there is already a history of cooperation between the partners which is supported by the public authorities.

LUXEMBOURG

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CHAPTER I: THE CONCEPT OF SOCIAL AND ECONOMIC ACTORS, BOTH INDIVIDUAL AND COLLECTIVE, IN A FUNCTIONAL CONTEXT

1. Description of partners and their institutional organisation

1.1 The employer

1.1.1 The concept of the employer

The employer may be a natural person or a body corporate.

From a contractual point of view, the employer is defined as the legal person who is party to a contract of employment.

The employer may be a natural person exercising the employer's prerogatives himself. This type of employer is often described as a self-employed worker.

In most cases, the employee works within an undertaking which belongs to a body corporate. In practice, a natural person, namely the head of the undertaking or establishment, exercises the employer's prerogatives and responsibilities.

Luxembourg law does not define the concepts of undertaking, head of undertaking or head of establishment. Legislation makes a distinction between public-sector and private-sector employers. The concept of public-sector employer also covers the various ministries, administrations and State and local services.

A breakdown of employers in the private sector shows that 75% have fewer than 6 employees, 17.5% have between 6 and 19 employees and 5% between 20 and 49 employees.

1.1.2 Structural organisation of employers

Representative chambers

The law requires an undertaking, whether a natural person or body corporate, to be associated with one of the representative chambers established by the *Law of 4 April 1924*, which created such bodies with an electoral basis, namely:

- The chamber of commerce for commercial and industrial undertakings, banks and insurance companies, and undertakings in the hotel and catering business.
- The chamber of trades for the construction, food and clothing industries and other craft trades.
- The chamber of agriculture for farmers, winegrowers and market gardeners.

Alongside the statutory bodies (representative chambers) established and operating on the basis of the *Law of 1924*, employers may establish employers' organisations.

They have complete freedom in this respect, as the State neither authorises, prohibits nor lays down any formal conditions for the creation of professional organisations.

At present, the main employers' organisations are the:

- *Fédération des Industriels luxembourgeois*;
- *Fédération des Artisans*;
- *Confédération du Commerce luxembourgeois*;
- *Association des Banques et Banquiers*;
- *Fédération Nationale des Hôteliers, Restaurateurs et Cafetiers* (Horesca).

1.2 Workers

1.2.1 The concept of worker

As far as employed workers within the private sector are concerned, the law still makes a distinction between blue-collar and white-collar workers.

In general, and despite the fact that the distinction is becoming increasingly vague, labour law and social security legislation maintain different schemes for blue-collar and white-collar workers.

The law defines a blue-collar worker as an employee exercising a task of a primarily manual nature, whereas a white-collar worker is a person carrying out work of a primarily intellectual nature. However, to a large extent the law has already brought about the unification if not the convergence of two statuses.

Complete unification of status under labour law and social security legislation constitutes a popular theme for the trade union organisations.

1.2.2 Structural organisation of employees

Like employers, employed workers have to come under one of the chambers set up by the *Law of 4 April 1924*, which created representative chambers with an electoral basis. In the case of employees these are:

- the chamber of labour for employees with the status of blue collar worker;
- the chamber of white-collar employees for white-collar workers employed in the private sector.

Civil servants working for the State or local authorities come under the chamber of civil servants and public employees.

The members of representative chambers are elected by postal ballot on the basis of proportional representation.

In practice they are elected from lists put forward by the trade union organisations they represent.

Alongside the statutory bodies (chamber of labour and chamber of white-collar employees), private-sector workers are organised within freely constituted trade union organisations, namely the:

- Confédération syndicale indépendante - Luxembourg (OGB-L) (*Onofhëngegen Gewerkschaftsbond Letzebuerg*);
- Confédération Luxembourgeoise des Syndicats Chrétiens (*Letzebuerger Chrëschtlechen Gewerkschaftsbond*) (LCGB);
- *Fédération des Employés Privés - Fédération Indépendante des Travailleurs* (FEP-FIT);
- *Fédération Nationale des Cheminots, des Travailleurs du Transport, des Fonctionnaires et Employés de l'Etat du Luxembourg* (FNCTTFEL);
- *Fédération Luxembourgeoise des Travailleurs du Livre*;
- *Fédération Chrétienne du Personnel des Transports* (SYPROLUX);
- *Association Luxembourgeoise des Employés de Banques et d'Assurances* (ALEBA);
- *Neutral Gewerkschaft Letzbuerg* (NGL).

The *OBG-L*, the *FNCTTFEL* and the *Fédération Luxembourgeoise des Travailleurs du Livre* are grouped together under the *Confédération Générale du Travail (CGT)*.

The *Confédération de la Fonction Publique (CGFP)* is composed of 47 sub-organisations representing the different categories of civil servants (graduates, junior and middle executives) or the different sectors of state employees (teachers, armed forces and police).

The *CGFP* is the government's privileged discussion partner in the negotiation of periodic agreements reviewing the salaries of State employees. The collective agreement for blue-collar workers employed by the State is negotiated and signed with the *OGB-L* and the *LCGB*.

The law[1] makes it compulsory for an employer who regularly employs 15 persons bound by a contract of employment to set up a workforce delegation.

Delegates are elected by the company's workforce from lists of candidates put forward either by the most representative unions at national level or by a number of employees from within the establishment representing at least 5% of the number of workers represented by the delegation, without however exceeding 100.

Unions representing an absolute majority of the members comprising the retiring delegation are also allowed to put forward lists of candidates.

The *Law of 6 May 1974* introduced joint works councils composed of an equal number of representatives of the employer and of the workforce.

Joint works councils are compulsory in all firms in the private sector with at least 150 employed workers.

Workforce representatives are appointed by the workforce delegates, by secret ballot, on the basis of proportional representation; they must be selected from the workers employed in the undertaking.

The employer's representatives are appointed by the head of the undertaking.

1.3 *Economic and Social Council*

Whereas the representative chambers are composed only of representatives of the socio-professional category which it is their legal task to represent, the *Economic and Social Council* (ESC) consists of 35 members representing, within one body, the employers and employees in the various sectors of the national economy, namely:

- iron and steel: 2 members
- small and medium-sized businesses: 2 members
- commerce: 2 members
- craft trades: 2 members
- banking: 1 member
- insurance: 1 member
- liberal professions: 1 member
- agriculture: 1 member
- viticulture: 1 member
- private-sector workers: 10 members
- civil servants and white-collar employees in the public sector: 3 members
- transport: 1 member

The ESC also has seven members who are experts on economic and social affairs and are completely independent of the professional and trade union organisations represented on the Council; four of these members are co-opted by the employers' and employees' members of the Council and three are appointed by the government.

2. Basis and guarantees for action

2.1 Trade union freedom

Article 11, paragraph 5 of the *Constitution* declares that the law *"shall guarantee trade union freedoms"*.

Equally, *Convention No 87* on union freedom and the protection of union rights, ratified by the *Law of 5 February 1958* (*Mémorial No 10 of 27 February 1958, p.47*) rules that *"employees and employers, without any distinction whatsoever being made between them, have the right to form organisations of their choice without prior permission, as well as to join these organisations, on the sole condition that they obey the rules of the organisations"*.

Since the general nature of the wording excludes any distinction based on nationality, foreigners as well as nationals have the right to set up and join professional organisations.

Clearly, this wording would make any limitation on the right to belong to a union for reasons of race, sex or political conviction contrary to the Convention.

In its definition of the status of trade unions, Convention No 87 states that they have the right to draw up their articles of association and administrative rules freely, to elect their representatives freely, to organise their administration and activities freely, and to draw up their action programmes freely.

The Convention prohibits the dissolution or suspension of a professional organisation by administrative procedures.

It requires workers, employers and their respective organisations to keep within the law.

2.2 Freedom of association

The *Law of 11 May 1936* guarantees freedom of association in all areas. Equally, it states that *"no one may be compelled to join an association"*.

The *Law of 11 May 1936* makes it an offence to refuse to employ a person for belonging to a union, as well as to make a contract of employment conditional on not belonging to an association.

It is also a punishable offence to make the implementation or continuation of a contract of employment conditional on not belonging to an association with the aim of undermining the freedom of association as laid down in law.

Finally, the Law makes it an offence to make a person fear losing his job in order to force him not to belong to an association.

1. Law of 18 May 1979 reforming staff delegations, amended by the laws of 3 April 1980 and 3 November 1983.

The Law does not, however, mention the subject of civil penalties applicable in the event of violation of the statutory rules governing the freedom to belong to an association and to carry out an activity within an association.

3. Functions, roles, prerogatives and responsibilities in the private and public sectors

3.1 Employers' and workers' organisations

The law does not provide any definition of an employers' organisation.

However, the *Law of 12 June 1965* on collective agreements recognises as trade unions those occupational groups with an internal structure, and whose aim it is to defend occupational interests and represent their members, as well as to improve their conditions. It is the statutory task of the employers' and trade union organisations to negotiate and enter into collective agreements.

From the employers' side, the collective agreement may be negotiated and signed either by one or several specific employers, or by one or several employers' organisations.

From the workers' side, the Law gives the most representative unions at national level exclusive rights to sign a collective agreement.

The Law thus excludes from collective bargaining sectoral unions, unions at undertaking level, and workforce representatives at undertaking or establishment level.

Unions characterised by their large number of members, their activities and their independence are regarded as being representative at national level.

The periodical tests of representativeness constituted by elections in the social sphere (i.e. election of the chamber of labour, chamber of white-collar employees, or workforce delegations) enable the authority, influence and interest in a union beyond the confines of its members to be ascertained.

At present, only the *OGB-L, LCGB* and *FEP-FIT* are considered to be representative at national level and therefore entitled to negotiate and enter into collective labour agreements.

It should be noted that the *Minister of Labour* is authorised to refuse to register a collective agreement entered into by a union which does not meet the criteria for national representativeness. Any such decision is subject to an appeal to the litigation committee of the *Conseil d'État*.

Case-law is consistent in refusing to grant the status of *"legal person"* to unions which are not constituted in one of the forms laid down in law, notably the *Law of 21 April 1928* on non-profit-making associations and public-benefit organisations.

The Law does, however, grant to unions which are party to a collective agreement the right to take to court, on behalf of a member, any case arising from the agreement, without having to provide evidence of a special mandate.

The Law makes the union's right to go to court conditional on the party concerned being given prior notice and not raising any objection.

Moreover, the Law allows the party concerned to intervene at any stage in proceedings begun by the union on the basis of a provision of the collective agreement.

However, the Law does not grant unions the right to go to court in an action for damages, neither as plaintiff nor defendant.

3.2 Workforce representatives at company level

Over and above the prerogatives granted by law to trade unions in the field of collective bargaining, the union is in close touch with company activities through workforce delegates elected at undertaking or establishment level and workforce representatives on the boards of larger limited companies.

The law acknowledges the right of nationally representative unions to put forward lists of candidates for workforce delegations elections in undertakings.

Thus the law attributes special prerogatives to delegates elected from lists put forward by such unions.

Similarly, delegates elected from such lists have the unrestricted right to post union messages on notice-boards reserved for this purpose.

They have the right to distribute union publications and handouts to the workers employed within the undertaking, on company premises.

Trade union delegates have the right to collect union dues within the establishment.

In establishments which regularly employ 150 or more workers, the law allows the workforce delegations to make use of advisers on specific questions.

These advisers may be members of the undertaking's workforce or outsiders. The delegation chooses the advisers which it intends to use on the basis of proposals from one or all of the nationally representative unions represented within the delegation.

In establishments with fewer than 150 workers, an absolute majority of members forming the delegation may decide to refer specific questions for joint examination by an employers' organisation and the nationally representative unions represented within the delegation.

In undertakings which employ more than 500 workers, the law compels the head of the undertaking to release a certain number of workforce delegates from all work.

Where the number of workers represented by the delegation exceeds 1,500, the law authorises each nationally representative union to appoint one of these delegates directly.

The law gives the workforce delegates the general task of safeguarding and defending the interests of the establishment's employees in terms of working conditions, job security and social status.

Although the law gives workforce delegates a limited role in collective bargaining, in practice the trade union organisations directly involve in negotiations those union delegates who represent them at undertaking or establishment level.

Equally, when a dispute arising from collective bargaining is brought before the *National Conciliation Office*, the special workers' representatives appointed by the unions are chosen from among the workforce delegates for the undertakings or establishments involved in the case.

In contrast to the representative chambers, which form the channel for union action at the level of legislative and statutory procedures and mechanisms, the workforce delegates constitute the channel for union action in support of claims at undertaking and establishment level.

The joint works council, on the other hand, is the forum for cooperation between the undertaking's representatives and the workforce representatives at undertaking level.

The works council is not involved in collective bargaining.

The law gives the works council the power to inform, advise, take joint decisions on certain specific matters, and monitor activities.

3.3 Representative chambers

The *Law of 4 April 1924* setting up representative chambers with an electoral basis gives those chambers an advisory role as part of the procedure of adopting laws and implementing measures.

In more general terms, the representative chambers have a statutory role with regard to safeguarding and defending the interests of the socio-professional category they represent.

Finally, the representative chambers have specific duties as regards implementing and monitoring vocational training, especially apprenticeship training leading to the *Certificat d'Aptitude Technique et Professionnelle (CATP)*. The members of the representative chambers are elected from lists put forward by the employers' and trade union organisations.

The representative chamber is the organisation which enables the employers' and trade union organisations to transpose into legal terms any claims they are making through their claims procedure.

Prior opinions on bills tabled by the government or parliament have to be obtained from the representative chambers concerned.

In addition, the *Cour de cassation* (Court of Appeal) ruled that regular consultation of the representative chambers is an important formality for the validity of a statutory act introduced under the law (12 January 1961, *Pasicrisie* XVIII, p.257; 27 February 1964, *Pasicrisie* volume XIX, p.297; 17 November 1966, *Pasicrisie* volume XX, p.255).

However, the requirement to consult the representative chambers does not affect the validity of a legislative act, since the representative chambers are not constitutional bodies.

Representative chambers may submit draft laws to the government, which the latter must examine and, where appropriate, place before the legislative bodies.

Where appropriate, the government may ask the *Economic and Social Council* to deliver a single coordinated opinion on questions of general interest on which the representative chambers have expressed fundamentally diverging opinions.

The representative chambers do not take any part in negotiating and signing collective agreements, their role being at legislative procedure level, in connection with bills relating to matters of concern to them.

3.4 *Economic and Social Council*

- *General responsibilities/powers*

The *Economic and Social Council* is a governmental advisory body whose task it is to study the economic, financial and social problems affecting either several sectors of activity or the national economy as a whole.

The ESC may make reasoned proposals to the government based on its research.

Matters are referred to the Council at the request of the government or on its own initiative.

- *Legislative or statutory measures of general import (guideline opinion)*

The government may ask for the opinion of the ESC on legislative or statutory measures of general import which it is planning and which affect several occupational groups or the national economy as a whole.

- *Diverging opinions of the representative chambers*

The government may ask for the opinion of the ESC on all matters of general interest and all questions on which the representative chambers have expressed fundamentally diverging opinions. The law requires the Committee to issue a single coordinated opinion in such cases.

- *Annual opinion on the general state of the nation*

The ESC is required by law to draw up an opinion during the first quarter of each year on the economic, financial and social position of the country.

- *ESC links with the Tripartite Coordination Committee*

The government forwards to the ESC the opinions adopted by the *Tripartite Coordination Committee*.

If specifically asked to do so by the government, the ESC draws up its own opinion.

4. Representativeness of the economic and social partners at the various levels (sectoral, regional, national)

There is no regional aspect to the employers' representative structures.

By contrast, the sectoral criterion is in evidence at the level of the representative chambers and the employers' and trade union organisations.

Although the internal structures of the large organisations reflect their representation of employers or workers in different sectors of the economy, at national level they act as integrated structures representing the interests of all their members.

This is also true of the chambers representing employers and workers.

Certain trade union organisations are characterised by the fact that they represent sectoral interests only.

With regard to collective bargaining, only the nationally representative unions are legally entitled to sign collective labour agreements; unions established on a purely sectoral basis are excluded.

Similarly, only nationally representative trade union organisations are part of the institutionalised framework for tripartite dialogue with the government.

The intersectoral representativeness of unions is gauged by means of the periodical tests constituted by ballots to elect workforce delegations, representative chambers and social security system bodies.

At the moment, the unions regarded as being representative at national level are the:

- *Confédération Syndicale Indépendante (OGB-L)* (approximately 33,000 members);
- *Confédération Luxembourgeoise des Syndicats Chrétiens (LCGB)* (approximately 20,000 members);
- *Fédération des Employés Privés - Fédération Indépendante des Travailleurs (FEP-FIT)* (approximately 11,000 members).

5. Functions of the bilateral or trilateral bodies at the various levels

5.1 *Tripartite Coordination Committee*

The *Emergency Law of 24 December 1977* authorising the Government to take measures aimed at stimulating economic growth and maintaining full employment (*Mémorial A 1977*, p.2702 and *Mémorial A 1982*, p.944) set up a *Tripartite Coordination Committee*.

The *Grand-Ducal Decree of 26 January 1978* (*Mémorial A No 9* of 7 March 1978, p.120) appoints as members of the *Tripartite Coordination Committee* four members of the Government, namely the President of the Government (who chairs the committee), the Minister of the National Economy, the Minister of Labour and the Minister of Finance, four employers' delegates (of whom two are appointed by the *Chamber of Commerce*, one by the *Chamber of Trades* and one by the *Chamber of Agriculture*), and four delegates appointed by the most representative trade union organisations at national level, including one representative of State employees.

The statutory task of the *Tripartite Coordination Committee* is to intervene when the economic and social position deteriorates to such an extent as to necessitate measures of general enforcement and national solidarity[2].

The government is obliged to convene the *Tripartite Coordination Committee* without delay in the event of a worsening of the economic and social situation translating in a significant discrepancy in the inflation rate between Luxembourg and its principal trading partners or a deterioration in the competitiveness of Luxembourg companies on the international markets.

In order to assess the critical threshold in a worsening economic and social situation, the government applies the economic indicators laid down in the *Grand-Ducal Regulation of 5 April 1985*[3].

These are as follows:

- the discrepancy between the national rate of inflation and the weighted average rates of Luxembourg's four principal trading partners (Belgium, Germany, France and the Netherlands)
- the actual rate of exchange of the franc weighted by the export and import markets
- trends in exports and imports of goods
- the terms of trade calculated by reference to the unit values of exports and imports
- the competitive position of Luxembourg industry expressed as the wage cost per unit produced
- industrial production prices
- activity indicators for the main economic sectors
- trends in unemployment and short-time working
- trends in the purchasing power of wages.

If it is the government's opinion that the trends in these economic indicators indicate a significant worsening of the economic situation or a deterioration in companies' competitiveness, it is obliged to propose to the *Tripartite Coordination Committee* the legislative and statutory measures it considers necessary to redress the economic situation.

These measures may, depending on the requirements of the particular situation, concern the procedures for implementing the sliding scale, including a temporary limitation on the number and effects of the index brackets, and capping above a certain level of income. They may involve a temporary freezing of price margins on products and services, including rents, and an increase in the period of notice given before redundancies.

The opinion of the *Tripartite Coordination Committee* is based on an assessment of the economic and social situation and on the proposals made by the government with a view to bringing about recovery.

The Committee adopts its opinions on the basis of a majority of the members of each of the groups representing the employers and nationally representative unions.

The government delegation puts forward its view in line with the position agreed within the government council.

If the Committee, after being consulted by the government, fails to reach a majority on the proposals to be put forward, the government may call in a mediator to present to the Committee a reasoned proposal aimed at restoring the economic situation. The mediator must compile an objective file on all the economic and social data relating to the problem put before him and draw out the terms of a solution which will win the support of all the parties.

He may carry out any study or analysis necessary to gather the information he needs to complete the task, in which he is bound by professional secrecy.

2. Law of 24 December 1984 amending:
   a) Article 11 of the amended law of 22 June 1963 establishing the remuneration scale for State civil servants;
   b) the Article of the amended law of 24 December 1977 which authorises the government to take measures aimed at stimulating economic growth and maintaining full employment (*Mémorial A No 114 of 29 December 1984, p.2394*).

3. Grand-Ducal Regulation of 5 April 1985 implementing the measures under Article 21, paragraph 6 of the amended Law of 24 December 1977 authorising the government to take measures aimed at stimulating economic growth and maintaining full employment (*Mémorial A No 28 of 3 June 1985, p.456*).

After trying to reconcile the parties, the mediator puts before the *Tripartite Coordination Committee*, in the form of a reasoned recommendation, proposals aimed at settling the contentious points. The government sets a deadline for this, which may be extended.

The mediator's conclusions and recommendations are submitted to the *Tripartite Coordination Committee*, which then expresses an opinion on them by the deadline set by the government.

The *Tripartite Coordination Committee* adopts its opinions on the basis of a majority of the members of each of the groups representing the employers and nationally representative unions. The government delegation puts forward its view in line with the position agreed within the government council.

Once the procedures for consulting the *Tripartite Coordination Committee* and, where applicable, the mediation procedure are exhausted, the government regains its full prerogatives to initiate legislation and may refer to parliament any legislative measures aimed at restoring the economic situation.

The *Tripartite Coordination Committee* is also called upon to give an opinion on the validity of any request to open negotiations aimed at concluding a collective agreement to reduce production costs in the interest of saving jobs.

The *Emergency Law of 24 December 1977* gives undertakings the option of entering into collective agreements with the unions to reduce production costs with the aim of safeguarding jobs. Such agreements may come into effect before the expiry of the existing collective agreement. This option is restricted to undertakings affected by particularly severe structural or economic difficulties to such an extent that the situation, in economic terms, is one of emergency.

The Law states that such agreements may not derogate, to the detriment of workers, from the minimum standards laid down by the laws and regulations governing working conditions and the protection of employees.

The undertakings which are permitted to enter into such agreements are those which can show they have implemented internal measures to combat unemployment and underemployment and can prove they have already requested and been granted application of the arrangements for short-time working or extraordinary work in the common interest.

The *Tripartite Coordination Committee* is called upon to assess and deliver an opinion on the justification for any request to start such negotiations.

The Law makes the implementation of such an agreement conditional upon ratification by the Minister of Labour, who ensures that the procedures have been complied with.

Under the terms of the *Law of 28 March 1987* on early retirement, the Tripartite Coordination Committee is called upon to deliver an opinion prior to the introduction of the early-retirement adjustment model for companies employing at least 150 workers.

5.2 Tripartite conferences

Apart from the institutionalised dialogue structure represented by the *Tripartite Coordination Committee*, the government and social partners meet periodically in a larger group known as the *General Tripartite Conference*.

The agreements on the restructuring and modernisation of Luxembourg's iron and steel industry were reached by the *Tripartite Conference on the Iron and Steel Industry*.

5.3 Other tripartite bodies

The employers' and trade union organisations are represented within other tripartite institutions, including the:

- *Comité de conjoncture* (Committee on the Economy), which is required by the law to give a prior opinion on the eligibility of the various sectors of the national economy for aid from the employment fund to maintain jobs through short-term working;
- *Commission nationale de l'emploi* (National Employment Commission), set up to assist the Minister of Labour and advise the government on the drafting and implementation of employment policy;
- *Comité du travail féminin* (Committee on Female Employment);
- *Conseil national de l'immigration* (National Immigration Council), the task of which is to examine all problems relating to immigrant workers;
- *Comité permanent de surveillance des effectifs de la sidérurgie* (Standing Committee for the Monitoring of Steel Industry Workers), the task of which is to study the change in the numbers employed in the iron and steel industry and to coordinate forward-looking measures with a view to redeploying surplus workers from that industry in other sectors of the economy.

6. National administrations and government institutions as socio-political actors and employers

The government does not intervene at any stage in the negotiation and conclusion of collective labour agreements.

In the event of the *National Conciliation Office* being called upon, the Minister of Labour, who is president of the Office, delegates his powers to a deputy-president. This practice illustrates the government's refusal to become involved in collective bargaining in any way.

The *Emergency Law of 24 December 1977* permitting the government to take measures aimed at stimulating economic growth and maintaining full employment, as amended by the *Law of 5 March 1980* (see coordinated text of 5 March 1980, *Mémorial A No 26 of 21 April 1980, p.440*), states that the implementation of any collective agreement reducing production costs in the interests of safeguarding jobs is subject to prior ratification by the Minister of Labour.

Moreover, before the start of any such negotiations the *Tripartite Coordination Committee* must express an opinion on whether negotiations are justified.

In actual fact, neither the *Tripartite Coordination Committee* nor the Minister of Labour were called to intervene at any time during the crisis years.

The contractual measures designed to reduce production costs in the interest of safeguarding jobs were all adopted without recourse to the mechanisms and procedures established for this purpose by the *Emergency Law of 1977*.

As an employer, the government enters into agreements with the unions on conditions of employment and pay applicable to civil servants, white-collar employees and blue-collar workers employed by the State.

With respect to civil servants and white-collar employees, the government negotiates and concludes, with the *Confédération Générale de Fonction Publique (CGFP)*, so-called collective agreements establishing conditions of pay and employment for a period of several years.

However, such agreements are not genuine collective labour agreements within the meaning of the law on collective labour agreements covering employees in the private sector. They can be more accurately described as a manifestation of the political commitment made to the union representing public-service employees. Through this commitment, the government undertakes to put before the legislature a bill transposing into law the commitments made with respect to pay and working conditions.

By contrast, the government concludes with the unions representing blue-collar workers employed by the State collective agreements governed by the *Law of 12 June 1965* on collective agreements.

CHAPTER II: INSTRUMENTS: THE SOURCES OF THE RULES GOVERNING WORKING CONDITIONS

1. Constitutional law and social prerogatives

The *Constitution* expressly guarantees the right to work. *Article 11, paragraph 4* states that *"the law shall guarantee the right to work and secure for all citizens the exercise of this right"*.

Secondly, the *Constitution* states in *paragraph 5* of *Article 11* that *"the law shall organise social security, health protection and time off for workers and shall guarantee union freedoms"*.

Finally, *Article 11 paragraph 6* requires the law to *"guarantee the freedom of trade and industry and the exercising of liberal professions and agricultural work, with the exception of the restrictions to be established by the legislative power"*.

2. Legislation

Apart from *Articles 1779* and *1780* of the *Civil Code*, which concern the contract of employment, the fundamental principles governing conditions of employment are laid down in ordinary legislation. There is no labour code as such.

The body of laws governing conditions of employment may be schematised as follows:

- *Legal framework for the contract of employment*:
  - *Law of 24 May 1989 on the contract of employment*;
  - *Law of 7 June 1937*, as subsequently amended (cf. coordinated text of 1 June 1981), making it a legal requirement to provide private-sector white-collar employees with a contract of employment;
  - *Law of 26 February 1993 on voluntary part-time work*;
  - *Law of 19 May 1994 regulating temporary work arranged through an agency and the temporary loan of labour*.
- *Legal framework for the collective labour agreement*
  - *Law of 12 June 1965 on collective labour agreements*.
- *Minimum employment standards*
  - Duration of working time:
    - * *Law of 11 August 1996* amending: (1) the *Law of 9 December 1970 reducing and regulating the length of working time for workers in the public and private sectors of the economy*; (2) the amended *Law of 7 June 1939 on the reform of the Law of 31 October 1919 requiring private-sector white-collar employees to be provided with a contract of employment*;
    - * *Articles 7 to 10 of the Law of 28 October 1969 on the protection of children and young workers*.
- *Work and time off on Sundays*
  - *Law of 1 August 1988 regarding weekly rest for white-collar and blue-collar workers*.
- *Work and time off on statutory public holidays*
  - *Law of 10 April 1976 reforming the regulations on statutory public holidays*.
- *Paid leave*
  - *Amended law of 22 April 1966 on the standardised regulation of annual paid leave for employees in the private sector*.
- *Sport leave*
  - *Law of 26 March 1976 on physical education and sport*.
- *Study leave*
  - *Law of 4 October 1973 instituting study leave*.
- *Cultural leave*
  - *Law of 12 July 1994 instituting cultural leave*.
- *Political leave*
  - *Grand-Ducal regulation of 6 December 1989 on political leave for mayors, aldermen and municipal councillors*, as amended by the *Grand-Ducal regulation of 19 April 1994*.
- *Leave for voluntary fire, rescue and other emergency service workers*
  - *Law of 24 April 1994 instituting leave for voluntary fire, rescue and other emergency service workers*.
- *Night work*
  - *Law of 28 October 1969 concerning adolescents*.
  - *Law of 3 July 1975 concerning women*.
- *Remuneration*
  - Minimum wage
    - * Amended *Law of 12 March 1973 reforming the minimum wage*.
  - Sliding scale of wages and salaries:
    - * *Law of 27 May 1975 giving general currency to the sliding scale of wages and salaries*.
  - Attachment and assignment of remuneration:

  - * *Law of 11 November 1970 on the attachment and assignment of wages, pensions and annuities.*
  - Equal pay for men and women:
    - * *Law of 8 December 1981 on equal treatment of men and women with regard to employment conditions and access to employment, training and promotion.*
- *Representative structures for the workforce at undertaking level*
  - Workforce delegates:
    - * Amended *Law of 18 May 1979 on the reform of workforce delegations.*
  - Joint works councils:
    - * *Law of 6 May 1974 setting up joint councils in private-sector undertakings and organising workforce representation in limited companies.*
  - Workforce representation on the boards of limited companies:
    - * *Law of 6 May 1974* referred to above.
- *Working conditions for special categories of employees*
  - Disabled workers:
    - * *Law of 12 November 1991 on disabled workers.*
  - Women:
    - * *Law of 3 July 1975 on maternity protection for working women.*
  - Children and adolescents:
    - * *Law of 28 October 1969 on the protection of children and young workers*, amended by the *Law of 30 July 1972* (coordinated text of 10 November 1981).

3. Grand-Ducal regulations

Under the terms of *Article 36* of the *Constitution*, *"the Grand Duke makes the necessary regulations for the execution of laws".*

This power is part of the overall executive power exercised by the Grand Duke under *Article 33* of the *Constitution.*

A Grand-Ducal regulation is subordinate to the relevant law and may do nothing other than implement it. It may neither extend, restrict nor modify it. In other words, a regulation ranks lower than a law.

The *Constitution* does not grant the courts the power to annul regulations which are contrary to the law. By stating that *"the courts and tribunals shall apply decrees and general and local regulations only in so far as they are consistent with the law", Article 95* of the *Constitution* ensures an additional control on the legality of regulations.

A regulation which is rejected as illegal remains on the statute books but has no force in law.

Article 37 paragraph 4 of the *Constitution* assimilates the implementation of international treaties with the implementation of laws, in terms of both form and effects.

The *Constitution* actually stipulates that the Grand Duke makes the necessary regulations for the implementation of treaties, in the forms laid down by the measures for implementing laws.

The *Constitution* lists a series of provisions which reserve specific matters to legislation.

On the whole these are particularly sensitive matters relating to fundamental liberties or of special importance for the functioning of the State.

The matters which the *Constitution* specifically excludes from being the subject of a formal law include the right to work (*Article 11 paragraph 4*), the organisation of the social security system, the organisation of health protection and the arrangements for rest for workers, as well as the guarantee of union freedoms (*Article 11 paragraph 5*).

In practice, the preserve of the law is interpreted in such a way that the constitutional requirements are met if the law confines itself to setting out the main principles, leaving detailed implementation to the regulatory authority.

The practice of authorisations, which dates back to the First World War, has become standard practice for matters which the *Constitution* does not stipulate as being the preserve of legislation.

Grand-Ducal regulations associated with enabling legislation are subject to a special procedure. The opinion of the *Conseil d'État* and the approval of the *Parliamentary Commission on Employment* must be sought. This Commission is composed of representatives from the different parliamentary groups, which have weighted voting rights proportional to the size of the group they represent. In other words, an enabling regulations now constitutes a simplified legislative procedure.

With regard to their effects, enabling regulations are assimilated to ordinary regulations and classified as *"decree laws".* They may derogate from existing laws.

The most recent enabling legislation, the *Law of 23 December 1987* empowering the Grand Duke to make regulations on certain matters (*Mémorial 1987, p.2821*), allows public administration regulations to be adopted in urgent cases, even if they derogate from existing legal provisions, with regard to measures of an economic and financial nature.

4. The collective labour agreement

The *Law of 12 June 1965* lays down the legal framework for the collective labour agreement.

It defines the collective labour agreement as a contract governing employment relations and general working conditions.

The role of collective agreements has become crucial, as they cover 60% of the active working population.

Sectoral collective agreements account for just over half the total number of employees covered by a collective agreement. Company collective agreements account for the other half.

Collective agreements are not confined to pay conditions for the workers covered. They deal with employment conditions as a whole, as well as the organisation of industrial relations within the undertaking.

Whilst the content of a collective agreement, generally speaking, is for the parties to decide, the Law does list a certain number of clauses which must be included.

These include bonuses for arduous, dangerous or unhealthy work and procedures for enforcing the principle of equal pay for men and women.

A collective agreement must also provide for night work bonuses, which may not be less than 15%.

Prior to the *Law of 1975*, which gave general currency to the sliding scale of wages and salaries, a collective agreement had to contain a sliding scale clause ensuring that the pay would be adapted to changes in the weighted cost-of-living index according to the methods applicable to public-sector pay rates.

The *Law of 12 June 1965* (*Article 8 paragraph 2*) states that *"where the employer is bound by the clauses of a collective agreement, the provisions of such agreement will apply to labour relations and employment conditions in respect of all members of his workforce"*.

It is therefore sufficient for the employer to be bound by a collective agreement for it to be applicable to all the undertaking's employees, regardless of whether their contract is dated before or after the date of implementation of the agreement in the undertaking.

A collective agreement also applies to those employees within the undertaking who are not members of a trade union organisation which is party to the agreement.

The undertaking may be a direct party to a collective agreement at undertaking level, negotiated and signed by the head of the undertaking.

It may equally find itself subject to a sectoral agreement because it belongs to an employers' organisation which is party to that agreement.

Finally, the Law states that an agreement is equally binding on the undertakings which subscribe to it and those which ratify it.

The *Law of 12 June 1965* states that any collective agreement may be declared to be of general application *"to all employers and workforce within the profession"* for which it was concluded.

The Law allows the government to use a Grand-Ducal regulation to declare that a collective labour agreement is of general application.

Extension of a collective agreement is subject to two conditions: that it is based on a proposal agreed to by both the permanent members and the special members of the employers' and employees' groups in the *National Conciliation Office*, and that the appropriate representative chambers have been consulted regarding the proposed extension.

A Grand-Ducal regulation declaring that a collective agreement is of general application is published in the *Mémorial*, together with the collective agreement which is the subject of the general declaration. The regulation takes effect eight clear days after it has been published in the *Mémorial*, unless otherwise specified.

The Law grants the government the right to revoke a Grand-Ducal extension regulation.

The concept of an agreement at undertaking level only recently became a source of labour law.

The *Emergency Law of 24 December 1977* allows special collective agreements to be entered into with the aim of reducing production costs in the interest of saving threatened jobs.

The *Law of 1 August 1988 on Sunday work and rest* introduces the concept of the special agreement at undertaking level providing for continuous shift working in order to make production more efficient.

In both these cases, the law restricts the legal power to make such agreement to unions which are representative at national level.

In practice, special collective agreements have the same effects as the collective labour agreement with which they are associated, where applicable.

5. The role of the courts: court and constitutional case-law

Labour courts may not constitute a source in the field of labour law, since *Article 5* of the *Civil Code* forbids judges to *"give verdicts by means of general and regulatory measures on the cases placed before them"*.

In law, court decisions have no authority against the parties in dispute and do not create a legal standard.

However, case-law, particularly from the *Cour Supérieure de Justice* (courts of appeal), does in practice make a significant contribution to the formation of legal standards regarding employment.

Case-law plays a vital role in the implementation of laws governing working conditions. It is published in the *Pasicrisie Luxembourgeoise*.

There is no constitutional case-law.

On the one hand, in accordance with firmly established case-law, the courts do not check that laws are constitutional (*Cour de Cassation* 14.8.1877, *Pasicrisie* volume I, p.370; *Cour de Cassation* 24.4.1879, *Pasicrisie* volume I, p.534; *Conseil d'Etat* 3.1.1883, *Pasicrisie* Volume II p.174; *Cour de Cassation* 13.5.1954, *Pasicrisie* volume XIV p.99; *Conseil d'Etat* 4.8.1962, *Pasicrisie* volume XIX p.7).

On the other hand, there is no constitutional court to ensure that laws are constitutional.

At present, the question of whether to establish a constitutional court is a topical subject in connection with the debate which has been opened at the request of the government, on a possible reform of the *Constitution*.

6. Custom

Custom, which is recognised by the *Civil Code* (*Articles 1135, 1159 and 1160*) with regard to the interpretation of contracts, plays a minor role in the implementation of labour laws. There is no labour law which refers to the custom and practice of the profession.

The concept of constant practice in undertakings is taken into account by employment courts as a legal source in connection with bonuses or thirteenth month payments.

7. International law and its regulatory effect at national level

Labour law is influenced by measures adopted within the framework of international organisations such as the Council of Europe, the *International Labour Organisation* and the *European Community*.

Case-law confirms the preeminence of international law over national law.

It tends to interpret national law in such a way as to achieve consistency with the requirements of international agreements (*Cour de cassation*, 13 June 1890, *Pasicrisie* volume II, p.621).

Secondly, case-law makes international law prevail over national law, even retrospectively, where it considers that the treaty has a more valid basis than that applied by an internal body. (*Cour (cassation criminelle)* 8 June 1950, *Pasicrisie* volume XV, p.41; *Cour (appel correctionnel)* 21 July 1951, *Pasicrisie* volume XV, p.232; *Conseil d'Etat*, 28 July 1951, *Pasicrisie* volume XV, p.263; *Cour (cassation criminelle)* 14 July 1954, *Pasicrisie* volume XVI, p.150).

7.1. Bilateral treaties

Bilateral treaties signed with the Republic of Portugal and the Socialist Federal Republic of Yugoslavia define the position of immigrants employed in Luxembourg.

7.2 *United Nations*

The standards adopted by the *United Nations* include the *International Covenant on Economic, Social and Cultural Rights*, which contains a certain number of clauses on labour law and was ratified by the *Law of 3 June 1983* (*Mémorial A No 41 of 9 June 1983, p. 956*).

This same Law also approved the *International Covenant on Civil and Political Rights of 19 December 1966*, as well as the *Optional Protocol to the International Covenant on Civil and Political Rights*, signed on the same date.

7.3 *International Labour Organisation*

Luxembourg has ratified 55 ILO conventions (*cf. Annex*).

7.4 *Council of Europe*

The standards adopted by the *Council of Europe* include the *Convention for the Protection of Human Rights and Fundamental Freedoms* signed in Rome on 4 November 1950, and ratified by Luxembourg by the *Law of 29 August 1953* (*Mémorial No 53 of 29 August 1953, p.1099*).

The *Law of 29 March 1958* authorised the government of Luxembourg to recognise as an obligatory right the right of individual appeal provided for in *Article 25* of the *Convention* (*Mémorial No 20 of 10 April 1958, p.441*).

The *European Social Charter* has not yet been the subject of a law of approval. A bill has however been under consideration by parliament since 24 April 1977 (*Parl. Doc. 2084*).

The *European Convention on the Legal Status of Migrant Workers*, presented for signature to the member countries of the *Council of Europe* on 24 November 1977, has not yet been ratified by Luxembourg.

7.5 *European Community*

The effect of Community law on labour law is particularly apparent in the field of equal treatment for men and women with regard to pay.

The Grand-Ducal *Regulation of 10 July 1974*, which is based on both *Article 119* of the *Treaty of Rome* and ILO *Convention No 100*, compels all employers to provide equal pay for men and women for the same work or for work of equal value (*Mémorial A No 56 of 22 July 1974, p. 1275*).

The application of *Article 4* of *Directive No 75/117/EEC of 10 February 1975* to private-sector employees led to a major case with regard to the family allowances granted under certain collective labour agreements. A court ruling of 21 April 1982 (*SA Bank M.M. Warburg-Brinckmann, Wirtz International v. Francine Zanardi*), subsequently confirmed by a series of court rulings of 17 January 1984 and by a ruling of 2 May 1985 (*Banque Nationale de Paris v. Stoffel, Pasiscrisie 1986, p. 273*), dealt with the question of the applicability of *Article 119* of the *Treaty of Rome*, which applies directly to any form of direct and overt discrimination without Community or national measures being necessary to ensure its implementation. Similarly, the head of family allowance granted to State civil servants gave rise to a major case.

In a decision of 10 July 1981 (*Catherine Scheitler v. Minister of the Public Service*), the *Conseil d'Etat* had ruled that *Article 119* of the *Treaty of Rome* had imperative force in that it was the duty of the national courts to ensure protection of the rights conferred by this provision by suspending the application of all provisions of national law which were contrary to the Treaty.

A judgment by the *Court of Justice of the European Communities of 9 June 1982* (*Case 58/81, Commission of the European Communities v. Luxembourg*) had stated that Luxembourg had failed to fulfil its obligations by not taking the necessary measures within the timescale laid down in *Directive* 75/117/EEC to eliminate discrepancies in the conditions for the granting of head of family allowances to persons in the public service.

The *Law of 20 May 1983* was passed to correct the situation by replacing the head of family allowance by a family allowance and by conferring the right to this allowance on all civil servants who are married and not separated.

Council Directive 76/207/EEC of 9 February 1976 was transposed into Luxembourg law by the Law of 8 December 1981 on equal treatment for men and women with regard to employment conditions and access to employment, training and promotion.

Council Directive 75/129/EEC of 17 February 1975 on the approximation of Member States' legislation on collective redundancies was transposed into national law by the *Law of 2 March 1982 on collective redundancies* (*Mémorial A No 12 of 12 March 1982, p.338*) and amended by the *Law of 23*

July 1993 introducing various measures to promote employment .

Council Directive 77/87/EEC of 14 February 1977 on the approximation of Member States' legislation on maintaining workers' rights in the event of transfers of undertakings, establishments or parts of establishments was transposed by the *Law of 18 March 1981 (Mémorial A No 16 of 26 March 1981, p.277)*.

Finally, *Council Directive* 80/987/EEC of 20 October 1980 on the approximation of Member States' legislation on the protection of employees in the event of the insolvency of their employer was transposed into Luxembourg law by means of *Article 19* of the amended *Law of 24 December 1977* authorising the government to take measures aimed at stimulating economic growth and maintaining full employment.

8. Conflict of rules and hierarchy of sources

Whatever their source, all legal standards are equally binding and may give rise to court proceedings.

The hierarchy of sources may be schematised as follows:

1. The *preeminence of international law* over national law.
2. The *preeminence of the Constitution* over all other national legal norms. In cases of dispute, the Constitution takes precedence over any other conflicting legal standards. However, in accordance with established precedents, the courts refrain from checking that laws are constitutional, taking the view that the principle of the separation of powers must oppose the interference of the judiciary power in the legislative power.
3. The *preeminence of the law*. Although subordinate to the Constitution, laws prevails over every other source of national legislation. In the field of employment conditions, laws lay down binding minimum thresholds from which neither an individual employment contract nor a collective agreement may derogate. Most laws on the regulation of employment conditions specifically state that any conflicting provisions are invalid. The same is true with regard to length of working time, paid leave, rest and work on Sundays, public holidays and maternity protection. The same also applies to the contract of employment. With regard to the minimum wage, the *Law of 12 March 1973* reforming the minimum wage states that the minimum rates of pay laid down by the law are binding on employers and may not be reduced by them, either by individual agreement or by collective labour agreement. The *Law of 27 May 1975* giving general currency to the sliding scale of wages and salaries makes it compulsory to index-link pay to changes in the cost of living.
4. *Grand-Ducal regulations* are subordinate to laws, whilst constituting a means of implementing them. However, a Grand-Ducal regulation based on enabling legislation may derogate from existing laws in as far as the enabling legislation specifically provides for this.
5. *Preeminence of written law over custom*. Custom may only have a subsidiary character, and customs may not be created or maintained against laws or implementing measures.
6. Preeminence of law from a public source over law from a professional source. A collective agreement may not derogate from the standards laid down by the law with respect to conditions of employment and pay. Most labour laws specifically provide for the possibility of derogations by the social partners to the advantage of employees, through a collective agreement.
7. *The employment relationship in the framework of different sources of regulation.* The *Law of 12 June 1965 on collective agreements (Article 11, paragraph 2)* lays down the rule of automatic applicability of a collective agreement, declaring null and void any provision of an individual contract of employment which is contrary to the provisions of the collective agreement. In other words, a contract which derogates from the collective agreement remains valid as a contract, but any provisions which conflict with those of the collective agreement are invalid and are replaced by those of the collective agreement. The law does, however, qualify the automatic rule and the submission of an individual contract to the collective agreement by allowing the parties to a contract of employment to make derogations from the collective agreement to the advantage of the employee. In other words, where a standard is laid down by the law or by the regulation implementing the law, an individual contract of employment may not derogate from it, except to the advantage of the employee. Where a minimum standard is laid down by the law, a collective labour agreement may only derogate from it to the advantage of employees. It goes without saying that in such cases an individual contract of employment may only derogate to the advantage of the employee as compared with the minimum standard laid down by the collective labour agreement.

CHAPTER III: ACTION IN SUPPORT OF CLAIMS, AND METHODS OF RESOLVING CONFLICTS: MAIN POINTS OF CONFLICT

Individual legal actions go before the labour court.

Collective disagreements are subject to extra-judiciary procedures.

The statutory task of the Labour Inspectorate is to anticipate and iron out all employment conflicts which do not come under the area of competence of the *National Conciliation Office*.

Luxembourg law makes a distinction between individual and collective legal action, although it does not provide definitions of these two concepts.

It makes provision for the peaceful settlement of collective labour disputes.

Thus, the Grand-Ducal *Decree of 6 October 1945* gave the *"interested parties"* the right to bring before the *National Conciliation Office* any *"collective disagreement relating to working conditions in one or several undertakings"*.

If the initiative is not taken by the interested parties, the law authorises the *National Conciliation Office* to *"concern itself with any collective dispute brought to its attention"*.

Conflicts arising at the time of the conclusion, revision or renewal of a collective agreement constitute collective cases, where the issue is not one of interpreting existing law but of creating a new rule.

The *Law of 12 June 1965 on collective agreements* permits referral to the *National Conciliation Office* where an employer refuses to enter negotiations with a view to concluding a collective agreement or if, during negotiations, the parties are unable to reach agreement on one or several fundamental points of the envisaged collective agreement. In this case, the law permits the parties, after or even before the failure of attempts at conciliation, to refer the matter to one or several arbiters.

Finally, the law describes as a collective conflict likely to lead to the conciliation or arbitration procedure before the *National Conciliation Office* all disputes arising from a difference between the employer's and workers' representatives on the joint works council on the subject of one of the measures falling under the council's jurisdiction (see *Article 16 paragraph 2* of the *Law of 6 May 1974* instituting joint works councils in private-sector companies and organising employee representation in limited companies).

The *Law of 12 June 1965* gives trade union organisations which are party to a collective agreement the right to bring before the employment courts any case arising from this agreement, on behalf of one of their members, without having to produce a mandate from the person concerned, provided the latter has been notified and has not objected. Similarly, the law gives a trade union organisation bound by a collective agreement the right to intervene at any time in a legal case begun on the basis of this agreement by an employee *"owing to the collective interest the resolution of the dispute may hold for its members"*.

If legal action is taken by a trade union organisation, this does not necessarily cause the dispute to lose its individual character, since the presence of a collective interest is not enough to give the case the collective nature required to start extra-judiciary measures for the peaceful settlement of collective labour disputes.

Despite the possible collective interest to all workers covered by a collective agreement, the law bestows on labour courts special jurisdiction to hear specific cases involving the interpretation of the provisions of a collective labour agreement.

1. The different types of strike and lock-out and their relative importance

1.1 The right to strike

The right to strike is not laid down explicitly either by the *Constitution* or in law.

Its derived from a broad interpretation of the judicial origins of the principle of union freedom laid down in *Article 11 paragraph 5* of the *Constitution* (revision of 21 May 1948), which stipulates that the law *"shall guarantee trade union freedom"*.

The *Constituante* of 1948 did not consider it necessary to include the right to strike among the rights laid down specifically by the *Constitution*, while considering this right as *"one of the attributes, a corollary of union freedoms"*.

Meanwhile, the *Cour de Cassation*, on 24 July 1952 (*Pasicrisie* volume XV p.355), ended the legal controversy regarding the right to strike by ruling that *"participation in a legitimate and lawful strike is an employee's right, laid down implicitly in Article 11, paragraph 5 of the Constitution"*.

However, in an authoritative opinion on the right to strike, the *Procureur Général de l'Etat*, after finding that the *Constitution* was definitive only in terms of trade union freedom, concluded that *"it must nevertheless be recognised that it also confirms the right to take trade union action, since without that right trade union freedom would be meaningless"*.

The law does not define a strike.

A ruling of the *Cour de Cassation* of 15 December 1959 (*Pasicrisie* volume XVIII p. 90) defines a strike as *"a concerted stoppage of work in support of social claims"*.

In his conclusions preceding the 1959 ruling, the *Procureur Général* expressed the view that to be *"justified in principle, a strike must pursue an economic aim, since political strikes have a revolutionary character, and one does not strike against the law"*.

In a declaration adopted on the occasion of the constitutional revision of 1956, parliament supported this approach by declaring that *"the guarantee of union freedoms contained in the Constitution of Luxembourg includes the right to strike to protect the legitimate social demands of workers"*.

Although the right to strike is not contained explicitly in the *Constitution*, the law nevertheless defines the conditions under which the right to strike may be exercised, as well as the effects of exercising the right to strike on industrial relations.

On the one hand, the law makes it an offence to incite a work stoppage without having first referred the matter to the *National Conciliation Office*.

On the other hand, the laws governing employment contracts of blue-collar and white-collar workers specifically state that *"if a worker refrains from providing his services because of a strike which is called under legitimate and lawful conditions, this does not break the contract and does not constitute a serious matter entitling the employer to dismiss him"*.

Finally, the *Law of 12 June 1965 on collective agreements* imposes on a union party to a collective agreement the obligation to refrain from threatening or conducting a strike.

The *Law of 16 April 1979* governs the right to strike of State civil servants and employees of public establishments under direct State control. The legitimacy of strikes in the public service is conditional on the failure of a compulsory conciliation procedure before a conciliation commission. The Law, however, does not grant the right to strike to members of the government, special envoys and plenipotentiary ministers, legation advisers, other diplomatic agents if they occupy the position of head of mission in a foreign posting, magistrates,

heads of administration and their deputies, directors of educational establishments and their deputies, the staff of court and prison establishments, members of the armed forces and forces of law and order, medical and paramedical staff of the emergency services, security agents, and staff responsible for security in state departments.

1.2 The right of lock-out

The right of lock-out is mentioned in passing by the *Law of 12 June 1965 on collective agreements*, imposing on an employer who is party to a collective agreement the obligation to refrain from threatening or implementing a lock-out.

This ties in with a broad interpretation of the concept of *"work stoppage"* as used in the texts governing the prior conciliation procedures, by including the right of the employer to apply a lock-out.

Neither legislation nor case-law say anything on the subject of what determines whether a lock-out is legitimate, or on the legal effects of a lock-out on the employment contracts of strike *"outsiders"*.

2. Methods of resolving disputes: structure and appeal

2.1 *The National Conciliation Office*

The *National Conciliation Office* was set up by the Grand-Ducal *Decree of 6 October 1945* (*Mémorial of 15 October 1945, p. 731*) and is presided over by the Minister of Labour or his delegate.

It is composed of permanent members and special members.

The permanent members are three employers' representatives appointed by the employers' organisations and three workers' representatives appointed by the trade union organisations which are representative at national level.

For each case, special members are appointed by the employers' organisations and the trade union organisations.

The task of the *National Conciliation Office* is to bring together the parties concerned to settle collective disputes. In particular, the law gives it the task of reconciling the parties concerned when collective agreements are to be concluded or renewed.

In practice, the Office has the power to intervene if the employer refuses to negotiate or in the event of failure to agree on the basis of a collective agreement.

Disputes brought before the *National Conciliation Office* are settled by agreement between the employers' and workers' groups.

Settlements reached within the *National Conciliation Office* may be declared generally binding.

If the President of the Office considers that the means of conciliation have been exhausted, he draws up a statement of non-conciliation, indicating the contentious points.

The conciliation process before the *National Conciliation Office* is obligatory.

The law makes it an offence to incite a stoppage of work without the prior intervention of the *National Conciliation Office*.

2.2 The arbitration council

In the event of non-conciliation, the parties concerned may ask the government to refer the case to an arbitration council.

The arbitration council comprises a representative appointed by the government, a employer appointed by the employers' organisations, and an workers' representative appointed by the trade union organisations.

Acceptance of the arbitration decision by the parties in dispute is equivalent to entering into a collective agreement.

The arbitration decision may be the subject of a declaration to the effect that it is generally binding.

The parties in dispute may refuse to accept the arbitration decision, which may be published if this is believed to be in the common interest or with the aim of resolving the dispute.

2.3 Arbitration according to the civil code of procedure

The *Law of 12 June 1965* on collective agreements explicitly states that the parties in dispute may at any time ask one or several arbiters to resolve their dispute after or even prior to an attempt at conciliation.

In this event arbitration is carried out on the basis of the rules of the *Code of Civil Procedure* (*Articles 1033 et seq.*).

CHAPTER IV: THE NATIONAL SITUATION IN AN INTERNATIONAL CONTEXT

Basic characteristics of the national arrangements for the regulation of working conditions

The law and its regulatory means of implementation form the main vehicle for normative action in the field of working conditions.

The legislature lays down the legal framework for the individual employment contract and the collective agreement.

Working conditions are covered by minimum standards laid down by law.

The legislator establishes the minimum wage to which anyone in employment is entitled, and also provides an assurance that wages and salaries will be automatically index-linked to changes in the consumer price index, in the same way for all employees in the public and private sectors.

The law organises the representation of employees at undertaking level and at board level in limited companies.

However, the existence of legal standards governing all aspects of labour law has not hampered the development of contractual law in the form of the collective agreement, since standards of contractual origin are supplementary to statutory standards.

On the one hand, the collective agreement constitutes the social partners' priority wage policy tool, since the law confines itself to stipulating the minimum wage and guaranteeing purchasing power by means of the sliding scale mechanism.

On the other hand, the development of agreement-based standards has led to a certain number of fundamental changes in employment legislation, notably in the direction of the statutory reduction of working hours.

It cannot be denied that the collective agreement has become a powerful factor in good industrial relations and constitutes one of the decisive elements in the country's economic and social upturn.

The institutionalised mechanism of dialogue through the *National Conciliation Office* has played a major role in the development of collective agreements by introducing bases for consensus between the social partners and defusing potential labour disputes. Strike action has remained sporadic and of limited extent.

The government is aware of the need to respect the autonomy of the social partners and therefore refuses to become involved in collective bargaining.

However, the economic crisis led the government to put at the disposal of the social partners, through the *Emergency Law of 1977*, the means of reducing production costs by collective agreement in the interest of saving jobs. The social partners made only marginal use of this possibility.

Similarly, between 1981 and 1984 the government persuaded parliament to adopt a series of changes to the sliding scale mechanism for wages and salaries. Indexing has, however, been fully re-established since 1 January 1985.

The government, nevertheless, is aware of the risks which a deterioration in the economic and social situation would present for Luxembourg's economy and has therefore entrusted the *Tripartite Coordination Committee* with the vital task of identifying the measures considered necessary, in the event of an manifest crisis, to bring about economic recovery.

Although one of the measures of national solidarity referred to by the law is the suspension of indexing, as well as the freezing of margins on products and services, the general nature of the terms used by the law makes it possible, where appropriate, to consider other drastic measures appealing to national solidarity.

It is essential to note that the mechanism of tripartite dialogue between the government, employers and trade unions, followed if necessary by mediation, do not restrict the government's freedom of initiative and action in the event of failure to reach a final consensus on the measures to be taken.

The unions consider the system to be appropriate in that, in their opinion, it provides the best guarantee for the harmonious development of industrial relations while offering the flexibility which is vital for the adoption of the necessary measures to combat crisis situations.

By contrast, the employers consider the mechanism to be inefficient, as it gives the government too much latitude and does not come into operation automatically.

The development of normative action by legislative means is currently the subject of considerable controversy between employers' representatives and unions.

The employers are hostile to any new statutory measures relating to working conditions and are calling for the removal of the inflexibility which hampers the functioning of the employment market.

The unions, on the other hand, continue to regard normative action as a vital element of a policy of social progress, while believing that a policy based on collective agreements offers the social partners the essential freedom needed to be able to take account of the potential of the different branches of the national economy.

The debate on the reform of the laws on dismissal and on the regulation of temporary work as envisaged by the government is a perfect example of the extent of the controversy.

ILO CONVENTIONS RATIFIED BY LUXEMBOURG

Convention No 1:	Hours of work (industry)
Convention No 2:	Unemployment
Convention No 3:	Maternity protection (convention revised by a subsequent convention)
Convention No 4:	Night work (women) (denounced by Luxembourg)
Convention No 5:	Minimum age (industry) (denounced as a result of the ratification of a revised convention)
Convention No 6:	Night work of young persons (industry)
Convention No 7:	Minimum age (sea) (denounced as a result of the ratification of a revised convention)
Convention No 8:	Unemployment indemnity (shipwreck)
Convention No 9:	Placing of seamen
Convention No 10:	Minimum age (agriculture) (denounced as a result of the ratification of a revised convention)
Convention No 11:	Right of association (agriculture)
Convention No 12:	Workmen's compensation (agriculture)
Convention No 13:	White lead (painting)
Convention No 14:	Weekly rest (industry)
Convention No 15:	Minimum age (trimmers and stokers) (denounced as a result of the ratification of a revised convention)
Convention No 16:	Medical examination of young persons (sea)
Convention No 17:	Workmen's compensation (accidents)
Convention No 18:	Workmen's compensation (occupational diseases)
Convention No 19:	Equality of treatment (accident compensation)
Convention No 20:	Night work (bakeries)
Convention No 21:	Inspection of emigrants
Convention No 22:	Seamen's articles of agreement
Convention No 23:	Repatriation of seamen
Convention No 24:	Sickness insurance (industry)
Convention No 25:	Sickness insurance (agriculture)
Convention No 26:	Minimum wage-fixing machinery
Convention No 27:	Marking of weight (packages transported by vessel)
Convention No 28:	Protection against accidents (dockers)
Convention No 29:	Forced labour
Convention No 30:	Hours of work (commerce and offices)
Convention No 42:	Workmen's compensation (occupational diseases) (revised) (denounced as a result of the ratification of a revised convention)
Convention No 45:	Underground work (women)
Convention No 59:	Minimum age (industry) (revised) (denounced as a result of the ratification of a revised convention)
Convention No 60:	Minimum age (non-industrial employment) (revised) (denounced as a result of the ratification of a revised convention
Convention No 77:	Medical examination of young persons (industry)
Convention No 78:	Medical examination of young persons (non-industrial occupations)
Convention No 79:	Night work of young persons (non-industrial occupations)
Convention No 81:	Labour inspection
Convention No 87:	Freedom of association and protection of the

right to organise
Convention No 88: Employment service
Convention No 89: Night work (women) (revised) (convention denounced by Luxembourg
Convention No 90: Night work of young persons (industry) (revised)
Convention No 96: Fee-charging employment agencies (revised)
Convention No 98: Right to organise and collective bargaining
Convention No 100: Equal remuneration
Convention No 102: Social security (minimum standards)
Convention No 103: Maternity protection (revised)
Convention No 121: Employment injury benefits
Convention No 130: Medical care and sickness benefits
Convention No 132: Holidays with pay (revised)
Convention No 135: Workers' representatives
Convention No 138: Minimum age

THE NETHERLANDS

A. Jacobs

CHAPTER I: THE LEGAL FRAMEWORK OF LABOUR LAW

1. Sources of labour law

§1 The sources of labour law in the Netherlands are:
a. international provisions;
b. the relevant articles of the Constitution;
c. statutes (acts of Parliament);
d. royal decrees, general regulations of the administrative authorities, etc;
e. collective agreements;
f. the individual contract of employment;
g. the employer's managerial authority;
h. company rules;
i. custom and practice (usage).

Together with: case law

2. Constitutional law

§2 Constitutional law obviously determines the powers of the various public authorities. According to the Constitutional structure, the heteronomous labour law of the Netherlands derives essentially from national power (the King, the government and the parliament), to the almost total exclusion of subordinate authorities such as provinces and municipalities.

§3 Between the 1920s and 1960s the various political forces of the Netherlands often played with the idea of a certain democratic corporatism: the establishment of *'product boards'* and *'industry boards'* (*'produktschappen'* and *'bedrijfschappen'*) which could be given regulatory power. This system would be governed by the *Economic and Social Council* (SER) which would have advisory, supervisory and legislative powers.

This concept was dubbed the organization of industry under public law. Some amendments to the *Constitution* made it possible to elaborate this concept and the idea took concrete shape in 1950 in the *Organisation of Industry Act* (OIA), a framework statute. This act has never been greatly appreciated in practice. Product boards and industry boards have been established only in the agricultural and retail sectors. And these boards have hardly ever received formal powers over social law.

At the moment the government is reconsidering the future of this system.

Only the *Economic and Social Council* (SER), the supreme body of this organization of industry under public law, has achieved an important role, although largely of a consultative nature (*see §§32-33*).

§4 The impact of fundamental rights was very limited in labour law in the Netherlands up to the end of 1960s, as the Dutch *Constitution* contained almost exclusively *'civil and political'* fundamental rights. Since the 1960s, the Netherlands has signed a growing number of international treaties which contain fundamental *'social'* rights. The Dutch *Constitution* was also updated in 1983 with a more extensive listing of the various fundamental rights (*Articles 1-23*), including fundamental *'social'* rights.

Although these rights are chiefly of a programmatic nature, this trend strengthened the impact of fundamental rights on labour law in the Netherlands. This is particularly true in the area of trade union freedom, the freedom to enter into collective bargaining, the right to strike, the quality of social case law and equality of treatment as regards race, sex, civil status, sexual behaviour, etc. It would seem that this trend has yet to reach its culmination.

§5 Constitutional law also plays a crucial role in determining the impact of international law on Dutch law.

In the Netherlands, international treaties come into force nationally following ratification, which has to be authorized by Parliament.

The Netherlands has a tradition of great loyalty as regards the ratification of international treaties containing social regulations. The vast majority of the conventions of the *International Labour Organization* and the *'social'* treaties of the UN and the *Council of Europe* have consequently been ratified by the Netherlands.

In some cases the government simultaneously tables a bill in which the terms of national law are brought into line with the international convention which is to be ratified.

Even if national legislation has not been amended, or has not been sufficiently amended, the terms of international treaties which have been duly ratified have priority over national laws, provided that their nature and content are appropriate.

Dutch law follows the philosophy of monism.

The Dutch courts have therefore recognized the direct application of *Article 6 {4}* of the *European Social Charter* (*the right to strike, see §58*) and *Article 26 of* the UN *Treaty on Civil and Political Rights* (the general regulation on non-discrimination). All these regulations are exceptions, however. Most of the terms of international treaties are such that they do not lend themselves to direct application to individual legal relationships. This is also true of documents, such as resolutions, recommendations, etc.

As regards the regulations enacted by the *European Community*, Dutch law scrupulously follows the outlines set out by the *Court of Justice* of the EC: some social articles of the *Treaty of Rome*, such as *Articles 48* and *119*, and Regulations enacted by the EC (*such as Regulation 1612/68*) are directly applicable in the national laws of the Netherlands. Some provisions of EC Directives are also directly applicable, provided that their nature and content are appropriate.

Rulings are made case by case and the most spectacular case in recent years has been the affirmative response to the application of the EC Directives on the equal treatment of men and women and the rights of employees in the case of relocation of an enterprise. Various judgments of the EC *Court of Justice* have had a major impact on Dutch labour law.

3. Statutes (Acts of Parliament)

§6 In contrast to France, labour law is not codified in the Netherlands. This law has to be sought throughout Dutch legislation.

Labour law, as set out in formal Dutch legislation, is the result of cooperation between the King, the government and the parliament.

The desire to amend or renew legislation comes in most cases from the Dutch government or parliament (responding to by the aspirations of society). The desired changes are then submitted by the government to the social partners for their opinion (via consultation requests to the SER or to the *Stichting van de Arbeid* [*see §§32-33*]) and finally become bills for formal statutes which have to be adopted by both Chambers making up the Dutch parliament. They are finally signed and promulgated by the King.

§7 Legislators may in principle legislate on any matter provided that they respect the fundamental rights set out in the *Constitution*. Parliament has the task of verifying this conformity since, under the Constitution, promulgated laws are inviolable. Parliament may be guided on a bill's conformity with the *Constitution* by taking advice from the Council of State, which is the supreme political and legal consultative body. There is, however, no *Constitutional Court* to verify the conformity of a statute after its promulgation.

For this reason Constitutional law has never played as predominant a role in labour law in the Netherlands as it does in the Federal Republic of Germany.

However, the courts may test whether a statute is in accordance with the provisions of international treaties, ratified by the Netherlands as far as these provisions lend themselves to direct application. This possibility has led in recent years to the cancellation of some terms of statutes on social security by the courts because of their non-conformity with international regulations.

§8 Dutch acts of parliament - and in particular statutes on labour law - usually contain only basic regulatory principles. Enforcement and actual application take place through royal orders, Ministerial Decrees, etc. In some cases they take place through Ministerial Circulars, etc.

Unlike in France, in the Netherlands there is no dispute as regards the distinction between the scope of a statute and the scope of a regulation.

Parliament no longer intervenes formally in regulations issued by administrative authorities but is kept informed and retains the possibility of imposing its will where necessary through a censure motion.

The social partners have no formal right of consultation during the formulation of regulations of administrative authorities. They are always consulted in practice, however, in the case of social measures.

Regulations of administrative authorities are subject to court vetting from the point of view of their conformity with legislation and the *Constitution*. Those which are illegal may be cancelled under the common law of administrative contention.

4. Collective agreements

§9 The most important instrument governing working conditions, after the law, is the collective agreement. We shall deal with this in detail below (*see §§37-47*).

In the Netherlands, industrial relations are largely ordered by the social partners' self-government. Legislators have not therefore needed to intervene as much as for example in France. The requirements which the law imposes on collective agreements are - as will be discussed below - so minimal that the problem of agreements made outside these requirements does not arise to such an extent as in France.

In the Netherlands there are few wildcat strikes and consequently there are no dispute-settlement agreements with delegations of striking employees. This explains why the effectiveness of *'atypical'* agreements is a matter which is hardly touched upon in Dutch case law and doctrine.

The only phenomenon in this field in the Netherlands worth mentioning are the agreements with the works council (*see below*).

In very rare cases employment relationships may be regulated by *'quasi collective agreements'*. These are regulations drawn up by *'industry boards'* (*see §3*) or by the Minister for Social Affairs under the *Wage Determination Act* (*WDA, Articles. 5 and 6*). They have the same mandatory force as extended collective agreements (*see §§51-52*).

5. Agreements with works councils

§10 It is increasingly the case that the employer and the works council enter into agreements. In the Netherlands, these agreements have achieved a formal status in the *Working Time Act*. In a bill to amend the *Works Councils Act* now pending in Parliament the legal status of other types of agreements between employer and works councils will be clarified, although a general solution has not been found yet.

6. Company rules

§11 Company rules predate the collective agreement but have gradually lost their importance with the growth of collective agreements as a source of regulations on working conditions allowing greater equality between employees and employers.

Where they exists - the establishment of company rules is not mandatory under Dutch law - they contain mainly prescriptions relating to the internal organisation of the enterprise. Even here, however, the law does not impose any prescription or limit on the content of company rules.

In the past, company rules gave concrete shape to the employer's power unilaterally to issue a set of regulations specific to the enterprise.

Since 1907 the law (*Articles 1637j-1637m CC*) has made the validity of company rules subject to the following conditions:

(a) that the employee has accepted the company rules in writing;
(b) that they have been published according to the stipulated provisions (display and filing).

These provisions are of little real significance, however, as employees would in practice find it difficult to register their disagreement and the unilateral setting of company rules has continued.

Their unilateral nature was suppressed in 1970 when the law stipulated that company rules should be adopted by the works council (*Article 27, WCA*).

Nevertheless, according to case law, company rules which are not published according to statutory regulations and which are not submitted for approval by the works council, may retain their compulsory nature under specific circumstances.

The government has submitted a bill to Parliament to completely overhaul the existing legal situation on company rules.

7. The managerial and disciplinary authority of the head of an enterprise

§12 Under Dutch law the head of an enterprise is entitled to lay down *"provisions relating to the performance of work"* or *"provisions intended to improve good order within the enterprise, although by using this option he must remain within the limits laid down by the law, the collective agreement, the contract of employment and company rules"* (*Article 1639b, Civil Code*).

This *'managerial authority'* gives the employer the possibility of unilaterally laying down enterprise regulations.

Employers can also lay down regulations unilaterally while making them appear to be bilateral; they draft rules which are accepted by employees when they sign their individual contract of employment.

As mentioned above, this latter situation has been approved by case law and the government intends to codify it.

8. The contract of employment

§13 The contract of employment is very often reduced to a kind of *'entrance ticket'*, as rights and obligations are regulated by legal provisions set out in collective agreements and company rules. This means that employers and employees have only to agree on the date of entry into service and the function which will be carried out.

Many employers and employees wish, however, to set out more precise arrangements in the contract of employment, for instance:

(a) to lay down rights which go beyond the minimum provisions of the law or the collective agreement;
(b) to settle issues which waive certain provisions of the law or the collective agreement authorizing exemption by written contract;
(c) to settle issues for which laws or collective agreements do not make provision;
(d) to settle individual issues, such as working hours, or the number of hours or days of work to be provided if these differ from usual working times in the enterprise.

For any job which is not subject to a collective agreement there are undoubtedly good reasons for entering into a detailed contract of employment.

This often concerns higher management, but also certain occupational sectors and whole enterprises which have not entered into collective agreements because of the lack of organization of employees. This situation concerns one out of four employees in the private sector.

9. Custom and practice

§14 *'Custom and practice'* is the last source of the Dutch system of sources of labour law.

Sometimes statutes or court decisions refer to custom and practice in the branch of industry or in the enterprise. The common law on obligations states that practice/usage should be taken into account for the interpretation of contracts. For instance, the payment of a bonus, which is not based on a provision of the contract of employment, the collective agreement, etc., may be invoked on the basis of practice/usage.

In addition custom and practice plays an auxiliary role in the law in relation to collective agreements. Employees who are not subject to a collective agreement under the law or as a result of their individual contract may invoke the rights contained in a collective agreement when they are able to prove that the collective agreement is customarily applied in their enterprise (*see §50*).

This is the trickiest problem raised by regulations deriving from custom and practice: proving its existence. Employers may dispute the existence of custom and practise; they may also claim that employees did not immediately oppose the modification of a practice and that this modification was therefore tacitly accepted by them.

An appeal based on custom and practice will always fail if it conflicts with the provisions of another source of law (legislation, collective agreement, company rules, contract of employment, etc.), even if these provisions are less favourable to employees than custom and practice.

Custom and practice is consequently somewhat neglected in Dutch labour law nowadays, because it is the weakest source of labour law.

10. The role of the courts

§15 Case law has played a modest part in the development of labour law in the Netherlands. The Netherlands does not have a *Constitutional Court* and – in contrast to most EC Member States – does not have labour courts. The establishment of social case law is largely a matter for the common law courts.

This type of case law is unlikely to bring about a specific doctrine of labour law. Courts merely interpret and apply

the law. In the rare cases in which courts are asked to fill in the gaps in the law, for instance as regards the right to strike, there is much reluctance to give general applicable rules.

It can be seen, however, that case law of the last twenty to thirty years has been characterized by a predominant social attitude. Courts tend to protect employees, using general legal principles, against employers who are considered to be more powerful. For instance in the law relating to proof, the law relating to damage caused by employees, etc.

In formal terms, the judges of courts of first instance do not have to abide by the case law of higher courts, although in practice they do. Courts of first instance have, however, been responsible for some modifications of labour law, derogating from outdated case law of the *Supreme Court* (*Hoge Raad*): for instance as regards the right to strike (*see* §*58*), the right to effective employment, etc.

11. The conflict of rules and the hierarchy of sources

§16 In the Netherlands the law does not lay down a hierarchy of sources of labour law as is the case in Belgium.

The priority of sources which we have listed above is based in the first instance on general principles which apply under civil and public law. These principles provide us with the following order of priority:

1. international regulations;
2. legislation and case law;
3. collective agreements;
4. the individual contract of employment and company rules;
5. usage.

The hierarchical criterion is less easy to apply to conflict between agreements with the works council, the managerial and disciplinary authority of the head of the enterprise and company rules, individual contracts of employment and usage; the same applies to the hierarchy of collective agreements entered into at more than one level. In this area there are many uncertainties in Dutch labour law.

§17 This hierarchy of sources is also overturned by the *'principle of the most favourable law'*: i.e. the idea that the regulations contained in a lower source of law may derogate from the regulations contained in a higher source if this is favourable to employees. The higher source is no more than a *'floor'* for the lower regulations to built upon and to provide additional advantages for employees in a particular branch of industry or enterprise. But the higher source is a *'floor'* in the sense that lower sources are prohibited to go below it, save for a few exceptions as discussed below.

The principle of the most favourable law is indisputable when a higher source of law uses terms such as *'at least'*. But even if there is no such terms are used, the applicability of the principle of the most favourable law may be assumed most of the time.

In some cases, however, the rules contained in a higher source are construed in such a way that they are to be seen as a standard, not allowing derogations in favour of the employees. They are a *'floor'* and a *'ceiling'* at the same time. This may also be the case with collective agreements, unlike in, say, for instance Germany, where collective agreements are always liable to derogations *in melius*.

Finally, as indicated above, there are also a few places in Dutch labour law in which a higher source of law allows derogations in lower sources, even if these are derogations *in peius*, less favourable to the employees. Some of these provisions allow derogations *in peius* only by way of collective agreements with the unions or agreements with the works council. Others allow derogations *in peius* in every lower source, provided that this derogation is agreed in writing.

CHAPTER II: INDUSTRIAL RELATIONS

SECTION 1: THE SOCIAL PARTNERS

1. Trade unions

§18 There are hundreds of trade unions in the Netherlands. Their membership varies from close on 300 000 in some cases to a few hundred in others.

The most important trade unions are grouped together in four confederations:

1. the *Confederation of Dutch Trade Unions* (FNV), traditionally the most powerful confederation, which was set up in 1976 as a result of a merger of the Social-Democrat confederation and the Catholic confederations of trade unions. The federations which belong to the FNV have approximately 1,100,000 members;
2. the *National Christian Confederation* (CNV), a confederation which was and is still largely Protestant-inspired and which did not take part in the merger in 1976. The federations which belong to this confederation have approximately 300,000 members;
3. the MHP, a confederation of white collar unions founded in 1972. The trade unions belonging to this confederation have approximately 140,000 members;
4. the AVC, a recently formed confederation of formerly autonomous unions, which have some 100,000 members.

§19 In addition to these four confederations there are:

a. a small number of independent unions for specific *'occupational categories'*;
b. a number of radical left-wing unions belonging to the *Independent Confederation of Trade Unions* (OVB). They are active in some occupational sectors such as the ports sector, which is very important in the Netherlands.

§20 The unions affiliated to the FNV and the CNV have clearly determined the organization of their members within their respective confederations according to the principles of industry-wide trade-unionism (i.e. a federation covers all employees employed in a particular economic sector, irrespective of their occupational category).

§21 This means that there is very little competition to attract members amongst unions belonging to the same confederation. Competition does exist, however, among

unions which are affiliated to different confederations or are not members of any confederation.

There is *'a tacit agreement of courtesy'* between the FNV, the CNV, the MHP and the AVC. Their unions normally refrain from *'poaching'* members from the other or entering into public disputes; they consult one other in a timely way, etc. But besides that, there is also *'rivalry'* which may occasionally lead to conflicts.

The constitution of Dutch trade unions can certainly be said to be democratic in principle. In theory, members are able to exert every influence on the choice of managers and on decision-making. In practice, the situation is often very different because of members' apathy and because it is difficult to make changes to the unions' complicated structure.

§22 The Netherlands is one of the least unionized countries of the EC. Some 25% of Dutch employees belong to unions affiliated to the FNV, the CNV, the MHP and the AVC. A further 2% are affiliated to the other unions.

Rates of unionization vary very greatly within the working population. Some occupational sectors have a high rate of unionization (for instance, journalists) and others have a low rate (for instance, the banking sector). There is still only a low level of unionization amongst employees in the new professions, part-time employees, the flexible labour force, young employees, working women and foreign employees.

Unions are looking for strategies to change this situation, although results are unlikely to be achieved immediately. A considerable increase in the rate of unionization should not therefore be expected.

§23 Dutch unions have no official links with the political parties, although there is some affinity between the Social-Democrat party (PvdA) and the FNV and between the Christian-Democrat party (CDA) and the CNV.

2. Employers' organizations

§24 There are federations of employers in most occupational sectors. At national level, almost all major enterprises and all the employers' federations are affiliated to the VNO-NCW, a recent merger of the *Confederation of Dutch Enterprises* (VNO) and the *Dutch Confederation of Christian Employers* (NCW).

Small and medium-sized enterprises (except those in the agricultural sector) are for the most part members of the MKB-Nederland, a recent merger of the *Dutch Royal Federation of Entrepreneurs* (KNOV) and the *Dutch Federation of Christian Entrepreneurs* (NCOV).

Farmers are federated in LTO-Nederland, a recent merger of the *Royal Committee on Dutch Agriculture* (KNLC), the *Dutch Catholic Federation of Agriculturalists and Horticulturalists* (KNVTB) and the *Dutch Christian Federation of Agriculturalists and Horticulturalists* (NCBTB).

VNO-NCW, MKB-Nederland and LTO-Nederland cooperate within the central *Council of Employers' Organizations* (RCO).

In general, employers' organizations are structured in a democratic way – managers are elected by members and must report to them on a regular basis. Some members may, however, exert more influence than others within certain employers' organizations. This is chiefly due to the size of the enterprise they represent.

3. Trade-union law

§25 Trade-union freedom is not explicitly mentioned as a fundamental right in the Dutch *Constitution*. Since 1872, however, it has not been disputed that the general freedom of association enshrined in the *Constitution* (*Article 8*) also extends to employers' and employees' organizations.

In recent years, the Netherlands has signed a number of international documents recognizing trade-union freedom, whose regulations will very probably be directly binding in law.

In the past there have been a number of situations in which extremist trade unions have been opposed by the public authorities. At present every union has complete freedom of action and may freely establish its constitution. No legal form is laid down. However, an organization must have *'full legal capacity'* in the sense set out in Book II of the NBW (*Civil Code*) in order to be able to enter into collective agreements as a result of collective bargaining, to propose lists of candidates for elections of works councils or if it wishes to participate in public-law bodies. Book II of the NBW (*Civil Code*), however, greatly facilitates access to *'full legal capacity'*, so employers' and employees' organizations in the Netherlands have no difficulty in satisfying this requirement. In practice, all employers' organizations and all the major trade unions have acquired this full legal capacity according to common civil law, in contrast with other EC countries, where unions are for the most part *'outside the law'* (Germany, Belgium) or governed by a specific trade-union law (France, United Kingdom).

§26 It is accepted that employees cannot lose their rights or be dismissed from their duties because they belong to a trade union. This has not however engendered case law and there are no legal provisions specifically relating to attacks on trade-union freedom.

§27 In some countries, employees are obliged to belong to a trade union (compulsory membership or the *'closed shop'*). In the Netherlands an obligation of this type is exceptional, existing only in the printing industry. Legislation and case law authorize it within well-defined limits.

§28 Several collective agreements contain provisions allowing employees to take part in trade-union activities and allowing the trade union to place officers within the enterprise, to organize meetings at workplaces, etc. Although there was talk of it several years ago, there has still not been any legislation on this matter.

4. Representativeness

§29 As the establishment of employers' and employees' organizations is free in the Netherlands and has effectively led to a multitude of organisations, the problem of their representativeness became evident.

It was inevitable that certain rights should be reserved solely for those organizations considered to be representative.

In the Netherlands, the *Economic and Social Council* (SER) undertook the task of laying down criteria for assessing representativeness, a task it achieved by issuing directives. The initial directives adopted in 1954 essentially gave a monopoly to the organizations affiliated to the precursors of the FNV, CNV and VNO. These criteria proved unsatisfactory in the 1970s when the white collar unions attracted an increasing number of members and became organized in a much more effective way.

During the 1970s, the white collar unions used social pressure to acquire the places due to them in consultative, administrative and management bodies. In 1977 the SER consequently reviewed its 1954 criteria, providing them with greater objectivity. It is now possible to lodge an administrative appeal against decisions to admit or reject prospective members of consultative, administrative or management bodies. This administrative appeal, however, is not used very frequently in practice.

For representativeness in the collective-bargaining process, see §42-45.

SECTION 2: THE CONCERTATION SYSTEM

1. Institutions

§30 Employers' and employees' organizations meet regularly and intensively either at sectoral level or at enterprise level in order to conclude collective agreements and discuss all socio-economic matters relating to the sector or enterprise (placement, vocational training, various social-welfare arrangements, etc).

In addition employees' and employers' confederations meet at national level, in some cases on a bipartite basis, and in others on a tripartite basis (with government representatives).

§31 Certainly, legislative power and socio-economic policies in our Welfare States have become unthinkable without dialogue between the social partners: people speak in this respect of *'the economy of concertation'*.

In the Netherlands this situation is shaped by delicate political relationships. There are never single-party governments but always coalitions of the centre-left or the centre-right which have constantly to take account of the opposition. It is for this reason that such importance is attached to social consensus. Attempts are always made to avoid severe public confrontations both on the part of the government and on the part of the social partners.

§32 In the Netherlands two forums for social concertation at national level have been set up:

- the *Stichting van de Arbeid* (Labour Foundation), a private-law body which was set up at the end of the Second World War by representatives of the major employers' and employees' confederations. This Foundation is governed by a joint-management body (i.e. on an equal bipartite basis) comprising leading figures from:
  - on the employees' side, the FNV, CNV, MHP and AVC;
  - on the employers' side, the VNO-NCW, MKB-Nederland and LTO-Nederland.
- the *Sociaal Economische Raad* (SER - the Economic and Social Council), a public-law body created and organized by the *Organisation of Industry Act of 1950* (*see §3*). These confederations hold 2×11 seats; 11 further seats are reserved for independent members, such as the Chairman of the *Nederlandsche Bank* (Central Dutch Bank), some university professors, etc. SER committees also contain top officials representing Ministries (*Article 4, OIA*) who - although formally only observers - play an influential role.

The *Stichting van de Arbeid* and the *Sociaal Economische Raad* have their head offices in the same buildings (belonging to the SER) in The Hague. Most of the leading personalities serve on both bodies.

There are only subtle differences between the two bodies.

Within the *Stichting van de Arbeid* the social partners operate on their own; they may confer together in camera.

In the SER, however, a third party has to be taken into account: the independent members and the ministerial officials. The deliberations of the SER, or at least of its plenary sessions, are public.

The President of the SER is an independent person, while the *Stichting van de Arbeid* is jointly chaired by the presidents of the VNO-NCW and the FNV.

The SER is financed by levies from the professional world (*Article 54, OIA*), enabling it to have a considerable secretariat. The *Stichting van de Arbeid* has only limited financial resources and does not therefore have much in the way of offices.

The SER was set up by an act of Parliament; it may, for instance, be consulted on important measures of a social or economic nature which the government is proposing to implement (*Article 41, OIA*).

The *Stichting van de Arbeid* was set up privately by the social partners.

§33 Despite this, the main difference between the SER and the *Stichting van de Arbeid* is still difficult to define. This dual system is explained by its historical context: the *Stichting van de Arbeid* was set up in 1945, when the SER did not exist, and was recognized by the government as its main partner in the area of wage policy after the war (*see §41*).

When the SER was set up in 1950 it did not displace the *Stichting van de Arbeid* from this role. It should be noted, however, that wage policy since the middle of the 1960s has moved in the direction of deregulation and the scope of action of the *Stichting van de Arbeid* has weakened since then. It continues, however, to operate because employers' and employees' confederations appreciate this forum where they can meet on an intimate basis, out of the public eye.

The *Stichting van de Arbeid* is also used when it is necessary to work out the outlines of a multi-industry strategy concerning policy on working conditions pursuant to a multi-industry agreement, a protocol or any kind of document. This policy is then implemented by the respective affiliates in the various occupational sectors and enterprises concerned.

The most famous example is the agreement concluded within the *Stichting van de Arbeid* in 1982 relating to shorter working hours, an agreement which was obtained in exchange for the abolition of automatic wage indexation.

The *Stichting van de Arbeid* is also useful when the government is attempting to consult the social partners at ministerial level rather than at civil-servant level. This consultation takes the form of a meeting between a delegation of the Cabinet and the management of the *Stichting van de Arbeid.*

It is evident from the above that the SER has to leave the initiative to the *Stichting van de Arbeid* as regards consultation about actual working conditions.

The SER is the main partner when the other aspects of socio-economic policy have to be discussed.

In addition the SER supervises the functioning of the system of production boards and industrial boards laid down in the *Organisation of Industry Act of 1950* (*see* §*3*) and of the system of works councils laid down in the *Works Councils Act.*

§34 This outline of bodies and situations in which employers' and employees' organizations may meet is far from exhaustive. The social partners also meet in:

- administrative, consultative and legal bodies in the area of social security;
- joint industrial committees (*see* §*75*) and industrial boards (*see* §*3*);
- the National Manpower Services Board (*Centraal Bestuur voor de Arbeidsvoorziening*, CBA) and the 28 Regional Manpower Services Boards (*Regionaal Bestuur voor de Arbeidsvoorziening*, RBA).

Even in left-wing circles - traditionally opposed to the unions' excessive integration in the State machinery - there is now a desire for socio-economic policies based on social consensus.

2. The role of the State

§35 In the Netherlands the public authorities have been the main socio-political actor for a long time, especially and very clearly since 1945. This development was shaped by the theories of Keynes which held sway for several decades. According to these theories, the public authorities should play a central role in pursuing often contradictory economic objectives, such as maintaining the balance of payments, a sufficient level of investment, a stable price level, full employment, the reasonable redistribution of income, budgetary balance, etc.

It is in this context that the public authorities exerted considerable control, with the *'controlled'* wage policy which was maintained from 1945 to 1958. The public authorities at that time were made up of a centre-left coalition government comprising Social-Democrats and Christian-Democrats. The Social-Democrats left the government in 1958. Since then the Netherlands has for the most part had centre-right governments comprising Christian-Democrats and Liberals. This centre-right coalition has gradually dismantled the controlled wage policy, but not as quickly as the unions (which are no longer soulmates of the new political powers) would have liked.

It is for this reason that the 1960s and 1970s were characterized by considerable concern over the State's role in wage policy. All the institutions of controlled wage policy suffered the impact of the major wage explosion of the 1960s.

In 1970 new legislation was enacted - the *Determination of Wages Act* (DWA) - which in principle gave the contracting parties of collective agreements responsibility for wage policy but left the door open for public-authority intervention in this area (*Articles 8-11, DWA*).

Since then and until the mid-1980s, the government has attempted every year to reach an agreement with employers' and employees' confederations as regards the outlines of wage adjustment, within the broader context of socio-economic policy. Concertation should ideally lead to *'central agreements'*, but they were only rarely achieved. After every failure of this tripartite concertation at the highest level, politicians and the media always demanded intervention by the public authorities. The public authorities used their powers to intervene effectively on several occasions between 1970 and 1982.

At first, such intervention often led to political and social conflicts (strikes). Legal problems cropped up later when the unions took this problem before the courts. The courts refused, however, to prohibit public-authority intervention. The problem was even brought before the *International Labour Organization*, which, after a few years, became more critical and, through an expert report by Professor Windmuller, censured this repeated intervention in wage formation. This opinion was issued in 1982, just when a new centre-right coalition government had come to power. This government, like all centre-right governments in Western Europe, intended to give greater scope to the play of free market forces. It ruled out State intervention in wage determination and, from an economic point of view, there was no longer any need for this since the Netherlands had a record unemployment level and the unions were consequently in a relatively weak position. Excessive wage increases were no longer to be feared. Dutch policy could then adopt the recommendations of the ILO's *Windmuller Commission* without any problem.

Since 1982 there has been no intervention in wage determination in the private sector. The 1970 the *Act on the Determination of Wage-setting*, which had left the way open for intervention, was modified in this respect in 1986. From then on the public authorities could intervene only in the event of extreme urgency caused by external factors (*new Article 10, WDA*).

The government is still, however, committed to the principle of wage growth within reasonable and moderate lim-

its, while the social partners carefully monitor the government's socio-economic policy in order to determine their position on wage policy.

The public authorities, which have always been constituted in the Netherlands by a political coalition of various parties, scrupulously avoid taking the part of one or other of the social partners (in contrast with the British case of the intimate relationship between the Labour Party and the TUC). It is evident, however, that a centre-left government will have more sympathy with the unions, while a centre-right government will be more sensitive to employers' aspirations. The current coalition between social-democrats and liberals keeps an equal distance to both social partners.

The public authorities have also played a role in recent years in closely linking the statutory minimum wage, the level of social-security benefits and the wages of civil servants to each other and to wage growth in the private sector. The linking of the wages of civil servants to the private sector was abolished at the beginning of the 1980s. The linking of the statutory minimum wage and the level of social-security benefits to wage growth in the private sector has been maintained in theory, but was in practice interrupted several times in recent years. At the moment this linkage is functioning again.

While every government attempts to pave the way for the harmonious growth of all these types of income, it has almost become an obsessional concern in Dutch policy.

This concern also explains why the government feels so involved in the determination of wages in the private sector, although at present it intervenes in the private sector by persuasion and indirect pressure rather than by direct intervention.

§36 The public authorities have continued to intervene directly in the area of civil servants' wages, since in this area they are the employer. This involves 15% of the working population.

At first, civil servants' working conditions and terms and conditions of employment were set formally and unilaterally by the government. For a number of years the trend has been towards a situation which increasingly resembles the collective-bargaining system in the private sector, but which leaves the final word to the government. In 1988 this procedure was formalized in the provisional protocol between the government and the unions representing civil servants.

Until the beginning of the 1990s the public authorities have kept control over wage increases for employees of semi-public organisations (hospitals, radio and television, etc), about 10% of the working population. When this in turn was criticized by the ILO, it was abolished in 1994.

In contrast to the situation in other countries such as France and Italy, the Netherlands does not have an income policy conducted explicitly by the public authorities through State enterprises, since such enterprises are very rare in the Netherlands (and employ less than 2% of the total working population).

CHAPTER III: COLLECTIVE BARGAINING

SECTION 1: BACKGROUND

1. The system of collective agreements

§37 Since the Second World War, the Netherlands has had a wide network of collective agreements and administrative wage regulations covering approximately 70% of the working population:

- approximately 200 sectoral collective agreements for approximately 2.6 million employees;
- approximately 600 company agreements for approximately 0.6 million employees in the private sector and the semi-public sector;
- hundreds of administrative wage regulations for approximately 0.8 million employees in the public sector.

§38 The various collective agreements at sectoral or enterprise level are concluded independently of one another, although there are some links.

In the first place, this is because there are a large number of major unions concluding several collective agreements. This is the case, for instance, of the *Industriebond FNV* (Federation of Industrial Employees, affiliated to the FNV), which is party to the agreements in the iron and steel and textile sectors and the *Hoogovens* and *Philips* enterprises, etc. These unions tend to coordinate their approach to each bargaining process as far as possible.

In addition most unions are affiliated to the three main confederations (*see §18*) and union policy tends to be coordinated within these confederations as well. In this area, it should be noted that the influence of the confederations' offices, although limited at official level, is relatively important in practice and is more important, for instance, than in the case of the TUC in Great Britain.

Employers also coordinate their strategic positions during collective bargaining in occupational sectors and enterprises, through their confederations (VNO-NCW, MKB-Nederland and LTO-Nederland). Round tables are sometimes held between the leading figures of the employers' and employees' confederations in order to reach *'common conclusions'* in the area of wage growth, working hours, employment, social security, etc. (*see §35*).

The result is that although collective bargaining is officially decentralized to the levels of occupational sector or enterprise, there has always been a tendency towards centralization. This tendency was very marked throughout the whole of the period 1945-1958 but was less pronounced between 1958 and 1982. Since 1982 it has gained in significance, with the result that a mixed trend towards centralization and decentralization has been one of the features of the current period. A very rapid change in this area cannot be expected.

§39 We have noted therefore that the Netherlands has two types of collective agreement: collective agreements at enterprise level and collective agreements for particular occupational sectors. It is rare for an enterprise to be bound by both a sectoral and a company agreement, which is often the case in France. In most cases, enterprises are bound either by one or by the other.

It should be noted, however, that bargaining at enterprise level is gaining ground. This trend, however, has more to do with works councils than with the unions. Having acquired full independence in 1979, works councils are being increasingly taken seriously by the employers. From a strictly formal point of view, the employer and the works council do not *'bargain'*, but solely confer. The law also prohibits works councils from interfering in fields which are already exhaustively regulated by collective agreements, bargaining between the union and the entrepreneur thus having priority over concertation between the entrepreneur and the works council (*see §87*).

In practice, however, it can be seen that, as the unions have only limited representation within enterprises, concertation between the entrepreneur and the works council is of much greater significance than is bargaining between employers and the unions at enterprise level.

Employers and some politicians would like to strengthen dialogue between employers and works councils, possibly by introducing the works council as a social partner in genuine collective bargaining at enterprise level. This already takes place in some major enterprises which are not subject to collective agreements with the unions.

The unions do not view this development favourably, because it might be detrimental to their position, which is already weak. The furthest they wish to go is the delegation of some executive powers as regards concertation between the entrepreneur and the works council. In this area, new developments are to be expected.

2. Formulating a collective agreement

§40 Employers and unions normally meet every year for bargaining relating to the renewal of the collective agreement, since collective agreements are in most cases concluded for one year, although there are from time to time agreements concluded for several years.

The *Act on collective agreements* (ACA) in practice places no restriction on the parties as fas as this issue is concerned (*Articles 18 and 19, ACA*).

The starting point of annual concertation is the existing agreement and the amendments which employers and employees wish to make to it.

In the case of economic prosperity, the unions in particular propose a whole series of improvements and employers try to limit or to delay them for as far and as long as possible.

If, in contrast, the economy is deteriorating, employers attempt to take a backward step and the unions attempt to maintain *'acquired rights'* for as long as possible.

In the current context, a mixed form seems to be emerging. Unions are pushing forward with new demands because of an improved economic situation but employers are maintaining their demands, for instance as regards greater flexibility of wage structures and working hours.

The demands put forward by the social partners during collective bargaining are established in advance by the various organizations following consultations with their members. Members' influence should not, however, be overestimated; it is the offices which play the crucial role. The policy of the various unions, moreover, is also shaped by the influence of the confederation (*see §38*).

Bargaining between employers and unions is not usually shaped by an institutional framework. In some occupational sectors, however, it is institutionalized within a joint consultation body. In only very few occupational sectors are meetings conducted by an independent chairman.

After the various bargaining sessions attended by the delegations, the social partners finally reach a compromise. This compromise is then passed on to their members. Once their approval has been obtained, the new collective agreement may be formally concluded.

If the social partners do not reach consensus as regards the new collective agreement, *'war'* may be declared in the form of a strike (*see §58*). A strike does not, however, always take place. It may be (especially if employees do not feel strong enough to undertake a strike and employers do not wish to make matters worse) that the unions do not call a strike and there is simply a period with no collective agreement in force. The social partners then resume bargaining a year later.

SECTION 2: THE LAW ON COLLECTIVE LABOUR AGREEMENTS

1. Definition - Form - Publicity

§41 According to the legal definition, a collective agreement is an agreement concluded between, on the one hand, one or several employers, or one or several employers' associations and, on the other hand, one or several trade unions, the main or exclusive aim of this agreement being to regulate the working conditions which have to be taken into account in contracts of employment (*Article 1, ACA*).

A collective agreement must necessarily be in writing (*Article 3, ACA*).

It must be submitted to the Ministry of Social Affairs (*Article 4*, WDA). The members of signatory parties must obtain a copy of it (*Article 4, ACA*).

2. Parties to collective agreements

§42 In the Netherlands any association of employers or employees may enter into a collective agreement.

No conditions relating to the size, independence or representativeness of the parties to the collective agreement are laid down in law or case law.

The only two legal conditions are:

(a) that the association has full legal capacity (*Article 1, ACA*),

(b) that the association is authorized, by its articles of association, to enter into collective agreements (*Article 2, ACA*).

These two requirements are readily satisfied by all organizations of employers and employees, even the smallest ones. It is sufficient to draft articles of association which correspond to the minimum regulations imposed by the *Civil Code* on all associations wishing to obtain full

legal capacity, to have these articles of association certified before a notary and then to enter the association on the register of associations.

§43 From the employer's point of view, the legal definition also allows an individual employer, or an ad hoc group of employers, as well as a permanent association of employers, to be party to a collective agreement.

This explains why there are collective agreements at the level of occupational sector as well as at the level of the enterprise itself (for instance *Philips*, *Hoogovens*). Collective agreements at sectoral level are sometime concluded by a number of employers' associations (for instance in the building industry and the textile industry).

§44 From the employees' point of view, unions, viewed in their formal sense, are entitled to enter into collective agreements, to the exclusion of all other employees' representatives.

In the case of an important agreement, bargaining is normally conducted by senior trade union leaders; in the case of a less important agreement, bargaining is conducted by the union's district leaders.

Only in a few major enterprises may the union delegates from these enterprises also take part in the negotiations.

But it is always in the name and on behalf of the union that bargaining is conducted and agreements are signed.

Under Dutch law works councils are formally not empowered to enter into collective agreements (*see §39*). But this does not prevent them in some enterprises in which the unions are not present to conclude informal collective agreements with the employer.

§45 A collective agreement is normally signed by all the unions active in the economic sector or enterprise concerned, or by none of them. Up to now, cases in which collective bargaining has given rise to disagreement between the unions concerned are not so frequent as for instance in France, If they do occur neither the excluded union nor its members are bound by this agreement and they may continue to press for a more favourable collective agreement using methods of collective action. As in recent years employees' militancy has decreased unions also have sought the intervention of the courts in such cases but the courts were not prepared to intervene.

The overall picture, however, is, that *'multi-unionism'* is not yet a problem in the Netherlands as employers do not systematically attempt, as they do in Great Britain, to deal with a single union at the negotiating table. Such a premeditated strategy would not be tolerated in the Netherlands.

3. A right to collective bargaining?

§46 Between 1945 and 1970 employers' and employees' organizations which were not affiliated to the *'official'* confederations of those days (the CNV and the precursors of the FNV) were excluded from the collective-bargaining process.

During the 1960s, some of these organizations took legal action to obtain support allowing them to take part in collective bargaining. The courts rejected them on the grounds of the principle of contractual freedom.

During the 1970s, the white collar unions made a major break-through. These unions were finally recognized as partners in collective agreements, more because of major political pressure than because of the size of their membership.

In 1979 the *Economic and Social Council* rejected the idea of legal regulation of the right of participation in collective bargaining and there is consequently no legislation on this issue. This SER opinion confirmed the traditional opinion according to which recognition of the right to participate in collective bargaining can be obtained only by force of numbers.

According to the SER, only clearly unreasonable cases in which access to collective bargaining is refused to an organization can be brought before the courts.

Since then, court decisions have tended to correct cases in which organizations have been excluded for inadequate reasons. In other cases organizations have not managed to gain access to the negotiating table by judicial means.

In the Netherlands - in contrast with the situation in France - the law does not make it compulsory for employers to negotiate or re-negotiate a collective agreement. The courts are not prepared to make employers subject to such an obligation (other than in exceptional cases). This means that the only way the unions can force employers to enter into collective bargaining is by striking.

Although cases in which employers deliberately avoid negotiating with any unions (the American phenomenon of *'no union'*) are rare, there are always some economic sectors and enterprises in which the unions cannot impose collective bargaining because of their small membership. It is estimated that this affects 20% of employees in the private sector.

4. Field of geographical, temporal and personal application

§47 Legislators have given almost complete freedom to the social partners to organize the scope of application of collective agreements - *ratione territorialis*, *ratione personae* and *ratione temporis*.

In the Netherlands, the geographical application of almost all industry agreements covers the whole country. The few exceptions concern, for instance, maritime ports, which are all subject to a separate collective agreement.

As regards the scope of application *ratione temporis*, we have already noted above that collective agreements are generally concluded in the Netherlands for a period of one or two years. Collective agreements which contain special provisions (early retirement, welfare funds, etc.) are sometimes valid for longer periods. The law lays down a maximum period of five years and specifies certain arrangements as regards the prolongation and termination of a collective agreement (*Articles 18-21, ACA*).

As regards the field of application *ratione personae*, the rule of the freedom of the social partners prevails.

The collective agreement does not have to be restricted to employees bound by a contract of employment, and may also contain provisions concerning employees under enterprise contracts or contracts for the provision of services (*Article 1[2], ACA*). This means that a number of atypical labour relationships may be included in the field of application of a collective agreement, such as *'on call'* contracts, apprenticeship contracts, temporary contracts and home-work contracts. In practice, while the working conditions of temporary employees are often regulated by collective agreements, the conditions of employees bound by other *'atypical'* contracts are less frequently so.

Dutch collective agreements traditionally cover the working conditions of blue-collar employees. For several years, however, a number of collective agreements have also organized the working conditions of white-collar employees. It is rare, however, for collective agreements to lay down pay scales for personnel receiving an annual wage in excess of DM 150,000.

Because of the fact that Dutch unions are organized in accordance with the principle of *'one occupational sector - one union'* (at least as far as the unions of the same Confederation are concerned), the boundaries of the field of application *ratione personae* does not raise many problems of rival agreements.

Some conflicts may, however, arise: for instance, do the administrative personnel of a shipping company come under the collective agreement for maritime trade or the agreement for the ports sector or even the agreement relating to administrative personnel in general?

5. Regulatory content

§48 The provisions of collective agreements relate essentially to wages, pay supplements, working hours, holidays, overtime, etc.

The collective agreement may also contain regulations on employee participation, health and safety rules, supplementary social-security benefits, environmental issues, investments, etc., although these latter issues are much less frequent in the Netherlands than elsewhere in the EC.

Dutch law, by giving the collective agreement *"the main or exclusive aim of regulating working conditions which must be taken into account in contracts of employment"* (*Article 1, ACA*) restricted the scope of collective agreements. This is also borne out by case law: the question as to whether collective agreements may contain provisions instituting social works to which individual employers must make a financial contribution has been brought before the courts on a number of occasions. The *Supreme Court of Justice* has confirmed this possibility on several occasions.

In the Netherlands there is no relevant borderline between the rules set out in collective agreements and those set out in law. The issues which may be dealt with in a collective agreement may also be dealt with in law, which is in fact what happens in practice: the law often lays down minimum regulations which are then improved by collective agreement. This is the case in particular in the area of rights to paid leave, to periods of notice, etc.

In most cases the regulations set out in collective agreements also have a minimum nature, which means that lower-ranking sources of law such as the individual contract of employment may depart therefrom in the employee's favour.

In some cases, however, the Dutch collective agreement has a maximum or standard nature and in this case derogations are not possible even if they are to the workers' advantage.

6. The mandatory force of regulatory provisions

§49 In this respect a distinction has to be made between *'ordinary'* collective agreements and agreements which have been rendered generally applicable, with *erga omnes* force, by an extension order.

Non-extended collective agreements are effective in principle only in cases in which employees are members of a signatory employees' organization and the employer is a member of the employers' organization which has concluded the collective agreement for the occupational sector to which it relates, or is himself a signatory to the collective agreement (*Articles 9, 12 and 13, ACA*).

Clauses of individual contracts of employment which are in conflict with the provisions of the collective agreement are null and void; they are automatically replaced by the corresponding provisions of the collective agreement (*Article 12, ACA*).

This subordination to the collective agreement continues after the termination or expiry of the agreement, until new provisions are laid down, either collectively or individually.

Parties to collective bargaining may also give the collective agreement retroactive force.

§50 Employers bound by collective agreements are legally obliged to apply them for their entire duration to all contracts of employment they conclude with non-organized employees (unless the collective agreement provides otherwise) (*Article 14, ACA*). If employers do not do so, however, non-organized employees cannot claim nullity and the replacement of conflicting clauses by reference to the law on collective agreements. In this case, only the unions which have signed the collective agreement may invoke this obligation in an action against an employer.

These non-organized employees may, however, successfully secure application of the collective agreement before the courts if this application has been expressly agreed in the individual contract of employment or if it is a result of the implementation of general notions of civil law, such as custom and practice. This also applies to employees (whether organized or not) working for an employer who is not bound by the collective agreement.

Nowadays, application of the collective agreement is very widespread, even in cases in which the law does not make it mandatory.

7. Extension

§51 During the years of the Great Depression prior to the Second World War, Parliament invested the executive authority (the Minister) with the power to extend the scope of an agreement to all employers in the occupational sector concerned, by means of an extension order: the *Act on the extension of the terms of collective agreements* (AECA).

The Minister undertakes this extension only at the request of one or several of the employers' and employees' organizations who have signed the collective agreement (*Article 4, AECA*) and wish to have it respected throughout the sector in question; he can accept this request only if he feels that the agreement is already applied to a substantial majority of personnel employed in this occupational sector (*Article 2, AECA*). When assessing this majority, the Minister takes account of the percentage of all employees (whether organized or not) in the service of the employers bound by the collective agreement with respect to the total number of employees in this sector. This method of calculation enables the collective agreement to be extended, even if the level of union organization is fairly low. At the same time this method of calculation makes it possible for a collective agreement to be extended even when it has not been signed by all the major unions.

§52 In the Netherlands the mechanism of extension is frequently used. When an agreement has been extended to a whole occupational sector all employers and employees in that sector are subject to the collective agreement by virtue of the law, irrespective of whether or not they are unionized. In such cases, non-unionized employees may take action to claim the rights contained in the collective agreement (*Article 3, AECA*).

The extension order cannot have retroactive force (*Article 2[3], AECA*) nor a forward effect.

The Minister may exclude certain enterprises and certain provisions of the collective agreement when undertaking the extension (*Article 2, AECA*). The law expressly cites certain provisions which may not be extended (in particular, provisions likely to favour union members above other workers (*Article 2[5], AECA*).

The Minister will also exclude provisions in collective agreements from extension when they have a dubious legal character.

The law sets out procedures for complaints and consultations (*Article 4, AECA*) but no judicial review is possible of the Minister's decision, whether yes or no, to extend the terms of a collective agreement.

The instrument of extending the binding force of collective agreements has come under sharp attack from economists in recent years as it is in fact creating *'wage cartels'*. The government considered abolishing it, but decided later to maintain the instrument as it contributes to stable social relationships on the labour market.

In recent times the Minister has started to use his power of extension to exert pressure on the social partners. He is only prepared to extend the binding force of collective agreements if the minimum wages contained in the collective agreement are not above the national statutory minimum wage. The aim here is to improve the possibilities for job seekers in the low paid sector.

8. Contractual content

§53 In the Netherlands, collective agreements often contain various provisions which relate only to the relationship between the signatory parties, for instance:

- the date of the next meeting for new negotiations to conclude a collective agreement;
- finding out whether an evaluation or a possible amendment of the current agreement may be envisaged;
- finding out what measures to take if a dispute arises between the signatory parties as regards application of the collective agreement (*see §56*);
- finding out to what extent the social partners will refrain from calling a strike throughout the period of validity of the collective agreement (*see §54*);
- finding out whether, should it prove impossible to conclude a new agreement at the end of the period of validity of the agreement, there will be initial recourse to mediation or arbitration.

A characteristic of this contractual part is that it can be legally invoked only by the signatory parties. Individual parties are not concerned; moreover, the contractual part cannot be extended by ministerial order (*see §52*).

9. The no-strike obligation

§54 In the Netherlands most collective agreements contain no-strike clauses, in accordance with which the signatory parties undertake to respect the provisions of the collective agreement throughout its duration and to refrain from any industrial action to change existing conditions.

Even if these clauses were not explicitly stated, the signatory parties would still be liable to apply this agreement in good faith by virtue of the general law of obligation.

The no-strike obligation is not only seen as a mandatory provision for the signatory parties of the collective agreement. It also applies to employers and employees who are members of the signatory parties, with the result that they are not authorized to undertake industrial action against one another during the period of validity of the collective agreement (*Article 9, AECA*). The signatory organizations must exert pressure on their members to respect the collective agreement. This obligation, however, guarantees respect of the collective agreement only if that agreement makes express provision therefor (*Article 8, AECA*).

In this context, unions cannot readily support a strike running counter to the provisions of the collective agreement. They would be penalized by the courts, which would order them, by summary procedure, to disassociate themselves from the strike under pain of payment of fines (*see §60*).

The no-strike obligation may be binding on unions and their members only if the unions are signatories to the collective agreement. If this is not the case, the union may start or continue strike action to obtain a more favourable collective agreement.

Most of the no-strike obligations contained in collective agreements are of a relative nature, i.e. they concern only matters which are regulated by the agreement.

It is therefore possible to organize, during the period of validity of the agreement, other types of strike, such as sympathy strikes. There is some doubt as to whether it is also possible to strike for reasons not covered by the collective agreement, for instance for a supplementary bonus, a ruling relating to safety at work, etc.

In principle, the no-strike obligation expires as the collective agreement expires or is terminated by agreement, although in some cases it remains in force for a certain period after this expiry/termination.

10. Interpretation and appeal

§55 The employers and employees who are bound by a collective agreement must respect it. If a party does not respect it – intentionally, without premeditation or because of a doubtful interpretation – the other party to the contract of employment may refer the matter to the district court (*see §49*).

Moreover, signatory organizations of the collective agreement are entitled, because of this status, to initiate action against a member of another signatory organization who has not respected the collective agreement (*Articles 9, 15 and 16, ACA*).

Signatory organizations of the collective agreement are also entitled to intervene in any legal dispute involving interpretation of the collective agreement (*Article 114(2), Code of Civil Procedure*), but this power is infrequently used.

In some branches of industry and in major enterprises, the collective agreement sets out specific bodies before which infractions of the collective agreement may be brought. This is not, however, a very current practice.

In the Netherlands the observance of collective agreements is never subject to criminal sanctions. And only if they are extended by a ministerial order their may compliance be monitored by the public authorities if this is required by one of the signatory parties (although this is exceptional).

§56 Disputes relating to the contractual content of the collective agreement too may be brought before the common law courts but only by the signatory parties to the agreement. However these parties are normally reluctant to bring their differences to the court.

In some cases they put the matter before a joint arbitrary body but in most cases they put the problem on a back burner until the next round of collective bargaining.

Or they try to resolve it by way of a strike. But this would enable the common law judge to comment on the matter if he were asked for an injunction.

11. European prospects

§57 Up to now, the Dutch system of collective bargaining has not been affected to any great extent by European industrial relations, since the latter hardly exist.

It also seems unlikely that a reduction in the autonomy of the national social partners by European Regulations, Directives and collective agreements will come about in the near future.

The current system of collective agreements at national level is not, therefore, threatened by the existence of European regulations; it is rather the lack of European regulations which is a threat. Economic life takes place increasingly at multinational level. Collective agreements limited to the national level no longer make it possible effectively to contain employers' authority and power.

There are also shortcomings in collective agreements as regards the legal status of transborder workers.

For these reasons it could be argued that the correct operation of the system for establishing working conditions on a joint basis needs European rules.

Certainly, the European collective agreement is not a suitable instrument for complete harmonization of working conditions at European level. It may however prove valuable in the fight against *'social dumping'*. It may lay down a minimum level for working conditions and fill in the gaps and shortcomings regarding working conditions at European level. These functions cannot usefully be carried out by national laws and collective agreements.

In this respect the first phenomena of European collective bargaining must be welcomed:

- the rising number of collective agreements establishing European Works councils (*see §102*)
- the *Framework Agreement on Parental Leave*, concluded in December 1995 by the European organisations of employers and trade unions.

CHAPTER IV: INDUSTRIAL DISPUTES

SECTION 1: THE STRIKE

1. Development of the right to strike and strike action

§58 The ban on *'coalitions'* was lifted in the Netherlands in 1872. From that time on, criminal proceedings could not be taken against people for organizing or taking part in strikes.

Yet, civil-law risks were not removed to the same extent: strikers could be dismissed immediately because of *'breach of contract'* and even made to pay damages to employers.

Between 1918 and 1940 the doctrine of the abuse of rights and the summary procedure entered Dutch civil law. This offered the possibility of initiating civil proceedings against unions inciting strike action. However, these possibilities were hardly used before 1940.

After 1945, the Netherlands had a controlled wage policy (*see §35*) and strikes were very quickly seen as strikes against the authorities which could not be legal by definition. Unions affiliated to the major confederations which were associated with this wage policy felt that strikes would undermine their position; the only strikes which were organized were wildcat strikes or strikes organized by non-recognized Communist unions and were declared illegal by the courts in every case.

After 1958 when the Social-Democrats had left the government, the trade unions distanced themselves further and further from the state controlled wage policy. In this social context, industrial disputes have become increasingly numerous.

This situation led employers to request the courts to place restrictions on the freedom to strike. In 1960, the Supreme Court gave its famous PANHONLIBCO ruling. It considered that strikes should in principle be considered as a *'breach of contract'* by employees against their employers and that unions which incited employees to take such action were committing a tort.

The *Supreme Court* left only a small opening for legal strikes, i.e. when *"the circumstances [...] are such that, in the prevailing legal opinion, it is not possible reasonably to request employees to continue to carry on with their work"*.

This *Supreme Court* ruling was widely criticized - the space which it left for strikes was considered to be too small. The government requested the opinion of the *Economic and Social Council* and in 1969 introduced a bill to regulate the right to strike. This bill provoked further criticism and was finally withdrawn in 1980. In the meantime, in 1972, the Amsterdam *Court of Appeal* had already changed the framework used up to then in case law by ruling that a strike is legal in principle unless auxiliary circumstances make it illegal. This decision laid the foundations for a renewal of case law on strikes during the period to 1986.

Following ratification of the *European Social Charter* by the Netherlands in 1980, this Charter backed up the new tendency of Dutch case law. In a major order of 1986, the Supreme Court finally stated that the provisions of the *European Social Charter*, which recognized the right to strike, were directly applicable in the Netherlands and that, for these reasons, the right to strike should be considered to be legal.

§59 Although there was talk at the beginning of the 1970s of an industrial-relations crisis - the traditional Dutch model of industrial harmony had given way to a conflictual model - the number of working days lost over the years because of strikes has been one of the lowest in Western Europe, with the result that it might be said that Dutch industrial relations are always fairly *'harmonious'*. There are no major or long-term disputes. The industrial disputes which arise nowadays are generally of short duration. They serve to indicate the precise position of the various power relations in a socio-economic and political context which is continually changing. None of the social partners is out to destroy the other. When the various parties have established the lie of the land as regards these power relations - which can be fairly readily deduced - a compromise is reached and life continues until there are further doubts about the true nature of power relations.

The most important strikes are caused by the renewal of collective agreements in the private sector.

Before 1983, some strikes were called because of the government's intention to intervene in wages in the private sector.

There are very few State enterprises in the Netherlands and public servants' salaries and wages were automatically linked to wage growth in the private sector until the end of the 1970s, so there was no reason to organize separate strikes in the two sectors.

This link with wages in the private sector has been abandoned over the past ten years and there have been some strikes in the public sector in the Netherlands on the occasion of the annual review of working conditions in the public sector.

Most of the various types of industrial action have occurred in the Netherlands: strike in all its forms (general strike, selective strike, strike for recognition, slow-downs, sit-ins, sympathy strikes, etc), but the most common form is a strike paralysing a whole sector or enterprise organized by the major unions in order to achieve an improvement in working conditions. It is sometime accompanied by picketing, but this is much less common and less violent than in Great Britain, for instance. Wildcat strikes are rare.

During the last twenty to thirty years employers have never had to resort to lock-outs but have stated that they would use this method in the future if it were to prove necessary.

2. Judicial methods

§60 Dutch society as a whole generally feels ill at ease when an industrial dispute arises, and attempts are then made to make it as short as possible. It is often the case that, when a strike breaks out, employers initiate summary proceedings with the presiding judge of the *Regional Tribunal*.

In their request, they ask the judge to prohibit the unions from supporting the strike, under penalty of a fine.

The courts have no problems in accepting such requests. The Dutch unions have civil personality (*see* §24) and can therefore be brought before the courts.

The presiding judge of the *Regional Tribunal* rejects or accepts the request, or accepts it conditionally.

In practice, a (conditional) acceptance means that unions must withdraw their support for the strike. The social partners then meet around the negotiating table in order to find a compromise.

If they loze the unions always withdraw their support from strikes; they are therefore never forced to pay a fine. There are only few examples in which employers have claimed damages from the unions. It is the end of the strike which is sought and not damage to the opposing party.

In some cases, the unions lodge an appeal against the judgement prohibiting the strike, but this procedure leads to a *Court of Appeal* judgement, which takes several months; by that time, the strike is long over and the appeal judgement is of no significance, other than for the development of case law. Appeals to the *Supreme Court* take place only very rarely.

If, in contrast, the court authorizes the action, this is also an incentive to return to the negotiating table to find a

compromise as quickly as possible. If it is impossible to reach a compromise and the strike continues, there is considerable political and media concern, with the result that steps are soon taken to settle the dispute.

In the case of an organized strike, there are few opportunities for employers to take summary action against individual employees, but this situation is possible in the case of wildcat strikes.

In the past, employees ran the risk of having an *'order to resume work'* enforced against them, under penalty of a fine or a lodging of security, but these actions have been abolished by law since 1979 (*Article 1639a, Civil Code*).

3. Definition/concept of the legal strike

§61 Neither Dutch legislation nor Dutch case law contains a definition of *'strike'*. The top Dutch expert on the right to strike, Professor M.G. Rood of Leiden, has given the following definition of a strike: *"The collective stoppage of work by employees as a means of exerting pressure so that they can resume work as soon as the objective pursued has been achieved".*

The *Supreme Court* ruled in 1986 ruled that the principle of the legality of strikes refers essentially to a strike which is:

(a) general (i.e. which concerns all the personnel of an enterprise or occupational sector);
(b) directed against the strikers' employer or against his representative organization (i.e. which is not directed against a third party).

Strikes which do not meet these conditions must be assessed more rigorously as to their legality.

According to this *Supreme Court* ruling of 1986, strikes are illegal when:

a. major procedural rules have been disregarded;
   This includes cases in which:
   - a strike is organized when there has been little negotiation;
   - the necessary care has not been taken to avoid pointless damage and injury;
   - the strike conflicts with the no-strike obligations set out in the collective agreement.
b. after evaluating all the specific conditions and circumstances of the strike, as well as their internal links and interdependence, it must be concluded that the unions should not reasonably have taken such extreme action.

This mainly includes cases in which the damage caused by the strike is excessive in relation to what is at stake.

4. Disputes of right and disputes of interest

§62 International literature makes a distinction between *'disputes of right'* and *'disputes of interest'*.

In the Netherlands most strikes are due to genuine disputes of interest. Strikes out of disputes of right are not very common in the Netherlands as

- the rights of Dutch employees have been strongly enshrined in law,
- the courts may deal in full with labour-law disputes without being subject to any restrictions,
- the existence of the summary procedure and of legal assistance have greatly facilitated employees' access to this *'legal channel'*,
- unions may also take action in the courts in the event of disputes relating to interpretation of a collective agreement.

Consequently unions and employees prefer the judicial way for the resolution of disputes of right.

As strikes out of disputes of right are not very common in the Netherlands, it is not quite evident whether such strikes are by definition illegal. In the small body of case laws on strikes out of disputes of rights the courts have only seldom taken such a dogmatic stand.

5. Strikes in essential public services

§63 There are no legal provisions in the Netherlands in this area. In 1980, it was decided to make the social partners responsible for regulating this issue, through a strike code, but this idea was never put into practice.

The courts assess the legality of a strike by taking account of the fact that certain occupational sectors require a minimum service or safety measures in the event of strikes, and that employees in some essential services cannot strike without alternative arrangements being made.

In some cases the courts have agreed to hear cases against unions brought by customers' organisations where a strike threatened public interests (for example a bus drivers' strike).

6. Effects of strikes

§64 If strikes are legal, this legality has consequences for the legal position of the unions organizing them and for individual striking employees:

- The unions are not committing a tort and are not responsible for the damage caused by the strike.
- Striking employees are not committing a *'breach of contract'* and their employers cannot legitimately take disciplinary action, such as dismissal, demotion, etc., against striking employees. The courts could overturn these sanctions and order the employer to re-employ the employee in his former position and to reinstate his rights.
- No action for compensation can be taken against strikers.

Employers are not, however, liable to pay employees' wages. Striking employees are not entitled to unemployment benefit, but the unions provide them with strike pay from their strike funds.

Most strikes end fairly quickly in the Netherlands and in some cases employers pay wages for the days on which employees have been on strike.

A court ruling that a strike is illegal will request the unions which have come out on strike to end the strike as soon as possible.

Failure to observe this order attracts a fine to force unions to withdraw their support for the strike (verbally and in writing, and especially in financial terms: the strike fund).

If the union fails to withdraw its support, the fine may be enforced and the union may in principle be made, by the employer or by third parties, to pay damages.

In the Netherlands, unions normally, however, abide closely by legal decisions. For this reason it is uncertain to what extent unions may be held responsible for damages caused after they should have withdrawn their support, because the strike has been ruled illegal. There is no case law on this matter.

If the strike has been organized by the unions, and employees have acted on the court ruling and resumed work, employers may not take disciplinary action only on the ground that the strike has been declared illegal. From the moment the court has ruled that the strike is illegal, however, employers may take disciplinary action against individual strikers who continue to strike as long as the disciplinary action is not disproportional.

It is not certain whether third parties may take action for compensation of damages against employees. There is no case law on this matter.

SECTION 2: MISCELLANEOUS

1. Other types of industrial action

§65 In the case of a go-slow or work-to-rule, for example, employers do not have to pay all employees their full wages. It is not certain, however, exactly how much employers must pay or to whom payment must be made. In order to avoid labourious disputes, most employers are forced in practice to pay all employees' wages in full. It is exactly this last point which may provide the courts with grounds for ruling that these actions are illegal.

§66 A picket may in principle entail action by the police. In practice, the police prefer not to interfere in an industrial dispute as long as it does not result in serious crimes, which is very rare in the Netherlands.

Employers may, however, request a summary court judgement ruling that the picket is illegal and subject to the penalty of a fine. In most cases, the courts consider pickets to be illegal and unions and employees accept this ruling.

Sit-ins may also entail criminal proceedings in the case of serious crime but, here too, the police prefer to take no action.

Employers again have the opportunity, especially in the case of industrial action supported by the unions, to ask for a civil summary judgement ruling that the sit-in is illegal and ordering the unions to withdraw their support for the illegal action.

This situation has arisen, but, for instance, in the case of the closure of the production unit of Ford Amsterdam, the court made this order subject to a prohibition on Ford management preventing them from closing this unit immediately (*see §93*).

2. The lock-out

§67 Lock-out is in some cases taken to mean the dismissal of all striking employees. Reference should be made to §64 in this regard.

In other cases, however, lock-out is taken to mean the laying-off of non-striking employees because of a strike. The legal situation in this case in the Netherlands is described below.

The employer cannot easily present this laying-off as a dismissal, as under Dutch law it is not normally possible to dismiss employees without the authorization of a civil servant, which may costs weeks to obtain.

The employer may consider presenting the lay-offs as an interruption of the payment of wages, but then the difficulty arises that the Dutch law on the obligation to pay wages (*article 163&d Civil Code*) is not very clear. Are employers liable to continue to pay wages to non-striking workers who cannot work as a consequence of a strike?

Supreme Court case law has ruled that the response to this question depends on the nature of the industrial dispute.

In the case of a strike organized to obtain improved working conditions for the majority of employees, employers are not liable to pay the wages of those who wish to work but are prevented from doing so because of the strike.

In the case, however, of a wildcat protest action of short duration, in which only a few employees take part, employers are liable to pay the wages of the other employees.

If there is no right to payment of wages, non-striking employees may apply for unemployment benefit.

None of these questions has been dealt with in depth because the lock-out has not been used in the Netherlands since 1945 and employers prefer to continue to pay non-strikers (as long as they are genuinely non-strikers).

3. Dispute-settlement mechanisms

§68 Although - as we have seen - social conflicts are surrounded by a fairly impressive arsenal of legal weapons, Dutch statute law does not make provision for institutionalized bodies for conciliation, mediation or arbitration in industrial disputes. Old legal provisions containing dispute-settlement mechanisms have been abolished or have gone unheeded since 1945.

A bill introduced in 1969 containing new regulations on dispute-settlement mechanisms was never enacted and was withdrawn in 1986. Meanwhile, the idea of self-regulation of strike action by representatives of employers' and employees' confederations in the *Stichting van de Arbeid* has proved attractive to some people but has never been put into practice.

Collective agreements in some cases contain provisions relating to the procedures to be followed in the event of industrial dispute, but these provisions are very rarely used.

Industrial disputes of longer duration are sometimes mediated on an *ad hoc* basis by a conciliator who is a high-

level personality. The SER keeps an updated list of people offering to undertake this task.

Statutory mediation is offered in the field of workers' participation in the enterprise (*see* §75) as well as in the public service, for which a consultation and arbitration commission was set up in 1985 and operates under the chairmanship of a former Minister for Social Affairs (Dr Albeda).

4. Strike in the public service

§69 Public servants were prohibited from striking in 1903 and subject to criminal proceedings. This prohibition was abolished in 1979 but the government did not wish to grant an unlimited right to strike to public servants and consequently announced a bill to regulate public servants' right to strike. This idea was never put into practice and there is no law on this matter.

Public servants' unions organizing a strike could still be brought before the courts and could have a prohibition accompanied by a fine imposed upon them. Public servants themselves could be disciplined: demotion, dismissal, etc.

In some cases, however, the courts have already ruled that a strike by public servants is legal; in other cases, for instance in the case of police personnel, on one occasion a strike action was prohibited, another time it was condoned.

CHAPTER V: EMPLOYEE PARTICIPATION IN THE ENTERPRISE

SECTION 1: INTRODUCTION

§70 The Dutch system of employee representation is based on two key elements: unions and works councils.

Representation by unions is the longest-standing form of representation. During the first half of this century, the unions managed to establish themselves as social partners in collective bargaining. Employers accepted the unions as fully fledged partners in the negotiation of working conditions.

After the Second World War, the unions also managed to take their place in various consultative and decision-making bodies. Unions have had a considerable influence over national socio-economic management.

There is, however, little presence of the Dutch trade unions on the shop floor. There is no legislation like in Belgium and France to give the unions access to the shop floor.

Workers' representation inside the enterprise is almost entirely a matter for the works councils.

At the outset, the unions had an attitude of distrust towards the precursors of the current works councils, which were set up at the end of the last century by employers. Unions rejected these councils as *'instruments of management'* to block the emergence of independent trade unionism.

After the First World War, under German influence, the Socialist unions started to favour works councils. The main trend at that time was, however, to establish participation at the level of the occupational sector. Since then and up to now, the attitude of the unions towards works councils has been hesitant, although they have shown increasing interest. A division of tasks has in fact become established, in which the works council is chiefly responsible for matters inside the enterprise, and working conditions are largely left to the unions. Some factors have made the acceptance of works councils easier for unions: in particular, the fact that unions may themselves present a list of candidates (*see* §§*81-82*) and the fact that legislators have deliberately denied works councils any power over matters which are exhaustively regulated by collective agreement (*see* §*87*).

§71 The first statute relating to works councils was the *Works Councils Act* (WCA) of 1950. Yet this was a weak piece of legislation which was not very helpful in furthering the development of works councils.

A growing trend towards democracy led in 1970 to four Acts which were to extend employee participation. These included:

- an Act on the annual accounts of the company;
- an Act on the management structure of major enterprises;
- an Act on the right of investigation (*see* §*92*); and
- a new Works Councils Act of 1970 (*see* §*74*).

In the new *Works Councils Act of 1970* the powers and tasks of works councils and the legal protection of their members were increased and penalties were established to cover cases of non-observance.

The ever-increasing trend towards democracy led in 1979 to a major amendment of the Act, through which the works council became a real employees' committee (the employer being no longer its chairman) and the powers, possibilities of appeal and legal protection of works councils were again extended.

This Act was supplemented in 1982 by regulations on employee participation in small and medium-sized enterprises.

In 1990 the *Works Councils Act* was again amended to simplify the procedures of judicial review and to harmonise them with those of the Health and Safety Act. Quite recently, in 1996, the government tabled a new bill with a series of new amendments to facilitate the operation of works councils.

§72 The trade union movement benefitted less from the drive to expand industrial democracy in the Netherlands.

Union delegates on the work floor are only recognized in a number of collective agreements. Legal regulations on this issue have never passed the preparatory stage and were withdrawn in 1991.

The only statutory rights secured for the trade unions were those included in the *Act on the notification of collective dismissals* and in the *Act on company inquiries* (*see* §*98*). In addition the trade unions were to play a role in the rules of conduct to be observed in cases of merger (*see* §*94*).

§73 Initially the public service was left outside the system of works councils. For civil servants of the State since 1982 departmental committees have been set up to serve as participation centres organized in accordance with the various regulations covering public servants.

In 1994 however this system was replaced by a system of works councils according to the *Works Councils Act*.

In education (both public and private) specific participation regulations apply in order to include the participation of parents, pupils and students. Because of the constitutional guaranteed freedom of education, these regulations are to some extent less strict than those in the economic sector.

The regulations on participation in force at universities are, in contrast and for historic reasons (student protests in the 1960s), more comprehensive than those in the economic sector but a harmonisation move is envisaged by the present government.

SECTION 2: WORKS COUNCILS

1. Concepts/definitions

§74 The most important statute on workers' participation is the *Works Councils Act* (WCA) of 1971 as subsequently amended. This Act regulates the composition, election and powers of works councils in detail and also sets out possibilities for settling any disputes which may arise.

§75 The *Works Councils Act* also regulates the composition, appointment and powers of *'joint industry committees'*. These committees are set up by the *Economic and Social Council* for each occupational sector. They are composed of an equal number of representatives of employers and unions belonging to this occupational sector. These industry committees have mediation and advisory powers as regards disputes arising between works councils and heads of enterprises in the occupational sector in question (*Articles 37-46, WCA*).

§76 Company owners are obliged to set up a works council as soon as they employ at least 35 people under contracts of employment. If they have fewer then 100 employees, only employees employed for more than a third of normal working hours are taken into account. Employees who are not employed under contracts of employment may be involved in the functioning of the works council.

In the bill currently before Parliament some modifications of the latter provisions are proposed.

In enterprises which do not employ enough employees to establish a works council but which have at least 10 employees, employers must organize a staff meeting at least twice a year. Employers must ask the opinion of staff before taking certain decisions, for instance in cases of dismissals or major changes affecting at least a quarter of the personnel (*Article 35b, WCA*).

According to the bill currently before Parliament a sort of a works council may be established in these small enterprises too, notably to negotiate with the employer on working hours and health and safety matters.

In the case of medium-sized enterprises (35-100 employees), the standard rules for the works councils are modified somewhat (*Article 35a, WCA*).

The end result is that the works councils system in the Netherlands is progressively more burdensome for employers according to whether he has:

- 10 or more employees;
- 35 or more employees;
- 100 or more employees.

§77 An enterprise is *"any body organized and operating as an independent entity in which work takes place pursuant to contracts of employment"* (*Article 1, WCA*).

So the term *'enterprise'* does not refer solely to commercial enterprises. It should be noted that the way in which *'enterprise'* is defined means that even organizations which are not conventionally considered to be *'enterprises'* must organize a works council, for instance hospitals, welfare organisations and even religious groupings like the *Salvation Army*.

As we have seen already the public service is also under the *Works Councils Act* and therefore covered by the notion of *'enterprise'* which in the ambit of the *Works Councils Act* has completely lost any commercial connotation.

Furthermore the concept of *'enterprise'* as defined above reflects the current situation in society. It may be, but is not necessarily, identical with the legal concept of *'company'* which is used in company law. It should be noted that *'company'* is always taken formally to mean the employer/legal person.

However, the French notions of *'enterprise'* and *'establishment'* are very often confused in the Netherlands. The latter are distinguished only if the establishment is not an independent entity within the company. This includes for instance a ship, a service station, a building site, etc. The latter are defined in Dutch law as *'part of the enterprise'*. Some legal provisions take up this notion.

§78 All this means that enterprises which have two separate sites operating externally in an independent way, for instance as regards their output of products, intake of personnel, etc. must establish a works council at each of these sites as soon as they employ the required number of employees. Consequently all major enterprises which have several factories in the country have several works councils.

Yet, derogations from this model are possible if they are advantageous the smooth functioning of the *Act in the enterprises* (*Articles 3-5 WCA*).

§79 When an employer has several enterprises and has consequently set up several works councils, it may be felt necessary to establish a works council that covers the interests of all the employees. Employers may, for this purpose, set up a central works council as an umbrella organisation covering the various councils for each enterprise.

In some cases, a financial group of enterprises may be so complicated that it is felt necessary to set up a further intermediate level between the upper level of the central works council and the basic level of the various local

works councils: this is called the *'divisional works council'* and serves as a sub-umbrella covering only a part of but not all of the local works councils.

If the majority of the works councils concerned so wish, the establishment of a central works council or a divisional works council is compulsory. These councils look solely at matters which are of common interest to all or the majority of enterprises for which they have been set up (*Articles 33-35, WCA*).

A complicated network of participatory bodies has consequently emerged in major financial groups, large department stores, etc. Sometimes this has led to disputes about powers and a case has been reported in which a works council has taken action against the central works council!

§80 The works council may itself further develop its structure (*Article 15, WCA*). It may establish subcommittees dealing with the interests of certain groups of employees. If a particular site is not large enough for the establishment of an independent works council, the works council may establish a subcommittee for this site which is responsible for consultation with the local manager.

The works council may also establish standing committees for specific issues, for instance, a standing committee monitoring the safety, health and welfare of employees in a factory. Ad hoc committees may also be set up to prepare certain dossiers.

Standing committees must include a majority of works-council members; subcommittees may also include employees belonging to the body in question, alongside members of the works council. Ad hoc committees include at least one member of the works council.

Powers may be transferred to subcommittees and standing committees.

2. The electoral system

§81 The works council is elected by all employees in the enterprise by free elections, with the exception, however, of the manager of the enterprise. The works council is thus representative of all personnel in the enterprise.

Unions are not authorized to make appointments, but they may present lists containing their own candidates (*Article 9, WCA*). In practice very often a great deal of the members of works councils are union members. They sit alongside *'independent'* members elected from independent lists. The result is that unions exert some influence over works councils but do not control them totally. It may be that a works council takes a position differing from the union position on a given problem.

§82 All employees who have been employed for at least six months in the enterprise may vote. In order to be eligible for election, employees must have been in the enterprise for at least one year (*Article 6, WCA*).

A member may be excluded from the works council only by the industry commission and at the request of the owner or of the works council and for the sole reason that the member is a serious hindrance to the performance of the works council's activities.

The operation of the works council is further determined by its own rules of procedure (*Articles 8 and 14, WCA*).

Under the law, employees cannot suffer prejudice as regards their position in the enterprise because of candidature or membership of the works council or its committees (*Article 21, WCA*). Members, former members and candidate-members of the works council cannot be dismissed without prior judicial consent.

3. General powers

§83 The works council has, in the first place, a certain number of general powers in the interest of an effective operation.

Firstly, works councils have a right to information from the employer. The law describes in detail what is understood by this right to information (*Article 31, WCA*).

In general, employers must without delay provide all the information which the works council and its subcommittees may reasonably require for the performance of their tasks. Employers must pass on, on their own initiative, certain basic data relating to the enterprise, such as forecasts and reports on the enterprise's activities and results, data relating to staffing social policy, etc. (*Article 31a and 31b, WCA*).

§84 Provision is made for the employer and the works council to meet whenever one of them so requests, but at least six times per year (*Article 23, 23a and 23b, WCA*). At least twice a year, the meeting reports on the general conduct of the enterprise's affairs, in the presence of a representative of the supervisory board, if this exists (*Article 24, WCA*).

Works councils also possess:

- the right to invite experts (*Articles 16 and 22, WCA*);
- the right to use certain facilities belonging to the enterprise, such as a meeting place (*Article 17, WCA*);
- the right to take part in joint discussions and to consult personnel (*Article 18(1), WCA*);
- the right to education and training (*Article 18(2), WCA*).

All this takes place in due proportion and with continued payment of wages. In the event of a dispute, the matter is resolved by the district court.

The operating costs of the works council and its committees are borne by the employer. Employers must be informed in advance of the cost of experts which it has been decided to consult. The costs of this consultation are borne by the employer only if he so consents. If this is not the case, the matter must be brought before the district court. If necessary, the works council may request legal assistance paid for by the State.

Some of the rights mentioned above are modified in respect of small and medium-sized enterprises (*Article 35a and 35b, WCA*).

In the bill currently before Parliament it is proposed to give works councils a genuine power of initiative – if the employer turns down an initiative of the works council the latter may request mediation.

In addition some improvements of the facilities for works councils are proposed.

4. Economic powers

§85 Employers must request the opinion of the works council on a large number of decisions of an economic nature, such as transfer of the enterprise, merger, closure, major re-organizations, the recruitment of temporary employees, etc. (*Article 25 WCA*). In the bill currently before Parliament it is proposed to add to this list: the introduction of technological innovations and environmental investments.

The works council must be consulted sufficiently in advance for due account to be taken of its opinion. The decision must be reasoned in the same way as the final decision, if this is not in accordance with the opinion of the works council.

In this latter case, employers must defer application of their decision.

In the case of small and medium-sized enterprises, these rules are somewhat modified (*Article 35a and 35b, WCA*).

§86 The works council then has a period of one month to appeal against this decision before the *Chamber of Enterprises* of the Amsterdam *Court of Justice* (*Article 26 WCA*).

The investigation by the *Chamber of Enterprises* is only of a cursory nature. It will only accept that the appeal is founded if it considers that the employer could not reasonably have taken this decision if he had correctly evaluated all the interests involved.

Practice shows that the *Chamber of Enterprises* avoids any intervention as regards economic choices made by employers. It does not want to intervene with the laws of the marketplace. The investigation by the *Chamber of Enterprises* of decisions taken by employers consequently concentrates on procedural aspects, for instance, finding out whether the employer has consulted sufficiently with the works council. Several works councils have consequently won their cases because of procedural mistakes. An employer was thus prohibited from closing part of an enterprise when he had previously given his agreement to its continued existence. A decision will also be overturned if it does not give sufficient explanation for its deviation from the opinion of the works council. *Chamber of Enterprises* case law therefore helps to formulate principles for correct enterprise management: its case law encourages management to work correctly with works councils, thereby giving the maximum opportunity for employee participation through the works council.

If the *Chamber of Enterprises* considers the disputed decision of management incorrect, employers may be ordered to withdraw their decision in full or in part, to remove certain effects or not to take certain implementing measures. If necessary the *Chamber of Enterprises* may take interim measures in respect of the decision which has led to the dispute.

An appeal against verdicts of the *Chamber of Enterprises* may be lodged with the Supreme Court.

5. Social powers

§87 In social matters, employers may not take decisions without the agreement of the works council, which consequently has a right of veto (which may, however, be overturned, as will be discussed below). This right of veto covers matters relating to personnel management, such as arrangements in relation to recruitment policy, leave or promotion, arrangements relating to working hours or leave, pay systems or systems of job evaluation, as well as company rules (*Article 27[1], WCA*).

In the bill now before Parliament it is proposed to remove *'company rules'* from this list, but to add to this list: arrangements in relation to privacy and discipline.

But there is a very important limitation to these powers: the employer does not need to seek the works council's agreement in these matters if the matter is already exhaustively dealt with in a collective agreement or a regulation by a public body applicable to the enterprise.

This rule enshrines the priority of collective bargaining with the trade unions over negotiations with the works councils.

In practice it often happens, that the collective agreement with the trade unions has not settled a matter exhaustively but only rudimentarily. In those cases the employer must seek the works council's agreement on its concrete implementation.

§88 If the employer does not obtain the works council's agreement on these issues, he may put the case before the industry committee for mediation and may then demand such agreement from the district court, with a possible appeal to the *Regional Tribunal* with further appeal to the *Supreme Court* (*Article 27[4], WCA*).

§89 The works council also has the task of promoting the observance of all relevant provisions governing terms and conditions of employment, employees' health and safety, consultation relating to work, decentralization, the distribution of tasks within the enterprise and the employment of handicapped workers. It must ensure that no discriminatory measures are taken and, in particular, encourage equal treatment of men and women (*Article 28, WCA*).

If employers establish an institution benefitting employees, for instance a pension fund, the works council is entitled to appoint at least half the administrators (*Article 29, WCA*).

6. Other powers

§90 The works council has a right to consultation when a director of the enterprise is appointed. It does not, however, have recourse against the appointment of a director (*Article 30, WCA*).

In major enterprises the works council can influence the composition of the Supervisory Board (*see §§ 98-99*).

The powers of the works council may be extended in an agreement between the works council and the employer or by a collective agreement. The SER may also, in the event of a joint request from the employers' and employees'

organizations involved, order an extension of the powers of works councils belonging to a certain economic sector (*Article 32 and 32a, WCA*). Little use is made, however, of this latter possibility.

Works councils have additional powers under the *Health and Safety Act* (HSA). They have the right of consultation and negotiation relating to all matters affecting employees' health, safety and welfare (*Articles 14 and 15, HSA*). They may accompany officials from the *Labour Inspectorate* during their visits to the enterprise and may speak to them confidentially (*Article 32, HSA*). In the event of a dispute with the employer, they may appeal to the *Labour Inspectorate* to enforce the law. They may also, in certain cases, lodge an appeal with the Minister as regards the decision of the regional director of the *Labour Inspectorate* (*Articles 36* and *40, HSA*).

7. Legal sanctions

§91 The works council may ensure observance of all the obligations which the law on works councils places on employers by lodging a request with the district court. Prior to this request the industry committee must be asked to undertake mediation. Appeals may be brought before the *Regional Tribunal* and appeals may be taken to the *Supreme Court* (*Article 36, WCA*).

SECTION 3: UNION PARTICIPATION RIGHTS

1. Involvement in the right of company inquiries

§92 In 1971 Dutch Company Law was amended to give the judiciary the power of investigation into the policy and daily management of an enterprise. Such an inquiry can be ordered by the *Chamber of Enterprises* of the *Court of Justice* of Amsterdam (*Articles. 346-347, Book II, Civil Code*). Applications for such inquiries to be held can be made, by the trade unions or by the shareholders or by the public prosecutor of the Amsterdam *Court of Justice.*

The applicant must have informed the company's management and supervisory board in advance of the grounds for this inquiry. Unions must also allow the works council, if there is one, to give its opinion (*Article 349, Book II, Civil Code*).

A request is accepted by the *Chamber of Enterprises* only if there are reasons to doubt the correct management of the enterprise. In this case, the *Chamber of Enterprises* appoints one or several people to conduct an inquiry into the policy and management of the enterprise. Investigators have access to the books and files of the legal person, and the directors and members of the supervisory board are required to provide any necessary information (*Articles 345 and 351, Book II, Civil Code*).

If the inquiry reveals incorrect management, the *Chamber of Enterprises* may take any necessary measure, such as the suspension or cancellation of decisions, suspension or dismissal of directors or members of the supervisory board, temporary appointments of directors or members of the supervisory board, temporary derogation from the articles of association and even dissolution of the legal person (*Articles. 355-358, Book II, Civil Code*).

Appeals against *Chamber of Enterprises* rulings may be taken before the *Supreme Court* (*Article 359, Book II, Civil Code*).

§93 In practice, unions use this right of inquiry very rarely.

A first reason for this lies in the fact that the procedure takes a considerable amount of time. In the case of the closure of the production unit of *Ford Netherlands* at Amsterdam in 1981, the ruling - which rejected the unions' application - was given only after closure of the enterprise.

However, there is a remedy for this problem: unions may, at the same time as the request for the organization of an inquiry is made, lodge an application for summary proceedings against the enterprise in order to obtain a temporary ban certain managerial decisions.

This was the outcome of the BATCO I affair in 1980 when the management was prohibited from implementing its decision to close its Dutch plant for one year. By that time the *Chamber of Enterprises* had been able to establish *'mismanagement'* on the side of BATCO and the management decided to keep the production unit in Amsterdam in operation.

Secondly, a request is a difficult matter because the criteria adopted by the *Chamber of Enterprises* as regards incorrect management supposes management contrary to the fundamental requirements which may be imposed on a responsible owner. This condition is a stringent requirement. It may, however, be shaded so that it differentiates between social management and economic management. It was therefore considered in the BATCO I affair that there had not been incorrect economic management, but that there had been incorrect social management, as certain procedural rules had been breached and negotiations with the unions had left much to be desired. In practice, it seems that it is easier to prove incorrect social management than incorrect economic management.

Finally, a request is a risky undertaking since an applicant whose application has been rejected may be ordered to pay damages if the request was not reasonably founded (*Article 350, Book II, Civil Code*).

2. The *Merger Code*

§94 A second consultation and information measure relates to mergers. This regulation is not set out in an act of Parliament but in a document of 1970 issued by the *Economic and Social Council* which sets out the rules of conduct to be followed in the case of merger. It has two chapters, of which the first relates to the protection of shareholders and the second to the interests of employees. It does not contain any formal rules but merely indicates the procedures to be followed in the case of merger.

The *Economic and Social Council* order (commonly known as *'The Merger Code'*), amended in 1975, applies to any acquisition of a financial holding, whether direct or indirect, in the activities of an enterprise or part of an enterprise. It consequently relates both to mergers by transfer of shares and to legal mergers or mergers by sale,

etc. The *Merger Code* is also applicable when a merger takes place on the basis of a takeover bid. Its scope of application is limited, however, to mergers concerning an enterprise with at least 100 employees. The order relates solely to the economic sector, although its scope may be extended by collective agreement (*Article 15, Merger Code*), which was done for instance in the hospital sector.

As soon as merger negotiations reach a stage at which the conclusion of an agreement seems likely, employers must immediately notify the unions and the *Merger Commission* of the *Economic and Social Council*. The unions must be informed of the reasons and effects of the merger and must be allowed, during consultation, to give their opinion on the merger from the point of view of employees' interests. This consultation is about the social consequences of the merger for the workers concerned and the measures taken to cope with them. Unions must observe the confidentiality of these negotiations (*Article 18, Merger Code*).

Because the *'Merger Code'* is not an act of Parliament, the courts cannot enforce its observance. There is, however, a *Merger Commission* which supervises the observance of the Code.

This Commission comprises representatives of employees, employers and the *Association of Brokers*, as well as independent members. In certain cases, the Commission may grant exemption from observance of the guidelines (*Articles 23-30* and *32, Merger Code*). As a sanction against failure to observe the code, it may issue a public reprimand or give a public notification (*Article 32, Merger Code*). Moreover, in the case of takeover bids on the Stock Exchange, the *Association of Brokers* may also refuse to collaborate if the Code is not respected.

§95 The *Merger Code* does not operate well in the case of a genuine takeover battle. Under the pressure of time, vital decisions may be taken as to the future of the enterprise, such as a merger with a third party or the establishment of a legal protection framework, which do not always make it possible to organize the compulsory information and consultation within due time.

3. Collective Dismissals

§96 Finally Dutch unions have a statutory right of information and consultation in the case of collective dismissals. This is laid down in the *Notification of Collective Dismissals Act*, which implements the EC *Directive on collective dismissals*.

If an employer makes 20 or more employees redundant within three months, he is obliged to notify the trade unions. Implementing the collective dismissal is forbidden during a *'waiting period'* of one month. The trade unions can use this period to negotiate a *'social plan'* with the employer.

SECTION 4: PARTICIPATION IN COMPANY BODIES

1. The management structure of major enterprises

§97 In 1971 Dutch Company Law was amended to allow employees to have some influence over the composition of the top level of management of major enterprises. This regulation is a compromise between the opinions of employers and employees as regards the question of whether the works council should be authorized directly to appoint some of the members of the supervisory board, as is the case in Germany.

'Major' enterprises are considered to be public limited companies or partnerships, cooperatives and mutual-guarantee companies:

a) whose paid-up capital, including reserves, is at least NLG 25 million;
b) which have organized a works council;
c) which have at least 100 employees in the Netherlands (*Article 262 of Book II Civil Code*)

When the company fulfils these conditions, it must establish a supervisory board. This board has the following legal powers:

a) the appointment of management;
b) the closure of annual accounts;
c) the approval of major management decisions (*Articles 272-274 of Book II Civil Code*).

The Dutch solution for the composition of the supervisory board then is very original. The supervisory board appoints it own members. It must, however, inform the general meeting of shareholders and the works council in good time. These latter two instances, in the same way as management, may then make recommendations for the appointment of a member of the supervisory board. Before making a final appointment, the supervisory board notifies the general meeting of shareholders and the works council of the persons it intends to appoint. The supervisory board may appoint such persons, unless the general meeting of shareholders or the works council disputes this appointment. This dispute may be founded, in a limited way, on:

a) the likelihood that the candidate will be not suitable to carry out the functions of a member of the supervisory board;
b) the fact that the supervisory board will not be duly constituted if the intended appointment actually takes place;
c) the fact that there have been procedural errors.

The appointment may, however, take place if, at the request of the supervisory board, the *Chamber of Enterprises* of the Amsterdam *Court of Justice* declares the grounds to be unfounded. Appeal to the *Supreme Court* is not possible in this type of cases (*Article 268* of *Book II* of the Dutch *Civil Code*).

§98 Works councils have made very little use of this appeal procedure over their 25 years of existence; the reason is, as the case law of the *Chamber of Enterprises* made clear, that objections to proposed appointments based on subjective feelings of mistrust towards the proposed candidate are not accepted; objections founded on the abovementioned grounds must be justified in an objective way.

Clearly, this will not happen where the *Supervisory Board* is wise enough to propose suitable persons.

So the system has certainly contributed to improving the quality of the *Supervisory Boards*. But it has not at all

contributed to the feeling among works councils that they can really influence the composition of the *Supervisory Board*.

The same feelings are prevalent on the shareholder side so the general impression is that the Dutch system has helped to amalgamate the powers of management and the *Supervisory Board*, which is virtually uncontrollable.

The trade unions would still prefer a system in which a certain number of members of the supervisory board are appointed directly by the works council, but the government has no intentions at present to change the system.

2. The provisions in national law in respect of rights of participation, consultation and information in multinational groups

§99 Dutch company and labour law has made a number of exceptions to accommodate the rules of industrial democracy in multinational enterprises.

In the *Act on the management structure of major enterprises* (*see* §§*98-99*) the participation model was structured *'upwards'*: it is enough for the parent company to respect the model for its subsidiaries to be exempted.

This parent company, however, does not necessarily represent the highest management level of the group. In cases of multinational companies it is in most cases merely the highest level of the group's Dutch establishments. Above it, there is generally an international holding company which - even if it is established in the Netherlands, normally falls outside the scope of the aforementioned model of participation, as it has less than 100 employees.

It is for this reason that Dutch multinational companies such as *Philips* and AKZO *Nobel* have been able to keep the registered offices of their holding companies in the Netherlands without their holding company having to comply with the Dutch rules on the *Supervisory Boards*.

In so far as the Dutch rules on *Supervisory Boards* are applicable to multinational companies, those companies, which have most of their employees employed outside the Netherlands, are further served by another exception.

They may give their *Supervisory Boards* a much *'lighter'* status in the sense that it only has the power to control the major decisions of the management, but not the power to appoint management and to approve the annual accounts.

§100 The *Works Councils Act* at first sight does not contain exceptions to accommodate multinational companies. Multinational enterprises are subject to this Act and therefore have to establish works councils and even a central works council for their subsidiaries in the Netherlands if they meet the criteria of the Act.

However the *Dutch Works Council Act* cannot require multinationals to establish works councils for their enterprises outside the Netherlands. Neither can it require multinational companies to establish a central works council which is representative for all the enterprises of the multinational, in the Netherlands as well as in other countries.

So until now there has been no obligation on the management of multinational enterprises to set up a genuine *'central'* works council covering all the enterprises of a multinational.

This picture will be changed in the near future to a certain extent now that multinational enterprises are obliged by virtue of an EU Directive to set up European Works Councils.

In the Netherlands there is currently a bill before parliament to implement this Directive and already two Dutch multinationals (ING and DAF) have set up a Euro Works Council.

§101 The *Merger Code* is applicable to any foreign enterprise which is directly involved in a merger with a Dutch enterprise, whatever its nationality or place of establishment.

The result is that, in the case of a merger, the foreign partner, in the same way as the Dutch partner, is required to participate in the process of information and consultation as vis-à-vis the Dutch unions. It is taken for granted that the Dutch partner will inform his foreign partner of his specific obligations. If this is not the case, rigorous action is not taken against the foreign partner in respect of any infraction of the *Merger Code* (bearing in mind that the code sets out only symbolic sanctions!).

The Code nevertheless makes a very important exception for mergers *"which do not come within Dutch legal jurisdiction"* (*Article 15[3][c], Merger Code*). This exception relates to mergers between two or several groups of foreign companies whose actual management takes place outside Dutch territory, although they include Dutch establishments employing more than 100 employees.

A full merger between the Péchiney group and the *American National Can* group would not, therefore, fall within the scope of application of the *Merger Code*, although both these groups have major subsidiaries in the Netherlands.

This exception is interpreted, however, in a very restrictive way. Mergers involving solely or principally the Dutch subsidiaries of a foreign group would, therefore, be subject to the *Merger Code*, which means that a merger of *Péchiney Holland* and *American National Can Holland* would be governed by the *Merger Code*.

The notion of *'solely or principally'* is interpreted on the basis of the number of employees involved.

A Dutch enterprise or a Dutch financial group wishing to take over a foreign enterprise would have to respect the *Merger Code*, since it could be expected that this takeover would have major consequences for Dutch personnel: for instance, because of the size of the foreign enterprise or the harmonization of activities or markets.

§102 It should be remembered that works councils too must be informed and consulted in the event of a merger, pursuant to the *Works Councils Act* (*see* §*85*). As the scope of application of *Works Councils Act* is limited solely to enterprises established in the Netherlands, this obligation does not relate to foreign partners in a merger. Only the local management of subsidiaries established in the Netherlands is concerned by this obligation of infor-

mation and consultation. Moreover, local management is not obliged to request the opinion of the works council if the partner in the merger is located abroad and there is no reason to think that the merger will have a serious impact on enterprises in the Netherlands (*Article 27[1], last sentence, WCA*).

AUSTRIA

U. Runggaldier

CHAPTER I: MAIN ACTORS

Austria has both voluntary and statutory representative bodies at industry level. Characteristic of the structure of Austrian labour relations is the centralised nature of such associations and their integration within the system of social partnership, in which they are active in various areas of economic and social policy. At company level, worker interests are represented by the works council.

1. Voluntary representative bodies

1.1 Austrian Trade Union Federation (*Österreichische Gewerkschaftsbund* - ÖGB)

The *Austrian Trade Union Federation* (ÖGB) represents almost 60% of all employees, and 98% of workers organised in trade unions; with its 14 member trade unions, it thus in practice monopolises the representation of the workforce. This concentration of power does not have any statutory basis, but has historical reasons. With a view to overcoming political conflicts and concentrating on the common interest in the reconstruction of Austria, the ÖGB was founded immediately after the end of the Second World War as a universal and non-party-political trade union organisation, replacing the ideologically oriented trade unions of the inter-war years. Despite its claim to be above politics, however, the ÖGB is not apolitical; within the ÖGB, policy is decided by political groupings, with the social-democratic group representing the majority in 13 of the 14 member trade unions. It should be noted, however, that individual trade union membership is not conditional upon belonging to a political group.

Legally, the ÖGB is a society under the *Societies Act*. Organised by industrial sector, the 14 member trade unions are not separate legal persons, but are statutory organs of the ÖGB, which supervises their composition and activity. Although individual workers join a specific trade union, they are, legally speaking, members of the ÖGB as the umbrella organisation. In practice, however, the trade unions play a major role, as can be seen from the dominant part they play in collective agreements at sector level.

The ÖGB comprises the following trade unions (in order of size): private employees' trade union, metal/mining/energy trade union, public service union, wood and construction workers' union, municipal employees' union, railway workers' union, post and telecommunications employees' union, chemical workers' union, agriculture and food union, hotel, catering and personal services union, commerce and transport union, textiles, clothing and leather union, printing and paper industry union, and the union for the arts, media and liberal professions.

Most of the trade unions in the ÖGB are organised along sectoral lines, i.e. all employees in an economic sector, regardless of occupation, belong to the same trade union. An exception is the private employees' union, which represents salaried employees in all sectors except for the arts, the media and the liberal professions. The organisational differences between the manual and white-collar unions occasionally lead to tensions. A restructuring of the trade unions is currently being planned, the aim being to have just three large umbrella associations grouping together related member organisations.

Under its statutes, the ÖGB is called upon to carry out the following tasks: representation of the social and economic interests of workers, promotion of trade-union activities to improve working conditions, participation in legislation in the field of social and economic policy, conclusion of collective agreements, representation of workers in disputes, nomination of representatives to organisations, exercising influence on the social insurance system, making legal protection available to members free of charge and promotion of the education and training of workers. The broad nature of these tasks illustrates that the ÖGB's activities within the framework of social partnership go beyond the immediate trade-union sphere.

In 1994, the ÖGB had 1 599 135 members, representing a drop of 1% compared with 1993. This continued a long-term trend; back in the 80s, the level of trade-union organisation in Austria fell from over 65% to around 58%.

1.2 The employers

On the employer side, no single organisation has such a dominant position comparable with the ÖGB's. The main body is the *Association of Austrian Industrialists*, a voluntary organisation; there are only a few other voluntary employer associations, for example in the banking and insurance sector. To avoid jurisdictional conflicts, these associations have concluded working arrangements with the statutory bodies representing employer interests. Collective agreements are normally entered into by the statutory bodies representing employers.

2. Statutory representation

Alongside the voluntary representative bodies, the interests of employers and workers are represented by statutory, self-governing bodies (chambers). The main chambers are the Chambers of Labour (*Arbeiterkammern*) and the Chambers of Industry (*Wirtschaftskammern*). In practice, statutory representation by the Chambers plays a major role, since nearly all sectors of the economy are represented by such statutory bodies and, in addition, all persons employed in these sectors are automatically members.

2.1 The Chambers of Labour (*Arbeiterkammern*)

In principle, the *Chambers of Labour* cover all workers apart from senior employees (*"persons permanently entitled to exert a determining influence on the management of the enterprise"*). Each Federal *Land* has its own chamber (*Landeskammer*); the *Federal Chamber of Labour* is responsible for matters affecting more than one *Land*. In practice, the *Chambers of Labour* and the ÖGB are largely run by the same people; while this ensures coordination between the two organisations, it does occasionally give rise to criticism. In addition to providing information and advice to workers (including legal protection in matters of labour law), the *Chambers of Labour* are integrated within the political decision-making process in a variety of ways (e.g. consultation on legislation and participation in social partnership bodies).

The *Chambers of Labour* are self-governing; the main organs are the plenary assembly, the executive committee, the president and various specialised committees. The plenary assembly is directly elected by the members every five years. The chambers are financed by a chamber levy, a percentage of gross earnings deducted at source from each Chamber member.

2.2 Chambers of Industry (*Wirtschaftskammern*)

Both natural and legal persons may be members of the *Chambers of Industry*; membership comes automatically with an authorisation to trade as a business. Every Chamber member has a vote, thus ensuring that small and medium-sized businesses are strongly represented.

As on the worker side, the employer side is also represented by nine *Land* chambers and a Federal chamber. They are each organised into six sections, representing the interests of different sectors (craft trades, industry, commerce, banking and insurance, transport and tourism) and in turn comprising specialist groups.

The main tasks of the *Chambers of Industry* are to advise their members and give opinions on draft legislation. Of particular importance in practice is also their ability to conclude collective agreements. The central collective agreements for each sector in Austria are concluded between the specialist groups of the *Chamber of Industry* and the ÖGB trade unions. Finally, the *Federal Chamber of Industry* is legally authorised to undertake various economic administration tasks (e.g. in the field of foreign trade).

3. Social partnership

A characteristic feature of Austria is the system of social partnership, in which the representative bodies of the employers and workers are integrated. The basis for social partnership is the pursuit of the long-term common goals and interests of both employers and workers (economic growth, international competitiveness, social consensus). Characteristic of this social partnership is an extensive negotiation process, going well beyond traditional industrial relations questions (wages policy, working conditions). The employer and worker organisations participate in the formulation of general economic and social policy and are often the driving force in such matters. They are represented on a variety of different bodies, ranging from social insurance boards to the central bank. They do not act purely as organisations fighting on behalf of their clientele, but are called upon to act in the *"common good"*. The centralised structure of labour relations facilitates the negotiation of stable agreements, but also serves to curb selfish group interests. There is general agreement that the readiness to cooperate and the tendency towards stability characteristic of the social partnership system has contributed in recent decades to the extremely positive economic development of Austria, also when compared at international level. A macro-economic policy pursued by the social partners is of great importance particularly for a small country with a high level of foreign trade. In recent years, however, the social partnership structures have increasingly been criticised as too rigid and insufficiently innovative.

The *"Joint Commission for Wage and Price Questions"*, established in 1957, is the central social partnership body. Cooperation on the *Joint Commission* is completely voluntary and has no statutory basis (gentlemen's agreement). Under the chairmanship of the Federal Chancellor, with the relevant government Ministers attending, the four *"big"* representative bodies – ÖGB, *Federal Chamber of Labour*, *Federal Chamber of Industry* and the Conference of the presidents of the *Land Chambers of Industry* – meet together on the *Joint Commission*. It in turn has various subcommittees (wages subcommittee, prices subcommittee). The *"Advisory Council for Economic and Social Questions"* is responsible for preparatory work (studies, reports, etc.).

In formal terms, the *Joint Commission* also plays a role in collective bargaining: the member organisations of the representative bodies ask it for permission to enter into negotiations and submit to it for approval the agreements they conclude. In fact, however, this is merely a formal procedure intended more for the purpose of general legitimation; the Commission does not intervene in collective bargaining.

4. Worker representation in companies: the Works Council

At company level, the works council represents the interests of employees. Unlike at industry level, the representation of workers in companies is governed by detailed legislation. The works council is legally completely independent of the trade unions. In Austria, there is no provision for trade union representation within companies, e.g. by shop stewards. In practice, however, there are close personal links between works councils and trade unions; the vast majority of works council members are also active trade unionists. Where at least four works council representatives are to be elected, trade union officials are also entitled to stand for election. At least 3/4 of works council members must be employed by the company in question, however.

As in Germany, the works council in Austria consists solely of worker representatives and is the negotiating partner of the company management. If the workers so request, a Works Council must be set up in any company permanently employing more than four workers entitled to vote. Where necessary, separate works councils have to be set up for workers and salaried employees. If the establishment employs more than four young persons, a youth representation council has to be set up; where there are more than four disabled workers, a spokesperson for disabled persons has to be elected. A works council can be established only at the initiative of the workers; however, the exercise of a number of rights is dependent on the existence of a works council.

The size of the works council depends on the number of employees in the company (one representative for 5-9 workers, two for 10-19 workers, three for 20-50 workers, four for 51-100 workers, etc.).

If a company comprises several establishments that form an economic unit and are administered centrally, a central works council must be set up. In groups of companies, a group representation can be set up if there are works councils in more than one enterprise.

The works council has supervisory, information and consultation rights in various areas. In addition, it has joint and non-joint decision-making powers. Its main non-joint decision-making power is its right to sit on the supervisory board. In the case of joint decision-making, the owner of the company and the works council are both equal partners. In legal terms, the aim is for this restriction on the owner's sole right of decision to be balanced by the works council's interest in the *"common good"* of the company.

The main decision-making power in economic terms is the right of the works council to designate 1/3 of the members of the supervisory boards of joint stock companies, limited companies and others mentioned in the relevant legislation. The worker representatives on the supervisory board essentially have the same rights and duties as the shareholder representatives.

CHAPTER II: REGULATION OF WORKING CONDITIONS

1. Constitutional law

Questions of labour legislation are touched upon only peripherally by Austrian constitutional law. Of particular relevance here is the division of competences between the Federal Government and the *Länder*, with legislative competence in nearly all labour legislation matters being in the hands of the Federal Government. In addition, the right of association is constitutionally guaranteed.

The *Austrian Constitution* does not provide for any fundamental social rights in the narrow sense. The *European Social Charter*, which has not been ratified as constitutional law, is subject to an implementation condition, i.e. national legislation is required to implement it.

2. Ordinary legislation

In Austria, labour legislation matters are usually governed by ordinary legislation. In the law governing employment contracts, most legislation imposes obligations on one party only, i.e. they may be modified by collective agreement, company agreement or individual contract in favour of the employees, but not to their disadvantage (advantage principle). In the law governing company constitutions, the legislation is normally binding on both parties, i.e. cannot be modified in either direction (regulatory principle).

At the level of ordinary legislation, there is considerable fragmentation of legal sources in Austria, because - for historical reasons - the employment conditions of individual groups of workers have each been regulated separately. Examples are the *Business regulations of 1859*, the *Journalists Act of 1920*, the *Salaried Employees Act of 1921*, the *Actors Act of 1922*, the *Estate Employees Act of 1923* and the *Contracted Employees Act of 1948*. In addition, there is a range of special legislation for subsidiary areas of labour law, e.g. the *Protection of Mothers Act of 1957*, the *Employee Liability Act of 1965*, the *Working Time Act of 1969*, the *Continued Payment of Wages Act of 1974* and the *Employee Protection Act of 1994*.

In 1967, the *Federal Ministry of Labour and Social Affairs* set up a Commission to prepare the codification of labour law. An important outcome of this work was the adoption of the *Labour Constitution Act of 1974*, which regulated a large part of collective labour law. Where individual labour law is concerned, however, no codification has yet been possible; indeed, special legislation continues to be adopted. However, the endeavours to arrive at a codification continue.

3. Collective agreements

In Austria, 98% of all workers outside the public service are covered by collective agreements. Collective agreements can apply to either the country as a whole or to individual *Länder*; most workers are covered by Federal collective agreements. The normal case is for collective agreements to be confined to occupational groups and sectors. The main division on the worker side is the split between workers and salaried employees: in many sectors there are separate collective agreements for these groups.

Collective agreements comprise a part governing liability and a regulative part. The part governing liability is essentially a civil-law contract binding only on the two parties. The regulative part of a collective agreement may be regarded as equivalent to legislation. The provisions of collective agreements are also governed by the advantage principle, i.e. in cases of doubt they are unilaterally binding and can be modified only by provisions in a company agreement or contract of employment that are more favourable to the employee. Collective agreements chiefly regulate rights and duties arising from the employment relationship. In practice, most collective agreements offer only slight improvements over the law in some central areas of regulation (protection of working time, redundancies, protection against dismissal and periods of notice for salaried employees), due to the considerable involvement of the social partners in the formulation of legislation.

In practice, most collective agreements in Austria are concluded between the statutory representatives (chambers of industry) on the employers' side and the voluntary representative bodies (ÖGB trade unions) on the workers' side. In Austria, collective agreements do not apply solely to workers who are members of the worker organisation party to the collective agreement but to all workers employed in an establishment or enterprise whose owner is a member of the employer association party to the agreement. This phenomenon is referred to as the *"outsider"* effect.

For employment relationships in sectors not covered by a collective agreement, the Federal Conciliation Office (*Bundeseinigungsrat*) may, in certain circumstances, declare an outside collective agreement to be applicable (made into a statute). Where there is no employer association able to conclude a collective agreement, a minimum wage may be set by the *Federal Conciliation Office* at the request of a worker association able to conclude a collective agreement. In practice, minimum wages are set in domestic service and caretaking.

4. Company agreements

Where authorised by law or collective agreement, company agreements may be concluded within individual establishments. A company agreement is a written agreement between the owner of the establishment and the works council subject to the restrictions placed on it by the authorisation.

Legislation provides for several types of company agreement. A *"necessary company agreement"* covers measures that can be taken by the employer only on the basis of a company agreement reached voluntarily. A *"substitutable"* or *"enforceable company agreement"* relates to matters the regulation of which by company agreement can be enforced by one of the parties. This means that if no agreement is reached, the party concerned can call upon the Arbitration Office (*Schlichtungsstelle*). However if it is then still not possible to reach an agreement, the *Arbitration Office* has to arrive at a decision, which takes the place of the failed company agreement. This decision has the effect of a valid company agreement. Finally, the *"voluntary company agreement"* covers matters that may be regulated by company agreement only if the parties voluntarily agree.

Like collective agreements, company agreements are directly binding in law. Their relationship to collective agreements is again governed by the advantage principle: in areas that fall under both a company agreement and a valid collective agreement, the company agreement only has legal effect if it contains more favourable provisions for the workforce.

In practice, company agreements are concluded with a variety of provisions going beyond the statutory requirements. These are known as *"free company agreements"*. They do not have the legal status of a normal company agreement. In the view of the *Supreme Court*, however, the content of such an agreement may be considered to supplement individual employment contracts and hence have legal effect. This interpretation of a free company agreement as a model contract is frequently criticised by experts.

5. Individual contracts of employment

In order of legal priority, individual contracts of employment come after binding law, collective agreement and company agreement. The contract of employment concluded between the employer and the individual worker provides the basis for the employment relationship and hence for the application of collective agreements and company agreements. In this respect, it is of some importance. However, as a means of regulating working conditions, it plays no more than a subsidiary role because of the wide scope of the law, collective agreements and company agreements.

Individual contracts of employment are important for senior employees, since they do not come under the law on the constitution of enterprises, which provides protection in the event of dismissal, relocation, etc. They are also of particular importance for those in practice rare employment relationships not covered by a collective agreement.

CHAPTER III: RESOLUTION OF DISPUTES

1. Institutions

1.1 The Labour Courts

The *Labour and Social Courts Act of 1985* brought together the previously separate competences of labour courts, arbitration tribunals and conciliation offices in labour disputes. The regular courts, acting as labour courts, are now competent in such matters. They include legal disputes between employers and employees in connection with employment relationships or the contracting of such relationships, between employers or workers and worker organisations, between workers in connection with the work they perform together, concerning pension claims, claims against the construction-workers, holiday and redundancy insurance schemes and against the pharmacists' salary fund and concerning rights under company statutes.

Austrian labour courts are integrated within the regular judicial system. Fifteen *Land* courts act as *"labour and social courts"* of the first instance; Vienna has its own labour and social court. The courts of second instance are the four higher regional courts, while the court of third instance is the *Supreme Court "in matters of labour and social law"*.

Decisions in labour law are in principle taken by court *"senates"* comprising professional judges and expert lay judges. In the first instance, the senate comprises one professional judge and two lay judges, one representing the employers and one the workforce, where possible from the same occupational groups as the parties involved. The senates of the *Higher Regional Court* and the regular senates of the *Supreme Court* comprise three professional and two lay judges; the reinforced senate of the *Supreme Court* comprises seven professional judges and four lay judges.

The expert lay judges are elected to their (honorary) posts by the statutory bodies representing the employers and workers for a term of five years. They are independent in the exercise of their duties and share the judicial powers of the court in full.

The new legislation governing labour and social courts introduced a collective right to initiate proceedings at company and industry level. In matters of labour law, for example (but not in legal disputes under company statutes), the employer and the worker organisations able to enter into collective agreements at company level (works council) may take legal action, and have actions brought against them, to determine the existence or non-existence of rights or legal relationships affecting at least three workers in the establishment or enterprise. The judgment applies only the parties to the action and is not binding on any subsequent action involving the employer and workforce. In practice, such judgments are usually complied with by both the employer and the worker side.

At industry level, employer and worker bodies capable of entering into collective agreements may, in their sphere of activity, may bring an action before the *Supreme Court* against other bodies able to enter into collective agreements to determine the existence or non-existence of rights or legal relationships. The case brought by the plaintiff need not mention named persons, but must relate to at least three workers or employers. Here too, the judgment applies only to the action in question, but in practical terms the interpretation of the *Supreme Court* assumes great importance. The *Constitutional Court* is soon to decide on the constitutionality of this special judgment procedure.

In the labour courts, proceedings in the first instance are uncomplicated and are designed to reach a rapid conclusion. For example, the parties need not be represented in the first instance. Where the parties present their own cases, the judge has a particular duty to provide instructions and directions. The parties can also be represented by an official

or employee of a statutory representative body or voluntary professional organisation capable of entering into a collective agreement; this often happens in practice. In addition, workers can be represented by the works council and employers by their employees, representatives or members of a management body.

1.2 Arbitration Office (*Schlichtungsstelle*)

Under Austrian law, a distinction is made between obligatory and voluntary arbitration, with voluntary arbitration predominating. In Austria, provision is made for compulsory arbitration only at company level in connection with enforceable or substitutable company agreements. Compulsory arbitration proceedings are handled in Austria by an arbitration body set up on an *ad hoc* basis.

At the request of the two parties to the dispute, such an arbitration body will be set up at the seat of the court of first instance concerned with matters of labour law and comprises a chairman and four assessors. The chairman is appointed by the President of the Court from those professional judges concerned with matters of labour law at the joint request of the two parties to the dispute. The latter each designate two assessors, one from the panel of assessors drawn up by the *Federal Ministry of Labour and Social Affairs* and one from the company in question. The decision of the arbitration body has the status of a company agreement.

Voluntary arbitration in connection with the conclusion or modification of collective agreements is the responsibility of the *Federal Conciliation Office*.

1.3 Federal Conciliation Office (*Bundeseinigungsstelle*)

The *Federal Conciliation Office* is a collegial body under the *Federal Ministry of Labour and Social Affairs*. It comprises the chairman, who is appointed for an indefinite term, subject to revocation, by the *Federal Ministry of Labour and Social Affairs* after consulting the *Federal Chamber of Industry* and the *Federal Chamber of Labour*, and members appointed by the employers and workers. The latter are appointed for five years upon the proposal of the statutory representative bodies.

The *Federal Conciliation Office* acts essentially in three areas:

1) On request it establishes statutes and determines minimum wage rates and apprenticeship compensation.
2) It can act on a voluntary basis to arbitrate in disputes between parties to collective agreements.
3) It is responsible for granting and withdrawing the capacity to conclude collective agreements and interprets collective agreements following requests by courts or administrative authorities.

2. Industrial action

In Austria, industrial action is very rare. In practice, the nearest thing to industrial action is works assemblies lasting up to two hours, which are allowed to be held under the *Employment Constitution Act*. The reasons for the very low frequency of strikes compared with the other OECD countries lie in the negotiating mechanisms of social partnership, which over the long term clearly represent for the trade unions a more efficient form of asserting their interests than industrial action.

It should be noted that, from a legal standpoint, industrial action is regulated neither by the constitution nor ordinary legislation. It is *"tolerated"* by the legal system and is subject to general law. No systematic distinction is made between strikes and lock-outs.

In Austria, the prevailing legal view is that a distinction needs to be made between the collective and individual aspects of the law where a strike is concerned. Even where a strike is legal as a collective action, the individual worker is in recurrent breach of his contract of employment through participating in the strike and hence provides grounds for dismissal. This *"separation theory"* is strongly criticised by some experts. The *Supreme Court* has hitherto not issued any ruling on this issue.

It could be argued that the rudimentary character of Austrian law governing industrial action is due to the centralised and negotiation-oriented structure of labour relations: on the one hand, a fully fledged strike law is not seen as necessary in a system of social partnership, since strikes are not regarded as an option. On the other, the relative unattractiveness of industrial action contributes to the inclination of the negotiating parties to cooperate. Last but not least, the law makes *"wildcat"* strikes difficult and hence facilitates the acceptance of centrally negotiated agreements.

CHAPTER IV: INTERNATIONAL BACKGROUND

The entry into force of the *European Economic Area* on 1 January 1994 and Austria's accession to the *European Communities* on 1 January 1995 have resulted in a qualitative leap in the international integration of Austrian labour law. Despite the generally high level of labour standards in Austria, the lot of workers has improved in various areas covered by Community law. Changes to Austria labour law were necessary particularly in the areas of equal opportunities, worker protection, ownership transfers, mass redundancies and written certificates of employment. For example, the regulations governing technical worker protection in Austria have had to be completely rewritten. In the case of ownership transfers, the obligation to transfer contracts of employment has led to an improvement in the position of workers, compared with the agreement between buyer, seller and workers previously required in Austria for the transfer of employment. Where equal opportunities are concerned, the ability to take into account indirect discrimination in particular represents an innovation. The obligation to provide a written certificate of employment had already been implemented in 1993 in line with *Directive 91/533*.

Beyond Community level, the ILO Conventions are of particular importance. Austria is a member of the ILO and, in this capacity, has ratified a number of international treaties.

PORTUGAL

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CHAPTER I: THE ACTORS

SECTION 1: INTRODUCTION

This study will focus on actors in the industrial relations system in the context of their collective organisations. A specific hierarchical and functional order will be adopted. First, the State. Next, the system of trade unions and employers' organisations, with their primary organisations, associations, federations and confederations. In-company workforce organisation through unions and works councils will be briefly examined, since it plays a part, albeit informal and subsidiary, in the regulation of working conditions. Finally, we shall study the structures which underpin the social dialogue nationwide: the *Permanent Council for Social Consultation* and the fledgling *Economic and Social Council.*

SECTION 2: THE STATE

1. Functions and structures

The State plays a very important role in the regulation of working conditions in Portugal. It intervenes at legislative, administrative and jurisdictional levels.

In the *legislative* sphere, the State:

(a) establishes the constitutional basis for workers' rights (fundamental rights)
(b) establishes the constitutional basis for trade union freedom and collective autonomy;
(c) gives shape to and guarantees the legal effectiveness of the collective regulation of working conditions (either in the agreement-based sub-system or in the statutory sub-system);
(d) prescribes minimum requirements for protection in the workplace;
(e) establishes the general nature of the employment contract.

In the *administrative* sphere, the State makes a direct contribution to the collective regulation of working conditions (to supplement collective agreements and to underpin collective bargaining). It is also responsible, through the Employment Administration, for monitoring, helping to resolve collective disputes, and for a range of administrative duties.

Finally, in the *jurisdictional* sphere, the State enforces the law.

The legislative function is the province of the Assembly of the Republic (Acts) and the Government (Decree-laws). The administrative function properly falls to the Government, more particularly to the *Ministry of Employment.* The jurisdictional function is carried out by the Courts.

Chapter II will examine how each of these bodies discharges its duties.

We now turn to the agencies and departments whose duties are relevant to this study, in order to see how they are organised.

2. The Assembly of the Republic

The Assembly of the Republic (AR) is the representative assembly of all Portuguese people. It is made up of at least 230 and at most 235 deputies. These are elected by electoral constituencies set up by law (which may also create a national electoral constituency). In principle, all voting citizens are eligible. The deputies represent the country as a whole, rather than just their own constituencies.

Only the political parties, acting on their own or in coalition, can stand for election to the AR. However, citizens who are not registered members of these parties may be included on their respective lists.

The deputies, who are elected by proportional representation using the method of highest average (the De Hondt system), enjoy special status for the duration of their mandate. The rights, prerogatives, immunities, duties and incompatibilities attendant on their position are specified in detail.

In principle, the legislative period is four years. It can only be interrupted by dissolving the AR. The President of the Republic has sole power to dissolve the AR.

A legislative session lasts one year. It generally runs from 15 October to 15 June.

Ministers are entitled to attend and speak at plenary sessions of the AR. They may be assisted or replaced by Secretaries of State. Meetings are held at which members of the Government answer deputies' questions and requests.

The AR regulations make provision for committees on which members of the political parties are proportionally represented. The third committee (the *Committee on Employment, Social Security and the Family*) is particularly relevant to this study. The committees play a key role in debates on new bills since, once these are passed in principle, the AR may ask the committees to fill in and vote on the details.

3. The Government and the Employment Administration

3.1 The Government

The Government conducts the country's general policy. It is the highest body of public administration, consisting of the Prime Minister, Ministers and Secretaries of State. Their number and their respective duties are laid down by the respective enabling laws.

The Prime Minister is appointed by the President of the Republic following consultations with the parties represented in the AR. His choice must reflect the outcome of the elections. The remaining members of the Government are proposed by the Prime Minister and appointed by the President of the Republic.

The Prime Minister is accountable to the President of the Republic and, as part of the Government's overall political accountability, to the Assembly of the Republic.

The Government drafts a programme of work and submits it to the AR for approval. The programme outlines the main political options and the measures to be taken or proposed in the different spheres of Government activity. The members of the Government are bound by the programme and by the decisions of the Council of Ministers.

The Government may ask the AR for a vote of confidence on a general policy statement or on any given subject of national interest. The AR, acting on the initiative of one quarter

of its members, may adopt a motion of censure on the Government's handling of its programme or on other subjects of national interest. If a motion of censure is passed by an absolute majority of titular deputies, the Government must resign.

New ministries introduced by the Enabling Law subsequent to the current Government (*Decree-law No 329/87 of 23 September*) include the *Ministry of Employment and Social Security*, formerly known as the *Ministry of Labour*. The old name still features in the Enabling Law (*Decree-law No 47/78 of 21 March*). According to this law, the Ministry's responsibilities include *"framing employment policy and coordinating the means of implementing it. To this end, it will ensure that workers' organisations are effectively involved and will promote the harmonious development of labour relations, with a view to improving workers' living conditions. It pays heed to social and economic reality in the country"*.

The Minister of Labour is assisted by three Secretaries of State: the Secretary of State to the Minister, the Secretary of State for Employment, and the Secretary of State for Social Security.

3.2 The Ministry of Employment and Social Security

With regard to employment, in addition to policy-making and support machinery, the Ministry includes a General Labour Inspectorate and Directorates-General for Labour, Collective Labour Relations, and Health and Safety at Work. There follows a brief description of the various departments, outlining their powers in the social and economic arena.

3.2.1 The Directorate-General for Labour

This Directorate-General has duties and powers in the field of labour relations and working conditions and is divided into two directorates and four divisions.

Besides formulating policies and drafting legislation, the Directorate-General is responsible for:

- registering and publishing collective agreements, arbitration rulings and accession agreements;
- taking part in preparatory research in the field of statutory labour regulation;
- promoting the establishment of joint committees as stipulated by collective agreements;
- drafting opinions and providing technical support for any public or private-sector bodies which ask for it;
- registering and publishing the rules of trade union and employers' organisations;
- promoting the publication of the means of identifying the members of employers' and trade union organisation managements;
- preparing sociological studies on the social aspects of labour and on the conduct of its actors;
- analysing the trends in collective labour relations, trade union activities and disputes;
- monitoring wage settlements resulting from collective bargaining;
- helping to prepare negotiations on the national minimum wage;
- drafting preparatory studies on the ratification of *International Labour Organisation* conventions ;
- providing technical back-up for permanent links with the *International Labour Organisation* and other international bodies.

3.2.2 The Directorate-General for Collective Labour Relations

The Directorate-General for Collective Labour Relations (DGRCT) plays an active part in the resolution of labour disputes, chiefly through the intermediary of its conciliation services. The DGRCT is a regionalised service, with delegations in different parts of the country. The Directorate-General for Health and Safety at Work, which is active in this field, also has a regionalised structure.

The DGRCT's duties include:

- monitoring the progress of collective bargaining, when asked to do so;
- preventing labour disputes and proposing means of resolving them.

The DGRCT's main task is to provide conciliation in disputes arising from the conclusion of collective agreements.

3.2.3 The General Labour Inspectorate (IGT)

The General Labour Inspectorate (IGT), whose legal status is defined by *Decree-law No 327/83 of 8 July 1983*, enjoys administrative autonomy, although it is part of the Ministry of Employment. Its staff has the authority to deal with issues independently. It can act both through its central departments and through its regional services, which cover the whole of the country and all areas of activity, public corporations, privately-owned enterprises and the cooperatives. The regional services include the regional coordination centres of the North, the Centre, Lisbon and the South, as well as delegations and sub-delegations.

The IGT is responsible for:

- enforcing the provisions of statutory labour law, using the instruments of collective regulation and individual employment contracts, including health, safety and medical care at work.
- approving and enforcing corporate in-house regulations;
- granting the authorisations provided for by labour legislation;
- assessing the employment position of foreigners;
- alerting the relevant ministries to any gaps caused by the absence or shortcomings of legal provisions which it is required to enforce;
- informing and offering technical advice to workers, employers' bodies and their respective organisations on how to interpret and implement the relevant statutory provisions.

As an offshoot of these duties, the IGT offers training and guidance to promote observance of statutory provisions. IGT delegations operate special units to supply information, answer queries and handle requests for intervention.

The inspectorate also has coercive powers. It is expected to report any infringements of the provisions it is required to monitor. It can also impose fines.

The various IGT services cooperate closely with the Directorate-General for Health and Safety and with the *Institute of*

Employment and Vocational Training. At the request of the courts, they may also investigate the circumstances in which an industrial accident occurred or an occupational disease was contracted.

Anyone denying a properly identified IGT officer access to premises he is visiting as part of his duties is liable to legal penalties, as is anyone impeding the officer's activities. Similarly, legal penalties await anyone who makes false statements, refuses to make oral or written statements without just cause, or refuses to supply such information as is judged relevant.

IGT officers are entitled, in discharging their duties and whenever they deem it necessary, to bring along technicians from the *Ministry of Employment and Social Security* or technicians and representatives from the trade unions and employers' organisations concerned.

4. Courts and tribunals

The *Constitution* defines tribunals as *"public institutions empowered to administer justice on behalf of the people"*. Tribunals are independent and subject only to the law.

There are several kinds of tribunal: the *Constitutional Court*, the *Supreme Court of Justice*, the lawcourts of first instance and second instance (or courts of appeal), the *Court of Auditors*, and the military tribunals.

The organisation and powers of the lawcourts – which are relevant to this study – are set out in the *Lawcourts Enabling Act (Law 38/87 of 23 December)*. The courts of first instance have general or specialised competence, according to the nature of the cases brought before them. The labour tribunals are an example of such a court with specialised powers. They handle civil-law cases relating to the cancellation and interpretation of collective agreements, cases between trade unions and the employees they represent, cases involving strike action, etc.

Appeals against the decisions of the courts of first instance can be made in various ways. The courts of second instance (courts of appeal), as well as the *Supreme Court of Justice*, may sit in plenary session or refer cases to specialised sections as required. The social sections are responsible for judging appeals in cases subject to the civil competence of labour tribunals.

SECTION 3: TRADE UNION FREEDOM AND THE STRUCTURE OF TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

1. The right to join a union

1.1 What is trade union freedom?

The *1975 Act* of the *Military Revolutionary Council* establishes a sort of trade union monopoly. Its champions advocated a *collective right* to engage in trade union activity, as opposed to an *individual right*. The collective right was a matter of a class rather than of individuals: class rights as opposed to individual rights[1].

Yet the overwhelming majority of the *Constituent Assembly* came out in favour of individuals' rights to join a union. The Portuguese *Constitution* now defines trade union rights as the workers' right to organise themselves in accordance with the provisions of ILO *Convention No 87* and the interpretation offered by the *Committee on Union Rights*. It constitutes specific expression of the general freedom of association, a basic human right.

1.2 The content of union rights

In a broad sense, union rights include the following main features:

- positive individual freedom (freedom to form trade unions and to join trade unions already in existence);
- negative individual union rights;
- the right of trade unions to form associations;
- the freedom of trade unions to decide their own internal organisation;
- the autonomy of trade unions;
- the right to collective bargaining;
- the right to organise within the company;
- the right of participation;
- the right to strike.

1.2.1 Positive individual freedom

1.2.1.1 Individual right of trade union association

The individual (positive) right of trade union association is reflected by the freedom to form trade unions or to join an existing union as an individual. The Portuguese *Constitution* grants these two rights (Article 56 §2).

The public authorities may not impede or hamper the exercise of these rights.

A trade union may acquire legal personality simply by registering its rules with the *Ministry of Employment* (*Trade Union Act, Article 10*). Once registered, the Ministry will order the rules to be published in the *Bulletin of Labour and Employment* (BTE).

Only the courts and tribunals are competent to judge unlawful practice in setting up a union (TUA, *Article 10 §4*).

Workers are free to decide the scope of action of a trade union they set up, and neither the State nor existing trade unions have any right to hinder or restrict their action in any way.

In practice, the right to form trade unions permits the existence of competing trade unions and is therefore a guarantee of *union pluralism*.

1. The concept of collective freedom was defended at the Constituent Assembly by the members of the Communist Party, who criticised the ideal of individual freedom to form unions as laid down by ILO *Convention No 87*. They objected that it had been conceived with the Cold War in mind and dismissed the idea of individual freedom to join a union as essentially bourgeois (the debates at the Constituent Assembly are summed up by MARIO PINTO in *Das concepçoes da liberdade sindicat às concepçoes sobre o homem e à sociedade* (Freedom to join unions: a function of ideas about Man and Society), published in: *Direito e Justiça*, N°1, 1980). All other parties, including the Socialist Party, defended a version of union freedom in line with the ideas expressed ILO *Convention No 87*, which is why it was ultimately included in the constitutional text.

1.2.1.2 The principle of non-discrimination

Article 56, §2 of the *Constitution* guarantees workers the right to union freedom *without any discrimination whatsoever.*

Nevertheless, union freedom is confined to workers (*cf. Article 2a*). This legal restriction demands careful interpretation, or difficulties might arise in respect of the legitimacy of home-workers' trade unions or the registration of unemployed workers (TUA *Article 16 §3*) or of workers looking for their first job.

1.2.1.3 The Civil Service

Civil servants are a special case, in that the constitutional provisions applicable to workers in general do not automatically extend to them. Yet civil servants' individual freedom of trade union association (positive and negative) is written into Portuguese law. *Article 50* of the *Trade Union Act*, which preceded the *Constitution*, stipulated that the exercise of union freedom by civil servants should be enshrined in a specific law. In the event, no such law was ever adopted, but general union rights are applied to civil servants' unions. Several civil service trade unions are registered with the *Ministry of Employment.*

Besides the *Trade Union Act*, the ratification by Portugal of ILO *Conventions Nos 87* and *151* constitutes a legal basis for civil service union rights.

Laws establishing special provisions for civil servants as regards their right to engage in collective bargaining, to strike and to form works councils have been enacted. These will be examined elsewhere.

Some civil service categories in Portugal have no union rights. Provision for this derogation is made in *Article 270* of the *Constitution*, which stipulates that the law may restrict the rights of expression, assembly, demonstration, association and collective petition and limit the passive electoral rights of regular military personnel and military agents in active service, in strict accordance with the demands of their functions.

Similarly, ILO *Conventions Nos 87* and *151*, the *International Agreement on Civil and Political Rights* and the *International Agreement on Economic, Social and Cultural Rights*, all of which have been transposed into Portuguese domestic law, provide for restrictions for the armed forces and police. Accordingly, Portuguese law denies the right to form trade unions to military personnel and members of the police force.

1.2.1.4 The right to define the union's scope of action

The (individual) right of trade union association implies that workers are free to decide the geographical and occupational scope of a future union and the *"category"* it is to represent. In other words, they are free to decide the geographical and occupational boundaries which will feature in the union's rules.

This means that no attempt has been made to define any *"categories"* in advance, since this would *a priori* restrict the union's representational scope. This is in direct opposition to the situation created by the single union system, now obsolete.

1.2.1.5 The (positive) right to join a trade union

Article 56 §*2b* of the *Constitution* expressly recognises the positive right to join a union. This may be interpreted as the guarantee of the trade union freedom in both senses; a positive right and a negative right.

Article 16 of the TUA grants workers the right to join a union representing their category and area of activity. This right was especially relevant in the days before the *Constitution*, when the principle of union monopoly was still in force (*Article 11* of the TUA, now repealed) and trade unions did not have specific leanings. Nowadays this right should be interpreted in the context of a new and different legal framework in which the right to join is not as far-reaching, since it is qualified by the trade unions' own right to accept or reject new members in accordance with their respective rules. Effectively then, Article 16 of the TUA has to all intents and purposes been repealed, since the legal system of single unions is no longer constitutional; all provisions deriving from this article have likewise been abrogated. Since the aforementioned *Article 16 §1* referred to the sole union for each respective category, it was inconsistent with the principle of union freedom.

The *Trade Union Act* restricts the right to join a union in that no worker may be a member of more than one union, and in addition that union must be consistent with his or her occupation or sector activity. A worker may join different trade unions only if they correspond to different occupations which the worker effectively exercises (TUA *Article 16* §2).

1.2.2 Negative union rights (non-membership)

Negative union rights (the right not to join a union) and the attendant right not to pay union dues, are enshrined in *Article 55* §*2b* of the *Constitution*. This article gives workers the freedom of membership in the form of their right not to be compelled to pay dues to a union to which they do not belong. *Article 16* §*4* of the *Union Act* expressly stipulates the worker's right to leave a union of which he is a member. The law does, however, require the worker to do so in writing and to pay three months' contributions.

In other words, *"union security"* clauses are prohibited under Portuguese law. Neither the law nor collective agreements are allowed to force a worker to join or not to join a union. Likewise, they may not require workers to pay dues to a union of which they are not members.

Article 37 for the TUA states that any agreement is forbidden and considered null and void which aims at:

a) making the recruitment of a worker contingent on his belonging or not belonging to a trade union or on his leaving the union to which he already belongs;
b) dismissing, transferring or in any other way prejudicing the interests of a worker on the grounds of his belonging or not belonging to a union or because of his union activities.

In actual fact, such clauses and indeed such a tradition are unknown in Portugal. However, the corporatist system in force prior to 25 April 1974 could require workers to pay

contributions to the union responsible for their job category, even if they were not members.

1.2.3 The trade unions' right of association

The *Constitution* also grants the trade unions themselves the right of association. They may form associations, federations or confederations. *Article 55* §2a of the *Constitution* expressly spells out the right to constitute trade union associations at all levels.

Trade unions at all levels have the right to establish links with or become affiliated to international trade-union organisations (*Constitution, Article 55* §5). Pre-1975 legislation forbade both trade unions (*Article 7, §3* of the TUA) and the employers' organisations to enter into international affiliations.

1.2.4 Freedom of internal organisation

In line with ILO *Convention No 87* (*Article 2* of which refers to the individual right to establish trade unions, and *Article 3* to the right of organisations to draw up their own rules), Portuguese constitutional law expressly stipulates (in addition to the right to set up trade unions) the trade unions' right to organise themselves and to formulate their own internal rules (*Constitution, Article 55* §2 *c*).

Article 14 of the TUA lists the items which must feature in the rules:

a) the name and address of the organisation, its head office, its geographical coverage, its area of activity, its objectives and its duration (where this is not indefinite);
b) the terms on which membership is acquired and forfeited, and the rights and duties attaching to it;
c) the disciplinary system;
d) details of financial administration, budget and accounts;
e) the establishment and operational details of sections, delegations or other forms of decentralised organisation;
f) the procedure for rule changes;
g) disbanding, dissolution and liquidation and the subsequent destination of the respective assets.

In addition to the principles laid down by the law in this matter, the system by which trade unions can acquire legal personality clearly rules out any form of interference, in particular on the part of the administrative authorities, in the drafting of rules, a right strictly reserved for the workers themselves (TUA, *Article 13*). Provision is merely made for the verification of an organisation's legality, a matter for the courts.

1.2.5 The right to self-management

The right to management autonomy springs from the legal principles in force. *Article 55* §4 of the *Constitution* stipulates that trade unions shall operate independently of employers, the State, churches, political parties or other political organisations.

The law also provides for the publication, in an official gazette, of the names of elected members of union administrative bodies, but forbids any form of control or impediment of the right to elect leaders. *Article 13* of the TUA states that union leaders must be elected freely and democratically from among the trade union members.

The *Constitution* stipulates that legal provision must be made to provide an adequate guarantee of the independence of trade unions (*Article 55* §4). Legal protection in this sphere is still imperfect, save for the rules which protect union leaders from discriminatory and anti-union behaviour on the part of employers.

1.2.6 The right to collective bargaining

The *Constitution* expressly stipulates that it is up to the trade unions to exercise the right to collective bargaining. This right is enshrined in *Article 56* §3 of the *Constitution*, which requires legislation to be brought in to establish the legitimacy of collective labour agreements and to ensure the effectiveness of the regulations in force (*Article 56* §4). The contractual autonomy of trade unions is another important aspect of union freedom.

1.2.7 The right to union activity within the enterprise

Article 55 §2*d)* of the *Constitution* guarantees workers the right to engage in union activities within the enterprise. This right was originally established by *Article 25* of the TUA, which decreed that workers and trade unions are entitled to engage in union activities within the enterprise, particularly through shop stewards, union committees and inter-union committees.

In addition to the right to engage in union activities, *Article 54* of the *Constitution* also grants industrial workers the right to organise works councils (*see below*).

1.2.8 The right to participate

In accordance with *Articles 56* and *54* of the *Constitution*, trade unions and works councils are entitled to participate in certain activities, such as drafting labour legislation, monitoring the implementation of economic and social plans, and managing social security institutions, etc. (*see below*).

1.2.9 The right to strike

In line with the principles defended by the ILO *Committee on the Freedom of Association*, the right to strike is part and parcel of union freedom in the broadest sense. Portuguese law guarantees workers' right to strike.

Article 57 §1 of the *Constitution* clearly states that the right to strike is guaranteed. *Article 57* §2 adds that it is up to the workers to decide the range of interests which may be defended by strike action, since the law cannot restrict this range (see below). The right to strike is embodied in the *Strike Act*. Lock-outs are forbidden by *Article 57* §3 of the *Constitution*.

1.3 The principles regulating union freedom

The statutory arrangements which regulate union freedom are based on a set of principles which underpin the exercise of union freedom. These are essentially threefold: the speciality principle; the principle of organisation and democratic management; and the principle of independence.

1.3.1 The speciality principle

To comply with the speciality principle, trade unions must, at all levels of their organisation and activity, tailor their conduct to the aims they have set out to achieve. This is a general legal principle which applies to all organisations, without exception, and which restricts their own legal capacity (*Article 160* of the *Civil Code*).

Application of this principle requires the scope of action or the purpose of each specific type of association to be identified. Where the trade unions are concerned, the *Constitution* expressly recognises union freedom for workers, in order to defend their rights and interests (*Article 55* and *56*). But the TUA goes into greater detail as to what constitutes workers' interests. *Article 2b* defines trade unions as a permanent association of workers set up to defend and promote their social and occupational interests. The defence of these interests is therefore the objective of trade unions.

Of course, there is still a margin of legal uncertainty as to the precise nature of the interests which trade unions are legally and technically empowered to defend. Union practice tends to a very broad interpretation of these interests, particularly where the right to strike is concerned. Nevertheless, the fact remains that workers are not entirely free to decide what the purpose of their union should be.

1.3.2 The principles of democratic organisation and management

The rule laid down by *Article 55 §3* of the *Constitution* is crucial. It states that trade unions must be governed by the principles of democratic organisation and management, on the basis of a regular, secret leadership ballot. No authorisation or confirmation is necessary. Unions are based on the active participation of workers at all levels of their activity.

Clearly, then, the *Constitution* alludes to two separate principles: democratic organisation and democratic management. Both must be rooted in a free electoral system and the practice of active worker participation in union life. The *Constitution* clearly intends organisation and government to be viewed as two distinct aspects. Yet both rest on the twin pillars of free elections and participation.

In line with these principles (and bearing in mind that of union independence), trade unions are not entirely free to choose the organisational and operational rules by which they are to operate. They must comply with the principles laid down by law.

Similarly, in regulating the drafting of union rules and disciplining union activity, the law must in turn respect and promote respect for the principles in question. The law is the guarantor of the principle of democratic organisation and government, which explains the requirement that administrative bodies must be elected by regular, secret ballot (*Article 55 §3* of the *Constitution*)[2].

2. See also: *Article 13* of the TUA (free and democratic election of union management); *Article 17* of the TUA (rules on elections, duration of management mandates, general assemblies and dismissal of management); and *Article 29* of the TUA (rules for the election, by secret and direct ballot, of shop stewards).

1.3.3 The right to dissent

The constitutional provision which obliges union rules to recognise the right to dissent, or *"splinter rights"*, (*Article 55 §2e*) of the *Constitution*) is very significant. Unions remain free, however to decide for themselves what form the right to dissent shall take in their rules. In practice, this means that the right to dissent is elastic, yet the core principle is sacrosanct: members have the right to express themselves in an organised manner within the union organisation[3].

1.3.4 The principle of union independence

It is generally accepted that trade unions should be independent. Partly this is because experience tells us this is right, and partly because of the key role played by trade unions, their social impact and their regular contacts with other social, ideological and partisan forces.

The *Constitution* make provision for this in *Article 55 §4*, which confirms the independence of trade unions from employers, the State, churches, parties and other political associations. The law must establish adequate safeguards for this principle, which forms the backbone of working class unity.

Prior to the *Constitution*, *Article 6* of the TUA of 1975 established the following system, which is still in force: employers, employers' organisations and other forms on non-union organisation may not promote the establishment of, or in any way support or finance trade unions, nor may they intervene in any shape or form in their organisation and management. Trade unions associations are independent of the State, political parties and religious institutions, which may not interfere with union organisation and management. All forms of reciprocal financing are prohibited. An administrative function in a trade union is incompatible with a leading function in a political party or religious institution.

The system does not provide sufficient guarantees to prevent infringements, which in practice often go unpunished. For instance, some union leaders are also members of parliament or of their political party leadership.

Under Portuguese constitutional law, the lack of such rules as imposed by *Article 55 §4* of the *Constitution*, is unconstitutional by default (*Article 283* of the *Constitution*).

2. Employers' freedom of association

Employers' organisations are governed by the *Employers' Associations Act*, the EAA, (DL 215-C/75), published jointly with DL 215-A and 215-B. The former gave the Intersindical a legal monopoly to represent all Portuguese workers; the latter established the *"single union"* legal framework.

Unlike its provisions on trade unions, the *Constitution* omits any reference to employers' right of association. Although

3. This is an unusual feature of union freedom in legal terms, not least because a substantial part of the trade union movement has always opposed the right to dissent or splintering. So why did the Portuguese Constitution opt for such a formula? The fact is that the Portuguese experience of union monopoly has essentially been a negative one. The monopoly was legally instituted in 1975 and left a clearly authoritarian imprint on Portuguese unions. This negative experience also explains why the union umbrella group, UGT, set up in 1979, decided to introduce a fair measure of freedom in the matter of dissent in its own organisation.

constitutional clauses can be applied to this right by analogy (drawing on the principle of non-discrimination and international instruments such as the *Universal Declaration on Human Rights* and ILO *Convention No 87*), the fact remains that the Portuguese *Constitution* specifically aimed at guaranteeing workers' rights. This constitutional difference is clearly illustrated by the fact that lock-outs are prohibited, while the right to strike is unequivocally guaranteed.

The EAA recognises the employers' right to form employers' organisations and provides for a procedure enabling them to acquire legal personality similar to that applicable to the trade unions. Yet there are significant differences and peculiarities. For example, the EAA requires employers' organisations to hold management elections during their general assembly, which must be held at least once a year[4].

Article 10 §2 of the EAA states that any employer may join an association which represents his respective category, in his own area of activity, provided it meets statutory requirements. His admission may not be contingent on a discretionary decision on the part of the organisation. The thinking underlying this formulation is the same as that which underpins the system of union monopoly embodied in the *Trade Union Act*.

Another noteworthy provision is the obligation on employers' organisations to inform the *Ministry of Employment*, by 31 January of each year, of the number of members they represent and the number of workers they employ within the area of activity covered (*Article 12* §2 of the EAA). Since this information has no legal purpose and since no such clause exists for the trade unions, theses provisions are of doubtful legality in terms of freedom of association and non-discrimination. As it is, these rules are not enforced.

The EAA forbade employers' organisations to join foreign or international organisations unless specifically authorised to do so by the *Ministry of Employment* (*Article 4*). This clause has effectively been abrogated by the *Constitution*. Nevertheless, the fact remains that there is a difference between the law applicable to employers' associations and that applicable to trade unions (see above). It is inadmissible that the government should still enjoy discretionary powers in this respect.

The general law on associations applies to employers' organisations in the absence of specific rules. This is laid down in *Article 14* of the EAA in accordance with its general principles.

There is a difference between employers' associations and associations of companies. The latter focus on economic interests and involve the pursuit of economic and productive activities. They do not represent the entrepreneurs in matters relating to labour relations, for which only employers' associations are competent. Employers' associations are associations of entrepreneurs who usually employ people (*Article 1* §2*a* of the EAA). Associations of companies set up in accordance with the general law on the right of association may, however, acquire the status of an employers' association (*Article 16* of the EAA).

4. Whether this requirement is legally enforceable is doubtful. It is almost impossible to implement, particularly where the number of members is very large.

3. Description and representativeness of the social actors

3.1 Trade union structures

3.1.1 The legal model

As in other aspects, the *Trade Union Act* (TUA) is clearly an extension of previous corporative legislation where the definition of criteria for trade union structures are concerned. *Article 2* of the *1975 Act* defines a *trade union* – in the strict sense – as a permanent organisation of workers established with a view to defending and promoting their social and occupational interests. It goes on to define *federation of trade unions* and *union of trade unions* as associations of unions grouped by area of activity or region. Finally, the Act defines a *confederation* as a national association of trade unions[5].

The 1975 Act established a statutory model for trade union structure based on the classifications we have already seen[6]. This should be interpreted in the context of the *Constitution* and the ILO Conventions on union freedom. It is safe to say, therefore, that Portugal currently enjoys union freedom in respect of the organisations' choice of representational scope[7].

3.1.2 The right to dissent

As outlined above, the *Constitution* requires the unions to respect the right to dissent within their organisational structure. This constitutional obligation can only be understood in the light of the great political and union debates taking place at the time (1974-75), debates which found an echo in the Constituent Assembly. Proponents of the right to dissent argued that this would ensure freedom of expression in union terms within a system still wedded to the single union principle. The different political trends then opposing the single union system (chiefly the socialists and the social-democrats) voted in favour of the right to dissent. When the *Constitution* was first amended in 1982, the right to dissent within the union was strengthened. This development corresponds to the convergent views held by the UGT (this group of unions has been a staunch defender of the right to dissent from its inception).

Since it was founded, the UGT has combined two major trends in union thinking, reflecting the positions defended by the two main political parties: the socialist trend and the social-democratic trend. The *"unitary"* tendency, i.e. the communist position, is also represented within the UGT through the large union (for example in the banking sector) which emerged from the old system and joined the UGT[8]. The Christian Democrats represent a third, but very small

5. This was the same in the old corporative system. Yet there is an important difference: the third level, i.e.confederations, corresponded to the corporations in the old system. These were mixed corporative organisations covering both the trade unions and the employers' associations. A complete analysis of the union structure in the corporative system can be found in MARIO PINTO, *Union Structures in Portugal*, GIS 1973.
6. Especially since there was a special procedure to cover the plans for replacing existing occupation-based unions by unions for a particular area of activity (*Article 12*, now repealed).
7. Yet the TUA model defining the union position was to a large extent inherited from the system previously in force.
8. The Communists did not withdraw because these unions occupy a very special position: they incorporate the social security system.

trend. The unions affiliated to the UGT are heavily influenced by the relationships between the different union trends. They participate individually in union elections, though they often present coalition lists.

By contrast, the right to dissent within the CGTP-IN is of minor practical importance. This is either because there is no room for it owing to the way the right of expression is organised, or because the Communist tendency prevails and restricts the scope for expressing minority views. It is unusual for the CGTP-IN to have different factions competing in union elections. The only time when there are any visible signs of divergence and bargaining with minority trends is at union congresses.

3.2 The question of representativeness

Portuguese law makes no provision nor lays down any rules concerning the problem of trade union representativeness. The prevailing system of effective union pluralism determines the potential and, in most cases, the effectiveness of pluralism in terms of collective agreements. Each of these collective agreements applies to workers affiliated to the respective representative trade unions – in terms of the legal system governing the effectiveness of agreements. We shall find further on that this aspect is regulated in a practical fashion. The only criterion applied by the law is that of the *"union representing the largest number of workers"*, to settle competing claims between collective labour agreements (*Article 14* of the *Law on collective labour regulation*)[9].

3.3 The two models of union structure

Because of the influence exerted by the TUA in the post-1975 period and because of the passive attitude of the union organisations of the time, Portuguese unions today are extensions of pre-1974 structures. One major difference however is the adoption by the UGT of a national union model based on area of activity for the new unions it has created. This model draws on Austrian and West German examples.

In brief, Portugal has two organisational models for its unions. One is built round district-level primary unions (based on professions or area of activity) which together form national federations for each area of activity. It is these sectoral federations which, in practice, negotiate collective agreements for each sector. The same primary unions also form regional organisations. Finally, the national confederation brings them all together and represents them at national level. This is the prevalent model as adopted by the CGTP-IN.

The second model consists mainly of the large national industrial unions. Because of their scope of action, they neither form sectoral federations nor regional organisations. This is the UGT model. Within this central union organisation are some of the unions inherited from the previous system, including large regional or national unions in the services sector of the economy (banks and insurance companies). These obviously are not quite the sort of small unions which need to form federations and they therefore fit in with the UGT set-up. Nevertheless, office-workers' and service workers' unions, also part of the UGT organisation, were for a long time organised at district level within large regional federations, but even these are now tending to evolve into national groupings.

Thus, the CGTP-IN has a large number of primary unions, which in turn form federations and regional organisations. The UGT for its part has no sectoral federations or regional organisations. It does have just two regional office-workers' federations, which also play a very important role in collective bargaining.

3.4 The large confederations

Since the end of 1978, Portugal has had two general trade union confederations: the *General Confederation of Portuguese Workers - National Inter-Union* (CGTP-IN) and the *General Workers' Union* (UGT).

3.4.1 The *General Confederation of Portuguese Workers - National Inter-Union* (CGTP-IN)

The CGTP-IN saw the light of day in the immediate aftermath of the revolution of 25 April 1974[10]. It was established *de jure* under the terms of a decree-law of the Military Revolutionary Council in March 1975 (DL 215-A/75).

The CGTP-IN is essentially Communist-inspired. At international level, it maintains special links with the WFTU, but it is not affiliated to a confederation.

3.4.2 The *General Workers' Union* (UGT)

The UGT was founded in late 1978 following agreement on a fifty-fifty coalition between the two union trends (socialist and social-democratic). It is reformist in nature.

Internationally, the UGT is affiliated to the ICFTU (*International Confederation of Free Trade Unions*) and ETUC (the *European Trade Union Confederation*).

3.4.3 Representativeness of the large confederations

The representativeness of the two trade-union confederations cannot be determined because of the lack of reliable public data[11]. It is a controversial issue. Some comments can, however, be made.

At the time of its first congress in 1975, some 150 trade unions representing approximately 1,500,000 workers were members of the CGTP-IN. A recent study[12] credits the CGTP-IN with 143 affiliated unions representing approximately 1,160,000 workers.

9. See further on.

10. The CGTP-IN dates its de facto foundation to 1970, when the first inter-union meetings took place between the managements of corporative unions of different calling but all largely opposed to the political regime then in power.

11. The Ministry for Employment and Social Security published in 1990 a study on trade union membership in Portugal - MARIA DE CONCEIÇÃO CERDEIRA and ERITE PADILHA, *A sindicalização e alguns comportamentos sindicais*, Lisbon, MESS, 1990 - which quotes the following average rates of trade union membership: 1969: 59%; 1974/1978: 52.4%; 1979/1984: 58.8%; and 1985/1986: between 50.5% and 52.6% (op. cit. pages 23-24). Nevertheless, this study does not give a breakdown by trade union confederation of the trade union membership figures, expressly stating that it was not possible to draw conclusions about the representativeness of the confederations (page 14).

12. JOSÉ BARRETO, *Estudo sobre os sindicatos após 1974*, unpublished, Lisbon.

The first UGT congress in early 1979 was attended by 33 trade unions representing some 600,000 workers. The study referred to in the previous paragraph states that the UGT now represents 53 trade unions, with approximately 1,100,000 workers.

However, another publication by the *Ministry of Employment and Social Security*[13] gives different figures, relating to April 1987. CGTP-IN: 122 duly affiliated primary trade unions and 71 associates; UGT: 52 trade unions. There were also 116 independent trade unions[14].

It should be noted that the number of trade unions does not reflect the number of affiliated workers, and only approximate figures are available. The number of workers who are members of trade union must in fact be considerably lower than the figures quoted above. Assuming a membership rate of around 50%[15], a hypothesis which neither confederation disputes and which is a very high rate in comparison with the other Member States of the Community, and also taking into account the size of the active population in Portugal, some 1,450,000 workers would be members of unions. Assuming they are more or less equally representative, each of the two confederations would have some 650,000 affiliated workers, with 150,000 shared among the independent trade unions. It should, however, be emphasised that this estimate is merely an attempt to correct the figures occasionally published and that, as mentioned earlier, no reliable figures exist.

3.5 Employers' organisations

The 1974 revolution heralded the rise of new-style employers' organisations. Three employers' confederations have emerged, probably under the influence of the old corporatist divisions:

- the *Portuguese Farmers' Confederation* (CAP)
- the *Confederation of Portuguese Industry* (CIP)
- the *Portuguese Trade Confederation* (CCP)

The CAP represents 76 regional farmers' associations, 16 specialised associations and 12 cooperatives. The primary associations are organised into four federations, which largely correspond with the country's main farming regions.

The CAP is a member of a number of international organisations: the *Committee of Agricultural Organisations* in the EEC (COPA); the *European Confederation of Agriculture* (ECA); the *International Federation of Agricultural Producers* (IFAP) and the *Economic and Social Committee*.

The CIP represents 79 associations (sectoral and regional). The primary associations may have sections and can also form sectoral federations. In some cases there are parallel technical associations.

This confederation's international links include membership of the *International Organisation of Employers* (IOE) and the *Union of Industrial and Employers' Confederation of Europe* (UNICE). Like the other Portuguese employers' confederations, the CIP is a member of the *Economic and Social Committee*.

The CCP represents 137 associations. There are some federations which mediate between the primary associations and the confederation.

SECTION 4: WORKERS' ORGANISATION WITHIN THE ENTERPRISE

In the Portuguese system, the organisation of workers within the enterprise is characterised by a dual structure. On the one hand, the organisation is an extension of the unions; on the other hand, it is an institutional aspect of the workers' community within the enterprise regardless of their union affiliation. The extension of union organisation and union activity within the enterprise is guaranteed by the *Constitution* and regulated by the TUA. This covers all workers belonging to a union. The law lays down rules establishing the legitimacy of the workers' general meetings with the union organisation within the enterprise.

The autonomous institutional organisation of workers within the enterprise is also provided for by the Constitution and subject to *Act 46/79*, known as the *Works Council Act* (WCA). This parallel form of workers' organisation within the enterprise has its own specific tasks, as opposed to the trade union organisation, which is solely responsible for collective bargaining. These tasks combine participation and monitoring.

1. Union organisation within the enterprise

Article 55 §*2d* of the *Constitution* guarantees workers the right to exercise union activities within the enterprise. This clause confers constitutional legitimacy to the rights enshrined in Chapter III of the *1975 Trade Union Act*, which deals with the exercise of union activity within the enterprise. This system is still in force.

Article 25 of the TUA gives workers and unions the right to carry out union activities within the enterprise, especially through shop stewards, union committees and inter-union committees. The shop stewards are union representatives within a given company. All the workers who have joined the same union within a company make up the union branch in that company (*Article 2 h*) of the TUA.

Each union has the right to appoint one or more shop stewards in each company. According to *Article 29* §*1* of the TUA, shop stewards must be elected and discharged by direct secret ballot of the union members (the union branch in the company). The law also makes provision for the respective unions' rules to regulate the whole process. If there is more than one shop steward representing the same union, a company union committee – a term used in the law – may be set up. This is an organisation of shop stewards belonging to the same union within a single company or production unit (*Article 2i* and *Article 29* §2 of the TUA). In companies with several union branches (representing more than one union), the respective shop stewards can set up a company inter-union committee. Sitting on this committee will be shop stewards representing different unions within the same company (*Article 2j*) and *Article 29* §*3* of the TUA).

13. MARIA DA CONCEIÇÃO CERDEIRA and EDITE PADILHA, *As estruturas sindicais portugaesas – uma análise evolutiva de 1933 a Abril 1987*, Lisbon, MESS, 1988.
14. The CGTP-IN (*Relatório de actividades ao V Congresso da CGTP-IN*, 1986), set the number of independent unions at roughly 160, 73 of these being associated with the CGTP-IN.
15. Figure given in the study quoted in note 11.

The law does not set limits to the number of shop stewards. It merely restricts the number of workers entitled to daytime release arrangements with a view to carrying out union duties (and to various protective privileges), the number varying according to company size[16].

2. Works councils

Works councils are separate from in-house trade union organisations (which are based on union freedom). They constitute the institutionalised legal right to representation of workers within each company. This workers' representative structure was established by the 1976 *Constitution*, but in fact embodies a very important feature seen in Portugal since 1974. The fundamental features of the works councils are laid down in the *Constitution*.

Article 54 of the chapter devoted to workers' rights, freedoms and guarantees stipulates that:

(i) Workers have the right to set up works councils to defend their interests and take part in the democratic process within the company.
(ii) Plenary meetings of workers will discuss the formulation and approval of rules and elect members of the works councils by direct secret ballot.
(iii) Coordination committees may be set up to improve the efficiency of economic restructuring and to guarantee respect of workers' rights.
(iv) The members of works councils are entitled to the same legal protection as shop stewards.
(v) Works councils have the right:
  (a) to receive the information they need to carry out their duties;
  (b) to monitor company management;
  (c) to have a say in any reorganisation of production units;
  (d) to take part in formulating labour legislation and social and economic planning concerning their particular sector;
  (e) to manage or participate in the management of the company's social work;
  (f) to promote the election of workers' representatives in State-run enterprises as defined by the law.

These basic constitutional provisions are supplemented by the *Works Councils Act* (WCA).

The law provides for only one works council per company (single representation). This is representative of all workers. Nevertheless, sub-committees may be elected within different establishments. The law also provides for the setting-up of coordination committees for more efficient intervention in the process of economic restructuring and the exercising of other rights.

SECTION 5: SOCIAL DIALOGUE STRUCTURES AT NATIONAL LEVEL

1. The *Permanent Council for Social Consultation*

The problem of social consultation became an issue in Portugal much later than in other European countries, owing to the country's trials and tribulations since the 1974 revolution. It was not until 1983 that the *"central-bloc government"* - a coalition of Socialists and Social Democrats - took the road of social consultation, a move endorsed by the UGT. The CGTP-IN, on the other hand, was resolutely against, and the employers' confederations were divided. The CIP took a wait-and-see attitude, while the CCP was in favour.

This led to a *Decree-Law dated March 1984* (DL 74/84), by which the government set up the *Permanent Council for Social Consultation* (CPCS). This is a tripartite body (government, unions and employers) with advisory powers. Its brief is to promote dialogue and consultation and to ensure participation of workers' and employers' organisations in social and economic policy-making. The law stipulates that the government must seek the Council's advice on all bills falling within its area of competence and inform it of its response to its opinions, proposals and recommendations.

However, the two agreements on wage policy, signed in 1987 and 1988 respectively, had a significance well beyond the scope of the various opinions on proposed legislation, for example - which were often not unanimous. In practice, the scope of agreements is equivalent to that of inter-professional collective agreements negotiated nationally. They provide a framework for collective bargaining at sectoral and company level. However, while the 1987 experiment certainly bore fruit, the same cannot be said of the 1988 agreement. Although this agreement did continue to influence collective bargaining proceedings, confirming its regulatory powers, it prevented real wage increases as inflation turned out to be higher than expected.

Meanwhile the CGTP-IN, which had initially opposed social consultation and refused to take part in it, decided in October 1987 to take its seat on the CPCS. Portuguese experience of social consultation is still relatively new. Its future will obviously depend on several factors. Nevertheless, all the social partners have of late indicated they would like to see more social dialogue within the Council. Now it is the government which seems less keen.

The latest constitutional revision has resulted in the establishment of an *Economic and Social Council*, which threatens the very existence of the *Permanent Council for Social Consultation*. A debate is now raging as to whether the creation of this new body justifies the abolition of the CPCS. All the social partners represented in the CPCS are opposed to this. Other employers' organisations, however, are in favour of doing away with it and transferring its powers to the new organisation.

16. The maximum number of shop stewards entitled to daytime release for purposes of union activity has been established as follows:
  - a company employing fewer that 50 unionised workers: 1;
  - a company employing between 50-90 unionised workers: 2;
  - a company employing between 100-199 unionised workers: 3;
  - a company employing between 200-499 unionised workers: 6;
  - a company employing more than 500 unionised workers: the number of shop stewards is calculated on the basis of a formula: 6+(n-500/200), where n represents the number of workers rounded up to the next higher unit where necessary.

  Once the shop stewards have been elected, the union management will communicate their names to the employers, by receipted registered letter. The names will be posted in the premises set aside for union information (*Article 36* of the TUA).

2. Other participation functions and bodies

The regulation of working conditions is further influenced by a set of bodies responsible for monitoring workers' and employers' participation. The following is a brief description of some of these.

2.1 The *Economic and Social Council*

As we have seen, the latest revision of the Portuguese *Constitution* saw the inception of an *Economic and Social Council*. The ESC is an advisory body with consultative powers in the field of economic and social policy (*Article 95* of the *Constitution*). Legislation is now needed to define the Council's powers and composition. This will designate the representatives of the government, workers' economic activities, autonomous regions and local authorities who will participate in the Council (*Article 95* of the *Constitution*).

2.2 The *Committee for Equality in Employment* (CITE)

Decree-law 392/72 of 20 September set up a tripartite committee reporting to the *Ministry of Employment and Social Security*, responsible for the promotion of equal opportunities for men and women at work. It focuses in particular on equal pay, equal access to employment, career opportunities, etc.

2.3 The *National Council for Health and Safety at Work*

This Council was set up by *Resolution 204/82*[17] of the *Council of Ministers* on 16 November pursuant to ILO *Convention No 155*. It is a tripartite body headed by the Minister of Employment and Social Security. Its vice-chairman is the director-general of health and safety. Other members of the Council include representatives from other ministries and the regional governments, and delegates from the most representative employers' and workers' organisations.

The Council's duties include:

- helping to formulate and implement national policies on health and safety for all workers and on the working environment;
- issuing opinions at national level on relevant topics and programmes;
- assessing the results of measures taken and proposing adjustments to them on the basis of social and economic change in the country.

2.4 The *Institute of Port Workers* (ITP)

The *Institute of Port Workers* is a public institution with administrative and financial autonomy. It is a structurally decentralised body reporting to the *Ministry for Maritime Affairs*. It has a management board and a supervisory committee, each consisting of a representative from the *Maritime Ministry*, the *National Federation of Port Workers' Unions* and the port operators' associations.

The ITP's duties include:

- studying and proposing general and policy guidelines for port workers at national level with a view to achieving, as far as possible, standard treatment of the problems arising in all the nation's ports;
- furthering the implementation of general standards for port work in all ports, by gradually improving their use throughout the country;
- assessing manpower requirements for each port according to traffic levels, and drafting proposals for fixing or adjusting manning levels as necessary;
- promoting schemes for rational work distribution, particularly for shift workers;
- establishing procedural rules for all employers in the different ports, creating the prerequisites for progressive standardisation in respect of the recruitment and allocation of labour;
- promoting the payment of guaranteed wages to port workers;
- ensuring the availability of vocational training schemes in collaboration with trade unions and port operators;
- establishing general terms of recruitment for all port workers;
- providing arbitration on any technical and labour disputes brought before it;
- generally doing all in its power to see that disciplinary standards and rules on the health and safety of port workers are respected.

2.5 The *Institute of Employment and Vocational Training* (IEFP)

The IEFP is a public institution with administrative and financial autonomy, reporting to the *Ministry of Employment and Social Security*. Its rules were approved by *Decree-law 247/85 of 12 July 1985*. It operates on a tripartite basis with a regional structure.

The IEFP's management board is made up of eight representatives of the public authorities, four representatives of trade union organisations and four representatives of employers' confederations[18]. The first of these groups consists of members of the executive committee and delegates from the Ministries of the Interior, Finance, and Planning and Education.

Generally speaking, the IEFP helps to draft, define and assess employment and vocational training policies and, once approved by government, to carry them out. More specifically, it:

- makes sure any employment problems are recognised;
- promotes the organisation of the job market with a view to achieving full employment respecting job-seekers' freedom to choose according to their preferences and qualifications;
- promotes vocational information, guidance, training and rehabilitation, and helps to find suitable openings particularly for school-leavers and other disadvantaged social groups. Another of its tasks is to analyse job openings and the geographical and professional mobility of labour;
- helps to improve productivity within the enterprise by organising training courses;
- backs any initiative liable to create new jobs;
- helps to coordinate cooperation schemes developed by national and international organisations and organ-

17. Amended by *Resolution 50/86 of 26 June*.

18. *Articles 1* and *7* of DL 247/85.

isations in other countries in the field of employment and vocational training and rehabilitation[19].

2.6 The *National Institute for the Organisation of Workers' Leisure Time* (INATEL)

INATEL is a public institution with administrative and financial autonomy managed on a bipartite basis. It was set up by *Decree-law 519-12/79 of 29 December 1979* and reports to the *Ministry of Employment and Social Security*[20].

The general management board of INATEL has 20 members, ten representing the trade unions and ten the different ministries and other departments concerned[21]. INATEL was set up to enable both active and retired workers to satisfy those interests concerned with their well-being and so contribute to a more rational organisation of their leisure time in order to improve their quality of life. Specifically, INATEL promotes schemes in the cultural, sports, games, economic and social spheres in accordance with its objectives[22].

2.7 The *Institute of Financial Management of Social Security* (IGFSS)

The IGFSS is a public institution with financial and administrative autonomy, set up by *Decree-Law 17/77 of 12 January 1977*. Its organisational and operational rules and its area of competence are laid down in *Decree-Law 124/77*. The IGFSS is directly answerable to the *Secretary of State for Social Security*. Its management board is made up of representatives of the government, pensioners' associations, trade unions, employers' associations and State-run enterprises.

It was set up to help define financial policy relating to Social Security and to carry out studies and implement schemes aimed at ensuring balanced financial management of the Social Security system. It also collects monthly dues in order to be able to cover costs, drafts and implements financial plans, administers the funds in its charge, collaborates with other Social Security institutions, etc. (*Articles 2* and *3* of DL 124/77).

CHAPTER II: INSTRUMENTS FOR THE REGULATION OF WORKING CONDITIONS

1. The sources of regulation

In Portugal, the sources of labour regulations are the *Constitution*, *European Community* employment legislation, international labour law, laws and government regulations, collective agreements, accession agreements, arbitration rulings, joint committee deliberations, ministerial decrees on labour regulation or extensions, company in-house rules, accepted custom and practice, and *"assentos"* (rulings of the *Supreme Court*, which have normative value). These sources will be discussed separately in the following sections.

2. Constitutional law

The *Constitution* of the Republic of Portugal features various stipulations with a direct bearing on labour law. In this sense it constitutes a source of labour law, in fact the highest source in hierarchical terms.

The constitutional stipulations with direct bearing on labour law are contained within Part I of the *Constitution*: *"Fundamental Rights and Duties"*, Title II on *"Rights, freedoms and guarantees"*, and particularly Chapter III thereof, *"Workers' rights, freedoms and guarantees"*. However, Chapter I on *"Personal rights, freedoms and guarantees"* also features at least one stipulation of interest to the subject of this study, namely *Article 47*, which enshrines the right of all people to choose their profession or job with freedom, save where there are legal restrictions dictated by the common interest or restrictions associated with the person's own ability. This article also spells out the right of all citizens to open and equal access to public service posts, subject to a competitive examination.

Besides the Title II chapters mentioned, Title III on *"Economic, social and cultural rights and duties"*, Chapter I on *"Economic rights and duties"*, also deals with matters covered by labour legislation.

2.1 Workers' rights, freedoms and guarantees

Articles 53, *54*, *55*, *56* and *57* are devoted to the fundamental rights granted to all workers.

Article 53 guarantees job security to all workers and bans unfair dismissals and dismissals on political or ideological grounds.

Article 54 affirms the right to set up works councils within the enterprise and lays down the rights of these councils. *Article 54* also defines the way in which the works councils should be elected and guarantees its members the same legal protection as that afforded to shop stewards. The rights of works councils are:

(a) to receive the information they need to carry out their duties;
(b) to monitor company management;
(c) to have a say in any reorganisation of production units;
(d) to take part in formulating labour legislation and social and economic planning concerning their particular sector;
(e) to manage or participate in the management of the company's social work;
(f) to promote the election of workers' representatives in State-run enterprises as defined by the law.

Article 55 is given over to union rights, granted to all workers without discrimination, and implying:

(a) the right to set up trade unions at all levels;
(b) the right to organise these trade unions and to decide their internal organisation;
(c) the right to engage in union activities within the enterprise;
(d) the right to dissent, according to the procedures established by the rules of the trade unions.

Article 55 obliges trade unions to observe the principles of democratic organisation and management. It affirms the their independence and grants them the right to international affiliation. Finally, it states that the law must give duly elected workers' representatives adequate protection against

19. *Article 4*, idem.
20. *Article 1* of DL 519-12/79.
21. *Article 28*, idem.
22. *Articles 3* and *4*, idem.

manipulation, constraints or limitations of any kind in the lawful discharge of their duties[23].

Article 56 recognises the trade unions' role to defend and to further the defence of the workers they represent, and sets out their rights. According to this article, trade unions have the right to:

(a) participate in the drafting of labour legislation;
(b) take part in managing social security institutions and other organisations set up to defend workers' interests;
(c) help to monitor the implementation of measures under economic and social plans;
(d) be represented on social consultation bodies.

Collective bargaining forms part of the trade unions' brief. Finally, *Article 57* stipulates that:

(i) *"the right to strike is guaranteed"*;
(ii) *"it is up to the workers to define the scope of interests to be defended by strike action; the law cannot restrict this scope"*;
(iii) *"lock-outs are prohibited"*.

2.2 Basic social rights

Article 58 of the *Constitution* lays down the right to work as a fundamental social right for all. It states that *"all people have the right to work, and that the duty to work is inseparable from the right to work, save for those hampered by age, sickness or invalidity"*. The right to work means that the State has certain obligations. By means of economic and social planning, it must guarantee:

(a) the implementation of policies to achieve full employment;
(b) equal opportunities in the choice of profession or job and no discrimination regarding access to a function, job or profession on grounds of sex;
(c) cultural, technical and vocational training for workers.

The *Constitution* goes on to list workers' rights and the State's obligations (*Article 59*), stipulating that all workers, regardless of age, sex, race, citizenship, region of origin, religion and political or ideological leanings, are entitled to:

(a) remuneration commensurate with quantity, nature and quality of work; the principle of equal pay for equal work must be respected, so as to guarantee a dignified existence;
(b) the organisation of work in socially acceptable working conditions, conducive to developing one's full professional potential;
(c) work in healthy and safe surroundings;
(d) rest and leisure, a limit to the working day, weekly rest, and regular paid holidays;
(e) material assistance in the event of redundancy.

It is up to the State to guarantee the working conditions, remuneration and rest to which the workers are entitled, by:

(a) fixing and updating the national minimum wage; account should be taken, among other things, of workers' needs, the rise in the cost of living, the level of development of productive forces, the imperatives of economic and financial stability, and the build-up of assets for development;
(b) setting limits to working time at national level;
(c) ensuring special protection at work for pregnant women and women who have recently given birth, for minors, the disabled and those engaged in particularly strenuous activities or particularly unhealthy, toxic or dangerous work;
(d) systematic development of a network of rest and holiday centres together with the social organisations;
(e) protecting the working conditions and guaranteeing the social rights of immigrant workers.

Last but not least, there is the constitutional right to social security (*Article 63*). The State is thus responsible for organising, coordinating and financing a unified and decentralised social security system. The trade unions, other organisations representing workers and associations acting for other beneficiaries are all expected to participate. The ultimate object of social security is to protect citizens against the risks associated with sickness, old age, invalidity, widowhood and orphanhood; protection is also provided against unemployment and, generally, against the loss or reduction of the means of subsistence or the ability to work.

2.3 The external impact of constitutional rights, freedoms and guarantees

According to *Article 17* of the *Constitution*, the system of rights, freedoms and guarantees applies to the terms of Title III as well as to basic rights of a similar nature. As we have seen, Title II, Chapter II spells out workers' rights, guarantees and freedoms. Hence the said system, as specified in *Article 18*, applies to it. According to this article, the constitutional postulates of *Article 17* are directly applicable and binding on public and private bodies alike. It is safe to say, therefore, that these rules have immediate impact and require no intermediary, development or other legislative spurs. They apply even where no specific laws exist and the State and private individuals alike must abide by them. This means that any laws which inhibit these constitutional prescriptions must be invalid, since they take the place of the law and are enforced in defiance of the law[24]. Furthermore, *Article 18* establishes that the law cannot restrict rights, freedoms and guarantees save in cases expressly spelt out in the *Constitution*. These restrictions shall be limited in such a way as to safeguard other constitutionally guaranteed rights and interests[25]. Moreover, laws restricting rights, liberties and guarantees must be of a general and abstract nature. They may neither be retroactive nor inhibit the extent or scope of the essence of constitutional prescriptions.

All this means that the rights, freedoms and guarantees of workers as set out in the *Constitution* have tremendous significance as far as the sources of labour regulation are concerned.

23. *Article 56* of the *Constitution* states that *"union associations are governed by the principles of democratic organisation and management based on the regular election of its managing bodies by secret ballot, without submitting to any authority or homologation; these associations are independent of the employers, the State, churches, parties and other political associations, and the law must guarantee this independence [...].; they are entitled to forge links with or join international trade union organisations"*.

24. Cf GOMES CONAOTILHO and VITAL MOREIRA, *Constituion of the Portuguese Republic - annotated*.

25. *Article 18*, §2.

3. Community rules

According to *Article 8 §3* of the *Constitution*, provisions issued by the competent international organisations of which Portugal is a member have immediate and direct effect on domestic legislation, provided this is expressly stipulated in the respective constitutive treaties.

This article was introduced when the Portuguese *Constitution* was revised in 1982 in order to enable the country to join the *European Community*, thus guaranteeing the constitutionality of one of the legal repercussions of accession: direct and immediate submission to provisions issuing from the competent *European Community* bodies. In line with the EC *Treaty*, provisions laid down by those bodies thus became a source of labour regulation in Portugal as from the date of accession.

4. International law

Article 8 §1 states that the rules and principles of general or common international law are an integral part of Portuguese law. *Article 8* §2 adds that the rules laid down by international agreements and formally ratified or approved shall take effect nationally as soon as they have been officially published and to the extent that they commit the Portuguese State at international level.

Hence *Article 8 §1* establishes *"automatic integration"* machinery for the rules and principles of general or common international law. The rules of general international law are customary rules which are general in their scope. The principles of general international law are the basic principles to which most States adhere and which, by that very fact, have become enshrined in international legal thinking, such as, for example, the principle of good faith, abuse of rights, etc[26].

Article 8 §2, also establishes an automatic, but conditional, integration system; incorporation into national legislation is made subject to agreements having been formally approved or ratified and properly published. For example, some of the pacts and agreements ratified by Portugal with a particular bearing on the subject in question include:

- The *Universal Declaration of Human Rights*[27];
- The *International Covenant on Civil and Political Rights*[28];
- The *International Covenant on Economic, Social and Cultural Rights*[29];
- The *European Convention on Human Rights*[30].

Given their much wider scope, we shall not attempt to discuss the Conventions of the *International Labour Organisation* ratified by Portugal.

5. Ordinary laws

Ordinary laws are a solemn act on the part of those bodies wielding legislative power and the power to lay down general and abstract legal rules i.e. the laws emanating from the Assembly of the Republic and the Decree-Laws issued by the government, as well as the legislative orders of the regional assemblies. In terms of labour legislation, two aspects come to the fore: one is the Assembly of the Republic's prerogative to legislate in certain areas; the other is the process of lawmaking itself, seen from the point of view of the workers' right to participate.

5.1 Laws in the strict sense

Under the terms of *Article 164* of the *Constitution*, the Assembly of the Republic is responsible for formulating laws on all matters, save where the Constitution decrees otherwise. *Article 168 §1b stipulates* that it is the prerogative of the Assembly to legislate on, *inter alia*, matters concerning rights, freedoms and guarantees. As indicated above, the rights, freedoms and guarantees of workers are covered by Title II, Chapter III on rights, freedoms and guarantees.

The subjects listed in *Articles 53-58* of the *Constitution* come within the legislative powers of the Assembly and may not be regulated by the government without the prior consent of the Assembly. Such legislative authorisation must specify the object, meaning, scope and duration of the authorisation and may not be used more than twice, unless it is put into effect in a piecemeal fashion[31].

5.2 Decree-laws

According to *Article 201* of the *Constitution*, the government is responsible, as part of its legislative duties, for:

- formulating decree-laws on all matters not reserved for the Assembly of the Republic;
- formulating decree-laws on matters falling within the prerogative of the Assembly of the Republic, where prior consent has been obtained;
- formulating decree-laws on the development of the general principles or guidelines for the legal systems contained within the laws that pertain to them.

Laws and decree-laws have equal status, save that decree-laws already promulgated on the basis of legislative authorisation and those dealing with the general bases for legal systems are subordinate to the relevant laws[32].

Laws and Decree-Laws, as well as regional orders on labour legislation[33] at the formulation stage (this will be discussed further on), must be submitted to the workers' organisations for consultation purposes, as mentioned in the first chapter of this report[34]. This means that the draft bills and proposals must be published in the *Journal of the Assembly of the Republic*, the *Bulletin of Labour and Employment* and the *Official Journal of the Region*, depending on whether the

26. GOMES CONOTILHO and VITAL MOREIRA, op cit.
27. According to *Article 16*, §2 of the *Constitution*, *"the constitutional and legal prescription in respect of basic rights must be interpreted and incorporated in compliance with the Universal Declaration on Human Rights"*.
28. Approved for ratification by *Act 29/79 of 12 June*.
29. Approved for ratification by *Act 45/78 of 11 June*.
30. Approved for ratification by *Act 65/78 of 13 June*.
31. *Article 168* §§2 and *3* of the *Constitution*.
32. *Article 115* of the *Constitution*.
33. According to the said *Article 2* of *Act 16/79 Labour Legislation* means any legislation aimed at regulating individual and collective labour relations as well as workers' rights as such and the rights of their organisations, i.e. a) individual labour contracts; b) collective labour relations; c) works councils, the respective coordinating committees and their rights; d) trade unions and union rights; e) the right to strike; f) national minimum wage and working hours; g) vocational training; h) accidents at work and occupational diseases; also the process involved in ratification of the conventions of the *International Labour Organisation*.
34. *Article 3* of *Act 16/79*.

legislation in question emanates from the Assembly of the Republic, the Government or the Regional Assemblies[35].

The legislator must take account of the views put forward by the workers' organisations[36].

5.3 The regulatory powers of government[37]

According to *Article 202* of the *Constitution*, the Government is responsible for administrative functions, drafting the necessary regulations to enable it to enforce the law and taking all necessary steps to promote economic and social development in a way calculated to meet collective needs. The regulations concerned are those which *Article 115* of the *Constitution* stipulates are part of normative legislation. Such regulations logically depend on the prior existence of relevant laws requiring normative enforcement at administrative level. As such they are derived legal acts which can in no way modify, suspend, derogate from or repeal a law[38].

Independent regulations are another aspect of the government's regulatory powers – i.e. regulations for which the *Enabling Act* will merely lay down who is subjectively and objectively empowered to formulate them[39]. The *Constitution* demands that these regulations take the form of an administrative decree. This is to prevent the government and the administration from turning to such regulations rather than the appropriate legislative instrument in an attempt to circumvent the specific requirements and controls devised for the purposes of lawmaking[40].

Equally, as indicated above, the government can take general measures to promote economic and social development. These aspects are particularly significant to our study, since they embrace both extension and regulatory decisions in respect of labour law. These points will be discussed later.

5.4 The legislative and regulatory powers of the autonomous regions

According to *Article 115* of the *Constitution*, legislative acts include Laws, Decree-Laws and regional legislative orders. *Paragraph 3* of the said Article stipulates that regional legislative orders deal with matters which are of specific interest to the respective regions and are not the prerogative of the Assembly of the Republic, since the government cannot act against the general laws of the Republic[41].

This means that the legislative power of the autonomous regions[42] is subject to two parameters. On the one hand, it only applies to matters which are of specific interest to the region concerned and are not already the preserve of the Assembly of the Republic or the government; on the other hand, it may not run counter to the general laws of the Republic. Hierarchically then, regional legislative orders occupy a lower rung on the ladder of rules[43].

The regional assembly and the regional government[44] are the government bodies at regional level. The regional assembly has sole power to legislate (within the limits imposed by the *Constitution* and the general laws of the Republic) on matters of specific interest to the Regions and not falling within the prerogative of other institutions[45]. It is also responsible for making regulations on the general laws issued by the institutions which do not assume sole responsibility for regulation; it also exercises legislative initiative on new bills and proposals for changes to the Assembly of the Republic. These are just the powers which have a bearing on this study[46].

The regional governments have no legislative power; they merely have regulatory power in matters of regional legislation[47].

6. Collective agreements

As we have seen, the *Constitution* recognises trade unions' right to collective bargaining, a right guaranteed by law. The law will lay down rules on the legitimacy of collective labour agreements and see that they are properly implemented.

The legitimacy of collective labour agreements and the effective implementation of rules is regulated by *Decree-law 519-C1/79 of 20 December 1979* on the *Collective Regulation of Labour*).

According to this text, collective agreements may not restrict the exercise of constitutionally guaranteed basic rights, run counter to imperative legal rules or feature provisions which would give the workers less favourable terms and conditions than those stipulated in law.

6.1 The content of collective agreements

Article 7 of the aforementioned Decree-Law stipulates that collective agreements may regulate relations between contracting parties, particularly as regards the means of supervising respect of the terms of the agreement and the machinery for resolving disputes arising from its implementation and revision (contractual part of the agreement); they may also regulate the reciprocal rights and obligations of workers and employers bound by individual labour contracts in so far as they fall within the scope of the agreement (regulatory part of the agreement).

6.2 Scope of collective agreements

6.2.1 Personal scope

Collective labour agreements are binding on the employers' organisations which subscribe to them and on employers affiliated to signatory employers' associations, as well as on the workers they employ, whether they are members of the contracting trade-union associations or of associations repre-

35. *Article 4* of *Act 16/79*.
36. *Article 7*, idem.
37. This should really be dealt with separately; strictly speaking it is not part of the Governments's legislative powers. However, we are including it here for the sake of clarity.
38. GOMES CANOTILHO and VITAL MOREIRA, op. cit.
39. *Article 115* §§ *6* and *7* of the *Constitution*.
40. GOMES CANOTILHO and VITAL MOREIRA, op. cit.
41. *Article 115* §*4* stipulates that laws and decree-laws sufficiently well-founded to warrant their unqualified extension to the entire national territory are general laws of the Republic.
42. *Article 227* of the *Constitution* of the Portuguese Republic has created two Autonomous Regions which correspond to the archipelagoes of the Azores and Madeira; their powers are laid down in *Article 229*.
43. GOMES CANOTILHO and VITAL MOREIRA op. cit.
44. *Article 233* of the *Constitution*.
45. *Article 229 a)* of the *Constitution*.
46. *Article 234* of the *Constitution*.
47. *Article 229 b)* of the *Constitution*.

sented by contracting trade-union associations[48]. Equally, collective agreements are assumed to cover those workers and employers already affiliated to the signatory associations at the start of the negotiating process as well as those who join up during the lifetime of agreements[49]. This means that the scope of a collective agreement is determined by the fact of membership, during a given period, of any of the associations which sign the agreement either directly or indirectly. Hence, in Portugal today, contrary to the days of corporatism, collective agreements do not have an *erga omnes* effect. A way therefore had to be found to widen their scope to include, in some cases, employers and workers. This was done by a ministerial extension decree.

6.2.2 Duration of agreements

Up until the latest reform of *Decree-Law 519-C1/79* by DL 87/89 of 23 March 1989, collective agreements were valid for two years minimum, save for wage scales which had a six-monthly revision clause built in. Currently, contracting parties are free to set the duration of the agreement themselves, with one proviso: collective agreements may not be revoked less than six months after being submitted for registration. In practice, this works out as a one year minimum term.

6.2.3 Geographical or territorial scope

The geographical or territorial scope of collective agreements is either established by the relevant trade unions and employers' associations or else arises naturally if the geographical scope of the two sides is the same. As a result, a collective agreement may cover several territories, i.e. as many as are represented by both the signatory trade unions and employers' associations.

6.2.4 Levels of negotiation and expression of dissent

Collective bargaining in Portugal is largely conducted at sectoral level. In fact, some two thirds of all negotiations take place at this level. Broadly speaking, company-level collective agreements are restricted to public-sector enterprises, the largest companies in Portugal.

Although centralised guidelines involving the State and certain employers' associations and trade unions have been known to influence collective agreements negotiated during the period concerned, this is to recent a development to be able to draw conclusions concerning the centralised or decentralised nature of collective bargaining in Portugal.

7. Accession agreements

Article 28 of Decree-law 519-C1/79 rules that trade unions on the one hand and the employers' associations on an individual basis on the other hand may join collective agreements already in force. This widens or extends the scope of collective agreements. This extension is based on an arrangement between the parties empowered to negotiate collective agreements. All the same, the law does impose a rather odd restriction: the accession agreement may not involve any changes to the content of the collective agreement, even if it were to apply solely to the new contracting parties (*Article 28 §3* of the Decree-law). Without this restriction, such accession agreements would simply turn into a new bargaining round and defeat the entire purpose of the exercise i.e. speed. Furthermore, the parties can always conclude a new collective agreement more or less in line with an existing one. It may be concluded, therefore, that accession agreements are bona fide collective labour agreements. Despite the slight difference in the way they are concluded, they cannot, generally speaking, be regarded as inferior to labour agreements as sources of rights. This restriction to the bargaining process warrants a special study.

8. Arbitration

Arbitration is one of several methods of achieving peaceful settlement of collective labour disputes covered by *Decree-Law 519-C1/79*. The outcome of arbitration - the arbitration ruling - has the same effect as a collective labour agreement, since the parties will have agreed to abide by it (*Article 34*).

Arbitration rulings may not diminish the rights or guarantees stipulated by earlier collective agreements.

9. The decisions of the joint committees

Article 41 of *Decree-Law 519-C1/79* stipulates that collective agreements must provide for the establishment of committees made up of an equal number of representatives of the various signatories with authority to interpret (and apply) collective agreements. Their decisions are taken unanimously and are regarded as having full interpretative or executive force; they are formally addressed to the *Ministry of Employment* and published in the same manner as collective agreements. These decisions are binding on the agreement as a whole, even where it includes an extension arrangement.

10. Generic government regulations

The Portuguese system of labour law is made up of different kinds of administrative regulations. For our purposes, we need to distinguish between those also applicable to other branches of the law and those which are specific to labour law, including for example extension orders (*"Portarias de extensao"* - PE) and labour regulation orders (*"Portarias de Regulamentaçao de Trabalho"* - PRT).

The following generic regulations are liable to constitute a source of labour law:

(a) regulatory decrees or ordinary decrees - this is the official formula for an administrative ruling, approved by the government and promulgated by the President of the Republic;

(b) regional regulatory decrees - this is the official formula for an administrative ruling passed by the regional assembly or approved by the regional government of an autonomous region (it is signed by the relevant Minister of the Republic);

(c) resolutions of the *Council of Ministers* - these are decisions taken by this body and not subject to promulgation by the President of the Republic. They may involve the resolution of concrete cases, set out a programme, or take the form of generic rules of a regulatory nature. They should not be seen as legislation, since they are not mentioned in the *Constitution*; they fall within the powers of the government in its capacity

48. *Article 7* of *Decree-law 519-C1/79*.
49. *Article 8*, idem.

as an administrative or executive body of the State);
(d) Orders (*"portarias"*) – the official formula for an administrative regulation approved by one or several Ministers acting under the powers conferred by the law.

There are two types of order in labour law: *extension orders* (PE) and *labour regulation orders* (PRT). Both engender legal rules which apply to labour relations between certain categories of employers and workers, defined in terms of sphere of activity or professional category and a given geographical zone.

Extension orders seek to enlarge the scope of application of a collective labour agreement or arbitration ruling. The law makes specific provision for two cases:
(a) the case of companies and workers who exercise their activity in the same area as the agreement but who are not covered because they are not members of the employers' associations or trade unions which signed the said agreement;
(b) the case of companies and workers belonging to the same economic and occupational sector as that covered by the agreement, but who exercise their activity in a geographical zone not covered by the agreement and where the employers' associations and trade unions which can represent them do not exist.

The extension order has two aims. The first of these is to ensure equal treatment for all workers and employers belonging to the same category and falling within the original scope of the agreement. This is in order to achieve single legal status for all, either at company level or at sectoral level (type of economic activity), and to fill so-called *"vacuums"* (buttressed by a policy of support for voluntary bargaining), by drawing parallels between the categories covered and social and economic conditions. Although the content of an extension order is established in advance by a collective agreement or an arbitration ruling, the law authorises a partial extension, but of course this does not mean that the provisions of the extended agreement are in any way changed.

A labour regulation order (PRT) is a ministerial act comprising an interconnecting set of rules to regulate employment conditions and remunerations. It applies to a given economic sector or professional category (*Article 36 et seq* of *Decree-Law 519-C1/79*). The use of this formula depends on the existence of a basic legal requirement: namely that no extension agreement can be concluded because the necessary conditions are not fulfilled. A number of further requirements must be met:

(a) the non-existence of trade unions or employers' associations;
(b) a repeated refusal by parties to negotiate;
(c) the manifest use of delaying tactics impeding collective bargaining.

A PRT is therefore used as an auxiliary tool, when all else fails.

11. Jurisprudence: the *"Assentos"* of the *Supreme Court*

In the Portuguese legal system, court decisions are a source of law only in exceptional cases. These are cases in which the *Supreme Court of Justice* establishes case law which will have general compulsory force. It does so by means of so-called *"assentos"*. *Article 763* of the *Code of Civil Procedure* states that if, within the framework of the same legislation, the Supreme *Court of Justice* hands down two rulings based on contrary reading of the same fundamental legal issue, the parties may appeal against the most recent judgement. The *Supreme Court of Justice* must resolve the dispute and hand down a ruling which will have general and compulsory force of law: the *"assento"*. This regime applies to labour law (*Article 74* of the *Code of Labour Procedure*). Obviously then, there may be *"assentos"* dealing with labour law. Nevertheless, this special source of law may take on a different form where labour legislation is concerned. According to *Article 180* of the *Code of Labour Procedure*, judgements passed by the *Supreme Court of Justice* in cases concerning the cancellation or interpretation of individual clauses of collective labour agreements have the same value as *"assentos"*. *"Assentos"* must be published in the *Official Journal* and in the *Bulletin of Employment and Labour*.

12. Custom and practice

In line with *Article 12* §2 of *Decree-Law 519-C1/79*, the customs peculiar to the worker's trade and to the company shall be taken into account, provided they do not run counter to the rules set out above (i.e. labour laws and collective agreements) or violate the principles of good faith, unless other provisions are added in writing.

Thus the customs in force in the different trades and in the companies themselves are a mediate source of law. They are normative and supplementary in scope, since they may not be ignored unless all parties agree in writing and, of course, provided no other source of law applies. It is therefore important to identify these customs, a task which the Portuguese legal profession more or less ignores, as they are rarely brought into the solution of concrete cases.

13. In-house regulations

Article 39 of the Act deals with the employer's powers to decide the terms of service, within the limits laid down by the contract of employment and the rules to which it is subject. The same article stipulates that these rights must be exercised within the framework of in-house regulations formulated by the employer, which should include rules on the organisation of work and discipline. The workers should be informed of these in-house rules once they are set, in line with *Article 23* of *Act 46/79*, which stipulates that the works councils must be informed of such matters. Moreover, in-house regulations must be officially submitted for approval by the *Ministry of Labour*. Approval is due within no more than 30 days of receipt. If no approval is forthcoming within this period, the regulations shall be regarded as having been tacitly approved.

The employer must then see to the proper distribution of in-house regulations within the company. Once this is done, all workers are bound by the rules, until they are changed or revoked.

However, some of these in-house regulations may include provisions other than those involving the employers' right to organise and direct the work. They may deal with contractual matters, over which the employer has no right to decide

unilaterally. The law allows in-house regulations to feature accession agreements (*Article 7* of the Act), but in that case the workers must agree to the contractual provisions. Their consent may be tacit or express. Nevertheless, *Article 7* §2 confirms that the worker is deemed as having agreed if he or his representative fails to speak out against the regulation in writing, within 30 days from the date on which the contract entered into force or the regulations were published, if the publication date was later than the entry into force of the contract.

In conclusion, in-house regulations may be said to constitute sources of law when they express the employer's unilateral right to organise and discipline work, but not when they express the contractual autonomy of the contracting parties, even though they take the form of an accession agreement. In this respect, in-house regulations are equivalent to a model contract.

14. The hierarchy of sources

The sources of labour regulation, in hierarchical order, are as follows:

(a) the *Constitution* of the Portuguese Republic;
(b) derived Community Law and International Law;
(c) ordinary legislation: Acts and Decree-Laws, plus the legislative orders issued by the regional assemblies;
(d) the *"assentos" of* the *Supreme Court of Justice*;
(e) general regulations issued by the government;
(f) collective agreements, accession agreements, negotiations within joint committees and arbitration rulings;
(g) extension orders and labour regulation orders;
(h) the customs and traditions of trades, professions and enterprises;
(i) in-house regulations of enterprises.

Portuguese legal doctrine raises a number of problems on several counts. Two in particular should be briefly mentioned. The first concerns the relationship between international labour rules binding on the Portuguese State, and the State's own laws. Most authors regard international law as superior to ordinary law. The second problem concerns the relationship between collective labour agreements on the one hand and extension orders and labour regulation orders on the other hand. Several authors insist on the primacy of collective agreements, even though the law (*Civil Code* and WCA, *Article 12*) gives priority to extension and labour regulation orders over collective agreements. Others argue the opposite case. But in debating the question of hierarchy it is as well to bear in mind the supplementary nature of administrative regulations in terms of collective autonomy.

15. The *"favor laboratoris"* principle

The Portuguese legal doctrine makes frequent reference to the principle of most favourable treatment of the worker (the *"favor laboratoris"* principle) in conduction with the problem of the hierarchy of sources of labour regulation. There is no room here to put the case in all its aspects, arguments and views. In a nutshell, the problem is this: *Article 13* §*1* of the WCA stipulates that higher sources of law always take precedence over lower sources of law, save where the latter, without infringing the former, establish rules giving more favourable treatment to the worker. Quite a number of authors take this to constitute the principle of most favourable treatment of the worker, a principle which can then be brought to bear on the theory of interpretation in labour law and in other areas. *Article 6* of *Decree-Law 519-C1/79*, while confirming these provisions, is taken by these authors to express the same principle: the instruments of collective labour regulation (i.e. orders, collective agreements, accession agreements and arbitration rulings) may not feature any provisions which would give less favourable treatment to the workers than that established by the law. This thesis is sometimes further bolstered by referring to *Article 14* of *Decree-Law 519-C1/79*, which says that the rules established by whichever of the means referred to in *Article 2* (which lists the various instruments of collective labour regulation indicated above) may not be ignored by individual labour contracts, unless they offer more favourable terms for the workers.

What seems certain is that *Article 13* §*1* emphasises the general principle according to which the rules established by a source higher up the hierarchical ladder take precedence over the rules established by one lower down. It expressly stipulates that this principle *always* applies, but then goes on to introduce one exception, which occurs when the rules established by the higher source do not prevent the rules of a lower source providing for more favourable treatment of the workers. This simply implies that some of the rules applicable to employment conditions are merely designed to offer minimum protection to the worker. In no way can it be construed as the expression of a principle actually altering the general rules on hierarchy. On the contrary, by specifically confirming the primacy of rules established by higher sources (by use of the word *"always"*), the law has sought to quash the notion that the criteria of hierarchy employed in labour law can be different from those in general use.

All the same, it is necessary to recognise the particular aspect of semi-imperative rules offering minimum protection for workers. Such rules are imperative only in so far as they do not allow lower normative sources to institute rules which are less advantageous to workers . One conclusion we may safely draw from the aforementioned *Article 13* §*1* is that it assumes the principle according to which labour law is protective law and that the protection offered is guaranteed by the hierarchy of normative sources. Rules emanating from lower down the ladder may not run counter to rules from higher up save where the latter are not imperative and provided the former are more advantageous to workers. In other words, hierarchically *"superior"* rules establish minimum protection on which *"inferior"* rules may then build, unless the former are absolutely imperative. These lower rules are likely to be more effective, either because they are narrower in scope, or simply because they are more in touch with reality and with the will of the parties concerned to protect workers not in relation to increasingly specific economic, industrial and social circumstances rather than an abstract set of generic rules. What we have here is the principle of worker protection rooted in the idea of development and improvement from the most general (and hierarchically superior) level down to the most specialised and concrete (and, in legal terms, hierarchically inferior) level. This system is probably more appropriate and more effective from the point

of view of protecting the worker, because it strikes a better balance between the interests involved.

CHAPTER III: INDUSTRIAL ACTION AND METHODS FOR CONFLICT RESOLUTION

1. Industrial action

1.1 Industrial action[50]

If we analyse industrial action in Portugal, a clear overall picture emerges of how disputes arise and are resolved. Broadly speaking, for the purposes of such an analysis, we need to break down industrial action into two groups: that within a single company, and that involving several companies.

In the majority of cases, industrial action within a company tends to be strictly occupational. This is no longer true of industrial action involving more than one company, when other t objectives may be involved.

In general, industrial action involving more than one company is called by the confederations and trade union associations. It is usually in the shape of days of action and includes mass meetings, demonstrations, picketing of certain public institutions, such as the Assembly of the Republic, the government, and the *Ministry of Employment and Social Security*. Such actions are usually linked to late payment of wages[51], redundancies, government legislation, privatisation of specific companies or simply to express solidarity with other people's economic claims.

1.2 The chief causes of conflict[52]

Looking at industrial action within a single company in 1978, we find that 37.8% of disputes related to the payment of wages, 21.9% job security, 9% wage claims and 3.2% increases in other financial benefits. Other claims did not reach significant percentages.

Industrial action concerning the payment of wages involved, in descending order of importance, the textile industry, the metalworking sector and building.

Industrial action for job security affected, in the same order, metalworking, textiles and the timber industry.

Wage claims and disputes for other financial benefits mostly concerned the metalworking sector, food, beverages and tobacco, and the catering industry.

Industrial action within a single company largely focused on the districts of Oporto, Lisbon, Setubal and Braga.

Industrial action at multi-company level shows that 21.6% of all claims concerned job security, 19.8% wage increases and 16.2% the payment of wages. Other claims were insignificant in percentage terms.

The areas most affected by multi-company industrial action were Lisbon, Oporto and Setubal.

Clearly then, industrial action in Portugal is largely defensive, and more so at single company level than at multi-company level.

2. Strikes and lock-outs

2.1 The system; strikes and lock-outs

As indicated above, the legal provisions on strikes and lock-out in Portugal are rooted in the *Constitution*. Under *Article 50* of the *Constitution*:

(i) The right to strike is guaranteed.
(ii) It is up to the workers to define the scope of interests they intend to defend by strike action. The law may not restrict that right.
(iii) Lock-outs are prohibited.

This leaves us with two fundamental points. To begin with, lock-outs are prohibited. Hence there is no way that collective labour relations can be organised on the basis of equality between the social partners in terms of the coercive machinery at their disposal.

On the other hand, the right to strike is guaranteed in the most generous of terms, quite ruling out the possibility of in any way restricting (by resorting to ordinary law) the range of interests liable to be defended by strike action.

Act 65/77 of 26 August, known as the *Strike Act*, develops the constitutional bases of the strike provisions, but does not specify the reasons or foundations for strike action or the forms which it may take. It merely regulates the procedural aspects relating to the decision to strike, notification of strike action, safeguarding the freedom to work, maintaining essential services, and the effects of strike action.

In Portugal, strikes may take forms other than the classic concept of *"collective and concerted withholding of labour, in which a group of workers seeks to bring pressure to bear in order to achieve a specific benefit or common objective"*. Under these other forms, either labour is not withheld (working to rule), it is only partially withheld (overtime bans, no ticket sales for public transport) or else the action involves only part of the workforce (staggered or selective strikes).

Current doctrine is seeking to classify the different types of strike action on the basis of legally relevant common characteristics[53]. We may distinguish offensive and defensive[54] strikes, lawful and unlawful[55] strikes, single-company strikes or sectoral strikes, regional and national strikes, socio-professional strikes, solidarity strikes, political strikes, etc. However, the concept of an unlawful strike has not been precisely defined, though the most prevalent doctrine is that political strikes are unlawful, as are strikes in which there is no withholding of labour. Many legal experts have their

50. This text was drafted on the basis of documents published by the Ministry of Employment and Social Securit - Department of Labour: *Relatorios e Analises - Conflitos Colectoivos de Trabalho - Reports and Analyses - Collective labour disputes*.
51. This kind of action occurs less frequently now that such situations are becoming rarer.
52. The percentages quoted are provisional and purely indicative.
53. For a classification of strike action, cf MARIO PINTO, *Greve*, in: *Enciclopédia Polis*; BERNARDO XAVIER, *Direito de Greve*; MONTEIRO FERNANDES, *Direito de greve*.
54. Defensive strikes are strikes aimed at forcing companies to abide by certain statutory or agreement-based obligations; offensive strikes are strikes called to press new claims.
55. According to whether the strike respects or is in breach or regulations.

doubts about the selective strike, both on the grounds of its lawfulness as such and because of its repercussions in law. There is not yet an adequate body of case law, and the evidence is contradictory.

2.2 Some facts and figures on strikes

The *Statistical Office* of the Portuguese *Ministry of Employment and Social Security* publishes a quarterly bulletin giving the number of strikes, the number of workers involved and the number of working days lost by sector, company, group of companies, district, type of claim, results achieved and strike duration.

Turning to the latest data published in the second quarter of 1988, we find there were 30 strikes involving 46,479 workers and the loss of 39,903 working days in total. The largest number of strikes was in the processing industries (18), followed by transport and communications (5). The largest number of workers concerned was in banking, insurance and real estate, in which there was only one strike but this involved no fewer than 22,638 workers. Next in line were the processing industries (17,298 workers). The number of working days lost was highest in the latter two sectors: 19,755 in banking, insurance and real estate and 12,700 in the processing industries.

Of the 30 registered strikes, 25 were single-company strikes and other five were multi-company strikes. The former involved 14,576 workers with a total loss of 14,787 working days. The highest number of workers affected and working days lost in the multi-company strikes were in the banking, insurance and real estate sector.

In the processing industries, the number of striking workers was roughly the same in single-company strikes and multi-company strikes, although the number of working days lost was lower in the latter category.

The districts with the highest number of striking workers and working days lost were Lisbon (18,433 workers and 17,502 working days lost), Setubal (13,226 workers and 3,564 working days lost).

Looking at what triggered the strikes, we find that 42.9% concerned wage claims, 28.6% conditions of employment, 7.9% working time, 7.9% workers' organisations' freedom to operate and disciplinary action, and 6.3% health and safety or social issues.

Turning to results, 77.8% of strikes did not achieve the desired objective, 12.7% were partially successful and only 9.5% were fully vindicated.

Finally, in terms of duration, we find that in the case of both single-company strikes and multi-company strikes, the vast majority of strikes, workers concerned and working days lost fell within a range of 1-5 days. Shorter or longer strikes were statistically insignificant.

3. The machinery for resolving collective disputes

In Portugal, as in other countries, we also need to distinguish between collective disputes based on legal grounds and those based on economic grounds or conflicts of interest.

A practical criterion for operating this distinction is the difference in the type of decision required for each of these categories.

Since it involves a difference of opinion on existing law, disputes based on legal grounds are resolved by interpreting, stating and applying the law. In practical terms, this means applying existing law, a typically judicial task.

A conflict of interest implies a dispute not based on existing law, but relates to the rules that need to be formulated for the just and equitable resolution of conflicting interests. This means either bargaining between the parties themselves (of their own free will, with the aid or mediation of third parties), or an external decision (e.g. compulsory arbitration or an administrative ruling).

3.1 Collective disputes on economic grounds

3.1.1 Conciliation, mediation and arbitration

Decree-law 519-C1/79 stipulates that collective labour disputes arising from the application or revision of a collective agreement (i.e. disputes based on economic grounds) may be resolved by conciliation, mediation, or arbitration (*Article 30 et seq*).

These peaceful means of resolving collective disputes on economic grounds are optional, i.e. they require prior agreement by the parties concerned (except in the case of compulsory arbitration applicable to public-sector enterprises).

The law also stipulates that the parties concerned may establish rules whereby they will resort to conciliation, mediation and arbitration. However, the law provides for additional arrangements which apply when the parties do not disagree.

3.1.2 Non-compulsory legal machinery

The law states that conciliation may be initiated at any time, by consent of all parties concerned, or by one of them (if the other part fails to respond to a proposal to conclude or revise an agreement or, in other cases, by giving one week's notice in writing to the other party).

Conciliation is provided by the conciliation services of the *Ministry of Employment and Social Security*, assisted if necessary by the relevant services of another ministry directly concerned in the resolution of the dispute.

Conciliation is the most common non-compulsory form of settling disputes.

Parties may at any time decide to submit their collective disputes to mediation.

In line with the supplementary character of mediation as a legal instrument, the mediator is chosen by both parties and must present a proposal (by registered mail) within 20 days of his appointment. The proposal will be considered rejected if the parties concerned fail to notify acceptance in writing, within ten days of receiving it. During this period, the mediator will contact all the parties, one after the other, as he judges necessary and feasible, with a view to obtaining their agreement. The mediator is sworn to secrecy regarding any information he may receive in the process and which is not known to the other party.

Although the law makes provision for mediation as described, there has so far not been a single case in Portugal.

Parties may, at any time, agree to resort to arbitration, on terms defined by themselves or, if they fail to do so, as stipulated by the law (supplementary arrangement). In accordance with this procedure, arbitration is in the hands of three arbiters. The parties appoint one each, who then appoint the third. The arbiters are independent and may solicit the help of experts. The arbitration ruling is made by majority vote. Arbitration rulings are as binding as the collective agreements themselves, with one important restriction: they may not diminish the rights or guarantees laid down by previous collective agreements; they may not operate a derogation *"in peius"*.

The social partners in Portugal have resorted to arbitration only on very rare occasions. In fact, not a single arbitration ruling has been published in Portugal since 1984.

3.1.3 Compulsory arbitration

The Minister of Employment or other minister concerned may order disputes arising from the implementation or revision of a collective agreement applicable to State-owned enterprises or companies operating with public capital to be resolved by compulsory arbitration (*Article 35 of Decree-law 519-C1/79*).

The law also authorises the Minister to decide by decree in the event of disagreement between contending parties on the choice of the third arbiter in the arbitration process. Yet the law is silent on the most likely eventuality, which is that one of the parties (most probably the trade union) fails to appoint its own arbiter. How arbitration is to take place in such circumstances is an open question, unless ways can be found to secure an appointment (no easy matter). No compulsory arbitration orders have been issued in Portugal since 1985.

3.1.4 Labour regulation orders

Significantly, the *Decree-Law 519-C1/79* includes labour regulation orders in its chapter on collective labour disputes. This clearly implies that this instrument of collective labour regulation constitutes a means of peaceful resolution of collective labour disputes on economic grounds which cannot or probably will not be resolved through collective bargaining between the parties. We have already discussed the way in which such labour regulation orders are issued and how the law makes this government option fit in with the collective autonomy of the social partners. No further comment is required. Although very popular in the past, this method of solving disputes has not been used since 1986.

3.2 Collective disputes on legal grounds

Like any other legal conflict, collective disputes on legal grounds can be resolved by the courts, which are empowered to interpret and apply the clauses of collective agreements, regardless of whether they are compulsory or normative.

All the same, the law also stipulates that the joint committees set up under collective agreements are themselves competent to interpret and incorporate the respective agreements and settle any doubts and disputes arising from them. This arrangement is part of *Article 41* of *Decree-Law 519-C1/79*. Only unanimous decisions, duly filed and published (within the terms of the collective agreement), have authority equal to that of the agreements, being regarded as regulations handed down by the agreements themselves.

Authors differ on whether these joint committees are entitled to apply the agreements (i.e. negotiate solutions to any shortcomings) as well as interpret them. It would seem that the answer should be in the affirmative, especially as the law, in the final passages of *Article 41* §5 makes express mention of the assumption of application. This clause states that decisions taken unanimously are automatically applicable to the employers and workers subject to the extension orders of agreements to be interpreted or applied.

A look at the bulletins published by the *Ministry of Employment and Social Security*, which contain the decisions taken by the joint committees, not only tells us that such decisions are frequent, but also that they apply and interpret the provisions of the collective agreements from which they arose.

CHAPTER IV: THE PORTUGUESE MODEL FOR THE REGULATION OF WORKING CONDITIONS - A SYNTHESIS

SECTION 1: THE SYSTEM - GENERAL BACKGROUND

1. The model in general. Consensus, criticism, trends

The Portuguese system for the regulation of working conditions is comparable in general terms to that operated by other European pluralist democracies. In other words, it dovetails with the global model in the Community countries.

Portugal operates a system of union freedom, in which the right to collective bargaining and the right to strike are enshrined in law and respected. Besides, the system is expressly rooted in the *Constitution*. It is further guaranteed by ILO *Conventions 11*, *87*, *135* and *151*, all of which apply in the Portuguese legal order.

Generally speaking, the union system and the regulation of working conditions are operated on the basis of consensus. Neither the trade unions nor employers are hostile towards the system, but all the same, individual aspects of the system sometimes come in for criticism.

One such aspect is the fact that the *Constitution* couches the right to strike in terms which, in the employers' view, impede proper legislative and jurisdictional control over the right to strike. This they argue, is compounded by the lockout ban, which effectively puts paid to any notion of *"equal weapons"* in labour relations.

The workers on the other hand complain that certain laws unduly restrict their right to collective bargaining in certain areas (more details on this later).

Globally speaking then, the constitutional model governing the system of regulation of working conditions, including the labour relations machinery, is clearly biased in favour of the worker (*favor laboratoris* principle). However, ordinary legislation, both pre- and post-Constitution, has had to block some of the practical repercussions of this system which would most likely have arisen had the model been allowed to operate freely. We thus have a basic model which tends to

favour the worker, but which is kept in check by the recollection of the difficulties which arose from balance of power problems during the 1974-75 revolutionary period and the economic crisis. The situation may become less acute as the economic situation improves, if industrial relations follow suit, particularly in terms of social dialogue. Some progress is already evident, both at practical level and in the legislative sense (the recent *Decree-Law 87/89*, for example, introduces more flexibility into the legal arrangements for collective bargaining).

2. Some of the principal features of the Portuguese system for regulating working conditions

Some aspects of the Portuguese system for regulating working conditions should be highlighted and compared with the systems operating in other countries.

A salient feature of the Portuguese system is its strong reliance on the *Constitution* as a basis for regulating working conditions. The Constitution proclaims fundamental workers' rights, guarantees union freedom and grants workers' organisations the right to participate in the drafting of legislation.

Secondly, the entire system of labour law (which includes labour relations and collective bargaining) is permeated by the concept of *"legality"* - clearly designed to protect the worker. This emphasis on the force of law is one of the traditions handed down by the previous political regime, and one which is sometimes used to restrict and control collective union autonomy.

The constitutional guarantee of the right to strike (reinforced by a lock-out ban), expressed in unequivocal terms, is another characteristic worthy of note.

The government's powers to extend collective agreements (*"portarias de regulamentaçao de trabalho"*) should also be mentioned. It is worth noting that the government's regulatory powers in this field, which go back a long way in Portuguese law, now tend to be measured against the principle of the right to collective bargaining and therefore tend to be used sparingly. The result is a system for the regulation of working conditions split into two halves: one is based on agreement and entirely autonomous, the other depends on government regulation. Priority is always given to the former, however. Since we have already described the regulatory sub-system on working conditions (Sources of labour law - *cf Chapter II*) and since the sub-system based on union autonomy in collective bargaining enjoys priority, a description of the latter is called for. We shall situate that description within the overall framework of the law and administrative regulation, with a view to achieving a synthesis of the legal and institutional model underlying the Portuguese system for the regulation of working conditions.

SECTION 2: A DESCRIPTION OF THE LEGAL AND INSTITUTIONAL MODEL FOR COLLECTIVE BARGAINING

1. The legal status and legitimacy of collective bargaining

It will be remembered that the constitutional regulation not only forms the foundation for the regulation of working conditions (specifically, the fundamental rights of workers) but also establishes the legitimacy of union freedom in general[56] and collective autonomy in particular. *Article 56 §3* of the *Constitution* of the Portuguese Republic expressly states that the trade unions have the right to exercise their collective bargaining powers as guaranteed by the law. *Article 56 §4* goes on to say that the law defines the rules on who is empowered to conclude collective labour agreements and the scope of the provisions they contain.

As far as the applicability of collective agreements is concerned, they are regarded as forming an integral part of the system of labour law sources. Hierarchically, they rank lower than the law, but they have normative effect on the individual labour relations in question. This normative applicability is enshrined in the *Civil Code* and upheld by the *Labour Contacts Act*. In addition, it is especially governed and guaranteed by the *Law on Collective Labour Regulation*, which sets out the civil penalties that apply. This Act also establishes the rules on the legitimacy of the conclusion of collective agreements.

The legal discipline inherent in the different instruments of collective labour regulation[57], and particularly evident in the above mentioned law , makes it clear that collective labour agreements in terms of legitimacy take precedence over other forms of collective labour regulation. The government's powers, when expressed by means of ministerial orders to regulate working conditions (*"portarias de regulamentaçao do trabalho"*) are manifestly intended to counter the (*de facto*) impossibility of concluding collective agreements.

2. The collective bargaining process

The thorough and detailed attention to the bargaining process is probably the most outstanding feature of the legal and institutional model for collective bargaining in Portugal.

Besides making sure that negotiations do not start until the agreement under review has almost run out, the law also, where appropriate (and this is an aspect with a bearing on the limits of collective autonomy, a point we shall return to later), organises the negotiations proper, by fixing a precise timetable and deadlines for the bargaining process and by defining and overseeing certain operations with remarkable attention to detail. For example, Chapter V of *Decree-law 519-C1/79* (significantly entitled *"Bargaining process"*) stipulates that representatives must declare their identity and inform each other by whom and for what they are mandated at the outset of the talks. It obliges the parties to establish, in writing, a timetable and the rules for the negotiations and to send a copy of the protocol to the *Minister of Employment* and the minister responsible for the sector concerned.

Very broadly then, the negotiating process (this is the term used by the law) breaks down as follows. The first, compulsory, step is the tabling of a formal, written negotiating proposal and counter-proposal, setting out the economic arguments in the case. Failing this, the documents will be declared null and void or prompt a refusal to negotiate.

56. We have already studied the constitutional regime governing these basic rights and union freedom.

57. The concept of *"instruments of collective labour regulation"*, covering collective agreements and arbitration rulings or ministerial orders, is one laid down by the law itself.

The next step is what is known as the direct bargaining stage, which the law requires to start within a fortnight of receipt of the reply to the proposal, unless another deadline is fixed beforehand. This is where the law goes into detail regarding some of the aspects involved in the opening procedures and the bargaining process itself (for example, that the issue of remunerations should be dealt with before all others). Other provisions are more substantial, such as the express prescription of the principle of good faith in bargaining, the principle of democratic consultation of the workers and employers represented by the participants in the talks, and the principle of reciprocal information by the negotiating parties.

If called for, the next stage will involve the search for a peaceful solution to collective disputes, if such is the outcome suggested by the direct negotiations. In this case the law prescribes conciliation, mediation and arbitration, and lays down supplementary rules to this effect. In collective disputes arising from the conclusion or revision of a collective agreement applicable to State-owned or State-run enterprises, arbitration may be made compulsory by order from the Minister of Employment and any other minister concerned.

The final stage is for the collective agreement to be registered and officially published, whereupon they enter into force in accordance with the law.

3. Limits to collective autonomy

The law sets limits in the realm of collective bargaining in labour relations which go back to the corporatist regime in force prior to the political changes in 1974. The current system applies these limitations both in a positive and a negative fashion.

On the positive side, the law confirms that collective agreements may govern relations between the contracting parties (e.g. monitoring of implementation of the agreement, the means for peaceful resolution of disputes arising from its implementation or its revision, and the reciprocal rights and duties of workers and employers who are party to individual contracts).

In the negative sense, the law expressly excludes from the framework of collective autonomy the regulation of the economic activities of enterprises (notably tax and pricing arrangements). This may appear excessive, but it is useful and instructive to know that these rules are occasionally transgressed.

With clear educational intent, the law expressly forbids the instruments of collective regulation to:

- restrict the exercise of basic rights guaranteed by the Constitution;
- impede the operation of imperative legal rules;
- include any provision implying less favourable treatment of the workers than that laid down by law.

However, in addition to these restrictive prescriptions, the law also imposes others whose bias is rather different. These take their inspiration not so much from a structural model but instead reflect the need for moderation in terms of the speed and scope of improvements to existing working conditions. One such is the ban (in principle) on entering into negotiations to review existing collective agreements until very near the end of their statutory (minimum) lifetime. The law also forbids contracting parties to implement agreed clauses retroactively, except within well-defined limits.

In addition to these bans (which apply to the regularity with which contractual arrangements are revised), there are others which oppose the application of certain prerogatives or improvements to systems defined by law. For example, the parties may not fix or regulate, by collective agreement, advantages over and above those granted by the public social security scheme. This rule is often flouted in practice, which only highlights its absurdity. It is also expressly forbidden to enter into contractual arrangements which exceed the legal thresholds in respect of annual holidays, public holidays, absence from work and working time, not to speak of course, of the restrictions arising from imperative legal rules in certain areas such as redundancy[58].

By setting itself up in opposition to the trends outlined above, the law makes it difficult to derogate from a collective agreement. A new agreement must contain a clause stating that the new scheme will be globally more favourable than that in force under the old agreement from which a derogation is sought. However, this is also a restriction of collective autonomy, although less wide in scope. In fact, while arguing the merits of certainty, this approach actually suggests a lack of trust in trade unions.

Collective bargaining in State-owned enterprises is faced with even more restrictions. The government, as guardian, must approve the agreement before it can enter into force. Similarly, in the event of a dispute, the Minister of Employment and the minister concerned may impose arbitration.

4. A structural outline of the legal and institutional model

Following is a description of the various elements which illustrate the way in which the legal and institutional model for collective labour regulation in Portugal is structured.

First of all, only recognised trade unions may legitimately take part in collective bargaining (as well as the companies and employers' associations, likewise duly recognised). This narrow concept of what constitutes a negotiating party is yet again the fruit of tradition, the legacy of a period when no other form of labour organisation existed. It is very much based on the strategic separation between trade unions and works councils in the period immediately after 25 April 1974. The operational division between the two forms of workers' organisation is explicitly confirmed in the constitutional regime and by extension, in ordinary law. The responsibility for management monitoring now lies with the works councils, whereas collective bargaining is the province of the

58. *Decree-law 121/78*, recently repealed, was an especially telling example of the way in which such bans were arranged. It forbade parties to:
- establish wage discrimination on grounds of sex;
- fix minimum wages by contract for unskilled workers amounting to more than 60% of the minimum wage in force;
- revise upwards, either as a percentage or in absolute terms, any additional benefits already in force and with a financial content, save for productivity bonuses paid out on merit.

The first of these is clearly superfluous, since there are rules, particularly constitutional rules, on the subject. The others are survivals of a policy of wage controls now replaced by informal practices.

trade unions. This functional, formal and radical division has frequently been controverted at company level through a variety of means, ranging from joint negotiation by union and committee representatives, through direct bargaining by the works councils either in lieu of the trade unions or by adopting a divergent contractual position arising from a crisis, to the exercising at company level of a contractual option negotiated on top of sectoral union agreements. An informal system grafted to the official system is thus created.

It is worth noting that the whole question of the role of works councils in collective bargaining is one of the keys to understanding the relative lack of importance of collective bargaining at company level (except in State-owned companies).

The fact that trade unions and employers' organisations need to be legally recognised in order to be allowed to take part in collective bargaining is typical of the legal framework of the Portuguese model. This rule has on occasion been breached, more because of inadequate controls than because of any deliberate, strategic opposition move on the part of the unions, as has been known to happen in other countries.

One of the strong-points of the Portuguese model is that the law clearly comes down in favour of collective agreements taking precedence over heteronomous instruments of collective regulation, particularly those of government origin. As we have pointed out, the law only justifies the issuing of ministerial orders for the collective regulation of labour to make up for the absence of collective agreements. This compensatory mechanism also plays a supporting role in collective bargaining in the event of the employers refusing to negotiate. In that case it is possible to bypass the obstacle and inflict a penalty (this function was extremely important in corporatist times, when statutory arbitration was unknown).

One of the most interesting aspects of the legal and institutional model in hand is what we might call the *pluralism of bargaining*. A practice still much in vogue is that of negotiating several collective agreements at one time, reflecting the pluralism of the trade unions. These agreements apply, parallel to each other, to the same category of workers. *Decree-Law 519-C1/79* has not bothered to determine who should negotiate or which is the most representative union; this would of course tend to rule out parallelism in the bargaining process and could indeed give the edge to ministerial orders extending agreements.

In our opinion, and in view of the specificity of the Portuguese system, this omission has its roots in the past. The single union concept was only really abandoned in practice some ten years ago. However, attempts to change this legal solution are fraught with difficulty, running into problems with the country's legislative policy and indeed with the sensitivities of the trade unions themselves. Unions and employers have found ways to solve the problem, but they lack consistency. Practical criteria have been adopted to govern the issuing of ministerial extension orders.

The legal model expresses a clear preference for company-level agreements rather than sectoral agreements and leaves absolutely no room for linking agreements at different levels. The law upholds the principle of primacy of specific in-house agreements over general sectoral agreements.

This choice takes on added importance in the light of the legal preference for the criterion most favourable to workers in the event of manifest positive conflict between agreements, where the speciality principle cannot win the decision.

The model envisaged by the law clearly rules out the possibility of linked bargaining. At the same time, the law assumes the principle of globality (not plurality!) for the purposes of resolving positive conflicts between agreements. That is to say, it works out solutions which ensure that one agreement will always globally and completely take precedence over the other. This is further borne out by the legal preference for vertical agreements.

The law makes provision for *vertical* collective labour agreements (or agreements by activity sector) and confirms their primacy over *horizontal* (occupation-linked) collective agreements. Of course, this only applies in the event of a conflict of application, i.e. if a new collective agreement sets out to regulate in their entirety the labour relations of all (occupational) categories of workers (or at any rate of the majority of workers) in a given sector of activity, and if a union acting for a given occupational category has previously concluded a horizontal agreement (for the occupation in question), the vertical (sectoral) agreement will take precedence over the earlier horizontal agreement, even if the latter has not yet run its course.

Furthermore, the legal provision underlying this option applies it to all instruments of collective labour regulation. On the whole then, it is safe to say that this option works well, despite a few problems which we need not go into here.

This is true in respect of both agreements at undertaking and establishment level and sectoral agreements.

5. The legal model and social dialogue

It is hardly surprising that a legal model of such minute detail makes no flexible provision for the recent phenomenon of tripartite agreements (government, employers' confederations and trade union confederations - UGT), commonly known as *social consultation agreements*. All the same, these agreements (dated 1986 and 1987, on incomes policy for 1987 and 1988 respectively) clearly reflect a mutual compromise between employers and unions on the method of adjusting pay in the context of collective bargaining.

Of course, tripartite agreements of this type are not standard collective labour agreements, but rather atypical collective agreements; their legal impact is undeniable.

One very special aspect of the situation is the fact that these social consultation agreements are by way of being national blueprints: they will form part of the bargaining machinery which will later influence sectoral and corporate agreements. What we have here is an articulated collective bargaining technique not foreseen by the legal model.

These social agreements were the first ones in Portuguese bargaining history to be concluded directly by the confederations.

Another point to bear in mind is that contrary to current practice and indeed to the assumptions made by the law, social consultation agreements are addressed directly to the social partners (and the government) and contain no rules which would be directly and immediately applicable to individual labour relations.

6. Final considerations: a legal and institutional model as an instrument of recognition, promotion and control

Taking the Portuguese legal and institutional model for collective labour bargaining as a whole, it emerges as a synthesis between the past and what is now a compromise between the strengths and weaknesses of the situation in Portugal.

Our interpretation, which we are offering for debate, is the following. The Portuguese model has adjusted to (and at the same time is placed in sharp relief by) the traditional interventionist stance of the State. This is reflected by the sub-system of collective autonomy for the unions and, to a lesser extent, by the autonomous way in which normative rules are fashioned. Here we are faced with the lack of a liberal tradition in Portugal and the heritage of State control over private autonomy.

Moreover, the Portuguese model reflects and highlights the shortcomings of the industrial relations system itself, in line with lagging economic, social and cultural development. Still, substantial progress has been made in this respect of late, largely owing to new concepts in social dialogue (social consultation), not only at national level, but also at company level, as in the case of the *Lisnave Agreement*. These new practices are proof of a high degree of material and formal rationalisation capacity. All the same, it is interesting to note that even this trend is anchored in law, through the establishment of the Standing Council on Social Consultation, which has been the forum for negotiations on the national tripartite agreements.

To conclude, it can be said that Portuguese law has a hand in collective bargaining in a number of respects.

To begin with, the law obviously plays a role in legally justifying the collective regulation of labour relations by recognising the collective autonomy of the unions and by recognising collective agreements as sources of law with normative legal impact on individual labour relations.

Secondly, it is responsible for promoting collective bargaining, particularly favouring the trade unions with a view to securing the highest possible advantage for workers. Regulation of the bargaining process and provision of the machinery for the resolution of collective disputes, including the role of the government's own normative interventions, are just some of the aspects which clearly highlight the legislative will to sustain and promote collective bargaining.

Last but not least, there is the matter of control. The law sets substantive and formal limits on the collective bargaining autonomy of both unions and employers.

7. The verdict: from rigidity to flexibility – a policy must

Although the legal and institutional formality of the system governing the collective regulation of labour relations in Portugal has undoubtedly had its advantages, its lack of flexibility is beginning to be felt as a serious impediment to collective bargaining and is clearly at odds with the new spirit which is finding a dynamic outlet in informal negotiations.

The lack of flexibility is evident not only in the content of negotiations or in the limits imposed on the social partners as to what they may discuss and what they may agree if their deliberations are to have normative effect, but also above all in the very structure of the collective bargaining system which puts too narrow a limitation on who is allowed to negotiate and draws the line rather too closely as to the solutions it will countenance on issues such as derogation from previous agreements, the link between different types of collective agreement, etc.

Of course, this does not mean we should make a clean break with a model to which the social partners have grown accustomed or that we are seeking to weaken the legal framework in favour of excessive liberalisation. An excessively radical reform could stop current progress in its tracks and trigger a crisis with an uncertain outcome. A reasonable method of reform would be to sound out the social partners' own subjective experience with the system and compare it with the objective labour relations trends which have been emerging in practice. That is why an in-depth analysis of such practice is absolutely essential.

Finland

Niklas Bruun

HISTORICAL INTRODUCTION

The real breakthrough in terms of Finland's industrialisation is generally considered to have taken place in the final decade of the last century. Collective labour market relations began to take shape in Finland during the period 1896-1909, the period during which the trades unions were gathering momentum and such new phenomena as strikes and collective bargaining were becoming common. The first regional trade union was established in 1907 and the corresponding employers' organisation was set up in the same year.

The labour market in Finland has been marked by discontinuity and violent upheavals. From the civil war of 1918 up until the peace agreement concluding the Second World War in 1944 collective agreements were non-existent, having ceased because of resistance, mainly, from the employers. The situation changed after 1944, the year in which collective bargaining negotiations were re-established. Wage policies in the post-war period were determined mainly by the government. A move to liberalise the wage controls prompted a general strike in 1955, in the wake of which the trade union organisation split to become two competing organisations.

In 1969 they were reunited and during the 1970s there was rapid development of what could be called a Nordic model for industrial relations with stable relations between the social partners and a high level of organisation on the part of employers and employees alike.

Since the end of the 1960s a state incomes policy has been the principal feature of Finnish procedures for regulating wages and other working conditions in Finland.

The effect of the incomes policy has been to allow a system of negotiation to be agreed between the national-level social partners and the government, whereby fixed frameworks are set for wages, taxation and social policy during the period in question. After 1968 it was only in a very few cases that there was a failure to achieve a national-level agreement for wage rounds. In legal terms these national-level income policy agreements are not collective agreements but they presuppose that each trade or federation concludes a separate collective agreement within the constraints imposed nationally.

The income policy presupposed, and encouraged, the setting-up of a neocorporatist political regime. The national labour market organisations have been invited to attend a large number of various government bodies' meetings. The incomes policy has also encouraged the labour market organisations to centralise their structure. The national level organisations have assumed the largest share of power and importance and they have assumed the highest level of responsibility in the federation and can exercise power directly within the federation at national level. Within the negotiating system a certain amount of decentralisation has been becoming increasingly evident, agreements contain fewer detailed rules than in the past and offer greater scope for local-level agreements.

CHAPTER I:THE ACTORS

1. The labour market organisations

Membership levels in the Finnish labour market organisations are high both for employers' organisations and for those representing employees. A figure of 85-90% is regularly quoted for employees' organisations. If pensioners and other special groups are discounted, however, the figure drops to a significantly lower 72% or thereabouts.

The largest trade union, the SAK (*Central Organisation of Finnish Trade Unions*) has 1.1 million members, primarily organised along industrial federation lines. The trade union movement in Finland caters for public and private-sector salaried employees. The second largest trade union is the STTK (The *Finnish Confederation of Salaried Employees*), which has about 630,000 members. The membership includes health care personnel (apart from doctors) and clerical and technical staff within the industry, including public-sector employees. The organisation comprises six negotiating teams. The membership of the *Confederation of Unions for Academic Professionals in Finland* - AKAVA - has a membership of 320,000 academics.

At national level there are four major organisations representing employers' interests.

The most important organisation representing employers is the TT (*Confederation of Finnish Industry and Employers*). TT has over 7,000 member companies employing some 500,000 people. The services sector has its own national-level organisation representing employers' interests, the PT - (*Employers' Confederation of Service Industries*). Member firms cover commerce, hotels, catering, banking, insurance and other fields within the private services sector.

Within the public sector there are two national-level negotiating partners, one to represent government, in other words the national administration as an employer (VTML, *Department of Public Personnel Management*), the other having been set up to manage the responsibilities of local authorities as employers (KT, The *Commission for Local Authority Employers*).

The national organisation representing the interests of wage earners has long been active in a broad international context of cooperation. SAK, STTK and AKAVA are members of the NFS (The *Nordic Trade Union Council*), ETUC (The *European Trade Union Confederation*), ICGTU (The *International Confederation of Free Trade Unions*) and the OECD's advisory body, the TUAC.

The employers' organisations also participate in extensive international cooperation programmes. TT is a member of UNICE (the *Union of Industries in the European Community*) the IOE, (the *International Organisation of Employers*) and the OECD's BIAC.

The labour market organisations play a key role in labour law in Finland. Apart from entering and negotiating collective agreements they are represented in many national committees and negotiating delegations and they are regularly consulted with regard to the drafting of new labour legislation.

1.1 Trade union representatives

Freedom of association has been guaranteed by the Finnish constitution for as long as the country has been independent. The obligation to respect the freedom of association is also anchored in the *Contract of Employment Act*. In addition, there is a provision in the act which stipulates that if at least ten workers are employed at a workplace the employer must allow them and their trade unions to use, outside of working hours, and free of charge, any suitable rooms which the employer has available for meetings relating to trade union matters. It is a condition is that such activity should not disrupt work within the company.

By implementing special rules relating to the position of the trade union representative an attempt has been made to prevent discrimination against workers who are active members of trade unions. In the agreement on trade union representatives concluded by the national-level organisations there are special provisions to protect the trade union representative against dismissal owing to a shortage of work or for other reasons of an economic nature. The basic premise has been that the trade union representative would be the last to be dismissed under such circumstances.

The *Contract of Employment Act* contains a corresponding rule. By law a trade union representative can be dismissed only if a majority of the workers he represents gives its consent or when his work is finished and no other work can be procured which corresponds to his professional qualifications.

The *Contract of Employment Act* contains a number of rules which indirectly protect trade union activities. The main rule is considered to be that relating to any industrial action which is taken by a trade union but which does not represent a breach of an agreement by an individual. An employee who is a member of a trade union is also entitled by law to adopt a neutral position in such circumstances and is not obliged to perform the tasks normally performed by those on strike. In practice, trade union representatives have enjoyed an influential position at workplaces in Finland, primarily industrial workplaces.

2. Workers and employers as individuals

Labour law in Finland allows a large measure of scope for one-to-one agreements. The provisions of binding, legally enforceable rules or collective agreements cannot, however, be waived in one-to-agreements. Individual employers can also enter collective agreements with a trade union.

The labour market system in Finland comprises both the public and private sectors. They are, however, regulated in different ways. At the level of private law the conditions of employment of public-sector employees are regulated separately. Public-sector employees are also covered by a collective agreement for the civil service, which is essentially based on the Collective Agreements Act. The system is, however, more centralised and in a number of ways the regulation is different. The right to contract is restricted and the right to take strike action is much more limited than in the case of private-sector employees.

3. Public authorities

The ILO-backed tripartite principle is considered very important in Finland. The power of the state is represented primarily by the *Ministry of Labour*, which is the most important actor in terms of labour law. The Ministry acts partly as legislative body but at the same time it supervises and implements provisions relating to job placement and the monitoring of worker protection or the working environment. In addition, the Ministry also runs a research department for labour policy.

The government acts as an employer through a special department attached to the Treasury, the *Government Employment Agency*.

The government also has a number of arbitration and mediating bodies, the purpose of which is to help prevent conflict on the labour market. The labour court, the national conciliation officer and the labour council are examples of such bodies. In certain circumstances special authorities have been set up to monitor compliance with legislation. The equal opportunities ombudsman thus has a special duty to monitor compliance with the *Equal Opportunities Act*.

4. Employees' scope for exerting influence

As a group employees have an important role to play in bringing influence to bear within individual companies. This influence can be exerted both within the context of collective agreements as well as in the manner prescribed in the *Cooperation Act*, the *Management Representation Act* and the *Working Environment Regulation*. In the three latter cases the trade unions can play a central role but there are also alternative ways in which influence can be brought to bear by those who are not members of trade unions.

4.1 The *Cooperation Act*

The *Cooperation Act*, which came into force in 1978, is applicable in all companies employing a staff of at least 30 (manual and clerical). The act does not apply to non-profit-making associations. The *Cooperation in Civil Service Departments and Establishments Act* (1988) essentially extends the act's application to staff employed in national administration.

The aim of the act is to extend cooperation within companies and to broaden the scope of employees to influence the way in which matters are dealt with which relate to their work and to their workplace. The objective is to develop the effectiveness of the company improve working conditions.

The act was supplemented in 1990 by a provision concerning cooperation within firms structured as groups of companies. This provision is to applied to Finnish groups of companies whose staff in Finland normally total at least 500. In 1996 the act was extended to include a number of rules aimed at complying with the requirements of EC *Directive 94/45/EC on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees*.

The cooperation procedure is based primarily on local negotiating structures as established by collective agreement.

Employers' representatives are selected from within the undertaking in the light of the nature of the issue to be discussed on a case-by-case basis. If the case of an individual worker is to be considered the cooperation procedure is initially restricted to the employer and the person concerned. Both parties to the employment contract can request that the matter should be considered at talks between the employer and the staff representative, by which is meant the trade union representative who, on the basis of collective agreement provisions, is elected for various staff groups and occupational safety officers who represent workers exclusively in matters relating to worker protection. In addition, workers who are not members of trade unions are entitled to choose their own representative if they account for the majority of the staff group in question. Furthermore, it is possible, within individual undertakings, to decide whether a delegation should be appointed for one year at a time to consider aspects of cooperation.

The cooperation procedure implies an obligation on the employer to inform the staff concerning important matters and to enter negotiations.

The obligation to provide information includes a duty to present regular reports on the economic situation of the company, including wage statistics etc. In addition, any requisite information must be provided separately each time a cooperation procedure is launched.

The obligation to negotiate is given whenever matters to be considered fall within the scope of the cooperation procedure. In the *Cooperation Act* there is a comprehensive list of examples such as circumstances which affect the position of the staff or substantial changes to tasks, working methods or work layout, transfer from one task to another, large-scale purchase of machines and equipment which would affect the staff, substantial changes to premises at the workplace and new products or service activities including closure of firms or parts thereof or the removal to another location or a substantial expansion or scaling down of the firm. A cooperation procedure may also be launched in the event of notice being served, redundancy or reassignment to part-time working due to economic or production-related causes or in the event of the transfer of the undertaking or its merger together with any decisions relating to training and reassignment associated therewith. The cooperation procedure also covers other company matters – staffing and training policy, rationalisation moves, the distribution of working hours throughout the day and the company's policy with regard to the recruiting and use of outside workers. Also included are in-house information, working regulations, cooperation training, employment-related accommodation and other matters affecting social activities as stipulated in the cooperation procedure.

The cooperation procedure is not limited simply to negotiations, in other words the exerting of influence by employees. In a number of special fields workers have cooperation rights on a number of issues including even scope for unilaterally deciding matters. For example, the working regulations can only be applied if such a move has been agreed in accordance with the cooperation procedure. This might cover general rules of a various nature relating to practical routines and procedures at the workplace. The contents of cooperation training and its scope could also be agreed together with questions relating to social activities. In the latter examples the staff representatives are entitled to make decisions if agreement cannot be reached in the context of the cooperation procedure.

The employers' obligation to negotiate is subject to a time limit in certain circumstances. Such is the case when the measure to be negotiated can clearly lead to a situation where the worker is given notice, made redundant or reassigned to part-time work. The length of the compulsory period for conducting negotiations – which can be shortened only if the negotiations are successfully concluded – can vary to reflect the number of employees who are affected by notice, redundancy or part-time working. The *Cooperation Act* contains a provision on the cooperation procedure with practical information concerning the taking on of outside personnel.

The cooperation negotiations should consider the reasons for the planned measures, their effects and any alternatives so that the staff representatives are given a genuine opportunity to influence the decision. The aim of the negotiating procedure is to achieve a consensus but once the obligation to negotiate has been discharged the employer is entitled to decide the matter as he sees fit.

By an agreement on cooperation the national employers' and employees' organisations can waive the other binding provisions of the act. Such an agreement has the effect in law of a collective agreement.

4.2 Management representation

The *Staff Representation on Company Management Boards Act* came into force in 1990. Finland introduced such management representation for staff relatively late compared with other Nordic countries.

The Act is applicable to Finnish undertakings employing at least 150 people in Finland.

It presupposes that representation on management boards shall be based primarily on agreement reached at company level. In the event of agreement not being reached the act remains fully applicable. However, the parties are not at liberty to waive certain of the act's basic rules.

Staff representation shall be provided whenever at least two categories of personnel, who together represent the majority of the staff, so require.

The act contains detailed provisions concerning the election of staff representatives, their eligibility and their rights, obligations and responsibilities. The provisions include that the staff representatives shall be employed by the firm. There is also a provision that the employer shall determine the bodies to which the representatives are to be appointed but in the first instance they are appointed by the staff acting alone. Representatives shall number at least one and no more than four. When certain issues referred to in the act are being considered staff representatives may not be present. Such issues are the election or removal of the firm's management, the conditions of contract of the management, the conditions of employment for the staff or action to be taken during an industrial conflict.

Experience with this act has mainly been good.

CHAPTER II: SOURCES OF REGULATION

1. General information on the sources of labour law

Alongside *legislation* the two most important sources of labour law in Finland are *collective agreements*, which in practice regulate working conditions on the Finnish labour market in accordance with an agreed method, and *employment contracts*, which are concluded between individual employers and employees. The effect in law of collective agreements is regulated in the *Collective Agreements Act* (1946) and the effect in law of contracts of employment are laid down in the *Contract of Employment Act* (1971).

The hierarchy of sources for labour law in Finland is complex because the conditions applicable to a particular employment relationship can be governed by a number of other various legal sources and in a number of different ways. It therefore seems appropriate to list the order of priorities applied in the event of a conflict of regulations. The main legal institutions listed below will be reviewed in more detail at a later stage.

- Absolute rules of law;
- Provisions within a collective agreement which are universally applicable under the terms of the *Contracts of Employment Act*;
- Provisions within a collective agreement which are to be applied under the terms of the *Collective Agreements Act*;
- The absolute rules from which derogation is possible by collective agreement;
- The conditions of the contract of employment;
- The employment regulations referred to in *Section 6* of the *Cooperation Act*;
- Provisions of the collective agreement from which derogation is possible in contracts of employment;
- Statutory provisions of a non-mandatory nature;
- The provisions of common law (and the above-mentioned established practice, which often has the same status as the conditions of a contract of employment); and
- Instructions issued by an employer.

The above list is not exhaustive. For example, within the first category (absolute rules of law) a distinction would need to be made between rules of a constitutional or basic-law nature, rules which form part of EC law and consequently have precedence over national law and ordinary national absolute rules of law. In general terms it can be said that in Finland labour law regulations are comprehensive and detailed. People's working lives are thus governed by the law to a very large extent.

In any assessment of those instances where conflict of regulations might arise it is worthwhile remembering that the aim of labour law provisions traditionally has been to protect the weaker party, in other words the employee. This aim also underlies the recognition afforded to the *advantage principle*. This implies that whenever it occurs that within the highly complex labour law hierarchy of regulations there are conditions which regulate one and the same issue, the regulation to be applied is the one which is most advantageous to the worker. This advantage principle is now accepted legal practice in Finland.

2. The employment contract - employment relationships

The *Employment Contracts Act* defines an employment contract as an agreement by which one party, the employee, enters a commitment vis-à-vis the other party, the employer, to perform work for wages or some other consideration under the guidance and supervision of the latter. This definition is of importance not only for the application of the *Contracts of Employment Act* but also because in accordance with the basic principle of Finnish labour law it determines a standard scope of application for labour law regulation overall. This is possible because the criteria specified in the *Employment Contracts Act* form the basic premise of the employment relationship. The difference between an employment contract relationship and an employment relationship is that the former takes effect when the employment contract is entered, whereas an employment relationship takes effect at the time at which the employee de facto commences working under the terms of his contract. Whereas the employment contract only includes those conditions agreed between the employer and the employee, there are a number of different types of regulations which are applicable to employment relationships (law, collective agreement etc.).

The concept of the employment relationship is also used as a basis for the definition of employee and employer.

The concept of employee is comprehensively defined in Finnish law. Homeworking and working with machines owned by the employed person can be included within the said definition with direct reference to the law. Furthermore, the requirement that work shall be carried out under the management and supervision of the employer has been interpreted liberally. It has been considered sufficient for the employer to be entitled to supervise work without him actually having to do so.

Under the provisions of the *Employment Contracts Act* employees are required to carry out the agreed work carefully and in accordance with the instructions and orders which the employer is authorised to issue. In addition, the *Employment Contracts Act* contains a series of provisions regarding other obligations that the employee is required to fulfil. The employee is required to observe the safety regulations and may not disclose business or industrial secrets with which he has been entrusted or has otherwise gained knowledge of. He must also not accept any bribes. The worker may not conclude any employment contract with a competing employer nor otherwise engage in any competing activity which might be detrimental to his employer. The law has special provisions regarding the scope for employers to curtail a worker's right to carry out competing activities after the termination of the employment relationship.

The employer's major obligation is to pay wages or some other remuneration for work performed. There are no provisions in the *Employment Contracts Act* or in any other law regarding the amount of wages. The *Employment Contracts Act* contains only general rules on various types of wage, the reasons for setting a wage, the time, place and nature of the payment and further information on the employee's entitlement to a wage for the period during

which he was unable to perform his work for reasons attributable to the employer, because of insurmountable or comparable obstacles or because of the employee's illness. The size of the wage is determined in the employment contract or, as is most frequently the case, in accordance with provisions either in the normally binding or the generally applicable collective agreement (*see below*).

It may be agreed that remuneration is paid either in cash or as payment in kind or as a combination of the two. If not otherwise agreed remuneration is paid in national currency. The basis for calculating the amount of the wage can be freely agreed. In practice the amount of the wage is determined by the time spent on the work (hourly, weekly or monthly wage), by the quantity of work performed or on the basis of results achieved (production bonus) or as a combination of these two wage-setting schemes.

Wages are to be paid at the agreed time. When a working relationship ends wages normally fall due on the last working day. If the payment of uncontested wage claims is delayed the worker is entitled, pursuant to a separate provision, to wages during the waiting period.

3. Employment contracts and the general effects of collective agreements

In view of employers' general minimum obligations the universal applicability of collective agreements takes on a central importance. As a minimum requirement the employer must by law include in his terms of employment the provisions of the national collective agreement which can be considered standard within the branch of industry concerned. Although the provisions have many points in common with the collective agreement which is binding in accordance with the provisions of the *Collective Agreements Act*, (more about which later), the universal applicability aspect should not be seen as part of the *"actual"* collective agreement system. In the *Employment Contracts Act* the collective agreement is merely a means whereby minimum conditions can be set, including for employment relationships where the employer is not a member of an employers' association and the employer and employee could therefore bilaterally agree wages and other terms quite freely in the absence of a universal applicability rule.

The obligation to comply with the provisions of the universally applicable collective agreement affects only the employer. Universally applicable collective agreements entail no obligations for workers but give them merely a right to require that the employer should apply the provisions of the universally applicable collective agreement which are more advantageous for the employees than provisions in other regulatory sources (for example an employment contract or the law) which relate to the same issue. The obligation to maintain industrial peace does not form part of the universally applicable collective agreement; any disputes arising are disputes relating to the employment contract, for which the general courts are the bodies responsible. The general court can seek the opinion of the labour court, for example for the interpretation of a universally applicable collective agreement.

The universal applicability rule in the *Employment Contracts Act* has often been described as a law on a minimum wage. The legal effects of the above are not however restricted to pay scales and the employer may apply all the provisions (standards) contained in the universally applicable collective agreement which are applicable to the *"employment contract"* and also those provisions which are applied to the *"employment relationship besides"*. In the case of the provisions first named above the *Employment Contracts Act* was given an automatic and binding effect for employment relationships: a condition in the employment contract which is less advantageous for the worker than corresponding provisions in the universally applicable collective agreement is rendered invalid and instead of the conditions of the employment contract being applied it is those of the collective agreement which are applied.

If there is no universally applicable collective agreement for the sector in question (and the employer is under no circumstances obliged to comply with a normally binding collective agreement) the scope for reaching an agreement is very wide for both parties to the employment contract. This scope is most tightly controlled by the absolute provisions of labour law and the general rules of contractual law. The *Employment Contracts Act* contains no express provision specifying how the conditions of an employment relationship are to be established in those cases when no agreement at all has been reached on such matters as wages or in circumstances when an agreed (wage-related) condition should be considered invalid. In such cases and whenever wages are under consideration the best principle is to do whatever is considered customary and reasonable in the trade concerned.

4. Regulation by law

In Finland there is a *Holidays Act* which establishes entitlement to an annual holiday, and working hours legislation, protection at work legislation etc., all of which contain a series of statutory obligations for employers and rights for employees.

An employee's entitlement to maternity, paternity or parental leave plus nursing-care leave are based on various statutory provisions in the *Employment Contracts Act*. According to this act a worker is entitled to maternity, paternity or parental leave for the same period as the Sickness Insurance Act entitles that person to receive maternity, paternity or parental allowance. Maternity allowance is paid to a child's mother over a period of 105 days. Entitlement to maternity allowance normally commences 30 working days prior to the expected birth of the child and accordingly ends 75 days after the birth. An employee who is pregnant and who at work is exposed to chemicals, radiation or who risks contracting contagious diseases in such a way that the development of the foetus or the continued pregnancy is endangered is entitled to special maternity allowance (or corresponding leave) in principle from the commencement of the pregnancy. A precondition for special maternity allowance is moreover that the worker could not be relocated to other duties for the period up to the commencement of maternity leave. Special maternity allowance is not paid at all if the risk can be obviated.

The termination of employment relationships is also regulated in detail by legislation which sets out specific provisions concerning redundancy, the serving of notice and

sions concerning redundancy, the serving of notice and rescission.

Redundancy. The rights and obligations which relate to employment relationships can be suspended temporarily under the rules on redundancy. When a worker is made redundant for economic reasons or owing to production-related circumstances an employer who falls within the scope of application of the *Cooperation Act* may apply the procedural rules set out therein.

In accordance with the provisions of the *Employment Contracts Act* an employer may, providing the conditions under which he can serve notice or revoke an employment contract apply, unilaterally make redundant a worker in such a way that the employment and payment of wages are stopped for a certain period or until further notice (entirely) while the employment relationship is otherwise maintained. This also applies if the worker's work is temporarily reduced and the employer cannot reasonably order him to perform other work or undergo training reflecting the employer's needs. In such cases a worker may be made redundant for a period up to a maximum of 90 days. Redundancy can also take the form of a shortening of standard working hours per day or per week, for example a six-hour working day or a four-day working week.

In practice it is usually a question of redundancy when the economic or production-related criteria for serving of notice are satisfied, in other words when the workload has dropped in a significant and permanent way or if the workload has dropped temporarily.

An employer's unilateral right to make workers redundant can be extended by collective agreement.

Notice of termination. An employment contract which is concluded for a certain time ends when that period of time expires, when the agreed task has been completed or if the reason for the limited-period employment contract ceases to exist. Normally it is not possible for a limited-period employment contract to end by the serving of notice of termination; it can be brought to an end before the agreed time only by rescission for the reasons shown below. An employment contract which is open-ended can be terminated by observing the period of notice which has been served or without so doing if so agreed or if specially provided for in the *Employment Contracts Act*. The period of notice can be agreed up to a maximum of six months. There may also be an agreement to the effect that the employers' period of notice should be longer than that of the employee and the *Employment Contracts Act* contains an appropriate provision.

The *Employment Contracts Act* contains provisions covering the reasons for serving notice of termination. These specify the reasons for serving notice of termination which relate to the personality of the employee or that person's behaviour, in other words *personal grounds* and also the reasons for serving notice of termination which relate to a reduction in workload for economic reasons or to production-related causes or other comparable reasons, in other words *collective grounds*. This classification of the grrounds for serving notice, which in practice are seldom so clearly defined, is of decisive importance with regard to the procedure to be applied prior to the serving of notice and, above all, with regard to the determining of the compensation to be awarded in connection with an unfair serving of notice.

Any assessment of the gravity of the employee's negligence or misdemeanour should in each case consider the nature of the work, the employee's position in the company's structure, any specific features of the working environment, the circumstances of the event and any consequences from the point of view of the employer or the employee's colleagues. If the employees misconduct is not particularly serious it is generally assumed that the employer shall give the employee a clear warning with regard to the misdemeanour and that the employee is thus given an opportunity to correct his ways.

The *Employment Contracts Act* contains special provisions regarding the collective serving of notice. The Act contains a general reference to the conditions determining an employer's right to issue notices of termination and examples of situations in which an employer would be considered to have no reason for issuing notices of termination. With this list of examples the aim was to describe situations in which collective grounds would not constitute a sufficiently important reason and partly to prevent personal grounds for serving notice being circumvented or personal grounds in reality being concealed behind economic reasons or causes relating to production.

A substantial and long-term reduction in workload is generally sufficient reason to serve notice. This is not the case if the employee can reasonably be reassigned to new duties consonant with this skills and capabilities. The employer's obligation to offer work extends to any available work at all if the employee, by virtue of his training, general capabilities and experience, can carry out the work after having received training or reasonable practice. The basic premise is that the work being offered to an employee must be as similar as possible in terms of requirements, responsibilities, etc. It is for the employer to establish which type of work the employee can carry out.

The *Employment Contracts Act* also contains a provision obliging the employer to reinstate a worker who has been made redundant during the nine months following the redundancy if the employer in question again seeks to increase the strength of his workforce.

In reality an employee is not protected against redundancy given that the employment relationship ends when the period of notice expires. Contesting the grounds for a notice or bringing a case before the court for a decision does not change the situation. An employment relationship on which notice has illegally been served cannot be reinstated in any circumstances by legal means without the consent of both parties. Compensation is normally awarded in the event of notice being served illegally. The aim with these compensation rules was to ensure that the employer is at least obliged to think carefully if he intends to continue or suspend a working relationship on which notice has been served for no particularly important reason.

An employer who has served notice of termination on an employment contract without objective reason is liable pay compensation to the employee of an amount corresponding to at least 3 and at most 24 months' wages. The compensa-

tion specified in the *Employment Contracts Act* is not the same as damages. Compensation is a sanction with special features. Although the employee need not have suffered material damage when he was served notice on other than objective grounds, the minimum compensation at least has to be paid.

Rescission. In accordance with the *Employment Contracts Act* an employment contract can be rescinded with immediate effect for a certain period or until further notice *"if important reasons so dictate"*. The reason for rescission must always be more serious than that for giving notice although the somewhat inconsistent wording of the *Employment Contracts Act* could suggest otherwise.

Before an employer can rescind an employment contract he must give the employee an opportunity to learn the reasons for the rescission. Conversely, the employee must give the employer an opportunity to be consulted if the employee is intending to rescind the employment contract for the reasons indicated.

5. Collective agreements

Paradoxically, the regulation by law of collective agreements was introduced in 1924, a time when collective agreements were concluded only under exceptional circumstances. The legislation was based largely on a German parliamentary bill which was never enacted in Germany. The bill was the work of Hugo Sinzheimer, a well-known German expert on labour law. The *Collective Agreements Act* in force in Finland since 1946 is in fact still essentially based on Sinzheimer's bill even if a number of aspects have been modernised.

The breakthrough for the modern collective agreement system in Finland occurred in 1945-46, a time when, for their part, the employers were reconsidering their aversion to collective agreements. The situation in Finland at the time was that the war had been lost and the Communist Party had been newly legalised. Within a short time trade unions spread rapidly. The Finnish system of collective agreements was characterised from the start by a large measure of central administration, the system was developed *"top down"* through national-level labour market agreements and regulations issued by the national-level organisation. Moreover, after the war the economy was largely state controlled, as were wages. Labour market policy was also affected by the fact that throughout industry a vicious power struggle was taking place between the Social Democrats and the Communists.

5.1 The structure of the collective agreement system

Since the end of the 1960s Finland has been operating an agreement hierarchy at four different levels. Within this hierarchy the collective agreement is located essentially on the second level.

At national trade union level the agreements concluded are income policy agreements and general agreements. The agreements relating to incomes policy constitute comprehensive economic agreements. However, agreements are also secured on wages, agricultural incomes, taxation policy and on issues which relate to economic policy. In an agreement of this type other interested organisations, including foreign countries (governments) and the Finnish national bank, can also contribute to the work of the employees' and employers' associations. An income policy agreement is most frequently drafted in writing but in legal respects it is primarily more of a gentlemen's agreement.

Comprehensive agreements on income policy are now no longer formalised as an agreement and it is sufficient to produce a national-level labour market agreement, which is of course based to a greater or lesser extent on clearly documented expectations with regard to national economic policy for the duration of the agreement.

A common feature of national-level labour market agreements and incomes policy agreements is that they form frameworks or guidelines for collective agreements concluded by unions. However, they have no direct effect in law with regard to the relationship of the parties to the collective agreement. Besides outline agreements relating to income policy matters which cover wage trends etc. the national-level organisations also conclude outline agreements of a different type, which are known as *general agreements*. These often settle matters which need to be agreed for longer periods of time. In the past such agreements have covered employees' protection against termination of employment, the position of the trade union representative, the taking on of outside staff, rationalisation and cooperation within the undertaking. Such general agreements have in practice been included as parts of collective agreements concluded by trade unions in various industries.

The most important level for concluding labour market agreements is union level. In practice the relevant collective agreements, primarily at this level, form an integral part of the *Collective Agreements Act*. The agreement is comprehensive and detailed. They are very important as a means of regulating the terms under which work is actually carried out at the workplace within the various branches of industry. Such agreements most frequently regulate aspects of wages, negotiating procedures, the position of trade union representatives, the payment of trade union membership fees etc. Collective agreement practice in Finland is characterised by the fact that a series of legal rules are also incorporated in collective agreements. The effect of this is that they can be monitored and legal proceedings instituted in the manner prescribed for conditions governing collective agreements.

At local level it is quite possible to conclude valid collective agreements. In practice such agreements are concluded mainly at a number of large undertakings, several of which (*Finnair, Yle* etc.) are not members of employers' organisations. For the remainder local agreements are concluded primarily on the basis of delegation provisions included in union agreements. Both the degree of interest in, and the need for, local solutions appear to have risen over recent years.

The fourth level for the regulation of the conditions governing employment relationships is the personal level. Since a collective agreement merely defines a minimum it is always possible to agree more advantageous terms within the context of a personal one-to-one employment contract.

5.2 The collective agreement under Finnish law

Collective agreements must be concluded in writing. A collective agreement may be concluded between employers or employers' associations as one party and trade unions as the other.

A collective agreement is a standard contract with conditions to be applied in the *"employment contract or otherwise in an employment relationship"*. This implies by definition that the collective agreement must regulate individual employment relationships if it is to have the legal effects provided by law.

The *Collective Agreements Act* gives the parties exceptional authority to establish rights and obligations in respect of persons who are not themselves parties to the contract. This authority, known as the *power of regulation*, is therefore interpreted relatively strictly.

This power of regulation comprises primarily a scope for regulating individual conditions in employment relationships (individual standards). In practice the power of regulation can to some extent be extended to apply to other matters. In classic German style this extension of power has come to be applied to solidarity standards (standards relating to social arrangements of the workplace or trade union representatives, etc.) but also a number of other matters which can, *de facto*, restrict the employers' rights to manage and distribute the work. There is actually a certain discrepancy between the theory and practice of collective agreement legislation in Finland in that, for example, the doctrine of the solidarity norm survives in a form which does not appear to be of particular relevance to collective agreements as practised.

The collective agreement also includes rules which are conditions designed to produce effect in law exclusively for the parties to the agreement. Conditions of this type are conventionally known as *compulsory conditions* in contrast to the *statutory provisions* which can be included in the agreement on the basis of the power of regulation.

The *Collective Agreements Act* requires the individual standards in the collective agreement are automatically binding on the employment relationship. This implies that any provision in the employment contract which is inconsistent with a provision in the collective agreement to the disadvantage of the employee is *invalid*. Instead it is the provision of the Collective Agreement which is to be applied.

Two different approaches were adopted in an attempt to ensure that the normative provisions of collective agreements were complied with at workplaces. In the first approach an employer who is bound by a collective agreement and who knowingly infringes a normative provision in that agreement or had every reason to see that he was infringing such a provision is liable to a fine not exceeding FIM 130,000. An employee who is bound by a collective agreement can under the same circumstances be liable to a fine not exceeding FIM 1,300 if individual standards are not respected. The latter fine is in practice of little importance since most of the conditions of the collective agreement entail obligations to be met by employers. In the other case it is the associations which are bound under the terms of the collective agreement to monitor their members' compliance with the provisions of the collective agreement. If this obligation to monitor is neglected an association renders itself liable to a fine not exceeding FIM 130,000.

The *Collective Agreements Act* contains an index of those persons who are bound by collective agreements. These persons are sometimes themselves parties to the contract, in other words employers or associations who have concluded the agreement, as well as those who with the consent of the parties to the agreement have in writing become parties to the said agreement. The other group comprises those persons who are merely bound by the agreement (without being parties to it). These persons are registered subsidiary associations affiliated to the associations which are parties to the agreement plus employers and employees who, under the terms of the agreement, are or have been members of an organisation which is bound by the agreement.

The foregoing implies that to leave an organisation during the period of validity of an agreement does not have the effect of freeing an employer or employee from the obligations imposed by the agreement for as long as it remains in force. By way of contrast, an organisation bound solely by a collective agreement can be released from its obligation under the agreement if it is no longer a member of the organisation which is party to the agreement.

An employer who is bound by a collective agreement is obliged to comply with the conditions of the collective agreement in respect of those workers who are themselves not bound by the collective agreement. The obligation laid down in the *Collective Agreements Act* is thus optional. On the basis of a provision in the *Employment Contracts Act* the employer is obliged - irrespective of any obligation under the terms of the collective agreement based on the *Collective Agreements Act* - to ensure that as regards the employment contract or employment relationship and as a minimum condition the wages and other terms determined for the type of work in question are observed in a collective agreement of a type generally used for the sector of industry concerned.

The legal effects of the collective agreement cover the period of time for which the agreement was concluded. In addition it has been accepted that the terms of a collective agreement continue to apply for some time afterwards in line with theory and practice. This implies that the conditions of the collective agreement are to be applied even when no agreement exists, as in the case of individual conditions in an employment relationship provided it has not been agreed otherwise.

6. Court jurisprudence

Court jurisprudence is an important source of law even though legislation and agreements are the most important control mechanisms for labour law in Finland. In general terms the Finnish system is based on the principle that individual legal disputes are decided by the general courts whereas disputes which relate to the interpretation of the provisions of collective agreements or are the result of breaches of collective agreements are decided by the *Labour Court*. This implies that the *Supreme Court* is the last Court of Appeal in disputes relating to the application of the *Employment Contracts Act* while the *Supreme Administrative Court* decides disputes involving public-sector salaried

employees in matters relating to the application of the universal collective agreements it is the *Supreme Court* which is the appropriate forum but the latter can request the opinion of the *Labour Court* whenever it is a question of the correct meaning of the collective agreement itself.

7. International sources

The regulation of labour law in Finland has always been profoundly influenced by international models. In the 1920s the *International Labour Organisation* (ILO) was the only forum in which the Finnish employers and employees associations cooperated were *de facto* involved. Many ILO conventions have also influenced the drafting of legislation in Finland in a major way. Nordic cooperation has also been important, albeit in a largely informal way .

The influence of international sources is most evident in legislation. In keeping with the dual approach adopted in Nordic countries with regard to the incorporation of international agreements into national law, courts have generally adopted a negative stance with regard to the direct application of international conventions in national disputes unless they were specifically incorporated into national law.

CHAPTER III: INDUSTRIAL ACTION AND METHODS OF CONFLICT RESOLUTION

1. Embargo on strikes and lockouts

Throughout the post-war period the labour market in Finland has suffered from a high strike rate. The 1970s were the decade which saw most industrial action, mainly in the industrial sector (metals, paper etc). These were mainly short strikes for higher wages during the term of the agreement. In the 1980s, and especially during the recession of the 1990s with its high rates of unemployment, this type of strike action virtually disappeared. To the extent that strikes do occur they are nowadays mainly well planned action by trade unions or demonstrations of short duration.

A collective agreement performs two traditional tasks: it guarantees certain minimum conditions with regard to the employment relationship during the term of the agreement and it attempts to guarantee that no strikes or lockouts will occur during the term of the agreement.

The embargo on strikes and lockouts is regulated in the *Collective Agreements Act* on the basis of premises which are ideologically on an equal footing. Strikes and lockouts are formally regulated in a non-partisan way by the fact that the law considers action by employees to be no different from action by employers.

The basic premise for the embargo on strikes and lockouts as regulated by law is that the embargo is relative. The only type of action which is prohibited is action which either targets a specific provision of the collective agreement or targets the collective agreement in its entirety. In practice the embargo has been applied comprehensively and from the point of view of Finnish law there is a case for claiming that the embargo has been respected absolutely during the current agreement period.

There are two main exceptions to the principal rule according to which the embargo is absolute. During the period covered by the current agreement so-called *political* demonstrations are permitted. Such action can also be taken by national-level trade unions to protest against planned legislation. So-called *solidarity action* is also permitted under certain circumstances.

The embargo on strikes and lockouts ends when the collective agreement expires.

The embargo is normally split into an active and a passive obligation. The passive obligation implies an duty to avoid prohibited industrial action and it applies to employers and associations which are parties to, or bound by, the agreement. The obligation does not, however, apply to individual employees, who can never be prosecuted for breaching the embargo. The active obligation comprises an duty to ensure that members, in other words organisations and individuals, do not initiate prohibited industrial action.

In the event of the embargo being breached a fine not exceeding FIM 130,000 may be imposed. This is imposed instead of damages in respect of liability and various other circumstances mentioned in the act and applicable to the case in question.

2. The *Labour court*

Industrial peace under Finnish law is based on a fundamental distinction between conflicts of interest and conflicts of rights. Conflicts of interest are resolved in free negotiation where the parties may even resort to industrial action to secure their goals. Conflicts of rights, however, relate to the application of the current collective agreement.

For the resolution of disputes affecting the validity of the collective agreement, its continuation, its content ot its scope a special court has been set up, the *Labour Court*. This court decides the extent to which an incident constitutes an infringement of the *Collective Agreements Act* or a breach of the provisions of the agreement. Breaches of the embargo on strikes and lockouts are also dealt with by the *Labour Court*, which can then also impose sanctions.

The composition of the labour court is tripartite, composed of representatives of employers, employees and impartial members. The *Labour Court* is headed by presidents appointed for three years at a time. As a rule the court works on a departmental basis with six judges but it can also be convened for a plenary session.

The plaintiffs and defendants before the *Labour Court* are generally organisations which are parties to the agreement. The court handles some 150-200 cases per year. The court's judgments are final and there is no leave to appeal against a judgment which the labour court has handed down.

3. Mediation in industrial disputes

The system for collective bargaining is based on free negotiation and voluntarily concluded agreements.

The national authorities do try to prevent conflicts of interest and negotiations leading too hastily to strikes or lockouts during periods not covered by agreements. This is achieved by having legislation on mediation in labour disputes which prescribes that stoppages or strikes and lockouts cannot be arranged in the event of industrial disputes unless at least

two weeks beforehand the conciliator has been notified in writing of the impending stoppage. The aim is to offer the conciliator an opportunity to enter talks with the parties so that their differences can be reconciled. Under exceptional circumstances when the public interest so dictates, the *Ministry of Labour* can also postpone the date on which the stoppage was to commence.

The law governing mediation in industrial disputes lays down that it is compulsory for the parties to cooperate in the negotiations headed by the conciliator. The law also prescribes compulsory mediation. By way of contrast, compulsory conciliation is not possible under Finnish law. Neither party is required to accept any conciliation which is proposed.

The conciliation service is run by a national conciliator and six district conciliators. In practice the national conciliator frequently plays an important role when the contracting parties' negotiations on a new collective agreement break down and a mediation proposal by the conciliator can unblock the situation.

CHAPTER IV: FINNISH LABOUR LAW SYSTEM IN AN INTERNATIONAL CONTEXT

1. The background

Labour law in Finland has its roots in the continental mainland (Germany, Austria and elsewhere) and in the other Nordic countries (Sweden, and to an extent, Denmark).

German influence on the Finnish legal system during the first decades of this century can be explained among other things by the fact that Finland's legal experts had undergone training in Germany. Since the Second World War, however, Scandinavian influence has become more pronounced.

2. International private law

Over the last twenty or thirty years Finnish labour law has been largely Finnish in character. The international dimension has been of most importance for the legislator, who for purpose of comparison has kept abreast of new legislation in other countries. However, international private law does constitute an exception.

During the 1970s and 1980s Finnish firms began increasingly to devote themselves to what was termed the export of designs. This prompted a discussion of the problem of which country's rules were applicable to such designs and, more generally, of the extent to which Finnish regulations were applicable beyond the country's borders.

A special chapter was added to the *Employment Contracts Act* in 1988 in Finland and headed *"Employment contracts of an international nature"*. In the act it was laid down that in any individual employment contract which had links to a number of different countries the applicable law would be the law of the country where the employer had his place of abode provided that his business was located there. In other cases the law to be applied was the law of the country where most of the work was carried out or if it was not possible to ascertain that the work was mainly carried out in a specific country, the law of the country where the employer's place of business was located. If, on the other hand, the employment contract clearly has closer links to a country other than the country whose law would be applicable in view of the foregoing, the law of this other country shall be applicable provided that all the circumstances relevant to the particular case have been taken into account. The *Employment Contracts Act* further stipulates expressly that it may be agreed to apply the law in the country where the work is primarily carried out, where the employer has his place of abode or where the employer's business is located. Agreements concerning which law is applicable must be completed in writing.

The *Employment Contracts Act* contains a requirement to the effect that whenever a law is to be applied to an employment contract which is not the law of the country where the work is carried out the binding standards to be complied with in connection with the employment relationships are those which apply where the work is carried out. This implies that when a Finnish court applies Finnish law to work which is carried out in a third country it is only the binding regulations in that country which have to be observed (work shall not be carried out during religious feasts, regulations governing the working environment, opening and closing times, etc). Otherwise under Finnish law the applicable regulations are those which in view of their relevance to public law or to some other associated important public principle should be applied irrespective of the provisions contained in the contract.

Among legal experts there are so many different views on whether the universal applicability rule in the Employment Contracts Act is to be applied irrespective of what the parties to the contract agreed. In other words it was unclear whether a foreign employer who posts employees to Finland to carry out work on Finnish territory can choose not to apply the conditions contained in the universally applicable collective agreements. In the spring of 1996 the law was clarified on this point. An addendum was included to the universal applicability rule in the Finnish *Employment Contracts Act* in accordance with which foreign employees carrying out work in Finland were also entitled to the advantages available under the universal agreement. There are, however, a couple of minor exceptions to the rule. Whenever the work relates to anything other than planning, supervision and training in connection with the purchase of machinery, plant or an expert system including installation, repair or service thereof, and including the transit of persons and goods through Finland or transport to Finland and when this work is temporary and cannot be carried out by Finnish workers, the rule shall not be applicable. In these circumstances the parties can therefore agree to apply the other country's law with regard to the employment relationship with the foreign workers.

3. Finnish labour law and EEC law

By and large labour law in Finland can be said to be based on the *Nordic model* for regulating employment. In many respects Finland is, however, closer to continental Europe than Sweden or Denmark, for example. Finland has well developed legislation and also a system of universal applicability for collective agreements which had been modelled on continental practice.

It therefore proved relatively easy to implement the labour law directives and transpose them into Finnish law. The directives have necessitated a series of minor adjustments but these did not involve radical upheavals or innovations. On certain matters questions have been raised whether Finland is complying with all the requirements of EC law but these discussions have related only to minor, frequently technical, points. The particular features of Finnish labour law are such that in the light of the most widely publicised decisions of the *European Court of Justice* it would appear to be in no way impossible to implement EC directives using the instrument of the collective agreement in Finland. In the context of Finnish traditions it appears natural for a national-level implementation of the directive to be introduced nationally at trade or trade-association level. However, it is difficult to imagine that a trade association agreement could achieve so wide a coverage as to satisfy the EC's requirements, the universal applicability provision notwithstanding. The question is how the government can guarantee that all trade associations, both in the private and public sectors can in practical terms conclude agreements which meet the EC requirements.

In Finland there are no legal impediments to the conclusion of collective agreements as defined in the *Collective Agreements Act* (within the public sector known as the Civil Service Collective Agreement) at national trade union level. The question which arises is what the advantages are compared with a legislation-based solution when the contract is concluded at national level. The scope for taking account of trade-specific special requirements is not particularly broad at national level. In each case a solution is conceivable when the national-level federation guarantees the implementation of an EC directive but initially assigns responsibility for its implementation to individual trade unions. In this way it might be possible for the national federation to conclude an agreement for those areas where trade-specific agreements were not concluded. A similar approach could presumably lead to satisfactory implementation in conjunction with the universal applicability rule.

Another problem arises where there is no agreement owing to the expiry of the collective agreement's validity. Upon expiry its binding and automatic effects in law cease even though in Finland, as in many other countries, it is considered that the conditions of an agreement should continue to apply (the residual effect) in the absence of any agreement to any other effect. The obligation at national level to comply with the provisions of an EC directive in no way ends when a collective agreement ceases to apply. A residual effect arrangement open to various optional interpretations is hardly an adequate base on which to guarantee that the minimum requirements of a directive are implemented.

It would therefore seem that as far as Finland is concerned the implementation of EU regulations can best be secured by a well balanced mix between legislation and agreements tailored to each special case. The most important thing from the Finnish point of view is that regulations are issued in a form which can ensure comprehensive compliance with the requirements while at the same time adequate scope is given for national variants in connection with the way in which the directives are to be implemented.

Finland takes the view that involvement in the social dialogue and legislative processes in accordance with the *Maastricht Treaty's Social Chapter* is something quite natural. Finnish labour market relations are characterised by a working social dialogue and a stable tripartite cooperation model although some opposing positions are of course also maintained.

In conclusion it can be said that the national level labour market organisations issued a joint resolution in June 1994 prior to the referendum on Finland's accession to the EU, the resolution in question relating to European integration and national cooperation component.

Management and labour stated, *inter alia*, that at the place of work the tripartite cooperation model developed by ILO was followed. Furthermore, the right of association was recognised as a fundamental right and it was stated that Finnish labour market policy was based on a system of negotiation and agreement which was consensus-oriented. The partners proclaimed also that the development of working lives should be based on procedures which respect, in a balanced way, the needs of the individual, the collective workforce and production. Staff involvement at the workplace and in development work was to be encouraged. The partners declared their willingness to work together on the implementation of EU regulations relating to working conditions and saw it as an important matter to ensure that associated agreements could be applied.

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SWEDEN

Birgitta Nyström

Background

Developments in Swedish labour law have long been influenced to a large extent by the labour-market organisations and characterised by the existence of collective agreements regulating labour-market conditions. The Swedish trade-union movement, and more particularly that part of it representing blue-collar workers, has developed in close collaboration with the Social Democratic Party, which has governed the country for a large part of this century. The organisation of the labour market and the principle of collective agreements was established as early as at the turn of the century, and for a long time the government merely kept an eye on developments without actively intervening. Up until the 1970s, only a small amount of employment legislation had been passed, the most important examples of which include: early legislation in the field of employment protection; a State-run conciliation procedure for mediation in labour disputes was introduced in 1906; regulations concerning collective agreements were introduced in 1928 – the same year as the labour court was created; and freedom of association and the right to negotiate were established in 1936.

In the 1930s, however, it looked as though the government would intervene more and more on the labour market by, among other things, placing restrictions on the right to strike. At the prospect of this, the two umbrella organisation in the private sector, namely the Swedish *Trade Union Confederation* (LO) and the *Swedish Employers' Confederation* (SAF), concluded what is known as the Saltsjöbaden Agreement, or Basic Agreement (*Saltsjöbadenavtalet*) in 1938 which, among other things, provided for self-imposed restrictions with regard to labour disputes. The *Saltsjöbaden Agreement* heralded a long period of cooperation and accord on various matters between management and labour. The phrase *"the Swedish model"* was coined to refer to successful cooperation between the social partners for sharing the benefits of the country's increasing wealth.

In the ensuing period, the labour-market organisations and arrangements concerning negotiations and collective agreements became increasingly centralised. However, the Saltsjöbaden era, which was characterised by harmonious relations and mutual trust, came to a close towards the end of the 1960s. The Swedish labour market then experienced far-reaching technical and economic changes. Tension between management and labour increased. Employees took the view that there was still a need for reforms in the field of employment, and for employees to exert more influence.

The following period saw much legislation introduced. The earlier scenario in which the regulation of labour-market conditions was to an overwhelming extent carried out through collective agreements, with only a minor legislative element concerning specific questions, was replaced by a situation in which, apart from a few exceptions, legislation now generally covered the entire field of labour law. Various laws set out provisions on security of employment and wages, the powers of employee representatives, representation of employees on management boards, equality of the sexes, racial discrimination, new legislation concerning the workplace, working hours and holidays, laws relating to legal procedures in labour disputes, and laws on parental leave, educational leave and the right of immigrants to take leave in order attend courses in Swedish. As far as social insurance and employment policy are concerned, a large number of regulations were enacted, and this area is still in a constant state of flux.

Almost all the new laws contain elements of relevance to employees, but the most important provisions in this field are set out in the 1976 Codetermination Act (*medbestämmandelag* – MBL). The Act also includes the most important provisions contained in earlier legislation on freedom of association, the right to negotiate and collective agreements. The name of the Act gives expression to a specific aim, but can hardly be said to contain any substantial provisions concerning codetermination; instead, it merely refers to observing and influencing developments.

Employment legislation is not collected together in any specific code or the like, other than as disseminated in the Swedish statute-book (*författningssamling*). There have nevertheless been discussions about whether these laws should be codified and collected together in a Labour Code (*arbetsrättsbalk*).

The almost rocketing increase in legislation in the field of labour law has not involved any sudden and total change in regulatory activity. Most of the laws have followed the approach taken by the social partners; legislation is often set out in very broad terms and requires management and labour to make appropriate adjustments or additions by means of collective agreements; many laws may also be deviated from in collective agreements.

An exception to the general rule that employment legislation is drawn up in consultation with the social partners, or at least with their approval, is legislation relating to the equal treatment of men and women. The situation is more or less the same throughout the Nordic countries. When Swedish employment legislation took off, the social partners opposed legislation in the field of sex equality and pointed out that such matters could best be solved by means of collective agreements. When no collective agreements were concluded regarding this question, a right-wing government passed a law on sex equality in 1979 (the currently applicable law dates from 1991). Generally speaking, however, the legislation has been ineffective, one reason probably being that the social partners do not give the matter priority.

In the 1980s and 1990s, new changes became discernible on the Swedish labour market. The centralised system of negotiation, which helped to create order and stability but at the same time hindered flexibility and problem-specific solutions, has gradually been replaced. The general economic crisis has had an effect on the whole labour market; wage negotiations have been made more difficult, a large number of social benefits have been cut back, job security diminished and unemployment increased. Sweden has for a long time had low unemployment by international standards. The official rate of unemployment was kept low by means of wide-ranging employment-policy measures. As of 1992, however, unemployment rose to a level unseen since the depression of the 1930s, namely 10%, a rate comparable with other EU countries.

A situation now exists in which there is a great deal of antagonism both between and within employers' and employees' organisations and various political institutions regarding negotiation arrangements and the system of collective agreements, as well as the question of the future shape of employment policy and how to solve the problems of unemployment and the overburdening of the system of social insurance. In the discussions on these matters, it was proposed, for example, that a general reduction in working hours be introduced with the primary aim not of improving working conditions but rather of creating more employment opportunities and expand the private services sector while providing various kinds of subsidies for these new workers in order to increase the level of employment. It was argued that employment-protection regulations made for a rigid labour market and prevented the emergence of a flexible jobs market accessible to young people beginning their working lives. The causes of these problems and how they can best be solved are matters of considerable controversy.

A tripartite Labour Law Commission (*Arbetsrättskommission*) was set up by the government in 1995. The Commission's work is aimed at seeking solutions to problems in the field of labour law by finding ways to enable the social partners to themselves shape the regulations governing the employment market - through collective agreements as far as possible - in such a way that these work properly and effectively. In the directive concerning the above-mentioned Commission, it is stated that labour-market conditions will normally be regulated through collective agreements.

Developments at international level also have an effect on the Swedish set-up. Sweden joined the EU in 1995. The Nordic countries have cooperated in the field of employment for a long time. The lines along which they are organised in this field are so similar that the *"Nordic model"* for industrial relations is sometimes referred to. There are, however, also some significant differences. For example, the Danish legislature has never intervened on the labour market in the same way as in Sweden (or Norway and Finland). Denmark and Norway have a much stronger tradition of government intervention in wage negotiations and labour disputes. The important position enjoyed by these labour-market organisations and their high level of trade-union organisation is common to all the countries, but whereas trade-union membership is 75-85% in the other countries, the figure is less than 60% in Norway.

CHAPTER I: THE ACTORS

Traditionally, employers' and employees' organisations have been the main actors on the Swedish labour market. The State's role as law-maker has gradually increased in importance, as has its role as economic policy-maker and public-sector employer.

Various forms of negotiation with opposite sides, such as the system enabling workers to influence developments, are an important element in the regulation of working conditions.

1. Freedom of association

Freedom of association, i.e. the right to belong to an organisation, is enshrined in the Swedish *Constitution*. The right to belong to an employers' or employees' organisation is also set out in employment legislation (the *Codetermination Act*), in which it is stipulated as meaning the right to belong to an organisation, to benefit from membership thereof and to work for an organisation or help in its creation.

Freedom of association is reciprocal, i.e. both employers and employees enjoy the same protection, although for practical reasons this protection is of most significance for employees. This only applies in relation to the other side in industrial relations; employers therefore do not enjoy any protection in relation to other employers, and the same applies to employees in relation to each other. An employer is not allowed to take any measures which are to the detriment of an employee because the latter has exercised his right of association, or which are aimed at preventing the employee from exercising such right. Any employer infringing this right is liable to pay damages to the employee and the organisation representing him. Furthermore, any measure, such as notice of dismissal, taken in violation of an employee's rights is invalid.

On the employee side, freedom of association applies only to people actually in employment, which means that a job-seeker cannot use the right of association as an argument against an employer who does not wish to take him on because he is a member of a trade union. So-called *"exclusive clauses"* (or *"organisation clauses"*) and closed shop agreements are legal in Sweden, since freedom of association does not provide any protection to those seeking a job. Freedom of association does, however, offer protection to those already in employment who belong to a trade union, and the dismissal of an employee on the grounds that they refuse to join a specific trade union would also be a violation of the employment-protection laws. Closed shop agreements are not, however, allowed among private-sector employers who are members of the *Swedish Employers' Confederation* (SAF), and are not met with at all in the public sector. Examples of such agreements are to be found in the private sector outside the sphere of responsibility of the SAF, but these are of little practical relevance given the high level of trade-union membership.

In recent times, Swedish employers have not tried to thwart employees wishing to join trade unions. On the contrary, most employers regard it as useful to have a competent opposite number on a continuing basis, and are normally happy to see their employees becoming members of any of the large established trade unions. Nevertheless, employers have an interest in those responsible for or representing the management (e.g. in negotiations) being free of ties with the trade unions with which they are negotiating. This is one of the reasons why managers of blue-collar workers have their own trade union. As regards white-collar workers, collective agreements provide that employers are entitled to demand that management employees do not join specific trade-union organisations. All employees are, however, entitled to belong to a trade union.

It is only the right to belong to an organisation, known as the *"positive"* right of association, which is protected under Swedish law; the right not to join an organisation, known as the *"negative"* right of association, does not enjoy any protection. This state of affairs has been the source of many

discussions of underlying principles, and it now looks as if, following the incorporation into Swedish law of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* with effect as of 1995, Sweden may be required to offer greater protection for the negative right of association.

These observations apply to the *"external"* right of association, i.e. in relation to organisations' opposite numbers on the labour market. As regards relations between the same types of organisation or their members, i.e. the *"internal"* right of association, no specific statutory provisions exist. The *"internal"* side is regulated by means of the rules governing the organisations concerned and by a number of general legal principles established by the courts. One such principle is that of equal treatment for all members of an organisation. Members are entitled to demand that the organisation safeguard their rights in return for their having paid their membership dues. The organisations represent the members without a specific power of attorney in negotiations and agreements with the employers (e.g. when a collective agreement has been concluded). However, a trade union is not authorised to control how an individual member exercises his rights in dealings with his employer, e.g. regarding entitlement to salary.

2. Employers' and employees' organisations

According to the definition in the *Codetermination Act*, an employees' organisation is an association of employees which, according to the rules governing it, serves to safeguard the interests of employees in dealings with employers. Employers' associations are corresponding organisations on the employers' side. *"Central employees' organisation"* means an association or similar body, and *"local"* employees' organisation refers to a club or local branch which is party to negotiations at local level. Swedish law does not contain any provisions relating to such matters as representativeness and official recognition of such organisations. However, employment legislation is designed in such a way that trade unions which have collective agreements with employers have many advantages. Smaller unions without any collective agreement therefore have difficulty in making themselves heard.

Both sides of industry play a crucial role in the Swedish labour-market set-up. By international standards, membership of both employers' and employees' organisations is particularly high. Generally speaking, all major employers are members of an employers' association. However, over 90% of Swedish employers have fewer than 20 employees, and relatively few very small businesses are members of an employers' association. On the employee side, trade-union membership is around 85%. This figure can be as high as 100% in certain sectors. In the 1980s, when demand for labour was high, union membership showed a downward tendency, but this has now changed. One of the reasons which contributed to the high level of trade-union membership is almost certainly the fact that unemployment insurance contributions and benefits are administered through unemployment funds, which are linked to the trade unions. (Membership of a union automatically means that one is also a member of the unemployment fund run by it. It is also possible to pay into an unemployment fund without being a member of a union, but the general set-up tends to encourage union membership). To a large extent, trade-union structures and traditional aims are geared to the needs of male industrial workers (i.e. breadwinners supporting a family), and problems are now being experienced in adapting to new groups on the labour market, such as young people, women, immigrants, employees in the services sector and white-collar workers. Nevertheless, it is still the normal thing for those entering the labour market to join the appropriate trade union. There is never any obligation to join, but it is certainly not unusual for colleagues to pressurise non-unionised workers into joining a trade union. In some sectors, such as computing and high technology, a smaller proportion of employees are unionised. Otherwise, union membership levels are broadly similar in the private and public sectors and among various groups of employees. Even managers and bosses are thus usually members of relevant associations.

There is no longer any clear dividing line to distinguish between blue- and white-collar workers. Seen in a historical context, however, salaried employees have occupied a position closer to the employer. This distinction was done away with a long time ago in the public sector. Nowadays, the main difference is that blue-collar and white-collar workers are in different trade unions. The main reason for this is the so-called *"industrial federation principle"* (*industriförbundsprincip*), according to which all employees within a particular company belong to the same blue-collar or white-collar union. There are, however, some trade unions which do not follow this principle and are instead organised by profession (e.g. a number of university lecturers' associations). The fact that blue- and white-collar workers belong to different trade unions generally means that they are subject to different collective agreements. In the public sector, however, the more general provisions of the collective agreements apply to all employees. In the private sector, moves in this direction have begun in the last few years. Generally speaking, the tendency has always been towards smoothing out differences in the conditions of employment of the two groups under their respective collective agreements. Employment legislation has, to an extent, also been used as a means of eliminating contractual differences in terms and conditions of employment.

On the employees' side, there are three major umbrella organisations, namely the Swedish Trade Union Confederation (*Landsorganisationen i Sverige* – LO) representing blue-collar workers, the Confederation of Professional Employees (*Tjänstemännens Centralorganisation* – TCO) representing white-collar workers, and the Swedish Confederation of Professional Associations (*Sveriges Akademikers Centralorganisation* – SACO) for white-collar workers with a university education. These umbrella organisations are made up of associations from both the public and private sectors.

In all, the LO has a little over 2.2 million members (out of a total workforce of 4.4 million in Sweden). The largest member organisation is the Swedish Association of Local Authority Workers (*Svenska Kommunalarbetarförbund*), which organises local-authority and county-council employees, and the next largest is the Swedish Association of Metal Industry Workers (*Svenska Metallindustriarbetareförbund*),

which represents workers in the engineering industry. The LO has occupied a very strong position as the main employees' organisation, but its position is gradually becoming weaker.

The TCO has a total of just over 1.3 million members; its largest member organisations are the Swedish Association of Industrial Employees (*Sveriges Industritjänstemannaförbund*) and the Swedish Association of Local Authority Employees (*Sveriges Kommunaltjänstemannaförbund*).

The SACO, which, with just under 400,000 members, is much smaller than the other two umbrella organisations, derives most of its membership from the public sector.

It is the various associations or individual negotiating bodies made up of different associations which conclude agreements with the employers.

Both the LO and the TCO were already members of ETUC prior to Sweden's joining the EU.

By international standards, the contrasts between the trade unions in Sweden are small. For example, they are not split into various unions based on political or religious affiliation. However, some tension does exist between unions in the public and private sectors. Up to now, there has been relatively little rivalry between various unions organising the same groups of workers.

The main umbrella organisation for employers in the private sector is the Swedish Employers' Confederation (*Svenska arbetsgivareförening* - SAF), to which associations in various sectors accounting for something over 40,000 businesses are affiliated as members. The SAF's previously strong position has gradually become weaker. It is the member associations which conclude collective agreements. The SAF has for a long time been a member of the *Union of Industrial and Employers' Confederations of Europe* (UNICE).

Employers in the public sector too are organised centrally. Local authorities and county councils, which have a long tradition of independence, are organised centrally in the Swedish Association of Local Authorities and the Federation of Swedish County Councils (*Svenska kommunförbund och Landstingsförbund*). The State as employer is represented by the National Employers' Administration (*Arbetsgivarverk*). Employers' organisations in the public sector are affiliated to the *Centre of Enterprises with Public Participation* (ECPE).

The primary purpose of Swedish employers' organisations is to conduct negotiations and conclude collective agreements, but they also function as policy-shaping interest groups for employers. This latter role is of particular importance for the SAF.

In the last few years, considerable changes have taken place in the organisational structure of employers' and employees' associations, and this process still seems to be far from complete. General economic and social developments, the call for decentralisation, greater flexibility, new areas and types of activity, internationalisation, etc. have made it necessary for organisations on both sides of industry to reorganise themselves accordingly and redefine their strategies.

a. Trade-union representatives

New employment legislation introduced in the 1970s led to the trade unions being faced with many new tasks, and this applied all the more to unions which were party to collective agreements with employers. These unions had largely assumed the role of representing all employees, regardless of whether they belonged to a union. This responsibility for the interests of employees in general does not, however, stretch to a duty of fair representation, as on the labour market in the USA.

One of the many pieces of legislation passed in the 1970s was the 1974 Trade-Union Representatives Act (*Lag om fackliga förtroendemans ställning på arbetsplatsen*).Trade-union representatives in Sweden can be seen as occupying the middle ground between a shop steward and a union delegate. They are appointed by a union which is party to a collective agreement with the employers in order to represent union members in the workplace in connection with questions concerning their employment. If no collective agreement is in place at a given location, there is no entitlement to appoint a trade-union representative.

Trade-union representatives are entitled to the time off necessary for their tasks, and if they carry out their trade-union work at their own workplace, they are entitled to retain their rights as an employee. The right to take time off is wide-ranging. The only restriction is that the amount of time taken off should be reasonable and not interfere with the normal course of work. Therefore, the right to time off is not necessarily dependent on the time being used for trade-union activities in the workplace; it can also be taken to enable trade-union representatives to undergo training, for example. Given that representatives retain their right to a salary and other benefits, they can, for example, take part in negotiations concerning their own place of work, and can also carry out preparatory work for such negotiations and discuss information concerning their own place of work with employees affected by such negotiations and the like. The Act also contains a number of provisions aimed at protecting trade-union representatives from harassment as a result of their activities, and at guaranteeing that when representatives return to their normal work, they are not disadvantaged because they have been active in the trade union.

There are some trade unions which, without the employer being involved in any way, elect their representatives and also decide how responsibility for trade-union activities is to be allocated between them. In businesses with a large workforce, it is usual to have full-time trade-union representatives, although many prefer to limit their activities to a few hours of their working time. The trade unions estimate that between a fifth and a sixth of their members carry out tasks covered by the *Trade-Union Representatives Act*.

Like the employers' organisations, the trade unions also have full-time staff working at national (and regional) level including ombudsmen to attend to general trade-union matters of common interest.

The 1977 Work Environment Act (*Arbetsmiljölag*) contains provisions on safety representatives, who are chosen from the employees in workplaces with at least five workers, and on safety committees, which must be established in busi-

nesses with at least 50 employees. Safety committees are made up of employer and employee representatives and have general tasks concerning changes in the work environment. The safety representative speaks for the employees with regard to questions concerning the work environment and is appointed by the local trade union or, if there is no trade-union representation, is elected by the employees themselves. In most cases, the definition of a trade-union representative in the *Trade-Union Representatives Act* also encompasses the safety representative (and the employee representatives on the safety committee), although these are also covered by some provisions of the *Work Environment Act* relating to time off work, protection while engaging in trade-union activities, and employment protection.

3. The role of the state

As can be seen from the above, the Swedish government has traditionally not played a central role in regulating the Swedish labour market. Despite the legislation introduced in the 1970s, this still left fairly wide scope for the two sides of industry. By international standards, State intervention in negotiations on collective agreements has been negligible. Broadly speaking, the only intervention has been in the form of a number of income-policy measures or talks/discussions between the government and the umbrella organisations. There is no legislation on minimum wages or the like, since this is regarded as inconsistent with the Swedish system. In the last few years, however, the State has become increasingly involved in wage negotiations aimed at tackling the considerable economic problems and increased unemployment. The most prominent example of this up to now is the establishment of a special negotiating group consisting of a number of former employer and employee representatives headed by an experienced member which, acting in a voluntary capacity, is supposed to get the parties to agree on a low wage settlement. This was, broadly speaking, achieved in the 1991-1992 round of negotiations.

The principle underlying Swedish employment law is that supervision of compliance with statutory instruments and the protection of individual employees should preferably be dealt with by the trade unions, and not by a State supervisory authority. However, some employment legislation is more in the way of regulations issued by a public authority. In the field of the work environment, there is a central government authority for the protection of workers (the *National Board of Industrial Safety*) together with twelve State-run Labour Inspectorates in various parts of the country responsible for monitoring regulations on the work environment and working hours. The Labour Market Administration (*Arbetsmarknadstyrelse*) is the central government body responsible for employment policy and at local level there is a *Regional Employment Office*. In the event of collective redundancies as referred to in *Directives 75/129/EEC* and *92/561/EEC*, the *Regional Employment Office* is the competent authority which must be informed.

a. Employment in the public sector

The public sector is very large in Sweden, particularly at local level. It has expanded considerably since the 1950s and now employs about 40% of the labour force. Since the end of the 1980s, however, the demand for savings, tax cuts and increased efficiency has checked this increase in the number of employees and led to privatisation and reorganisation. It is predominantly women who are employed in the sector, in areas such as nursing, institutional care and education.

There has been a continuing process of the public sector moving closer to the private sector as regards conditions of employment, negotiations, the law governing disputes, etc. Most of the special regulations applying to the public sector have gradually been dispensed with. The new labour legislation introduced during the 1970s was, broadly speaking, geared equally to the private and State sectors and local-authority level. There is probably no other country, apart from its Nordic neighbours, in which employment legislation in the various sectors of the labour market is as far-reaching as in Sweden.

However, certain special provisions, mainly concerning state employees, still remain in place. These mainly relate to situations which arise as a result of public authorities carrying out activities with a bearing on the relationship between the State and its citizens, e.g. tasks involving the exercise of authority over the general public. At both national and local authority level, there is also a need for a special approach so that the public authorities which determine policy do not encroach too closely on the right of employees to influence and observe the running of the undertakings in which they are employed; allowance must be made for *"political democracy"*.

4. The right of negotiation and the system of negotiations

According to the basic provision on negotiations contained in the *Codetermination Act*, employer and employee organisations as well as individual employers have the right to negotiate with their opposite number(s) on questions concerning the relationship between employers and their employees. The right of negotiation is thus reciprocal, i.e. it is balanced out by an obligation on the other side to enter into negotiations.

Generally speaking, there is a right of negotiation as regards all matters which may have a bearing on the employer-employee relationship. The only matters which are excluded are questions such as the employer's purely personal relationships, aims and approach regarding activities of a religious, scientific, technical, political or ideological nature and, in the public sector, supervisory activities of the authorities in relation to the general public.

An organisation is only entitled to negotiate on behalf of its members, a prerequisite for this being that one of its members must be employed at the workplace concerned, or that the matter in question concerns a member who previously worked for the employer. The basic provisions on the right of negotiation apply to all organisations irrespective of their size or whether they are party to a collective agreement.

The obligation to negotiate means that a party must attend negotiations and discuss objectively the questions under consideration. However, the obligation to take part in negotiations does not imply any obligation to enter into an agreement.

The negotiation arrangements in place on the Swedish labour market can be divided up into three distinct categories:

- collective bargaining aimed at concluding new collective agreements takes as its basis the general provisions on the right of negotiation and concerns what are known as *"disputes of interest"*. Here, the right of negotiation is closely linked to the right to take industrial action. The right of negotiation would be of less value if it were not possible to exert pressure on the other side in negotiations (*see Chapter II.2.1*);
- disputes negotiations (also known as grievance negotiations), which also derive from the general provisions on negotiations and relate to so-called *"disputes of rights"*. The aim of negotiations is to reach agreement on how a law or contractual provision should be interpreted and applied so that the dispute does not have to be referred to the courts for a ruling (*see Chapter III.4*).

Both these types of negotiations have been used on the labour market for as long as employer and employee organisations have existed. Under the *Codetermination Act*, a third type of negotiations was introduced:

- codetermination/cooperative or joint regulation negotiations, which give entitlement to negotiate on questions concerning a business and its management, in which the employer has the right to take binding decisions but the employees are given the opportunity to gain an insight into the matter in hand and exert an influence. In most cases, the precondition for this type of negotiations is the need for a collective agreement with the employer. (*See also section 6.2.1*).

5. Employer's management rights

As long ago as 1906, the LO and SAF entered into an agreement which established the right of employers to choose their employees freely and to manage and allocate work. At the same time, the agreement acknowledged the principle of freedom of association. The practice of the courts established as a basic principle the employer's right to manage and allocate work and to freely employ and dismiss workers unless the law or collective agreement contained provisions preventing this. An important departure from this principle came along in 1974 with the introduction of the *Employment Protection Act* (the currently applicable version of which dates from 1982), which stipulated that employers must have an objective reason for dismissing an employee.

On the basis of their right to determine the running of their businesses, employers may therefore choose their employees freely. In the private and to a large extent the local-government sector too, an employer can, as a general rule, freely choose the people he wishes to employ. The only restriction on this choice is that it may not contravene special legislation banning racial or sex discrimination. In addition, there may also be a few former employees who, under employment-protection legislation, have a priority right to a new job within one year of their old job coming to an end. An employer can also voluntarily limit his freedom to choose employees, e.g. under an agreement with employees' organisations concerning internal recruitment. Employers in the public sector, especially public authorities, are more restricted than private-sector employers when taking on employees. In both the State and local-government sectors, any decision to take people on must be objective. Furthermore, in the State sector, it must be based on the merit and skills of the applicants (i.e. experience and formal qualifications), and other specific regulations also apply with respect to some posts (e.g. special requirements regarding training or skills, the requirement of Swedish citizenship, etc.).

The right of management of an employer includes the right to determine the work tasks, method of work, working time and location. Under an employment contract, an employee makes his working capacity available for carrying out various tasks and is therefore subject to the decisions and instructions of his employer. What an obligation to work includes is mainly determined by what may have been agreed between the parties. As long ago as 1929, the *Labour Court* established a work-obligation principle according to which an employee, as a worker under a collective agreement, must carry out any work which is connected with the employer's activities and which may be regarded as falling within the sphere of the employee's general vocational qualifications. This principle has since been developed further in a number of legal cases. An employer can therefore allocate different work tasks to an employee, but limits are set as regards the work an employer must do under a given employment contract. If the employer wishes to go beyond these limits, a new agreement must be reached with the employee or a new employment contract drawn up.

The assignment of an employee to a different work task must normally be regarded as a measure which an employer's right of management entitles him to take, provided that the employee's contractually stipulated duties include such new task. However, any assignment to other duties which encroaches on the freedom of association or constitutes racial or sex discrimination can be challenged on the basis of specific statutory provisions. It is also generally considered that management of a business may not be conducted in an arbitrary way or in bad faith. In addition, the practice of the *Labour Court* has been to require that objective reasons be provided for any assignment to a different task.

Gradually, through collective agreements, the employees' organisations exerted an increasing influence on matters relating to the management and running of businesses. A major aim of the legislation in the 1970s was to deepen and widen this influence.

A number of other ways in which employees can make their influence felt are set out below. The intention is not, however, to provide an exhaustive account of these methods. For example, the long-established collaboration between employers and employees' representatives regarding questions concerning the work environment will not be looked at. Nevertheless, it should be noted that the basis for this collaboration is that it is the employers who have the right to run and manage their businesses. This gives them wide-ranging opportunities to take decisions on business policy and the scale of production, control the work operation and stipulate working hours, etc.

6. Employee participation

Employees are able to exert influence on management by electing employee representatives to sit on the management board. Out on the shop-floor, the various forms of employee participation provided for in the *Codetermination Act* are an

important means of obtaining information and bringing pressure to bear.

a. Representation at management level

Before new legislation was introduced in the 1970s, provisions on employee representation were contained in collective agreements on works councils. Once other channels became available for employees to exert an influence, these collective agreements ceased to apply. Today, there are no works councils in Sweden. However, a completely new law for the implementation of *Directive 94/45/EEC on European Works Councils* was proposed by a government committee in 1995.

On the employees' side, there was from the outset a certain degree of doubt about employee representatives sitting on management boards. These misgivings subsided when the employment legislation introduced in the 1970s provided that representation on boards of management should be only one of several means of exerting an influence on the running of businesses. A specific law concerning such representation, namely the Board Representation of Private-Sector Employees Act (*lag om styrelserepresentation för de privatanställda*), which applies to employees in, among other things, joint-stock companies, banks and insurance companies, is now in place. When at least 25 workers are employed, the local trade union which has concluded a collective agreement with the employer may pass a resolution on board representation and elect two members to serve on the board of management, together with two deputies. (Swedish joint-stock companies are organised according to a one-tier system). If the business operates in specific sectors and employs at least 1,000 people in Sweden, then the unions may elect three representatives and three deputies.

The employee representatives are always in a minority on management boards. In principle, they are on an equal footing with other board members.

The idea behind board representation is that employees should be able to observe and exert an influence on the running of a business. In practice, the legislation introduced has mainly served to provide information. The fact that a matter is dealt with by the management board in the presence of employee representatives does not release the employer from his obligation to conduct cooperative negotiations (*see below*).

In the public sector, specific regulations apply regarding employees sitting on certain boards and committees. As regards public authorities, however, these only apply to those appointed by the government, and there is no right of representation in local authority bodies or on county councils. Political decisions taken by these bodies must be respected, and their employees usually only have a right to be present at and/or comment on proceedings, and may not take part in the decision-making process.

b. The *Codetermination Act*

The *Codetermination Act* contains provisions on the various ways employees may influence the running of businesses. It applies to all business undertakings irrespective of their size. However, undertakings of a religious, scientific, political or technical nature or of any ideological or other persuasion are exempted from these provisions as far as the aims of the undertaking are concerned. In the public-sector labour market, in the same way as with the relationship between the State and its employees, the employees' influence may not interfere with what is known as *"political democracy"*, i.e. the right of public authorities to determine policy.

i. Cooperative/Joint Regulation/ Codetermination negotiations

The most important means for employees to influence the management of businesses provided for in the Codetermination Act is the enhanced right of the trade unions to negotiate on questions with respect to which the employer is entitled to take the final decision. Before an employer decides on major changes within his company or as regards the conditions of employment or working conditions of a worker belonging to the union, he must take the initiative in organising *"codetermination negotiations"* with the local trade union with which he has concluded a collective agreement; this requirement is known as the *"primary duty to negotiate"*. The employer must wait until the negotiations are completed before taking any decision. In exceptional cases, however, it is possible for the employer to take a decision before entering into negotiations, namely when there is a danger to life and limb or a risk of serious economic loss if a decision is delayed.

The primary duty to negotiate may apply, for example, in connection with scaling-down of a business operation, the introduction of new technology, company reorganisations, relocation or the assignment of an employee to new duties.

The idea behind the primary duty to negotiate is to involve employees at an early stage and to make this involvement a normal part of the decision-making process. The purpose of negotiations is for the employer to listen to the points raised by the employees' representatives in order to reach agreement on what decision the employer should take.

As regards business and management matters not covered by the primary duty to negotiate, employers are still obliged to set out their intentions and negotiate before taking a decision if the trade union so requests. There could, for example, be matters which have already been negotiated in routine meetings and with respect to which the union wishes changes to be made.

Also in dealings with trade unions with which he has not entered into a collective agreement, an employer must take the initiative in negotiating and waiting before taking a decision specifically relating to the conditions of employment or working conditions of an employee belonging to such a union.

In order to implement *Directives 75/129/EEC* and *92/56/EEC relating to collective redundancies* and *Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings*, a new regulation was introduced with effect as of 1 January 1995 which makes provision for situations in which an employer is not bound by any collective agreement at all. With any matters concerning redundancies because of scarcity of work or the transfer of an undertaking or business, such employers have a primary

duty to negotiate with all employee organisations which have any members affected by the intended measure.

The emphasis is on negotiations at local level, but if the parties at local level are unable to agree on what decision the employer should take, the trade union can refer the matter to its head organisation for further discussion, although this is something which happens only quite rarely.

When the regulations were introduced, there were misgivings that the wider obligation to negotiate would unnecessarily create additional work and lead to delays within businesses. However, research shows that both sides are now for the most part in favour of the system and regard it as effective.

ii. The right to information

The enhanced right to negotiation involves an obligation on the part of the employer to provide his opposite numbers with detailed information on the matters for negotiation, but there are also specific legal provisions on the right to information which are aimed at giving those representing the employees a more general insight into the business undertaking's situation.

Employers must, on their own initiative, keep trade unions with which they have concluded a collective agreement informed about the undertaking's progress in terms of production and its financial position as well as the guidelines on staffing policy. Employees' organisations should also be given an opportunity to examine the accounts and other company documents to the extent necessary for them to be able to safeguard the collective interests of their members. The employer must provide all reasonable assistance in this connection.

The employer may demand that the information provided by him be treated confidentially. If the trade union does not agree to this, the employer is entitled to call for negotiations to discuss the duty to maintain confidentiality. If such negotiations do not result in any agreement being reached, the employer may, within ten days, refer the matter to the *Labour Court* for a ruling. Notwithstanding the duty to maintain confidentiality, however, the person receiving the information is allowed to pass it on to the union representative sitting on the management board.

iii. Agreement on codetermination

In the *Codetermination Act*, the parties which conclude the usual collective agreements on wages and general conditions of employment are called on to enter into what are known as *"codetermination agreements"*, i.e. collective agreements on the employees' right of codetermination in matters relating to the conclusion and termination of employment contracts, management, work distribution and other aspects of the business operation.

Codetermination agreements of a different kind have now been entered into by central employer and employee organisations and cover larger portions of the Swedish labour market. These agreements mainly contain provisions adjusting or adding to the provisions of the *Codetermination Act*. Only in exceptional cases has specific provision been made for the right of trade unions to determine matters otherwise decided on by the employer, or for restrictions to be placed on employers in matters with regard to which they would otherwise be free to act at their own discretion. These *"central"* agreements generally take the form of a framework agreement which can be made more specific and amended as required at a lower level.

Developments in this area have been slow, but it is long-term task which will require the two sides at local level to find new approaches and methods of collaboration which work well for them.

iv. Priority right of interpretation

In the event of a legal dispute arising between the two sides, a particularly important question is whose view should prevail whilst the dispute is still going on, and who should have the priority right of interpretation while a court ruling or some other settlement is being awaited. It is a provisional right which, for practical reasons, becomes an established decision in most cases. Given the employer's right to manage his business, the usual approach is that he should have the priority right of interpretation. However, the legislation introduced in the 1970s granted the priority right of interpretation to the trade unions with regard to certain matters.

In the case of a dispute about an individual worker's obligation to carry out certain work, the priority right of interpretation lies with the trade union which has concluded a collective agreement. If the union states that, in its view, there is no obligation to work, then the worker concerned is released from his duty of loyalty to the employer. The worker can refrain from carrying out the work concerned without any risk of sanction; however, the union may be liable for damages in cases where it makes a grave error of judgment or invokes the priority right of interpretation in bad faith. The employer may, despite the union's priority right of interpretation, have the work carried out if, for example, the safety of the workplace would otherwise be jeopardised.

The unions' priority right of interpretation also applies in disputes about the interpretation of codetermination agreements, penalties for breach of contract by employees (e.g. disciplinary measures), the right of trade-union representatives to pay, time off and job-protection. A limited priority right of interpretation applies with respect to disputes about remuneration (wages etc.) of employees. In addition, there are other variants of this right in the fields of employment protection and work environment.

v. The trade unions' right of veto

Employers have a primary duty to negotiate with trade unions party to a collective agreement whenever they intend to contract work out to someone who will not become their employee, such as an entrepreneur or hired labour. The trade union is empowered to use its veto, i.e. prevent the measure, if it may be assumed that it disregards the law or collective agreement or otherwise goes against what is generally accepted in the sector concerned. The veto may only be invoked against a particular employer (e.g. who gains a reputation for not paying taxes or social insurance contributions, or who neglects his obligations towards his employ-

ees) but not against the measure as such. The exercise of a veto merely means that a planned measure is stopped; the trade unions are not allowed to take any decision of their own instead of the employer.

The rules governing vetoes have been much discussed; they were abolished in 1994 (by a right-wing government), and when they were reintroduced in 1995 (by a social-democratic government) a clause was added to the effect that a veto may not be invoked in any dispute concerning the rules on public procurement introduced in order to comply with EC law.

When employees' organisations exercise their right of veto, they are subject to liability for their actions but also have a wide margin of discretion.

CHAPTER II: SOURCES OF REGULSATION

Swedish labour law is derived from provisions contained in laws and other regulations, the established practice of the courts, collective agreements and individual contracts of employment. At a lower level, it is based around regulations and the like issued by employers by virtue of their right to manage their businesses, and also custom ,usage and standard practice. International sources of law are beginning to acquire greater importance, especially since Sweden's accession to the EU.

Clearly one of the distinguishing features of Swedish labour law is that legislation has only been passed in this field over the last few years. For a long time, the main emphasis was placed on collective agreements, although many important principles were established though the practice of the courts. Despite the considerable increase in the amount of legislation over the last few decades, collective agreements can still be regarded as a particularly important and central source of regulation.

1. Laws and regulations

Some of the fundamental rights in the field of labour law are contained in the Swedish *Constitution*. The freedom of association of employers and employees and their right to take industrial action are enshrined in the Constitution. As regards the public sector, i.e. government, local authorities and county councils, there is a general constitutional requirement to remain objective and impartial when decisions are taken by public authorities; this is known as the *"objectivity principle"*. In the State sector, it is also the case that only *"objective"* factors such as work experience and formal qualifications may be taken into consideration when offering employment (*see also I.5 above*). The *Constitution* guarantees equality of the sexes and protection against racial discrimination, but actual legal provisions are set out in specific legislation. Under Swedish law, there is no general ban on discrimination on the labour market. (The prevention of racial and sex discrimination is, however, provided for in specific laws, and legislation banning discrimination against the disabled is planned. Public-sector employers are subject to the requirements of the objectivity principle in this regard).

Most employment legislation falls within the field of civil law, although some of it does have features of public law. For example, public-law aspects are of considerable importance in the field of environmental law. The field of social insurance and other social-security regulations are related to labour law, but usually relate to the general public irrespective of whether they are in employment or not, and for the most part give rise to claims against the State rather than employers. Employment policy is broad and flexible and is made up of a combination of civil-law and public-law provisions.

Swedish labour law is usually divided up into collective labour law, which is concerned with the relationship between the social partners, and individual labour law, which concerns the relationship between the individual employee and his employer. Given that the main emphasis in Swedish labour law is on the social partners' activities and regulation of the labour market by means of collective agreements, collective labour law is usually given priority over individual labour law in any presentation of this field in Sweden.

The aim that has been pursued has been for employment legislation to have as wide a scope of application as possible. Special provisions applying to particular groups of employees are rare. As stated earlier, however, there are a few special provisions applying to State employees, and specific legislation concerning work by domestic employees and seamen. It is unusual for any categories of worker to be exempted from employment legislation. There are, however, some examples, such as home-workers and other *"unsupervised employees"*, who are not covered at all by the Working Hours Act (*arbetstidslag*) and only partially by the Holidays Act (*semesterlag*); senior executives are not covered by employment-protection legislation. There are no exemptions applying specifically to small businesses.

The Swedish Parliament can delegate to the government and/or authorities the right to introduce statutory provisions in the field of labour law. An example is the work environment, in which the framework law (namely the 1997 Work Environment Act (*arbetsmiljölag*)) was supplemented by the Work Environment Ordinance (*arbetsmiljöförordning*) introduced by the government, and by a large number of regulations on various matters introduced by the National Board of Industrial Safety (*Arbetarskyddsstyrelse*).

2. Collective agreements

Collective agreements are sometimes used to regulate questions which are not a subject for legislation, e.g. wages and other remunerations, and sometimes in matters with regard to which legislation exists and the social partners are nevertheless allowed to conclude collective agreements deviating from it, make appropriate amendments and set out detailed provisions for various sectors and areas of activity.

A collective agreement must by law be set out in writing and relate to conditions of employment for employees or other aspects of the employer-employee relationship. The contracting parties must be an employers' association or individual employer on the one hand and the employees' organisation on the other. Both the contracting parties and their members are bound by the agreement. Non-unionised employees or those belonging to an organisation which is not a party to a collective agreement with the employer are not bound by collective agreements. The established practice of the courts is, however, that employers are not allowed, unless other-

wise stipulated, to have different conditions of employment for employees not covered by a collective agreement. If, for example, an employer pays a non-unionised worker a lower wage than that provided for under a collective agreement, the organisation which is party to the agreement may sue him for breach of contract and claim damages. On the other hand, a worker not covered by the collective agreement cannot invoke any rights deriving from it. This principle means that non-unionised workers enjoy the advantages of union membership without having to pay any subscriptions, i.e. *"freeloading"* is possible. However, the idea behind these arrangements is that the employer should not be allowed to take on labour at a lower rate of pay than that required for union members.

Employers who are not in any employers' association often conclude what are known as *"derivative agreements"* (*hängavtal*) with the trade union at the place of work, i.e. collective agreements similar to national agreements applying in given sectors of the economy. Also with employers who have not concluded any agreement at all, a widely applied collective agreement can be regarded as establishing given practice and may thus be applied in the workplace concerned (see below).

The Swedish labour market is covered by national collective agreements under which wages and general conditions of employment are laid down for various sectors and/or professions. Such agreements usually apply for between one and two years, and negotiations on new agreements take place, as a rule, each year or every other year. There are also some collective agreements which govern the relationship between organisations on the labour market. This type of agreement may remain in force for a very long time. An example are the so-called *"principal"* agreements in the various sectors of the labour market which regulate basic questions concerning negotiations, industrial action and the like (one example of this being the *Saltsjöbaden Agreement* mentioned above).

Collective agreements may be concluded at national or local level. It is not permissible for employers and employees bound by a collective agreement to make any arrangements infringing its provisions; such arrangements are invalid. However, a collective agreement can be designed in such a way that it leaves scope for possible departures from its provisions where appropriate. An example of this is when, within an individual sector, a national agreement contains provisions on a minimum wage which allow the partners to agree on a higher wage at local level. It is customary for collective agreements to allow deviations from their provisions if these are to the advantage of employees, but if, for example, clauses concerning wages provide for *"standard wages"*, the contractually stipulated wage – no more and no less – must be paid. This arrangement is different from many other countries, where the provisions of collective agreements are generally restricted to laying down a minimum wage.

It is not possible under Swedish labour law to extend the scope of a collective agreement or declare it universally valid. Neither Swedish nor Danish law provides for this possibility (unlike Finland and Norway). The high degree of organisation and the extensive coverage afforded by collective agreements have meant that such arrangements have not been regarded as necessary in Sweden.

Apart from their regulatory and normative function, collective agreements are also of considerable importance in that they set out what is known as the *"peace obligation"* of the social partners.

a. Collective bargaining

Collective bargaining has for a long time been carried out on a highly centralised basis in Sweden. Over recent years, however, there has been a move towards more decentralisation and greater freedom of action at local level, especially as regards wages.

Broadly speaking, this centralised system has meant that, in the private sector, framework agreements concerning wages and general conditions of employment are concluded at national level between the Swedish *Trade Union Confederation* (LO) and the *Swedish Employers' Confederation* (SAF), under which the total wage increases are stipulated. This total figure is then broken down into specific awards firstly at national branch level and then at local level by the undertaking concerned and the local trade union. These negotiations are conducted subject to the peace obligation on the social partners.

At the beginning of the 1980s, agreements moved towards further decentralisation. This was backed up by intensive public-relations work, especially by employers in the private sector. The position of the umbrella organisations became weaker. The main focus of negotiations is now at national branch level. The main aim on the employers' side is further decentralisation down to local level, or in certain cases to the level of individual employees.

Nevertheless, it is still the case that negotiations are concentrated among a small circle of principal protagonists. In the private sector, the general rule is that negotiations are conducted and collective agreements concluded between national branches and sector-specific organisations. Negotiations at local level then take place in the framework of the agreement concluded by the national branch, subject to the peace obligation incumbent on the parties. At local-authority and county-council level, nationwide agreements are entered into between the relevant employees' organisation (or a special body acting on behalf of several organisations) and the Swedish *Association of Local Authorities* and the *Federation of Swedish County Councils*. The agreements are not subject to government approval, but each individual local authority or county council must approve them. In the State sector, negotiations are conducted between the *National Employers' Administration* and the relevant employees' organisation (or the body negotiating on behalf of the latter). The agreement concluded applies directly to lower-level authorities, and negotiations at local-authority level are subject to the peace obligation.

3. Individual employment contracts

Under Swedish law, agreements for the performance of work can be divided into two categories, namely employment contracts and contract work agreements. The difference between the two is very important. As soon as an employ-

ment contract comes into being, the employee is generally covered by employment legislation.

There is no general legislation on employment contracts, nor is there any legal definition of an employment contract. When an agreement concerning the performance of work for remuneration is entered into, an employer-employee relationship is deemed to exist because an employment contract is considered to have come about. The concept of *"employee"* has been developed through the practice of the courts; there is no general definition applying in the field of labour law generally, nor any precise rule determining when a person is to be deemed an employee. This assessment involves weighing up a number of different facts and circumstances of relevance in each individual instance, such as the duration of the work, who is responsible for management, who is to supply the materials, the nature of the remuneration and the work obligation on the person concerned.

Like other industrialised countries, Sweden has in the last few years seen an increasing degree of variation in the types of agreement concerning the performance of work. Some *"atypical"* agreements do not generally fall within the definition of an *"employment contract"*, which means that the person performing the work must be regarded as an independent contractor. Other arrangements must be classified as employment contracts, although the main provisions of employment-protection legislation may be departed from if the employment concerned is for a limited period, as is the case with a fixed term job or probationary employment. Specific legislation may also apply to such employment contracts (e.g. contracts on the hiring-out of labour).

An employment contract may be entered into without having to meet any formal requirements. It is often merely specified what work is to be carried out by the employee and the date on which he is to start work. The rest of the contract is derived from employment legislation – to a large extent collective agreements governing employment relationships – as well as custom, usage and standard practice. The specific provisions contained in contracts between individual employees and their employers vary greatly, however. Contracts with highly qualified or skilled employees may be very much geared to the individual concerned.

4. Practice of the courts

The Labour Court (*Arbedsdomstol*) is a special court which rules on labour disputes in Sweden. It plays an especially important role in Swedish labour law and sets legal precedents. The Court has in some cases established rules in areas in which no regulations existed previously, and sometimes has brought about greater legal clarity in areas where the law is open to interpretation. It has established many important general principles applying on the Swedish labour market, e.g. as regards the right of employers to unilaterally manage and run a business unless otherwise stipulated.

Although the *Labour Court* is the principal court in the field of labour law, some important principles are also established by the civil courts, particularly the Supreme Court (*högsta domstol*), which is the court of final instance in civil law.

Sweden's membership of the EU has of course meant that the practice of the Labour Court has acquired increasing importance in Swedish labour law.

5. Customs, standard practice, etc.

A collective agreement which is universally applied within a given sector may be regarded as a legal custom, even in workplaces where the parties concerned are not bound by any collective agreement. Unless the parties agree otherwise, it is quite likely to be assumed that the established legal custom is to apply. The terms of the collective agreement may be considered to reflect what should reasonably apply in the given context.

Rules or regulations, etc. introduced unilaterally by employers on the basis of their right of management, and also established custom, usage and standard practice, may also be of relevance.

6. International law

As regards international law, Sweden applies what is known as the *"dualistic approach"*. International conventions ratified by Sweden therefore do not form part of the body of laws until they have been incorporated into Swedish law.

Sweden is signatory to a number of ILO (*International Labour Organisation*) conventions and is thus obliged under international law to ensure that its national laws meet the requirements of the conventions concerned. However, ratification as such does not imply that a convention's provisions can be invoked by parties to a dispute before the Swedish courts in the same way as provisions of Swedish national law. If Swedish laws contain no provisions corresponding to those of the convention, then the latter must be incorporated into Swedish law. However, ratification without any accompanying legislation for incorporation into national law is regarded as an implicit indication that already existing provisions of national law correspond to the provisions of the convention concerned.

Cooperation between the Nordic countries takes place under the auspices of the *Nordic Council*, and agreements have been entered into in the field of labour law. An agreement on the free movement of workers and a common labour market within the Nordic countries was introduced as long ago as 1954 (and was revised in 1982).

The *Convention for the Protection of Human Rights and Fundamental Freedoms* was incorporated into Swedish law on 1 January 1995. Previously, the *Convention* was only regarded as binding on the Swedish State.

Sweden joined the EU on 1 January 1995, but was already obliged under the EEA *Agreement*, which entered into force one year earlier, to bring its employment legislation into line with Community law. Community employment legislation thus applies in Sweden.

7. Interplay of legal provisions in the field of labour law

The interplay between the various types of legal provisions applying to the labour market is complex, and only some of the essential features can be outlined here.

Sweden is obliged to comply with its legal obligations under international law. Some provisions of Community law may be invoked directly in Sweden.

Employment legislation contains some absolute (non-dispositive) provisions, according to which the social partners are not allowed to make any alternative arrangements or place an employee in a worse position than under the provisions concerned, and non-absolute (dispositive) provisions, which may be contracted away. To a large extent, employment legislation contains binding provisions to the advantage of employees. Swedish labour law also makes use of semi-absolute (semi-dispositive) provisions. Under these provisions, deviations from existing laws are only possible subject to special qualifications, which are often set out in collective agreements at national branch level, i.e. individual contracts of employment are ruled out and collective agreements at local level do not always apply. The idea is to ensure a strong negotiating position and possibly a degree of uniformity in any such deviations from statutory provisions.

The *Labour Court* has also established a number of general principles which are regarded as an implied component of collective agreements or contracts of employment. Individual employment contracts between employers and employees are of relatively little importance on the Swedish labour market.

The hierarchical structure of these various provisions may be simplified somewhat: absolute legal provisions (i.e. which cannot be contracted away) take top priority, followed by collective agreements at national level and then local level, non-absolute legal provisions (which may also be placed at a higher level of priority than local collective agreements), individual employment contracts, with rules, established customs etc. bringing up the rear.

CHAPTER III: INDUSTRIAL ACTION, APPROACHES TO RESOLVING DISPUTES

The resolution of conflicts on the labour market involves not merely measures to resolve disputes but also measures to prevent them. An example of the latter is the system for enabling employees to influence the management of businesses. Negotiations between employers and employees are an important part of both the preventive and *"curative"* procedures.

Swedish labour law makes an important distinction between disputes of rights and disputes of interests. The essential feature of disputes of interests is that the parties are not in dispute about any question on which legal provisions exist, but about questions for which there is no underlying principle for establishing which party is in the right. The decisive factor is the relative strength of the parties involved. Punitive measures may be taken to put pressure on the other side to meet the given demands. Disputes of rights concern the interpretation and application of laws and collective agreements. Only disputes of rights may be referred to the courts for a ruling, and punitive measures in connection with such disputes are forbidden.

1. Strikes and lockouts, etc.

The right to take industrial action is a basic constitutional right, but may be restricted under specific laws or collective agreements, which is often what happens. The basic rule is that in cases where a collective agreement does not apply, there is a right to take industrial action, although, broadly speaking, the peace obligation applies for the duration of the agreement concerned. Exceptions to the above are the following:

- measures for the purpose of settling questions not provided for in the collective agreement (the scope for such measures being very limited),
- measures merely for giving support to another party on the labour market in cases where the latter has taken industrial action which is legal, i.e. measures in sympathy with primary action which is legal,
- picketing of an employer to force him to meet a clear and outstanding wage demand, i.e. to enforce claims,
- measures aimed at bringing about a codetermination agreement.

In practice, the main exemption from compliance with the peace obligation during the term of a collective agreement is measures taken in sympathy with other workers. The right to take such measures is very wide-ranging under Swedish law. The fact that a single, minor dispute can in theory lead to lawful action in sympathy by the rest of the labour market – even if the parties concerned have already concluded a collective agreement – encourages a centralised approach in connection with negotiations and collective agreements.

A basic precondition for industrial action to be deemed lawful is that a decision to take such action has been taken in the proper manner. The rules governing most organisations attach a high degree of importance to the right to take such decisions. Rules requiring a ballot of members are very unusual and, for all practical purposes, such balloting now never takes place in connection with industrial action. The most common type of illegal strike is the wildcat strike. Actions of this kind are mainly very short-term, and sometimes last only a few hours. Before the introduction of the *Codetermination Act*, employers used to refuse to negotiate if an illegal strike was in progress. The law now states that the two sides have a reciprocal obligation to start discussions immediately on how the unlawful strikers can be induced to return to work.

Any work which is the subject of an industrial dispute may not be carried out by other workers not involved in the conflict. The use of blackleg labour is unknown on the Swedish labour market.

Possible forms of industrial action are the strike, lockout, picketing and boycott, and *"other comparable measures"*. What these *"measures"* are is left for the law to decide; they usually involve partial industrial action of various kinds. Strikes and lockouts are analogous under the law. Swedish law imposes no restrictions requiring that the industrial action serve a specific purpose or that it must be socially justified. For a long time, strikes and lockouts were the most common forms of industrial action, but on today's labour market the pattern of disputes has altered. Disputes now often begin with employees taking various forms of limited

industrial action, such as an overtime ban, a work to rule and selective strikes of key personnel, etc.

It is always an illegal act for an employer in a dispute to withhold outstanding wages. There is a special law banning an employer from evicting an employee from tied accommodation during the course of a dispute.

In the public sector, the general rule is that industrial action may only be taken subject to the same requirements as in the private sector, although there are some restrictions specified by law. State employees with administrative functions may only be involved in overtime bans or recruitment freezes. They may not, for example, take part in selective strikes and are therefore only allowed to take part in strikes in sympathy with other workers.

As far as political action or action in sympathy with workers abroad is concerned, existing legislation merely provides that public-sector workers are banned from taking action designed to influence domestic political circumstances. Case law has also provided some clarification. In short, it may be said that there is a certain scope for taking industrial action with a foreign political background even if a collective agreement has been concluded, provided that these are short-term protest or demonstration measures. With respect to sympathy action on behalf of a foreign party, the principle is that sympathy measures in Sweden are permissible provided that the foreign dispute is legal under that country's legislation.

If a collective agreement has been concluded which provides for a peace obligation, outside organisations are also not allowed to instigate or support illegal industrial action in areas covered by such agreement. Following a number of significant court rulings, 1991 saw the introduction of changes to the law which restricted the above ban so that it only applies if an organisation is involved in industrial action in connection with employment relationships to which the Codetermination Act directly applies. The new provisions have opened up the possibility for Swedish trade unions to take industrial action aimed at setting aside collective agreements which, for example, are concluded between a foreign undertaking and workers it has seconded abroad to carry out work in Sweden. The trade unions regard this as a major opportunity for preventing *"social dumping"*. There is some controversy about whether Swedish law makes a distinction between Swedish and foreign employers in a manner contrary to the provisions of the *Treaty of Rome* concerning freedom of movement and a ban on discrimination.

In addition to these statutory restrictions on the right to take industrial action, the social partners have agreed on further restrictions. The *Saltsjöbaden Agreement* in the private sector does not allow industrial action in which neutral third parties are adversely affected or which relate to essential public services. In the public sector, the social partners have exempted employees working as employer representatives from any industrial action, and have agreed that any such action should show restraint in areas affecting national security, law and order or the care of the sick and elderly. The parties have also agreed that they would avoid any action which might be detrimental to the democratic system.

Before taking any action, the parties are legally required to give the other side seven days' advance notice of their intentions. Failure to give such notification does not mean that the industrial action planned is illegal, but may lead to liability for compensation. There are no legal provisions in place concerning cooling-off periods etc.

Individual employment agreements may not be terminated during a work stoppage as part of industrial action, but remain in effect for the duration of the action. However, the rights and obligations of the contracting parties are suspended for as long as the dispute continues.

A feature of the Swedish labour market is its great stability. Employers' and employees' organisations almost never back illegal industrial action. However, there are two sides to the centralised structure of the market: on the one hand, parties exercise responsibility and discrimination in their use of industrial action, but on the other hand such action is often very major once it has broken out. In the 1980s, there were many serious major disputes, mainly in the public sector. The economic crisis led to a reduction in the number of disputes, but recently public-sector employees have once again been showing a readiness to engage in industrial disputes in order to stop their pay slipping behind wage-levels in the private sector. Despite these moves towards a market with less tension and antagonism, there are nevertheless still only a few European countries in which the number of working days lost through strikes is lower than in Sweden.

If a party takes illegal industrial action, the other side may take the matter to the *Labour Court* and claim damages. However, the damages payable by an individual employee taking part in illegal industrial action are fairly limited. For a long time, SEK 200 was normally payable (which corresponded to one month's wages for a worker when the legal provision concerned was introduced in 1928); since 1992, SEK 2,000 at current monetary value is payable. If striking workers return to work as a result of discussions between the employers and trade unions, the *Labour Court* is usually willing to take a lenient view of the need to pay damages. The *Labour Court* can also order striking workers to return to work. Only in particularly serious cases can illegal industrial action lead to dismissal. In principle, no dismissals are possible in connection with legal industrial action.

2. Mediation

Under Swedish law, no distinction is made between *"conciliation"* and *"mediation"*. Legal texts even refer to mediation being carried out by conciliators. Mediation is the usual procedure when parties are unable to settle a dispute among themselves. Mediation is intended to be used in disputes between employers' and employees' organisations, but is not restricted to only this type of dispute; in practice, there is a separate procedure at local level for dealing with legal questions concerning, for example, disputes about employment-protection or wages.

Mediation is the only institutionalised form of State intervention in wage negotiations in Sweden. A State-run mediation body has existed since the beginning of the century, and the set of rules and regulations within which it operates has changed very little since then. The central body is the

National Swedish Mediation Service, which follows developments on the labour market and sends mediators whenever it learns of a dispute which threatens to lead or has already led to industrial action. Mediation in local disputes is first of all referred to conciliators permanently based in various regions of the country. The conciliators carry out these activities as a secondary occupation. In serious disputes, the *Mediation Service* assigns one or more conciliators to a particular dispute. The parties in dispute have a considerable say in who is to be chosen, and they often choose a person of high standing in the community, such as a county governor or director-general. In recent years, former representatives of labour-market organisations have been a popular choice.

A party must give the *Mediation Service* and the other side to a dispute seven days' advance notification of any industrial action. The *Mediation Service* usually keeps up with developments in this way, or through one or both parties approaching it and asking for a mediator to be appointed. The costs involved in providing a mediator are met by the State.

Mediators do not have any actual power over the parties to a dispute. The only thing which the latter are obliged to do is meet in the mediator's presence. The mediator can neither postpone nor stop industrial action, but it was previously almost a tradition for the parties to do as the mediator requests. In recent years, the parties have taken a more confrontational attitude, which has made the mediator's job more difficult. For example, it is now quite often the case that mediation goes on while a dispute is in progress, or that industrial action is taken while mediation is going on.

During the history of the mediation services in Sweden, it was proposed on repeated occasions that mediation bodies should be given extensive powers, that a conciliator should be appointed along the same lines as in the other Nordic countries, and that the latter should (also in the same way as in the other Nordic countries) be empowered to postpone industrial action. No proposal of this kind has been implemented up to now. It is still the case that, for all practical purposes, all major disputes which the parties involved are unable to resolve through negotiations among themselves are settled through mediation.

At national and local-authority level, the parties fairly recently concluded a collective agreement, known as a *"principal agreement"*, under which they agreed not to take any industrial action while efforts are going on to resolve the dispute through mediation.

Private mediation procedures are not supposed to take place on the Swedish labour market.

3. Disputes posing a danger to society

Sweden does not have any legislation concerning disputes posing a danger to society, not even as regards disputes in the public sector. Nor is there any legislation banning industrial action by certain groups of workers. As a general rule, the military, police, persons caring for the sick, and court employees, to name just a few examples, thus have the same right to take industrial action as other groups of workers. Employers' and employees' organisations have been more forceful in asserting their right to self-determination and independence than has been the case in the other Nordic countries.

In their *"principal agreements"*, the parties agreed that any party which regarded any industrial action as posing a risk to society should be able refer the matter to special committees; this applies to each sector of the labour market. The committees are made up of representatives of the parties, and their decisions are merely of an advisory nature. They have been criticised for this reason, and a proposal has been put forward for a body with wider-reaching powers to be set up. In the government and local-authority sectors, the committees concerned have recently been expanded through the appointment of an equal number of members representing the two sides.

There is an implied assumption that the government or parliament may, as a final resort, intervene in a labour dispute which poses a risk to society as a whole. Such intervention has been planned on three occasions in all, but only once did it take place, namely in 1971 when a dispute involving teachers and lecturers broke out as a result of a particular piece of legislation being introduced.

4. Negotiations in labour disputes and the *Labour Court*

Labour-dispute negotiations are aimed at clarifying the facts surrounding an issue, and the interpretation or implementation of rules in a specific instance. Such negotiations differ from contractual negotiations in that they are subject to already existing rules restricting the parties' scope of discretion. A precondition for any dispute being referred for examination by the *Labour Court* is that the parties involved are engaged in negotiations. Under non-absolute legal provisions and most collective agreements, negotiations must first of all be conducted at local level and may then be referred to national level if no agreement can be reached. Only after these two stages can a party refer the matter to the *Labour Court*. The great majority of legal disputes are resolved in negotiations; only a small number are referred to the *Labour Court* for a ruling.

The *Labour Court* has since 1928 been the special court dealing with labour disputes. The Court is the only one of its kind and deals with all disputes throughout the country. It is the court of both first and final instance in labour-law disputes involving employers' and employees' organisations or collective agreements concluded by individual employers. The dispute must either concern a collective agreement, the *Codetermination Act*, or alternatively a collective agreement must exist between the parties to the lawsuit. The *Labour Court* therefore gives rulings in the field of labour law relating to both collective arrangements and individual rights.

Other labour disputes are dealt with by a lower civil court, namely the district court. These disputes concern claims of non-unionised workers, or workers whose trade union does not wish to represent them. Appeals against rulings of the district court may be lodged with the *Labour Court*. No appeal is possible against rulings of the *Labour Court*.

The *Labour Court* is made up of judges, experts and representatives of employers and employees. The latter are appointed by the government in line with proposals from

employers' and employees' organisations. The members of the court each cast a vote when a ruling is to be given. Following the introduction of new legislation in the 1970s, the number of judgments increased yearly. Since then, the Court has dealt with an average of 150-200 cases a year. In recent years, however, the number of lawsuits filed has increased considerably, especially in the case of disputes concerning employment-protection. This increase is believed to have been caused by, among other things, the greater degree of confrontation between the parties and a harsher climate on the labour market.

As stated earlier, the *Labour Court* occupies an important position as a source of labour-law precedents. However, despite the great importance of the Court in Swedish labour law and its established position as an integral part of the labour market in Sweden, it is still the subject of some controversy; among other things, the question is being asked whether the fact that employer and employee representatives sit in the Court violates Sweden's obligations under international law.

The main penalty that can be imposed in connection with labour disputes is an order to pay damages. Damages may be awarded for losses which are financial in nature or non-financial (i.e. arising from an infringement of the law or breach of contract). An example of other measures available to the Court is to order, in cases of unfair dismissal, that the employment contract concerned remain in effect (while at the same time also awarding damages).

5. Arbitration proceedings

Arbitration proceedings are used very sparingly on the Swedish labour market. They are hardly instituted at all in connection with disputes of interest. In disputes of rights, arbitration proceedings are mainly used with respect to specific issues. Many collective agreements contain arbitration clauses relating to specific questions, for example disputes about the terms of a contract. The parties have also set up a number of permanent arbitration committees, such as the committee dealing with restraint of competition clauses. Arbitration proceedings may be instituted with regard to highly qualified or specialised staff if the agreement between the parties provides for matters to be taken to arbitration. This also happens in some disputes between different trade unions, or between a trade union and one of its members.

Arbitration proceedings come under private law and are entered into by parties on a voluntary basis. There is no employment legislation requiring arbitration proceedings to be instituted. The parties can agree that the procedure may be invoked in connection with both a current dispute and in any other dispute arising between them in the future. they themselves decide how their arbitration committee should be made up. It is customary for each party to appoint an arbitrator and for these two arbitrators to appoint a third one. A dispute may not be referred to a court if an arbitration agreement is in force.

CHAPTER IV: SWEDISH LABOUR LAW IN AN INTERNATIONAL CONTEXT

It is only in the last few years that international developments have made themselves felt on the Swedish labour market.

1. International private law, competent court, applicable law

With regard to disputes involving a foreign country, Swedish employment legislation does not for the most part contain any provisions concerning jurisdiction. In order to establish whether the Swedish courts have jurisdiction and which country's laws are to apply, there are a number of legal provisions in force deriving from international conventions to which Sweden is a party, and also provisions of Swedish law concerning international disputes. Only a very general outline will be provided here.

The question of when a court has jurisdiction to deal with a labour dispute is provided for in the 1988 Lugano Convention, adopted by the EFTA and EU countries, on jurisdiction and the enforcement of judgments in civil and commercial matters, which was incorporated into Swedish law in 1993. The general approach taken is that any lawsuit against a person resident in a signatory state should be dealt with by the courts in that state. Alternatively, if a dispute concerns a collective agreement, the matter may be referred to the courts with jurisdiction at the location where the employee works. The *Lugano Convention* applies between EFTA and EU member states, and between EFTA member states in relation to each other. (It is worth mentioning here that the *Lugano Convention* applies alongside and is almost identical to the *1968 Brussels Convention* between the EU Member States. Sweden has not yet signed the latter.)

If a respondent in a lawsuit has not been resident in any country which has signed up to the *Lugano Convention*, Sweden does not have any special legal provisions concerning jurisdiction. The legal position used to be that Sweden has jurisdiction if the dispute or the parties to it have such strong links with Sweden that a Swedish interest in the administration of justice can be considered to exist. The principle underlying this approach is an application, by extension, of the rules determining which local court has jurisdiction; if no such court is deemed competent, then Sweden is considered to have jurisdiction unless there are any reasons preventing this. This gives rise to the general rule that a case will be dealt with by a Swedish court if the respondent is resident in Sweden. (In a ruling issued in 1995, the *Labour Court* took into consideration certain provisions of the *Lugano Convention* even though these did not relate directly to the dispute concerned.)

As regards the question of which country's laws should apply in a dispute involving a foreign country, Sweden has not yet signed the *1980 Rome Convention* applying to all EU Member States. According to Swedish legal practice and jurisprudence, the general rule is that the legal system of the country with which the employment relationship (or collective agreement) has the closest and most obvious links should apply.

2. International context

Sweden has signed a number of ILO Conventions and has for a long time been a driving force behind the work of the ILO. However, the dualistic system in Sweden, which requires introductory legislation, has meant that questions are occasionally raised about whether all conventions signed by Sweden have been incorporated into Swedish law. In the last few years, there have been instances of Sweden withdrawing from conventions involving changes to Swedish law, and of the ILO having to look at the compatibility of Swedish law with ILO conventions. There has, among other things, been a public-sector monopoly on job-placement services and protection against occupational injury.

It remains to be seen to what extent the introduction of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in 1995 will affect the Swedish legal system. As mentioned above, transposition into Swedish law is considered to have an impact on the protection of the *"negative freedom of associations"* (i.e. the freedom of non-association).

The main source of international law now having an effect on Swedish labour law is EU labour law.

a. Swedish labour law and EU labour law

As can be seen from these observations, the structure of and legal approaches provided for in Swedish labour law differ from the systems applying in the Continental Member States and British Isles. The Nordic countries, in contrast, have a long tradition of a common employment policy and labour-market culture (*see also the section on Denmark*). Two particular features of the Swedish system are the central role of employers' and employees' organisations (especially trade unions) and the importance of collective agreements.

The matter of collective agreements is very important to Sweden. According to some rulings of the *European Court of Justice* (*Cases 91/81, 131/84: European Commission versus Italy*; *Case 143/83: European Commission versus Denmark*), collective agreements in Sweden are unable to meet the requirements which the implementation of directives implies. No body exists in Sweden which is responsible for the general validation of collective agreements under Swedish labour law (*Case 215/83: European Commission versus Belgium*). The legal position of collective agreements is also of relevance in Sweden as regards the question of whether EC directives may be implemented by means of semi-absolute legal provisions (*see Chapter II.7 above*). The incorporation of EC law into Swedish law has made the legal provisions concerned *"EC dispositive"*, which means that collective agreements may deviate from statutory provisions but may not provide for arrangements less advantageous to employees than are set out in the current version of the relevant directive.

It is possible that EC law will also have an effect on other sources of labour legislation and bodies in Sweden. In Swedish legal practice, the preparation of pre-enactment legislation (*förarbeten*) is a very important source of interpretation of legal texts. The *European Court of Justice*'s refusal to consider statements made in the *förarbeten* as fulfilling the requirements of the EC directive concerned (*Case 143/83: European Commission versus Denmark*) can be expected to lead to a weaker position for this source of law in Sweden.

When Sweden implemented EU regulations on freedom of movement for workers, a number of changes to legislation concerning foreigners were necessary, as well as to legal provisions on the mutual recognition of educational and vocational qualifications. It should be noted that Swedish law places cohabiting couples on a par with husbands and wives as regards the family of the migrant worker concerned.

In order for *Directives 75/129/EEC* and *92/56/EEC on collective redundancies* and *Directive 77/187/EEC on the transfer of undertakings* to be implemented, major changes had to be made to Swedish regulations relating to the right of employers to dismiss employees if there is a lack of work, and as regards negotiations in connection with dismissals due to lack of work or the transfer of a business. The initial attitude of the Swedish Parliament was that the *Swedish Employment Protection Act* (*anställningsskydd-lag*) and the trade unions' right of negotiation and their central role as labour-market watchdog meant that Swedish legal provisions met the requirements of the directives. No laws were changed until the EFTA *Surveillance Authority* (ESA) had given its comments. Thus, in contrast with earlier Swedish legal provisions, the requirement applying from 1995 onwards is that the transfer of a company or business does not in itself constitute an objective reason for dismissing staff. On the contrary: the rights of employees under a collective agreement are now transferred into their relationship with their new employer. Employees of the transferred company therefore have greater job security. The obligation to provide information and notification when negotiations are being conducted prior to any dismissals because of lack of work are laid down by law. As can be seen from the above, the primary duty to negotiate when dismissals are planned because of a shortage of work or the transfer of a business has been broadened in scope.

For a long time, Sweden had legal provisions which broadly complied with *Directive 80/987/EEC on the protection of employees' rights in the event of an employer's insolvency.* Reductions in wage-guarantee legislation (which as a result of the general economic crisis was proving very expensive) which were aimed at preventing abuses and exploitation led to a new regulation stipulating that an employee who has on one occasion received pay under a wage guarantee upon the bankruptcy of his employer is not entitled to any additional payment of this kind in the event of the insolvency of essentially the same company within two years of the first bankruptcy. This change in the law was unsuccessful because a ruling of the EFTA *Labour Court* stated that it contravened the Directive, and a toned-down version of the law was introduced on 1 July 1995 under which it is possible in the above-mentioned situation to take into account the circumstances of individual employees. Following a request, the Swedish government submitted the new provisions to the *European Commission.* At present, it is regarded as unclear whether Swedish law complies with the Directive.

As regards *Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the*

contract or employment relationship, a completely new provision to the same effect was introduced into the *Swedish Employment Protection Act* before the EEA *Agreement* entered into force.

In the field of equal opportunities, Sweden may in many respects appear to be well ahead of other countries. Women today account for around half the total workforce. However, almost half of them work part-time. Women's income is only 80-90% of men's. Women in gainful employment are restricted to certain activities and sectors of the economy, and it is possible to talk of the *"men's"* and *"women's"* labour markets.

A very important aim, and also a way of attaining sex equality, is considered to be that men and women should share responsibility for taking care of their children. The primary means of achieving this is to introduce rules concerning parental leave and insurance arrangements providing remuneration during such periods of leave. Despite the cutbacks in the last few years, these arrangements are very generous by international standards, and in principle provide for sickness benefit for 360 days, followed by a low level of benefit for a further 90 days. Remuneration during parental leave is also payable if parents have to stay off work in order to look after a sick child, for example. Parents are entitled to one and a half years' leave following the birth (or adoption) of a child, and may also reduce their working hours to three quarters of normal working time until the child reaches the age of 8. It is almost exclusively women who take parental leave to any substantial extent. In order to increase the proportion of men doing this, an arrangement was introduced in 1995 specifically providing for increased remuneration if both parents took advantage of parental leave.

A new Sex Equality Act (*jämställdhetslag*) was introduced in 1991, partly in response to the need to bring arrangements in the fields of equal pay and equal treatment up to EU standards. Even after this, there was a discussion about whether Swedish law met the requirements of Community law and, for this reason among others, the rules on wage discrimination were made more stringent with effect as of 1 July 1994. The principle of equal pay may present problems in terms of its compatibility with the traditional freedom in wage negotiations prevailing on the Swedish labour market. However, Sweden has too little experience and too few court precedents in this field to comment on this. The ruling issued by the *European Court of Justice* in October 1995 in *Case C-450/93* (*Kalanke versus the Free Hanseatic City of Bremen*) concerning the interpretation of *Articles 2.1* and *2.4* of the equal treatment *Directive 76/207/EEC* led to discussions of the Swedish *Sex Equality Act*. Swedish law leaves scope for what is known as *"positive discrimination"*, which gives employers the possibility (as part of a systematic move to counterbalance sex discrimination in the workplace) of giving precedence to a person of the under-represented sex – if they are equally or even less (but nevertheless sufficiently) qualified – over persons of the other sex. The question has been asked whether such a provision is in line with the equal treatment Directive. Two convincing reasons suggest that it is: Swedish legal provisions allow for the possibility of choosing someone less qualified but do not force employers to do this. The wording of the provisions is also gender-unspecific, and can thus be used for the benefit of either sex.

In the work-environment field, Sweden was well-prepared as regards the *"product directives"*. The Swedish government supervisory authority, the National Board of Industrial Safety (*Arbetarskyddsstyrelse*), was involved in the European standardisation bodies on equal terms with the EU Member States long before Swedish membership of the EU came onto the agenda. Some of the product-related directives (e.g. *Directive 89/392/EEC* concerning machinery) have led to changes in Swedish law involving both intensification and loosening of requirements applying previously. As regards the *"workplace Directive"*, there are considerable similarities between the *framework Directive 89/391/EEC* and the Swedish Work Environment Act (*arbetsmiljölag*) of 1977. Given that the workplace Directive merely sets out minimum requirements and does not require any harmonisation measures to be carried out, its implementation did not lead to any substantial changes to Swedish legal provisions. However, *Council Directive 92/85/EEC* on measures to improve the safety and health of pregnant workers or workers who have recently given birth or are breastfeeding gave rise to more rights for these groups of workers in a number of respects.

With regard to the *Working Time Directive 93/104/EEC*, the social partners on the Swedish employment market generally take an unfavourable view of detailed regulation in an area which has traditionally been dealt with by means of collective agreements. The entire Swedish Working Time Act (*arbetstidslag*) can be contracted away under a collective agreement. In 1995, a government committee submitted a proposal for implementing the directive which would involve the minimum possible interference with the *Working Time Act*. The aim was to see what legislation the committee report might lead to.

Employee influence in the running of businesses has proved difficult to implement at the level of groups of companies, since in principle the statutory rights enjoyed by employees apply in relation to their own employer, and employees in a subsidiary company are therefore not entitled to negotiate with the parent company, for example, although in practice it is at this level that decisions are taken. A codetermination agreement has been concluded which attempts to resolve this problem. *Directive 94/45/EEC on European Works Councils* provides for new ways for employees to influence the running of businesses. In a report which came out in the autumn of 1995, a government committee (the Employment Commission (*Arbetsrättskommission*) set up in 1995) proposed that a special law be introduced to implement the Directive. Most of the (just under 100) Swedish companies affected have already concluded or are negotiating voluntary agreements aimed at resolving the given problems before the Directive enters into force.

Swedish compliance with Community law has thus required a number of changes to be made to Swedish law, but it can hardly be claimed that these have been wide-ranging or drastic. Differences concerning sources of labour law and the underlying view of the relationship between trade unions/individual employees (collectively/individually), employers' and employees' organisations, the State and changes to the

law, and collective agreements will almost certainly be of far greater importance.

The relatively poor protection afforded to the basic rights of employees in the Swedish system (which is the same as that applying in the other Nordic countries) can be expected to be strengthened as a result of international legislation such as the European Convention on Human Rights and Community law. The agreement on social policy and its open-minded stance as regards social dialogue, negotiations and collective agreements, as well as arrangements with *"collective-agreement"*-type solutions set out in some more recent directives and proposals for directives, seem to point to greater flexibility at European level. Sweden and the other two Nordic members of the EU may be given an opportunity to encourage or devise laws (either jointly or in collaboration with the partners on the employment market) to increase the scope for the traditional Nordic approach. The opposite scenario, in which Sweden and the other Nordic countries become increasingly influenced by the Continental legal system, would probably lead to a greater degree of regulation and less scope for the trade unions in the Nordic countries.

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UNITED KINGDOM

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CHAPTER I: THE ACTORS

1.1 The Employers

Several features of the changing industrial organisation of corporate employers have a direct impact on the regulation of working conditions in the United Kingdom.

The first is that major companies account for a larger proportion of employers than in most other Member States. More than half the labour force in manufacturing works in companies with over 1,000 employees, and one-quarter in companies with over 10,000 employees. Large companies are also dominant in the services sector. The pension funds and investment trusts, rather than banks, are the major shareholders in these companies. It has been argued that this has influenced companies to concentrate on short-term financial performance[1].

Second, there has been increasing decentralisation of management. The framework of planning and budgetary controls is laid down by company headquarters and then tested by performance at divisional or local level. Divisional or local managers are responsible for their own costs and profits, and therefore set their own levels of pay and terms of employment either unilaterally or after negotiation. Moreover, the growth of licensing, sub-contracting and franchising has resulted in a split between the economic entity which is the employer and the decision-making centre of the undertaking. Many key strategic decisions are taken by higher level boards of directors and executives. This is particularly important in the case of multi-national companies, bearing in mind that the United Kingdom is host to many such companies especially those with headquarters in the United States or Japan. The more rapid development of decentralisation in the United Kingdom than elsewhere was one of the reasons for the opposition to EC-wide measures particularly as envisaged in the *Maastricht Agreement on Social Policy*.

Third, there has been extensive privatisation and contracting-out. The effect on industrial relations has been profound. The former public corporations had a statutory duty to recognise trade unions and to consult employees through various mechanisms. After privatisation, managements were relieved of these legal duties. Although the *1990 Workplace Industrial Relations Survey*[2] found that there was no evidence of widespread removal of negotiating rights in privatised workplaces, other extensive changes in working practices have occurred. Contracting-out of services has become mandatory for local authorities and other public corporations, and this too has had a major impact on working practices. Alongside the strategy of privatisation has been that of the de-collectivisation or individualisation of labour relations, a movement away from consultation and bargaining with trade unions and towards individual contracts with employees.

Fourth, the membership of employers' organisations is relatively low in the United Kingdom, compared with other Member States[3]. In many sectors this is less than 50% of eligible companies. Multi-national companies such as *Ford*, *General Motors* and *Peugot-Talbot* are not members of the *Engineering Employers' Federation*. ICI is a member of the *Chemical Association*, but does not follow multi-employer agreements. The *Confederation of British Industry* (CBI) is a pressure group which companies can join, but it does not negotiate agreements. Among the reasons for this low level of organisation are the fact that collective agreements are mainly concerned with procedural rather than substantive matters; single employer bargaining is widespread and is usually independent of multi-employer agreements rather than a supplement to them; pay and other terms of employment for white-collar workers are usually set by managers without reference to collective agreements; and company and plant agreements rather than employers'association agreements usually set the *'going'* rate There is no concerted co-ordination of pay bargaining to avoid *'leap-frogging'*.

1.2 Trade unions

Trade unions have been seriously affected by the economic, social, political and legislative changes since 1980.

According to returns made by unions to the *Certification Officer for Trade Unions*, trade union membership was at a peak of 13.2 million in 1979, but by the end of 1994 had fallen to 8.3 million., the lowest number of trade union members since 1945. A more comprehensive analysis of the significance of trade unions is available from labour force survey data[4]. This indicates that the proportion of all employees who were union members has fallen from 56.1% in 1978 to 39% in 1989 and 32% in 1995. If all those in employment (including the growing number of self-employed) are counted, union density was 28.8% in 1995 compared with 30% in 1994. There is no evidence that this long-term decline is beginning to level out. There are great sectoral differences, with union density ranging from only 7% in agriculture to 79% in rail transport. An estimated 21% of employees in the private sector are union members compared with 61% of employees in the public sector. The fall in membership in the production and construction industries has been far greater than the decline in employment in those sectors, and it is also declining in the services sector despite the increase in jobs in that sector. Areas that traditionally were a stronghold of trade unionism have suffered the greatest decline The gender balance has also been changing with union density among men falling from 44% in 1989 to 33% in 1995, and that among women declining only slightly from 35% in 1989 to 32% in 1995.

There are many reasons for the decline in union membership. The most important factor appears to have been the

1. A. COSH et al., *Takeovers and Short-Termism in the UK*, London, Institute for Public Policy Research, 1990.
2. NEIL MILLWARD et al., *Workplace Industrial Relations in Transition (WIRS 3)*, Aldershot, 1992, p.359.
3. P. EDWARDS et al., *Industrial Relations in the New Europe*, Chap. 1, (eds. A. FERNER and R. HYMAN), Blackwell, Oxford, 1992, p.21.
4. *Trade union membership and recognition: an analysis of data from the 1995 Labour Force Survey*, (1996) 104 *Labour Market Trends* 215-24. The Labour Force Survey questions only those in employment, and thus excludes union members who are unemployed or economically inactive or whose usual residence is outside the UK. For earlier statistics and analysis, see: JEREMY WADDINGTON and COLIN WHITSON, *Trade Unions: Growth, Structure and Policy*, in P.K. EDWARDS (ed.), *Industrial Relations Theory and Practice in Britain*, Oxford, 1995, pp.151-202.

shift in the balance of the economy from manufacturing (where unions were relatively strong) to services (where they are relatively weak). Moreover, the changes in the labour market encouraged by the government – such as the growth of short-term contracts and part-time work and the spread of privatisation (above) – have made it difficult for the unions to organise. Another significant factor associated with lower levels of aggregate unionisation, has been increasing unemployment, and at the same time an increase in the real earnings of those in jobs, with an accompanying lack of interest in unions[5]. The change in government and employer policies since 1980 towards trade unions has also had an impact (below).

Unions have taken a number of steps to respond to these pressures. Attempts have been made to improve administration and financial efficiency. There have been new avenues of communication between unions and their members. In part, this was necessitated by legislation which has required ballots of members on a variety of issues, such as trade union elections, support for political objects, and industrial action. But polling and other techniques for expression of members' views on other topics as well have become more common. Unions increasingly use public relations consultants to improve their image among the public. Individual unions have launched recruitment drives aimed at weakly organised sectors like hotels and catering, retail distribution and the financial sector, and at the growing number of part-time workers. The *'male'* image of unions is having to be altered in face of the changing gender balance in the workforce. New services are being offered to members, such as improved legal advice and representation and financial services.

It is significant, too, that there have been several important mergers of unions in recent years, in some cases linking widely differing industries and occupations. Although, at the end of 1994, there were 243 trade unions on the lists of the *Certification Officer* (the government official responsible for maintaining lists of unions and exercising supervision over various activities), the 17 largest unions accounted for 79% of total union membership. Seven unions, each with over 250,000 members, have 59% of all union members[6]. Eighty per cent of all union members are in unions affiliated to the *Trades Union Congress* (TUC).

1.3 Collective bargaining institutions

In the UK there is no national framework collective bargaining between the TUC and the principal employers' organisation, the CBI. These central bodies do not engage in collective bargaining on their own account. Nor is there any other centralised bargaining forum. Generally speaking, employers' associations in particular industries play a much smaller role in bargaining in the UK than elsewhere. There has been a widespread decline in the extent to which basic pay rates are set by multi-employer negotiations with trade unions. Since 1980 there has been no procedure for the extension of collective agreements to weakly organised sectors of a trade or industry. The system of tripartite statutory wages councils, which used to set minimum standards of pay and holidays in industries where collective bargaining was weak or non-existent, was abolished in 1993. In the private sector the main focus of bargaining is at company or plant level. In the public sector, much contracted due to privatisation (above), bargaining has been largely decentralised.

Fewer than 50% of employees now have their pay and conditions affected by collective institutions. This decline, from a peak of 84-86% coverage of collective bargaining and wages councils in 1975, has been steeper than the fall in union density (above). With the abolition of wages councils, collective pay-setting now affects fewer employees than at any time since 1935. This 'stark, substantial, and incontrovertible' decline[7], has occurred in a climate of political and legal hostility to trade unions and collective bargaining. The political power of trade unions is now weaker than at any time since the defeat of the 1926 General Strike, and their industrial power is hamstrung by unemployment and by the economic and structural changes in the labour market. The removal of statutory supports for collective bargaining and union membership, and the severe restrictions on the immunities in respect of industrial action are an expression of government policies, hostile to trade unions. Although union de-recognition by employers still remains relatively limited, it has become more widespread since the mid-1980s. Some managements have taken advantage of the weakening of unions to refuse to recognise them at the workplace, while others have adopted a purposive approach of removing union influence altogether[8].

1.4 Other forms of workers' participation

There is no institutionalised system of workers' participation, either at the level of the establishment or the enterprise in the United Kingdom. An amendment to the *Companies legislation* in 1980 (now the *Companies Act 1985*, s. 309) requires company directors to have regard to the interests of employees as well as those of shareholders, but the employees as such cannot enforce this duty because it is owed to the company alone. A minor stimulus to greater *'employee involvement'* was provided by section 1 of the *Employment Act 1982* (now the *Companies Act 1985*, Sched.7, Part V), which requires companies with more than 250 employees to state in their annual reports what they have done over the year to promote employee involvement arrangements. A wide variety of voluntary arrangements exist such as informal and formal management line communications or meetings, employee suggestion schemes, employee surveys, employee reports or accounts and the use of consultative committees. However, according to the *1990 Workplace Industrial Relations Survey*, the proportion of workplaces with functioning consultative committees has been falling. Fewer than one-fifth of all workplaces had consultative committees in 1990, compared with one-quarter in 1984.[9] At one time trade unions played a major part in the appointment of consultative committees, but with the decline in union recognition and of large workplaces, there has been an accompanying decline in the proprtion of workplaces with

5. WADDINGTON and WHITSON, op.cit., p. 169.
6. *Membership of Trade Unions in 1994: an Analysis based on information from the Certification Officer*, (1996) 104 *Labour Market Trends*, pp.49-54.
7. N.MILARD et al, *WIRS 3*, at p. 352.
8. TIM CLAYDON, *Union De-Recognition: a Re-examination*, in: IAN J. BEARDWELL (ed.), *Contemporary Industrial Relations: a critical Analysis*, Oxford, 1996, pp. 151-174.
9. *Ibid.*, pp.151-155.

consultative committees. Where they exist, it is now common for there to be a mixture of trade union and other representatives. In these cases there is a considerable degree of overlap between those matters which are the subject of consultation and those dealt with by collective negotiations. However, in a minority of workplaces, consultation arrangements have been introduced in the absence of, and as an alternative to trade union representation and collective bargaining. In a small minority of establishments, non-union works committees have been established by employers who are resistant to trade unions. There have been other management initiatives in recent years to increase employee involvement. In particular, there has been a spread of worker share-ownership schemes. Between 1980 and 1990 the proportion of workplaces in industry and commerce whose parent company operated share-ownership schemes rose from 13 to 32%. The proportion of the workforce who participated in such schemes where they were available rose from 22% in 1984 to 34% in 1990[10]. The Government has encouraged this development by allowing special tax advantages.

Overall, there is no indication that the shrinkage in the extent of trade union representation (above) is being offset by an increase in other methods of employee representation. A serious weakness of workplace consultation arrangements is that they are generally confined to the level of the plant or establishment and so are unable to influence decision-making at the corporate level. The growth of multidivisional forms of organisation in large enterprises has enhanced the role of relatively few senior managers in each enterprise in developing corporate strategy and controlling subsidiary companies, particularly through budgetary policy. Corporate decisions by these managers about matters such as investment policy, product development and the opening and closure of plants lie beyond the scope of establishment-level negotiations which is the predominant form of collective bargaining in the UK. Where corporate bargaining takes place the role of shop stewards is limited and the possibilities of effective collective action are reduced. So whether bargaining takes place at establishment or corporate level, strategic decisions were unlikely to be much influenced by workers' views. So far, there has been no legislative framework in the UK for board-level representation of workers. However, among the Labour government's first action on coming to government in 1996 was to agree at the Amsterdam summit to participation in the Social Chapter and the new Employment Chapter, including a commitment to implement the *European Works Council Directive 94/45/EC*.

1.5 The role of the state

The UK differs from most other Member States of the EC because of the *'negative'* role of the state. There have always been few *"positive"* legal rights to support the voluntary system of collective bargaining, and virtually all of the *'auxiliary'* props to the system have been removed since 1980. There is no state-created system of workers' participation (above). Regulatory (*'protective'*) legislation which directly affects working conditions is highly selective and much of this has been repealed or modified. From 1919 to 1979 the state aimed to act as a *'model'* employer so as to encourage trade unionism, collective bargaining and fair wages, but that tradition has been ended.. The disbandment of the *Department of Employment* in July 1995, and the division of its work between four departments, appeared to be the culmination of the process of deinstitutionalisation, decollectivsation abd deregulation of labour relations in the UK. However, developments in EC law, such as the *Working-Time Directive 93/104/EC* and the *Young Workers' Directive 94/33/EC*, are forcing some re-regulation. With the participation in the European Union's Social Chapter and the implementation of the above mentioned directives, the main source of change is likely to continue to be EC law. However, the TUC has launched a campaign for a new legal framework which combines the traditions of British collective bargaining with new rights under EC law.

The developments of state policy may be divided into three main periods.

(a) *Before 1970.* The traditional system until the 1960s rested upon a social consensus that the state's role should be minimal. Trade unions and collective bargaining emerged from illegality in a series of statutes from 1824 to 1906. No positive rights to organise, bargain and take industrial action were established, but only a series of *'negative'* immunities from the judge-made common law. The recognition of trade unions was achieved without the aid of legislation or any significant demand for such legislation. However, there was a certain amount of *'auxiliary'* legislation designed to promote and support voluntary collective bargaining. This included the minimum wage-fixing machinery established from 1909 in selected *'sweated'* trades where collective bargaining was weak or non-existent, successive *'fair wages'* resolutions of the *House of Commons* from 1891 which imposed obligations on government contractors to pay fair wages of which collectively agreed terms were the primary guide, and the machinery established in 1896 and 1919 to encourage the use of voluntary conciliation and arbitration.

The primacy of collective bargaining meant that regulatory legislation, directly laying down rules of employment on matters such as hours, health and safety, tended to take second place. The policy of the state was not to regulate by statute the terms and conditions of those who could protect themselves by collective action. Legislation applied primarily to children, young persons and women but not to adult men. As a result of this approach, there has been an absence of the kind of comprehensive regulation that is to be found in other industrial countries of such matters as hours and holidays for all employees. With a few exceptions, the hours of work of adult men (and most women) have been regulated by collective bargaining (or wages councils) but not by legislation. In the field of health and safety, as late as 1972, five million workers worked in premises not covered by any kind of occupational health and safety legislation[11].

(b) *1970-79.* There were already signs in the late 1950s and early 1960s that the social consensus which had sustained the traditional voluntarist framework was under

10. *Ibid.*, p.265.

11. *Report of the Committee on Safety and Health at Work 1970-72*, Cmnd. 5034.

strain. The pressure of full employment had contributed to a shift in power to the workplace; there was *'wages drift'*, increases in earnings not accounted for by central industry-wide negotiations, and trade unions were blamed for their failure to control the relatively large number of unofficial (wildcat) strikes in breach of agreed procedures, and for the inefficient use of labour through the imposition of restrictive practices and overmanning.

Two broad strategies were adopted in order both to maintain full employment and to control inflation. One was a succession of incomes policies. The other was the use of law in order to influence the conduct of industrial relations. These strategies were not consistently applied and were not infrequently discordant. The negative restraints on the results of collective bargaining were accompanied by a series of positive measures to encourage or promote trade union growth and recognition: in the period 1948 to 1979 union density among manual (blue collar) workers grew from 53 to 63%, and among non-manual (white collar) workers from 33 to 44%. The most significant result of the incomes policies was the politicisation of collective bargaining, the blurring of the distinction between economics and politics on which the traditional system was based. There was *'corporatist bargaining'* in which the trade union interest in a wide range of policy issues was recognised. In particular, the TUC entered into a *'social contract'* with the *Labour Government* (1974-76) under which the trade unions agreed to temporary pay restraint in return for a wide range of new legal rights for workers and trade unions. This included new rights for individuals (e.g. against unfair dismissal and discrimination) enforced through industrial tribunals.

The policy of reform was also evident in the legislation on collective bargaining. The *Royal Commission on Trade Unions & Employers' Associations* (*Donovan Commission*) which reported in 1968, had wanted to introduce *'order'* into the largely informal system of plant bargaining *"if possible, without destroying the British tradition of keeping industrial relations out of the courts"*[12]. However, the *Conservative Government*, elected in 1970, saw legislation as the main instrument for bringing about reform. The *Industrial Relations Act 1971* contained a series of provisions designed to reform bargaining structures, to secure recognition of unions by employers, to encourage legally enforceable agreements and to reform union rules. The immediate cause of the failure of the Act was the defeat of the *Heath Government* in the February 1974 election which arose from a confrontation with the miners' union over incomes policy. However, the TUC's policy of non-cooperation had rendered the Act largely inoperable: the Act had tried to bring about too drastic a change in existing institutions and behaviour by means of law. It was based on the mistaken assumption that employers would use the law and the transplantation of institutions from the United States (e.g. bargaining units, cooling-off periods) took insufficient account of the different economic and political circumstances.

12. Cmnd. 3623 (1968), para. 190.

The *Labour Government*'s social contract legislation (1974-76) returned to the path of reform by restoring the presumption that collective agreements were not intended to be legally enforceable contracts and by recreating extended immunities from legal action in respect of strikes and lockouts. An *Advisory Conciliation and Arbitration Service* (ACAS) and *Central Arbitration Committee* (CAC) were created and novel rights to trade union recognition and disclosure of information for collective bargaining as well as improved provisions for the extension of collective agreements to non-organised workers were created. The wages councils system was strengthened. The primacy of collective bargaining was emphasised by reforms such as these.

(c) *Since 1980.* By 1979, unemployment was mounting, inflation remained at high levels, public expenditure was being cut and there was acute discontent with the government's income policies. In May 1979, the Conservatives, led by Mrs Thatcher were elected to power. The policies of her Administration, and that of Mr Major since 1990, have fundamentally altered the parameters of state intervention in labour relations. The solution to the major problems of the 1970s – inflation and the politicisation of the unions – has been sought in the restoration of *'free'* markets. The argument was that trade union *'coercion'* had caused inflation, unemployment and fluctuating living standards. Trade unions and collective bargaining are seen as a distortion of market relations between the employer and individual employee. In order to make markets *'work'* it is necessary to deregulate, to privatise, to reduce public expenditure, and to weaken trade union power. The idea of any kind of *'social dialogue'* involving unions, employers and government is anathema.

This ideology has been reflected in the extensive legislation enacted since 1980. First, workers' rights of self-help through collective organisation and industrial action have been effectively restricted to their own employment units. For example, sympathy and solidarity action between enterprises has virtually been prohibited. Secondly, the ability of trade unions to govern their own affairs and maintain solidarity have been severely restricted. For example, trade union funds have been placed at risk (since 1982 it has been possible to make unions responsible for unlawful action by members and some unions have suffered heavy fines and sequestration of all or a substantial part of their assets for failing to observe court orders restraining industrial action); there are stringent requirements for secret ballots to elect voting and non-voting members of the principal executive committee; requirements for periodic ballots to maintain funds for political expenditure; rights of trade union members to require secret ballots before industrial action and not to be disciplined for ignoring majority decisions; rights for members to challenge union decisions in court without waiting for the outcome of internal union procedures; the removal of all legal protection for the closed shop, and severe limits on check-off arrangements for payment of union dues. A Commissioner for the *Rights of Trade Union Members* has been created to help members take legal

action against their unions, and Commissioner for *Protection Against Unlawful Industrial Action* to allow members of the public to bring proceedings against a union which is taking or threatening unlawful action. Although little used in practice, the institutions are indicative of government policy.

Thirdly, contrary to the public policy of the previous hundred years, in the new structure of labour law there is now a clear commitment to restrict collective bargaining. The Government itself gave a lead by banning membership of trade unions at the *Government Communications Headquarters* (GCHQ) in January 1984. Statutory provisions for the recognition of trade unions were repealed in 1980; collective bargaining over teachers' pay and conditions was effectively ended in 1987. The law now makes pressures on an employer to engage trade unionists and to negotiate and consult with trade unions unlawful, while at the same time it is lawful to induce an employer not to negotiate with a union. The removal of legal supports from collective representation rendered largely ineffective the duties to inform and consult workers' representatives in the event of collective redundancies and transfers of undertakings introduced in response to EC Directives in 1975 and 1981 It is only since 1995, as a result of infringement proceedings brought by the European Commission, that the regulations have been amended so as to allow for some form of employee representation in these cases, but even then this may be done by undermining recognised independent trade unions.

Fourthly, central to the whole strategy has been the control of labour through the market. Traditional supports for the low-paid have been removed: in 1983 the Government secured the repeal of the *Fair Wages Resolution* (above); the machinery for fixing minimum wages in the road haulage industry was repealed in 1980; the provisions for extending recognised terms and conditions to unorganised sectors of a trade or industry were repealed in 1980; in 1986 the wages councils (above) were slimmed down so as to exclude young people under 21 from statutory protection and to restrict councils to setting only a minimum hourly rate and a single overtime for adults within their scope, and in 1993 they were abolished altogether. Job security has been diminished by increasing the qualifying period for unfair dismissal rights from 6 months to 2 years. The right of women to return to work after pregnancy and confinement was restricted in various ways, although the *Pregnant Workers Directive 92/85/EC* has now established certain minimum standards. Many changes have been made in the social security system, which have the effect of imposing a powerful discipline on workers to hold down their jobs or seek low-paid employment if unemployed. This has included extending the period of disqualification for *'voluntary'* unemployment from 13 to 26 weeks, compelling unemployed persons to seek employment outside their normal occupation after 13 weeks, and requiring benefit recipients to be actively seeking work. The *Jobseekers' Allowance*, which replaced unemployment benefit in 1996, may be lost if the jobseeker fails to carry out any direction by a local government officer, for example to work at a wage which the jobseeker considers to be too low.

The process of *'lifting the burden'* on business has included the removal of restrictions on women's working hours and on men's hours in bakeries, and the repeal of restrictions on the hours and conditions of young people, the removal of licensing requirements on employment agencies and employment businesses, the deregulation of labour supply in the docks, and a range of other measures aimed to *'individualise'* labour relations.

CHAPTER II: INSTRUMENTS - OUTLINE OF SOURCES OF REGULATION

2.1 Constitutional Law and Social Rights

The Parliament of the UK can enact any law on any subject; even the rules and conventions of constitutional law can be changed by ordinary legislation. This means that there are not the formal restraints against encroachment on individual liberties which exist in most other democracies. There are no entrenched rights, far less *'social'* rights to associate in trade unions and to strike. The *European Convention on Human Rights* (ECHR) and the *European Social Charter* (ESC) and various international instruments which recognise certain minimum civil and social rights are not directly enforceable in the UK. Concern over issues such as the denial by the Conservative Government of the right to belong to independent trade unions at *General Communications Headquarters* (GCHQ) in 1984, and earlier legislation by a Labour Government permitting compulsory trade union membership, has led in recent times to pressures for some limitation on executive and parliamentary power and for the formal entrenchment of basic rights. The *abour Party* has promised that, if elected to power in 1997, it will introduce legislation incorporating the ECHR into domestic law. More radical proposals, for a written constitution and entrenched *Bill of Rights*, are unlikely to be implemented in the foreseeable future.[13] On the both sides of industry, there remains deep hostility against transferring the resolution of disputes from the industrial and political spheres to the judicial sphere, which would be a consequence of constitutionalising fundamental rights.

2.2 Statute law

Acts of Parliament are the main source of legal regulation of working conditions. Over 50 general Acts on employment have been passed since 1970. Labour law is not codified, but there has been some consolidation of statute law. The two principal consolidation Acts currently in force are the *Trade Union and Labour Relations (Consolidation) Act 1992*, which deals with collective labour relations, and the *Employment Rights Act 1996*, which is concerned with individual rights. In addition, there is a large number of general rules, orders and statutory instruments made by Ministers under parliamentary authority, most of these being post-1970. In addition, there are hundreds of Acts and instruments applying to specific employments. The complexity of legislation

13. See e.g. proposals by the Institute for Public Policy Research, *The Constitution of the United Kingdom*, London, 1991.

has frequently ben criticised, not only by the judiciary, but also, in connection with legislation on strikes, by the *ILO Committee of Experts on the Application of Conventions and Recommendations*[14].

Most legislation applies throughout Great Britain (England and Wales, and Scotland), and similar legislation has in most cases been applied (under separate statutory instruments) in Northern Ireland. There is no form of devolved regional government, and local authorities have very limited competence in employment matters (e.g. certain regulations regarding the employment of children).

Legislation is of three main types.

- *Regulatory*, directly affecting the payment of wages, health and safety at work, the terms of the contract of employment and termination of employment. The policy of deregulation since 1979 has involved the repeal or modification of some of this legislation (e.g. hours of work of women and young persons). It is now mainly to be found in the *Employment Rights Act 1996*, and the *Health and Safety at Work etc. Act 1974*.
- *Auxiliary*, supporting the collective bargaining process (much of this has been repealed since 1979, e.g. on fair wages, wages councils, and trade union recognition), and assisting in the resolution of disputes (especially the *Advisory, Conciliation and Arbitration Service* (ACAS) and *Central Arbitration Committee* (CAC)). The main legislation is the *Trade Union and Labour Relations (Consiolidation) Act 1992*. Another important source has been EC law on consultation with workers' representatives, usually implemented by statutory instruments made by Ministers under the *European Communities Act 1972*.
- *Restrictive*, defining what is allowed and what is forbidden in the context of strikes and lock-outs (e.g. statutory immunities from liability in tort, and control of trade unions). This is mainly to be found in the *Trade Union and Labour Relations (Consolidation) Act 1992*.

Two broad approaches to the interpretation of legislation can be found in the case law. The first is the purposive approach by which the court gives effect to the policy of the statute and the intentions of Parliament. The second approach is to ascertain the true meaning of the words used in the statute as the best guide to the intention of the lawgiver. If the words of the statute are unambiguous, then those words must be expounded in their natural and ordinary sense and the policy of the Act is irrelevant. These two approaches often converge and lead to the same conclusions. However, reliance on textual and linguistic analysis has traditionally been an important feature of British statutory interpretation. British legislation usually specifies in detail the application of the law in particular circumstances. This contrasts with the approach in Continental and EC legislation which express only broad objectives. British judges have, until fairly recently, found it difficult to adjust to the Continental tradition when dealing with the interpretation of Community obligations in the sphere of employment and discrimination law However, the House of Lords (as highest court) has been developing a more purposive approach especially in the context of sex discrimination legislation.

14. Report III, Pt 4A, p.241.

2.3 Codes of Practice

These are issued to provide guidance on the application of various statutory provisions, and sometimes go beyond the statute. There are two main types:

- *Codes made by the Secretary of State*, after approval by resolution of each *House of Parliament*. This includes the *Code of Practice on Picketing* (revised) and on *Trade Union Ballots on Industrial Action* (revised).
- *Codes made by regulatory agencies*. This includes the *ACAS Codes of Practice on Disciplinary Practices and Procedures in Employment, Disclosure of Information to Trade Unions for Collective Bargaining Purposes, Time Off for Trade Union Duties and Activities (revised)*, the *Equal Opportunities Commission Codes of Practice for the Elimination of Discrimination on Grounds of Sex or Marriage*, and on *Equal Pay*, and the Commission for Racial Equality's *Code of Practice for the Elimination of Racial Discrimination*.

A failure on the part of any person to observe the provisions of a Code does not of itself render him or her liable to any proceedings, but the Code is admissible in evidence, and any relevant provision must be taken into account by the court or tribunal. There are also important self-regulatory Codes, such as the TUC *Disputes Principles and Procedures* (known as the *'Bridlington'* principles) which are not intended to be legally enforceable, and whose effect has been restricted by legislation.

2.4 Common law

Those matters which are not covered by legislation are the domain of the common law, which is to be found in the decisions of the courts. As *"the law behind the law which is enacted by Parliament"*[15], the common law has a powerful impact on the interpretation of employment legislation. Its importance has grown, rather than diminished, with the growth of legislation. For example the law relating to industrial action is based on judge-made economic torts, whose application in the sphere of *'trade disputes'* is restricted by statutory immunities. This gives much scope for judicial creativity both in developing the torts, and in limiting the application of the immunities, so having a crucial impact on the freedom to strike.

The focus of the common law is on the relationshp between the individual employer and employee, characterised in terms of the contract of employment. The contract of employment remains the *"cornerstone of labour law"* in the UK[16]. The common law contract of service differs in its origins and development from the contract of employment in civil law systems. It originated in the status of *'master and servant'*, and this has had a lasting impact on the modern law. In particular, the patchy and inadequate coverage of legislation which applies to the contract of employment in the sense of a *'contract of service'*, arises from the limited scope of the concept of *'service'*. Moreover, the courts make

15. LORD WEDDERBURN, *The Worker and the Law*, (3rd ed), p.648, citing HAROLD LASKI.
16. See: B.A. HEPPLE, (1986) Industrial LJ 69.

use of the technique of *'implying'* terms into contracts. Since everyday obligations, such as the speed of work, are implied from what the employer has laid down and applied in practice either formally or informally, these implied terms tend to favour the employer. The civil law idea of positive regulation of the contract by imperative norms is alien to the common law, with the result that parties may contract out of collective agreements. In general, however, it is forbidden to contract out of employment protection legislation.

In regard to the development of the law. It is important to note that a specialised system of industrial tribunals has existed since 1965 to deal with disputes under a variety of legislation including unfair dismissal and redundancy and anti-discrimination statutes. They also have jurisdiction to deal with some contractual disputes. There is an appeal on questions of law to the *Employment Appeal Tribunal* (EAT) which covers the whole of Great Britain. (In Northern Ireland, appeals go direct to the Northern Ireland *Court of Appeal*). From the EAT there may be a further appeal to the *Court of Appeal* (England and Wales) or *Court of Session* (Scotland). From these courts there may be a final appeal, with leave, to the *House of Lords*. The industrial tribunals consist of a legally-qualified chairman and two industrial members from panels nominated respectively by employers and trade union organisations. The industrial members are expected to reach their decisions as impartial judges, but to do so on the basis of their specialised knowledge and experience of labour relations. The EAT has a similar composition, with a *High Court* or *Court of Session* judge presiding and sitting with industrial members. So the expectation is that *Acts of Parliament* will be construed *"so as to give effect to good industrial relations rather than the contrary"*[17].

Questions of employment law may also come before the ordinary courts in respect of:

(1) actions for damages and other remedies for breach of contract;
(2) actions in tort (delict) the most important of which are injunctions (interdicts) and damages in respect of unlawful industrial action;
(3) actions for personal injuries and death arising from industrial accidents and diseases.

The *High Court* and the *Court of Session* have a general supervisory power over inferior tribunals and over administrative action. Although there is no separate system of public law in the UK, and no administrative court as such, a special procedure by way of judicial review has to be followed where the actions of the executive are called into question. It will be observed that there is no specialist labour court dealing with collective labour disputes. Claims by trade union members or non-members about the conduct of trade union affairs usually go to the *High Court* or *Court of Session*.

2.5 Collective agreements

A unique feature of collective agreements in the UK, in comparison with other Member States, is the very weak system of enforcement. There is no labour inspectorate charged with administration of labour standards. The agreement itself usually does not have contractual effect. This is because of a statutory presumption (codifying the common law) that collective agreements are not intended to have contractual effect unless the parties agree otherwise in writing (s. 179 *Trade Union and Labour Relations (Consolidation) Act 1992*). Very few agreements have been made which are expressed to be legally binding. This absence of contractual effect has created problems in the application of EC employment and equality Directives. In infringement proceedings in 1984[18], the UK Government argued that the non-binding character of collective agreements removed them from the field of application of article 4(b) of *Directive 76/207/EC*. Mrs Advocate-General Rozes, favoured the Commission's position that the Directive was intended to create a legal safeguard against discrimination in agreements, *"in particular by reason of the requirements of clarity and legal certainty"*. The *European Court of Justice* rejected the UK Government's argument, and held that the Directive *"covers all collective agreements without distinction as to the nature of their legal effects which they do or do not produce"*. The Court recognised the important *de facto* consequences of collective agreements, despite their non-enforceability. Following this reasoning it may be argued that Article 3(2) of *Directive 77/187/EC (Transfers of Undertakings)* places a legal obligation on the transferee of an undertaking to observe the terms of a collective agreement, irrespective of the non-enforceability of the agreement under UK domestic law. However, the implementing UK *Transfer of Undertakings (Protection of Employment) Regulations 1981*, appear to preserve the non-enforceability of collective agreements as against the transferee of an undertaking.

Although the collective agreement does not usually have contractual effect in the UK, appropriate terms of the agreement may have normative effect by virtue of being expressly or impliedly incorporated into the individual contracts of employment of relevant employees, whether or not members of the union/s which negotiated the agreement. These employees can individually enforce their contracts by legal action. Case law has established that if the employer unilaterally withdraws from the collective agreement, the collective agreement may remain part of the individual contract because these terms can be varied only with the employee's express or implied consent. The consent may be implied if the employee continues to work without objection to the altered terms. Moreover, it remains open to the employer to change the terms incorporated from the collective agreement by terminating the individual contracts (with notice) and offering to re-employ the relevant employees on new terms. If the employee has been continuously employed for two or more years he or she may be able to complain that this is an unfair dismissal, but in most cases, provided the employer has consulted the employees or their representatives and the new terms are such as could be required by a *'reasonable'* employer, the industrial tribunal is likely to find that the *'dismissal'* was not unfair.

It can be seen that individual enforcement of the collective agreement is likely to prove difficult. It may be difficult to *'bridge'* the gap between the individual contract and the

17. *TGWU v Ledbury Preserves (1928) Ltd* [1986], Industrial Relations Law Reports, 492, p. 495.

18. Case 165/82, *Commission v United Kingdom* [1984], Industrial Cases Reports, 192.

collective agreement because of the need to show that there is an express or implied term or custom which allows incorporation. It may, then, be problematical as to which terms in the collective agreement are *'appropriate'* for translation into the individual contract, particularly in the case of procedural clauses which are collective in character. Perhaps most important of all, the common law, in contrast to the civil law systems, does not recognise the distinction between *'imperative'* and *'optional'* norms of the law of contract. This means that a collective agreement will not be construed as containing compulsory minimum terms of the individual contract. The seriousness of this defect in the common law has become obvious at a time when there is no longer any statutory mechanism for applying *'recognised'* (i.e. collectively agreed) terms to those employers who are not observing collective agreements. Employers have succeeded in not a few cases in cutting wages or otherwise breaking collective agreements by the simple expedient of terminating individual contracts and offering re-engagement on unilaterally imposed terms.

2.6 Custom and practice

Custom and practice have tended to become less important sources of regulation as working practices have been formalised. However, they may still be relevant. For example, when ascertaining the terms of individual contracts of employment courts and tribunals are willing to incorporate customs which are reasonable, certain and well-known. A somewhat different type of custom and practice developed in manufacturing industry in the 1950s in the form of informal workplace bargaining, displacing national agreements. This was increasingly recognised as an important source of terms of employment. In the past few decades workplace bargaining has itself become increasingly formalised.

2.7 International law

It is a general principle of the legal systems of the UK that treaties are not self-executing. Accordingly, international law has no direct effect on the regulation of working conditions until incorporated by Act of Parliament.

The UK is a founder member of the *International Labour Organisation* (ILO). The general policy of the UK has been not to ratify ILO Conventions unless domestic law and practice are in conformity with the international standards in question. Before 1979, the UK had ratified over 80 Conventions. Since then few Conventions have been ratified, and several have been denounced so that changes could be made in UK law which are inconsistent with the denounced Conventions. Those denounced include the *Labour Clauses (Public Contracts) 1949* (No. 94) preparatory to the repeal of the *Fair Wages Resolution*; *Minimum Wage-Fixing Machinery 1929* (No 26) preparatory to the *Wages Act 1986*; *Protection of Wages 1949* (No 95) also preparatory to the *Wages Act 1986*; *Night Work (Women) (Revised) 1937* (No. 41) preparatory to the *Sex Discrimination Act 1986*; and the *Underground Work (Women) Convention 1935* (No 45). preparatory to the *Employment Act 1989*. It is to be noted that the UK has not yet ratified the *Discrimination (Employment and Occupation) Convention 1958* (No 111). In recent years, several complaints have been made by national and international workers' organisations to the ILO Governing *Body's Committee on Freedom of Association* (e.g. regarding the unilateral suspension of the *Civil Service Pay Agreement (1981)*, the ban on trade union membership at GCHQ (1984), and the ending of collective bargaining for teachers (1987). The *Committee of Experts on the Application of Conventions and Recommendations* has also invited the UK Government to amend certain legislation to comply with Conventions on freedom of association and the right to organise.

The UK has ratified the *European Convention on Human Rights and Fundamental Freedoms* (ECHR) and recognised the competence of the *European Commission on Human Rights* to receive petitions. Two cases of particular importance to the UK, were those of *Young, James and Webster*[19], in which the *European Court on Human Rights* held, by a majority of 18-3, that the dismissal of 3 British Rail employees for refusal to join a particular union in accordance with a closed shop agreement, was a breach of *Article 11* of the Convention, and the *GCHQ case (1986)*, in which the Commission ruled that the petition was inadmissible on the grounds that the workers at GCHQ were part of the *'administration of the state'* and that the prohibition of membership was a *'lawful restriction'* under *Article 11(2)* second sentence. The first decision was used by the Conservative Government to justify its policy of reversing the previous Labour Government's legislation on the closed shop, under which the case arose.

The UK has also ratified the *European Social Charter* (ESC), and accepted all numbered paragraphs except art. 2(1) (working hours), 4(3) (equal pay for work of equal value), 7(1) (age of admission to employment), 7(4) (working hours of persons under 16), 7(7) (3 weeks' holiday for persons under 18), art 8(2) (dismissal during maternity leave), 8(3) (time off to nurse infants), 8(4)(a) (regulation of night work by women), 12(2) (social security standards), 12(3) (progressive raising of social security), 12(4) (foreign nationals' social security rights).

2.8 Conflict of laws

Judge-made case law is the most important source of law in this field. Three issues may be distinguished.

1. *Jurisdiction.* This depends solely on procedure and not upon nationality, residence or domicile. So far as proceedings in the *High Court* are concerned so long as a writ of summons has been served upon a person who is present within the jurisdiction, in accordance with the rules of procedure, he or she is subject to the power of the court even though he or she is a foreigner and despite the fact that the cause of action has no factual connection with England. This basic common law rule has been modified by Acts of Parliament and rules of court which give a discretionary power to a judge to authorise service of a writ of summons upon a defendant abroad in certain cases (e.g. where a contract was made within the jurisdiction).
2. *Choice of law.* This depends on rules developed by the judges to determine which system of law governs a

19. Series A, vol. 44, 4 *EHRR* 38 (1982).

contract or tort (delict) or other issue. The details can be found in specialist commentaries[20].

3. *Application of statutes.* An important feature of judicial interpretation of statutes in the UK is that the courts have refused to apply to statutes the ordinary criteria of private international law. In other words, instead of regarding the territorial scope of statutes as being co-terminous with the proper law of the contract, labour legislation has generally been confined in its operation to work done within the territorial boundaries of the UK. Most employment legislation is expressed to apply only to those employees who under their contracts of employment *'ordinarily work'* in Great Britain.

2.9 Hierarchy and interplay of sources

There is no formal hierarchy of sources in the UK, except that legislation may override the common law. There is, however, a general principle of statutory interpretation that Parliament does not intend to interfere with common law rights. This includes the presumptions that, in the absence of express words or necessary intendment, statutes are not to be interpreted so as to:

(a) restrict access to the ordinary courts;
(b) abrogate existing contractual rights; or
(c) deprive a person of property rights without compensation.

The second and third of these presumptions have led UK courts and tribunals to give narrow interpretations to Community obligations and to UK statutes on working conditions.

Because legislation has developed in parallel and often independently of the common law contract of employment, the relationship between statutes and the contractual employment relationship is complex. Some statutory rights operate wholly outside the contract of employment (e.g. breach of the *Health and Safety at Work etc. Act 1974*) may be subject to criminal prosecution or, in some cases, civil actions for breach of statutory duty in tort, but are the statutory duties are not themselves part of the contract). In some cases, statutory and contractual rights exist side by side (e.g. guarantee payments for workless days) and overlap is avoided by provisions in the statutes for set-off of sums of money awarded under the statute against sums of money due under the contract, or by the creation of composite rights allowing the employee to claim whichever right is more favourable. Some recent legislation expressly provides that the rights created take effect as a compulsory clause of the contract (e.g. the equality clause in respect of equal pay for men and women). Yet other statutes are silent on this point, leaving it to courts and tribunals to decide whether or not rights arise under the contract. This has on occasion led to the employee being deprived of statutory protection (e.g. protection from unfair dismissal is lost is the contract is tainted with illegality because of an agreement to defraud the Revenue).

20. For a brief account, see: B.A. HEPPLE and S. FREDMAN, *Labour Law and Industrial Relations in Great Britain*, Deventer, Kluwer, 1986, pp. 68-72.

CHAPTER III: INDUSTRIAL ACTION AND METHODS FOR CONFLICT RESOLUTION

3.1 The decline in strike activity since 1980

In the 1980s and 1990s there has been a sharp decline in the incidence of strikes. In 1994, only 278,000 working days (13 per 1,000 employees) were lost due to strikes, the lowest number since records began in 1891. In 1995, there were slightly more days lost, 415,000 (19 per 1,000 employees), but this was still well below the peak of 29,474,000 in 1979 (1,272 per 1,000 employees). In 1994, 107,000 workers were involved and in 1995, 174,000, compared with 4,608,000 in 1979. The very high number of days lost in 1979 was mainly due to a major strike by engineering workers. In 1984 and 1985 a high number of days was lost due the miners' strike. Since 1990, large strikes have become very infrequent. Strikes which last for longer than 3 days are rare. Since the mid-1980s strikes about immediate workplace issues such as allocation of work, disciplinary measures and working conditions and supervision, have outnumbered strikes about pay issues. As pointed out earlier, the United Kingdom did not have a formalised system of works councils for dealing with such issues, and the extent of shop steward organisation at the workplace has been declining.

The lower incidence of strikes is due to many causes, including: technological and structural changes, the changing composition of the workforce, leading to greater fragmentation; recession and declining employment in strike-prone industries notably mining, docks, and car production; the reduction of inflation haswhich reduced pressures for higher wages; the decline of the power and status of trade unions; and new laws which have severely discouraged strikers and their unions. The effect of the requirements, introduced in the early 1980s, for pre-strike ballots is ambivalent. The proportion of ballots in favour of strikes rose from 78% in 1985-86 to 95% in 1992[21]. Yet most strike ballots do not result in action, because management, faced with the clear signal of solidarity, settles the dispute[22]. The law has had a significant impact on secondary boycotts, secondary picketing and sympathy strikes which have almost disappeared[23]. Despite the stringent imposition of responsibility on trade unions for authorised (i.e. official) industrial action, two-thirds of cases of strike action by manual workers in 1989-90 and well over nine out of ten cases of strikes by non-manual workers were made official by unions[24].

Since 1990, it has been possible to make selective dismissals of unofficial strikers, and trade unions risk legal action if they organise solidarity strikes in support of such dismissed strikers.

3.2 Other forms of industrial action

In addition to all-out stoppages of work, there are many other forms of concerted pressure. These are not recorded in official statistics, but workplace surveys indicate that non-

21. S.DUNN and D.METCALFE, *Trade Union Law since 1979*, in: *Contemporarty Industrial relations* (ed. IAN J. BEARDWELL), p. 84.
22. J.ELGAR and B.SIMPSON, in: *New Perspectives on Industrial Disputes*, (D. METCALF and S. MILNER eds) London, 1993.
23. N.MILLWARD et al, *WIRS 3, pp.* 289-292.
24. *Ibid.*, p. 296.

strike action is about twice as common as strikes, and has been declining more slowly than strikes[25]. Such action includes bans on overtime working, go-slows, and *'working to contract'*.

3.3 Machinery for conflict resolution

Most disputes in the UK are not processed through machinery provided by the state. They are settled informally through workplace procedures and joint industrial bodies. Parliament has encouraged the growth of voluntary procedures. For example, employers of 20 or more employees are obliged to give every employee a note specifying disciplinary and grievance procedures applicable to each employee[26]. Another example, is that officers of ACAS (below) must have regard to the desirability of using voluntary procedures before intervening in individual or collective disputes. There is a wide variety of voluntary procedures. Most involve a series of stages, each with time limits, and if these fail to resolve a dispute the matter is then referred to an outside body or individual for conciliation, mediation or arbitration. The arrangements for arbitration usually envisage a joint rather than unilateral reference. In recent years there has been increasing use in voluntary agreements of pendulum (last-offer) arbitration.

It is to be noted that in the UK the distinction, often found in other systems, between disputes of right and disputes of interest, has little practical relevance. The reason for this is to be found in the dynamic system of collective bargaining which has traditionally been characteristic of the UK, as distinct from the static or contractual method. Both forms of dispute may be referred to conciliation or arbitration. Despite the shift in bargaining from national to company or workplace level in the private sector, decentralisation and contracting-out in the public sector, and the growth of single union agreements with arbitration clauses, there does not appear to have been any greater use of a distinction between disputes of right and disputes of interest. Disputes over statutory rights are mainly dealt with by the industrial tribunals.

The *Advisory, Conciliation and Arbitration Service* (ACAS), is the most important machinery provided by the state for dispute resolution. Since 1974, it has had the general duty to improve industrial relations, in particular by the settlement of *'trade disputes'*. Originally it also had the specific duty to encourage the extension of collective bargaining and the development and reform of collective bargaining machinery, but this objective was out of line with government policy after 1979, and was removed in 1993. ACAS took over from the (former) *Department of Employment* the functions of conciliation, arbitration and mediation. It is a tripartite body, which is independent from government and not subject to direction by Ministers; it is expected to act impartially. It does not have powers of compulsion. ACAS provides facilities for settling collective disputes by conciliation, at the request of one or more of the parties or otherwise. ACAS involvement in such disputes was greater in the period of government incomes policies than at present. Each year between 80% to 90% of cases completed by ACAS result in a settlement or progress towards a settlement. ACAS may also, at the request of one or more of the parties to a dispute and with the consent of all of them, refer the dispute to arbitration or mediation by one or more outside persons or to the *Central Arbitration Committee* (CAC). Mediation differs from conciliation because the mediator may make positive recommendations, although the parties themselves must reach an agreement. Arbitration awards are not legally binding, unless the parties expressly agree in advance to this, but ACAS reminds parties that there is a longstanding practice of accepting awards. There has been a decline in recent years in ACAS referrals to arbitration. ACAS provides employers unions and workers with free advice on industrial relations; this occupies four times as many staff hours as collective conciliation. ACAS also has power to inquire into any question relating to industrial relations, even where no dispute is in existence or pending.

Another function of ACAS is to endeavour to promote a settlement of any complaint presented to an industrial tribunal in respect of unfair dismissal, unlawful discrimination and certain other statutory rights. This results in the settlement or withdrawal of a high percentage of complaints to tribunals.

The *Central Arbitration Committee* (CAC) was established in 1975 as a permanent tripartite arbitration panel maintained at state expense. It is the successor to the *Industrial Court*, established in 1919 and the *Industrial Arbitration Board* (1975). The CAC is not subject to any directions from a Minister. With the consent of all the parties ACAS may refer a dispute to the CAC for arbitration. Only a small handful of cases is received each year under this voluntary jurisdiction. The CAC had a number of powers of compulsory arbitration when first created but these have been whittled away, so that it is now left only with the power to arbitrate in disputes over disclosure of information for bargaining which is little used in practice (and may be removed if overnment proposals made in 1996 are implemented).

CHAPTER IV: THE NATIONAL SITUATION IN AN INTERNATIONAL CONTEXT

4.1 Essential characteristics

From the preceding account it can be seen that the regulation of working conditions in the UK has a number of unique characteristics in comparison with other Member States. Some of these may be summarised here.

There is no institutionalised system of workers' representation and workers' participation in decision-making.

Collective bargaining now determines the pay and terms of employment of less than 50% of the workforce, and in any event rests upon voluntary recognition of trade unions by employers and voluntary collective agreements which are usually presumed not to have contractual effect between the collective parties.

There is a relative absence of *'positive'* legal rights to support the voluntary system of collective bargaining and most of the *'auxiliary'* props to the system have been removed since 1980.

25. See: P.EDWARDS in: *Industrial Relations: Theory and Practice in Britain*, p. 443.
26. *Employment Rights Act 1996*, s. 3.

Regulatory legislation which directly affects working conditions is highly selective.

- There is an absence of entrenched constitutional civil and social rights.
- There is a weak system of legal enforcement of individual rights under collective agreements which are not treated as laying down compulsory minimum terms, nor is there any statutory mechanism for applying collective agreements to other employers in the industry. There is no right to be covered by a collective agreement or similar arrangement.
- Statutes tend to specify in detail the circumstances in which they apply, and the courts tend to rely on a general presumption that Parliament does not intend to interfere with common law rights.

4.2 The Community context

The main thrust of the deregulatory policies of the former UK Government was built around the weakening of trade unions and collective bargaining, through measures such as extensive privatisation of strongly-unionised public corporations and local authority services, the decentralisation of collective bargaining to corporate and plant level where unions are relatively weak in times of recession, and legislation which has severely restricted the freedom to organise, to bargain and to strike. In order to fulfil these policies various ILO Conventions and articles of the *European Social Charter* were denounced, regulation of working conditions at EC level opposed, the *Community Charter of Fundamental Social Rights of Workers* was not signed, and an opt-out from the *Maastricht Agreement* on Social Policy was secured. The changes which will have to be made within the UK in order to make these proposals feasible will include:

(1) the revision of existing legislation to give full effect to existing Community obligations;
(2) the creation of more effective remedies for breach of Community obligations;
(3) the acceptance by the UK of the spirit as well as the letter of such obligations;
(4) the establishment by law and practice of more effective machinery for workers' representation;
(5) the establishment of a right of workers to be covered by collective agreements;
(6) a general right of workers' representatives to be informed and consulted about major changes in working conditions.

The new UK government agreed at the Amsterdam Summit to participate in the Social Chapter and the new Employment Chapter, recognizing the importance of employment and social policies at European level, and meaning commitment to implement the measures so far adopted under the Agreement, such as the *European Works Council Directive*, and the *Parental Leave Directive*.

The Government has furthermore committed itself to:

- introduce legislation to institute a National Minimum Wage;
- introduce a statutory duty on employers to bargain with a trade union where 51 percent of the relevant workforce vote for this in a ballot;
- an Employment Rights (Dispute Resolution) Bill, with the aim to facilitate the resolution of complaints under employment rights law;
- support a Public Interest Disclosure Bill to give more effective protection against dismissal or other sanctions to employees who publicize malpractices which are against the public interest.

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