FACETS OF DANISH LABOUR LAW

BY

OLE HASSELBALCH

Traditionally, many students of labour law and industrial relations from outside Scandinavia have looked upon the Scandinavian systems of industrial relations as something of an ideal, a flattering view which not unexpectedly was also adopted by their Scandinavian fellows. These systems have been presented as collective solutions to the problems of the labour market based on firm and mutual recognition of trade unions and employers' associations giving rise to developments towards cooperation rather than towards confrontation.

This paper focuses on the industrial relations system on which the Scandinavian model originally was patterned, viz. the Danish system of collective bargaining.[1] It tries, however, to present a critical view of the Danish system in its present form and also to emphasize the labour law and social legislational aspects of the Danish industrial relations system.

An attempt will be made to analyse the development which has taken place within this field in relation to the problems of the 1980s. Does the Danish system still deserve its reputation? Is it viable enough to retain its basic qualities under the increasing pressures brought by economic recession, ambitious state intervention and supranational harmonization?

The question of the position of the legal scientist in relation to the challenge of the ever-changing pattern of industrial relations is also discussed.

1. THE DEVELOPMENT OF A COLLECTIVE SYSTEM[2]

1.1. *Emerging collective power*

The latter part of the nineteenth century brought a wave of new ideas into Danish society. The introduction in 1849 of a new constitution granting

[1] On Danish labour law in general, see Ole Hasselbalch, *Labour Law and Social Security in Denmark—Facts and Points of View,* 2nd ed. Copenhagen 1981, Per Jacobsen in *International Encyclopaedia for Labour Law and Industrial Relations* (Denmark), *idem.,* "Labour Law" in *Danish Law, a General Survey,* Copenhagen 1981, pp. 249 ff., and in *Jura Europae, Arbeitsrecht.*

[2] For more detailed information, see Walter Galenson, *The Danish System of Labor Relations,* Cambridge, Mass. 1952, Per Jacobsen, "Danish Collective Labour Law and Its Development in Recent Years", 22 *Sc.St.L.*, pp. 109 ff. (1978), Albert Kocik, *The Danish Trade Union Movement,* International Confederation of Trade Unions, Brussels 1961, and H. W. Arthurs, "Labour Lore and Labour Law: A North American View of the Danish Experience", *The International and Comparative Law Quarterly* 1963, pp. 247 ff.

democratic rights, including the right to organize freely, marked indeed a change of attitude in society that favoured employees' rights. Up till then organized strikes had been criminal acts, and even if strike organisers were rarely prosecuted, such a prohibition marked an attitude which left little scope for employees to improve their positions by means of their own power. In the employment relationship the employee side was indeed inferior.

The mid-nineteenth century saw new ideas within political as well as commercial life. Liberal ideas took over and within the labour market this meant that in 1858 the old guild system, including the traditional dependencies between employer and employee, was abolished. This led to an almost total liberalization of the employment relationship in the most common employment contracts, namely those of skilled and unskilled labourers. From now on the key to labour relations was the free contract. The ideological belief was that the best results for labour conditions would be achieved by letting the parties to the employment contract themselves negotiate the settlement of the terms of that contract.

In theory, of course, this mechanism might be expected to work perfectly. In practice, however, it is easy to see the weakness of the individual employee in his relations with the employer. It was only natural, therefore, that labourers associated in order to negotiate on a collective level and thereby gain collective strength. And it was a natural response to this tendency that similar attempts were made on the employer side to form proper counterparts in these negotiations.

The last part of the nineteenth century was a rather unstable period in Denmark.[3] The population of the cities grew and this again caused social unrest. Furthermore, modern industry came into being, slowly but surely involving greater numbers of workers in each workshop than had ever been seen before. But no system of social security had been developed to meet the social needs created by industrialization and no formula had been devised that would cover the relationship on the labour market. Therefore, all forms of self-help were the order of the day. And the parties involved in the labour market fought each other to the best of their ability, each one hoping to get the upper hand. It was not until 1899 that developments crystallized and took another direction.

After a large-scale conflict the two main organizations, the Danish Employers' Confederation (*Dansk Arbejdsgiver- og Mesterforening*) and the Confederation of Trade Unions (*De samvirkendes Fagforbund*, now *LO*) realized the necessity of finding a "modus vivendi". The conflict was settled by an agreement, the so-

[3] A description of the development of labour law in the EEC countries is on the way, *The Making of Labour Law in Europe* (general editor Bob Hepple).

called September Agreement (*Septemberforlig*), in September 1899. This agreement laid down certain fundamental rules for the relationship between the organizations on both sides. Thus the parties accepted each other, as well as the right of each side to work for its particular objectives. Procedural rules were introduced to assure that certain formalities were observed where the use of the industrial conflict weapon (strike, lockout, blockade or boycott) was concerned. The employers' right to "hire and fire", to lead and direct work and to require foremen not to join the ordinary unions was accepted, too. On the whole, it could be said that from now on forces on both sides moved in a more constructive direction. Attention was now focused on the legal tools for the fixing of labour conditions and the administration of the terms agreed upon, rather than on opportunities for destroying each other.

This early acceptance of unionization and the stable basis granted by a mutually accepted legal system for collective relations have proved their vital importance for the unions during the twentieth century. The remedies created in 1899 have been a keystone, not only for the development of the enormous power which the unions hold today compared with the state of affairs in most non-Scandinavian countries, but also for the progress of the Social Democratic Party, with which the LO has always been closely connected. In particular, the 1899 Agreement has been one of the vital preconditions for the high level of unionization which developed, so that today almost 90 per cent of blue-collar workers are in fact unionized.

Outsiders may wish to find reasons why this turning point in the parties' relations to each other marked by the September Agreement was achieved at such an early date, but no single explanation would be sufficient. One explanation, however, could be the traditional Scandinavian preference for "soft" solutions rather than for confrontation. Another reason might be that the Danish Employers' Confederation of that time was in fact dominated by smaller employers within the traditional fields of craftsmanship, in fact by people who were often closely associated with their employees and familiar with their problems and their way of thinking.

1.2. *Completing a legal system of collective relations*

However, not all the problems of the collective relationship were solved by the September Agreement. On the contrary, it soon proved that vital areas had been left open, such as for instance the questions related to the legal sanctioning of a breach of a collective agreement. What legal remedies were to be applied in such cases, and when such incidents occurred how should they be handled in practice?

The occasion for solving these problems came in 1908, when a new conflict

broke out. This conflict was settled with the assistance of the Minister for Internal Affairs. The Minister convinced the main organizations on both sides of the need to form a committee that would consider and draw up rules designed to prevent lockouts and strikes, and promote conciliation during industrial conflicts, etc.

The committee was headed by a distinguished lawyer, the Supreme Court Justice *Carl Ussing*. Following Ussing's advice the committee suggested several measures to be taken.

First of all, it recommended a sharp distinction between what were called conflicts of interests (*interessekonflikter*) and conflicts of rights (*retskonflikter*). The distinction introduced a system according to which no question relating to disagreements on matters of law should lead to an industrial conflict (strike and lockout, etc.). Thus, when a collective agreement had been made, disagreements on, *inter alia,* the interpretation of the agreement should be settled in a peaceful way according to legal procedures. Furthermore, the employee side should have easy access to an enforceable legal decision on claims for wages under the agreement.

Thus, when the terms had been agreed upon, a "peace obligation" applied, forcing the parties to take any disagreement on interpretation, as well as on other matters, to the Labour Court or to industrial arbitration. Even in cases where no provision had been made which applied to the concrete case, the collective agreement should be supplemented by the Labour Court. In short, industrial conflicts should arise only when there was no agreement at all – for instance, when the collective agreement had been terminated.

This was the "ideology" of the suggested system. Various procedures were recommended in order to realize these ideas. First of all, it was proposed to introduce into all collective agreements a standard grievance procedure (*Norm for Regler for Behandling af Faglig Strid*), rules which required the parties to the agreement to negotiate when disagreements came up and, eventually, to have the disagreement decided upon by a local arbitration tribunal (*faglig voldgiftsret*), set up within the trade in question. Furthermore, a bill was suggested that would set up a labour court (*Den faste Voldgiftsret,* later *Arbejdsretten*) to deal with cases of breaches of collective agreements, and to introduce a particular remedy of mixed damages and fines (so-called *bod*) to be applied by that court where it was found that such breaches of the collective agreement had occurred. Finally, a bill was suggested that would create a permanent conciliation board (*Forligsinstitutionen*). The aim of this bill was to set up a system of official conciliators who would try and settle "conflicts of interests" through conciliation, if possible.

1.3. *A general survey*

The Danish system of collective labour law was eventually completed according to the guidelines of 1910. To this day the ideas of 1899 and 1910 form the basis of Danish collective relations. Only minor adjustments and supplements have been made over the years. For instance, in 1947 the main organizations agreed on a framework of rules that dealt with cooperation within the individual enterprises and prescribed organs for such cooperation to be set up at the local level, what came to be called cooperation committees (*samarbejdsudvalg*). It is characteristic, too, that the framework created on a voluntary basis by the collective parties within the traditional fields of craftsmanship and industry has been regarded so realistic and flexible that it has now spread also to other fields, even to the public sector.

On this basis the organizations in Denmark have developed remarkable strength as well as effective legal tools. Their relationship surely has the characteristics of a legal system under which development takes place in an orderly way. This system is based on the autonomy of the parties backed up by the legislator. It grants the organizations involved a free right to fight for their respective goals and to launch industrial conflicts in order to achieve new legal positions—provided that no collective agreement exists. It should be added that there are no statutes granting the collective agreement general validity in respect of employers who have not signed it. A union is therefore protected only by its own strength and will only enjoy the agreement which it is able to enforce.

Thus, the freedom of the collective parties is extensive. On the other hand, while a collective agreement is in force only the remedies of the law are available in cases of disagreement concerning what the legal positions represented by the agreement really are. But, the system also gives the employee side easy access to the enforcement of claims for wages and other rights set out in the collective agreement. It secures industrial peace and it gives the employer free access to manpower and guarantees him the flexible use of manpower already employed.

If a new question arises during the period of validity of the collective agreement it shall be decided upon by the industrial courts operating within the collective system (the Labour Court and arbitration tribunals). The peace obligation even extends to the unwritten terms. Thus a collective agreement need not even be in writing. Oral terms and even unexpressed assumptions might carry the validity of a collective agreement, too. Therefore, the collective agreement is supplemented by the courts in accordance with the principles on which the collective relationship is based.

This system enjoys general acceptance and the result has been a relatively low level of industrial conflicts in Denmark. The effectiveness of the system has

had further consequences, too. Thus, the legislator has traditionally interfered very little in labour market affairs.

Even social protection has been based on initiatives taken by the collective parties, by and large backed by legislation. Thus, the Danish Holiday Act (*ferieloven*), the Act on Daily Sickness Benefits (*sygedagpengeloven*) and the Act on Supplementary Old-Age Pensions (*ATP-loven*) all have this starting point.

2. RISE OF THE PERIPHERAL GROUPS

The system sketched above, the system of collective labour relations, originally covered only the large groups of blue-collar workers within crafts and industry. In fact, this area was for a very long time the focus of attention of politicians as well as of lawyers with an interest in labour market affairs.

However, the peripheral groups also merited attention long before they had grown to their present-day size, and were to put the blue-collar workers and their organizations in the shade. Notice should in this connection be taken of the apprentices, who as early as in 1889 had a separate Act of Parliament (*lærlingeloven*) granting a more comprehensive coverage of the questions arising in the employment relationship. The same goes for agricultural workers and domestic servants (*tyende*), who had from ancient times had a statutory back-up which was revised and liberalized in 1854. Furthermore, there were statutes on seamen and on civil servants (*tjenestemænd*) in the public sector which conferred a more comprehensive right on the employer to decide wages and working conditions. These groups all lived on within their respective systems of statutory law and only slowly gained collective power. In fact, some of them have not even won that power today.

One quite special problem, however, concerned the salaried employees in private employment (*funktionærerne*). Only few positions corresponding to what we today call a salaried employee existed in late nineteenth-century Denmark. In consequence, the legislator traditionally did not pay much attention to these groups of employees. However, technical developments during the twentieth century and the growth of individual undertakings brought a change into this field so that today salaried employees are even more numerous than blue-collar workers.

Legal developments within the white-collar sector took a different direction. The mere fact that the salaried employees were so few in the late nineteenth century meant that they were not very likely to unionize. Furthermore, they had a closer connection with the employer and were therefore mentally less motivated in this direction. On the other hand, however, salaried employees might of course occasionally enter into disagreements with their employers

over salaries and other conditions of employment. But it is characteristic that in the absence of collective agreements such disagreements had to be solved on the basis of what could be assumed to have been agreed upon among the individual parties.

Since employment contracts were indeed scarcely made in writing, nor were very detailed, rights and duties within this field developed to some extent on the basis of a doctrine of implied terms applied by the courts. Thus it is interesting to notice how new legal positions gradually developed as a result of the way the ordinary courts constructed implied terms in the employment contract. This mechanism deserves closer examination.

Complaints from the employees' side within the white-collar sector might, typically, relate to such matters as terms of notice of dismissal. If such a question arose, the court had in principle to interpret the terms agreed upon by the parties. But if no terms of notice had been agreed upon, the court would look to rules which applied for similar groups employed in a close relationship with the employer. This means that the court, e.g., would decide that in the absence of any express provisions on the matter the terms of notice established for agricultural workers and domestic servants in the Act on this field (*tyendeloven*) would apply. If the salaried employee fell ill, it could moreover be assumed, e.g., that the monthly wage which was normally agreed upon in such employment relationships rather than hourly wages would mean that no deduction in the monthly salary had been agreed. The same construction might apply in other cases of absence from work which were not caused by negligence or fault of the salaried employee.

In this way a system of social security developed for the growing group of salaried employees, granting these payment even during military service and certain other rights, too. "Implied terms" were applied covering social risks. The tools for this were the remedies of the law of contracts—but in fact results were achieved which were very nearly what could properly be derived on the basis of interpretation of a free contract.

In 1938 an attempt was made by the Conservatives in Parliament to enact a comprehensive statute on employment benefits. The purpose of this was to lessen the inclination of the employee side to unionize and through unionization support the Social Democratic Party. The Social Democratic government, however, managed to give the bill a different emphasis. It turned out to be an Act on salaried employees giving statutory legality to rights that had already developed, but which now became mandatory. Since then, the Act (*funktionærloven*) has been supplemented by the provision of other benefits for salaried employees, giving the Act an identity of its own and giving salaried employees a social security level different from that enjoyed by blue-collar workers.

In this way a system of individual employment protection developed within

the field of salaried employees, a system independent of the collective system that had developed within the field of blue-collar workers. While on the blue-collar side rights and obligations were regarded as being vested in the trade unions and little regard was had for individual employment protection, on the salaried employee side everything was seen from the point of view of the individual. Moreover, it was not until collective bargaining became widespread in the white-collar sector that this split was recognized.

3. CHARACTERISTIC FEATURES

3.1. *A split legal discipline*[4]

This split in the basis from which modern Danish labour law emerged is still evident in the substantive labour law rules in force today. By statute a distinction is made between several categories of employees, in particular between blue-collar and white-collar workers. While the blue-collar workers traditionally depend mainly upon positions gained through collective bargaining, white-collar workers traditionally depend upon legislation and the terms of the individual employment contract.

This distinction creates a fundamental split in labour law as a legal discipline. Even if collective agreements deal with questions relating to individual employment terms, collective agreement matters have always been regarded as matters between the trade union and the employer. This means that collective agreement rules on individual employment matters are often poorly drafted since such matters have not attracted the attention of the parties to the collective agreements. On the other hand, individual employment law for white-collar workers has always been regarded as a separate part of labour law that was not even called "labour law", but rather the "law of salaried employees" (*funktionærret*). Legal writing within this field looked with suspicion upon collective relationships.

3.2. *The contractual background*[5]

Another characteristic feature of Danish labour law is the extent to which it has retained many of the general characteristics of the law of contract. Freedom of contract as well as contractual remedies are essential features of the

[4] See Ole Hasselbalch, *Arbejdsretlige funktioner* (Labour Law Functions), Copenhagen 1979 (with an English summary).

[5] See footnote 4.

Danish system. This characteristic is found within the "law of salaried employees", as well as within collective labour law.

Thus, pure contractual remedies form the basis of the collective system. The existing legislation within this field, e.g. the Act on the Labour Court, does not involve major amendments to the normal principles of the law of contracts. Such matters as the field of application of the collective agreement as well as its interpretation depend on considerations according to the law of contracts. Only the system for sanctioning a breach of the agreement has been changed by the introduction of the special fine (*bodssystemet*).

Furthermore, contractual freedom has remained a tool for the fixing of working conditions. A renewal of the collective agreements depends on free negotiations.

Thus, the legislator has traditionally been reluctant to intervene in the collective bargaining process and in the administration of the collective system. Nor has there been a tendency to interfere in the results agreed upon by the parties by introducing social protective legislation. Now, however, an opposite attitude seems to have been adopted—which will be discussed later on. It is, however, worth noticing that even when such intervention in the employment relationship has taken place the statute has normally been designed on the basis of the law of contracts.

As an example of this last feature, mention should be made of the Danish Act on Daily Sickness Benefits. This Act puts an obligation on the municipalities to pay a daily cash benefit if an employee is off work ill, provided that he is genuinely unable to work and does not consciously and unnecessarily prolong his period of absence. These few conditions and the one-sidedness of the obligations truly give the Act the characteristics of a "social" statute. However, for the first five weeks of absence the public coverage is only a subsidiary one: The employer shall pay a daily benefit directly to the employee as part of the employment benefit. But this obligation on the part of the enterprise is conditioned in a way which can only be explained in the light of the contractual relationship between employer and employee. Thus, it follows from the Act that a claim for a daily cash benefit cannot be put to the employer, but has to be directed towards the municipality if sickness already existed when the employee was taken on. This applies also to situations where the employee was not aware of his condition. Thereby it forms a clear example of implied conditions in the law of contracts. Similarly, employers do not have to pay if the illness is caused by gross negligence (*grov uagtsomhed*) on the part of the employee himself.

These statutes relate to the individual employment relationship. Even in a more general context this relationship displays the characteristics of the free contract. Thus, in the private sector as well as in public service (apart from

civil servants under the Civil Servants Act) the employers' right to terminate the contract is remarkably wide compared with what is the case in most European countries. The principal starting point is that the employer is entitled to terminate the contract. Only in the Act on Salaried Employees (and in the Seamen's Act, *sømandsloven*) are statutory rules to be found providing compensation for unfair dismissal in general. And even in the event of an unfair dismissal the statutes do not prescribe re-engagement. However, the Basic Agreement (which is the successor to the September Agreement) contains rules on unfair dismissals, as well as on re-engagement.

Apart from these rules on unfair dismissal only a very few bonds limit the employer's right to fire an employee at his own discretion. There are rules on employment protection in relation to the right of association. Moreover, limitations have recently been imposed based upon directives from the EEC (cases of collective dismissals, and sex discrimination).

On the surface this seems incompatible with the legal system of a modern welfare state. However, the contradiction is only superficial. The employee side is organized to a level where the unions feel that it is up to them to shape a proper development within the framework of collective bargaining. Protection against abuse of the employers' discretionary power lies in the collective power of the unions. So, in practice employers in general have no real possibility of abusing contractual freedom. In addition, the national supplementary network of social security has been created to protect those who drop out of the labour market. Mention has already been made of the Act on Daily Sickness Benefits, but mention could also be made of the Act on Unemployment Benefits (*lov om arbejdsformidling og arbejdsløshedsforsikring*). The unions have on the whole been interested in terms of employment which create the best possible basis for a high hourly income when the employee is actually in service. Employment protection may be kept at a low level because of the economic protection provided by the social security system.

In general this means that manpower costs are variable for the enterprise, although it could be discussed whether this system is in the long run cheaper for the employer or not. Calculations seem to prove that the employee, in fact, takes out more money per hour than employees in countries with a higher social security level in the employment relationship, such as e.g. Sweden. Even if the tax paid by the employee in Denmark is somewhat higher (due to the fact that the employers' contributions to national social security funds are more limited), the net income (after tax) of the Danish employee seems to be better than in most European countries.

Normal contractual mechanisms function also where the employment relationship has to be supplemented by "implied terms" through decisions of the courts. This has been discussed in relation to the development of new legal

positions of the salaried employees until the Act on Salaried Employees was passed. The same mechanism works also today outside the area covered by positive rules. Moreover, even where such statutory rules actually apply, they are often modified as a result of considerations of a contract-law nature. Sec. 13 of the Danish Holiday Act provides that time when the employee has been ill also counts towards paid vacations. However, the courts have decided that this shall not apply in cases where an illness is caused by the gross negligence of the employee, even if no such reservation is contained in sec. 13.

As has already been mentioned, such mechanisms operate also at the collective level when the collective agreement is interpreted and supplemented by the Labour Court or arbitration tribunals. The driving force is the principle applied when interpreting and supplementing a normal contract—maybe with a slight tendency to preserve established *de facto* positions, or at least not interfere too abruptly with such positions.

To this end a special device for the construction of collective agreements, *overenskomstkutymen* (custom and practice), has been invented. If a collective agreement has been executed in a particular way for some time, this practice forms an important contribution to the construction of the agreement. Evidently such practice need not be an old-established one. On the contrary, passivity quickly creates an assumption that the party subject to the practice has agreed that the practice does not constitute a violation of the agreement. Even if such practice is in contradiction to an express provision of the agreement, the construction might be in favour of the practice. Thus, if such a practice has lasted for a considerable time, it may be assumed that the parties have agreed to change the terms of the agreement according to what has actually been going on for years.

3.3. *Influence of the judges*[6]

As may be seen from the last-mentioned example, the collective agreement is a rather open instrument for the creation of new legal positions, not only as a consequence of the autonomy of the parties, but also as a consequence of the possibility that exists of supplementing the agreement with provisions not expressly agreed on by the parties.

This latter fact indeed gives an extraordinary degree of influence to the judges, particularly since the collective agreements in practice are often rather incomplete. Furthermore, if no guidance is to be found, for instance, in custom and practice within the trade, the judges have to take the lead from the overall principles of the collective system, and maybe even to formulate those princi-

[6] See footnote 4.

ples and objectives themselves. On this basis great numbers of specific cases have been solved over the years. Thus, the solution of many cases is arrived at solely on the basis of the wish to preserve the industrial peace between the parties during the period of validity of the collective agreement. Other leading principles are the employers' right to "hire and fire" or the employees' interest in a speedy and easily accessible dispute procedure on wages and other kinds of remuneration provided for by the agreement.

Thus, it could be said that judges even participate in the creation of the agreements between the parties. For when a judgment has been rendered, it becomes an integral part of the agreement—until the parties agree otherwise. This also means that it is more difficult to overrule such judgments and to create new leading cases than with regard to ordinary court judgments. The binding effect is stronger.

3.4. *Grievance procedure and cooperation as a legal tool*[7]

In addition to what has already been said, a final feature should be mentioned, namely that of the grievance procedure in labour law. Grievance procedure and other kinds of joint dispute resolutions between the parties at the national union level and between the parties within the individual enterprises form one of the cornerstones on which the labour relations system in Denmark rests.

Danish collective labour law constitutes a network of procedural channels which, so to say, filters the relationships of the parties. This means that many daily incidents are solved even before they reach the level of a disagreement in a legal sense. Consultations and negotiations take place at the collective level between employer and shop steward on almost any matter coming up at the level of the enterprise: wage rates, work assignments, etc., etc. If a solution is not found at this level each of the parties is entitled to invoke help from the organizations within the trade, *inter alia,* by referring the matter to negotiations at the national level. Most disagreements are in fact solved or decided upon at this level before any legal decisions are taken, e.g. before an arbitration tribunal. Even disagreements on the application of statutory law are dealt with within this system—but here of course the arbitration tribunal does not have jurisdiction if the problem is not solved through negotiations.

Furthermore, it is very common to set up joint cooperation committees within the individual enterprise (*samarbejdsudvalg*) on the basis of a special agreement on cooperation, and cooperation committees (*Samarbejdsaftalen*) be-

[7] See Ole Hasselbalch, *Worker Participation in Decision-making Processes,* Copenhagen 1981, and Jytte Thorbek, "Employee Participation, Public Shareholding for Employees, and State-appointed Representation in Danish Enterprises", *Journal of Business Law* 1973, pp. 382 ff.

tween the Confederation of Trade Unions and the Danish Employers' Confederation (or a similar cooperation agreement within other fields of the labour market). This agreement prescribes that the employee side shall participate in the making of general policy decisions within the enterprise as far as questions relating to the employees are concerned. Cooperation committees are compulsory in enterprises employing more than 50 workers—if one of the parties so demands. The task of the committees 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 enterprises. Moreover, they are to exercise co-determination on principles governing local working, safety and welfare conditions and to exercise co-determination with regard to the principles governing the enterprise's personnel policy. In this lies an obligation on the employer to strive for agreement on such questions. Furthermore, the cooperation committee has in accordance with the agreement a right to exercise co-influence—that is, a right to exchange points of view and proposals—in respect of policies affecting the day-to-day organization of production and work and in respect of implementation of any major changes in the enterprise.

The committee receives information from the management on the enterprise's financial position and future prospects. This information is the same as that made available to shareholders, and it must be presented in such a form as to enable the committee to understand the situation.

But the influence of the employees goes further than this. Within company law, provisions have been made granting the employee side representation on the supervisory boards (*selskabsbestyrelser*). In this way the employees of joint stock companies and similar companies participate in the general management of the firm—even if they do not control the majority vote on the board. By these tools of cooperation sources of disagreements on the shop-floor are diminished considerably and many problems are solved even before they reach the level of a legal dispute.

The idea of joint decision-making has spread to take place—formally and informally—between the industrial relations parties and the state.

State interests in labour market affairs have grown during recent years. Special attention will be paid to this feature later on. However, in this context it is worth noting that intensive consultations even take place between the industrial relation parties and state organs when new legislation is prepared. Thus, when government committees are set up to prepare such legislation, representatives of the organizations are normally included. Furthermore, the state organs rely to a very high degree on the expertise of the organizations. This means that the experience of the organizations of the problems on the labour market is utilized in new legislation, thus making it more relevant to

what is actually going on than would have been the case if such consultation and participation had not taken place.

Even within the field of the day-to-day administration of such legislation, a participation system is often introduced. Standing committees are often set up, including the collective parties in their work and granting them power to participate in the administration or administrative tribunals and enabling them to make preliminary decisions on how a particular statute is to be applied. For example, when the employer and the employee disagree on whether daily sick benefits should be paid by the enterprise, the disagreement can be taken to a special tribunal consisting of a representative of the Danish Employers' Confederation, a representative of the Danish Confederation of Trade Unions and a representative of the governmental agency which administers the system (*Sikringsstyrelsen*). But if these three disagree amongst themselves, each one is entitled to call for a judge to make the decision.

4. PROBLEMS OF THE EIGHTIES[8]

4.1. *The diffuse picture*

To the outside observer Danish labour law today presents a somewhat diffuse picture rather than one of an organized system, which on the whole must be attributed to the fact that the system has been allowed to develop, propelled by its own intrinsic forces. It forms a mixture of legislation, collective agreements, unwritten law, and principles derived from individual employment contracts.

Little by little, collective agreements and statutory social security provisions have been mixed up in a conglomerate whose ingredients are not harmonized. During this process the collective and the individual parts of labour law have become so intertwined that different sorts of rules now have to be administered in a common context to solve the concrete cases which arise. Therefore a system of legal priorities is applied according to which collective agreements shall give way to mandatory statutes, and the terms of the individual employment contract for their part shall give way to both. However, this does not always work out well in practice, so other priorities are often applied.

One of the main reasons for the impenetrability which characterizes the Danish labour law system today is that no overall guidelines have been brought to bear on the development of new legal positions and terms of

[8] See Ole Hasselbalch, "Arbejdsretsudviklingen" (Trends in Danish Labour Law) in *To debatindlæg* (Two Contributions to the Debate), with an English summary, Copenhagen 1980, *Et perspektiv* (A Perspective), with an English summary, Copenhagen 1981, and Ole Hasselbalch, Alan Neal and Anders Victorin, *A Perspective on Labour Law*, Stockholm 1982.

employment. Consequently, the rules relating to the employment relationship and collective relations have turned out to become what could virtually be called a "test bed" for all sorts of legal problems. Another reason for the complexity is the distinction between blue- and white-collar workers arising out of the Act on Salaried Employees. This distinction has all along created complications with the growth and increasing unionization of salaried employees, and the introduction of the collective bargaining system into the public sector.

4.2. *Developing social positions in statutory law*

It is in particular the development of a national social security system on the labour market based on statutory enactments that has caused problems in Denmark.

From the late sixties and onwards, the legislators' interest in labour market affairs grew slowly, but steadily. There was a steady stream of new acts on various subjects, such as collective dismissals, discrimination, transfer of enterprises, pregnancy leave, while the old ones were amended just as frequently.

Several reasons for this can be mentioned. The increasing competition between the political parties, membership of the EEC and a general increase in the demands for social security have all contributed. Whatever the reasons were, however, the fact remains that even though several new statutes have been introduced within this field, no common framework has been created to link these statutes together in a smooth-running mechanism. Nor has any consideration been given to the general goals to which the legal system should refer. Numerous specific problems have been dealt with in isolation from their broader labour law context. New acts have even been presented on the same subject by different ministries without any mutual coordination on their part.

This, of course, is bound to breed severe problems in the legal system. A great number of details have been regulated in new statutes. But the more detailed these statutes are, the more difficult it seems to be to reach precisely the appropriate decisions for the concrete cases that arise in practice. This has become a problem, since the creation of new legal positions by the legislator is not based on the same "nearness" to the needs of daily working life as are the solutions devised by the collective parties. Thus, the latters' conception of concrete fairness is often strangled by the "right"—i.e. the lawful—solution. This means that statutes are often "devalued" in the eyes of the general public compared with what was formerly the case.

Furthermore, it has proved very difficult to administer so many provisions. Because of its limited size and resources, Denmark has a rather weak "infrastructure" in the form of administrative capacity, which means that it is

difficult to create and maintain the tools necessary to deal with all the problems that arise in the context of the administration of very detailed statutes. In the collective system, as has already been described, disagreements are dealt with and settled at a very early stage. This also includes the possibility of solving the problems that arise by making a new agreement, even in spite of the existing collective agreement. No individual may question such a solution since the organizations control the making of the collective agreement. This goes even for rights already vested. Thus, according to the Labour Court Act, an organization is entitled to waive the claims of its members during the court hearing. Administering mandatory legislation is quite a different matter. The trade unions are obliged to try to get the most out of the statute in order not to be accused of miscalculating the opportunities available to them in the statutes. This means that the unions have to take any doubt which arises to the courts. Furthermore, it has proved virtually impossible to amend statutes which prove not to work well, if such amendments lead to even minor reductions in the rights and entitlements of the employee side. And such adjustments are of course often necessary if a smooth-running instrument is to come out of it.

4.3. *Problems within the field of collective bargaining*

But problems arise even within the traditional field of collective bargaining, particularly since the results of collective bargaining reached by the collective parties have become still more closely integrated into the social and economic policy of the government.

First, modern society has become more sensitive to the disturbances which might be caused by the use of the traditional tool for reaching collective agreements, namely the threat and actual use of industrial actions (strike and lockout). To the population in general this tool appears almost as a saurian reptile in the neat garden of the modern welfare state. This means that the threat of industrial action becomes less real, which also makes collective bargaining at the national level less effective, since both parties expect the government to intervene on one side or the other. In fact, during the 1970s the government has several times passed bills on the prolongation of collective agreements and has even introduced new conditions, all in the attempt to preserve industrial peace.

Secondly, the integration of the collective goals with the legislators' social endeavours means that many problems which were formerly solved through collective bargaining are today handled through social legislation. Consequently, the collective parties have less room for manoeuvre in their attempts

to find solutions. Thus, the balancing mechanism as the fundament of the original collective system cannot function in the same way as it used to.

Furthermore, a special problem has turned up due to the invasion of the public sector by the system of collective bargaining (apart from civil servants, whose number continues to diminish). The traditional system created in the private blue-collar field has been introduced here only with minor adjustments. The decisive step in this direction was a new Act on the Labour Court in 1973, granting general jurisdiction to the Labour Court within all professions and trades.

However, subsequent developments have—in the eyes of the present author—demonstrated that the central balancing mechanism for the collective system, namely that of industrial warfare, does not necessarily work out in the same way in the public sector as it does within private enterprise. Several factors deserve attention in this context. For instance, the policies of the government as an employer are often closely connected with the overall goal of employment policy to reduce unemployment in society as a whole. Those who receive jobs as a social welfare measure are rarely in a position to support their negotiations with the public employer by threatening to strike. Welfare recipients do not usually reject their benefits. At the same time, the employer side is not subject to the same economic pressures as the private employer, who works within normal market mechanisms. Within the public sector, the "market" mechanisms are political rather than purely economic. The public employer's willingness to agree to demands of the unions depends more on what is politically feasible than on the results of economic pressure. Finally, in the daily administration of the collective agreement, problems arise which are different from those in the private sector. For instance, the public employer as an organ of the state is normally subject to the rule of law. This means that he is not entitled to negotiate at the local level and to solve concrete disputes by "adapting" the collective agreement without the acceptance of his superiors. And his superiors will invoke general guidelines to be followed in order to secure that public administration is "legal" and does not exceed the limits marked out by the appropriation involved. This, of course, diminishes the flexibility with which rules can be adapted, which is one of the essential features of the Danish system of administering collective agreements.

Finally, at the general level some technical problems have emerged within the collective system. The development of new employee rights in the collective agreements, rights which often are spelled out in minute detail, does of course increase the need for provisions tailored for the individual enterprise. As a consequence a collective system is now developing at the enterprise level, resulting in different kinds of collective agreements with a lower degree of priority than that enjoyed by the general agreement within the trade. It is

certainly not easy to assess the legal validity of such enterprise agreements, nor is it easy to handle such agreements in a broader context when questions arise relating, e.g., to their termination and renewal.

4.4. *Death knell of pragmatism?*

It has become increasingly difficult to administer the collective system and the solutions traditionally utilized within this field of law. The economic recession means that collective bargaining can no longer be conducted on the basis of perpetual progress. At the same time, the collective solution has to be integrated into society's general social legislation and economic policy. The ambitions of the legislator have grown and are in fact more easily satisfied if new social rights and obligations can be presented in statutory law—even if the employees themselves eventually have to pay the cost in the shape of smaller advances in the collective bargaining field when wages are to be fixed. Finally, the Danish membership of the EEC is making itself felt. Demands from the EEC in the shape of EEC directives cannot be satisfied through the collective system or through the traditional pragmatic solutions adopted within the labour law system. For instance, "custom and practice" is not an appropriate tool for creating social rights and obligations of the sort required by such directives.

At the same time, the tools of the traditional system personified by the organization remain on the scene in all their potential power. Based essentially upon the ideas of collective struggle and the striving for new goals it is hard to see how these organizations will react to the labour market conditions which are now appearing over the horizon. It is obvious that they cannot deal either with the static solutions or with the artificial dynamic of legislation presented by the politicians in present-day political life. The question is how the enormous power of the organizations will be used in the years to come.

5. STILL AN IDEAL?

It is evident that many of the features sketched above can hardly be regarded as models for other legal systems. The gap between blue- and white-collar workers marked out in Danish statutes has certainly ceased to be relevant. And no lawyer would regard the automatic development of a legal system now taking place on the Danish labour market as an attractive prospect. On the contrary, it is likely to be viewed as disastrous in the long run. Nor will the unconsidered drive towards new social goals, which will at the end of the day have to be paid for by the employees themselves, be likely to stand up to objective criticism.

On the other hand, it is evident that some of the features and structures within Danish labour law still provide some interesting material.

In an area where legal systems develop ready-made solutions at a speed which can hardly be followed or appreciated by those who are to benefit from them, pragmatism and "grass-roots" initiatives should not be done away with in a hurry. And pragmatic solutions created at shop-floor level are in fact still an essential feature of the Danish system. This proximity to the problems channelled by the steering mechanisms provided by the existence of powerful labour market organizations forms a sound basis even for future developments.

It is evident that this approach to making dependable collective solutions should not be interfered with. The collective agreement in Denmark is still a reliable regulator even for the detailed adaptation of new legal positions and employment benefits. The problem, however, is that less and less room is being left for collective solutions. To the present author it seems remarkable that the EEC seems to choose to mark out in positive statutes new substantive rights rather than to facilitate opportunities of finding collective solutions to the problems by supporting the building up of organizations. Denmark is only a small corner of the EEC and therefore it will be difficult to argue the merits of the Danish collective system in a European context. And it will certainly be even more difficult to convince the big neighbours of the potentials of such a system when it has to function in a context other than the traditional Danish one. So, if the present development is allowed to continue, there is a danger that the EEC will destroy something valuable within this field of law.

The present author also wishes to stress the importance of the joint efforts of the collective parties within the legislative field. These are closely connected with state recognition of the collective powers, and are in effect a logical consequence of this recognition. The example provided by the Act on Daily Sickness Benefits has already been touched upon. Another example, the one provided by the Work Environment Act (*arbejdsmiljøloven*), will be discussed in somewhat more detail.

Within the field of the working environment all legislation has been amended on the initiative of the collective parties. In the mid-seventies, a new Act was launched as a framework to be supplemented through statutory instruments issued by the Minister of Labour Affairs in close cooperation with the collective parties. This means that all the details of the enactments are made subject to a preliminary decision at the collective level. The discussions ensure that the final text of the statutory instrument is relevant to the needs of daily working life and the practical possibilities of the parties on the shop-floor. But cooperation within this field takes place on an even broader scene. Labour environment boards have been set up within the different trades in order to follow developments and to put forward proposals for new or amended provi-

sions on the working environment, workers' consultations within the trade, etc. Even at the enterprise level a similar system has developed. Thus, special safety representatives (*sikkerhedsrepræsentanter*) are elected according to the Act and given special employment protection and the necessary training in matters relating to the working environment.

6. RESPONSE OF LEGAL SCIENCE

6.1. *The challenge*

The system sketched above presents a challenge to legal science. In all its complexity it calls for analysis and demands major skills from those who implement it.

The system contains a collective part created by the collective parties themselves and segregated in vital respects from the rest of the legal system. It differs also from the rest of the legal system with regard to the complexity of the legal relations involved. Not only the individual employer and employee but also the organizations form parties. Furthermore, decisions cannot be made with reference only to the private parties at the individual or collective level. Account must also be taken of the public interest involved, whether this is formulated in legislation or not. Thus, several actors are on the legal stage when concrete cases are to be solved.

This field of law forms a melting pot out of which new developments crystallize. Labour law is dynamic, carrying perpetual demands for new rules and regulations. Moreover, legal positions develop to a large extent outside the normal procedure of lawmaking, namely that of legislation initiated by the political parties. The will and the needs of the labour market parties have throughout the years been decisive, even within the statutory field. Mention may be made, too, of the fact that the need for a functioning daily administration has led to the development of what could be called "administrative" rules in the statutory field. By this I mean guidelines not necessarily based on statutes, but rather on practical day-to-day needs, guidelines to be followed by the administration, in contrast to what is accepted as valid law according to jurisprudence. Such rules guide new developments—but might be hard to cope with within the traditional system of law.

In spite of these challenges Danish labour law traditionally has not been subjected to much research.

6.2. *Legal writing*

Traditionally legal writing falls into certain categories of law. Writers are specialists in various fields. The predominant categorization of legal writing

and legal teaching is a systematic one—it is divided into private law and public law, subjects which in their turn are subject to further categorization. Thus, private law is, *inter alia,* divided into the general law of contract and the law of contracts, the latter being subject to further classification into various types of contracts, with a possible regrouping of various contracts into new subjects such as intellectual property law, transportation law, etc.

However, during recent years a functional approach towards a classification of law has become increasingly common. What is characteristic of the functional approach is a tendency to group subjects together according to their field of application in society. In certain relationships the interests of the parties are affected not only by the rules of private law, but also by rules of legal procedure, administrative law rules and even criminal law rules.

In many countries labour law is regarded as a typical subject suitable for a functional classification. The relationship between employers and employees is governed not only by the two principal contracts found in this field—the employment contract and the collective agreement—but also by public law rules such as rules on the working environment, national insurance benefits and employers' contributions, procedural law rules applicable in disputes, as well as criminal law rules, e.g. on bribes and embezzlement. One may describe the functional approach as one of applying a personnel management view or as an approach inspired by that applied in industrial relations studies. However, this functional approach has not always been applied and it seems that in Denmark it has not even been accepted yet.

Legal writing in the late nineteenth century on labour law is characterized by the systematic approach. Thus, in 1897, Julius Lassen, a famous professor in the University of Copenhagen, published a handbook on the law of contracts (*Håndbog i obligationsretten, Speciel del*), which contained a chapter on the employment contract. The chapter was later rewritten by Lassen's successor, Professor Henry Ussing, and a similar chapter appeared as late as 1945 in Ussing's book *Enkelte kontrakter* (Specific Contracts). At that time the work done by Ussing, with its emphasis on the employment contract, was certainly not comprehensive or even representative of labour law in view of developments in, above all, the collective field.

In the collective field, however, other writers appeared on the scene. Reference has already been made to the brilliant practical work of Carl Ussing, a Supreme Court Justice, later director of the National Bank of Denmark. Ussing published only short articles, but all of them belong to the heritage of Danish labour law.

In 1913, Fredrik Vinding Kruse, later Professor at the Copenhagen Law Faculty, published his dissertation *Arbejdets og kapitalens organisationer, retligt bedømt* (Legal Aspects of the Organizations of Labour and Capital), a subject

on the dividing line between labour law and the law of corporations, and in 1918 H. J. V. Elmqvist published his book *Den kollektive arbejdsoverenskomst som retligt problem* (The Collective Agreement as a Legal Problem). Early Danish writing in this sphere was inspired not only by the emergence of collective agreements but also by early German writing, e.g. by Sinzheimer. Similar writing also appeared in other Scandinavian countries, e.g. in Sweden (see, *inter alia,* Östen Undén, *Kollektivavtalet enligt gällande svensk rätt* (The Collective Agreement according to Swedish Law), 1912).

Modern writing in this field may be said to start with Knud Illum's book *Den kollektive arbejdsret* (Collective Labour Law), which was published in 1938. It was in effect a handbook on the Danish system of collective industrial relations based on thorough research of court decisions. From here on, Danish collective labour law acquires a strong national identity that has emerged from the careful deliberations of the industrial courts. Illum's book remained unique for many years. It was much appreciated among Danish practitioners and also served as an inspiration for other writers in Scandinavia, *inter alia* Folke Schmidt.

The last edition of Illum's book appeared in 1964. In 1973, Per Jacobsen published a book along the same lines, which was indeed intended to cover the field in the absence of new editions of Illum's book. Jacobsen, who is a lecturer at the University of Aarhus, has published two more editions of his book, the last of which contains 789 pages. He has also published a book on the lawful object of industrial disputes (*Konflikters lovlige formål*) as well as several other articles (see, e.g., 22 *Sc.St.L.,* pp. 107 ff. (1978)). Among non-academic writing mention should be made of Allan Rise and Jens Degerbøl, whose book *Grundregler i dansk arbejdsret* (Basic Principles of Danish Collective Labour Law) has appeared in many editions.[9]

The present author's main contribution in this field is *Arbejdsretlige funktioner* (Labour Law Functions), 1979.

As for legal writing within the field of the employment contract, mention should be made of H. G. Carlsen's book on salaried employees (*Dansk funktionærret,* 2nd ed. 1974). Carlsen, who is a barrister and a judge of the Labour Court, has also published a book on the history of salaried employees. The present author has published, *inter alia, Ansættelsesret* (Employment Law), 1975, *Arbejdshindringer* (Hindrances to Work), 1979, *Ansættelsesændringer* (Changes in the Employment Relationship), 1979, and *Loven om kollektive afskedigelser* (The Act on Collective Dismissals), 3rd ed. 1982.

[9] As for academic writing, again, one may mention Inger Dübeck, who published a book in 1979, *Arbejdsretten i støbeskeen* (Labour Law in the Melting Pot), in connection with her studies in legal history, and Walter Galenson, an American law professor who published a book on Danish collective labour law in 1952 (*The Danish System of Industrial Relations,* Cambridge, Mass. 1952).

6.3. *The need for a different approach*

As mentioned earlier, it is obvious that legal writing in Danish labour law developed along the lines of the traditional systematic approach. Furthermore, one may discern not only a tendency to regard solely collective labour law as labour law proper, but also a tendency to differentiate between writing concerned with salaried employees and writing concerned with blue-collar workers.

In the opinion of the present author, it is obvious that labour law research and writing conducted along the lines of this approach cannot meet the challenge of the increasing complexity of modern labour relations. Labour relations form a system where the parts cannot be investigated in a meaningful way if viewed in isolation from each other. This does not only apply to the parts of the system of industrial relations that are based on private law, i.e. mainly contracts of employment and the collective agreement, but also to the parts based on private law in relation to those based on public law. This is obvious in some connections and there should be no need to argue the case—e.g. dispute procedures and grievance procedures should be seen in the context of the general rules of legal procedure. But it is equally obvious that the collective agreement system as well as the employment contract system cannot be entirely understood unless the impact of publicly granted benefits is taken into account. Furthermore, the operation of the public benefit system cannot be understood, either, unless account is taken of the way they are subject to local negotiations and decision-making.

It seems as though in Denmark only the present author has attempted to apply the functional approach in full in labour law writing. His work *Arbejdsret* (Labour Law), 2nd ed. 1982, constitutes the first comprehensive work on the Danish labour law system, including its collective and individual parts as well as work environment aspects and the links with social security.

What has now been said about the need for a functional approach does, however, give rise to some more intricate problems. The question may be raised whether the methods and materials of ordinary dogmatic legal science are sufficient to deal with the challenge presented by labour law and industrial relations. The source materials of labour law do not only consist of legislative materials and court decisions, they also consist of collective agreements and customs at the workplace or in a particular branch of industry. For ordinary researchers such source material is hard to come by. It may in this connection be noted that the majority of writers on labour law in Denmark have experience as practitioners or have had connections with the organizations on the labour market. And as for the legal method it is evident that a deeper understanding of the functioning of the system of rules on the labour market

cannot be gained unless the methods of jurisprudence are supplemented either by practical experience or by industrial relations research. It would seem as though in this particular area of law, cooperation between legal and social science would be particularly rewarding. One may add, too, that industrial relations cannot be studied using only the methods developed by social science—industrial relations are governed by legal norms to a greater extent than most other areas in society. The behaviour of the parties on the labour market cannot be understood unless due account is taken of the legal system.

Yet another hurdle should be taken into consideration. It is characteristic of legal dogmatics to treat the legal system as a static entity. The task of dogmatic legal science is to give a correct description of the present state of the law. No doubt there is a need for that kind of legal writing in labour law, too. But one may add that in industrial relations the need for a constant revision of the rules is greater than in most areas. Labour law may therefore in many respects be more correctly regarded as a process than as a static system. In this context it should be noted that the recipients of the results of labour law research are able to influence the state of law or legal norms to a greater extent than in other areas. Such recipients are less easily impressed by careful investigations of the present state of the law than by the practical effects and the needs and possibilities of reform. One may add that the procedures for reform are as worthy an object of research as the substantive rules emanating from the process. Labour law has—in a manner of speaking—its own constitutional law and political process. This does not mean, however, that research in labour law necessarily should develop into a technique for putting forward proposals for reforms. But it is obvious that in a dynamic and flexible system the lawyer and academic researcher in law has a unique opportunity to utilize his knowledge of the legal tool in order to spell out the limitations and possibilities of that tool. The present author feels that some of the bases, as well as a great many of the substantive results of the legal system operating within the field of industrial relations, can and should be investigated from this very starting point.

It is obvious that this calls for some re-orientation of legal science for which the time, however, may not yet be ripe. Such a re-orientation also calls for complex considerations concerning the relationship between legal values and legal science. It is a commonplace observation that a discussion of the legal tools cannot be held in isolation from legal values or even the values connected with the desired results of reform. Yet the present author feels that a discussion along these lines should begin in Denmark. The positivistic inclination of legal science should be supplemented by a problem-orientated outlook. An attempt along these lines is presented in the book by the present author *Et perspektiv* (A Perspective), 1981, which may be described as an attempt to formulate the

problems within the system of Danish labour law of the 1980s on the basis of the differing ideologies and interests represented by the parties on the labour market.

As noted earlier, Danish labour law has traditionally not been subjected to very much research. The research that has been conducted has also been characterized by a rather narrow national approach. In a small country like Denmark one should not perhaps expect much more. The resources of Danish law schools are severely limited, which also may go some way towards explaining the traditional attitude in relation to, *inter alia,* the deviation from a systematic approach in legal research. However, in the view of the present author, it is obvious that a fresh start is needed and that labour law should be given sufficient room in academic research. There is not yet a single chair of labour law in Danish law schools. The result has been that a great deal of the research conducted at present is financed by labour market organizations and promoted by other Scandinavian universities.