DAMAGES AND BOT

REMEDIES FOR BREACH OF COLLECTIVE AGREEMENTS IN NORDIC LAW

BY

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The most common remedy in the Nordic countries for breach of the peace obligation and other duties created by collective agreements is of an economic nature and takes the form either of damages or a hybrid of damages and fines—*bot*.[1] In what follows, a comparative description will be made of how this remedy has been introduced into the Danish, Finnish, Norwegian and Swedish legal systems, and how it is now regulated in those countries.[2] Only brief mention will be made of other remedies for breach of collective agreements. Similarly, the rules of conduct backed by the remedies will be dealt with only summarily.

Self-evidently, a central problem throughout the history of collective labour law has been how to select a remedy for breach of collective agreements. In all of the countries under consideration, an intensive politico-legal debate on the question was carried on throughout the early decades of this century as the task was faced of incorporating the collective agreement into the statute-regulated legal system, and there is good reason, at this point, to take a glance back at the solutions originally adopted, since we are still very much ruled by decisions made then.[3] Indeed, on almost no other labour law issue is the legislation as conservative as that dealing with this question of remedies. The

[1] The word "bot" or "boote" is common to the legal systems of the Anglo-Saxon period in England and of the Nordic countries in the Middle Ages. The laws of the Anglo-Saxon kings lay down rules on a minute tariff of compensation for injuries, based on the wrong done and the rank of the sufferer. Radcliffe and Cross (*The English Legal System*, 6th ed. 1977, p. 7) write that "[t]hus we can read in the laws of King Alfred, 'If the great toe be struck off let twenty shillings be paid to him as bot. If it be the second toe, fifteen shillings; if the middlemost toe, nine shillings. If the fourth toe, six shillings. If the little toe be struck off let five shillings be paid him'; and in the laws of Ethelbert, 'God's property and the Church's 12-fold. A bishop's property 11-fold. A priest's property 9-fold. A deacon's property 6-fold. A clerk's property 3-fold.'" The point of the introduction of the bot was to induce the wrongdoer to offer, and the injured party to accept, compensation for the wrong in order to put some limits to the private feuds, the "blood feuds". The terminology and some of the underlying reasons have been revived in the labour law of 20th century Scandinavia.

[2] This article is based upon a paper on the subject of "Remedies for Breach of Collective Agreement", presented to the Norwegian Association of Labour Law in Oslo on 13th May 1982. The present author is grateful for information from Stein Evju (Oslo), Ole Hasselbalch (Copenhagen) and Antti Suviranta (Helsinki), with whom he has collaborated in a comparative project on Nordic labour law. Results of the project are presented in *Arbeidsretten i Norden* (see *infra*, note 19).

[3] In his multi-disciplinary thesis *Kollektivavtalet* (The Collective Agreement) published in 1954, Axel Adlercreutz has given a penetrating account of how the collective agreement developed as a social phenomenon and later became incorporated into the legal system. His description applies not only to Sweden but also to several other countries, including Denmark, France, Germany and Great Britain.

problem has been, both at the time of the original debate and subsequently, to find remedies which, on the one hand, are sufficiently serious to imbue respect for the duties under the agreement, so that, not least, the trade union's promise of peace during the period of validity of the agreement is given real value as a bargaining object, but which, on the other hand, are not so severe that to apply them will give rise to reactions of defiance, thereby creating increased antagonisms between classes and groups within society. During the period when the collective agreement was about to be regulated by statute, a combination of ideological and technical arguments may have contributed to the fact that lawyers were reluctant to propose severe remedies. Specifically, it was argued, this agreement—if one looked at its obligations from the standpoint, for example, of their being binding upon members of a union which had entered into the agreement—could be regarded as some kind of compulsory third-party agreement, something which constituted, as a matter of principle, a new phenomenon. It was therefore a matter of some delicacy to introduce such a strange phenomenon into the Nordic legal culture coupled with the threat of sanctions.

The Nordic country which first regulated the question of remedies for breach of collective agreements by statute was Denmark. This was achieved through an Act of 1910, establishing a permanent Court of Arbitration (*Den faste Voldgiftsret*). That new body, despite its name, was a court in the true sense, charged with the task of determining disputes about breaches of collective agreements, and was a predecessor to the present Labour Court (*Arbejdsretten*).[4] The Act introduced a primary remedy called a *bod* (i.e."bot" in Danish), a hybrid between damages and a penal sanction. This remedy, which is still to be found in Danish collective labour law, is similar to damages in so far as it is paid to the party injured by the breach of agreement and in that it is assessed by having regard *inter alia* to the amount of the economic loss suffered. However, there is a discretion to reduce the amount of *bot* below the level of the actual loss suffered. On the other hand, the *bot* is similar to a penal sanction in that it can be awarded even where no economic loss has been suffered, or, where such loss has arisen, it may be assessed at a figure higher than the actual loss. The Act laid down no maximum for the amount of the *bot*, and, quite soon, very large sums were being awarded where a union appeared as the defendant in cases concerning prohibited industrial action. Thus, following a dock strike in Copenhagen in 1919, the responsible union was ordered to pay

[4] Act of 12th April 1910, amended in part by an Act of 4th October 1919. The latter Act was repealed by the currently applicable Act on the Labour Court, of 13th June 1973. The title of Labour Court (*Arbejdsretten*) was introduced in 1964.

800,000 DKK,[5] equivalent to about half of the economic loss which had been incurred by the employer side.[6] Individual workers, too, could be ordered to pay *bot* for a prohibited strike, but, for a long time, the amount of the *bot* for them was kept at a low level. Even by the end of the 1930s it appears that no case has arisen in which an individual worker had been ordered to pay a *bot* higher than 100 DKK.[7]

This labour law institution of the *bot* appears to be a Danish innovation. The proposal for its introduction was put forward in 1910 by an official Committee—the so-called August Committee (*Augustudvalget*)—under the chairmanship of Judge Carl Ussing.[8]

It seems plausible to assume that the prototype for the August Committee's proposal had been provided by the Middle Ages legal institution of the *bot*, which appeared in many Nordic laws and involved a standardised remedy for breach.[9] The Middle Ages *bot* was paid, wholly or in part, to the plaintiff or his relatives, and was intended to provide both redress and compensation for loss suffered. It involved a kind of private penal damages which was something between the present institutions of the penal sanction (fine) and damages. A

[5] The rates of exchange at various times can be seen from the following table. The figures are based on the average of selling rates during the year indicated and refer to the value of U.S.$ converted into local currencies. (According to a monetary reform in Finland, in 1963, 100 old marks were evaluated into 1 new mark; figures referring to old marks are put in brackets.)

	Currency			
Year	DKK	FIM	NOK	SEK
1920	6,40	(26)	5,55	4,90
1935	4,55	(46)	4,05	3,95
1950	6,90	(231)	7,15	5,15
1965	6,90	3,20	7,15	5,15
1980	5,65	3,70	4,95	4,20
1984	10,35	6,00	8,15	8,30

Abbreviations:
DKK Danish *kroner*
FIM Finnish marks
NOK Norwegian *kroner*
SEK Swedish *kronor*

[6] Arbitral Award in Case No. 275, delivered by *Den faste Voldgiftsret* in 1919. This remedy led to the union going bankrupt; see Topsøe-Jensen, in *UfR* 1935 B, p. 107.

[7] See Illum, *Den kollektive Arbejdsret*, Copenhagen 1939, p. 305.

[8] *Beretning fra Fællesudvalget af 17. August 1908 angaaende Arbejdsstridigheder*, Copenhagen 1910, esp. at pp. 11 ff. In relation to Carl Ussing and the old Danish rules on collective labour law, see Dubeck, "Hvordan skabtes arbejdsretten i Danmark", in *Rättsvetenskap och lagstiftning i Norden. Festskrift tillägnad Erik Anners*, Stockholm 1982, pp. 35 ff., and references contained therein.

[9] See the entry under the heading *Böter* in *Kulturhistoriskt lexikon för nordisk medeltid II*, Malmö 1957, pp. 519 ff. Cf. Forsman, *Bidrag till läran om skadestånd i brottmål enligt finsk rätt*, Helsinki 1893, pp. 6 ff.; Stang, "Erstatningsrettens historie" in *Det nordiske Studenter-Jurist-Stævne i København*, Copenhagen 1918, pp. 225 ff.; and Fenger, *Fejde og mandebod*, Copenhagen 1971. Cf. *supra* note 1.

thought-provoking parallel is to be found in the fact that the Middle Ages *bot* was introduced in order to bring an end to reprisals by one family against another occasioned by the infringement by an individual of somebody belonging to another family ("blood feuds"), while the introduction of the Danish modern labour law *bot* was intended to do away with the practice prevailing in the labour market of resorting to industrial action as an extra-legal remedy for the individual's breach of agreement.

No reference was made in the deliberations of the August Committee to the Middle Ages institution of the *bot*. Nor, despite the fact that the Committee, on a number of occasions, gave consideration to foreign law, are there references to any similar institution abroad. Instead, a prototype for the remedy created by the 1910 Act was probably liquidated damages (*konventionalbod*), clauses on which, according to reports, were often included in old Danish collective agreements in order to provide a more effective remedy than that furnished by the general legal rules on economic damages.[10] Perhaps remarkably, there was also a kind of model for the new remedy in the case law of one of the courts of arbitration. In 1900, a Court of Arbitration (*Den permanente Voldgiftsret*) had been set up in order to determine disputes over breaches of the 1899 September Compromise (*Septemberforlig*) between the top labour market organisations, and this tribunal, without any express basis in statute or any other source of legal rules, had awarded *bot* for breaches of the agreement. The introduction of this practice appears to have been facilitated by the fact that the parties consented to, or at least did not oppose, such awards. Even as early as in the tribunal's judgment to Case No. 1, in the summer of 1900, a *bot* of 300 DKK was awarded as a remedy for a breach of the agreement; the decision receiving certain support from a statement by the defendant to the effect that he undertook, if he was not relieved of liability, to pay a *bot* rather than damages ("*at utrede en bøde fremfor erstatning*").[11] Carl Ussing was aware of this case law, since he was a member of *Den permanente Voldgiftsret*, and reference is made in the deliberations of the August Committee to the tribunal's procedure in awarding *bot*, which was said to have been done with the approval of all, but without express authority ("*med alles Billigelse, men uden udtrykkelig Hjemmel*"). Practical arguments are also put forward in the Report (pp. 11 ff.) for introducing the new remedy into the law. Above all, mention is made there of the need for an effective remedy in the event of breaches of agreement for

[10] See Carl Ussing's paper "Om Foranstaltninger imod Brud paa Overenskomster" (published as an appendix to the August Committee's Report), esp. at p. 6 and p. 11. Cf. how the term *bod* in the original version of sec. 36 of the 1917 Danish Contracts Act was used to signify a contingent penalty provided for by contract.—In Danish law the term *bod* is also used to denote compensation for non-economic loss, see Popp-Madsen, *Bod*, Copenhagen 1933.

[11] Quoted from Rise, in *Socialt Tidskrift* 1972, Afd A, p. 294.

which the general rules on economic damages were unsatisfactory; e.g. where overtime has been performed in breach of an agreement, or where provisions in an agreement on conditions of apprenticeship have been contravened.

In Norway, the collective agreement was regulated by statute in 1915 through an Act on Labour Disputes. Under the same Act, the Labour Court (*Arbeidsretten*) was set up as a special court for dealing with disputes over collective agreements. In relation to remedies for breach of the peace obligation under the collective agreement a solution was adopted at that time which was to prove peculiar in terms of Nordic comparison and which today still exercises its influence and places Norwegian law in a special position, although in a rather different way now from previously. In the 1915 Act a penal sanction was introduced as the remedy for an unlawful stoppage of work; notably, a fine of between 5 and 25,000 NOK which should be paid to the state and could be awarded against both individual workers and employers and representatives of organisations. Since such a severe remedy as the fine formed part of the system of sanctions, there was no need, at least in relation to the peace obligation, to introduce anything corresponding to the Danish institution of the *bot*. In relation to damages liability, it was sufficient to apply traditional principles, with the result that the injured party was awarded compensation only for provable economic loss. However, as in Denmark, there was introduced a possibility of setting the compensation at a figure lower than the amount of the actual loss. Particularly in cases against individual workers, the Labour Court was very reluctant in the early years to find liability. Thus, in the few cases where damages were levied at all, the amount was severely limited, regard being had to the fact that a worker typically possessed weak economic capacity, and a principle of liability *pro rata parte* was applied.[12]

The principle that compensation is only available for loss incurred of an economic kind in the event of breach of the peace obligation and other duties created by collective agreements has continuously applied and is still being applied in Norwegian law. Indeed, the principle has been retained notwithstanding that the system of remedies has undergone far-reaching changes in relation to the penal liability to pay a fine. When a new Act on Labour Disputes (*arbeidstvistlov*)—in principle, the Act currently applicable—was introduced in 1927, penal liability was abolished for breaches of the peace obligation by individual workers, and, in 1956, the provisions of that Act on

[12] In the judgment in Case 1932 p. 208, liability for an economic loss of 2,000 NOK was divided between 227 workers *pro rata parte*. With reference to the weak economic capacity of workers, the judgment in Case 1939 p. 80 limited the liability to pay compensation to 50 NOK for each individual worker. When unlawful conflicts became more common towards the end of the 1940s, damages practice became sharper; see, for case-law, Andersen, *Arbeidsretten og organisasjonene*, Oslo 1955, pp. 240 ff.

fine for unlawful strikes and lock-outs were completely repealed. No substitute for the fine in the form of *bot* or any similar quasi-penal institution has been introduced. The question of whether it should be possible to award compensation for non-economic loss by virtue of a breach of the peace obligation has been considered on one occasion by the State investigatory organ the *Arbeidsrettsrådet*, but the notion was then dropped, since it was felt that there was no need for such a remedy. It should be mentioned that this consideration took place in the mid-1960s, a period when fewer unlawful conflicts than ever appear to have taken place in the Norwegian labour market.[13]

The fact that there was initially introduced into Norwegian collective labour law what was, by Nordic comparisons, the especially severe remedy of the fine, so that it remained satisfactory to have the traditional kind of damages remedy, may be said, as has already been mentioned, to have had the paradoxical effect in the long term that, today, the remedies for breach of the collective agreement—at least in certain situations, namely, where no, or insignificant, provable economic loss has been occasioned—are more lenient in Norway than in the other countries.

Shortly after Finland became independent, comprehensive legislation was introduced into that country in the area of labour law, and an Act on Collective Agreements was introduced in 1924. The models for this were taken primarily from Germany, and, in this context, *inter alia* a 1921 draft Bill, which, however, was never implemented, is noteworthy.[14] In relation to remedies for breach of the peace obligation and other obligations created by collective agreement, regard was also had to the Danish model. Thus, there was introduced a remedy in Finnish called *hyvityssakko* (hereinafter called *bot*)[15] which, as with the Danish *bot*, was a form of private penal damages, intended to provide, wholly or in part, compensation for loss, but also intended to deter unlawful measures in cases where no, or insignificant, economic loss had been incurred. However, by contrast with the Danish *bot*, the Finnish *bot*, in line with its German model, had a maximum amount provided for in the Act. The maximum for breach of the peace obligation was set relatively high, at 100,000 FIM. However, only those who were directly party to an agreement, and not

[13] Opinion of the *Arbeidsrettsrådet* of 20th January 1965, pp. 4 ff., cited in Andersen, *Fra arbeidslivets rett*, Oslo 1967, pp. 382 ff. According to the *Norsk Arbeidsgiverforening*'s publication *Statistiske oversikter 1981*, Oslo 1982, table 20, there was not a single unlawful conflict within the Association's sector during the period 1962-64.

[14] See, for the following, *Lagberedningens publikationer 1921: 11*, Helsinki 1922; Suviranta, *Finland*, in *International Encyclopaedia for Labour Law and Industrial Relations*, Deventer 1980, pp. 26 ff.; and Bruun, *Kollektivavtal och rättsideologi*, Vammala 1979, pp. 210 ff. and 242 ff.

[15] The corresponding term in the Swedish language version of the statutory text is *plikt*. The Finnish term *hyvityssakko* carries roughly the meaning of penal damages intended to redress the wrong caused. A translation into English sometimes used is "compensatory fine".

their members, were bound by the peace obligation. The maximum amount of *bot* for breach by individual workers of obligations under collective agreements was set at 500 FIM. It turned out, however, that the 1924 Act never had any great practical significance because of antagonisms between the labour market parties. A new Act on Collective Agreements was introduced in 1946, which, essentially, retained the same basis for the system of remedies. In that year, too, a Labour Court was established in Finland.

In Sweden, collective labour law was first regulated by statute through the 1928 Acts on Collective Agreements and on a Labour Court. The closest model for this legislation was the Norwegian Act on Labour Disputes, but, in relation to the system of remedies, a special solution was adopted in Sweden, although, in essence, this was rather closely in line with the Danish model.[16] The non-socialist Parliamentary parties who were then in power wanted to proceed cautiously, as the legislation had to be passed in the face of co-ordinated opposition from the labour movement. It appears that, for tactical reasons, it was sought to avoid the impression that the remedy possessed a penal character, and, in consequence, terminology was chosen which obscured the realities of the situation. The central remedy was thus referred to as "damages" (*skadestånd*), although regard was to be had not only to economic loss. In a divergence from what normally applied in the Swedish law of damages, it was to be possible for an economic remedy to be awarded for the infringement suffered by a party through a breach of collective agreement, even where no economic loss had occurred (sec. 8 of the Act on Collective Agreements). In Sweden, one usually refers to this special labour law remedy as "general damages" (*allmänt skadestånd*).[17] As in the other Nordic countries, it was provided that the remedy could be reduced, having regard to the circumstances in the particular case. In relation to the liability of individual workers, a limitation was inserted into the 1928 Act similar to that in the Finnish provisions: for breach of the peace obligation or of any other collective agreement obligation, an individual worker should be subject to a maximum award against him of 200 SEK. That was a significant sum in 1928, amounting to roughly one month's wages for an industrial worker. However, despite the limitation, and even though damages were, in general, set at modest amounts, with the maximum being awarded only in occasional cases, damages practice

[16] In relation to the introduction of the rules, see *Prop.* 1928:39, p. 117, and references cited therein; and Bergström, *Kollektivavtalslagen*, 2nd ed. Stockholm 1948, pp. 142 ff., and references cited there. In relation to the introduction of the "200-kronor rule", see, in particular, Bergström, *Arbetsrättsliga spörsmål I*, Stockholm 1950, pp. 74 ff.

[17] The term *allmänt skadestånd* was introduced in 1932 by Arthur Lindhagen, then the Chairman of the Labour Court. See Bergström, *Kollektivavtalslagen*, p. 160, with reference to Case AD 1932 No. 44, p. 193, and No. 128.

in respect of breach of collective agreements by workers during the 1930s was apparently stricter in Sweden than in Denmark and Norway.[18] The limitation of 200 SEK was subsequently left unaltered, despite the fall in the value of money, until this much-discussed "200-kronor rule", as it was known, was repealed in 1976 along with the introduction of the Act on the Joint Regulation of Working Life, which *inter alia* replaced the Act on Collective Agreements. Strangely, however, the "200-kronor rule" has, in principle, been re-introduced as from 1st January 1985. This will be discussed in more detail below.

Before looking in more detail at the current legal state of the rules on remedies, a number of things should be borne in mind about sources of law and the content of rules of conduct backed by remedies.[19] In Norway, Sweden and Finland, collective labour law is, to a marked extent, based upon legislation. The leading principles are codified in the 1927 Act on Labour Disputes in Norway, and, in Sweden, through the Act on the Joint Regulation of Working Life of 1976. In Finland, relatively detailed rules are contained in the 1946 Act on Collective Agreements. The statutes mentioned here also contain the central rules on remedies.

In Denmark, on the other hand, collective labour law, in important parts, is not a creation of the legislator but of the labour market organisations themselves. Thus, there exists no all-embracing Act providing for systematic regulation of the collective agreement and its legal remedies. Instead, basic principles for collective labour law have been established through *Basic Agreements* between LO (the Central Confederation of Danish Trade Unions) and the Danish Confederation of Employers. The current Basic Agreement was made in 1973, and was revised in 1981. It contains, *inter alia*, rules on collective agreements, labour disputes, and the peace obligation, and also makes refer-

[18] Only in six cases during the 1930s was the maximum of 200 SEK awarded. For the statistics, see Bergström, *Arbetsrättsliga spörsmål I*, p. 27. In respect of the case-law in Denmark and Norway, see above at notes 7 and 12.

[19] The following represents a selection from the extensive legal writing:

Denmark: Jacobsen, *Kollektiv arbejdsret*, 3rd ed. Copenhagen 1982, referred to below as *Jacobsen*; Hasselbalch, *Arbejdsret*, 3rd ed. Copenhagen 1985; Jacobsen in 22 *Sc.St.L.*, pp. 107 ff. (1978); Hasselbalch in 27 *Sc.St.L.*, pp. 37 ff. (1983);

Finland: Sarkko, *Arbetsrätt, allmän del*, Helsinki 1981; Bruun, *op.cit.* (*supra*, note 14);

Norway: Andersen, *Fra arbeidslivets rett*, Oslo 1967; Evju, *Organisasjonsfrihet, tariffavtaler og streik*, Oslo 1982; Jakhelln in *Norsk petroleumsguide*, Oslo 1983, pp. 143 ff.;

Sweden: Schmidt, *Facklig arbetsrätt*, 2nd ed. Stockholm 1979; an English version of this book was published in 1977 under the title of *Law and Industrial Relations in Sweden*.

Amongst comparative presentations, mention should be made of *Arbeidsretten i Norden*, published by the Nordic Council (Nordic Official Reports Series 1984: 10), Stockholm 1985. See also Schmidt's report on "Labour Peace as a Problem for the Legislator", presented (in Swedish) to the 1972 Nordic Jurists' Meeting, pp. 298 ff. Additional comparative presentations include the contributions to the *International Encyclopaedia for Labour Law and Industrial Relations*, Deventer 1977–1982, on Danish, Finnish and Swedish law by, respectively, Jacobsen, Suviranta and Adlercreutz.

ence to other rules, provided for in an agreement of 1908, on a peace obligation in disputes of rights over collective agreements—the "Rules for dealing with industrial disputes" (*Norm for regler for behandling af faglig strid*). However, the remedies for breach of obligations created by collective agreements are regulated by statute; nowadays, in the 1973 Act on the Labour Court. This Act assumes the existence of Basic Agreements, and, in respect of the 1908 Agreement, the Act provides that that Agreement is to be applicable to all parties in the labour market who have not themselves made agreements for similar rules (sec. 22). The principles established through agreements as to the effects of a collective agreement may, thus, be said to have been approved by the Danish legislator in the Act on the Labour Court.

In all four countries, provisions in collective agreements may bind directly both parties to the agreement and members of organisations which are party to the agreement, and these provisions can be given compulsory (normative) effect for contracts of employment entered into within the area of application of the collective agreement. In Finland, Norway and Sweden, these principles are expressed directly by statute (sec. 4 and sec. 6 of the Act on Collective Agreements; sec. 3 of the Act on Labour Disputes; and secs. 26-27 of the Act on the Joint Regulation of Working Life), while those in Denmark are implied in the Act on the Labour Court and confirmed in the case-law of that court. In addition, the peace obligation to which a collective agreement gives rise is binding both for parties to the agreement and for members of such organisations, although here, so far as Finland is concerned, there is the important exception that individual workers are not, according to the Act, placed under a peace obligation in the sense that they can be made to pay *bot* if they take part in unlawful industrial action.[20]

Just as with any other contract, a primary remedy for failure to comply with a collective agreement is the compulsion under which a debtor may be placed, through a measure of an executive authority, to make performance as provided for in the agreement. Such an order for *specific performance* is used primarily in the case of monetary obligations; e.g. to make payment of wages. As regards the majority of other duties to be performed under agreements (e.g. the duty to negotiate in a certain manner, or to perform work), it is in the nature of these duties that performance cannot be effected directly by means of an executive intervention. To the extent that an order for compliance is issued, such specific

[20] See, conversely, sec. 8 of the Finnish Act on Collective Agreements. The central rules on the peace obligation are to be found for Norwegian law in secs. 4 and 6 of the Act on Labour Disputes, and for Swedish law in secs. 41-45 of the Act on the Joint Regulation of Working Life. As far as Danish law is concerned, the nearest equivalent rules are to be found in sec. 2 of the Basic Agreement and in the 1908 Agreement, together with complementary provisions in the 1973 Act on the Labour Court.

performance can only be enforced in an indirect manner, by means of the threat of compulsion.[21] Generally, in respect of executive proceedings in the legal context, a contingent penalty (*vite*) can, in principle, be used as a means of compulsion in order to bring about specific performance, but here, to some extent, labour law adopts a unique position. Nordic Labour Courts should normally not hand over to executive authorities the choice of the means of compulsion in relation to specific performance. Where an order for such performance has been made without any means of compulsion being specifically stated, it appears to be tacitly understood that enforcement can only give rise to a duty to pay *bot* or the equivalent. In Swedish law, it is very rare for a contingent penalty to be used as a means of compulsion. Instead, a threat of *general damages* is used to bring pressure to bear.[22]

In English and American labour law, the *injunction* may, in certain situations, be used to bring about specific performance; for example, by ordering a strike-leader to desist from continuing unlawful action. Disobedience of such an order may, eventually, give rise to imprisonment for disobedience (*contempt of court*). Experience shows that the use of such a draconian means of compulsion often leads to reactions in protest, e.g. in the form of the extension of an industrial dispute. There is no equivalent in Nordic labour law to this institution. A court may, however, have the possibility, through an interim decision during the trial, to order, for example, unlawfully striking workers to return to work. Such a decision could be made in Danish and Swedish law, but failure to comply with the decision carries with it no sanction other than that the *bot* or damages will be somewhat greater than would otherwise have been the case. In Finnish and Norwegian law, it appears that an equivalent function is served by a form of speedily delivered interim judgment, containing a declaration that the industrial action is unlawful.[23]

Penal sanctions, in the true sense, no longer exist in Nordic law as a remedy for breach of a collective agreement.

Rescission (*hävning*) of a collective agreement may occur in all four countries in the event of a really serious and fundamental breach of the agreement, but this remedy has scarcely any practical significance. Under Finnish and Swed-

[21] It should be borne in mind here that not all kinds of performance can be brought about through executive compulsion; see, for example, Rodhe, *Obligationsrätt*, Stockholm 1956, para. 32 at note 17 ff., and *Lärobok i obligationsrätt*, 5th ed. Stockholm 1979, pp. 155 ff.

[22] See *SOU* 1975:1, pp. 504 ff., and references contained therein. In relation to sanctions against an employer who wrongly refuses to permit a worker who has been transferred to return to his previous work duties, see now Case AD 1978 No. 89, p. 707.

[23] Cf. the Norwegian Labour Court's judgment in Case 1980 p. 150. It is unclear whether an interim decision can be delivered in Norwegian law in relation to industrial action. The question is dealt with in a decision of the Stavanger district court of August 13, 1982, in Case No. 165/82 A IV.

ish law, rescission may not be made without the involvement of the Labour Court.[24]

Before collective labour law was regulated by statute, it was not uncommon for industrial action to be taken as an extra-legal remedy for breach of a collective agreement. Nowadays, such self-help is, in principle, prohibited in the Nordic countries under the rules on the peace obligation, although it is not entirely excluded as an extreme possibility. There is a difference here between the legal position in Denmark and that in the rest of the countries. In Danish law, industrial action is regarded as being available as a response to continuing serious breaches of a collective agreement, without prior approval from the Labour Court. However, it is a requirement that the breach of agreement first be processed through the legal system, without the action in breach of the agreement having been ended.[25] In practice, it will be a breach of the peace obligation which will provoke such measures in response. In 1981, there was introduced into the Basic Agreement a special rule on notice (sec. 2, para. 3), which presupposes that such response action is lawful. In Norwegian and Swedish law, on the other hand, it is required that the Labour Court give its approval to the use of industrial action as a remedy for breach of the agreement.[26] In Finnish law, it is demanded that the collective agreement be rescinded before any response action may be undertaken. A special rule applies in Swedish law for action taken to enforce payment of back wages (*indrivningsblockad*).[27]

As regards the application of remedies under the contract of employment as sanctions for breach of a collective agreement, it suffices to say that in all four countries *termination of the contract of employment* is regarded as being possible in consequence of a serious breach of the peace obligation. In Norway and Sweden, where there is legislation on employment protection, this follows from the case-law on that legislation.[28] In Denmark, where there is no general Act on employment protection, a certain level of employment protection follows

[24] See sec. 11 of the Finnish Act on Collective Agreements, and Sarkko, *op.cit.*, pp. 226 ff. In Swedish law, see sec. 31 of the Act on the Joint Regulation of Working Life. In relation to Danish and Norwegian law, see, for the former, *Jacobsen*, pp. 129 ff., and, for the latter, Berg, *Arbeidsrett*, Oslo 1930, p. 208.

[25] *Jacobsen*, pp. 320 ff.

[26] See sec. 6, point 2, of the Act on Labour Disputes, and sec. 31, para. 3, of the Act on the Joint Regulation of Working Life.

[27] Sec. 41, para. 2, of the Act on the Joint Regulation of Working Life. Such action may also, within certain limits, be taken in Denmark; see *Jacobsen*, pp. 303 ff. Actions to recover payment of back-wages also occur in Finland, and are given some support in the case-law of the Labour Court, so long as they are not considered as being directed against the collective agreement.

[28] Sec. 60 and sec. 66 of the *Lov om arbeidervern og arbeidsmiljø* (The Working Environment Act) 1977; 1977 NRt 902 (The *Hammerverk* case); sec. 7 and sec. 18 of the *Anställningsskyddslagen* (Employment Protection Act) 1982; Case AD 1975 No. 31 and Case AD 1981 No. 10, and see Lunning, *Anställningsskydd*, Stockholm 1984, pp. 221 ff.

from collective agreements and special legislation, but it is thought that this may be lost if, despite an order of the Labour Court, an unlawful stoppage of work is persisted in.[29] The situation in Finland is dealt with below.

The possibility of an employer taking action for breach of a collective agreement through the application of *remedies under unilaterally established regulations* or under personal contracts is strictly limited in Sweden by a rule in sec. 62 of the Act on the Joint Regulation of Working Life. In Norway and Finland, there is legislation on work rules, which includes certain limitations upon the possibility of implementing disciplinary remedies for offences committed by workers.[30] It is regarded as following as a general principle from sec. 69 of the Norwegian Working Environment Act that an employer is not permitted to take advantage of a contractual contingent penalty (*vite*) or any similar private penal damages as a disciplinary sanction.[31]

As regards the central economic remedy for breach of the collective agreement, it has been indicated that *Norwegian* law adopts a unique position in that compensation is available *only for economic loss*. The rule as to how compensation is to be assessed derives from sec. 5 of the Act on Labour Disputes. There, it is provided that regard is to be had to the extent of the loss suffered, the blameworthiness and economic capacity of the person causing that loss, the circumstances of the person suffering the loss, and any other circumstances. Where there are especially mitigating circumstances, liability may be dispensed with altogether.

> The fact that the rule contained in sec. 5 covers only economic loss is confirmed *inter alia* in judgment 1960 p. 1 of the Labour Court. In that case, an unlawful seamen's strike had caused traffic to be cancelled on various domestic routes. A number of firms were awarded damages for their losses, but one company, *Troms Fylkes Dampskibsselskab*, could not have any compensation awarded, since it was not possible to show that the cancelled trips would have contributed to covering the company's general costs.

It is relatively uncommon in the Norwegian Labour Court for an employer to be held liable in damages—which is natural, given the background of the damages rule and the fact that it may be difficult to show economic loss by reason of breach of many employer-duties under collective agreements. Nevertheless, it should be possible to award damages if, on a hypothetical calcula-

[29] *Jacobsen*, p. 604; Rise, *Overenskomstfortolkning ved faglig voldgift*, 4th ed. Copenhagen 1980, pp. 476 ff.; and, for example, Labour Court Cases No. 7387 (1974) and No. 9239 (1981).

[30] For the Norwegian position, see secs. 69-73 of the Working Environment Act. Sec. 6, point 10, and sec. 7, para. 4, point 1, of the Finnish *lag om samarbete inom företag* (Act 1978 on Cooperation within the Enterprise) should also have the effect that working rules cannot be introduced except by way of a democratic procedure within the undertaking.

[31] Friberg, *Arbeidsmiljøloven*, Oslo 1981, p. 351; cf. Evju, *Arbeidsrettslige emner*, Oslo 1979, pp. 235 ff., in respect of the prohibition on suspension as a disciplinary measure.

tion, it is probable that some economic loss has arisen, even if the basis for that calculation is somewhat tenuous. An employer who was under a duty laid down by collective agreement to make arrangements at his workplace to enable piece-work to be performed rationally and who, in various ways, had been in breach of that duty, was held liable, in Case 1960 p. 195, to compensate the workers for the diminution of their piece-work earnings to which his failures could be considered to have given rise. From a legal-economic point of view, the Norwegian damages rule, which, in principle, requires proof of the extent of the loss suffered, is, of course, weightier than corresponding rules on *bot* and general damages in the other Nordic countries. Indeed, this is so, even if one takes account of the fact that the Labour Court, in common with other Norwegian courts, has a certain discretionary freedom to assess the amount of economic loss.

As was mentioned previously, it has been maintained by a statutory Committee that there is no need in Norwegian labour law for any rule on non-economic damages (see above at footnote 13). Perhaps extra-legal sanctions, such as the risk of unfavourable publicity, have had greater significance in Norwegian society than in other Nordic countries. It is worth noting that, in cases before the Norwegian Labour Court concerning unlawful industrial action, claims have, for a long time, normally been confined to requesting a declaration as to the unlawfulness of the action taken, coupled with compensation for legal costs, while damages have not been sought. However, under the influence *inter alia* of the peculiar circumstances within the offshore oil industry, the pattern of events in the Norwegian labour market appears, in many respects, to be undergoing change, and it remains to be seen whether the system of remedies will also be influenced.

For the purpose of comparing the remedies and their severity in the various countries, it will be indicated, in what follows, how remedies are normally applied in respect of one particular kind of collective agreement breach, namely, breach of the peace obligation. In Norwegian law there is hardly any notion, as is the case in Danish and Swedish law, that there should be a normal remedy for breach of the peace obligation by individual workers. On the other hand, the Labour Court is thought, in essentially a rule-creating manner, to fix a maximum for the individual's liability. Thus, in Cases 1981 p. 236 and p. 282, in actions against unlawfully striking lift-electricians and pipe-layers, each individual worker's liability was limited to 1,200 NOK. Roughly in line with this is the decision in Case 1972 p. 52, where flight controllers were ordered to pay 1,000 NOK each. However, significantly higher amounts have been awarded against workers who have been considered to bear a particular responsibility for a breach of the peace obligation. In the judgment in Case 1949 p. 28, nine members of a strike committee were each held liable to pay

damages of 1,500 NOK, and, in 1947, as reported in Case 1945-1948 p. 63, two shop stewards were ordered to pay 5,000 NOK, although this liability was imposed jointly with their trade unions.

The highest award of damages which a trade union has been ordered to pay for breach of the peace obligation appears to have been 300,000 NOK, which was imposed in the lift-electrician judgment in 1981, mentioned above.

The *Finnish* rules on *bot* (*hyvityssakko*) are now to be found in sec. 7, sec. 9 and sec. 10 of the 1946 Act on Collective Agreements. As has already been indicated, this is a matter of some kind of private penal damages, which replace ordinary damages. The amount of the *bot* is set by having regard, primarily, to the extent of the loss and the degree of blameworthiness established. Where economic loss has been incurred, the *bot* is paid to the person suffering the loss, and, otherwise, it will be paid to the plaintiff. The freedom of action of the court in awarding a *bot* is limited by rules providing for a maximum amount. The maxima were certainly high when they were set in 1946—for breach of the peace obligation, one million FIM in the currency of the day—but, because of the fall in the value of money, even the most severe sanctions gradually became rather modest. Following a monetary reform in 1963, the maximum award for breach of the peace obligation was until the end of 1984 10,000 new FIM. This was the highest *bot* which could be awarded against an organisation or against an employer for breach of the peace obligation. As has already been mentioned, an individual worker cannot have a *bot* awarded against him at all for breach of the peace obligation. For other breaches of the collective agreement, the liability for a worker was until the end of 1984 limited to 100 new FIM. However, by an Act of 1984 the maximum amounts of *bot* have been increased as from 1st January 1985. The highest *bot* which can be awarded against an organisation or against an employer for breach of the peace obligation or of any other obligation arising under a collective agreement is now 90,000 FIM. The liability of a worker for breach of a collective agreement is now limited to 900 FIM; as previously, an individual worker cannot have a *bot* awarded against him for breach of the peace obligation. According to a new sec. 13*a* of the Act on Collective Agreements, the limits in the Act are to be adjusted in the future every third year in line with changes in the value of money.

As regards remedies for participation by individual workers in stoppages of work rendered unlawful under the Act on Collective Agreements, it should be added that, under the 1970 Act on Employment Contracts, a worker is also protected against termination of his contract of employment being used as a remedy. It is specifically stated, in sec. 37, para. 2, point 2, of the Act, that participation in a strike or other industrial action does not constitute a reason for dismissal with notice. The rule on rescission, contained in sec. 43 of the

same Act, meanwhile, provides that dismissal without notice on the ground of industrial action is only forbidden where that action is lawful. These statutory provisions are not at all easy to reconcile with one another, but the general view appears to be that participation in an unlawful strike may entitle the employer to resort to *dismissal without notice*, provided that the essential requirements in the rule on rescission are satisfied.[32]

The fact that individual workers are exempted from the remedy of *bot* for participation in an unlawful strike appears, in practice, to have led to the local-level trade union instead shouldering a relatively heavy liability. Thus, if the majority of a union's members take part in unlawful industrial action, the union may have *bot* awarded against it as a direct consequence of its members' behaviour, even if the action has not been decided upon or implemented in any organised form.[33] It should be mentioned, in relation to union liability, that *bot* may be awarded several times over for the same industrial action if that action is not discontinued in compliance with an order of the Labour Court. As regards practice before the 1984 Amendment it has been said that a *bot* of approximately 7,000 FIM would be awarded under the first order. If that order is not obeyed, a higher figure, say 8,500 FIM, would be awarded after a week. If necessary, a third judgment might be given, providing, for example, for a *bot* of 9,500 FIM. In practice, no more than three judgments may be given, even if there is a possibility under the law of awarding further remedies. In such a situation, the trade union involved would expel a local branch which continued the strike, since, otherwise, the union itself would give rise to a liability of its own for breach of the peace obligation.

The *Danish* rules on *bot* are now to be found in sec. 12 of the 1973 Act on the Labour Court.[34] The *bot* is to be paid to the plaintiff in the case. In a legislative reform of 1973, the statutory text concerning the *bot* was amended in such a way as to tone down its character as damages, with the result that it now appears even more clearly than before as a kind of private penal sanction. When sec. 12, para. 2, lays down how the *bot* is to be assessed, no express mention is made, by comparison with previously, to the effect that the extent of the loss suffered is to be taken into account. In essence, it is provided that the *bot* is to be assessed having regard to all the circumstances in the case, and with

[32] Sarkko, *op.cit.*, pp. 78 ff. and p. 86 ff.; Bruun, *op.cit.*, pp. 293 ff.; and see Suviranta, in Mazzoni (ed.), *Il diritto del lavoro dei paesi europei non partecipanti alla C.E.E.*, Padova 1981, pp. 90 ff.

[33] Sarkko, *op.cit.*, pp. 220 ff.

[34] In relation to the following, see *Betænkning nr 685 av udvalg om arbejdsretten*, Copenhagen 1973, pp. 28 ff.; Christensen, *Lov om arbejdsretten med kommentarer*, Copenhagen 1974, pp. 55 ff.; *Jacobsen*, pp. 477 ff. In respect of the way in which remedies for breach of the peace obligation are dealt with in practice, see *Overenskomststridige strejker* (published by *Dansk Arbejdsgiverforening*, 4th ed. Copenhagen 1983).

due regard to the extent to which the breach of agreement was excusable. Special instructions are contained in the statutory text as to how stoppages of work in breach of agreement are to be judged. Here, regard is to be had to whether the stoppage of work should be regarded as an understandable reaction, to the circumstances, on the side of the other party. Where there are especially mitigating circumstances, the *bot* may be dispensed with altogether, and it should be dispensed with if a breach of agreement by the other party can be regarded as having provided reasonable cause for the stoppage of work.

As regards the awarding of *bot* for participation by individual workers in strikes which are in breach of agreement, the Danish Labour Court has, for many years, applied various formulae which have been so rigid that it has been possible to speak in terms of "tariffs". Previously, a *bot* would be awarded for every day of a strike, and, towards the end of the 1960s, the daily sum was 60 DKK for a qualified skilled worker. In 1970, the Labour Court altered its tariffs, and went over to awarding a sum per hour. Between 1976 and the end of 1982, the hourly tariff was 16 DKK for skilled workers and 13 DKK 50 *öre* for others. Where an order of the Court to return to work has not been complied with, the tariff thereafter has been increased by 5 DKK. For more well paid, so-called "staff" (i.e. white-collar workers), a higher hourly tariff of 28 DKK has been applied.

The tariffs have been amended time and again. Previously, amendments were made following agreements between the organisations, but, since 1970, they have been fixed by the Labour Court without the backing of such agreements. The most recent increase was made in November 1982, when the Court made reference to the fact that average hourly earnings had risen by 57-60% since 1976, and that there should be a reasonable proportionality between the general level of wage rises and changes in the amount of the *bot*.[35] The new tariffs involve 24 DKK per hour for qualified skilled workers and 20 DKK for other workers. So-called "aggravated" *bot*, which applies where an order of the Court to return to work has not been obeyed, involves a further 10 DKK per hour being awarded.

From what has just been said, it will be apparent that strikers can be brought before the Court afresh if a strike continues in contravention of a judgment by the Labour Court ordering a return to work. It has happened that, in all, a sum as high as 9,000 DKK has been awarded for participation by a worker in a long-term stoppage of work. Normally, however, the Labour Court will not make awards of continued *bot* after about one month's strike.

In practice, the tariff system is applied in a rather mechanical way, and

[35] Judgment 22nd November 1982, in Case No. 9655.

negligible scope is left for account to be taken of circumstances in the individual case. An outside observer might make the reflection that the duration of a stoppage of work is given far too much weight, at the expense of other variables which it would be reasonable to take into account when a judgment is being made as to the seriousness of a breach of the peace obligation.

Mention should be made of a rule introduced in 1973, which has been copied in Swedish law. Where a stoppage of work occurs, then, according to sec. 9, para. 2, of the Act on the Labour Court, the organisations must, on the following day, arrange for a meeting (*fællesmøde*) in order to discuss the matter. If the workers comply with a proposal from the negotiating parties to return immediately to work, they will, by virtue of sec. 12, para. 2, be relieved of liability for *bot*, provided that the stoppage of work did not lack a reasonable cause, or unless it may be regarded as a step in a systematic course of action, as may be the case where several brief strikes have taken place within a short period at the same workplace.

Should a trade union organise, support, or remain passive, in the event of industrial action by its members in breach of agreement, the union will itself become liable, and the amount of *bot* may then be very high. In several cases during recent years, trade unions which have ignored a breach of the peace obligation have been ordered to pay a *bot* of one million DKK.[36]

In one notorious case during 1980 (Case No. 9112), remedies were awarded in respect of widespread industrial action in breach of agreement in the slaughter-house industry during the early summer of 1980. The workers taking part in the action—over 6,000 of them—had aggravated *bot* awarded against them, in addition to the tariffs applied by the Labour Court, and it has been calculated that the total amount of *bot* for those workers was in excess of 2 million DKK. The trade union to which those workers belonged was also held liable on various grounds, and the Court appears *inter alia* to have regarded it as constituting an independent ground of liability that almost half of the union's members took part in the action. The *bot* awarded against the union was fixed at one million DKK, so that, in all, more than 3 million DKK was awarded. This appears a very high sum by comparison with what is usually awarded as a remedy in the other Nordic countries, but it should also be viewed against the background that the combined economic loss of the slaughter-house employers in consequence of the industrial action has been estimated to have amounted to 30 million DKK.[37]

It may be mentioned that it appears from the case-law of the Arbitration Courts that one trade union, the *Foreningen af yngre Læger* (the Association of Junior Physicians), in a decision of 21st December 1981, was ordered to pay 10 million DKK as *bot* for breach of the peace obligation. That arbitral award, which was

[36] See the references cited in *Jacobsen*, p. 525.

[37] In a decision of 19th November 1984 (Cases No. 10191 and 10232) a trade union (*Specialarbejderforbundet*) was ordered by the Labour Court to pay 20 million DKK as *bot* for breach of the peace obligation. The cases concerned strikes which for a couple of weeks stopped or severely disturbed public transportation services in the greater Copenhagen area.

delivered under the chairmanship of the President of the Labour Court, and in which the rules on remedies contained in the Act on the Labour Court were applied, concerned remedies for an extensive strike in breach of agreement during the Spring of 1981 amongst hospital doctors. The overwhelming majority of the union's members had joined the strike, and, for that reason, no individual awards of *bot* were made, but such awards were included in the *bot* which the union was ordered to pay.

Criticisms have been made of the Danish Labour Court on the ground that, in awarding *bot*, it has been relatively lenient towards employers who are in breach of agreement.[38] However, there are examples in recent years of employers having been ordered to pay high sums as *bot*.

One employer, in a judgment of 1978 (Cases Nos. 8154, 8177 and 8226), was ordered to pay a remedy of 100,000 DKK on account of the dismissal in breach of agreement of a dock-worker who was both president of the local union branch and also, in that capacity, gang foreman.

In a judgment of 1982 (Case No. 9587), a shipowner was found to have breached a collective agreement made with the Danish Seamen's Union, in that he had paid a Nigerian crew lower wages than were provided for in the tariffs set by the agreement. The under-payment was reckoned to have amounted to a total of approx. 937,000 DKK. For this breach of collective agreement, he was ordered to pay a *bot* of 1,200,000 DKK, which included the sum just mentioned.

To give an overall assessment, it has to be said of the Danish case-law on *bot* that the system of remedies appears to be the strictest amongst the Nordic countries. Strike statistics are incomplete, but much points to the fact that unlawful strikes, despite the more severe remedies in Denmark, are more common there than in Norway and Sweden. One hypothesis, linking societal circumstances and legal rules, which it might be convenient to test here, would be that the more severe remedies have to be regarded as a response to a greater strike-proneness in Denmark than in the other two Scandinavian countries.

The extensive *Swedish* reforms which resulted in the 1976 Act on the Joint Regulation of Working Life also affected the system of remedies, although, by and large, the previous system of damages as the central remedy for breach of the collective agreement, along with the associated statutory rules, was retained (see secs. 54-61 of the Act on the Joint Regulation of Working Life).[39] The fiction was retained that the remedy always comprises damages, even in those cases referred to in sec. 55 of the Act on the Joint Regulation of Working Life, where it is provided that, in assessing whether, and to what extent, a person has suffered loss, regard shall be paid to that person's interest that

[38] *Jacobsen*, p. 524, with references cited therein.

[39] For the following, see *SOU* 1975:1, pp. 491 ff.; *Prop.* 1975/76: 105, appendix I, pp. 283 ff.; and *SOU* 1982:60, pp. 223 ff., with references contained therein. Cf. also Bergström, *Kollektivavtalslagen*, 2nd ed. Stockholm 1948, pp. 142 ff.

statutory provisions or provisions in the collective agreement should be observed, and to factors other than those of purely economic significance. Such *general damages* may be awarded to a party to a collective agreement where the other side has not observed the agreement, irrespective of whether economic loss has been occasioned or not.[40] Thus, the intention is that it should be possible to impose a duty to pay damages—as the matter was expressed in earlier *travaux préparatoires*[41]—"also where the loss consists only in that the agreement has not been held sacrosanct", i.e. for breach of agreement as such. In addition, where economic loss has been suffered, further economic remedies for the breach of agreement itself may be awarded as a supplement, should the court consider that the deterrent effect of compensation for economic loss is insufficient. As in previous law, there is also discretion to vary the remedy.

The reality behind the rule in sec. 55 of the Act on the Joint Regulation of Working Life is, as Rodhe has put it, that there has been a need for "a sanction which has the same deterrent effect as compensation for economic loss, but which also functions where no economic loss has been incurred, and which does not have the demeaning character of the penal sanction".[42]

General damages thus serve a primary function of providing sufficient deterrence against actions in breach of agreement. It should also be pointed out that, where a worker who is a member of a union has been the victim of a breach of agreement, general damages may be awarded to his union as a party to the agreement—a construction which can certainly stimulate unions zealously to discover and prosecute breaches of agreement. In this way, the system provides the conditions for an unusually effective policing of contraventions.

One further important function of general damages should also be stressed: namely, that they may be used as a *substitute* for economic damages. There must be considerable legal-economic significance in the fact that, in many cases, the person suffering loss can be relieved of the need to investigate in detail and to prove that economic loss has been suffered. It is rather uncommon for parties in the Swedish Labour Court to submit detailed evidence about economic loss; a difference which ought to be pointed out here by comparison with the situation in Norway, where, in principle, compensation is only awarded for proven economic loss.

The fiction, retained by the legislator, that the rule in sec. 55 of the Act on the Joint Regulation of Working Life constitutes a damages remedy, has been

[40] According to sec. 55 of the Act on the Joint Regulation of Working Life, compensation can also be awarded for personal loss suffered: for example, that of a worker in consequence of an infringement of his right to freedom of association. A distinction is made for present purposes from that kind of compensation.

[41] *Prop.* 1928:39, p. 121.

[42] Rodhe, *Lärobok i obligationsrätt*, 5th ed. Stockholm 1979, pp. 210 ff.; cf. pp. 195 ff.

criticised in scholarly writings. Rodhe has maintained, in connection with what has just been mentioned, that the realities behind sec. 55 have been wrapped up "in a great many vague phrases, which give the appearance that it is a matter of reparation for loss suffered". Ekelöf has said bluntly that it is really "a private fine ("*straff*"), for which this term is not to be used".[43] Schmidt, who previously accepted the official classification of the remedy as damages, changed his view after observing how the Labour Court took account primarily of the nature of the action, and thus the deterrent aspect, when remedies were settled upon. In addition, statements in the *travaux préparatoires* to the Act on the Joint Regulation of Working Life, to the effect that remedies should be determined according to different principles for employers' and for workers' breaches of agreement and breaches of statute, contributed to Schmidt recommending that there should be a change to other, more appropriate, terminology.[44] Undeniably, the official use of language gives an impression that an attempt has been made to obscure the truth, and to do so in a way which seems hard to reconcile with the openness which ought to prevail in a democratic society. The Danish and Finnish terminology, where the terms *bod* and *hyvityssakko* respectively are used, are intellectually more honest, and a correspondence with these is to be recommended also as far as the Swedish position is concerned.

As has been mentioned, it was previously the case that no damages in excess of 200 SEK could be awarded for breach of the peace obligation by an individual worker. That limit was abolished by the Act on the Joint Regulation of Working Life, contrary to the views of the Socialist parties, and following a ballot in the Parliament. However, in the *travaux préparatoires* on the new rule, it was stated that damages should continue in future to be kept at a moderate level, and the Labour Court has loyally followed that direction.[45] In common with the Danish Labour Court, the Swedish Court applies some kinds of models or tariffs when awarding remedies, but a comparison reveals that the Swedish application is less mechanical than the Danish. Remedies are also, in general, significantly more lenient in Sweden. The normal amount of damages for an unlawful strike of the usual duration of a couple of days has, up until November 1982, been 200 SEK for each worker. A somewhat lower sum, 100 or 150 SEK, has been awarded where there have been mitigating circumstances. A sum higher than 200 SEK has only been awarded if the industrial

[43] Ekelöf, *Straffet, skadeståndet och vitet* (Uppsala universitets årsskrift 1942:8), p. 124.

[44] Schmidt, *Facklig arbetsrätt*, 2nd ed. Stockholm 1979, pp. 276-78, where the term *bot* is recommended. Cf. previously in, for example, *Kollektiv arbetsrätt*, Stockholm 1950, pp. 206 ff. Cf. also Schmidt, *Law and Industrial Relations in Sweden*, Stockholm 1977, pp. 212 ff.

[45] See, for the following, *SOU* 1982:60, pp. 228 ff.

action has included an element which appears as "especially serious or noteworthy", as the Labour Court put it in its judgment in Case AD 1977 No. 218. In that case, the strikers *inter alia* had used cars to block access to a storehouse, and damages of 300 SEK were awarded. Where a strike has continued in defiance of an order by the Labour Court to return to work, the strikers may have fresh judgments made against them, in which case the disobedience will be regarded as an aggravating element. The highest total amount which has been awarded against a worker for participation in a long-term strike has been 600 SEK, which occurred in Case AD 1978 No. 122. It can be read out of the judgment in that case that the Court was not prepared to award further damages for continued participation by the workers in the same strike, so that a limit had therefore been reached as regards utilisation of the damages remedy.

In common with the Danish Court, the Swedish Labour Court has adjusted models for the calculation of damages in line with the fall in the value of money.[46] The Labour Court in 1982 came roughly into line with the Danish Labour Court as regards adjustment of remedies for breaches of the peace obligation by workers. Thus, in November 1982, both Courts raised the normal remedy in relation to what had been applied since 1976-77; the Swedish Court by 50% and the Danish Court by roughly the same percentage. If there had been no particularly aggravating or mitigating circumstances, the level of damages for an unlawful strike in Sweden was, thus, in 1983 and 1984 set at 300 SEK (see, e.g., Cases AD 1984 Nos. 33 and 137). In consequence of this, it could be reckoned that the maximum economic remedy for participation in a long-term strike in contravention of an order of the Court should be around 900 or 1,000 SEK. This maximum corresponds fairly closely to what has been applied by the Norwegian Labour Court in the judgments during 1981 mentioned above, but is well below what can be awarded in Denmark.

In a similar way as in the other Scandinavian countries, shop stewards in Sweden are regarded as bearing a special responsibility for the peace obligation. In Case AD 1981 No. 5, a pair of shop stewards had initially given their approval to a collective agreement on wages, but, immediately thereafter, had resigned from their positions in order to take the lead in an unlawful strike against the agreement. They subsequently had a remedy of 300 SEK each awarded against them, while their comrades got off with 200 SEK. Thus, relatively mild note is taken of the special responsibility in assessing damages,

[46] See Case AD 1982 No. 129, delivered on 3rd November 1982. Cf. how a raising of the damages for contravention of the Employment Protection Act has been announced in Cases AD 1982 No. 39 and No. 107. The increase appears to be 50% in comparison with the pattern which began to be imposed in the middle of the 1970s. The increase is somewhat lower than the equivalent rise in the consumer price index.

and the remedy cannot be compared in the least with what has been applied—as has been explained above—in some cases in Norwegian law. The guiding principle in Swedish law is that liability is borne jointly by the strikers, and that each and every one who joins with the group bears the same liability as the others. Thus, the fact that one of the strikers has taken on the role of spokesman for the others will not give rise to a situation where he is dealt with more severely (see, in particular, Case AD 1975 No. 31).

As has already been mentioned, there has been adopted into Swedish law the Danish rule that employees who immediately bring an end to an unlawful strike following a meeting for discussions (*fællesmøde*) will normally be relieved of liability for the breach of the peace obligation. The Swedish rules are to be found in sec. 43 and sec. 60, para 3, of the Act on the Joint Regulation of Working Life, together with statements in the *travaux préparatoires*. The intention is not that the employer should have to discuss the strikers' demands during these statutory discussions; rather, the idea is that it should be possible to overcome any unnecessary *impasses* of a psychological kind, by talking about what has happened and clearing up any misunderstandings, as well as that, together, the parties should attempt to sort out what can be done in order that work may be resumed again. The rule is an expression of the prevailing view in Swedish labour law that the threat of sanctions should not be the only, or even the most important, means for dealing with unlawful industrial action.

Alongside damages as a remedy for unlawful industrial action, there is liability for the other side's *legal costs*. In particular, where only a small group of workers has embarked upon prohibited action, liability for these costs can be rather heavy. By way of example, mention may be made of Case AD 1981 No. 5, where each of six workers against whom legal proceedings had been brought was ordered to pay legal costs to the tune of 893 SEK.

In all three Scandinavian countries, employers have the possibility, in certain circumstances, of enforcing damages awarded by a court for breach of the peace obligation by workers through compulsory set-off against wages.[47]

It is unusual in Sweden for *trade unions* to be liable for breach of the peace obligation, and remedies awarded in the few cases which have occurred during recent years appear very mild in comparison with what has happened in Danish and Norwegian case-law. However, it is not possible to make direct comparisons, since the Swedish Labour Court has not, as have the other two Scandinavian Labour Courts, had to adopt a position where a union has organised or supported really extensive unlawful conflicts. Only in two cases

[47] *Jacobsen*, p. 484, note 148; sec. 55 of the Norwegian Working Environment Act; see also sec. 3 and sec. 4 of the Swedish *lag* (1970: 215) *om arbetsgivares kvittningsrätt* (Act on the Employer's Right of Set-off), and Sigeman, *Kvittningslagen*, 1972, pp. 176 ff. and p. 184.

during the four years 1979-1982 was a trade union held liable for breach of the peace obligation under a collective agreement.[48]

> In Case AD 1979 No. 99, an engineering union branch was ordered to pay 5,000 SEK as damages for breach of the duty to endeavour to bring an unlawful strike to an end; *inter alia* some members of the branch committee of the union had resigned from their positions, and joined an *ad hoc* committee which had taken the lead in the strike, which lasted for roughly two weeks. As justification for the remedy being so very lenient, the Court made reference to the members' lack of industrial relations experience.
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> Case AD 1982 No. 31 concerned a union branch in the commercial sector, which had conducted a public opinion campaign against shops being open for trading on Sundays. As part of the campaign, leaflets had been distributed outside department stores which were open on Sundays, with exhortations to customers not to shop there. This activity was held by the Labour Court to amount to an unlawful infringement of the relevant firm's right, provided for by collective agreement, to manage its business, and that infringement was not protected by the principles of freedom of opinion. The union was ordered to pay general damages for breach of the peace obligation, amounting to 15,000 SEK, and the same remedy was levied against the national level union to which the local union belonged, since it was held to have supported the unlawful action.

As can be seen, the amount of damages is relatively low, which is in line with the Labour Court's earlier practice in cases concerning breach by trade unions of various duties under collective agreements. The highest amount which such a union has been ordered to pay in general damages is 40,000 SEK. This happened in Case AD 1963 No. 12, where the Union of Pilots was held liable for implementing a refusal to work in breach of collective agreement. As far as liability for local unions is concerned, the highest sum awarded is 25,000 SEK. These damages were awarded in Case AD 1965 No. 28, where the Stockholm Bricklayers' Union was held liable for failure to observe the, at that time, strict normal-wage system under the building sector's collective agreements.

It is, of course, unusual for an *employer* or an employers' organisation to commit a breach of the peace obligation (although see, for example, Case AD 1976 No. 130). As regards other breaches of collective agreements by employers, it may be said that general damages in normal cases (for example, concerning occasional breaches of clauses on working time or wage-rates) will be in the order of 5,000 SEK.[49] However, particularly where the employer has made a large economic gain by virtue of his breach of the agreement, a

[48] Furthermore, in one case (see Case AD 1982 No. 157), a trade union was held liable for what was referred to as "pure economic loss" (*ren förmögenhetsskada*), which had been occasioned by its members through criminal acts, incited by shop stewards, as part of what, in itself, was a lawful industrial dispute in circumstances not regulated by collective agreement.

[49] During the years 1978-1980, the highest damages awarded against an employer for breach of collective agreement provisions were 8,000 SEK; see Case AD 1978 No. 165, which concerned breach of provisions on training for safety representatives.

significantly higher amount may be awarded. In Case AD 1982 No. 114, an incorrect application of working time provisions had led to a cost-saving for a Municipality in the order of 120,000 SEK, and, having regard to this, coupled with the fact that the breach of agreement had, for other reasons, to be regarded as very serious, general damages were set at 150,000 SEK. It may be added that relatively high damages have been awarded where there has been breach of supplementary rules to collective agreements following from the Act on the Joint Regulation of Working Life. An employer company, which breached sec. 11 of the Act on the Joint Regulation of Working Life on the duty to negotiate before any important alterations to the activity are decided upon, was, in Case AD 1984 No. 75, ordered to pay a total of 900,000 SEK as general damages to three trade unions. Although falling outside the scope of this paper's subject-matter, it must also be mentioned that the Employment Protection Act—which is also applicable to circumstances which are not regulated by collective agreement—contains strict rules on remedies, particularly for the case where an employer disregards a decision of the Court declaring a dismissal void. Under a contract of employment which made reference to the provisions of the statute for this case (sec. 39), one employer was ordered, in Case AD 1981 No. 115, to pay damages equivalent to 32 months' wages, a total of approximately 470,000 SEK.

As regards Swedish legal developments in relation to the remedy of damages, it should be mentioned here that the "200-kronor rule" has, in principle, been re-introduced as from 1st January 1985. By taking this step the Social Democratic Government, which has been in office since the autumn of 1982, has met demands raised and adopted at trade union congresses. According to the *travaux préparatoires*,[50] the primary purpose of re-introducing the rule is to clarify how, and with what measures, breaches of the peace obligation are to be dealt with. The idea is that, as far as possible, means other than court hearings and damages should be used when dealing with such breaches.

The new regulation implies that employees who immediately bring an end to an unlawful strike following a meeting for discussions will be completely relieved of liability, unless there are special reasons, see sec. 43 and sec. 60, para. 3, of the Act on the Joint Regulation of Working Life. Employees who do not return to work as a result of the meeting may have damages awarded against them, but normally an individual employee will be subject to a maximum award against him of 200 SEK. A sum higher than 200 SEK can only be awarded if a strike has continued in defiance of an order by the Court to return to work and the industrial action appears as "especially serious or

[50] *SOU* 1982:60, *Prop.* 1983/84:165.

noteworthy" (sec. 60, para 4, of the Act on the Joint Regulation of Working Life).

In relation to this new regulation the criticism can undeniably be made that the limitation to a fixed amount appears irrational against a background of changes in the value of money.[51] If there is no index-linking, and if inflation continues as it has until now, the remedy will soon virtually lose all practical significance. More generally, it may be felt that the standing of the legal system is harmed if there is introduced a rule whose effects are hollowed-out in this way, and, simply from that point of view, it should be accepted that liability in damages of individual workers for breach of the peace obligation be completely abolished. However, it should be borne in mind here that the trade union which has entered into an agreement can also derive advantage from the fact that the individual members bear a personal liability for labour peace. The union's promise of peace during the period of the agreement will carry greater value as an object of exchange than if liability in damages is abolished or hollowed-out, and, consequently, the union will have greater opportunities to promote its wage-policy activities.

In this connection, there may be cause to consider a more radical reform of the economic remedies for breach of the peace obligation by workers. At the 1972 Nordic Jurists' Meeting, the present author advanced the notion that the damages remedy ought to be exchanged for an economic penal damages award of a moderate, though not meaningless, size, which would be paid not—or at least not entirely—to the employer, but would go to some generally-useful purpose.[52] A similar proposal has been put forward by Folke Schmidt. If the penal damages were not paid, or, in any event, were not paid completely, to the employer, the remedy would not contribute, as it does under the current system, to heightening conflicts between the parties. Furthermore, if the penal damages award were to go to some generally-useful purpose (for example, protection of the working environment), the rule would be able to make it clear that a breach of the peace obligation may constitute not only an infringement of the employer side's interests but also of the requirement for solidarity between various groups of employees.

It falls outside the framework of this paper to set the rules on remedies which have been described here in their broader social context, and, in any event, it is an undertaking fraught with danger to attempt to demonstrate a connection between rules and social reality. To conclude with, therefore, the problems will

[51] Cf. sec. 13 *a* of the Finnish Act on Collective Agreements, mentioned above.

[52] See *Förhandlingarna vid det tjugosjätte nordiska juristmötet 1972*, Vammala 1975, p. 180 (Sigeman), and pp. 191 ff. (Schmidt). See further, Schmidt, *Facklig arbetsrätt*, 2nd ed. Stockholm 1979, p. 278 and pp. 293 ff.

be indicated only in connection with the comparisons made above in relation to the remedy for breach of the peace obligation in the four legal systems. The statistics on stoppages of work are incomplete and hard to interpret, but much points to the fact that the occurrence of unlawful strikes, over a number of years, has, on average, been significantly greater in Denmark and Finland than in Norway and Sweden.[53] Against that background, it may be thought paradoxical that it is precisely those two first-named countries which constitute the extreme cases in relation to economic remedies for breach of the peace obligation by workers. The remedies are, as has been illustrated, strictest in Denmark, while in Finland individual workers cannot be made liable at all for a remedy in the form of *bot* or damages. Nevertheless, it is convenient to regard the high level of unlawful strikes in Finland as evidence that there is a need for a legal remedy of that kind in order to hold the strike frequency to a modest level. On the other hand, Danish experiences show that there is no simple connection such that more severe remedies would more effectively prevent breaches. Explanations must also be sought in other economic, political and social factors. It is also self-evident that legal remedies can only be given limited significance when what is being sought is the promotion of social regulation which is suitably balanced to, on the one hand, prevent unlawful stoppages of work having a socially damaging extent, and, on the other hand, not unduly suppress the resort to stoppages of work as measures of protest which are a natural and understandable feature of a democratic society which recognises freedom of opinion.

[53] See *International Encyclopaedia for Labour Law and Industrial Relations:* Jacobsen, *Denmark*, para. 731; Suviranta, *Finland*, paras. 369-72; Adlercreutz, *Sweden*, para. 577; and cf. the diagram in Hepple, *Great Britain*, following para. 464. See further, *Statistisk Årsbok*, Stockholm, most recently 1984, table 209, and *Statistiske oversikter 1981* (published by *Norsk Arbeidsgiverforening*), table 20. Cf. *Year Book of Labour Statistics 1982* (published by the ILO), table 28 A.