

CO-DETERMINATION IN SWEDEN: THE UNION WAY

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The development of co-determination has proceeded along different paths in different countries. To a large extent, this process has been determined by historical and institutional factors, although an element of chance seems to have been involved as well. It therefore cannot be explained completely and rationally. Indeed the terminology of the subject itself poses a difficult problem. To the Englishman, the term “co-determination” seems to be synonymous with the German word “*Mitbestimmung*” and thus covering a limited field in industrial relations. But in Sweden the term co-determination means more than that: it is a question of workers’ participation in other fields as well. Thus in this paper the term “co-determination” will be used when I speak of the whole range of union participation in industrial relations, while a specific term, “joint regulation”, will be used when referring to the forms of workers’ participation dealt with in the new Act on the Joint Regulation of Working Life [1]. In this paper I will describe the development of co-determination in Sweden in the light of historical and institutional factors peculiar to Sweden, starting by pointing to some distinctive features of the Swedish labor market [2].

1. Structure of the collective bargaining system in Sweden

The Swedish labor market is characterized by a highly developed system of organizations representing all categories of employers and employees, both in the private and public sectors. Organizational density is very high among blue-collar workers; in some branches it is well over ninety percent. It is slightly less among white-collar workers; in industry it is about seventy percent, but in some branches of government service it runs up to almost one hundred percent. The overwhelming majority of blue-collar workers are members of nationwide industrial unions affiliated with the Swedish Trade Union Confederation (LO). Similarly, white-collar workers belong to national unions, but these are grouped into two confederations with somewhat divergent profiles. The Central Organization of Salaried Employees (TCO) mainly represents low- and medium-income white-collar groups, while the

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Confederation of Professional Associations (SACO/SR) mainly represents academically trained employees in higher income brackets. All three of these top organizations cover the private as well as the public sector.

Employers in the private sector are organized into branch associations affiliated with a dominant top organization, the Swedish Employers' Confederation (SAF), in a way similar to the organizational structure of the employees. In fact, the organizational structure of the employers has set the pattern for the entire labor market, since the unions have shaped their organizations to match those of the employers. There are also employers' associations that are not affiliated with the SAF, for example, those involved with shipping, cooperatives and newspaper publishing. The state as an employer is represented by the National Collective Bargaining Office [3]. The municipalities have two bargaining associations.

The system thus permits a very high degree of centralization in collective bargaining on matters of wages and general conditions of work as well as on matters of co-determination. All the top organizations in the private and public sectors engage in negotiations over wages and general conditions of work covering all the employees of the participating employers. Usually agreements are concluded for a period varying between one and three years. These agreements made at the top level are subsequently accepted by the national unions and employers' organizations, with whom the power to make binding collective agreements rests, and transformed into ordinary collective agreements [4]. The typical collective agreement in Sweden is thus a nationwide branch agreement. During the last few years the government has participated indirectly in these negotiations, since inflation combined with high marginal taxes has necessitated a series of tax reforms [5].

The organizations of the labor market, particularly on the labor side, do not look upon their task as limited strictly to the problems of that market. They participate in the activities of society in a number of fields, for example in local government and the educational system. The unions of blue-collar workers maintain close ties with the social-democratic party, which was in government in Sweden for over forty years until it lost the election of 1976. In fact, the party and the unions look upon themselves as two branches of the labor movement. This close connection with the former government made it possible for the trade union movement to get the kind of legislation it wanted; indeed, one could say without irony that the Swedish legislation on co-determination is made to order.

There are other important aspects of the Swedish labor market that can be only briefly mentioned here. Traditionally, cooperation between the unions of blue-collar workers and those of white-collar workers has not been very good. The situation might be described as one of the blue-collar workers trying to catch up with the white-collar workers, who in their turn try to keep ahead. Nevertheless, the result has been a gradual closing of the gap between the two groups. Co-determination, however, makes it necessary for the white-collar workers to cooperate with the blue-collar workers (and *vice versa*, although possibly to a lesser extent), particularly on the local level. The relationship between the unions has consequently

improved remarkably since the introduction of the new legislation on joint regulation. The top organizations now negotiate together for a master agreement with the employers on matters of joint regulation, as indicated more fully below.

Another notable feature of the Swedish labor market is the process of making the status of employees in government and in the municipalities as equal as possible to that of employees in the private sector. Very little now remains of the public law oriented way of regarding public servants; in all important respects, the relationship between the public employer and his employees is now regulated by private law. The scope of collective bargaining is, for all practical purposes, as wide as for private employees. This also holds true with regard to questions of joint regulation. In some respects the bargaining rights of unions in the public sector are even wider than the rights of unions in the private sector.

2. Historical development of co-determination

A. Evolution of employers' powers

The strikes and demonstrations that swept Europe in 1968 and 1969 also affected Sweden. Until then the Swedish trade union movement had taken a rather faint interest in the problems of co-determination. The unions viewed economic issues (that is, wage policy) as primary. This view seems to have been typical at that time at least for the leadership, which apparently was taken by surprise when the demand for co-determination was raised. Before that, some agreements had been made in the field of co-determination, the most important of which was the agreement on works councils, but they had not gone very far because of the resolute opposition of the employers. The agreement on works councils provided that the employer was regularly to furnish prospective information about the enterprise's economic situation and provided also for joint consultations in matters of importance to both sides. The power to make decisions, however, remained with the employer [6].

The documentation of the opposition of Swedish employers towards industrial democracy on a wider scale can be traced back to 1906. In that year, the first agreement between the top organizations of workers (LO) and of employers (SAF) was made. This agreement constituted recognition of the right of unions to represent employees, to bargain collectively, and to organize. In return, the employers demanded and obtained recognition of their own right to manage and to hire and dismiss workers at will, regardless of union membership. This principle was also written into the bylaws of the SAF. Indeed, that organization would not permit any member enterprise or affiliated organization to make a collective agreement without a clause on management prerogatives of the kind just indicated [7]. This clause, Section 32 of the bylaws of the SAF, has become a symbol of the whole issue of co-determination. The employee organizations discovered that they could

not break the opposition of the organized employers to co-determination on their own without major industrial action. In this context the issue of employment protection became closely connected with the issue of co-determination. Employment protection and co-determination became two sides of the same coin: breaking the power of the employers, the symbol of which was Section 32. The unions demanded and achieved legislation on both issues.

Other less important factors contributed to strengthening the position of the employers. In 1929, the Swedish Labor Court was established. Its main task was to administer the new Act on Collective Agreements. That act did not raise obstacles to employment protection or industrial democracy. On the contrary, it was clear that under the act the scope of collective bargaining was wide enough to cover almost any substantial issue. Naturally the right to strike existed to the same extent. During its initial years the Labor Court created a vast body of case law, laying down rules for the construction of collective agreements. Some of those rules constituted important victories for the employers. Two of the doctrines of the Labor Court have been particularly debated: the doctrine of invisible clauses [8] and the doctrine of the employer's prerogative of interpretation [9], both of which have come to play a major part in subsequent legislation.

The doctrine of invisible clauses was a means of avoiding the requirement in the Act on Collective Agreements that all terms in such an agreement be in writing. The act literally meant that, if there were no peace obligation written into such an agreement (*i.e.*, no agreement by employees to refrain from industrial action), then there would be no peace obligation with respect to the matters covered by the agreement. However, to promote a policy of extending the peace obligation as far as possible, the Labor Court in the early nineteen-thirties adopted the position that the requirement of a writing could be set aside in some instances. The reasoning of the Court went as follows. The primary task of the collective agreement is to regulate wages and other conditions of employment on the individual employment level. A collective agreement cannot be totally comprehensive; thus the parties are likely to rely on some rules remaining unchanged, regardless of the silence of the collective agreement. This is the case in particular with the basic rules, the *naturalia negotii*, of the individual employment contract, and, in the eyes of the Court, the right of the parties to terminate the contract at will, and the right of the employer to manage the business, belonged to the *naturalia negotii* of the individual contract of employment. The effect of this line of reasoning was thus that the substance of Section 32 was made into something similar to nonmandatory law: the right of the employer to hire and dismiss, and to manage, was made part of every collective agreement, unless the parties had expressly provided otherwise. This meant that the bargaining position of the unions was made weaker, since the burden of making the agreement and of incorporating clauses on employment security and industrial democracy was laid upon them.

The doctrine of the employer's prerogative of interpretation is perhaps less difficult to understand. The same principle exists in most legal systems as a corollary to

the right of the employer to give reasonable orders. In 1934, a case was brought before the Labor Court in which employees had refused to obey the orders of their employer to work overtime. According to the employees, the employer had no right under the agreement to order overtime to the extent and under such circumstances as he had done. The Labor Court expressed the following opinion about the duty of an employee to perform work [10]:

In regard first to the general question of principle, whether a refusal to perform work is prohibited, irrespective of the true meaning of the agreement in relation to the extent of the duty to perform work, it has been maintained from the employee side that there cannot be imagined to exist a duty for the workers, in a dispute over the duty to perform work, to obey instructions, since the employer would then be able, through the maintenance of an interpretation of the agreement which was quite impossible, to force the performance of work which would otherwise not be permitted. However, it could equally strongly be contended that, if a refusal to perform work in a dispute of this kind were permitted, the workers would have the possibility, through a completely untenable interpretation of the agreement, of preventing a piece of work which the employer had the right to demand be performed. Note is taken, in this context, that it would generally probably be harder to, at a later stage, compensate for damage arising through the non-performance caused by the refusal to perform work which could justifiably be required than to compensate for damage which stems from the workers having been compelled to carry out a job which they were not obliged to perform. In view of the employer's right to manage and distribute the work, the Labor Court must hold that, when a dispute arises concerning the duty to perform work, and there is no time to have a resolution made by the Labor Court before the work has to be carried out, the employer, as a rule, will have a right to insist that the work be performed without being hindered by the dispute, pending legal trial of the disputed matter.

This rule differs from the usual rule in contractual relations [11]. In the normal case, it is the person who has the duty of performance who must judge, with full contractual responsibility, whether or not he is obligated to perform. According to the rule spelled out by the Labor Court, the employee is in breach of contract if he does not comply with the order of the employer, even if the employer has misinterpreted the scope of the duty to perform work. Naturally, the unions have considered that this rule is a great handicap in negotiations with the employer. The unions must instruct their members to carry on with the work in dispute, even though the members feel that they are not obliged to do it. If the matter comes before the Labor Court the only questions that are open are compensation and damages, not the obligation to perform work. The Labor Court has always refused to overrule these doctrines and others that the unions have regarded as outdated. The main argument seems to have been that collective agreements have been based, to a large extent, on the rulings of the Labor Court, so that to overrule the early decisions would, in the eyes of the Court, be equivalent to amending those agreements, which is more appropriately a matter for the parties themselves or for the legislature [12].

B. Evolution of union powers

It was against this background that a major reform of Swedish labor law was launched in the late nineteen-sixties. This reform included an Act on Employment Security, a reform of the Act on Industrial Safety, an Act on the Union Representative, and, finally, the Act on Joint Regulation (based on earlier enactments concerning the right to organize and bargain collectively). A separate statute was adopted covering official employment. Reform was based on the principle that the rights of employees with regard to co-determination should be exercised by the local union that already had a collective agreement with the employer [13]. There was thus to be no room for individual rights or for minority unions without collective agreements. The importance of this principle cannot be overestimated. The established unions were given a firm hold on the situation at the expense of the non-established unions [14]. Indirectly this meant that industrial democracy in Sweden on the individual level would develop as a question of union democracy.

A second principle of overriding importance in the reform movement was that the unions would exercise their rights in matters of co-determination from a negotiating position. The unions have looked with suspicion on all kinds of joint committees and attempts at integrating union participation with the decision-making structure of enterprises. Swedish unions prefer a clear-cut party-to-party relationship with employers.

I shall not comment on the Act on Employment Security here. Neither shall I discuss the Act on Industrial Safety. Before discussing the Joint Regulation Act, however, it is necessary to comment briefly on the Act of the Union Representative, since, in many respects, it is fundamental to the whole reform [15]. One may say that that Act creates the economic backbone necessary for the unions to participate. According to the Act, the union representative is entitled to the use of a room or other space at the place of work to carry on union activities. He has the right to time off to the extent necessary to perform duties in connection with his union mandate; when he takes time off for union activity at the place of work, he is entitled to full employment benefits. However, not every kind of union activity is privileged in this way; only activities aimed at the protection of the interests of the members in relation to the employer are privileged, while those undertaken to promote internal union activities are excluded. The borderline between privileged and non-privileged union activities is rather shady, as is the borderline between activities at the place of work and outside it. The union representative is further protected in a number of ways. When he concludes his work for the union, he is guaranteed the employment benefits to which he would have been entitled if he had remained in his regular work. Indeed, work for the union qualifies him for promotion and wage increases in the same way as regular work for the employer. In case of layoffs, the union representative may be accorded super-seniority if it is considered necessary to union activity. Naturally, the union representative cannot be dismissed because of his work for the union nor can he be assigned another job without consultation with the union.

The union may appoint any number of representatives. However, the total privileged union activity may not exceed a reasonable amount of work time. The union representative must be an employee, since the Act does not give national union officers access to the enterprise. In all matters of substantive importance, the local union has been given a prerogative of interpretation in disputes concerning the Act or collective agreements ancillary to the Act. The prerogative of interpretation will be discussed below in connection with the Joint Regulation Act.

The Act on the Union Representative will probably be amended to strengthen the position of the union; a bill to that effect was presented by the government in 1979. The proposed amendments include granting unions the right to arrange for meetings during working hours on the employers' premises and extending the right for the union representative to take time off for union activities, as well as the setting up of a system of regional union representatives in order to cover small enterprises with no local of their own. It is also proposed to provide a right for national union officers to have access to the enterprise.

Board representation in Sweden represents a side-track in the development of industrial democracy [16]. Existing legislation gives to established local unions the right to appoint one or two members to the boards of companies, depending on the total number of directors on the board. The legislation covers every company employing twenty-five people or more. However, the unions look upon minority board representation more as a means of gaining information than as a means of exercising substantive influence on the decisions of a company. The union representative on the board is to be regarded as a full member, with all the rights and responsibilities of a board representative appointed by the shareholders. The employer cannot refuse to let the union representative participate in meetings and decisions of the board, since the effect of such an attempt would be only to make the decisions of the board void and to make it illegal for the executives to carry them out.

The policy of Swedish unions to stress direct negotiations in matters of co-determination has made them increasingly suspicious of board representation, which, of course, means participation in decision-making in cooperation with employers. This tendency has been even more noticeable on the government side, where employees appoint members to the boards of agencies. It is possible that unions, and particularly those affiliated with the TCO, will stop appointing such representatives in the future. Instead they will rely on the procedures of the Joint Regulation Act.

However, this policy does not mean that Swedish unions are always going to rely solely on the Joint Regulation Act and on direct negotiations based on a traditional system of collective bargaining. It may be true that they are not interested in minority board representation, but they are certainly interested in majority board representation, and even in owning the major companies. The question of various profit-sharing fund systems has been a focus of political debate in Sweden for several years and various proposals have been put forward. A government committee was appointed in 1976 and is to deliver a proposal in 1980. Swedish unions apparently see some kind of profit-sharing system as the most effective way to

achieve a gradual take-over of decision-making in the private sector. At the same time the proposed profit-sharing systems have other goals as well. Presently there seems to be general agreement (except on the part of the conservatives) that some kind of collective fund system with a very strong employee representation is inevitable, the common denominator being the need for increased saving in the economy and the growing need for capital in industry. This means that, in the long run, co-determination in Sweden will rest on two main pillars: the system established by the Joint Regulation Act and a system of ownership of profit-sharing funds. It remains to be seen whether these systems can be reconciled and if so, how. This also means that the Swedish system will differ from the German, which is based on quite another concept: the idea that work qualifies for administrative and decision-making powers in the same way as ownership (capital). This development, however, lies far in the future and the attention of the labor market is now focused on the Joint Regulation Act and the collective agreements that so far have been concluded or are being negotiated.

3. The Joint Regulation Act

A. Innovations

The Joint Regulation Act is drafted in a peculiar way. It is based on three pre-existing statutes: the Act on Collective Agreements, the Act on the Right to Organize and to Bargain Collectively, and the Act on Mediation in Labor Disputes. Since these three statutes have been amended only slightly, one may say that joint regulation is being built on the foundation established by the already existing law. However, the Joint Regulation Act introduces five innovations into the system [17], thereby, of course, increasing the complexity of the system. In order to understand the impact of these innovations, one must realize that the legislative intent has not been to use the Act to change the fundamental principle of the employer's right to manage. The Joint Regulation Act is only a starting point for collective agreements, and it is up to the parties in the labor market to determine the precise extent of joint regulation. In other words, the unions have to rely on their bargaining strength in order to achieve a satisfactory degree of influence on the employer's decision-making, since, as indicated below, there are distinct limits to the degree of influence the unions can exercise solely on the basis of the Act itself. The five innovations introduced into the system are the following:

- (1) the employer's duty to conclude collective agreements on joint regulation if the union so demands;
- (2) the employer's primary duty to negotiate on essential changes in production, policy, *etc.*;
- (3) the employer's duty to keep the union informed;

- (4) the union's prerogative of interpretation on certain disputes; and
- (5) the union's right to veto the sub-contracting of work in certain situations.

(1) The employer's duty to conclude collective agreements on joint regulation

Section 32 of the Joint Regulation Act reads as follows:

Between parties who conclude a collective agreement on wages and general conditions of employment there should, if the employee party so requests, also be concluded a collective agreement on a right of joint regulation for the employees in matters which concern the conclusion and termination of contracts of employment, the management and distribution of work, and the activities of the business in other respects [18].

This section can be seen as the focal point of the whole Act; it expresses the fundamental principle that joint regulation is a matter for collective bargaining and that it is up to the unions to decide the direction and speed of reform in this area. The field of joint regulation under this section is wide indeed. According to its tenor, any activity of the business can be made subject to collective agreements on joint regulation. (I shall discuss the limits later in this paper.) However, the legal impact of this section is limited to a widening [19] of the scope of collective agreements since sanctions are not provided. It is clear why such a section cannot be sanctioned: imposing a sanction would involve the establishment of a regulatory body to determine whether an employer who had refused to agree to a collective agreement had acted lawfully or not. Such influence on the development of joint regulation could not be reconciled with the principle that unions are to decide for themselves in this area. It is also hard to visualize a system combining a quasi-judicial decision-making process with economic sanctions. It seems that a judicially enforced duty to contract should exclude to some extent the right to resort to industrial action [20].

Consequently the section must be looked upon primarily as a declaration of legislative intent: that a moral obligation be placed on employers not to resist a praiseworthy and necessary social development. Thus, Section 32 of the Joint Regulation Act reflects the social purpose of the whole legislation; it serves as a social contract between the parties under the mediation of the state, with the effect that collective agreements on joint regulation will finally be developed. Employers have given up resistance to union participation in the decision-making process and at the same time unions have accepted a new role in emphasizing participation.

The legislature has tried to strengthen the bargaining position of the unions with regard to collective agreements on joint regulation. This has been done in a peculiar way. Section 44 of the Act provides:

Where, during negotiations over a collective agreement, a party has requested that a matter referred to in § 32 be regulated in the agreement or in a separate agreement, but the matter is not expressly so regulated when the collective agreement is concluded between the parties, the matter shall not, during later negotiations about regulation of the matter in a separate agreement, be considered covered by a peace obligation under § 41 by virtue of the agreement which has already been reached [21].

In order to understand the reasoning behind this section it is necessary to return to the doctrine of invisible clauses established by the Labor Court, discussed earlier in this article. According to this doctrine, a collective agreement on wages and general conditions of work that contained no provision on managerial rights nevertheless imposed a peace obligation on the union concerning such matters since the right to manage was regarded as an invisible clause of the collective agreement. This placed the burden of negotiation on the union; it would thus be up to the union to see that a clause limiting managerial rights was inserted in the text of the agreement. Under Section 44, the burden of negotiation has been shifted to the employer who must now ensure for himself that there is an express provision in the agreement concerning his Section 32 rights. Otherwise, if the union has requested that Section 32 matters be regulated (and has not dropped its demands), a so-called "surviving right of industrial action" arises. Thus, in addition to its practical effects, this provision changes the psychological balance between the parties and serves as a kind of sanction on the employer's duty to conclude a collective agreement on joint regulation.

The effectiveness of this kind of rule is open to question. If there is a risk of industrial action during the life of a collective agreement (such as might arise from an employer's unwillingness to meet union demands on joint participation), an employer who is strong enough may refuse to enter into any collective agreement at all even on wage increases. With this threat facing it, the union may therefore simply drop its demand on matters of joint participation. Beyond that possibility, even if the negotiations proceed in such a way as to give rise to a surviving right of industrial action, the usefulness of that right is limited since it is confined to the precise demands raised during the negotiations; no additional demands beyond those previously raised can be supported by industrial action.

One further problem connected with the "surviving right of industrial action" is that the system is designed for negotiations at the enterprise level, so that there are certain difficulties in adapting it to the centralized collective bargaining system in Sweden.

(2) The employer's primary duty to negotiate concerning essential business changes

As noted earlier, the right of the parties to negotiate industrial disputes and grievances concerning the collective agreement or statutory rights has not been altered by the Joint Regulation Act. However, these bargaining rights have been supplemented by the employer's duty to negotiate prior to making certain decisions. This duty is provided for in Sections 11 to 13 of the Act, set forth in the notes [22]. According to Section 11, the employer must negotiate on his own motion with the established local union before he decides on important alterations of business activity or of work or employment conditions for a member of the established organization. According to Section 12, the union may request such negotiations in other cases concerning the activities of the employer, while under Section 13 a union that is not bound by a collective agreement is also given negotiating

rights when a matter *specifically* concerns its members. It is characteristic of the primary duty to negotiate that the right to make decisions remains with the employer; the union's negotiating rights are limited to requiring the employer to give reasons for his actions and to listen to the arguments of the union. The employer must not make and implement a decision until he has negotiated with the union. The reasoning behind this is that the employer should look upon primary negotiations as a normal part of the decision-making process of the enterprise [23]. In some cases the employer is free to make his decision before he has fulfilled his duty to bargain. According to Section 11, the employer must have compelling reasons. However under Section 12 the reasons do not have to be so strong, since, in cases covered by that section (wherein the demand for negotiations is initiated by the union), the employer may not have foreseen that negotiations would be necessary and may not have planned his decision-making with negotiations in view.

Thus, in primary negotiations the right to make decisions remains with the employer. If an agreement is not reached at the local level and if the local union so requests, the employer must negotiate with the national union. But even here, the employer may terminate the negotiations and make his decision if an agreement is not reached. The propriety of using the term "negotiations" in this context has been questioned. Usually, the term suggests that there is access to some kind of external decision-making procedure, such as courts or arbitration. (It should be noted that in Swedish the word "*förhandling*" means bargaining as well as negotiation. Industrial action is also regarded as a decision-making process. The important distinction is the fact that neither of the parties has the right to decide but that there is an external mechanism for solving disputes.) Perhaps it would have been better to have used the word "talks" or "joint consultations" or some other word not as strong as "negotiations". The legislature is, of course, not unaware of this. The choice of term is a conscious one, indicating legislative intent that the employer should engage in real negotiations and not merely listen politely to the complaints of the union.

Here, too, the legislature has chosen to work with psychological means rather than with traditional legal sanctions. Indeed, the importance of the primary right to negotiate lies in the fact that the employer must give reasons for his decisions. Since unwise or faulty decisions are hard to explain or to defend, in the long run the union will acquire a great deal of influence over the decisions of the employer.

This kind of regulation can be criticized since it is still based on the proposition that, according to the collective agreement, the employer has the right to manage and to make the final decision. This tends to cement the old pattern and fits all too easily with the doctrine of invisible clauses.

The relationship between the new primary duty of negotiation and ordinary negotiations [24] is basically unclear and also very hard to grasp for the parties at the local level. The ordinary right of negotiation covers disputes over rights and disputes over matters of interest. This means that it covers disputes where there is access to some kind of procedure for their solution. Does this mean that there is no

primary duty of negotiation in such cases? As has just been mentioned, the primary duty of negotiation is applicable where the employer has the right to decide for himself and thus appears to exclude cases covered by the ordinary right of negotiations. (On the other hand, in the reverse case, the ordinary right to negotiate also covers cases giving rise to the primary duty of negotiation, but this is neither controversial nor interesting. It only means that the union can request negotiations and waive its right to demand that the employer postpone his decision until he has fulfilled his duty to bargain.) However, a decision taken by the employer which can be attacked in court may certainly involve important changes in his activity or in the conditions of work. There is no clear answer to this question. The notion that there exists a primary duty to negotiate in cases involving disputes over rights (as well as disputes over interests) seems to fit in with the general inclination of the statute. However, this leads to a very awkward procedure. The employer must first negotiate prior to his decision (perhaps also with the national union), then make his decision and then bargain again according to the grievance procedure, finally ending up in court, where he risks an adverse award of damages.

Unfortunately, this is not the only case where one kind of negotiation may conflict with another. There are no less than eight kinds of negotiations in the Joint Regulation Act, each differing with regard to scope, parties, procedure, *etc.* Furthermore, there are provisions on negotiations in other statutes, many of which may conflict with each other [25].

(3) The employer's duty to keep the union informed

The unions' right to information has been well established for a long time by means of collective agreements. However, the statutory regulation of the Joint Regulation Act goes further, and in some respects the rules are controversial. It should be noted that, although the rationale behind the rules on the right to information is to strengthen the union in its bargaining position (*i.e.*, it is easier for a well-informed party to convince the other party than for one with little or no information), the rules are not coordinated with those concerning the primary duty to negotiate.

Section 18 of the Joint Regulation Act imposes a duty to produce documents that are referred to during negotiations. This right is accorded not only to the established unions but to all parties who have bargaining rights under Section 10 of the Act.

Section 19 establishes the substantive rules concerning the right to information. Three kinds of duties are defined. First, "an employer shall keep an organization of employees in relation to which he is bound by collective agreement continuously informed about how his activity is developing in respect of production and economically, and about guidelines for personnel policy". This rule requires the employer to supply general information on his own motion and corresponds closely to the rules contained in collective agreements.

Second, "the employer shall additionally afford the organization of employees

an opportunity to examine books, accounts, and other documents which concern his activity, to the extent that the union needs in order to take care of its members' common interests in relation to the employer". The employer is to be completely open to examination by the established union, with one important reservation: information is required to be given only to the extent needed by the union. Naturally, this is a difficult point for the parties to master.

Thirdly, the employer shall, on request, provide the organization of employees with copies of documents and shall assist the organization with any examination which it needs for the above-mentioned purposes, if it is possible to do so without unreasonable cost or inconvenience. The controversial point concerns the examination that the union may request. The employer is required to provide more than just facts. The duty of information requires that material be presented in a form that can be understood. Under this provision the union may ask the employer to make surveys, to run special computer programs and to take other steps. Whether this will impose unreasonable costs or inconvenience on the employer will be determined in the light of the usefulness of the materials to the union.

The most controversial points concern the employer's right to withhold information and the union's right to disseminate information it has obtained. The employer's duty to provide information does not extend to private circumstances, arrangements in connection with dispute situations, research and development of a particularly secret nature, *etc.*, although, according to the parliamentary committee, the right to withhold information should not be too limited, considering the important values at stake [26].

The employer may also demand that information given to a union representative be kept secret. Nevertheless, the union representative is allowed to convey the information to the committee members of the local. If the information concerns negotiations at the national level, it may also be conveyed to the members of the board of the national union as well. In view of the fact that in industry there are usually three unions established within each enterprise (representing blue-collar workers, supervisors and white-collar workers), it is likely that even secret information will be widely divulged. It is questionable whether information known to some twenty people can ever be regarded as secret at all [27].

(4) The union's prerogative of interpretation

The employer's prerogative of interpretation in disputes concerning an employee's duty to perform work, as laid down by the Labor Court, has always been a source of discontent for the union. It has been maintained that this prerogative has put the unions in an unfavorable position in negotiations at the local level. Since this rule differs, to the disadvantage of the employees, from the normal rules on the right to decide in disputes over interpretation it has been considered particularly obnoxious. Even under normal rules the employer also has the prerogative of interpretation in disputes over wages or other remuneration. This is merely a reflection of the rule that it is the party under the duty of performance who has the right to

judge, at his own risk, what his contractual obligations are [28]. This also creates a disadvantage for the unions, as in disputes over the duty to perform work. It is the union which has to take up the matter and, in the end, bring it before the Labor Court; the burden of taking procedural actions lies with the employees.

The Joint Regulation Act gives the union the right to make preliminary decisions in disputes over the duty to perform work and shifts the burden of taking procedural actions onto the employer. It also gives the union a prerogative of interpretation in disputes over collective agreements on joint regulation (*i.e.*, matters referred to in Section 32 of the Act). Under Section 34 of the Act, if a dispute arises over the duty to perform work, the interpretation of the union will apply until the dispute has been finally tried. However, if there are urgent circumstances [29], the employer may require the work to be performed. In this case, the employer must immediately call for negotiations and eventually bring an action before the Labor Court [30].

This is an example of the technique often used by the legislature in the Joint Regulation Act. A new system of rules is built onto the existing system. Here, there are certain preconditions before the union's interpretation can be applied. A dispute must have arisen, meaning that the employer and the representative of the union must have been in contact with one another and must have stated their opinions as to the correct interpretation of the contract. The union must also unambiguously declare that it is going to exercise its prerogative of interpretation. If this is not the case, the old system of rules will apply, *i.e.*, individual member must obey the orders of the employer and his duty to perform work will not cease until the union's prerogative of interpretation has been activated. The prerogative of interpretation can be exercised by the union only if it chooses to do so, and curiously enough, the union's prerogative is not limited to the provisions of the collective agreement, but applies also to the individual contract of employment.

The union will be liable for abuse of the prerogative of interpretation. According to Section 57 of the Act, the union must pay compensation for loss where it has maintained or approved a wrongful interpretation of an agreement or of Section 34 without good cause. Further the employer is under no obligation to follow the union's interpretation if it is obviously wrong.

Very little is yet known about how the prerogative of interpretation is being used. Under some agreements, disputes over the duty to perform work are infrequent, while under other agreements there are a number of disputes brought up to central negotiations each year. So far, it seems that the prerogative of interpretation has not been used very frequently by the union, but this is of minor significance in assessing the practical importance of these rules. The power of the union to apply its prerogative of interpretation will be extremely important in negotiations concerning the duty to perform work. It will probably lead to increased employer willingness to settle for a compromise or to seek some other solution to the practical problems involved. In practice the prerogative of interpretation shifts the burden of taking procedural action. The prerogative of interpretation will also ob-

viously have an effect on the peace obligation. The union's ordering an employee to stop working when the employer has the prerogative of interpretation would previously have been unlawful industrial action. This is no longer the case. Since in many cases disputes over the duty to perform work in reality constitute disputes over remuneration for the work to be performed, the Act gives the unions the opportunity to use the prerogative of interpretation, or to threaten to do so, in order to reach a satisfactory wage agreement. The union is free to "sell" the prerogative of interpretation in exchange for more pay. However, this can be done only within certain limits. Apart from the fact that the collective agreement itself may raise obstacles to such solutions, there is also a boundary to unlawful industrial actions. However, the precise contours of this boundary are not yet well defined.

The Act could have regulated disputes over wages and other remuneration in the same manner as disputes over the duty to perform work. Indeed, in one instance this has been done: disputes concerning remuneration for the union representative are treated in the same way as work disputes. As mentioned above, the Act is built on the principle of shifting the burden of procedural action. Under Section 35, in a wage or compensation dispute between parties to a collective agreement, the employer is required to call for negotiations, within three or four days, and, if the dispute is not resolved at the local level, must call for central negotiation within fourteen days. If negotiations fail to resolve the dispute, the employer must begin suit in the Labor Court. Failure to take these procedural steps requires the employer to meet the union's compensation demands [31]. This does not give the employees the ordinary prerogative of interpretation, which would require the employer to meet the union's demands at the outset. The reason for not using the ordinary prerogative may be explained as follows. In the case of a dispute over the duty to perform work, the employer's prerogative of interpretation means a duty for the employees to perform the work in accordance with the view of the employer. If the employer's interpretation is wrong, however, the work performed cannot be undone. The only sanction is damages. In the case of a dispute over pay or other remuneration, however, this is not the case. The employees will, in the end, always get paid, but the process of extracting money from the employer is time-consuming and difficult. Furthermore, if the employer were to pay at once, in accordance with the view of the union, he could always reserve the right to require the employees to pay back the disputed sum. Hence, an ordinary prerogative of interpretation for the union would be of little or no value to the individual employee. The best would be to guarantee a speedy processing of the union's complaints and this is exactly what Section 35 does. Since disputes over wages are more frequent than those over the duty to perform work, the unions view Section 35 as extremely valuable. Indeed it may be more so than the prerogative of interpretation on the duty to perform work.

The Act also gives the union a prerogative of interpretation with regard to disputes over the interpretation of collective agreements on joint regulation, *i.e.*, joint regulation agreements concerning a matter referred to in Section 32. The language

of Section 33, establishing this prerogative, is set forth in the notes [32]. As with the prerogative of interpretation over work disputes, very little is known about disputes dealt with in this section, since very few collective agreements on joint regulation have been concluded. The author knows of only one such dispute. In the negotiations over an agreement on co-determination for the public sector, the state bargaining authority maintained that the prerogative of interpretation applies only when the employer has made a decision, or is about to make one. The prerogative of interpretation cannot, however, be applicable in every kind of dispute, in spite of the wording of the section.

There is one important matter of principle that ought to be mentioned. According to Section 35, the prerogative of interpretation does not give employees the right to implement a decision on behalf of the employer. This must be seen in connection with the rules on the relationship between company law and the Joint Regulation Act. This relationship will be dealt with later in this article. It is sufficient to point out that a major principle of the Act is that the rights of the union vested in the Act itself or in collective agreements concluded under the Act do not affect contractual or other relations of the employer outside its relationship with the union or the employees. The union, or a joint committee with an employee majority, cannot act on behalf of the employer without his authorization; even if such powers have been given in a collective agreement, they can, in relation to a third party, be revoked at any time. Thus, if a business contract between the employer and a third party constitutes a breach of a collective agreement, the contract remains valid. This is also the case if the union has vetoed the sub-contracting of a job in accordance with the rules in the Act; the employer will have to pay the union damages, but the contract will still stand.

(5) The union's right to veto the sub-contracting of work

In Sweden, it is the duty of an employer to pay preliminary tax, social insurance payments, vacation wages, etc., only if work is performed for him by an *employee*. If the work is performed by an independent contractor, there is no such duty and the contractor must pay his own costs. Since these costs are quite high, it is always tempting for the employer to try to make a contract of employment look like a sub-contract with an independent contractor. Furthermore, in some areas sub-contracting is very common, particularly in the building trades. Often a chain of sub-contractors is established with the sub-contractor contracting out to a sub-sub-contractor and so on. At the end of the chain, one is likely to find "independent contractors" who should properly be regarded as employees, but who receive no social benefits, have no collective agreements and enjoy very little employment security. All this poses a difficult problem for the legislature. It is very hard to prohibit this activity, partly because of the problem of exercising efficient control, and partly because it is difficult to draft statutes without also making it impossible for small entrepreneurs to "be their own men".

This problem was noted during preparatory work on the Act. The drafting com-

mittee proposed that some control be exercised by the unions and therefore proposed a primary duty for the employer to negotiate before sub-contracting certain kinds of work. The committee also proposed a very restricted right of the unions to veto sub-contracting where there was reason to suspect evasion of the rules on social insurance, collective agreements, *etc.* The legislature finally followed the committee's proposal but left the matter to a future committee for further consideration. The relevant sections are set forth in the notes [33]. Section 38 prescribes a primary duty to negotiate that arises once the employer has found a particular sub-contractor. The rationale for the rule is that the negotiations should concern a particular sub-contractor and his suitability under standards established in Section 39. It has not been the intention of the legislature in any way to put obstacles in the way of the employer's right to sub-contract work. In many instances, the union and the employer are quite able to agree as to what measures should be taken in order to satisfy the demands of the union. The union will often demand that the sub-contractor be bound by collective agreement, or that he be prohibited from sub-contracting in turn. Such conditions may then be stipulated in the contract between the employer and the sub-contractor. As noted earlier, the right to veto is limited and has apparently been used in very few cases; rather, the duty of the employer to negotiate before he appoints a sub-contractor is of most importance.

Unexpectedly, the right of veto has caused conflict within quite another area. The unions that organize workers in enterprises engaging in sub-contracting often maintain that the industrial unions use this "right of veto" to retain work for their own members, and thereby influence the employer not to sub-contract. This is the case in such areas as transportation, cleaning services and office services. In particular, there has been a heated conflict between the construction workers and the transport workers on the question, which must be seen as part of an old conflict between these two organizations, aggravated by the slump in the building trade. However, the right of veto is only one of the weapons used in this conflict.

B. Co-determination in the public sector

Co-determination in relation to private capital is one thing, but co-determination in relation to the institutions of a democracy is quite another matter. One would thus have expected that, in view of the far-reaching provisions of the Joint Regulation Act, the Swedish legislature would have restricted the applicability of these provisions to the public sector in several ways. Such an approach, however, has not been taken. The rules on joint regulation discussed earlier in this article are almost fully applicable to the public sector. (The sole exception is with respect to the rules concerning the right of the employer to withhold information. In their place, the rules of the Act on Secrecy of Public Documents apply.) One may even say that the Act has a wider impact in the public sector, since, as indicated below, the Act does not apply to certain private institutions, such as newspapers, trade unions, *etc.* There therefore seems to be nothing short of statutory regulation that might

restrict unions from demanding collective agreements on co-determination from public employers and from supporting their demands with industrial action.

The unions in the public sector, however, do not seek co-determination to such an extent that it conflicts with the decision-making of the government or of the municipalities. Legislation on this point has therefore not been necessary. Instead, another regulatory technique has been used. The applicability of the Joint Regulation Act to the public sector has meant the abolition of that sector's exemption from collective agreements. Some kind of limit on union demands for co-determination is thus necessary, but it need not take the form of a statutory regulation. The government still exercises sovereignty over trade unions by the mere threat of legislation, should the unions challenge the authority of the state or threaten its vital functions. Legislation, or the threat thereof, has been used before and may be used again.

Abolition of the exemption for the public sector has not led to the state or the municipalities entering into collective agreements conferring decision-making power on the union to any extent or in relation to any subject. The *travaux préparatoires* of the Joint Regulation Act repeatedly affirmed that continued development of co-determination must take place in the light of the principle of the sovereignty of political democracy. The politically elected assemblies of the state and of the municipalities cannot refrain from exercising their mandates. Even if such agreements were legally valid, neither the state nor the municipalities should enter into agreements on matters that affect the "aim, direction, scope and quality" of official activity. The exercise of official authority must be excluded from the area of collective agreements on co-determination. Naturally, there is no room for such agreements where the field is covered by legislation. The question arises whether demands for collective agreements, or industrial action in support of such demands, might be regarded as infringing political democracy. Shortly before the Joint Regulation Act came into force, the government and the municipalities, on the one hand, and the top organizations of the unions in the public sector, on the other, signed an agreement in which a special procedure was established for disputes on this matter. Under the agreement, a tribunal of thirteen members was established. Seven of the members of the tribunal, and thus a majority, are members of Parliament appointed by the government. Of the remaining six, three are appointed by the employers and three by the employee unions. The purpose of the tribunal is to decide whether or not an agreement infringes on political democracy. The decision is not binding on the parties, but is only a recommendation. Therefore, at least in theory, one or several unions might disregard the submission of the tribunal, in which case, the ultimate sanction of the system, legislation, will certainly follow.

C. The limitations of joint regulation

According to the Joint Regulation Act, there are two principal limitations on union participation in decision-making. The first is expressed in Section 3 of the

Act: if a statute or a statutory instrument contains any rule that deviates from the provisions of this Act, that rule shall apply. The Joint Regulation Act is thus subject to other statutes or statutory instruments. Of course, it is possible to conceive of such a provision as a safety precaution, since there was no time to investigate all possible kinds of conflicts between the Joint Regulation Act and other statutes. However, in the author's opinion, this provision should be regarded as a matter of principle: co-determination should in all ways be adapted to the present legal system and should not be allowed to conflict with the rules and institutions of the mixed market economy. This is clearly expressed in the rules concerning the conflict between the Companies Act and the Joint Regulation Act, which will be discussed presently.

The second limitation deals with the foundations of a democratic state. In connection with the discussion of co-determination in the public sector, it was mentioned that co-determination must not infringe upon the functions of the state and the municipalities. But a democratic state is pluralistic. The freedom of the press is essential, but other institutions depend as well upon freedom of thought and expression. Some of these depend also on the freedom of association, and their activity in particular might be based on the principle of democracy. Their internal organization is based on a form of democracy, and they often serve as channels for the expression of the interest and beliefs of their members in relation to the state and other institutions. This has necessitated a special section in the Joint Regulation Act, the so-called "aim and direction section":

§ 2. There shall be exempted from the provisions of this Act an employer's activity which is of a religious, scientific, artistic, or other non-profit making nature, or which has cooperative, political or other opinion forming aims, so far as concerns the aim and direction of that activity [34].

This exemption is more far-reaching than the exemption that has been worked out in practice for the public sector, for it does not only exempt collective agreements that might intrude upon the "aim and direction" of such employers. The exemption covers the whole Act, which means that there is no duty of primary negotiations or of information. Neither is there any right of industrial action (although this may be debated). However, there is nothing in the Act that forbids employers from agreeing to collective agreements on co-determination over matters of "aim and direction". The effect of Section 2 is that such agreements would not be regarded as collective agreements under the Joint Regulation Act. Instead, they will be governed by general rules of contract. No doubt, one can foresee a need for primary negotiations or information even in these sensitive areas as well as in the public sector. Indeed, in this connection it should be mentioned that, in the public sector, all matters of legislation are subject to primary negotiations and a new agency has been created in order to fulfil the duty of the government to bargain on such matters. In one particular area the "aim and direction clause" is in fact likely to create

difficulties. The newspapers are certainly the focal point of this clause, but the problem is to decide how far the "opinion forming aims" of a newspaper extend. According to the owners not only the editorial section, but also the cultural section, the news section, and even the comics are covered by the exemption. This opinion rests on the idea that a modern newspaper is an integrated whole and that presentation of the news is not "objective" or "impartial". The selection of news and its presentation to the reader constitute part of the "opinion forming" activity of a newspaper. Journalists, on the other hand, maintain that only the editorial section should be exempted since it is the only "opinion forming" section of the paper. Journalists cannot accept an interpretation of the Joint Regulation Act that would deprive them of most of the rights provided that Act. Since the journalists exercise a great deal of influence over the presentation of the news it would seem that the newspaper owners and the journalists' union will be able to strike some kind of agreement. However, the journalists are not the only ones involved. There are the printers and office clerks, as well as salesmen, distribution workers, drivers, repair workers, and other groups who are also anxious to achieve at least the same degree of influence as the journalists. Thus the conflict with the owners may intensify.

As noted above, co-determination in the private sector is not allowed to conflict with, or to supersede, the institutions of the market economy. In the long run, one can foresee union demands for collective agreements that will provide the right to decide on such matters as personnel policy, wages, work organization, and health services. However, the right to make decisions in fact (not merely to participate in the decision-making processes of the employer) can be exercised only so long as it does not conflict with statute or statutory instruments (and one might add, other principles of law). The problem is that a collective agreement conferring such rights on one or several unions would almost certainly come into conflict with the principles laid down in the Companies Act (as well as the Act on Co-operative Associations and other statutes within the field of company law).

D. The scope of co-determination

There are actually two partly interconnected problems involved in determining the scope of co-determination. First, there is the question of the functions and distribution of powers among the company organs. Secondly, there is the question of economic and penal responsibility for decisions taken.

According to the Swedish Companies Act the distribution of decision-making power and authority among the company organs is mandatory. The Act is based on a one-tier system in which the shareholders meeting is required to make certain nondelegable decisions. The board and the managing director may delegate some of their powers, but not all. The crucial factor is the delegation of powers from the board and the managing director, who under the Swedish Companies Act are responsible for the organization and the administration of the company. For prac-

tical reasons, the board and the managing director must be able to delegate their duties, particularly the authority to make decisions, but, since they are responsible for the administration of the company, such delegation can be revoked at any time. This line of reasoning seems extremely formal. If it is followed *in absurdum* the conclusion seems to follow inevitably that any form of co-determination is impossible because the right to manage the business is vested by the Companies Act, which is mandatory on this point. The employer could not be bound by any contract that would infringe upon his right and duty to manage the company. Thus, a contract of employment fixing the duties of an individual employee would be in contradiction to the Companies Act. Naturally this is not the case, since such a contract is certainly valid under Swedish law. However, if the employer should wish to change the tasks of the employee, *i.e.*, deprive him of certain parts of the job or the whole job, the employee cannot demand performance under the contract. His only sanction is damages. This accords with the company law rules, under which there is nothing to prevent the employer from reorganizing the company, so long as he pays damages for loss arising as a result. Collective agreements on co-determination can, of course, impose far-reaching restrictions on the authority of the employer to make decisions. Such contracts are valid only up to a certain point. The employer cannot irrevocably delegate his right and duty to make decisions, but he will have to pay damages if he interferes with the decision-making powers of the employees granted under an agreement on co-determination.

The underlying reason for the mandatory distribution of power within a company is the need to protect the capital of owners and creditors. Decision-making by unions or employees may impose financial responsibilities on the company over which the owners have no control. The owners and their representatives must be able, at any time, to regain control. However, it might be argued that decision-making authority can be irrevocably delegated to unions or employees if definite financial limits within which the decision-making may take place are expressly stated. The need for protection of the company's capital does not, of course, in any way raise obstacles to the fixing of definite financial commitments; such a collective agreement on co-determination would not differ from an ordinary collective agreement on wages and general conditions of work.

Nevertheless, there is still the question of responsibility for decisions taken. We have already dealt with one kind of responsibility: the economic responsibility in relation to owners and creditors. There is also the question of responsibility in relation to regulatory authorities and third parties, since decision-making takes place in the name of the company and unlawful decisions may result in damages or even penal sanctions. Who, then, is to bear the responsibility? The unions have not accepted responsibility to the same degree as have the members of the board and the executive directors. In fact, they have not accepted the notion that their members appointed to decision-making groups should bear personal responsibility. Responsibility is born by the union, and even then only for gross errors. For example, this means in practice that the damages for unlawful dismissal made by a deci-

sion-making group will be borne by the company, unless the union representatives have acted negligently. In such circumstances, it is obvious that the board has the right as well as the duty to correct decisions that appear to be unlawful. With regard to criminal responsibility, the members of decision-making groups should be treated the same as ordinary employees of the company upon whom the authority to make decisions has been conferred. Thus, although in most cases the executives of a company bear criminal responsibility, the employee in charge might also be held responsible, *e.g.*, for polluting activities.

As a result of these considerations, the Joint Regulation Act was amended in 1977; a new part was added to Section 32:

In a collective agreement on joint regulation the parties may, having regard to the provisions of § 3, determine that a decision, which otherwise would have been taken by the employer, shall be made by representatives of the employees or by a specially constituted joint committee.

It is possible to argue that this provision does not add anything to the Act, since there is nothing in the Act that prevents the employer from conferring decision-making power on groups jointly appointed by him and the union, or by the union alone, apart from the provisions of Section 3. However, the interesting point is the amendment to Section 57 of the Act. According to this section, the union is responsible to the employer only for damage caused by abuse of authority or gross negligence by its representatives in their capacity as members of decision-making committees constituted under a collective agreement. This limitation on the financial responsibility of the union (the individual representative normally bears no liability at all) means that the employer must have some other means of protecting himself against unwise or unlawful decisions taken by committees with an employee majority. (I shall not discuss the problems involved when such a committee has an employer majority.) It is obvious that the responsibility of the board or the managing director under the Companies Act is in no way diminished when decision-making authority has been conferred on representatives of the union. Thus it is within the power, as well as the duty, of these organs to control and supervise decisions made by such committees. Should a representative of the company find that such a decision is faulty or unlawful, it will be his duty to stop it, by refusing to execute it and, further, by amending it. This will entail a partial revocation of the authority conferred on the committee, although if the employer acts without cause he will be liable for damages for breach of contract.

It should be added that the Bill on the amendments to Section 32 and 57 was introduced by the Liberal Government. The Social Democratic minority in Parliament put forward another proposal, whereby the conflict between the Companies Act and the Joint Regulation Act would be resolved by giving the Joint Regulation Act priority. Such an enactment would have created major difficulties and inconsistencies within the legal system. In order for such a system to work, a major revision of the Companies Act would have been necessary. Such a revision would have

had to aim at striking a new balance between the interested parties within a company: the owners, the creditors and the employees.

E. Collective agreements on joint regulation

As of July 1979, only three major collective agreements under the Joint Regulation Act had been made: for the employees of the state, for the employees in state owned enterprises and for the employees in enterprises owned by consumer cooperatives. In the private sector, negotiations were in progress, but nothing is yet known as to the possible outcome. The positions of the parties here differ on several substantial issues, and there seems to be a long way to go before an agreement is reached. With regard to the municipalities, an agreement is close. Here, the problems have been more of a technical nature. At this point I shall present a short summary of the agreements in the government sector and for the state owned enterprises and also discuss some of the issues involved in the negotiations in the private sector.

As noted earlier, the Swedish system of collective bargaining is centralized: collective bargaining in the public as well as in the private sector takes place between the top organizations. The agreements reached nationally are transformed into agreements at the branch and local levels. This system will also apply to negotiations over agreements on joint regulation. The parties have come to the conclusion that it is impossible to make one collective agreement on joint regulation that will suit the conditions of all enterprises. This is also the case with regard to the government sector. Even though the government sector is much more homogeneous than the private sector, conditions in government service vary to such a degree that the only possibility is to make a central agreement with few substantive rules but with general guidelines followed by particular guidelines for local agreements. This accords with the general policy of the Joint Regulation Act, that union participation in decision-making is to be exercised primarily on the local level, as closely as possible to the employees concerned. However, the central agreement in the government sector also presupposes that the central negotiations will continue, and that local agreements will be made only in areas dealt with by the central agreement.

The central agreement for the government sector lists six areas in which local agreements may be concluded:

- (1) rationalization and administrative development;
- (2) planning;
- (3) personnel mobility;
- (4) personnel development;
- (5) management of work;
- (6) personnel information.

For each of these six areas the agreement contains general guidelines, as well as

specifications for the subject matter of local agreements. The agreement is rather bulky, and I shall merely give an example. Under the heading "Rationalization and Administrative Development" the agreement stipulates that a relevant local organization is to be informed continuously of preparations in this area and is to have access to all relevant materials. Such a local organization will also have the right to be represented in various groups that might be established in connection with rationalization and administrative development. Union representatives are to be given the training necessary for them to participate in the work of such groups.

Local agreements concerning rationalization and administrative development may, among other things, deal with:

- (1) the aim and direction of the rationalization of the government agency concerned;
- (2) the participation of unions and personnel;
- (3) the aim and amount of internal personnel information;
- (4) training of representatives of unions and personnel;
- (5) investigations required by the union.

It may also be prescribed in collective agreements that union participation may take place in one of three stipulated forms in each of the six areas; local agreements giving more influence than these three forms are not allowed. According to Form A, the employer is to negotiate with the union before he decides on a certain issue. Rules on such duty to negotiate replace the duty to negotiate under Section 11 of the Joint Regulation Act. Naturally, the agreement may widen the duty of the employer to negotiate before decision-making. Collective agreements may also contain provisions on the establishment of joint groups for negotiations, and on groups for preparation and investigation of certain issues.

According to Form B, the parties may agree locally that the union, after going through a process of negotiation, has the right to veto decisions of the agency on matters of certain interviews with employees. This includes psychological aptitude tests.

According to Form C, if a collective agreement has been negotiated concerning any of the four areas listed below, and if the union so requests after negotiation with the employer, the union may make decisions concerning these matters:

- (1) provision of information in connection with rationalization and administrative development;
- (2) provision of work orientation programs;
- (3) organization and scheduling of meetings at the workplace;
- (4) dissemination of personnel information (*e.g.*, newsletters and other periodicals).

It is obvious that the collective agreement on joint regulation in the government sector is ambitious, and that the unions can be satisfied with the result of the nego-

tiations. Quite naturally success in the government sector will serve as a beacon for negotiations in the other sectors. Here, however, the situation is very different. In their proposal for an agreement on joint regulation, the Swedish Trade Union Confederation (LO) and the Central Organization of Salaried Employees (TCO) had listed a number of areas where the employees would have a right of self-determination or a right of veto. In some instances the demands were so far-reaching that their legality in relation to the Companies Act appeared doubtful. Among other things, the top union organizations in the private sector demanded that a plan for personnel planning be drawn up in each enterprise, with the unions deciding its contents, presentation and duration. With regard to internal personnel mobility, the unions demanded a right of veto over the principles and guidelines applied by the enterprise. The central unions also demanded a right to determine the organization of work within the enterprise; in particular they demanded the right to determine whether a group organization should be introduced. The unions also demanded the right to determine the form of remuneration. These are just a few of the demands raised by the central unions. Naturally, the demands made by the central unions are unrealistic. The agreements so far reached have in no way satisfied these demands.

The agreement for the state-owned industries is a master agreement much like the agreement for the government sector [35]. The agreement stresses that blue-collar workers and white-collar workers are to participate jointly in joint regulation; local agreements will make provision for joint negotiations at all levels of a particular enterprise. The agreement covers the following three areas: planning, organization and personnel matters [36]. As to planning, the agreement stipulates that each enterprise is to make plans for at least three years ahead. The plan is to be revised annually and the unions are to participate in the making of the plan. There is also to be a short-term plan for each year. Here, personnel planning comes in as an important part. The part of the agreement dealing with organization also stresses that plans are to be made. The plans are to deal with the present organization of the enterprise, particularly with regard to work organization and supervision, as well as with organizational development, stressing the possibility of improvements in personnel management. The employees are to participate in job development, group work is to be utilized when necessary, *etc.* Particularly important is that guidelines, rules and routines for work are to be established, with special stress on improving the possibility for the employees to exercise influence on their own jobs. One may say that, to a certain extent, the agreement calls for the introduction of the rule of law in the organization of work. The introduction of guidelines, rules and routines will certainly promote such a development.

In personnel matters, the agreement gives a number of rules on such matters as personnel policy, personnel planning, and personnel development. The only point in the agreement at which the unions are given a right of self-determination concerns the program for personnel introduction. If the parties cannot agree, the unions are to decide. On all other points the right to decide will remain with the enterprise. However, there is a curious provision stating that the decision of the

enterprise is to be based on the outcome of the negotiation.

The negotiations in the private sector are not yet concluded. It seems, however, that the LO and the TCO hope to make an agreement not unlike the one they have with the state-owned enterprises. The SAF, however, refuses to enter into agreements on partial reforms, maintaining that joint regulation is an indivisible whole. The SAF also stresses another factor, *i.e.*, that joint regulation must be adapted to the decision-making process of the enterprise. Negotiations and consultations are to take place at every level on which decisions are made. This means that the SAF is demanding that the decision-making process in unions be decentralized also. It seems that the blue-collar unions, in particular, are reluctant to enter into such an agreement, fearing that their representatives at the local level will be no match for local management. To a certain extent, decentralization is alien to unions. Their strength depends on collective action and collective decision-making. In a decentralized system, this strength is not as readily available as in a centralized system.

There are other matters as to which the views of the central unions and the employers also differ. The employers are not willing to accept the application of punitive damages, as laid down in the Joint Regulation Act, in matters of joint regulation. They fear that such damages will hamper the spirit of cooperation necessary in joint regulation. The employers also prefer to take disputes to arbitration rather than to the Labor Court.

It remains to be seen how these differences of opinion can be reconciled. For the observer, however, it is obvious that the views of the SAF, to a far greater extent than the views of other employer organizations, are the expression of a consistent ideology. The employers feel that the influence of the unions is an alien element in the administration of an enterprise. The demands of the union often run contrary to the demands of the enterprise for efficiency, flexibility, and quick decision-making. Indeed, the ideas of unions are similar to the ideas of political democracy; these cannot be easily adapted to an enterprise, which in a way can be looked upon as a semi-military unit, with but limited goals: to produce and to compete. The employees are also demanding justice and fairness, a demand which, in the eyes of the employers, can only mean the gradual introduction of the rule of law, and hard on its heels, overwhelming bureaucracy.

Notes

[1] The Act is described in detail below. In his book, 'Law and Industrial Relations in Sweden (1977), Professor Folke Schmidt elected to use the term "joint regulation" as the English translation of the Swedish title of the Act (Lag om Medbestämmande i Arbetslivet), thus avoiding its identification as an act on the wider subjects of *Mitbestimmung* as understood in Germany and co-determination as understood in Sweden. Professor Schmidt's practice is followed in this article.

[2] The description that follows is more fully set forth in Victorin, *Labor Relations in Sweden* (Swedish Institute, Stockholm 1977) and Schmidt, *op. cit. supra* n. 1, at 13–36.

[3] The Agency was reorganized in 1979. The Swedish name was changed from Statens Avtalsverk (SAV) to Statens Arbetsgivarverk (SAV).

[4] Victorin, *Lönenormering genom kollektivavtal* (Wage Determination by Means of Collective Agreements, with a summary in English) (Stockholm 1973); Victorin, *The Implementation of a Wage policy*, 19 *Scand. Studies in Law* 295–315 (1975).

[5] Lodin, *Swedish Tax Reforms 1971–77 – Why So Many*, 21 *Scand. Studies in Law* 177 (1977).

[6] Schmidt, *op. cit. supra* n. 1, at 79.

[7] Victorin, *op. cit. supra* n. 2.

[8] Suviranta, *Invisible Clauses in Collective Agreements*, 9 *Scand. Studies in Law* 177–215 (1965).

[9] Schmidt, *op. cit. supra* n. 1, at 79.

[10] As translated in Schmidt, *op. cit. supra* n. 1, at 152.

[11] *Id.*, at 153.

[12] This opinion has been expressed orally on several occasions by the members of the Court, particularly by the former chairman, Chief Justice B. Hult.

[13] Schmidt, *op. cit. supra* n. 1, at 87–89.

[14] The non-established unions are few, however, and do not have many members, the most important being the syndicalists, with about 20,000 members (to be compared with the 1.9 million members of the national unions affiliated to the LO), and the dockworkers, who have formed a splinter organization from The Transport Workers' Union.

[15] Schmidt, *op. cit. supra* n. 1, at 81–85.

[16] *Id.*, at 85–87.

[17] *Id.*, at 80–83.

[18] As translated in Schmidt, *op. cit. supra* n. 1, at 234. This section was amplified by amendment in 1977. See Part 3D *infra*.

[19] Under the earlier statutes it had been unclear whether the collective agreement could cover all of the activity of a business.

[20] This question is disputed in Sweden. Unfortunately it has not been resolved. When this paper was originally drafted a case had been brought before the Labor Court which concerned the question whether a union, not bound by any collective agreement and therefore not bound by a peace obligation, was free to resort to industrial action in order to force an employer not to dismiss a member of the union. Unfortunately, from the point of law, the court found that the dismissal was unjustified; the employers therefore did not pursue the matter. (AD 1978 No. 92.)

As to disputes on the "right" to make collective agreements on joint regulation it would of course be possible to construct a system based on a differentiation between disputes over law and disputes over interest. Such a system seems, however, rather clumsy and hard to apply.

[21] As translated in Schmidt, *op. cit. supra* n. 1, at 241.

[22] Sections 11–13 of the Joint Regulation Act read as follows (as translated in Schmidt, *op. cit. supra* n. 1, at 235):

§ 11. Before an employer decides on important alteration of his activity, he shall, on his own initiative, negotiate with an organization of employees in relation to which he is bound by collective agreement. The same shall be observed before an employer decides on important alteration of work or employment conditions for employees who belong to the organization. If urgent reasons so necessitate, the employer may make and implement a decision before he has fulfilled his duty to negotiate under the first part of this section.

§ 12. Should an organization of employees which is referred to in § 11 so request, an employer shall also, in a case other than those mentioned therein, negotiate with the organization before he makes or implements a decision which concerns a member of the organization. If special reasons so necessitate, however, the employer may make and implement the decision before he has fulfilled his duty to negotiate.

§ 13. Where a matter specifically concerns the work or employment conditions of an employee who belongs to an organization of employees in relation to which the employer is not bound by collective agreement, the employer shall be under a duty to negotiate according to § 11 and § 12 in relation to that organization.

[23] Cf. Schmidt, *op. cit. supra* n. 1, at 109.

[24] Section 10 of the Joint Regulation Act provides as follows (as translated in Schmidt *op. cit. supra* n. 1, at 235):

An organization of employees shall have a right to negotiate with an employer on any matter relating to the relationship between the employer and any member of the organization who is or has been employed by that employer. An employer shall have a corresponding right to negotiate with an organization of employees.

A right of negotiation under the first part of this section shall also be enjoyed by the organization of employees in relation to any organization to which the employer belongs, and by the employer's organization in relation to the organization of employees.

[25] AD 1977 No. 89 concerned a conflict between the duty of primary negotiations according to the Act on Joint Regulation of Working Life and the duty to bargain in case of redundancies according to the Employment Protection Act.

[26] Schmidt, *op. cit. supra* n. 1, at 177.

[27] *Id.*, at 118.

[28] See text in Part 2A *supra*.

[29] Cf. § 11 of the Act, *supra* n. 22.

[30] Section 34 of the Act reads as follows (as translated in Schmidt, *op. cit. supra* n. 1, at 239):

Where, between an employer and an organization of employees bound by the same collective agreement, a dispute arises over a member's duty, under an agreement, to perform work, the organization's view (of the interpretation of the agreement) shall apply until the dispute has been finally tried.

Where, in the opinion of the employer, there exist urgent reasons against a postponement of the disputed work, he may, notwithstanding the first part of this section, require the work to be performed according to his interpretation in the dispute. The employee shall then be bound to perform the work. Such a duty will not, however, lie if the employer's interpretation in the dispute is incorrect and he realizes or ought to have realized this, or if the work involves danger to life or health, or if there exist comparable obstacles.

Where work is performed according to the second part of this section, the employer shall immediately call for negotiations in relation to the dispute. If the dispute cannot be resolved through negotiations, he shall bring an action before the Labor Court.

[31] Section 35 of the Act reads as follows (as translated in Schmidt, *op. cit. supra* n. 1 at 240):

Where, between an employer and an organization of employees bound by the same collective agreement, a legal dispute arises over wages or other remuneration for a member of the organization, it shall be the duty of the employer to immediately call for negotiations in relation to the dispute. If the dispute cannot be resolved through negotiations, he shall bring an action before the Labor Court. If the employer fails to call for negotiations or fails to bring an action, he shall be obliged, so far as relates to the disputed amount, to pay remuneration which accords with the interpretation of the organization of employees, so long as that demand is not unreasonable.

[32] Section 33 of the Act reads as follows (as translated in Schmidt, *op. cit. supra* n. 1, at 239):

Where a collective agreement contains provisions about a right of joint regulation for employees in a matter which is referred to in § 32 and, in a particular case, a dispute arises over application of any such provision or of a decision which has been made by virtue thereof, the employee party's view (of the interpretation of the agreement) shall apply until the dispute has been finally tried. The same shall apply in a dispute over provisions in a collective agreement concerning (disciplinary) measures for an employee who has committed a breach of contract. The provisions herein shall not, however, give the employee party any power to implement a decision on the employer's behalf.

Where two or more employee parties adopt incompatible positions in a dispute such as referred to in the first part of this section, the employer may not make or implement a decision which is affected by that dispute before the dispute has been finally settled.

The employer need not observe the provisions in the first and second parts of this section if there are urgent reasons against doing so, or if the interpretation put forward by the employee party is incorrect and that party realizes or ought to have realized this.

[33] Sections 38–40 of the Act read as follows (as translated in Schmidt, *op. cit. supra* n. 1, at 240):

§ 38. Before an employer decides to allow anybody to perform certain work on his behalf or in his business without that person thereby being employed by him, he shall, on his own initiative, negotiate with any organization of employees in relation to which he is bound by collective agreement for such work.

The first part of this section shall not apply if the proposed arrangement is of short duration and of a temporary nature or requires special skill, or the arrangement essentially corresponds to an arrangement which has been approved by the organization of employees. If the organization in a particular case so requests, however, it shall be the duty of the employer to negotiate before he makes or implements a decision.

If urgent reasons so necessitate, the employer may make and implement a decision before he has fulfilled his duty to negotiate under the first part of this section. If negotiations are called for under the second part of this section, the employer shall not be obliged to postpone his decision or its implementation until the duty to negotiate has been fulfilled, if special reasons exist against such postponement . . .

§ 39. Where negotiations have taken place under § 38, and a central organization of employees, or, if there exists no such organization, the organization of employees which has concluded the collective agreement, makes a declaration that the agreement proposed by the employer may be taken to involve disregard of the law or of a collective agreement for the

work, or the arrangement is otherwise in conflict with what is generally approved by the parties concerned within their bargaining sector, that arrangement may not be decided upon or implemented by the employer.

§ 40. A prohibition under § 39 shall not apply if the organization of employees lacks good reasons for its point of view. Where the employer, with the backing of § 38 third part, has implemented a decision on the matter to which the negotiations relate, § 39 shall not be applicable.

[34] As translated in Schmidt, *op. cit. supra* n. 1, at 234.

[35] Bargaining in these sectors is conducted independently. With regard to state-owned enterprises, the government does not seem to exercise any influence at all in matters of collective agreements.

[36] The parties have agreed to continue bargaining in order to extend joint regulation into other areas as well.

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