The Relationship between State Law, Collective Agreement and Individual Contract

Stein Evju, University of Oslo

I. Individual asymmetry and aggregate regulation

The conception of *asymmetry* in the individual employment relation is foundational of labour law. The presumption in general contract law 'equality of arms' on which party autonomy is based fails when it comes to the employment relation. As Otto Kahn-Freund once noted, the relation between an employer and an isolated worker

'is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".'[1]

This asymmetry is not just an historical fact; it is a topical feature as well. Labour law regulation at aggregate levels, i.e. legislation and collective agreements, evolve from this seminal recognition. Their principal purpose may be perceived as being to regulate, support, and restrain the power of employers and organized labour.[2] This is certainly an important analytical paradigm. In the present context, however, it is pertinent to somewhat shift and specify the focus. Legislation and collective agreements share a common objective and a common function. This is, self-evidently, nothing specific to Norwegian labour law. The common objective and function of the two forms of regulation are, namely, to mitigate the asymmetry of the individual employment relation. The overarching objective of either form of regulation is giving workers a voice in the world of work and the protection of the weaker party in the individual employment relation. This is trite, of course; but still a point of departure worth recalling.

In the context of Norwegian law there is in principle a hierarchy between the different regulatory instruments, i.e. legislation, collective agreements, and individual employments contracts. This hierarchy at the outset is simple and easily recognizable. Statutory law – legislation, in a broad sense − takes precedence over collective agreement regulation. Collective agreements in turn have priority over individual employment contracts. This principled hierarchy of norms of course is nothing unique; it is recognizable in a multitude of labour law regimes, albeit with country specific variations in its details.

II. The legal nature of collective agreements

[1] Otto Kahn-Freund, *Labour and the Law*. Stevens & Sons, London, 1977. p. 8.
[2] Paraphrasing *Kahn-Freund*, p. 8.

Proceeding, it is requisite first to consider the legal nature of collective agreements. In Norwegian law the collective agreement is strictly a private law contract. This is of the essence. A collective agreement is a legally binding contract. It may be concluded on the one side by a collectivity of employees, a 'trade union' in a very broad sense, and on the other side by a single employer or an employer organization. This taxonomy of possible parties to a collective agreement is familiar to most labour law regimes. It should be noted in this context that a distinction between civil law and labour law as separate branches of private law does not obtain in the Norwegian legal system. Albeit labour and employment law harbours its peculiarities it is an integrated part of general private law.

The private law nature of the collective agreement as a regulatory instrument needs to be seen in context with the emergence of this particular type of instrument. Whereas forms of collectively agreed arrangements slowly gained ground from around the turn of the last century their standing, their legal effects were uncertain. In 1902, the recently founded confederations on either side, LO and N.A.F., [3] concluded a general agreement on the resolution of collective conflicts recognizing the legally binding effects of collective agreements based on a distinction between rights disputes and interest disputes. That agreement, renegotiated in 1907, served as a frame of reference for the legislative development which resulted in the first so-called Labour Disputes Act, 1915. The essential objectives of the Act was to recognize and support collective contracts and collective agreement regulation, coupled with social considerations to the peaceful resolution, as far as possible of collective conflict. A special Court, the Labour Court, was vested with collective rights disputes. For interest disputes a system of mandatory mediation was introduced to assist parties to reaching agreement, with a view to avert industrial action but with no power to compel the conclusion of an agreement.[4]

This is the fundamental basis on which the labour disputes legislation still rests. The first Labour Disputes Act, of 1915, covered all of the private sector as well as blue-collar workers in the public sector. It was superseded in 1927 by an essentially similar act, which in 1957 was extended to also comprise public servants in the municipalities sector. The 1927 act in turn has been superseded by an act of 2012,[5] again essentially similar to its predecessor. A separate act covering civil servants in the state sector was adopted in 1958[6], being based on the very same principles.[7] The scope of this act includes top echelon officials and also police and military personnel.

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[3] Landsorganisasjonen i Norge (The Norwegian Confederation of Trade Unions) and Norsk Arbeidsgiverforening (now Næringslivets Hovedorganisasjon, NHO; The Confederation of Norwegian Enterprise), respectively.

[4] See e.g. Stein Evju, Voldgift og domstol i kollektivarbeidsrettslige tvister : Et komparativt blikk på genesen i Danmark og Norge. In: Torstein Frantzen, Johan Giertsen, Giuditta Cordero Moss (eds.), *Rett og toleranse. Festskrift til Helge Johan Thue 70 år*, Gyldendal Akademisk, Oslo, 2007. p. 507.

[5] Lov 27. januar 2012 nr 9 om arbeidstvister (arbeidstvistloven) [the Labour Disputes Act, 2012].

[6] Lov 18 juli 1958 nr. 2 om offentlige tjenestetvister (tjenestetvistloven) [the Public Service Labour Disputes Act, 1958] (as amended).

[7] See further e.g. Stein Evju, Courts and jurisdiction in labour rights disputes in Norway. In: Andrzej Swiątkowski (ed.), *The Jagiellonian University Yearbook of Labour Law and*

The objective of this legislation, as just noted, was and still is to underpin the collective agreement as a type of private law contract, albeit *sui generis*. This essential foundation has never been conceived of in terms of a *Delegationstheorie* or the like. The basic premise is private autonomy and freedom of contract. And for precisely that reason, a true concept of *Tarifautonomie* does not obtain; it has no constitutional underpinning.[8]

III. The hierarchical and functional relations between statute law and collective agreements

III.1. The legal status and role of collective agreements; points of departure

Further to the above (in II), the relation between collective agreements and statutory law is not the subject of specific legislative provisions. The essential point of departure is that as a private law contract the collective agreement is subordinate to mandatory legislation. This is a fundamental and general principle of law, which applies independent of whether the relevant statutory instrument contains a non-derogation clause or not.[9] If and to what extent statutory provisions may be derogated from in any case is a matter of the construction of the provision in question.

Thus put the normative principle is however simplistic. At a closer look it is more complex. From a functional perspective there is no one-sided relation of supremacy and subordination between legislation and collective agreements, neither past nor present. It is more pertinent generally to say that collective agreement regulation may be seen in part as an alternative to legislation and in part as supplementing legislative measures. Both dimensions may well be in evidence simultaneously.

In a wider perspective, differences in this regard are no less important than similarities, both in time and across different statutory instruments. Initial decisions on which alternative forms of regulation to emphasize and on the interaction between statutory law and collective agreement, if any, may have become firmly embedded, thus forming a largely stable structure over time. On the other hand, the interaction and balance between different means of regulation may have changed in the course of subsequent developments.

Norway may serve as a case in point. In the formative phase of collective labour law at the turn of the previous century, the actors involved − the social partners and the State − opted for collective agreements as the primary means of regulating collective and individual labour matters. With the 1915 labour disputes act, referred to above, Norway opted for a stronger

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Social Policy. Vol. 10. 1998/99. Jagiellonian University Press, Krakow, 1999. p. 247; Stein Evju, Labour Courts and Collective Agreements – The Nordic Model, *Europäische Zeitschrift für Arbeitsrecht.* Volume 1. Issue 4. 2008. p. 429; Stein Evju, Die Zukunft der Kollektivautonomie und das nordische Modell, *Europäische Zeitschrift für Arbeitsrecht*, Volume 3. Issue 1. 2010. p. 48.

[8] The Constitution of Norway stems from 1814 and contains essentially no provisions pertaining to labour law issues.

[9] This point, however obvious it may seem, needs to be made inasmuch as from the perspective of other legal orders explicit provisions may be considered the ordinary requirement in this regard.

legislative underpinning of collective agreements and a a public law based institutional structure as regards collective disputes resolution, i.e. a national mediation institution for interest disputes and a separate Labour Court for collective rights disputes including matters of the lawfulness of collective action. At the time, individual employment relations were governed by collective agreements. In that regard statutory employment law has however taken precedence since the mid-1930s.

III.2. Collective agreements and legislation in interaction

As noted in III.1 above, there is no one-sided relation of supremacy and subordination between legislation and collective agreements, neither past nor present, considered from a functional perspective. In the foundational phase of collective agreements and statutory regulation of agreements and institutional structures at the collective level it needs to be recalled that State law on worker protection was confined essentially to so-called factories legislation, i.e. on matters of health and safety and restrictions on working time for women and children, in industrial undertakings. The mutual relation between employer and worker was contractual under the doctrine of freedom of contract. Hence the collective agreement was the first regulatory instrument by which a measure of coequality could be attained. In a longitudinal perspective also, collective agreement regulation has in many cases set the pace, laying down standards subsequently to be adopted and generalized by legislation. Holidays with pay is a prominent example. Collectively agreed provisions were introduced in 1915–16 and proliferated in the following years. When this subject was included into legislation in 1936, in the first worker protection act of a general scope, the statutory provisions were explicitly framed so as to correspond to the dominant collective agreement regulation at the time. On the other hand, on similar or different issues it has been the other way around, legislation laying down basic standards that collective agreements have subsequently elaborated on. A form of mixed interaction can be seen in the regulation of working time. Against the background of on-going legislative reform the intended changes have been effected through collective agreement revisions prior to the actual adoption and entry into force of new statutory provisions. This was the case with the introduction in 1919 of the 8 hours working day as well as with the shortening of the work week to 45 hours in 1958. In short, the interaction between collective agreements and legislation is a prominent feature of Norwegian labour law, both for collective and individual labour relations and in a developmental as well as a current perspective. I shall return to the latter later on.

IV. Binding effects and coverage of collective agreements

In Norwegian labour law, as in Scandinavian labour law otherwise basic conceptions of the collective agreement and its nature were influenced to some extent by early German theoretical discourse and the multitude of proposed legislative measures, in particular as regards the concept of the collective agreement as a private law *contract*. In the Norwegian rendering it is characteristic of the collective agreement that it does *not* provide a

regulation for the labour market as a whole or for the branch or industry to which it pertains. The collective agreement as such is legally binding only on its contracting parties and their members that are covered by the agreement in terms of personal and substantive scope. This is different, of course, from the countries in which a Romanic legal order prevails, where the collective agreement is legally binding on all workers concerned in an undertaking which is bound by the agreement.

In consequence a collective agreement has no binding or direct effect on 'outsiders', be they non-unionized workers in an undertaking to which the collective agreement applies or non-affiliated employers and their employees. In the former relation the employer is considered, however, to have a – non-mandatory – obligation by virtue of the collective agreement to treat non-unionized workers in the enterprise equally.

Further, there is no 'extension' of the effect of a collective agreement to non-affiliated employers and their employees. Essentially there is no legislation enabling the declaration of a generally binding effect of a collective agreement (*Allgemeinverbindlicherklärung, extension*). Only a minor exception applies; to which I shall return (below, VII).

Consequently, trade union density and collective agreement coverage are of the essence. In actual fact, collective agreement regulation does not provide protection or benefits for all. How encompassing it is differs considerably across sectors and industries. Whereas in practical terms collective agreement coverage is 100 per cent in the public sector, in the private sector as a whole it just slightly exceeds 50 per cent, ranging from 20 per cent in some branches to 70–75 in others, mainly traditional industry. In Norway trade union density and collective agreement coverage rates are generally lower than in the other Scandinavian countries, which may be seen as a factor of significance to the early adoption and development of employment protection legislation in the Norwegian context.[10]

One element has however been reserved in principle to be regulated by collective agreements; that is wages. There is no minimum wage legislation.[11] If not stipulated in an applicable collective agreement, fixing a wage is a matter for the parties to the individual employment contract. At the aggregate level, however, in Norway 'triangulation' in the form of interaction and cooperation between the dominant social partners and the State since 1945 has been and still is a prominent feature of industrial relations, in particular with regard to incomes policy and wage formation.

V. Individual employment legislation

Legislation on workplace and employment relations is comprehensive, the main act being the so-called Working Environment Act (WEA). Its title in full is indicative of its scope; the act is properly titled Act on Working

[10] In Denmark, the basic premise is regarding collective agreements as the primary means of regulating collective and individual labour matters, albeit EU law has resulted in more of legislative measures. In Sweden the institutionalization of collective labour law emerged in the late 1920s and the conception of role of collective agreement regulation was essentially similar to that in Denmark. This changed fundamentally, however, with reforms in the 1970s introducing comprehensive legislation pertaining to employment law matters.

[11] This is the case for all of the Scandinavian countries.

Environment, Working Time and Dismissal Protection.[12] The act implements all of the relevant EU directives, e.g. on working time etc., information on terms and conditions of employment, collective redundancies, and transfer of undertakings.[13] Further, the right to hire in workers (labour only contracting) is restricted, and by an amendment act of 2012 new provisions aimed at implementing the EU directive on temporary agency work[14] as of 1 January 2013 were added. Moreover, the WEA encompasses rights to leave, the majority of which are coupled with income compensation schemes in the Social Insurance Act,[15] and whistleblower protection. The act also sets out the provisions on the organization and competencies of the Labour Inspection Authority. In this context it should be noted that the Labour Inspection Authority is competent in the field of public law regulations only. E.g. working environment and working time; and not in private law matters such as employment contracts and dismissal protection. Provisions on holidays with pay are set out in a separate act.[16] This legislation covers municipal civil servants, coupled with certain administrative law norms. Except for some special provisions on hiring and dismissal protection the above statutes apply also to state civil servants. A notion of *'Beamte'* as in German law, or the like, does not obtain. Separate legislation applies to seafarers.

This protective legislation pertaining to employment relations is rich on detail. This I have to leave aside. The important issue in the present context is the relation between different categories of norms.

VI. Employment legislation, collective agreements, and favourability

VI.1. Legislation and employment contracts

The standing of employment contracts in relation to legislation is the same as that of collective agreements. Employment protection legislation is characterized, generally, by being *mandatory*, albeit in a unilateral way. The employment contract as a private law contract in principle is subordinate to mandatory legislation. The same is true for public sector employment relations; they rest on a form of private law contract coupled with norms of public administrative law, cf. in V above. Just as for collective agreements, the supremacy of mandatory legislation vis-à-vis employment contracts is a

[12] Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern (arbeidsmiljøloven).
[13] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time; Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies; and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, respectively.
[14] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
[15] Lov 28. februar 1997 nr. 19 om folketrygd (folketrygdloven).
[16] Lov 29. april 1988 nr. 21 om ferie (ferieloven).

fundamental principle of law, which applies independently of whether the relevant statutory instrument contains a non-derogation clause or not.
It is commonplace, however, that employment law statutes contain provisions on semi-derogability. E.g., statutory law provisions cannot be derogated from *in pejus*, i.e., to the detriment of the individual employee. Contractual stipulations that are more favourable to the worker than the statutory minima (*in melius*), on the other hand, are fully permissible. In that sense, a principle of favourability (*Günstigkeitsprinzip*) obtains, expressing a two-sided hierarchy of norms. Legislation takes precedence over contractual regulation, be that collective or individual, in so far as stipulations *in pejus* are concerned. This limitation on the freedom of contract of course is the very purpose and function of protective labour legislation. On the other hand, contracted provisions *in melius* have priority over statutory minima. This is equally commonplace, of course. E.g., collectively agreed working hours are shorter than the limits laid down in legislation, overtime rules are more favourable in agreements, notice periods pertaining to dismissals in many cases are longer than the statutory minima by virtue of collective agreement or employment contract, as the case may be.

This simple, two-sided hierarchy is not without exception, however. To some extent legislation allows of derogation which considered in isolation appear to be *in pejus* for individual employment relations. Provisions on this kind of 'two-way' derogation exist e.g. in the WEA regulation on working time and the holidays with pay act. The crucial point, however, is that such derogation *'in pejus'* essentially is permitted only by way of collective agreement and more far-reaching derogations by collective agreements with national, representative trade unions.

VI.2. Employment contracts and collective agreements

The relation between collective agreement and employment contract is clear cut in principle. From the first labour disputes act of 1915, the legislation on collective agreements has included an express provision to the effect that stipulations in an employment contract that are at variance with an applicable collective agreement are null and void. Leaving the theoretical discussion at the time to a side, this kind of stipulation was considered requisite for collective agreement regulation to fulfil its intended social functions. This included ensuring the legally binding effect of collective agreements not just on the contracting parties but on their members concerned who are mutually bound by the collective agreement, as well. This 'vertical' binding effect also is one of the common features to a number of labour law regimes, albeit its legal basis and scope may differ considerably. In Norwegian labour law it is notable that subordination of employment contracts in principle is *two-sided*, covering terms that are less favourable as well as such that are more favourable to the individual employee; see further below. Hence, in this regard a principle of favourability does *not* obtain in law.

The same principle of 'two-sided' subordination applies also to the relation between collective agreements concluded at different levels by parties that are bound by an agreement at a superior level. The importance of this pertains essentially to the relation between national level collective

agreements and local agreements at the enterprise or undertaking level. National collective agreements are comprehensive, in principle covering all matters of collective and individual terms and conditions; they are not subdivided into separate agreements on framework norms, pay, working time, holidays, etc. In practice, however, notwithstanding the principle of 'two-sided' subordination national level collective agreements all predominantly make provision for local level follow-up or supplementing bargaining on a wide range of issues. This is so widespread and involves so much variation that 'law in action' is very considerably more complex than the basic principle of hierarchy may be taken to suggest.

VII. Excursus: a protective measure against 'social dumping'

As noted above (IV), in the Norwegian context there is no general system of 'extension' of the effect of a collective agreement to non-affiliated employers and their employees. A very specific exception applies in the context of cross-border provision of services and the concomitant posting of workers. In conjunction with the pending entry into force of the EEA agreement,[17] on 1 January 1994, a special act was adopted in 1993,[18] the purpose of which is essentially to facilitate protection against so-called social dumping – in short, low wage competition from foreign service providers within the EU/EEA. The Act does not provide for declaring a collective agreement as such generally binding. Rather, by way of delegated legislative authority it empowers an independent administrative law body, *Tariffnemnda*, to issue regulations of a public law nature on minimum terms and conditions, modelled on key normative provisions of the collective agreement otherwise applicable in the branch or industry, on wages and working time in particular. Such regulations apply to all undertakings within their scope, regardless of nationality. It is essential to note, however, that regulations are no substitute for the collective agreement in question as far as the parties already bound by the agreement are concerned. The collective agreement remains fully in force; consequently differences will obtain between the minimum standards applicable to all and the terms and conditions that apply to those who are bound by the agreement.

The 1993 Act was dormant until the EU/EEA enlargement in 2004. Since then a small number of regulations were adopted. Currently, four sets of regulations are in force, for the building industry, shipyards, agriculture, and cleaning services. The regulations applying to the shipyards industry are contested in a pending law suit on grounds of EU/EEA law pertaining to the free movement of services and the Posting of Workers Directive.[19] Subsequent to a rather indefinite advisory opinion of the EFTA Court[20] the

[17] Agreement on the European Economic Area, between EU and EFTA Member States, signed in Lisbon on 2 May 1992.

[18] Lov 4. juni 1993 nr. 52 om allmenngjøring av tariffavtaler m.v. (Act on 'extension' of collective agreement provisions).

[19] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[20] The EFTA Court fulfils the judicial function within the EFTA system, similar to but not identical with the Court of Justice of the EU, with interpreting the Agreement on the

case is scheduled for a final hearing and decision by the Supreme Court in January-February 2013.

VIII. Summing up

The formal relation between State law and collective agreements is a straightforward consequence of the conception of the collective agreement as a private law contract. Agreements, collective or otherwise, must yield to mandatory legislation. In the field of labour law semi-derogable statutory regulation is prevalent, however, allowing of a wide scope for collectively agreed stipulations for more favourable terms and conditions. The scope for similar employment contract stipulations is far more restricted. Moreover, employment contract stipulations cannot be at variance with a collective agreement that is binding on the parties to the employment contract. Authorizing clauses in collective agreements are however widespread. Thus, in conclusion, what appears from a formal viewpoint as a clear-cut three levels hierarchy is a far more complex system of intra-level interaction in labour law in actual practice.

European Economic Area with regard to the EFTA States party to the Agreement, at present those EFTA States are Iceland, Liechtenstein and Norway.