The Interstices of Collectivism and Individualism
- A Comparison on Collective Bargaining and Collective Agreements in Sweden and the United Kingdom

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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACAS</td>
<td>Advisory, Conciliation and Arbitration Service</td>
</tr>
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<td>AD</td>
<td>Swedish Labour Court Reports</td>
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<tr>
<td>Am. J. Comp. L.</td>
<td>American Journal of Comparative Law</td>
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<td>CBI</td>
<td>Confederation of British Industry</td>
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<td>Comp. Lab. L.J.</td>
<td>Comparative Labor Law Journal</td>
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<tr>
<td>Comp. Lab. L &amp; Pol’y J</td>
<td>Comparative Labor Law and Policy Journal</td>
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<td>CA</td>
<td>Court of Appeal</td>
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<td>CAC</td>
<td>Conciliation and Arbitration Committee</td>
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<td>ERA</td>
<td>Employment Rights Act</td>
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<td>EU</td>
<td>European Union</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>Indus. &amp; Lab. Rel. Rev.</td>
<td>Industrial &amp; Labor Relations Review</td>
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<td>LO</td>
<td>Swedish Trade Union Confederation: <a href="http://www.lo.se">www.lo.se</a></td>
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<td>PTK</td>
<td>The Council for Negotiation and Co-operation: <a href="http://www.ptk.se">www.ptk.se</a></td>
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<td>SACO</td>
<td>Swedish Confederation of Professional Associations: <a href="http://www.saco.se">www.saco.se</a></td>
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<td>SAF</td>
<td>Swedish Employers’ Confederation: now <a href="http://www.svensktnaringsliv.se">www.svensktnaringsliv.se</a></td>
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<td>SALAR</td>
<td>The Swedish Association of Local Authorities and Regions: <a href="http://www.skl.se">www.skl.se</a></td>
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<td>SFS</td>
<td>Swedish Official Legislative Gazette</td>
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<tr>
<td>TCO</td>
<td>Swedish Confederation for Professional Employees: <a href="http://www.tco.se">www.tco.se</a></td>
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<tr>
<td>TUC</td>
<td>Trade Union Congress</td>
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<tr>
<td>TULCRA</td>
<td>Trade Union and Labour Relations (Consolidation) Act</td>
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<td>UK</td>
<td>United Kingdom</td>
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Abstract

Collective bargaining and collective agreements have different functions and roles in each national model of labour relations, depending on numerous influences of historical events, political views and social science disciplines, e.g. industrial sociology, political theory and labour economics. Labour law as an intellectual tradition has outgrown its scope and origins and spans the divides of various legal areas with different national and international influences, which demands a broader view on the conceptual framework of today. The term “labour law” is often used to refer to the system of rules governing industrial relations on the labour market and the objective of this thesis is to conduct a comparative analysis of the industrial relations models in Sweden and the United Kingdom, focusing on the role and function of collective bargaining and collective agreements. The systems consist of legislative intervention, agreements and custom and each component is given different weight in the systems examined. This thesis will also examine the collectivist tradition of the Swedish labour model as well as the individualistic theme of the United Kingdom, its historical development and the future challenges to come.
Chapter One: Introduction

1.1 Objective
This work aims to present a comparative legal analysis of the role, function and power of collective agreements and the structure of collective bargaining in Sweden and the United Kingdom. Observations will be made with respect to the rise, and possibly the fall, of collective bargaining.

Moreover, the objective is to understand why certain institutional patterns have acquired power and achieved stability within the legal communities. The intention is to highlight the differences as well as the commonalities between the systems with the ambition of ascertain common trends in light of the historical and ideological development.

1.2 Materials and Method
Labour law is more than just the sum of its parts. Labour law has a wide scope and it spans the divides between numerous areas of law, e.g. contract law and social welfare legislation as well as the interaction of law and labour organisations and businesses. In addition to this, labour law touches upon fields such as sociology, trade and economics. The indication is that the intellectual tradition has outgrown its own distinct origins. In this broad spectrum of fields, the primary aim is to conduct a systemic comparative analysis of the industrial relations models, focusing on the role and function of collective bargaining and collective agreements. Traditional legal research methods, as invoked in Sweden and the UK will be applied. Authoritative texts such as statutory texts and collective agreements as well as articles, reports and statistics\(^1\) will be used to the extent of fulfilling the objective of this paper. The structure and approaches of both systems are compared within the theoretical framework of the system approach to comparative law.

1.2.1 Comparative Law

Comparative law can be a tool for shaping or guiding domestic decision-making, harmonising and unifying of legislation, resolving conflict of law issues as well as private law issues spanning several systems. Nevertheless, when studying comparative law and conducting a comparative study there is neither an official comparative language nor a general methodology applicable, instead three general methods of comparative law exist, the transplant, the functional and the system approaches. In this work the system approach is invoked, whose object is to capture and represent influences as to decision-making, reflecting the dynamics and not only the norms of the systems compared. This comparative system approach is conducted by evaluating the primary authoritative texts, the institutions, decision-making communities and patterns of thought, discourses. The theoretical framework is a structure in a broad and functional sense rather than in a narrow and formal sense. This method uses the concept of decision-making as the core analytical unit with conceptually wide categories focusing on the dynamics of the approached systems.

1.2.2 Language and Terminology

In a work spanning two countries with two different legal traditions, two languages and different legal theories and ideologies, the language, terminology and citation may become problematic. The English translations of Swedish texts as given in this thesis are primarily those of “Swedish Labour and Employment Law: Cases and Materials”. The internal conventions of the UK and Sweden with respect to legal citations have been used to the extent possible. Nonetheless, in the Bibliography the referenced legislation is also presented, in Swedish.

The United Kingdom (UK) consists of England, Scotland, Wales and Northern Ireland and does not have a single unified legal system. While being conscious of the fact that there is no such thing as British law or UK law, reference will be made to British and UK labour law, interchangeably. Nonetheless, labour law of the United

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3 Ibid, at 730.
Kingdom can be treated as a single system with no major difference among the jurisdictions for the purpose of this thesis.

As to more specific terminology, *labour law* in this comparative thesis refer to the system of rules, which governs the relationships in a system of industrial relations, i.e. a mix of legislative intervention, agreement and custom as opposed to *employment law*, which regulates the individual employment relationship and its contract.\(^5\)

The legal implications of the distinction of being a *worker* or an *employee* is not emphasised in this thesis and the terms are used interchangeably without any more value implied than that of being employed by the employer, regardless of status of the employment contract.

*Collective bargaining* is the process of negotiation between unions and employers regarding the terms and conditions of employment and the rights and responsibilities of trade unions. It is a process of rule making. The central role of collective bargaining between employees and employers, and their organisations, in the member states of the Community, is recognised by the EU in Article 28 of the Charter of Fundamental Rights of the European Union of December 2000 and in Article 12 of the Community Charter of the Fundamental Social Rights of Workers of 1989. The right to collective bargaining was also declared a fundamental right in the 1961 European Social Charter of the Council of Europe, Article 6. The ECtHR decided, in 2008, that “the right to bargaining collectively with the employer has, in principle, become one of the essential elements” of the right to form and join trade unions under Article 11 of the ECHR.\(^6\) The right to engage in collective bargaining is furthermore regarded by the ILO as an essential element of freedom of association.\(^7\)

### 1.3 Limitations

In order to conduct a comparative analysis in accordance with the objective, taking into consideration time and space constraints, the reader is presumed to have basic knowledge of labour law from a Swedish context as well as an understanding of the

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\(^5\) Note that the distinction cannot always be clear as the areas of law overlaps in certain situations.

\(^6\) Demir and Baykara v Turkey [2008] ECHR 1345, para 154.

European Union and the legislative impact by its membership. Additional knowledge and understanding of the basic structure of the European civil law tradition as well as the English common law tradition is presumed.

The countries chosen cannot easily be included in a straightforward legal comparison. This is owing not only to the profound differences that mark the history of trade union movements but also the very important aspect of social and institutional consequences by which both legislators and economic actors are guided in very different directions.

This study is not intended to be a detailed analysis of the outcomes achieved by collective bargaining nor is it a case law study; case law is only presented to a required explanatory extent. European labour law will not be discussed in this work, only recognised as being influential on both systems due to the Community membership. However, some reflections will be given in the last chapter of this work.

The levels and extent of collective bargaining in Britain is featured by enormous diversity. In view of the complexity of the law governing collective bargaining in Britain, the legal framework of labour law and the relationship between the formal and informal sources, a comprehensive description of the systems will not be possible. Nevertheless, key features and trends, which have been of particular legal importance, will be highlighted and discussed. The same applies to the examination of the Swedish system and the Swedish labour model.

1.4 Disposition
Finally, a short note on the outline. This thesis is divided into five chapters, starting with an introduction. The following two chapters, Chapter Two and Three, will provide the reader with a short presentation of the industrial relations systems in Sweden and the UK, with the intention to highlight key features as to collective bargaining and collective agreements. Furthermore, the intention is to provide a historical background of the development of labour law in each of the countries, focusing on the main subject matter. The historical outline in itself is more systemic than chronological in its disposition. The appreciation of the historical development of Swedish and British labour law and employment relations system is essential to an understanding of its current form and content. In Chapter Four the comparison is then
made within the theoretical framework of the system approach to comparative law. The comparison is divided according to the primary sources of the system approach to comparative law, however decision-making and patterns of thought, discourses, are jointly compared because of the close interaction between these two aspects. In the final chapter of this thesis, Chapter Five, conclusions will be made, as well as some reflections on prospects for the future.
Chapter Two: Sweden

2.1 Development of Labour Law in Sweden and its Legal Framework

2.1.1 The Historical Background of Labour Law and The Swedish Labour Model

Historically, Sweden was an agrarian society with a very strong guild system dominating the mercantile up to the mid 19th century. The agricultural revolution in the late 18th century introduced new refining methods and increased productivity, creating redundancies, making the labour force move on to work in the early industries. However, most economic activities were restricted by regulations, as part of the guild system. With the abolishment of the guild system by the liberal reform in 1846, a positive foundation for economic growth was created. From 1870 to 1970 Sweden had one of the highest rates of economic growth in the Western world. The transition from an agrarian to an industrial society was only the start and even though industrialism came to Sweden almost a century later than in England, it has been said that Sweden became an industrial society in record speed. The rapid economic growth was accompanied by changes in society where servants, ruled by masters through an extension of the household, became individual employees. With the abolishment of the guild system in 1864 and the free trade movement, there were principally no legal provisions prohibiting collective self-organisation, with some restrictions. The period of 1850 – 1900 was a time characterised by the rise of the worker after the break-up with the guild structure and the start of the trade union movement. Generally the state held a neutral stance with respect to the trade union movement in Sweden thus letting the social partners, i.e., the employer and employee organisations, regulate their own relationship. From the 1860 and onwards trade unions were created, starting negotiation with individual employers and employers’ associations over wage regulation and employment agreements. In 1906 the early Swedish labour model was established through an agreement referred to as the December Compromise between SAF and LO. The agreement protected the freedom

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8 Schmidt, Folke, Kollektiv Arbetsrätt, 4th ed. (Norstedts 1962), Ch. 1.
9 Eklund et al., at 15.
10 Nycander, Svante, Makten över arbetsmarknaden, 2nd ed. (SNS Förlag 2009), at 89.
11 Lund, Christer, Spelets Regler, 2nd ed. (SNS Förlag 2010), at 87 ff.
of association in exchange for the right of employers to direct and allocate work and freely hire and terminate workers. This was an understanding of the social partners regulating issues and resolving disputes without legal intervention.

In 1928 the Labour Court was established and the first Collective Agreements Act enacted, followed by the 1936 Act on the Right to Organise and Negotiate. Before the Labour Court was established the resolution mechanism of choice for the social partners was mediation and arbitration. The social partners wanted to keep the state out of all labour issues. The trade union movement centralised and collective agreements were then spread through the private sector outside the industries.

In 1938 SAF and LO further rooted the Swedish labour model in the Basic Agreement. In the years between the agreements the base of modern labour law took form and the 1930’s brought with it the finalisation of the Swedish labour model as well as the Swedish welfare state. Workers in the factories were organised at an early stage of the development and they were the earliest group of workers to be affected by collective bargaining and collective agreements. The great spread of collective agreements at this time owed much to the dominating central organisations LO and SAF as well as the rather steady political climate with the Social Democracy Party in power. The social partners were also promoters of the view that collective agreements should cover all workers within specific areas, not only members of trade unions. SAF had a generally positive approach to the collective agreement-system and endorsed nationwide agreements.

From the time the labour model was established until the 1970’s there was little legislative intervention with respect to labour law in general, thus reflecting the neutral role of the state. The 1970’s was a period of change, of reform. Since then most aspects of labour and employment law have been subject to legislation. The legislative approach was accompanied by the declining economy in the 1970’s due to several factors, e.g. high inflation and high state budgetary deficits.

\[12\text{ SFS 1928:253; 1928:254; 1936:506.}\]

\[13\text{ The first Act on mediation was passed in 1906 (SFS 1906:113). The 1906 Act on Mediation in Industrial Disputes can be seen as an acknowledgement of collective agreements.}\]
The Swedish labour model had its peak in the 1960’s when the model was seen as an exemplary for social responsibility, party cooperation and absence of state intervention. A new phase began with the legislative approach, starting with the new Swedish constitution, adopted in 1974\(^\text{14}\), protecting both the freedom of association as well as the freedom to take industrial action. This was then followed by several labour and employment acts and in 1976 the Act on Joint Regulation in Working Life\(^\text{15}\) (“the Joint Regulation Act”) was enacted, which came to replace the 1928 Collective Agreements Act. The political balance started changing and the economy declined. The Swedish labour model and the spirit of cooperation were questioned. The beginning of the 1990’s was a time of economic distress and in 1990 SAF decided not to participate in any more collective negotiations at national level. The 1990’s were also, to a large extent, characterised by the efforts of harmonising Swedish law with that of the European Union. The entering and membership of 1995 put pressure on the Swedish legislation to comply with Community law. This resulted in several new and replaced acts as well as the important adoption of the European Convention of 1950 on the Protection of Human Rights and Fundamental Freedoms (ECHR)\(^\text{16}\) through the Swedish Human Rights Act\(^\text{17}\). Moreover, several acts were passed, and amended during this time.\(^\text{18}\)

2.1.2 Legal Framework of Collective Bargaining, Collective Agreements and Labour Market Institutions

The primary legal sources in Swedish labour law are the constitution, statutes at large (including EU law), case law, collective agreements, individual contracts of employment, and employer rulemaking.\(^\text{19}\) Labour law in Sweden is principally of private law character, resulting in the social partners asserting rights and taking legal action when disputes arise or violations of the law or agreements occur.

\(^{14}\) SFS 1974:152.
\(^{15}\) SFS 1976:580.
\(^{16}\) Ratified by Sweden in 1950, Legislative Bill 1951:165, see further Legislative Bill 1966:33. For further information about the convention and its protocols, see www.coe.int.e.
\(^{17}\) SFS 1994:1219.
\(^{18}\) See further, Eklund et al., at 17.
\(^{19}\) The use of preparatory works as a source of law is an integral part of the Swedish method of statutory interpretation.
Collective bargaining is considered a fundamental principle, domestically as well as internationally. What is so unique about the Swedish system is the extensive freedom granting the social partners the right to opt out certain statutory provisions through collective agreements. This quasi-mandatory legal approach does not apply to all statutory provisions. Legislative protection of employees is largely mandatory and social protection provisions are not possible opting out. The quasi-mandatory provisions are only able to opt out through collective agreements, not by individual contracts of employment or other agreements. This approach facilitates flexibility and detailed provisions allowing adapted rules for workplaces. Restrictions to this approach on collective bargaining under quasi-mandatory law can be found in the implementation of Community directives, the EC Bar.\textsuperscript{20} Derogation may be permitted, however not as to stipulate less favourable conditions for employees than those following the EC Bar.

When studying sources of labour law one will discover that collective agreements are only regulated to a certain extent and the rules on collective bargaining only creates a framework for negotiation and subsequent joint participation. The Joint Regulation Act is the platform for collective bargaining and collective agreements in Sweden. The Act was passed in 1976, replacing the Collective Agreements Act of 1928. First and foremost the Act contains provisions on collective agreements and the general right of negotiation and consultation. The Act also codifies the fundamental right to freedom of association as well as the Swedish labour model. The Act is to open up the way for a more democratic working life through employee influence and is founded on the conviction that democratic principles, cooperation and a common responsibility are natural elements in the workplace.\textsuperscript{21}

The history of the Swedish Model has demonstrated the power of the social partners in labour as well as employment issues in Sweden. The primary institutions on the labour market are the social partners. The Swedish system is a bipartite system where the state has a neutral role and stands outside the system and where the social partners are represented by strong centralised umbrella organisations on both sides, followed

\textsuperscript{20} Eklund \textit{et al.}, at 18.
\textsuperscript{21} Legislative Bill 1975/76:105 (appendix 1)
by central labour or employee unions and local organisations belonging to the central unions.

However strong the social partners may be, disputes still arise. When disputes arise there are two alternatives: mediation and litigation. The Swedish National Mediation Office\textsuperscript{22} is authorised to try and resolve the disputes through mediation according to Sections 46 – 53 of the Joint Regulation Act. Interest disputes e.g. dispute as to whether a collective agreement is to be concluded cannot be taken to court. Instead, the social partners can engage in industrial action as leverage. If a rights dispute, a conflict of the content or application of a legal norm, cannot be solved through mediation it will be referred to a court or other decision making body\textsuperscript{23}. Only rights disputes can be taken to the Labour Court or the district courts, under the 1974 Labour Disputes (Judicial Procedure) Act\textsuperscript{24}. In general it can be said that if the parties to a dispute are social partners and the dispute concerns a collective agreement, the Labour Court has jurisdiction, as the first and only instance.\textsuperscript{25} Interpretation and enforcement of collective agreements by the courts have provided for case law about most aspects of labour and employment law.

2.2 The Swedish Labour Model

2.2.1 Characteristics of Swedish Labour Law
What one might name modern Swedish Labour law started in the early twentieth century and with it also came the highly recognised Swedish labour model. The Swedish labour model is based on consensus, as reached by the social partners through collective bargaining, manifested in collective agreements. One key feature explaining the operation of the system, and which it could not function without, is the high rate of unionisation. There has been a slight decline in union density over the years, however today the rate is rather steady, around 70 % (slightly lower in the private sector than in the public sector). The fact that collective bargaining and collective agreements have been accepted as a way of regulating relationships on the labour market and has been accepted since the early twentieth century.

\textsuperscript{22} For more information, see www.mi.se.
\textsuperscript{23} It is possible to refer labour disputes to arbitration, however not common.
\textsuperscript{24} SFS 1974:371.
\textsuperscript{25} For more information about the Swedish judicial system, see www.dom.se.
The system of collective agreements emphasises the role of the social partners, and not the individual worker. Nevertheless, collective agreements are still the principal source of norms with reference to individual contracts of employment, as well as the only wage-regulating source, due to absent minimum wage legislation. Another essential element is the mutual acceptance by the social partners on their interests, thereby creating a positive climate for the model and the high degree of collective autonomy.

2.2.2 Collective Bargaining Structure

The collective bargaining system in Sweden is characterised by a high degree of centralisation with a highly organised workforce. The unionisation on the labour market in 2009/2010 was just over 70% of the working population. The labour market is generally divided between the public and the private sector, which can further be divided. The social partners in Sweden are represented by strong centralised organisations, on both the employee as well as the employer’s side. There are three major trade union confederations, the Swedish Trade Union Confederation (LO) for blue-collar workers, the Swedish Confederation of Professional Employees (TCO) for white-collar workers and the Swedish Confederation of Professional Associations (Saco) for graduate/professional employees. There is a certain hierarchy comprising the mentioned umbrella organisations, followed by central unions and then local organisations. However, the only confederation to conclude collective agreements is LO, as TCO and Saco do not conclude any national central collective agreements. The affiliated trade unions to TCO and Saco have nonetheless established negotiation cartels, e.g. the Council for Negotiation and Co-operation (PTK). Almost all private employers are joined, belonging to the Confederation of Swedish Enterprise. In the public sector the Swedish Agency for Government Employers and the Swedish Association of Local Authorities and Regions (SALAR) are the umbrella organisations. Union recognition is not a problematic legal area in Sweden and it is relatively easy to form a trade union and obtain bargaining rights.

26 There are some small unions outside the confederations, concluding their own collective agreements.
27 Svenskt Näringsliv, former SAF.
The 1976 Joint Regulation Act replaced the previous statutes of 1920, 1928 and 1936, and basically governs the entire area of industrial relations and collective bargaining. According to Section 10 of the Joint Regulation Act, every labour union has the right to call for negotiations, irrespective of how big or representative they are regarding employees at the place of work. This right to negotiation is reciprocal and extends to all levels, on both the trade union and the corresponding organisation on the employer side. Even if this right does not include any obligation to enter an agreement it still encourages collective bargaining. Collective bargaining is freely decided, not mandatory, but in the making of a collective agreement, a party may freely use direct action in order to bring the other party to accept his demands.

All conditions and terms of employment can be subject to collective bargaining and collective agreements. Other subjects concerning the relationship between employer and employee and between the social partners can be included. Traditionally collective bargaining in Sweden has been very centralised. However, in the last few decades or so there has been a strong tendency towards decentralisation. Collective bargaining in Sweden can, theoretically, be said to take place at three levels, with collective agreements concluded at each level:

1. National central collective agreements, “recommended agreements”, between the confederations, on both sides. The agreements need to be adopted by the individual affiliate within these organisations to become binding. In 1990 the Swedish Employers’ Confederation decided not to negotiate on pay and overall terms of employment and today only some matters are negotiated at this level, such as labour market insurance and pensions;

2. Industry-wide agreements, in which trade unions represent workers of a particular profession or specific industry. There are currently among 650 collective agreements in Sweden representing this level; and

3. Local collective agreements. These are negotiated and concluded between local trade unions and the employer. Local agreements are increasing and becoming more and more important.

The levels are related depending on the intentions of the organisations involved. In industry-wide agreements the partners have left it up to the local partners to adapt the provisions on a local level, which is the case in wage regulation where
decentralisation is a fact. Only 10% of the working population are covered by industry-wide agreements without local influence over wage setting. The local partners are however restricted by industry-wide agreements as well as discrimination legislation.

2.2.3 Collective Agreements
Collective agreements have a central and fundamental role in the Swedish labour model. Around 90% of the working population is covered by collective agreements, even with the absence of general legislation on the subject. The key factor to the Swedish labour model is that most employees and employers are unionised. In spite of this, the unionisation rate has declined somewhat since the middle of the 1990’s and is still showing a slight decline in union membership, resulting in an overall rate of 70%.

The Swedish model is based on a system of collective agreements regulating the labour market with provisions governing the agreements in Section 23 – 31 and 41 – 44 of the Joint Regulation Act. Collective agreements are a powerful source of law regulation not only the relationship between the employer and the employees, but also the relationship between the social partners. A collective agreement is to be a written agreement concerning employment terms and conditions on the relationship in general between the employees and the employer, according to Section 23 of the Joint Regulation Act. Collective agreements are present at all levels of the labour market, accompanied by individual contracts of employment.29

The content of collective agreements is not stipulated in the Joint Regulation Act, however the core issues taken up in a collective agreement are the question of wages and employment terms and conditions. The issue of wages is extremely important in Sweden because of absent minimum wage legislation. The social partners have relatively extensive powers regarding the content of the agreement and the agreement may cover all aspects of the employer-employee relationship, as well as organisational issues in relation to the social partners. The agreement is not only

29 There are also accessory or tie-in agreements, where employers not member to any employers’ association have the option of signing an already existing agreement. Tie-in agreement reflects the minimum terms and conditions in the collective agreement for the industry.
legally binding upon the parties to the agreement, but also on members of the organisations concluding the agreement.\(^{30}\) This normative effect is the primary function of the collective agreement in Sweden and is explicitly established in Section 26 of the Joint Regulation Act.\(^{31}\)

Section 26 does not expressly state the applicability of the normative effect of collective agreements on non-unionised employees and the employer is not bound in relation to employees who are not members of the trade union. This does however not mean that the collective agreement do not affect employees of such sort. In practice the employer applies at least the minimum conditions to non-unionised employees. This does not follow from legislation rather than an obligation towards the trade union, thereby preventing low-wage competition.\(^{32}\) It is on the power of the principle of collective autonomy, as given distinct shape in a strong normative function of collective agreements that it was thought unnecessary to implement legislation on national minimum wage.\(^{33}\)

There is no mechanism that automatically extends the binding force of collective agreements, to give them \textit{erga omnes} effect. By giving the agreements an \textit{erga omnes} effect would most likely conflict with the Swedish system and the social partners would not promote such change.\(^{34}\) However, the normative function of collective agreements is rather extensive in Sweden, and it is understood that an existing collective agreement may fill in gaps in individual contracts of employment for non-unionised employees when not agreed otherwise by the employer and employee, and thereby have a normative effect. Case law also illustrates that the Labour Court read in a commitment on the employer not to apply other conditions than those stated in the collective agreement on non-unionised employees. The result is that the normative effect of collective agreements includes non-unionised employees, as in part of terms of a general character, with some exceptions allowing employers to offer less

\(^{30}\) When a collective agreement is concluded a \textit{peace obligation} follow. According to Sections 41 – 42 of the Joint Regulation the right to take industrial action cease, but not unconditionally.

\(^{31}\) Schmidt, Folke, \textit{Facklig Arbetsrätt} (updated by Eklund, Ronnie, Göranson, Håkan, Källström, Kent & Sigeman, Tore, Juristförlaget 1997) at 53.

\(^{32}\) Eklund \textit{et al.}, at 156.


\(^{34}\) Eklund \textit{et al.}, at 31.
favourable terms to these types of employees. Accordingly, if the employer is bound by a collective agreement then non-unionised employees are submitted to its stipulated general terms, even if they do not agree with them. This does also mean that they are entitled to receive all the benefits that follow from the general provisions of the collective agreement at hand.

Collective agreements are the primary source of law for individual contracts and if a change is made to a collective agreement that change has a direct impact on an individual level. Individual contracts conflicting with the prevalent collective agreement are void, Section 27 of the Joint Regulation Act. However, entering into a contract that is not consistent with the current collective agreement can be possible, if the latter permits derogation of such sort. This view has been accepted since the 1928 Collective Agreements Act. Any party, in accordance with Section 54 of the Joint Regulation Act, breaching a collective agreement is liable for damages, compensatory and punitive.

2.4 Summary

The Swedish labour model is greatly characterized by the social democratic movement and its values of equality and social justice. The model has been held up as an example of an extremely successful labour relations model, where minimal social disturbance have been caused by disputes due to factors such as social responsibility and party cooperation. The success of the Swedish model cannot be denied or negated and it has led to much praise due to its archetypical model of centralisation. Labour law and labour market issues have generally been regulated by cooperation between the social partners through collective bargaining and by workers acknowledging the interests of the social partners as guardians of the rights of the individual.

Individual contracts of employment are not highly regulated in statutory texts, as is the case in other countries, and most often than not the collective interest triumphs the interest of the individual employee. Historically, the law has not been the guardian of the rights of the individual, in particular workers, instead it has been through the efforts of the labour law model and the social partners. The individual contracts are

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35 AD 1984 No. 79.
36 Legislative Bill 1975/76:105 appendix 1, at 375.
practically subsumed within the Swedish model making an indistinct delineation between labour law and employment law.

The Swedish model cuts across the entire labour market and underpins the discourse with its socialistic rights-approach and the neutrality of the state with respect to issues on the labour market. Enacted legislation is more or less regarded as a secondary source of law instead of a primary source due to the extensive freedom of opting out certain legal provisions through collective agreements by the social partners. With the extensive interpretation of the normative function of collective agreements it can truly be said that collective agreements are the primary source regulating almost the entire labour market. The collective agreements concluded by the social partners are legally binding but can generally be seen to be governed as much by trust built into the system by the social democratic nature of Swedish labour. The Swedish labour model is the driving force providing for the strong principle of collective autonomy, which has given concrete shape of the structure of today.
Chapter Three: The United Kingdom

3.1 Development of Labour Law, Sources and Institutions in the UK

3.1.1 The Historical Development of Collective Labour Law in the UK

The industrial relations system in the UK is traditionally characterised by collective 
laissez-faire\textsuperscript{37}, i.e. voluntary relations between the social partners with an absolute 
minimum state intervention. With a liberal political culture and the early 
industrialisation in the UK, the state rarely interfered in the relationship between the 
social partners. The result was that trade unions, little by little, secured their 
membership and structure of power in the 19\textsuperscript{th} century up to the last quarter of the 20\textsuperscript{th} 
century, which brought with it the significant decline in trade union density.

In the middle of the 18\textsuperscript{th} century, the labour market was still regulated by the 
corporative system, established under the Statute of Artificers of 1562, dominating the 
trade and creating a tightly controlled society.\textsuperscript{38} The system outlawed strikes and any 
collective self-organisation to improve terms and conditions of employment. Any acts 
of such sort constituted a criminal conspiracy according to common law.\textsuperscript{39} The 
hostility towards collective self-organisation could clearly be seen in the legislation 
imposed during this time. From the 1720’s and onwards numerous acts of Parliament 
outlawed associations regarding individual trades. More restrictions and a general ban 
on combinations were imposed and the hostility towards combinations of such sort 
went so far as to formally repeal the entire corporative guild system in the years of 
1813 – 1814. The repeal led to massive strikes and a new Combination Act was 
imposed in 1825, which permitted freedom of association as well as collective 
bargaining.\textsuperscript{40}

\textsuperscript{37} Kahn-Freund, Otto, Labour Law, in Law and Public Opinion in Britain in the Twentieth Century, ed. 
M Ginsberg, (Stevens, London 1959)
\textsuperscript{38} The Statute of Artificers, 4 Elizabeth c. 5 (1562) contained the tradition derived from the first formal 
labour statutes of the middle ages, the Statute of Labourers of 1351, following the Ordinance of 
Labourers of 1349.
\textsuperscript{39} See R v Journeymen–Tailors of Cambridge (1721) 8 Mod 10; Deakin, Simon and Morris, Gillian, 
Labour Law, 5\textsuperscript{th} ed., (Hart Publishing 2009), at 5.
\textsuperscript{40} Deakin and Morris, at 6.
The decriminalisation of labour law began in the 1870’s and trade unions were accepted as legal entities as corporations in the 1871 Trade Union Act, giving trade unions the right to strike, followed by the right to peaceful picketing in the 1875 Conspiracy and Protection of Property Act. However, with the removal of the criminal liability, common law civil liabilities developed. The courts started to fill the gap created by the removal of criminal liability by extending the economic torts. The expansion of economic torts gave rise to liability in tort for almost every industrial action being taken. Statutory rights protecting the right to organise or strike were not enacted, instead trade dispute immunities were created. The Trade Disputes Act of 1906 lifted the threat of trade unions being sued for damages for engaging in industrial action. The Act restored the position of trade unions by extending the trade dispute immunity to cover some of the economic torts, thus creating a gap where a system of autonomous collective bargaining could develop further. At this time the strong social hierarchy was still maintained with strong solidarity within the working class, with its roots in the guild system.

The economic context of this time favoured the trade union movement. The 19th and early 20th century was a time of economic growth, due to the pace of industrialisation. In the period of 1890 – 1940 industry-wide collective bargaining was encouraged.\[^{41}\] In terms of the role of law, the influence of legislation was not at all as important as collective bargaining. The role of statute law was to promote and extend collective bargaining instead of regulating the system in detail. In the post war-years, the UK experienced a growth in trade union membership. During this period industry-wide collective agreements were typically concluded, in both the private and public sectors, to cover whole industries. With the late 1960’s an era started, characterised by attempts by successive left wing and right wing governments to regulate the system with several statutory incomes policies. The succession of income policies was not consistently applied and the trade unions, employers and the political parties were stuck in constant battle over these issues.\[^{42}\] All policies generally ended in failure and the policies did not reshape labour law itself\[^{43}\], however, indirectly the policies had an enormous impact on the conceptual framework of labour law with successive

governments continuously tying to assure trade union approval to their income policies. In return for political influence through corporate bargaining trade unions accepted more state intervention in collective bargaining. The political influence of trade unions increased and so did direct legal intervention, which also signalled the start of the breakdown of the traditional voluntary system of collective laissez-faire. During this time the objective was to reform bargaining structures and support legally enforceable collective agreements with the Industrial Relations Act 1971, nevertheless the Act was a failure. From 1974 and onwards several acts were introduced focusing on individual rights, as part of the social contract by the Labour government. Labour also returned to the tradition of non-legally binding collective agreements and created ACAS as well as the CAC with the aim to assist and spread the operation of collective bargaining.44

With the election of the Conservative government headed by Mrs. Thatcher in 1979, collective bargaining was subjected to a revolution in social and economic policy i.e. a platform of neo-liberalism and anti-trade unionism. From the election of the Conservative government of 1979 the trade union membership declined and the majority of industry-wide collective agreements were dismantled due to companies abandoning them. Legal restrictions on the right to engage in industrial relations were enacted and the privatisation of many public areas began. There was a clear commitment, in policy and legislation, to restrict collective bargaining and welfare rights were dismantled and other benefits were cut in order to reduce the public sector and its costs. The New Labour government focused on the base of competitiveness and fairness, which started a route towards a cultural change. The National Minimum Wage Act 1998, statutory recognition procedure and floor of rights from the EU-level were introduced. Individual labour law was extended by statute to areas previously untouched, e.g. wages, hours and holidays. As the areas of wages, hours and holidays were regarded as the core of collective bargaining and collective agreements, the state influence became greater than commonly assumed in the UK, as the state often appeared to do very little, in line with the collective laissez-faire approach. Nonetheless, the state has intervened more often than not. The New Labour’s “Third Way” government of 2001 adopted a new approach to labour law, resulting in a

44 Advisory, Conciliation and Arbitration Service (ACAS) and Central Arbitration Committee (CAC).
minimum rights-approach balanced with the immense Europeanization of the labour market.

### 3.1.2 Labour Law and its Sources and Institutions in the UK

Labour law in the UK is not regulated through a general Labour Code, instead it consists of several sources, formal and voluntary, legal and extralegal. The legal norms governing labour law can be divided into formal sources and voluntary sources, common law and legislation being the primary formal sources, complemented by codes of practice. Common law is still the core of the system, both at collective and individual level. The most purposes of trade unions are still considered as restraint of trade according to common law and it is only because of the statutory immunities that there is a lawfulness of trade unions’ status and the right to take industrial action.\(^{45}\) From a collective perspective the common law is of great importance, especially for collective bargaining because only a minimum framework has been set up by legislation. Legislation has played an important, but a generally subsidiary role to common law throughout history, although now there is an expansion of legislation in most areas of labour law. The primary statute regulating the framework of collective bargaining is the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). There are very important voluntary, autonomous, sources of labour law as well.\(^{46}\) Voluntary sources have been, and still are, crucial in Britain. The most significant source is by far collective agreements. Collective agreements are somewhat remarkable because of their independence from the formal legal system, separating the British approach from that of many other countries.

The sole umbrella trade union confederation in the UK is the Trade Union Congress, TUC. However, the TUC does not reach or have the power to reach collective agreements at any level. There is no clear structure of trade unions and they are organised both horizontally and vertically. Confederation of British Industry (CBI) parallels the TUC on the employers’ side and similar to the TUC, the CBI has no mandate to collectively bargain and bind its affiliated organisations. The government

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\(^{45}\) *Hornby v Close* (1867) LR 2 QB 153.

\(^{46}\) Such as collective agreements, workforce agreements, work rules and self-regulatory codes of conduct.
regards the CBI as its main interlocutor with business because CBI represents large quantity of companies in the private sector. However, because of the largely decentralised system of industrial relations in the UK the employer organisations are not as important as they once were.

There is no separate labour court system to deal with eventual labour disputes, instead there is a specialised system of tripartite Employment Tribunals. The main route for enforcement is through the Employment Tribunals and appeals to the Employment Appeal Tribunals, as regulated by the Employment Tribunals Act 1996. There has been quite an awkward separation of jurisdiction between the ordinary courts and the tribunals because labour law matters are divided between the tribunals and the common law courts, the tribunals hearing generally statutory employment rights and certain common law claims. A further possibility of appeal from the EAT exists, on questions of law, to the Court of Appeal (CA) and to the Court of Session (Inner House). Apart from the courts and tribunals there are two very important and relevant governmental institutions that need to be mentioned, the Advisory, Conciliation and Arbitration Service (ACAS) and the Central Arbitration Committee (CAC). ACAS has a wide span of functions such as the role of collective conciliation in preventing and resolving disputes, as well as operating a voluntary arbitration scheme in certain matters as an alternative to tribunal proceedings and issue codes of practice. The CAC’s main function is to adjudicate on applications relating to statutory recognition and de-recognition, where this cannot be agreed voluntarily.

3.3 Collective Bargaining Structure

In the UK there is no code or central law that regulates collective bargaining and the British system has developed through practice over many years without much legal regulation. The result is a system traditionally characterised by voluntary bargaining, or in the words of Otto Kahn-Freund, collective laissez-faire. However, in using the

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term “voluntary” the meaning is not a complete absence of law. The use of terms such as “voluntarism” in the context of collective bargaining can be misleading when not understanding the fundamental nature of collective laissez-faire and its legal support for autonomous collective bargaining. Instead of a statutory platform there was an active administrative policy of support from successive governments, resulting in that both definition as well as enforcement of bargaining depended upon the social partners and their union action.50 The collective laissez-faire approach has made Britain to an example of liberalism and minimal governmental intervention. Collective bargaining is not, nor has it been, very regulated.51

The diversity of collective bargaining in the UK has resulted in that bargaining can take place at several levels simultaneously. Bargaining takes place at various levels e.g. industry, district, company, plant and work group level. The different bargaining levels have been subject to particular attention during the 1980’s and 1990’s and are still going on today. The attention and discussions are directed at the diversity of levels at which bargaining takes place in trying to determine the effects, such as financial performance, wage setting and inflation.52 Traditionally the levels of bargaining in the UK is set up in industry-wide bargaining, regional or district bargaining and plant or workplace bargaining53, however the dominant level for the wage setting and working time is the company or plant level. Moreover, no formal system exists for the coordination of wage bargaining levels in the UK.

The industry-wide bargaining and district bargaining have decreased and is not of the same, historical, importance as they once were. In the UK today there are more or less no industry-wide agreements left, and district level bargaining was most important before the First World War and is now of no major importance. After 1965 plant-level bargaining became more and more significant, demonstrating a move towards a more decentralised bargaining structure. Collective bargaining in the UK has become much more decentralised since the 1970’s – 1980’s, when companies abandoned industry-wide agreements, as well as district agreements, affecting both private and public

53 Hardy, at 272.
sector, and in 2004 the degree of bargaining centralisation stood at just around 13%.

The trade union density in 1980 was up at 65%, however this number was significantly decreased in 1998 when union density had declined to 36%. In 2010 the trade union density in the UK was 26.6% including both the private and public sector\textsuperscript{55} with the overall coverage rate of collective agreements at 30.8\%\textsuperscript{56}

In collective bargaining trade unions look after the interests of their members, however they also recognise the advantages of cooperating with employers and the state. A lucrative and successful company is not only good for the employer but also for the workers and consequently the union and its members. An employer and a recognised trade union interact with the workplace in a number of ways. For a union to engage in collective bargaining with an employer or employer’s association there is a question of recognition of the trade union by the employer. Recognition can be done in two ways, either voluntary recognition by the employer or statutory/compulsory recognition. Recognition gives rise to important legal consequences, e.g. the right to disclosure of information for bargaining purposes and a variety of statutory consultations rights.\textsuperscript{57} However, it is not until rather recently that compulsory trade union recognition was imposed in the Employment Relations Act 1999. The relevant provisions are now to be found in the TULRCA 1992.\textsuperscript{58} This “centrepiece” of trade union recognition basically means that an employer has to recognise a trade union for the purpose of collective bargaining.\textsuperscript{59} Collective bargaining in the TULRCA means “negotiations relating to or connected with” one or more of the matters as specified in the act.\textsuperscript{60} This means provisions on compulsory bargaining when it can be established that a majority of employees in a defined bargaining group wishes to do so. However, recognition is only compulsory by law if the parties themselves fail to sign a voluntary agreement. This is an indication of the voluntary approach as the law is considered the very last remedy.

\textsuperscript{54} Visser, Jelle., Patterns and Variations in European Industrial Relations”, in Industrial Relations in Europe, Luxembourg, Office for the Official Publications of the European Communities, 2004.

\textsuperscript{55} 14.2\% for the private sector; 56.3\% for the public sector.

\textsuperscript{56} 16.8\% for the private sector; 64.5\% for the public sector.

\textsuperscript{57} Such as, Directive 2002/14/EC, implemented through the Information and Consultation of Employees (ICE) Regulations 2004.

\textsuperscript{58} Trade Union an Labour Relations (Consolidation) Act 1992, Schedule A1, inserted by the Employment Relations Act 1999, s 1 Schedule 1, supplemented by a Code of Practice.

\textsuperscript{59} TULRCA s 178(3).

\textsuperscript{60} TULRCA s 178(1) and (2).
Both of the mentioned approaches to recognition are invoked by a union’s request for recognition. When an employer refuses to recognise a trade union when a correct request has been made by the union the CAC has the power to decide whether to declare recognition or not, which is done by ordering recognition or arranging a secret ballot election\textsuperscript{61}. The voluntary and statutory recognition is very important. The way of recognition sets the boundaries of the subject matter of collective bargaining. The statutory duty imposes a duty not found under common law and the subjects of compulsory bargaining are only hours, pay and holiday. The legislative approach is clearly designed to encourage voluntary recognition and the majority of employers have chosen the way of voluntary recognition.\textsuperscript{62}

### 3.4 Collective Agreements

In line with the voluntarist tradition, collective agreements are voluntary instruments that are “binding in honour only”. A collective agreement is an agreement reached through collective bargaining between an employer and a trade union or employer’s associations and trade union confederations. The primary objective of collective bargaining is to conclude a collective agreement. It is commonly said that collective agreements have two main functions and that they can be divided into procedural agreements and normative agreements. The procedural agreement regulates the relationship between the parties to collective bargaining and the treatment of workers, e.g. disciplinary treatment. A normative agreement on the other hand regulates individual employment contracts, including wages, hours of work and other conditions of work.

Collective agreements between trade unions and employers can be categorised into three types, according to legislation. The most common type is agreements complying with the legal definition in TULRCA and which were made before 1 December 1971 and after 31 July 1974, defining a collective agreement as “any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers’ associations”\textsuperscript{63}. The agreement must further relate to any of the stipulated provisions in TULRCA, 1992, s. 178(2). This kind of collective

\textsuperscript{61} See further Deakin and Morris, at. 798 – 771.


\textsuperscript{63} TULRCA, 1992, s. 178(1)
agreement is presumed not legally enforceable, unless in writing and expressly stating an intention of the opposite. Even if a contract includes such a provision it may not necessarily mean that it is legally enforceable, especially if the language used is too uncertain and ambiguous. Such a provision needs to be clear, and it does not suffice to just express a will to be “bound”. Secondly, collective agreements made during the period of 1 December 1971 and 31 July 1974, when the Industrial Relations Act 1971 was in force, are presumed legally enforceable, unless containing an express provision stating otherwise. Lastly there may be negotiated agreements that are not included in the legal definition in TULCRA. These agreements are not without any legal protection, instead they are governed by common law. However, the legal status of such agreements is considerable uncertain and does not give any substantial legal guidance.

Collective agreements are an important source of labour law, however Britain has chosen an extraordinary path with the presumption of collective agreements not being legally binding with its independence from the formal legal system. However, the terms of collective agreements can be incorporated into individual contracts of employment, thereby making them legally enforceable. The non-enforceability of the majority of collective agreements does not affect the enforceability as part of the individual contract. There is no voluntary extension mechanism of collective agreements, and collective agreements are thereby subsequently never extended by legislation. The legal basis for the normative effect of collective agreements relies on the individual contract of employment, and the possible incorporation of collective agreements, because common law recognises no principle of automatic and compulsory effect of such matters. However, non-unionised may be covered by a collective agreement in the workplace, even if not a member of a trade union, as trade unions often negotiate on behalf of all of the workers employed in a specific group, i.e. a bargaining unit.

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64 TULRCA, 1992, s. 179 (1), (2). If only parts are stated to be enforceable, the presumption against enforceability will apply to the remainder of the agreement, see s. 179 (3).
68 Deakin and Morris, at 238.
3.5 Summary

The UK has experienced a revolution in government policy relating to collectivist values that was established as long ago as the end of the First World War. The traditional approach has involved little use of legal intervention for its promotion. When explaining the system of collective bargaining in Britain people may very often refer to the traditional system of “collective laissez-faire”. In the writing of labour law scholar Otto Kahn-Freund, 1959, the term collective laissez-faire was used for describing the method of collective bargaining, however collective laissez-faire is not synonymous with a complete absence of law. Even without legislation, which was never entirely lacking, administrative and political support did much for the extension of collective bargaining, thus the state have become the major institution regulating in the labour market in the UK. The system in Britain is characterised by competitive unionism, resulting from the basic socio-economic reforms, which have been pursued on both the economic and political fronts, by both trade unions and employers’ associations with a close relationship with the political system. There is no pressure on changing the system and therefore the system of non-enforceability collective agreements has stayed the same. There is a fear of direct intervention by the state, however indirect intervention has been continuously accepted. The intensity of public support has however varied over time and indirect intervention have ensured that collective bargaining always have had the benefit of at least official indifference and sometimes active promotion. The state has played the major role in shaping the development of the labour market in Britain for the last 150 years, with being highly interventionist. In 1890 – 1940 with the establishment of industry-wide collective bargaining; “voluntarism” at that time was highly interventionist. The period of 1940 – 1979 was characterised by the shift towards a more decentralised system turning in to the deregulation of industrial relations with Thatcherism and the neo-liberalistic offensive, making the social hierarchy even stronger and emphasising class structure. This was a major ideological shift and legal regulation became dominant in the post 1979 period, supplanting collective bargaining and dismantling the traditional system of collective laissez-faire. The post 1997 period saw an even more marked increase in the influence of legal regulation in the employment relationship which have continued until today, focusing on preserving and further protecting individual rights.
Chapter Four: Comparison – The System Approach

The Swedish legal system belongs to the European civil law tradition as opposed to the legal system in the United Kingdom, belonging to the English common law tradition. These legal traditions in themselves are significantly different, thus resulting in difficulties conducting a straightforward comparative analysis. The system approach to comparative law is for that reason invoked for a more comprehensive basis for comparison. The system approach is divided into four basic categories: authoritative texts, institutions, decision-making and patterns of thought, discourses.

4.1 The Authoritative Texts

In Sweden as well as the UK the primary legal texts are the constitutions, treaties, statutes and then regulations. The sources are given different importance in each system. Each country’s industrial relations model is characterised by its own legal system and the developed legal culture, intertwined with its political system.

Different lines of texts have been discussed and mentioned in this thesis, however the primary texts in this work are collective agreements. The starting point is the constitution and statutory texts, however, in Sweden the collective agreements are the primary source of labour market regulation, gaining its powers from the statutory level. With the statutory texts as a starting point one may establish that the Swedish labour model, with its collective agreement system has had an enormous impact on the authoritative texts in Sweden. Legislation was more or less fitted into the already existing Swedish labour model with the reform of the 1970’s. The quasi-mandatory approach within the framework of the Joint Regulation Act is more or less a codification of the Swedish Model, thus leaving matters to the social partners to decide. The social partners are given an extensive freedom to opt out provisions through collective agreements, making collective agreements the most important authoritative text for regulating the labour market. In contrast, United Kingdom does not have a labour system regulated by enforceable collective agreements. Historically, collective bargaining has been left unregulated to the point of non-enforceable collective agreements. Collective agreements have been a supplement voluntary source to statutory texts and individual contracts of employment. On the other hand,
Statutory texts have had an extremely important function within the English common law tradition, overturning the courts' common law characterisation of unions as criminal conspiracies. It is the statutory texts that balance up the structure of the system, granting immunities and giving trade unions the right to statutory recognition (when not achieved voluntarily) and thereby collective bargaining rights, such as the right to negotiation and consultation. However, the primary statute, TULRCA, does not provide more than the ground rights for collective bargaining, setting up a basic legal framework. The role of statute law is still to promote and extend collective bargaining instead of regulating the system in detail. Its function is still to encourage voluntary collective bargaining, which can also be implied by the compulsory/statutory recognition procedures. Collective agreements are legally defined in TULRCA, even so still not legally binding. A collective agreement is quite broadly defined in both the British and Swedish statutory texts, but the Swedish quasi-mandatory approach is promoting a more flexible regulation appropriate to the diversity of collective agreements and workplaces, making the agreement ideal for regulating the labour market in Sweden.

A Swedish collective agreement is of a legally binding nature in contrast to the UK where collective agreements are not binding. Instead, individual contracts of employment are the binding option to collective agreements in the UK. The legal consequence of this is a statutory presumption of collective agreements being not legally binding, if not incorporated into an individual contract of employment. The legally binding nature is up to the parties to the agreement to decide. The consequence of non-enforceable collective agreements are that if breached there is no right to damages, in contrast to the Swedish approach where anyone in breach of a collective agreement is liable, resulting in damages. This is a fundamental difference and sets the two countries widely apart. The Swedish model is based on collective agreements, while the UK system declares collective agreements a voluntary source relying on individual contracts of employment; the collective agreement stands outside the British legal framework as a voluntary extra legal source compared to being the primary instrument of labour market regulation as in Sweden. Even during the period of legally enforceable collective agreements in the UK, provisions were incorporated making them not legally binding, demonstrating a fundamental will of preserving the voluntary character of collective bargaining and its outcome. A further interesting
difference that appears within these two systems is the width of the normative function of collective agreements. A collective agreement does not have an *erga omnes* effect in either of the systems although the normative effect is more extensive in Sweden than in the UK. In Sweden the non-unionised employees enjoy the benefits following the agreement at hand, but they also need to submit to the agreement’s general terms and conditions even if they do not agree to them. In contrast, the UK does not have this extensive interpretation of the normative effect, yet they normally apply the prevailing collective agreement on non-unionised employees, if incorporated in the individual employment contract. The focus in the UK has been on the individual employee and the rights and duties in contracts of employment. It is up to the parties themselves, the employer and the employee, to decide whether or not to be bound by a collective agreement. This individualistic approach is statutory established with legislation providing individual minimum rights concerning wages, hours and holidays, which normally are the core issues of collective agreements, as opposed to the Swedish approach of not even having minimum wage legislation. Reasons to the absence of minimum wage legislation may be the strength of collective autonomy and the concrete shape of the strong normative effect.

### 4.2 The Institutions

Sweden is a bipartite system characterised by the Swedish labour model with the neutral position of the state, standing outside the system. The labour model is leaving collective bargaining and collective agreements up to the social partners, making the social partners the primary institutions on the labour market. There is a significant difference in respect of the power of the social partners as compared to the UK. The social partners in Sweden have more extensive powers than in the UK, such as the explicit right to opt out statutory provisions through collective agreements. The entire Swedish labour model is based on a social consensus granting the social partners the extensive powers of deciding the terms and conditions, exclusively in some areas such as wages because of absent minimum wage legislation. The British system is characterised as being a tripartite system consisting of the social partners and the state. The British social partners are not as strong as in Sweden, however they still serve an important function within the voluntary bargaining system. In the UK the trade union density is low, combined with a diverse and incoherent bargaining structure, depriving the British social partners much of their power. The roles of the
unions and management are affected by the influence of bargaining structures and as a clear downward shift in locus have occurred because of the historical and political structural changes the system can be considered highly decentralised. The social partners have not welcomed legislation in the UK as legislation has been considered a threat to the “single channel” that the trade unions strive to maintain with individual employers. This may have its roots in the strong social hierarchy and class structure of the British society where there has been little interest between the members of the working class and those of the higher classes, thus resulting in lack of general community interest. The result is that the primary, and most powerful, institution on the British labour market have become the state. The state has played the major role in shaping the development of the labour market in Britain. The role of the state may vary but the influences are obvious. Direct influence, not only politically and by lawmaking but also as an employer. Indirectly the state has an important role of providing contexts by shaping the priorities and climate on the labour market, which is an important distinction between the systems and their approaches.

4.3 The Decision-Making and Discourses

Decision-making procedures and structures of power are to be found in all labour market institutions. The influences on decision-making are important for the understanding of patterns and the way that influences can interact and operate.

The legislation and legal approaches in Sweden and the UK are very different and can basically be described as the others opposite. There is a different approach to legislation in Sweden, more indicative to objectives rather than “duties”. The implementation of legal solutions in Sweden is of a different nature as opposed the approach in the UK. Swedish solutions are more of a communitarian nature in contrast to the liberalistic view in the UK. The origins of communitarianism can be found in the writings of Marx, pointing out that law itself is a vehicle of class oppression. Marx’s theory developed further and was formulated by Pashukanis who argued that in a communist society there could be no existing law because the law would not be needed and would therefore disappear. The law would be replaced by administration because law only protects the rights of individuals in a contractual

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relationship.\textsuperscript{70} The Swedish approach of socialist rights is quite straightforward and fits in the typical vision of socialist rights. The law has historically not been a guardian of the rights of the individual. Rather, the Swedish labour model and trade union have protected the rights of the individual worker. In contrast, liberalism has underpinned the entire labour law and its legal culture in the UK. The ideology stands for individual liberty, free markets and the traditional approach of collective laissez-faire, political democracy and a state which, if it regulated or intervened in society, did so principally in order to give greater power to individuals. The state has an ideological role and in the UK there has existed a traditional view of liberal collectivism. The political and legal doctrine of collective laissez-faire, referring to the governmental policy of limited government interference and oversight. When the parties are of equal bargaining strengths they will agree to an optimal solution for fairness and economic production. This is balanced against the prevailing ideology of market individualism, starting with the free market model established by Thatcher in the 1980’s with support for managerial prerogative and constraint on trade unions. During the voluntarist period of traditional collective laissez-faire the state encouraged voluntary bargaining to the point of the 1960’s when the state concerns were altered due to low productivity, inflation and the continuing role of trade unions. During the final quarter of the 20\textsuperscript{th} century the advocacy of the economic side of the liberal tradition, separated from its cultural and political aspects, developed. This neoliberalistic influence in the governmental policy was a significant factor to the decline of union power and the abandonment of national agreements. In contrast, the Swedish labour model strengthened union power and density, creating an archetypical centralised system.

Collective laissez-faire was part of the classical liberalistic decisional approach in the UK. This “model” does not longer exist in modern labour law, at least not in its original form as proposed by labour law scholar Otto Kahn Freund. The traditional liberalistic view is now replaces by an “up-to-date” liberalism where individual rights legislation and the promotion of the free market and the individual choice is the prevalent theory. The communitarian approach is on the other hand basically intact, primarily because of the stability of the Swedish political arena, with the Social

\textsuperscript{70} Ibid. at 218, citing R. Warrington, \textit{Pashukanis and the Commodity Form Theory} in D. Sugarman (ed.) \textit{Legality, Ideology and The State}, at 43.
Democratic Party in power from 1932 until 2006, with exception of short intervals. The stability in the political climate has also been an important factor of strengthening the Swedish labour model. The British political settings have been rather fluctuating, with successive left wing, right wing governments, making the political debate and policies incoherently applied. However, the fundamental liberalistic view has been the centre at all times, however in different forms as adopted by each sitting government.

The British social partners are still to take complete responsibility for collective bargaining, with the basic legal framework at its side. Nevertheless the spirit of cooperation no longer exists and statutory provisions, leaving the collective agreement aside, have regulated the core of collective bargaining. To fulfil the vision of competitiveness and fairness in the British labour market the social protection rights are the essential components of enhancing the vision, rather than reducing it by a collectivist approach. Sweden on the other hand is trying to hold on to its labour model, not giving up its labour market regulating function. The task of preserving the Swedish labour model gets harder when striving towards systemic coherence with the Community continues. However, as both countries are intertwined at the EU-level, as Member States, EU law will become more and more important.
Chapter Five: Conclusions

The focus of this presentation has been on collective labour law and the industrial relations model in Sweden and UK as regards the role and function of collective bargaining and collective agreements. The method chosen for the comparison is the system approach to comparative law, in which the significant authoritative texts, institutions, decision-making as well as discourses have been examined in both systems to give a more comprehensive base for a comparison. The concept of decision-making has been the centre of this comparison as the text and the actors are placed in its broad context. Several contrasts as well as commonalities have been identified through the system approach, however the purpose of this thesis is not to conclude which system has the best solution in respect of collective bargaining and collective agreements, as the role of collective bargaining is not always straightforward. Collective bargaining is complex and bargaining structures can be viewed both as a reflection of the partners’ relative power and as a determinant of power.

During the 1980’s and the 1990’s the Swedish labour market experienced considerable changes. The centralised bargaining system in Sweden has given stability to the labour market as well as counteracted flexibility. This centralised system has gradually disappeared and collective bargaining has become more complex. The future role of collective agreements has to be analysed in the light of flexibility and decentralisation on the modern labour market. Swedish labour law has almost exclusively focused on collective rights with a low level of individual protection. The challenges today require the system to change towards more individual protection, strengthened by the human rights-approach as well as Community law. The collectivist tradition, as established in the Swedish model, is fundamental and owing its strength to the strong social partners and the social acceptance of collective agreements as the instrument regulating the labour market. However, the individualistic approach can, and must, supplement and balance the Swedish model. By contrasts, British unions have weakened, much due to the industrial relations legislation of the 1980’s until today. However, the declining union power does not solely come from legislation, as other factors have played a great role in the shaping of union power. The model of collective laissez-faire has lost its
authority with the revolution in governmental policy relating to collective representation and the exponential growth of individual rights is regarded the instrument to enhance the vision of competitiveness and fairness. Minimum rights legislation is providing the platform for individual agreements; individualism at its highest, where the individual employment contract decides whether or not collectively agreed terms are to be binding. Collective bargaining and collective agreements are still of a voluntary nature. When considering the liberal driving forces of the state, unions and employers and the historical development one may draw the conclusion that the role of collective agreements as a voluntary and subsidiary source, “binding in honour only”, will probably not change in the near future.

The function and role of collective bargaining and collective agreements are greater in Sweden than in the UK. However, the similarities in the changes under way in bargaining structure across these two countries are apparent, even with the more severe decline of union density in the UK compared to the somewhat declining union density in Sweden. The downward shift of locus in the bargaining structure is obvious in both systems, as the intensity of local bargaining has increased in recent years, thus confirming a shift in bargaining power. The Swedish labour model, as well as the UK system, is facing serious challenges, as observed with the declining union density, corporate and structural changes on the labour market and the Community influence. The development of the internal markets of the EU will have consequences on all areas of law, there among labour law. The all-increasing influence demonstrates that national and international traditions overlap, contradicting or complementing one another. There will probably be a future conflict on which labour- as well as welfare model will be the best deal with the global competition. What it all boils down to is the driving forces on the labour market and the structure of power.
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