Dispute Settlement Procedures in Five Western European Countries.

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INTRODUCTION

BENJAMIN AARON*

The five papers comprising this volume are based upon talks originally made by the respective authors at a conference on the subject, "Labor Courts or Arbitration," held on November 11, 1967, on the campus of the University of California, Los Angeles. The reader will note that the range of ideas expressed in these papers extends well beyond the limits of that subject; hence a more accurately descriptive title has been selected for this volume.

The authors of these papers did not contemplate at the time they addressed the conference that their remarks would subsequently be published. However, at the conclusion of the conference, which was attended by more than 100 distinguished jurists, government officials, law professors, and practitioners from the United States and Canada, many of the conferees asked for copies of the proceedings, and many persons who knew about the conference but had been unable to attend made similar requests. With the consent of the authors, therefore, the UCLA Institute of Industrial Relations has decided to publish the papers in substantially the same form in which they were initially presented. No attempt has been made to alter their essentially informal style.

The 1967 conference was a by-product of a more ambitious project devoted to an analytical comparison of dispute settlement procedures in Britain, France, West Germany, Italy, and Sweden with those in the United States. The project was originally suggested in 1962 by Professor Otto Kahn-Freund, for many years a member of the Faculty of Law of the London School of Economics

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The decision to embark upon the project in 1966 coincided with and was influenced by the marked resurgence in this country of criticism of both the National Labor Relations Board and the private arbitration system, as well as the renewal of demands that courts supplant, wholly or partially, one or both of those institutions. My impression then, since confirmed by further research and by some of the testimony submitted at the recent well-publicized hearing on NLRB decisions and policies by the Subcommittee on Separation of Powers of the United States Senate Judiciary Committee, was that the debate was being conducted with an appalling ignorance of the relevant facts on the part of almost everyone concerned. The comparative study referred to above, soon to be published,[1] should help to raise the general level of the debate by providing essential information based on empirical research, and by offering some useful hypotheses derived from an analytical comparison of the different national systems involved.

The selection of the European countries to be included in this comparative study was not made at random. France, West Germany, and Sweden were picked because each has a well-established labor court system with special features distinguishing it from the others. Italy was chosen because it has neither a labor court system nor a general private system for settling labor disputes, which are largely handled at the present time by the ordinary courts. Finally, Britain was included for two principal reasons: first, because it has the widest variety of institutional devices for settling disputes of any of the countries represented here; and

[1] The results of the study will be published in three volumes by the University of California Press. The British national report, by K. W. Wedderburn and P. L. Davies, which is longer than the others, will appear in a single volume, EMPLOYMENT GRIEVANCES AND DISPUTES PROCEDURES IN BRITAIN. The French, West German, Italian, and Swedish national reports, written by Xavier Blanc-Jouvan, Thilo Ramm, Gino Giugni, and Folke Schmidt, respectively, will be incorporated in a single volume tentatively entitled LABOR COURTS AND GRIEVANCE SETTLEMENT IN FOUR WESTERN EUROPEAN COUNTRIES. Both of these volumes will be published in 1969. A third volume, by Benjamin Aaron, seeking to relate the findings and conclusions of the previous two to the Amercan experience, will be ready for publication in 1970 or 1971.

second, because a Royal Commission was then considering a number of different proposals, including the establishment of labor courts. It has since published a report[3] which could lead to profound changes in the British system of industrial relations. These important developments, coupled with the common heritage shared by Britain and the United States, made the inclusion of England indispensable.

The project has been financed largely by the UCLA Committee on International and Comparative Studies from a Ford Foundation grant to the University. Supplementary support for my own research in this country was provided by the Walter E. Meyer Research Institute of Law. I take this opportunity to express my deep appreciation for this financial assistance, without which the project could not have been undertaken. I also acknowledge with thanks the generosity of the firm of Seyfarth, Shaw, Fairweather & Geraldson, of Chicago, Illinois, which kindly made available to my colleagues and me in advance of publication a series of comparative studies of labor law and related practices and procedures in selected European countries. Finally, the UCLA Institute of Industrial Relations provided space, editorial and secretarial assistance, and some financial support for the project.

Our research team met together for the first time in the Summer of 1966, in Stockholm, at the close of the International Congress of the International Society for Labor Law and Social Legislation. There we agreed upon the scope of the study, a method of procedure, and a timetable. During the ensuing year, each of my colleagues conducted research in his own country to provide material for a national report.

During that period from September to December, 1967, my five European colleagues joined me at UCLA. Part of our time was spent in a continuing colloquium, and the impact of that extended discussion is reflected in the papers presented in this volume. In a sense each author has acted as a general reporter for the group with respect to the topic covered in his paper. Although there is some overlap in the coverage of the several topics, it does not take the form of tedious repetition; rather, it

[3] Royal Comm'n on Trade Unions and Employers' Assn's 1965–1968, Report, Cmnd. No. 3623 (1968).

is an apt example of the way independent minds, though starting from different points, sometimes arrive at similar conclusions.

The volume begins, appropriately, with a discussion by Professor Thilo Ramm of the structure and function of labor courts. The labor court idea has never found widespread acceptance in the United States, but it has shown remarkable durability and has always managed to survive both heated opposition and icy indifference. Recently, as previously noted, resurgent hopes that the time of the labor court idea has finally come in this country have resulted in new proposals, or variations of old ones, designed to turn over to the courts jurisdiction over unfair labor practice cases now within the exclusive jurisdiction of the National Labor Relations Board, as well as over matters now largely limited to the province of arbitrators voluntarily selected by parties to collective agreements.

Proponents of the labor court idea have obviously concluded that judges and courts are better qualified than administrative boards or arbitrators to adjudicate labor-management disputes. These conclusions are based on positive and negative values imputed to the respective decision-makers. The judgment of courts is esteemed, provided they are "sound" courts. This means that the judges are trained in "law," not "sociology," and that they only "apply" law and do not "invent" it. Individual judges, it is said, are immune to political pressure (at least after their appointment) because of their long tenure. Being lawyers, they know how to read and interpret contracts, including labor agreements. The atmosphere and formal procedures of the courts are familiar and comforting to the lawyers who represent labor and management, and this forum provides all parties a full and fair opportunity to exploit every advantage afforded by our adversary system, without the meddling interference of government agents or bubble-headed laymen serving as arbitrators.

The National Labor Relations Board, on the other hand, exemplifies qualities which decision-makers should not have. Its members, it is said, are chosen not on the basis of merit but for political reasons. They need not be lawyers, do not in any case think like lawyers, and have no decent regard for legal rules or the value of precedents. Lacking life tenure or long-term appoint-

ments, they are peculiarly subject to outside pressures, and this susceptibility is reflected in their decisions. Moreover, they constantly ignore the plain meaning of statutory language and seem devoted to the cause of circumventing or subverting congressional mandates.

As for arbitrators, Judge Paul R. Hays has said it all. Only a "handful" possess "the knowledge, training, skill, and character to make them good judges and therefore good arbitrators"; the remainder, who decide "literally thousands of cases every year," are "wholly unfitted for their jobs" and lack "the requisite knowledge, training, skill, intelligence, and character."[3] This must be so because Judge Hays spent 23 years as an active practitioner of this nefarious craft, and he ought to know.

Some readers will perhaps share my opinion that the foregoing assertions about courts, the NLRB, and arbitrators are grossly exaggerated or patently absurd. Even so, it will not do simply to dismiss all arguments in favor of labor courts as so much disingenuous flapdoodle. Our present institutions for settlement of labor-management disputes are not so successful that we can afford to ignore criticisms, however extravagant, or to refuse to consider other alternatives. But those who propose alternatives such as labor courts have the elementary responsibility, which few have assumed, to learn something about how labor courts in other countries actually work. For our purposes it is important to know, among other things, whether and to what extent the organization, jurisdiction, and procedures of labor courts differ between countries; whether, indeed, those bodies function as "courts," as we define that term; whether their work is shared with public or private tribunals, and so on. Professor Ramm's paper provides us with some of this information.

The reliance on labor courts by France, Germany, and Sweden represents a commitment to the public ordering of disputes settlement procedures. None of the other countries covered by our study has made an equally strong commitment to private ordering. Both Britain and the United States rely heavily upon the principle of voluntarism, and both have developed strong

[3] P. R. Hays, LABOR ARBITRATION: A DISSENTING VIEW (New Haven: Yale University Press, 1966), p. 112.

private institutional arrangements for settling industrial disputes. Nevertheless, each country also assigns a role to courts and other types of tribunals, and each provides for governmental intervention in some situations.

Italy occupies a position somewhere in between the labor court countries on the one hand and Britain and the United States on the other. It is therefore especially fitting that Professor Gino Giugni should discuss the relative advantages and disadvantages of public and private ordering of disputes settlement procedures.

That this is still a very live issue is apparent not only from the demands in the United States and Britain for greater judicial control over the settlement of industrial disputes, but also from the criticism of the judiciary's role in the very countries in which the labor court system has allegedly been so successful.

The American system of voluntary arbitration represents perhaps the most pervasive system of private ordering to be found among the industrialized countries of the world. To say that the system is not truly private, because it must depend upon the courts to enforce compliance both with agreements to arbitrate and arbitration awards, is to pronounce a highly misleading truth—misleading because our system of industrial jurisprudence *is* self-enforcing, by voluntary consent of the parties, in the overwhelming majority of cases. Yet even the staunchest advocate of the American arbitration system must concede that it has serious imperfections and that in respect of such basic considerations as the speed and cost of the process it has no demonstrated superiority over the labor court systems of other countries.

Professor Giugni discusses these and other factors, including the feasibility of adopting a particular system at a given historical moment. Because his own country has no commitment to either public or private ordering of disputes settlement procedures, his observations are especially interesting.

Professor Xavier Blanc-Jouvan's contribution is concerned with the status of the unorganized worker. This is the area in which the broadest differences exist between European and American laws. In this country, at common law, the unorganized employee's "rights" in the employment relation amounted to little more than protection of his largely illusory "freedom of contract." Modern

statutes have guaranteed him protection against hostile discrimination on grounds of union activity, race, creed, color, sex, national origin, and age. They have also provided limited and insufficient protection against substandard wages, excessive hours of work, and the hazards of illness, injury, unemployment, and old age. Unlike his counterpart in the continental European countries, and to a lesser extent in Britain, however, the unorganized American worker has no statutory guarantee of vacation and holidays with pay, protection against unjust dismissal, and other similar benefits. In this country these protections and benefits are provided as a matter of right, if at all, by collective bargaining agreements, which are applicable to both union members and nonmembers within the bargaining units covered by such agreements.

The employment relation in the European countries referred to here is based on an individual contract of employment, which may coexist with, but is quite independent of, a collective agreement. By contrast, in the United States the individual employment contract is limited almost exclusively to relations between employers and higher-paid managerial employees. In bargaining units covered by collective agreements, individual contracts cannot survive, even when they purport to provide greater advantages than those established in the collective agreement. As the Supreme Court said in *J. I. Case Co. v. NLRB,* "The practice and philosophy of collective bargaining looks with suspicion on such individual advantages."[4] Although the employer and his employees are free, theoretically, to enter into individual contracts of employment that are not inconsistent with the collective agreement or that deal with matters not included within the statutory scope of collective bargaining, the mandatory subjects of collective bargaining have been increased so greatly as to make that possibility almost wholly impracticable.

This situation, in conjunction with the developing law of the collective agreement and of enforcement of rights that it creates, has led to a peculiarly American dilemma: how does the nonunion or dissident union member obtain enforcement of rights guaranteed to him by the collective agreement? The courts have given the union wide discretion in determining whether to process an

[4] 321 U.S. 332, 338 (1944).

employee's grievance, which in a sense it "owns." If the agreement provides for arbitration of grievances, the employee may not sue in court over an alleged violation of his contract rights unless he first exhausts the grievance and arbitration procedure. If he does so and then sues, he will be thrown out of court unless he can prove that the union discriminated against him in bad faith. And in the recent case of *Vaca v. Sipes*[5] the Supreme Court strongly implied that the employee cannot successfully sue his employer alone for breach of contract unless he also proves that the union breached its duty of fair representation in handling the employee's grievance. Even under the recently developed view of the NLRB that the violation by the union of its duty of fair representation constitutes an unfair labor practice,[6] the burden of proving that the union acted in bad faith remains a formidable one.

This type of problem does not arise in the European countries represented here for reasons explained by Professor Blanc-Jouvan. His paper, although largely descriptive, is immediately relevant to the question whether there is anything in the European law and practice that we in this country can or should adopt in order to provide greater protection to the unorganized or non-union worker.

The last two papers in this volume deal, respectively, with methods of reasoning and standards relied upon by courts, mediators, and arbitrators and with conflicts over rights and conflicts over interests. The discussion of these topics by Professors Folke Schmidt and K. W. Wedderburn reflects the impact of each man's thinking on the other. Some differences remain; but it is apparent that the areas of agreement are much broader than those of disagreement.

Because the two topics are rather more far-ranging than is suggested by the titles given them, it may be useful to mention in their American context some of the problems to which the papers are addressed.

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[5] 386 U.S. 171, 185 (1967).

[6] Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

One of the principal points covered is the basis of arbitral decisions and the function of the arbitrator, a subject alluded to briefly above. Grievances involve rights under existing collective agreements, and in the United States, as in the continental European countries referred to here, we draw a sharp distinction between disputes over rights and disputes over interests, the latter term being applied principally to controversies over the provisions of new agreements. And because we think of grievances as disputes over rights, it is perhaps natural that we should speak of their settlement as "adjudications" in the same way that we speak of courts "adjudicating" controversies at law. The final step in the logical sequence is, of course, that arbitrators should apply the same methods of reasoning that judges are assumed to employ, even if this assumption may not always be correct. That is to say, arbitrators are supposed to apply the contract as written, and are not to add to, subtract from, or otherwise modify the written terms.

But the life of the law, as Mr. Justice Holmes observed, has not been logic but experience; and the same may be said of arbitration. The role of the impartial umpire in this country does not fit the model described above. The man retained on a continuous basis to handle all grievances arising under a collective agreement eventually gets into the bloodstream of the enterprise (to borrow one of Professor George W. Taylor's apt descriptions) and frequently becomes for the parties much more than a judge. He may assume the additional roles of counselor and mediator, as such distinguished figures as William M. Leiserson, Harry A. Millis, and Harry Shulman did in their time. Indeed, it is no secret that Mr. Justice Douglas' description in the *Steelworkers Trilogy*[7] of the arbitrator's role was drawn largely from the writings of Harry Shulman; and the inappropriateness of that description to the work of the average *ad hoc* arbitrator has occasioned considerable amusement or consternation, depending on one's point of view.

Once the umpire assumes these additional roles, it is inevitable that some of the so-called grievances submitted to him

[7] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

will not involve conflicts over rights but will in fact arise out of conflicts over interests. And these disputes must be settled not on the basis of which party is "right," but rather on the basis of enabling the collective bargaining partners to continue to live with each other. Thus, in making his decision in this type of case, the umpire looks to the future as well as to the past.

Disputes in the United States over new contract terms are not subject to "adjudication" in the usual sense of that term because, by definition, they concern "interests" rather than "rights." These disputes are seldom arbitrated, but when they are, the decision may well embody an element of compromise, not only because a fair result is likely to lie somewhere between the polar positions of the parties, but again because one aim of the process is to produce a settlement both sides can live with.

Yet even here we find a tendency on the part of some people in this country to disapprove of these compromise settlements and to dismiss professional arbitrators as irresolute men whose motto is "Never face the issue when you can split the difference." Those holding this view are in the forefront of the push for labor courts, but one wonders whether they are not confusing form with substance. Consider, for example, the bill sponsored by Senator Smathers of Florida to establish a United States Court of Labor-Management Relations to settle emergency disputes.[8] Section 5(g) provides in part:

> In any case wherein the court is required to fix rates of pay or other conditions of employment in order to resolve the disputes or controversies between the parties, the court shall have the power to fix only such rates or conditions as, on the basis of the evidence submitted, are fair and equitable to both employers and employees, and in all instances rates of pay fixed by the court must be within the employer's ability to pay.

Among the many questions raised by this provision, the following are especially relevant in the present context: Are courts better qualified than arbitrators to apply these standards? Using these standards as a guide, can anyone "adjudicate" the dispute in the sense in which I have been using that term? Is it true that courts apply only one type of reasoning to the cases before them,

[8] S. 176, 90th Cong., 1st Sess. (1967).

regardless of the issues involved? Is this a desirable approach in any event? These, and related questions, are discussed in the Schmidt and Wedderburn papers.

We must not forget, however, that most disputes over interests are settled by collective bargaining, often with the assistance of government representatives. And here we encounter another problem that is also known in some European countries. What should be the role of the mediator? Should he be concerned only with securing a settlement, or should he also assume some responsibility for the substance of that settlement? This question recurs periodically, most recently in this country during the short, unhappy life of the federal government's wage and price guidelines. And doubtless, as the danger of inflation increases, the question will be raised with corresponding urgency. This problem is treated by Professor Schmidt.

A related question, also adverted to by Professor Schmidt, is the problem confronting the arbitrator who sees an apparent conflict between the language of the collective agreement and the relevant statutory law. To which source of authority does he owe higher allegiance? The answer may not be so obvious as it first appears, especially when we consider the special and limited frame of reference within which the arbitrator functions.

The Schmidt and Wedderburn papers also focus attention on a question that, in this country at least, is rarely posed in a straightforward manner. I refer to the question whether the sharp distinction we draw between conflicts over rights and conflicts over interests, with all the consequences that distinction implies, is really necessary or desirable. On this point the views of Professor Wedderburn are of special interest, because Britain makes no such distinctions either in law or in practice. British law and practice described in his paper merit more careful evaluation than they have generally received in this country.

Although all of the papers naturally concentrate on the systems of the five European countries included in the study, the authors have allowed themselves some limited comments about procedures for settling labor disputes in the United States. The reader will find their respective views of the National Labor Relations Board of particular interest.

THE STRUCTURE AND FUNCTION OF LABOR COURTS

THILO RAMM*

Let me begin with the statement that a uniform European labor court system does not exist. Even some similarities between the various national systems will lose significance in view of the enormous differences. I shall prove this point by referring mainly to France, Germany, and Sweden; but I shall also mention Great Britain even though it has no labor court system. Italy will not be covered in my presentation because it has no labor courts at the present time. The *collegi dei probiviri* were closed by Mussolini and were never reopened after the breakdown of Fascism. The other courts, the French *conseils de prud'hommes,* the German *Arbeitsgerichte,* the Swedish *Arbetsdomstolen,* and the British industrial tribunals may be described as judicial institutions established by the state and composed of laymen from the employers' and employees' side, for the settlement of some—not necessarily all—labor disputes. The establishment of these courts had several different reasons: the French system, for instance, is based on the same idea as the commercial tribunals, namely that all disputes should be settled within the specific branch of the industry; the German system is designed to protect the economically weaker workers against the employers and secure social peace; and the Swedish Labor Court merely replaced an ineffective central arbitration board.

We may learn from a comparative history of labor courts only that they were not created because statutory law prevailed. All of them were established before the period of broader labor

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legislation. And, history also shows that their structure and jurisdiction and even the respective countries' attitudes towards them often changed essentially. For instance, from 1806 to 1848 employers' and employees' representatives on the French *conseils de prud'hommes* were not equal in number. Today the principle of equal representation is the basis of *all* labor court systems. Or, to give another example, in Germany in 1890, when the so-called industrial courts, the predecessors of the labor courts, were introduced, as well as in Sweden in 1928, the social democratic parties of the two countries voted against the bills providing for labor courts. Now in both countries, as well as in France, the labor courts belong unquestionably to the social establishment.

I.

The history of labor courts begins in 1806 with the *conseils de prud'hommes.* They were and still are established by government decrees and consist of boards of conciliation and boards of judgment. Both are bipartite boards composed of employers' and employees' representatives *only.* French labor courts do not sit everywhere in France. Although there are 228 courts besides the 15 courts of Alsace-Lorraine, which operate under separate local legislation, some quite important towns—Chartres, for example—have no labor courts. Furthermore, the courts have different jurisdictions. According to the statute they may have four sections: for industrial, commercial, agricultural, and miscellaneous occupations; but in actual practice the fourth section does not exist at all. Moreover, only for 12 of the 228 courts have the decrees establishing the courts provided agricultural sections, and only 149 courts have commercial sections. Labor disputes which are not covered by the specific jurisdiction of these courts have to be decided by the ordinary courts. Also, it must be added that the labor courts have only an optional and not a compulsory jurisdiction over disputes involving the so-called *cadres,* the engineers, technicians, supervisors, etc., and that all questions arising out of noncontractual employment relationship are decided by the ordinary courts. Last but not least, disputes involving French civil servants appointed for life, the so-called *fonctionnaires,* are never decided by the *conseils de prud'hommes* but by the administrative

courts. Thus, French labor courts do not decide *all* individual disputes, and according to the law they are not concerned in any respect with collective labor disputes.

Keeping all these points in mind, we may ask the question whether France actually has a labor court system. And this question seems to be even more justified when we consider that the *conseils de prud'hommes* are only courts at the first level. All appeals are brought to the ordinary courts of appeals, whose decisions can be declared void by the Supreme Court. Therefore, I should much prefer to classify the French system as a combined labor court-ordinary court system.

In Germany in 1926 a uniform labor court system was established at three levels: the regular labor courts (a total of 113); the 12 *Land* labor courts (one for each state, except for the state of Nordrhein-Westfalen, which has two); and the Federal Labor Court. The *Land* labor courts are the general courts of appeals; the Federal Labor Court is concerned only with appeals on legal, not on factual, points. The labor courts decide all labor disputes, individual and collective, with the exception of those over new terms of collective agreements and of agreements between works councils and employers. It is even legally possible for managers and the members of boards of directors to submit their disputes to the labor courts and not to the ordinary courts, but this must be contractually agreed upon. However, the jurisdiction of these labor courts, as in France, does not cover the disputes of *Beamte,* the German *fonctionnaires.* Their disputes must be submitted to the administrative courts. In contrast with the French bipartite system, the German labor courts are tripartite boards. The boards of the labor courts and of the *Land* labor courts consist of one learned judge and two wingmen (i.e., partisan members); the Federal Labor Court has three learned judges and two wingmen.

Sweden has only one labor court. It is composed of three officials and four wingmen. The officials are a former member of the Supreme Court, a learned judge, and a labor relations expert, all three appointed by the Cabinet. The background of the four wingmen varies depending on the status of the employee. This court originally decided individual and collective labor disputes, mainly arising out of the interpretation of collective agreements; but sub-

sequent legislation extended jurisdiction to disputes over certain dismissal cases and vacation pay.

The Swedish system may also surprise many of you in two other ways: first, if the case does not concern the interpretation of a collective agreement, it will be tried by the civil district court; second, only organized employees are permitted to appear before the Swedish Labor Court. The nonorganized employees have to submit their cases to the ordinary courts. But that is not too important because about 90 percent of the labor force is organized. Another point distinguishing Sweden from Germany and France should also be mentioned: the jurisdiction of the Swedish Labor Court also applies to collective agreements of state and municipal officials.

The British industrial tribunals, created in 1965, are tripartite boards. At the present time there are 18 such boards, but their number is increasing. They decide matters involving redundancy pay, but their awards have to be enforced by registration in the county courts. Appeals based on points of law also go to the High Court. We find a situation quite similar to France; the British industrial tribunals fall under the supervision of the ordinary courts. And I hesitate to call these tribunals labor courts at all because their jurisdiction is very narrow, and labor courts should by definition decide all, or most, or at least the majority of labor disputes. Therefore, I think, we may ignore the British industrial tribunals for our present purpose. We should perhaps regard them as the embryo of future British labor courts. This depends on the present, strong attempts to initiate labor legislation in Great Britain and thereby to extend gradually the jurisdiction of the industrial tribunals.

II.

So much for the short survey of the four different national systems. Let me now try to draw some general conclusions from what I have already said, and add some more detailed information. The jurisdiction of the labor courts may first be described negatively; namely, the courts are all precluded from deciding whether and how *new* collective agreements should be concluded. But, in Germany and in Sweden, although not in France, they will decide issues involving strikes and lockouts, which may be considered to

be either torts or violations of the peace obligation. Concerning individual labor disputes, we have already seen that the jurisdiction of the Swedish *Arbetsdomstolen* is larger than that of the *conseils de prud'hommes* or of the German labor courts, because it also covers civil servants appointed for life, that is, the *fonctionnaires* and the *Beamte*. But, in another sense, the jurisdiction is narrower because it does not cover the unorganized employees.

The relative importance of labor courts in the various labor systems can be best described by some statistics on the annual number of cases:

In France, with a population of about 50 million, an average of 50,000 cases are submitted to the *conseils de prud'hommes* annually. But no statistics are available on the number of labor cases decided by the ordinary courts at the first level.

In Germany, with a population of about 70 million, an average of 170,000 to 180,000 cases are submitted to the labor courts annually.

In Sweden, with a population of about 8 million, only 30 to 40 cases are tried annually, and the number of cases has steadily decreased from a high of 220 in 1932. This was, and is, a much smaller number than the decisions of the German Federal Labor Court, which increased from 247 in 1954 to 543 in 1966, the highest number being 725 in 1959.

Of course, these figures give only an incomplete picture of the importance of the labor courts. Furthermore, all information is fragmentary if it refers to this one aspect of the labor courts. Full information can be obtained only by comparing labor courts and private arbitration boards, and by including screening or conciliation procedures. We therefore should ask how labor disputes are settled in a country.

In France and, with very few exceptions, in Germany we have no arbitration of individual labor disputes, only of collective labor disputes. But in Sweden either the labor court or arbitration boards may decide individual as well as collective labor disputes. Only if the collective agreement does not provide for arbitration will the Swedish Labor Court decide. In view of this important distinction, we may say that in France and in Germany the labor courts suppress arbitration, while in Sweden the labor court supplements arbitration.

But let me now add a very simple practical question concerning the legal situation in Germany and France, where collective agreements are legally binding upon the members of the contracting unions and upon the members of the employers' associations. How shall we distinguish substantially between individual and collective disputes? If, for instance, overtime pay is provided by a collective agreement and the individual employee demands it from his employer, this is an individual dispute and he must go to the labor court. But if the parties to the collective agreement disagree over the interpretation of this provision, this becomes a collective labor dispute, and in France they must arbitrate the case, or in Germany they have to choose between arbitration and labor courts. So the same legal question will be investigated as two different concepts and by different boards. I rather doubt that this is a satisfactory solution!

In order to get a complete picture we must also consider the various screening procedures before a case is submitted to the labor courts.

In France the delegate of personnel and in Germany the works council may take up an individual labor dispute and negotiate it with the employer. Both the delegates of personnel and the members of the works council may belong to the union—which, in fact, they often do, especially in larger enterprises—so that the unions have some influence in this informal screening procedure.

Unfortunately, I can give you neither statistics nor estimates on the effectiveness of these screenings; they are not available. It depends entirely on the strength of the individual worker's representation.

In Germany the representative of the union may also try to get a settlement with the employer before filing a suit in the labor court. The rate of these compromises—reached for union members only, of course—is estimated to be about 50 percent. In France such informal screening is not considered possible because the rights of the delegates of personnel would be violated. But sometimes—I would say as an exception—in France as well as in Germany formal screening procedures are provided for in collective agreements.

In France still another screening procedure is possible: the

labor inspector, an administrative official in charge of the supervision of factories, can act as mediator.

In Sweden screening procedures are provided for at plant, local, and national levels, and the boards operate with high efficiency. In the metal industry, for instance, out of the 50,000 cases submitted annually at the local level, about 200 reach the national level, and two or three go to the court. In total about 400,000 to 600,000 cases may be submitted annually at the different local levels; yet, as previously mentioned, only 30 or 40 cases are actually decided by the labor court. Furthermore, the state conciliation service which assists negotiations on new collective agreements may also intervene in questions of interpreting existing collective agreements when industrial peace is threatened. Considering all these facts, we now may ask who actually settles the Swedish labor disputes. Certainly, I think, not the Swedish Labor Court. Therefore one can hardly speak of a Swedish labor court system. Sweden has a combined arbitration-conciliation-labor court system.

The different importance of screening procedures in France and Germany on the one hand and in Sweden on the other explains the different attitudes towards conciliation in the labor courts.

The Swedish Labor Court does not have conciliating or mediating functions. This is not necessary because it decides only the few cases which could not be settled before in the screening procedure.

But the French and German labor courts are closely connected with conciliation and mediation. Thus, the *conseils de prud'hommes* are divided into boards of conciliation and boards of judgment. And all parties have to submit their cases first to the board of conciliation, where two judges try to effectuate a compromise. Only if conciliation fails will the judgment board decide. Also, the latter board is legally bound to try to achieve a compromise—and in more than half of all cases a compromise will be reached. Furthermore, I would think that the bipartite structure of the *conseils de prud'hommes* and its restriction to laymen, excluding learned judges, can be understood only as an implementation of the idea of conciliation.

In Germany, too, the percentage of compromises before the labor courts is very high, because the first two levels have the statutory obligation to mediate. Indeed, there is a special procedure established at the first level, the so-called *Güteverhandlung,* in which the same judge who will decide later, but without the wingman, must discuss the whole dispute factually as well as legally with the parties and may even hear the testimony of witnesses, but not under oath, all "in order to come to a compromise between the parties."

To give you some statistics: the number of settlements by compromise before the labor courts amounted to 28 percent in 1966, but 45 percent of the cases in that year were "settled otherwise," and they certainly included out-of-court compromises. Out of the 9 or 10 percent of cases decided after litigation, about a third went to the *Land* labor courts, and a quarter of these were settled by compromise before them. So, in practice conciliation is actually very significant.

Moreover, the tripartite structure of the labor courts seems to imply the same idea as under the French law, namely, that the parties shall reach agreement, though assisted by the third impartial member. And I should like to add that the actual difference between the French and German system on this point is much smaller than it seems. In France the judge of the ordinary court is called when the bipartite board does not reach agreement. In these deadlock situations, which occur in about 4 to 5 percent of the cases, we actually have a tripartite structure in France.

I think that the close relation to conciliation will explain why unions support the labor courts. They consider them to be their arbitration boards, and surely there is some reason for this attitude. If we consider, for instance, the appointment of wingmen in the German labor courts, we find that according to the statutes the employers' and the employees' associations have to present lists with more candidates than needed so that the Labor Ministers may select from among them. Actually, however, the willingness to accept honorary jobs is not widespread, and therefore the organizations have difficulty finding the necessary number of laymen. So in practice there is no governmental influence on the selection of wingmen. Furthermore, the government will also con-

sult both organizations before appointing the learned labor court judges. In fact, we may say the organizations are acting as representatives of the nonorganized employers and employees as well.

In Germany the idea of conciliation originally was so strong that attorneys were not admitted to the labor courts and the impartial third member was not supposed to be a learned judge. This attitude still prevailed during the time of the Weimar Republic. But today it has changed; attorneys are practically accepted and the impartial third member must be a learned judge. I think that in some respects this development is very significant and I shall come back to it later on.

If we consider conciliation as the underlying purpose of labor courts, it becomes easier to understand why they are so similar to arbitration boards in their inclination to informal proceedings. The establishment of the French and German labor courts was a demonstration of protest against the long, formal, and very expensive proceedings before the ordinary courts. There was an intention to get rid of the strict rules of evidence, and to give free discretion to the labor courts in judging the evidence, in preparing the case, and in leading the oral session. Today, however, the importance of this point has decreased because the ordinary courts have followed the example of the labor courts. May I add briefly that in France and in Germany proceedings in labor courts are never compared with arbitration, but always with the ordinary courts; the oft-heard remark that these proceedings are much faster and their costs lower therefore refers to a comparison between labor courts and ordinary courts, not between proceedings before labor courts and before arbitration boards.

III.

Now, after this brief and necessarily incomplete survey, let us return to some criticism of labor courts.

First, I would like to question the differences between arbitration and labor courts. We cannot simply say that arbitration means discretion of the arbitrator, or of the arbitration board, and that the labor courts are strictly bound by law: statutes, collective agreements, or contracts. This statement would be true neither for procedural law nor for substantive law. Procedural law, as I

have already said, is very informal. And I have also stressed the enormous influence of conciliation in the French and German labor courts, which is naturally not restricted to procedural law but covers the application of substantive law as well. In Germany a special board of the Federal Labor Court, the so-called big senate with six learned judges and four wingmen, has been established not only to prevent conflicts of decisions among the five senates of the court, but also "in order to develop the law." Generally you will find that no German labor court considers itself to be the "mouth of the statute" or the servant of the law, but to be its master as far as contracts, collective agreements, statutes, and even the constitution are concerned. I could give you some surprising and even terrifying examples of this attitude.

You will certainly think of the Swedish example as being different. The Swedish Labor Court is very legalistic, and this approach may be based on the conviction that the employees, 90 percent of whom are organized, are strong enough to reach their aims through collective bargaining. It is true that they may not need help to develop a better, or a social, law, which was the intention, for example, of the old German labor court legislation. But on the other hand, the Swedes also recognize the necessity of access to discretionary decisions. It was probably this legalistic attitude of the Swedish Labor Court that caused the top organizations to establish another board, the Labor Market Board, which now acts as an arbitration board in cases of unjustified dismissals that cannot be judged without discretion.

Returning to the question of the difference between labor courts and arbitration, I should also like to emphasize that labor courts are no substitutes for arbitration. In all three countries with labor courts arbitration still exists, less powerful in France and Germany, and more powerful in Sweden. But how shall I answer the question of the difference between labor courts and arbitration bodies? Certainly we cannot judge by the title. For example, the British Industrial Court is no court but an arbitration body. And is not your so-called National Labor Relations Board in some respects a court? As a European, I cannot see any reason why this terminology should be rejected either because of the composition of the board or because of its functions, which, by the way, are

included in the functions of our German labor courts. I think the classical example to show how close together labor courts and arbitration bodies are is the Swedish Labor Court. If we consider its origin, its supplementary function, its restriction to organized employees, and its composition, we might more correctly call it a state arbitration board, in which the state takes care of the selection, especially of the impartial third members, rather than a court. The Swedish Labor Court is halfway between arbitration and labor courts in the French and German sense.

The only two points in which arbitration and labor courts are really different are the following:

First, the problem of the learned judges. Their positions vary: they are weakest in Sweden and most powerful in France and in Germany. In France we must consider not only that the judge of the ordinary court decides in cases of deadlock; we must also consider the psychological impact of this practice on the routine cases which favor agreements between the wingmen. And it is far more significant that all labor law problems of general importance must be decided by the ordinary supreme court, the *Cour de Cassation.* In Germany you may regard the learned judges as the dominant figures at all levels of adjudication. This is obviously true of the Federal Labor Court, which has a majority of learned judges; but it is also true of the courts at the two lower levels, because the learned judges prepare the hearings, read all records, and conduct the mediation sessions. And the more labor law is considered not as a part of the social question but as a cluster of merely legal problems, the stronger becomes the position of the learned judges and the weaker that of the laymen. This transition is taking place without changing one word in the language of the statute.

Second, the problem of the wingmen. The difference between arbitration and labor courts does not lie in the absence of union control over the employees' wingmen. In Sweden and in Germany they are actually selected by the unions, but only in France are they elected as representatives of the employees. However, union influence in Sweden and Germany on a single labor court decision is not as strong as it could be on a decision of a private, tripartite arbitration board, because the wingman is usually not a member

of the union involved in the case but belongs to a different union. Is it really an advantage if a dispute on the interpretation of the complicated piece-rate regulation of the metal workers is judged by a salaried public employee as one wingman and, for instance, a master tailor as the other? In Germany we waste much time at all three levels of labor courts with job evaluations, which could be solved much better and quicker by single arbitration boards familiar with the problem. Generally speaking, I would prefer a system in which the parties to a collective agreement could discuss and solve their problems with the assistance of an impartial third member, especially as the problems very often arise out of the poor language in the collective agreement. Why should the parties not have an opportunity to learn in which points they did not cover actual practice? I think they should not be deprived of this extraordinary chance to improve their agreements. If this is not done we make a mistake similar to Germany's, which introduced compulsory arbitration on new terms of the collective agreement during the Weimar Republic. It is a basic misunderstanding of collective labor law if the responsibilities of parties to collective agreements include only the conclusion of the agreements and not their application. This mistake is made in France and in Germany.

Let me also ask another question: Why are the parties not allowed to judge the qualifications of the impartial third member, and why can they not, if they are dissatisfied with his performance, appoint a different person next time, as in the United States? I cannot understand why wingmen should be condemned to the role of fellow travellers of a learned judge, who, according to the present German law, need not even have knowledge or experience in labor law prior to his appointment.

Let me conclude this presentation by pointing to a very simple criterion of the efficiency of arbitration as compared with labor courts. Labor disputes can be efficiently settled only if the employee is not threatened with the loss of his job when submitting a grievance. Today the French and the German labor courts almost always decide disputes only after the contract of employment was terminated. Perhaps this is the strongest criticism I have of the present system of labor courts.

THE PUBLIC AND PRIVATE ORDERING OF DISPUTE-SETTLEMENT PROCEDURES

GINO GIUGNI*

This report is devoted to a tentative comparison between state and private ordering (or voluntary systems) in the settlement of labor disputes. I feel obligated, at the outset, to clear up some preliminary points in order to restrict the subject matter, otherwise immense, and to make possible a comparison which obviously has to take place between homogeneous entities.

As a matter of fact, whereas state ordering requires some sort of rules and formalization of the process, private settlement may take place anywhere at any moment. However, we shall not pay attention to private *settlement* as such, but rather to private *ordering*, a concept that calls for a system, for a procedure, for some degree of formalization. In labor disputes, in addition to public ordering, we may have private ordering. But in the latter situation the rule-making agencies are the organized groups engaged in collective action: employers' associations (which in Europe assume a far more important role than in the United States), individual employers, and unions. Voluntarism in labor relations is a philosophy for groups, not individuals.

In accomplishing our comparison, moreover, we have to bear in mind that the demarcation line between state and voluntary systems is not as sharp as it seems to be on the surface. Such an opposition is rather conventional: it is useful for scientific analysis, but it does not always correspond to the facts of life.

Voluntary systems may exist alongside state ordering, may overlap with the latter, or each may support the other. In some

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I.

countries the parties may be entitled to a free choice between private and public channels. Even where labor courts exist and operate efficiently, considerable leeway is ordinarily left for voluntary settlement, through autonomous institutions such as works councils, or union-management meetings or joint panels of unions' and management's representatives. For example, courts in Sweden coexist with an increasing practice of voluntary settlement, and the jurisdiction of ordinary courts in Italy is invoked less frequently because of the increasing preference for union-management channels. Finally, sometimes the state comes into the industrial arena, but only in order to help in the voluntary settlement. In the latter case, so frequent in Britain, and not unknown in the United States, I would say that the state itself becomes a party in a voluntary system—a support of it, not an alternative to it.

The demarcation line, moreover, is not always clear cut. Similar or identical institutions (e.g., a conciliation agency) may have a very different impact, according to the way they operate and to the balance of power among the parties. Conciliation carried on by a strong state while unions are weak in terms of bargaining power may go far beyond the operational logic of a voluntary system: this has been, at least in the past decade, the case of Italy and perhaps of France.

Private ordering may take shape in different institutions. The types of industrial conflicts are remarkably diversified themselves: collective conflicts call generally for procedures other than the ones for individual conflicts; but there are also conspicuous exceptions, very frequent in Britain. The same may be said for the well-known distinction between conflicts over rights and conflicts over interests. Truly, under a voluntary system, distinctions as to the nature of the conflict are usually sharper than under state ordering: there is an eventual tendency to attract the individual disputes into a collective one, due to the prevailing consideration that collective parties, such as unions, pay to collective interests vis-à-vis the individual ones. And a conflict over rights may be dealt with as a conflict over interests, that is to say, through negotiation. This is true for Italy, in spite of the sharp distinctions

drawn by collective agreements, which are often set aside by the parties in order to comply with the needs of day-to-day life.

The voluntary institutions established for the settlement of disputes may take a wide variety of forms, and an overall account of them in this brief discussion would be impossible. By and large, we may distinguish the following basic types: a grievance procedure with a union-management conciliatory final step; joint decisions made by panels of union and management representatives (or representatives of employer associations); and adjudication by a third party, appointed by the two disputants. Grievance procedures, either formal or informal, exist almost everywhere. Joint panels (at times appointed on a permanent basis) are well known in Britain within the framework of bargaining machineries; they are also developing in Italy, especially on such matters as job classification, piece-rates, and incentives, which call for quick and accurate fact-finding and technical evaluations. This method has some similarity to arbitration, for a joint decision may be something more than a pure compromise. It may be a true judgment agreed upon by the members of the panel, acting more as experts than as representatives of clashing interests.

Finally, apart from the United States, arbitration in its proper form (adjudication by a third party) is practiced within some, although a minority, of the British bargaining machineries. It is also provided for in disputes over the interpretation of collective agreements in Germany (where it is prohibited, but for a few exceptions, in disputes involving individual claims). Arbitration is used for some matters (dismissals) or in some occupational branches in Sweden, and for disputes over dismissals in Italy (where, furthermore, collective agreements, in an increasing number, grant the individual parties the possibility of submitting the claim to an *ad hoc* arbitration). Arbitration, of course, is not voluntary settlement in a literal sense, because the settlement is laid down by a third party. The third party, however, is selected by the disputants or, more often, by their "collective" representatives. Here, in my opinion, lies the basic difference between an arbitration board and a labor court, a difference which in many other respects may appear remarkably shadowy: it is enough to recall the structure of the French or of the Swedish labor courts, very

similar indeed to a joint panel or an arbitration panel, but still courts, because they are vested with decisional powers not by the parties but by the state, and because the impartial members are appointed by the latter.

As it may be easily ascertained, with the possible exception of France, all countries resort to some amount of voluntary procedures. On a rising scale, we might range: France, Germany, Italy, Sweden, the United States, and Britain. The jurisdiction of the NLRB means that the United States also has some amount of state ordering. Even Britain has now had experience for the past few years with state industrial tribunals for redundancy claims. We find confirmed, therefore, that there is no purely voluntary system in any country. But, on the other hand, we may as well draw a demarcation line between countries where the settlement of disputes, at least of the individual ones, was almost naturally taken over by the state, and countries where it was maintained under the domain of industrial autonomy. And we shall find that this distinction corresponds to the one between civil-law and common-law countries—leaving Sweden, as it is for its general approach to law, in an intermediate position.

Another finding is relevant. There is undoubtedly a trend, even in countries with established systems of courts, toward an expansion of voluntary procedures. Such a tendency is remarkably apparent in Sweden and in Italy. In Italy this is partially due to the low efficiency of ordinary courts in settling labor disputes. But this can't be said of Sweden. Well, I think there is a factor, an independent variable, acting on its own: the establishment of collective bargaining, its stabilization as a permanent channel of relations, brings about an expansion in the use of voluntary channels; and the latter, on the other hand, interact positively on collective bargaining itself by strengthening its hold. This is not a "law" governing the development of industrial relations; there are no such "laws" in history. The trend just mentioned does not seem to be operating in other countries. It is only a finding, but one of considerable importance.

Other factors have played an important role, causing remarkable differences among countries which, apart from the dif-

ferent legal systems and traditions, have a similar background, represented by the universal recognition of unionism and of collective bargaining. I can but hint at some of them. Some factors lie in a choice among values. The principle, so widespread in continental Europe, that unions have to fight on behalf of the working class, not just of their membership, is strong support for the idea of labor courts open to organized and unorganized workers. Besides, when the labor movement was more influential in the political arena than in the industrial one, why should it have assumed the long and hard task of establishing piecemeal a network of voluntary institutions when the way was open to a legislative enactment? Finally, the time when institutions were first established also has its importance: the French labor courts go back to the early eighteen-hundreds. The first industrial or labor courts in Germany and in Italy were born long before the upsurge of unionism. Of course, once such an institution is established and works well, there are always reasons for improving it, and very few for getting rid of it in the name of an abstract preference granted to voluntarism.

It goes without saying, therefore, that a choice between state and private ordering, if put in absolute terms, would not make much sense. However, if we bear in mind the relative value of any argument of this kind, we may still attempt to work out a range of arguments *pro* or *contra* each of these solutions. Such standards of evaluation do not mean much for countries with established solutions and no apparent will or reason for change. But they may be helpful where the issue is raised, as in Britain, in Italy, and, I believe, in the United States.

II.

Some of the reasons for the taking over of disputes by state agencies—I refer mainly here to labor courts or ordinary courts—have scant value or no value at all. Impartiality of the adjudicating body, uniform enforcement of standards, power to take evidence, possibility of appeal, enforceability of decisions may be also achieved through a voluntary procedure and often they are, especially if the state itself enforces rules aimed at framing and enlarging the legal powers of the voluntary institutions.

What remains, however, ought not to be underestimated. There are at least two solid arguments for state ordering: (a) The taking over by government of the cost of proceedings, either totally or partially. The very low cost of a suit in French labor courts is a good example. In German labor courts, for disputes averaging a value of nearly $600, the court fees will amount to $18. The cost of an attorney for the worker, if used, will be covered either by the union, or, often, by legal insurance. And, finally, in the British industrial tribunals not only does a worker not pay any court fees, but a national fund will award expenses to the parties, including loss of wages, and to their witnesses for the day of appearance. (b) The general coverage of a court's jurisdiction, open to members and nonmembers as well. It is true that in Sweden only union members may sue in the labor courts, but still nonorganized workers have the way open to general courts. The previous point was a matter of great practical importance, especially when unions have low revenues. The latter is based upon a choice of values: we have to decide, first, if organized and nonorganized workers have to be granted the same opportunities. And the response—apart from individual preferences—may be very different in different sociological contexts.

Following a parallel method of presentation, we may assert that some arguments for the voluntary procedures are not of primary importance. Let's take first the oft-made assertion that voluntary procedures are speedier. Assuming that some procedure for settlement at plant level always exists, whether a court has final jurisdiction or not, the comparison should be drawn between the time required for a settlement at the final step of the voluntary procedure and for a judgment in a labor court. We have examined this point in our group and our findings are that a reasonable estimate leads to nearly two to three months (as a very rough average) in both cases. This is the time taken in the bargaining machinery operating in the engineering industry in Britain, although other national procedures are more speedy. Two to three (or slightly more) months seems to be the average time for an arbitration in the United States and in Italy as well. Forty-three percent of cases heard by labor courts in Germany range from one to three months, and one to three months is the average time for a decision in a

French labor court. State industrial tribunals in Britain with jurisdiction over redundancy claims average about two and a half months. Both systems may be quick, and both, we may add, may be slow.

III.

Now we come to the alleged absence of formalism and technicalities. The American arbitration experience shows a tendency towards a larger participation of attorneys representing the parties, and towards a larger reliance upon written evidence and briefs. A proceeding in a labor court, on the other hand, may appear to be much simpler, without almost all the technicalities typical of civil procedures; the French labor courts are again a good example. We conclude, therefore, that this argument is not decisive.

But more decisive arguments may be brought in favor of private ordering, and they are basically the following:

(a) Experience shows that even where labor courts with non-costly and simplified procedures are established, almost all of the claims come from employees whose employment relations have terminated because of either dismissal or voluntary quit. The opposite situation prevails in the United States (under the grievance-arbitration procedure) and in Britain. There must be some reason for this phenomenon, the seriousness of which is self-evident. It is so self-evident that two years ago the Italian Constitutional Court decided that the statute of limitations should be suspended for the whole duration of the contract of employment. I think the reason is that, no matter how informal and simplified a procedure before a labor court may be, still it is a suit, a solemn action brought in a public tribunal, which practically means the end of the peaceful cooperation between the two parties to a contract. The tendency to refrain from action is not necessarily due to the fear of discharge. In some countries the employees are statutorily protected from unjust dismissals, yet the described situation takes place. It is rather due to the feeling that legal battles in court make cooperation in an employment relation difficult if not impossible. By contrast, voluntary settlement, even by arbitration, is perceived as a natural continuation of an action undertaken at plant level, along channels established by the parties themselves; an action which starts and ends within the realm of industrial relations, never

getting out of it. What I would call the psychological "bar of the citation" here does not occur.

(b) There is a strict connection, in the voluntary systems, between the process of settlement of a single dispute, either collective or individual, and the bargaining process as such. The connection may be so intimate that even the distinction between bargaining over new terms and settling a dispute under the existing terms fades away: this is the well-known case of Britain. It goes without saying that this situation may be highly desirable. When the institution charged with the settlement has a close working relationship with the parties, has a technical expertise regarding the problems of the industry and a familiarity with its history and current problems, the solution, worked out jointly or laid down by a third party is likely to be, if not the right one, the most practical and workable one. This is by far the best result that can be achieved in this area of social and economic relations.

(c) Finally, the voluntary procedure—the joint administration of labor-management relations—is a means for verifying the good will of the parties, for establishing working relationships between them, and, in other words, for building industrial peace on the basis of mutual understanding and cooperation. Britain and Sweden stand out for these achievements; but in Italy also there are definite indications that the participation of unions in the administration of collective agreements has softened their militancy, and on the other side, has fostered the good will of management towards unions.

The mentioned arguments build up a strong case in favor of the voluntary system, or at least, of a combination of public and private ordering, which may not be reciprocally exclusive. This conclusion, however, ought to be framed into two basic considerations:

(1) It takes for granted some values, such as industrial peace and full recognition of the unions. These are a matter of free choice and evaluation.

(2) It is based upon some degree of oversimplification. It does not take into account the specific conditions under which state or private ordering is bound to operate. Ideally, the voluntary system is perhaps the best. Under given historical conditions, however, it may not be workable; any specific conclusion, therefore, has to be submitted to a careful screening.

THE STATUS OF THE UNORGANIZED WORKER

XAVIER BLANC-JOUVAN*

One cannot describe the status of the unorganized worker without trying first to define that term. The problem is important because in none of the five European countries does the concept of an "unorganized worker" have precisely the same meaning as in the United States. In none of these countries is there an official procedure by which a majority union can be designated as the exclusive representative of all workers within a given unit for purposes of collective bargaining. The possibility of establishing such a system may have been considered at certain times, but it has never been accomplished; and at least in France and Italy it seems to be wholly unacceptable because of the pluralism of unions. In any case, we do not find in any of the five European countries organized plants or organized workers in the American sense of those terms.

Nevertheless, the concept of unorganized worker is commonly used in Europe. But it is used with a meaning that varies from one country to another. In Sweden, and sometimes also in Britain, it applies to the worker who is not employed in a firm covered by a collective agreement; here the term is used in the American sense. But sometimes in Britain, and more often in France, Germany, and Italy, the term applies to a worker who is not a member of a union. Regardless of which of the meanings is intended, the problem raised is the same, namely, what protection is afforded the individual worker who belongs to no union and is not covered by any collective arrangement, especially when he is involved in a dispute with his employer. But the situation is sufficiently different in both cases to justify a separate study. I shall therefore examine

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successively the status of the employee who works in a plant where there is no collective agreement, and the status of the nonunion worker.

I.

The distinction between workers in plants covered by collective agreements and those in plants where there are no such agreements is not equally important in all countries. It is important only when the two categories of workers can be clearly distinguished and when they have a very different status. That is the case in the United States; but in most of the European countries, the two above-mentioned conditions are not equally met and the distinction is far from having the same significance.

It appears that in most of these countries the workers who are employees in firms not covered by collective agreements do not constitute by themselves a distinct category because they are too few and they cannot be exactly determined.

They are few because the collective agreements actually apply to most enterprises. This is so for several reasons. First, most collective agreements are negotiated, not at the shop or plant level, but at a regional or national level within a given industry, and sometimes even at an inter-industry level, so that the same agreements will be simultaneously applicable to a large number of firms. Second, most European countries (except Sweden) provide for some possibility of compulsory extension of the collective agreements to all establishments located in the geographic and professional area in which they were originally negotiated. This extension can be made by a statute, as in Italy; by a decree of the Minister of Labor, as in France and Germany; or by a decision of a special court, as in Britain. Third, many employers who are not legally bound by a collective agreement will nevertheless abide by some of its terms, either spontaneously or because of the policy of the courts. Thus, in Sweden and Britain the terms of collective agreements may be treated as customary law; in Britain they may also be treated as "recognized terms and conditions of employment," and in Italy, as an expression of the fair standards provided for by the constitution. Therefore, in all three countries these terms may become applicable to the whole industry. To that extent, of course, the collective agreement loses much of its con-

tractual character for the individual worker and even for the employer; it becomes more like a statute.

But the collective agreement is not always extended in its entirety; it may be only partially applicable. On the other hand, a collective agreement, even when applicable in its entirety, does not always encompass the complete relationship between a given employer and a given employee. A national agreement can be supplemented by a regional or a local agreement, which in turn can be supplemented by a company or a plant agreement (although these supplements can provide only more favorable terms to the workers). The result is that we have a whole network of collective agreements which are simultaneously applicable, so that it is not always easy even to determine exactly which workers are covered by such agreements, much less to consider them as a separate category. This can still be done in some countries like Britain and Sweden (where there are, respectively, 65 and more than 80 percent of the workers covered by collective agreements), but not in others like Germany, Italy, or France, where the situation is more confused and where statistics are not available.

Another reason why a clear distinction is not always made between these two categories of workers is that it does not have such important consequences as in the United States. In many European countries the situation of the workers employed in plants covered by collective agreements is not fundamentally different from that of those who work in plants where there is no collective agreement. It should be clearly understood that collective agreements are only one, and not the most important, source of labor law in these countries. The worker enjoys a protection outside the scope of the collective agreement. This is true from both a substantive and a procedural point of view.

Regulations concerning rights and duties of the individual worker may have different origins, but all are supposed to be incorporated in a single document: the individual contract of employment. Of course, this is largely a fiction, but this fiction is important; although the individual contract does not always exist as a physical document, it has a real existence as a legal concept. In all of the European countries it constitutes at least the formal foundation of the employment relationship, embodying all the rules which are applicable to that relationship.

These rules may derive, first, from individual bargaining between the employer and the employee. This is rather frequent, not for the rank and file, but for the high-level employee. The special conditions of his employment will be expressly described in the contract itself.

Besides that, the contract is supposed to embody all regulations derived from statutory law. We should remember that the terms of employment are fixed by labor legislation to a much greater degree in Europe than in the United States, although there are, of course, some differences from one country to another. In all five European countries we find some legislation dealing with safety, health and welfare, women's and children's work, etc. This legislation is sometimes considered as a part of the individual contract of employment, but it can also be regarded as external to the contract, directly enforceable by factory inspectors and giving rise to criminal sanctions, as in Britain and Sweden. There can also be some statutory rules on hours and conditions of work, holidays and vacations, etc. Still more important is the legislation concerning problems of layoff or dismissal and providing for periods of notice, redundancy payment, damages in case of wrongful dismissal, and special protection for some particular categories of workers, such as workers' representatives. This legislation is less developed in Sweden and Britain than in France and Germany; but in all cases, it gives to the employee a minimum protection which is extremely important.

The individual contract also embodies many rules deriving from some kinds of collective arrangements which are not collective agreements. These arrangements are made possible—and sometimes even compulsory—by statutory law, and they are the result of a procedure in which the unions play no part, at least not theoretically. In Britain, for example, the law has set up more than fifty wage councils, which have a tripartite composition and the power to submit to the Ministry of Labor proposals for fixing general minimum rates, overtime rates, holidays and holiday remuneration, etc. Such proposals, when made effective by the Minister through a Wage Regulation Order, must be observed by all employers in the industry concerned and are enforceable at law. The procedure is a compulsory one, which takes place at the national

level in the industries where there is a lack of organization on the side of the workers, resulting in an absence of collective agreements. Similar procedures exist in other countries, but generally at the plant or shop level. In Germany, for example, in the absence of a collective agreement there may be some agreements entered into by the employer and the works council. The latter is composed of people elected by the workers' community and represents all workers; it has almost nothing to do with the union. Such agreements are compulsory with respect to so-called social matters, dealing with hours and conditions of work, discipline, vacations, etc., but they are only optional in other matters. Even so, they play an important role.

These two examples are sufficient to show that many rules which apply to the employer-employee relationship are not derived from collective agreements. Thus, all workers, whether or not they are covered by collective agreements, enjoy at least a minimum of protection.

What is true for the substantive rules is also true for the procedural rules—those which are concerned with the settlement of labor disputes. Many different procedures have their origin outside of collective agreements and they are available to all workers, whether organized or not in the American sense. They are actually very diverse in nature.

There may be, in the first place, some kind of grievance procedure at the plant level. This procedure may not necessarily lead to a settlement of the dispute, but at least it permits the worker to present his claim to the employer and serves as a screening procedure before further steps are taken. In France, for example, the law provides that in all enterprises employing more than ten workers some delegates are elected by the whole community of workers. Those delegates are empowered to present to management the complaints of workers and to try to negotiate their settlement. A good number of conflicts can be settled at this stage. In Germany it is the works council, elected in the same way and also set up by law, which plays a similar role through informal procedures. This often dispenses with the need to carry the case to the court or arbitrator.

There also are in most European countries some administrative authorities who play an important part in the enforcement of labor legislation. They receive the complaints filed by the workers and, although they have no power to make a decision by themselves, they try to bring about settlements through conciliation; in many cases, they may even use as a weapon the threat of criminal prosecution. This also makes possible the settlement of a good number of labor disputes at an early stage. In Britain and in Sweden, factory inspectors are in charge of the enforcement of the legislation on safety, health, and welfare. Also, in Britain some inspectors are appointed by the Ministry of Labor to insure that the legal requirements of the Wages Council Act and of the "Fair Wages Resolutions" of the House of Commons are satisfied; when an offense appears to have been committed, legal proceedings may be instituted by the Ministry. In France the labor inspectors play a more important role in layoff and dismissals, disciplinary sanctions, etc., for there are more and more statutory regulations which are made enforceable by criminal sanctions.

If we turn now to settlement procedures available to workers not covered by collective agreements, we see that they are of two kinds.

There is first some sort of legal machinery which exists outside of the courts. In most cases, this machinery is expressly provided to solve collective disputes; but because unorganized workers may also be involved in such disputes, they will be able to use this machinery. For example, legislation may have set up some conciliation procedures, either compulsory as in France, or optional as in Britain or in Italy where they exist even for individual disputes. It may also be a mediation procedure, which is provided for by law, as in France or in Britain. In Britain this function is performed by courts of inquiry and committees of investigation. Finally, some countries provide an arbitration procedure which may be resorted to even when there is no collective agreement; this is the case in France and in Britain. In both countries arbitration was even made compulsory in the past, but it is only optional today. However, the arbitrator's award is binding in France, although it is not in Britain.

In any case, the most important procedures for resolving labor disputes in all European countries are those which take place be-

fore either ordinary courts or specialized labor courts. The latter offer many advantages: the procedure is usually less formal, less legalistic, less costly, and more rapid; the judges are more expert in the field of labor relations and they can make a greater effort towards conciliation. But, as Professors Ramm and Giugni have pointed out, not all European countries have labor courts, and even in those countries that do, parties must sometimes have recourse to the regular courts.

One of the great advantages claimed for the court system is that it permits even the unorganized worker, the worker who is not covered by a collective agreement, to have his case adjudicated. This is not always true, however, so far as the specialized labor courts are concerned. It is true in France and in Germany. It is also true in Britain where access to the industrial tribunals, competent in matters of redundancy payments, is open to all workers, whether organized or not. But it is not true in Sweden where the jurisdiction of the labor court extends only to workers whose terms of employment are defined in a collective agreement; this is so even in those rare cases in which the dispute has not arisen from a collective agreement, but from the application of a statute or of an individual contract of employment. In such a situation, when the unorganized worker is not entitled to go to the special labor court, he may still go to the regular court where no distinction based on union membership is ever made. Thus, it is always possible for him to have his rights enforced by a court, and this may be considered an advantage.

But there is, of course, a corresponding disadvantage. All courts can grant only the remedies available at law, and in many countries these remedies do not include the reinstatement of the worker. This is all the more regrettable because in most cases the worker dares not bring a court action against the employer before the employment relationship has been terminated; this is a serious gap in the system.

And this is the main reason why some observers argue that voluntary procedures are preferable to statutory procedures for the settlement of labor disputes. More generally, it is often said that all this protection given to the workers by law is not sufficient, that it constitutes only a "floor of rights" and should be supplemented by

protection provided for in collective agreements. Of course, these collective agreements do already exist, but it is argued that they should be developed and made to constitute the basic foundation of the employer-employee relationship from which all rights and duties should be derived. But, in my opinion, this raises another problem, namely: would not the development of the collective bargaining process give rise to some kind of discrimination between union and nonunion members? This, in turn, is part of a more general problem—the problem of the comparative status of unionized and nonunionized workers. Let us now turn to a consideration of the nonunion worker, bearing in mind that in most European countries that term is synonymous with unorganized worker.

II.

The status of the nonunion member varies among the five European countries, just as much as the rate of unionization. This rate is very high in Sweden (90 percent), rather high in Britain (almost 50 percent), lower in Germany (about 36 percent), and still lower in Italy and in France (between 20 and 25 percent of the workers). The problem of the distinction between union and nonunion workers is more acute in countries where there are a small number of union members; it is still more acute in countries like Italy and France where the union movement is split on ideological grounds and where two or more unions exist within the enterprise. The problem cannot be solved in the same manner as in the United States because in none of the five European countries does there exist an equivalent of the union duty of fair representation. We must consider, therefore, whether and to what extent discrimination between union and nonunion workers is made possible, first, in the application of collective agreements and, second, in the application of statutory regulations.

The possibility of discrimination seems, of course, greater in the application of the collective agreement because this agreement is negotiated by the union itself. The question is whether all employees who work in plants where a collective agreement is applicable will be covered, regardless of membership in a union which signed the agreement.

The answer to this question varies greatly, depending upon whether the question is addressed to those parts of the collective agreement applicable to individual employees or to those parts that establish institutional arrangements within the enterprise. As to the former, there is also considerable variance from one country to another. In France the law expressly states that the employer who is bound by a collective agreement has the duty to apply it to all of his employees, whether unionized or not. In other words, the terms of the agreement applicable to individuals will be automatically incorporated into the contracts of employment of all workers in the plant, so that all of them will benefit by the terms of the agreement and all of them will have the right to have these terms enforced through the statutory procedures. This absence of discrimination may induce some unions to refuse to participate formally in negotiations for political, ideological, or tactical reasons, because they know perfectly well that they do not take any risk; the agreement will still be applicable to their members as well as to all other employees.

The situation is rather different in the other countries—at least theoretically if not practically. The agreement applies only to members of the signatory unions; the terms of the agreement will be incorporated, either automatically or by express reference, as in Britain, in the individual contracts of the union members, and in their contracts only. But for reasons of equity and efficiency it is hardly practicable for the employer to discriminate against some of his employees. Moreover, it is in the union's interest to secure application of the agreement to nonmembers because this will prevent frictions arising between the unionized and nonunionized employees. Obviously, the latter wish to be covered by the collective agreement because it can only provide them with better terms than they already have. The extension of the collective agreement to all workers may be accomplished by the same means used to extend coverage to employers, that is, by statute or, more often, by court order or decree of the Ministry of Labor. In Sweden and Britain this extension can be enforced by a court only at the request of the union itself, not of individual employees. Sometimes the employer voluntarily applies the agreement to all workers. The situation, of course, is not identical in all countries. In Sweden, for

example, most terms of collective agreements are exclusively applicable to union members; and that is why it may happen that several collective agreements will be simultaneously applicable to workers belonging to the same industry and category, but not to the same union. In other countries collective agreements have a wider applicability; and that is why, when two or more unions are involved, there will be only one collective agreement and the employers will try to negotiate this agreement with representatives of all unions—or at least of the most important ones. That is why, also, in these countries the workers covered by collective agreements largely outnumber the members of trade unions.

It does not mean, however, that even in these countries all workers in the plant are in the same situation, because there is also a part of the collective agreement which deals with the institution of voluntary procedures for the settlement of labor disputes. Even if the agreement does not make any explicit distinction between union and nonunion workers, it may provide for processing of grievances through the union, so that it makes indirectly possible some kind of discrimination between workers on the basis of union membership. This would, however, be illegal in France because it would directly conflict with the strict statutory policy against such discrimination. Even when the collective agreement provides for some form of a recognition of the union (which is rather exceptional in France), this should not result in any particular benefit for union members. The consequence is that the voluntary procedures are equally available to all workers in the plant.

But similar guarantees do not exist in all countries and union members may, with respect to settlement procedures, be in a better position than nonunion workers. The first reason is that in case of mediation or arbitration the mediator or arbitrator will be appointed with the union's consent; consequently, he may be more favorable to the union members. Second, the law itself may draw a distinction between union and nonunion workers in the use of the voluntary procedures. That is the case in Germany, for example, in the exceptional situations in which arbitration is available for individual disputes. The applicable statute states that the use of arbitration will be restricted to union members and those nonunion workers who expressly agree to arbitration in their individual con-

tracts of employment. The third and most important reason is that the use of these voluntary procedures is at the discretion of the union, so that it will be up to the union to decide whether it will process the grievances presented by nonunion workers. Thus, in Sweden access to the arbitral boards is reserved exclusively to the union; in Germany the union has exclusive control over the informal screening procedures by which it tries to reach a compromise with the employer and over the arbitration procedures applicable to collective disputes; and in Italy the union similarly controls the conciliation and arbitration procedures instituted under collective agreements. The Italian Constitutional Court has decided that a union cannot be forced to process the grievances of nonunion workers, even when the collective agreement which originated the procedure has been converted into a statute and made applicable to all employees. Finally, we may say that the situation is not different in Britain as to the voluntary procedures which are set up by collective agreements. In all these cases, the union is free to accept or to refuse to process grievances presented by nonunion workers. In fact, the union will act according to its own interest; most often, it will agree to act on behalf of the employee, provided that he will join the union and pay the dues. But if the union refuses to act for one reason or another, the employee has no recourse other than going to court. That is why in these countries most of the court cases are brought by nonunion workers who are denied access to the voluntary procedures.

But we are now assuming that all workers, union and nonunion alike, do enjoy the same protection by statutory law. That is true, of course, as a matter of principle because the main purpose of the legislation is to give equal protection to all workers; and it is true not only for the substantive regulations but for the procedural ones as well. We have already seen that the members of the representative institutions that are established by law within the enterprise, such as the works councils in France and in Germany and the employees' delegates in France, are elected by all workers and empowered to represent all of them in the plant, without any discrimination; they are, in fact, external to the union movement. We have also seen that it may be considered an advantage of the labor court system to offer equal protection to all employees. In

some countries the legislation goes even further: it prohibits all forms of discrimination, for or against the union, by the employer, and notably the kind of discrimination which results from a union security agreement. Thus it bans both the closed and the union shop. This is not the case in Britain where the closed shop is widespread, nor in Sweden where the union shop exists, at least in small and medium enterprises; but it is the case in Italy and in France.

This is the principle, but it should be qualified by some legal and factual considerations which are not without importance. We can say that, in some cases, the law indirectly favors union members at the expense of unorganized workers. This appears true even with respect to the organization and the operation of labor courts. As you have previously heard, all of these courts are composed, wholly or partially, of nonprofessional judges who are appointed, nominated, or elected with the help (official or unofficial) of the unions; so they may be tempted to be more favorable to union members. In fact, however, that danger is more theoretical than real. Sometimes the access to the labor court is restricted to the union itself or to the union member; this is the case in regard to the labor court in Sweden. Even when individuals are allowed to bring their own cases before the labor or ordinary courts, union members are in an advantageous position because they have the benefit of legal and financial assistance provided by the union.

Similar advantages also exist in regard to the settlement procedures within the enterprise. Although the workers' representatives are actually elected by and supposed to represent all the employees, it should not be forgotten that the unions play an important role in their election. In France, for example, they have the exclusive right to present candidates. The same is true of the representation function itself. Thus, in France and in Germany some union members may attend, with a consultative voice, all the meetings of the works councils. None of these points, however, should be overemphasized, especially in the countries where there are several competing unions; for a kind of balance exists between these unions and forces them to behave with a certain degree of objectivity.

A brief comment should be made about the procedures set up for the settlement of collective disputes. They are theoretically

available to all groups of workers, and they are not necessarily limited to trade unions. But, in fact, because there are no organized and structured groups of workers other than the trade unions, it is fair to say that the unions have a kind of monopoly on the use of these procedures. If we go further, we may even say that in many countries the union has virtually exclusive power to resort to concerted and economic action, and this is an essential weapon in the settlement of the labor disputes; but that problem, of course, is outside of the scope of this paper. In all these respects we may say that a certain amount of discrimination is inevitable between union and nonunion workers, even in the application of the statutory law.

My final word will be in the form of questions. I have tried to show to what extent the European systems may assure better protection for the unorganized worker than is provided by a system which almost entirely relies on the collective agreement. But I have not tried to prove that it is necessarily an advantage to promote the amelioration of the condition of workers other than through their organization in trade unions. And here are the questions: Which of the systems we have considered is the best? What kind of policy should be favored and encouraged? But these are questions which I shall not try to answer today.

CONCILIATION, ADJUDICATION, AND ADMINISTRATION: THREE METHODS OF DECISION-MAKING IN LABOR DISPUTES

FOLKE SCHMIDT*

In the United States labor relations are dealt with on the assumption that the parties—the employer and the employee, the employer and the union or association on both sides—will come to agreement in all disputes over wages or other conditions of employment. For various reasons, however, a number of bodies have been instituted to assist the parties or to make the decision for the parties when this basic assumption does not become true.

There is the Federal Mediation and Conciliation Service which has to make available "full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration." A number of highly qualified persons are regularly engaged as private arbitrators in the adjudication of grievances arising under collective agreements. The National Labor Relations Board (NLRB) has exclusive jurisdiction of disputes over the scope of the "appropriate bargaining units," the choice of collective bargaining representatives, and "unfair labor practices." In national emergency disputes a board of inquiry can be established by the President. From time to time, and increasingly in recent years, Presidents have appointed *ad hoc* boards for fact-finding—such a board has to report its findings and recommendations to the President. In an enumeration of decision-making bodies the civil courts, the federal courts in particular, should be mentioned. The district courts grant injunctive relief on petitions from the NLRB in cases concerning

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specific unfair labor practices identified in the statute. The federal circuit courts of appeals have to deal with the enforcement of the decisions of the Board. Suits for breach of collective agreements can be brought directly in the federal or state courts, although compared with arbitration this course of action is rarely pursued.

In all countries where the principle of freedom of contract prevails there are bodies with somewhat similar functions. Almost everywhere you find a state conciliation service. In France, West Germany, and Sweden special labor courts have been established. In Great Britain, where labor relations in general and relations of concern to unions specifically are considered matters which should not be subject to adjudication by the ordinary courts, you find a wider variety of special bodies dealing with labor disputes than in almost any other country.

As is often the case in international relations, technical labor relations terms do not always mean the same in different countries. Thus labor arbitration has another meaning in Great Britain than in the United States. In France a sharp distinction is made between "conciliation" and "mediation," whereas elsewhere the two terms may be used more or less synonymously. Variations with regard to the formal setup of different bodies are not sufficient to explain the distinctions involved. It is necessary to proceed one step further and try to find out how the body concerned makes its decisions. Which principle is applied when the body in a "case at bar" gives its opinion about the settlement of the dispute? The following is an attempt to analyze various methods of reasoning.

It might be assumed that there is a close relation between the arguments deemed permissible when a party presents his claim to the deciding body and the reasoning employed by that body in reaching its decision. The assertion by a party that he has economic means at his disposal—e.g., a union officer mentions that his union has a large treasury and complete control over all the workers in the plant or the industry—might be a good argument before one body but out of place before another. Therefore, one should have some notion of what method a body applies even in case the body itself does not give the reasons underlying its decisions.

There are, I submit, three methods of reasoning applied by bodies dealing with labor disputes, namely, conciliation, adjudica-

tion, and administration. The first two terms are fairly adequate. The term administration is much too broad and has been chosen much for the lack of a better term. What I have in mind are those kinds of standards which are applied by a body such as a fact-finding board, i.e., not ordinary legal rules but some kind of established standards.[1]

I.

Conciliation, as performed by a federal or state conciliation service, is mostly concerned with the bringing about of collective agreements. The task of the conciliator is to do his best to get the parties to meet and settle their dispute by agreement. He has to try to find the point at which offer and acceptance conform. Unlike the judge, the conciliator is not concerned with the substance of a settlement. Assistance in bargaining would therefore be a proper name for this method of decision-making.

Since the conciliator is primarily concerned about effecting an agreement, it seems natural to him to try to find out which party might be willing to yield. If the circumstances do not indicate which party has the stronger claim, he may recommend either a compromise between two proposals or the exchange of one claim for another. For short periods in the United States or more permanently as presently in Britain, the government has sought to impose policies of wage and price controls upon the bargaining parties. This should be a matter of no concern to the conciliator. His task as an assistant in bargaining is not compatible with the responsibility of enforcing governmental orders.

[1] Many have been working with similar problems before. When in October, 1967 I was writing up a draft of this paper, I had the privilege of reading an unpublished article by Lon Fuller, The Forms and Limits of Adjudication. It was highly stimulating and I am much indebted to Professor Fuller. Basically, our approach seems to be the same. We use, however, different categories of classification.

Later I found that the Norwegian scholar Torstein Eckhoff had published in 1966 an article, The Mediator, the Judge and the Administrator in Conflict-Resolution, *Acta sociologica*, Vol. 10, 1966, pp. 148 ff. As indicated by the title, Eckhoff adverts to the same three methods of decision-making posited by the present author. Eckhoff makes general sociological observations and does not pay special attention to labor relations.

A Swedish monograph by Sten Edlund, *Tvisteförhandlingar på arbetsmarknaden*, 1967, is highly relevant. Edlund studied the methods applied when parties to collective agreements make settlements. By comparing them with the decisions of the Swedish Labor Court, he throws light upon traditional juridical methods of adjudication.

Conciliation is used, too, by various bodies other than official conciliators for the settlement of grievances. In France they distinguish between "collective" disputes and "individual" disputes. Collective disputes have to be submitted to "conciliation" by the state conciliation service, consisting of standing regional committees and a national commmittee. With regard to individual disputes "conciliation" is the first step when an action by a party to an employment contract has been brought to the local labor court (*conseil de prud'hommes*). Two members of the court—one employer and one employee—act as *conciliateurs*. The composition of the court is worth special attention. When performing its conciliatory function, the court has two members, both laymen. In case a *conseil de prud'hommes* has to adjudicate a dispute failing settlement by the parties, the court will be reconstituted in the form of either four laymen or four laymen and a judge.

In West Germany, too, conciliation is a part of the procedure of the local labor court (*Arbeitsgericht*). The president of the *Arbeitsgericht* is instructed to assist the parties in the prehearing step to reach a settlement through negotiation (*Güteverhandlung*). It should be noted that the same person who acts as conciliator during the prehearing step also presides over the court.

In Sweden, also, conciliation before the president of the labor court is an established part of the prehearing step.

"Conciliation" before a French *conseil de prud'hommes* follows the same pattern as "conciliation" of a "collective" dispute before a regional committee. It might not be legitimate to bring pressure upon the weaker party. But the conciliators have no duty to protect the interests of either party, nor to envisage the possible outcome of a trial by a full court presided over by a judge.

Conciliation conducted by the president of a West German *Arbeitsgericht* has a slightly different character. It is part of the German tradition that the president gives his advice. He may suggest a compromise solution, but he may also hint at the outcome in case the dispute should be decided by the court. There are reasons to believe that the substance of settlements reached during the course of such a procedure will more nearly resemble a judicial decision than a compromise resulting from a bargain.

In Sweden, as in West Germany, conciliation is in the hands

of the judge. Normally the president of the Labor Court conducts the prehearing. He operates, however, within a very narrow framework. It is not considered proper for the judge to express his view of the merits of the arguments. On rare occasions only the judge suggests a compromise settlement. The value of the system lies in the fact that one party is offered an opportunity to meet the other in neutral surroundings. Questions and answers are always presented through the chair.

The method of adjudication we associate with the decision-making of judicial courts, or, in other words, the judicial method. It should be kept in mind, however, that judicial courts have different tasks, and that probably the most important one—to act when a person is accused of a crime—does not always lead to an adjudication in the sense now concerned. On the other hand, there are bodies performing adjudicatory functions which are not considered courts in the ordinary meaning of that word. One of many examples is provided by the American NLRB, which for practical purposes might be considered an American counterpart of the European labor courts.

Actions in contract and tort before a civil court are typical objects of adjudication. In such a case the plaintiff claims that he is entitled to a right; adjudication in our sense therefore involves implementation of vested rights.

The method of adjudicating vested rights varies from country to country, but in essential respects it is the same everywhere. Once the facts at issue are established, the judge is supposed to apply an existing rule embodied in a legal system. For our purpose a contract should be considered as law established by the parties. As stated in the French *Code Civil,* article 1134, subsection 1, "contracts lawfully formed substitute statutory law for those who have made them."

Certain creative elements are involved. Gaps in the law have to be filled by extracting doctrines from existing cases, or, in continental Europe, by drawing analogies from existing statutory provisions or by application of so-called general principles of law. The latter are often abstractions or generalizations of established practices. The judge may have to determine for himself the purpose of a statutory provision, taking into account the legislative intent. He

may also consider the feasibility of the rule he intends to apply to the case at bar.

The principal feature of this method is that it looks to times and events that have passed. A *retrospective* view is natural not only for the reason that adjudication of vested rights means application of rules which are supposed to exist. Facts have to be proved which refer to time passed. Generally the defendant is held to be in arrears since a claim does not materialize until after the lapse of time. Further, the judge is dependent upon precedents. This is the case whether precedents are considered binding or merely persuasive.

Administration in labor disputes, as a method of reasoning in decision-making, is not easy to define clearly. Negatively, it can be defined as a method which is not designed to bring about a solution that the parties might have achieved through a settlement. Thus administration differs from conciliation. Nor does the "administering" body attempt to adjudicate possible existing rights. To some the term "administration" might indicate the use of a discretionary power whereby the "administering" body arbitrarily decides wages or other conditions of employment. Although it is true that the process involves more than simply implementing vested rights, the administrator typically applies certain norms. Therefore administration, as a method of decision-making in labor disputes, might be defined as the application of norms in the absence of vested rights.

The norms which I have in mind are not ordinary legal rules; rather, they refer to what is considered fair. For example, a group of employees may claim that they are entitled to a wage raise of 10 percent because others with similar skills and job duties receive the higher rate. Comparability of that kind is a norm often used. An equally important norm is the increase of productivity in the plant. Behind this argument lies the idea that the workers should share the profits with management. The demand for a wage increase because the employees concerned are receiving substandard pay is yet another norm. Here we discern as a distant ideal the idea of equal pay for all, or at least a feeling that society should protect the underdog.

Price stability is a goal set by almost every fiscal authority.

From this it follows that government wishes to determine the amount of future production that will be available for consumption, and also to discourage wage increases above a fixed ceiling on the ground that they are inflationary and thus contrary to public policy. With regard to the United States it is true that the wage and price guideposts have ceased to be viable; but considering their present role in Western Europe, it is not unlikely that they will appear again in this country.[2]

Some norms might be identical with standards applied by a conciliator assisting in bargaining. Thus the decision-maker may find it fair to split the claim and give the initiating party only part of the demanded wage increase.

In this review of possible norms I have referred to claims for wage increases. I did so because the arguments for wage raises are familiar to all of us and relatively easy to distinguish from arguments which relate to vested rights. As a matter of principle, these kinds of arguments can be applied to other conditions of employment too. The argument of comparability, in particular, is applicable in almost any relationship.

I should like to emphasize that our sample contains a number of norms which are not consistent with one another. Indeed, many of them are conflicting. The argument that low-paid workers should have a greater share than others necessarily implies that part of the general pot will be used in advance. This means that other groups will be given less than otherwise would have been justified considering their contribution to the rise of productivity. The decision-maker must therefore choose between a number of norms. He may also tentatively apply first one norm and then another. Finding that an application of the first norm would justify a wage increase of 3 percent and of the second one of 9 percent, he may recommend a raise somewhere between 3 and 9 percent as a compromise.

The British system of voluntary arbitration will serve as an example of the method of solving industrial disputes by administration. The Industrial Court is a permanent, official board of arbi-

[2] See GUIDELINES, INFORMAL CONTROLS, AND THE MARKET PLACE. POLICY CHOICES IN A FULL EMPLOYMENT ECONOMY. Edited and with an introduction by George P. Schultz and Robert Z. Aliber, University of Chicago Press, 1966.

trators with a president appointed on a full-time salary basis. The Minister of Labor (now the Minister for Employment and Productivity) may alternatively refer a dispute to an *ad hoc* arbitrator or *ad hoc* board of arbitrators. It is in the discretion of the Minister to decide whether a dispute is arbitrable. The parties must have exhausted agreed arrangements that exist in industry for settlement of disputes by conciliation or arbitration. The parties must also have given their consent to a reference to arbitration.

Claims referred to arbitration may concern the application of the collective agreement to an individual employee—e.g., a claim regarding his job; the application of the collective agreement to a group of workers—e.g., a claim that certain skilled workers be paid in accordance with the national agreement for their trade, rather than according to the agreement applicable to other workers in the plant. Other cases concern wage raises made retroactively or as of a future date.

It is the practice of the Industrial Court to express its awards in the form of decisions, with a full statement of the arguments presented by each party but without discussion of the merits of these arguments. One meets arguments based upon alleged vested rights, including claims, e.g., that the parties have already settled the dispute by a special agreement, or that they attached a certain meaning to the collective agreement when the agreement was made. Arguments of these kinds, however, are rather rare. The great majority of cases have nothing to do with vested rights. This is true not only in the great bulk of cases concerning straight wage claims; it applies to other cases as well. Voluntary arbitration in Great Britain is something different from voluntary arbitration in the United States. It is not adjudication of rights under a contract; rather, arbitration aims at the adjustment of the relations of the parties with a view to the future.

The British court of inquiry is another body which applies the method of administration. It has functions similar to the American *ad hoc* fact-finding committee. Courts of inquiry are primarily a means of informing Parliament and the public of the facts and the underlying cause of a labor dispute. The Minister uses his power to set up a court of inquiry sparely. The power is reserved for matters of major importance affecting the public interest. A court

of inquiry may, and often does in the framework of its conclusions and recommendations, freely comment upon the arguments of the disputants.

The French "mediation" is a counterpart to British arbitration or to the procedure applied by a British court of inquiry. As mentioned before, "collective" disputes have to be submitted to "conciliation." If "conciliation" fails, the president of the conciliation committee may order "mediation." The Minister of Labor has the same power. In case of such order the parties are obliged to submit their dispute to the *mediateur*. The award of the *mediateur* is considered as "recommendations" which are not binding. If the Minister so decides, the award of the *mediateur* will be published, the idea being that threat of publication may furnish a stimulus to the parties to settle their dispute as they have been advised to do. "Mediation" is a rather fresh innovation into French labor law while arbitration or appointment of courts of inquiry are well etsablished institutions in Great Britain. The rules on "mediation" were laid down in a statute of 1955, amended in 1957. At the beginning the new system was considered a great success. In the first two years, 1955–56, there were about fifty disputes submitted each year. Later the willingness to submit has declined. The figures had dropped to five cases in 1964. Incidentally, no mediation awards have been published.

An additional piece of information should be given with regard to Great Britain. In recent years control of prices and incomes has become increasingly important. By various means the British government has tried to keep wage increases within narrow limits. A special board, the National Board of Prices and Incomes, was established as a result of the prices and incomes policy agreed between the British government and industry during the period December, 1964 to March, 1965. It has come to stay at least for the time being. By virtue of the Prices and Income Acts of 1966, 1967, and 1968, the Minister has been granted power to postpone the effective date of wage increases resulting from settlements and awards. According to the 1968 Prices and Incomes Bill, a ceiling of 3.5 percent is put on all wage and salary settlements reached on or after March 20, 1968. Exception is made for agreements that genuinely raise productivity above that level.

The British system is two-tiered. Collective bargaining and arbitration continue independently of the standards set for incomes policy by the government. In the evidence presented by the Ministry of Labor in 1965 to the Royal Commission on Trade Unions and Employers' Associations one can read between the lines that the Ministry sometimes had to face the problem that the Industrial Court had been more generous than the government expected. In order that those concerned with arbitration should not be unaware of the economic background against which they were asked to make awards, they were supplied with wages and earnings statistics. The Ministry stated, however, that there had been no attempt to prescribe the limits within which arbitrators should work or to suggest to them any way in which their awards should reflect public policy.[8] As already indicated, the remedy against an award which was not in line with the official policy has been the delaying of its effective date.

II.

So far I have been concerned with a description of the three basic principles in action. The first principle, conciliation, or in more expressive words, the principle of assistance in bargaining, we associate with a federal or state conciliation service. The second principle, adjudication of vested rights, is applied by courts. The third principle, administration, like adjudication, involves the application of norms, but vested rights are not matters of concern. In labor disputes in Britain administration plays a dominating role; indeed, the whole machinery of arbitration consists of "administering" bodies. It should be emphasized again that a British arbitrator thus applies a different method than does an American arbitrator.

The following part will be devoted to a discussion of the merits of each of these three principles.

One would be inclined to believe that the first principle, that of conciliation, should be assigned a preferential position. No harm would follow in any dispute if there were an authority assisting the bargaining of the parties. Conciliation is useful because it strips the dispute of matters of prestige and of misunderstandings

[8] Written evidence by the Ministry of Labor, 1965, p. 109 (S.O. Code No. 73-39-0-66).

and eases tensions caused by personal conflicts between the representatives on both sides. If conciliation functions properly, each party will have the comfort of knowing that he has achieved the maximum bargain without resort to economic action. Since economic actions, especially strikes and lockouts, are costly affairs, resorts to economic action, if they ever happen, should be considered miscarriages of the conciliation procedure. However, there are at least two objections to this proposition.

(1) Some issues should not be subject to bargaining. A case might serve the purpose of illustration. In the Hotel and Inns Act of an imaginary state it is prescribed that hours of work shall not exceed 45 hours a week and that no employee can be ordered to do overtime work. The provisions of the Act are enforced by the Office of Factory Inspection. The municipality of Xshire runs a house called the Downtown House where vagrants and other homeless persons are lodged at a low rate. The municipality, claiming that the Hotel and Inns Act does not cover charitable institutions like the Downtown House, offers the union an agreement for a weekly salary for the employees at the Downtown House based upon a 50-hour week. It seems to me a matter of course that a state conciliator should not advise the union to accept this offer in case the conciliator has any doubt regarding the scope of the Hotel and Inns Act.

(2) It should be noted that in many cases the parties at the bargaining table lack the power to dispose of the claim. Assume that a worker has been dismissed without due cause or has been paid less than the proper rate for work performed. In an action brought before a French *conseil de prud'hommes* no problem will arise because the employee has to bring the action himself, although possibly assisted by the union. If, on the other hand, as in the United States, the union by statute is recognized as the exclusive representative of all employees within the bargaining unit, the question arises whether the union is entitled to abandon or compromise a claim in the bargaining process. Before conciliation can be used the conciliator has to know whether a vested right exists.

Let us turn to the second principle of reasoning, namely, adjudication of vested rights.

When in Germany the first statute on collective bargaining

was introduced in 1920, the legislators had in mind that the employee would be at the mercy of his employer if he had to bargain himself over wages and other conditions of employment. On the other hand, the legislators were not able to deal with all details peculiar to each industry or profession. The unions *on both sides* were given the power to govern their relations themselves.

In Sweden the legislators had other goals in mind when they introduced the Act on Collective Agreement of 1928. It is true that at that time the collective agreement was recognized by the courts as a contract at law binding upon the parties. Little use was made, however, of the possibility of bringing an action before a court of justice against a contracting party accused of breach of a collective agreement. If at the time before the 1928 Act the collective agreement was observed, as was the case generally, this was not so because of legal sanctions resulting from its breach. For practical purposes, resort to economic action was the only remedy available. This state of affairs was considered unsatisfactory by those in power. A quotation from the legislative history indicates the purpose of the 1928 Act: "The rule of law demanded that the solution of disputes concerning collective agreements should not depend upon the respective powers of the belligerent parties."

German and Swedish law hold in common that certain issues are considered suited for adjudication by courts of justice and should be submitted for adjudication unless the parties prefer arbitration. I submit that the American method of voluntary arbitration of grievances under a collective agreement is based upon the same philosophy. Incidentally, those advocating voluntary as opposed to compulsory arbitration often are thinking along the same line.

Generally, the idea that a certain group of disputes should be submitted to adjudication by a court of law is expressed by the term disputes of rights as opposed to disputes of interest. In my opinion these terms, which incidentally are alien to British law, are too general. By classifying all disputes as belonging to one of the categories, disputes of rights and disputes of interests, one easily overlooks relevant points. There is no room here, however, to demonstrate this point.

In the following I will accept the assumption that the basic

principle of the laws of West Germany, of my own country, Sweden, and of the United States is sound. Disputes arising under a collective agreement should be subject to adjudication by courts or private arbitrators. There are, however, some weaknesses in the traditional juridical method which courts and arbitrators are supposed to apply.

Sometimes there is a strange contrast between the common law of a country and generally recognized third-party standards. In most countries decisions regarding dismissals have been within the realm of the managerial prerogatives. The employer has been entitled to dismiss a worker for any reason and has not been obliged to disclose his motives. This is still the general rule in England and the United States, although subject to important restrictions. However, I guess that in these countries, as in Sweden, the great majority of employers act with great caution in dismissal matters. Indeed, many employers may apply a policy of "generous farewell" (i.e., liberal severance pay) especially in their relations to white-collar workers at or close to managerial level. Here we meet a phenomenon common to many fields of law. The insurance company secures itself paramount rights and privileges in the insurance policy form but is lax in the application.

If a dismissal case is brought to a court of justice, the court will rule against the employee because, from the legal point of view, there is no vested right to remain in employment. The Swedish experience with dismissal cases before the Labor Court in the 1930's was rather distressing. The union officers were not able to see why the court refused to take into account the actual situation in the shop, where dismissals were matters of negotiation. They could not grasp that the court, from its own point of view, merely applied existing law when it ruled against the dismissed worker. These decisions created a certain mistrust of the court's ability to deal with employment relations—fortunately counterbalanced by decision on other matters more consistent with the views of the unions. Following the Basic Agreement of 1938 and its amendments of 1964, they managed to reach agreements with the employers on protection against unfair dismissals; they then preferred to take this group of cases out of the courtroom to be adjudicated by an independent body, the *Arbetsmarknadsnämnden.*

In another respect, too, the ordinary method of adjudicating vested rights is apt to cause frustrations. Justice is pictured as a pair of scales; but in real life, unlike the usual portraits of the blind Goddess of Justice, the scales are seldom evenly balanced. An action is either sustained or dismissed. It is generally taken for granted that this is a sound rule in business relations where, according to our general philosophy, the parties are trained to take losses. Certainly, however, that philosophy is not suitable to labor or employment relations. The law governing dismissal of individual employees may again serve as an illustration. In one case the employee is granted compensation; in another he will achieve nothing. The marginal cases in which doing justice is like casting a die are rather frequent. Sometimes, as in the British Redundancy Payments Act, 1965, the legislators may ameliorate the position of the employee. According to the Act, a dismissal is treated as a dismissal by reason of redundancy in a number of situations. Ordinarily, the rule is the opposite one, namely, that the employee, in his capacity of plaintiff, has the burden of proof. I submit that an element of bargaining should be introduced into the judicial method of reasoning. Rather than casting a die, the court should split the benefit of doubt and in marginal cases grant compensation in part.

Here I should like to raise a question as to American experience. Ordinarily, American collective agreements have a clause concerning discharge. If the arbitrator finds that an employee has been discharged without just cause, the employee must be reinstated, with or without back pay. When such a clause exists, the American arbitrator has an advantage over the Swedish Labor Court. In dismissal cases he is not forced into a position of applying the common-law rule that all the prerogatives are in the hands of the employer; thus his award is more likely to be acceptable to the union. My question concerns the other point on which I was critical of the judicial method. Have the parties in the United States emancipated themselves from the traditional rule of all or nothing and developed a policy of permitting the arbitrator to split the benefit of doubt? From what I have heard this is generally not the case.

It is not possible to analyze in detail "administration" as a method of decision-making when dealing with labor disputes. The field is wide and the norms applied are often vague and contradicting. I shall concentrate upon a comparison with the method of adjudication. There is one characteristic feature that distinguishes administration from adjudication. The reasoning of the decision-making body looks to the future. The main concern is what wages and other conditions of employment shall apply to jobs to be performed.

I will not deny that the idea of vested rights in contractual relations has its merits. It is a deeply rooted conviction in our society that each shall be awarded that to which he is entitled. The parties are supposed to live up to the obligations they have laid upon themselves by contract. It is a matter of course that the aggrieved party shall have a remedy in court when the defendant has failed to abide by his contractual obligations.

There is another side of the coin, too. If once a merchant would happen to bring an action in court against another merchant, this ordinarily would be the end of the business relations between them. One might claim that no great harm is done to society, since in a country with free competition each party soon will find a new party to deal with. I shall not argue the question whether the idea of vested rights ought to prevail in the law merchant. In labor relations the situation is peculiar. The parties to the collective agreement have to continue their relations if they are going to survive. The relationship between the employer and the union is like a Catholic marriage; it cannot be dissolved unless by death.

Earlier I submitted for consideration the theory that the method of adjudicating vested rights has some inherent weaknesses. I suggested that some elements of bargaining should be introduced. Thus in cases of dismissals the court should have the power to split the benefit of the doubt and award the aggrieved party compensation in part. Now let me make the further observation that the principle of adjudicating vested rights, regardless of how you amend it, never will meet the needs of justice in continuous relations. Again I should like to refer to an example. Assume that the collective agreement entered into in 1966 for the years 1966–68 prescribes that the workers are classified as manual

workers and laboratory workers and that the hours of work for the former category is 42 and for the latter 40 hours per week. In 1967 the union raises the issue that a group of employees engaged in heating ovens in the laboratories should be considered laboratory workers. To the employees concerned the possible amount of back pay is a matter of minor importance. In this situation it would seem awkward for a court to rely exclusively on the literal meaning of an obscure clause in the contract. Nor would it be preferable to try any other means of revealing the true meaning of the original agreement.

To me it seems more reasonable to face the situation as it is. The task of the decision-maker in collective labor relations should be to find a rule which is suitable for the regulation of the future relations between the parties. Here I see the great strength in the English system of arbitration. The task of the English arbitrator is to help the parties in the readjustment of their relations.

In the acknowledgment of the merits of the English system is embodied a criticism of the German and Swedish approach. There is reason to believe that the legislators in the latter two countries should not have assigned to traditional methods of judicial decision-making such a paramount role in labor relations. The traditional method of reasoning in adjudication of rights ought to yield in part to other methods which take into account the need of readjustments in future relations.

Again I should like to return to the American scene. The methods of reasoning used by arbitrators have been much debated. Some persons prefer the arbitrator to "act as a judge" and to decide each case according to the traditional judicial methods. The American Arbitration Association is the principal advocate of this view, although with some modifications. Others want the arbitrator to do more. They expect him occasionally to conciliate or mediate and to effect adjustments of the relations between the parties.

Personally, as you will have noted, I am more in favor of the view that the arbitrator should be free to consider necessary adjustments in continuous relations.

Some qualifications are necessary.

A collective agreement creates a complex situation. Its conditions are of concern to others besides the parties to the agreement.

According to German law, the normative part of the agreement is automatically incorporated into the employment contracts of the members of the contracting union. The Swedish statute prescribes that the union members are bound by the collective agreement as if they themselves were parties to the agreement. The collective agreement influences the employment relations of the nonunion members, too. This is the case even in countries like Germany and Sweden which do not recognize the union as the sole bargaining agent of the appropriate unit.

To the individual employee an arbitrary dismissal may cause economic loss and serious harm. In my opinion there are good reasons for a law which provides for reinstatement and continuation of the employment relationship. However, even the advocates of such a rule have to admit that an action for reinstatement does not involve a question of economic survival, since the worker can find employment elsewhere. Thus the problem of readjustment with regard to future relations is not as pertinent as in litigation between two parties which, like management and unions, have to continue their relations. As far as I can see there are no principal objections to the application of the principle of adjudicating vested rights when individual claims are concerned.

In this context I should like to remind you of the distinction between "individual" and "collective" disputes in French law. It would seem that this distinction supports my thesis that partly different methods of reasoning ought to apply in adjudication of "rights" of the union and "rights" of individual employees.

III.

Basically, there are three methods of reasoning employed by public bodies when they make decisions in labor disputes: conciliation, adjudication, and administration.

The object of conciliation is to effect agreements or settlements of grievances. The conciliator has to assist the parties in their bargaining. It is not a matter of his concern whether the settlement reflects the possible outcome of a litigation in court or corresponds to governmental wage policies. If conciliation functions properly, each party will have the comfort of knowing that it has achieved the maximum bargain obtainable without resort to economic action.

Conciliation is performed not only by federal or state mediators; it is also an established part of the prehearing in the labor courts in France, Germany, and Sweden. It is worth mentioning, in particular, that the French labor court (*conseil de prud'hommes*) has a special chamber for dealing with conciliation, namely a board of two laymen—one employer and one employee.

Conciliation should be given a preferential position in all kinds of disputes. Certain restrictions should be observed, however. According to mandatory rules, some issues might not be subject to bargaining. In case an individual employee is represented by a union, the conciliator should consider possible conflicting interests between the individual and the union.

With adjudication or, as it sometimes is called, the judicial method, the present author has in mind the method applied by civil courts in actions in contract or tort. The judge is supposed to apply an existing rule embodied in a legal system once the facts at issue have been established. For our purpose a contract should be considered as law set by the parties themselves. Principally, this method looks to the past.

Adjudication is performed by the labor courts of France, Germany, and Sweden. With regard to France one should notice the peculiar distinction which is made between "individual" and "collective" disputes. The *conseil de prud'hommes* is competent to adjudicate only the former category of disputes.

By and large, the method of adjudication is applied by American arbitrators, too. In Great Britain another method prevails.

In Germany, Sweden, and the United States a distinction is made between disputes of rights and disputes of interests. This distinction is based upon the assumption that disputes arising under a collective agreement (disputes of rights) should be subject to adjudication by a court of law or an arbitrator.

Administration implies application of norms. Generally, the norms have a rather vague character, such as that the increase of productivity justifies a corresponding increase of wages. The norms are not always consistent with one another and administration is therefore often a matter of choosing between a number of possible norms. Unlike adjudication, administration does not make the implementation of vested rights a matter of principal concern.

The aim of administration is the adjustment of the future relations between the parties.

Little use is made of the method of administration in countries like Germany, Sweden, and the United States. In Britain this method is the dominating one. Incidentally, in Britain the collective agreement is not recognized as a contract binding at law. For special reasons, action against a union for breach of a collective agreement cannot be brought in a civil court. Generally, the collective agreement is for an indefinite period and negotiations aiming at amendments can be opened at any time after notice. Considering these circumstances, it is natural that the mandate of a British arbitrator is not restricted by the terms of an existing agreement. The Industrial Court in its capacity as a permanent arbitral board, as well as arbitrators appointed *ad hoc*, applies the method of administration and delivers awards adjusting wages and other conditions of employment.

The discussion of the merits of the various methods of decision-making has focused primarily upon adjudication. Administration was dealt with mainly in order to demonstrate how it differs from adjudication. The present author accepted the assumption common to his own country, Sweden, and to the United States that certain kinds of disputes over rights should be subject to adjudication. He claims that this method, as it is applied traditionally, has certain weaknesses.

Sometimes there is a strange contrast between the common law of a country and generally recognized standards. The employer's prerogative of dismissal provided an example.

All or nothing is a characteristic feature of the ordinary judicial method. An action is proven and sustained or not proven and dismissed. The present author submits that an element of bargaining should be introduced into the judicial method of reasoning. Rather than casting a die the court should split the benefit of doubt and in marginal cases grant compensation or other appropriate relief in part.

It is submitted that the judicial method is not always able to meet the needs of justice in continuous relations. The court should try to find the rule which is suitable for the regulation of the future relations between the parties. With the British method of adminis-

tration as a model, the present author suggests that an element of social engineering should be injected into judicial reasoning.

Possibly the method should vary. It need not be the same in disputes between organizations or between an employer and a union or a group of workers as in disputes concerning the employment relationship of an individual worker. Consideration of the future is more pertinent when collective issues are concerned. The traditional method is best suited for application to individual claims.

CONFLICTS OF "RIGHTS" AND CONFLICTS OF "INTERESTS" IN LABOR DISPUTES

K. W. WEDDERBURN*

To the lawyer, and especially to the common lawyer, what could be more natural and obvious than the distinction between conflicts of "rights" and of "interests"? For him there must be a chasm between, on the one hand, the decision-making process in any tribunal concerned with a worker's suit brought for wrongful dismissal, or to recover wages due, and, on the other, a determination by some umpire or arbitrator of a trade union's claim that its members ought to be paid higher wages. English judges have not failed to appreciate the point. In 1957 Viscount Simonds said:

> The essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights of the parties as they exist or are deemed to exist at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not to enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.[1]

That distinction is critical in Australian labor law. It is said to be fundamental in most systems, in the United States, Sweden, and Germany, as well as in Italy and France, though in these last two countries it seems to be, in practice, less important.

But in Britain, as I hope to make clear, the distinction plays scarcely any role in the ordering of labor relations, at any rate on

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[1] A–G for Australia v. The Queen and the Boilermakers Society of Australia [1957] A.C. 288, at 310. (Privy Council appeal from Australia; the words "but not to enforce" relate specifically to the Australian situation only. Viscount Simonds was quoting from the judgment of Isaacs and Rich JJ. in an earlier case.)

the collective plane. On this topic I have perhaps, therefore, been chosen to report the discussions of our group because I am the nearest thing to an extraterrestrial visitor from Mars. Furthermore, I come from a system where the debate is raging furiously about whether or not we should introduce this type of distinction.[2] I shall, in consequence, make no apology for dwelling at length upon the current British situation, for there may be as much to be learned about the distinction which is my subject from inspection of a system of industrial relations which rejects it as from those systems whose labor laws accept and apply it.

I shall address myself principally to three questions: First, what is the place of the distinction in practice in regard to "individual" labor disputes? Second, what is its place in "collective" labor disputes? Third, I want to ask how we might approach the problems of using this distinction at the points of tension in any labor law structure, those growth points which seem to me to be not dissimilar in the five European systems which have been the object of our study, and even in the American system too—areas where technological change forced the rules of the system to develop (whether or not they use legalistic concepts). In this third area, each system, in its different way, has to face the question: What is the function of our arbitration and our arbitrators?

I.

First, it must be said that the division of "individual" disputes is one which I adopt for convenience only in my presentation. Most individual disputes have a collective element. But the simplest example of a conflict of "rights" in all the European systems is an action brought to enforce the individual employment relationship. This is most usually expressed in terms of a breach of an individual "contract" of employment. Sometimes, as in France, that contract has imported into it a vast hinterland of statutory regulation of the employer's and employee's rights and duties. Sometimes, as in Sweden and Germany, that contract is automatically interwoven with the rights created by any relevant collective agreement.

[2] That debate will by the time this paper appears in print have crystallized in 1968 in the Report of the Royal Commission on Trade Unions and Employers' Associations under the chairmanship of Lord Donovan.

Sometimes, as in Britain, the express individual contract can, *per contra,* oust the collective terms (though it normally will not do so). Sometimes, too, the individual relationship is governed by statutory regulation which is not technically imported into the area of the individual contract, but for breach of which the worker himself has a right of action. (Again, in Britain examples are found in the Redundancy Payments Act, 1965, or the Factories Act, 1961.) But in such systems there is rarely any doubt about who "owns the grievance." The worker (often supported by his union) brings and controls his own action. Even in Sweden, all the individual needs to show is that the union has not taken up his case.

It has seemed to us in our discussions that many of the difficulties of the American jurisprudence are largely caused by the virtual obliteration in your system of that old-fashioned laissez-faire institution, the individual contract of employment. I am thinking here especially of the conflicting decisions concerning the jurisdiction of the National Labor Relations Board and the courts, and of the problem of the union member's need to show lack of fair representation and exhaustion of internal remedies before being able to process certain grievances for himself. Such problems surely stem from the inconvenient insistence in America upon the reality, namely, that in labor relations it is the collective institutions which matter, to the exclusion of that unreal but convenient fiction, the individual contract of employment.

Of course, no labor lawyer can overlook the creative character of judicial activity even at the level of the individual employment relationship where the dispute concerns existing rights. Even in Britain, we now recognize that judges make law as well as find it. As Viscount Radcliffe said in such a case in 1957:

> No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.[3]

[3] Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555, at 591–2; [1957] 1 All E.R. 125, at 142.

Furthermore, even individual rights often rest in the European systems upon rules which contain a policy content of a high order. Take a German labor court deciding whether the employer's dismissal of his worker was unjust and whether his reason for so doing was "socially adequate," a concept into which the economic needs of the enterprise can be imported; or a French court deciding whether a worker has been guilty of *faute grave*. Or take the Swedish Labor Court deciding whether an individual worker has broken the "peace" obligation derived from the collective agreement; a nodding acquaintance with the writing of Professor Folke Schmidt shows how creative some of those decisions can be.[4] Take in Britain the statutory jurisdictions of administrative tribunals: the National Insurance Commissioner (from whom there is no appeal) deciding whether a worker was rightly deprived of unemployment benefits for refusing "suitable" employment, or an industrial tribunal (from which an appeal on law lies to the High Court) deciding whether a worker has lost his statutory right to a payment when dismissed by reason of redundancy because he "unreasonably" refused an offer of alternative employment "suitable to that employee."

Such decisions take the court or the tribunal into the thick of social policies. The language of the decision will be "law talk." The reasoning (where reasons are given) will be the well-known syllogistic methods most highly developed in the Anglo-Saxon jurisdictions. But the content will be often as much concerned with policy as any grievance arbitrator here in the United States faced with deciding whether there was "just cause" for a dismissal. But to him we return later.

In parenthesis, let me add that it would seem to me impertinent to spell out this point of judicial creativity to an American audience, were it not for one curiosity in your current discussions. After all, your courts have led the way in express policy-oriented decision-making. But curiously, this aspect of their work seems to be implicitly denied by some commentators in the debate which you are now having about the possible introduction of labor courts

[4] See his THE LAW OF LABOUR RELATIONS IN SWEDEN (Cambridge: Harvard University Press, 1962).

in place of grievance arbitration. To my ears they seem to be declining a most strange irregular verb that runs:

> My appellate judges make proper decisions;
> Your grievance arbitrators inject their own values;
> His National Labor Relations Board is full of political prejudices.

There are various ways, it seems to me, in which modern European labor laws recognize the legislative function from which tribunals often cannot escape, even in deciding upon individual "rights." Let me instance but two. First the composition of the tribunals. Everywhere you find either an established or a growing pattern of putting lay "wingmen" on either side of the judge or legal chairman (as in the German and Swedish labor courts and, now, the British industrial tribunals). This practice speaks to the need to have the parties' "rights" decided in a common-sense manner by a tribunal which will look to the realities of industrial life and not just to legalism. Otherwise, why are the "wingmen" there? When the judges become dominant, as in the superior German labor court, so legalism increases. In the French *conseils de prud'-hommes* there are normally no lawyers at all. In those many geographical or professional areas where the writ of a labor court does not run in France, the civil courts take over; and once again the decline from a realistic industrial jurisprudence into legal conceptualism is apparent. The same is true in regard to the appellate decisions of the English High Court and Scottish Court of Session on appeals from our industrial tribunals.[5] If it is accepted that wingmen are, therefore, desirable, let us notice an associated problem that besets those systems which establish local tribunals. Active wingmen are hard to find, especially on the workers' side; the young energetic trade unionist will have little time for such service, and the old retired official is not the most desirable member of the panel. Purely in terms of staffing we may all have much to learn here from the elected personnel of the French *conseils de prud'-*

[5] For some early decisions by tribunals and the High Court, see Wedderburn, CASES AND MATERIALS ON LABOUR LAW (Cambridge University Press, 1967), chap. 2, pp. 215–239. A further analysis of the tribunals' work will be made in the forthcoming volume by Wedderburn and Davies, a result of the research project described in the Introduction to this volume.

hommes on which McPherson and Meyers have written such a useful study.[6]

My second instance concerns procedure. Invariably one finds that the procedure of labor courts or tribunals is meant to be informal and speedy. It has often been in issue (as in France and Germany, or even, in respect of administrative tribunals, in Britain) whether lawyers should be allowed to appear at all (though they usually get in in the end). Most important of all, however, all the fully fledged labor courts (except the Swedish court) employ a *conciliation* stage built into their procedure. To the common-law mind conciliation is alien to the judicial role. We have much to learn here from other systems which do not make any such rigid demarcation. In France two *prud'hommes* conciliate in a session distinct from the judgment session, even though they may form part of the four-member court if the issue goes on to judicial determination. In Germany it is the presiding judge who conciliates (a much less satisfactory procedure). The French practice of conciliation in court may have grown up largely because of the inadequacy of voluntary "screening" procedures collectively bargained by the industrial parties; and it was certainly assisted by the very low cost of proceedings in the labor court. In Italy the civil courts may try to conciliate; but in individual labor disputes they always, and in effect must, try to do so. The Swedish Labor Court has some power to make an independent investigation to obtain its own evidence; but the power has rarely if ever been used in the last decade; and some of the weaknesses of that court (possibly expressed in the declining use of it by the industrial parties and in the legalism found in its decisions on dismissal of individual workers) may well stem from its failure to use any conciliation stage, a failure which contrasts sharply with the practice of its neighbor labor court in Denmark. Conciliation is particularly useful if any such remedy as reinstatement is being sought. In Italy an example arises in the use made of conciliation in the arbitration arrangements concerning mass layoffs (which now have gone over to a statutory basis). And, of course, the higher the policy content of the rules to be applied the more useful is the conciliation stage.

[6] W. H. McPherson and F. Meyers, THE FRENCH LABOR COURTS: JUDGMENT BY PEERS (University of Illinois, 1966).

In Britain the industrial tribunals, which currently have a very narrow jurisdiction, employ no formal conciliation techniques. But there is increasing pressure for a statutory "floor" of rights for employees, e.g., legal protection against "unjust dismissal."[7] Recently a report of a Committee of the National Joint Advisory Council (composed of Ministry of Labor, employers' and trade union representatives) suggested that improvement of voluntary machinery was to be preferred to the method of enactment on this problem. But they added that if statutory tribunals were to be introduced, they should have a jurisdiction of a "fall back" character, merely supplementing voluntary machinery, and said:

> There are two factors which we think particularly significant in deciding what form statutory machinery might best take: the need for flexibility and the importance of conciliation. On the second point, we consider that if dismissal cases are to be dealt with satisfactorily conciliation is of the greatest importance and provision for this should be built into any statutory arrangements. Informal talks with the employer and worker concerned, during which the matter can be thrashed out and the parties given an opportunity to reconsider and, perhaps, to suggest solutions themselves, are more likely to produce an all-round satisfactory settlement than (for example) a quasi-judicial hearing alone. We have been impressed by the apparent value of the conciliation role played by the chairmen of both the labour courts in West Germany and the *conseils de prud'hommes* in France. In our view a similar conciliation role ought to be an essential part of any statutory machinery dealing with dismissals in this country. . . .
>
> We therefore consider that any statutory machinery should incorporate a statutory official to whom a worker aggrieved by dismissal could refer his complaint. The statutory official would investigate the matter quickly and informally on the spot and act as a conciliator where appropriate. . . .
>
> We do not think it should be assumed that the Industrial Tribunals are the right bodies. It may be that a new and rather different body is needed. We have already emphasized that conciliation should play an important part in the work of tribunals dealing with dismissal cases and that they should be given a wide discretion. Their functions would therefore be different from those of the Industrial Tribunals, which have

[7] On some proposals of this kind and their difficulties, see this author's written and oral Evidence to the Donovan Royal Commission, in Minutes of Evidence, Day 31, 22nd March 1966, (H.M.S.O.).

no conciliation role and are concerned with applying statutory provisions—including provisions of (for example) the Industrial Training Act and the Selective Employment Payments Act, as well as the Redundancy Payments Act.[8]

If, then, it be true that the specialized European labor tribunals find themselves applying, even in individual labor disputes as to "rights," rules with a high discretionary or policy content, and find, too, that they work best when their techniques include techniques of conciliation as well as adjudication, how much more odd is a defect which oppresses many of them. That defect is the dominance of the ordinary judiciary in appellate jurisdictions. In three of the systems certainly one encounters the same complaint, namely, the unrealistic legalism and conceptualism of the higher courts of appeal. In France, the special chambers of the courts of appeals and then the *Cour de Cassation;* in West Germany, the Federal Labor Court; even in England the High Court (and in Scotland the Court of Session) in appeals from industrial tribunals —all these are dominated by the ordinary judiciary; all revert to the normal legal tradition of the land. This may well include a high degree of creativity; indeed, Professor Ramm has in our discussions given us a terrifying picture of the creativity of the Federal Labor Court, which does not always have great relevance to the needs of industrial relations. In Britain, France, and Italy the complaint is of old-fashioned judicial conservatism. In Sweden there are, of course, no *local* labor courts, and from the one central labor court there is no appeal. Yet in some ways it is, we have been told, rather more legalistic than the ordinary Swedish civil courts. Perhaps one permanent judge, chairing such a court, feels more bound by his own precedents than a group of judges might be.

On this defect, we may contrast the wisdom of the United States federal courts—in using section 301 of the Taft-Hartley Act in order to refuse to be courts of appeals by way of review of grievance arbitrators' decisions. That refusal was perhaps taken to extremes in the steelworkers' trilogy of decisions. The same attitude may be seen in the courts' occasional willingness to defer to the expert knowledge of the NLRB. All in all, this judicial disinclina-

[8] Dismissal Procedures (Ministry of Labour: H.M.S.O. 1967), pp. 41–42.

tion to become the forum for general appeals from specialized labor tribunals seems to a European observer to display a most wise judicial instinct.

II.

We must contrast the similarities in European countries concerning "individual" disputes with the great theoretical discrepancies in their approaches to "collective" disputes. Of course, systems which make formal use of the distinction in order to define jurisdiction of labor courts encounter grave problems of definition; but over these we need not linger. Broadly speaking, whereas conflicts between employer and employee cast in an individual mould are most easily expressed in the lawyers' language of "rights," collective disputes, between employers and trade unions, for example, may be expressed either in that language or in the language of a conflict of "interests," or even in an idiom which does not stop to consider the distinction, according to the preferences of those who control the operation of industrial relations. If we ask after the *practice* as well as the theory, I believe we reach a threefold division:

(i) Countries where legal norms dominate and the distinction between rights and interests is often critical in practice. These are the three "collective labor court" countries.

(ii) Countries where the distinction under discussion is made in law but means very much less in practice.

(iii) At least one country where the distinction may be made in law but where in practice it is not made.

(i) The best-known examples in the first group are Sweden and Germany. In both, a clear line is drawn between the interpretation, application, and enforcement of collective agreements and the negotiation of new contracts. That is parallel to the situation in the United States. The experience of both the German labor courts and the Swedish Labor Court shows clearly that jurisdiction over the former relates especially to the control of trade union or other collective workers' activity. The Swedish court has been very creative in interpreting both the duties of the parties in negotiation and also the "peace" obligation inherent in their agreement. (British workers would undoubtedly find decision 82 of 1947, for ex-

ample, where damages were awarded against those who threatened industrial action during the currency of a collective agreement, to be a major curtailment of their liberty of action.) The German labor courts—especially the Federal Court—have also developed the peace obligation; but they have gone further and added a more general delictual liability in tort for union industrial action which is against public policy as interpreted by the judges.[9] The German Federal Labor Court even seems to have declared all "wildcat" strikes illegal on the second ground. By means of the peace obligation and, if necessary, civil obligations of a tortious character, the major function of these labor courts is the reduction of collective disputes to the pattern of a dispute over "rights." Sometimes it is thought in Europe that, because both Sweden and Germany have had in the last decade or so a very low rate of industrial stoppages, there is a correlation between this means of judicial control over trade unions and industrial peace. To such minds it is necessary to introduce the experience of countries like Australia, where the same legalism pervades the system and the rate of stoppages is very high indeed. No more can be said than that labor courts in whose hands weapons of this kind are put will control wide areas of industrial relations policy, more particularly by curtailing the bargaining power on the collective workers' side of the table. To British eyes this appears as a clear illustration of a description applied in another context by Professor Julius Stone,

> the judge is often directly adjusting conflicts of interests, just as the legislator does, but without feeling responsibility for the choice which he makes.[10]

The court, unlike the legislature or even the administrative conciliator, bears no continuing responsibility for the relationships of the industrial parties after it has rendered its Olympian decision as to their "rights."

Many of these thoughts are surely true too of the third "collective labor court" country—by which I mean the United States. To

[9] See Thilo Ramm in LABOUR RELATIONS AND THE LAW, Otto Kahn-Freund, ed. (London: Stevens & Sons, 1965), chap. 15.

[10] J. Stone, LEGAL SYSTEM AND LAWYERS' REASONINGS (Stanford University Press, 1964), p. 229, discussing Heek and Ihering.

a European, or at least a British, observer the United States harbors a strong "labor court" in the National Labor Relations Board, as reconstituted by the Taft-Hartley Act in 1947. Its prosecuting arm (the office of general counsel) was thereafter distinct from its judgment board. Like the Swedish court, it is a central national tribunal. It enforces the "peace obligation" under the provisions of the same Act. Essentially, it is surely a kind of labor court. The fact that its "judges" are not necessarily lawyers is irrelevant (look at the *conseils de prud'hommes*); that they have a term limited to five years is a detail of no significance; and the argument that the NLRB cannot enforce its orders except by taking further proceedings in the ordinary courts is *nihil ad rem* on the issue of its essential character. (The execution of orders frequently needs proceedings elsewhere, for example, in bankruptcy matters, or in various types of family courts; and the order of British industrial tribunals can be enforced only through the ordinary county courts.)

What matters is that here you have a tribunal with power to adjudicate the great issues which fall under the rubric of "unfair labor practices" according to the parties' "rights"; and these include cases where the Board *must* now go on to seek an injunction after it has reasonable cause to believe that the charge is true (e.g., secondary boycotts, hot cargo and organizational picketing cases). Then there are the decisions on the limits of organizing 100 percent union membership, and the illegalities inherent in strikes to promote craft demarcation. Furthermore, we find the NLRB possessing a jurisdiction which overlaps that of the ordinary courts. Take, for example, secondary boycott cases where an injured third party may sue in the ordinary court even after the NLRB has decided an issue arising from the same facts; and a court of appeals can hear appeals from both proceedings and may not decide them consistently. Again, where the NLRB has jurisdiction over an unfair labor practice, an employee may sometimes sue in court where no grievance arbitration procedure is provided for in the collective contract. A body which uses quasi-judicial methods to decide these matters over which the NLRB has jurisdiction patently deserves to be described as a species of labor court. And its function turns out often to be that same one of controlling the power of union pressures.

In parenthesis, it may be noted briefly that both in Sweden and in Germany, countries where the concept of a labor court is most deeply entrenched, there is some evidence of a tendency not to use that method of deciding collective labor disputes. In Sweden the number of cases has fallen sharply, from some 200 in 1931 to 27 in 1966. This may be partly caused by an improvement in voluntary machinery for the "screening" of disputes before they come to litigation. Also, it may be true that once the major principles are established, in a centralized labor relations system such as the Swedish, references to the court are bound to decline. Furthermore, however, there is evidence that the parties are choosing arbitration rather than the labor courts. The 1964 Agreement on Dismissals in Sweden is an illustration. Under it, disputes on mass dismissals and related questions go not to the Labor Court but to the Labor Market Arbitration Board, which is a much less legalistic body than the court. Recent studies by Dr. Edlund in the building and engineering industries led him to suggest that collaboration by way of autonomous bargaining and compromise was gradually replacing the habit of looking for legalistic decisions on rights to such a degree that the Swedish Labor Court might be a "transitional" phenomenon only. Similarly, in that continuous process of adjustment which operates on the factory floor in every industrialized society, especially where piece rates or time rates are in use, the Swedish system, like the British, uses the weapon of negotiation and, if need be, arbitration without much recourse to arguments based on the "rights" of the parties which might be spelled out in existing agreements. Even in Germany, despite the all-pervasive presence of the labor courts, disputes over normative clauses in collective agreements (for example, wage or bonus rates) will often be taken through a process of negotiation and ultimately to arbitration, not to the labor court. Also, disputes between a works council and an employer sometimes may go to a board of settlement rather than to the labor court, and on occasion (where the issue arises over a "social" question in an agreement) must go to such a board, a much less legalistic body than the court.

These tendencies introduce the concept that even where the collective agreement is most clearly established as creating collective legal rights and duties enforced through courts, the social fact

that collective bargaining is a process in modern technology not of a series of isolated contracts but of continuous renegotiation (especially at plant level and in a situation of near full-employment) compels the parties to move away from judicial formal procedures towards arbitral and negotiating institutions. It is for speculation whether this tendency would be increased if a major recession hit either Sweden or Germany, for in neither country has the labor court system had to bear the strain of any severe economic crisis. However that may be, if there is a marginal tendency *away* from legalism in Sweden or even Germany, is it not true that the tendency in the United States is in the opposite direction? If so, why is it so?

(ii) The second group of countries comprises France and Italy. Here collective agreements are recognized as enforceable contracts in law, as was the case in the countries in group (i). Therefore, disputes which arise under those contracts naturally present themselves to the mind as disputes over "rights." But it may be questioned how far this is of any importance in practice at the collective level of labor relations. In neither country are there any special courts for the determination of collective rights or duties in labor disputes. Indeed, as in Britain, disputes over "rights" (even if the real origin is in a collective agreement) usually present themselves in the form of suits to enforce individual rights. We may take the matter a little further by examining the situation in France.

In France, control by means of the "peace obligation" is of no importance because scarcely any French trade union ever negotiates away or limits its right to strike. (The reaction of British, American, and Swedish employers, who tend to ask what is the point of French collective agreements, serves only to illustrate the habit into which they have fallen of regarding such clauses controlling union power as the critical part of collective bargaining.) When a collective dispute arises, however, French law, in characteristically logical fashion, sets out three stages through which the dispute should go: (1) conciliation (2) mediation and (3) arbitration. In theory parties are supposed to use at least the first two stages; and since 1957 a *Préfet* (or the Minister) can order the parties to submit to mediation. The French texts set out the distinct concepts of conciliation, mediation, and arbitration. In theory the

powers of the statutory mediator are different in a "rights" dispute from his powers in one concerning "interests." For example, in the latter he may make recommendations for a settlement. Again, in a "rights" issue an arbitrator must act as a "judge," apply the law, and give reasons for his decision, which is subject to an appeal to the Superior Court of Arbitration. In a conflict of "interests" he arbitrates "in equity," namely seeks the sensible solution between the parties, which is, as we shall see, arbitration as we know it in Britain. Furthermore, certain collective agreements distinguish between voluntary Commissions of Conciliation for use in disputes as to "interests" and Commissions of Interpretation for use in disputes about existing rights under the contract.

But it is questionable whether this theoretical framework is of great practical importance in the operation of French industrial relations. Arbitration is little used, and where it is the distinctions laid down are certainly not always observed. There have been scarcely any recent appeals to the Superior Court of Arbitration. Nor do mediators observe the divisions between these two sets of powers; they more frequently try to get a lasting truce between the parties. Very few cases go through the statutory stages of conciliation and mediation. Indeed, the statutory machinery is normally replaced by a *procedure souple*—a flexible and extra-statutory procedure which seems to consist in the local *Préfet* or *Inspecteur de Travail* calling the sides together and trying to hammer out a solution.[11] At this point the distinction between conflicts of rights and of interests ceases to be the dominant consideration. In Italy, as in France, informal negotiation and arbitration have a similar effect in practice.

(iii) In this respect, therefore, the French system in actual operation is remarkably similar to British practice in our system of labor relations. It may here be mentioned that there *is* a British "system" of industrial relations which does work. Although Britain suffers a rather high percentage of "unofficial" work stoppages, the unofficial character is often affected by the choice of "official" trade union leaders to let others make the running; and the figures need correcting against the number of days actually lost. In the decade to 1964 Britain had twice as many stoppages per 1,000 employees

[11] See H. Sinay, *La Grève* (Dalloz, 1966), pp. 435–447.

in major industries as the United States; but overall, the United States lost four times as many workdays in stoppages as did Britain. With that preface let me make three points about the British system:

(1) The British system operates on the basis not of any legal structuring of collective industrial relations (there are no bargaining agents, no works councils, no general duty to bargain set down by law), but of the primacy of voluntary procedures. Annually, thousands of grievances and disputes are resolved through disputes "procedures," usually beginning with a "works" procedure and moving up through local and district conferences or committees to a national level. In 1964, nearly 10,000 such issues were processed in coal mining at pit level alone; in engineering over 3,600 at "works" level. Rarely, if ever, do such procedures stop to distinguish "rights" questions from disputes over "interests." The object is to negotiate the answer which suits these parties. As Allan Flanders has put it:

> Most important, perhaps, is our lack of concern for the distinction between conflicts of interests and conflicts of right, which is fundamental in European labour law; or between negotiation and grievance procedure, as in the United States. So long as the agreed disputes procedure is followed through the various stages, we are not particularly interested in whether new substantive rules are being made or old ones applied: the main thing is to find an acceptable, and if possible a durable, compromise by means of direct negotiation between representation of the two sides.[12]

A recent authoritative study of voluntary British disputes procedures found that:

> In Britain most procedures do not define the broad issues of rights and duties to be claimed under them in any precise way. It is not usual for a distinction to be made between the process of applying and interpreting existing agreements, as against the process of formulating new ones. . . .
>
> The existence of procedures is regarded much more as a by-product of the commonsense fact that disputes have to be solved rather than as an attempt to bind the parties strictly to rules of behaviour

[12] INDUSTRIAL RELATIONS: WHAT IS WRONG WITH THE SYSTEM? (London: Institute of Personnel Management, 1965), p. 28.

which cannot be varied according to circumstances and temperament. This is an attitude which the parties would consider necessary, not only because of the wide variety of situations in which disputes are likely to arise but also because of the nature of industrial relations themselves. . . .

The tendency in the British industrial relations system for the parties to treat issues arising more as grievances than as conflicts of rights is logically reinforced by the attitude of employers and trade unions to voluntary *substantive* agreements about terms and conditions of work. The characteristics of such agreements are such that they are rarely intended to establish *in detail* a corpus of rules which can, or should, be applied to each situation in which disputes between the parties at various levels are likely to arise. This is not to suggest that substantive agreements in this country are not regulative in their effect. But it does mean that they are not drawn up in most industries with the intention of providing a collection of rules affecting the worker at the workplace which can be administered in detail through agreed procedures. In fact, in most industries, *procedures are very little used in the application or interpretation of substantive agreements.* . . .

In the British system such distinctions are rarely made either in the main procedure agreements between the parties or in subsidiary agreements at lower levels. The tendency is to regard procedures as all-purpose arrangements, to be used flexibly as particular situations arise and as common sense seems to dictate.[13]

(2) The collective agreement is not as such a contract enforceable by legal sanction. Any legal effect which it has is achieved by its incorporation into the individual contract of employment. With some few exceptions over which we need not here pause, statutory intervention at collective level takes the form of machinery provided by the state to help the parties solve their own disputes.[14] As Professor Kahn-Freund put it: "All British labour legislation is in a sense a gloss or a footnote to collective bargaining."[15] Three types of state assistance in the resolution of collective disputes de-

[13] A. Marsh, *Disputes Procedures in British Industry,* Research Paper for Royal Commission on Trade Unions and Employers' Associations No. 2 (Part 1), pp. viii, 14, 16, 18.

[14] See K. W. Wedderburn, THE WORKER AND THE LAW (Pelican 1965; MacGibbon and Kee 1966), chap. 4 on "Collective Bargaining and the Law."

[15] THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN, Flanders and Clegg, eds. (Oxford: B. Blackwell, 1954), p. 66. The Prices and Incomes Acts 1966 and 1967 form, of course, a novel and important exception to this rule.

serve mention, all of them deriving from powers granted to the Minister of Labor in the Conciliation Act 1896 and Industrial Courts Act 1919.[16] First, there is, at national and local level, the conciliation service of the Ministry of Labor. In practice these officers play a vital role in resolving disputes by bringing parties together, often before conflict has arisen. Second, the state provides arbitration machinery for those who want to use it, in the form either of single arbitrators or the standing Industrial Court. The "Court" is not a court of record and its awards normally carry no legal sanction. The Minister can normally refer an issue to the Industrial Court only if the parties have exhausted their own voluntary procedures. The court itself decided after the first few years of its activities not to give reasons for its awards. The President, Sir Roy Wilson Q.C., defended this practice before the Royal Commission largely on the grounds that the job of the court was to decide an issue between the two parties; the giving of reasons would be more likely to prolong their dispute; and reasoned decisions could be used as "precedents," which was undesirable. The whole spirit of the court's activities leads it to reject a distinction between disputes as to "rights" and as to "interests" (except in rare cases as when it is interpreting one of its own awards). It arbitrates in the English sense of that word—i.e., finds a sensible and durable answer to the parties' dispute, taking account of their agreements and their claims. In some cases the interpretation of a prior agreement will, of course, dominate the argument. But in many cases it is quite impossible to classify the issue by use of the distinction we are discussing; it is a silly question to put and would receive no sensible answer.

Occasionally awards of the court can illustrate how it is prepared to deal with both "rights" and "interests." For example, in Award Number 3036, August 1964 (Iron and Steel Trades Confederation and Iron and Steel Trades Employers' Association) the Union had agreed with certain employers, *inter alia*, a base tonnage bonus rate on the understanding, generally accepted in the industry, that any variation in it should be the subject only of national negotiation except in the case of a local "change of practice." The

[16] A detailed survey of hitherto unpublished material on these matters will be made in the study of Wedderburn and Davies (forthcoming).

relevant clause read: "It shall be competent for either party to this Agreement to seek a revision if a change of practice has taken place . . . ." Clearly, then, before one party could demand that the other negotiate with it a new agreement it would have to prove that a change of practice had taken place within the terms of the existing agreement. However, the terms of reference asked the court not only to decide the "rights" question whether a change of practice had taken place, but also to adjudicate the "interest" question, i.e., the company's claim for a 12½ percent reduction in the tonnage bonus rates. In argument the Union said that there had been no "change of practice" because improved techniques should benefit employees as well by giving them higher wages and had in any case increased the risks to which the workers were subject and for which they ought to be paid more. The Award was in favor of the Union and in its entirety read:

> Having given careful consideration to the evidence and submissions of the Parties the Court find that the claim has not been established and award accordingly.

It would be a lawyer of more than usual brilliance who could make a precedent out of that!

Third, the Minister of Labor can institute a variety of committees of investigation or a court of inquiry into particular trade disputes. These have some resemblance to American boards of inquiry, or rather to Presidential *ad hoc* boards since they can always make recommendations. Once again, the findings have no binding effect; and no categorization of the inquires into "rights" and "interest" disputes will fit at all. The person holding an inquiry of this kind tends to conciliate, mediate, arbitrate and generally bang heads together in order to obtain a sensible, agreed result, if possible, on which he can base his recommendations. Great strides have recently been taken in this field by Sir Jack Scamp, chairman of the voluntary body, the Motor Industry Joint Labour Council, who has sat with the powers of a court of inquiry on a number of occasions. One of his reports illustrates his methods. He was appointed

to inquire into the causes and circumstances of the dispute at Birmingham Aluminum Castings Limited involving members of the

Transport and General Workers' Union and the National Society of Metal Mechanics, taking into account all the relevant considerations, including those set out in the White Paper—Prices and Incomes Standstill: Period of Severe Restraint (Cmnd. 3150), and to report.

Having clarified the issues between Unions and Management, largely by making Management write down what it meant by "labour mobility," he obtained a clear Union negotiating demand and a clear response from Management. The report goes on:

17. . . . The unions stated that the company's offer was quite inadequate. They considered that the increased degree of mobility which they were prepared to give, coupled with their claim for comparability with rates paid elsewhere, justified an increase of 1s. 6d., although they were prepared to accept 1s. 3d. an hour.
18. At this stage I concluded my hearing.
19. I was informed later, however, by the parties concerned that immediately following the hearing, they had met and agreement had been reached on the basis of an increase of 1s. an hour to all the maintenance workers mentioned in paragraph 6 in exchange for their acceptance of full mobility of labour as defined in paragraphs 15 and 16. The proposals for regrading had been dropped. I informed the parties that I would report this settlement to you, and stressed that it would need to be examined in the light of the requirements of the Government's incomes policy.

One can only guess at what had gone on between paragraphs 18 and 19.

Inquiries of this kind have numerous other advantages. For example, a Committee of Inquiry in 1965 was able to go into the whole background of inter-union rivalry and working conditions in a dispute which ostensibly appeared as disputes between a miner and a safety deputy at a pit, one of whom had sworn at the other, which had resulted in strikes. In another inquiry at Southampton docks, the committee was able to balance a "conflict of rights"—but these turned out to be "rights taken to be established by a collective agreement" (which favored one group of workers) and "rights derived from custom and practice" (which another group insisted must be preserved).

(3) Lastly, it must be mentioned that the basic statutes of British labor law are still those of 1871, 1875, and 1906. One of the

most significant features of the last two acts was to exclude from liability under certain common-law doctrines acts done in furtherance or contemplation of a "trade dispute." Without such protection and so-called "abstention of the law" from trade disputes, ordinary trade union activity would be impossible in Britain.[17] All persons who so act are protected, not only officials of trade unions. Much, therefore, turns on the definition of trade dispute and the Act of 1906 lays it down that

> the expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises.

Clearly, this definition is wide enough to protect disputes as to "rights" and "interests"—the British law of industrial conflict, in its statutory protection of liberty of collective action, makes no use of this distinction.

III.

Not unnaturally, with this peculiar background, I am led to ask rather sceptically after the real *function* of the distinction. In individual disputes, or disputes couched in the form of a conflict concerning rights inherent in the individual employment relationship, the function seems to me to be clear. Even so, we have seen that the recognition of a dispute as to individual rights rather than interests does not necessarily lead us, in the sphere of employment, to the conclusion that it ought to be adjudicated by the ordinary methods and machinery of a legal system. The need for special tribunals and special procedures involving conciliation breaks through at every point. But in regard to "collective" disputes, it seems to me more questionable whether the systems which purport to rely on this legalistic distinction will find it more or less valuable as their technology advances. Two questions may serve to prompt my conclusions.

[17] On the recent developments whereby the courts have evaded the protections of the statutes, see THE WORKER AND THE LAW, *op. cit.*, chap. 8.

(i) First, where a system leans heavily upon a concept of "rights" disputes, what are those persons *doing* who then actually decide the cases? For example, does the American grievance arbitrator really act so differently from the British arbitrator who is out to get the right answer for the parties? Is he not bound, in the end, to apply an industrial jurisprudence very different from the legalism of a Lord Halsbury and (as it were) to take in a conciliation stage tacitly on the way?

In a British voluntary arbitration in 1963 an employee was dismissed for refusing to obey a normal order, viz. refusal to load a lorry. One of the defenses put forward by the union was that by the time of the refusal of which the employer complained, the company's dispute with the employee was no longer on an individual basis but had merged with a general withdrawal of labor of which the employee's refusal was only one aspect, so that his refusal should have been dealt with by the employers on that basis and not singled out for special attention. The arbitrator upheld the argument. It is interesting to reflect what the courts of law would make of a defense to an action for breach of contract which consisted in saying that lots of other people were at the same time breaking similar contracts. But would an American arbitrator have decided differently?

A recent account of some arbitration cases concerning "subcontracting" and "Out of Unit Work Transfers" raises an allied point.[18] When one finds in these cases arbitrators whose critical point of reasoning includes phrases of the following kind, one pauses to reflect upon the nature of their decisions.

[18] See James Cross, *Value Judgments in Decision of Labor Arbitrators*, 21 Ind. and Lab. Rel. Rev. 55 (October 1967). For another study which supplements the point made here, see R. Salsberg, *The Arbitration of Christmas Bonuses* (1967) 13 I.L.R. Research p. 15. [*Additional Note:* For a useful survey of grievance arbitration see Research Paper No. 8 for the Royal Commission on Trade Unions and Employers' Associations, *Three Studies in Collective Bargaining*, chap. 1 by Professor J. Steiber, "Grievance Arbitration in the United States: An Analysis of its Functions and Effects" (1968, H.M.S.O.). Professor Steiber suggests that as arbitration matures the scope for "mediation" tends to be reduced. He also cites Professors Smith and Jones (52 Virginia Law Review 912) for the view that the Supreme Court's decisions, since its first and second "trilogy" of cases on grievance arbitration, have to some extent "contributed to industrial conflict rather than to its resolution"—a criticism which runs counter to a view advanced in this paper.]

A collective bargaining agreement . . . is generally not intended to restrict traditional and customary decisions by the company to maintain a fair margin of profit even though employment may be affected. . . .[19]

It was sufficient justification that a management innovation was in line with current business practice and in accordance with the prevailing ideology concerning the benefits of unrestricted technological change.[20]

Arbitrators who read into a collective agreement "traditional" management rights to maintain profits as against employment and "the prevailing ideology" as to technological change are clearly recognizing, in Dean Shulman's phrase, that the agreement is more than a contract. If arbitrators go so far, it would not be surprising to find that umpires, fed as it were into the lifeblood of a particular company's industrial affairs, went even further. In these respects the arbitrator, British or American style, is likely to go beyond the linguistic tests of a court theoretically bound not to "imply a term" unless both the parties would have said "Oh! of course" to the officious bystander.

At other times arbitrators have to go out of their way in some systems to *avoid* appearing legalistic. Take a voluntary arbitration conducted by Mr. Scamp in 1965 to interpret an agreement made between the railway unions and British Railways. In the course of his decision he says:

I have not attempted to make a legal interpretation of the agreement. It was not conceived, drafted or to be implemented by lawyers. It attempted to record the understanding of each of the parties as to what was contemplated. I have therefore directed my attention to what I conceive to be the spirit and intention of the agreement.

Yet at the end of the day one wonders whether his answer is so very different from that which a court would have reached. In some countries, especially Britain, the arbitrator seems to have a special need to go out of his way not to look like a lawyer. As Professor Aaron has said:

[19] Robinson Baking Co. 30 L.A. 493 (1957).
[20] Safeway Stores 42 L.A. 353 (1964).

The one thing we may be sure of is that, if the arbitrator is familiar with the facts of industrial life and understands that his function is creative as well as purely adjudicative, he will not evaluate the evidence solely on the basis of rigid standards of absolute proof or presumptions of innocence.[21]

But neither here nor even in the previous American cases can the arbitrator *ignore* the agreement. He, like the British Industrial Court, is able to inject his values to a lesser degree than a German labor court deciding whether a dismissal or a strike is justified as being "socially adequate." The arbitrator will rarely, in fact, go beyond what an adventurous judge might obtain by use of that well-tempered tool, the "implied term"; and when he does so, as in injecting the "prevailing ideology," he, like the joint negotiating council, or the labor court, (if all three are sensible) will *both* interpret the existing agreements *and* take account of the power relationship of the parties according to the prevailing social values that seem to secure a degree of consensus. He will aim for a *durable* result.

Why, after all, should we expect "rights" disputes, when they spring from collective labor agreements, to resemble in essential respects disputes about commercial contracts, even if we force them into a similar semantic mould? The collective labor contract is not the same kind of document as the commercial agreement, as Isadore Katz has said. "The collective bargaining agreement," he added "is at once a business compact, a code of relations and a treaty of peace." What he did not add, but perhaps should have added, is that it is also a code of relations under which it is not a commodity which is being sold but the labor of one man, or set of men, to another.

(ii) Second, then, in the continuous adjustment of relationships which necessarily takes place in modern employment, is it not often a matter of mere history or of choice or of taste, but rarely of logic, whether a conflict with a *collective* content is brought forth as one which concerns "rights"? Even in Germany, if workers claim that they have not been properly paid for overtime they *may* take the matter up in the works council; then, after

[21] B. Aaron, *Some Procedural Problems in Arbitration* (1957) 10 Vand. L.Rev. 733 p. 741.

negotiation with the employer, the parties may in certain cases apply for a board of settlement to arbitrate or mediate on the issue. It depends partly on how the argument is put. Yet the same factual situation could clearly end up in the labor court as a straightforward battle about "rights." In the United States, is there not more history than logic in the Railway Labor Acts? Disputes as to minor issues go to compulsory arbitration; major issues go, as interest questions, into negotiation.

In many such cases, however, major or minor, negotiation within an established practice will not be so very different in fact from adjudication by a tribunal which applies an industrial jurisprudence and attempts to conciliate. Both processes pay attention to agreed "rights." Both necessarily try to reach out beyond them for a solution for parties who have to go on living together. The rhetoric will differ more than the substance. No doubt the "reasoned elaboration" of a judicial judgment, as Julius Stone has called it, will always bear a particular, and to us lawyers a lovably familiar form. It will, as far as possible, have to take on the appearance of a syllogism. The arbitrator, and even more the joint negotiators, will usually use different language, but thereby they will take more open responsibility for their policy choices than is customary for, at any rate, the European judge.

But what Karl Llewellyn called the "steadying factors" in appellate law-making (those factors which allow a court to classify a flying-boat as either an aeroplane or a ship if it wishes, but deny it the right to dub it an automobile)—these will be matched by some "steadying factors" in the determination of conflict by non-judicial means. Where in interest disputes there is a sufficient consensus, sufficient agreement as to which arguments are relevant and which are not (whether it be past practice, job comparability, or the like), Viscount Simonds' simple dichotomy between the judicial and arbitral function breaks down, and even the function of negotiation is not wholly different. If there are no such agreed principles, of course, the conflict can only be one of "interest." And, of course, I do not wish to deny that there *is* a difference between an action brought by a worker for wages due and a claim by his union that his rate of overtime should be raised. But between the two there is no simple chasm. There is a spectrum of delicate color.

Many conflicts are carried on beneath the guise of one color when in fact the agreed principles of relevance could have led to their appearance under a slightly different hue.

Take the least legalistic event you can imagine in industrial life—a plant negotiation with a British shop steward about a lawful dismissal. McCarthy in his study cites this example:

> Departure from precedent can cause trouble, and one good example of this arose in one of the engineering firms studied by Coker and myself. There a departmental manager sacked a worker for throwing a sponge at a foreman, although in fact it missed him. A five day strike secured the re-instatement of the man concerned, and the basis of the steward's case was that three years earlier another man threw a sponge at a foreman which hit him. On that occasion the culprit was only suspended.[22]

The flavor of the argument from precedent is not unfamiliar to lawyers. The argument was, however, not about "rights" because of the form taken by our British machinery. Yet the matter, and even the conceptual mechanisms, were not so different from those of a German labor court faced with a charge of unjust dismissal or of a United States grievance arbitrator. (I have in mind especially a case in which the grievant engaged in "stubborn unswerving insistence on loudly whistling or singing to the known disturbance of the other employees and his supervisor," but it was held that dismissal was too harsh a penalty.) If it be said that the five-day strike is the feature which singles out the British system as defective, that may be so; but it must be added that workers who have achieved such strength in the power relations that are real life at the workplace are unlikely to relinquish their liberty of action because lawyers tell them the issue is really one about "rights" rather than "interests." Instinctively they will know what is the case, namely, that this language of "rights" is too often used as though it served as self-evident proof that workers must be prohibited from using some sanction which might otherwise be available to them during periods when there is apparent or supposed agreement concerning the principles of relevance to determine disputes. The language is no such proof.

[22] "Shop Stewards" Research Paper for Royal Commission No. 1 by W. E. J. McCarthy, p. 18.

Moreover, it is our own undue belief in our own law-talk which leads us lawyers sometimes to an attempt to settle collective labor disputes by inappropriate legal remedies—injunctions and damages to enforce "rights"— when what the industrial difficulties really disclose are the symptoms of a problem calling for conciliation, inquiry, and negotiation. To a British observer, then, the distinction between conflicts of rights and of interests seems to be of limited value in collective labor disputes. Unless such language is to be merely a method of curbing trade union strength, the arbitrator or investigator or labor court or voluntary negotiating body will have to work within both the realities of preexisting rights and the possibilities of future interests. As for individual grievances, the ways of legal adjudication have more to recommend them so long as we remember (a) that the rules will frequently present us with a choice of policies and (b) that our tribunal and its procedures must be adapted both to that fact and to the industrial character of the social problem presented for decision. The tribunal can use conciliation followed by adjudication; and it may be that the special problem of the arbitrator (in Britain *and* in America) is that he has to perform both tasks in one process. That may be another ground why he might do better not to give reasons.

In truth, what we in Britain may have to offer to this topic is the need to place as little emphasis as possible in industrial relations on the distinction which is my title. If that conclusion be thought too negative I can only defend it by appealing to the wisdom of the remark of Ross and Hartman: "It is a well established fact that collective bargaining does not thrive on a diet of principles."[28]

[28] CHANGING PATTERNS OF INDUSTRIAL CONFLICT (New York: Wiley, 1960), p. 174.