COMMENT

AN ANALYTICAL THEORY OF LABOUR ARBITRATION IN AUSTRALIA

I

Modern free society, emphasizing popular welfarism, has sought palliatives, preventatives, and finally remedies for industrial unrest. Of the many panacea contemplated, arbitration has been one of the most popular. Australasia, it is almost unnecessary to note, has led the world in this type of social experiment. This essay, which concerns the day-to-day operation of the Australian arbitration system, develops a hypothesis relating to the role of the public official in the arbitration process. Briefly, the intent is to present a general thesis summarizing the conclusions of several Australian industrial studies covering the period 1920-1950[1], to compare the thesis with a contemporary American discussion in a cognate area, and, finally, to consider some of the inherent implications.

The delicate question of the place for private organizations in democratic society is one which has long fascinated certain political theorists who are dissatisfied with what they term superficially abstract discussions of the sovereignty of the State or of the law. For instance, Otto von Gierke noted the issue in 1902:[2]

> Jurisprudence has to do with social institutions only insofar as they are active in law, and must, therefore, necessarily proceed in a one-sided fashion. For legal activity is only one side of collective life, and by no means the important side. Jurisprudence must remain conscious of this one-sidedness. It must also bear in mind that the active powers of the social organism come to light beyond law in all movements of force or culture and realize their most powerful effects independently of law, or even in opposition to law.

A splendid opportunity for observation is afforded by the almost half-century history of the federal Arbitration System, where public authorities representing a State, limited in powers, and an inarticulate public have attempted to deal with employers' associations and trade unions. It is not necessary to review the history of the legislative background of the system, nor even to investigate the judicial peccadillos of Arbitration and High Court claims for legitimate jurisdiction, for the interested student to realize how difficult has been the task of the public authorities. They, dressed in the robes of the bench, have had to yield a product which is largely enforceable only with the co-operation of the interested litigants.

[1] See M. Perlman, *Judges in Industry; The Role of the Australian Arbitration Court* (1953).

[2] *Das Wesen der menschlichen Verbande*, inaugural address upon assuming *Rektorat* at the University of Berlin, October 15, 1902: quoted from John D. Lewis, "The *Genossenschaft*-Theory of Otto von Gierke" (1935) 25 *Univ. Wisconsin Studies in Soc. Sci. and Hist.* 156.

Fortunately, the disputants have some observable immediate needs and do not approach the arbitration tribunals with ungovernable and inarticulate hostility. And, if the governmental officials are able to formulate awards which, in one way or another, take into account the parties' needs, the problem of compliance is considerably minimized. Thus, the basis of the argument of this essay is that the parties' dependence upon the public representatives (as seen in the judges and later in the conciliation commissioners) is the key to the relatively successful operation of the system. Implied is the assertion that it is not alone respect for the law, but imperative need, that brings the organic social groups of employers and employees to formal litigation.

What are the causes of such a need? Obviously a disproportionately strong or unbalanced bargaining relationship makes the weaker side seek out the public's representatives as a protector. Similarly, a distaste for the chaotic state of chronic struggle leads the parties to a willingness to settle for a system intended to bring peace[3], although how much a particular truce agreement is desired depends inevitably upon underlying economic and political factors. Another, perhaps more complicated, cause is to be found within the "personality" of the group (*Genossenschaft*), or "group-will". For in their development groups often reach out and absorb so many members that factions develop. As a result the organic group finds itself incapable of peacefully resolving internal conflict. In these instances, if the larger unit is to survive, either an internal bargaining compromise must be developed or an appeal to some external authority for settlement must be made. Yet in the first instance general dissatisfaction can develop as logically as general agreement: in the latter, a poorly engineered solution is possible.

Hence it follows that the business of the arbitrator facing two groups of litigants is not only to come forth with a solution to the immediate problem brought by them to him, but also, if possible, to handle it in such a way that it is applicable to their individual needs. In one sense, then, the terms of the settlement must be within the range of expectation.[4] Equally as important, however, is the process of or procedure in achieving settlement, since a set of terms may become unsatisfactory if in its presentation it is compromised.[5]

II

The Australian arbitration system has long intrigued American observers.[6] The lack of effective punitive powers at the Court's disposal suggests the existence of another source of strength. It proceeds logically from the foregoing discussion that this strength is essentially associated with the pattern or role of the judges and conciliation commissioners in fulfilling the demands of the parties. For instance, where a union is composed of two major factions, one wanting long weekly working hours because its members are paid by the piece (tally) and live away from home, and the other wanting a shorter working week because its members are paid by time units (weekly wage), the case presented to the authority is naturally rather ambiguously formulated. Similarly, where there is great fear of "cutthroat" competition (sweating), the employers will prefer a strong disciplinary authority, even though it means a diminution of their own prerogatives.[7] Conversely, where each party is closely knit, the need for the

[3] According to Thomas Hobbes this is the first law of nature (*Leviathan* pt. i, c. xiv).

[4] *Cf.* A. C. Pigou, *The Economics of Welfare* (4 ed.) 452-53.

[5] E.g., ends and means are, of necessity, related. The theory of economic *tatonnements* is a too often neglected area of study.

[6] V. H. Clark, *The Labor Movement in Australasia* (1906); M. B. Hammand, "Wage Boards in Australia" (1915) 29 *Q.J. of Economics*; Carter Goodrich, "The Australian and American Labour Movements" (1928) 4 *Economic Record* 193.

[7] See my *Judges in Industry* for an examination of the industrial alignments in the pastoral and stevedoring industries, cc. iii and v. Essentially the important factors are the elasticity of the demand curve, the short run mobility of the factors of production (particularly labor), and the economic geographic organization of the buyers' market.

stabilizing interference of the public authority, as well as the tolerance of him, is correspondingly diminished. Thus in the case of a relatively compact entity, like a craft-oriented union[8], or one with a concise economic program easily evident to the rank and file, or an employers' federation in a "horizontally-organized" industry, the role of governmental experts is less creative in scope.

The judges of the Arbitration Court have not been slow to respond to the calls for assistance. Some, like Mr. Justice Higgins, have sought to extend the advantages of planning or social engineering to the provinces of industrial relations. Higgins, J., had included in the original Arbitration Act a provision for the establishment of industrial common rules applicable to all parties which his court thought to be interested. Although this provision was invalidated by the High Court[9], his intent remains on the record. In another instance, he implied that it was "right" for him to determine that the differentials for the skilled be cut in order to transfer income to the unskilled and thereby permit a living wage for all.[10] This type of reasoning or conception of his role appears to have had a "legislative" flavour, and the judge is tempted to write into the "law" by enlarging the realm of judicial notice and by summoning evidence on his own motion to adopt his own set of ethical commitments.[11] One student of the Court's policies felt that judges like Higgins have tried to put themselves in the vanguard of social reforms to the "grievous embarrassment of the country".[12]

Generally we can note on the part of many other judges, too, a willingness to set standards for industry. From their pens and judgments have flowed a widening series of judicially-legislated decrees, including the principles of the basic wage, of quarterly adjustments, of annual leave with pay, and of long service leave. And while it is true that s. 51, pl. 35 of the Constitution prevents the Parliament from handling directly these topics, it does not follow, as so many Australians imagine, that such matters could not have been handled by direct negotiation between the employers and the unions. What has developed is a belief that the judges and commissioners should *administer* industry, that they must for reasons of social efficiency assume a legislative mantle, or, in the words of one judge, they must function as the "economic dictators" of Australia.[13] Thus, there has developed an approach to the arbitration process — a theory of the role of judge-legislator which, for want of a better term, we call "*administrative* arbitration".[14] It predicates parties needing judges with figuratively strong hands and keenly imaginative eyes. "It is the principal duty of this Court," commented Drake-Brockman, J., in 1935[15], "to prevent and settle industrial disputes. This Court is only in a minor degree a court of law. Its legal functions are practically limited to the interpretation and enforcement of its own awards. Its main activities are directed to the making of awards, which is a legislative function. . . . "

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[8] *Ibid.* c. iv. Reference is to the Amalgamated Engineering Union.

[9] *Whybrow's Case* (1910) 11 C.L.R. 311, 16 A.L.R. 513.

[10] 3 C. Arb. R. at 32.

[11] "Give (the workers) relief from their materialistic anxiety; give them reasonable certainty that their essential material needs will be met by honest work, and you release infinite stores of human energy for higher efforts, for nobler ideals. . . . " (from H. B. Higgins, *A New Province of Law and Order* (1923) 37-38). Also, " . . . but in order that the Court may effectually carry out its primary program of settling and preventing industrial disputes, it has to provide for the just treatment of employees, and it has to find and to state what it thinks to be the proper standards for such treatment. The Court (however) has nothing to do with theories for the reconstruction of society on some new economic basis — for example, the ending of the wage system. . . . " from H. B. Higgins, "'The Australian Commonwealth Court of Conciliation and Arbitration" 1924 speech at Oxford University and privately reprinted (Melbourne, 1925).

[12] M. A. Rankin, *Arbitration Principles and the Industrial Court* (1931).

[13] See *Sydney Morning Herald*, October 17, 1947.

[14] We use the adjective, "administrative", in order to carry the connotation of "administrative law" — by it we also imply something of a legislative nature.

[15] *Australian Rlys. Union* v. *Victoria Rlys. Commissioners* (1935) 34 C. Arb. R. 15.

III

Unlike Higgins, J., a few judges have resisted the forces which compelled them into a quasi-legislative (*administrative*) function. Their product, although still "unbound" by normal judicial standards, is, compared with the *administrative* variety of arbitration, constrained; they have tried to narrow the allowable area of judicial notice and have restrained the temptation to call for and introduce evidence on their own motion. Instead, they have left the initiative to the litigants, and where the parties have been able to present adequately their positions, the end-product has been generally acceptable. For instance, in one case O'Mara, J., in delivering judgment noted that he personally disagreed with the conclusion that the evidence presented to him suggested, but that he felt bound to abide by it.[16]

This approach to the arbitration process tends to be devoid of articulated social goals and is, by way of contrast, thereby somewhat less inspirational. As a young man Kelly, C.J., once penned his sentiments on this topic[17]:

> As I conceive them, there is in the function of an Industrial Court no room for experiments such as may originate in the realm of politics or in the fertile field of sociological ideals. The Court is constituted to remedy injustice. The injustice must be proved in terms of facts and of the recognized rules of human like and fair dealing. These will, of course, vary as civilization progresses; but until they are accepted by the community as part of the regulative code for its transactions, they must be treated by the Court as not having emerged from the regions of social idealism. The Court has no right to assume the role of reformer. Having discovered an injustice, however, it is bound to devise a remedy. But the remedy should be sufficient for its purpose and nothing more, for further interference by the Court is unwarranted and, in my view, beyond the limit of its jurisdiction.

And in yet another instance, Dethridge, C.J., noted that his judgment was not to be considered the end of the matter, and implied that the issue could be resolved on bases other than his determination.[18]

This second theory of arbitration we term "*autonomous approach*", since it implies that the relationship between the parties and the system is essentially one of independence. As a political philosophy, it resembles the views of James Madison in the *Tenth Federalist Paper*. It seems to favor direct negotiation between the parties at the expense of a controlled or planned relationship.[19]

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[16] "The Unions have asked for the rescission of the provision which enables employers to take apprentices in the trades of mechanical engineer (etc.) . . . in the proportion of one to one. Their advocate, however, concedes that some dispensation from the proportions of one to three or one to two might be allowed and I have redrawn the clause in a way which conforms to his suggestion. *I would have limited the proportion as at present, but I have deferred to (his) suggestion.* . . . " 57 C. Arb. R. at 280 (italics added).

[17] *Public School Teachers' Case* (1934) 13 S.A. Ind. R. 18.

[18] "This Court is not to be influenced by political considerations, but it cannot ignore economic conditions merely because they have been created, partly or wholly, by political or governmental action, even though that action might be considered by some people to have been ill-advised or too far-reaching. . . . In any event, this Court cannot prevent a State Government or Legislature from continuing to grant a 44-hour week to its own employees, or from requiring it to be granted by all public bodies under its control, or by persons desiring to make contracts with such Government or public bodies involving the employment of workers. This Court has not power to prevent any person or body from granting to his or its own employees the 44-hour week, nor has it any power to prevent any person or body from requiring a condition in contracts that the contractor shall grant the 44-hour week . . . " *Amalgamated Engineering Union* v. *Alderdice & Co.* (1927) 24 C. Arb. R. 755, 789.

[19] It should be clear that not all industries even in the United States are in a strong enough economic condition to weather the vicissitudes of "unassisted" collective bargaining. By and large the partisans of group autonomy and *autonomous* arbitration assume sufficient economic resiliency to permit a relatively great degree of unfettered bargaining. In any case these practitioners tend to refrain from direct intervention until the parties have clearly formulated their positions and realized that a bi-partite developed compromise is not possible.

In this discussion we have sought to avoid the terminology of "pro- and anti-labor" officials: obviously, it follows, *a priori*, that the official who says to a relatively weak or poorly organized union, "it is essentially up to you", has the effect *in the short run*, at least, of being unfriendly. It does not follow that such is the long-run case, although admittedly account must be taken of economic and political considerations. The major point, however, has been to discuss the arbitration system in the light of long run developments and to see its implications in terms of the growth and behaviour of responsible social groups. Before, however, turning to this topic, it will be useful to consider a discussion of a cognate American question.

IV

In the United States collective bargaining is not as anarchistic as many non-Americans imagine. Not only has Congress, and its administrative agency, the National Labor Relations Board, defined public policy on many points, but long-term relationships between employers and unions have developed patterns of industrial jurisprudence. Generally, these patterns are found within the negotiated joint agreements, as well as with the unions' working rules and the policies unilaterally determined by the employers.

The joint agreements or collective contracts are usually negotiated on a one- to five-year basis. Within the life of the contracts questions of interpretation arise, which are often eventually settled by recourse to a formal, although private, arbitration process. In addition, the contracts often provide for the eventual arbitration of individual worker grievances directed at company actions. And, in a few instances, the contract provides for arbitration of unresolved issues in the preparation of new contracts.[20]

Functionally American labor arbitration falls into two sets of categories: first, as already noted, there is arbitration under existing contracts as differentiated from the arbitration of new contracts. And, second, there is arbitration by a semi-permanent tribunal where the same individual or individuals handle all cases until dissatisfaction or other disruption develops. Compared with these "permanently umpired" systems are those of an *ad hoc* nature, involving a new tribunal for each individual or set of cases. The first arrangement in the umpired industries has gained considerable popularity where there is fear of protracted economic struggle involving bankruptcy or where considerable litigation has developed or threatened to develop over the course of the life of some previous contract.

Arbitrators are usually drawn from the ranks of lawyers specializing in labor law, from amongst economists or other academicians, or occasionally from governmental employees. The preponderant number of cases are prepared and presented by legally-trained advocates. The reliance on the legal profession has often been the cause of charges of excessive legalism. This feeling has been accentuated by the formality of proceedings which, particularly in cases of *ad hoc* procedure, takes place. In fact, there has been a spate of literature on the proper procedural role of labor relations arbitrators.[21] And while this

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The *autonomous*-minded official not only views his positive role as a substitute for direct bi-partite negotiation, but above all he limits his participation to ruling on the evidence prepared for his notice by the litigants themselves. By and large be is reluctant to base any part of his decision on his own personal knowledge of the situation; if the parties want something to be considered, it is their responsibility to point it out to him.

[20] This is the case in some of the garment trades where the unions dominate the scene and where union leaders have used the arbitration system as an entering wedge into the production side of the industry. Cf. S. Perlman, "Jewish-American Unionism, Its Birth Pangs and Contributions to the General American Labor Movement", 31 *American Jewish Historical Society* (1952), 311 ff.

[21] E.g. G. W. Taylor, "Effectuating the Labor Contract Through Arbitration", paper presented to the National Academy of Arbitrators, Washington, D.C., January 14, 1949; and an opposing view, J. Noble Braden, "Current Problems in Labor-Management Arbitra-

question stems from disagreement over procedural techniques, it relates basically to the level of intervention desired or even tolerated by the parties.

Two American arbitrators, dealing in different segments of "big" industry, provide students with philosophical formulations that, when seen against the relevant industrial backgrounds, illustrate excellently the dichotomy developed above. In 1940 United States Senator Wayne L. Morse (then a professor of law at the University of Oregon) held the "permanent", although part-time, position of arbitrator in the west coast longshore (stevedoring) industry. The litigating parties consisted of a militant, somewhat embittered, union, headed by the ubiquitous Harry Bridges, and an employers' association that had with obvious reluctance been forced to grant recognition and concessions to the union. The leaders of the two groups reflected the basic social antagonisms. In short, it was not the type of situation conducive to "a meeting of the minds".[22] Thus, it is not surprising to find Professor Morse having expressed a typically *autonomous*-view[23]:

> My chief criticism of labor arbitration as it functions in many cases is that too few arbitrators have grasped the full significance of arbitration as a judicial process. Too many arbitrators still take judicial notice of interests and facts not established in the record of the hearings. Too many arbitrators still try to apply the principle of compromise in their decisions. I think I understand their good intentions and motives, and their desire to please both sides, at least a little bit. But when they yield to the principle of compromise they wrong not only both parties to the dispute, but they impair the effectiveness of arbitration as a judicial method of settling labor disputes. . . .
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> I am satisfied that if we followed a less technical and formal system of procedure in our cases, it would be impossible to confine the arbitrator's decision to the record made by the parties. As I have indicated before, I am convinced that there is but one way to try a case on its merits, and that is to try it on the basis of the record made before the arbitrator. That record must be an orderly record. The parties must be guaranteed that only relevant and material evidence will go into the record. They must be protected in their right to cross-examine those who submit evidence against them. They must be given an opportunity to present their cases in an orderly fashion, and an opportunity to answer their opponent's case in an orderly fashion. Such guarantees involve both substantive and procedural rights. In fact, I know of no way of protecting the parties in respect to such rights, except in accordance with the generally accepted rule of court procedure, which we apply in all of the arbitration cases under the longshore contract.

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tion" (1951) 6 Arb. J. (N.S.) 91 ff. Professor Taylor (Wharton School, University of Pennsylvania) suggested *inter alia* that arbitration awards inevitably shape the relationships between the parties, that the arbitrator must fashion his award so that it falls "within the area of expectation", that, if necessary, the arbitrator should "sound out" the parties (employ mediatory tactics), and that the arbitration process is, in reality, no more and no less than an opportunity to bring about a meeting of the minds. Dr. Taylor relied on his extensive and successful experience as a "permanent" arbitrator, and his long service on governmental labor boards. Mr. Braden (a principal figure in the private American Arbitration Association), along with several others, vigorously opposed the *Taylor*-view, and held that it virtually stripped the arbitrator of his claim to rigorous impartiality. The American Arbitration Association held a conference on March 1, 1949, in New York City to discuss the differing concepts. A summary of these proceedings was prepared by J. Noble Braden, "The Functions of the Arbitrator in Labor-Management Disputes" (1949) 4 Arb. J. (N.S.). While the proponents of the two views undoubtedly understand each other, the "great debate" continues.

[22] *Cf.* the classical American anecdote of the union representative who said: "We don't know what we're going to ask, but it will be one hell of a lot." To which the employers' representative is said to have replied, "Regardless of what you ask, you won't get that much."

[23] W. L. Morse, "The Scope and Limitations of the Arbitration Process in Labor Disputes", *Proceedings*, International Longshoremen's & Warehousemen's Union, Third Annual Convention, April 6, 1940. Quoted in E. W. Bakke and C. Kerr, *Unions, Management, and the Public* (1948).

> An arbitrator is bound by the language of a contract, and he has no right to reform or amend it. . . .

While it seems an eminently fair judgment to conclude that this view, analogous to that of Dethridge, C.J., Kelly, C.J., or O'Mara, J., was intended to protect the arbitrator by clothing him in the socially recognized robes of impartial judicial propriety, what is more significant is the understanding of the background and its relationship to a particular socio-political philosophy.

A second American illustration involves the views of Mr. Harry Shulman, Sterling Professor of Law at Yale University. Professor Shulman has been for many years umpire of the Ford Motor Company - United Automobile Workers (C.I.O.) contract. The parties, in this instance, concluded their first joint agreement in 1941, when the Company did a sudden *volte-face* and recognized the union as the bargaining agent for its employees. At the time all of the important company policies were determined by the Founder-President, Henry Ford, who demanded and received unquestioning obedience from his subordinate officials. Thus, when the shift was made, it was complete and the "new order" had many appearances of starting off *tabula rasa*. The inference is that any company official who thwarted Professor Shulman in the latter's necessary duties was seeking *economic decapitation* from the head office.

Also, in this instance, the union has had severe factional disturbances, particularly evident in the giant (80,000 member) River Rouge (Detroit) Ford local (branch). Many of these union issues were related to "pure" union politics (including a series of internal political squabbles), but others related to alleged racketeering, and such festering sores as the (anti-Negro) racial prejudices of some of the rank and file. Thus, the union leadership, too, has generally been most willing to "co-operate fully" with the umpire.

In the light of this background, it is not surprising to find that the parties looked for substantive, as well as procedural, suggestions from the arbitrator. Their attitude found its reflection in Professor Shulman's views:

> Some speak of the 'grievance procedure', with beguiling metaphor, as the judicial branch of the industrial government. Its function is thus thought of as that of ascertaining and enforcing rights and duties under the collective agreement. To be sure, that is one function. But it is a subordinate one. The primary function of the grievance procedure is to ease and advance the co-operation of the parties in their common enterprise—to maintain the continuity of joint endeavor which the collective agreement only initiates.
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> The grievance may have to be denied, of course. But the denial will sit better and be more conducive to future co-operation if it is made after honest and serious consideration, and if it is explained in a manner designed to elicit sympathetic understanding rather than to provoke animosity by naked insistence on 'legal right' or 'prerogative'.[24]

Although Professor Shulman has elsewhere generalized his view[25], this writer still holds that most basic to the question are the economic and political factors that condition the parties' behaviour.

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[24] H. Shulman, "The Settlement of Labor Disputes", 4 *The Record of the Association of the Bar of the City of New York*, (1949) 17, 19. Italics added.

[25] *Ibid.*, p. 22: "With this conception of arbitration, questions as to whether an arbitrator should mediate or 'socialize' with the parties are idle talk. Where the situation permits it, he will do both; where the situation does not permit, either because of the nature of the case or the character of the parties, he must do neither. As previously stated, there are cases which present an issue for determination not symptomatic of any wider trouble not pregnant with serious implications for the parties' future whichever way the decision goes. The decision may reflect on the arbitrator's intelligence and be quite displeasing to the losing party, but it relates to a single instance and will not shake the relationship. Attempts at mediation in such a case, particularly in *ad hoc* arbitration, is quite undesirable. It reflects upon the arbitrator's courage. It wastes the parties' time. And it unduly glorifiies compromise over insistence upon the right."

The relevance of including these American examples goes beyond a mere comparison of mutual national experiences. While showing a similar problem facing an industrial society, purportedly pledged to a system of "free" collective bargaining, and one where the state takes a vital role, the American experiences again illustrate that the key variables in the industrial relations picture are the needs of the parties. The socio-political philosophies of the arbitrators must find sympathetic responses there if the systems are to work. One implication is that the system must seek out the right man, but that a good man may not be able to work in all systems.

V

Having discussed the existence (meaning) of a procedural dichotomy, with substantive effects, in the matter of labor arbitration, as well as its probable cause, the final step is to speculate a little. For instance, if the needs of the parties are the key variables, can an arbitrator satisfy the same two litigants over time during which their needs, simultaneously, change? Or what happens if one desired the *administrative* approach, and the other the *autonomous*? In the first case, the answer undoubtedly lies not only in the intellectual agility of the arbitrator, but in the degree of extremeness of the litigants' and his own views. For it is only proper to note that our distinction has been developed in polarized form — the weakness of any theoretical discussion.

When the parties want the "judge" to approach the problem in opposing ways the need for agility is even more increased. In fact, it may be so great that no one can fill the role. The history of the Arbitration System's unhappy experiences in the Australian coal and stevedoring industries illustrates this conclusion only too vividly.[26]

Another aspect to be considered is the implication that this province of investigation and control belongs not in the juristic realm, but in the area of politics or political economy. Perhaps that is why the bench has since 1926 been occupied by what in American is termed "practitioners of labor law" (in contrast to general or the other more traditional types of legal practices). Similarly in the United States, the non-legal talent in the area of industrial relations tends to be specialists in *empirica*, rather than their more rigidly abstract (deductive) colleagues. It is possibly not enough, however, to say that the Arbitration Court really is not a court, because that implies a more static concept of the juridical process than need be taken. Yet, if it is not a court (in the usual narrow sense), what is it?

Obviously it is a quasi-juridical agency operating in the twilight zone between the purely legislative and purely judicial processes. It is the agency, set up on the frontier of a system of social control, charged with "civilizing" what Mr. Justice Higgins so nicely hailed as a "new province of law and order". Yet, as it has felt its way along, is it possible that it has inhibited more progress than the order, which it claims to have initiated, is worth? Many critics of the Court so believe. They argue that the judges have, in the hope of "civilizing" the entrepreneur, seriously diminished his vitality. Others, like the late Maurice Blackburn, think that the System has made Australian unions mere "agents of the state", and reduced thereby their usefulness to the membership.[27] Another view is that the Court has not destroyed the stamina of the entrepreneurial "class" or of the trade unions, but has merely filled in a void, created by economic factors (shortage of water resources, available capital, and high transportation costs), or by the irremedial exhaustion of two major wars, or by

[26] See M. Perlman, *op. cit.* c. v; and an, as yet, unpublished manuscript of Professor K. F. Walker, Professor at University of Western Australia (Perth). (The latter manuscript has been submitted as a doctoral dissertation at the Harvard University, Cambridge, Massachusetts, U.S.A., and contains *inter alia* a detailed history of industrial relations in the coal industry.)

[27] M. Blackburn, *Trade Unionism: Its Operation Under Australian Law* (1950).

misguided social policies *vis-a-vis* immigration, etc. Thus, it is said, if Australia is not fulfilling her potential it is not due to the Court or the System, but to more basic factors. This writer does not, for the most part, share these critical views; having been educated largely in American schools, he believes that the Australian national development is little short of phenomenal, when compared to the development of other one-time colonial areas. This debate over the effects of the Arbitration System, while containing many aspects of validity, is merely the local adaptation of the endless controversy, "order v. progress". At the moment it is possible that the Australian entrepeneur needs something of a shot in the arm, a condition which is said to prevail in many British countries. Times do change, however.

The barons, bargaining collectively at Runnymede, are said to have forced on John Lackland the innovation of personal property rights. It took the "law" several centuries to digest the new concept: it is debatable whether some political theorists have absorbed it yet, which is, perhaps, just as well, since the change continues even now. The individual rights which the barons sought are analogous to the collective rights or type of hegemony sought currently by the unions. The implication is that the "new" area of "collective" rights remains relatively uncharted.

One added embarrassment is that while thoughtful individuals can indicate their desires and long-run needs, that process is not simple for a group. In spite of the willingness of some over-enthusiastic members to synthesize articulately these demands, the latter often remain on an effective level, relatively undefined. Here the historical record of tactics employed, invoking intra- and inter-group negotiations, as well as the long relationships with governmental agencies, can be most helpful in synthesizing the group's strategy. It is undoubtedly in these reports that the answer to queries about group-will (*Genossenschaft*) lie, as well as an excellent evaluation of conscious institutional controls, like the Arbitration System. In other words, studies in sociological jurisprudence may stem from an historical estimate of the relation of group tactics to group strategy. "But whether one embraces a one-sided cult of hero-worship or revels in a one-sided collective picture of history," wrote von Gierke[28], "still one can never overlook the fact of a continual interaction between the two factors. At all events, the community is something active."

MARK PERLMAN *

A "CARTESIAN TURN" IN THE THEORY OF LAW

I

In seeking to understand the law's relation to the values cherished by the community, and to the facts of community life, the sociology of law is designed to help man to understand and therefore better to control the social realities confronting him. The importance of this approach is manifest in theoretical and practical objectives of legal sociology and the important legislative and judicial changes which have already come about under its influence.[1] It is the more interesting that the very possibility of the sociological study of law still remains a matter of debate. In part, resistance to its recognition has been due to intel-

[28] *Op. cit.*, p. 149.

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[1] For the scope and objectives of the legal sociology (sociological jurisprudence) see J. Stone, *The Province and Function of Law* (1946) 31, 381, 388, 406-12 (here cited as "Stone, *Province*"). For the terminological problem of the discipline see *infra* n. 7.