GRIEVANCE ARBITRATION AND CONFLICT REGULATION*

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Industrial conflict, when viewed as an incompatibility of objectives in forming or operating the employment relationship, is a common occurence which can take many forms. Some are initiated by individual workers, others by groups of workers and yet others by the employer. Despite this diversity, much of the effort to regulate conflict centres on only one form, namely, the strike. Very often it consists of providing alternatives to the strike. An extreme example is New Zealand where legislation has provided conciliation and arbitration and prohibited strikes. In the United States, the parties to most private sector labour contracts have specified a grievance procedure, capped by arbitration, intended to take the place of the strike in conflicts over ''rights''.

The distinction between rights and interests is long established in the U.S. but not in New Zealand. It entered New Zealand industrial relations only in 1973 with the passsage of the Industrial Relations Act. Another move closer to the American system now seems possible with the considerable interest presently being shown by the New Zealand government in grievance arbitration.[1] This paper explores some conceptual and practical aspects of grievance arbitration, partly in an effort to establish its chances of ''success'' as a conflict regulator in the New Zealand environment.

Nature of Rights Dispute.

In explaining why the parties in the U.S. have generally accepted grievance arbitration (and its preliminary procedure) in preference to the strike or other types of conflict regulation, one might ask whether there is something in the nature of the rights dispute which makes it peculiarly suited to this form of regulation. The dispute of rights theoretically is over the interpretation or application of an existing agreement. As such it is seen to involve definite standards or criteria which can provide the basis for an arbitrated settlement. But that such disputes exist suggests that the criteria are less than definite, or at least less than unambiguous. Indeed, they are indicative of the different perspectives of the parties which need not necessarily converge as a result of arbitration. Should they fail to converge, one party is likely to be happier than the other with the award so that mutual acceptance implies a more general acceptance of the procedure itself.

Of course, in practice some criteria can be provided to arbitrators in disputes of interest although they may be less than definitive.[2] Moreover, in practice the

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1. The procedures for settling rights disputes outlined in the 1973 Act differ in important respects from the American system of grievance arbitration.
2. See Irving Bernstein, **Arbitration of Wages** (University of California Press, Berkeley and Los Angeles, 1954).

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arbitrator is not merely applying the rules of an existing contract. Frequently, the matter in dispute is not covered by the contract so that the arbitrator makes a judgement on "custom and practice" in a process of "law formulation".[3] Furthermore, in interpreting the contract, the arbitrator almost necessarily modifies it.[4] He may even make or complete an agreement by ruling on intentionally ambiguous language.[5] Such considerations led Brown to conclude that the law formulation/law application characterization of interest and rights disputes "is of little analytical value for . . . determining the appropriateness of arbitration for either task".[6]

A related argument comes close to denying that a rights dispute is a conflict at all. In again emphasizing the existence of jointly agreed principles, it portrays the grievance procedure as a search process through which the parties together establish or assert the common principle applicable to a particular situation.[7] But it does not logically suggest that rights disputes are therefore more amenable to arbitration than interest disputes. Rather, as Chamberlain points out, it suggests that arbitration is unnecessary "for even without it employer and union could approach disputes under an agreement in the spirit appropriate to their settlement".[8] The existence of arbitration attests to the unsoundess of the argument. The grievance procedure is likely to contain elements of joint search and of bargaining, just as is the negotiaiton process in determining new rules (although the mixture may differ). In essence, a dispute irrespective of its subject is, in our terms, a conflict. An incompatibility in the objectives or potential positions of the parties exists in both disputes of rights and of interest.

Efficiency as a Regulator

Another possible explanation of the acceptance of grievance arbitration may lie in its superiority over other conflict regulators and particularly over the strike.[9] Strikes are said to be a costly way of producing settlement by comparison with arbitration.[10] The argument's appeal, however, is commonsensical rather than empirical. Data necessary for testing are not available, largely because of measurement problems. The actual (as opposed to apparent) economic effect of the strike is difficult to estimate precisely. Effects flow from both the action itself and from the terms of settlement and may be positive (a benefit) or negative (a cost).[11] Establishing the overall economic effect of arbitration may also be difficult.

Uncritical acceptance of the superiority of arbitration is even more difficult when its alleged advantages and disadvantages in disputes of interest are con-

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3. See Donald J.M. Brown, **Interest Arbitration** (Study No. 18, Canadian Task Force on Labour Relations, Information Canada, Ottawa, 1970) p. 7.
4. See Harold W. Davey, **Contemporary Collective Bargaining** (Prentice-Hall, Englewood Cliffs, N.J. 3rd Edn 1972) p. 170 and F.A. O'Connell, **What's Wrong With Labor Arbitration?** (National Association of Manufacturers Monograph, New York, undated).
5. See Carl Stevens, "The Analytics of Voluntary Arbitration: Contract Disputes", **Industrial Relations**, Vol. 7, Oct. 1967, p. 69.
6. Brown, *op cit.*, p 6.
7. See Fred Witney, **The Collective Bargaining Agreement: Its Negotiation and Administration** (Report No. 25, Indiana University School of Business Bureau for Business Research, 1957) pp. 112-133.
8. Neil W. Chamberlain, **Collective Bargaining** McGraw-Hill, New York, 1951) p. 99.
9. The strike can itself be viewed as a conflict regulator in that it is initiated to produce a settlement, albeit one intended to be different from that which would otherwise occur.
10. The comparison is seldom extended to other third-party techniques such as mediation.
11. See Don J. Turkington, **The Economic Effects of Industrial Conflict** (Occasional Paper in Industrial Relations No. 19, Victoria University of Wellington, 1976).

sidered. In the U.S. there is a fairly general aversion to arbitration and a preference for the strike in the context of an impasse in bargaining over interests.[12] One argument against interest arbitration is that it involves an ''outsider'' making rules. In particular, the parties are said to be reluctant to have an outsider determine the conditions of employment,[13] especially if in all probability he is ''inexpert''.[14] Moreover, interest arbitration may promote extreme positions in negotiations rather than compromise (the ''chilling effect''); and produce continued or increased reliance on it in future negotiations (the ''narcotic effect'') or, in contrast, lose its effectiveness as unions or employers become aware of its shortcomings and attempt to circumvent it by using other tactics (the ''half-life effect'').[15] The strike, on the other hand, is seen to produce compromise and so mutually acceptable agreements;[16] to maintain ''free'' collective bargaining and the opportunity for the parties to ''work out their own salvation''[17] (which presumably is again desirable because they will accept responsibility for something of their own creation); and to give the workers emotional release and so have a cathartic effect.[18]

Without considering the validity of these arguments, several appear applicable to rights disputes. The grievance arbitrator is an outsider who may be inexpert; his potential involvement may promote extreme positions in the grievance procedure and so on. Equally, the strike may promote compromise and have a cathartic effect among other things. To dismiss or downgrade these possibilities because of the existence of a written contract is, as our earlier analysis suggests, to strain credibility. We, like Stevens, are led to ''wonder whether there is not, prima facie at least, a contradiction in the parties' contrasting attitudes towards voluntary arbitration of grievances, on the one hand, (and) the arbitration of new agreements, on the other''.[19]

U.S. History and Institutions

If the logic of rights disputes and the relative efficiency of grievance arbitration do not appear convincing explanations of its widespread acceptance, where then does the explanation lie? A thorough analysis of the history and institutions of the United States is likely to produce the answer. This is obviously not the place for such an analysis but some suggestions are in order. Unionism in the U.S., unlike in some countries, did not develop under a panoply of supportive legislation. Rather, gains were achieved through struggle. This was no more so than in the garment and anthracite coal industres, where the forcing of a bargaining relationship led to the founding of much publicized grievance procedures.[20] These early twentieth-century developments provided an historical basis for the acceptance of grievance arbitration, particularly for unions. This process was hastened through the passage of the National Labour Relations

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12. See, for example, Witney, *op cit.*, p. 114.
13. *Ibid*, pp. 114-115.
14. See Neil W. Chamberlain, ''Strikes in Contemporary Context'', **Industrial and Labor Relations Review**, Vol. 20 July 1967, p. 611.
15. John C. Anderson and Thomas A. Kochan, ''Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process'', **Industrial and Labor Relations Review**, Vol. 30, April 1977, pp. 283-301.
16. See George W. Taylor, ''Public Employment: Strikes or Procedures'', **Industrial and Labor Relations Review**, Vol. 20, July 1967, p. 623.
17. See Chamberlain, ''Strikes in Contemporary Context'', p. 612.
18. *Ibid.*, p. 614.
19. Stevens, *op cit.*, p. 69. The insert has been added.
20. See Chamberlain, **Collective Bargaining**, p. 100

Act, 1935 which promoted collective bargaining, the unionization of the mass-production industries in the late thirties[21] and the encouragement of the War Labour Board in World War II.[22]

Experience also gradually convinced managements of its value. The promise of continued production was especially appealing given the existence of unions and of collective bargaining. Indeed, in the 1950's managements used their not inconsiderable power to force adherence to the grievance procedure. In this their interests coincided with those of the national unions which, in Reynolds' words, "had never sanctioned the unofficial tactics of their more exuberant local members, and now took steps to tighten internal union discipline".[23] Experience and the particular situation of American industry have produced an acceptance of, or even a belief in, the system of grievance arbitration.

Implications for New Zealand

That the basis of this acceptance is institutional has important implications for grievance arbitration in New Zealand. For the parties in New Zealand a conflict is a conflict and there is little in the nature of one over rights to compel them to accept that it must, in the limit, be handled only by arbitration. The unions especially have, even in the face of compulsory arbitration of interest disputes, long expressed a preference for keeping their "options open". As a result they are unlikely to entertain the idea of foregoing the use of the strike. As in Britain, the offer by an employer to agree to refer disputes arising during the life of an agreement to arbitration would constitute no particular inducement.[24] Grievance arbitration, if accepted at all, is likely to be seen as but one of several possible means of conflict regulation.

The failure to recognize or heed the distinction beteween rights and interests is unsurprising when it is considered that New Zealand collective agreements or awards specify minimum rather than actual rates and conditions. Bargaining can therefore be continuous and resulting agreements informal. The rights/interests distinction is in a sense an institutional one, deriving as it does from the nature of the U.S. labour contract. Our earlier analysis suggests it is open to abuse. As Stevens contends, "legalistic concepts must (in some cases) be stretched and strained to afford a principle for making this (strike versus nonstrike) distinction".[25]

It is clear that some of the prerequisites for a viable and widespread system of grievance arbitration are missing from the New Zealand situation. The basis for acceptance and potential for utilization may expend with changing institutions and legislation. In the meantime, however, one must accept Aaron's judgement that "the American system for settling rights disputes is not for export".[26]

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21. *Ibid.*, p. 100.
22. See Edwin E. Witte, **Historical Survey of Labor Arbitration** (University of Pennsylvania Press, Philadelphia, 1952) p. 49.
23. Lloyd A. Reynolds, **Labor Economics and Labor Relations** (Prentice-Hall, Englewood Cliffs, N.J. 6th edn, 1974) p. 465.
24. For a discussion of the British situation see Benjamin Aaron, "The Settlement of Disputes Over Rights: A Comparative View," **Proceedings of the American Philosophical Society**, Vol. 118, Oct. 1974, especially pp. 424-426.
25. Stevens, *op cit.*, p. 74. The inserts have been added.
26. Aaron, *op cit., p. 430.*