

# METHODS OF WAGE POLICY. I\*

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\* This article is the second of a series on the theory of wages, wage policy, and governmental wage regulation, the first of which was Professor Paul Douglas' article on *The Economic Theory of Wage Regulation*, 5 *Univ. Chi. L. Rev.* 184 (1938).

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SOCIAL science has a threefold task: first, that of describing the phenomena of social life; second, that of classifying and arranging these phenomena in a systematic order; and, finally, that of investigating regularities of relations between social phenomena in the order of cause and effect. Wages and governmental efforts to influence their level are social phenomena. In the following article an attempt will be made to classify various methods of governmental wage policy under certain type situations and to arrange these type situations in a systematic order. It is hoped that such an arrangement may be helpful in the way any classification is helpful, viz. in pointing out the problems and the possible ways in which they may be solved. No attempt has been made, however, to give an encyclopedic survey of all existing wage regulation schemes. Such a task would require a bulky work, possibly of several volumes. All statements on wage regulation laws contained in this article are no more than illustrations of type situations. Furthermore, no attempt has been made here to explore the economic effects of the various measures which have been adopted by the different countries for the purpose of influencing the wage level. Such an inquiry, again, would require a voluminous treatise, written by a scholar of applied economics. The present article ought to be taken simply as an investigation preliminary both to an encyclopedic description of existing wage regulation schemes and to an inquiry into their economic and political effects.

## I

Wage policy, to the student of political economy, connotes the governmental attitude of a given country towards wages, as expressed either in those of its legislative, administrative and judicial measures which are intended to influence the level of wages, or in the absence of such measures.<sup>1</sup> Under the New Deal, wage policy has become such a widely discussed subject that a survey of methods of modern wage policy may be appropriate for the determination of a standard of evaluation of wage policy measures recently taken or proposed in the United States.

The necessity to decide upon some sort of wage policy arises in every country in which the salaried employment of legally free but economically

<sup>1</sup> Sometimes, the term "wage policy" is used in the wider sense of meaning all those activities carried on with an intention of influencing the level of wages irrespective of whether they are carried on by governmental or non-governmental agencies. In this sense the term is used, for instance, by Marschak in his article on Wages in 15 *Encyc. Soc. Sci.* 291 (1934). In a still wider sense the term is used to denominate the attitude of a particular individual or group of individuals towards wages. In this sense, one speaks, for instance, of the wage policy of the "X" corporation.

dependent workers plays any conspicuous role. Wherever this element exists in the economic structure of a country, it becomes necessary to decide whether the determination of the price of labor shall be left to the free interplay of economic forces or whether the State shall take an active part in the determination of the level of wages.

Analysis of wage policy of various countries indicates that governmental interference with the free interplay of economic forces may be caused by a variety of motives.

1. The purpose most influential in causing modern governments to embark upon a program of regulation is the desire to improve the economic position of the working classes. If left alone, levels of wages are determined by factors similar to those determining the prices of commodities and of economic services in general. Statistical observation indicates in particular that the price paid for a commodity or a service tends to fall with an increasing supply. Whether, as certain economists have asserted, labor, at least unskilled labor, will always be available in superabundance, with the result that, in the free interplay of the economic forces, its price will never rise above the minimum necessary for subsistence and physical reproduction, is a theoretical problem with which we need not deal here.<sup>2</sup> Actually, the standard of living of the majority of the laboring classes, though it has been steadily rising during the last hundred and fifty years in most industrial countries,<sup>3</sup> is still so low that it has caused dangerous unrest and even revolutionary movements.<sup>4</sup> Labor organized on economic or political lines has been seeking to improve its condition in three different ways.<sup>5</sup> In the first place workers have attempted to raise the price of labor by cornering the supply. This is the method of collective economic labor action, especially of the strike. The suppliers of labor combine to

<sup>2</sup> So-called Iron Law of Wages. It was formulated by Ricardo and Lassalle and was long regarded as the basis of all wage theory. On modern wage theory, see Douglas, *Theory of Wages* (1934); Keynes, *The General Theory of Employment, Interest and Money* (1936); Millis and Montgomery, *Labor's Progress and Some Basic Labor Problems* (1938); Pigou, *Economics of Welfare* (4th ed. 1932); Hamilton and May, *The Control of Wages* (1923); Burns, *Wages and the State* (1926); Marschak, *op. cit. supra* note 1.

<sup>3</sup> See Woytinsky, *Wages: History and Statistics*, 15 *Encyc. Soc. Sci.* 302 (1934) and references cited.

<sup>4</sup> Cf. Commons and Andrews, *Principles of Labor Legislation* (1936). These authors believe that it is no exaggeration to say "that the majority of low-skilled workers in the United States receive wages too small for decent self-support."

<sup>5</sup> The standard treatise on the various efforts made by labor to improve its position is Sombart, *Der Proletarische Sozialismus* (10th ed. 1924), tr. from 6th ed. by Epstein as *Socialism and the Social Movement* (1909); see also the following articles in the *Encyclopedia of the Social Sciences*: Commons, *Labor Movement*, 8 *Encyc. Soc. Sci.* 682 (1932); Hardman, Brailsford and Heaton, *Labor Parties*, 8 *Encyc. Soc. Sci.* 697 (1932) and references cited.

withhold from the market the commodity they have to offer, viz., their working power, unless and until the buyers of labor, *i.e.*, the employers, agree to pay higher wages or to grant, in general, conditions of employment better than those obtainable by individual sellers of working power competing with each other. Trade unionism is the principal method used by the workers to achieve this economic aim.

Wherever concerted labor action occurs, government is faced with the problem of whether to suppress, to tolerate, or to promote it.

Both suppression and promotion of collective labor action constitute an active wage policy. Toleration, combined with measures designed to eliminate physical violence from labor disputes, and, eventually, with measures for the legal enforcement of collective agreements, is an expression of a wage policy of *laissez faire*.

In the second place labor may attempt to induce a government to take active measures for the improvement of labor conditions.

Where, as frequently in the past, and occasionally in the present, governments have been engaged in suppressing collective economic labor action, labor has attempted by political action to compel the government to lift such restrictions.

The workers of many countries have also sought governmental measures directly interfering with the free play of economic forces. There are two principal methods through which government may undertake to correct, for the benefit of labor, the wage level as it would exist in a free system of complete *laissez faire*, *i.e.*, a system of complete freedom of collective action, viz.: (1) Active governmental promotion of collective bargaining. This technique is employed especially in industries in which labor's economic strength, unsupported by governmental intervention, is insufficient to eliminate competition within the ranks of labor. (2) The second method is that of immediate governmental fixation of wages at a level higher than that obtainable through the uncontrolled interaction of economic forces.

In order to influence a given country to embark upon one or the other of these courses of action, the laborers of that country may combine in a political party and enter the political arena exercising a controlling voice in governmental policy either alone or in coalition with the members of other groups. Or, labor may attempt, in a country with a two party system, to trade its vote and to cast it for that one of the two parties which is more willing and more likely to carry out its demands. The latter method was that employed by English labor until the 20th century, and is still the one favored by labor in the United States. Organization of political labor

parties has been the method of labor on the continent of Europe and in England since the turn of the century.

The third method applied by labor is that of abolishing the capitalistic system of society and of substituting for it a system of socialism.<sup>6</sup> This end can be sought by peaceful or by violent means. Proletarian socialism results from the belief that no fundamental improvement of the situation of the laboring classes can be achieved within the framework of the capitalistic system. Revolutionary socialism is caused by the conviction that the capitalist classes will not yield without violent resistance the position of power and wealth which they occupy under the existing system of society.

Both economic and political labor organization have been applied toward the end of complete social renovation. Not only political labor parties but also unions, especially of the syndicalist type, have been organized and used in the political struggle to serve as revolutionary cadres. The political strike, especially the "general strike," has been advocated and tried as a revolutionary weapon in the struggle for the overthrow of the capitalist system.

In its struggle for the improvement of its living conditions, labor has found support from other groups of society. The theoretical structure of socialism has been established and elaborated almost exclusively by non-proletarian intellectuals, and a large percentage of the active leaders of revolutionary socialism have sprung from bourgeois origins. Some of these intellectual and political leaders of the proletariat, Karl Marx, for instance, or Ferdinand Lassalle, have come, it is true, from bourgeois groups which themselves had not obtained complete equality. Others, however, for instance the nobleman Vladimir Ilijitsch Ulianov, better known under the revolutionary pseudonym of Lenin, have come from the leading groups of society.

More numerous than the bourgeois fathers and supporters of proletarian socialism were and are the non-proletarian supporters of governmental measures designed to improve the position of the laboring classes without a complete overthrow of the existing structure of society. The advocates of such "measures of social reform" have been numerous especially among "neutral" groups of society, such as university professors or members of a civil service with a tradition of impartiality, groups who, though closely linked with the bourgeois class, are nevertheless interested

<sup>6</sup> In addition to the works mentioned in the preceding note, see the following articles in the *Encyclopedia of Social Sciences*: Jaszi, *Socialism*, 14 *Encyc. Soc. Sci.* 188 (1934); Rosenberg, *Socialist Parties*, 14 *Encyc. Soc. Sci.* 212 (1934) and references cited.

in the welfare not so much of this or that social group as of society as a whole. Motivated not only by ideals of Christianity and humanitarianism, but also by fear of revolution, apprehensiveness of a decline of physical fitness of army recruits, and a desire to increase production by promoting industrial peace, social reformers were successful, first in Australia and New Zealand, in Germany and in England, and later in the other industrial countries, in introducing an era of "social policy" (*Sozialpolitik*), i.e. a policy intended to improve, without violent disruption of the capitalist system, the general living conditions of the working classes by increasing their share in the national income and assuring to their members a higher measure of social security.<sup>7</sup>

In the arsenal of weapons of *Sozialpolitik*, wage policy plays an important role. Raising the level of wages is not, however, the only way in which an improvement of the living conditions of the proletariat can be sought to be achieved. There are numerous other means towards the ends of "social policy," for instance a system of taxation tending to burden other social groups more heavily than wage earners. Particularly effective are measures offering to the working classes social services free of charge or under cost, coupled with a system of taxation which effectively imposes the costs of such services on other groups. To offer free education to the children and also to the adult members of the working classes has become universal in modern countries, although differences still exist with respect to education above the elementary level. Care for health and old age, and increased facilities for healthful recreation are spreading rapidly over all industrial countries. While city parks are practically universal, free or reduced admission to theatres, concerts, etc., is still more frequent on

<sup>7</sup> No established English term corresponds exactly to the German term "Sozialpolitik." The terms "social reform" or "social reform movement" are both too narrow and too wide. They are too narrow because of their distinctly philanthropic-humanitarian connotation; they are too wide because they cover not only action by the government tending to promote or influence governmental action, but also all kinds of non-governmental reformist activities. The absence of a well-established English term is indicative of the prolonged absence or the abortive character of a consistent "social policy" in the two leading English speaking countries. Perhaps, the term which comes nearest to the German "Sozialpolitik" is the American phrase "New Deal," which, however, has a connotation of propaganda absent in the more scientific German term. On the development of "Sozialpolitik" in the principal industrial countries, see Pipkin, *Social Politics and Modern Democracies* (1931); Tillyard, *The Worker and the State* (1923); Reichsarbeitsministerium, *Deutsche Sozialpolitik 1918-1928* (1929); Herkner, *Die Arbeiterfrage* (8th ed. 1922); Weddigen, *Sozialpolitik 141 et seq.* (1933); Bauer, *Arbeiterschutzesetzgebung*, 1 *Handwörterbuch der Staatswissenschaften* 401 (4th ed. 1923); Perris, *Industrial History of Modern England* (1920); Tannenbaum, *The Labour Movement* (1921); Heyde, *Abriss der Sozialpolitik* (3d and 4th ed. 1923) (excellent short survey of the German and Austrian development); Meeker, *Labor; Government Services for*, 8 *Encyc. Soc. Sci.* 644 (1932) (with further references); Heimann, *Soziale Theorie des Kapitalismus* (1929).

the European continent than in British and American countries. To the same category of free or below-cost social services to the working classes belong, furthermore, such institutions as free sport stadia, public baths and swimming pools, travel reductions on public railroads and pleasure boats, and free or below-cost accommodation in publicly owned hosteleries for youths and adults. Serving the same end are the enormous machineries of public relief for unemployed and unemployables, both in the form of cash and work relief, and all the other institutions and agencies of social work, to be found to an ever increasing extent in all modern industrial countries. The problem of whether the burden of the improvement of the conditions of the working classes shall be directly imposed, in the form of taxes, upon the "capitalist" groups of the population, or whether it shall first be imposed, in the form of higher wages, upon employers, to be shifted by them in part or in whole, to the consumers (including the workers themselves), and to the owners of capital and land, is a question of political wisdom and expediency, which will and must be answered differently in different countries and at different times.

2. While active governmental interference with the determination of wages by the free interplay of the economic forces has been and still is in numerous instances motivated by a desire to improve the social conditions of the working classes, such a desire is by no means the only conceivable motive of active governmental measures of wage policy. An interference with the workers' freedom of combination, for instance, may be motivated not only by fear of revolutionary labor action, but also, and as a matter of fact, mostly has been motivated primarily by the desire to prevent wages from reaching the level which they would have reached under the system of collective bargaining. Such a motive may be inspired, in turn, either by selfish interests of employers or owners of capital, or by a genuine belief that a lower wage level would be helpful in the attainment of some other economic aim, for instance, the increase of production or the improvement of a country's competitive position on the world market. In German political economy, a wage policy which is motivated not by a desire to improve the social conditions of the workers but by some other economic aim has been called "economic wage policy" (*wirtschaftspolitische Lohnpolitik*).<sup>8</sup> An "economic wage policy" need not necessarily imply a tendency to lower wages below the level fixed by the free interplay of economic

<sup>8</sup> The term is used here in the special sense in which it is contrasted by German economists to "social wage policy" (*sozialpolitische Lohnpolitik*). The general term "economic policy" is used "broadly to comprehend all government action in the economic sphere." Bonn, Economic Policy, 5 Encyc. Soc. Sci. 333 (1931). In this sense, every kind of wage policy, i.e., "social" as well as "economic," is a branch of "economic policy."

forces. It may quite well lead to a wage increase, for instance, if wage policy measures are motivated by a desire to increase production and profits through increasing the purchasing power of the masses. In such a policy, the wage increase is not, however, the primary motive but rather a by-product.

The two motivations of wage policy just described are not mutually exclusive. A system of wage policy motivated by ideals of "social policy," when once established, cannot help paying attention to "economic" requirements, and may find itself compelled to work, at times at least, not for an increase but for a reduction of the general level of wages, or of the wages received by certain groups of labor. Such a necessity may arise especially in periods of impending or actual depression and unemployment. In such periods, governmental authorities may also find themselves confronted with antagonistic interests within the working classes, for instance, between the employed and the unemployed, or between skilled and unskilled labor.<sup>9</sup>

3. Wage policy of the socio-political and of the economic-political type are not the only conceivable ones. Wage policy may form part of a system of planned economics, as in the "socialist" system of the Soviet Union,<sup>10</sup> the "national-socialist" system of Germany,<sup>11</sup> or the "corporative" system of Italy.<sup>12</sup>

The wage policy of a country may finally be determined by a desire

<sup>9</sup> See Hamilton and May, *op. cit. supra* note 2.

<sup>10</sup> On wage policies of the Soviet Union, see Weddigen, *op. cit. supra* note 7, at 157 *et seq.*; Sidney and Beatrice Webb, *Soviet Communism: A New Civilization?* 697 *et seq.*, 1206 *et seq.* (1936); Zagorsky, *Wages and Regulation of Labor in the U.S.S.R.*, Internat'l Labor Office Studies and Reports, Series D, No. 19 (1930); see also Internat'l Labor Office, *Collective Agreements, Studies and Reports, Series A, No. 39*, 241-53 (1936); Harper, *The Government of the Soviet Union* 123-4, 163 *et seq.* (1938). The Soviet system of wage determination will not be discussed in this article, which is concerned only with those countries in which wages are the price paid for labor by private employers.

<sup>11</sup> On National-Socialist Wage Policy, see *infra*, pt. II, 2, a; see also Lederer, *Who Pays for German Armaments?*, 5 *Social Research* 70 (1938) (with further references); see also Internat'l Labor Office, *Collective Agreements, Studies and Reports, Series A, No. 39*, 228-35 (1936); Ermarth, *The New Germany* 131 *et seq.*, 162-5 (1936); Morstein Marx, *Government in the Third Reich* 135 *et seq.* (1936); Geck, *New Trends in Social Policy in Germany*, 37 *Internat'l Lab. Rev.* 26 (1936).

<sup>12</sup> On Fascist Wage Policy see pt. VI, 2, a *infra* and, furthermore, Rosenstock-Franck, *L'économie corporative fasciste en doctrine et en fait* (1934) (best treatise in the field); Haider, *Capital and Labor under Fascism* (1930); Finer, *Mussolini's Italy* 502-12, 533-4 (1935); Marrani, *Il contratto collettivo di lavoro* 247 *et seq.* (1935); Steiner, *The Government of Italy* 98 *et seq.* (1939); Field, *The Syndical and Corporative Institutions of Italian Fascism* (1938); Por, *The Italian Corporations at Work*, 35 *Internat'l Lab. Rev.* 643 (1937); Internat'l Labor Office, *op. cit. supra* note 11, at 235-41.



to stabilize a given socio-economic system, *i.e.*, to preserve the traditionally existing distribution of wealth among the different groups of society. Such a wage policy, for which the term "traditionalistic" may be appropriate, was part of the medieval system of society. This system was conceived as being founded upon the idea that society, as created by God, was naturally divided into different classes and callings, that it was every man's duty to fulfill to the best of his ability his calling, and that a natural ratio existed between the value of all commodities produced and the services rendered by the members of the various groups of the social hierarchy. The idea thus prevailed that each commodity or service had its "just" price<sup>13</sup> and that the economic forces of society should be organized in such a way as to guarantee to each workingman the just price for his product or work. Where tradition alone seemed not to be strong enough to prevent disturbances of the just level of prices or wages, the temporal authorities were thought to be obliged and were also inclined to announce the just price in the form of price or wage taxes. Guilds were anxious to enjoin their members from selling their products at a price lower than that which guaranteed to everyone his traditional decent living, and from competing with each other by paying the journeymen wages higher than those commonly established. Municipal or territorial authorities were inclined to support, but also to control, the guilds in such efforts, or to take upon themselves the task of fixing the just price of necessary commodities or services, especially when a common calamity threatened to result in a general rise of the cost of living.<sup>14</sup> How successful such efforts actually were in stabilizing wages and prices is difficult to say. It is clear, however, that prices and wages tended to be influenced in a large measure by tradition, and it therefore appears probable that guild restrictions exerted a powerful restraint upon the medieval mind and upon the forces of competition.

## II

With the dawn of modern times a new spirit became gradually dominant in economic affairs. The origins of modern capitalism are still a topic of controversy among historians and sociologists.<sup>15</sup> At present, the opin-

<sup>13</sup> Cf. Salin, *Just Price*, 8 *Encyc. Soc. Sci.* 504 (1932) (with further references); Johnson, *Just Price in an Unjust World*, 48 *Ethics* 165 (1938).

<sup>14</sup> On medieval price and wage policies in general, see Ashley, *Introduction to English Economic History and Theory*, part 1, 67-102, 126-48, 181-95; part 2, 5-32, 377-94 (4th ed. 1906-9); 2 Holdsworth, *History of English Law* 464-71 (1923). On medieval wage policy in particular, see v. Zwiedineck-Südenhorst, *Lohnpolitik und Lohntheorie* 28-86 (1900).

<sup>15</sup> Cf. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1930); Weber, *General Economic History* (1927); Tawney, *Religion and the Rise of Capitalism* (1936); Sombart, *Der*

ion prevails that a complicated interplay of spiritual forces and physico-economical developments brought about the changes in economic ideologies and practices which are usually referred to as the commercial, agricultural, and industrial revolution and the rise of modern capitalism. Why, in the period from the 15th to the 19th century, the ideals of traditionalism, of just price, fair wage and a fixed social order were replaced by a new spirit of adventure, enterprise, expansion, and innovation, combined with careful individual planning, accounting, and calculation, is a much debated problem which need not concern us in this connection. Suffice it to say that during the 18th century in England, and somewhat later in the other countries of Western and Middle Europe, this new spirit became dominant and resulted in the dissolution of the old forms of economic organization. Freedom of contract and freedom of competition became the principles upon which the new economic order was to be established.

In one field only, freedom of contract was not established, viz., in labor relations. Freedom of contract was established, it is true, in the relations between employers and employees, but it was withheld in the relations between employees, and the various governments engaged upon an active wage policy of enforced individual bargaining.

Legal doctrines against workmen's combinations, which had a proper place in a social order tending to maintain a system of traditional "just prices" and "fair wages," were taken over into a new order where no authority any longer embarked upon the task of determining a workman's fair wage.<sup>16</sup> New and more stringent anti-combination laws were enacted, first in France,<sup>17</sup> then in England<sup>18</sup> and other European countries.<sup>19</sup> As late as 1908, a statute aimed at trusts and monopolies,<sup>20</sup> was interpreted by the courts of the United States as a weapon against workers' unions.<sup>21</sup> Under these various doctrines and laws, agreements between wage earners

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moderne Kapitalismus (1928); Henri, *Modern Capitalism, Its Origin and Evolution* (1928). For a short survey, see Sombart, *Capitalism*, 3 *Encyc. Soc. Sci.* 195-208 (1930); Heaton, *Industrial Revolution*, 8 *Encyc. Soc. Sci.* 1-12 (1932) and references cited.

<sup>16</sup> 11 Holdsworth, *op. cit. supra* note 14, at 477 *et seq.* (1934); Landis, *Cases on Labor Law* 17 *et seq.* (1934).

<sup>17</sup> *Loi Le Chapelier* of 1791; *Criminal Code* of 1810, arts. 414-16.

<sup>18</sup> *Combination Laws* of 1799 (39 Geo. III, c. 81) and 1800 (39 & 40 Geo. III, c. 106). On these laws, their history and effects, see 11 Holdsworth, *op. cit. supra* note 14, at 475 *et seq.*

<sup>19</sup> For details, see Internat'l Labor Office, *Freedom of Association. Studies and Reports*, Series A, Nos. 28-32 (1927-30); see also Sidney and Beatrice Webb, *History of Trade Unionism* (1920).

<sup>20</sup> *Sherman Anti-Trust Act*, 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1-7 (1927).

<sup>21</sup> *Loewe v. Lawlor* (Danbury Hatters' case), 208 U.S. 274 (1908). Cf. Berman, *Labor and the Sherman Act* (1930); Witte, *The Government in Labor Disputes* 61 *et seq.* (1932).

not to accept work for wages below a certain amount or below certain conditions were declared, by legislation or judicial pronouncement, not only to be unenforceable as between the contracting parties, but were also held to constitute a criminal offence and tortious conduct.

In labor relations an antinomy inherent to the capitalistic system became for the first time apparent, viz., the antinomy between the principles of freedom of contract and individual competition. The same antinomy exists in the relation between vendors and purchasers of commodities, viz., the antinomy that freedom of contract, the very basis of the individualistic system of economic organization, tends to destroy free competition, which is an equally essential element of the system. In the field of relations between sellers and buyers of commodities, Germany and other industrial countries of the continent of Europe, and, to an extent, also England, have chosen to prefer freedom of contract over restrictions of industrial and commercial combines (cartels),<sup>22</sup> while the United States has embarked upon a policy of anti-monopoly legislation tending to enforce—"preserve," as it is usually said—competition in the market. In the labor field, the policies of the leading industrial countries have not been so different from each other. Almost everywhere do we find in the early 1800's the law tending to forbid coalitions of workmen.

Restrictions were imposed upon the workers' freedom of association everywhere and for a variety of reasons. A potent motive was probably the fear that workers' combines constituted a menace to the public peace,<sup>23</sup> a fear which was certainly not unjustified in the turbulent days of early and revolutionary trade unionism. Another motive was the apprehension that the old craft guilds might reappear under the guise of workmen's associations.<sup>24</sup> There was, furthermore, the belief of some of the economists of the physiocrat and the early classical school that individual competition not only in the commercial but also in the labor field would result in the highest productivity of the economic system and in the greatest harmony of economic forces. There was, finally, the desire of the capitalists to maintain the position of power which they held over labor in the early 19th century. The doubtful validity of the theoretical argument in favor of free competition among workers was pointed out by no

<sup>22</sup> Rheinstein in 5 Williston, Contracts § 1662 (rev. ed. 1936).

<sup>23</sup> Cf. the following preamble to the Prussian Industrial Code of 1845: "There is certainly occasion to fear that . . . the combinations of wage earners menace the existence of factories, are likely to provoke tumults and riots, and threaten the public security."

<sup>24</sup> Cf. the speech made on June 14, 1791, by M. Le Chapelier before the French Constituent Assembly on the introduction of his anti-combination bill, reported in *Moniteur officiel*, 15 juin 1791, partly translated in 2 Internat'l Labor Office, *op. cit. supra* note 19, at 89.

man other than Adam Smith, the very apostle of the new school of economic thought, who proved that in the relation between employers and employees free competition could not work in the same way it did between sellers and buyers of commodities, because, while both parties were disposed to combine, employers were more able actually to carry out that intention.<sup>25</sup> His chapters on labor<sup>26</sup> clearly imply the demand that restraints on workers' combinations should be removed. Though Adam Smith was eagerly followed in his demands that ancient restrictions upon commerce and industry be abolished and that a system of complete freedom of contract be created, his advice was not heeded in respect to labor.

The various anti-combination laws and doctrines did not constitute an application of the principle of *laissez faire*, but were measures of an active wage policy designed to prevent the workers from freely contracting with each other and were intended to produce a state of affairs and a level of wages different from that which would have prevailed in the free interplay of economic forces.

Restraints on the workers' freedom of association were not lifted before enough political power came to be wielded by labor and other groups to which the wage level obtainable by individual bargaining appeared undesirable for one reason or another. The first step in this direction was taken by Great Britain in 1824. The British Combination Acts of that and the following year<sup>27</sup> opened an era of gradual removal of restrictions of the workers' freedom of association in all industrial countries, a process which proceeded at a slow pace,<sup>28</sup> was interrupted by many retrogressions,<sup>29</sup> and was particularly slow in the United States.<sup>30</sup>

<sup>25</sup> Smith, *Wealth of Nations* 66 (Common's ed. 1937): "We rarely hear, it has been said, of combinations of masters, though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual rate."

<sup>26</sup> Book I, c. 8 and c. 10, part II.

<sup>27</sup> 5 Geo. IV, c. 95; 6 Geo. IV, c. 129. On these acts, see Webb, *op. cit. supra* note 19, at 92 *et seq.*; Dicey, *Lectures on the Relation between Law and Public Opinion in England 190 et seq.* (1924).

<sup>28</sup> Cf. Internat'l Labor Office, *op. cit. supra* note 19, vols. 2-5; Hale and Seagle, *Labor Legislation and Law*, 8 *Encyc. Soc. Sci.* 667 (1932) (with further references).

<sup>29</sup> Especially in England; see Webb, *op. cit. supra* note 19, at 137, 157; Hedges and Winterbottom, *Legal History of Trade Unions* (1930); Slessor and Baker, *Trade Union Law*, esp. 178 *et seq.* (1927); see also the works cited in notes 18, 19 *supra*.

<sup>30</sup> On American developments, see 3, 4 Commons and Gilmore, *Documentary History of American Industrial Society* (1910). For a more recent, terse discussion, see Commons and Andrews, *op. cit. supra* note 4, at 372 *et seq.*; Witte, *op. cit. supra* note 21, at 61 *et seq.*

## III

1. Once restrictions upon the workers' freedom of association had been lifted, the industrial countries gradually shifted from an active wage policy of enforced individual bargaining to a "passive" wage policy of non-interference. However, a wage policy which leaves the determination of wages to the free interplay of economic forces does not imply an absolute inactivity of governmental agencies. On the contrary, it imposes upon the government the obligation of taking care that economic forces can act and react upon each other in a non-violent, peaceful way. If a government fails in this task it shows that it is either unable to fulfill its most imperative duty, viz., the duty of preserving peace and order, or that the state is taking the side of one of the contestants in the economic struggle. A government which fails to check violent action by workers against employers or fellow-workers is engaging upon an active wage policy in favor of labor, or a particular group of labor, while a government which does not stop violent interferences with the workers' freedom of coalition is following an active wage policy for the benefit of the employers. Only if the government equally suppresses the violence and oppression of employers and labor can it be said that the principle of economic non-intervention is applied consistently.

To allow collective action on the side of the workers and yet to prevent violence is no easy task for a government, and sometimes it may be difficult to find out whether a particular government is unwilling or unable to live up to its duty. In the United States in particular, labor disputes have led to frequent outbreaks of violence, more frequently perhaps, and more intense, than in other countries.<sup>31</sup> The prevention of violence in labor disputes requires not only an efficient and impartial police force, but also the development of an intricate system of legal rules and regulations to demarcate permissible from non-permissible conduct in labor disputes. American legislatures and courts have been fertile in establishing such rules on the conduct of strikes and lock-outs, picketing and boycotts, and other incidents of labor disputes. It may even be said that these rules form the bulk of what is being called and taught as Labor Law in this country.

2. The most elaborate legal regulation and the most efficient police force are unable entirely to eliminate the danger of violence from strikes and lock-outs. Furthermore, every incident of industrial warfare implies

<sup>31</sup> Cf. Adamic, *Dynamite: The Story of Class Violence in America* (1931); Witte, *op. cit. supra* note 21, at 175 *et seq.* (believes that violence in labor disputes has decreased since the turn of the century).

a loss in production. In many instances, industrial conflict results in serious inconveniences to wide groups of the populace at large, especially if it occurs in an industry affected with a public interest.<sup>32</sup> No wonder, therefore, that everywhere governments have been anxious to establish institutions for the "peaceful" settlement of labor disputes.<sup>33</sup> Mediation services, conciliation boards, and similar institutions have been established or supported by the governments of all industrial countries, either *ad hoc*, or as permanent institutions.<sup>34</sup> Mediation may be entrusted to government officials or to representatives of the parties acting as conciliation boards. Where government officials act as conciliators, conciliation may be their exclusive sphere of activity, or it may be incidental to a wider sphere of general administration. Thus, under the French system before the legislation of 1936 mediation of labor disputes was one of the numerous tasks of the prefects and certain other administrative officials.<sup>35</sup> In Czarist Russia<sup>36</sup> and in present-day Poland,<sup>37</sup> Estonia,<sup>38</sup> Latvia,<sup>39</sup>

<sup>32</sup> The economic losses to a national economy as a whole are frequently over-estimated, however. See *The Conciliation and Arbitration of Industrial Disputes*, 14 *Internat'l Lab. Rev.* 645 (1926).

<sup>33</sup> That the government should offer its good offices in the mediation of industrial disputes was not at all self-evident during the heyday of *laissez faire*. When in 1831, the prefect of the Rhone district successfully intervened in a dispute in the silk industry of Lyons, which threatened to disrupt the peace of the region, his action was disavowed by the French government, and the award was declared to be invalid upon the theory that the government was absolutely required to remain aloof from economic issues. Nevertheless, in the ensuing strike, the government was obliged to send an army to restore peace and order! (See Debré, Note on the French Conciliation Law of 1938, *Recueil Périodique Dalloz*, part 4, p. 5 (1938)).

<sup>34</sup> See *Internat'l Labor Office, Conciliation and Arbitration of Industrial Disputes, Studies and Reports, Series A, No. 34* (1933). See also Squires, *Conciliation, Industrial*, 4 *Encyc. Soc. Sci.* 165 (1931) and references therein cited.

<sup>35</sup> See *Internat'l Labor Office, op. cit. supra* note 34, at 170-86. The Conciliation Act of 1892, which was incorporated into the Labor Code as Book IV (*cf. Legislative Series* 1924, Fr. 3), provided for a system of conciliation committees which were to be set up from case to case and were to act under the presidency of the justice of the peace of the canton. As a matter of fact, "recourse to the statutory procedure before the occurrence of a stoppage has been rare. In all there have been 232 such cases (from 1892-1920), enabling strikes to be averted on 132 occasions. The total number of disputes submitted to conciliation between 1893 and 1920, either before or after the occurrence of a stoppage, was 4,729 (*i.e.*, 18.53% of all strikes)." On the other hand, the regular administrative offices of the government regarded the mediation of industrial disputes as incidental to their general duties. Between 1893 and 1920, prefects and sub-prefects intervened in 1,038 cases, mayors in 669, the Ministry of Labor in 96, and labor inspectors in 87 cases.

<sup>36</sup> *Internat'l Labor Office, op. cit. supra* note 34, at 387-91. When the labor inspectors used their powers of mediation in industrial disputes to check exploitation of workers by employers, the mediative function of these inspectors was gradually curtailed and finally abolished.

<sup>37</sup> *Internat'l Labor Office, op. cit. supra* note 34, at 325-35.

<sup>38</sup> *Id.* at 338-9.

<sup>39</sup> *Id.* at 341-4.

Lithuania<sup>40</sup> and Yugoslavia,<sup>41</sup> it is within the official scope of duties of labor inspectors, whose primary task is the supervision of safety and hygienic conditions of factories.

A greater governmental concern with the prevention of labor struggles is indicated by the appointment of special officials whose sole or primary task is the mediation of labor disputes. This system is in successful operation in the Netherlands,<sup>42</sup> and especially in Finland,<sup>43</sup> Denmark<sup>44</sup> and Sweden, where mediation by government conciliators is the regular method of settling those industrial disputes for which no collective adjustment machinery has been established by the parties.

In Sweden, the government has, since 1908, "placed conciliators and arbitrators at the disposal of the parties in industrial disputes. The conciliators are appointed for the several conciliation districts into which the country is divided. The duty of the conciliator is to follow the conditions of work in his district, to lend his assistance in the settlement of trade disputes arising therein, and, on request, to assist workers and employers to conclude agreements likely to establish good relations between them and prevent strikes and lock-outs. The conciliator's primary object is to bring about an agreement in accordance with the proposals made by the parties themselves in the course of negotiations. If unsuccessful, he may urge arbitration with the parties pledging themselves to observe the award, but he cannot compel arbitration, and he must not himself act as arbitrator. If a dispute arises, the conciliator calls upon the parties to meet together for negotiations before him and urges the parties to find a settlement without a stoppage of work. Both the employers and the workers are bound to respond to the conciliator's summons, but not bound to yield to his urging that they refrain from hostile action. If a dispute is likely to be serious in extent, the Crown may, and usually does, appoint a conciliation commission or special conciliator."<sup>45</sup>

<sup>40</sup> *Id.* at 345-7.

<sup>41</sup> *Id.* at 488-95.

<sup>42</sup> Government conciliators are permanent officials. The majority of conflicts are dealt with, however, by joint committees. In 1929, stipulations providing for the establishment of such committees were contained in approximately 80% of all collective agreements. Conciliation boards may also be appointed from case to case by the conciliators. See Internat'l Labor Office, *op. cit. supra* note 34, at 200-11. For the text of the Labor Disputes Act of May 4, 1923, see Legis. Ser. 1923, Neth. 1.

<sup>43</sup> Internat'l Labor Office, *op. cit. supra* note 34, at 380-6.

<sup>44</sup> Conciliation proceedings are carried on through the State Conciliation Institute, whose greatest achievement to date has been its mediation of the general strike of 1935. See 6 Internat'l Labor Office Year Book 300 (1936).

<sup>45</sup> United States, Dept. of Labor, Report of the Comm'n on Industrial Relations in Sweden 7 (1938). The statutory basis of the system is the "Act Respecting Conciliation in Trade Dis-

Although hardly comparable to its role in the Scandinavian countries, mediation through government conciliators also plays a considerable role in the United States. Governmental mediation agencies are provided for both by state and federal legislation.<sup>46</sup> State agencies are older but less important today than those established under federal auspices. The central federal mediation agency is the United States Conciliation Service, which was created in the Act setting up the Department of Labor in 1913. The enabling act provided for the service in these words:

"The Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes, whenever in his judgment the interests of industrial peace require it to be done." A bureau was organized for this purpose, and at the end of the fiscal year 1937, fifty odd commissioners, stationed at various points throughout the country were engaged in this work.<sup>47</sup>

The Conciliation Service confines its work to mediation. It does not use any compulsion in bringing the parties together. The Service intervenes only on the application of one of the parties or of a state authority.<sup>48</sup> Despite its voluntary character it has proved successful in promoting industrial peace. "The records of recent years bear witness to the fact that the Conciliation Service can be most helpful in reaching an agreement whenever the disputants are fairly disposed, even though at the outset their viewpoints may be widely separated."<sup>49</sup> From the creation of the Service in 1913 to the end of the fiscal year 1929, 9,048 trade disputes have been submitted to this government agency, involving more than 12,637,809 workers, with the result that more than 75% of the cases have been settled in cooperation with the Service.<sup>50</sup> During the fiscal year ending June 30, 1937, the United States Conciliation Service "used its good offices in 1,267 industrial disputes as against 1,012 in the fiscal year of

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putes," of May 28, 1920. *Författningssamling* 1920, at 565, English translation: *Legis. Ser.* 1920, Swe. 6-8; United States, Dept. of Labor, cited herein, at 56. See also the Act Respecting Special Arbitrators in Trade Disputes, of May 28, 1920, *Författningssamling* 1920, at 570, English translation: United States Dept. of Labor, cited herein, at 59. See further, Conciliation (Amendment) Act of June 28, 1935, *Författningssamling* 1935, at 955, English translation: *Legis. Ser.* 1935, Swe. 4; United States Dept. of Labor, cited herein, at 66.

<sup>46</sup> For details see Twentieth Century Fund, *Labor and the Government* 149 *et seq.*, and esp. 172 *et seq.*; Witte, *op. cit. supra* note 21, at 239 *et seq.*

<sup>47</sup> United States, Secretary of Labor, Annual Report for the Fiscal Year ended June 30, 1937, at 14.

<sup>48</sup> The manner in which the Service works is illustrated in 1 Labor Relations Reports No. 26 (1938) by a model case based upon actual experience.

<sup>49</sup> United States, Secretary of Labor, *op. cit. supra* note 47, at 14.

<sup>50</sup> *Id.* at 29.



1936. The Conciliation Service served as mediator in nearly one-third of the 3,619 strikes in the United States in the fiscal year of 1937. Approximately 1,383,588 workers were involved directly or indirectly in the disputes handled by the Service in the fiscal year 1936-37.<sup>51</sup>

At the request of the competent state authorities, the Conciliation Service of the Department of Labor has taken over a great many cases in which state boards formerly intervened. It has thus become the most important machinery of mediation in this country.<sup>52</sup>

Due to the activities of the Conciliation Service, the state agencies have gradually become less important. The first state law dealing with mediation was a Maryland Act of 1878. By 1900 most states had legislation on this subject. Today, many of these state regulations seem to be dead letters.<sup>53</sup> In 1935 thirty-eight states had statutes concerning mediation, but only three states (Massachusetts, New York and Pennsylvania) seem to have had active boards at this time.<sup>54</sup>

Aside from the permanent official agencies charged with mediation, the President of the United States and Governors of States have occasionally acted as mediators in conflicts of major importance when the ordinary agencies did not seem to be able to settle the dispute.<sup>55</sup>

Mediation through a single governmental officer can be carried on quite informally; his intervention can be speedy and unobtrusive. Its success will largely depend, however, upon the personal tact and experience of the individual mediator, and, in some circumstances, may be resented by the parties as officious governmental intermeddling. For such reasons, mediation through representatives of the parties has frequently been preferred. "Joint conciliation boards" are provided for in collective agreements, especially where, as in Great Britain, such agreements are concluded between organizations of both labor and employers. The well-functioning mediation system of Great Britain is primarily carried on by such voluntary boards whose formation and smooth functioning is active-

<sup>51</sup> *Id.* at 13.

<sup>52</sup> Concerning mediation under the NIRA, see Twentieth Century Fund, *op. cit. supra* note 46, at 201 *et seq.* For mediation under the Bituminous Coal Conservation Act of 1935, see § 4, III (f) of the Act, 49 Stat. 991 (1935), repealed in 50 Stat. 90 (1937), 15 U.S.C.A. § 850 (Supp. 1938).

<sup>53</sup> For details, see Witte, *op. cit. supra* note 21, at 251 *et seq.*; Commons and Andrews, *op. cit. supra* note 4, at 432 *et seq.*

<sup>54</sup> Twentieth Century Fund, *op. cit. supra* note 46, at 115.

<sup>55</sup> See Berman, Labor Disputes and the President (1924); Witte, *op. cit. supra* note 21, at 237 *et seq.*

ly encouraged by the government.<sup>56</sup> The numerous boards which have been established by collective agreement or in pursuance of the recommendations of the so-called Whitley Report of 1917 (so-called Whitley Councils)<sup>57</sup> form the backbone of the British conciliation system. Where an existing joint machinery fails to bring about a settlement, the Minister of Labor, with the consent of the parties, may bring the controversy before the Industrial Court, whose members are publicly esteemed representatives of industry, labor, and the public. Unless otherwise agreed, the Court's "awards" are not binding; but they are generally accepted.<sup>58</sup> This system of conciliation boards and courts is supplemented by full-time trained government conciliators who intervene where no joint boards exist or where their activities threaten to fail. "Their duty is to keep intimately in touch with industrial conditions in the areas which they cover, to anticipate trouble and if possible forestall it, and to shorten it as best they can when it comes. They have no power and their success depends on their skill in conciliation."<sup>59, 60</sup>

Joint boards may also be established by the government to act as governmental agencies. While their members are primarily chosen from among representatives of workers and employers of the industry concerned or of the public, the presiding officer is frequently a government official or some other neutral person. Such a governmental board is represented by the British Industrial Court, which, as already mentioned, does not interfere in a dispute unless the parties' own agencies have failed.<sup>61</sup> On the other hand, conciliation boards of governmental provenience were the primary conciliation agencies in Republican Germany,<sup>62</sup> and they seem to play an important role in the present system of France.<sup>63</sup>

<sup>56</sup> For a more detailed description of the British system, see esp. Internat'l Labor Office, *op. cit. supra* note 34, at 145-67, and United States Dept. of Labor, Report of the Comm'n on Industrial Relations in Great Britain (1938). As to its historical development, see especially Mackenzie, *Industrial Arbitration in Great Britain* (1929). See further Richardson, *Industrial Relations in Great Britain*, Internat'l Labor Office, Studies and Reports, Series A, No. 36 (2d ed. 1938); Chang, *British Methods of Industrial Peace* (1936).

<sup>57</sup> Cf. King, *The Whitley Council Scheme* (1932).

<sup>58</sup> Industrial Courts Act, 9 & 10 Geo. V, c. 69 (1919); United States, Dept. of Labor, *op. cit. supra* note 56, at 104.

<sup>59</sup> United States, Dept. of Labor, *op. cit. supra* note 56, at 14.

<sup>60</sup> The British system of government-promoted voluntary conciliation has been followed in numerous countries, in Belgium among others; see Royal Order of May 5, 1926, Legis. Ser. 1926, Belg. 5, as amended by Royal Order of November 25, 1929, Legis. Ser. 1929, Belg. 7, where pressure to resort to conciliation is exerted upon the parties by the provision that unemployment benefits will be paid to workers engaged in an industrial dispute in accordance with their or their employers' willingness to cooperate in the conciliation proceedings.

<sup>61</sup> See pp. 568-9 *supra*.

<sup>62</sup> See pt. IV, 1 *infra*.

<sup>63</sup> See pt. IV, 2 *infra*.

3. Mediation agencies of any kind may sometimes do no more than open to the parties a neutral place where they can meet around a table and "talk matters over." At other times they may take the additional step of suggesting peace terms, perhaps on the basis of a factual investigation and in the form of a formal award. However, even if the parties are willing to make concessions to avoid industrial warfare, the terms suggested by the mediator have slim chance of acceptance by the parties unless they anticipate the outcome of an eventual strike or lock-out. Therefore, a mediation agency, in formulating its peace terms, is moved more by a calculation of the respective fighting strengths of the parties than by considerations of governmental wage policy. The more closely the board's suggestions conform to the result the parties anticipate as the probable outcome of a strike or lock-out, the greater are the chances of acceptance. Hence, the mediator has to appreciate the economic position of the industry involved—its price level, its ability to devolve eventual higher wages upon consumers, middlemen or furnishers of raw material; the situation of the money market; the size of the war chest of the labor union and the employers; the situation of the labor market—the employers' ability to obtain strike-breakers, the workers' and employers' willingness to suffer losses; the reaction of public opinion in so far as it may strengthen or weaken each party's will and power to fight, etc. Ideas of social justice or schemes to influence the general wage or price level of a country or an industry can be taken into account only insofar as they may tend to influence, psychologically, politically or economically, the parties' respective fighting strength. Mediation defeats itself when it undertakes to go beyond these limits, unless the mediator is endowed with the power of compelling the parties to accept an award which does not correspond to their respective fighting strengths. If the mediator has such power, however, we are no longer concerned with mediation but with compulsory arbitration or governmental wage regulation pure and simple.<sup>64</sup>

The idea of mediation is not opposed, however, to that of voluntary arbitration. As a matter of fact, most countries which provide governmental machinery for the adjustment of industrial conflicts, and which base their policy upon the voluntary cooperation of the parties, make provisions for voluntary arbitration of industrial conflicts. Voluntary or optional arbitration occurs "when the two parties, unable to settle the

<sup>64</sup> On these general principles of conciliation and its necessary limits, see Weddigen, *op. cit. supra* note 7, at 204 *et seq.*; Kuttig, Problems of Conciliation and Arbitration, 26 *Internat'l Lab. Rev.* 649 (1932); Sinzheimer, in *Bericht ueber die Verhandlungen der XI Generalversammlung der Gesellschaft fuer Soziale Reform* (1930).

controversy by themselves or with the assistance of a mediator, agree to submit the points at issue to an umpire or arbitrator by whose decision they promise to abide.”<sup>65</sup> Such a system is strictly voluntary in its character, as it is based upon the fact that *both* parties to the controversy consent to appeal to an arbitrator and either consent in advance to be bound by his award or declare their acceptance of the award after it has been rendered. Provision by the state of a system of voluntary arbitration or of machinery for the enforcement of awards rendered after optional arbitration, is not inconsistent with the adoption by the state of a “neutral” wage policy. Even a requirement that the facts be investigated in a manner prescribed by law is compatible with a neutral attitude of the government toward the regulation of wages inasmuch as the only aim of compulsory investigation is to induce the parties to reach a voluntary settlement of their differences. The essential characteristics of investigation are well described by Kuttig:<sup>66</sup> “Statutory investigation proceedings are a characteristic part of the systems of English-speaking countries and in particular of Canada and Great Britain. In these countries complete dependence on the parties’ will to agree must at times cause dissatisfaction, particularly in important disputes which closely affect the public interest. In English-speaking countries great weight is attached to public opinion, and so it was regarded as desirable to bring its influence to bear on the settlement of disputes. For this purpose the public has to be provided with material enabling it to form an opinion. This is effected by the publication of a report by the competent authority (conciliation board or court of enquiry) on the causes of the dispute and the technical and economic possibilities of some particular settlement. The report naturally cannot be drawn up without an impartial investigation of the facts. This scheme enables the principle of voluntary negotiation to be maintained while at the same time allowing public opinion to exert an effective pressure to the general advantage. The success of such methods of investigation depends on and therefore justifies certain measures of compulsion for the determination of the facts. Such measures are in fact permitted by the British Industrial Courts Act and the Canadian Industrial Disputes Investigation Act.”<sup>67</sup> In the United States compulsory investigation procedures exist under the Colorado Act of 1915<sup>68</sup> and the Railways Act of

<sup>65</sup> Definition by Commons and Andrews, *op. cit. supra* note 4, at 430.

<sup>66</sup> Kuttig, *op. cit. supra* note 64, at 665.

<sup>67</sup> Canada L. 1907, c. 20.

<sup>68</sup> Col. L. 1915, c. 180, §§ 29 *et seq.*; now Col. Stat. Ann. 1935, c. 97, § 19 *et seq.*

1926<sup>69</sup> as amended in 1934.<sup>70</sup> The latter act provides for compulsory investigation by a special board to be appointed by the President, if the Board of Mediation finds that there is danger of a substantial interruption in transportation service.

Mediation is finally compatible with a governmental prohibition of resorting to industrial warfare before all or certain modes of peaceful negotiation and mediation are exhausted. The parties may be forbidden, as, for instance, in France, to resort to strike or lock-out before the mediation agencies have been given an opportunity to intervene;<sup>71</sup> or, as in Sweden, before the expiration of seven days from the notification of the conciliator;<sup>72</sup> or acts of industrial warfare may be declared illegal before the means of conciliation are completely exhausted. This rather serious restriction of the parties' freedom of action appears especially in laws concerned with labor relations in public utilities. The oldest and most famous regulation of this kind is the Canadian Industrial Disputes Investigation Act of 1907.<sup>73</sup> The act applies principally to "public utilities" (Section 2a). It provides for a suspensive prohibition of strikes and lock-outs and of changes in conditions of employment and makes it compulsory to give at least thirty days' notice of any intended change in wages or hours, during which period either party may apply for the appointment of a board of conciliation and investigation. The penalty for infringement is a fine. However, "since prosecution is not undertaken by the State, but is left to the aggrieved party very few cases under this Act have come before the courts."<sup>74</sup> It has been stated, however, that nevertheless, "In Canada the prohibition seems to have had satisfactory results, perhaps partly owing to the provisions for preventing its abuse, especially in the form of deliberate delay of the proceedings."<sup>75</sup> In the United States the state of Colorado, as a result of a bitter coal strike, enacted the above-mentioned law of 1915,<sup>76</sup> which was modeled after the Canadian Act of 1907. The

<sup>69</sup> 44 Stat. 577 (1926).

<sup>70</sup> 48 Stat. 1185 (1934), 45 U.S.C.A. c. 8. (1938).

<sup>71</sup> Law of December 31, 1936, Journal officiel 1er Janvier, 1937, at 127, Bulletin Législatif Dalloz 1936. 1132.

<sup>72</sup> Conciliation (Amendment) Act, 1935, Författningssamling at 955, English translation: Legis. Ser. 1935, Swe. 4; United States, Dept. of Labor, Report of the Comm'n on Industrial Relations in Sweden 66 (1938).

<sup>73</sup> Canada L. 1907, c. 20. For the present status of this Act, see Canada Rev. Stat. 1927, c. 112. See also United States Bureau of Labor Statistics, Operation of the Industrial Disputes Investigation Act of Canada, Bull. No. 233 (1918); Selekmán, Law and Labour Relations, A Study of the Industrial Disputes Investigation Act of Canada (1936).

<sup>74</sup> Internat'l Labor Office, *op. cit. supra* note 19, at 147.

<sup>75</sup> Kuttig, *op. cit. supra* note 64, at 661.

<sup>76</sup> See note 68 *supra*.

Colorado Act prohibits strikes and lock-outs in industries affected with a public interest pending investigation and report by the Colorado Industrial Commission. For the violation of the act fine and imprisonment are provided and "since 1921 the commission has been authorized to take out mandatory injunctions in cases of violations under which strikers may be punished for contempt."<sup>77</sup>

It has been suggested that the federal conciliation law of the United States should penalize self-help by either party to a labor dispute until the governmental conciliators have had a reasonable time in which to find facts and compose differences.<sup>78</sup> A mooted question is whether or not the Railway Labor Act of 1926,<sup>79</sup> as amended in 1934,<sup>80</sup> contains an implied restriction of the right to strike.<sup>81</sup> Although the railroad companies are explicitly prohibited under severe penalty to change wages or working conditions without recourse to the adjustment agencies established under the act,<sup>82</sup> no implication can be found to the effect that the employees are subject to a corresponding restriction which would prevent them from striking before exhausting all means of adjustment presented by the act.

<sup>77</sup> Witte, *op. cit. supra* note 21, at 253. As to details, see Warne and Gaddis, *Eleven Years of Compulsory Investigation of Industrial Disputes in Colorado*, 35 J. of Pol. Econ. 657 (1927); Twentieth Century Fund, *op. cit. supra* note 46, at 119. For official accounts, see biennial reports of the Colorado Industrial Comm'n.

<sup>78</sup> See esp. the recommendations of the committee investigating the role of the government in labor relations under the auspices of the Twentieth Century Fund. The recommendation in question is as follows:

"We recommend the creation of a federal mediation agency or the strengthening of existing federal mediation agencies, with the power to mediate in all industrial disputes between employers and employees which obstruct or threaten to obstruct the free flow of interstate commerce or threaten the general welfare, and, failing success, to recommend the appointment of special investigating commissions by the President.

"The Committee, realizing that the U.S. Conciliation Service as it now exists is working under a handicap resulting from the frequent failure of either party to inform the Conciliation Service of a pending dispute at that early stage at which mediation is relatively easy, especially before a strike or lock-out has broken out, recommends that there be established by law an obligation to give fifteen days' notice by employers and employees of all changes or demanded changes in wages, hours or working conditions, except where (a) there is an agreement which provides for a different period of notice, and (b) the employees have no chosen bargaining representatives, in which case, they but not the employers should be relieved of the obligation to give notice." Twentieth Century Fund, *op. cit. supra* note 46, at 369.

The necessity for the development of a more adequate mediation machinery has also been emphasized by Garrison, *Government and Labor—The Latest Phase*, 37 Col. L. Rev. 897 (1937).

<sup>79</sup> 44 Stat. 577 (1926).

<sup>80</sup> 48 Stat. 1185 (1934), 45 U.S.C.A. c. 8 (1938).

<sup>81</sup> For a discussion of this problem, see Commons and Andrews, *op. cit. supra* note 4, at 436.

<sup>82</sup> 48 Stat. 1188, 1189, 1197 (1935), 45 U.S.C.A. c. 8, §§ 152(7) (10), 156 (1938).

Resort to industrial warfare before genuine attempts at conciliation have failed may also be forbidden by collective agreements. Such clauses can be enforced by resort to the courts, unless collective agreements are, as in England, without legally binding force.

The mere existence of mediation agencies in a country tells little about their actual role in the adjustment of labor controversies. They function best where both workers and employers are organized<sup>83</sup> and where a long experience in *bona fide* collective bargaining has brought to influence a group of union officials and employers' representatives who are not interested in displaying power and prestige but in genuine and responsible collaboration. Both in Great Britain and Sweden,<sup>84</sup> mediation seems to work so well that suggestions to replace this system of voluntary cooperation by a system of direct governmental interference have met with the combined resistance of labor and capital. In the United States, mediation seems to have grown in importance in recent years, in part seemingly because of the increasing willingness of employers to recognize labor unions and because of the intensified feeling of union members and leaders that collective agreements must be scrupulously observed if the system of collective bargaining is not to be seriously compromised. Many signs seem to indicate that mediation has a good chance of obtaining in the United States a position similar to that which it now occupies in England, Sweden or the Netherlands, and that, with its help, much of the present hostility can be eliminated from labor relations.

4. The free interplay of economic forces may lead to the result that in a certain branch of industry labor is able to deal with some employers collectively while other employers may be strong enough to preserve individual bargaining or bargaining with a union of their own choice and, perhaps, their own creation. Such a situation is likely to result in different wages in the unionized and non-unionized sectors of the industry and thus to endanger the competitive situation of the unionized sector. In order to avoid such a result, a country may, as a method of active wage policy, provide that the wages and other conditions of employment, which exist in the unionized sector of the industry, be compulsorily extended as a "common rule" to the non-unionized sector. Such a situation existed in the German Republic, where the Minister of Labor had the

<sup>83</sup> On employers' organizations, see Kessler, *Arbeitgeberverbände*, 1 *Handwörterbuch der Staatswissenschaften* 712 (4th ed. 1923); Bonnett, *Employers' Associations*, 5 *Encyc. Soc. Sci.* 509 and references therein cited.

<sup>84</sup> On labor relations in Great Britain, see works cited in note 56 *supra*. As to Sweden, see the report cited in note 45 *supra*; also Childs, *Sweden, The Middle Way* (1936).

power to extend to outsiders the binding force of a collective agreement whenever a collective agreement had "obtained preponderant importance for the establishment of the conditions of work in a certain industry and within a certain region."<sup>85</sup> Analogous results can be achieved in New Zealand and those Australian jurisdictions in which an arbitration award can be declared a "common rule" for an entire industry of a certain region.<sup>86</sup> Under this system, parties to a collective agreement may engage in *pro forma* arbitration proceedings in which their agreement appears formally as an arbitration award, or, under some laws, they may simply have their collective agreement registered as an award, whereupon, if all other conditions are fulfilled, it can be imposed by the proper authority as a common rule upon the entire branch of industry.

Where labor is strong enough to compel employers to bargain collectively, it will, normally, also be strong enough to obtain terms at the level of a decent living wage. On the other hand, the wage thus obtained will not be higher than the organized sector of the industry, *i.e.*, the sector usually composed of the largest and technically best equipped firms, is able to pay. Thus, the system of extension of collective agreements effectively prevents the payment of sweating wages in the unorganized sector of the industry without, as under the systems of immediate governmental wage fixing, leaving the determination of the minimum wage to administrative or judicial arbitrariness or guesswork as to what constitutes a "fair" wage in a given industry. The wage for the whole industry is kept at that level which corresponds to the respective bargaining or fighting strengths of the parties in the unionized sector, *i.e.*, at that level which appears as the result of the free interplay of economic forces in the leading part of the industry. Cut-throat competition is thus prevented, however, from depressing wages to a lower level. The result may be, of course, that weaker firms are eliminated, a result which is unavoidable, however, under any form of minimum wage regulation. The system which worked satisfactorily in the German Republic combines, one is tempted to say, in an ideal way, the advantages of the free interplay of economic forces with the principal advantage of the system of the minimum wage, *viz.*, the elimination of starvation wages. It is feasible, of course, only in such industries where labor has been strong enough to unionize the leading

<sup>85</sup> Ordinance on Collective Agreements, of March 1, 1928 (RGBl. 1928. I. 47) § 2. The power to extend the binding force of a collective agreement upon outside employers had first been established in Germany by a Decree of the Council of People's Commissars, of December 23, 1918 (RGBl. 1918. 1456).

<sup>86</sup> See pt. V, 2 *infra*.



firms. Where a country is determined to prevent starvation wages generally, the system must be supplemented by straight minimum wage regulation for those branches of employment where labor is not strong enough to obtain a sufficiently broad foothold.<sup>87</sup> To apply direct governmental wage fixing to those industries where labor has obtained sufficient power can be justified only by a policy either to boost wages above the level obtainable even in genuine collective bargaining or to keep wages, for reasons of general economic policy, under that level.

5. A unique method of active wage policy tending to fix minimum wages at the level obtainable by genuine collective bargaining has been attempted in the United States. Under the Wagner Act<sup>88</sup> employers are compelled to bargain with labor collectively. This system deviates from a passive wage policy insofar as it compels employers to bargain with organized labor where in the free interplay of economic forces labor would not be strong enough to achieve such a result, and where, consequently, without government interference, wages would be at the presumably lower level of individual bargaining. Where, however, labor would have sufficient strength of its own to compel employers to consent to collective bargaining, the system of compulsory collective bargaining does not result in a change of the "free" wage level.†

<sup>87</sup> Thus straight minimum wage regulation through wages boards existed in Germany for homeworkers under the Homeworkers' Wages Law of June 30, 1923 (RGBl. 1923. I. 467, 472).

<sup>88</sup> 49 Stat. 449 (1935), 29 U.S.C.A. c. 7 (1938).

† Compulsory arbitration and governmental wage fixation will be discussed in the December issue.