

produce appropriate outcomes. At the very least, these may include minimum wages and standards of workplace safety. The problem with state intervention is the difficulty in tailoring it to the specific needs of different groups or sectors. Thus, in order not to introduce unacceptable rigidities, it must be set at the lowest possible level. Compulsory arbitration can overcome this weakness by greater sensitivity to context. It also helps to alleviate the single greatest difficulty facing any central planner: lack of information as to the needs and desires of individual parties. The compulsory arbitrator, while not as knowledgeable as the parties, through constant exposure to the same sectors and firms is much better placed than the far-off legislator.

It is not surprising then that many in Australia (not least in the ranks of trade unions and employers) are concerned as to the potential loss if compulsory arbitration is gradually eliminated from the Australian system. It would be ironic indeed if, at the very time other parts of the world are at least taking an interest in compulsory arbitration, it is abandoned by the one country that has nurtured it over the past century.

PART II. THE VIEW FROM HERE

HOYT N. WHEELER*

In the not far distant past American industrial relations scholars who embarked upon an exploration of foreign practices tended to do so in the spirit of the Ming Dynasty, which sent a fleet under the eunuch of Cheng Lo to demonstrate to the world the glory of the Middle Kingdom, with no intention to learn from foreigners or to gain anything from them other than their admiration of the excellence of China. Unfortunately for us, given the current general disarray of our industrial relations system, we now find ourselves exploring more in the tradition of Columbus, looking for treasures to bring back to enrich our own system. This paper is an attempt to take a look abroad to see where we stand in what has traditionally been considered an area of strength in the American system—labor arbitration.

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In viewing labor arbitration internationally from here, it is helpful to start out by pondering what we wish to gain from the exercise. Hopefully, we can come to a better understanding of our own system as well as come up with ideas for improvement. Perhaps as important from an international perspective, we can achieve a truly fundamental and general understanding of the basic and common phenomena with which all systems are attempting to deal.

Particularly in comparative international analysis, where there is often a confusing overload of detail, it is helpful to begin by stating a few fundamentals. Accordingly, this paper will briefly consider what arbitration is about in general, and then will move on to a comparative discussion of rights arbitration, as to both substantive and procedural rules. A brief discussion of interests arbitration will follow. Finally, I will draw a few conclusions.

Labor Arbitration's Setting and Functions

By definition, labor arbitration has as its setting the employment relationship. Its basic function is to resolve disputes arising from this relationship.

In all industrialized societies the employment relationship is one in which an exchange takes place—the exchange of a promise on the part of the employee to obey, for a promise on the part of the employer to pay.¹ In addition to the general subordination obligation—to obey—employees are obligated by law, contract, or custom to engage in and to avoid certain behaviors (e.g., they must be loyal and must avoid stealing from the employer). In addition to pay, the employer may have other reciprocal obligations, such as making particular work assignments and keeping the workplace safe. Employee obligations are typically enforced within the organization through private systems of workplace justice, with punishment meted out by managers for failure to meet these obligations.

So long as the rights and obligations created by the employment relationship are administered within the firm through the ordinary processes of managerial decision making, there is no need for procedures like arbitration. Only when a dispute arises over managerial decisions or actions is there a need for recourse to conflict-resolving mechanisms. These can, of course, exist within

¹Wheeler & Rojot, *Workplace Justice: Employment Obligations in International Perspective* (Univ. of S.C. Press 1985), at 2.

the firm itself. However, in all industrial societies there are extrafirm procedures for resolving these rights disputes for some groups of employees. Here arbitration becomes a possibility. "Arbitration," which derives from the Latin *arbitari*, literally means "to give judgment" or the making of a decision.² The function of this extrafirm authority can be and often is served in a variety of ways in different national systems. The function being served in some manner, however, is a constant across systems.

The above discussion relates to rights arbitration. Interests arbitration over the terms of the employment relationship is a quite different organism. Like rights arbitration it serves as a strike substitute. But it is more legislative than judicial in nature.³ It resolves disputes between workers and employers and takes on a form approximating that of rights arbitration, but its function is to establish, not apply and interpret, rights and obligations.

Disputes Over Rights

An international view of disputes over rights must take in two aspects of dispute-resolution structures. *First* is the matter of the substantive principles of law applied in the various national systems. *Second* are the procedures, of which there is a bewildering variety. Although the subject of substantive rules has not been much studied internationally, this is an area of inquiry in which I have been recently involved, so it is relatively easy to speak to it in this paper. In contrast, procedures for settling rights disputes have been often and thoroughly covered in the international literature. Rather than merely repeat what others have said, I will attempt to use that literature to systematically consider the various ways that the several functions of rights disputes-resolving mechanisms have been served by different systems.

Substantive Rules

Culminating in the recent publication of a book, *Workplace Justice: Employment Obligations in International Perspective*,⁴ and several papers,⁵ an international group of labor law scholars con-

²Conciliation and Arbitration Procedures in Labour Disputes: A Comparative Study (International Labour Office 1980), at 151.

³Braun, *Labor Disputes and Their Settlement* (Greenwood Press 1973), at 308.

⁴Wheeler & Rojot, *supra* note 1.

⁵Ojeda-Aviles, *Discipline and Discharge for Poor Performance*, in Proceedings of the 45th Annual Meeting, Industrial Relations Research Association (IRRA 1993), at 489; Rojot,

ducted a 10-country international study of the substantive principles dealing with dismissal and discipline. What follows is a brief summary of and some comments upon this work.

The threshold question is whether it makes sense to study as a single set of principles, using a common analytical structure, the substantive rules governing workplace justice in 10 countries. Our group of 14 scholars from 10 countries (Australia, Belgium, Canada, France, Germany, Israel, Italy, Spain, the United Kingdom, and the United States) began with the idea that this might make sense. At the end of our several years of study, we concluded that this was indeed so. We were able to arrive at a set of 10 basic obligations of employment that we believed applied to some degree and were of some importance in all of our countries. These obligations were (1) subordination, (2) sobriety, (3) respecting the security of the employer's property, (4) maintaining a peaceful workplace, (5) refraining from off-duty conduct that would harm the employer, (6) attendance, (7) performance, (8) loyalty, (9) refraining from collective action, and (10) avoiding conflicts of interest. We were also able to agree upon and use in our analysis a set of factors that we believed might affect discipline or dismissal: (1) Seriousness, (2) Mitigation, and (3) Enforceability, as set out in Table 1.

It is significant, I believe, that the national systems are similar as to: (1) the *particular types of (mis)conduct* that are possible and usual grounds for discipline, (2) having a single *analytical system* that can usefully be applied to all of them, and (3) disciplinary *outcomes* that are lawful for particular examples of misconduct.⁶

From our comparative analysis we observed two broad principles operating. *First*, we believe it is possible to deduce the particular obligations of employment from an understanding of the fundamental nature and function of the employment relationship. The behaviors giving rise to discipline materially impair this relationship's crucial functions—the efficient and effective production of goods or services in a socially hierarchical work organization.

The *second* principle has to do with dismissal: *Those behaviors that damage the personal relationship between employer and employee so as to make further cooperation impossible can legally lead to summary*

Insubordination, at 498; Adell & Adams, *Discipline and Discharge for Theft in Ten Countries*, at 501; Wheeler & Rojot, *Discussion*, at 510; Trebilcock, *Discussion*, at 512. See also Wheeler, Klaas, & Rojot, *Substantive Principles of Justice at Work: An International Comparison*, Annals of the American Academy of Political and Social Science (1994) (forthcoming).

⁶Wheeler, Klaas, & Rojot, *supra* note 5.

Table 1
Factors Affecting Discipline or Dismissal

Seriousness

- Degree of severity of offense
- Probability of reoccurrence
- Nature of offense
 - Threat to managerial authority
 - Threat to important policy or rule
- Cost
- Precedent establishment
- Moral turpitude

Mitigation

- Needs of employee
 - Old age
 - Financial need
 - Poor health
 - Low market demand for employee
- Personal characteristics
 - High seniority
 - Good discipline record
 - Good performance record
 - Status as employee representative
- Accompanying circumstances
 - Urgent need to act
 - Provocation
 - Other offenses absent (aggravation if present)
- Value to organization
 - High performance
 - Critical skills
 - Skills difficult to replace

Enforceability

- Due process
 - Lack of procedural standards
 - Procedural standards not followed
- Failure to enforce against other employees
- Reasonableness
- Waiver
 - Explicit
 - Implicit by failure to enforce against others
 - Implicit by failure to enforce against employee
- Clarity of rule
 - Lack of written rule
 - Ambiguous rule
 - Lack of notice of rule

termination of employment. This principle would not be so readily apparent from viewing only American arbitral law; thus it is a payoff from the cross-national nature of the analysis.

The emergence of a single body of principles across the several national systems may be accounted for in a number of ways. It may be that we simply have a very limited sample of countries, or that our findings reflect the biases of a group of scholars who are inclined to see common threads across international systems. However, it may alternatively be the case, as we believe it is, that the common economic system, and particularly the common reality of the peculiar relationship called employment, draws us together more than our diverse cultures separate us.

Although there are the broad commonalities just noted, there are also a few systematic differences observable when American rules are compared with those in other countries. The United States also differs in the coverage of its general protection against unjust discipline and dismissal, having far more narrow coverage than any of the other countries in our sample.⁷

As to general substantive principles, we in the United States do differ from the other countries on several dimensions. Unlike Spain, Italy, Belgium, and France, we have no broad legal protection of the right to strike, leaving American employees with a much stronger obligation to refrain from collective action against their employers. Italy differs from the United States and the other countries by not requiring the employer to be consistent across employees in punishing the same act of misconduct. The United States differs from many other countries in that it may work to the disadvantage of an employee to be a union steward, while in Belgium, France, Germany, and Spain employee representatives are given special protection.

When we categorized countries as to whether their legal systems were identifiably more stringent or lenient on particular types of misconduct, we could so classify the United States with respect to several types of offenses. We found the United States relatively lenient as to unjustified absences and disloyalty, but relatively stringent as to insubordination, off-duty misconduct, and collective action. In a separate portion of our study we collected data on employer practices as to dismissal. We found that the differences in leniency or stringency

⁷Wheeler & Rojot, *supra* note 1, at 368-70.

existing in the law were often reflected in similar differences in practices.⁸

As to substantive principles, the general picture emerging from our study of 10 countries is one of broad similarity moderated by some rather interesting differences. To the contrary, when we move on to a consideration of procedures, we find extraordinary dissimilarity.

Procedures

Viewing rights disputes procedures in international and comparative perspective is challenging for several reasons. *First*, when we look across different national systems, the complexity is very great indeed. *Second*, in recent years others have done quite well at making international comparisons in this respect, leaving only limited room for new contributions.⁹ It was partly for these reasons that our group of international scholars chose to focus our study on substantive rather than procedural rules. It is, therefore, with some hesitation that I embark on this part of the discussion.

First, I will set out briefly the key characteristics of the American labor arbitration system that might lend themselves particularly well to the purposes of international comparative analysis. There will follow a discussion of key characteristics of the systems that, unlike ours, use courts or other public tribunals to resolve rights disputes. Last, these two types of systems will be compared on dimensions associated with the functions they are capable of serving.

Key Characteristics of the American System

The salient aspects of our system for international comparative analysis are: (1) the source of the rights to be enforced, (2) the character of the adjudicators, (3) the proceedings, and (4) the legal consequences of the process.

⁸Wheeler, Klaas, & Rojot, *supra* note 5.

⁹See, e.g., Aaron, *Settlement of Disputes Over Rights*, in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Labour Law, Vol. 1, ed. Blanpain (Kluwer 1990), 241; Blenk, *Disputes Concerning Termination of Employment: Comparative Overview*, in *European Labour Courts: Current Issues*, ed. Blenk (ILO 1989), 47; Vranken, *Specialisation and Labour Courts: A Comparative Analysis*, 9 *Comp. Lab. L.J.* 497 (1988); Vranken & Blanpain, *The Role of Neutrals in the Resolution of Shop Floor Disputes*, 9 *Comp. Lab. L.J.* 1 (1987); Bandaret, *Discipline at the Workplace: A Comparative Study of Law and Practice*, 125 *Int'l Lab. Rev.* 383 (1986).

Under the American labor arbitration system, the rights to be enforced have their source in collective bargaining agreements. This has a number of consequences. *First*, it is logical that the procedures also come from this source. *Second*, coverage of the rights and procedures are bounded by the coverage of the collective agreements. *Third*, final adjudication is the last step in a collective bargaining procedure—grievance administration—which is also set up by the agreement. *Fourth*, the party negotiating the agreement—the union—is the party to its enforcement—that is, the grievance is owned by the union, not by the employee.

The character of the adjudicators in our system is another important facet of it. That they are chosen by the parties to the collective agreement flows from the centrality of this agreement to the American system. The way they are chosen is also set by the agreement. They are private parties who are experts in industrial relations. The adjudicating body is sometimes tripartite, with the partisan arbitrators clearly performing a partisan role.

The proceedings in American arbitration are semilegal in nature. They involve hearings, generally less formal than court proceedings. Conciliation prior to the hearing is unusual in our system, particularly in the ad hoc situation. During the pendency of the proceedings the employer's decision stands, meaning that a terminated employee stays off the job until ordered reinstated by an arbitrator.

The results of our proceedings are awards legally enforceable in a court of law. Awards are not, however, self-enforcing. As to remedies, it is common to order reinstatement along with back pay.

Key Characteristics of Other Systems

Consistent with the above discussion of substantive rules, and in order to simplify this discussion of extraordinarily varied systems, I will focus here mainly upon the characteristics of other systems' procedures involving dismissal and discipline. This permits a clearer, if only partial, view of the comparisons between the American system and others. As in our consideration of characteristics of the American system, we will look at the source of the rights to be enforced, the character of the adjudicators, the proceedings, and the legal effect of the outcome of the process.

The right of an employee not to be dismissed (and, in some countries, disciplined) without cause may be based upon statute.

This is the case in Norway, Spain, Sweden, the United Kingdom,¹⁰ Belgium,¹¹ France,¹² and Italy.¹³ In some countries like Germany, these rights are based both in law and in collective agreements. As has been noted by Werner Blenk,¹⁴ in these countries the mechanisms for enforcement of these rights also derive from the law. They tend to have broad coverage of protection against unfair dismissal or discipline. The preadjudication procedures in Germany involve works council procedures serving some of the same functions as U.S. grievance procedure.¹⁵ In these countries the right to complain to the adjudicative body generally belongs to the individual employee, although sometimes the union shares in this right.¹⁶

The character of the adjudicators varies a great deal across countries. This is affected to a large degree by the type of various possible "systems of dispute settlement" in effect, including labor courts, industrial tribunals, administrative agencies, "organs of arbitration," and ordinary courts.¹⁷ Except for the United States, the labor courts and the ordinary courts are the most important, and it is to those that these remarks will relate. Countries using labor courts include Austria, Belgium, Denmark, Germany, Finland, Norway, Spain, Sweden, and Britain (in Britain they are called industrial tribunals). Labor courts are also used in Eastern Europe, much of Latin America, the Middle East, Africa, and Asia.¹⁸ Ordinary courts are used in Italy, Japan, and the Netherlands.¹⁹

As Benjamin Aaron notes, one difference between American arbitration and the labor court systems is that the parties have no part in selecting labor court judges for a case.²⁰ Labor courts are usually comprised of both professional judges and "wingmen." Professional judges do not need special knowledge of industrial relations. Wingmen are labor and management practitioners

¹⁰Blenk, *supra* note 9, at 47.

¹¹Engels, "Belgium," in Wheeler & Rojot, *supra* note 1, at 60, 60-74; Vranken & Blanpain, "Belgium," in *The Role of Neutrals in the Resolution of Shop Floor Disputes*, *supra* note 9, at 44, 44-46.

¹²Rojot, "France," in *The Role of Neutrals in the Resolution of Shop Floor Disputes*, *supra* note 9, at 68, 79-81.

¹³Liso & Pisani, "Italy," in Wheeler & Rojot, *supra* note 1, at 230, 240-43.

¹⁴Blenk, *supra* note 9, at 47.

¹⁵Weiss, "Germany," in *The Role of Neutrals in the Resolution of Shop Floor Disputes*, *supra* note 9, at 82, 83-86.

¹⁶Blenk, *supra* note 9, at 48.

¹⁷Aaron, *supra* note 9, at 241.

¹⁸*Id.* at 244.

¹⁹*Id.* at 260.

²⁰*Id.* at 244.

experienced in industrial relations. This requirement of lay expertise on labor courts derives from the earliest of these courts, the French *conseil de prud'hommes*. Unlike the partisan arbitrators on American tripartite arbitration boards, wingmen must be nonpartisan.²¹

The proceedings in labor courts and the ordinary courts hearing labor issues are somewhat more informal than in many other kinds of cases. According to Aaron, the labor courts are not necessarily more informal and friendly to the layman than the ordinary courts hearing these cases.²² For example, the Italian *pretori*, the ordinary courts that hear labor cases, "bear significant differences from ordinary civil practice, conducted mainly in order to increase the speed, informality and accessibility of the procedure."²³ Conciliation is required in some systems and strongly encouraged in others.²⁴ Some countries, such as Germany, Norway, and Sweden, provide for continuation of employment during the pendency of proceedings.²⁵

Unlike American arbitration awards, labor court orders are, by their very nature, self-enforcing.²⁶ As to remedies, although the power to order reinstatement is present in a number of systems, in practice the remedy for unjust dismissal is generally limited to money damages.²⁷

Functional Implications of Procedures

One of the more important questions to ask about any structural component of an industrial relations system is to what extent it performs the functions for which it has been erected. The American labor arbitration structure and those in other countries have common functions: (1) providing a definitive resolution to disputes over employee rights; (2) assuring individual employees of certain rights, including the right not to be dismissed or disciplined without good cause; (3) encouraging industrial peace; (4) providing a resolution that is in fact, and perceived by the parties to be, fair, unbiased, and correct on its merits; (5) encouraging

²¹Vranken, *supra* note 9, at 500-01.

²²Aaron, *supra* note 9, at 242.

²³Treu, *Italy*, 7 International Encyclopedia for Labour Law and Industrial Relations 1 (Kluwer 1991), at 113.

²⁴Blenk, *supra* note 9, at 48; Braun, *supra* note 3, at 305.

²⁵Blenk, *supra* note 9, at 49.

²⁶Aaron, *supra* note 9, at 244.

²⁷Blenk, *supra* note 9, at 49; Goldman, "Introductory Note," in *The Role of Neutrals in the Resolution of Shop Floor Disputes*, *supra* note 9, at 1, 4.

the solution of disputes by the parties themselves; and (6) performing with dispatch and economy.

Both the American arbitration system and the foreign systems perform the function of providing a *definitive resolution* to the dispute. The American system provides finality at an earlier stage in the adjudicatory process, given the lack of any formal appeal process. On the other hand, the court systems provide a self-enforcing order, once a final decision is rendered.

The American arbitration system's quite limited coverage—around 15 percent of the labor force—prevents it from providing *protection to individual rights* of employees in general. Perhaps the greatest advantage of a legislative guarantee of rights enforced by courts is the universality of coverage. One response to this limitation in the United States, of course, has been the enactment of a whole new set of legal rights enforceable in the courts. Indeed, we may be getting a mixed system, with arbitration decreasing in importance and the ordinary courts and administrative agencies growing in importance.

On the other hand, the quality of protection provided by the American system to those covered by it is probably unmatched by any other system. A limitation on the protections furnished individuals in our system is its dependence upon the union to enforce individual rights. The union has a legal duty of fair representation, but this may not always be met. The union does provide representation to employees at all stages of the process, including, quite importantly, at the early stages of the grievance procedure. It is also true that the collective instruments of worker rights enforcement—unions—are strengthened by their involvement in this process.

By providing continuance of employment during the pendency of a challenge to a dismissal, some labor court systems provide protection to workers that is both very powerful and useful. This would seem to prevent unnecessary harm to either party in a better fashion than the American practice of leaving a worker without a job while providing a remedy that may pay the worker for not working and require the employer to pay for work not performed. The awkwardness of the reinstatement remedy stems in part from the difficulty of displacing the worker who has been moved into the dischargee's place. At least one American union, the United Steelworkers of America, has negotiated a provision for continuance of employment in some of its contracts.

Both the American arbitration system and the court systems serve the function of leading to *industrial peace* by providing an outlet for employee complaints. It could be questioned whether this function is intended by all of the European systems, given constitutional guarantees of the right to strike in France, Spain, and Italy. Arbitration is the *quid pro quo* for the right to strike in the United States, but this view does not exist in these countries. Nevertheless, it does appear that providing an outlet for these complaints other than the strike does lessen the probability of strikes, and it seems unlikely that this would be seen as dysfunctional even in those countries that protect the right to strike.

American arbitration and the court systems both appear to provide fair, unbiased, and correct decisions. Perhaps it is the bias of an American arbitrator to say that this is true in the United States; the parties may have different ideas about this. However, studies over the years have shown that the parties are generally satisfied with these aspects of arbitration, even though they tend to criticize its costs and formality. The European labor court practice of having professional judges plus wingmen, all of whom are committed to being nonpartisan, is especially well calculated to deliver high quality decisions.

The function of encouraging *voluntary solutions* is justified because they are better than imposed solutions in at least two respects. First, the parties may reach a better quality of decision than an outsider can make. Second, the outcomes may be more acceptable to the parties if reached on their own. The United States arbitration system does this primarily through the grievance procedure preceding arbitration, and by having arbitration itself a creation of the parties. Court systems generally emphasize conciliation, which serves similar purposes. Whether one strategy works better than others is an empirical question that has not been addressed in the literature.

As to *speed and economy* of the process, it is difficult to compare arbitration and the courts. Both systems are capable of delivering quick and cheap results compared with adjudications in other kinds of disputes. The American system has, as noted above, been criticized for its increasing costs, and there is room for improvement in this respect. It is, however, some testimony to American labor arbitration that, under the label of alternative dispute resolution (ADR), its processes are rather widely copied elsewhere within the U.S. legal system.

Disputes Over Interests

Though not nearly so widespread as rights adjudication, and in the process of being dismantled in its traditional native lands—New Zealand and Australia—interests arbitration procedures or the equivalent are nevertheless available in a number of countries.²⁸ In the United States it is used mostly in the public sector, particularly with respect to “essential” employees. In Canada, in addition to its use in the public sector, it is available in the private sector in several provinces for first contracts. It is available but little used in Germany, Israel, and the United Kingdom.²⁹

An anomaly in this regard is noted by Alvin Goldman, “In most national systems, Adjudication is seldom or never used to resolve interest disputes. Even when it is available, its greatest impact is not in its actual use but in the impetus it gives the parties to find their own solutions rather than become the victim of the third party’s ‘wisdom.’”³⁰ Much of the early literature on compulsory interest arbitration in the U.S. public sector, to which I have contributed, had to do with whether the prospect of arbitration would have a “chilling” effect on bargaining, or would become addictive—the “narcotic” effect. Indeed, final offer selection arbitration was invented to deal with the chilling effect. The point of all this concern, of course, is the voluntaristic bias toward having the parties solve their own problems rather than have a solution imposed upon them. As noted above, voluntarily arrived at decisions are presumably of better quality and more acceptable.

Our interest arbitration structures can be distinguished from those outside North America principally because they have more detailed statutory guidelines for arbitrators and use arbitrators with different backgrounds.³¹ Instead of requiring arbitrators to consider criteria such as pay and benefits of comparable employees, employer ability to pay, and cost of living increases, German and Israeli adjudicators are given only broad directions to be just or to consider market forces. Unlike those systems we use private professional ad hoc arbitrators.

²⁸Goldman, *The Role of Neutrals in the Resolution of Interest Disputes: Comparative Overview*, 10 *Comp. Lab. L.J.* 271, 283 (1989).

²⁹Weiss, *Federal Republic of Germany*, 10 *Comp. Lab. L.J.* 339, 352 (1989); Ben-Israel & Mironi, *Israel*, 10 *Comp. Lab. L.J.* 356, 364 (1989); Wood, *United Kingdom*, 10 *Comp. Lab. L.J.* 411, 425 (1989).

³⁰Goldman, *Settlement of Disputes Over Interests*, in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies: Industrial Relations*, ed. Blanpain (Kluwer 1990) 197, 212.

³¹*Id.* at 284–85.

These various systems of interests adjudication do not engage in what would normally be identified as “adjudication” or “arbitration.” Making policy is a different kind of intellectual exercise than its application. Although the trappings are the same, as is the purpose of avoiding strikes, a true court or adjudicative system would involve only rights.³² The processes in other countries may take this difference into account more explicitly than ours.

Conclusions

Viewing the topic of labor arbitration from an international comparative perspective puts into bold relief several features of the American labor arbitration system. One is its severely limited coverage. Indeed, it may be inappropriate to compare it with the labor court systems of other countries. A more proper comparison might include the American ordinary courts and administrative agencies that enforce employee rights such as freedom from discrimination, plant closing notice, safety, family leave, and protections against subjection to lie detector tests. One of the more interesting questions is how the American courts stack up in comparison with the labor courts or the ordinary courts in other countries in their handling of employment-related questions.

It is also obvious from looking at various systems that they are exactly that—systems. It is not particularly useful to contemplate transferring bits and pieces of one national system to another, at least without serious attention to the effects on the receiving system as a whole. A more reasonable question is whether we might adopt a whole new system for adjudicating employment rights, given our very complex legislative structure. This could easily coexist with an arbitration system, as it does in many countries with labor courts.

Procedurally there are many ways to achieve a workable system of rights adjudication. There are advantages and disadvantages at the margin, but most work pretty well. All might benefit from application of the Japanese notion of *kaizen*—constant improvement. However, no glaring deficiencies exist with respect to any of the systems reviewed for this paper.

As to substantive rules, norms of workplace justice in dismissal and discipline are broadly similar. It would be interesting to see whether a study of a sample of countries more diverse than ours

³²Braun, *supra* note 3, at 307.

would produce similar results. Once you define the relationship as employment, you have made a fundamental statement about its functions and fundamental nature that determines to some degree the obligations and rights arising from it.

The basic and common phenomena with which labor arbitration and other adjudicative structures deal consist of the rights and obligations arising from the relationship called employment. The adjudicative mechanisms dealing with rights will probably survive only if they serve most of the functions that have been identified. They must resolve disputes; protect employee rights; encourage industrial peace; provide resolutions that are fair, unbiased, and correct; encourage the parties to solve their own problems; and do all of this with dispatch and economy. The systems we have reviewed seem to meet these tests pretty well.

Interests arbitration poses another set of concerns. It deals with fundamentally different questions and fulfills a different function. Like rights arbitration, it must serve industrial peace. This may indeed be its chief function. It does so by creating new obligations. In all of the countries where it operates, it assumes a form similar to a truly adjudicative structure. Yet it is, I believe, something truly different. It needs its own study and separate theory. As one who has advocated broader use of interests arbitration in the American system, I feel a strong need for a better understanding of this hybrid structure. The Canadian experience with private sector first contract arbitration should continue to be particularly instructive.

After having said a great deal about the function of labor arbitration and similar structures, I find myself reluctant to make any claims about the functionality of this analysis. Hopefully, it will serve its purpose by touching on some of the more salient issues and focusing attention on what can be learned by an international comparative consideration of them.