DECLARATION

This thesis is my own original work. All authorities and sources that have been consulted have been acknowledged by referencing and compiled in the bibliography.

Paul Omojo Omaji
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ABSTRACT

This thesis attempts a comparative sociology of the labour law in Australia and Nigeria. It finds that there are fundamental similarities between the compulsory arbitration laws of both countries which cannot be adequately explained, simply, in terms of race, geography or stages of industrial development. The thesis outlines in considerable details two broad sociological perspectives on law, the autonomy model and the social product model, and uses the insights of these two approaches to explain the observed similarities.

The thesis shows that the 1904 Australian law was transplanted to Nigeria in the period 1968-76. Further, it shows that although at first sight Australia in 1904 is very different from Nigeria in 1968, the respective social circumstances (particularly the social control traditions) were remarkably similar, thus allowing the borrowing of the Australian legislation by Nigeria. The few differences which the thesis identifies suggest that the borrowing was not a case of blind legal transplantation.
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<td>ALR</td>
<td>Australian Law Report</td>
</tr>
<tr>
<td>ALJR</td>
<td>Australian Law Journal Review</td>
</tr>
<tr>
<td>CLR</td>
<td>Commonwealth Law Report (Australia)</td>
</tr>
<tr>
<td>CO</td>
<td>Colonial Office (London)</td>
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<tr>
<td>CPD</td>
<td>Commonwealth Parliamentary Debates</td>
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<tr>
<td>DFAT</td>
<td>Department of Foreign Affairs and Trade (Australia)</td>
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<tr>
<td>IAP</td>
<td>Industrial Arbitration Panel (Nigeria)</td>
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<td>ILO</td>
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<td>ILR</td>
<td>International Labour Review (Geneva)</td>
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<td>NECA</td>
<td>Nigerian Employers Consultative Association</td>
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<td>NIC</td>
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<td>New South Wales (Australia)</td>
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<td>NZLR</td>
<td>New Zealand Law Report</td>
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<td>UAC</td>
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CHAPTER ONE: INTRODUCTION: THE RESEARCH PROBLEM AND METHOD

1.1 A statement of the research problem

How is [new] legal policy possible? As soon as this question is asked the limited significance of the positivistic legal method is demonstrated... In calm periods of history, when a certain degree of equilibrium has been achieved in the relations between the social forces, it is usually simply a matter of formal modifications of the law, for which the positivistic technical method may be sufficient. But in times of sudden change, where the old disappears and the new craves recognition, a purely technical insight into the existing legal order is not sufficient. At the very moment when jurisprudential thought advances beyond existing law and wishes to develop new forms of law, it becomes dependent on the sociological method. For only the latter provides the foundations for the tasks [of understanding new] legal policy.

---- Hugo Sinzheimer, 1922 (quoted in Clark, 1983: 88)

In every country, North and South, workers, employers and governments have both common and divergent interests, ... The way such interests must be expressed and reconciled is the subject of industrial relations [and labour law]. It will of necessity vary from country to country. International comparison must bring out and explain the differences and similarities of national industrial relations systems [and laws].

---- Schregle, 1981 (quoted in Blanpain, 1987: 3)

In 1904 the Commonwealth of Australia instituted the most comprehensive compulsory arbitration legal system the world had ever known\(^1\). The ripples of the 1890s industrial turmoil had not quite disappeared before this happened. That is to say the system was introduced against the background of an open social conflict. The system was radical, i.e unprecedented, in the sense which the statement by Sinzheimer quoted above implies. Henry Bourne Higgins, to whom Kahn-Freund (1977: 16) attributes the founding of this system\(^2\), has quite passionately affirmed these characteristics of the system in his work, *A New Province for Law and Order* (1922). The system represents a significant legal innovation at the federal level (Rawson, 1980: 291; Brereton, 1989: 293). Given this background, it is submitted in this thesis that the

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\(^{1}\) For a comparison of this system with the older but less comprehensive systems instituted by New Zealand in 1894, Western Australia in 1900 and New South Wales in 1901, see Mitchell and Stern (1989: 112-123).

\(^{2}\) Most Australian scholars who are interested in this area would regard Charles Cameron Kingston as the principal Founding Father, without discounting the importance of Higgins. In any case, Kahn-Freund's attribution to the latter has been put to a good use - e.g, as a connecting point for the contributions of Merrifield (1980) and Portus (1980) to the *In Memoriam: Sir Otto Kahn-Freund*, edited by Gamillscheg, et al. (1980).
emergence of this system would, as in Sinzheimer's statement, be dependent upon the sociological rather than positivistic legal method for a sufficient explanation.

Significantly, this system has contrasted sharply with the industrial relations systems in Britain and other industrialised nations and has provided materials for what Schregle (quoted above) indicates to be the necessary project of international comparison: identifying and explaining differences and similarities. For instance, with this contrast in mind, Kahn-Freund once suggested to the Congress of the International Sociological Association (at Liege, August 1953) that the compulsory arbitration system in Australia and New Zealand is "a phenomenon which ought to be of some interest to those who are inclined to explain social institutions with the help of 'national' or 'racial' characteristics" (see Kahn-Freund, 1954: 214). Although he did not elaborate and his meaning has remained obscure, his suggestion implies a broader sociological accounting for differences and similarities among national systems/laws by national and racial traits.

There have been attempts to address the contrast between the Australian system and the systems of other Western countries, using a sociological approach. One is Mote's (1916: 118-166) work on why compulsory arbitration law (in his view, a legislative taboo) had emerged and worked well in New Zealand and Australia and not in Britain and the United States. He suggests, in effect, that similar national characteristics have led to similar industrial legislation in the former and that the absence of these characteristics accounts for the different industrial legal regimes in the latter. He argues that New Zealand and Australia had a relatively small percentage of foreign-born residents, low illiteracy, large surplus of land and liberal state aid to the colonists. These factors made the populations of the two countries contented and receptive to compulsory arbitration. Britain and the U.S on the other hand were not similarly placed, hence the different approach to compulsory arbitration. However, the fact that Canada, with national characteristics apparently similar to Australia and New Zealand,
has industrial legislation different from the Australasian model (see Mitchell, 1990: 47-80) casts doubt on this explanation.

When Blain, et al (1987: 179) ask "why ... similarities and differences exist" in the industrial arbitration systems of Australia, Great Britain and the United States, they raise another expectation that the sociological explanation suggested by Kahn-Freund would be demonstrated. But they left the question unanswered, after merely demonstrating that the countries "have developed clearly diverging industrial relations practices". Nonetheless there is a significant point in their work: the differences between the industrial laws and practices of Australia on the one hand and of Britain and the U. S. on the other exist in spite of a common cultural tradition and language.

In an earlier attempt, situating the Australia system in a wider comparative context of the approaches to compulsory arbitration in Canada, Great Britain, Jamaica and the U.S, Loewenberg, et al (1976: 174) point to the varying stages of industrial development, differing populations, and unique experiences of and attitudes to strikes to account for the differences especially between Australia on the one hand and the other four countries on the other. Why the factors of being "political democracies ... [and] ... part of the English-speaking world having a history of ties with Great Britain" did not orient all the five countries towards similar systems is not explained. So, the question whether national characteristics account for the occurrence of compulsory arbitration in Australasia as suggested by Kahn-Freund remains unanswered.

It is all the more sociologically puzzling if compulsory arbitration systems, similar, for instance, to that of Australia, occur in other countries with little or no similar national or racial characteristics. Apparently unknown to many a scholar of labour law in the Western world, this has in fact happened with Nigeria introducing and elaborating since 1968 a compulsory industrial arbitration scheme fundamentally similar to that of Australia. Interestingly, the contribution of Givry (1978) on the voluntary and compulsory arbitration systems world-wide to the International Encyclopedia of
Comparative Law makes no mention of Nigeria among the numerous examples from the developing world. Similarly, Rawson's (1980: 291) assertion that "the ... Australian ... legal innovation of the turn of the century, compulsory industrial arbitration, has on the whole found ... no true imitators" suggests a lack of awareness of the Nigerian case.

Addressing the 1986 National Convention of the Industrial Relations Society of Australia at Adelaide, Professor Benjamin Aaron alluded to the debate about the "compulsoriness" of the Australian system and, then, said: In any event, what is certain is that the Australian arbitration scheme is unique, there is no other in the world quite like it" (Aaron, 1986: 149). This statement also suggests a lack of awareness of the Nigerian case. Further, the reactions of other scholars in Australia and Geneva with whom I have discussed my research since 1988 tend to confirm the view that the Nigerian compulsory arbitration law is little known in those places. Obviously the Nigerian system has not been examined by Western scholars specifically in relation to the Australian system.

Be that as it may, this thesis conceptualises the observed fundamental similarities (along with any sociologically significant differences) between the Australian and Nigerian arbitration systems as unexplainable by national or racial similarities. Further the thesis perceives that it is by locating the phenomenon in broader sociological perspectives that a more valid explanation can be advanced. Both constitute the research problem for the thesis. Considering the perspectives in terms of the "autonomy" versus "social product" debate which I reconstruct from the law and society literature, I arrive at the following research question to guide the thesis: in the light of the debate as to whether law has some independent existence or is a mere product of society, how do we account for the differences and similarities between the labour laws of Australia and Nigeria? The concern is to give the discourses about differences and similarities among laws across national boundaries a more explicit sociological focus than has hitherto been the case.
Put in general terms, the thesis attempts a comparative sociology of the labour law in Australia and Nigeria. The attempt is an engagement with the macrosociological tradition, using the legal framework of the collective labour relations in both countries to highlight the broad questions about the law-society relations in general and the social foundation of differences and similarities among laws across national boundaries in particular. Thus, although the research upon which the thesis is based is conceived along the axis of the conceptual interplay between jurisprudence and sociology, the emphasis rests more with the sociological than with the formalist legal orientation. It should be noted, however, that this emphasis does not re-enact what Hopkins (1978a: 266) has described as a "predominantly one way" traffic from sociology to law. In other words the approach is not merely to apply sociological theories and techniques "to law as an object of inquiry", but to explain what are fundamentally sociological problems through the study of law. Thus, apart from drawing on literature from both disciplines, the thesis highlights, inter alia, how labour law serves as an index of the sociological character of the Australian and Nigerian political economies, especially in their formative years.

In the remainder of this chapter I shall specify the theoretical background against which the research problem is conceived and the reason(s) for choosing labour law and the two countries. Further I shall undertake a conceptual clarification of the aspect of the labour law upon which the research is focused and outline the strategies for the collection and analysis of the materials used in the thesis. Although the thesis does not assume general knowledge about the history and development of the sociology of law and about the methodologies in the field, one is constrained by space to adopt a `sketch' format in the specifications that follow.

1.2 Theoretical background of the research problem

There is no gainsaying the importance and ubiquity of the presence of law in society (Friedman, 1977: 2). Indeed the philosophers in the era of the Sophists and Socrates equated legal ontology with social ontology in so far as the application of and
obedience to law were taken as the twin facets of the foundation or character of social existence. Thus the Athenians held the view (projected through Socrates in Plato's *Crito*) that "a City without law is not a City ... [For, an Athenian citizen] owes his birth and education, and his very existence as a civilized human being to the Laws" (Allen, 1980: 85-88).

In contemporary times it is equally recognised that "relatively few areas of social life can be fully understood in all their complexity without some apprehension of their legal aspects" (Schur, 1968: 4). Put differently, "law ... has become a metaphor for ordered social life" (Campbell and Wiles, 1979: ix) or, as Chambliss and Seidman (1982: 8) have observed, law has to be implicated by the organised political community "in all attempts to solve social problems". In contemporary literature, this important and ubiquitous presence of law in the organisation of social life on an increasing scale has been nicely captured by one concept, namely, 'the juridification of social spheres'. This concept conveys a progressivist view of the expansion of law through judicial, legislative, and administrative measures (see Teubner, 1987).

Significantly, the growth of law has meant not only "the enormous quantitative growth of norms and standards' or 'the proliferation of law', but also the increasing use of law by the polity (state) "as a means of control to constitutionalise the economy" (Teubner and Firenze, 1987: 12). One illustration is Winkler's (1975: 103) location of the formal origins of the British *Industry Act 1975* in "the Labour Party's attempt to revise its strategy for the State control of private enterprise into a form appropriate to the British economy of the 1970's, that is to an economic structure now characterised by high levels of concentration in virtually all sectors". In the process of being so used in the interpenetration of the polity and the economy law increasingly assumes the character of a "regulatory law" (Nonet and Selznick, 1978: 89). Also, the process has led to more, not less law in society.
The reality of law as a constitutive element of social organisation has been recognised in long-running intellectual debates among philosophers, lawyers and social scientists alike. These debates involve diverse conceptions of law, e.g: a divine or superstitious command (a stoic view represented by Cicero); a rational ordering of things - divine or natural (Aquinas); a utilitarian regulation by the government (Bentham); the command of the sovereign (Austin); a collective product of the 'general will' (Rousseau); an external symbol of social solidarity (Dürkheim); an instrument of domination over the society by the ruling class (Marx); a bourgeois form of social regulation (Pashukanis); a product of reconciliation or compromise between conflicting claims and demands (Pound); and the crystallisation of the interest of the dominant group in society (Quinney).

These representations contain or are formulated with different sets of assumptions about the nature of the relationship between law and society. This relationship remained largely unexplored, intellectually, until about the 16th century when a "humanist movement" developed within the study of law to challenge the dominant exegetical method (i.e. the dogmatic-normative science of law) which had closed legal studies off from "specific reference to the historical and social circumstances of [the] origins and application" of legal rules (Stewart, 1981: 112).

The humanist movement assumed an historical and proto-sociological orientations when it was renewed in the early 19th century by Fredrick Otto Von Savigny. In the later part of the 19th century, Henry Maine introduced the dimension of comparative history into the movement. Soon the movement was beset with the inability to bring the study of law vis-a-vis the dynamics of society out of 'exegesis' and was trapped into crude historicism where "the historical account itself [i.e the description of connections in the history of law] ... was taken as the norm of correct law" (Schnadelbach, 1984:

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3 This German jurist and scholar is regarded, generally, as the founder of the school of historical jurisprudence. His "On the Vocation of Our Age for Legislation and Jurisprudence", 1814 is said to have set the programme for this school.

4 See his *Ancient Law*, 1861.
39). Arguably this was the state of the art of intellectual discourse on law at the time when, or in reaction to which, Durkheim proposed a sociology of law in his introductory lecture of 1887. In that lecture he "aptly raised the problems of the relations between forms of solidarity and kinds of law" (see Gurvitch, 1947: 92).

Translated as "What is the relation between law and social order?", the problems which Durkheim had raised have since constituted what Gibbs (1966: 315) terms "the original paramount question" upon which was built "the grand tradition in the sociology of law". This question has remained a fascinating subject, even though it has been addressed on differing scales at different periods in the subsequent development of sociological and legal discourses on law. For instance, after the programmatic approaches to the study of law in society by Emile Durkheim, Karl Marx, and Max Weber, sociologists vacated the field for lawyers (Hopkins, 1975: 609), like Eugene Ehrlich and Roscoe Pound on the one hand, and on the other, Oliver Holmes, Karl Llewellyn, Karl Olivecrona and Jerome Frank whose intellectual activities on the subject gave rise to the schools of sociological jurisprudence and legal realism, respectively.

When the sociologists returned to the subject in the 1960s they shifted their focus from the tradition of the programmatic discourses to the micro-level analysis of the details of such issues as the law in action and the structure of the legal profession (Gibbs, 1966: 315; Hopkins, 1975: 610). Perhaps, this shift reflects the response of the sociologists at the time to the positivist expectation to be relevant (see Grace and Wilkinson, 1978: 7; Becker, 1990: 11). After the early 1970s, however, sociologists began to return to the macroscopic level with the attempt to synthesize theoretical inquiries with empirical and historical research (see Roshier and Teff, 1980: 6-13; and Hunt, 1981: 48-49 for brief statements on the British and American experiences respectively).

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5 Stewart (1981) indicates that this was specially to get away from the study of law by exegesis. For a good summary of the interaction between jurisprudence and sociology, see Timasheff (1974).
The changes in the character of the discourses as indicated above correspond to what Tomasic (1983 and 1985) has described as the three phases in the development of the sociology of law: (1) the 'European phase', lasting up to 1930s, during which the founding fathers of the sociology of law were concerned with charting the field of the discipline; (2) the 'American phase', beginning with the works of the Legal Realists and Pound's sociological jurisprudence and peaking during the 1960s; and (3) the 'International phase', starting from the 1970s with the efforts to replace the "narrow provincialism" or empiricism of the previous decade with a synthesis of theory and historical research (Tomasic, 1985: 6-7).

The contemporary phase (i.e the international phase) has witnessed more attention to the relationship between law and society than the preceding two phases. This phenomenon is alluded to in the observation made by Chambliss and Seidmnan (1982: ix):

the field of study now known as "law and society" mushroomed in the last ten years. Theoretical and empirical developments have been so rapid that where once we suffered from a paucity of good studies we now have an embarrassment of riches.

The reasons for the attention burgeoning in this way may not be known fully, but they are not unconnected with the rising influence of Marxism in sociology and the immense flowering of interest in the classical sociologists in general during this phase (see Rhea, 1981; Byrant and Becker, 1990).

For the purposes of this research, what is of utmost significance in all this work is, to use the words of Hunt (1981: 51), "the successive engagement between rival dichotomous conceptions" of the nature of the law-society relation. There, for instance, is the divine/convention or nature/custom dichotomy. Among the early (especially the Greek) philosophers the verdict was in favour of the "supra-human" (God or Nature) genesis of law, thus founding the "natural law" paradigm which postulates that there is a "higher law" serving as a universal normative model for positive (man-made) laws.
There is also the mirror/engineer dichotomy. As aptly summarised by Friedman (1964: 19), "the controversy between those who believe that law should essentially follow [and] not lead ... and those who believe that law should be a determined agent in the creation of new norms, is one of the recurrent themes in the history of legal thought". The proponents of the "mirror" argument maintain, essentially, that law is a decisive reflection of its society (see Durkheim, 1893, 1968; Dicey, 1905; Duguit, 1912 & 1913; Friedman, 1964). The "engineer" argument, on the other hand, sees law as a technological force for conserving, liberalising, and creating social change (Jenkins, 1980: 214). This view echoes Timasheff's summary of Petrazycki's assertion:

> law molds the motives conducive to human action, coordinates the very actions and thus creates social order ... Thus, for instance, the civil law of liberal society has greatly developed thrift, the spirit of enterprise and love for work; whereas the different types of constitutional law have differently molded the political mentality of the corresponding nations (quoted in Podgorecki, 1974: 218-219).

It is this view, articulated by Pound (1943) as the "social engineering" function of law, that inheres in the Soviet "modernising experiment" in central Asia in the 1920s (Massell, 1968), the Allied Occupation "directed socio-political change" in Japan in the 1940s (Oppler, 1976) or the "sanitisation" of the Papua New Guinea economic ventures through licensing laws by Australia in the 1950s and 1960s (Burman, et. al, 1979), and also informed the founding of the "Law and Development" movement by the International Legal Centre in New York between the late 1960s and early 1970s to export the American legal model for the "modernisation" of the Third World (Trubek, 1972; Trubek and Galanter, 1974; Merryman, 1977).

These instances of the "engineer" view, while possibly unrepresentative, show that there was a widespread belief in law as an instrument of change and control in the situations of colonial subjugation and post-colonial social reconstruction (Omaji, 1986). Usually this involved the superimposition of ready-made legal systems, in most cases, oblivious to the likelihood that any attempt to force a form of law on a social environment uncongenial to it may miscarry with damaging results. Britain
superimposed the English law and notion of justice on its colonies\(^7\); the Soviet Union came on their "civilising" mission to Turkey in the 1920s with their own legal codes; when the Ethiopian Emperor invited Rene David in 1960 to draft a new civil code for Ethiopia as part of the drive for development and modernisation, Rene convinced him to adopt a ready-made legal system on the grounds that "Ethiopia cannot wait 300 to 500 years to construct in an empirical fashion [a new] system of law" (David, 1963: 188); etc. More significantly, these instances constitute a statement of an assumption about the independence and transplantability of law, an assumption that will be shown to be crucial to the research problem of this thesis.

Another dichotomous conception of the law-society relation is the consensus/conflict argument. On the one hand, law is portrayed as an embodiment of the consensual values, spirit or public will of the society. On the other hand, law is seen as a product of group or class struggles, the form, content and application of the law being determined by compromise, domination or the coercive force of the state. In tracing the origins and developments of this consensus/conflict dichotomy, McDonald (1976: 26-137) identifies the works of Montesquieu, Adam Smith, Durkheim, Spencer, Parsons, etc with the consensus view, and those of Beccaria, William Godwin, Robert Owen, Marx, Bonger, Quinney, etc with the conflict view.

Some concern has been expressed in the literature regarding the effect of dichotomous thinking on the sociological study of law. Hunt (1981: 52) points out that there is "[a] general deficiency inherent in the dichotomous conceptions of law" which is the tendency to produce an 'either-or' effect, capable of resulting in unstable analyses. More or less restating this point, Tomasic (1985: 101) regards the dichotomous conceptions as "a depressing tendency", because they have "made for extremely unstable and often merely polemical explanations of law-making". Both scholars

\(^7\) Kalu's (1988: 79) note regarding the experience of Nigeria is graphic: "There is an apparent consensus of opinion that it is as a result of the superimposition of an alien system of law and justice on our indigenous concepts that incalculable difficulties have arisen in the administration of justice in this country. Demonstrably, [groups in Nigeria] had their independent system of arbitration ... before the British accosted them with the baggage full of legal and cultural assortments".
suggest that dichotomous conceptions are theoretically unproductive, or even counterproductive. This may be the case if, in conceptualising the origin of law-making, the effort is concentrated on adjudicating between the competing conceptions (see Hopkins, 1978b: 6-8) or if there is "the addition of a moral dimension" [see Tomasic's (op.cit: 102) comment on Hagan (1980)]. However, the position in this thesis is that dichotomous thinking can be a fruitful strategy for addressing the sociological foundation of legal innovation, insofar as each side of the dichotomies is not defined as irreconcilable with the other.

There is one pertinent contention which this thesis would raise with the existing discourses on law-society relations: their terms (e.g "consensus" versus "conflict") are not broad enough and are, therefore, incapable of yielding theoretical frameworks that can facilitate cross-national comparative investigation of law-society relations. In context, the lack of broader conceptualisation is a reflection of more basic syndromes, two of which will be mentioned here. First, is the inadequate effort to provide a synthesis of literature in the field of the sociology of law as a whole (Abel, 1980). Second, there is a hesitancy to return to the macrosociological tradition, which tradition is historical and comparative. The latter syndrome has been dubbed "developmental agnosticism" and "the retreat of the sociologists into the present" (see Mennell, 1990: 54). Needless to say, both syndromes underscore the inadequate theoretical base in the sociological study of law (see Tomasic, 1980: 15; 1985: 1). The second syndrome falls short of what Berger and Kellner (1981: 15-16) conceive to be the calling of the sociologist:

> the sociological perspective is comprehensive and comparative ... And this means that sociologists must retain some ability for cross-cultural, global comparisons, in historical depth as well as in contemporary terms. Put simply, the calling of sociologist is by its very nature a cosmopolitan one.

The general concern of this thesis is to attempt a contribution, albeit a modest one, towards the filling of this gap. It is largely for this purpose that I adopt the approach of reconstructing the major dichotomous conceptions into broader models which are, as
mentioned before, the autonomy (i.e. independence) and heteronomy (i.e. social product) models of the law-society relation. Chapters two and three of the thesis present each of these reconstructed categories respectively. After comparing and contrasting the Australian and Nigerian labour laws in chapters four and five, these theoretical models are used in chapter six to explain the observed differences and similarities between the labour laws of the two countries. In the last chapter of the thesis, the relative strengths of the two models as sociological explanatory constructs vis-a-vis the observed cross-national differences and similarities in laws are discussed.

1.3 The choice of labour law and the two countries

From the initial stages of the development of my research problem I was quite disposed to choose any field of law as an empirical focus of investigation. Although I had researched in the area of criminal law for a master's degree thesis, my research interests had broadened out, ranging from theoretical issues like "law and social change", through law reform, adoption laws, foreign exchange law, the judiciary, to industrial development law. Thus, when it became clear that labour law could well be the research focus of this thesis, there was not much difficulty coming to terms with that direction.

Soon I realised that labour law is one of the least researched fields of law in the sociology of law. For instance, surprised that there had been "no attempt to examine systematically the implications of [theory and methodological debates in sociology] for the study and development of labour law", Clark (1983: 81) embarked on analysing the German writings of Kahn-Freund with a view to developing "hypotheses concerning the sociology of labour law". Further, out of the 996 titles listed in Tomasic's (1985: 139-267) trend report on the major concerns of legal sociologists only an insignificant proportion (0.8%) have some identifiable bearing on labour law. Without suggesting that this report has listed all the titles in the sociology of law, it is reasonable to argue

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8 This figure includes 988 plus 8 second entries (229a, 319a, 731a, 759a, 837a, 900a, 908a, and 980a).
that the proportion (8 out of 996) is by itself a commentary on the neglect of labour law in sociological research.

My feeling at this realisation bordered on surprise and exasperation, quite akin to the feeling conveyed by a statement attributed to a one time Associate Justice of the Supreme Court of the Philipines, Jose Parades:

> When one takes into consideration the plethora of law tomes in our book market, it is sometimes exasperating - nay, mystifying - to fail to find authoritative writings on labour legislations(sic). The dearth of such writings is anomalous, since knowledge of the laws governing labour-management relations is indispensable to men of affairs in a country aspiring to economic advancement (quoted in Martin, 1970: iii).

If the words "authoritative", "men of affairs" and "economic" in this quote were "sociological", "intellectuals" and "theoretical", respectively, I would say Parades articulated my feeling about two decades before I came to it. The neglect is gross considering, as Simitis (1987: 113-114) has observed, that "labour law constitutes the classic paradigm for juridification ... [- a concept which] expresses the displacement of the 'contemplative state' by the 'activist' state and thus marks the path from the undisputed priority of contractual agreements to a 'law-driven' society".

I take the view that sociology neglects this branch of law at a high cost, given the dynamics of political economy which the juridification of labour relations encapsulates. Rather than being put off by the observed neglect, I felt challenged to consider this branch of law. Thus, having come to the doorstep of labour law more or less fortuitously, my exasperation at the sociologists' neglect opened the door, and the social processes which I found reified by this law presented a research challenge. Needless to say, a member of "the Holy Trinity of the sociologists' pantheon", Karl Marx (the others being Durkheim and Weber - see Mennell, 1990: 54), had found the analysis of the British labour legislation up to the 19th century equally rewarding. This is borne out by his drawing on this analysis in laying the foundation for what has come down as the Marxian theory of society (see chapter 15 of his Capital, vol.1). It goes without saying, therefore, that there is weight in the observation that labour law
Choosing two countries whose labour laws are to be examined for the purpose of this thesis is a result of my interest in comparative macrosociology. Holt and Turner (1970: 6) observe that comparative method came into use in the social sciences "because scholars were interested in developing and testing theories that would be applicable beyond the boundaries of a single society"; but my interest does not contemplate such an ambitious project. The interest is basically to use broader categories of the debates on the law-society relation in a cross-national context.

Using the occurrence of significant and sustained legal innovation in the settlement of industrial disputes as the main consideration for choosing the countries, I observed from the relevant literature that Australia and Nigeria are classic cases. In my judgement, the introduction and maintenance by law of compulsory arbitration in the industrial relations of both countries constitutes what Chambliss (1986: 27) would describe as "critical events, ... important turning points" in the political economies of the countries "about which we should be concerned to develop adequate sociological explanation". Together with the secondary reasons of convenience and accessibility, this factor made Australia and Nigeria the obvious choice for me.

1.4 Research Design

1.4.1 Conceptual clarification and comparative schema

Labour law is a wide field, covering individual contracts of employment, wage fixation, health and safety, factory conditions, workers' compensation, trade unionism, industrial dispute resolution, etc. Obviously it is impracticable to examine the entire field in research of this nature; hence, the need to delineate a specific aspect of the law

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9 This delimiter is crucial because it excludes from my consideration shortlived legal innovations like the British Industrial Relations Act 1971 which made collective agreements legally binding for the first time in contemporary history of industrial relations in Britain and was repealed by the Trade Union and Labour Relations Act 1974.
for study. It should be evident by now that I chose the aspect relating to the resolution of industrial disputes in Australia and Nigeria, namely: the compulsory arbitration system.

In both countries the system has had a major impact as a result of the operation of the Australian *Conciliation and Arbitration Act 1904*, now the *Industrial Relations Act 1988* and the Nigerian "*Trade Disputes Act [1968-76]*". With regard to Australia for instance, the system is seen to have become "a multi-armed miscellany which reaches into nearly every nook and cranny of industrial relations" (Justice Ludeke, 1984: 20). The potential of this system to impact upon the wider society had been aptly highlighted by Geoffrey Sawer. Referring to the achievements of the 2nd Commonwealth Parliament of Australia which passed the law, Sawer (1956: 40) observes:

> the passing of the Conciliation and Arbitration Act 1904, establishing a system of compulsory judicial arbitration of industrial disputes... was to have a profound effect on the social structure, because of the encouragement it gave to trade union development on a national scale; on the economic structure, because of its consequences for wages and hours fixation; and on politics, because of periodical party crises caused by attempts to alter the system.

This observation is an expanded version of the ILO's (1930: 607) observation that industrial arbitration "has played a highly important part in Australia and is a question of first importance both in industrial and in political circles".

Thus, even on face value, the Australian system with its intertwining with the political economy provides an attractive sociological research focus. Finding a similar system in Nigeria - a country unrelated to Australia by race or geography - makes the research more attractive.

There have been some questions whether the Australian and Nigerian arbitration systems are in fact compulsory schemes. For instance, in joining issue with the "critics" of the Australian arbitration system, Dabscheck (1986: 166) asserts rather confidently that "Australia does not have a compulsory arbitration system". His argument in
support of this assertion appears underdeveloped and less than convincing. Nonetheless it underlines the need to establish from the outset the true character of the systems being studied here.

It is significant that Australia ratified the ILO basic Conventions relating to voluntary organisation of labour - the Freedom of Association Convention and Protection of the Right to Organise No. 87, 1948 and the Right to Organise and Collective Bargaining Convention No. 98, 1949 - in 1973, about 25 years after they were adopted. Although not every member State which has delayed ratifying these Conventions can be said to have collective labour relations incompatible with ILO voluntary standards, this was probably the reason in the case of Australia. For example, prior to 1973 matters of interpretation were held to have obstructed the ratification of these Conventions (see Bailey, 1969: 590).

Essentially, these Conventions prescribe for the workers and employers the right to associate/organise, draw up their constitutions and rules, elect their representatives, etc, in full freedom and also provide that the public authorities refrain from any interference which would restrict this right or impede its lawful exercise. The ILO Committee of Experts on the Application of Conventions and Recommendations had implied in their Report to the 43rd Session of the International Labour Conference in 1959 that Australia was in breach of this right. The breach relates to the fact that in Australia unions must satisfy certain legal requirements, especially on matters internal to the unions, in order to secure registration. Some legislation also prohibit the registration of union rules which are contrary to the provisions of an award.

Australia's response to this implied breach was that application for union registration was voluntary, unregistered associations can exist and defend the interest of their members, and that it was only to prevent a multiplicity of organisations for bargaining.

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10 This Committee was established by the ILO in 1927 to carry out a technical examination of the annual Reports of the member States to the ILO to determine whether the law and practice of the countries concerned satisfy the requirements of the ratified Conventions.
purposes that some official measures have been put in place (see Department of Labour and National Service, 1969: 79-80, 88). Yet, there has been a debate in the House of Representatives on the compatibility of section 142 of the 1904 Act, relating to the registration of trade unions, with Article 2 of the ILO Convention No. 87 (Hansard [Representatives], 1973 vol. 83: 1809-1812).

The climate of opinion which favoured the ratification of Conventions Nos. 87 and 98 among others, it is alleged by Landau (1987), was fostered by the Whitlam Labor Government's general approach to human rights, but the submission of the Minister of Labour to the Parliament on April 12, 1973 seems to point up the need for "a favourable international image of Australia as a forward-looking country" as a major concern at the time (see Landau, 1987: 677). In any case, as at June 1987, the Commonwealth had not ratified other relevant Conventions like the Labour Relations (Public Service) Convention No. 151, 1978, and the Collective Bargaining Convention No. 154, 1981, the former because she was not in compliance with article 4 of the Convention which requires adequate protection against acts of anti-union discrimination in respect of public employees and the latter because of "interpretative difficulties in relation to Article 6" which requires the ratifying Members to promote collective bargaining and to progressively extend it to cover all negotiations between employers and workers (including their organisations) (see Department of Industrial Relations, 1987). These reasons suggest that these Conventions are patently antithetical to the laws of collective labour relations in Australia and it can be argued that this antithesis has occurred precisely because the relevant Australian laws embody compulsory schemes as will be shown in chapters four and five.

In the case of Nigeria the official stance since 1955, observable from official pronouncements, has been that of commitment to the ideals of voluntarism as espoused by the ILO. The first Prime Minister of Nigeria, in reacting to the politicisation of wage increases by regional governments in 1955 pronounced thus: "Government re-affirms its confidence in the effectiveness of voluntary negotiation and collective bargaining
for the determination of wages" (quoted in Fashoyin, 1980: 97). In the same year Nigeria's Minister for Labour submitted to the ILO Conference that Nigeria has followed "the voluntary principles which are so important an element in industrial relations in the United Kingdom" (ILO Ministerial Conference, 1955: 53). This submission was reiterated at the 1957 ILO Conference when an adviser to the Nigerian Government stated: "the Governments of the Federation have given and will continue to give practical support to the ideals and aspirations of the [ILO]. Our labour policies have for more than 20 years been based on the standards established by the [ILO]" (International Labour Conference, 1957: 112).

Before Nigerian independence in 1960 Britain accepted the obligations of the relevant ILO Conventions (including Nos 87 and 98) on behalf of Nigeria which was, within the meaning of Article 35 of the ILO Constitution, a non-metropolitan territory of the United Kingdom. At independence, Nigeria ratified these Conventions. In 1975, more than half a decade after the government had introduced compulsory arbitration, the then Federal Commissioner for Labour released a New National Labour Policy - the policy of guided democracy in labour matters - which expressed "continued support of the principles and objectives of the [ILO] ...[but] subject to the over-riding interests of the Government and people of Nigeria". And, writing 14 years later, Damachi (1989: 9) affirms that "the Nigerian labour law derives most of its provisions from the tenets of the [ILO]". All this can raise doubt about the compulsoriness of the Nigerian arbitration system.

The claims of some scholars regarding the "origin" of the Nigerian labour law tend to increase the doubt about the existence of compulsory arbitration in Nigeria. Emiola (1982: 3) says "Nigerian labour law rests largely on the British model", a model built on the principle of voluntarism. In her work dealing with adjudication as a mode of resolving industrial disputes in Nigeria, Audi (1985: 27) asserts: "the idea of court and tribunal in Nigeria is borrowed from Britain". And, Uvieghara (1985: 39) declares without qualifications: "Nigerian labour laws and industrial relations are a legacy of
Nigeria's colonial past... Nigerian labour legislations(sic) are all modelled on English labour statutes".

While these claims suggest that the Nigerian labour law does not contain compulsory arbitration, these self-same scholars have acknowledged in other parts of their works that Nigeria has departed from voluntarism (see Emiola on pp.222-232; Uvieghara on p. 143). Audi's assertion is particularly intriguing as earlier in her work (p.14) she had acknowledged that Nigeria established its National Industrial Court in 1976, two years after Britain had abolished her own industrial relations Court in 1974. Evidently, these scholars have written under the shadow of the governmental claim about Nigeria's commitment to voluntarism.

Interestingly, however, the ILO Committee of Experts on the Application of Conventions and Recommendations has not ceased since 1970 to remind the Nigerian government that the main elements in its labour law (e.g trade unions decree, labour code, trade disputes decree) are not compatible with the ideals of voluntarism. For instance the system of arbitration, in the Committee's view, "is equivalent in practice to an indirect prohibition of the right to strike, restricting the opportunities available to workers' organisations for furthering and defending the interests of their members and the right to formulate their programmes" - one of the points which "have been the subject of comments for many years" (Committee of Experts, 1987). In 1989, the Committee also observed that "for several years its comments have been concerned with numerous discrepancies between the national legislation and the Convention on a number of matters" one of which is "the restrictions on the right to strike which may result from the imposition of compulsory arbitration" (emphasis, mine). No further evidence is needed to advance the position that the Nigerian system of arbitration, like the Australian system, has elements of compulsion. The details of this compulsion will be elaborated in chapters four and five.
There is yet another conceptual issue to be clarified. Starting with a sociological assumption that Australia and Nigeria have different political economies, past and present, the expectation is that their compulsory arbitration laws would be different. This expectation raises the question of their comparability. For, as Smelser (1976: 33) argues,

when it comes to a comparative analysis of discrete historical events [like] a legislative act, a governmental decree, ... these are most difficult to compare directly because they derive their meaning and significance from [their contexts]... Only when a common socio-cultural context can be reasonably assumed is the direct comparative analysis of specific historical events possible.

Common socio-cultural context could not be assumed, a priori, for the two countries. Moreover, the adoption of compulsory arbitration as an instrument of state regulation of industrial relations in the two countries is separated by about sixty-four years, the Australian (Commonwealth) law coming into being in 1904 and the Nigerian law in 1968; hence, the issue of how to go about validly comparing the two systems.

It became clear from comparative methodological literature that cultural (e.g. linguistic) and chronological difficulties can be quite inhibitive if the comparison is focused on the practice of the systems. However, the research problem of this study is directed not at the practice but the conceptual frameworks of the systems. In such a situation it is sufficient to establish culturally-neutral equivalent measures or elements for the objects of comparison through the method of definition. The pertinence of this approach is supported by Smelser's (1976: 77) submission that "a definition proclaims phenomena as identical to one another with respect to the central defining characteristic or characteristics, however they may differ in other respects", thus rendering them comparable to one another. This approach in isolating the comparative schema for the compulsory arbitration laws of the two countries is applied in what follows.

Arbitration as a way of resolving disputes is an ancient method. King Solomon in the Bible arbitrated between two women, although not according to law but rather ex aequo et bono (i.e. from equity and conscience), deciding according to what was fair and
reasonable in the circumstances (see Melbourne Seminar, 1983: 3). Also, according to
mythology, Venus, Juno and Pallas Athene agreed to allow Paris to decide their dispute
over which of them was the most beautiful (see Nolan, 1979: 2-4). These two incidents
identify one essential characteristic of arbitration: the involvement of a third party.

By the second half of the 19th century, arbitration had become a widely used method of
settling labour disputes. In locating the origin of industrial arbitration in Britain during
this period, Fisher (1986: 20f) states that it was in the course of the struggle between
"those who wished to encourage the development of competitive capitalism by
restricting the interventions of the state and those who wished to use the apparatus of
the state in the spirit of protective paternalism (i.e the artificers, labourers and their
parliamentary spokesmen)" that "the concept and practice of industrial arbitration first
began to be defined". In Europe and North America, the second half of the 19th century
was also a period in which arbitration became a popular means of settling industrial
disputes\(^1\).

With the exceptions of the British Cotton Arbitration Act 1800 and Combination Act
1800, and the Canadian (Nova Scotia) Mines Arbitration Act 1888, the arbitration
schemes during this period were largely voluntary not compulsory. In fact, the
aforementioned exceptions had their peculiar limitations either in terms of industry
coverage, scope of matters, or institutional operations which made them partial rather
than full compulsory arbitration schemes. Nonetheless all the schemes shared in the
characteristic of being a third party intervention in the settlement of industrial disputes.

In contrast to these schemes, however, the Australian and Nigerian arbitration schemes
which are comparatively examined in this thesis are full compulsory schemes. They are
not restricted to particular industries; they do not discriminate between major and
minor disputes or between essential and non-essential disputes. More important, they

\(^1\) For more historical details on arbitration, along with conciliation, in Europe, America, and
Australasia see Peters (ed. 1902); Mote (1916).
bind the parties with regulations and decisions which are not of the parties' own choosing, i.e. the "arbitration does not depend on the consent of both sides and the award is binding on them, whether they accept or reject it" (Kahn-Freund, 1977: 116). In terms of the process and the outcome, Givry's (1978: 13) description is apt: "once the point of impasse is reached, resort to the arbitrator is mandatory, i.e. ... it can be set in motion ex officio or at the request of either party... [and] once arbitration is introduced, the arbitrator's award has a binding character ... in the sense that it produces a contractual relations between organizations on both sides or it may directly become a compulsory part of individual contracts of employment".

Macintyre and Mitchell (1989: 7) outline the essential elements which characterize the Australian scheme thus: state tribunals with compulsory powers to settle disputes, with powers to enforce the decisions, bans and limitations upon direct action by the parties to disputes, and the registration and regulation of trade unions. I established in a preliminary investigation that these elements are also present in the Nigerian system. In the light of the general descriptions of compulsory arbitration, I have identified specific abstract equivalent measures with which to compare the Australian and Nigerian systems, namely: the philosophy (i.e. the central purpose, essence or function and the means to this purpose); the structure (i.e. the institutional framework, consisting of the tribunals and the parties); the process (i.e. the activation of the schemes); and the products (i.e. the outcomes of the scheme). As indicated earlier, the comparison of the two laws, using these measures, is undertaken in chapters four and five of the thesis.

1.4.2 Methods of data collection and analysis

Two sets of data have been used to identify the differences and similarities in the laws and to undertake the proposed explanation for these differences and similarities. One
set consists mainly of the statutes; the other consists of legislative debates, scholarly works, and personal discussions in Australia, Nigeria and ILO Headquarters (Geneva) with some specialists on the laws. Both sets of data are largely documentary and historical.

Archives and libraries were the main sources for the primary and secondary materials acquired in Australia, Nigeria and Geneva. The possibility of stumbling upon materials that could establish a relevant Britain-Australia-Nigeria nexus with regard to the similarities between the Australian and Nigerian labour laws led the researcher to the British Library and the Public Records Office, both in London. And, to secure interviews with those specialists identified after reading some of their works or through recommendation by my advisory committee, an advance notice in form of a letter was sent to them, setting out the broad focus of my research.

The data collected in the course of the archive/library searches and interviews are qualitative and were analysed by an interpretive method (see Smelser, 1976: 49; Haralambos and Holborn, 1990: 698-781; and Williams, 1990: 33 for the place of this method within the paradigms for generating sociological knowledge). Needless to say, in the words of Berger and Kellner (1981: 33), as I interpreted the materials "the entire discipline [sociology] (or, rather, that segment of it that is theoretically relevant to this research material) [was] invisibly present in my own mind - a silent partner in the situation, as it were".

13 Only the legislative debates on the Australian law were available to the researcher. The official secrecy laws and the unwritten 'tight-lip' policy under military regimes made the much needed primary information about the Nigerian law inaccessible during my "data-collection" visit to Nigeria.
CHAPTER TWO: AUTONOMY MODEL OF LAW AND SOCIETY

2.1 Introduction

This chapter attempts to construct an explanatory autonomy model for the research question of this study. The model will be based on the arguments about the independence of law from society, and provide variables to guide an autonomy explanation of the differences and similarities between the compulsory arbitration laws of Australia and Nigeria. I have delineated, from the law and society literature, two variants in this model, namely the absolute autonomy and the relative autonomy arguments.

These arguments will be highlighted in the review of the major works upon which the attempt to construct the model in this chapter has drawn. These works include those of Herbert Spencer, Max Weber, George Gurvitch, and Alan Watson for the absolute autonomy argument and those of Louis Althusser, and Isaac Balbus for the relative autonomy argument. For the purpose of this study, these works are considered to represent significant currents of the sociological and legal scholarship on the autonomy aspect of the law and society debate. Since the works do not directly address my research question, the chapter will conclude by drawing their respective insights together into an autonomy framework for the purpose of explaining similarities and differences in the laws of different countries.

2.2 Absolute autonomy argument

The absolute autonomy argument maintains that the source of law is "supra-human". A major component of this argument is the view that natural law, however derived, is the quintessence of all legal orders, and that man-made laws are an "imperfect simulacrum" of this natural ideal (Lord Lloyd, 1972: 75). The man-made laws which are created with a high degree of formality, i.e. free from the intrusions of, and
intermixtures with, non-juristic elements, approximate the natural ideal and have independence from the social and economic conditions of its home nation.

A law that yields to these descriptions is independent of differences between peoples, states and times and is transplantable. It is an autonomous law, deriving its validity from its own values. Of direct relevance is the point that made-made (i.e. positive) laws seek to participate in, or approximate to, the character of this higher normative order and thereby become inherently independent of their societies. Out of the works which will be reviewed on the model, those of Spencer, Weber, Gurvitch and Watson closely address these issues.

2.2.1 Spencer and the absolute autonomy argument

Herbert Spencer is, perhaps, the first sociologist to raise the view in which law is presented as independent of human society. Spencer (1882, Vol.II: 605) identifies four major sources of law, two of which are outside the domain of living social processes. In his words,

along with development of the ghost-theory, there arises the practice of appealing to ghosts, and to the gods evolved from ghosts, for direction in special cases, in addition to the general directions embodied in customs. There come methods by which the will of the ancestor, ... or the derived deity, is sought; and the reply given ... originates in some cases a precedent, from which there results a law added to the body of laws the dead have transmitted.

He refers to the practices of a wide spectrum of peoples to illustrate this point. For example, the "Veddahs", "ancient Egyptians", "ancient Peruvians", etc, lived by the injunctions of the "spirits of their ancestors". And, the "Hebrews", "Tongan natives" "Todas of the Indian hills", "ancient Greeks", etc, had as their principal laws, the "divine commands" or "supernatural directions".

Spencer shows a mastery of the traditions through which the knowledge of these practices have come down. With attention to one such tradition, he acknowledges the "supra-human" source of law. "Not forgetting the tradition that by an ancient Cretan
king, a body of laws was brought down from the mountain where Jupiter was said to be buried"; he says, "we pass to the genesis of laws from special divine commands..." (p. 607). And, "originating in this manner, law acquires stability", Spencer argues. In addition, "the unchangeableness of law, due to its sacred origin, greatly conduces to social order ...".

Spencer's contribution significantly reflects the various conceptualisations and characterisations of the "supra-human" source of law in philosophical literature which should be summarised for further illumination. In this literature, the central question - especially starting from the early Greek speculation on law - is whether law exists by nature or convention. Most philosophical writings on this question argue in favour of nature or what Spencer has presented as "supra-human". By this, they not only locate the source of law outside the realm of social processes, but also lay the foundation for an approach in which "natural law" is seen as the quintessence of all legal orders and "man-made" laws, viewed as an "imperfect simulacrum" of the natural ideal (Lord Lloyd, 1972: 75).

As to what constitutes this "nature", the views expressed in these writings amount to diverse traditions, ranging from the classical through the Christian, empiricist/rationalist to the idealist traditions. The classical tradition maintains that it is the "animated nature". For the Christian tradition, this nature is the personal God who is the creator, provider and ruler of human beings and the world.

The works within the empiricist and/or rationalist tradition, like those of Thomas Hobbes, John Locke, J. J. Rousseau and Montesquieu, maintain that the nature from which law emanates is either the "primitive instinct" of self-preservation or logical reason, or liberty unspoiled by civilisation or human reason concerned exclusively with

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1 This comprises the works of Socrates, Plato, Aristotle, and the stoics on the side of the Greeks; and Cicero, Seneca, Epictetus, Gaius, Ulpianus, Marcianus and Justinian (the Emperor) on the side of the Romans.

2 Here we are looking at the works of the Church Fathers like St. Paul and St. Augustine, and the medieval theologians like Thomas Aquinas and Hugo Grotius.
the preservation of one's own being. Lastly, the idealist tradition\(^3\) simply maintains that this nature is an autonomous reason and will.

At the base of these diverse traditions, a common concern can be discerned, namely: "to find the permanent element, the ground of being, the core of reality, the fixed essence or substance which may be called the nature of being, a nature which operates as a standard in the midst of a changing, pluralistic and contingent world" (Eterovich, 1972: 22). This raises the concern of both finding what this essence is and defining the character of the law which it produces. Consequently, the question narrows down to

whether there is anything that is valid everywhere and always, any law that is independent of the difference between peoples, states and times, and therefore authoritative for all. [As nature survives all changes], it is now asked whether there is also, determined by this unchanging nature, a law that is exalted above all changes and all differences (Windelband, 1901: 73).

Having taken the position that there is, in general terms, the essence of things (i.e. nature) which remains ever the same, the response of the philosophers to this specific question is predictable. As argued by Hutchins (1963), "the principles of social organisation can be derived from [this nature], a nature that is insusceptible to change, that is the same the world over, and that, in consequence, suggests the general legal ideas that should govern the developing world community". Like other contributors to this argument, Hutchin draws support for his argument from the oft-quoted statement in Cicero's "De Re Publica" (54 BC) which maintains that

There is in fact a true law - namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal... It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all people (quoted in Lord Lloyd, 1972: 92).

This true law, then, is the law of nature whose essence, as Lloyd and Freeman have written, "may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason" (quoted in Kaye, 1987). The significance of this true law has been

\(^3\) The works of Immanuel Kant and Johann Fichte stand out in this tradition.
highlighted in Ellul's (1969: 30) argument that in the efforts to construct a legal system (i.e. to put in place a man-made law), "man is guided by ... principles which are undoubtedly common to all men ... (And that) these principles alone are capable of explaining the ... similarities". He exemplifies this position with a study, *Collatio Legum Mosaicarum et Romanarum*, which details the fundamental similarity between the Hebrew law of the 5th century B.C. and the Roman law of the 2nd century A.D., maintaining that "no social identity can explain this similarity". It was, perhaps, a result of "faithful observance of the 'essence' of [or true] law".

Thus, when Spencer speaks of a "supra-human" source of law, this concept extends to such origins as deity, nature or principles of an unchanging character which have been elaborated in the writings of philosophers.

### 2.2.2 Weber and the absolute autonomy argument

Another major contribution to the absolute autonomy argument comes from Weber (1922). As will become clear later in this review, this contribution reflects more of his views on universalistic laws (the code systems) than on particularistic laws. Further, it is noted here that the characterisation of Weber's contribution as falling within absolute autonomy argument is different in one respect from those of scholars like Paul Walton and Alan Hunt. Although both of them agree that Weber's position is a contribution to an autonomy model of law and society, they put this contribution into a relative autonomy category. Walton (1976: 12) merely attributes to Weber the view that "law is to be seen as relatively independent of a given social system". He does this in the context of agreeing with the degree of independence which Weber appears to have attached to law, even though he would not go as far as adopting the opposite "crude view" that law is merely a reflection of material reality".

Hunt (1978: 118) is more definite on the view that the autonomy which Weber attaches to law "is ... relative rather than absolute". He summarises Weber's position on this issue to be that "law ... constitutes a sphere of autonomous social reality which, while
influenced in its development by economic forces, in turn also influences the economic (and indeed other) processes within the society”. It is interesting that the portions of Weber's work which Hunt cites to highlight this point are the same portions that have created the impression for my characterisation of Weber's contribution as an absolute autonomy argument.

There is no doubt that Walton's and, in particular, Hunt's analyses of Weber's sociology of law in general, leading to their characterisations of his contribution as a relative argument, are highly insightful and profitable. Besides, it would appear consistent with the sociological general stance on the contingency of social phenomena that Weber (the sociologist) should be relativistic. In fact it is arguable that certain historical illustrations which Weber used to demonstrate the development of law strongly suggest not only a relative autonomy argument as Walton and Hunt have picked out, but also a social product model. However, his typology of the rational and irrational laws which forms the foundation of his developmental model of law, and to which these illustrations are largely incidental, amounts to an absolute autonomy argument. The constraint of space allows only an outline of Weber's exposition here.

Whether or not Weber has attempted to develop a systematic sociology of law - depending on whose view is considered, e.g Hunt (1978: 93) says he has⁴ and Rheinstein (1954: xlvii) says he has not - it can be observed that the relationship between law and society forms a major part of the core of his sociological enterprise, viz: to understand what has made the West unique in its adoption of the capitalist social order. As will be seen, since he finds the key to the uniqueness of the West in "rationality", Weber follows the rationalist tradition in his analysis of the relationship between law and society.

⁴ Hunt cites Talcott Parsons' suggestion that "the core of Weber's substantive sociology lies ... in his sociology of law", apparently, in support of his affirmative view.
Weber's election to deal, in his analysis, principally with the 'internal' modes of legal thought suggests a positivist orientation. This is reflected in his conception of law as an order which "is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose". This is "an unashamedly positivistic definition of law", but Hunt (1978: 104) who makes this statement says, "it is not sufficient grounds for labelling him a 'legal positivist'" as Martin Albrow has done. Yet, this conception reinforces Weber's concern for the internal characteristics of law - a concern which, more than any other criteria, seems to have set apart scholars in the school of analytical jurisprudence as legal positivists.

In my view, Weber might avoid the label of positivism not simply because his definition of law can be defended as a "neutral starting point, one that remains acceptable to jurists and sociologists alike" (Hunt, 1978: 104), but rather because of his recognition, quite contrary the legal positivistic stance, of the influence of natural law upon positive laws. This is indicated in his definition of natural law as "the sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide the very legitimation for the binding force of positive law" (Rheinstein, 1954: 287f) (emphasis, mine).

Like Spencer, Weber acknowledges that there was a time when legal rules were "not conceived as the products, or as even the possible subject matter, of human enactment. Their 'legitimacy' rather rested upon the absolute sacredness of certain usages ..." (Ibid: 76). Where the rules emerged through explicit imposition, he continues, it was "through a new charismatic revelation [- the primeval revolutionary element -] which undermines the stability of tradition and is the parent of all types of legal 'enactment'". Further, he acknowledges the influence of natural law dogmas upon contemporary law-making and law-finding; and that some of these dogmas "survived the economic conditions of the time of their origin and have come to constitute an independent factor
in legal development" (Ibid: 296). In this analysis, a strong link is established between natural law and autonomous development of law.

The acknowledgement of this link dovetails into the position at which he had arrived in a doctoral dissertation he submitted in 1889, entitled: "Geschichte der Handelsgesellschaften im Mittelalter" (On the History of the Companies in the Middle Ages). From the stand-point of refusing "to see law as any mere reflection of the material interests of the capitalist class" or "avoiding Marx's economic determinism" (Albrow, 1975), he posed the following question for the dissertation: "How and in what formations and developments did certain modern commercial forms, especially partnership firm, come about?" (quoted in Brand, 1982: 95).

His conclusions in the dissertation clearly imply the notion that law is autonomous from any economic base or expression of Folk consciousness, contrary to the views in Marx and the romantic-metaphysical approach of the Historical School of Jurisprudence regarding the question of the emergence of legal norms. In a comparative reference to the developments in England and Germany, Weber says: "generally it appears ... that the development of the legal structure of organisations has by no means been predominantly determined by the economic factors" (Rheinstein, 1954: 176). As I have indicated above, the link of this autonomy of law with natural law keeps his approach out of the camp of the legal positivists as much as these other theoretical camps.

However, Weber's formalist notions of law-making and law-finding have kept him close to positivism. He expounds these two activities in terms of the substantive/formal and irrational/rational axes. Law-making and law-finding are substantively irrational if they are "influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than general norms". They are "formally irrational" if the means applied in them "cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes thereof". The converses of
substantive and formal "irrationality" are substantive and formal "rationality"; one involves the guidance of clearly conceived and articulated general principles which accord predominance to ethical, utilitarian and other expediential rules; the other involves the guidance of definitely fixed legal concepts in the form of highly abstract rules without consideration for extrinsic (non-juristic) factors (see Ibid: 61-64; and, for a tabular representation of this typology and its relation to Weber's developmental model of law, see Hunt, 1978: 104-109).

Weber's formalist notions of law-making and law-finding seem to come together concretely in his characterisation of the French Civil Code. According to him, "the Code is completely free from the intrusion of, and intermixture with, nonjuristic elements and all didactic, as well as all merely ethical admonitions; casuistry, too, is completely absent" (Rheinstein, 1954: 285). Invariably, he conceives this Code as a product of rational legislation, as against the Anglo-Saxon law which is a product of juristic practice and the Roman *ius civile* (common law) which is a product of theoretical-literary juristic doctrine. The Code's characteristics are expressions of a particular kind of rationalism, namely the sovereign conviction that here for the first time was being created a purely rational law, in accordance with Bentham's ideal, free from all historical "prejudices" and deriving its substantive content exclusively from sublimated common sense in association with the particular raison d'etat of the great nation that owes its power to genius rather than to legitimacy (Ibid: 286).

He also sees in "its imitations all over Western and Southern Europe" the strength of the universal appeal of the Code's "extraordinary measure of lucidity as well as a precise intelligibility in its provisions". The fact that the imitations are possible because of "the abstract total structure of the [Code] and the axiomatic nature of [its] many provisions", as opposed to parallel development of social conditions, underlines the tenuousness, if not the absence, of any relationship between the Code and its original society.
Whereas Weber's absolute autonomy position on law-society relations involving code systems should be obvious from the foregoing, his treatment of some other laws require that some caution be noted; and this is one area where Walton's and Hunt's attribution of a relative autonomy view to Weber finds apparent support. For instance, on the commercial law, which he regards as "one of the most important instances of modern specialisation", Weber adopts an analytical approach/inference that seemingly assumes a social product view as will be shown in what follows.

In the course of a rather sketchy, if not substantially empty, review of the history of the German Commercial Code, Weber asserts: "commercial law, then, inasmuch as its application is personally delimited, is a class law rather than a status-group law" (Ibid: 302). In another instance, he presents as one of two "causes ... responsible for the emergence of ... particularistic laws", "the occupational differentiation and the increasing attention which commercial and industrial pressure groups have obtained for themselves" (Ibid: 303). Put differently, "as our brief sketch has shown", he says, "... the great differences in the line of development [perhaps, between universalistic and particularistic laws] have been essentially influenced ... by the diversity of political power relationships" (Ibid: 304).

On the face of assertions such as these, it might appear that Weber is far from being consistent in his position on the source and nature of law. Considered together with his description of the differences in the structure of domination which "squares with the view that they are the outcome of material power struggles between contending classes", it is arguable that "indeed Weber undermined his own `autonomy' argument" (Walton's, 1976: 13-14). It is nonetheless correct to observe that Weber sees as anomalous the development of modern law which incorporates "substantive rationality" - like considerations of economic advantage, justice, morality, welfare and public good. At best, it is an expediency.
For the most part, Weber appears to regard law in its highest form (e.g., the code system) as totally autonomous, but recognises that in practice particularistic laws are influenced by social factors. His emphasis on the autonomous development of law can be readily discerned from his claim that the general development of law and procedure may be viewed as passing through the following stages: first, charismatic legal revelation through "law prophets"; second, empirical creation and finding of law by legal honoratiores, i.e., law creation through cautelary jurisprudence and adherence to precedent; third, imposition of law by secular or theocratic powers; fourth and finally, systematic elaboration of law and professionalised administration of justice by persons who have received their legal training in a learned and formally logical manner (Rheinstein, 1954: 303).

It is hard to see substantive interface between law and society in any of these stages. The historical examples in which he appears to be demonstrating the relation between particular political forms and the corresponding legal development largely illuminate the rationalisation process through which law acquires logical rationality and not the emergence of new legal rules per se. Weber's preoccupation with the internal processes of law with a view to determining the ideal type of legal rationality, or his "view of law as indexing a historical movement towards increasing rationality" (Grace and Wilkinson, 1978: 61), tends to overshadow his quest for the social basis of particularistic legal order. Further, this preoccupation has kept alive, rather than dispelled, the spectre of legal positivism over his contribution to the law-society relation in general.

2.2.3 Gurvitch and the absolute autonomy argument

In some significant respects, Gurvitch has made a contribution to the absolute autonomy argument - a contribution which looks like a logical extension of those of Spencer and Weber. Like Weber, some ambivalence can be observed in his position on whether law is autonomous or a product of society. In this section it is his discourses on the natural law vis-a-vis the character of the positive law that are seen to be relevant to the absolute autonomy argument. These discourses appear to reinforce the
understanding which comes from the approaches of Spencer and Weber. His attempt to define natural law provides a good window into his contribution.

In his view, the term "natural law" may be used to designate, among other things, "the invariant rules of law in contrast with the changing; [the] autonomous law deriving its validity from its own inherent values". Being "independent of convention, legislation or other institutional devices", this law provides "the ideal source … and the criterion for testing the positive law emanating from this ideal" (Gurvitch, 1930: 284).

He notes the diverse conceptualisations of "natural law" in the philosophical writings of the stoics, Plato, Aristotle, Hobbes, Spinoza, Kant, Locke, Rousseau, etc. to underline the point that the terms "nature" and "natural" which qualify the law "have proved confusingly protean". Part of the reason for this diversity, he observes, lies in the attempts by the philosophers to come to grips with the confrontation between the "ideal norms" and the "deviations of reality", and the jurisprudential antimonies that flow from it.

Quite significantly, Gurvitch makes a point which bears closely on the question of the factor of the natural-law conception in understanding differences and similarities between laws of two or more countries. He says:

One of the characteristic features of natural law has been its striving after unity and universality, as opposed to the particularism of the systems of positive law. With few exceptions the partisans of natural law have thrown their emphasis on the cosmopolitan element inherent in all law, stressing the common meeting point of the various systems of national law (Gurvitch, 1930: 285).

Although the emphasis of these 'partisans' is "a reaction against the traditional tendency to place major emphasis on the multiplicity of the sources of positive law", as Gurvitch has observed, this characteristic re-echoes what has previously been shown to be the central concern of the natural law traditions, viz., to derive "the fixed essence of things which operates as a standard in the midst of a changing, pluralistic and contingent world". By implication, wherever this standard is uniformly observed there
will be similarity in the legal rules which embody the standard; in a converse situation, there will be diversity.

In a later work, entitled *Sociology of Law* (1947), Gurvitch develops further the significance of natural law for social organisation - mainly, in terms of the way in which it serves as the basis for positive legal systems in "inclusive societies". His definition of law in this work alludes to this interaction between the two spheres:

> law represents an attempt to realize in a given social environment the idea of justice (that is, a preliminary and essentially variable reconciliation of conflicting spiritual values embodied in a social structure), through multilateral imperative-attributive regulation based on a determined link between claims and duties; this regulation derives its validity from the normative facts which give a social guarantee of its effectiveness and can in certain cases execute its requirements by precise and external constraint, but does not necessarily presuppose it (Gurvitch, 1947: 47).

As can be seen from this definition, the characteristic feature of law for Gurvitch is "justice". It is clear that this justice is a product of some equilibrium between spiritual values and not as McDonald (1979: 40) has interpreted between social values. The significance of correctly noting the kind of values as spiritual is that it not only locates the definition as straddling between "naturalism" and positivism of some sort (bearing in mind the characterisation of regulation as "imperative-attributive" - Petrazhitsky's coinage), but it also locates the "soul" of law in the supra-human sphere of existence.

In the discussion of Gurvitch's notion of social law, Swedberg (1982:40) acknowledges that for Gurvitch, "justice is directly connected to the spiritual realm. It is founded on normative facts, i.e., on the extratemporal values which are partly realized in empirical reality". He goes further to note that in Gurvitch's analysis these normative facts "constitute the primary sources of the law and can be apprehended directly through intuition".

Admittedly, the task which Gurvitch set for his sociology of law is formidable and cannot simply be reduced to one argument. For instance, he distinguishes between
kinds of law, frameworks of law and systems of law and seeks to determine the functional relationship between them and the various forms of social reality (i.e., solidarity and sociality). He uses the criterion of the degree of mysticism and rationalism as developed by Weber to establish seven types of inclusive societies and their repercussions on systems of law, implying that positive laws are not independent of society. He also utilises Durkheim's characterisation or "jural typology of backward society" to extend his analysis to poly-segmentary societies whose legal systems have a magical-religious basis.

He ends up producing what he calls "systematic sociology (or microsociology) of law", "differential sociology of law" and "genetic sociology of law", each relating one of the three segments of his jural typology to different levels of social reality. Perhaps, because of the encyclopaedic character of this approach, McDonald (1979: 24) has urged the view that Gurvitch's work "is associated with no recognisable school".

Be that as it may, Gurvitch's relevance to the absolute autonomy argument, as far as can be observed here, derives from his emphasis that any law, although emanating from the sociality of 'active groups', "can [ideally] affirm itself and be valid independently of all organisation" of the groups (Gurvitch, 1947: 159). This independence is made possible, probably, because the content of the sociality from where the law emanates is spiritual. In addition, despite the view urged by McDonald, a positivistic slant can be observed in Gurvitch's theoretical framework and this inclines his work towards autonomy argument. Petrazhitsky, who taught Gurvitch, was noted for attempting "to give idealism a firm scientific-positivistic basis" (see Swedberg, 1982: 45-46). Such attempt lies at the foundation of the autonomy model from which, as it appears, Gurvitch could not escape.

2.2.4 Watson and the absolute autonomy argument

Another profitable contribution to the absolute autonomy argument, also made within the positivist framework, is that of Alan (William Alexander Jardine) Watson. A legal
scholar, Watson expresses an unwavering belief in the transplantability of law - a belief predicated (positivistically) on a deeper conviction that law has no organic link with the society in which it operates. He does this in a manner that puts him "in flat opposition to most sociologists of law, and indeed to most current theorists of law" [of social product persuasion] (Friedman, 1979). Indeed Watson (1977b: 130) holds the view (and declares this rather belligerently) that "none of the theories of the development of law or the relationship between law and society are (sic) acceptable", except his own.

The relevant starting point for Watson (1974: 3) is a concern for Comparative Law: Should this branch of law be regarded as an academic activity worthy of pursuit in its own right and with its own proper boundaries? In examining this question, he adopts a theoretical path which invariably leads him to an argument for the "autonomy" of law.

He takes the view that Comparative Law is a worthy academic activity and that its proper province is the "study of the relationship of one legal system and its rules with another". He further contends that the nature of this relationship, including the reasons for similarities and differences, "is discoverable only by a study of the history of the systems or of the rules ...".

Following on this conception of Comparative Law, Watson embarks on an extensive investigation of the legal systems of continental and western Europe. Apparently, he derives his "problematic" from a puzzle identified by Vingradoff (1961:11). This puzzle was expressed as follows:

Within the whole range of history there is no more momentous and puzzling problem than that connected with the fate of Roman Law after the downfall of the Roman State. How is it that a system set to meet certain conditions not only survived those conditions, but has retained its vitality even to the present day, when political and social surroundings are entirely altered? ... How did it come about that the Germans, instead of working out their legal system in accordance with their national precedents, and with the requirements of their own country, broke away from their historical jurisprudence to submit to the yoke of bygone doctrine of a foreign empire? (quoted in Watson, 1985: 66f).
It would seem that Watson sees in this statement an agenda of two items consisting of a full scale study of (1) legal survival/development, and (2) the reasons for the development of similar laws in different social, economic and political contexts. In support of the latter, he finds a strong statement in Milsom's (1969: ix) work:

Societies largely invent their constitutions, their political and administrative systems, even in these days their economies; but their private law is nearly always taken from others. ... The common law, governing daily relationships in various modern societies, has developed without a break from its beginnings in a society utterly different from any of them (emphasis, mine) (quoted in Watson, 1974: 8).

Watson attempts to produce, in line with this statement, "conclusions [that] will be useful tools for everyone interested in law and society, whether as legal historians, sociologists of law, anthropologists or law reformers". This attempt is then channelled towards his overall goal "to further understanding of the relationship between law and society in which it operates, and of the vital role played by legal transplants in legal growth" (Watson, 1985: ix; x).

One major conclusion which he derives from his investigation is formulated as follows: "usually legal rules are not peculiarly devised for the particular society in which they now operate" (Watson, 1974: 96). This conclusion is based largely upon his observation that "in the Western world borrowing (with adaptation) has been the usual way of legal development" (Watson, 1974: 7). He regards it as "perhaps the strangest" of all paradoxes of law, that:

- on the one hand, a people's law can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be;
- on the other hand, legal transplants - the moving of a rule or a system of law from one country to another, or from one people to another - have been common since the earliest recorded history (Watson, 1974: 21).

In the light of this conclusion, Watson considers as inadequate, and in fact false, any "fundamental assumption of rationality in legal development or of a response determined by [social] circumstances" (Watson, 1977: 4). He is here referring to those writers whom he regards as being "fascinated by the relationship between law and
society" and having "in common the firm belief that legal development is very much a rational response to existing [societal] circumstances, ...". On the contrary, he asserts, there need not be anything like an exact correlation between the political, social and economic needs and desires of the members of a society as a whole or of its ruling elite on the one hand and the legal rules actually existing in the society on the other (Watson, 1977b: 84).

He later reiterates this position in the following words: "to a large extent law possesses a life and vitality of its own; that is, no close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or of the members of the particular society on the other hand" (Watson, 1978: 314-315).

It should be mentioned that Watson draws on the development and spread of Roman and English law in societies with different social, political, economic and cultural systems in arriving at the conclusion that "the direct link between a society and its law is tenuous" and that "law is largely autonomous and not shaped by societal needs; law evolves from the legal tradition" (Watson, 1985: 117; 119). Thus he argues that in the development of the law of delict in the French Code Civil, for instance, "no particular political intention determined the drafter's choice, only the impact of earlier legal writing" (Watson, 1988: 35).

It should also be observed that throughout the relevant works of Watson, significant explanatory value is placed on legal history, the subject-matter of which is legal tradition (or legal system). In his Legal Transplants, 1974, for instance, Watson sets out to explain the changes that occurred in the Roman law in Egypt. These changes were mainly in the law of persons and contract where marriages occurred between brothers and sisters; slaves seem to have been treated as capable of owning property; direct representation and agency in contract performances operated, etc - contrary to what was allowed under the Roman law in Italy (see pp. 31-35). For Watson, these changes
occurred "as a result of contact with other legal systems" and because "in Egypt Roman traditions of law were not so strong". There is no extra-legal explanation.

He equally maintains in *The Making of the Civil Law* that "the basic differences between civil law and common law systems are explained in terms of the legal traditions themselves" (i.e. legal history), not social economic or political history (Watson, 1981: viii). In reviewing this work, Stein (1982: 360) observes, approvingly, that Watson "has provided, with panache and erudition, a necessary corrective to the prevalent tendency to explain legal differences by reference to non-legal factors". Even where societal factors appear decisive in the emergence of certain legal phenomena, Watson remains inclined to this view on the fundamentality of legal traditions. For instance, with respect to the types of contract in the early Roman law, he says: "though economic or social reasons demanded the introduction of each type, it was the legal tradition that determined the nature, structure, and chronology of every contract" (Watson, 1985: 5).

Thus it is no surprise that Watson has "a strong disparagement of social, economic or political forces or anything outside 'purely legal history'" (Lawson, 1975). This follows from his stance against sociology. In particular, "sociology of law" for him, provides the least help in understanding legal change and the relationship between legal rules and the society in which they operate. Further, he declares that the focus of "all scholarly research on law in society" (as undertaken by traditional sociologists of law and legal anthropologists) "is inappropriate, inexact, or inefficient" (Watson, 1983).

In his determination to provide a purely legal understanding on the relationship between law and society, Watson deliberately eschews the insights of the social sciences. Hence, in his *Roman Private Law around 200 B.C.* (1971), he chooses to write a purely "analytical work". Similarly, his discussion in the *Legal Transplants*

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5 See a review of this book by Birks (1972) for a statement on the unsatisfactory result of Watson's "straight analytical approach".
(1974) is pitched at the level of technical details of law and excludes society in order to avoid dabbling into sociology (see Seidman, 1975; Diamond, 1980).

Further, his definition of the process of legislation appears fundamentally apolitical. For Watson, the reason why the body charged with the responsibility of keeping law up to date usually fails in this role is because it is bogged down with "other functions especially of a political nature" or the "pressure of business" (see Watson, 1974: 115-117). This implies, then, that legislative 'law reform' is not a function "of a political nature".

On the whole, Watson's position comes squarely within a legal positivist orientation: "the distinguishing and sole necessary feature" which he attributes to law betrays this stance. For him, law is distinguished by "the availability of an institutionalised process [to resolve] actual or potential disputes ... with the specific object of inhibiting further unregulated conflict" (Watson, 1977b: i). Like Weber's conception of law, this is a semi-Austinian view. Indeed, in this same work Watson acknowledges his intellectual debt to positivists (see Watson, 1977b: 46).

Not surprisingly, the essence of law, in Watson's view, is order - rather than freedom, justice or morality - which does "not inevitably reflect the political, social and economic needs and desires of the society as a whole or its ruling elite" (Oberdiek, 1981). Legal rules, in the sense that he refers to the Roman law as being organised into "self-contained", "self-referential" blocks, "are isolated from any historical context and can be discussed without regard to their original purpose or even their practical applicability" (Stein, 1982). They can be moved anywhere.

Despite this absolute autonomy stance, Watson slips into social product model time and again. For, although he has disparaged societal factors totally from the outset, he explains certain aspects of his subjects in terms of these same factors. Thus he describes the reception of the Roman law in Scotland in terms of the political relation...
of Scotland with England before and after the War of Independence of the early 14th century. This, for him, is an example of "how much legal relationships and transplants may owe to the non-legal historic-political factors"; but he then quickly dismisses it as "sheer chance".

He lays the cause of the legislature's inertia (in their law reform role) at the doorsteps of the "pressure from business". He even proposes that "law like technology is very much the fruit of human experience" - it can be invented by a few people or nations. And, in explaining the phenomenon of legal change, he writes that "society has its input, which may be vigorously expressed or be tacit but demonstrated by obvious needs..." (Watson, 1985: 117).

Many of these assertions are similar to those which a scholar with a social scientific perspective would make. However, and in this lies the interesting point about Watson, at almost every point where he encounters these societal factors, he seems to handle or dismiss them without careful analysis. Ultimately, it comes down to the view that Watson only "flirted with sociology of law"; he never proceeded with it (see Abel, 1982: 787). Or, as Adams (1979: 122) puts it, he "attempts to make a sociological thesis without using a sociologist's methodology". Where a sociologist's object is to develop and/or apply theoretical apparatuses for the understanding of society (and not events qua events), Watson's technique "is to analyze particular legal events and facts" (Watson, 1985: 1) and, this, in total disregard for social factors. As will be shown later, nonetheless, his analysis of the mechanics of legal transplant provides some of the crucial factors for an autonomy explanatory answer to the research question of this study. These factors are: (a) there must be raised a question of major law reform (a matter internal to law) in the country borrowing the law; (b) there must be, in the borrowing country, an instinct to first look at solutions in other jurisdictions before considering the internal resources - the presumption in respect of this factor is that a

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6 This point has been raised, subtly but cogently, by Kahn-Freund in his review of Watson's *Legal Transplant*. 
body set up to suggest law reforms begins normally not by trying to think its way through to its own solution based on local conditions and character but by examining external solutions; (c) the law which is being borrowed must be regarded with enough respect (whether or not it in fact meets the needs of the borrowing country is immaterial); and (d) the law must be accessible in language and materials to the borrowing country (Watson, 1974: 91-93).

Thus, in all the contributions reviewed in the foregoing sub-sections - whether it be Spencer's perceived unchangeableness of sacred laws, the philosophical conception of natural law as universal and as the quintessence of all legal orders, Weber's formalistic appreciation of law (e.g. the French Civil Code) as free from all socio-historical prejudices, Gurvitch's point on the search for the cosmopolitan element in national laws or Watson's legal transplantability - there is a strong suggestion that law (natural or positive) possesses some measure of absolute independence from society.

2.3 Relative autonomy argument
The relative autonomy argument acknowledges some independence for law. Through the process of abstraction, law extinguishes the memory of its social origins or defines them out of existence. It then assumes formality, generality and autonomy. The autonomy is only from the preferences of the social actors and not from the social system or the mode of production; hence it is relative. This is, however, enough to make the law mobile and/or able to reproduce itself in countries with similar or different social structures.

2.3.1 Althusser and the relative autonomy argument
Although Althusser never singled out law for analysis in its own right, the notion of relative autonomy of law has, more likely than not, gained currency among social scientists (especially those of Marxist bent) as a result of his sustained efforts to operationalise Marx's conception of the social totality. As may be noted, contrary to

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Proudhon's consideration of economic relations together with an ideological system (or limbs of the social system) "as so many social phases", i.e, "so many separate societies, following one upon the other", Marx had argued that these "production relations ... form a whole" (see *The Poverty of Philosophy*, 1847). In *Grundrisse* (1858), Marx further maintained that this whole is an "articulated-hierarchy".

It is this totality - articulated-hierarchy - that Althusser (1970: 97) presents as a unity of a *structured whole* containing what can be called levels or instances which are distinct and 'relatively autonomous' and co-exist within this complex structural unity, articulated with one another according to specific determinations, fixed in the last instance by the level or instance of the economy.

This "articulation in the whole", Althusser argues, precludes the reduction of the "relative independence" view of the *levels* "to the positive affirmation of an independence *in vacuo*, [or] even to the mere negation of a dependence in itself" (Althusser, op. cit: 100). In his "Ideaology and Ideological State Apparatuses" (1970), he elaborates on this articulation in terms of the respective "effectivity" of the "levels" or "instances".

According to Althusser, the 'social whole' is constituted by "the infrastructure, or economic base (the 'unity' of the productive force and the relations of production) and the superstructure, which itself contains two 'levels' ...: the politico-legal (law and the State) and ideology (the different ideologies, religious, ethical, legal, political, etc.)". This entity engenders a dialectic in which "the 'floors' of the superstructure are clearly endowed with different indices of effectivity". And, this effectivity, ultimately, yields to the "determination in the last instance" by the economic base. In other words, "if they [i.e. the floors] are determinant in their own (as yet undefined) ways, this is true only insofar as they are determined by the base".

In this elaboration, there is uncertainty as regards the link between the base and the floors. This is all the more so as the effectivity of the 'floors' in terms of "a 'relative
autonomy' of the superstructure with respect to the base" and "a 'reciprocal action' of
the superstructure on the base" remain "as yet undefined".

As an attempt to overcome the spectre of "economic determinism" hanging over
Marxist theory, Althusser's formulation has not emerged with much clarity. Engels
(1890) appears more accessible in his assertion that:

The economic situation is the basis, but the various elements of the
superstructure - [politics, law, ideology] - also exercise their influence
upon the course of the historical struggles and in many cases determine
dtheir form in particular. There is an interaction of all these elements in
which, ... the economic movement is finally bound to assert itself
(quoted in Cain and Hunt, 1979: 56).

It is, however, arguable that Althusser's formulation marks the beginning of the
contributions from social sciences to the "relative autonomy" argument in the law and
society debate.

Despite the lack of clarity, Althusser's formulation marks, in the words of Hindess and
Hirst (1977: 5), a "retreat from the consequences of economism" when Marxists were,
allegedly, forced "to recognise a complex field of social relations inadequately
comprehended by the classic Marxist theories of the economy and politics" (Hirst,
1979: 1). Soon after the publication of Althusser's work, Poulantzas (1973: 255) came
to apply the concept of "relative autonomy", along with "unity of power", to the
analysis of the capitalist type of state.8 The concept had quickly become firmly
established in social scientific discourse.

2.3.2 Balbus and the relative autonomy argument

Although Balbus (1978) embarks upon a project different (arguably, in form but not in
essence) from Althusser's, his work is probably the most handy illustration of an
extended application, to law, of the relative autonomy argument.

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8 See Gulalp (1987) for a summary of the development of the concept of "relative autonomy" vis-a-vis
capitalist power relations.
The problem which Balbus addresses in his Essay is "why a specifically legal form of the exchange of people is inextricably intertwined with a specifically capitalist form of the exchange of products" (p.74). Put simply, why is the legal form homologous to the commodity form?

By tackling this problem, he expects "to outline the essentials of a Marxist theory of law" which

entails a simultaneous rejection of both an instrumentalist or reductionist approach which denies that the legal order possesses any autonomy from the demands imposed on it by the actors of the capitalist society in which it is embedded, and a formalist approach which asserts an absolute, unqualified autonomy of the legal order from this society (PP73-74).

In other words, it will be a Marxist theory of the "relative autonomy" of law which transcends the object captured by intrumentalist-formalist debate.

Here, I will not take issue with Balbus' reduction of the "legal theory" debate of "at least two hundred years" to a "Marx vs. Weber" affair, except to say that the debate has certainly more participants than Marx, Weber and their "followers". That is to say, if Balbus means that "intrumentalism" (of the Marxist type) and "formalism" (of the Weberian type) exhaustively cover all the nuances of this debate, I cannot agree.

It is instructive also to note the deficiencies of those two approaches which Balbus points out. On the one hand, the instrumentalist approach "fails even to pose the problem of the specific form of the law and the way in which this form articulates with the overall requirements of the capitalist system" (p.74). On the other, even though the formalist approach does specify the form of law, it precludes its ability "to conceptualise the relationship between the legal form and the specifically capitalist whole" by treating "this form as a closed, autonomous system whose development is to be understood exclusively in terms of its own `internal dynamics'" (ibid).
It is from this position that Balbus begins to draw the parallel between "the logic of the commodity form" and "the logic of the legal form" and relate both to the relative autonomy of law. Whereas he could readily lift the "logic of commodity form" from the first chapter of Marx's *Capital Volume 1*, he has had to reconstruct the "logic of the legal form" from Marx's fragmentary treatments of law in about five works. In the end though, he is able to demonstrate that in a capitalist order law assumes the form of "the universal political equivalent" by representing qualitatively distinct (different?) individuals as equal citizens. This parallels the process in which money (in relation to qualitatively different commodities, made equal) assumes the form of "the universal economic equivalent".

More importantly, law, in this form, extinguishes "the memory of different interests and social origins", i.e. it "defines distinctions of interest and origin out of political existence". By and large, law assumes formality, generality and autonomy. This, then, leads to 'legitimation' in which law's "claims or pledges [of equality, for instance] are valued in the first place" and to 'fetishism' in which "individuals attribute subjectivity to the Law and conceive themselves as its objects or creations".

In this guise, Balbus concludes, law acquires the guarantee to exist, function and/or develop "autonomously from the preferences of social actors ... [but not] from the system in which these social actors participate". In other words,

the autonomy of the law from the preferences of even the most powerful social actors (the members of the capitalist class) is not an obstacle to, but rather a prerequisite for the capacity of the law to contribute to the reproduction of the overall conditions that make capitalism possible, and thus its capacity to serve the interests of capital as a class.

This conclusion re-echoes Unger's (1976: 80) view, without its "naturalist" flavour, that

insofar as human law seeks to participate in the character of the higher normative order, it too must be represented as relatively autonomous from the desires of human sovereigns and from the customs of particular societies. ... Its rules ought to have a measure of critical independence from politics and custom.
More significantly, it is my view that this conclusion essentially restates Althusser's arguments to the effect that the conception of a relative autonomy of law does not amount to the "negation of a dependence in itself". The primacy and influence of the modes of production are not called into question in the conclusion. Suppose we turn Althusser's arguments into an abstract proposition: "the dependence of each 'level' within the set of articulations of a capitalist society produces and establishes a mode of relative independence of that level as its necessary result". Most probably, Balbus' analysis of the link between law and capitalist order would occur to those familiar with it as a concrete application of this proposition. It may well be argued that the extinction of the law's own social origin, as demonstrated by Balbus, is a condition for, or product of, the effectivity of this floor of the superstructure, as in Althusser's formulation.

2.4 Implications of the model for the study

The absolute and relative autonomy arguments of this model seem to converge on the conception of law as sui generis. In one argument, the essence of law is identified with the "nature" or "form" which is universal and "self-existent"; in the other, law is shown to exhibit some independent existence which it acquires in the course of the development of its internal dynamics. In further support of this latter argument one might add Engels' (1873, 1977: 365) apt description of the process in which law acquires some independence:

With further social development, law develops into a more or less comprehensive legal system. The more intricate this legal system becomes, the more is its mode of expression removed from that in which the usual economic conditions of the life of society are expressed. It appears as an independent element which derives the justification for its existence and the substantiation for its further development not from the economic relations but from its own inner foundations ... (emphasis, mine).

Both arguments suggest that the explanation for the differences among national laws lies in (1) "the negation of the essence of law" and (2) the different degrees of autonomous legal development. The differences among laws, arising from the negation of...
of the essence of law occur when, in some but not in other nations, "laws lose their relationship with justice and are made to fit immediate social expediency. [The laws are bent] to favour the power of the strong who, in turn, justifies his position by endowing the juridical system with new criteria of law" (Ellul, 1969: 31-33). In Weberian formalism differences occur when there is a differential predominance of "substantive rationality" in legal development. In both cases, the law ceases to be autonomous and develops organic links with the peculiar conditions of its nation. The differences which arise from the extinction of the social origins of law are contingent upon the nature of the mode of production within which the legal development takes place. This implies, as Balbus' contribution suggests, that the character of law in say the capitalist mode of production would be different from the character of law in other modes like the communal and feudal modes.

The point being thus far is this: the autonomy arguments as outlined in the preceding sections acknowledge that the positive law may be socially conditioned. When this happens, such a law would be different from the law which approximates the natural ideal. Further, laws which are constructed in different modes of production would show differences among themselves.

Regarding the similarities among national laws, the explanations respectively suggested by both arguments of the autonomy model are: (1) concomitant observance of the principles of nature which are common to all peoples or the principles of formal rationality in law-making; and (2) the existence of a similar mode of production in the nations being compared. Significantly, both arguments also suggest that law has a life of its own and is amenable to move around in the same form or substance. In other words, law is "a brooding omnipotence in the sky" and, ipso facto, transplantable. The issue of the transplantability has emerged most clearly in Watson's contribution which, as can be seen from the review in this chapter, is predicated on the conception of law as independent from the society.
2.5 An autonomy explanatory framework for differences and similarities in national laws

This section outlines in more clearly defined propositional terms the factors or insights which the foregoing discussion throws up for the explanation of differences and similarities in national laws. On the one hand, the laws of two countries might differ:

(a) as a result of differential deviation from the universal principles of nature or formal rationality (i.e one or both countries may bend their laws away from "natural" ideals to fit different social expediencies) - [it should be noted that this explanation resorts to, indeed give primacy to, social factors in explaining differencies. Put in another way, the natural law argument by itself cannot explain differencies; it must be supplemented by the social product explanation to be discussed in chapter three]; or

(b) if the laws arise in different modes of production.

On the converse side these laws might be similar:

(a) if they all conform to the natural principles; or

(b) if they are bent away from these principles (i.e concomitant deviation) but are made by their countries, independently, to fit similar social expediencies - [here again, it is social factors to be discussed later which are critical in explaining the similarity]; or

(c) if the law of one country approximates the true law (i.e the natural ideals) and the other country copies it; or

(d) if one of the countries bends its own law and the other copies this "deviant" law.

The main use of this framework is that it sensitizes us to specific aspects of the law-society relations not all of which may be applicable to the explanation of the differences and similarities between the compulsory arbitration laws of Australia and Nigeria. But, the propositions provide sufficient leads for the collection, analysis, and interpretation of the relevant materials upon which the proposed explanation in this thesis will be based.
It is noted that the key concepts in this framework would require some operationalisation. For instance the universal principles of nature which the Australian and Nigerian laws either conform to or deviate from would need to be concretely determined. Similarly the social expediencies which may be associated with such conformity or deviation must be isolated. Further, with regard to imitation or borrowing as an explanatory factor, the Australian law (given that it is the one being imitated or borrowed) must be shown to have taken a life of its own (i.e. having no link to any particular society) in a manner suggested by the two arguments of the autonomy model. This operationalisation will be undertaken in chapter six where the framework is to be used.
CHAPTER THREE: SOCIAL PRODUCT MODEL OF LAW AND SOCIETY

3.1 Introduction

In this chapter an attempt is made to construct, from the law and society literature, a social product model as an alternative explanatory framework to the autonomy model. Unlike the autonomy model conception of law as an entity independent of the society or social formation, this model conceives law as emanating organically from society. The arguments about the nature of the social fabric from which law emerges as a product have been diversely articulated in the literature.

For the purpose of this study, these arguments have been divided or categorised into two, namely, the consensus and the conflict arguments. In developing these arguments to give effect to the construction of the model, I have used the works of Herbert Spencer, Emile Durkheim, Edward Ross and William Sumner for the consensus argument, and of Karl Marx, Andrew Hopkins, Otto Kahn-Freund and Richard Quinney for the conflict argument. These scholars have addressed significant theoretical themes on the law-society relations. With the exception of the particular work of Hopkins which I have selected for review, the works of these scholars draw on the experiences of similar and different countries to illustrate the themes. Hopkins' focus on an Australian law within the context of its political economy provides a useful insight into some of the Australian materials which will needed for my subsequent analysis.

From the review of these works, the explanatory factors which the arguments raise for the research question of this study will be drawn together in the last section of this chapter.

3.2 Consensus argument

In general sociology, the foundation of the consensus model of society was firmly laid by the works of Auguste Comte, Herbert Spencer and Emile Durkheim. Upon this
foundation, later generations of scholars, like Talcott Parsons, Robert Merton, Kai Erikson, Neil Smelser, Davis and Moore, etc, came to build. In both sets of works, the picture of society conveyed is, generally, one in which "consensual order and stability are the natural state of social systems" (O'Malley, 1983:3-4). For instance, while analysing the cause of, and the solution to, the social crisis of his time, Comte forcefully suggests that consensus lies at the base of every genuine social order. He says:

the great political and moral crisis that societies are now undergoing is shown by a rigid analysis to arise out of intellectual anarchy. While stability in fundamental maxims is the first condition of genuine social order, we are suffering under an utter disagreement .... Till a certain number of general ideas can be acknowledged as a rallying-point of social doctrine, the nations will remain in a revolutionary state. .... For the causes of disorder will have been arrested by the mere fact of the agreement. It is in this direction that those must look who desire a natural and regular, a normal state of society (Comte, 1853) (emphasis, mine).

Although Comte's writings generally represent a reaction to a specific social crisis of his time, his general principle of agreement-normality equation, as exemplified in the above quotation, features prominently in most of the consensual approaches to society.

Regarding the relationship between law and society, the picture painted by the consensus argument suggests a position which views law as essentially embodying and/or emanating from generally accepted social values. As Chambliss, (1969: 8) has observed,

the crux of this position is that legal norms are an expression of those societal values which transcend the immediate interests of individuals or groups. Legal norms are seen as emerging through the dynamics of cultural processes as a solution to certain needs and requirements which are essential for maintaining the fabric of society.

A detailed articulation of this position is presented in the following review.

1 See Cuff and Payne (1979: 34-53) for summaries of their works.
2 This view reflects the structural functionalism of the Durkheimian type. It is necessary to note this distinction because at certain levels of analysis the works of Marx and neo-marxists like Althusser may qualify as "structural functionalist" in their assumptions.
3.2.1 Spencer and the consensus argument

In chapter two the contribution of Spencer to the autonomy model has been reviewed. In this chapter, the other parts of his work, the *Principles of Sociology*, 1882, which articulate a social-product consensus position on law will be reviewed. In the chapter devoted to "Laws" in Volume II of this work, Spencer identifies consensus as one of four major sources of laws; the other three, being the special injunctions of deceased leaders, the commands of deities and the commands of living leaders.

In communicating the idea of this consensus, Spencer uses a number of concepts. There is the "aggregate opinion", the "aggregate feeling", the "prevailing sentiments and ideas" and the "public desire". In each or all of these, "we have the germ of law which eventually becomes recognised as expressing the public will", i.e "the formulated will of the majority".

This law, according to Spencer, derives its "obligation from the consensus of individual interests", though, itself, " impersonally-derived"; it conduces to social welfare" or "provides directly for social order"; it precedes any kind of law "initiated by political authority"; and it has "equality as [its] essential principle". The "consensus of individual interests" remains the "primitive source of the law". And, even when "entirely subordinated [by other sources, it] ... never ceases to exist".

Spencer notes that his analysis

is tantamount to saying that the impersonally-derived law which revives as personally-derived law declines, and which gives expression to the consensus of individual interests, becomes in its final form, simply an applied system of ethics - or rather, of that part of ethics which concerns men's just relations with one another and with the community.

There is no rigorous analysis of the concepts which Spencer has used to represent the images of consensual foundation of law in his work. For instance, the connection between "individual interests" and "public desire" should have been clarified, as should the distinction between law and a system of ethics. Nonetheless, he has said enough to indicate the theoretical position of law as a product of some form of social agreement.
3.2.2 Durkheim and the consensus argument

To appreciate Durkheim's contribution to the consensus position on law, some reflection on his intellectual orientation may be necessary. Durkheim, from the beginning of his career, took sociology "seriously as his vocation"; and "the development and autonomy of sociology remained his salient preoccupation" (Tiryakian, 1981). His pioneering contribution to the emergence of the sociology of law as a discipline is, in my judgment, unrivalled.

Out of the eleven names on Gurvitch's (1947) list of the founders of the sociology of law, only Durkheim had his original training in sociology. And, as Gurvitch (1947: 83) observed, "aside from the two principal works in which he takes up legal questions, ... all his works, as well as the important notes in the Annee Sociologique ..., contributed to the clarification of this field [of the sociology of law]". This journal - Annee Sociologique (12 volumes from 1898 to 1912) - which was run by Durkheim himself, contained a special section devoted to "'the analysis of works where law of a society or social type is studied in its entirety' and ... in such a way as to reveal principles of social organisation and collective thinking" (Lukes and Scull, 1983: 1f).

Durkheim (1900) presents the centrality of the study of law to his sociological enterprise in these words:

Instead of treating sociology in genere, we have always concerned ourselves systematically with a clearly delimited order of facts: save for necessary excursions into fields adjacent to those which we are exploring, we have always been occupied only with legal or moral rules studied in terms of their genesis and development (quoted in Lukes and Scull, 1983: 2).

As to why law came to be central in his sociology, Cotterrell's (1977: 248) submission seems cogent. He argues, "law is important for [Durkheim] because it indicates in observable form a morality operative at the level of the whole society and sufficiently central to the society's existence to be reflected in definite, communicable, codified
rules". This is a fair restatement of Durkheim's (1893, 1960: 64-65) own assertion that, as a moral phenomenon, social solidarity by itself,

does not lend itself to exact observation nor indeed to measurement. To proceed to [the measurement and comparison of the degree to which the solidarity contributes to the integration of society], we must substitute for this internal fact which escapes us, an external index which symbolises it, and study the former in the light of the latter. This visible symbol is the law.

Durkheim argues that to study social solidarity in this way (i.e. sociologically), it is necessary to discover some identifiable characteristics which are capable of varying as the species of solidarity varies. He finds such a characteristic in the sanctions which attach to the laws through which the moral codes of the conscience collective are expressed; hence, his focus upon the repressive and restitutive laws. Durkheim further reiterates the significance of law in these words:

Social life, especially where it exists durably, tends inevitably to assume a definite form and to organise itself, and law is nothing else than this very organisation... We can thus be certain of finding reflected in the law all the essential varieties of social solidarity (op.cit).

With such theoretical conviction and commitment as shown in the foregoing, it is probably not surprising that Durkheim's name has come to dominate sociological discussion of the consensus argument about law and society.

Durkheim begins with a conception of social order in terms of "the totality of beliefs and sentiments common to average citizens of the same society". According to him, these beliefs and sentiments form a determinate system which has its own life; one may call it the collective or common conscience... [I]t has specific characteristics which make it a distinct reality. It is in effect, independent of the particular conditions in which individuals are placed. Moreover, it does not change with each generation, but on the contrary, it connects successive generations with one another (Durkheim, 1893, 1947: 79-80 - translated by George Simpson).
The technical concept which he uses to convey this collective reality in his sociology is "social fact". This "thing", in his view, provides the foundation from which all normative systems (including law) emerge; and the "thing" is in turn indexed by these systems. As it would appear, Durkheim singles out law as epitomizing this indexation. In the words of Grace and Wilkinson (1978: 48), law, for Durkheim, is "the paradigmatic instance of a social fact".

In his first major work - The Division of Labour in Society (1893) - Durkheim puts forward what Lukes and Scull (1983: 1) have termed "three bold and striking hypotheses about law". This work "became overnight a landmark of sociological writing and has remained a standard reference work ever since its publication as a doctoral dissertation in 1893 - which I suspect is an unmatched record of longevity in sociology" (Tiryakian, 1981: 116).

On the source of law, Durkheim is forthright in this first work. For him, law is derivative from and expressive of a society's social solidarity ("a wholly moral phenomenon"). This social solidarity - more technically, conscience collective - is the moral-political consensus or, as indicated before, the totality of beliefs and sentiments common to average citizens of the same society.

The solidarity varies from the mechanical one of the simple society to the organic one of the complex society. The former "is all-embracing and furnishes a comprehensive moral code" (Cotterrell, 1977: 242). And, corresponding to it is the penal law (supported by repressive sanctions). The repressive law aims at hurting the offender through his fortune, his honour, his life, his liberty, or to deprive him of some object whose possession he enjoys.

3 See his The Rules of Sociological Method (1938).
4 As Giddens (1989: 692) has observed, "Durkheim's famous first principle is: 'study social facts as things'".
By contrast, organic solidarity 'expresses a positive union, a co-operation which
derives, in essentials, from the division of labour'. It "consists in increasing complexity,
differentiated institutions and individual specialisation, resulting in the interdependence
of very large numbers of individuals in single societies" (Clarke, 1976: 246).
Corresponding to it is the restitutive law which "is not expiatory but comes down to a
mere restoration of the status quo ante". The damages awarded against the offender
"have no penal character: they are simply the means of putting back the clock so as to
restore the past as far as possible to its normal state" (Durkheim, 1893).

Durkheim's approach in this major work - the Division of Labour - leaves little doubt as
to his strong view on the connectedness of law to consensual social order. His review
of Gaston Richard's "Essai sur l'Origine de l'Idee de Droit" (1893) reinforces the
understanding that his position on the relationship between law and society is
unequivocally consensual. In that review he inveighs against the empiricists and
apriorists who

studied the idea of law in the abstract, detaching it from the
circumstances which had determined its formation and development.
They did not see that it was the act of living in society which led men to
define their juridical relations, to fix "what all may require from each
and what each may expect from all" (quoted in Lukes and Scull, 1983:
147).

Also, although he approves of Richard's "notion of law" which comprises the ideas of
arbitration, of guarantee, of offence and of debt (reparation and punishment), Durkheim
implies some deficiency in Richard's analysis, basically on the ground that the ideas are
not located in the "idea of solidarity". He then argues that, to allow for a better analysis,
Richard's problem should be reformulated thus: "What are the social influences which
gave rise to the idea of the law and in terms of which it has evolved historically?" He
maintains that the "notion of the law" is not only impressed by but also derived from
the "idea of solidarity".
On the evidence, it is probably correct to argue as Hunt (1978: 69) has done that "Durkheim posits a mirror image relationship between law and social solidarity". The complexities in social relations which Durkheim appears to have overlooked, or perhaps sacrificed to enable him maintain his position, will not be discussed here. It suffices for our immediate purpose to note that his approach is a strong consensual perspective within a social product model of law and society.

3.2.3 Ross/Sumner and the consensus argument

To a lesser extent, some of the other sociologists who have adopted the consensual view of society and addressed the law-society relations in their works arrive at conclusions very much in line with those of Spencer and Durkheim. In respect of the source of law, the works of Edward W. Ross and William G. Sumner appear worthy of note, although they need not attract more than a brief review here.

It is generally held that it was Ross who introduced the concept of social control into sociology. This concept came to him in 1894 while "he sat in an alcove in the Stanford Library during the Christmas recess". His preoccupation was to determine the means through which society disciplines its members. After setting down thirty four of such means, he "stumbled on to a great social secret". In excitement, he wrote to Lester Ward, whom he regarded as his Master, the following words: "I am more than ever convinced that I have got hold of ... a thread which will enable us to unravel many tangles in the development of culture. I find Social Control a key that unlocks many doors ...." (Ross, 1901, 1969: xvi).

In contradistinction to the other means, Ross finds in "social control" an intended and purposeful societal domination "which fulfils a function in the life of society". As with Durkheim, law appears to Ross as "the most specialised and highly finished engine" of

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5 Even though works of Parsons, Merton and Bredemeier command attention in their own right, they are not considered here because they focus mainly on the "function", and not the "source", aspect of law in society.
this domination over individual members. Thus he argues that "the making of law is ever the first care of a new community".

Ross comes even closer to Durkheim over the link which he established between law and society. He is of the view that changes in laws (in his words, "a bewildering series of metamorphoses in laws") are expressions of "the life of a given society" or, in Unger's (1976: 47) words, "the innermost secrets of the manner in which [society] holds men together". Invariably, therefore, Ross has no difficulty concluding that "the search for 'the spirit of laws', which since the days of Montesquieu has engrossed many of the highest minds shows that the legal code is connected with the institutions and needs of society ...".

In a manner similar to Ross, Sumner argues that there is a close link between law and society. His contribution in this regard begins with his *Folkways* (1906). In that work, he shows how *folkways* transform into *mores*. After practising certain folkways (i.e habits and customs) for an extended time, people acquire the conviction that these mass phenomena are indispensable to the welfare of society. "It is with the addition of this welfare-element", he says, "that folkways become mores".

More significantly, he argues that "it is out of mores that institutions [including law] develop". Referring, specifically, to parliamentary activities, he asserts that "acts of legislation come out of the mores... Legislation ... has to seek standing ground on the existing mores and it soon becomes apparent that legislation, to be strong, must be consistent with the mores". Put differently, "law... is a sort of crystallization or precipitation of mores".

Thus, in a collaborative work with Albert G. Keller, Sumner (1927: 666) could advise that the growth of law from customs (or mores) "should never be lost sight of by one who would understand its nature and evolution". He then quotes, with approval, Carter's statement that
Law begins as the product of the automatic action of society ... [law] is the fruit of the myriads of concurring judgements of all the members of society pronounced after a study of the consequences of conduct touching what conduct should be followed and what should be avoided.

Against this background one can understand the observation by Akers and Hawkins (1975: 44) that "the classic statement of the consensus explanation of law as a reflection of widely and deeply held societal norms is found in Sumner".

3.3 Conflict argument

Although through a different route, the conflict argument also comes down on the side of the social product model of law and society. At the core of this argument is the view that conflict (and not consensus) of interests is the engine of society and, more significantly, is the determinant of the nature of law.

Around this core, however, three theoretical perspectives are discernible: the Marxist, the pluralist, and the power-elite perspectives. It might be argued that the pluralist perspective which postulates 'harmonisation of interests or majority rule' should belong to the consensus argument. This appears to be the position of Tomasic (1980: 28; also, see Hopkins, 1978b: 5). Chambliss and Seidman (1982: 140) have gone as far as to regard "pluralist theory" as an "offspring" from the consensus perspective. However, considering its main concepts like "reconciliation" "compromise", "conflicting claims", and "diverse interests", I take the view that the assumptions of the pluralist perspective are more akin to the conflict paradigm.

Akers and Hawkins (1975: 47) appear to share in the understanding that these three perspectives belong to one paradigm when they observe that, apart from the contention of the "marxian model of class domination", there is the unresolved issue which is not whether the law is most often the outcome of group conflict; rather it is whether the nature of that conflict is better described as the overwhelming and enduring dominance of a "power elite" or as the "pluralistic" conflict of many different groups with varying amounts of
power, which are successful on certain issues and not influential on others, and none of which is all-powerful (emphasis, mine).

It is therefore defensible to consider the pluralist perspective, along with the other two, in a conflict argument framework. The key postulates of these perspectives on the relationship between law and society will be brought into clear focus in the following review of the works of Marx, Hopkins, Kahn-Freund and Quinney.

3.3.1 Marxist perspective and the conflict argument

It is perhaps trite knowledge that Karl Marx himself never lived to fully develop a coherent theory of law. Most of what has passed as "marxist perspective" has been derived, in the form of abstractions and/or extrapolations, from Marx's allusions to law in his general works. In my view, it is probably an over-statement for Renner (1949: 56) to assert that Marx undertook, in *Capital*, "a comprehensive exposition of the functions fulfilled by the legal institutions at every stage of the economic process" - as this carries an overtone of a complete or systematic theory of law and economy.

Mills (1962: 41) is closer to the reality when he observes that "the work of Marx as he left it when he died in 1883 is not very neat and nowhere does he summarize his ideas in a complete and systematic way". Not even the State upon which Marx seems to have dwelt considerably can be said to have received a systematic theorising. For, as Miliband (1969: 7) observes, "Marx himself ... never attempted a systematic study of the state [even though] references to the state in different types of society constantly recur in almost all of his writings". And, on Marx's treatment of law, Beirne's (1975) observation seems just. He says: "Marx's analysis of law was always secondary to that of the State and the class struggle, and the scattered nature of his references to law testifies to this ..."). On the whole, his attention to law remained "tangential to a

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6 There is no suggestion here that Marx had such project in mind. In fact, there is no specific mention of law in the project set out in his Preface to *A Critique of Political Economy*, namely, "to examine the system of bourgeois economics in the following order: capital, landed property, wage labour, state, foreign trade, world market".
predominant focus on the general mode of social organisation and the material circumstances in which men are placed" (Collins, 1982: 9).

Be that as it may, whatever qualifies as the Marxist perspective on the relationship between law and society appears to be inherent in and elaborated by the works of Marx himself. For, although "no theory of law as such is constructed by Marx, indeed no concept (theoretical definition) of law is developed, directions for such an elaboration" seem to be strongly suggested in his treatment (Cain and Hunt, 1979: xiii)^7. The review here concentrates on Marx's analysis of law in relation to the economic base of society.

3.3.1(a) Marx's contribution

Apparently Marx's first encounter with law as a subject did not strike a happy chord. Not only did he find learning the law an unrewarding and unsatisfying task, compared to Philosophy, he also expressed views on law which were "likely to arouse storms if made into a system". The form of this expression was anything but "conciliatory and agreeable"^8.

His irritation centred on what he perceived as "an obstacle to grasping the truth". An instance of this was "the unscientific form of mathematical dogmatism, in which the [authors on law argue] hither and thither, going round and round the subject dealt with, without the latter taking shape as something living and developing in a many-sided way". This was communicated in his letter to his father in 1837 (see MECW 1, 11-19).

Further on, in this letter, there are some indications that Marx's quarrel was mainly with the abstractness with which law was discussed. For him, law exemplified "the concrete expression of living world of ideas" and, therefore, must be studied in its historical development, whereas the prevailing approach was what he was pleased to call "the

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^7 For this part of our review, Marx and Engels on Law, 1979, by Cain and Hunt provides a valuable resource. As Tushnet (1980) duly observed, these authors "have expended enormous effort in discovering and collecting the fugitive writings of Marx and Engels that deal with law".

^8 See "Letter from Heinrich Marx to Karl Marx". 28.12.1836, MECW 1, 665.
metaphysics of law, i.e., basic principles, reflections, definitions of concepts divorced from all actual law ...".

The direction of Marx's conception of the relationship between law and society is clearly foreshadowed by these comments. At the very least, law, in his view, would not be "a brooding omnipotence in the sky". Soon we find an explicit statement on this in his classic formulation:

My investigation led me to the result that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life, the sum total of which ... combines under the name 'civil society' [whose] anatomy is to be sought in political economy. ... The general result at which I arrived ... can be briefly formulated as follows: In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. ... The sum total of these relations ... constitute[s] the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness (Marx, 1859, 1977: 503).

This formulation incorporates some fundamental issues that have preoccupied many a writer in contemporary general sociology and, more especially, in the sociology of law, in particular. For writers in general sociology, this statement, together with the one dealing with the conflict between "the material productive forces" and the "relations of production" (the latter, not quoted here), "gives a schematic outline of the structure of society and the mechanisms of social change" (Hindess, 1987: 12f).

For writers in the sociology of law, three issues stand out. First, the statement forcefully attributes materiality to the origin of law or legal relations. Second, the building analogy of base/superstructure which it introduces, in effect separates law and economy into different spheres of life. And third, it seems to impose a specific kind of relationship upon law and economy, with the former deriving its existence from the latter.
Out of these three issues, the third one which suggests that Marx conceives law (superstructure) as an expression or reflection of its economic substratum (base) has attracted the most attention. In essence, whether it amounts to determinism, that is, by importing a unidirectional causality in which law is a necessary consequence of the economic structure, has remained the focus of a long-standing controversy with(in) the marxist theory of law. However, in the terms that Marx has employed here, it can be argued that law is intended "to be explained and understood as a product of changes in the economic base" (Cain and Hunt, 1979: 49). Yet, this law-society relation can be interpreted either in instrumentalist, functionalist or class politics marxist terms (see Brereton, 1989: 300-309 for a good relevant summary).

In *Capital*, Vol. 1, the nature of the relationship between law and society is presented as arising in the context of commodity exchange; and this is brought out much clearly in Pashukanis' (1978: 63) interpretation:

Marx reveals that the fundamental condition of existence of the legal form is rooted in the very economic organisation of society. In other words, the existence of the legal form is contingent upon the integration of the different products of labour according to the principle of economic exchange. In so doing, he exposes the deep interconnection between the legal form and the commodity form.

In the exchange-context, commodity-owners are said to enter into "juridical relations" (i.e mutual recognition in each other of the rights of private proprietors). Though a relation between two wills, it "is but the reflex of the real economic relation between the two" which determines "the subject-matter comprised in each such juridical act". Again, the social-product nature of law is suggested.

Marx, in Volume III of this work, hints at the process in which this social-product nature develops. He says:

It is ... clear that here as always it is in the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this, by the way, comes about of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time. ... [A mode of
production] entrenches itself as custom and tradition and is finally sanctioned as an explicit law (Marx, 1867, 1986: 793).

This process is re-echoed by Engels when he says that

at a certain, very primitive stage of the development of society, the need arises to bring under a common rule the daily recurring acts of production, distribution and exchange of products, to see to it that the individual subordinates himself to the common conditions of production and exchange. This rule, which at first is custom, soon becomes law... With further social development, law develops into a more or less comprehensive legal system (quoted in Cain and Hunt, 1979: 55).

Apart from reiterating that law is a product of evolving economic forces, Marx has introduced a class dimension by presenting law as a tool used by the ruling class to perpetuate their domination over the society. Informed by this perspective, Karl Marx puts the proposition to the bourgeoisie of his day that: "your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class"; or, as in the *German Ideology*, (1970: 106), that: "the expression of this will, which is determined by their common interests, is law".

Marx finds concrete illustrations for his theoretical formulation in the British *Statutes of Labourers* of the fourteenth to seventeenth centuries and the Factory legislation of the nineteenth century. Marx argues that the *Statutes of Labourers* - especially vagrancy laws, the first being the 23 Edward III, 1349 - arose from the economic conditions created by

the great plague that decimated the people, so that, as a Tory writer says, "The difficulty of getting men to work on reasonable terms (i.e., at a price that left their employers a reasonable quantity of surplus-labour) grew to such a height as to be quite intolerable" (Marx, 1867, 1986: 258).

A major consequence of these conditions is stated rather graphically by Dobb (1963: 33):

The result of this increased pressure was not only to exhaust the goose that laid golden eggs for the castle, but to provoke, from sheer desperation, a movement of illegal emigration from the manors: a
desertion \textit{en masse} on the part of the producers, which was destined to drain the system of its essential life-blood and to provoke the series of crises in which feudal economy was to find itself engulfed in the fourteenth and fifteenth centuries.

These conditions, engendered by the Black Death (as the plague was called), empowered the surviving but scarce labour to bargain for higher returns to the "detriment" of their employers' surplus-value margins: "the poor demanded such high wages as to threaten industry and wealth". The legislative response was predictable: "In an attempt to salvage the system of feudal formation from collapsing, various laws were promulgated whose contents reflected the prevailing social relations" (Omaji, 1984: 133). Chambliss' analysis of the Law of Vagrancy (1964) provides one specific sociological treatment of these laws.

Turning to the Factory legislation - the history, details and results of which Marx is inclined to give "so large a space" - Marx is equally firm in locating its source in the developments on the economic front. The context was "the limits of the working-day" which had become a conflicting issue as the economy moved into the capitalist production stage.

"Capital", says Marx, "is dead labour that, vampire-like, only lives by sucking living labour, and lives more, the more labour it sucks" (Marx, 1986: 224). Having bought the labour-power, capital insists on getting "the greatest possible benefit out of the use-value of [its] commodity". To the capitalist (i.e. "capital personified and endowed with consciousness and a will") this requires that the labourer remain at his disposal all day long - for 24 hours!

Against this tendency, the voice of the labourer rises. Labour argues that the quest of the capitalist would amount to "spoliation" rather than "use" of labour-power. Hence Labour's disposition:

\begin{quote}
I will, like a sensible saving owner, husband my sole wealth, labour-power, and abstain from all foolish waste of it. I will each day spend, set in motion, put into action only as much of it as is compatible with its
normal duration, and healthy development. By an unlimited extension of the working-day, you may in one day use up a quantity of labour-power than I can restore in three *(Ibid: 224-225).*

In these circumstances, the stage is set for a show-down. In Marx's words,

There is here, therefore, an antimony, right against right, both equally bearing the seal of the law of exchanges. Between equal rights force decides. Hence is it that in the history of capitalist production, the determination of what is a working-day, presents itself as the result of a struggle, a struggle between collective capital, i.e., the class of capitalists, and collective labour, i.e., the working-class *(Ibid: 225).*

In the desire to "curb the passion of capital for a limitless draining of labour-power" or, in a sense, its blind eagerness towards system-suicide, the State intervened with factory laws (between 1833 and 1864) to forcibly limit the working-day. Thus Marx conceives the English Factory legislation as "the negative expression of the greed for surplus-labour". Stating this position in a more sweeping generalisation, Marx maintains that

Factory legislation, that first conscious and methodical reaction of society against the spontaneously developed form of the process of production, is, as we have seen, just as much the necessary product of modern industry as cotton yarn, self-actors, and the electric telegraph (Marx, op.cit: 451).

He is, however, careful to locate each of the Factory Acts (i.e. of 1833; 1844; 1850 and 1860) within its immediate societal conjunctures (see Marx, op.cit: 264 - 286).

When read closely, the presentation of these concrete illustrations by Marx appears to lack the sharpness of his original formulations, regarding the base/superstructure relationship between law and society and the dominant-class character of legislation. For instance, the assertion that factory legislation is a reaction of society against a process of production appears to be a far cry from the seeming definiteness with which he had formulated the relationship between ideological forms (e.g. law) and their economic base.

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9 The expression is "negative" when compared with the *Reglement Organique* of the Danubian provinces - the code of corvee, proclaimed in 1831 by the Russian General Kisseleff - which approvingly legalised "the hunting after [more] days of corvee" (more surplus-labour) by the Boyard.
Further, Marx expresses the view that the Factory Act of 1850 was "a compromise between masters and men" which was given the force of law by "the seal of Parliament". On a different occasion, he portrays the Factory legislation, generally, as a victory of the working class: "it was the first time that in broad daylight the political economy of the middle class succumbed to the political economy of the working class" (quoted in Cain and Hunt, op.cit: xi).

As would be expected, this perceived "shift" (dual orientation?) has led to much controversy over Marx's actual position. However the purpose here is not to address this controversy which arises both from the original formulation\(^\text{10}\) and the subsequent shift. Suffice it that it remains evident from the foregoing review that, for Marx, law has organic links with society and, generally, that law is a product of the interests of the ruling class.

### 3.3.2 Pluralist perspective and the conflict argument

Unlike the views in marxist perspective, the pluralist perspective emphasises "interest group proliferation, diversity, differentiation and overlapping", thus challenging the primacy and exclusiveness of class interests in policy determination (Matthews, 1983: 124). With each group capable of successfully exerting its power at certain times and on certain issues, the perspective highlights "the numerous foci of decision-making and the countervailing forces\(^\text{11}\) which hinder a great concentration of power in any single location" (Head, 1983: 8).

Consequently the proponents of this perspective not only advance a plurality of variables in explaining social phenomena, they also, like the American legal realists, have "a horror of any view which [propounds] a single major causal factor" (Hunt,\(^\text{10}\) For instance, Hindess (1987: 14) points out that "Marx does not clearly define the connections between the three parts of society which he refers to with the words 'on which arises' and 'to which corresponds'".\(^\text{11}\) For a discussion of "countervailing forces", see Galbraith's *American Capitalism: the Concept of Countervailing Power*, 1952; chs. 9 and 10.
1978: 43). For instance, rather than explaining state policy in terms of a single causal or
class priority, they would represent it as

the outcome of the balance of economic forces in the group struggle; the
state passively registers the views of the dominant group (or coalition of
interests) on particular issues. The state is thus available as an
instrument for carrying out the policies of the majority of voters or a
majority coalition of interests; or it simply reflects the compromises
arising from the conflict of group forces in the economy and society
(Head, 1983b).

Even where it is conceded that the state has some independence on the basis of its
functions of pursuing general or national interest against the inevitably narrow and
selfish interests of organised groups, and defending the basic institutions and values of
the system, the importance of the mediation of electoral politics in the state-society
relations is still underlined. It should be noted in passing that some scholars, e.g.
Brereton (1989: 296), characterise this conceptualisation of the state as one of the
"caricatures of pluralism" and "an unfair representation".

With regard to law, this perspective locates its source in "an interplay of a variety of
interests with different groups being successful at different times or else with
compromise occurring between various interest groups" (Tomasic, 1980: 28).
Apparently, the implied plurality derives from the view that the political system in
which the success or failure of these groups is decided "is open to a wide range of
interests that no single group's interest prevails across a spectrum of significant issues,
and that the system is therefore democratic and responsive to shifts in public opinion"
(Head (1983b: 26).

3.3.2(a) Hopkins' contribution
Hopkins' *CRIME LAW & BUSINESS: The Sociological Sources of Australian
Monopoly Law* (1978b) provides a concrete illustration of this perspective on law and
society. "Intended as a sociological study"¹, Hopkins orients this work to a

¹ Unless otherwise indicated, this and other quotations in this section are taken from Hopkins' 1978b
work.
sociological tradition on law and society - that which deals with the value-consensus versus interest-conflict debate on the sources of law.

After some review of this debate, Hopkins adopts a theoretical proposition (that is, "most legislation can be seen at the time of enactment to represent certain group interests") which "assumes neither conflict nor consensus". The chosen units of analysis are the "three landmark antitrust Acts of Parliament since Federation - the Australian Industries Preservation Act of 1906, the Trade Practices Act of 1965 and the Trade Practices Act of 1974". Of these units, the central issue considered is the role of interests and values in the creation of these laws.

On the passage of the Act of 1906, Hopkins considers "response of a democratic parliament to the public concern about the growth of monopoly in Australia" as an inadequate explanation. He contends that attention must be paid to the "political groupings" and the prevailing/dominant interests in the Parliament at the time. The groupings include the free traders, the protectionists and the Labor Party, while the dominant interest was the protection of local industries. Prompted by McKay's (then Australia's largest manufacturer of harvesters) representations which highlighted the threat from overseas industry (in particular, the American International Harvester trust), the protectionists and the Labor Party decided to act to protect native industry in Australia.

In formulating the law to give effect to this decision, the American Sherman Act 1890 was taken as the model. Although the Australian law "was never itself intended to promote competition", the American Act upon which it was modelled "gave expression to a philosophy of competition". More curiously, some sections of the former (e.g. section 10 of the 1905 Bill) indicate some evidence of direct copying from the latter. An explanation for this apparent "legal transplant" (to use Watson's phraseology) would have made this aspect of Hopkins' work quite akin to a major concern of my study; but it is not pursued by him.
For my immediate purpose, though, the conclusions he draws from the analysis of the advent of this law are significant. Apart from being "a result of political compromise" between Business (manufacturing) and Labour interests, the Act was "an expression of [the] dominant protectionist philosophy rather than of any serious concern to strike at the anti-competitive practices of rings and trusts in Australia". Was "protectionism" a dominant philosophy because it was "a value shared by large sections of the electorate as well as by a majority of members of Parliament"? Maybe. Nonetheless, Hopkins concludes "the dominance of this value is a vital explanatory factor" (see pp. 18-29).

When the 1965 Act was initiated and passed, different explanatory factors had emerged. From the late 1950s, official evidence - generated through the Tariff Board investigations, and the judicial and Royal Commission inquiries - had shown the existence of price fixing and other restrictive trade practices, indicating a non-competitive situation. Garfield Barwick, who was appointed Attorney-General in 1958 and upon whom it devolved to introduce government legislative proposals into the Parliament, had "shown himself an enthusiastic and even doctrinaire believer in the virtue of maximum competition in a private enterprise system". Further, inflation (believed to result at least in part from a lack of competition) had become "perhaps the greatest challenge to management in Australia".

It is in the context of these forces that the Trade Practices Act 1965 was proposed by the Government, opposed (generally, speaking) by business, supported by "farmers", labour organisations, local government associations and the press, modified by Government, and passed by the Parliament. From Hopkins' presentation, it can be observed that this context was more complex than the one in which the 1906 Act emerged.

It is, however, arguable that, as a product of a political process, the 1965 Act is similar in some formal sense to that of 1906. As with the earlier Act, the 1965 Act "did
represent a compromise", although this time around between "the competing values espoused by the Government" and not between competing interests (p. 68). Similarly, the 1965 Act was contingent on an identifiable "explanatory factor" - different from that of 1906 Act - namely, the dominant value of competition.

The 1974 Act, which Hopkins also discusses, is no less a product of competing forces of some sort, balanced or reconciled in a political process. For although "the new [Labor] Government felt no need to make concessions to the needs and interests of business and was free to adopt an uncompromising philosophy of consumer protection" (p. 87), it soon discovered that there was no perfect correspondence between the interests of labour (i.e. its traditional constituency) and those of consumers which it now decided to champion in order "to expand its electoral base" (p. 93).

Obviously "consumer-protection had become a dominant social value" and the Government must have perceived it as such before seizing on it "as a new vantage point". There should be no surprise, therefore, that, in addition to strengthening the restrictive trade practices provisions of the previous Acts (i.e. those of 1965 and 1971), the Government incorporated in the new legislation "a number of quite new explicitly consumer protection provisions" (p. 88).

To do this, however, the Government needed to reconcile the labour-related and electoral forces, among which a potential conflict was seen to exist. In what appears to be a political feat, the Government reduced the agents of these forces (i.e workers and voters) to a new category, i.e. the consumers; and directed its policies of health, education and welfare to them in their new form. Thus, apart from becoming a dominant value, consumer-protection provided for the Government a concept by which to unite labour interests and an electorally significant interest. In the 1974 Act, both forces found expression.
In drawing some comparative conclusions on the three landmark Acts, Hopkins notes specifically that "the 1906 and 1974 enactments ... were the product of the dominant concerns of the day - producer-protection in the first case and consumer-protection in the second". These "concerns" had electoral anchors. The argument that the concern upon which the 1965 Act was founded had no "electoral considerations" may explain its exclusion from this conclusion by Hopkins. However, it is significant that the Act was seen as a product - even if a "freely floating" one - of "autonomously operating Liberal Party values" (p. 110).

On the whole, then, Hopkins' work shows clearly that the antitrust laws of Australia have firm links with the social conditions of their times. The complex nature of these links is well documented in the work, as can be observed in Hopkins' concentration not only on the way particular interests were affected by legislative proposals but also on how the various parties sought to justify the interests by reference to apparently altruistic and more universalistic values shared by legislators and the electorate. The author captures nicely the ebb and flow of consumerist interest and intra-capitalist and worker-consumer conflicts (Levi, 1984).

More relevantly (for this section of the review), these conditions are articulated in pluralistic terms. If in doubt, there is further evidence in Hopkins' (1980) critical commentary on Elites in Australia (1979) by Higley and others. There, he refers to this same work to exemplify "the point ... that particular elites are successful only on certain occasions, and under certain circumstances". In the Trade Practices legislation of 1971 (under a Liberal-National Party coalition Government) and 1974 (under a Labor Government), "representations made by union leaders were heeded"; those of business leaders were not. "The important question, then," says Hopkins, "is under what circumstances are the particular elites successful in their efforts to influence governments". Patently, this is a pluralistic formulation, the use of the concept of "elites" notwithstanding.
Hopkin's study with Parnell, "Why Coal Mine Safety Regulations in Australia are not Enforced" (1984) is yet another work of his that bears the imprint of pluralism. He here argues that "the first coal mines regulation Act in N.S.W. was passed in 1862 in response to union pressure"; and that the subsequent revisions were "in part a response to perceived public pressure" (emphases, mine). As can be seen, the pressures for the creation of, and changes in, this law did not emanate from a single location.

The strength of Hopkins' pluralistic articulation of the social conditions under which the antitrust laws emerged in Australia is not at issue here. The point is that his main work (i.e. the monopoly law work) which has been reviewed here clearly illustrates a pluralist perspective in which law is viewed as a product of the interplay of a variety of social interests. It nevertheless can be observed, in the words of Levi (1984), that "quite apart from the clarity of its writing, this book is a marked improvement over reified ex post facto functionalist 'explanations' (whether consensus or Marxisant) and over theories that depict legislation as the result of naked power struggles unmediated by some appeals to some broader justificatory ideology".

3.3.2(b) Kahn-Freund's contribution

Another source of illustration for the pluralist perspective and, more generally, the social product model of law and society is the contribution of Kahn-Freund, a scholar of towering stature in legal circles. Kahn-Freund employs a "pluralist perspective" in most of his analyses of law. This can be detected not only in his definition of law (especially, labour law) and its function, but also in his account of the sources of law and legal development in general.

With respect to industrial relations, for instance, he maintains that the purpose of labour legislation is to regulate and/or mitigate the dependency of the employee. This view is

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13 He is referred to as "one of the pillars of English legal and academic life"; "a polymathic scholar, the most distinguished legal academic in [Britain] in this century"; a founder of the academic study of Industrial Law and "one of Britain's most distinguished comparatists of the post-war era", etc. (Fridman, 1979; Griffith, 1979; Butler, 1987).
elaborated in his *Labour and the Law* (1977) where he states that "labour law is chiefly concerned with this elementary phenomenon of social power". In a more profound postulation, he says:

The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation; ... and indeed most labour legislation altogether must be seen in this context. It is an attempt to infuse law into a relation of command and subordination (p.6).

In *Labour Relations: Heritage and Adjustment* (1979) he illustrates how the character of this law ("a particular kind of legal intervention") in Britain and North America is largely determined by the traditions of trade union "direct democracy" and "job control".

Kahn-Freund's idea of law as "a technique for the regulation [or balancing] of social power" is pluralistic in orientation. In industrial relations, and in other spheres of social life where legislation is required, he presents the State as a neutral instrument: the State is above the conflict of the sectional interest groups; so, for example, industrial conflict is a distributional conflict between management and labour, not a class conflict between capital and labour. In such situations, the intervention of the State occurs mainly to guarantee "order, peace and efficiency" (see Lewis, 1983). However, this view tends to overlook other ideological, legitimating and coercive functions of law which can, and do, determine which law is put in place (whether home grown or borrowed) and the character which this law ultimately assumes.

With respect to Kahn-Freund's general position on the relationship between law and society, his assertions in his "On the Uses and Misuses of Comparative Law" (1974) seem to set the framework. In this work, his concern is with "comparative law as a tool for law reform", especially in relation to "the problem of transplantation". He translates this concern into two questions, namely: "what are the uses and what are the misuses of foreign models in the process of law making?"; and "what conditions must be fulfilled in order to make it desirable or even to make it possible for those who prepare new
legislation to avail themselves of rules and institutions developed in foreign
countries?". As observed earlier, it is in his answers to these questions that one finds
the core of his social product approach. The answers warrant a close scrutiny.

Drawing upon Montesquieu's opinion that "only in most exceptional cases [could]
institutions of one country serve those of another at all"^, Kahn-Freund develops the
argument that law is linked "so closely to its environment that it could hardly ever
change its habitat" (or be transplanted). He contends that even though most of the
environmental factors identified by Montesquieu (geography, economy, culture, etc),
which make law a society-specific phenomenon, have decreased in importance over the
years, the political factor has gained strength in linking law and society.

Put differently, while "the process of economic, social, cultural assimilation or
integration" which implies the flattening out of diversity may have reduced the
"society-specificity" of law, the concomitant differentiation of the political base of law
does not allow for the transplantability of law. The "flattening out of diversity" is
taking place and can potentially make transplantation easier, he says, but this is not
happening on a universal scale. Thus he constructs a potential defence for
Montesquieu's "theory of environmental obstacles to legal transplantation":

Yes, we can hear [Montesquieu] say, there may be something in your
point [of universal flattening of diversity] if you look at Europe -
Western or Eastern, capitalist or communist - at North America or
Australia, at Japan or parts of Latin America. But have you forgotten
India, have you forgotten China and South East Asia, or Africa or the
Islamic Middle East? Your economic and social and cultural integration,
... covers only a minority of the inhabitants of this globe, and not the
subsistence peasants, say in India or Pakistan, and in large parts of
Africa.

This implies that even if the "flattening out" in, say, the West allows legal
transplantation among its countries, it does not allow transplantation from there to other
regions which remain different. For example, it will be difficult, or perhaps impossible,
to transplant law from Australia (in the West) to Nigeria (in Africa).

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^ See The Spirit of Laws Book 1. Ch. 3
In his own illustration Kahn-Freund points to "the gulf between the communist and the
non-communist world, and that between dictatorships and democracies in the capitalist
world". He also points to the difference between presidential and parliamentary types
of democracies which "impinges on the distribution between the judicial and
administrative and policy-making powers and ... on the minutest details of legislation
affecting economic and social policy, especially industrial relations". Lastly, he refers
to the varying degrees of influence which organised interests within a country's power
structure have over law making as another aspect of the difficulty put in the way of
legal transplantation by political differentiation.

With specific reference to three branches of law (family, procedural and industrial
relations), Kahn-Freund seeks to demonstrate that to the extent that laws express and/or
allocate political power, they remain tied to the history and social structure which
characterise their countries; hence they are not transplantable. Even though he
concedes, not without expressing surprise, that the inter-country assimilation of ideas
and institutions of family law through transplantation has been so intensive and
rapid\(^\text{15}\), he seems to present this phenomenon as an aberration. The example of Ireland
which rejected the marriage/divorce law of England (similar, socially and economically
as the two countries may be) proves very handy for his position that, ultimately,
different structures of political power keep law localised. He says, "how can the Irish
rejection of divorce ... be explained except in terms of the political power of the
Catholic hierarchy?"

With industrial relations law, Kahn-Freund maintains that the obstacles to
transplantation are formidable. This is precisely because, "it is hard to think of any
branch of law where decisions in individual cases involve a higher degree of political
responsibility". For, "in each country the relations between management and labour are

\(^{15}\) He showed how the fundamental rules and details of divorce law "have been transplanted from
Australia and New Zealand to England" (see the British Divorce Reform Act, 1969). Yet, nothing, in his
view "can be closer to the moral and religious convictions, the habits and the mores and also the social
structure of a community than the subject which this law covers".
organised under the influence of strong political traditions, traditions connected with the roles played by organisations on both sides as political pressure groups promoting legislation ...". He adds that even the drafters of international standards know too well that "collective bargaining institutions and rules are untransplantable".

He submits, then, that "the transformation of the power structure ... [has become] at certain times one of the decisive factors in the development of the law" (see Kahn-Freund, 1977: 10ff). And, logically, he advises that the use of comparative law "requires a knowledge not only of the foreign law, but also of its social and above all its political context. The use of comparative law for practical purposes becomes an abuse... if it is informed [only] by a legalistic spirit which ignores this context of the law".

From a survey of most of his works, both before and after 1974, it can be observed clearly that whatever the subject (or branch of law) of his discourse may be, societal factors loom large in his account of the emergence, the ontological status of law and the direction that changes in law take. "Throughout", says Fridman (1979: 413),

... whether the subject under discussion is labour law, matrimonial or matrimonial property law, comparative law, or something else, Kahn-Freund places particular emphasis upon the social aspects if the law itself is to be understood, and especially if the law is to be changed and improved.

For instance, his discussion of the development of the *Matrimonial Property Law in England* (1955) is littered with references to the influence of social, economic and political factors. "It is difficult", he says, "to imagine any system of law which, in its regulation of the impact of marriage on property, could completely ignore ... social facts ...". He adopts a similar approach in his contextual discussion of the 'Conflict of laws'. As Karsten (1978) has rightly observed, Kahn-Freund demonstrates "how differing social, economic, geographical and political conditions ('spheres of life') in different countries have had their impact on the development of conflicts rules in different systems". In particular Kahn-Freund uses the great migration of the 19th
century to explain why, for instance, Italy adopted the "nationality principle" while the United Kingdom adopted the "domicile principle"; and why neither of these principles took root in the United States. Instead, the U.S chose the *lex loci celebrationis* rather than the *lex domiciles* to govern capacity to marry (see Kahn-Freund, 1976).

What is more, he seems to be prone to reading his own social product approach into other people's works. For example, in his edition of Karl Renner's (1949) *The Institutions of Private Law and their Social Functions*, he attributes to the author the stance of challenging jurists to approach "the science of legislation ... not only as a science explaining a technique, but as an exploration of the political and economic forces that go into the making laws and the process by which they translate themselves into fixed norms" (p. 302). This challenge does not appear to me to be apparent in Renner's work.

In addition, Kahn-Freund translates his social product approach into a pedagogical argument when he says:

> the teaching of the law is most likely to fulfil an educational function if those who teach it and those who learn it co-operate with the representatives of the other social sciences. Rubbing shoulders with economists and sociologists, political scientists and social anthropologists is a healthy exercise for a lawyer. It helps to immunise him against the illusion of the mirage which Mr. Justice Holmes castigated as "a brooding omnipotence in the sky", of law as a self-contained unit which develops itself out of itself. It brings home to the lawyer that he cannot understand his subject without a constant and painstaking effort to see the social forces and changes that promote or stunt the growth of the law (Kahn-Freund, 1966).

How Kahn-Freund, being a lawyer in a traditional sense, acquired his orientation will not be discussed here. It is, however, pertinent to note that his exposure to subjects other than law and to Professor Hugo Sinzheimer\(^\text{17}\) in his student days at the

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\(^{16}\) In an earlier work, Kahn-Freund had shown, through a historical survey, how "nationalism" influenced the development of private international law (i.e. conflicts of laws) in England. (see Kahn-Freund, 1960).

\(^{17}\) Partington (1978: x) observed, in a footnote, that Kahn-Freund did pay tribute to the intellectual impact that Sinzheimer had on him and other German law students of his time. We may add here that Gurvitch (1947: 50f) had identified Sinzheimer as one of the representatives of the German sociology of
Universities of Frankfurt, Heidelberg and Leipzig "clearly inculcated in him a willingness and an ability to look at law from the sociological point of view", thus putting him "in a rather different class of legal academic from many of his English contemporaries" (Fridman, 1979: 412).

The result is that, although a lawyer by training, Kahn-Freund, finds social sciences are an asset, in contrast to Watson to whom they are a liability. Kahn-Freund (1966) maintains: "I do not believe that any student of law can understand his subject nor do I believe that legal education deserves its name unless law is taught in the frame of a universitas literarum or scientiarum, that is in conjunction with other disciplines". Perhaps, as a consequence of this "disbelief", he remained "in the forefront of those who have sought to make sociological studies relevant to law" until his death in 1979 (Fridman, 1979: 413).

3.3.3 Power-elite perspective and the conflict argument

In contradistinction to the pluralist argument of numerous foci of power or decision-making, power elite perspective advances the view of concentration of power in single locations. When Vilfred Pareto introduced the concept of "elite" at the turn of this century, it was in terms of "those who score highest on scales measuring any social values or commodity ('utility'), such as power, riches, knowledge" (Pareto, 1901, 1968: 8). These individuals could be found in as diverse callings as in government, business, religion, and academia - some as conservators, others as innovators - with little to unite them on a course of action.

Later in the century this concept was operationalised by Mills (1956) in a way that tilted understanding from diversity and "individualism" to concentration of power. One law who "were occupied mainly with sociological description of the actual state of law and the conflicts surging within its bosom ...".

18 While this effort is a significant "improvement" over the exegetical tradition in the study of law, it should be borne in mind that it remains, essentially, an effort at "broadening the study of law from within" [Twining's "Some Jobs for Jurisprudence" (1974), quoted in Stewart, 1981: 115]. Nonetheless, it seems more profound than what Stone called "the lawyer's extraversion" in his The Province and Function of Law (1946), quoted in Stewart, 1981: 115.
of the subjects upon which he focuses is the failure of the New Deal which, allegedly, was an attempt by the American Government "to check the power of private capitalism by creating competing centres of power" (Encels, 1961:5). Contrary to intention, Mills argues, "the corporate rich came to control and use for their own purposes the New Deal institutions whose creation they had so bitterly denounced" (Mills, op. cit: 272f).

The idea of concentration emerges clearly in the process through which the rich are said to assume dominance. In Encels' view, the corporate rich form a "power elite [by] the interlocking of a greatly enlarged state bureaucracy and the controllers of the big industrial corporations". This analysis of the process is similar to Mills' conceptualisation, although the implied scope of the membership is more restricted.

For Mills (1956: 278), the power elite is "a coalition of generals in the roles of corporation executives, of politicians masquerading as admirals, of corporation executives acting like politicians, ... of vice-admirals who are also the assistants to a cabinet officer, who is himself a member of the managerial elite". The strength of the military component of this group is further reflected by Mills' characterisation of American society as a system of military capitalism dominated by a "military metaphysics". As Encel (1961: 8) notes, it was "found in 1960 that the leading one hundred defence contractors employed no fewer than 726 former senior officers of the armed services".

A postulate that has become central to the power elite perspective is that there is "a dominant group in society achieving its political (and other) ends against the interests of other groups in society" (Tomasic, 1980: 28). With regard to law-making, the perspective holds that laws emerge from the demands of the interests of the powerful rather than the interests of the less powerful. This perspective is vividly illustrated by
the works of Richard Quinney, especially those written before his "conversion" to marxism

3.3.3(a) Quinney's contribution

To characterise pre-marxist Quinney as power-elitist in perspective, as suggested here, is to disagree with the established viewpoint; hence the need to justify my own view from the onset. Akers and Hawkins (1975:47) have argued that Quinney's formulation in *The Social Reality of Crime: A Sociology of Criminal Law* (1970) - one of the works which I will use to demonstrate his contribution to the power-elite perspective - "is essentially a 'pluralistic' model". How they arrived at this conclusion is not shown but this is sufficient to raise questions with my view.

My own characterisation benefits from Quinney's statements in the same work referred to by Akers and Hawkins. In that work, Quinney says: "Rather than accept the pluralistic conception of the political process, which assumes that all groups make themselves heard in policy decision-making, I am relying upon a conception that assumes an unequal distribution of power in formulating and administering public policy" (p.12). With specific reference to law, he similarly, but more unequivocally, states:

> My theoretical perspective on criminal law departs from the general tradition of the interest theory of sociological jurisprudence in a number of ways... law is a *result* of the operation of interests ... [It] is made by men, representing special interests, who have the power to translate their interests into public policy. Unlike the pluralistic conception of politics, law does not represent a compromise of the diverse interests in society, but supports some interests at the expense of others (p.35) (emphasis, mine).

Such an affirmation would seem to move him unequivocally out of the pluralist tradition - a point to which his pre-1974 works bear strong witness.

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In *Crime and Justice in Society* (1969), Quinney attempts "a reformulation of sociological jurisprudence" by proposing "a sociological theory of interests". This theory (1) recognises "the unequal distribution of power and the conflict" within the "interest structure of society"; and (2) relates the formulation and administration of law "in politically organised society" to this conflict (p. v).

Guided by, or perhaps in demonstration of, this theory, Quinney provides a selection of other scholars' research on various aspects of criminal law. The studies of the formulation of criminal law are of immediate relevance here. They include Haskins' "A Rule to Walk By"; Chambliss' "A Sociological Analysis of the Law of Vagrancy"; Sinclair's "The Law of Prohibition"; Sutherland's "The Diffusion of Sexual Psychopath Laws"; and Becker's "The Marihuana Tax Act" (see pp. 33 - 105).

In each of these studies, Quinney finds evidence to warrant such assertions as: "behind the formulation of all laws is an enterprising group that stands to benefit in some way from a particular law"; and "law is formulated and administered by the segments of society that are able to incorporate their interests into the creation and interpretation of public policy" - usually, the powerful interest groups (see pp. 5, 8 and 29, respectively). For instance, powerful interest groups - landowners and merchants - brought about the formulations and changes in the vagrancy statutes. For the law of prohibition (the Volstead Act), it was the "dry interest groups" - the "rural Protestant mind". Behind the sexual psychopath laws, stood "the occupational interests of psychiatrists". And so on. Quinney's view is that in each of these laws, the interests embodied are those of single power elites.

Using essentially the same materials, Quinney restates this power-elitist position in *The Social Reality of Crime* (1970). There he shows that "... criminal laws mark the victory of some groups over others. The notion of a compromise of conflicting interests is a myth perpetuated by a pluralistic model of politics" (p. 43). It is not clear how the analyses of some laws which he also introduces - especially, the "criminal laws in
colonies and territories", "Antitrust Laws", and "Pure Food and Drug Laws" - help to advance this position.

In relation to Antitrust Laws, for instance, the assertion that "in broad perspective, the interest to be protected in the law was the basic economic order of the nation" (p. 75) or that "antitrust legislation was formulated and administered by and for the interests of capitalist economics" (p. 77) appears too broad to distinguish his position from other conflict perspectives. Equally ambiguous is the claim that "the effort to control foods and drugs through criminal law is a demonstration of how the public interest may eventually be served in spite of the private interests of individual members of society" (p. 77).

How well Quinney accomplishes his objective of showing that "the interests represented in each [of the laws] are those of the social segments that have had the power to translate their values into social policy" (p. 50), is not my central concern here. What he presents as a single power-elite view could well be a pluralist perspective in which different groups are seen to prevail on different issues. It should, however, be beyond dispute, from the foregoing review, that his works locate the source of law in the interests of the powerful. These works exemplify the power-elite variant of the conflict argument within the social product model of law and society.

3.4 Implications of the model this study

There is agreement between the two versions of the social product model that law is contingent upon, or organically linked to, society. Both posit that this link is objective and determinative of the nature of law. While the consensus argument focuses on the values of the "collective conscience" of the society as the base from which law emanates, the conflict argument emphasizes that what gives rise to law is the victory of
the "interests" of the dominant class\textsuperscript{20} in the society. In both arguments, the rootedeness of law in its society is underscored.

This convergence should not come as a surprise. In a classificatory analysis of sociological perspectives, Rich (1978) has put both the consensus (structural-functionalism) and conflict arguments in one category, namely, the "social facts paradigm". There the two are shown to be concerned, mainly, with social structures and institutions, i.e. objective frameworks of social existence. Also, in another context, they have been presented as "two varieties of structuralism", since both are taken to present institutional orders as products of the organisation and structure of society (see Cuff and Payne, 1979: 22).

The light which the two arguments throw on explaining differences and similarities among laws of two or more countries is particularly crucial. The implication of the consensus argument is that differences and similarities between laws of more than one country are to be explained by the extent to which the social consensus in one country differs from, or approximates to, the other. It was observed in Durkheim's contribution, for instance, that the differences in law are explicable by the different needs of societies around which different solidarities develop. With regard to the repressive law, he says: "It has been claimed that penal rules have expressed for each type of society the basic conditions for collective life. Their authority thus sprang from necessity. Moreover, since such needs vary according to societies, one could in this way explain the variations in repressive law" (quoted in Lukes and Scull, 1983: 40). It can be deduced from this statement that where such needs are similar they could give rise to similar laws.

Correspondingly, the conflict argument postulates the interplay of the "dominant interests" in the countries in question as the explanatory factor for differences and

\textsuperscript{20} This concept is used here, loosely, to accommodate: (a) the interests of the ruling class, put forward by the marxist variant, (b) the compromise of interest groups, by the pluralist variant, and (c) the interest of the powerful, by the power-elite variant.
similarities among their laws. A crucial point is that the character of the laws which this interplay produces is to be understood from the nature of the mode of production and the political tradition of the countries being examined. The substance of this implication is that unless there is a parallel development in the economy and polity of the countries, the laws would be different, bearing, particularly, the marks of the different political contexts in which they operate.

Even differences among the forms of democracy have been held to sustain such differences in laws. Arguably, it is within the frame of this orientation that Kahn-Freund opposed the British *Industrial Relations Act 1971*, his ground being that this was a reckless use of North American labour law concepts without regard to the vastly different political and constitutional contexts in Britain. This, to him, was "an 'abuse' rather than a legitimate 'use' of comparative method" (Lewis, 1983: 113).

Regarding similarities, the level of development of a mode of production has been presented as a crucial factor. For instance, arguing in a manner that can be taken to mean that advanced capitalism produces similar institutions (including law) in more than one country, Miliband (1969: 9) says:

> When all ... national differences and specificities have been duly taken into account, there remains the fact that advanced capitalism has imposed many fundamental uniformities upon the countries which have come under its sway, and greatly served to attenuate, though not to flatten out, the differences between them. As a result, there has come about a remarkable degree of similarity, not only in economic but in social and even in political terms, between those countries.

If it is recalled that in marxist theory law, politics and ideology belong to the same domain of superstructure, then it will be conceivable that this statement contemplates an account of similarity of laws in terms of the level of capitalism. Put differently, advanced capitalism in two or more countries will be an explanatory factor for their similar laws. This view, of course, challenges Weber's argument that "the essential similarity of the capitalistic development on the Continent and in England has not been
able to eliminate the sharp contrasts between the two types of legal systems” (Weber, 1922, 1968: 318).

Another significant issue that emerges from the construction of the model is the question of the link between the social product nature of law and legal transplant. It is observed from most of the contributions that, in the social product position, there does not seem to be any argument against the transplantability of law as a result of its social "nativity". Perhaps, the contributions have considered legal transplant an obvious impossibility, meriting no specific attention or it is an oversight on their part. Clearly Chambliss (1969), for instance, to which reference has been made earlier, shows no surprise at the discovery that the vagrancy laws of England, adopted by the U.S, were first created under conditions different from those of the adopting country.

The exception to this view seems to be Kahn-Freund who has argued against legal transplant, even when confronted with potentially transplant cases. For instance, in explaining the similarities in the law on "fraud in equity" in England and Germany, Kahn-Freund maintains that this did not come about by transplantation but as "a response to almost exactly the same social needs". Even though "some of the provisions of the German law of July 1884 read like summaries of the facts in the English cases", he argues, "we can be certain that those who were responsible for drafting the German statute knew nothing of the Sombrero decision"\(^{21}\) (Kahn-Freund, 1966).

However it would appear that Kahn-Freund's aversion to transplantation is focused mainly on the copying of the collective labour law, as can be seen in his reaction to the 1971 British labour law\(^{22}\). Ivanov (1987) affirms such misgivings when, in his broader discussion on "Transplantation of Labour Norms as a Research Problem", he says: "as a

\(^{21}\) There is no full citation for this case in the work. This has made it difficult to follow it up for more details.

\(^{22}\) It is the collective labour law which, for him, is so linked to society that it can hardly be transplanted (see Kahn-Freund, 1974).
rule, if the conditions differ, difficulties and obstacles, sometimes insurmountable, arise for transplantation". And there is further support from Pustogarov (1985) in whose view it might be impossible to transplant the Soviet Law On Labour Collectives\(^2\) into any capitalist country. For, as he argues, this law "implements in a legal form, the political policy of involving large numbers of working people in the management of the State, the economy and social processes" - a phenomenon peculiar to a socialist society.

Otherwise, Kahn-Freund acknowledges that between countries which have reached similar stages of economic development "transplantation is comparatively easy" (Kahn-Freund, 1974). He even believes that individual labour law, for instance, could be transplanted between countries which, although having a different political complexion, are at a similar stage of economic development. This is evident in the adoption of the French model of labour courts by the 1968 Report\(^2\) of the Donovan Commission, a Commission in which the ideas of Kahn-Freund were most influential or, indeed, the 'guiding hand' (see Simpson, 1986: 796-7).

3.5 A social-product explanatory framework for differences and similarities in national laws

The foregoing review of the consensus and conflict arguments, together with their implications for this study, suggest a social product explanatory framework for differences and similarities between national laws. This framework can be formulated in the following propositional terms: the laws of two countries, being rooted in or products of the social conditions of their respective societies, would differ among themselves if the conditions which give rise to them are not parallel. Where they are parallel, the laws would be similar. The review and the implications also suggest the nature of these social conditions:

(a) the nature of the social solidarity;
(b) the nature of the mode of production;
(c) the structure and process of industrial relations;

\(^2\) This law was adopted by the Soviet Union in 1983.
\(^2\) This was the report by the British Royal Commission on Trade Unions and Employers' Associations 1965 - 1968, chaired by Lord Donovan.
(d) the interpenetration of polity and economy; and

(e) the social control tradition.

Not all of these factors may be needed to explain the differences and similarities in the labour laws of Australia and Nigeria. For the purpose of this study, attention will be focused on those factors which demonstrate clearly the nature of the power relations in the two countries. The direct relevance of power relations to the branch of law being examined in this study has already been emphasised by Kahn-Freund. This emphasis is reiterated by Hepple (1986: 5) who argues that "the crucial element in the making of labour law is power", and that "it is in power relationships which are rooted in social structure that we may find a key to understanding both the common tendencies and the divergencies in the labour law of societies which have shared the experience of capitalist industrialisation". Needless to add, the power relations can be either consensually or conflictually determined.

The foregoing discussion, then, suggests that any attempt to explain the differences and similarities between the compulsory arbitration laws of Australia and Nigeria must relate the emergence of these laws (at their respective times) to the social circumstances and in particular the power relations in each country. Such attempt will be made in chapter six.

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25 As at 1987, Bob Hepple was a Professor of English Law in the University of London and Chief Editor of the Labour Law Volume of the International Encyclopaedia of Comparative Law.
CHAPTER FOUR: THE PHILOSOPHY AND STRUCTURE OF COMPULSORY ARBITRATION IN THE AUSTRALIAN AND NIGERIAN LABOUR LAWS

4.1 Introduction

This chapter compares the philosophy and structure of compulsory arbitration in Australian and Nigerian labour law. These aspects of compulsory arbitration system are the first two of the four aspects which have been isolated for analysis in this study. The aim of the analysis in this chapter is to identify the differences and similarities in the laws relating to arbitration in the two countries. The focus is mainly on the legislative (conceptual) framework. Thus, unless needed to clarify the legislative provisions, the practice of industrial relations is not discussed in detail.

The comparison, in this chapter and the next, attempts to present and interpret two manifestly complex legislative systems, as they were up to the early 1990. Since the origins of, and the major changes in, both systems are not contemporaneous, most of their characteristics will be seen to correspond as general concepts more than specific details. For instance, the Australian law contained certain provisions (e.g on prohibition) which were explicit at inception in 1904 but have become largely implicit in the 1960s and 1970s when the Nigerian law which stated similar provisions explicitly was instituted. The comparison should, therefore, be read, having regard to this fact.

As indicated in chapter one the philosophy will be examined in terms of the central purpose (i.e the motivation) and the means through which this purpose is to be realised. The structure of the system involves the institutional framework within which the purpose and the means interact to enhance industrial harmony, i.e the tribunal system and the parties between whom the system adjudicates. It will be seen that, with respect to philosophy and structure, there are more fundamental similarities than differences between the Australian and Nigerian arbitration systems.
4.2 Philosophy of compulsory arbitration

After examining the main purpose and the means of the arbitration scheme, I shall also highlight under this heading the typology of disputes which the purpose and means have been devised to settle, the scope of the means, and the constitutional limitations on the operations of the purpose and the means. These other subsidiary issues are highlighted to clarify further the philosophy. The examination of all the issues shows that, with the exception of the differences in the impact of the constitutional limitations, the Australian and the Nigerian laws are conceptually similar.

4.2.1 Central purpose: the prohibition of direct industrial action

There are different views about what is the main purpose, object or intent of the compulsory arbitration laws in Australia and Nigeria. This does not come as a surprise for, with law as a meaning system, "all too often ... there is no clear intent evident from the publicly stated official legal position and, even where there is, this may be at variance with the private purposes of rule-makers" (Tomasic, 1985: 108). With regard to the Australian law, for instance, one view maintains that the purpose has been to compel the recognition of trade unions by employers (Macintyre and Mitchell, 1989: 18). Another maintains it is to institutionalise state intervention in industrial relations (see Sykes and Glasbeek, 1972: 368; Macintyre, 1983: 103). My interpretation, derived from some relevant literature (e.g Commonwealth Parliamentary Debates, 1903-4; Martin, 1958: 139; Sir Richard Kirby, 1965: 2-3; ILO, 1980: 160; Hancock Committee, 1985: 55-62; Adeogun, 1976: 8-9; Yesufu, 1984: 74-77) and the statutes, is that the central purpose of both the Australian and Nigerian laws relates to the prohibition of direct industrial actions, in contrast with the industrial relations laws in Britain and the United States, for instance; and that this purpose has been expressed in such generic terms as the prevention and/or settlement of industrial disputes. "Prohibition" might present the issue as a matter of criminal law, but it is used in this thesis in its ordinary meaning of forbiding or not allowing something by means of a law, rule or official agreement backed by sanctions which may be compensatory or punitive. What follows in this sub-section is a detailed presentation of this interpretation.
Section (hereinafter, s. or ss. for plural) 2 of Australia's original *Commonwealth Conciliation and Arbitration Act 1904* expressed seven "chief objects". These included preventing industrial action, constituting a conciliation and arbitration court with jurisdiction to prevent and settle industrial disputes, enabling the court and State authorities to aid each other, facilitating and encouraging the organization of representative bodies of employers and employees, and providing for the making of industrial agreements. However a meticulous examination of the legislation in question and other relevant documents shows that the main object, purpose or motivation of the compulsory arbitration system is to prohibit industrial action.

As Deakin told the House of Representatives on July 30, 1903 the task of setting up the proposed arbitration system was "of a most momentous character [precisely] because of its main object, the prohibition of strikes and locks-out". Deakin referred specifically to clause 9 of the Bill which provided that "No person shall on account of any industrial dispute for the prevention or settlement of which the court has jurisdiction, do anything in the nature of a lock-out or strike ..."\(^1\) and asserted: "in this clause lies the keynote of the Bill. It has as its first direct object the prohibition of strikes and locks-out" (see Commonwealth Parliamentary Debates, hereinafter CPD, 1903 vol. XV: 2871).

No doubt, the Act was amended so much that it appears, in the words of Rawson (1986: 275), "like a ruined giant, horrible in its form". And in the process of these amendments the wording of the "chief objects" of the Act had been changed (in 1930, 1947, 1956 and 1973). However, the central focus, i.e the prohibition of strikes and lock-outs, had been maintained. In my view, s.3 of No. 86 of 1988 (the Act renaming\(^2\) the law as *Industrial Relations Act 1988*) which enumerates the objects of the current law and the various sections "penalising" industrial action (e.g. ss.124, 125, 178, 311 and 312) signify that the motivation of the law remains essentially the same.

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1 This clause became s.6(1) of the original 1904 Act.
2 There is no admission that the 1988 law is merely a renaming of the 1904 law. But it has been argued that it was little more than "a major restructuring of ... the [1904 Act]" (see Mitchell, 1988: 501).
In Nigeria the relevant expression of this object began in 1968 with the enactment of a law entitled *Trade Disputes (Emergency Provisions) Decree 1968*. Unlike the Australian law, this law did not contain any section enumerating its objects. However the preamble clearly suggests what its central motivation was. It states: "Whereas it is expedient during the present state of emergency in Nigeria to make transitional provisions for the settlement of trade disputes arising within the period of such emergency: THE FEDERAL MILITARY GOVERNMENT therefore hereby decrees as follows:-". The text of this Decree shows that the nature of the dispute-settlement foreshadowed by this preamble involved some restriction upon direct action, unprecedented in the history of the Nigerian labour laws.

The thin veil of "provisions for the settlement of trade disputes" was soon removed by the amending Decree No. 53 entitled *Trade Disputes (Emergency Provisions) (Amendment) (No. 2) Decree 1969*. The first section of that Decree provided outright for the banning of strikes and lock-outs. The veil was later to be restored in the *Trade Disputes Act 1976* - a consolidating or cumulative law, incorporating the 1968 and 1969 Decrees. Its explanatory note employs the disguising phraseology: "the Act makes fresh provisions with respect to the settlement of trade disputes ...". However, as will be shown below, no emphasis is diverted from the prohibition of industrial action, thus keeping the motivation for the legislation which began in 1968 similar to the motivation for the Australian law.

In Australia, Part II of the original Act, entitled "Prohibition of Lockouts and Strikes in relation to industrial disputes", expressly banned direct industrial action. The provisions of this part were made more elaborate by legislation passed in 1918 under a non-labor government led by William Morris Hughes, and in 1926 and 1928 under another non-labor government led by Stanley Melbourne Bruce. While this elaboration may appear to be a "conservative way" of getting at labour, what the terms of these early arbitration statutes betray is "a general feeling that the existence of a right to
strike was inconsistent with the whole basis of a compulsory arbitration system” (Sykes, 1980: 329).

The prohibitions were repealed in the 1930 amendment by a Labor government, led by James Henry Scullin. However a provision was introduced at the same time which penalised union officers for aiding and abetting industrial action (see s.138 of 1904 Act; Brooks, 1986:277), and the possibility continued to exist for inserting clauses in awards (i.e bans clauses) that parties to such awards shall not take part in industrial action, the contravention being treated as a breach of award (Portus, 1971: 89). This anti-industrial action provision in awards was held to be valid by the High Court in *Seamen’s Union v. Commonwealth Steamship Owners’ Association* (1936) 54 CLR 626. The decision was later endorsed in *R. v. Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union, Australian Section* (1950-51) 82 CLR 208 and *R. v. Spicer & Ors; Ex parte Seamen’s Union of Australia* (1957) 96 CLR 341. The insertion of a bans clause by an arbitrator or the commencement of the enforcement proceedings by an employer against a breach may be a matter of discretion. But the provision for the bans clause in the law implies at least discouragement of industrial action.

In 1977 the *Conciliation and Arbitration Act* 1904 was amended to insert a definition of "industrial action" in s.4 which, for all intents and purposes, cast a very wide net upon "objectionable" industrial behaviours of workers. And in 1979 s.25A was added to the Act restraining the Commission from making an award "in respect of a claim for the making of a payment to employees in respect of a period during which those employees were engaged in industrial action".

Also in 1977, s.45D was inserted into Commonwealth legislation - *Trade Practices Act 1974* - to prohibit secondary boycotts by unions. Founded upon the Report of the Trade Practices Review Committee (the Swanson Committee) which, among other things, examined the "development of a free and fair market", the section "extends anti-trust laws to trade unions, it prohibits secondary boycotts in certain circumstances and it
provides for a liability in a union for any loss or damage caused by individual members or officers acting in concert" (Brooks, 1986: 272). The insertion of s.45E in the same legislation in May 1980 further strengthened this type of prohibition\(^3\). There was a concomitant amendment to the *Conciliation and Arbitration Act 1904*, inserting Division 5A to grant the Arbitration Commission jurisdiction over disputes relating to boycotts; but this was not to affect the operation of the *Trade Practices Act* (s.88DG of the 1904 Act; see also s.162 of the *Industrial Relations Act 1988*).

There has been other prohibitive legislation in respect of industrial action in Australia, some of which is still operational. Outside the industrial relations legislation, there is the *Crimes Act 1914* (Cth) which allows for the imposition of penalties for threats, intimidation and boycotts in relation to interstate and overseas trade and commerce (see ss.30j, 30k). There is also the Commonwealth *Social Security Act 1947*, s. 107 of which disqualifies for unemployment benefits persons whose unemployment results from engaging directly (or indirectly through membership of union) in industrial action. S.66 of the *Public Service Act 1922* prohibits public servants from engaging in industrial action. More specifically it deems strike to be an illegal action and renders public servants who engage in strikes liable to summary dismissal. In the period of 1939-45 "strikes were or could be made illegal under various National Security Regulations ... [providing] power to make employees liable for service in the armed forces" (Portus, 1971: 90). The *National Emergency Coal Strike Act 1949* was designed to deal with the strikers in the coalfields: union funds were frozen; unions were fined heavily; union officials were gaoled.

Two other Acts regulating, in a prohibitive manner, industrial action were the *Commonwealth Employees (Employment Provisions) Act 1977* and the *Public Service and Statutory Authorities Act 1980*. Both were introduced by the Liberal-National coalition Fraser Government: the former provided sweeping stand-down powers to deal with the tactics whereby the Commonwealth public servants relied on "partial work

\(^3\) See Healey (1988) ch. 6 for a clear analysis of ss.45D and 45E.
"bans" to achieve the effect of industrial action without attracting the stigma of "going on strike"; the latter was brought in to empower the Commonwealth and statutory Authorities to effect the "no work as directed, no pay principle", reversing the effect of the decision in *Bennett v Commonwealth* (1980) 30 ALR 423 which appeared to deny this power.

This analysis reveals that industrial action is essentially prohibited in the Australian law. The absence of any express prohibition of industrial action in the post-1930 amendments "does not mean that the concept of some kind of general ban on industrial action has been entirely discarded" (Creighton, 1984: 123). Or, as argued by Brooks (1986: 283; 1988: 161), "while it is possible to say that there is no direct definition of, and prohibition on, strikes, go-slow, overtime bans and the like in the Commonwealth legislation, the reality is that strikes, lock-outs, working-to-rule and other forms of industrial action are prohibited by legislation". In this regard assertions like "in Australia strikes are not illegal under the Commonwealth Act" (Galin, 1980:20) appear rather unconvincing.

As the review of the 1904 Act and other Commonwealth legislation in the preceding paragraphs has shown, the prohibition of industrial action seems to be popular with the legislature. Indeed, prohibiting industrial action appears consistent with the notion which was dominant at the inception of the arbitration system, namely, the need to substitute a new regime for the reign of violence. While moving for the second reading of the *Conciliation and Arbitration Bill* in the Senate on 19 October, 1904 Senator Sir Josiah Symon, in a fashion similar to Deakin's submission in the House of Representatives in 1903, argued that the measure was a "humane legislative effort to substitute in industrial disputes the arbitrament of conciliation, the peaceful arbitrament of an appropriate judicial tribunal, for the violent and barbarous methods of strike and lock-out" (CPD, 1904 vol XXII: 5710).
This notion was espoused by Higgins who was the second President of the Commonwealth Conciliation and Arbitration Court and whose name is more or less synonymous with the early development of the Australian arbitration system. On one occasion, he said:

the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public (Higgins, 1922: 2).

Elsewhere he said

There should be no more necessity for strikes and stoppages in order to obtain just working conditions than there was need for the Chinaman of Charles Lamb to burn the house down whenever he wanted to roast pork. The arbitration system is devised to provide a substitute for strikes and stoppages, to secure the reign of justice as against violence, of right as against might - to subdue Prussianism in industrial matters (Higgins, ibid: 60).

Perhaps it was the entrenchment of this notion which lay behind the inability of the Hawke Labor Government to get rid of, or reduce, the sections penalising industrial action in the Industrial Relations Act 1988 - an Act intended to represent the first thorough overhaul of industrial relations legislation since the enactment of the Conciliation and Arbitration Act 1904 (see Mitchell, 1988 for a discussion of the promise of "emboldened plan for labour reform").

What is the situation in the Nigerian law? As with the Australian law, the Nigerian compulsory arbitration law began - via the 1968 Decree - with an express ban on lock-outs and strikes. In the side note on s.16 of this Decree, the ban is referred to as "restrictions". This gives the impression that this ban is not total. This impression is reinforced by the following wording:

during the continuance of this Decree and without prejudice to the provisions of any enactment ..., an employer shall not take part in a lock-out and a worker shall not take part in a strike after the date of notification of a declaration of a trade dispute to the Commissioner in accordance with section 4 of this Decree, or as the case may be, after the time when the Commissioner has notified the parties or their representatives of his apprehension of a trade dispute under section 5 (2) of this Decree [(s.16(2)].
A close reading of the Decree, however, will show that the so-called lee-way (i.e. pre-notification of a declaration of dispute) for industrial action is virtually non-existent. As Adeogun (1970: 118-119) has shown, the effect of s.4 of the Decree is that "whereas [workers who went on strike before the declaration of a trade dispute] might not have committed an offence under s.16(2) ... they would, nevertheless, have committed an offence under s.4". The latter section places obligation on the parties to report a declaration of a trade dispute "within a period of seven days of the failure to resolve any dispute". A violation of either s.4 or s.16 is an offence, punishable with a fine and/or imprisonment [see s.19(1)].

In any case, s.1 of the 1969 Decree, i.e. the Decree which amended the 1968 Decree, has put paid to the impression of an incomplete ban. The side note on this section calls a spade a spade: there is a ban on strikes and lock-outs. S.2 of the Decree places a duty upon employers and trade unions to report strikes and lock-outs, respectively, within 24 hours to the Inspector-General of Police; failure to comply attracts two years imprisonment and no alternative of a fine.

In 1976, another group of military officers took over government. The law which they enacted, i.e. the 1976 Decree, allegedly lifted the total ban on strikes and lock-outs which had been imposed by s.1 of the 1969 Decree. The side note on s.13 of the 1976 Decree indicates that industrial action is prohibited only "before [the] issue of award of National Industrial Court", suggesting that strikes and lock-outs are allowed after the issue of award. But this reading cannot be sustained in the light of paragraph (f) of s.13(1) which states:

13-(1) An employer shall not declare or take part in a lock-out and a worker shall not take part in a strike in connection with any trade dispute where -

(f) the National Industrial Court has issued an award on the reference.

The other paragraphs of s.13(1) impose further restrictions: there can be no lock-out and strike if (i) negotiation provisions have not been complied with; (ii) a conciliator
has been appointed; (iii) the dispute has been referred to Industrial Arbitration Panel; (iv) a Tribunal award has become binding; or (v) the dispute has been referred to National Industrial Court. In a roundabout way a total ban is imposed on industrial action. Any one of these paragraphs, (e.g v), in combination with the issue of award by the NIC, can produce the effect that parties are not entitled, lawfully, to take industrial action at any time (Adeogun, 1976: 8-9; 1980: 13).

The Nigerian Employers' Consultative Association (NECA) which was inaugurated on January 16, 1957 to assist, among other things, in the maintenance and promotion of good relations between members and their employees, did provide a synopsis of this section (along with other sections of the Decree) without placing any interpretation on it (see NECA News, February 1976: 3). On the other hand the Nigerian Labour Congress (NLC), which was inaugurated on February 16, 1978 to serve as the central labour organization of all trade unions in Nigeria interpreted the provisions, showing that the purpose of s.13 of the 1976 Decree is to put a ban on strikes, i.e. "another attempt at labour control" (NLC Memo, 1982: 3).

The analysis of the 1976 Decree, along with the *Trade Disputes (Essential Services) Decree 1976*, by Yesufu (1984: 74-77) supplies further evidence of the prohibition of direct industrial action in the Nigerian law. On the 1976 Decree, Yesufu submits: "this in effect means that once a dispute has started to follow the normal course, strikes are legally forbidden in Nigeria. It constitutes a fundamental departure from the former principle of freedom to strike under the British traditional system of free collective bargaining". And, on the Essential Services Decree, he concludes that the essence of the Decree is accordingly to ban strikes and lock-outs in the essential services of the nation as so defined ... The inclusion of banking services, security printing and minting as well as the public services of the Federation and of the States as essential services, does mean in effect that about sixty percent of wage-earners in Nigeria can no longer lawfully exercise the strike weapon.

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4 See Okogwu (1988) for a detailed presentation on the history and operations of this Association.
It is not clear whether this analysis by Yesufu is deprecatory or merely stating the law as it is. It is known for sure that Yesufu is among those who had, before the introduction of the compulsory arbitration system, articulated the notion of banning industrial action as a necessary element of maintaining industrial peace. For instance, in February 1968, Professor Yesufu addressed the sixth National Management Conference in the following terms:

Frankly, I think that strikes and lockouts should be banned at least during the current national crisis [the civil war] and the period of reconstruction that will follow. The right to strike cannot be seen as a fundamental human right except by those who regard conflict with its associated sense of victory or defeat as an end in itself. Such a ban must, of course be accompanied by an effective and just machinery for the location and settlement of grievances and industrial discontent ... (Yesufu, 1968).

This address reflects the view expressed by the Morgan Commission in 1964, in which Commission Yesufu served as a member. The Commission was of the view that resort to strikes and lock-outs should be controlled, for "in a developing economy such as ours, strikes are an unnecessary luxury and, like an ill-wind, blow nobody any good" (Morgan Commission, 1964: 44).

The point here is that, as in Australia, the notion of forbidding industrial action as an effective way of achieving industrial peace pre-dated the enactment of the collective labour law in Nigeria.

One observation needs be made. Although the position taken here is that the Australian and Nigerian laws express a similar purpose, it should be noted that the representation of this purpose appears to indicate some difference. In the Australian law, the legislation refers to "prevention and settlement"; in the Nigerian, it speaks of "settlement". It is difficult to ascertain, from the face of each of the laws, whether prevention and settlement are conceptualised as one and the same thing or as different aspects of the object.

It has once been urged on the Australian High Court that "the word 'prevention' connotes an event which has not yet happened, while the word 'arbitration' connotes
the presence of parties to an existing dispute" [Whybrow case (1910) 11 CLR 311]. This stems from the argument that the means (of conciliation and arbitration) should be read distributively either "as meaning conciliation for the prevention and arbitration for the settlement, or as conciliation for the prevention and settlement and arbitration for the settlement, of interstate industrial disputes" (Ford, 1984: 69). The position adopted by the Court was not to decide as urged. This accords with Deakin's response to Watson's question in the debate on the Conciliation and Arbitration Bill on 30 July 1903. "Why leave out the word 'prevention' in your subsequent presentation of the Bill?", Watson queried. "Because we speak of industrial disputes, that includes prevention. There has to be an industrial dispute, and we can therefore omit the former word without affecting the meaning of the sub-section ...", Deakin replied (CPD, vol. p. 2859).

While in practice differences may be observed regarding the operationalisation of the terms "prevention and settlement" and "settlement", conceptually they are understood in this study to indicate a similar aspect of the philosophy of the Australian and Nigerian labour laws. They both relate to the prohibition of direct industrial action.

4.2.2 Means: full compulsory conciliation and arbitration

The means adopted to effect the prohibition of direct industrial action (or the "prevention and settlement of industrial disputes") in both countries is full compulsory conciliation and arbitration, applicable to all disputes - whether about interests or rights (see 4.2.3 infra) - in essential and non-essential services.

In the first Australasian Constitution Convention Debates in 1891, Charles Cameron Kingston - one of the main proponents of the industrial relations power for the Commonwealth - expressed his conviction about this means. He said:

It is impossible, having regard to the disastrous effects which are occasioned to society generally, to leave the contesting parties to fight the matter out to the bitter end, and the only means which occur to me by which some good can be done is the appointment of a tribunal qualified to investigate the matters in dispute, to reconcile the parties if possible, or, if such a course be impossible, to pronounce an award which will fix what, according to the decision of the court, is right and
proper to be done, and will carry with its pronouncement the means of its enforcement. Conciliation and arbitration therefore seem to me the only means of doing anything towards settlement of the difficulties... (quoted in Niland, 1978: 24) (emphasis, mine).

In the context of those debates, this conviction supported government intervention which, as Niland (1978: 24) has observed, "could only produce a court system of compulsory conciliation and arbitration". Evidently, it did produce such a system.

In Nigeria, similar reasoning seems to have informed the establishment of the compulsory arbitration system: direct government intervention as a means for resolving industrial dispute. When the Federal Commissioner for Labour and Information gave a press statement on the 1968 Decree, it was clear that the government had concluded that what was required was a speedy and effective means for the settlement of trade disputes as well as powers of effective intervention by the Ministry of Labour. And, as Oshiomhole (1979: 43) has noted, "by 'effective intervention' the Commissioner [meant] a compulsory conciliation and arbitration system".

Professor Adeogun has reached a similar conclusion about the means of the compulsory system in Nigeria. While analysing the 1968 Decree, specifically with reference to the provision for the binding nature of awards, he said: "By these provisions, compulsory arbitration has been introduced into our system of industrial relations... This new feature is very welcome and should be retained permanently". Although there was room for improvement in the Decree, he was sure that "a good beginning has been made by the promulgation of the Trade Disputes (Emergency Provisions) Decree 1968". Uvieghara (1985: 158) compares this 1968 Decree - as reinforced by the Trade Disputes (Emergency Provisions) (Amendment) (No. 2) Decree 1969 - with the Trade Disputes (Arbitration and Inquiry) Act 1941, and regards the former as "radical legislation" because it "introduced compulsory powers for the settlement of industrial disputes".
It is clear from the foregoing analysis that the central purpose or motivation and means for the resolution of industrial conflict which were introduced in Nigeria from 1968 are broadly similar to those which were introduced in the Commonwealth of Australia from 1904. Basically the introduction of the arbitration system in the two countries was directed at prohibiting industrial action, itself a state intervention in the industrial relations but of a peculiar type. There has been state intervention in countries like the United States America and Britain which has not incorporated the prohibition of industrial action and full compulsory arbitration as my analysis has demonstrated in the case of Australia and Nigeria.

4.2.3 Typology of disputes

Unlike the industrial relations laws of Canada, the Federal Republic of Germany, the United States and the Scandinavian countries, the Australian and Nigerian laws do not distinguish between "interests" and "rights" industrial disputes. "Interests" disputes involve a question of what should be the terms of a new legal rule or collective agreement or award, forming the basis of employment relationships. Another name for them is "economic" disputes. "Rights" disputes, on the other hand, involve the question of how an existing "rule" should be applied or interpreted. They are also called "grievance" disputes. There is nothing in the definitions of "industrial dispute" in the Australian law and "trade dispute" in the Nigerian law to suggest that such a distinction is contemplated.

The absence of this distinction in the Australian law was underlined by the Hancock Committee (1985: 546): "we think that the role of conciliation may be further enhanced by a clearer distinction between the processes of settling disputes created by the service of a demand aimed at creating an award or varying an award, and disputes involving matters already covered by the award". The basis of this remark was spelt out in the observation that "the distinction between interests disputes and rights disputes have not generally been explicitly drawn in the Australian system" (p.564).
One implication of this lack of distinction relates to the jurisdiction of the system's tribunals. In Mitchell's (1986: 3-4) words, "there is no distinction between disputes of rights and disputes of interests in the Australian system. Therefore the jurisdiction of the [federal] tribunal can be invoked over matters of the interpretation or implementation of existing award rights, or over claims for additional rights".

In the case of Nigeria, little has been written to explicate the distinction. Adeogun's (1980: 10) remark that strikes "are not confined to grievances about improvement of terms and conditions of employment although such grievances form the bulk of the causes of trade disputes involving industrial actions" seems to contain a faint allusion to it. Other attempts, usually made within the context of drawing a typology of "individual" and "collective" disputes, have produced little more than confusion (see for example Ubeku, 1983: 157-161 and Damachi, 1986: 3-5). By using the typology of 'interest' claims, disputes involving 'rights', and "other cases" to group 29 NIC judgements in the years 1978-81 without conceptually clarifying what the terms stand for, Ubeku (1983: 179) has left his readers free to assume what they mean. In the context of his discussion, a clear understanding is difficult to come by. This lack of clear understanding notwithstanding, the absence of the distinction is suggested by such comments as: "if a distinction must be made [in Nigeria] ... it should be between rights disputes, i.e. claims arising from the contract of employment or a labour statute which should be for the ordinary courts and future rights or interests disputes which seem more appropriate for arbitration" (Uvieghara, 1985: 169).

The significance of the distinction between interests and rights disputes has been documented. Givry's (1978: 6-8) contribution is worthy of note. He shows that the distinction corresponds to a fundamental aspect of legal thought which relates to distinguishing between "justiciable" and "non-justiciable" disputes, as in international law. With regard to national experiences, the distinction is said to be basic to the industrial relations systems of the Federal Republic of Germany and of the Scandinavian countries. Also it inspires the whole collective bargaining system in the
U.S and Canada, leading to different methods of settlement for contract-interpretation disputes and disputes relating to the terms of new contracts. For example, the U.S. Railway Labour Act 1934 established a National Mediation Board to deal with interests disputes and a National Railroad Adjustment Board to deal with rights disputes. On the African continent, Chad, Ivory Coast and Senegal have laws which provide that interests disputes should be settled by awards "in equity" and rights disputes, by awards "in law".

Previously, the International Labour Organisation (ILO) had made no distinction between interest and rights disputes in its Voluntary Conciliation and Arbitration Recommendation No. 120 1951. It later rectified this omission by proposing through its Grievances Recommendation No 130 1967 that grievance procedures deal with rights disputes, and that other machinery be established to deal with disputes aimed at the modification of terms and conditions of employment.

In the countries where no hard and fast distinction is drawn between interests and rights disputes, e.g. Britain (at least before the Industrial Relations Act 1971) and countries with British-inspired industrial relations systems, the justification put forward is that the distinction is considered unrealistic or unnecessary since their collective agreements do not give rise to legal relations/rights. In the words of Kahn-Freund (1954: 206), "conflicts of rights and conflicts of interests do not have to be kept in watertight compartments where the 'rights' are enforced mainly by social and not by legal sanctions, i.e. where the interpretation as well as the application and enforcement of collective standards remains in the sphere of intergroup autonomy". But, this does not explain the experiences of Australia and Nigeria where collective agreements and/or rights (in awards) are enforced by legal sanctions and, yet, no distinction is made. This is much more so in the case of Australia where, in the early stages of the development of its system, there were questions about whether or not arbitration was restricted to resolving disputes about existing rights only (see Ford, 1984: 68-70).
It may be added that countries which place less emphasis on enforcement by legal sanctions have adopted this distinction in their respective industrial relations systems. For instance, in addition to Austria, Denmark, the former Weimar Republic of Germany, Norway and Sweden which were the first to adopt the interests-rights distinction, there are now Canada and the U.S., Finland, Iceland and the Latin American countries\(^5\). More recently, New Zealand (in the *Industrial Relations Act 1973*) and Pakistan have also followed suit (see ILO, 1980: 6-9).

4.2.4 Scope of the means: general application

Compulsory arbitration systems can either be of general or of specific application in scope. In the former type, any dispute can be referred to arbitration irrespective of whether or not it relates to an essential service or seriously affects the public interest or whether it is a major dispute or one of relatively minor importance. In the latter type, compulsory arbitration is applied only to disputes in industries or services "where there is a broad consensus that their continued operation is essential to the health and safety of the community" (Givry, 1978: 45).

In the Australian law, the means apply to "industrial disputes" in general, subject to the constitutional limitations as will be shown in the next sub-section. S.18 of the original *Conciliation and Arbitration Act 1904* stipulated that the "Court shall have jurisdiction to prevent and settle, pursuant to this Act, all industrial disputes". In s.4 of the Act, the definition of "industrial disputes" is general, i.e there is no limitation as to specific industries. Among other things, the application cuts across the public-private sectoral divide.

The enactment of the *Public Service Arbitration Act 1920* to deal with disputes in the public service may suggest that the 1904 Act was restricted to the private sector. On the face of the law, there are grounds for this impression. First, the Act was enacted, principally, to provide an independent avenue of appeal by Commonwealth employees

\(^5\) These include Argentina, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Panama, Peru and Venezuela.
against decisions made by the Public Service Board on their general terms and conditions of employment. And, second, the tribunal which was set up under the Act was empowered to decide on the claims lodged by any registered staff organisation, the Public Service Board or the Minister of a department and to hand down "consent determinations".

However under ss. 15A and 15C of the Act, inserted into the Act in 1952, requests for reference and appeals to the Conciliation and Arbitration Commission on the decisions of the Public Service Arbiter were available to the parties. These provisions had the effect of integrating "the Public Service industrial relations system, through the Conciliation and Arbitration Commission, within the Australia-wide industrial relations system" (McCallum, 1984: 383). Direct integration occurred in 1983 when the tribunal was abolished and its powers were transferred to the Conciliation and Arbitration Commission. This was accomplished by the amendment which incorporated ss. 41A and 70A to 70K into the Conciliation and Arbitration Act 1904 (see Smith, 1987: 25). The integration has been retained in the Industrial Relations Act 1988; thus affirming the point that the application of the Australian compulsory arbitration law is not restricted in any sectoral way.

Another significant aspect of the history of the Australian law is that, initially, State instrumentalities were held by the High Court to be excluded from, or immune to, the jurisdiction of the federal tribunals. Two years after the enactment of the 1904 Act, a question arose whether the provisions of the Act applied to a State Department of Railways. In what came to be known as the States Railway Servants' Case\(^6\), the High Court - applying the doctrine of implied immunities\(^7\) which they had introduced in D'Emden v. Pedder (ironically in favour of the Commonwealth) - decided that the provisions did not apply to State instrumentalities. The doctrine favoured the notion

\(^6\) Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employes Association (1906) 4 CLR 488.

\(^7\) Zines says this doctrine of immunity of instrumentalities was a direct descendant of principles propounded in the United States in the 19th century.
that the Commonwealth and the States were each 'sovereign' within their respective fields and each was to be free to perform its functions "without interference, burden or hindrance from the other government" (Zines, 1987: 1).

For well over a decade this doctrine held sway (not without some limits, e.g. of "logical necessity") until it was overruled in the *Engineers' Case*[^8]. The question in that case was whether an award of the Commonwealth Court of Conciliation and Arbitration could be made arising out of an interstate dispute where certain of the respondents were State instrumentalities. The High Court decided in the affirmative and thus removed the limitations previously imposed on the scope of application of the Commonwealth conciliation and arbitration law. But then the High Court managed to construe "industrial dispute" to mean dispute "in an industry", so that significant sections of State governmental employment were excluded, notably school teachers, fire fighters and public servants (and by analogy, health and welfare workers). This view lasted from 1929 to 1983 when it was overturned in the *Social Welfare Union* case (1983) 57 ALJR 574.

The application of the means of compulsory conciliation and arbitration in the Nigerian law is also general. From the beginning of the system, the law applied to all workers, public and private, with the exception of the armed forces, the police, the prison and fire services (see s.21 of 1968). S.38 of the *Trade Disputes Decree 1976* added Customs Preventive Services to the list of exemptions. Despite these exceptions, the law applies to all disputes involving "workers employed by or under the Government of the Federation or a State as it applies to persons employed by a private person" (Adeogun, 1987: 182-183). "In effect therefore", Adeogun continues, "save as provided by Section 38(2), trade disputes involving public sector employees are covered by the Act"[^9].

[^8]: *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.
[^9]: Section 38(2) provides thus: "This Act shall not apply to-
(a) any member of the Nigerian Army, Navy or Air Force;
(b) any member of the Nigeria Police Force;
The enactment of the *Trade Disputes (Essential Services) Decree 1976* was not intended to exclude essential services disputes from the operation of the arbitration system. S.5 of the Decree which empowers the Commissioner/Minister to take action clearly indicates that these disputes are to be processed within one and the same system. It provides:

Where any trade dispute exists or is apprehended and it appears to the Minister that the dispute is one to which persons employed in any essential service are a party or might become a party, the Minister may ... refer the dispute for settlement to the Industrial Arbitration Panel established under section 7 of the principal Act\(^\text{10}\), and the provisions of that section (as well as any other relevant provision of the principal Act) shall apply in respect of the dispute to the same extent as they apply to any trade dispute referred to the Industrial Arbitration Panel under the principal Act.

In contrast to the situation of Australia and Nigeria, the means of compulsory arbitration in other countries does not apply automatically to all disputes. For example, the Guatemalan *Labour Code*, the Jamaican *Labour Relations and Industrial Disputes Act*, the Kenyan *Trade Disputes Act*, the Pakistan *Industrial Relations Act 1973*, the Sri Lankan *Industrial Disputes Act*, the Sudanese *Regulation of Trade Disputes Act* and the Thailand *Labour Relations Act* all provide for compulsory arbitration only in disputes either involving federations of trade unions as a party, or which are considered of national importance, i.e. in essential services (see Givry, 1978: 42-46).

In the United Kingdom, under the now repealed *Industrial Relations Act 1971*, the disputes had to be ones which "seriously threaten the national health, safety, economy or livelihood of a substantial proportion of the community" in order for them to attract government intervention in the form of limited compulsory arbitration. The means in the United States is limited to "public utility disputes". Likewise in Canada some employees are "governed by special labour relations legislation [compulsory arbitration

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(c) any officer of whatever rank appointed to carry out duties in relation to any prison within the meaning of the Prisons Act 1972;
(d) any member of the Customs Preventive Service;
(e) any member of any other service of the Federal or State Government authorised to bear arms."

\(^\text{10}\) This refers to the *Trade Disputes Act 1976*. 
schemes] because they are seen as operating in sectors in which it is deemed unwise to give them unrestricted collective bargaining rights" (Glasbeek, 1976: 55).

4.2.5 Constitutional limitation on the purpose and means

The scope of the central purpose and means adopted in Australian and Nigerian law is also influenced by the constitutions under which both countries are governed. As federations, both countries have a division of constitutional powers between federal and state governments. In Australia, section 51 (xxxv) of the schedule to the Commonwealth of Australia Constitution Act 1900\(^\text{11}\) allocates industrial power to the Commonwealth in the following words:

"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to -

( xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:"

Establishing the meaning of this placitum or head of power has been a major preoccupation of the Australian High Court. However it can be understood from the construction that: (1) read together with s.107 of the Constitution, this Commonwealth power is concurrent rather than exclusive vis-a-vis the powers of the States, although the inconsistency-of-laws provision in s.109 of the Constitution favours the Commonwealth's activity within the bounds of the placitum; and (2) the wording of this enumerated power precludes the Commonwealth Parliament from dealing with labour conditions in a general way, except as they relate to "any department of the public service the control of which is by [the] Constitution transferred to the Executive Government of the Commonwealth" or in the Australian Capital Territory or the Northern Territory [ss.52(ii) and 122; for more details, see Macken, 1974; Lane, 1987].

\(^{11}\) This is an imperial Act, enacted by the Parliament of the United Kingdom and given royal assent in July, 1900. It provides the constitution for Australia, the full title of which is "the Constitution of the Commonwealth".
It can be deduced from the numerous High Court judgements on this placitum that the outer limits marked by the Constitution are, simply put, as follows: there must be a dispute; it must relate to industrial matter(s); it must extend beyond the limits of one State; and the tribunal must function by conciliation, arbitration or both. In the course of its rulings, the High Court has added other limits, including limiting the award to the matters in dispute and the inability of the Commonwealth tribunal to make "common rule" (Sykes, 1957: 467).

The Nigerian (Constitution) Order in Council 1960\footnote{This is an imperial law, made under the authority of the Nigeria Independence Act 1960, itself, an imperial Act.} vested the power to make laws for the peace, order and good government of the country in the federal Parliament. "Labour, that is to say, conditions of labour, industrial relations, trade unions and welfare of labour" was placed on the concurrent list, thus empowering both the Federal and Regional Governments to make laws on industrial matters. As in Australia, there was an inconsistency-of-laws provision, making federal laws prevail where they are in conflict with regional laws.

The glaring difference between Australia and Nigeria in respect of this point is that, whereas the Australian Commonwealth is limited to conciliation and arbitration in interstate industrial disputes, its Nigerian counterpart is apparently not so limited as it has power to deal with labour conditions in general. In fact, by mutual agreement, only the Federal Government had legislated on labour matters before the Constitution was changed in 1979. By item 32 of Second Schedule, Part 1 of the Constitution of the Federal Republic of Nigeria 1979, the matter of "labour, including trade unions, industrial relations conditions, safety and welfare of labour, industrial disputes, prescribing a national minimum wage for the Federation or any part thereof and industrial arbitrations" has been placed on the exclusive list of federal powers (see Uvieghara, 1985: 19 and 24). So, unlike in Australia, the scope of the Nigerian law has become, \textit{de jure}, constitutionally unrestricted.
4.3 Structure of compulsory arbitration

Expert opinions indicate that one of the distinguishing features of the Australian arbitration system is the presence of permanent public tribunals\(^\text{13}\). They are created and empowered by law to conciliate and arbitrate in all arbitrable disputes with or without the consent of the parties. Equally distinguishing is the reliance of the system upon collective organisations of the two sides of industry for its effective operation. Together, these tribunals and the collective organisations constitute the main frame of the structure of the Australian compulsory arbitration.

It will be argued in this sub-section that the adoption of compulsory arbitration system in Nigeria has carried with it similar institutional machinery and powers. However some difference is observed in terms of the degree to which the Nigerian system relies on collective organisations.

4.3.1 Institutions: court-type permanent public tribunals

Australia's original Act of 1904 provided for "a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a President" (s.11). The President who was entitled "to hold office during good behaviour for seven years, and ... eligible for re-appointment" was to be appointed from among the Justices of the High Court by the Governor-General (s.12). The President could appoint as deputy any Justice of the High Court or Judge of the Supreme Court of a State (s.14)\(^\text{14}\).

S.38 of the original 1904 Act empowered the Court to hear and determine disputes, make orders or awards, fix maximum penalties for any breach or non-observance of orders/awards and impose penalties for proven breaches. These were arbitral and

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\(^{13}\) O'Connor J., in the Whybrow's case, used this concept when he said (at p.329): "The tribunal was no longer necessarily constituted by an act of the parties, nor for the adjustment of each dispute as it arose. It might be a permanent public tribunal, appointed by the government for the arbitral adjustment of differences of a special kind. The parties between whom such differences existed were compelled to resort to it, and were bound by its awards" (emphasis, added).

\(^{14}\) Justice O'Connor, the first President of the Court, was appointed on February 10, 1905. However, there was no Deputy President until 1913, when Justice Higgins (who took over from O'Connor J in September 1907) appointed Mr Justice Powers as his Deputy.
judicial powers invested in one body. However, in the *Alexander case*\(^1\), the High Court held that the Court, being composed of a President with no life tenure, could not perform the judicial function (i.e exercise the judicial power of the Commonwealth) of enforcing and interpreting its awards/agreements as this contravened s.72 of the Constitution which then provided that judges hold tenure for life\(^2\). The seven year term provision was repealed in 1926 and the President was renamed Chief Judge; thereafter, the Court (or the judicial arm of the system after 1956) consisted of Judges appointed for life, until the Constitution was amended in 1977.

In 1918 the power of the President to appoint its Deputy was removed, but in the 1928 amendments the Chief Judge was empowered to appoint Conciliation Committees, comprising equal numbers of representatives from each side of industry, along with non-voting chairpersons. These Committees had powers to prevent and settle industrial disputes and the agreements reached under them could be certified by the Court and would have the force of law as awards. Although the power to appoint the Committees was transferred to the Governor-General-in-Council in 1930, there was no change to the powers of the Committees. Later, the provisions under which the Committees were appointed were held by the High Court\(^3\) to be *ultra vires* the Federal Parliament under the Constitution "because ... they attempt to transfer the power to settle industrial disputes by award from the Arbitration Court to a committee constituted to exercise that power otherwise by arbitration" (Foenander, 1937: 62).

It is significant that the Arbitration Court was conceived from the beginning as a standing (permanent), rather than an *ad hoc*, institution. This contrasts with the United Kingdom where, although the need for a standing tribunal had become evident in the early part of 1896, there was no permanent court until 1919 when the Industrial

15 *Waterside Workers' Federation of Australia v. Alexander* (1918) 25 CLR 434.
16 The section was amended by a referendum approving s.2 of the *Constitution Alteration (Retirement of Judges) Act 1977*, which changed the tenure to "a term expiring upon [the Justices] attaining the age of seventy years".
17 The case is *Australian Railways Union v. Victorian Railways Commissioners and Others* (1930) 44 CLR 319.
Court\textsuperscript{18} was created. The importance of the permanency of this tribunal in Australia was dramatised in the 1920s in the confrontation between Higgins and the Hughes' Government, as outlined below.

The latter part of World War I was dominated by a climate of industrial unrest in Australia. The Hughes' Government\textsuperscript{19}, "was frustrated by the failure of Higgins and Powers [President and Deputy President of the Court] to secure quick settlements of damaging strikes" (Hancock, 1979: 17). In response, the Government appointed \textit{ad hoc} tribunals and later institutionalised them by getting through the Parliament an enabling legislation - the \textit{Industrial Peace Act 1920}. This Act empowered the Government to appoint special tribunals, constituted in the manner of wages boards, whose awards would override those of the Arbitration Court.

Higgins was infuriated by this manoeuvre and showed it in a statement to the Court on September 25, 1920, during which he announced his resignation. Among other things, he said:

\begin{quote}
By the Industrial Peace Act the Prime Minister (unwittingly, I think) undermines the influence and usefulness of the Court ... [special tribunals] must be merely opportunist, seeking to get the work of the particular industry carried on at all costs, even the cost of concessions to unjust demands, and of encouraging similar demands from other quarters. On the other hand, a permanent Court of a judicial character tends to reduce conditions to system, to standardize them, to prevent irritating contrast ... The objectives of the permanent Court and of the temporary tribunal are, in truth, quite different ... A tribunal of reason cannot do its work side by side with executive tribunals of panic (Higgins, 1922: 172-173)\textsuperscript{20}.
\end{quote}

Despite this crisis in the 1920s, permanent public tribunals have remained the dominant institutional machinery in the Australian law. As of 1988, there were 18 of such tribunals in the Commonwealth jurisdiction (see Brooks, 1988: 28).

\textsuperscript{18} This was renamed "the Industrial Arbitration Board" by the \textit{Industrial Relations Act 1971} and "Central Arbitration Committee" by the \textit{Employment Protection Act 1975}.

\textsuperscript{19} The last seven years of Hughes' Prime Ministership, beginning from November 14, 1916, were on the platforms of the National Labor Party - a break-away party from the Australian Labor Party - and the National Party - a product of the merger between the Liberals and the National Labor Party in February 1917. He had begun on the platform of the Australian Labor Party on 27 October 1915 (see Brodie, 1988: 126-135).

\textsuperscript{20} For a good window into the background of the clash between Higgins and Hughes, see McQeen (1983: 154-162).
Equally significant is the point that this institution represents a "court" or "judicial" approach to the prevention and settlement of industrial disputes. For instance, although there is no statutory obligation on the institution to observe formal notions of precedence, its operators (e.g. Higgins) have apparently adhered to the rule of taking cognizance of previously established principles in subsequent award-making. Hancock (1979: 16) attributes this to "the adoption, in the Commonwealth jurisdiction, of court-type arbitration rather than wages boards". Willis (1984: 4) also underlined this point when he remarked that despite the changes over the years "the tribunal of 1904 and the tribunal of 1983 are not really all that dissimilar in their respective roles and functions. There is still, in essence, a 'court' approach to the prevention and settlement of industrial disputes of an interstate character" (emphasis, mine).

In a working paper entitled "Australian Federal Labour Law: Legal Regulation and the Arbitral Model", Gardner, et. al. (1989) develop the argument that the Australian "arbitral tribunals do not conform to the ideal-type descriptions of courts". Further, in the context of this argument, they remark that "the mantle of court-like processes and judicial independence becomes less important as a description of aspects of arbitration and more important as a mechanism for bolstering the tribunal's claims to autonomy - claims which may be vital to effective dispute settling".

One main basis for their argument seems to be that the Australian tribunal system has incorporated "the bureaucratic administrative tradition in which the arbitrator adopts a more inquisitorial role formulating principles based on the public interest". This reflects the reference by Rawson (1980: 293) to the arbitration law as a "bureaucratically-oriented public law". The entire argument seems like a response to what Gardner et al might have perceived to be an attribution of traditional "judicialness" to the tribunals even though they did not demonstrate such attribution in their paper.
It is nonetheless pertinent to draw attention to the fact that the framers of the system were certainly not in doubt about the extra-ordinary character of the tribunal which they were putting in place. Let us witness the emphasis which Deakin put on the Court while presenting the Bill. He said: "... I now come to the general scheme of the Bill ... [I]n the forefront of the scheme of the Bill there is a Court - a Court in every sense of the name worthy of that title" (CPD, 1904 vol. XVIII: 767). He was quick to point out that this was "a Court which has not yet its parallel in this country, except in New South Wales, and which in the area of its jurisdiction has probably a parallel nowhere outside the Supreme Court of the United States, and one or two of the courts of great nations". How extra-ordinary? Here it is:

The Court is first a committee of conciliation and then a court of arbitration ... the Court is clothed with a power with which Judges are not endowed in our ordinary courts, except in very rare instances and to a very confined degree. Here we have connected judicial and administrative duties of the highest importance (CPD, ibid) (emphasis, mine).

It is clear from this presentation that, from inception, the Australian tribunal was conceptualised to embody judicial and administrative approaches. It began operation as such and later this gave rise to significant constitutional cases including *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. These cases, in turn, led to significant amendments, reshaping the character of the tribunal. For example, the *Boilermakers* case resulted in the 1956 amendment in which the arbitral and judicial powers of the Court were located in two separate bodies: the former in the Commonwealth (later Australian) Conciliation and Arbitration Commission and the latter in the Commonwealth (later Australian) Industrial Court and then Federal Court. Whether this separation effectively put an end to these bodies adopting a judicio-administrative approach to dispute settlement is open to debate.

It can be argued, though, that the restructuring which followed the *Boilermakers* was a logical extension of what had been begun in 1947. In that year the 1904 Act was amended to restrict the Arbitration Court to purely legal matters (judicial functions) and
to specific disputes involving basic wage (now defined for the first time), minimum female wage, hours of work, and annual leave with pay. Simultaneously the role of the Conciliation Commissioners was enhanced. Outside the matters specified for the Court, the Commissioners could conciliate and arbitrate in all matters. In a later amendment in 1952 under the Menzies Government, parties could apply to the Chief Judge to have their disputes transferred from the Commissioners; and a limited right of appeal against the decisions of the Commissioners was also allowed. Clearly there were signs before 1956 that the jurisdictions of the Court could or should be put in two mutually exclusive bodies, except that the separation was not clear-cut.

The post-1956 changes have left the jurisdictional divide largely intact. The 1972 amendment was seen as significant in that it altered the qualifications for the appointment of Deputy-Presidents and also created two categories of Commissioners - Arbitration Commissioners and Conciliation Commissioners. This did not affect the separation of judicial and arbitral jurisdictions. Even the distinction between the Commissioners was soon abolished by the 1973 amendment to the Act. In 1977 the Industrial Court became the Industrial Division of the Federal Court of Australia; and the 1988 Act changed the name of the Conciliation and Arbitration Commission to the Industrial Relations Commission.

In the Nigerian law, innovative as the introduction of compulsory arbitration through the 1968 Decree was claimed to be, the tribunal system which was originally set up to operate it was *ad hoc* - a carry-over from the system under the *Trade Disputes (Arbitration and Inquiry) Ordinance 1941*. Sections 9 and 11 of the 1968 Decree provided for the appointment a of Board of Inquiry and an Arbitration Tribunal by the Commissioner for Labour on an *ad hoc* ("appointed for the purpose") basis to inquire into, and settle, any trade dispute pursuant to the Decree. Once the Tribunal "gave an award in respect of the dispute it became *functus officio*" (Adeogun, 1972: 116).
Soon, however, a permanent public tribunal system was introduced under the amending law - *Trade Disputes (Emergency Provisions)(Amendment)(No. 2) 1969*. In s.3, a provision was made for the establishment of a standing tribunal "to be known as the Industrial Arbitration Tribunal", consisting of a Chairman, a Vice-Chairman and five others - all appointed by the Commissioner. The Decree came into force on 12 December, 1969, and three months later the tribunal was inaugurated on Monday, March 16, 1970. Apparently, this was a welcome development. In Adeogun's (1970: 125) words, "the establishment of a standing Industrial Arbitration Tribunal is very welcome and serious consideration should be given to the possibility of making it a permanent feature of our industrial relations system after the cessation of the current national emergency".

Evidently such consideration was indeed given, for the *Trade Disputes Decree 1976* established the Industrial Arbitration Panel as a standing institution (or "permanent" body - see ILO, 1980: 157) in the place of the Industrial Arbitration Tribunal. This Panel was composed of a Chairman, a Vice-Chairman and not less than ten other members. Of these members, two each were to be nominated by the employers organisations and workers organisations, so appearing to the Minister of Labour as representing the interests of employers and workers respectively [s.7(2)]. The members of the Panel had three years tenure of office and could be eligible for re-appointment.

Quite significantly, the 1976 Decree also introduced the "court" approach into the Nigerian industrial relations system by providing for the establishment of the National Industrial Court, with a President and four other members (see s.14). The appointment of these members was to be done by the [National Assembly] acting, in the case of the President, after consultation with the Federal Judicial Service Commission [s.16(1)].

Under s.17 the President was empowered to appoint, with discretion, assessors to assist the Court, consisting of two each nominated by employers' and workers' representatives. The members of the Court could hold office up to the time they attained the age of 62 years (see s.19).

* (see Emiola, 1982: 492)
The establishment of this Court had been recommended by a number of sources long before it eventuated. For instance, the Morgan Commission in 1964 remarked that they "received submissions on the desirability of making provisions for the establishment of Industrial Courts in the country". Convinced by the evidence, they accordingly recommended "that legislative provisions should be made for the establishment of Industrial Courts to adjudicate upon industrial disputes" (Morgan, 1964: 44). In 1969, Adeogun recommended in a similar vein:

An industrial court should ... be set up to deal with such labour matters as termination of contracts of employment, interpretation of collective agreements and adjudication upon industrial disputes. The establishment of an industrial court, it is hoped, would obviate the present painful delays, not to talk of the expense, involved in litigation through the ordinary courts (Adeogun, 1969: 40).

The Adebo Commission is also said to have made a similar recommendation in 1971 (see Adeogun, 1976: 6 - footnote 11).

The Court actually commenced functioning in June 1978. Armed with original and appellate jurisdictions, the Court emerged "as the final arbiter in all trade disputes between the management and the trade unions" (Launching address, 1981: 8). These jurisdictions cover the settlement of trade disputes and the interpretation of collective agreements. Thus, there now exists in Nigeria, as in Australia, a separate judicial institution dealing solely with industrial or labour matters.

4.3.2 Institutions: Parties - individual/collective distinction

What is the status of collective bodies in the two compulsory arbitration systems? How does this affect the standing of individual disputant before the tribunals? These questions, inter alia, constitute a significant aspect of the debate about the position of "parties" within the structural frameworks of the Australian and Nigerian collective labour laws. They are examined in this sub-section.

21 This Commission was set up to hold an inquiry into the salaries and wages of junior employees, the abolition of the daily-wage system and the introduction of a national minimum wage.
22 This Commission was set up to review the wages and salaries in public service and to recommend in respect of rationalising and harmonising remunerations in the public and private sectors.
Early debates in the 1903 Australian Commonwealth Parliament attributed considerable importance to "organisations". Deakin remarked that "a very important part of the measure is that which relates to the organisations of employers and employes(sic)". He then drew attention to the clauses which provided for the incorporation of organisations, including those that provided for dealing "with those who seek to avoid coming under the provisions of the measure by neglecting to organize" (CPD, 1903 vol. XV: 2881). Another expression of opinion on organisations, albeit on a higher level of generality, came from Reid. He said:

I do not attempt to disguise my opinion that trade unions are the evolution of intelligence ... I have come to look upon a union ... as the form in which the most intelligent spirits assert their vitality and their power ... I have the keenest belief in that sort of evolution which makes labour speak with one voice as much as possible, and which causes capital to speak with one voice as much as possible. With only two voices reason may prevail, but in the tower of industrial Babel what hope is there of any rational settlement of the everlasting differences between these two great powers? (CPD, 1903 vol. XV: 3192-3).

Regarding the specific place of organisations in the system, as was originally conceived, let Deakin speak again:

under this Bill, ... the organizations themselves ... are sought to be made extensions of the machinery of this Court. The object is ... to enable findings to be binding; to allow the decisions to cover a large area; to prevent isolated disputes, and to enable broad principles and practices to be adopted in particular trades ... By all these ways and means they are, so to speak, constituted a part of the machinery of justice (CPD, 1904 vol.XVIII: 772).

In consonance with the position expressed in this remark, great emphasis was placed on organisations in the 1904 Act and it does not appear to have diminished to date. As it was in that Act, so it seems to be in the 1988 Act, the increase of State control over the internal affairs of the organisations over the years notwithstanding.23

Against this historical background it can be better appreciated why registered organisations have, apparently, acquired the exclusive right to be the parties in matters brought before the tribunals. This situation is underlined by Higgins' (1922: 15) remark that

23 The Hon Ralph Willis, MP once said: "The Act now covers organisations from the cradle to the grave, ... and regulates almost every aspect of their affairs in extraordinary detail".
the system of arbitration adopted by the Act is based on unionism. Indeed, without unions, it is hard to conceive how arbitration could be worked ... [N]o party can file a plaint for the settlement of a dispute except an "organization", that is to say, a union of employers or employees registered under the Act.

During his time as a President of the Arbitration Court, Higgins adopted the policy that the Court would not "assist an employer in devices to stamp out unionism" or wreak "gradual bleeding of unionism by the feeding of non-unionism".

It was also an early view of the High Court that the status conferred upon the organisations by the legislature was valid and justifiable under the Commonwealth's incidental power, i.e s.51.(xxxix) of the Constitution. In *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners Association* (1908) 6 CLR 309, the incorporation of workers association was challenged. The Court held, as per O'Connor J., at 361, that "the constitution of these representative bodies as legal entities in the corporate form is merely the adoption of a means for effectually carrying out the powers expressly conferred by sub-sec xxxv. Being, therefore, according to the test I have laid down, means appropriate and plainly adapted to that end, their creation in the form enacted is within the power conferred on Parliament by sub-sec xxxix".

Moreover the High Court endorsed the position that the organisations can create and be parties to disputes and to awards. They are parties as "principals" not agents, for as held in *Burwood Cinema Ltd v. Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528, "an organisation registered under the Arbitration Act is not a mere agent of its members: it stands in their place, and acts on their account and is representative of the class associated together in the organization. It is, as my brother Higgins said, 'a party principal', and 'not a mere agent or figurehead'" (as per Starke J., at 551).

In addition to acting as representatives at tribunal hearings, the organisations are said to have played the role of policing, i.e. carrying "the burden of detecting breaches and non-observances of the Act and the awards" (Foenander, 1958: 225). This view has
been echoed in Scherer's (1983: 170) observation that unions were recognised not "only for the purpose of serving claims for wage increases to be heard by the tribunals. They were also responsible - in their role as organisations registered under the Act - for the enforcement of awards". In fact, Scherer is of the view that, until 1928, the unions "were solely responsible for the enforcement of federal awards". Whatever uncertainty there may be with this view, there is little question that the organisations under the Australian law have had a special standing.

It goes without saying that the standing of the individual disputant pales in comparison with the registered organisations within this tribunal system. When the legal framework of this system was being fashioned, Senator Symon was unequivocal on the lack of standing of the individual. He stated: "I wish to say, generally, that the Bill is not intended, and will not give any benefit to individual employes (sic). It is only as members of organizations that they can secure any benefit under this Bill" (CPD, 1904 vol.XXII: 5719).

In the *Jumbunna* case Isaacs J., at 373, added a judicial notice to this emphasis on the "collective" when he stated that "dispute in the industry generally, which is an industrial dispute in the large economic sense, must be carefully distinguished from an industrial dispute between a specific single employer and one of his employees. The latter may be an industrial dispute too but in a narrower sense, and not in the broad national sense which the Constitution intended". This position was affirmed in *R. v. Staples; Ex parte Australian Telecommunications Commission* (1980) ALR 533.

In that case, it was argued for Telecom, *inter alia*, that Michael Morris - the employee whose dismissal gave rise to the case - was an individual acting in his own cause and that the Commission had no jurisdiction to settle disputes between a single employee and an employer. The Court upheld this argument, stating that "even if Mr Morris were able to bring the subject-matter of his dispute within the literal terms of the definition of 'industrial matter' ..., we would have grave difficulty in drawing a conclusion in
favour of jurisdiction" (per Stephen, Mason and Wilson, JJ p. 542). It is not clear how McCallum (1990: 212) has arrived at citing this case as an authority in which "the High Court has held that individual employees may be industrial disputants in their own right". Perhaps, because the Court noted that individuals may mount a dispute with implications for other workers, e.g. health and safety matters.

In the 1987 Industrial Relations Bill there were provisions which could have given a right to individual employees to approach the tribunals. For instance, clause 188(4) provided that a complaint on unfair dismissals may be made by the person or an organisation of which the person is a member. The Bill never became law. The 1988 Bill - under the same name - which did become law, omitted this provision. Thus, as Mitchell (1988: 491) has observed, "on the basis of the existing authority, individuals will find it difficult, if not impossible, to create an industrial dispute which will give rise to the exercise of the Commission's jurisdiction". The system remains, essentially, the domain of collective parties.

In Nigeria it is not obvious how much the system depends on unionism. The first legislation which introduced compulsory arbitration into Nigeria's industrial relations defined a "party" to a dispute as including "an employer or organisation representing the interests of the employers, the trade union directly concerned in the dispute, and where there is no such trade union then, the representatives of the workers directly engaged in the undertaking" [s.1(2)(iii) of the 1968 Act]. This definition does not give unions or organisations the sole right to be "parties"; neither does it exclude them. It has, nonetheless, been regarded as "a significant change" which has led to the industrial relations practice of having unions and associations as parties (Adeogun, 1972: 115).

However, on the face of the current principal law, it can be argued - as Emiola has done, albeit tentatively - that the 1976 Act has kept the trade union out of the business of dispute resolution:

apart from section 24(4) of the [Trade Disputes] Act which deals with the granting of consents to the publication by the minister of
confidential matters relating to the affairs of 'any trade union' in the report of a board of inquiry—there is nowhere else that the new Act specifically [not even indirectly] mentions a 'trade union' as a party to the resolution of any dispute (Emiola, 1982: 222).

Sections 2(1), read together with 37(1)(a) and (b), provides to the effect that any collective agreement for the settlement of a trade dispute, being an agreement concluded between an employer or organisation of employers and trade unions, shall be deposited by these bodies with the Minister for Labour. Yet any order made by the Minister upon this agreement "shall be binding on the employers and workers to whom they relate" [s.2(3)] (emphasis, mine). How about the union with which the agreement was concluded? Adeogun (1969: 37) seems to have answered this question while commenting on the earlier version of this provision [i.e. s.2(2) of the 1968 Act). He pointed out that although the trade union is a party for the purpose of concluding a collective agreement, "when it comes to legal enforceability, the trade union drops out and the individual workers step in".

Other unclear provisions include s.3(1) of the 1976 Act which states that "if there exist agreed means for settlement of the dispute apart from this Act, whether by virtue of the provisions of any agreement between organisations representing the interest of employers and organisations of workers ... the parties to the dispute shall first attempt to settle it by that means" (emphasis, mine). There is nothing in this provision to suggest that the "organisations" between whom the agreement is entered are necessarily the said "parties". Also, it cannot be implied from s.34(2) of the Trade Unions Act 1973, which recognises a trade union as "a party to collective ... bargaining" (emphasis, mine), that the trade union has to be the party in a dispute arising from the bargaining.

Uvieghara (1985: 146) has remarked that to conclude a collective agreement does not give general acceptance to collective bodies, i.e. the trade union, to act as agent for its members. The National Industrial Court has pointed out that "the primary right ... to be a party to a trade dispute belongs to the workers on the one hand and the employers on the other hand. Contrary to the argument that has been canvassed for the trade union,

24 This section is more or less a re-enactment of s. 10(4) of 1968 Decree.
the right of appearance before this Court belongs to the workers. The trade unions are only the representatives of the workers.\(^{25}\)

In *Nigerian Tobacco Co. Ltd v. National Union of Food, Beverages and Tobacco Employees*\(^{26}\), the Court held that a trade dispute "can be taken up by a recognised trade union on behalf of its members" (quoted in Uvieghara, ibid: 168). The union would, however, need to show that it has been asked to do so by its members in order to obtain *locus standi* before the Court.

In the light of all this, it is not immediately clear why Adeogun (1976: 12) needed to recommend that "the jurisdiction of the NIC ... be widened to allow individual workers to have access to it ...". For, as things now stand, the system seems to give more recognition to individual, than to collective, parties. This conforms, for instance to the British system which is built upon the "inviolability of individual's rights" principle and is in sharp contrast to the Australian experience in which collective parties are held as pillars of the system.

It will now be noted, by way of summary, that out of the seven themes upon which the Australian and Nigerian laws have been compared in this chapter, differences occur on two themes (i.e, the constitutional limitation and the parties to disputes). On the remaining five, namely the purpose, the means, the disputes types, the scope in terms of application, and the tribunals both laws are parallel to each other. Obviously, the two laws are overwhelmingly similar, given that these are laws of countries not connected by race, geography or direct colonial relationship. But more significantly they stand in a class of their own in comparison to other countries like Britain, France, Germany, the Scandinavian countries, and the United States.

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\(^{25}\) *Western Textile Industries Ltd. v. Ado-Ekiti Westexinco Workers' Union* [1978] 79 NICLR 107 at 111.  
\(^{26}\) Unreported Suit No. NIC/5/82.
CHAPTER FIVE: THE PROCESSES AND PRODUCTS OF COMPULSORY ARBITRATION IN THE AUSTRALIAN AND NIGERIAN LABOUR LAWS

5.1 Introduction
In chapter four an attempt has been made to identify the differences and similarities between the philosophies and institutional frameworks of compulsory arbitration systems in the Australian and Nigerian labour laws. The focus in this chapter is on the remaining two key aspects of these systems, namely, the processes and products of the means which has been adopted to achieve industrial peace in the two countries.

What are the various stages in the settlement of industrial disputes? How are they initiated, by whom and under what conditions? What is the nature of the outcomes of the settlement and how are they enforced? The answers to these questions constitute what are here regarded as the processes and products of the systems. As in the preceding chapter, the attempt here is to identify the differences and similarities between the two systems.

5.2 Processes of compulsory arbitration
There are four main stages in the processes of arbitration system in Australia and Nigeria: negotiation, notification, conciliation, and arbitration. In their initiation and conduct, it will be seen that the Executive arm of Government plays a more significant referral role in Nigeria than in Australia. Apart from this material difference, the processes in both countries are fundamentally similar in that they are automatic and mandatory.

5.2.1 Negotiation and the status of collective bargaining
In the Australian and Nigerian laws there are provisions which recognise collective agreements concluded by parties to an industrial dispute. The implication of this, regarding the status of direct negotiation or voluntary collective bargaining in systems
that are essentially compulsory and arbitral, has remained a question for debate. Nevertheless, the recognition of collective agreements underlines the importance that is attached to direct negotiation in the arbitration systems of both countries.

Part VI (ss.73-78) of the original Australian Act of 1904 provided that organizations may make industrial agreements with themselves "for the prevention and settlement of industrial disputes by conciliation and arbitration", a duplicate of which was to be filed in the office of the Industrial Registrar within 30 days of the making thereof. The Registrar was, if requested, to investigate and confirm with a certificate "that the fact is as stated". Upon this confirmation, the agreements would, during their continuance, be binding on all parties thereto and their breach was punishable by pecuniary penalty.

In 1972 there was an amendment to the law. In addition to the existing provision for industrial agreements (now Part X, ss.172-180 of the Act), it was provided to the effect that the Commission, in dealing with an industrial dispute, should encourage the parties to agree on procedures for preventing or settling further disputes and this should be included in an award (s.20 of the Act 1904-1986). This amendment followed the publication by the National Labour Advisory Council of guidelines on "Procedures for Dealing with Industrial Disputes" which listed principles to guide parties seeking to incorporate grievance procedures in their awards or agreements.

Does this provision encourage negotiation for procedural agreements or for substantive agreements or for both? At the early stages of the system, there was a judicial ruling on a question of this nature in *Federated Engine Drivers and Firemen's Association of A'asian v Broken Hill Pty Co Ltd (No 3)* (1913) 16 CLR 715. The parties had made an agreement purporting to settle the wages and working conditions of members of the workers organisation. They described the agreement as made pursuant to the Act and

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1 As defined in s. 167 of the English *Industrial Relations Act* 1971, these are key elements in collective bargaining, being "negotiations with respect to terms and conditions of employment, or with respect to the making, variation or recission of a procedure agreement, or with respect to any matter to which a procedure agreement can relate".
incorporated the provision for the reference of any dispute arising under the agreement to a conciliation board. The High Court, however, held that this was not an agreement within the meaning of Part X because it contained such substantive issues as wages and working conditions.

Mills and Sorrell (1975: 404) drew upon this judicial ruling in their comment that "the only industrial agreement contemplated by this part of the Act is one for the prevention and settlement of industrial disputes by conciliation and arbitration". In effect, the negotiation contemplated is one which would lead to an agreement only on procedures or methods for the prevention and settlement of industrial disputes. This understanding appears to be at variance with that submitted by the Hancock Committee (1985: 367) when they say

The provisions of Part X of the Act enable parties covered by a federal award to choose, by mutual consent, to enter into an industrial agreement for the prevention and settlement of disputes by conciliation and arbitration. By the use of such procedures, agreed terms and conditions of employment could be arrived at and provision made for the enforcement of those terms and conditions (emphasis, mine).

Even though this understanding appears, in the light of the existing judicial interpretation, to be stretching the construction of Part X too far, it is closer to the meaning which the framers of the law had put on Part X. In his explanatory speech in the House of Representatives Deakin referred to the agreements contemplated in Part X as voluntary industrial agreements between employers and employees made quite independently of the Arbitration Court "in regard to the conduct of the particular trade or business in which they are engaged" (CPD, 1903 vol. XV: 2861-2). McCallum (1986: 301) has a similar understanding of this Part as indicated by his view that the framers of the original 1904 Act made room for voluntary agreements by employers and employees on substantive issues such as wage rates and work rules.

However, the judicial interpretation shows that the provision would not meet a generally held definition of collective bargaining as "a method, or process, of
conducting negotiations about wages and working conditions and other terms of employment between an employer, or group of employers, or employers' associations on the one hand, and representatives of workers and their organizations on the other, with a view to arriving at collective agreements ..." (Marsh, 1979: 54). Neither does it accord with article 4 of Convention 98 (Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively), adopted by the ILO in its 32nd session on 8 June 1949. This Convention provides that appropriate measures be taken "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of the terms and conditions of employment by means of collective agreements". Nonetheless it can be suggested that the restriction on the Part X agreements was the creation of the High Court, not the Legislature.

Another provision in the Australian law recognising "collective agreements" is s.28 of the Conciliation and Arbitration Act. It provides that parties could make a memorandum of an agreement reached between themselves on terms for the settlement of all or any of the matters in dispute before this dispute is referred to arbitration in accordance with the Act, or during arbitration proceedings as per s.30(3). The parties could request the Commission to certify this memorandum which, when certified, would have "the same effect as, and shall be deemed to be, an award of the Commission for all purposes of this Act". Compared to the provision under Part X, the difference here is that this provision allows negotiation to reach agreements on substantive issues of industrial relations. That is, the negotiation can address issues which would normally be addressed in a conventional collective bargain.

Niland (1978: 82) is sceptical about this measure of negotiation as it is provided for in "the Australian approach to industrial regulation [which] is still dominated by the institutions and mental postures of compulsory arbitration". The negotiation is to be conducted under the shadow of arbitration. Nonetheless, drawing on the "Direct

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2 This was introduced into the law by s.7 of the amendment No. 44 of 1956 as "s. 16Q(1)".
Negotiation Survey" and the "Scott & Co Survey" conducted in 1975 and 1977 respectively, he attempts to demonstrate that the "incidence of collective bargaining", especially outside the tribunal structure, has been significant in Australia (see pp.83-85).

Creighton, et. al. (1983: 510-513) share the view that "direct negotiation and collective bargaining play a more significant role in our industrial relations systems than is often supposed". In support of this position they then list a number of case studies which have focused upon "'conventional form' bargaining in Australia". They also highlight "one extremely important form of direct negotiation - namely, overaward bargaining" which Niland appears to have overlooked in his categorisation of bargaining proper in Australia.

The Industrial Relations Act 1988 seems to have given more recognition to substantive agreements than was previously the case. It strengthens the provisions in the old law and adds new ones. In addition to providing for the Commission to give greater "encouragement" to the parties to agree on grievance procedures (s.91), it enjoins the Commission, in exercising its powers in relation to an industrial dispute, to have regard to the extent to which the parties have complied with the procedures (s.92). The latter provision is entirely new in the law. It says:

Where the parties to an industrial dispute are bound by an award that provides for procedures for preventing or settling industrial disputes between them, the Commission shall, in considering whether or when it will exercise its powers in relation to the industrial dispute, have regard to the extent to which the procedures (if applicable to the industrial dispute) have been complied with by the parties and the circumstances of any compliance or non-compliance with the procedures.

It should be observed that this new statutory requirement reflects, to some extent, the [existing] practice of the Arbitration Commission.

Of more significance is the new provision in s.115 which, in my view, contemplates negotiation in its own right and not as a stop-gap between conciliation and arbitration as was the case in s.28 of the 1904 Act. One is inclined to this view even though
s.103(1)(a) of 1988 describes the action in s.115 as part of the completion of conciliation proceeding. Perhaps this unclear picture has arisen from the situation in which the provision "embraces but transforms two different types of agreement envisaged by [the 1904 Act] - s.28 (certified memorandum of agreement) and Part X (industrial agreement)" (Weeks, 1989: 2043)\(^3\).

In any case, the provision allows for the making of a memorandum of agreement on "terms for the settlement of all or any of the matters in dispute". Upon application by the parties and satisfying certain conditions, the memorandum shall be certified by the Commission. The certification gives the agreement the effect of an award and makes its terms prevail over any existing award or order of the Commission dealing with the same matters and binding on each of the parties to the agreement (s.116). This provision is a clear indication that direct negotiation, leading to substantive agreements in their own right, is contemplated in these provisions and it reflects the recommendation which had been made on this issue by the Hancock Committee (1985: 369).

It may well be that the recommendation was part of the pressure under which the federal government had been "for some considerable time ... to enact legislation which would enable employers and employees within an enterprise to negotiate agreements relating to wages and conditions" of employment (Marks, 1989: 68-69). Whatever the motivation may have been, it is defensible, as Mitchell (1988: 493) has argued, to see this provision "as a contribution to the strategy aimed at enhancing the flexibility of the centralized system".

Obviously, the full impact of this new regime on conventional collective bargaining in Australia, in contrast to that of the old regime, cannot be ascertained as yet. Put differently, "it is still too early to pronounce upon its fate" vis-a-vis private negotiation.

\(^3\) Weeks' work under reference provides a very useful detailed comparison between the *Industrial Relations Act 1988* and the legislation it replaced, i.e the *Conciliation and Arbitration Act 1904*. 
The signs are that it may not go far, for its enactment and operation "has not silenced those who wish to see a much higher level of decentralised and enterprise focused bargaining under federal law" (McCallum, 1990: 223).

The criticism of the old regime is that it destroyed the underpinning, or stultified the growth, of collective bargaining. It is yet to be seen how the new regime can change matters, given that it will still operate within the compulsory tribunal system in which industrial action is essentially unlawful. For, as Sykes and Glasbeek (1972: 369) have observed,

> it stands to reason that if disputants know that, if they refuse to agree, an independent body will settle their dispute, they will not be required to gamble on the outcome of a trial of strength. Yet preparedness to wage an economic warfare to the bitter end is a fundamental tenet of a collective bargaining system.

In Nigeria, s.2(1) of 1968 Decree and s.3 of 1976 Decree have recognised negotiation, with or without mediation, by providing that its products (collective agreements) - where they exist - should be deposited with government and complied with in the event of a trade dispute. The 1968 provision made failure to deposit the agreements an offence. It also provided for the Commissioner to make an order on the terms of the agreement which would make them binding on the "parties", and failure to comply with the agreement thereafter would be an offence.

While s.3(2) of the 1968 Decree left it to the discretion of the parties to adopt any procedure stipulated in any collective agreement as a first step towards the settlement of their dispute, s.3(1) of the 1976 Decree has provided that parties are obliged to negotiate according the existing means in the circumstance of a dispute. In both Decrees, however, it is provided that the Commissioner/Minister may order due compliance with any existing agreements [see s.6 (1968); s.5 (1976)].
As in the Australian law, it is not clear from the face of the Nigerian law whether the recognition is restricted to those agreements which deal solely with dispute settlement, i.e. procedural agreements, or whether it extends to all agreements so long as they provide for dispute settlement among other things. The definition of "collective agreement" in s.37 of the 1976 Decree - referring to the settlements of disputes and relating to terms of employment and physical conditions of work - which appears wider than the scope of "for the settlement of a trade dispute" in s.2 contributes to this lack of clarity.

Be that as it may, the views of some scholars have indicated that the recognition in the law extends to conventional collective bargaining whose outcomes can include procedural and substantive issues. Adeogun (1969: 36) has argued that the 1968 Decree did not abolish the "principle of free and voluntary collective bargaining" or, as he put it a few years later, "Decree No. 21 of 1968 leaves unimpaired the principle of free and voluntary collective bargaining which is the State's policy to foster ..." (1972: 112). The law has left the employers and the workers to set up collective bargaining machinery (Whitley Council system in the public service sector and Joint Industrial Councils/Joint Consultative Councils in the private sector) for the regulation of wages and other labour matters and to reach agreements on them. In the event of a trade dispute, the law begins by obliging the parties to settle according to their agreements, failing which other procedures are bought in.

Although Fashoyin also holds the view that conventional collective bargaining is legally retained in Nigeria, he seems to argue that this machinery now operates within the tribunal structure. His argument can be abridged from his own words as follows:

After a case has been referred to arbitration, the parties set to argue their case, ... the parties, sometimes with the urging of the IAP [i.e. Industrial Arbitration Panel], have gone back to the bargaining table to resume negotiations, though they have not formally withdrawn their case from the tribunal ... the agreement thus reached is taken to IAP [for certification as award] (Fashoyin, 1977: 159-160).
Although he describes this process as "accommodative conciliation", it appears more like a combination of what Niland (1978: 18) has conceptualised as referred negotiation and accommodative arbitration.

Essentially, Fashoyin sees the law as combining compulsory arbitration with collective bargaining, and takes the view that this legal framework "has had the direct positive effect of encouraging private negotiation" (Fashoyin, 1980: 84). He demonstrates this effect in a table, showing that collective bargaining machinery has maintained a strong lead over other machineries for dispute resolution, particularly since the seventies. Bearing this in mind, the point he makes a couple of paragraphs later that arbitration "may often have a negative impact on the collective bargaining process" (emphasis, mine), presumably by inhibiting consensual industrial relations, appears hollow with respect to Nigeria. But it brings him somewhat in line with the contention of Sykes and Glasbeek (1972: 369) that "any scheme which embodies both compulsory arbitration and private settlement can hardly claim to have a consistent attitude to the management of industrial relations".

Another scholar who has expressed views on this question is Emiola (1982: 216). He appears inclined to the opinion that "free and voluntary collective bargaining [is] the cornerstone of our industrial relations" or, in the official parlance, "the process of consultation and discussion ... is the foundation of industrial democracy in industry", to which the Nigerian government is committed. From this point of view, Emiola seems to maintain that the changes that have taken place since 1968 or, in his words, "such intervention that there has been, ... is the extension of the legal framework of collective negotiation".

The work by Imoisili (1984) is one indication of the extent to which procedural and substantive agreements are being concluded through direct negotiations in the private sector in Nigeria. In the public sector, the constraints to collective bargaining
machinery appear formidable, but they have not dampened expressions of the desirability of the machinery in the sector (see Fashoyin, ed. 1987).

The point remains that the Nigerian law does not appear to shield substantive issues per se away from direct private negotiation. In fact, in another statute - the Wages Boards and Industrial Councils Act 1973 - employers and workers are enjoined to establish Joint Industrial Councils for the purpose of negotiating and reaching agreements relating to such matters as are considered to be matters for negotiation, including wages and conditions of employment (see s.18).

In practice, the difficulty has been where to draw a line between issues that are negotiable and those that are not. One illustration of this dilemma can be derived from the dispute between Allied Workers Union and Michelin (Nigeria) Trading Limited in 1975. The IAP turned down the request of the Union to amend a procedural agreement already in existence so that welfare matters, medical facilities, etc could be included on the list of items that are negotiable. The reason for the decision was not because those matters were substantive; rather it was because, in the industrial relations practice in Nigeria, they are for discussion only and not for negotiation (see Ubeku, 1983: 176-177). However, in Nigerian Breweries Ltd v. Nigerian Breweries Management Association (1978-79) NICLR 35, the NIC was urged to set aside an award which the IAP had made, rather inconsistently, in favour of the workers' argument that medical facility was a negotiable matter. The Court did set aside the award.

It can be observed from the foregoing presentation that, prior to the 1988 changes, the Australian law differed from the Nigerian law in terms of the issues which they allow for direct negotiation outside the shadow of arbitration. More significantly, however, both laws have consistently and in a similar way given the force of law to agreements arising from such negotiations. In regard to the latter point, both laws differ from the British law under which agreements are generally "gentlemen's agreements", binding upon the parties in honour only.
5.2.2 Notification of industrial dispute

Notification as a procedure in dispute settlement occurs at different times in direct negotiation in Australia and Nigeria. Under the Australian law, except, perhaps, for the effect of s.115 of the 1988 Act, notification occurs before the negotiation of substantive agreement begins; in Nigeria, it occurs after. However, the condition under which the procedure occurs and the character that it takes are similar in the two countries: once a point of impasse is reached, notification is mandatory. In this respect, both countries contrast with Britain where the compulsory arbitration system which operated between 1940 and 1959 (see Kahn-Freund, 1959) placed no obligation on the parties to a dispute to notify the relevant Minister, not even during the regime of the notorious Conditions of Employment and National Arbitration Order 1940 (Turner-Samuels, 1951: 289).

At the start of the Commonwealth system in Australia, the law empowered the Arbitration Court to have cognizance of all industrial disputes which were certified by the Registrar as proper to be dealt with by the Court in the public interest, those which were submitted to the Court by an organisation (by plaint in the prescribed manner) and those which any State Industrial Authority or a State Governor-in-Council has requested the Court to deal with (s.19 of the original 1904 Act). In 1956, this procedure was changed to notification (see "s.16M" as inserted by s.7 of No. 44 of 1956).

Section 25 of the 1904 Act (as amended) and s.99 of the 1988 Act provide that once an industrial dispute has occurred, the parties are (or any of them is) obliged to notify the tribunal forthwith, i.e. "as soon as an organisation or an employer becomes aware of an existence of an (alleged) industrial dispute affecting" them. The sections also permit the Minister who becomes aware of a dispute to notify the tribunal. The notification covers all such disputes except, as now provided in s.99(4) of 1988 Act, those relating to secondary boycotts.
Also, if it appears to the tribunal that an industrial dispute has occurred or is likely to occur, the tribunal shall, whether it has been notified or not, immediately ascertain the parties and the matters and shall take such steps as it thinks fit. The tribunal can do this because it is has been armed with a compulsory power of intervention (see s.21 of the 1904 Act; s.33 of the 1988 Act). In other words, in contrast to the United States and Britain where the existing procedure is basically contractual, i.e. based on consent of parties, the tribunals in Australia have power to take over dispute situations whether the parties like it or not. Thus the notification, howsoever made, obliges the parties to the dispute to answer to the tribunal.

The Hancock Committee (1985: 547) specifically supports the provision for the tribunal's intervention which, according to them, has "the effect of placing disputes before the Commission earlier than might otherwise occur". In fact they are in favour of the legislation making this power more explicit by requiring "the relevant member of the Commission to make himself aware of actual or impending disputes situations and to move quickly on his own motion ..." (p.548).

In the Nigerian law, either party to a dispute which has not been resolved by the collective bargaining machinery, where it exists, is obliged to report the dispute to the Minister of Labour, Employment and Productivity within a specified period after the failure of the direct negotiation and/or mediation (s.4 of 1976 Decree). Under s.4 of 1968 Decree, now superseded by the 1976 Decree, the party had to declare a dispute and then notify the Commissioner of the declaration accordingly; and failure to do so was an offence.

This statutory obligation to notify is similar to that which the Australian law has imposed upon parties to an industrial dispute. The opposite is the case in Britain where, as indicated earlier, parties are under no obligation to notify disputes either to the Advisory Conciliation and Arbitration Service or the Government. In the United States,
notification is required to the Federal Mediation and Conciliation Service only in certain types of disputes (see Blain, et. al., 1987: 185).

Section 5(2) of the Nigerian 1968 Decree empowered the Commissioner (as the official was then called) to apprehend disputes and take action. This provision was dropped in the 1976 Decree but restored by amendment No. 54 of 1977, inserting s.3A which says: "where a trade dispute is apprehended by the Minister he may in writing inform the parties or their representatives of his apprehension and of the steps he proposes to take for the purpose of resolving the dispute" (per sub-section 1).

This provision gives the Minister power of direct intervention, similar to the power which the Australian law has given to the Commission. For, as Adeogun (1972: 114) had observed with regard to the 1968 provision, "what is new is that the [Minister] can resort to [conciliation, formal inquiry and arbitration] without the consent of the parties to the dispute ...".

It is pertinent, at this juncture, to examine the question: when has a dispute occurred or when is there a dispute situation? It is the existence of such occurrence or situation that triggers the process of notification in Australia and Nigeria.

Brooks (1986: 157) has noted that originally the High Court in Australia looked to strikes and lock-outs as evidence for the existence of an industrial dispute; and that this approach changed in 1938 when the Court ruled that demands genuinely made in the interest of an organisation and not acceded to, so long as the geographic limits of one State are exceeded, bring into existence a dispute.

The change in approach is a fact, but it would seem that it actually occurred much earlier than 1938. Before 1913 the judicial position was that "a process of written

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4 See The Australian and Motor Omnibus Employees Association v Commr for Road Transport and Tramways (NSW) & Anor (1938) 58 CLR 436 at pp442-443.
demand for the improved working conditions and refusal thereof had not brought into existence a 'dispute' within the meaning of section 51(xxxv) of the Constitution. However in the Merchant Service Guild Case this process was held to be sufficient to create a dispute. Also, in the Builders' Labourers' Case (1914) 18 CLR 224, the High Court decided that a formal demand for improved conditions of pay and work, if refused, affords a prima facie evidence of a dispute.

Plowman (1983: 13-15) makes a sociological point by attributing this change in approach to the appointment of Charles Powers, Frank Gavan Duffy and George Edward Rich to the High Court in 1913. He said, "one of the first industrial results of the new appointments was the acceptance of the 'paper' dispute as constituting a 'genuine' dispute". While the death of Justice O'Connor in 1912 and the enactment of the Judiciary Act 1912 which increased the size of the Court from five to seven were the immediate pretext for this appointment, what is significant is that the change in the personnel of the High Court brought with it a change in the dominant perspective of the Court.

In any case, it does not seem that there are, any longer, questions about the sufficiency of "paper disputes" for the purpose of notification, and ipso facto of setting the industrial machinery in motion. Sykes (1957: 471 footnote 36) characterises this as "merely a technique to justify the court, with the assistance of the parties, in writing a code for the industry". Typically, a union seeking an award draws up a "log of claims" which it sends to specific employers in at least two States. If the claims are refused, which is often likely since their ambit is usually wider than what the union expects to obtain at the time, a dispute has arisen and the union notifies the tribunal (the Registrar, a member or a Presidential Member of the Commission) accordingly, or it may be apprehended by the tribunal or the Minister who in turn may notify the tribunal.

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6 Merchant Service Guild of Australasia v Newcastle and Hunter River Steamship Co. Ltd. and Other (1913) 16 CLR 591.
As Creighton and Stewart (1990: 63) have noted, "if there is a conscious and premeditated desire ... to involve the Commission, the dispute will normally be formulated in such a way as to fall within the parameters of the Commission's jurisdiction". It might be pointed out that this accepted process of creating disputes is not obvious on the face of the law. It is a product of practice.

Unlike in Australia, the creation of "paper disputes" does not appear to be an institutionalised practice in Nigeria. Under the Nigerian law a dispute situation is said to exist when there is a failure by the parties, at the end of the procedures of direct negotiation machinery, to resolve a dispute. This situation brings the parties to the point where reporting the dispute to, or apprehension of the dispute by, the Minister is mandatory. The party doing the reporting is expected to do so in writing and to state the points on which disagreement has occurred. The Minister apprehending may in writing inform the parties or their representatives of his apprehension and the steps he proposes to take to resolve the dispute.

The foregoing analysis has demonstrated that, although notification takes place at different points in the Australian and Nigerian processes of dispute settlement, the laws of the two countries have, in a similar manner, made this stage mandatory for the parties to an industrial dispute. In addition these laws have also similarly vested the tribunals with the power to apprehend and to assume jurisdiction over such dispute, with or without the consent of the parties.

5.2.3 Conciliation of disputes

Although there is a tendency to confuse conciliation as practised in Australia and Nigeria with the conventional collective bargaining in countries like Canada, the United States of America and Britain, the position is that conciliation in the laws of Australia and Nigeria appears peculiarly different.
Niland (1978: 16-19) has shown that conciliation in Australia breaches the five basic or necessary elements of conventional collective bargaining. The summary of his argument by Brooks (1988: 33) is apt:

[Conciliation] occurs only after legal procedural steps have been completed; it occurs under the supervision of permanent industrial tribunals which play an active part in the process; it is compulsory and the agreement which emerges conforms to a common pattern as the parties know with a high degree of precision the likely outcome if the dispute is unresolved at conciliation and goes to arbitration. This conformity and predictability is a contrast to unfettered collective bargaining which is characterised by general uncertainty as to the outcome of the final contract.

In Nigeria, conciliation is a legal requirement which is invoked at a certain stage in the settlement of trade dispute whether or not the parties have a "positive philosophical commitment to the process"; the conciliator is required to take an active part in the process; the parties know that the terms of settlement concluded under a third party not of their choice will be incorporated in the contracts of employment of their members; and they also know that failure to resolve the dispute at that stage will result in arbitration. As in Australia, this process can hardly be regarded as a conventional bargaining.

How is the process of conciliation provided for in the Australian and Nigerian laws? The Australian law makes conciliation one of its chief objects. S.2(III) of the original 1904 Act expressed this object as: "to provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties". In subsequent amendments, the expression came to be: "to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes" [s.2(b) of 1904]. Although recast in different words, the same object is maintained in the 1988 Act [see s.3(b)].

The law goes further to set out how this object is to be achieved. Where an industrial dispute has been notified in accordance with the law or apprehended, the Presidential
Member shall, unless it would not assist the prevention or settlement of the dispute so to do, refer the dispute for conciliation by himself or another member of the Commission [s.25(4) of the 1904; s.100(1) of the 1988 Act].

At this stage the law enjoins the Commission to do all such things, appearing to be right and proper, to assist the parties to reach an agreement on terms for the prevention or settlement of the dispute. Such things include arranging conferences for the parties or their representatives presided over by the member, or conferences at which the member is not present. These conferences, which can be called on the tribunal's own motion or upon application made by a party to, or intervener in, the dispute, are compulsory (see ss.26 & 27 of the 1904 and ss.102 & 119 of the 1988).

The conciliation process is considered complete when agreements settling the dispute have been reached or when the tribunal is satisfied that conciliation is not likely to be achieved within a reasonable time (s.29 of 1904 and s.103 of 1988).

Commentators on the Australian system have observed that there is a strong emphasis on conciliation in the process of dispute settlement. For instance, Kirby, C.J. once said: "we all rely heavily on the availability of Conciliators to bring about settlement of disputes by negotiation" (quoted in Sykes and Glasbeek, 1972: 505). This emphasis is also apparent in the remark by the Hancock Committee, after they had reviewed the conciliation procedures as set out in sections 25(4), 26, 27, 28, 29, 34 and 34A of the 1904 Act. They said: "Thus it is a feature of the present legislation that a priority is given to the conciliation phase in the dispute settling process" (see p.535).

It might be added that the observed emphasis on the process of conciliation can be traced to the inception of the system in one of Deakin's addresses to the House of Representatives in 1903 on the Conciliation and Arbitration Bill. There he referred to the Court which was being proposed as "first a committee of conciliation and then a court of arbitration" (CPD, 1904 vol.XVIII: 767). One of the early practitioners of the
The process of conciliation in Nigeria begins upon notification or apprehension of a trade dispute, assuming that the authority before whom the dispute has come would not need to order compliance with the requirements of direct private negotiation. This is similar to the Australian process of conciliation. But, unlike in Australia, the authority empowered to initiate conciliation process in Nigeria is the Commissioner/Minister in the Ministry of Labour - an arm of the Executive Government as opposed to a separate tribunal.

The authority receives notification on, or apprehends, a dispute and may appoint a fit person to act as a conciliator. The practice seems to be that the person is appointed from among senior labour officers in the Ministry of Labour. This person shall inquire into the causes and circumstances of the dispute and by negotiation with the parties endeavour to bring about settlement.

The process is completed either when agreement is reached and a memorandum of the terms of the settlement is signed by the parties and forwarded to the authority or when the impasse is unresolved and the conciliator reports same to the authority (see ss.5 & 7 of 1968 and s.6 of 1976).

It has been observed that to ensure effective achievement of conciliation, the Ministry of Labour would send guides to professional officers in the Labour Division of the Ministry. These guides provide hints on the attitudes of conciliators, approaches to conciliation, etc (see Ubeku, 1983: 172-173 for summary of one of such guides). There is no indication that this course of action necessarily leads to an effective conciliation process in Nigeria.
5.2.4 Arbitration of disputes

The final stage in the process of preventing or settling industrial disputes in Australia and Nigeria is arbitration. Generally, this stage occurs when conciliation fails.

In Australia, the first Commonwealth legislative provision for arbitration occurred in s.2(IV) of the original 1904 Act and it reads: "In default of amicable agreement between the parties, [the object is] to provide for the exercise of the jurisdiction of the Court by equitable award". Perhaps, to be consistent with the nature of the award which it was expected to make, the Court was enjoined to act "according to equity, good conscience, and the substantial merits of [industrial disputes]" (s.25 of the Act). This provision has been retained in subsequent changes to the law [see s.40(1)(c) of the 1904 Act as amended; s.110(2)(c) of 1988].

The need to avoid legalism was expressed in paragraph s.40(1)(b) of the 1904 Act as amended, thus: "the Commission is not bound to act in a formal manner and is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks just". This paragraph has been reproduced, more or less verbatim, in the Nigerian law [see, in particular, s.27(3)(a) and (b)] of the 1976 Decree.

Where conciliation fails or the dispute has not been wholly settled, the Australian law empowers the Commission to refer the dispute (or the unresolved part) to arbitration (s.30 of 1904; 104 of 1988). The referral is automatic. Barring the provision in s.22, now s.105 of 1988, (i.e. with regard to either party objecting) and any matters reserved for the Full Bench, a member of the Commission who had taken part in conciliation can also arbitrate if the same dispute is referred for arbitration.

It should be noted that the 1972 amendment to the 1904 Act introduced a "task force" principle into the organization of the Commission for the purpose of dealing with industrial disputes. According to s.23 of the Act (s.37 of 1988), the President may assign an industry or a group of industries to a panel of members who shall exercise the
functions/powers of the Commission in relation to that industry or group of industries. In the ordinary course of events, therefore, when a dispute is referred to conciliation and ultimately to arbitration, it will be handled by the appropriate panel of the Commission.

In Nigeria, upon the failure of conciliation, the authority (i.e. the Minister for Labour) to whom the report is made shall refer the dispute either to the IAP (s.7 of 1976) or, in some circumstances, directly to the National Industrial Court (NIC) (s.12 of 1976) for arbitration. Whether the Minister directs the dispute to the IAP or the NIC, the referral is, as in Australia, automatic and mandatory.

The format of the referral to the IAP usually indicates the power under which the referral is being made, confirms the existence of a dispute not settled by "intervention", and specifies the terms of the referral. It is worded as follows:

"IN THE MATTER OF SECTION OF THE TRADE DISPUTES DECREE, 1976

AND

IN THE MATTER OF A TRADE DISPUTE BETWEEN ... AND ...

Whereas a trade dispute has arisen and now exists between the ... and ...
And whereas the endeavours to promote a settlement through intervention have proved unsuccessful;

Now therefore, I [name and office of the Minister], in exercise of the power conferred upon me by Section 7 of the Trade Practices Decree, 1976, hereby refer the matter in dispute to the Industrial Arbitration Panel with the following terms of reference:-".

For the purpose of settling the dispute, the Chairman of the IAP is to constitute an industrial tribunal which may consist of a sole arbitrator, a single arbitrator assisted by appointed assessors, or one or more arbitrators nominated in equal numbers by each party to the dispute from the panel of employers' and workers representatives drawn up by the Minister in accordance with s.33 of the Act [s.7(3) of 1976].* While the arrangement of this panel system appears different, its underlying philosophy is similar to the one which informed the "task force" approach introduced in Australia in 1972.

* Perhaps, the actual practice of this procedure differs markedly. But this is beside the point.
5.3 Products of compulsory arbitration

The processes of compulsory arbitration in Australian and Nigerian laws which have been examined in the foregoing section produce outcomes called consent and arbitral awards. These awards are not subject to judicial review on the merits. In the laws of both countries, while proceedings of the tribunals may be challenged and halted by applications on jurisdictional questions to superior courts, the tribunals' final awards are final and binding. The enforcement of these awards is backed by sanctions which the tribunals have powers to impose. These characteristics are examined in this section in more detail.

5.3.1 Certified agreements and Consent awards

In section 5.2.1 above, it has been shown that the Australian and Nigerian laws recognise collective agreements concluded outside the formal systems or in the course of the conciliation and arbitration processes. The certification of these agreements makes them certified agreements or consent awards, as the case may be, and gives them a binding force.

There is a subtle difference between the two. Whereas certified agreements are memoranda drawn up by the parties and endorsed through certification by the tribunal or portfolio authorised by law, consent awards are orders of these institutions which embody the terms of settlements reached by the parties. However, both stand in the same status as awards for the purposes of enforcement (Creighton, et al, 1983: 369).

In the Australian law, certified agreements and consent awards are binding on each of the parties who make the request that their memorandum be certified. The binding effect, of consent awards in particular, is upon all members of an organization that is such a party, and an employer who is a successor to or an assignee or transmittee of the business of such a party, including a corporation that has acquired or taken over the business of such a party [s.28(4) of 1904; s.112(3) of 1988].
It is not obvious on the face of the law whether industrial agreements (Part X of 1904 Act) need be certified before they can acquire a binding force. Neither is it obvious whether they must come within the limits marked by s.51(xxxv) of the Constitution before they can be certified by the Industrial Registrar that they are duly made and executed pursuant to the Act. However, under ss.174 and 175 of the 1904 Act, they must comply with the form and filing requirements. On the other hand, since the memoranda under s.28 of 1904 Act and 112 of 1988 Act are made, clearly, in the course of the formal proceeding of arbitrable disputes, it is straightforward that all the constitutional and statutory criteria which determine whether or not the tribunal has jurisdiction to arbitrate must be fulfilled before they can be certified and be deemed to be awards for all the purposes of the Act. This was the view of Sykes and Glasbeek (1972: 647) on this provision, then s.31 of the 1904 Act. Creighton, et. al (1983: 370) have put the matter this way: "certified agreements or consent awards going beyond the Commission's jurisdiction are not illegal. They are merely unenforceable and have none of the attributes of a valid award".

In the *Industrial Relations Act 1988*, certified agreements and consent awards have been put in two separate sections: the former in s.115 and the latter in s.112. This is probably due to the intention of the new law to give certified agreements a scope of operation wider than that of the consent award (see s.116 of 1988). For, subject to some residual controls such as a review by the Full Bench of the Commission upon application by the Minister [s.117(1)], or a declaration by the Commission to unbind a party upon application made by that party against whom an industrial action has been taken by the other party to the agreement [s.117(6)], the agreements, during their operation, will prevail, as far as the parties are concerned, over any award dealing with the same matters and the Commission is not empowered to vary them otherwise (see Creighton and Stewart, 1990: 69). Although Mitchell notes in his comment on this provision as expressed in the *Industrial Relations Bill 1988* that it is "not a scheme for opting-out in the sense proposed by *Hancock*", it can be suggested that the scheme,
now on the statute book, is "a partial response" to Hancock (Creighton and Stewart, op cit).

The certified agreements and consent awards in Nigeria acquire a legal force once the authority makes an order specifying that their terms are binding on the employers and workers too whom they relate [s.7(4) of 1968; s.6(3) of 1976]. However, as in Australia, they must conform to the statutory requirements of being in writing and deposited/filed within 30 days before the binding order can be validly made on them. As at 1985, seventeen years after the provision was made in the 1968 Decree, the authority had not exercised its power to make an order on collective agreements (Uvieghara, 1985: 146). This implies that, in practice, the collective (procedural and substantive) agreements which had been concluded up to that time operated or were in force by what Imoisili (1984: 385) has described as "mutual consent" or "common understanding".

5.3.2 Arbitral awards
The products of the arbitration stage in the process of dispute resolution in Australia and Nigeria are arbitral awards. Unlike the products of the other processes, the element of consensus is, technically speaking, absent in these awards. Once validly made, the awards are "binding and conclusive".

The Australian law provides directives for the subjects, framing and operations of this type of award. Those dealing with the subjects can be seen in ss.48, 51-55 of the 1904 Act and ss.94-97, 123 of the 1988 Act. The subjects covered include rates of wages, uniformity throughout an industry in relation to hours, holidays and general conditions, schemes of apprenticeship, safety, health and welfare of employees. The awards are to be framed in such a manner as to best express the decision of the Commission and to avoid unnecessary technicalities (s.56 of 1904 and 144 of 1988).
Furthermore, in terms of the operation, the awards are to specify the period during which they will continue in force. The periods nominated in s.58(1) of the 1904 Act (five years for arbitral awards and three years for certified agreements) have been left out in the 1988 Act. They are now replaced by the directive that the Commission have regard to the wishes of the parties to the industrial dispute and the desirability of stability in industrial relations. This new provision (i.e. for the Commission's cognizance of the wishes of the parties) does not suggest that the consensus of the parties is now required for the making of awards.

In the Nigerian law, the making of arbitral awards is governed by ss.7, 9-12 of the 1976 Decree. When a dispute is referred to arbitration, the tribunal had, under paragraph s.9(1)(a), to make its awards within 42 days of its constitution or such longer period as the Minister may in any particular case allow. By the Decree No. 39 - Trade Disputes (Amendment) Decree 1988 [s.1(d)], the former period has been reduced from 42 to 21 days. This has restored the period which was stipulated in paragraph s.12(1)(a) of the 1968 Decree.

Upon making the award, the tribunal is to send a copy thereof to the Minister. The Minister may refer the award back to the Tribunal for re-consideration (no grounds specified) or give/cause to be published a notice to the parties setting out the award and specifying the time and manner for a notice of objection to be lodged with her/him. Barring all this, the Minister is to publish in a Gazette a notice confirming the award, thus making it binding on the employers and workers to whom it relates.

Where an objection to the award is raised by the parties according to the Decree, the Minister shall refer the dispute to the NIC whose award shall be final and binding. If the terms and conditions of employment in this award are more favourable than any statutory provisions, i.e. "in any written law [and instruments made under them] in force in Nigeria", the award shall prevail [see s.10(3)].
Ubeku (1983: 174) has joined issue with the argument of Adeogun that "the awards of the IAP should, without more, become binding on the parties immediately upon publication, leaving it to the parties themselves to decide whether or not an appeal should be lodged with the National Industrial Court". This argument can be interpreted to have two parts: one, the provision that the award of the IAP should be confirmed by the Minister before it acquires a binding force is unnecessary and reduces the independent stature of the IAP; and two, the parties should have direct access to the NIC.

Ubeku's disagreement seems to be with the first part of the argument. He believes that "the IAP, sometimes out of enthusiasm, hands down decisions that are not in accord with practice in industry" or which offend "provisions of government's incomes policies". Therefore, "the involvement of the Minister of Labour is necessary to ensure that the award is not only fair and just but in accordance with government economic parameters and industrial practice generally".

Obviously there is the need for awards to be fair, just and in accordance with policies and practice. What is not clear is whether Adeogun's argument per se jettisons these virtues and how the involvement of the Minister by way of confirming awards necessarily guarantees such virtues. Ubeku talks of the need of opportunity for the Ministry of Labour to register awards for future experience and to be made aware of actions taken in law in the settlement of disputes. This objective can easily be accomplished through an administrative arrangement requesting the IAP to deposit their determinations with the Ministry on a regular basis. What this aspect of Ubeku's argument seems to ignore is the fact that without the power to vary any award (see s.9 of 1976), the Commissioner/Minister could do very little to ensure fairness in awards. Regarding the need for harmony between awards and government incomes policies, Ubeku himself cited a case which, on the face of it, shows that the involvement of the Minister may not, in itself, guarantee harmony. The award of the IAP in the Management of the Nigeria Airways Ltd. v Airline Pilots Association of Nigeria in

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7 The page reference to Adeogun (1976) in Ubeku's note 24 should be 6, not 5.
October 1975 was confirmed six months later by the Federal Commissioner of Labour (as the office was then called). The federal government considered the scale of salaries awarded too high, was apparently unhappy about this and, in the circumstances, passed the *Industrial Arbitration Tribunal (Variation of Certain Award) Act 1979* to annul the award. Where does the "lapse" lie: with the enthusiasm of the IAP or the Commissioner who did not pick out the lack of harmony of the award with government incomes policy? In any case, the guidelines which are issued at the beginning of every financial year since 1977 by the Productivity, Prices and Incomes Board under the *Productivity, Prices and Incomes Policy Act 1977* are meant to ensure harmony between awards on wages and government incomes policies.

It must be mentioned in passing that the power of intervention, as shown in action of the government in the above-cited case, is reminiscent of the power of the Australian Commonwealth Parliament over its public servants. As Higgins (1922: 36) has pointed out, although the Parliament entrusted the function of the settling of wages, hours and conditions of labour for Federal public servants to the Arbitration Court in 1911, the Parliament retained the final control. Until 1983, if an award was made on those issues, it would "not come into operation till the expiration of thirty days after it has been laid before both Houses, and Parliament [could], ... pass a resolution disapproving of the award".

It might appear from the foregoing discussion that the role of the government shows a significant difference between Australia and Nigeria with regard to the entire process of award-making. There is a view that apart from the National Wage Cases where the Industrial Relations Commission must consider macro-economic matters and the Commonwealth government is just one party making submissions, there is little political intervention in Australia as in Nigeria. This does not reflect the whole matter. In law and practice, significant political intervention exists in both countries. Beside the submissions by the government in wage cases in Australia, ss.36 and 106 of the 1904 Act or 44 and 60 of the 1988 Act give rights of intervention to the Minister in matters
before the Commission and Industrial Court. And, in addition to the clash between Hughes (the then Prime Minister) and Higgins (the then President of the Arbitration Court) summarised earlier in the thesis, there are other illustrations of the practice of political intervention in Australia (see Hancock, 1979: 15).

5.3.3 Status of awards

It is probably evident from the presentation in the preceding sections of this chapter that the Australian and Nigerian laws place great importance on permanent public tribunal awards. This has involved, among other things, placing awards at the apex of their respective systems. But, what is the juridic nature or character of these awards? And to what extent are they subject to substantive litigations or judicial review? These are the questions now to be examined.

Although it has been said that the character of the federal awards in Australia has never been a central focus of major inquiry, there are hints as to how they are to be classified - that is, whether they should be classified as judicial, quasi-judicial, legislative or administrative. Creighton, et al (1983: 374) consider Fullagar's, J. remark, in *R. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* (1952) 86 CLR 283, an adequate statement on the character of the awards. At p.319, Fullagar, J. said:

[An award] is not subordinate legislation. It is not legislation at all. It is no doubt, an "instrument" in the general legal sense: it is a document affecting rights. ... The making of an award is not an exercise of judicial power, but an award is essentially a decision inter partes upon matters in dispute inter partes.

This position appears to be at variance with some other descriptions of the character of the awards. For instance, the often quoted description of the New Zealand equivalent by Salmond, J. states that "an industrial award is in form a judicial decree, but in substance is an act of legislative authority". This is similar to the position of Sykes who, in his "Labour Regulation by Courts: the Australian Experience", says:

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8 This statement is said to have been made in *New Zealand Waterside Workers' Federation v. Frazer* (1924) 43 NZLR 689 at 708.
When the court makes the first award for an industry, there will be a host of matters of a general nature provided for which are not in dispute between the parties at all. The parties want a legislative code, and a legislative code is what they get (Sykes, 1957: 471) (emphasis, mine).

He maintained this position in a later work where he remarked that "once it was clear that 'dispute' meant no more than that there was an issue for decision, the way was open for the tribunals to exercise a general legislative function in relation to which the judges were no more restricted than was the medieval chancellor in England" (Sykes, 1980: 311).

The apparent controversy apart, it will be recalled from chapter four that the Australian system was intended by its framers to be a judicio-administrative structure. The ultimate product of such a structure will, at the very least, be a charter of the rights and obligations of the parties whose disputes have been prevented or settled by the structure. As a charter, an award will, for all intents and purposes, be legislative in character.

If the treatment of the character of awards has only been incidental to other inquiries in Australia, in Nigeria it seems non-existent. Nonetheless there is a legislative conception in which awards are given the character of a charter of rights and obligations. With this character, the awards prevail over existing contracts of employment. For, as provided in s.37(2) of the 1976 Decree, where there is a binding award,

the contract between the employers and workers in question shall be deemed to include a provision that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the award or terms of settlement until varied by a subsequent agreement, settlement or award; and accordingly the provisions of that contract shall be read subject to the award or terms of settlement and any failure to give effect to the award or terms of settlement shall constitute a breach of contract.

Being implied into the contract of employment, a breach can give rise to claims for damages (Uvieghara, 1985: 163). It is pertinent to observe here that the situation about implying awards into existing contracts of employment in Australian labour law is obscure, as it has remained largely unexplored. The only available research on this
aspect of the Australian labour law seems to be the work of Mitchell and Naughton (1989) whose problematic is derived from Gregory v. Philip Morris (1987) 77 ALR 79.

With respect to judicial review, the language of the law in Australia and Nigeria has led to some debate about the extent to which the awards of the industrial tribunals can be challenged in the ordinary courts. In both countries, there are provisions to the effect that the awards are final and conclusive. The question is, are these provisions intended to oust the appellate jurisdictions of the superior courts of record of the realm? Are they also intended to oust the original jurisdiction of the highest courts to entertain applications for a writ of mandamus or prohibition or an injunction over all matters?

S.60(1)(a)-(c) of the Australian 1904 Act provides that "subject to this Act, an award (including an award made on appeal) is final and conclusive; shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and is not subject to prohibition, mandamus or injunction in any court on any account" [see also s.150(1) of 1988]. "An award made on appeal" in this provision refers to the award which the Full Bench of the Commission makes upon an appeal against an award or decision of a member of the Commission (see s.35 of 1904; s.45 of 1988).

It can be read from these provisions that the only review contemplated is internal and not external to the tribunal system. The internal appeal process was first proposed in 1947 but was defeated by the opposition of the Labor Party. It was finally introduced into the system by the 1952 amendments. The then Minister for Labour in the Liberal-Country Party Government, Harold Holt, gave the reason to be that the government wanted "to achieve co-ordination on large questions of industrial principle and ... a more authoritative decision on large industrial issues" (Healey, 1972: 82-86). This provision was introduced at the stage when the arbitral functions of the system were divided between the judges of the Arbitration Court and a number of Conciliation Commissioners.
Regarding the exclusion of external review, there are comments which show that, subject to certain exceptions, this "protection" stems from a concern to exclude delays associated with judicial procedures. Portus (1971: 79) argues that

in legislating this way the parliaments [i.e Commonwealth and States] were in effect saying that the arbitrator's decision may be in error but it is better that this should happen rather than allow the normal legal machinery to exist for the correction of errors which entails delays and additional expense. If the error is important the legislature can correct it.

Like Portus, the ILO (1980: 177) has supported the understanding that such provisions give expression to "one of the principal concerns of policy-makers in planning the design for compulsory arbitration [which] is to avoid the delays usually associated with judicial procedure, of which one of the main causes is the taking of appeals". Yet Murphy (1984: 86) has observed that s.60 has not been very effective, presumably because "the proceedings of the Commission can so easily be halted by application to the High Court for constitutional writs of prohibition, mandamus or injunction".

There are good summaries of the judicial interpretations of these "final and unappealable" provisions in the Australian law in Mills and Sorrell (1975: 234-237) and Creighton and Stewart (1990: 71-72). From these it can be gathered that, while the awards of the tribunal may be appealed against on the question of excess or absence of jurisdiction, they are not subject to judicial review on the merits. This understanding is in accord with Deakin's explanation in 1904:

once an award has been made, it stands, unless varied by the Court itself, without appeal to any other Court of the realm. The decision is final, unless, of course, challenged as outside the law altogether. Within its own limitations and the powers of the Court, an award is subject to no appeal (CPD, 1904 vol.XVIII:773).

Generally, the argument on the jurisdictional appeals turns on the questions: is there a dispute?; does it relate to industrial matters?; and does it extend beyond one State? There is the view that such appeals cannot be sustained before the High Court under s.73 of the Constitution because the Commission, whose awards are supposed to be the subject of the appeals, is not a Federal Court within the meaning of the Constitution.
However they can be sustained under s.75(v) of the Constitution which gives the High Court original jurisdiction "in all matters in which a writ of Mandamus, or prohibition or an injunction is sought against an officer of the Commonwealth", since the Commissioners are officers of the Commonwealth. Although the Federal Court, since 1983, now possesses concurrent jurisdiction in regard to this section of the Constitution, it does not share in the jurisdiction over the 1904 and 1988 Acts with the High Court (see Creighton and Stewart, 1990: 71).

The volume of the High Court cases relating to the awards of the tribunal suggests that the High Court has not shunned this constitutional right. In fact, at the early stages, the Court had fought to retain the right. When the Fisher Labor Government amended the 1904 Act in 1911 and provided for the removal of the High Court's power to issue prohibitions in respect of federal awards, the Court declared the amended section invalid, "thus reserving to itself the right of deciding whether the [Arbitration Court] was acting within its powers" (Plowman, 1983: 12-13).

In Nigeria the balance of opinion seems to be that the awards of the tribunal are not subject to judicial review except on the question of jurisdiction. Within the framework of the law, Part II (item 7) of Schedule 1 to the 1968 Decree did provide that "the Arbitration Act shall not apply to any proceedings of an arbitration tribunal appointed under this Decree or to any award made by such a tribunal". The relevant law which this provision has excluded can be found in s.12 of Arbitration Ordinance 1914 (Cap 13 of the Laws of Nigeria). That section states:

"12(1) Where an arbitrator or umpire has misconducted himself, the court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside".

Thus, under the 1968 Decree, the power of the ordinary court to remove arbitrators and to set aside awards was disallowed. Also, item 10 of Schedule 1 to the 1968 Decree did
provide that "an act, proceeding or determination of an arbitration tribunal ... shall not
be questioned on the ground that a member or assessor was not validly appointed ... ".
This is now operational under s.8(4) of 1976 Decree. And in s.15(2) of this Decree
there is another provision that "No appeal shall lie to any other body or person from
any determination of the [National Industrial] Court".

Although this framework of the law tends to suggest complete immunity from judicial
review for the awards of the arbitration tribunals, judicial decisions and subsequent
legislative changes show that judicial review, at least on jurisdictional questions, has
been available. For instance, in Bashorun v. Industrial Arbitration Panel (1971)^,
Odesanya, J. held:

Industrial disputes are ... committed to the special Tribunal instead of
the Courts. Judicial control of its awards and determinations will,
however, ensure that such awards and determinations are kept within the
law including the provisions of the Constitution. In my view any award
by the Tribunal must be made within the law. Otherwise it is made
without or in excess of jurisdiction ... There is nothing in the Decree
outsting the supervisory control of the Court or preventing judicial
review of awards made by the Tribunal. Even if a clause is inserted into
the Decree ousting the jurisdiction of the Court as long as an award is
prima facie ultra vires ... the High Court will intervene (quoted in

An amendment in 1978 (No. 25) inserted s.15(3) into the 1976 Decree, providing that
the exclusive power of the NIC to make awards and determinations and the `no appeal'
provision "shall not prejudice any jurisdiction of the Federal Court of Appeal under
section 259(1) of the Constitution of the Federation or any jurisdiction of a High Court
under section 42 of that Constitution"^1 0. The comment of Uvieghara on this provision
is scanty, but his submission on the legal status of the awards of the NIC with regard to
this provision is probably the most comprehensive submission available on this
question of judicial review (see Uvieghara, 1985: 166-170). The reading of the
Constitutional provisions shows that the jurisdictions of the Federal Court of Appeal

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9 Unreported Lagos High Court Suit No. LD/105/71 of 22 March 1971.
10 It would seem that this 1978 amendment was made in anticipation of the Constitution becoming
operational in 1979.
and the High Court apply only to the extent that the awards raise "substantial questions of law" or contravene fundamental human rights. This is not judicial review on merits.

In 1988 there was a further amendment to the law - *Trade Disputes (Amendment) (No. 2) Decree 1988*. The amendment inserted s.15A into the 1976 Decree which states: "An appeal shall lie from the decisions of the Industrial Arbitration Panel to the Court as of right, in matters of disputes conferred upon it by section 15 of this Act". The explanatory note to the Amendment Decree states that "the Decree ... confers appellate jurisdiction on the [NIC] from the decisions and awards of the Panel". However, what in essence has been introduced is an internal review process, similar to the process introduced into the Australian law in 1952.

### 5.3.4 Enforcement of awards

It has been shown in chapter four that the central purpose of the compulsory arbitration systems in both Australia and Nigeria is the prohibition of direct industrial action within the context of achieving industrial peace. To attain this object, the settlements by the tribunals of the systems - by way of conciliatory and arbitral awards and determinations - should be respected by the actors between whom the settlements are effected. It is in order to secure this respect that provisions have been made in the laws to enhance the enforcement of the tribunals' awards.

As Creighton et. al (1983: 469-471) have shown, there is some difficulty in knowing where to draw a line between anti-direct action provisions and those for the enforcement of awards per se; and this difficulty should be recognised. In this sub-section, the emphasis is on those provisions which have direct bearing on the enforcement powers of the tribunals.

In the original Australian Act of 1904, Part IV - entitled "THE ENFORCEMENT OF ORDERS AND AWARDS" - provided for the Arbitration Court to impose penalties for any breach or non-observance of orders and awards, recoverable in any Federal or
State Court having civil jurisdiction. These penalties include the issuance and execution of "process ... against the property of any organization" or the members of the organization "where the property of the organization is insufficient to satisfy fully any process ..." (see ss.44-47; ss.119-121 of 1904-86; ss.178 and 357 of 1988).

Also the Arbitration Court was empowered to make an order in the nature of mandamus or injunction to compel compliance with the award or to restrain its breach under the pain of fine or imprisonment. This was in addition to the power granted to the President of the Court to require, from organisations submitting any industrial dispute to the Court, security of a maximum of 200 pounds for the performance of the award (s.33 of original 1904). The 1947 amendment to the Act, inserting what came to be s.119(3) and (4) of 1904, also empowered the Court to order repayment of wages to employees in actions for breaches of awards by employers, provided that the proceedings were commenced within six years after the commission of the breach [see now s.178(6) and (8) of 1988].

The law has contained an array of sanctions in these enforcement provisions. In addition, before their repeal in 1930, the express prohibitions of direct industrial action equally had bearing on the enforcement powers of the Court. Although they were manifestly anti-direct action provisions, "the generality of [their] application suggests that [they were] seen as part of the overall control mechanism in maintaining the authority of the Court" (Creighton, et. al, 1983: 470). These provisions carried with them sanctions of 1000 pounds for organisations for strikes or lock-outs and 20 pounds for individual employers/employees for dismissal of employees or ceasing to work for employers on account of awards.

It has been pointed out in chapter four that the 1930 amendment, in which the repeal of the anti-direct action provisions was effected, also marked the beginning of a defined use of a "bans clause" provision in awards. This provision enables the tribunal to insert a clause into an award, limiting the right of an organisation who is a party the award to
engage in any ban upon work (see ss. 32 and 33 of 1904; ss.125 and 181-186 of 1988). The content of such a clause suggests that the provision is an enforcement device directed, mainly, against workers' organisations. For example, the bans clause which operated in the Metal Trades Award from 1947 to 1969 reads thus:

(i) An employer may require an employee to work reasonable overtime ...
(ii) No organisation party to this award shall in any way, ... be party to ... any ban, limitation or restriction on the working of overtime ... (quoted in Hutson, 1983: 238).

Up to 1969, once this clause is breached, the aggrieved party is allowed to approach the tribunal for a statutory injunction to restrain the other party from continuing the breach. As Sorrell (1979: 73) explains, "if the union continued with its industrial iniquity, the employer could then issue a summons, not for a penalty for breach of award, but for the entirely inappropriate (or only technically appropriate) contempt of court".

The power of the Industrial Court to punish contempts of court was provided for in s.83 of the original 1904 Act. Although the construction of this section appears to show that the object was to protect the Court from verbal assault, it is reasonable to suggest that it also extended to any disregard for the Court's determinations. In s.111 of the 1904-86 Act, the contempt is shown to consist, specifically, of a failure to comply with an order of the Court made under s.109(1)(b), i.e. enjoining an organisation or person not to commit or continue a contravention of the Act or the regulations made under the Act.

Other enforcement provisions include those on the suspension or cancellation of awards (s.62 of 1904; s.187 of 1988), prohibition of incitement to boycott award (s.138 of 1904; s.312 of 1988) and deregistration or cancellation of the registration of organisations (s.143 of 1904; s.294 of 1988)\(^1\).

The 1928 amendment added a new ground for the suspension or cancellation of awards, i.e. a party to an award doing something in the nature of lock-out or strike; but, this was

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\(^1\) In Creighton, et. al. (1983: 498-500), other informal enforcement sanctions, including "refusal to arbitrate" (the history of which can be traced to Higgins) and "discounting an indexed increase for industrial disputation", were discussed.
later removed by the 1930 amendment to the Act. Although the provision on the suspension or cancellation of awards has not been widely used, there is little doubt that its existence in the law may be "an effective deterrent to those who might be tempted to stray from the paths of industrial righteousness" (Creighton, et. al, 1983: 498).

Equally seldom used is the provision on the incitement to boycott awards. Introduced into the law in 1930, this provision was designed to protect the award system against obstruction by holders of office in an organisation or branch of an organisation. Ironically it was introduced at the same time as the amendments to abolish the anti-direct action provisions, including s.87 of the original Act which made counselling or procuring any offence against the Act punishable.

With regard to deregistration of organisations, it is noted that the grounds which are relevant to the context of enforcement of awards are those stipulated in paragraphs (g) and (h) of subsection 143(1) of 1904 or sub-paragraphs (i) and (ii) of paragraph 294(1)(a) of 1988, i.e conduct in breach of order or award of the Court/Commission and conduct preventing or hindering the achievement of an object of the Act. Creighton et. al indicate that paragraphs (j) and (k) of s.143(1) - 1904 [now, (b) and (c) of s.294(1) - 1988] are also relevant.

A well known case in which the deregistration provision has been applied is R. v. Joske; Ex parte Australian Building Construction Employees and Builders Labourers' Federation (1974) 130 CLR 87. Commenting on the "green bans" campaign mounted by the Federation, Smithers, J. noted in that case that the resolve that the members of the Federation should voluntarily withhold their labour from green banned projects constituted ugly and menacing "conduct of the kind specified in s 143(1)(h) and [operated] to hinder and prevent achievement of objectives of the Conciliation and Arbitration Act".

12 The element of mens rea (criminal intent) in para. (h) of 1904 is now absent in para. (a) of 1988.
Of all the enforcement provisions, none has been so notoriously used as the "bans clause". Commentators on this aspect of the Australian law are agreed on the position that the bans clause procedure was "the established centre-piece of the enforcement powers" from the late 1940s until the late 1960s (see Boulton, 1986: 84-87; Creighton, et. al, 1983: 482-488; Creighton and Stewart, 1990: 221 and Hutson, 1983: 237-284).

In 1936, the High Court upheld the validity of inserting this clause in awards (Seamen's Union of Australasia), but it was only after it had been inserted into the Metal Trades Award in 1950 for the second time that its use became widespread. Between 1956 and 1969, there were at least 77 occasions on which the tribunal made or varied awards containing a bans clause. Within the same period, fines amounting to a total of about $282,410 were imposed upon unions for defying orders made in respect of the clause (Creighton, et. al., 1983: 486; Hutson, 1983: 242).

This period has come down in history as one in which the Australian arbitration system was ostensibly effective. There were 788 convictions and "up until 1967 all but one of the fines imposed upon unions under the bans clause provisions were paid" (Boulton, 1986: 84). The last two years of this period (1968-69) were particularly notorious. A major wave of industrial action followed the 1967 Metal Trade Award case and the unions were now beginning to avoid payment of fines. This culminated in what is popularly referred to as the O'Shea case.

The case is too well known to the scholars of Australian labour law to require more than a brief detail here. In 1969 the Tramway Employees' Association was fined for breaches of the bans clauses in their industrial award. The Victorian secretary of the Association, Clarrie O'Shea, refused to disclose information about or make the union funds available to pay the fine. He was jailed for contempt of the Industrial Court and, for this reason, the unions engaged the Commonwealth government in a serious confrontation. The government "backed away" and thereafter the bans clause penalties
fell into disuse: the case marked the end of an era of enforcement of awards based largely upon the bans clause procedure. In Rawson's (1980: 293) words, this case was the culmination of a period in which the Commonwealth Industrial Court had been imposing increasingly heavy penalties on trade unions for breaches of 'bans clauses' in arbitration awards ... From the time of the O'Shea case it was plain ... that the imposition of sanctions was at an end, at least for that era.

Indeed, the case led to significant amendments of the law in which procedures for dealing with breaches of bans clauses in awards were tightened. For instance, ss. 32 and 33 of the 1904 Act (as substituted by No. 37 of 1972) intended "that there would be no prosecution under the bans clauses unless the dispute has been investigated by a Presidential Member of the Arbitration Commission" (Rawson, 1980: 294). There was an attempt, in Part VI (Division 4) of the Industrial Relations Bill 1987, to replace these procedures with "directions" procedures. The Bill failed and the strictured "bans clause" were restored, but with further tightening, in the 1988 Act.

It is pertinent also to examine the structural aspect of the enforcement of awards as provided within the Australian law. In this regard it seems that governments on the conservative wing of politics have taken most of the initiatives, rightly or wrongly, in setting up structures for the enforcement of awards.

In 1928 the appointment of Inspectors who would secure observance of awards was introduced by the Bruce-led National-Country Coalition Government through an amendment to the Act (see ss. 36 and 42 of No. 18, 1928). The Menzies-led Liberal-Country Coalition Government advanced on this by establishing an Arbitration Inspectorate in 1950. It was the function of this Inspectorate, being referred to as the "industrial policeman", that was taken over by the Industrial Relations Bureau which was created by the 1977 amendment to the Act under the Fraser-led Liberal-National Coalition Government13.

Part VIA of the *Conciliation and Arbitration Act 1904-82* specified the functions of the Bureau. In the interpretation of Dabscheck and Niland (1981: 262-3), these functions included (1) securing the observance of awards, orders and agreements made under the Act; (2) acting as a type of industrial ombudsman helping organisations and individuals become aware of their rights and obligations under the Act; and (3) ensuring the lawful conduct of the parties in the overall industrial relations process.

In June 1983 the Bureau was abolished by the Hawke-led Labor Government. In its place, Part V of the 1988 Act has provided for the appointment of inspectors (under the *Public Service Act 1922*) who are empowered to initiate proceedings to secure penalties for the contravention of awards. This is, in some ways, a return to the 1928 approach where the issue of an inspectorate was first raised.

In the Nigerian law, the provision for enforcement of awards began with the stipulation of an offence with no specific penalty. S.7(4) of 1968 Decree provided that non-compliance with a confirmed conciliation memorandum was an offence under the Decree. However it was provided in s.19 that any person guilty of an offence under the Decree for which no special penalty is provided was liable, in the case of an individual, to a fine of 50 pounds or 3 months imprisonment or both; and, in the case of a body corporate, to a fine of 500 pounds maximum. In a rather general way, the amendment Decree (No. 2) of 1969 introduced another enforcement provision. It empowered the Inspector-General of Police or the Chief of Staff of the Armed Forces to direct any person concerned with acts prejudicial to industrial peace to be detained in a civil prison or police station [s.6(1) of 1969]. Although there is no indication that the offence exists only if the person to be detained is a party to any confirmed industrial agreement, the provision was wide enough to have covered breaches to awards so long as they could be regarded as prejudicial to industrial peace.
The 1976 Decree specifies some procedures relating to the enforcement of the awards of the IAP and the NIC. In s.2(4), failure to comply with the terms of an order confirming a collective agreement is an offence punishable by a fine of 100 naira or imprisonment for six months. Also a 1977 amendment (No. 54) inserted other enforcement of awards provisions into the 1976 Decree. Sub-section (3A) of s.6 provides for the punishment of any breach of "consent award", i.e a signed memorandum of the terms of settlement forwarded to the Minister by the conciliator. Sub-sections (4) and (5) of s.9 and (4) and (5) of s.10 punish breaches of arbitration awards and awards of the NIC respectively. The prohibition of industrial action, "where the NIC has issued an award on the reference" [s.13(1)(f)], applies to the enforcement of awards as much as it does to strikes and lock-outs (its application to the latter has been shown in chapter four).

The 1977 amendment also changed the penalty figures to 200 naira for a worker or trade union; and 2,000 naira for employer or employer organisation for offences under s.6(3A) of 1976; and the same figures for offences under s.9(4) and s.10(4). These figures run for each day on which the offences continue.

As in the Australian law, the penalties attached to these offences are exercisable in the jurisdiction of ordinary courts. Since the terms of agreement or awards are implied into the contract of employment of the employers and employees to whom the settlements and awards relate, any aggrieved party could bring an action for breach of contract in either the magistrates court, if the amount involved is not more than 1000 naira or the High Court, if the amount is more than 1000 naira. This arrangement has been found to be inadequate in terms of the powers of the NIC to enforce its judgements.

The *Nigerian Union of Civil Typists, Stenographic and Allied Staff v. Attorney-General of Ogun State and Governor of Ogun State* (1982-83) NICLR 190 provides an illustration of this inadequacy. In a judgement on March 12, 1981, the NIC had awarded that all the Governments of the Federation should pay the new scales of salary
to the members of the Union with effect from April 1, 1980. All the governments who
complied with the award did so fully, with the exception of Ogun State Government
which complied partially. The Union then brought the action, asking for the direction
of the Court to enforce the judgement against Ogun State.

The Court ruled that the officers of the Union were at liberty to file claims either
individually or collectively in the appropriate High Court or Magistrate's Court.
Adesalu (1984: 16) expresses the view that this was begging the question and that it
prolonged matters which could have ended quickly had the Court the powers to enforce
its judgements.

Another inadequacy which Adesalu deprecates is in respect of the contempt of court.
Unlike the Australian law, the Nigerian law did not empower from the start of the
system the arbitration tribunals, themselves, to punish for contempt. For instance, s.26
of the 1976 Decree empowers the tribunals to compel attendance by persons and
production of materials for the purpose of dealing with any trade dispute or other
matter referred to them under the Decree. Indeed they are to exercise these powers as if
they are powers "exercisable by the Supreme Court of Nigeria". However, although the
Supreme Court can punish a breach of its directions in respect of issues similar to the
ones in s.26, the arbitration tribunals could not. Sub-section (4) of s.26 "took away the
steam" by vesting the power to punish contempt of the tribunals in the High Court.

Adesalu's proposal is that subsection (4) be repealed. However there is another
argument, mounted by Audi (1986: 45-47), that the Court has not availed itself of the
power to commit persons of contemptuous conduct to the High Court, limited as the
power may be. An example is the Management of Union Bank of Nigeria Ltd. v.
National Union of Banks, Insurance and Financial Institution Employees (1982-83)
NICLR 185. In that case, the workers "deliberately defied the NIC's order to go back to

14 According to Audi (1986: 49), the Court's notes show that 11 out of 19 States complied in full. With
the creation of Akwa Ibom and Katsina States in 1987 and nine more states in 1991, there are now 30
States in Nigeria.
work pending judgement". Rather than committing them to the High Court, the response of the NIC was, like the Australian Arbitration Court under Higgins, to refuse to hear the case until they complied with the order to go back to work. Audi sees this failure to utilise the minimum power that the Court has as the result of sympathising with the view that it was difficult for the trade union leaders to persuade the rank and file to see reason. She argues that the Court should not have been carried away by such an extra-legal consideration.

Indeed Adesalu had referred to other cases where the management defied the awards of the Court to further underline the point that the Court's enforcement powers were inadequate. While the Court could not punish this contemptuous defiance, there is no indication that in those cases, such as the *Stadium Hotel v. National Union of Textiles and Personal Service Workers* and the *Western Textile Co. Ltd & Anor v. National Union of Textile and Tailoring Workers of Nigeria*, the Court even committed the offenders to the High Court for contempt.

In 1988, the 1976 Decree was amended by Decree No.57 to empower the NIC and the IAP to enforce their awards and, at their discretion, to commit for contempt trial any person or representative of a trade union or association who commits an act or omission which, in the opinion of these tribunals, constitutes contempt (see the inserted ss.15B and 15C). Except for the provision in s.15C that the President of the NIC or the Chairman of the IAP "shall, until the trial, either admit [the person] to bail or send him to prison for safe keeping", it is difficult to see how these 1988 amendments have significantly improved the enforcement powers of the Nigerian tribunals.

Further, one's understanding on this matter is not helped by the report, in May 1989, that the Minister for Labour in Nigeria "has added another feather to the cap of the IAP" when he said that anybody guilty of contempt against the IAP "will henceforth be committed to jail" and that the Panel "has now been given judicial powers to enforce its awards" (Daily Times, Tuesday May 30, 1989, p.18). However, despite this uncertain
situation regarding the contempt powers of the Nigerian tribunals in contrast to the Australian tribunals, the provision of penalties (compensatory or punitive) for offences against the breaches of awards puts the Nigerian law in a position quite similar to the Australian law on the question of the enforcement of awards.

Generally, the fact that in Nigeria a person can go to jail in lieu of fines for breaches or offences under the law while in Australia the penalties are only percuniary might suggest a significant difference - the former, impliedly, a criminal matter; the latter, civil. A close examination of the Australian law indicates that such suggestion seems overdrawn. Proceedings for the recovery of penalties in Australia can be brought by the Industrial Registrar on behalf of the Commonwealth and the penalties or part thereof can be paid into the Consolidated Revenue Fund [ss.119(2) and 120 of the 1904 Act] - arguably, not an entirely "civil" approach. As a matter of historical interest, s.5 of the original 1904 Act did empower the Court to imprison any person, convicted of an offence under the Act, who continued or repeated the offence.

As the foregoing discussion shows, out of the eight themes upon which the Australian and Nigerian laws have been compared in this chapter, only one theme bears a significant difference between the two laws, namely the pre-1988 restriction of collective agreements to procedural matters in the Australian law in contrast to the wider scope for these agreements in the Nigerian law, covering substantive and procedural matters. Thus the similarities between the laws on these themes appear even more overwhelming than the similarities on the themes examined in chapter four.
CHAPTER SIX: AUTONOMY AND SOCIAL PRODUCT EXPLANATIONS OF THE DIFFERENCES AND SIMILARITIES IN THE COMPULSORY ARBITRATION LAWS OF AUSTRALIA AND NIGERIA

6.1 Introduction

There is an overwhelming similarity between the Australian and Nigerian legislative frameworks for compulsory arbitration systems, most importantly with respect to the philosophy of compulsion. In chapters four and five where both laws have been compared with respect to fifteen conceptual themes, differences are observed to occur only in three of these themes. On the remaining twelve themes, the laws of the two countries are strikingly similar.

The primary task of this chapter is to explain this fundamental similarity. A secondary task will be to explain how the few differences arose, given the overall similarity of the legislation. Both tasks shall draw upon the autonomy and social product models which have been constructed in chapters two and three. In essence, this chapter addresses the guiding question for this thesis: in the light of the debate as to whether law has some independent existence or is a mere product of society, how do we account for the differences and similarities between the labour laws of Australia and Nigeria?

6.2 Autonomy and social product explanations of the similarities among the laws

Durkheim once said in his "Rules for the Demonstration of Sociological Proof" that

[the mere parallelism in values [or conceptual orientations] through which two phenomena pass, provided that it has been established in an adequate number of sufficiently varied cases, is proof that a relationship exists between them... Now this connexion alone suffices to demonstrate that they are not foreign to each other (quoted in Lukes, 1982: 151).]

In this section the concern will go beyond the Durkheimian standard of the "proof of relationship" which the quotation above suggests and ask why the Australian and Nigerian laws "are not foreign to each other". Specifically the attempt is to determine first what the autonomy model has to say about the fundamental "parallelism" which has been observed in the conceptual orientations of these laws: are the similarities among the arbitration laws of Australia and Nigeria due to both countries conforming
to the natural law principles or to legal transplantation (i.e. to Nigeria borrowing the Australian model in the course of preparing her own law)? As shown in chapter two, the model also suggests similar modes of production as an explanatory factor, but the factor is considered too diffuse to be of much value to the explanation. Next the attempt is to address what the social product model has to say: are the similarities due to parallel development of social conditions?

6.2.1 Conformity to natural law principles and the similarities among the laws

To ascertain whether the Australian and Nigerian laws conform to the natural law principles as a possible explanation for their overwhelming similarity, it is pertinent to determine from the outset what these principles are. For, the principles of nature which are supposed to act as universal standards or extratemporal values for the positive laws are themselves not self-evident. In their most tangible manifestations they still remain abstract universal principles of justice and reason, notwithstanding that human beings can rationally apprehend them and translate them into the ideal norm or standard of right conduct and of justice for social institutions. Put differently, they remain at the level of general moral principles which, according to one philosophical school, God has implanted in human nature and embodied in the "law and the Gospel". Although immutable, they can be set aside, e.g. in laws enacted to meet the exigencies of the moment, as a necessary accommodation to the corrupt state of human nature. This point is elaborated upon by Haines (1965: 1-27).

There are claims that the Civil (Roman) and Common (Anglo-Saxon) Laws embody these principles. When the Roman praetors built the *jus gentium* to regulate the commercial dealings between citizens and aliens, they associated it with *jus naturale* and thus sanctioned it as a universal system of law, superseding the *jus civile*. This association has been officially endorsed by Gaius and Justinian in their *Institutes*.

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1 "Law and the Gospel" is a concept used to represent the Old and New Testaments of the Bible.
Equally the early Common Law lawyers have treated the Common Law itself as an embodiment of the *jus naturale*. Bracton is said to have written on the Common Law under the influence of the doctrines of the natural law. Sir Francis Bacon who sided with the King in most of the King's conflict with Justice Coke has argued that the Common Law "is grounded upon the law of nature" (ibid: 35). Writing about *The Expansion of the Common Law*, Pollock (1904) did assert that the central idea of natural law as the ultimate principle of fitness with regard to the nature of man as a rational and social being and the justification of every form of positive law "is fully recognized in our own system" (ibid: 39). Sir William Blackstone, the first Vinerian Professor of English Law at Oxford, a one time Member of Parliament for Westbury, and a Judge of Common Pleas had supposed that "the English Common Law was the natural law, the law of God" (Richards, 1977: 10).

The claims about the Common Law being an embodiment of the natural law principles have been well summed up in Figgis' *The Divine Right of Kings*:

> The Common Law is pictured invested with a halo of dignity, peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man... Common Law is the perfect ideal law; for it is natural reason developed and expounded by the collective wisdom of many generations (quoted in Haines, 1965: 40, footnote 2).

The validity of the claims that Civil and Common Laws embody the principles of natural law will not be discussed here, but the claims are not beyond question. Indeed Bentham who had attended Blackstone's lectures at Oxford was appalled by the claim that the English Common Law, with all its barbarities, was 'the natural law, the law of God' (see Richard, 1977: 11). Assuming that the claims contain some measure of validity, the immediate concern is to ascertain the principles in these Laws which constitute a standard for measuring the conformity of the Australian and Nigerian arbitration laws.
The relevant literature show that the dominant concept of the principles of natural law in the Civil and Common Laws relates to the inborn and indestructible rights belonging to the individuals as such (see Haines, 1965: 19). It is a concept of the priority of the individual to the collectivity where the individual in the state of nature is seen as his own sovereign (see Gierke, 1934: 96). The canon lawyers translated this concept into the doctrines of freedom and equality for all human beings to pursue their own individual happiness. In Blackstone's explanation, the Creator laid down certain "eternal immutable laws of good and evil" and, for ease of discovery, "graciously reduced" them to one simple precept: man should pursue his own happiness (see Robson, 1935: 45-46). And "Governments, to justify their existence, were to be measured by the security they furnished for the natural principles of freedom and of equality" (Haines, 1965: 55). The framers of the French Declaration of the Rights of Man and of the Citizen (1793) upheld these principles when they provided, in Article 1, that "Men are born and remain free and equal in rights... The aim of all political association is the preservation of the natural and indefeasible rights of man..." (ibid: 63).

The aspect of the Australian and Nigerian labour laws with which this study is concerned deals with arbitration as a method of industrial dispute resolution. It is, therefore, pertinent to further determine how these principles of natural law feature in this method of dispute resolution or indeed if they do: is arbitration a universal phenomenon and how do the institutional framework, processes, and outcomes of arbitration coexist with the rights of freedom and equality of the individual?

A view has been expressed that arbitration is one of four principal means which natural law has recommended to individuals and nations for the settlement of their disputes; the other three being amicable adjustment, compromise, and mediation. In this view "arbitration is a very reasonable means, and one that is entirely in accord with the natural law" (Vattel, 1758: 224). In other words, it is a means capable of preserving the
natural doctrines of freedom and equality. It would be illuminating to examine how the Civil and Common Laws embody this natural means of dispute resolution.

The enactment of Justinian (the Justinian Code)\(^2\) provides for arbitration and sees it as "intended to put an end to litigation". It is a method in which no one is compelled to undertake or submit to an arbitration since it "is voluntary and depends upon the exercise of the will" (The Civil Law, vol.3: 117). The arbitrators are to be selected by the parties and the decisions of these arbitrators are to be based upon the consensus between the parties. These decisions are binding only in honour.

Another law, in the Civil Law tradition, which embodies arbitration is the French Civil Code. Drafted in 1804 by a Commission headed by two lawyers of distinguished reputation - Portalis (of academic bent) and Tronchet (a practitioner), this Code aimed at distilling "the most basic and enduring elements [or fundamental values] of private law whereby the essential rights and obligations of and between citizens in their private affairs of life would be set forth" (Crabb, 1977: 5).

In the original version of the Code there were some provisions (articles) relating to arbitration in TITLE XVI, under the heading "Corporal Restraint in Civil Matters". This TITLE was abrogated by the Law of 22 July 1867 but partly reinstated by the Law of 5 July 1972 (No. 72-626), under the heading "Arbitration Agreement". The essence of these provisions is that individuals could "make arbitration agreements on rights of which they have the free disposition" (Article 2059).

With regard to the Common Law Blackstone presents arbitration, in his *Commentaries*, as part of the laws of England and describes it as a method

> where the parties, injuring and injured, submit all matters in dispute ... to the judgement of two or more arbitrators; who are to decide the controversy... This decision ... is called an award. And thereby the question is fully determined, and the right is transferred or settled, as it

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\(^2\) Promulgated around 530, this Code was a convenient packaging and systematising of the whole Roman law as it had developed up to that date.
could have been by the agreement of the parties or the judgement of the court of justice (Blackstone, 1765, 1978: 16).

In the foregoing examination a recurring feature in the Justinian Code, the French Civil Code, and the Laws of England is that arbitration is a universal phenomenon and that it is organised around the principle of voluntarism. For, although arbitration involves the intervention of third parties, the rights of freedom and equality for the individual are not eroded thereby: the arbitrators are chosen by mutual consents of the parties; when and how the parties go to arbitration are to be in accord with the natural liberty of the parties; the awards of the arbitrators are to emanate from the consensus of the parties; and these awards bind the parties only in honour and not in law.

On these essential points it is evident that the Australian and Nigerian labour or industrial laws which institutionalise compulsion in arbitration have deviated from, rather than conformed to, the principles of natural law. This deviation is made more significant by the fact that in all other substantial respects the laws of Australia and Nigeria have conformed to the general principles of the Common Law which have been viewed by people like Blackstone as natural principles. For instance as Sir John Latham (1960: 57) has observed, although the basis of most of the law of Australia is the common law of England, "an extensive body of industrial law in Australia ... has no connection with any common law principles". This is truest in the area of industrial arbitration. Similarly in Nigeria the deviation from the common law principles is most marked in the area of industrial arbitration. The point that both arbitration laws have been recognised as deviations from the principles of natural law will now be demonstrated.

It is significant that at the inception of the Australian arbitration system the issue of deviating from the natural law principles was fiercely contested and defended. The then Attorney-General, Alfred Deakin, who introduced the *Conciliation and Arbitration Bill* in 1903 argued that, although the measure which the Bill proposed was a novel experiment, the power which this measure conferred upon the State was kept well
"within the limits of reason, justice, and constitutional governments" (CPD, vol.XV 1903: 2862). While the aim of this argument may be to project the measure as being within the natural law framework, it does also suggest that some deviation has occurred. But, in response to the challenge to the principle of compulsion in the measure, Deakin maintained that "any apparent infringement upon that freedom [of the employee to choose his employer or of the employer to choose his employee] is more nominal than real. Both the employer and the employe (sic) are practically free" (CPD. vol.XV 1903: 2869).

The then leader of the Opposition in the House of Representatives, Mr Reid, although supporting the measure, disagreed that the measure was in conformity with the natural law principles. For him, "this Bill comes so largely into conflict with the personal liberty of the individual" (ibid: 3185). He described the provision for the 'common rule' in clause 63(d) - later, s.38(f) of the original 1904 Act - as "one of the grossest invasions of the ordinary rights of the individual and of the first principles of British justice which we can conceive" (ibid: 3189). In yet stronger terms, he portrayed this measure as a serious departure:

I am supporting this Bill with a full knowledge that ... it involves one of the most serious violations of all the principles upon which our system of politics and our system of justice have hitherto been administered. But, just as in martial law, all the sanctions and usages of civilized life disappear, is it not better that, in this case, they should disappear for a time in order to prevent the destruction, bloodshed, and hatred which these quarrels engender? (ibid: 3190).

Later on in the debates he contended: "no man is more sensible than I am of the multitude of points in which the provisions of this Bill seem to shock all one's instincts of personal liberty, and all one's desire to see a free Commonwealth composed of free and independent subjects" (ibid: 3195). From an angle different from that of Reid, Hughes acknowledged that the Bill invaded the liberty of the subjects but that this was properly so. "The employer", he says, "is no longer to be allowed freedom of contract. The shibboleth which has served him so admirably in the past is to be taken away from him. He is robbed of his ewe lamb, and is correspondingly downhearted" (ibid: 3377).
The first uncompromising opposition to the measure on the grounds that it violated natural law principle was mounted by Bruce Smith, the honourable member for Parkes. In his view this measure was undoubtedly "a great departure". He affirmed the position of the then President of the American Federation of Labour, Mr Samuel Gompers, that compulsory arbitration "is the very antithesis of freedom, order, and progress" or a way to commit industrial affairs to "political jugglery". This position is echoed by a statement attributed to the then Treasurer of the American Federation of Labour, Mr Lennon, that compulsory arbitration is "a system of slavery" and "a method inconsistent with the principles of ... American Government and the natural rights of man" (see Sawers, CPD. vol.XV 1903: 3485-6).

Smith also referred to the Moseley Commission's branding the compulsory arbitration as one of "ready-made milleniums" which the workmen of England must reject in favour of "[working] out one for ourselves by natural laws" (see CPD. vol.XV 1903: 3456-7). For him, "the whole tendency of history - certainly that of Anglo-Saxon history - is to give the individual increasing liberty so long as he does not interfere with the equal individual liberty of others" (ibid: 3459). Therefore, and as a ground for his inability to support the measure, Smith concluded that "the spirit which has led to the introduction of the Bill is a retrograde one, and is opposed to the experience of the last century, during which individual liberty matured and became a living principle among Anglo-Saxon people" (ibid: 3464). If by this conclusion he meant the absence of the State intervention in labour-capital relations, Mr Edwards and Sir John Quick were quick to point out that he either had been "asleep for forty years" or had "not studied the lessons of English history" at all (see CPD. vol.XVI 1903:4001).

In general, the protagonists of the measure were unanimous in their view that the Bill was in line with the direction of State intervention which had crystalised in Britain by

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3 This, as Sir John Quick has pointed out, is the well-known dictum of Herbert Spencer - the law of equal freedom (see CPD. vol.XVI 1903: 4004).
the 14th century (see in particular the contribution of Mr Spence, the honourable member for Darling, CPD. vol.XV 1903: 3490-3496). They were, however, unsuccessful in denying that the measure was an interference with individual liberty or a deviation from the natural law principles and resorted to redefining liberty or rationalising the measure. For instance Mr Higgins, the honourable member for Northern Melbourne, attempted to reconceptualise this liberty in terms of restraint in the interest of the social order. "Have not people come to recognise", he asked, "that the greatest liberty is obtained where there is the greatest law - that where there is the greatest restraint in the common interest there is to be found the greatest liberty for the individual and for individual action?" (CPD. vol.XV 1903: 3472). When Sir John Quick was driven to admit the interference with individual freedom by the Bill, he invoked a social-utilitarian argument:

the only justification for the Bill is that, although it interferes with freedom, it does so with the object of securing the greatest good to the greatest number... If we want a scheme which will work in a satisfactory manner we must make the necessary provision, even though it may interfere with individual rights and interests (CPD. vol.XX 1904: 2663)4.

On balance it was recognised by the politicians who enacted the Australian arbitration law that the law, so far as it embodied compulsion, departed from the natural law scheme for arbitration. The law was not just state intervention par excellence in industrial relations, it was an intervention of an unprecedented type. The debates of the then Supreme Military Council which decreed the Nigerian arbitration law could not be accessed for reasons beyond the control of this writer. It is not therefore known how the military debated (if at all)5 the question of conforming to or deviating from the principles of natural law. Insofar as the law which they decreed embodied compulsion,

4 Paradoxically Mr Shack, the honourable member for Tangney, referred to this argument in 1988 in his opposition to the 'compulsory unionism' provision in the Industrial Relations Bill 1988 (see the Commonwealth House of Representatives Weekly Hansard, No. 9, 1988: 2804).

5 As Robin Luckman has observed in his The Nigerian Military (1971), the meetings of the Supreme Military Council took the form of "a military briefing in which information is exchanged and orders given, rather than the political caucus in which bargains are struck and compromises achieved" (quoted in Ojo, 1987: 152).
that which has been said about the Australian law vis-a-vis the natural law principles apply to the Nigerian law.

The principle of compulsion which the arbitration laws of Australia and Nigeria embody is a major departure from natural law. Hence conformity to natural law principles cannot be an explanation for the similarity among the Australian and Nigerian laws. A second possibility mentioned in connection with the autonomy model was that laws could be similar if both started from some notion of natural law and deviated in a similar fashion because of similar social exigencies. Since this amounts to a social product explanation I shall deal with this possibility in the next section (i.e. 6.3). A third possibility suggested by the autonomy model is transplantation; it will now be addressed.

6.2.2 Legal transplantation and the similarities among the laws
Legal transplantation involves the moving of a rule or a system of law from one country to another, or from one people to another. This can be through borrowing from, adapting or, at least, studying of, one country's laws by another country. The construction of the autonomy model in chapter two raised the possibility that transplantation might be the explanation for similarities in substance and/or formulation among laws of many countries. To explain the similarities in the Australian and Nigerian arbitration laws, using the factor of transplantation, there is the need to consider the status of the Australian law: how independent the law was from its society, i.e. taking on a life of its own or surviving beyond original "causes" to be moveable. Then I shall discuss whether Australian law was in fact transplanted to Nigeria and the process through which such transplantation would have been effected. These issues will now be examined in turn.

6.2.2(a) Status of the Australian law (Conciliation and Arbitration Act 1904)
An informed examination of the Australian Conciliation and Arbitration Act 1904, being the law which was in force at the time when Nigeria started her own compulsory arbitration system in 1968, will show that the legal form of that Act was largely
abstracted from its underlying social interests and origins. Although it is in the province of the social product explanation coming up later to discuss the relative strength of the various interests which were associated with the enactment of this Act in 1904, it can be observed here that the representation of these interests in the Act not only equalises these interests but also obliterates any significant traces of their association with the enactment of the law.

On the equalisation, one illustration is that while the recognition of the union of workers by the employers was a key factor in the process which culminated in the enactment of the Act, the formulation of the chief objects of the law concealed this fact. Thus the object which relates directly to the recognition of unions was expressed in the following terms: "to facilitate and encourage the organisation of representative bodies of employers and employees ..." [s.2(VI) of the original 1904 Act]. Further, in the Act, both employers and employees are equally prohibited from 'injuring' one another (i.e the former shall not dismiss or threaten to dismiss and the latter shall not cease work) by reason, among other things, that the other party is an officer, delegate or member of an organisation registered or about to be registered under the Act (see ss. 9 and 10 of the original 1904 Act; s.5 of the amended 1904 Act and s.334 of the 1988 Act). Such equalisation effectively disguises the conditions under which the necessity for compulsory arbitration arose.

It needs be observed that this equalising expression was not accidental nor was it incidental to any legal drafting tradition at the time; it was deliberately contrived by the framers of the law. Deakin maintained:

This Bill contains nothing in favour of the employe (sic) any more than in favour of the employer. Their unions are both classed in the same way. Every privilege given to the one is given to the other; every liability imposed on the one is imposed upon the other. They are placed in a position of equality before the law (CPD. vol.XV 1903: 2870).

A similar approach was adopted by Kingston as can be seen in his declaration:
I make no distinction between masters and men in this respect... I say treat all fairly; treat all alike... I defy any honourable member to find within the four corners of the Bill ... any provision which makes an unjust distinction between masters and men, or makes any difference at all between them (ibid: 3196).

This mode of expression produces, in effect, what Isaac Balbus has termed "universal equivalent[s]". It tends to re-enact in the industrial law what Anatole France has observed about the criminal law: "the law, in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread". The social consequence (manifest or latent) of such legal form may not be difficult to fathom. One illustration is the view expressed by the Editorial Collective (1978: 85) that
to prohibit both rich and the poor from sleeping in the park; from begging on the streets; to prohibit the propertied and the propertyless from stealing from each other; to prohibit the wealthy and the downcasts from being vagrants, is quite simply absurd, [and] far from being equalising [it] merely criminalises, harasses, degrades and oppresses further the poor, the propertyless and the structurally disadvantaged.

In a more aphoristic manner, this consequence has been expressed as follows: "the systematic application of an equal scale to systematically unequal individuals [or groups] necessarily tends to reinforce systematic inequalities" (Balbus, 1978: 79). This, of course, is subordinate to the other consequence which is "to mask and occlude class differences and social inequalities, contributing to a `declassification' of politics which militates against the formation of the class consciousness necessary to the creation of a substantively more equal society" (id).

It may be argued that the 1904 Act emerged as part of an egalitarian package which the Australian labour movement, through its Parliamentary arm (the Labor Party), was able to "wrest" from the political leaders of that period and, therefore, could not have intended such unequalising consequence(s). But there is evidence in the Commonwealth parliamentary debates about the law in 1903-4 that the government of the day did not want the law to be seen as a class legislation. In any case the point remains that the form which the law took conceals the class or power differences
between labour and capital. That is, it is difficult to read from its face any express ideological affiliation or concrete particularism pointing to its origins.

Regarding the obliteration of the association between the emergence of the law and the surrounding circumstances, one good illustration is the absence of a detailed preamble in the 1904 Act. Generally, the practice before its enactment (especially in the pre-Federation period) was to provide a relatively long preamble and/or detailed provisions in each enactment, encapsulating the factors which have given rise to such law. Some randomly selected examples of such enactment include the New South Wales University and University Colleges Act 1900 and the Commonwealth of Australia Constitution Act 1900. One common feature of these pieces of legislation, which the 1904 Act lacks, is that their preambles provide some clear hints about their social and historical origins.

These laws compare closely with a classic British illustration - the Black Act 1723. The preamble of this Act shows that it was a law "for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and doing injuries and violences (sic) to the persons and properties of his Majesty's subjects, and for more speedy bringing of the offenders to justice". A good number of the seventeen articles which this Act contains distinctly indicate the origins and the interests from which the Act has emanated.

For instance Article I shows that many persons had associated themselves into confederacies under the name of Blacks (going about with their faces blacked or in disguised habits) to support and assist one another in stealing and destroying the "valuables" of the propertied class. It also shows the means used by these "wicked" persons, including the coercion of "peaceable" subjects into compliance with their allegedly nefarious demands. It was "for the preventing [these] wicked and unlawful practices" that the Act was enacted "by the King's most excellent Majesty, by and with
the advice and consent of the lords spiritual and temporal and commons, in parliament assembled.

If one's concern is merely, at a glance, to get an idea of the origins and the interests associated with the enactment of this law, the "history" in the Act appears quite adequate even though it is the official version. In other words, the form of expression of this Act retains, rather than extinguishes, the memory of its social origins and different interests. It is for a critical analysis of the Act and an extended explanation of its enactment that some insights may be sought in other works such as Sir Leon Radzinowicz's *A History of English Criminal Law and Its Administration from 1750*, vol. 1 (1948) and E. P. Thompson's *Whigs and Hunters: The Origin of the Black Act* (1975).

A view has been expressed that the objects enumerated in the Australian 1904 Act provide a substitute for a detailed preamble. In the context of the discussion in this chapter, these objects amount only to a statement of the focus of the legislation and this is not denied. Rather, the argument is that this statement of the focus (including the general expression of the provisions in the Act) essentially abstracts from and/or masks (1) the qualitatively different needs of, and the social relationships between, those for whom the Act has some direct relevance and (2) the concrete historical processes with which the Act has generally been associated.

In the statement of the focus of the 1988 Act which has replaced the 1904 Act there are hints about the contemporary necessity of the law. The objects relating to the need to promote industrial harmony and co-operation among the parties to the Australian industrial relations, to minimise the disruptive effects of industrial disputes on the community, and to ensure proper regard for the interests of the parties and those of the Australian community [see s.3 (a), (b) and (c)] are indicative of the structure and processes of industrial relations in Australia. Even then they are faint signals, compared to the explicit statements which come from the detailed preambles of, at least, the pre-
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20th century pieces of legislation. Yet they appear stronger than those signals which the
1904 Act emits.

The point being made in the foregoing discussion is that by equalising its subjects and
obliterating the association between its rise and the prevailing social processes, the
1904 Act acquires a form which enables the law to present itself in a manner that it can
apply to the prevention and settlement of industrial disputes generally. In this form,
although still far from being as epigrammatic as the form of the French Civil Code has
been described to be\(^6\), the 1904 Act becomes transplantable or eminently practical to
transport into other places no matter how socially different from its original society
these places may be. In particular, it becomes transplantable to social contexts in
which the aim is to protect employers rather than employees. As will be shown later
these were the circumstances in Nigeria at the time of transplantation.

6.2.2(b) The fact and process of transplantation of the Australian law to Nigeria

The question to be addressed now is: did Nigeria borrow the Australian model of
industrial arbitration law? On the evidence, the answer to this question is resoundingly
in the affirmative. From the interviews with some of the officials directly connected
with the emergence and development of the Nigerian compulsory arbitration system I
established, clearly, that the system was modelled closely after the Australian system.
These interviews were with Mr G. C. Okogwu and Mr O. Efueye. Mr Okogwu was the
Federal Director of Labour in the Federal Ministry of Labour at the time when the
compulsory arbitration system was started and, as a lawyer, he participated directly in
the drafting of the arbitration legislation. He was quite familiar with the works of E. I.
Sykes and J. E. Isaac on the Australian arbitration law and system. Mr Efueye, also a
lawyer, was appointed to the IAP as vice-chairman and later became the chairman
between 1975 and 1986.

\(^6\) For an argument as to how this form assisted the widespread transplantation of the French Civil Code,
see Max Weber: Economy and Society, vol. II (1978), pp.865-6 - edited by G. Roth and C. Wittich; John
Both officials indicated that from the time of the 1963-4 general strike it became plain that the existing system of industrial dispute resolution was inadequate and a question of major law reform was raised. For instance the Morgan Commission which inquired into the causes of the strike recommended, among other things, "that all labour legislation in Nigeria should be reviewed as a matter of urgency": this would entail the establishment of Industrial Court, the banning of industrial action while the process of settlement is in progress, and the introduction of compulsory arbitration (Morgan Commission, 1964: 44).

Although the Ministry of Labour had tacitly embarked on the review of the labour laws in line with some of the Morgan Commission recommendations, it was under the military regime of General Yakubu Gowon that this question of labour law reform overtly received the much needed attention (Yesufu, 1984: 54, 223). According to Okogwu, the Morgan inquiry and their recommendations "were still fresh" when the regime approached the civil administration in the Ministry of Labour and instructed them to search for a workable industrial dispute settlement system. Okogwu said something to the effect that the legal group to whom the task was assigned looked among the Commonwealth countries for a model in a country 'of similar level of development'. The reason for this approach was that, in time of difficulty, the point of reference for Nigeria was the United Kingdom or the Commonwealth countries.

The group found in Australia a system of industrial relations which was radically different from, and considered more efficient than, the one existing in Nigeria. The element of compulsion in the Australian system had previously been recommended by the Morgan Commission. There was, therefore, not much difficulty in "convincing" the regime that the Australian system was the model upon which to base the new system for Nigeria. One crucial point in Okogwu's recollection is that the compulsory system was perceived to be faster than the existing voluntary system and to be based on unified

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7 The details of this strike will be provided in the next subsection.
and centralised control which fitted squarely with "the identification marks of the military".

To a large extent the story of Mr Okogwu was corroborated by Mr Efueye. He noted how Britain could not make their industrial relations system work; how Australia had already provided the model for the Nigerian criminal code at the turn of the twentieth century; how Australia, Nigeria and a few other countries were operating federalism; how Australia and Nigeria were using the Westminster system of government; and how, through "natural process, selective affinities and closeness in spirit", Nigeria is similar to Australia.

Mr Efueye was definite in his view that the source of the Nigerian compulsory arbitration system is Australia. As a matter of fact he visited Australia in 1980 to observe the practical working of the arbitration system upon which the one he was administering in Nigeria was based. Asked why this connection between the Australian and Nigerian systems is not readily admitted in official documents, he pointed to the practice of the bureaucrats who copy without acknowledging their sources. This practice, he said, is usually rationalised in the way that Sheridan replied to the criticism of plagiarism in his work, The Rivals: "Faded ideas float in the fancy like half-forgotten dreams. And the imagination in its fullest enjoyment becomes suspicious of its offsprings and doubts whether it has created or adopted".

In addition to the foregoing anecdotal evidence there is documentary evidence, supporting the position that Nigeria borrowed its compulsory arbitration system from Australia. Between 1959 and 1963 there were at least two ILO-Fellowship holders from Nigeria who came to Australia to study the legal framework and practice of the Australian industrial relations systems. The reports which they submitted to the Department of Labour and National Service (now the Department of Education,

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8 In 1904 the Queensland Criminal Code 1899 was adopted and used as a model for the enactment of a criminal code for Northern Nigeria. Following the amalgamation of the North and South in 1914 this code was extended to the whole of Nigeria. Its operation became confined to the South from 1960.
Employment and Training, DEET), indicate a substantial appreciation of both the State and the Commonwealth laws and systems in Australia.

One of these reports, written by Abiodun⁹, records extensive discussions and observations by the writer on the systems. The officials with whom Abiodun had the discussions include Industrial Relations Officers in the Department of Labour and National Service, Industrial Registrars, Conciliation and Arbitration Commissioners, Arbitration Inspectors, Company Industrial Officers, Presidents/Secretaries of workers' and employers' organisations (at state and federal levels), and University lecturers. The subjects upon which the discussions were conducted include the background and achievement of the Australian system of compulsory arbitration, wage theory/wage fixation in Australia, operations of the Commonwealth Conciliation and Arbitration Commission and the Arbitration Inspectorate, the role of the peak unions like the Australian Council of Trade Unions in the arbitration system, and the prospects for compulsory arbitration in Nigeria.

From these discussions, coupled with the observations which he personally made at the relevant sites, Abiodun came to the view that

the Arbitration System in Australia has worked satisfactorily but it has not taken the place of collective bargaining in industry. In fact, the Arbitration System itself encourages the idea of collective bargaining since both sides of industry are afforded by the machinery in existence to iron out their differences themselves through discussions at the factory level and with Conciliators appointed under the Law before taking particular cases to Arbitration Commissioners for decisions.

He maintained that despite the "imperfections in the ... System" which the "textbooks ... written by Professors and University Lecturers" have disclosed, "the consensus of opinion is that the system has proved to be effective ...". Having observed that the arbitration system then existing in Nigeria was different from the Australian system, he noted that with further development in industries and trade union movement in Nigeria

⁹ The source of this report is CRS A.838 [DFAT, C.O. files], item 2037/3/12 "I.L.O. Fellow Nigeria. Abiodun, Mr M.O. 1959-60", obtained from the Department of Foreign Affairs and Trade, Canberra.
"it will become necessary to give thought to either improving on the [voluntary] system or finding a more suitable one". If by "a more suitable one" he was contemplating a compulsory arbitration system for Nigeria, the assertion was prophetic. Somewhat anticipatorily, Abiodun alluded to the effectiveness of an Industrial Court in dealing with the problem of trade union demanding what the economy could not bear and employers not paying fixed wages.

Apart from the arrangements for the Nigerian ILO-fellowship holders to undertake educational visits to Australia, there were other avenues through which the Australian arbitration system "migrated" to Nigeria. For the most part of the 1960s the Australian Department of Labour and National Service, through their representatives like Mr B. J. Watchorn who were attached to the Australian Mission in Lagos, were in contact with the Nigerian Federal Ministry of Labour. In fact, Mr Watchorn did advise on the 1968 arbitration legislation in its draft stages. It has been observed that when Mr B.J. Watchorn departed from Lagos the Nigerian Ministry maintained some informal contact through ILO conferences at Geneva and by correspondence with other officers of the Australian Department of Labour and National Service (see DFAT files, 201/4/4 728; DEET files, C83/7057 pp111-112: by special access).

In 1971 Mr Leonard Lambourne of the Federated Clerks' Union, New South Wales State Executive of the Australian Labour Party and Commonwealth Council of the Institute of International Affairs visited Nigeria. During his call on the Federal Ministry of Labour the then Federal Director of Labour, Mr Okogwu, engaged his expertise: the Director disclosed to him that "a major review of Nigerian industrial legislation and arbitration machinery [was] under way"; that his "Ministry had a lively interest in Australian advancement in the area of industrial relations"; that his Ministry "would like to receive a complete set of [Australian] Commonwealth legislation covering industrial relations" and, finally, he organised for Lambourne a panel discussion with the senior officers of the Labour Division of the Ministry (ibid).
In response to the request for the Australian laws a set of the Australian federal legislation covering industrial relations were delivered to the Nigerian Ministry of Labour in July 1972 (see DFAT files 201/4/4). This gesture is consistent with the technical assistance which Australia had given to Nigeria before and after 1971. For instance in 1967 when Dr J.W.C. Cumes, the then out-going Australian High Commissioner in Nigeria, paid a farewell call on the Head of State, Major-General Yakubu Gowon, he was told that the Nigerian Government was grateful to Australia "for the technical assistance she had been giving to Nigeria, especially in the field of education" (Daily Times, August 9, 1967 in NIIA files). And in 1974 Australia contributed books on various subjects including "books on Criminal Law, Commonwealth Acts and Industrial Law" to the rebuilding of the libraries of the then Midwest State and East Central State after the civil war (see Nigerian Observer, July 6, 1974, p.5; the Renaissance, July 10, 1974, p.1). Through such assistance and, partly, through purchases books on the Australian system, including notably Higgins' *The New Province of Law and Order* (1922) and Foenander's *Towards Industrial Peace in Australia* (1956) have become available in many Nigerian libraries.

The foregoing examination shows that in the 1960s a question of major law reform had been raised in the area of the Nigerian industrial legislation, a question which led the body charged with the responsibility for finding the solution to consider the Australian model. As it turned out this model had a form sufficiently abstracted from its social origin; it was written in a language used officially in Nigeria; it was developed by a fellow Commonwealth federation; and it was accessible in literature to a legal elite obviously fascinated by the model. It is also shown that first-hand information about the Australian model was acquired through educational visits, formal and informal contacts or correspondence between relevant government agencies. The availability of books in the libraries, through donations and purchases made the Australian model accessible and easy to be adopted.
The examination also shows that there is no question about the Australian system being regarded with enough respect. It should be noted that the borrowing of the Australian model of compulsory arbitration took place towards the end of the 1960s, at the time when the system was well placed especially in the pre-O'Shea period, to be admired and borrowed. It was in the heyday of the use of 'bans clauses' and the imposition of heavy fines on the trade unions. In the works published shortly after this period the notion of the effectiveness of the law was conveyed. For example, Macken (1974: 150) maintained that "the arbitration law has often been held up as a model for the world ... It has proved to be fast and effective in carrying out its task of preventing and settling disputes".

Thus the fact and process of the transplantation of the Australian arbitration law to Nigeria seems to fit a classic textbook image of the factor of borrowing in the autonomy explanation for similarities among national laws. In addition to the overwhelming similarity with respect to the philosophy of compulsion, there are traces of identical wordings in the two laws. For example, s.15 and s.26 of the Nigerian 1968 and 1976 Decrees respectively which provide for the procedures of the tribunals are more or less a verbatim reproduction of s.40(1)(b) of the Australian 1904 Act: the tribunal shall "not be bound to act in any formal manner and shall not be bound by any rules of evidence but may inform itself on any matter as it thinks just".

Although the foregoing autonomy explanation sheds some light on the role of legal transplantation in the similarities between Australian and Nigerian laws, it does not address the crucial sociological question why it was possible for Nigeria to adopt or borrow the Australian system. Neither does it address the question whether the social conditions which motivated the borrowing were similar to the conditions associated with the emergence of the system in Australia. The factors to which one has been sensitized by the social product model have to be interrogated for the answers to these questions.
6.2.3 Parallel social conditions and the similarities among the laws

The issues to be addressed in this subsection relate to the social foundations of the similarities between the Australian and Nigerian arbitration laws. Did the conditions in the Australian and Nigerian industrial relations systems which provided the immediate pretext for the enactment of compulsory arbitration laws in both countries develop in the same way as to produce such similar consequences? Did the development of the political and economic structures/traditions in the two countries parallel each other as to give rise to similar laws? For the latter question I will be examining how the interaction of the political structures/traditions and the modes of production with the industrial relations systems influenced the adoption of compulsory arbitration laws in both countries. In the discussion of both questions attention will be paid to the "consensus" and "conflict" dimensions of the power relations in the two countries.

6.2.3(a) Industrial relations context

Under this heading the focus is on those conditions which derived from (a) the creation and maintenance of the labour markets, (b) the raison d'être of the organisation of labour and capital, and (c) the industrial turmoil that significantly struck the 'moral conscience' of both countries prior to the adoption of the arbitration systems. The aim is to ascertain how similar to those of Australia these conditions in Nigeria were at the time the arbitration law was adopted.

One of the basic determinants of the nature of any country's industrial relations is the labour market, involving the whole complex of structures that "make labour power a commodity" (i.e the creation of wage labour) and guarantee "the accumulation of capital out of the labour process" (Connell and Irving, 1980: 19). Invariably, these structures ensure the availability and discipline of labour, and a fair 'return' to the buyers of labour power. What aspects of these structures proved congenial to the emergence of compulsory arbitration laws in Australia and Nigeria, and how similar are they?
The creation and control of the labour markets in Australia and Nigeria began with a heavy involvement of the state. In the early white settlement of Australia and the early colonial period in Nigeria the responsibility fell, entirely, to the state to "create" and discipline labour for both public and private employment and services. Confronted with the demand for the construction of basic infrastructures for the penal settlement which began in 1788 and the comfort of the officers and officials of this settlement, the state in Australia introduced a convict assignment system. Describing how this system began, Coghlan (1918, 1969 vol.1: 24) remarks:

As there was no other labour obtainable - there being not a dozen free men outside the ranks of the soldiers, sailors and civil servants - the Governor [Captain Phillip] found it expedient to grant to those whose position admitted of the concession being made, the services of convicts to clear the ground, build houses, and do such other work, both mechanical and domestic, as might be required.

By the time this system of bond (compulsory or forced) labour ran its course in 1839, being the year it was abolished, it had passed through three phases. In the first phase the feeding and clothing of the assigned convicts were undertaken by the Government, the masters having their labour without being required to support them; and the convicts worked without wages. In the second phase, the convicts also worked without wages but the masters, and not the Government, were made to feed, cloth and house them. And in the third phase, in addition to maintaining the convicts, the masters were required to pay wages to these convicts, following the practice whereby the Government allowed the convicts in its own employ `to work on their own hands' for wages.

During these phases the system developed into a legal covenant between the Government and the private employers, the former laying down the regulations for the conditions of employment (the mode of obtaining labour, the hours to be worked, the general treatment of the labourers, etc) and the rates of wages. The only part allowed

10 Only a summary of the system is provided here. For details, see Coghlan (1969 vol. 1: 24-39 and 175-199).
for the assigned convicts to play was to make appeals to the magistrates over any mistreatment from the private employers. Thus it can be seen clearly that, in the beginning, the state not only created a labour market but also contracted on behalf of labour. Connell and Irving (1980: 37) made this point in more ideologically colourful terms: "the legal basis of assignment was decidedly marxist, the convict's labour-power being regarded as a kind of commodity that was granted to the settler by the government, which maintained (in theory) control over the convicts' persons".

More significantly, by dictating the terms of the contracts of employment in the early settlement, terms which the convicts and employers were theoretically not at liberty to challenge, modify or reject, the state invariably confined labour and capital to passive roles in the labour market which it had created. There is no suggestion that both labour and capital were subjected to equal treatment: the state generally used its penal authority to maintain labour discipline in favour of the ensuing capitalist enterprise and its bearers (i.e. the private employers), a discipline which "gave labour relations in early Australia [a] horrific cast" (ibid: 45).

The approach of the state in the early colonial administration of Nigeria which began in 1862 paralleled the Australian experience in essential aspects. Although the colonialists did not find Nigeria "terra nullius", wage labour force was not readily available for the administration. While labour relationship of some sort existed in those pre-colonial societies which were later brought together to form Nigeria, wage employment was generally unfamiliar in these societies (see Fashoyin, 1980: 12; Emiola, 1982:1 and Yesufu, 1984: 14). Early in the twentieth century Friedrick Lugard, one of the colonial governors, did complain that the natives would not "seek wages for hire" (Lugard, 1919: 224).

In the circumstances the colonial administration resorted to creating and using forced labour from among the indigenous. This use of compulsion became institutionalised and widespread under Lugard who justified it "as an educative process to remove fear
and suspicion" among the "primitive tribes" (ibid: 243). The forced labour was employed on the construction of railways most of which was done between 1900 and 1936; in the tin mines in Jos area which were opened in 1902 and the coal mines of Enugu, opened in 1915 (see Otobo, 1988: 32-34). Back in Britain the Parliamentary Under-Secretary for the Colonies was in 1926 "stressing the continuing importance of compulsory [i.e enlisted, sometimes called political] labour", his argument being the voluntary scheme for labour recruitment had "proved a complete failure" (ILR, 1960: 30). The fact of the matter is that the resort to the use of forced labour was driven by "an urgent need to open up the extensive hinterland so as to facilitate commerce and achieve the chief objective of occupation - to provide materials for British factories" (Ananaba, 1969: 4).

The system of forced labour was established through the military approach of conscripting people into labour gangs, army platoons and battalions mainly, as indicated earlier, for the construction of roads and railways. Nonetheless this system formed the foundation upon which a free labour market was eventually constructed. That the colonial administration believed in the success of their approach can be inferred from a somewhat triumphal remark by Lugard (1919: 243): "the Government rule that every [compulsorily recruited] labourer must be paid up fully in cash ... has done more than anything else to popularise the system of labour, and to create a free labour market".

In reality the full establishment of a free labour market was far from being accomplished at the time that this remark was made. For up to the later part of the 1940s forced labour was still being used by the administration; hence the enactment of a Forced Labour Ordinance for Nigeria in 1933, following the adoption of the Forced Labour Convention by the ILO in 1930, to abolish the system. Yet this legislation did not deter the administration from conscripting the indigenes into the armed forces during the second world war on behalf of the British government and using forced labour to work mines up to 1947 on behalf of the colonial state and the private
employers. One official indication that the practice of forced labour persisted even beyond the 1940s is the amendment to the Labour Code in 1956 which aimed at abolishing forced labour "for all but essential communal works of a restricted character" (Yesufu, 1984: 17).

Thus between 1862 and 1947 the colonial state in Nigeria forcibly recruited, motivated and disciplined labour on a large scale with a view to, among other things, laying the foundation for a free or voluntary labour market. The March 1943 edition of the Quarterly Review, being the official news bulletin of the Department of Labour at the time, was referred to by Yesufu (id) as indicating that between September 1942 and March 1943 alone about 30,000 persons were compulsorily recruited to work in the tin mines.

Otobo (1988: 62-68) highlights how a share of this forced labour was deployed for the service of the private commercial and industrial establishments like the John Holt and the United African Company. As in the early Australian white settlement the state in Nigeria retained full control over the conditions of employment of this labour. For instance, in addition to its arrangement for food supply, the state directed the private employers to procure food and firewood for workers at the mines 'at official subsidized prices'; it also provided blankets, and imposed on the employers a minimum wage (e.g four shillings a week by 1944) for the mine workers.

At this juncture it is pertinent to observe that this mode of creating a wage labour market in Australia and Nigeria necessarily established a tradition of coercive control of labour and of passivity on the part of labour and capital in direct industrial relations. In other words a compulsory framework for industrial relations was being set up in both countries which kept at bay the basic bargaining initiatives of the two principal actors in the system. Further, as it shall be shown shortly, the state in both countries never appeared to have departed from this form of intervention before later
institutionalising the civil version of compulsion in industrial relations through the instrumentality of law.

That the state in Australia continued to see it as its responsibility to maintain, in the post-convict assignment era, a stable labour market can be observed from its effort to offset labour shortages through the means of sponsored immigration which continued into the late 1840s. More significantly its coercive control over labour, bond and free alike, in the post-convict period was perpetuated through such strategies as the master and servants legislation\(^\text{11}\) and the compulsory discharge certificate system. Both strategies originated in New South Wales, the former beginning with "An Act for the Better Regulation of Servants, Labourers and Work People" of 1828 and the latter being introduced first, on a limited scale, for the seamen and the whalers in 1840, then on a wider scale when it was incorporated into the New South Wales Masters and Servants Act 1845\(^\text{12}\).

There is a strong case for the suggestion that the sort of control referred to in the preceding paragraph was borrowed from the convict regulatory system (Quinlan, 1989: 31). For instance on the understanding that the desertion or absconding by the workers from their employers' works was an indication of bad manners the penal administration took measures to deal with the malady as the following provision (s.1) in the Penal Settlement Regulations 1790, enacted by Governor Phillip, shows:

As an aversion to honest industry and labour has been the chief cause of most of the convicts incurring the penalties of the law, they shall be employed at some species of labour of an uniform kind which they cannot evade, and by which they will have an opportunity of becoming habituated to regular employment.

Governor Hunter, a successor to Phillip, made an Order in 1797, "directing that labouring men offering themselves for hire who refused to accept the regulated wages

\(^{11}\) For some detailed reviews of the history and use of this legislation in the state intervention in and control of industrial relations, see Merritt (1982); McQueen (1987); and Quinlan (1989).

\(^{12}\) The compulsory discharge certificate system was adopted from the NSW by Tasmania in 1856 and lasted till 1882. It was also adopted by Victoria in 1851 where it lasted till the 1890s.
were to be apprehended immediately and prosecuted as vagrants" (Coghlan, 1969: 56). Governor Macquarie who took over from Hunter continued with this policy.

Thus one main concern of the penal administration from the very start was to maintain through coercion the supply, stability and control of labour for the development of infrastructures and preventing "the formation of a class of idle vagabonds" (ibid: 65). But the later colonial and State administrations, the latter extending into the 1890s, hardly shifted from this philosophy as the subsequent introduction of the master and servants legislation also took the form of a coercive "mechanism of labour control which sought to deal with the particular labour market characteristics of the Australian colonies" (Quinlan, 1989: 36).

As in Australia there were times in Nigeria when the state considered importing labour (the "Kroo labourers", equivalent of the "coolies" in Australia) from India and, at other times, did recruit labour from countries in the same region like Ghana (then Gold Coast), Liberia, and Sierra Leone as a way of stabilising the labour market. The pertinent issue is that, in addition to pursuing this objective, the state also continued with its compulsory interventionist approach to the industrial relations system by using the master and servants legislation and government wage tribunals, the use of the legislation being similar to the Australian situation in the 19th century.

The Nigerian *Master and Servants Ordinance 1917* which was enacted to provide a legal framework for the conditions and recruitment of labour was later updated with the new title of *Labour Ordinance 1929*. While it may be conceded that this legislation provided some 'protection' for the workers (see Yesufu, 1984: 52, 215), the main significance lies in its instrumentality for raising and controlling compulsory paid or unpaid labour. For an earlier law - i.e the Southern Protectorate *Master and Servants Proclamations* of 1901 and 1903 - after which the 1917 Ordinance was modelled and whose provisions the Ordinance incorporated was of a draconian and compulsive
nature. As Tamuno (1978: 317) noted, people sought to evade this law by escaping to places outside its jurisdiction, including the Spanish territory of Fernanda Po.

The wage commission system, being another method of state control, was devised to determine and impose wage rates upon the employers and workers. Even though this system was designed mainly for the public sector, the decisions of the tribunals became the standards for the private sector wage determination. The use of this system was so frequent as to effectively set the foundation of the institutional framework for industrial relations in Nigeria. Between 1920 and 1960, for instance, there were at least nine of such Commissions. For our purpose, though, the greater significance consists in the point that the practice reduced the employers and workers to the role of "passive actors" in the industrial relations system, a role which they have continued to play under the subsequent compulsory arbitration system.

Of the immediate products of the form of state intervention in Australia and Nigeria as examined above, two are particularly relevant to the questions being addressed in this subsection: one, the dependence of the workers and the employers upon the state was institutionalised; and two, the perpetuation of passivity among the workers and the employers left these principal actors in industrial relations largely untutored or uninterested in the art and practice of consensual collective bargaining.\(^{13}\)

One indication of the first product is that in Australia labour and capital usually turned to the state, the former urging for the creation of jobs in times of unemployment or for the curtailment of labour supply when labour surplus threatened the wage standards, and the latter always urging for the direct pegging of wage rates or the boosting of labour supply, through immigration, during labour scarcity to produce wage decline. In Nigeria the dependence of labour and capital upon government took the form of

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\(^{13}\) This deduction is truer for the Nigerian situation where the wage tribunal system was introduced much early in the process of creating the labour market than for Australia. In the latter country the first instance of the state wage tribunal occurred in 1896, i.e over a century after the creation of wage labour had begun, by the enactment of the Victorian minimum wage legislation in that year.
agitation by labour for the curbing of inflation and shortage of consumer goods, and the private employers’ total surrender, more or less, of their personnel functions to the government. An indication of the second product, one which holds good equally for both countries, is the frequent resort to strikes or lock-outs in the settlement of industrial disputes from the early settlement or administration through to the industrial turmoil of 1890-4 for Australia and 1963-4 for Nigeria, the turmoil being held as a decisive factor in the adoption of compulsory arbitration systems by the two countries.

In some ways the organisation of labour and capital in Australia and Nigeria can be said to have arisen as a mechanism, principally, to place each camp in a strong position in which to maintain an effective pressure on the state for their respective interests rather than to build "equal" forces for the purpose of consensual collective bargaining. Coghlan (1969)\(^\text{14}\) provides, for Australia, illustrations of the negative reactions of the working class to the government's assistance to or renewal of immigration; their inclination to form trade unions, like the formation of the Sydney "Trade Protection Society" in 1843, to agitate for the provision of employment or relief works by the state; the desire of the employers "to see immigration on such a scale as would produce a permanent decline in wages"(ibid: 435); frequent strikes by workers for higher wages; and the employers' concerted effort to crush workers' unions by the use of "free labour".

For Nigeria Ananaba (1969) and Tokunboh (1985) have given detailed descriptions of labour's concerted confrontations with government, e.g in the general strikes of 1920 and 1945 arising from the cost of living allowance (COLA) agitations and the general strike of 1963-4 arising from the demand for wage increases\(^\text{15}\). An analysis of the dependence of capital on the state can be found in Otobo (1988: 61-68): in the 1940s and 1950s the state authorities assumed many personnel functions for private firms; the ports in Nigeria were owned by two main private commercial establishments, the UAC

\(^{14}\) See the chapters on labour, wages and other related matters: Vol I: pp 424-459; Vol II: pp 687-782 and 1018-1087; and Vol III: pp 1425-1590.

\(^{15}\) For the detailed descriptions, see Ananaba (1969: chs. 4, 7 & 20) and Tokunboh (1985: chs. 3 & 4).
and John Holt, but were constructed by government's forced labour and garrisoned by the state military; and the trading operations of the commercial companies were supervised and protected by the state officials "from the presumably dangerous activities of the employees".

While the dependence of labour and capital on government as demonstrated above may in itself be a strong invitation to or justification for state intervention in the industrial relations of Australia and Nigeria, of greater significance is the argument that the nature of this intervention precluded the entrenchment of voluntary negotiation between the employers and employees and laid a foundation for institutionalised compulsion in the industrial relations systems of both countries. For instance the first example in the history of Australia of the full recognition of collective bargaining as a principle and not as an isolated phenomenon occurred only in 1873, more than three-quarters of a century after the white settlement began. This was when the Associated Colliery Masters and the miners' union of the Hunter River district "entered into a formal written agreement" on wages and procedures for settling future industrial disputes (see Coghlan, 1969: 1427-8).

What is more, the speeches on the occasion of that agreement were said to have indicated that both organisations of the employers and the workers tended "to look to the State for compulsory arbitration in labour disputes" (id), a step further than the frequent suggestion of arbitration (mainly voluntary) as a means of settlement in the previous times. Indeed by 1889 the "legalisation of compulsory courts of arbitration" could and did feature as an official agenda item for the sixth congress of the Inter-Colonial Trade Union Congress (see Sutcliffe, 1967: 69).

Such systematic tendency towards arbitration seems to belie Hutson's (1983: 36) claim that "by 1890 the trade unions ... had adopted the use of collective bargaining with employers to establish wages and conditions, supported sometimes by strikes". The method which appears to be the most popular, especially with the employers and the
workers in the casual employment industries like pastoral, mining and transport industries, was unilateral regulation. And when this proved unworkable the parties had been open to arbitration. Since these industries constituted the larger proportion of the entire economy it is reasonable to suggest that unilateral regulation cum arbitration, rather than collective bargaining, was the dominant mode of power relations in the industrial relations context at that time. The work of Bray and Rimmer (1989) shows that by the time of the 1890-4 strikes collective bargaining which underpins the principle of voluntarism had not developed firm roots in Australia.

In Nigeria collective bargaining was more in the imagination of the state policy makers than in the practice of the industrial relations. The prolonged reliance on forced labour meant that the ideology which represents the workers and their organisations as possessing no legitimate rights both in the labour market and workplace had ample time to form. One concrete manifestation of this ideology was the practice in which, largely during the early period of the colonial administration, the state and private employers unilaterally determined the terms of employment (Otobo, 1988: 71).

Akpala (1982: 75-77) wondered why the Trade Union Ordinance 1938 which was supposed to be a landmark in the evolution of free industrial relations in Nigeria was silent on collective bargaining, and concluded that the ordinance "was not helpful to either the development of effective or meaningful collective bargaining or the use of voluntary settlement of industrial disputes in the private sectors". He missed the point. Collective bargaining or dispute settlement was not even in the consideration that went into the making of that law. Rather "the primary object of [the] ... legislation ... was to promote the regular organisation of wage labourers under the sympathetic supervision and guidance of Government and that this was the reason why compulsory registration was considered necessary". In plain words the consideration was to control the organisation of labour without using naked force. As one letter written by the UAC to

16 See the Colonial Labour Committee memo 33 in CO 323/1539/1754/5 item 18 from the Public Records Office, Richmond, London.
the Colonial Office on the 25th November 1938 attests, the employers felt that the legislation "must necessarily come and that some guidance and control of the present tendency towards irregular labour associations is ... necessary ...". A more revealing piece of evidence is the hand-written comment by O.G.R. William on 8th July 1938 regarding the demand by the business sector (the UAC, the West African section of the London Chamber of Commerce, etc) that certain combinations (especially those involving the "masters") be excluded from the jurisdiction of the legislation: "the proposed omission may make it difficult to check the activities of combinations of African workers which are not bona fide trade unions but have a subversive object".

Also it has been suggested that the *Trade Disputes (Arbitration and Inquiry) Ordinance 1941*, enacted three years after the 1938 trade union legislation, lived up to the traditional British standards of collective bargaining and settlement of disputes (Yesufu, 1984: 74). The correctness of this suggestion is in grave doubt but, in any case, no sooner was it enacted than it was circumscribed by another law, cited as the *Industrial Arbitration Regulations 1941*, which in effect banned direct action and gave the Governor power to refer industrial disputes to arbitration with or without the consent of the parties. Of course, being a war time emergency measure, this law (i.e. the Regulations) was expected to lapse at the end of the war in 1945 even though it contained no sunset clause whatsoever. Having lapsed, then, collective bargaining and voluntary settlement would be restored under the Ordinance. It did not happen that way.

The wider institutional setting within which the Ordinance was to operate was such that no effective collective bargaining or voluntary settlement of disputes could develop.

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17 See CO 323/1539/1754/5 item 31. p.2.
18 See CO 323/1539/1754/5, comments arising from the report of Mr Dale on the discussion between Mr Dawe and Mr Muir.
19 Some officials in the Colonial Office at the time complained about the sweeping nature of this law which presumed that all industries or occupations in Nigeria were essential to Britain's prosecution of the second world war - see para. 9, CO 859/58/4
20 Peter Kilby and John Weeks, joined by Robin Cohen, entered into a debate on the failure or non-failure of the Anglo-Saxon model of industrial relations in Nigeria prior to the start of the compulsory arbitration system in 1968. Although this debate appears largely semantic, it highlights the deficiencies
The Cowan Inquiry Report which was submitted to the colonial administration in 1948 suggested that the attitude of many officers of the Government Departments had been to destroy trade unions. This suggestion reflects an earlier allegation by N. A. Cole, the president of Nigeria's Trade Union Congress, on the occasion of the police shooting of the UAC employees at Burutu on June 21, 1947: the "Government was using all means, fair and foul, to dwarf the growth of trade unionism in the country" (quoted in Ananaba, 1969: 72). Also, the private employers were reluctant to recognise trade unions in their establishments, taking advantage of the fact that the 1938 Ordinance did not compel recognition of trade unions.

Moreover "Whitleyism" which was introduced in 1948 as a method of negotiation (collective bargaining) between government and the employees in the state-owned establishments foundered almost as soon as it was introduced. Both in composition and orientation the Whitley Councils quickly became anomalous and inhibitive to any effective collective bargaining. In Whitley Council B, for instance, the government side of the membership was composed of heads of departments who would have disagreed with the unions at the departmental level before sitting on the Council as "unbiased negotiators". Often the heads used the Councils as a higher authority to legitimise their initial rejection of unions' demands, or at best as consultative bodies.

Mr Fred Carruthers who was sent from London to Nigeria in 1951 to re-establish "Whitleyism" observed, among other things, that lack of goodwill, patience, tolerance and respect, contributed to the breakdown of the earlier Councils. He also recommended that formal recognition of trade unions and the establishment of "a standing arbitration court reference to which will be at the option of the either side" would be necessary conditions for the survival and effectiveness of "Whitleyism". His visit evoked high hopes for Whitleyism, expressed in comments such as: "if we can maintain the standards that he has set up here he will have done a really first-class job in the practice of collective bargaining in Nigeria. See Kilby (1967); Weeks (1968); Kilby (1968); Weeks (1971); and Cohen (1971).
of work for Nigeria"; "I am sure that Carruthers has put us on the right lines". But the Councils which were reconstituted along the lines of Carruthers' suggestions were doomed to failure as the necessary conditions were not created. Further the Councils were undermined by the frequent use of wages commissions which essentially amounted to unilateral wage determination by the state (Ananaba, 1969: 78-79; Fashoyin, 1980: 106; Fashoyin, 1987: 1-5; Otobo, 1988: 77).

It should be clear from the foregoing examination that, as in Australia in the period leading to the adoption of compulsory arbitration in 1904, collective bargaining did not develop any firm roots in Nigeria prior to the adoption of the compulsory arbitration system in 1968. For both countries reference is often made in the literature to the 1890-4 (for Australia) and 1963-4 (for Nigeria) industrial turmoil as classic evidence of the non-existence of institutionalised consensual collective bargaining or voluntary settlement of industrial disputes. I will conclude this sub-section with an overview of the images of these classic instances of industrial turmoil. These instances are a culmination of the conflicting power relations among labour, capital, and the state within a regulatory, nay a coercive, institutional framework of industrial relations.

The significance of the 1890-4 industrial turmoil in Australia to the adoption of compulsory arbitration is beyond question. Barely eight years after the turmoil occurred, Reeves (1902: 86) expressed the view that "to introduce any account of [the Australian and New Zealand] experiments in compulsion it is necessary to say something of the strife [the unexampled series of strikes in the years from 1890 to 1894] amid which they were framed". In contemporary times this view has echoed in assertions like the one made by Markey (1989: 156): "all explanations for the introduction of compulsory state arbitration [in Australia] place great importance on the impact of the great strikes of the 1890s...". To a large extent this assertion is true of the major works on the Australian arbitration laws and systems some of which are Coghlan.

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21 See "Proposals of the re-establishment of Whitleyism throughout the Public service in Nigeria" by Carruthers; Memo to Mr Watson, dated 15th December, 1951 by Barthrop; and a letter from Nigerian Secretariat in Lagos to the Colonial Office, dated 12th January, 1952: CO 554/697.
Hutson (1983: 43-46) called the turmoil "the Big Strike Struggle" which went for four rounds, namely, the Maritime Strike of 1890, the Queensland Shearers Strike of 1891, the Broken Hill Miners Strike of 1892 and the Queensland Shearers Strike of 1894. The employers saw the strikes as an opportunity not only to test the relative strength of labour and capital but also to break the growing power of the trade union movement. The employees equally interpreted the strikes as "capital versus labour" but were singularly determined to extract union recognition from the employers, using their industrial muscles. The state represented the strikes as an insurrection and confronted them with its might (the coercive apparatuses), "ostensibly to keep the ring clear, but in reality [it entered on the side of capital] to try to crush Unionism" (Spence, 1909: 57).

Following the Maritime Strike of 1890, the Government of New South Wales appointed a Royal Commission under the presidency of Dr Andrew Garran to investigate and report upon the causes of conflicts between Capital and Labour, known as 'Strikes', and the best means for preventing or mitigating the disastrous consequences of such occurrences; and to consider from an economic point of examination the measures that have been devised in other countries by the constitution of Boards of Conciliation or other similar bodies to obviate extreme steps in trade disputes ... (Royal Commission on Strikes, 1891: 25).

Bray and Rimmer (1989: 56) suggest that, given the political context of the middle-class voters pressing for state intervention in industrial relations, the terms of reference quoted above were deliberately worded by the government to cover its tactic "to preempt the Commission's investigation" by deciding to intervene through legislation before the report was ready and then, presumably, obtain a report which would legitimise such decision.

Although the Commission did not recommend the element of state compulsion in industrial relations, it made recommendations which constituted a formal basis for state
intervention in industrial relations. Moreover the Commission provided a significant public forum for Charles Cameron Kingston to explicate his well thought out compulsory arbitration scheme outside his home state (South Australia). It was this scheme which served as a model for the subsequent compulsory arbitration measures which found their ways into the statute books in New Zealand in 1894, Western Australia in 1900, New South Wales in 1901 and the Commonwealth of Australia in 1904. In the words of Coghlan (1969: 1917), his "scheme was the precursor of all Australasian legislation of that character". This widespread adoption of a compulsory arbitration scheme after it had been described as a "repugnant element" and rejected by the 1891 NSW Royal Commission (Royal Commission Report, 1891: 35) is attributable to the fact that the rounds of strikes subsequent to the Commission's recommendations belied the assumed moral force of public opinion as an effective voluntary state machinery.

The 1963-4 strikes in Nigeria constituted "a Big Strike Struggle" which, although different in character to the 1890-4 Australian "Big Strike Struggle", paralleled the latter in relative magnitude and implication insofar as these strikes influenced the adoption of compulsory arbitration in Nigeria. The recommendations which emanated from the inquiry into these strikes "made an open leaning towards compulsion" and "gave the standpoint for the [compulsory] industrial relations legislations(sic) in Nigeria since 1968" (Akpala, 1982: 109). Indeed the recommendations constituted the first articulation and spelling out of the changes which many people clamoured for after the independence (Yesufu, 1984: 223).

Perhaps the recommendations reflect the magnitude or seriousness of these 1963-4 strikes. When the first round of the strikes began on September 27, 1963, the press called it "the Big Strike" (Daily Times September 28, 1963, p.1) and Mr Wahab Goodluck, a leading figure in the Joint Action Committee of the trade unions which

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22 There is a debate about to whom the legacy of "inventing" the Australasian model of compulsory arbitration should belong: Kingston or Reeves (of New Zealand). I rely on Kingston's (1894) *Notes* and the arguments in Mitchell (1989: 93-96) in forming my opinion in favour of Kingston.
coordinated the strikes, represented the second round which began on June 1, 1964 as "the titanic strike that shall engulf the nation" (Daily Times June 1, 1964, p.1). Tokunboh (1985: 59-63) referred to both rounds of the strikes as "the Great Confrontation" - "the most serious confrontation ever experienced by a Nigerian Government". Most commentators on the strikes agree that they completely paralysed the administrative, commercial and industrial life of the nation, in addition to causing a political embarrassment for the ruling elite coming as the first round did on the eve of Nigeria's assumption of the new status of a Federal Republic (Cohen, 1974: 91; Ubeku, 1983: 86)

About four days into the first round of the strikes the Federal Government agreed to the demand of the unions to set up a high-powered commission of inquiry into the wage structure. A six-man Commission under the chairmanship of Mr Justice Adeyinka Morgan was asked to investigate and make recommendations on "the existing wage structure, remuneration and conditions of service in wage-earning employments in the country ...". Other areas included in the terms of reference are: suitable new wage structure, machinery for wage review on a continuing basis, general upward revision of salaries and wages of junior employees in public and private sectors, the abolition of the daily-wage system and the introduction of a national minimum wage.

Obviously the subject matter of the inquiry which the Morgan Commission was asked to make is different from the subject matter for the 1891 NSW Royal Commission on Strikes. So also is the underlying assumption about the power relations which informed the handling of the strikes. Unlike in Australia where the state interpreted the strikes as a conflicting relationship between labour and capital and saw its own role as regulatory (i.e merely setting the rules of the game) in the public interest, the Nigerian state saw the strikes as an outcrop of a malfunctioning public system and undertook, paternalistically, to fix that system.
Nonetheless there is an interesting feature of the Nigerian Commission which reflects what seems to be an Australian idiosyncrasy. Contrary to the dominant practice of the previous wage commissions, the Morgan Commission rejected "the existing pattern of family expenditure" (i.e. the bare cost of living) as the basis for determining minimum wage and, instead, adopted the "principle of living wage" in a manner consistent with or having the flavour of the Australian Higgin's *Harvester* judgment in 1907. The Commission (1964: 8-21), in determining the national minimum wage, started building a foundation for their position by acknowledging that "a wage-earner, no matter how hard he works and is willing and able to work, has no power of himself, to increase his wage". This sounds like Higgin's (1922: 3) interpretation of the Act under which he was to decide the *Harvester* case as "designed for the benefit of the employees, and ... meant to secure for them something which they could not get by individual bargaining with their employers".

Further the Commission argued that the existing system "cannot be regarded as equitable or fair"; hence their preference for the principle of the living wage as a basis for a minimum wage which would be sufficient to meet the requirements of the unskilled labourer and his immediate family, and afford the labourer other items like amusement, tobacco, etc. Again Higgin had considered similar items, like amusements and holidays, liquor tobacco, charity, etc, before coming to the conclusion that nothing less that 42s. per week would be fair and reasonable wages for an unskilled labourer in Australia of his time. The Morgan Commission recommended a minimum wage of 12 pounds sterling (ps), 10ps, 8ps and 6.1ps per month (i.e. approx. 9ps or 45s. average per week), respectively, for four zones of cost of living levels.

Thus the foregoing discussion shows major parallels in the industrial relations contexts of Australia and Nigeria which could explain the similarities in the arbitration laws of both countries. The discussion also indicates that there are differences as well, but they do not vitiate the strength of the overall parallelism of the industrial relations contexts in explaining the similarities among both laws.
The differences exist mainly in the character and consequences of the industrial turmoil. First unlike in Australia where the struggle was waged directly with capital in transport, pastoral, and mining industries - the government only stepping in "to keep the ring clear", the struggle in Nigeria was directed at the government, both federal and regional. The strategy adopted by the Nigerian labour was to confront the government not necessarily as an employer, but

as the authority of State, which not only has direct responsibility to protect workers in all sectors of wage-employment ... but also the obligation to bring about a more rational economic structure, the first steps towards which in our view is a complete overhaul of the existing colonial wage structure (Ananaba, 1969: 238).

Adeogun (1980: 5) takes the view that the struggle "was ... an industrial one", notwithstanding that the strategy which is indicated in the above citation and other utterances of labour gave the struggle a political undertone. However a review of the main underlying circumstances suggests that the struggle was an economic class war, not merely an industrial one and that the political undertone or the use of the government as the target was only a strategy by labour to mount an effective challenge to the iniquity of capital in general (see Cohen, 1974: 164-168 and Ubeku, 1983: 67). Thus when the Government proposed to bring the association of the private employers (Nigerian Employers Consultative Committee) into the negotiations over the Morgan Commission Report, the representatives of labour objected on the grounds that they would not negotiate with their enemy: "the Government of this country has been sacrificing us to the private employers. We do not want to negotiate with them at all" (Daily Times, June 13, 1964, p.1). So, although the Nigerian labour movement directed their struggle to the government, their real target or enemy, was, as with their Australian counterpart, capital. The difference in the strategy has no obvious relevance in the social product explanation of the similarities between the laws of Australia and Nigeria.
Another difference between the two struggles has to do with the recommendations made by the Commissions which were set up in the wake of the struggles. While both Commissions sanctioned the institutionalisation of state intervention in industrial relations, the Commissions diverged in the form that this intervention was to take. The Commission in Australia was content with the state providing the machinery for the voluntary settlement of industrial disputes, the only mild element of compulsion being that this machinery could be called into action by either of the parties to a dispute. It also counted on public opinion to supply the force for compliance: "public opinion would be adverse to those who, except for very good cause shown, refused to avail themselves of its good offices" (Royal Commission Report, 1891: 28).

The Government of NSW welcomed the recommendations and immediately introduced into its Parliament a Bill to establish the recommended Conciliation and Arbitration Boards. The Bill failed to become law following the resignation of the (Parkes) Government before it could be passed. However in 1892 George Dibbs's Ministry put through the Parliament a diluted version of this Bill, which required both parties to an industrial dispute to consent to conciliation or arbitration before the machinery could be called into action. The law as passed effectively removed the "degree of compulsion" which the Royal Commission had regarded as "clearly expedient" in the public interest and was prepared to propose (ibid: 34).

In contradistinction to the Royal Commission in Australia the Morgan Commission in Nigeria formally proposed the element of compulsion for the settlement of industrial disputes. They recommended, among other things, compulsory arbitration and compulsory recognition of registered unions. But the Government welcomed only the spirit of these recommendations; it suspended their implementation till further "examination" and "consultation" were undertaken (Daily Times, June 4, p.11). The implementation never came to fruition before the military took over the government in 1966. In spite of these differences in the recommendations of the Commissions and the
responses of the governments both countries ended up putting in place similar compulsory arbitration schemes.

The last difference which will be examined here relates to the politicising effect of the outcomes of the struggles on the labour movements in both countries. In Australia labour was defeated and was convinced of the need for direct representation in electoral politics: labour saw in the constitutional means an opportunity to infiltrate the state machines the support of which they considered robbed them of victory in their struggle with capital (Coghlan, 1969: 1842-3). Or, as Tanner (1980: 42) suggests, "frustrated by defeat ..., the labour movement harked back to the Australian tradition of government action and evolved the momentous decision to enter politics". The political organ which they started in Balmain in 1891 evolved into a full-fledged party known as the Australian Labor Party. By 1893 the Party had won 80 seats in the State Lower Houses (Ledger, 1909: 56). It has been alleged that the presence of labour in politics in this way greatly facilitated the enactment of the compulsory arbitration laws in Australia, including the 1904 Act by the Commonwealth Parliament (see National Industrial Conference, 1918: 1). The explanation is that labour saw it to be in its interest to have such a law.

In Nigeria labour was successful in their struggle against the government and, perhaps for this reason, remained on the sidelines of electoral politics. Interestingly labour had articulated their grievances in political terms. Indeed Michael Imoudu, popularly known as No. 1 Labour Leader in Nigeria, had announced to a crowded rally at Idi-Oro (about 12 kilometres from Lagos) in the course of struggle that a Party which would cater exclusively for workers would soon be formed (Daily Times, June 12, 1964, p.16). A political strike which the Joint Action Committee organised in December 1964 was a further indication that labour was set on the road to forming a distinct electoral party.
Yet the Nigerian labour failed to mobilise an electoral organ, apart from "occasional brushes with party politics" (Ubeku, 1983: 92). Perhaps since labour accepted the Morgan Report as a basis for negotiation with the government during the 1963-4 struggle it can reasonably be speculated that their presence in the National Parliament would have facilitated the implementation of the Morgan's recommendations for compulsory arbitration and compulsory recognition for unions, as was the case in Australia. But since, in Nigeria, a military government brought in the arbitration scheme without any obvious urging from the labour movement, it can be argued that the presence of labour in politics is not a sufficient factor in the explanation of similar compulsory arbitration laws.

Thus, significant as the differences specified in the foregoing examination may be, they do not diminish the argument that the overall parallelism between the two countries' industrial relations contexts motivated the adoption of similar arbitration laws. The influence of the broader political and economic contexts on the adoption of the laws will now be discussed.

6.2.3(b) Politico-economic context

The discussion in this sub-section is focused on the similarities or otherwise in the interpenetration between the politico-economic configurations (state formations, political traditions, and modes of production) and the immediate conditions under which the adoption of the similar arbitration laws in Australia and Nigeria occurred. The discussion anticipates that the process of state formation in both countries took off on a military foundation; and that, being the prime mover of the development of the productive forces and relations in addition to being large employers of labour [see previous discussion in 6.2.3(a)], the states in Australia and Nigeria had a paternalistic role expectation which pervaded all facets of their nations, including the industrial relations systems. Further, the states' conceptions of these roles would have been affected by the militia traditions which had evolved from the structures within which the states began to form. Invariably, therefore, the states in both countries adopted
interventionist and/or regulatory stances, stances which later conduced to the adoption of full compulsory arbitration systems. Some details will now be provided for these salient factors.

As indicated earlier, the state in Australia began essentially as a military bureaucracy, tailored towards the needs of the penal settlement which it was devised to "govern". Although some civil officials were present in the administration of the early settlement, the decisive force in the moulding of the political character of the settlement was the military power, being "the frame within which everything else happened" (Connell and Irving, 1980: 32). The exercise of this power took the form of coercion and subsequently entrenched compulsion as a weapon of enforcement of the social order. For the duration of the convict system or, at least, until the termination of the purely bureaucratic administration, following the setting up of partially elected legislative and municipal councils in the 1840s, the direct use of coercion held sway.

In Nigeria the beginning of the colonial state presents a picture similar in critical respects to the corresponding Australian picture. The establishment of a centralised political authority in Nigeria by Britain took off through imperial and military campaigns. At the initial stages Britain enlisted the assistance of the European liability companies which had been trading in Nigeria since the 17th century. Thus between 1862 when Lagos was forcibly occupied and the end of the 19th century Britain laid the foundation of the colonial state under the aegis of the United African Company (UAC)- a British company formed in 1877 and granted a Royal Charter in 1886 to be a British agent for imperialistic expansion into Africa.

The UAC established its own Constabulary with which to administer the conquered territories. Friedrick Lugard who rose through the ranks to become a Commander of this Constabulary was later commissioned by the British Government to organise the Royal West African Frontier Force. Together with the Constabulary this Force was used for a systematic military subjugation of the areas later named Nigeria. The
governing bureaucracy that ensued lacked political legitimacy and, invariably became authoritarian, governing through violent repression by the coercive apparatuses of the state.

Tamuno (1978: 33-63) has presented a vivid account of how coercion became the means of consolidating colonial control in Nigeria. Ahire (1990) critiques Tamuno's presentation of this account with particular focus on policing, but essentially comes to the same conclusion: the British colonial state used its coercive apparatuses - police and army - to establish its external and internal boundaries, resolving the inter-imperialist confrontations in its favour and "coercing the submission of the indigenous people" (Ahire, 1990: 53). This coercion may represent a "paradox of Pax Britannica", but it was a classical embodiment of the colonial policy of "breaking African 'eggs' in order to make a British 'omelette'". The military campaign which perpetuated this coercion as a weapon of enforcement of social order continued well into the 1930s.

Now the need to provide the basic social and economic infrastructures greatly expanded the role of the states in Australia and Nigeria beyond the law and order functions. As Head (1983: 4) has observed with regard to Australia,

> the state had a special importance in providing the infrastructure necessary for economic development: roads railways, harbours, telegraphs, town water supplies, irrigation, and so on. There were also important forms of subsidy and protection for industry and commerce - including cheap land, credit, and tariffs - as well as regulation of the workforce, the encouragement of foreign investment and immigration and the establishment of public education.

A similar role was played by the state in Nigeria. In addition to building railways and roads to link the ports and the raw material producing centres in the hinterland, and constructing harbours at the coast for commercial ventures, the state also provided credit facilities and tax relief incentives to foreign firms.

It is generally recognised that playing this role rendered the states a potent force in the development of the primary industry economies which Australia and Nigeria were at
the time their compulsory arbitration laws were enacted\textsuperscript{23}. Moreover this role fortified the states' interventionist tendencies in both countries. In Australia the state's interventionist role was accentuated by pressures from the local capitalists who came to dominate the colonial legislatures, especially the Upper Houses. Most of these capitalists were defenders of the economic principles of "squattocracy" and "wakefieldism"\textsuperscript{24}. The state in Nigeria also came under strong pressures from the representation of the shipping, banking, mining and other commercial interests in the Legislative Council to maintain a stable atmosphere and provide facilities for business.

It should be observed that in spite of the extensive scope of the state intervention in the Australian and Nigerian economies the capitalist orientation of these economies was preserved. Some commentators have argued that the enduring historical connection with Britain enhanced the preservation of this orientation. This is probably the case. The concern here is to show that the mediation of the state intervention in the structures of the productive forces and relations did not diminish the potential of this orientation to hold labour and capital in antagonistic or conflictual, rather than "unitary" or consensual, relationships in Australia and Nigeria. A typical manifestation of this potential were the Australian 1890-4 and Nigerian 1963-4 industrial turmoil, the aftermath of which saw the states choosing the way of compulsory arbitration systems.

It becomes pertinent to ask why it was possible for the state in Australia and in Nigeria to adopt full compulsory mechanisms in their fight against industrial conflict: what is

\textsuperscript{23} Up to the 1950s agriculture continued to account for more than 80% of the Australian exports. In Nigeria, although crude oil production had begun in the mid-1950s and entered Nigeria's export trade in 1958, agriculture had continued to contribute about 60% to the GDP up to the 1970s (Iloabochie, 1986: 101, 106). The claim that the early 1950s witnessed the beginning of large scale industrialisation in Nigeria (e.g Uvieghara, 1985: 43) fails to critically appreciate that only import substitution industries, designed to benefit the metropolitan imperialist interests following a change in the British colonial policy in 1949, were encouraged (see Bonat, 1986: 161; Kalu, 1986: 2).

\textsuperscript{24} For details on the squatters' economy founded on the principle of discovering and occupying land (runs) outside the Limits of Location for the purpose of pastoral farming, starting from the crossing of the Blue Mountains in 1813 during the period of Governor Macquarie, see Buckley (1975); Greenwood (1978: 46-97); Rosewarne (1983); Buckley and Wheelwright (1988). The doctrine of Edward Gibbon Wakefield sought to 'manufacture wage-workers' by advocating a shift from the system of land grant to land sale at prices out of reach for ordinary independent entrepreneurs (see Coghlan, 1969: 404-423). Karl Marx caricatured this wakefieldian doctrine as "the modern theory of colonisation" in chapter xxxiii of his \textit{Capital} vol. 1 (1986: 716-724).
the most critical contextual factor, common to both countries, that made the adoption of compulsion possible at that time? Macintyre and Mitchell (1989: 8) have asked a similar question with regard to the peculiarity of Australia and New Zealand; and said: "this question calls for specification of relevant economic, social and political factors that distinguish Australia and New Zealand ... [and] requires that the distinctive features of the two countries be given sufficient historical precision to locate the new departure". In the case of Australia and Nigeria, my readings have led me to consider coercive social control tradition as the distinctive feature. Other factors, like industrial turmoil and fragile "dominion" capitalist economy, do not seem peculiar (where they are applicable at all) to the two countries alone.

When the structures of the convict regulations in Australia and the colonial punitive controls in Nigeria were dismantled did the coercive or compulsive (military) social control traditions which had evolved within those structures vanish with them? In Nigeria where military regimes have continued to dominate the political scene in the post-colonial period it is doubtful if the structures have ended at all. Even if the argument is that the punitive and autocratic\textsuperscript{25} structures of the colonial state were no longer present as from the 1960s, the dominance of the indigenous military structures from 1966 onwards, during which time the compulsory arbitration law was introduced, means that the coercive tradition of the colonial administration had continued to find nurture in Nigeria. Whether it was the "military democracy" of General Gowon (1967-75) or the "military dictatorship" of General Buhari (1983-85) the basic instrument of governance, i.e force, remained the same as that of the military-oriented colonial Governors of Nigeria. In the circumstances, compulsory arbitration was not out of place.

\textsuperscript{25} Lugard's rule at the critical formative years of the colonial state in Nigeria has been characterised as "simple autocratic rule from himself downwards" (Nicolson, 1969: 137). The nature of this autocracy has been highlighted by Gann and Duignan (1978: 209) in their description of Lugard as a Governor "whose administrative gospel blended muscular Christianity with a military puritanism".
Australia's situation in this respect is not straightforward. The discovery of gold in NSW and Victoria in the early 1850s led to a remarkable transformation of the structures of the Australian society, which transformation in turn hastened the development of political democracy in the second half of the 19th century (see Gollan, 1976 for a good account of this social dynamics). In 1856 the parliamentary system of responsible government was put in place and has continued ever since. Therefore, it can be said quite easily that the structures of convictism and the militarisation of the social life were dismantled in the wake of this transformation. What is unclear is whether the military or compulsive tradition of the pre-1850s had significantly given way to a democratic tradition by the turn of the 20th century when the adoption of compulsory arbitration laws was being fostered.

Coghlan (1969: 519) asserts that the period of the gold discoveries completely altered the method of government and placed it upon a democratic basis. The period saw "the destruction of the last vestiges of convictism". What these 'last vestiges' are is not specified; but Coghlan is careful enough to know that traditions do not necessarily disappear with the systems or structures to which they correspond as his reference to the Wakefield tradition vis-a-vis the Wakefield system in South Australia shows (Coghlan, 1969: 1900).

A study by Tanner (1980) shows that the compulsive tradition of the Australian convict age persisted into the early 20th century more than is commonly realised. He sets out to explain why "compulsory soldiery" was adopted in Australia in a peace time and, with particular attention to the support of Labor for the scheme, concludes that "compulsory training seemed to best fit the democratic ideals propounded by many Australians, but chiefly by the Labor Party" (ibid: xxiii). He argues that the Labor Party had evolved an "unstated theory of 'compulsory democracy'", i.e obliging people to act in an equalitarian fashion, in its party organisation and policy. And that, the progression from

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26 Greenwood (1978: 98-108) is less convinced about the significance of the gold discoveries. He is of the view that their immediate effect and ultimate importance were counted too high.
apathy to apprehension about territorial defence, together with this theory, "suggest an explanation for Australia's adoption of compulsory military training" (ibid: 41). In formulating this theory Labor, without doubt, drew upon their prior experience of state intervention which was coercive in form.

Another aspect of Tanner's study which is relevant to the concern in this section is his analysis of the debates on the Defence Bill 1909. In these debates the Parliamentarians exhuberantly acknowledged their tradition of "military instinct by which the great dominions of the Crown have been built up" (ibid: 34). This acknowledgement, together with the form of democracy which the Labor Party had articulated, sufficiently allows for a suggestion that although the military structures of the convict age had been dismantled before the end of the 19th century, the tradition upon which the Commonwealth Parliamentarians knowingly or unknowingly drew when they passed the 1904 Arbitration Act retained a coercive orientation.

It is difficult to tell how far the presence of ex-soldiers in the Parliament can be associated with the persistence of this tradition. Rydon's (1986: 104-108) work shows that in every federal parliament between 1901 and 1980 there have been ex-soldiers, the parliaments up to 1929 having people with experiences in British or colonial forces (including several veterans of the Boer and Zulu wars). With the enlargement of the parliament in 1949, perhaps to accommodate a greater intake of returned men, "over 45 per cent of new members and almost 47 per cent of all members were ex-servicemen" (p.107). By 1980, the percentage of all the members that are ex-servicemen had dropped to 19.1. It is plausible to suggest that these men carried with them into politics the identification marks of the military.

The "militarisation thesis" on compulsory arbitration which this research has thrown up here has not featured prominently in the existing literature. The closest acknowledgement, it would seem, is the statement by Quinlan (1989: 28), quoted approvingly by Creighton, et. al. (1992, forthcoming): "the predisposition of both
legislators and employers to seek statutory solutions to labour problems was reinforced by the pattern of regulation that had been established with the convicts. The penal background and an associated tradition of coercive measures ... faded only slowly" (emphasis, mine). How sharp or faded the tradition was at the time the 1904 Act was enacted we may not know; my argument is that this coercive (militaristic) social control tradition could well be a major key to the explanation of the presence of a similar compulsory arbitration law in political economies that would otherwise be different with particular regard to race, geography and political structure.

The coincidence of the coercive social control traditions in both countries raises the question what difference it makes that in Australia the adoption of the compulsory arbitration law was carried through by a democratic government in peace time, while in Nigeria it was by a military regime in a war emergency. In general terms it problematises the relative significance of political "traditions" versus political "structures" in the relationship between law and society which is not directly addressed here. A more profound related question which will be given some attention here is: given that both countries had a history of compulsion/coercive tradition, why did they not solve their labour problems more drastically by, for example, banning trade unions "as some other countries have done, e.g. Indonesia - another military dictatorship" (Hopkins, 1991 - per. comm.)?

In the Australian case a democratic social structure had evolved in which labour was by 1904 strong electorally, reflecting the strength of the working class more generally. The Nigerian case appears more intriguing: why was the military regime at the time so relatively moderate, deciding to tackle the home-grown problem of industrial disputes with a democratically developed (Australian) model which institutionalises rather than destroy the trade union movement? There is no simple answer. It is, however, critical that the military intervened in Nigerian politics in 1966 under the banner of reformist populism. Against the background of bitter ethnic rivalry and political corruption, they claimed to provide a corrective government with "a trusteeship relation to the civilian
body politic” and not motivated by usurpation or tyranny (see Dent, 1978: 101). Thus at the time of General Gowon, during which the 1968 and 1969 arbitration Decrees were enacted, the regime is said to have adopted a “managerial brokerage” approach - a modality which, as described by Decalo (1976: 247), caters "to the satisfaction of group demands outside the armed forces".

Gowon was said to have changed over to a "personal dictatorship" approach in 1973 using active-combative method to maintain a high corporate status for the military - a method continued by General Murtala who took over government in 1975. But, by 1976 when the arbitration laws were being consolidated and expanded, the Obasanjo regime is said to have shifted from this potentially repressive method to an "active-reconciliationist" approach (see Ojo, 1987: 155-160).

It might be asked why the unions were not banned between 1973 and 1975. The reason seems to be that other critical structural factors forced the military regime to adopt a relatively benign attitude towards labour. Initially, the small size of the officer corp at the time of the intervention made it impossible for the military to govern on its own. Having swept away the politicians, their parties and allied organisations, the military had to rely on the civil service which was one of the highly unionised segments of the labour force at the time. Evidently, to ban unions would have meant leaving a sizeable proportion of its "governing partner" highly disaffected. The way Gowon went about canvassing the support of the civil bureaucracy, among other things, is, perhaps, the ground for regarding his regime as a "military democracy". Another critical factor is that the military itself was not spared from the fractionalising forces of the ethnic rivalry in the wider society (see Oyediran, 1979: 22-24; Otobo, 1988: 103). Thus it lacked the unified internal support to embark upon such drastic measures like banning the collective movement of the working class. So, why were the unions not banned? In Australia it was the emergent "liberal" democracy in which labour had a strong presence; in Nigeria it was the peculiar circumstances of the military regimes.
Let me return to the explanations of the overwhelming similarities among the labour laws of Australia and Nigeria. The discussions in this section have drawn on aspects of both autonomy and social product models. As evident from the discussions, transplantation did take place but parallel social conditions were necessary in order to motivate the transplantation. What about the differences: if, as has been shown before, both the Australian and Nigerian laws are overwhelmingly similar and have deviated from the natural law principles in similar ways how did the observed differences between the two laws arise? It is to this secondary task that I now turn and, as with the similarities, I will interrogate both theoretical models for possible explanations.

6.3 Autonomy and social product explanations of the differences among the laws

The autonomy model suggests that the differences between the compulsory arbitration laws of Australia and Nigeria may be due to both countries differentially deviating from the principles of natural law or to different modes of production. The discussion in subsection 6.2.1 above shows that the former cannot be relevant, as both countries have been shown to have departed from the natural law. With regard to the latter, on the basis of the relative autonomy theory the laws of Australia and Nigeria should be similar not different since both countries have a similar (capitalist) mode of production. This means that the autonomy model cannot explain the Australian/Nigerian differences. So I look to the social product model which suggests an explanation for the differences in terms of non-parallel development of social conditions.

In the light of the model I suggest that two of these differences, namely the differences in the process of negotiation and in the standing of individuals or organisations as parties before the tribunals, are directly explainable by a socially conditioned deviation from the natural law principles. The third difference, relating to the constitutional limitation is largely jurisdictional in a political sense (with no direct implications for the universal rights of the individuals) and will be examined in relation to the political context in both countries.
6.3.1 Socially conditioned deviation from the principles of natural law and the differences among the laws

The severe restriction by the Australian law on what issues relating to an industrial dispute the parties can voluntarily negotiate suggests a radical departure from the principle of voluntarism upon which arbitration as universally recommended by natural law is based. Similarly the emphasis of the law on collective, rather than individual, representation at arbitration suggests a radical departure from the universal principle of rights and liberties of the individual.

Although the Nigerian law deviates from the principles of voluntarism and the individual rights of the individuals with regard to these themes, the law did not go as far in restricting voluntary negotiation and the individual's right to take disputes for arbitration as is the case with the Australian law. This suggests, therefore, that the differences which are being considered here have occurred due, among other things, to different degrees of deviation from the universal principles by the Australian and Nigerian laws. Why did the two laws deviate from the natural law principles in varying degrees?

It would be recalled from chapter five of this thesis that the pre-1988 restriction on the voluntary bargaining which made the Australian law radically deviate from the natural law principles and differ from the Nigerian law was the creation of the High Court. The extent to which the language of the provisions in the law on "Industrial Agreements" led the Court in this direction is not certain. However, it has been suggested, and plausibly so, that the Court redefined the law in this way so as to uphold the social expediency which gave rise to the arbitration system in the first place.

One intuitive guess is that the employers might have attempted to manoeuvre the voluntary bargaining provisions in a manner that threatened the arbitration system: using their superior bargaining power "to conclude industrial agreements with their employees in order to remain aloof from the [system]". And in response "the High
Court chose [a] narrow reading of [the then] Section 73 in order to bolster what was then a highly judicialised form of compulsory conciliation and arbitration" (McCallum, 1986: 303). The Court reaffirmed their aversion to any legislative provision which might destabilise the arbitration system, e.g through 'opting out' mechanisms, when they ruled as unconstitutional the provisions for the Conciliation Committees in the Australian Railway Union (1930) 44 CLR 319.

This expediency of safeguarding the arbitration system by the highest court of the realm has no parallel in Nigeria. Unlike the High Court in Australia the Supreme Court in Nigeria has not in any significant way shaped the content and character of the arbitration law. This may be due, partly, to the fact that the constitutional right of the individuals or organisations to challenge legislation in general, which could have been used to litigate the arbitration law in this highest court, was suspended as soon as the military took over government and remained so for a long time after the arbitration law was enacted. Whether or not the Supreme Court would have been or is disposed, like its Australian counterpart, to safeguard the arbitration system cannot therefore be known.

With regard to the difference relating to the standing of individuals and organisations as parties to industrial disputes, the different degrees of deviation bears on the union-related social expediencies which both laws were enacted to deal with. In Australia the expediency was how to give legal recognition to workers' organisation and, perhaps, make them equal regulators of industry with a view to achieving industrial peace through the prohibition of industrial action. In Nigeria the expediency was how to curb the alleged excesses of the worker's unions and, by that fact, protect the managerial prerogatives of Capital. As will be shown shortly, the circumstances directly associated with the adoption of compulsory arbitration laws in both countries highlight these respective expediencies.
The events which constitute the immediate pretext for the introduction of compulsory arbitration laws in Australia were the 1890-4 strikes. While it would appear that the *causa belli* of these strikes was the demand for higher wages, it has been argued that the fundamental issue was the recognition of trade unions. In other words, the substance of the capital-labour conflict during this period was not wages but the recognition of unions and their role in industrial regulation. The employers probably felt that time was opportune for them to confront the principle of unionism with their own principle of 'freedom of contract'. In this situation, whenever the unions demanded conferences of employers and employees to settle their differences, employers steadily refused on the grounds of no outside public interference between master and servant (see Ebbels, 1960: 18; 125-149; Sutcliffe, 1967: 90-106; Coghlan, 1969: 1591-1607).

The refusal to negotiate further encouraged the trade unions to press for the introduction of compulsion in government-sponsored arbitration. More importantly, this refusal generated a considerable sympathy for trade unions from liberal circles, a sympathy which translated into extensive provisions for securing union recognition in the Arbitration Acts of the States and, later, that of the Commonwealth (Scherer, 1983:169). Important as this point might have been, Macintyre and Mitchell (1989: 18) appear over-emphatic in their representation when they say: "the statutory schemes of arbitration introduced in the period from 1890 to 1914 were a response ... to the need for trade union recognition". As I submitted in chapter four the central purpose of these schemes could also be interpreted as the prohibition of industrial action. Be that as it may, the point remains that in tackling the problem of industrial conflict at that time the state in Australia saw union recognition as a social expediency.

The social expediency which informed the Nigerian legislation and whose foundation was laid during the colonial period was different. The labour revolts in most of the British colonies in the late 1920s and 1930s had put the Colonial Government on a high alert about the possible link between the development of trade unionism and political/nationalist movements in the colonies. A despatch on September 17, 1930
from the then Secretary of the State for the Colonies, Lord Passfield (formerly Sidney Webb) urged all colonial governments to encourage the existence of trade unions, by way of providing "sympathetic supervision and guidance" in the formation of labour organisations. This was with a view to ensuring that the unions did not "fall under the domination of disaffected persons". Much as this urging reflects a "labourite" ideology of the Party in government in London at the time, this was a scheme for a state control over trade unions in the colonies against nationalist politics.

The Nigerian Trade Union Ordinance 1938 which legalised the activities of collective bodies of workers was a direct product of this urging. Although the ordinance made registration compulsory for these bodies, it did not compel the employers to recognise them. Such compulsory recognition was to come in the train of the 1973 amendment to the law (see Uvieghara, 1976: 102-104; 1987: 34). With the object being to control the unions, it is not surprising that much of the emphasis of the ordinance was on duties and obligations of the unions and not their rights or benefits (Otobo, 1988: 45). The continuation of this tradition or policy of control over unions in post-colonial Nigeria explains why the law that introduced compulsory arbitration in Nigeria failed to give much importance to organisations as the Australian law has done.

6.3.2 Non-parallel political (constitutional) history and the differences among the laws

The difference in the constitutional limitation on the scope and means of industrial dispute settlement as demonstrated in chapter four bears on the division of power between the state and federal governments in both countries. Thus, the light of political history is required to explain why in Australia the industrial power of the federal government is restricted and in Nigeria it is not.
The states in Australia assumed the status of separate British colonies with full powers over their respective internal affairs early in their formations. Barely three decades after the start of the white settlement in 1788, the original colony, i.e New South Wales, began to break up into colonies with different interests. In the words of Clark (1955: 443),

> [t]he political current of the time was running steadily not towards union, but towards disunion. Victoria was just receiving her independence from New South Wales: Queensland was beginning to move in the same direction. Tasmania did not wish to go back on the decision of 1823, and South Australia was, as ever, loath to have any association with the convict "Sodom and Gomorrah" of the East.

By the 1860s and 1870s, the inter-colonial jealousy and rivalry had intensified. However, when circumstances demanded that these colonies form a federation, the dominant disposition among the states was to hold back most of the powers over their internal affairs from the emergent federal government. This disposition is evident in the debates of the Intercolonial Conferences or Conventions\(^{27}\) which were held between 1883 and 1898.

One of the issues upon which the "State-righters", as opposed to the "Centralisers" (Federalists), refused to relinquish the power of the States to make laws was industrial relations. In the debates on the Commonwealth of Australia Bill, during the National Australasian Convention in 1891, Cameron C. Kingston (from South Australia) proposed that the federal government be given power to establish "courts of conciliation and arbitration, having jurisdiction throughout the Commonwealth, for the settlement of industrial disputes". The proposal failed on a 25 to 13 vote. Another attempt in 1897 to give the federal government this power, based on a proposal by Higgins and an amendment by Kingston, also failed.

When the proposal was eventually accepted in 1898 by a bare majority of three (a vote of 22 to 19) it was purged of all plenary and/or exclusive jurisdiction for the federal

\(^{27}\) See Sawer (1975: 13-23) for some biographical notes on the "behind-the-scenes" leaders of the Conventions and a précis of the issues that dominated these Conventions.
government over industrial relations. S.51(xxxv) of the Constitution embodies the industrial power allowed for the federal government, and as Brooks (1986: 156) has observed the "nineteen words [in this placitum] have been the subject of more argument before the High Court than any other single part of the Australian Constitution". The Conciliation and Arbitration Act 1904 which was enacted by the federal Parliament, pursuant to this power has, generally, been read down by the High Court to keep it within the intended State-Federal power allocations. Beginning in the Engineers case in 1920, but more widely since the Social Welfare Union case in 1983, the High Court has continued to give a liberal reading of the Act and the Constitution.

It is noteworthy that most of the efforts of the Commonwealth Governments - conservative, liberal or labor - in seeking the people's approval by referenda to enlarge the federal powers were, at least up to the 1950s, directed at the industrial power. More significantly all these efforts failed, indicating that the desire of the Commonwealth Governments to have greater power over industrial relations had not found support among a majority of voters in the Commonwealth and a majority of voters in a majority of States\textsuperscript{28} (see Sawer, 1949: 178-180; Portus, 1980: 395; McMillan et al, 1983: 24-29). Thus the restriction of the Australian (Commonwealth) arbitration law to the prevention and settlement of interstate industrial disputes by conciliation and arbitration is strongly associated with the political condition under which the power to make the law was fashioned.

Although Nigeria began as a colony of Britain as did Australia, the relevant political condition which can be associated with the constitutional scope of its arbitration law was not parallel to that of Australia. Starting with a forcible occupation and proclamation of Lagos as a Crown Colony in 1862 Britain, through imperial and colonial military campaigns, fashioned a centralised political entity (which became

\textsuperscript{28} See s.128 of the Constitution, as amended by the Constitution Alterations (Referendums) 1977 (No. 84 of 1977).
Nigeria) out of a motley collection of `nations'. This entity was governed as three administrative units\textsuperscript{29} until 1906 when the units were reduced to two.

The Southern Group of Provinces and the Northern group of Provinces, as the administrative units were generally known then, were placed under one Governor - Lord Lugard - in 1912 as a step towards a planned unification of the two Groups. Several reasons were advanced for this plan, one of which was "the clamour for unification from educated Nigerians in Lagos" (Akande, 1985: 1). In 1914 the two Groups of Provinces were amalgamated by Lugard. Subsequently the colonial constitutional developments, beginning with Arthur Richard's Constitution in 1946, introduced the principle of regionalism by which the country was divided into three regions. This principle was attacked by the dominant part of the emerging indigenous political movement as "a divide-and-rule instrument" of the British administration (see Ananaba, 1969: 87).

It is significant that the powers given to the legislative assemblies of these regions were limited to the discussion of general legislation and the rights of passing regional budgets. In regard of the power over budgets the regions did not even have it all as theirs: "the amount of the revenue to be appropriated or assigned to each region was to be directed by the Governor who might also `specify the service and work to be included in regional estimates of expenditure'" (Akande, 1985: 2). This limitation on the regional administration underlines the point that power was disproportionately concentrated at the centre in the Nigerian polity, a concentration which has continued after the colonial rule.

\textsuperscript{29} These are the Colony of Lagos and the Protectorate territories of Yorubaland which were administered from Lagos under the auspices of the Colonial Office in London; the Niger Coast Protectorate (comprising of the former Bendel State and the former Eastern region), administered by a Consul based at Old Calabar under the auspices of the Foreign Office in London; and the Northern Protectorates, administered by a British Company, the National African Company, which became the Royal Niger Company after it was granted a Royal Charter by the British government in 1886, under the supervision of the Foreign Office (Otobo, 1988: 8).
In contradistinction to Australia where the centre was created by the colonies (states), the regions in Nigeria, being the creation of the centre, were not in the position to restrict the powers of the federal government to make laws in respect of any matter. Under these circumstances, it becomes understandable why the industrial power of the federal government is general and provided in the constitution in the widest terms. Although labour matters were placed on the concurrent list in the *Nigerian (Constitution) Order in Council 1960*, by the time the 1968 arbitration law was enacted, the regions were already in the habit of allowing only the federal government to legislate on labour/industrial matters.

The foregoing application of the social product model to the differences between the Australian and Nigerian arbitration laws has shown that the Australian law, in response to certain social expediencies which were different from those in Nigeria, departed from the natural law more radically than the Nigerian law. Thus the different ways in which both laws incorporated voluntary negotiation and entrenched individual or collective rights is explainable by this socially conditioned variance in the deviation. On the theme relating to the constitutional limitation on the laws it has been shown that the difference in both laws arose from the differences in the evolution of the political (constitutional) structures of Australia and Nigeria.

The overall picture which can be derived from the autonomy and social product explanations of the similarities and differences in this chapter is this: the Australian and Nigerian arbitration laws do not approximate the natural law in so far as they both embody compulsion. These laws are so similar because Australia departed from the natural ideal and Nigeria copied her "deviant" model. The copying was possible because of the remarkable similarities in the social circumstances, particularly the social control traditions, of the two countries - remarkable because at first sight Australia in 1904 is so different from Nigeria in 1968. Yet the similarities are so great that the Australian legislation turned out to be what the Nigerian government needed. But it was not a blind transplant; hence the different reflection in both laws of the
different social expediencies and constitutional development to which the laws were responsive.
CHAPTER SEVEN: SUMMARY, FURTHER DISCUSSION AND CONCLUSION

7.1 Introduction
This thesis has focused on the explanation of the differences and similarities between the labour laws of Australia and Nigeria in the light of some theoretical traditions in sociology. The comparison of these laws in chapters four and five demonstrates that the primary task would be to explain the fundamental similarity in legislation in both countries. The explanation of the few differences became a secondary task. Using the explanatory frameworks developed in chapters two and three, both the primary and secondary tasks have been addressed in chapter six.

In this chapter, I shall tie together through summary and further discussion the core issues addressed in all the preceding chapters. The discussions will further underline the relative importance of the explanatory models. On the similarities, it will be reiterated that although the factor of transplantation sheds some light on the similarities between the compulsory arbitration laws, it was the industrial and politico-economic contexts of these laws which explain not only why it was necessary for Nigeria to borrow from Australia but also why it was possible for both countries to adopt such an unusual system of arbitration. And on the differences, it will be stressed that the different social expediences and constitutional history in both countries suggest that the transplantation of the Australian model to Nigeria could not be total. The chapter concludes by noting some limitations of the thesis and identifying for future research some questions suggested by the analyses, interpretations and arguments in the thesis.

7.2 Summary and further discussions
The main research problem in this thesis is to explain why the Australian and Nigerian arbitration laws show such a striking similarity with each other (in 80% of the themes upon which they have been compared in chapters four and five), a similarity which is inexplicable simply in terms of the character of labour movement, race, geography or
political institution. Both laws, in essence, prohibit direct industrial action; they embody full compulsory arbitration, applicable to all disputes - interest or right, in essential or non-essential services; and their institutional machinery consists of permanent public tribunals with powers to intervene and before whom, more clearly in Australia than in Nigeria, mainly collective parties can seek redress. The main stages of the settlement of industrial disputes which the laws provide are automatic and mandatory; the awards (consent and arbitral) made under them are not subject to judicial review on the merits; and the enforcement of these awards is backed by sanctions which the tribunals have powers to impose through the contempt proceedings or the variation of awards.

As pointed out in chapter one, examining both laws in a comparative manner as done in this thesis with a view to explaining this fundamental similarity is a pioneering attempt. Further, such examination is potentially revealing with regard to the history and character not only of both laws but also of the two societies. Such examination is also considered well suited for a contribution to the theoretical base of the sociology of law.

The explanation of the overwhelming similarity and, later the relevant differences, in chapter six drew upon the theoretical models which have been constructed in chapters two and three from some contrasting conceptions on law-society relations. The suggestion of the autonomy model that similarities may be due to conformity to natural law was seen to be inappropriate as, by embodying compulsion on a comprehensive scale, both laws represent a major departure from the voluntaristic principles of the natural law. Nevertheless legal transplantation, another factor to which the autonomy model has sensitized us, proved to be a significant element in the explanation. The pieces of evidence point to Nigeria borrowing the Australian model under specific circumstances. In response to the need for a major review of the labour laws, Nigeria looked for a model from among the Commonwealth countries. She found the Australian law well placed to be borrowed. This law had a form sufficiently abstracted from its social origin and was written in a language used officially in Nigeria. It also
had a reputation of being effective, especially in the 1960s (pre-O'Shea period), and was accessible in the form of books and statutes to a Nigerian legal elite obviously fascinated by the model.

With regard to the question why it was necessary and possible for Australia to depart from the "natural ideal" of voluntarism and for Nigeria to borrow a compulsory model, the social product, not autonomy, model provides the explanation. Remarkably, key aspects of the Australian and Nigerian political economies which can be associated with the adoption of the laws were found to be parallel.

In the industrial relations context the creation of the labour market, the raison d'être of the organisation of labour and capital, and the epoch-making industrial turmoil (of 1890-4 and 1963-4, respectively) were associated with the adoption of the compulsory arbitration system in both countries. More fundamentally, these factors show significant similarities in character. In conventional wisdom both countries should have developed a system of industrial dispute resolution based on free collective bargaining because of their colonial connection with Britain, a country regarded as the bastion of voluntarism. However, as argued in chapter six of this thesis, the nature of the state intervention in industrial relations of these countries created "passive" actors in the system, inhibited the development of voluntary collective bargaining and, ipso facto, laid the foundation for their compulsory arbitration systems.

No doubt the volatile and risky nature of the Australian and Nigerian economies in their formative years, being predominantly rural (primary), kept both countries dependent upon government for infrastructures and security and thrust upon the two states a paternalistic role. This role, it is generally argued, explains the intervention in these countries. This thesis argues that a coercive social control tradition, not the economic configuration, determined the compulsive character of the state intervention in both societies. Further it is argued that this tradition arose from the military foundation upon which the process of state formation took off in the formative years of
both countries. On this ground, mainly, the thesis has suggested that the adoption of compulsory arbitration in both countries has a strong link with their militarised social pedigree, a pedigree which is not necessarily a "mark of Cain".

For, in Australia the dictatorial and military style of social control in the formative years was the means to "the goal of reform". This means involved pinning "down coercively the nomadic groups [i.e the convicts] ... lashing them into shape until they could be confined ... [and] compelling them to work and to marry so that they necessarily became sedentary and associated in fixed patterns" (Davidson, 1991: 30-34). In colonial Nigeria coercion or, in the words of Joseph Chamberlain - Secretary of State for the Colonies, 1895-1903 - , "the use of force" was the means of "breaking the African eggs in order to make a British omelette' (see Tamuno, 1978: 48).

With regard to the differences in the laws, the study finds that in response to different social expediences and constitutional trajectory, Australia and Nigeria deviated in varying degrees from the natural law principles of the priority of individuality over collectivity and voluntary arbitration. The differences are few and do not relate to the critical elements of the arbitration scheme in both countries. However, their presence supports the proposition that the borrowing of the Australian model by Nigeria was not a blind legal transplant.

This type of borrowing contrasts, for instance, with the borrowing which Japan engaged in after the Meiji Restoration. She borrowed heavily from the major European legal systems (e.g the German legal codes; elements of the French and English laws) "in an effort to create a modern state that would not only be recognised by the Western powers but would be their equal in stature" (Japan's Institute, 1989: v). Now given that the Australian arbitration law was quite unique in the international context, it is not plausible to argue that a country such as Nigeria would borrow it with a view to gaining international recognition. Where the necessity to deal with a home-grown problem is
the main reason, then the country borrowing would in so doing accommodate its peculiar social expediencies or history as the Nigerian experience suggests.

As the foregoing summary shows, the compulsory arbitration laws of Australia and Nigeria present profound sociological "problems". The commentary that follows will reiterate the interconnection between these laws and their social contexts. It emphasises the point that these laws emerged at, and bear the marks of, critical junctures of the historical development of the Australian and Nigerian political economies. This will underline the relative importance of the social product model.

In Australia, the law emerged barely one decade after, and in the shadow of, the antagonistic relationship between capital and labour which had culminated in an unprecedented show-down in 1890-4 and in which labour suffered defeat under the combined might of capital and the state. Fitzpatrick (1941) portrays the show-down as a bout of fierce class conflict triggered by a mounting crisis of capital accumulation in which the parliaments, judges, police and the military sided with capital. The hostility of the state to which labour attributed its defeat is succinctly expressed by Coghlan (1969, vol.IV: 1841):

Against [labour] were arrayed not only the forces of capital, but the whole force of the Government, ... Whilst the Government had punished the shearers and the seamen, who, in the interest of the cause, had left work without notice, it had protected the "blacklegs" on the wharves and in the mines, even to the extent of an unnecessary and irritating display of its military forces.

Paradoxically, this defeat made labour quite determined to acquire the constitutional use of the state power, thus marking their "incursion into politics". By 1904, they had mustered enough power to 'bargain' for compulsory arbitration in the federal parliament. The explanation in chapter six shows that the adoption of this scheme was possible not merely because of the presence of labour in the Parliament, but largely because of the tradition of coercive state intervention.
The corresponding experience of Nigeria involves a confrontation between labour and the state-cum-capital in 1963-4, four years before the Nigerian compulsory arbitration law was introduced under a military regime. In contrast to the Australian experience, labour won in the confrontation in spite of the use of police by the state\(^1\) and remained on the sidelines of politics. Given the signals that Nigerian labour was going political prior to this confrontation, the lack of 'incursion into politics' cannot be accounted for fully by its success in the confrontation. The labour movement in the colonial times had taken a nationalist political stance largely as a reaction to the prevailing race relations. The movement had also demanded labour representation in the colonial Legislative Council, perhaps as a counterweight to the representation of shipping, banking and mining interests in the Council at the time.

The arrival of Sir Arthur Richards as Governor in 1943 accentuated the political ferment within labour. Richards looked "upon every desire for improvement or reform [including labour's request for better conditions of employment] ... as unnecessary political agitation, which must be crushed at all costs" (Ananaba, 1969: 44f). In 1944 he condemned the students' strike over bad food and unhealthy accommodation in King's College and ordered the ringleaders to be conscripted into the army and others to be prosecuted for offences relating to breach of peace. One of the ringleaders died a few days later, triggering an outrage by the indigenous groupings over the general approach of the Governor. In the aftermath of this episode, an indigenous political party was formed to which the then Nigerian Trade Union Congress applied for formal affiliation and was accepted, marking an auspicious start for labour in politics (ibid: 86-87). And, as shown in chapter six, it looked like labour was being galvanised into electoral politics during the 1963-4 industrial turmoil.

So, why did the Nigerian labour stand aloof from direct presence in politics even though they had reasons as good in some respects as their Australian counterpart to be

\(^1\) T. M. Yesufu noted in his minority Report of the Morgan Commission the "mounting dissatisfaction with the role of the police during strikes" (quoted in Otobo, 1987: 38).
involved? The main reasons suggested in the literature are: (1) the colonial government opposed the idea as they feared that trade unions might fall under the domination of disaffected persons by which their activities may be diverted to improper and mischievous ends; (2) the indigenous politicians had not appreciated the immense power of organised labour (see Ananaba, 1969: 86); and (3) the ethnic conflict among the emergent political parties (the National Council of Nigeria and Cameroons formed in 1944, the Action Group in 1950, the Northern Peoples Party in 1951, the Northern Elements Progressive Union in 1953, etc) threatened the solidarity within the labour movement and weakened their capacity to mobilise a virile political organ of their own (Tokunboh, 1985: 49).

Added to these domestic reasons is the split of the International Confederation of Free Trade Unions from the World Federation of Trade Unions in January 1949, a phenomenon of the cold war. This split polarised the Nigerian labour movement ideologically into conservative and radical camps as segments of the movement affiliated with either of the two bodies. The differential affiliation led the segments into recriminations and political sabotage against each other and kept the movement polarised. This polarisation continued into the post-independence period, further undermining the already confused and ethnically-divided political mobilisation among labour. Otobo (1986) provides an informative expose on the influence of the international ideological struggle on the Nigerian labour movement. The Australian counterpart has been highlighted by Martin (1963: 152; 1964: 67).

At the time the Nigerian arbitration law was introduced in 1968 by the Gowon military regime the rifts within the labour movement had not been mended and, unlike its Australian counterpart, labour was not in any stable position to bargain on this law. Yet this law is fundamentally similar to the Australian law. This provides an answer to the question whether the presence of labour in politics is a necessary factor in explaining the adoption of compulsory arbitration law. The answer is no. The explanation
suggested in chapter six is that, as in Australia, the adoption of this law in Nigeria has a strong connection with the coercive tradition upon which the state has evolved.

Another critical juncture which has left an imprint on the laws relates to the constitutional trajectory. The Australian law emerged less than half a decade after the States had federated into a Commonwealth, allotting specific heads of power to the central government and holding back the residual powers. This political arrangement is reflected in the constitutional restriction of the federal industrial relations power to the prevention and settlement of interstate industrial disputes by means of conciliation and arbitration. Plain and carefully worded as this restriction may appear, its meaning has been the subject of much litigation in the High Court, resulting in numerous amendments to the arbitration law.

Unlike in Australia, the constitutional development in Nigeria ensures that the centre has always had more powers than the regions. There was a change from the regional to state structure in 1967 which had no effect on the general power of the federal government in respect of labour matters. In particular, the arbitration law subsequently introduced in 1968 contains no restriction upon the relevant powers of the federal government. Again, unlike in Australia, the suspension of the Nigerian Constitution by the military at the time meant that the rights of individuals/groups to litigate on constitutional matters (including labour relations) were severely restricted. The point is that, as shown in chapter four, these differences have been reflected in the arbitration laws of both countries. Beside raising the sociological question about the relationship between constitutional histories and the scope/character of law, this phenomenon suggests that the borrowing of the Australian model by Nigeria was not a blind legal transplant.

The alliance of labour with a sector of capital (i.e the manufacturing sector) in the early Australian Commonwealth Parliaments over state arbitration, tariff protection for locally manufactured goods, etc, illustrates another aspect of the critical junctures to
which the institutionalisation of compulsion in Australia's industrial relations relates. In a Parliament largely of three equal groupings (Labor, protectionists and free-traders), the Labor support allowed the manufacturing interest (the protectionists) to govern in the first decade of the Commonwealth (Hopkins, 1978b: 18). In return this ruling interest initiated the Conciliation and Arbitration Bill which provided for union recognition and security. Interestingly, this Bill became law a year later under the Reid-M'Lean Ministry - a temporary political coalition between free-traders and the protectionists. Evidently, this period witnessed fluid class relationships, so fluid that it has, for instance, remained difficult for scholars on the origins of the law to agree on who supported or opposed its enactment.

One reaction to this difficulty is Macintyre's (1989) argument that in the politics of the establishment of arbitration "neither capital nor labour" took the initiative. Nonetheless the temporary alliance between the political wing of the labour movement and the manufacturing sector of capital remains an important feature of the environment in which the law was enacted. Needless to say, it was a democratic environment in which bargains were struck and compromises achieved. The law did not result from a society-wide consensus as the consensus theory would suggest. But it was obviously a product of a compromise between conflicting political claims, fitting neatly into the pluralist mould of the conflict theory in my social product model. Why the compromise in such a democratic institution tilted in favour of compulsion is part of the crucial sociological question raised and addressed by this thesis. A coercive social control tradition has been advanced here as the main explanatory factor; but it has been noted in chapter six that this tradition did not lead to other drastic measures like banning trade unions because Australia became a democratic society in which labour was strong electorally.

Presumably the adoption of compulsory arbitration law by the military regime in Nigeria is patently expected. Compulsion is one of the identification marks of the military and the regime, not being democratic, need not operate by alliance or coalition as in Australia. What is less obvious and has been addressed in chapter six is why the
military did not act true to type by taking more repressive measures against the union movement. This question becomes more significant if it is recalled that the war time during which the law was introduced could have been a perfect alibi for such repression. The discussion in chapter six suggests that the reformist ideology with which the military regime took over the government, its inability to mobilise a unified support within the army (i.e. a support not infected by the divisive ethnic rivalry of the wider society), and its dependence on a unionised civil service to govern explain the non-use of outright repression against the trade unions.

The summary and further discussion up to this point bring together the highlights of this thesis. In the next (final) sub-section, some concluding remarks will be made. Essentially they will critically reflect upon the general thrust of the thesis and the limitations of my approach and conclusions. At the end, attention is drawn to some questions for further inquiry.

### 7.3 Conclusion: inferences, limitations of the study and questions for further research

In this thesis two levels of explanations have been advanced for understanding the overwhelming similarity in the Australian and Nigerian compulsory arbitration laws. First, one country deviated from the "natural law" approach to industrial dispute resolution at a certain conjuncture in the development of its political economy and the other copied the resulting "deviant" model. Second, the social conditions which motivated the copying by the latter are remarkably similar to the conditions which made the deviation by the former possible in the first place. Implied in the second statement is that there is an interface between the two levels.

The importance of this interface is not self-evident and should be highlighted. Legal transplantation can be shown to account for similar laws in two or more countries without considering whether the transplantation was motivated by parallel social conditions. This approach typifies positivistic jurisprudence, e.g. of Alan Watson, and
is insufficient for the explanation of the Australian-Nigerian case. Conversely it can merely be shown that countries with parallel conditions have similar laws without due attention to the question whether the laws were derived quite independently or by borrowing from each other. The sociological jurisprudence, e.g of Otto Kahn-Freund, which regards law (especially of collective labour relations) as too closely connected with the structure of power relations of its society to be transplanted elsewhere would take this path.

The Australia-Nigeria similarity provides an example of how an interface between the two levels of explanation could shed greater light upon a patently puzzling sociological problem, a light more illuminating than what could possibly be derived from any one of the levels. This illumination owes much to the fact that rather than taking an "either-or" approach to the application of the two levels, both of them as represented by the autonomy and social product models were interrogated for possible explanations of the overwhelming similarity and the few differences. In the end the position reached is that although the autonomy level/model sheds a significant light on why both laws are so similar, it is the social product level/model which explains the more profound question why it was necessary and possible for Australia to adopt, and for Nigeria to borrow, a comprehensive compulsory arbitration system. Nevertheless both models have complemented each other in providing a critical understanding of the main sociological problem in this thesis.

It is pertinent to note at this juncture that a study of this nature cannot completely avoid some of the strains or pitfalls of interdisciplinary and comparative investigations. Llewellyn and Hoebel (1941: 41) once said: "the obstacle [to integrating law-stuff with the rest of social disciplines] is the acceptance of the realm of Law as being of a different order; for if of a different order, then it sets its own premises and becomes impenetrable on any premises except its own". Once this acceptance occurs the sociologist who takes law as an object or framework of sociological knowledge runs
the risk of being pulled away from sociological bearings (Stewart, 1981: 107-8). Did I get pulled away?

In this study the arbitration law in Australia and Nigeria has been treated as a social phenomenon, embodying action and meaning, which cannot be adequately appreciated by jurisprudence alone. Indeed, as pointed out in chapter one, the unprecedented nature of its emergence in Australia and its "migration" to Nigeria, both countries supposedly nurtured with the Anglo-saxon legal tradition, raise wide-ranging issues which only the sociological method can resolve (see Sinzheimer's statement in chapter one). More important, the attempt here has been to reach beyond the law to the political economy which it indexes, and in so doing I have endeavoured to stay within sociology. Yet it must be admitted that the treatment in this study is limited in scope and thus cannot be the last word in the sociological investigation of the law.

Gelfand (1989: 188) warns about

`fortnightly wonders' [i.e academics who visit] a country only briefly and have reviewed some of the literature on its political or legal structures, but they feel qualified to expound upon a whole range of issues and to `explain' how and why institutions in that nation are better (or worse) than similar institutions in their own home country.

The explanation in this thesis is not evaluative in the "Gelfandian" sense. It is, however, pertinent to acknowledge the limitation which the type of educational visit under which this thesis is written places on the capacity to fully grasp the fundamental politico-legal questions and issues in the two countries under comparison. The limitation is potentially more serious in the country foreign to the comparative researcher. Here is an example of this limitation. This study strongly suggests a "militarisation thesis" to explain the rejection of voluntary collective bargaining and the adoption of compulsory arbitration in Australia and Nigeria. It does not thereby explain why the system has been maintained, for instance, in Australia from 1904 into the 1990s. The study of the operation of the law and its modification over time may suggest the need to qualify the "militarisation thesis" but it is unlikely to force its rejection. For my purpose, the relevance of Gelfand's warning lies in its cautionary value.
Another pitfall of comparative investigation is to transpose the characteristics of one country to the other knowingly or inadvertently. For example, I have suggested that the military foundation of the state in Australia gave rise to coercive tradition which is the main factor in explaining the adoption of compulsory arbitration. Is this suggestion influenced by the brooding presence of the military in a country (Nigeria) with which Australia has been compared? Obviously there is a possibility; for, the approach in this thesis is that of a double-mirror in which the interpretation of one country is informed by the interpretation of the other and vice versa.

However, the acknowledgement of the differences wherever they were met in the comparison of the two countries should suggest that any transposition can only be inadvertent. As a point of fact, military despotism has had a place in the formative years of the state in Australia. Renton and Phillimore (1981: 289) describe the period 1788 to 1823 in the Australian history as one "of military and despotic government". Davidson (1991) states: the "commission" given to Arthur Phillip by the monarch implied that "power in the English gaol in the Antipodes would be despotic" (p.21); the night-watch which Phillip set up in New South Wales, out of which "eventually grew all the other Australian administrative institutions of State", had completely coercive and command structure (p.36); and the coercive moral discipline "contemplated not only the present 'but the future character and enjoyments through endless ages" (p.45). Whether the experience of this early period has any connection with a predilection which Joan Rydon has suggested bears another research. She says: "the strength of the ANZAC tradition, the notion of preference to ex-servicemen and the importance of the RSL [i.e Returned Soldiers League] have made war service a qualification for many Australian positions, not least those of MPs" (Rydon, 1986: 105).

Finally, there are many questions relating to the Australian and Nigerian labour laws and their corresponding political economies which have been left largely unexplored in this thesis. Two of these are worth noting here: (1) how do the practices of the law in
both countries compare and how would their similarities and differences be explained?; and (2) Where is the place of "agency" (e.g. the roles of the Kingstons, the Higgins, and the Wises in Australia; the Okogwus and the Efueyes in Nigeria) in the conception, adoption, and development of compulsory arbitration systems? And, how does being imbued with the Fabian socialist ideology as Cameron Kingston and Henry Higgins were or being a firm believer in the Toynbee Hall school of social philosophy as B.R. Wise was influence the actions of such people?

For instance, an examination of the practices could reveal how the arbitration law not only indexes but also defines, legitimises and reinforces the social traditions, structures and processes in Australia and Nigeria. Further, a focus on individuals or groups with certain social doctrines/ideologies may enrich the militarisation explanation. Nonetheless, if the investigation undertaken in the thesis has expanded "our universe of possibilities" with regard to the theory and practice of legislation, and highlighted aspects of the Australian and Nigerian political economies that are usually overlooked, I should consider the objective of this study largely accomplished.
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