

INDUSTRIAL ORGANIZATION AND REGULATION IN THE NETHERLANDS AND UNITED STATES: SOME COMPARATIVE REFLECTIONS

Sigmund Timberg †

Mr. Balkenstein's paper supplies a clear and objective description of the relative roles played by industry associations and labor groups and by the national government, respectively, in the regulation of Netherlands industry. The basic issue raised by this paper—the distribution of regulatory power in the modern state between private groups and a central government—is one of the most important, delicate and continually perplexing problems in the whole domain of political science.

It seems fair to conclude that the Dutch confer upon their private business and labor groups powers of decision-making and self-regulation which we in this country would regard as politically undesirable and economically unwise. Not only are private agreements to restrict competition not forbidden, but the Netherlands Government has the power to make such an agreement binding on an entire industry, if so requested and if it finds the agreement compatible with the public interest. (p. 505). A nominally advisory, but in practice controlling influence over major questions of national economic and social policy is exercised by an Economic and Social Council of forty-five members, one-third appointed by designated industry organizations, one-third appointed by designated labor organizations, and one-third appointed by the government for their expert knowledge. Once the administration in power and the Council agree on a program, in Mr. Balkenstein's words, "rejection by the Parliament is only possible under very special circumstances." (pp. 510, 513). Also, commodity and industry boards, composed entirely of business and labor representatives, have been established covering twenty-five per cent of the national production and endowed with the power to regulate specified aspects of the production and marketing of commodities, including conditions of

† M.A., Columbia University, 1930; LL.B., Columbia University, 1933. Member, Supreme Court, District of Columbia and New York Bars.

sale, wages, the quality of products and (thus far apparently in rare cases) prices and methods of cost accounting. (p. 521).

This paper will first enumerate some social and political beliefs which we in the United States have in common with the Dutch, and then indulge in a brief reminder of the fact that we too have on occasion relegated the control of our economy to private industry groups and businesses. It will conclude with a somewhat rash effort to set forth some radical differences in the industrial intellectual climate of the two countries that may serve to explain the different relationships obtaining between business and government.

The Netherlands approach to industrial organization is premised on the following sociological and political propositions which, at least in their abstract formulation, would command the support, I think, of the weight of public opinion in the United States:—

First, there would be agreement with our Dutch friends that private groups perform a useful role in any democratic society. (p. 503). A democratic society, in our scheme of things, is based on the proliferation of dynamic centers of individual initiative and creativeness, and a certain amount of cooperative action by business and labor groups is indispensable for the maintenance of such centers of creative energy. Political pluralism, the notion that groups less comprehensive than the State have an important and proper role to play in moulding patterns of economic and social behavior, is an accepted facet of Anglo-American political theory. It may be recalled that Von Gierke's profound research into the history and philosophy of corporate groups not only had a deep influence in England on Barker, Laski and the political pluralists, but constituted in Germany an intellectual counter-thrust to the dynastic tendencies of the Prussian State.

Second, we share with Mr. Balkenstein a prima facie attitude of hostility to more governmental bureaucracy than is absolutely necessary, and a feeling that on the whole industry groups are more competent than are government bureaus and government experts to deal with the host of complex and technical issues that confront every industry. (p. 504).

Third, and concurrently with a continuing hostility to bureaucracy, both we and the Dutch have abandoned laissez-faire theories of government and have come to accept as inevitable increasing participation by the government in economic affairs, such as is evidenced in social security legislation.

Fourth, there would be no significant effort in the United States to dispute the Dutch thesis that the public interest is paramount over

the private interests of business and labor groups and combinations, and that it is the function of government to assert the public interest where that interest does not coincide with such private interests.

Fifth, the United States industrial climate supports the desirability of avoiding industrial conflict and promoting as much intelligent cooperation as possible between business groups and trade unions. Mr. Balkenstein in his historical exposition assigns a great deal of weight to the development of collective bargaining procedures between industry and labor as setting both the precedent and tone for the current organization of Netherlands industry. (pp. 505-06). In basic essentials, that collective bargaining procedure seems similar to what has been evolved in the United States, and the call for harmony in labor relations in this country has been as persistent as it has been in The Netherlands.

Sixth, both in The Netherlands and in the United States, the exploitation of the large-scale capital and technological resources needed for so many modern industrial projects demands a considerable amount of cooperative and collective effort on the part of industry. No one who is familiar with the tremendous scope that we in the United States have given the modern corporation can doubt that we recognize the need for the at times massive concentration of individual human efforts and physical resources under a single business management. The existence of 5000 trade associations in this country, and the large pools of patents and other technological resources thrown open to exploitation by whole industries rather than left as the exclusive domain of individual companies, are illustrative of the extent to which American society recognizes the need for industrial collaboration.

Thus, we share with the Dutch common and pervasive thought patterns with respect to the desirability and necessity of individual initiative; of the avoidance of unnecessary, and the acceptance of necessary, governmental intervention in economic affairs; of the public interest as the controlling test of social policy; of cooperation between industry and labor; and of collaboration among different segments of industry.

Despite broad discrepancies between the prevailing abstract notions of the relationship of government to business and labor groups that obtain between the two countries, the United States has, either for considerable periods of time or within special sectors of the economy, adopted practical approaches to the regulation of its industry that are the same as those which are present in the current Netherlands setup.

In fact, it could be said that, however antithetic the present Netherlands scheme for the organization and regulation of industry may be to our ideals, that scheme represents a carrying out, to a degree which we would not now approve and in areas where we think it inappropriate, of tendencies and schools of thought that have been intermittently reflected in United States industrial society and history. (pp. 500-01).

History and current events both recall occasions when United States legislation has given private individuals and industrial groups a power of public regulation and decision-making closely approximating that which is envisaged under the current Netherlands scheme. Thus, under the National Recovery Act (which Mr. Balkenstein reminds us was a precedent for the Netherlands legislation (p. 505), industry groups were permitted to agree not only upon minimum wages, maximum hours and other conditions of work, but also upon the allocation of production and marketing quotas, the curtailment of plant capacity, the suppression of styles and models, the imposition of mandatory accounting procedures, the fixing of prices, and the forced abandonment of many competitive practices. Under the Netherlands Industrial Organization Act, the central government may limit the regulatory powers which commodity and industry boards may exercise and reserves the right to post-audit, as it were, their regulations to see whether they are in accord with the public interest. Under the NRA Act, there may have been more of an emphasis on a pre-audit. NRA codes had to be approved by the President and were subject to criticism by three Advisory Boards representing business, labor and the consumer, respectively. The recommendations of the Advisory Boards, if negative and sufficiently forceful, sometimes brought about a change in the code, and consumer representatives were appointed to the authorities administering the codes. However, these theoretical safeguards frequently turned out to have no practical efficacy.

We are now so accustomed to deploring the NRA that we are perhaps prone to overlook the fact that there still exist vestigial survivals of that experience. Thus, in the marketing of fruit and vegetable products, there are scattered over the United States some thirty-five odd marketing agreements and orders, whereby private producer and processor groups are able to establish marketing quotas and price regulations for the products which they produce, process and sell. The Secretary of Agriculture retains a legal right of review and a theoretical responsibility for seeing to it that these agreements and orders function in the public interest. However, it would be blinking the realities of current economic life to regard these agreements and

orders as basically anything other than the products of industry self-regulation. Also, it is quite easy to be deceived and over-complacent about the extent to which the consumer and other public interests are held in mind in their operation.

Moreover, in the field of transportation, railroad carriers are permitted by the Reed-Bulwinkle Act of 1948 to form and participate in rate conference bureaus wherein joint rates are fixed by private agreement; and water carriers may, through shipping conferences, agree upon uniform rates. The subsequent review of the industry action by the Interstate Commerce Commission or the Maritime Board that has been legislatively provided for is necessarily nominal in nature. Rating bureaus consisting of representatives of private insurance companies have for decades established uniform, industry-wide rates for fire insurance, with only nominal powers of oversight on the part of the state Superintendents of Insurance; Sherman Act disapprobation of this situation in the *Southeastern Underwriters* case of 1944 was removed by the McCarran-Ferguson Act of 1945. Industry self-regulation in the marine insurance field has been exempt from antitrust scrutiny since the Merchant Shipping Act of 1916. A considerable amount of collective regulatory activity is permitted the National Association of Securities Dealers under the Securities and Exchange Act of 1934.

Some forty-five of our sovereign states have at one time adopted legislation authorizing manufacturer or distributors, by a single contract entered into with one of their customers, to set the price at which their branded or trademarked products must be resold by all wholesalers or retailers of the product, regardless of whether those wholesalers or retailers have agreed to observe the stipulated price. In about thirteen of these states, courts have held such clauses as violative of their respective state constitutions, many of which specifically prohibit delegation of legislative power to private groups. Putting to one side any arguments as to either the desirability or constitutionality of such fair trade "non-signer" provisions for resale price maintenance, those state courts which have described the matter as a delegation of legislative power to private groups are on the right track as a matter of political analysis. We have in effect delegated to private individuals—albeit in the limited field of branded and trademarked commodities—the legislative power to fix prices.

If our political and sociological ideals are in such large measure similar to those of the Dutch, and our practice has at certain times and in certain areas so closely paralleled the Netherlands experience, what, then, explains the extent to which most of us would find the Dutch industrial environment distasteful and uncongenial?

Mr. Balkenstein finds the answer in part in certain philosophical assumptions which are dominant on the Netherlands scene. It is in keeping with the modesty and meticulousness of expression that characterizes his entire Article, that he does not claim for the Dutch system of industrial regulation, or the premises upon which that system is based, validity for any country other than The Netherlands itself.

I should like to rise to his tantalizing bait by speculating on the philosophical preconceptions and ideals which have historically conditioned the American industrial scene.

Sociologically, we seem to set a greater store than do the Dutch on competition as a creator of social values; the countervailing Dutch emphasis is on cooperation. While we consider cooperation between different business units to be inevitable in certain areas (*e.g.*, labor relations, standardization), our prevailing assumption is that industrial progress and economic development is best assured by tapping the competitive instincts of the individual businessman—by spurring him to drive his costs below those of other industry members, to engage in more effective advertising, to afford his customers better service, to “invent around” a competitor’s patent or process. Excessive habits of industry collaboration are supposed to supply a protective haven for technological, production and market laggards, who would otherwise be reformed into efficiency or eliminated by the purging process of competition. Similarly, we feel it unfair to expect public officials, any more than cartel executives, to make the cruel decisions that might result in removing inefficient or redundant producers or distributors from the market, and we rely instead on the impersonal competitive market mechanism. In short, a certain amount of tension and competitive strife is considered a desirable method of massaging our industrial muscles to see that they maintain optimum tautness and tone. Of course, we also recognize industry situations where violent competitive exercise might be a crippling phenomenon.

From the standpoint of psychological and ethical theory, our tradition is closer to the classical outlines of hedonistic utilitarianism; that of the Dutch verges closer to the standards of rational idealism. We regard human beings as basically guided by selfish ends—as motivated by the desire to maximize enjoyments and minimize privations; believe selfish group pressures to be an inevitable part of the body economic; and trust in our political and economic institutions to distill public benefit from private selfishness. Even those of us who take a more altruistic view of “economic man” in general feel that society must be protected against the predatory minority that might unreasonably exploit their economic position for self-aggrandizement,

and feel that such protection is best afforded by the social institution of the free market than by fallible laws or fallible men.

Not among the least of the selfish aspirations of human nature is to take things easy, to rest on one's oars. As a prominent English economist has pointed out, one of the leading rewards of the monopolist is "the quiet life"; this may at times be even truer of a group of firms dominating an industry than of the unitary monopolist. Fearful as we in the United States are of industrial stagnation and retardation, we therefore prohibit industry groups from agreeing on common price, production and sales policies, because free competitive choices in those areas are assumed to promote maximum industrial efficiency and technological progress. Mr. Balkenstein may not disagree with the notion that human nature initially approaches industrial problems on a selfish plane. However, implicit in his approach is the assumption that, when human beings participate in their industry associations and government councils and accept group responsibilities, their innate selfishness tends to be replaced by a more moderate approach, by a tendency to compromise and, ultimately, by a larger measure of regard for the public good. (pp. 506-07). We, on the other hand, while not excluding the optimistic possibility that shafts of public altruism might occasionally light up the inner spiritual recesses of an individual association or council member, on the whole cling to the pessimistic premise that the ordinary business or labor representative might use his power primarily to satisfy his immediate selfish ends or those of the organization that he is representing.

This emphasis on competition, and on the selfish pursuit of individual gain resulting in public benefit, is part of that fluid set of mores often referred to as the "Protestant Ethic," an ethic which Weber's and Tawney's brilliant researches have established as the religious basis of present day capitalism. Mr. Balkenstein indicates that the Netherlands emphasis on group activity has firm roots in both Protestant and Catholic religious theory in his country, and undoubtedly many of the thinkers and doers of both religions have held a strong brief for cooperative effort in society. One might well speculate, however, whether on the whole the philosophy of competition and struggle would not find deeper historical roots in the Protestant than in the Catholic intellectual tradition, with the latter's greater emphasis on the collaboration of all social classes.

From our basically pessimistic view of individual human nature, there result one economic, two political and two sociological corollaries. The economic corollary is our reliance on the impersonal automatic

operation of the free competitive market mechanism as the basic method of reconciling the conflicting selfish interests of private business groups. This reliance has not in any fundamental way been shaken by the economists' demonstration that the market mechanism is not as impersonal and automatic as we had thought, and is inapplicable to certain large industrial areas. By way of contrast, the reader of Mr. Balkenstein's Article will, I think, sense a greater predilection in The Netherlands than here for government planning and (to use an expressive French term) the dirigist economy. This is particularly apparent in the Dutch handling of the problem of inflation, doubtless a much more serious problem for The Netherlands than for us, because of the former's greater dependency on foreign trade.

The question then arises as to who shall do whatever planning is necessary, and this leads us to the first political corollary of the American pessimistic premise about human nature. Mistrustful as we are of the individual human's capacity or desire to use economic power wisely for the general good, we have laid it down as a fundamental postulate of our economic system that no business group should be given the power, for any industrial area, to fix prices, limit or allocate production, exclude new entrants or, to use a catch-all phrase, establish a "private government" of business. If the exercise of such power is required in the public interest, that exercise must be *in the first instance* at the hands of a public authority—either the legislator or some commission with legislatively-endowed power—responsible directly or indirectly to the general public. The Netherlands Industrial Organization Act makes it possible for a public body to exercise rights of review over the way in which industry groups exercise regulatory powers; we proscribe outright any private regulation of industry.

Our second political corollary is a latent prejudice against compromise (particularly compromise arrived at out of the public view), and a sneaking preference for open conflict as the best technique for resolving economic disputes and establishing a sound economic policy. No one who has seen the United States political process at work and observed such economic phenomena as collective labor agreements and antitrust consent decrees can question the substantial role that negotiation and compromise play on the United States industrial scene. But the flood of legislative, judicial and administrative struggles in economic matters indicates a continuing large-scale preference for "slugging it out in the open," and for trusting, as did the constitutional Founding Fathers, to the selfish clash of contending factions to produce a social end-product that is in the best public interest. I think the Economic

and Social Council so highly regarded in The Netherlands would be mistrusted in this country.

The Founding Fathers lived in the Eighteenth Century Age of Enlightenment and took as an article of faith a society in which all contending economic and political factions (at least all that were worth taking into account) would be equally articulate and well-represented. Any compromise in the political or economic arena would, it was therefore assumed, be one in which all factions would participate. In the Twentieth Century, we have discovered that this is not so—that, for example, business groups, or business and labor groups, may compromise their private differences at the expense of the consuming public, and that the consuming public is neither articulate nor well-organized. This discovery has tempered our original *laissez faire* attitude towards business and labor, and conditioned our legal attitudes towards restrictive agreements. Having regard to the unprotected position of the distributors, consumers or others who must deal with business groups, our law allows less room for collaboration and compromise to the trade association representing an entire industry than to the corporation. For like reasons, we tend to scrutinize more carefully the activities of those large corporations which dominate their industries than we do the acts of less powerful corporations.

Relying as Mr. Balkenstein does on the rational element in human nature, he makes a sociological assumption about the role of informed public opinion that would, I think, be skeptically viewed by many United States observers. He speaks of an informed public opinion as causing interested industry groups to relax their selfish pressures. (p. 507). In the United States, there have been established a great number of administrative agencies for the regulation of business, on the contrary assumption that the general public has *no* informed opinion on most industrial problems, and that even legislators and judges do not have the information that makes them competent to decide commercial and economic issues. Consequently, we tend to regard public opinion (apart from that of the interested parties) as a cipher in most cases. Where public opinion does exercise an influence on practical economic controversies, we think it always a good chance that that influence is either largely irrational or consciously manipulated by parties with a direct interest in the outcome of the controversy.

Mr. Balkenstein asserts that the presence of government-appointed experts on the Economic and Social Council keeps the deliberations of that body from lapsing into mere negotiations between the employer and labor members of the Council, and makes the advice of the Council more than an expression of group interests. (p. 512). Moreover, the

Council members appointed by the employer and labor groups legally do not represent those organizations and are expected to vote independently of previous instructions or consultations; however, it is conceded that in practice the Council members generally vote in accordance with the view of the organization that has nominated them. Rightly or wrongly, I doubt whether the United States observer would take as much comfort as do the Dutch from the presence of experts on the Council, particularly in view of the fact, noted by Mr. Balkenstein, that the consumer is not represented on that body. This, as Mr. Balkenstein also observes, is a danger, particularly since the deliberations of the Council are not public. (p. 514).

Having swallowed Mr. Balkenstein's sociological bait in large intellectual gulps, let me close with a few disclaimers.

First, concepts derive substance and shape from the specific factual matrix to which they are applied. For example, we are all prepared to endorse in the abstract the idea of stimulating the initiative and fostering the cooperation of industry groups. But a lot depends on what sort of industry group we are talking about. In the United States political-economic system, we accord greater latitude of initiative and cooperation to the group constituting the small business corporation than to the group constituting the large business corporation, and to the group constituting the large business corporation than to the group represented by an industry trade association. The Netherlands industry and commodity board is a super-group of trade associations and labor unions. Hence, the vesting of the power of economic self-regulation in such groups would be generally repugnant to the United States view of things.

Second, I have been indulging in large empirical generalizations about the conflicting philosophical values that condition the relationship between government and industry in the United States and The Netherlands, respectively. In neither country has public policy ever rejected either of the antithetical concepts discussed in the last section—competition v. cooperation; hedonistic utilitarianism v. rational idealism; the free market v. the planned economy; distrust of privately exercised power v. its acceptance; conflict v. compromise. What has happened can be best visualized if we take each conflicting pair of concepts as the two sides of a parallelogram of social and political forces. For us, competition, a hedonistic utilitarianism, the free market, the distrust of power and the beneficial value of conflict, have been the long side of each parallelogram. For the Dutch, the antithesis of those concepts has been the long side. And, as always happens

when two conflicting forces or vectors assert themselves against an object (be it society or a stone), the result is to move the object along an entirely different vector and one closer to the stronger force.

Third, as Whitehead has said, any groove of abstraction is bound to be an inadequate description of reality. This paper, like Mr. Balkenstein's Article, is largely devoted to the *theoretical* preconception with which United States and Netherlands public policy *start out*. Whither those policies are *tending in practice* is quite another matter. We may be closer together than we think. Thus, on the United States scene, trade associations and labor unions in practice exercise broader regulatory powers than the law provides; and, if some of the doctrines of "workable competition" and "corporate concentrates" are followed, we shall be tending further in the Dutch direction. On the other hand, Mr. Balkenstein points out "that neither the [Netherlands] government nor the [Economic and Social] Council is too inclined to allow the [commodity and industry] boards to direct their attention primarily to measures intended to restrict competition." (p. 522); that commodity boards have been set up primarily for the "small business" and agricultural industries; that such boards can at no time prevent entry into business; and that the power to fix prices is generally refused them.

Fourth, there are dangers in overdoing the sociological approach to law, economics and even social institutions. I am reminded of Montesquieu's observation concerning the laws of a nation: "They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another." Not to flirt with Montesquieu's thesis is to strangle comparative law in its infancy. To become too closely wedded to it is to stifle comparative law before it achieves maturity. I have therefore, gallantly but perhaps imprudently, pursued the same intellectual gambit as has my Dutch colleague.

There are great and obvious differences between the Dutch economic and social scene and our own—differences that *may* justify a different framework of public regulation. But there would also appear to be a large residuum of economic and psychological problems that we and the Dutch have in common. In that large residual area, the Netherlands and the United States will have to make continual basic choices—whether to accentuate and enlarge the competitive, or the collaborative, potentialities of the industrial scene. Despite the somewhat amorphous and self-contradictory performance of business and government in the two countries, the choice between these two distinct political and philosophical approaches is both real and important to every society.