LABOR LAW BETWEEN CHANGES AND CONTINUITY

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> Le droit est la plus puissante des écoles de l'imagination. Jamais poète n'a interprété la nature aussi librement qu'un juriste la réalité
>
> (Jean Giraudoux, La Guerre de Troie n'aura pas lieu).[1]

Lawyers are not prophets, nor fortune tellers. However, scholars have to try to imagine the future evolution or developments of their discipline. But they should not only venture to forecast the future of labor law. Their task is also to put forward ideas and proposals that could frame this future on the basis of the identified problems. To this aim, the prediction must be based on an awareness of the past and a close analysis of the present. At the end of the century during which labor law has developed and at the dawn of a new one, it appears difficult for western European countries to develop optimistic views about the evolution of employment rights and social protection. In this sense, fears about the future are underpinned by a glorified past and a troubled present.

I. A GLORIFIED PAST

Modern labor law emerged in France with the French Revolution. With the destruction of the corporative system, the French Revolution gave workers the possibility to sell their labor force on the labor market. Labor became a commodity as any other good. Freedom of contract governs the labor market and the contract is conceived as the central institution to establish labor relations. However, this fiction has a limit: labor force is part of a human being. Allowing employers to buy labor force would be tantamount to

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1. "Law is the most powerful school for the imagination. Never has a poet interpreted nature so freely as a lawyer reality."

admitting that workers sell themselves. For this, instead of using the model of the contract of sale, the French Civil Code of 1804 refers to the ancient roman *locatio operarum*. This contract, whereby employers and workers are formally taken as equal in the bargaining process, provides the legal technique that organizes labor relationships on a market basis. Employers do not buy labor force but hire it from individuals whose labor force is their sole property. Still, in 1804, a marginal way to regulate employment relationships, the *locatio conductio operarum* became, during the industrial revolution, the widespread and central legal technique to hire workers. More essentially, such a legal framework for labor relationships forms the basis of the liberal organization of society. In the last quarter of the nineteenth and first quarter of the twentieth century, the modern concept of contract of employment emerged precisely to distinguish labor from other types of commodities. The personal aspect of the relationship justifies the special legal regime attached to this type of contract. Historically, labor law may be analyzed as a creature of the industrial revolution. It corresponds with the first statutory laws protecting workers in factories and mines. In fact, the development of modern labor law coincides with the development of heavy industry and the problems linked to this phenomenon. It is also during the late nineteenth-century and the beginning of the twentieth that the legal conditions for collective labor law were established. In 1864, the act making coalition a criminal offense was repealed and in 1884, the Waldeck-Rousseau Act allowed the creation of trade unions. Therefore, by the end of the first half of the twentieth century, the basic legal structure and concepts of labor law were defined and distinct from civil law. From this time onward, the construction of labor law was made of an accumulation of legislation and successive reforms. The contract of employment was and still remains the condition for the application of protective legislation.

In France, general strikes and industrial action have given rhythm to the development of labor law throughout the twentieth century. In common thinking, labor law is related to important historical periods and events that have brought significant improvement in working and employment conditions. Following the general strikes of 1936 came the forty hour week, the binding and *erga omnes* effects of collective agreements through an extension mechanism and the establishment of workers' representatives in the undertakings. After the Second World War, some social rights were constitutionalized, the social security system was created and work councils were established in companies. The general strike of 1968 led to a significant wage increase, the

recognition of trade union rights at the workplace and, a few years later, a statutory law on dismissals was enacted (1973). From this brief historical outline, important features may be drawn concerning French labor law and its reading. First, statutory law may be analyzed as the main regulatory instrument used in the French legal system to regulate labor relations. The State has been the prominent actor in the field of labor law affording primacy to statutory regulation. Collective bargaining appears from an historical perspective as a minor source of labor law. Second, France has an adversarial culture of industrial relations. Conflicts are the privileged channel to gain employment rights. In this sense, collective bargaining in the French tradition is very linked to industrial conflicts. For many decades, collective bargaining has been reduced to negotiation to end strikes. It also explains the rather chaotic development of French labor law. And third, during the first three-quarters of the twentieth century, the development of labor law is conceived as an ongoing process of improvement for employees. The improvement of labor standards was considered as the measure and the reflection of an endless social progress. The teleological dimension of labor law was therefore directly related to a certain conception of social history. Employment rights and social protection attached to the employment contracts reflected the recognition of the special character of the work relationship and the will to depart this specific relation from pure market logic. Here, the development of labor law was interpreted as an expression of the value given to the person. With the economic crisis that started at the beginning of the seventies, this perception of labor law changed. This is the end of what has been called by some authors the "Golden Age"[2] of labor law. Labor law had emerged to protect the worker against the inequality of bargaining power inherent in the contractual conception of the employment relationship and to establish decent working conditions. The economic context leads to a reappraisal of the widespread opinion considering labor as inherently protective of workers. A troubled present will give rise to an "historical reversal,"[3] which is still taking place.

II. A TROUBLED PRESENT

From the mid-seventies, a process of reform radically changed not only the content of labor law but also the perception of it.

2. J. PÉLISSIER, A. SUPIOT & A. JEAMMAUD, DROIT DU TRAVAIL 74 (21st ed. 2002).
3. A. SUPIOT, LE DROIT DU TRAVAIL (2004).

Clearly, these reforms do not bring about new employment social rights but, on the contrary, cut or reduce some of them. Changes in labor law do not improve work security but organize flexibility as part of a policy against unemployment. Here comes the shift from labor law to employment law. All labor law reforms are driven by the objective on the one hand to provide employers with a more flexible workforce and, on the other hand, to get workers back to work. The possibility for companies to use part-time work is broadened and arrangements regarding working time are allowed through collective bargaining on a company level. A fixed-term contract is introduced and the temporary work industry becomes lawful. The growing importance of the service sector and the ongoing decline of the industry sector explain this changing model of labor relations. The manufacturing industry has not only shaped our modern understanding of work, it has also framed the structure of labor law. But the development of precarious jobs is also the consequence of the dominated market economy. The reaction of the French system has been to regulate and, to some extent, limit the use of new forms of working relations. This explains why labor law has been the instrument, the necessary bypass for organizing the flexibilization of the labor market. And instead of diminishing the role and place of labor law, these processes have given rise to an increase of labor regulation.

To this extensive use of precarious jobs[4] must be linked the growing recourse to contracting-out. Taken as another symptom of the crisis of labor law put forward by scholars, companies tend to contract out growing numbers of activities. This process has led companies to give incentives to their employees to become independent workers. Consequently, a growing proportion of employment relations fell out the scope of labor law. While workers seek the social protection provided by the contract of employment, employers try to avoid this status for their workforce. Modern labor law emerged at a time of homogeneous working relationships and now faces a trend toward greater diversification and heterogeneity. This trend goes with an ever-increasing economic dependence of companies toward others. This is the case of subcontractors, commercial agents, or franchisees that may depend exclusively on a single company. However, economic dependence still remains excluded as the criteria of dependent labor. In fact, only a limited

4. Here, precarious may have a double meaning. First, it refers to a job of short duration. Second, it may define a job that does not pay the worker enough for him to support himself.

category of workers come under the scope of labor law. Employment protection and social security legislation apply only to workers who are considered as legally subordinate. This legal criterion of subordination leaves aside a great number of workers who fall within the scope of civil law. In this respect, some evolutions in contract law clearly express the greater concern of judges for the unequal position of contractors. Very closely to the main objective of labor law, some caselaw in contract law regulates the unilateral breach of contractual relationships in particular for the party in a dominant position.[5] In this sense, other fields of law affect a growing proportion of labor relationships. Therefore, a major challenge for labor law will be to take into account the new organizations of companies to determine the adequate level of protection for workers. Another phenomenon is the ever-invading process of market logic. The market tends to become the only logic by which any exchange of goods is carried out or any service is provided. Under this trend, competition law becomes the prominent discipline and any element that could disrupt the functioning of the market is considered harmful. In this approach, which is greatly influenced by neo-liberal ideology, labor law is considered as having a disruptive effect on the market. In France, this conception damages the idea that some services, being of general interest (education, health, transport), justify restrictions of competition and cannot be organized on pure market logic.

Another major evolution regards the system of sources of French labor law. As mentioned before, legislation has always been the prominent source of regulation in the social field. In this sense, statutory legislation was not only the most important source of French labor law but also formed a yardstick for other sources of regulation and in particular collective bargaining. Collective agreements have historically been a secondary source of legislation in the French legal system. Basically, they were only conceived to improve statutory labor standards. The relationship between statutory legislation and collective bargaining was therefore governed by a so-called "favorability principle" whereby collective agreements may only derogate from legislation for the benefit of employees. Therefore, collective agreements could only improve statutory standards for workers. This rule used to also apply to the relations between

5. To give an example, the general duty to give prior notice in case of breach of contract illustrates this will to provide minimum protection to the parties. In two famous cases concerning agency, The French *Cour de Cassation* held that it belongs to the principal to ensure to the agent the possibility to have competitive prices. Cass.com., Nov. 3, 1992, Bull. Civ. IV, No. 340; Cass. com., Nov. 24, 1998, Bull. Civ. IV, No. 277.

collective agreements of different levels (sectoral collective agreements, company agreements). Expressed in different articles of the French Labour Code, this "favorability principle" structured the whole legal system. And more fundamentally, it inspires the specific *ratio* of labor law. From 1982 onward, such a principle received numerous exceptions, mainly in the field of working time. The State has allowed social partners to set by collective agreements different working time arrangements than the one foreseen by legislation. The possibility of signing collective agreements that are less favorable to workers than statutory legislation was designed to provide employers with a greater ability to organize flexible working time on a company level. This new possibility was linked with two important trends: first, a strong promotion of collective agreements as a regulatory technique to the detriment of statutory legislation. Legislation would be too uniform, too rigid. On the contrary, collective agreements would provide flexible instruments to adapt working conditions to the workplace. Second, this favor given to collective agreements has also been conceived in a decentralized dimension. Decentralized levels—workplace, company—are given priority over more centralized ones—sectoral, intersectoral. In this respect, the statutory act on social dialogue adopted in May 2004 continues to promote deregulation through collective bargaining on a company level. This act goes further in the process of weakening legislation faced with collective bargaining. It also restrains the role of sectoral agreements in front of those signed on a company level.

All these reforms that have taken place during the last twenty years have led to new thinking in labor law. The social consensus and equilibrium found whereby employees, in exchange for labor, could expect a certain work security and guaranteed income, broke down in the beginning of the seventies. And labor legislation no longer aims to consolidate labor rights, but to organize a flexible labor market and reduce unemployment. This historical reversal has buttressed up the thesis of a crisis of labor law[6] and raised the question of its future among lawyers.[7] The growing scarcity of work analyzed by some scholars, leading others to predict the end of work[8] seemed to put into question the existence of labor law. However, more than twenty years after the diagnosis of the crisis in labor law, we have not reached

6. G. Lyon-Caen, *La Crise du Droit du Travail*, *in* IN MEMORIAM SIR OTTO KAHN-FREUND 517 (1980).

7. S. Simitis, *Le Droit du Travail a-t-il encore un Avenir*, 7–8 DROIT SOCIAL 655 (1997).

8. JEREMY RIFKIN, THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA (1996).

either the end of work or the end of labor law. A quick outlook at the French Labour Code is sufficient to realize that, if a crisis exists, it has not affected the volume of labor legislation. In fact, the past twenty years have been a period of intense legislative activity and have produced a complexification and fragmentation of French labor law. A more sophisticated labor law has emerged, setting principles but establishing at the same time more or less detailed exceptions. Various legal forms of working relationships have been created (fixed-term, assignment and part-time contracts). In sum, it is difficult to speak of a crisis of labor law looking at the quantity of the body of law concerned. So, when scholars talk about a crisis of labor law, they are referring to the deterioration of the workers' situation brought by legislation. The crisis of labor law would therefore be tantamount to a downgrading process of social rights acquired by workers over the past fifty years. Another analysis of these changes has been based on a different conception of labor law. It basically denies the presentation of labor law as inherently protective of the worker. If some changes are taking place, the function of labor is still to give companies access to manpower. Labor law still organizes the terms of the exchange on an individual basis through the contract of employment. According to this approach, speaking of a crisis may be true only if you relate the changes to the protective objective assigned to labor law. However, the objective of an institution differs from its function. In this sense, the aim given to labor law—protective of the worker—differs from its original and permanent function—organizing access to the workforce in a profitable way for employers. In this way, no dysfunction of labor law is taking place. Therefore, these scholars do not envisage the changes affecting labor law as a real crisis but as a reversal, an adaptation to the economic context.[9] In any case, both interpretations lead to pessimistic prognoses and justify a feared future.

III. A FEARED FUTURE

It is difficult to imagine that these evolutions of labor law will end in the very near future. Different factors clearly lead us to believe that this new framework of labor law will continue. In fact, it is highly predictable that those evolutions will exacerbate and certainly put under pressure welfare states as developed since the second world

9. A. Jeammaud, *Droit du Travail 1988: des Retournements, Plus Qu'une Crise*, 7–8 DROIT SOCIAL 583 (1988).

war. Consequently, it would be unrealistic to predict for workers a future improvement of labor standards and social rights in Western European countries. On the contrary, a process of deterioration of social rights appears more realistic. Many elements underpin this diagnosis: pressure has been maintained on wages to the detriment of the purchasing power of workers; the period of pension contribution has been lengthened; the historical process of reduction of working time has stopped, and sometimes reversed; the duration of unemployment benefits has been reduced; the phenomena of working poor is growing. Many factors therefore contribute to a gloomy prospect. Demography is, for example, a matter of concern in Western post-industrialized countries. The general aging of the population undermines the social security systems based on solidarity and in particular the pension schemes. At the same time, the low rate of birth in developed countries will probably require a recourse to immigration.

In this context, different challenges may be identified for the following decades. Three appear to us of major importance. The first one is globalization. Globalization of the economy constitutes an essential parameter for the development of social progress in underdeveloped countries and its preservation in welfare state countries. The new technologies, the transport facilities and the free movement of capital have transformed the whole world into a borderless market where labor cost is becoming the main factor of competition between countries. In this context of an advanced global economy, one of the most important challenges will be to improve working and social rights in developing countries where companies tend massively to relocate their production. Promoting and enforcing core labor standards in these countries will require the International Labour Organisation to act in new ways. Despite a long existence and an impressive number of Conventions, the International Labour Organisation has not achieved its original goals. The optional character of Conventions and the absence of any significant sanction for the violation of these conventions explain this situation. Recently, the International Labour Organisation has tried to develop new strategies, focusing on core labor standards or targeting multinational companies instead of national States. However, the International Labour Organisation appears to have difficulties in controlling the enforcement of those core labor standards. An important breakthrough would be to integrate the development and enforcement of labor standards within the world trade negotiations of the World Trade Organisation. So far and despite a demand by the

International Confederation of Free Trade Union and some countries, this link between trade agreements and labor standards does not exist. Leaving aside the debate on the general benefit for developed and developing countries, there is no doubt that globalization endangers labor standards in first world countries while there is no evidence of a significant raise of working conditions in the others. A growing concern exists however among citizens of developed and developing countries about the social, ecological, or cultural effects of the globalization of the economy. In this respect, non-governmental organizations take the lead in the protests, pushing the international trade union movement in the background. Even though internationalism inspired the workers' movement from the very beginning, the international trade union movement has so far been unable to weigh on decisions taken by key institutions (WTO, G8, IMF, World Bank). Besides the international labor movement, structured on the basis of the cold war, faces difficulties in adapting to a globalized market economy and preventing national trade unions from adopting positions purely on a national perspective.

Regional integration may also be a way to organize and moderate the effects of globalization. In this respect, the European integration may be considered as a model with the successive entrance of countries of Southern, Northern, and Eastern Europe. The European Union experience demonstrates how market integration requires a minimum of social and political integration in order to counteract its disruptive effects. While a single market and currency exists, the competence over labor and social security matters left to national Member States transforms labor cost into the main factor of competition within the EU. In this respect, the claim for more subsidiary in the field of labor and social security from national Member States shows that the perspective of a harmonization of labor standards in Europe is moving away. Even if such a harmonization of national legislations remains a formal objective of the EU, only a few directives actually correspond to this ambition, mainly adopted after the first social action program of 1974. From that time, some Member States have refused to adopt binding instruments that would reduce their advantage based on lower labor cost and less protective employment legislation. In this respect, this situation could be more pronounced with the enlargement of the EU to countries of Eastern Europe. Consequently, the trend goes toward a convergence or coordination national legislation without harmonization using non binding instruments (the "Open Method of Coordination").

Another noticeable trend of the European social policy is the growing role given to social partners. From the Maastricht treaty, social partners must be consulted by the Commission before any action in the field of social policy. They may also decide to suspend the legislative process by entering into negotiations on the issue about which they have been consulted. In short, social partners are given primacy through this procedure in the field of social policy. Furthermore, since 1994, multinational companies of more than 1,000 workers located in at least two different countries of the EU must set a European Working Council. All these procedures and structures give a growing space for trade union action at EU level. Therefore, the European trade union movement has more institutional power to weigh on European social policy. It also increases as much its responsibility. In this context of a withdrawal of EU institutions from social policy, the great challenge in the next future will lie in the trade union movement. The most difficult task would be to create at EU level a community of interest among EU workers and to convince trade union members that such a common interest exists. The existence of a single market and a single currency, the growing place of multinationals and the similar social phenomena affecting national labor markets is bound to increase the Europeanization of the trade union movement. At present, there is a great contrast between the important institutional role of the trade union movement in Europe and the difficulty of arousing a common interest among European workers. In this respect, the company or the sectoral levels appear more adequate than the intersectoral to build up this collective common interest. In this sense, it might be questionable whether European labor law will develop in the same way as it did in most national Member States. To take an example, collective bargaining at EU level constitutes a way to avoid social dumping within the EU. In many national countries, industry-wide collective agreements have been established to ban social dumping among companies within the same sectors. As a body of uniform rules, labor law may be analyzed as a mechanism that equalizes competition on the basis of labor standards among companies. So far, such a reality has not appeared at EU level due to the deficiencies of industrial relations and collective bargaining systems. Here, the objective would be to regulate the competition maintained by national Member States on labor standards at the expense of EU workers.

Therefore, national trade unions must give a more important place to the European dimension of national problems. The capacity of the trade union movement to organize European strikes or

demonstrations will depend on its capacity to have a real collective bargaining power. In this respect, the Charter of fundamental rights adopted in 2001 and integrated in the EU Constitution will give a legal basis for collective actions. So far, the promotion of collective bargaining by the EU treaty and the recognition of European collective agreements are undermined by the lack of incentive for employers to enter into negotiation. National experiences show that collective bargaining has developed in most countries in order to end industrial conflicts or in situations where employers could obtain more valuable results than the one set by statutory rules. In this sense, being able to convince employers to negotiate at a European level remains a decisive task. Another crucial problem is the legal status of EC level agreements signed by European social partners. Since the Maastricht treaty, collective agreements may be implemented through a Council "decision" or "in accordance with the procedures and practices specific to management and labor and the Member states." The last method of implementation raises important questions about the binding effect of such EU level agreements that are not transposed to EU instruments. Sooner or later, the European Court of justice will have to define the legal regime of such collective agreements. However, various conceptions of collective agreements exist among EU Member States. While some countries give automatic normative effects to collective agreements, others consider them only as gentlemen's agreements, which require formal incorporation into the employment contract. So far, no indication has been given regarding the enforceability of EC level collective agreements. To conclude, the globalization of companies and markets raises the crucial question of the allocation of normative competence between supranational, national, and regional authorities. Even though systems of labor and social security are deeply rooted in national cultures, the phenomenon of globalized economy would require giving more competence to supranational authorities in order to monitor or reduce its disruptive effects at national levels. In case of absence of any organization of globalized enterprises and markets would contain a risk of a return to national protectionism. This possibility however remains marginal given the great economic interdependence of National States and their limited power in front of multinationals.

A second challenge for labor law will be for industrialized countries to balance the flexibility required by companies with the legitimate aspiration of workers of a minimum of security. The new organization of companies will require an ever-increasing ability for

workers to adapt to new forms of work and technologies. As often mentioned, the flexible firm does not only mean for workers "just in time" but "just in case." Therefore, the time has gone when workers used to spend their entire career in the same company, being able to make reasonable plans for their personal and professional future. Given this, an important issue for labor law will be to construct or give the possibility for workers to develop a career despite different employers and periods of unemployment. In this respect, professional training constitutes an important tool to ensure the employability of workers and to avoid social exclusion. Scholars have proposed giving workers a certain amount of social rights to be taken by the worker over his professional life (parental leave, training leave, trade union leave).[10] Other scholars had proposed creating a contract of activity that would cover the worker for different periods (work, unemployment, and training) and guarantee for the individual some basic rights (social security, remuneration).[11] However, serious legal difficulties exist concerning this contract of activity mainly related to the identification of the parties and their mutual obligation. If one party is the worker, the other is more difficult to identify (the State, a company).

A third challenge for labor and social security law will be to guarantee and to enforce for all individuals minimum labor standards and fundamental labor and social rights. A noticeable trend in French labor law is the growing impact of fundamental human and social rights, in particular under the influence of the European Court of Human Rights and its caselaw. In the European Union, the recent integration of the Charter on fundamental rights in the EU Constitution will probably reinforce this influence of fundamental rights on the national legislation of EU Member States. However, it is possible to distinguish two different evolutions. First, judges do not hesitate to apply human rights to the employment relationship. Human rights set limits to the power of the employer in the workplace and employees do not abandon these rights at the doorstep of the company. To give an example, the employment relationship does not eliminate the right to privacy or the freedom of speech even though some restrictions might be admitted. In a case held in 1999, the French *Cour de cassation* decided that a contractual clause requiring an employee to have his residence in a defined area was contrary to

10. A. SUPIOT, AU-DELÀ DE L'EMPLOI 53 (1999), *translated in*, BEYOND EMPLOYMENT (2001).

11. J. BOISSONNAT, LE TRAVAIL DANS VINGT ANS 278 (Odile Jacob ed., 1995).

the right to privacy and family as recognized in article 8 of the European Convention on Human rights.[12] A second evolution might come from the growing number of social rights elevated to constitutional status. In this respect, the Charter on fundamental rights increases without doubt, from a French perspective, the category of the so-called fundamental rights due to their high level in the hierarchy of norms. Despite their recognition under French law, some rights have not been so far given constitutional ranking. With their integration in the EU Charter of fundamental rights, they acquire a greater legal value in the EU Member States. This is the case, for example, of the right to information and consultation of workers within the undertakings, to protection in the event of unjustified dismissal, to fair and just working conditions, to collective bargaining and action. In this context, the European Court of Justice will play a crucial role in defining the scope of these rights in national contexts.

At a time when inequalities among regions in the world and within countries are growing, fundamental rights might become the ultimate means to maintain a minimum of social cohesion and solidarity within society. It remains to be seen whether labor law may be reduced to the respect of fundamental rights. There is no doubt that there is a future for labor law. But which labor law?

12. Cass. Soc., Jan. 12, 1999, Bull. civ. V, No. 7; C. Roy-Loustaunau, *Nullité d'une Clause de Résiliation Anticipée Mise en Oeuvre par l'Employeur*, 3 DROIT SOCIAL 287 (1999).