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Why have labour law ?
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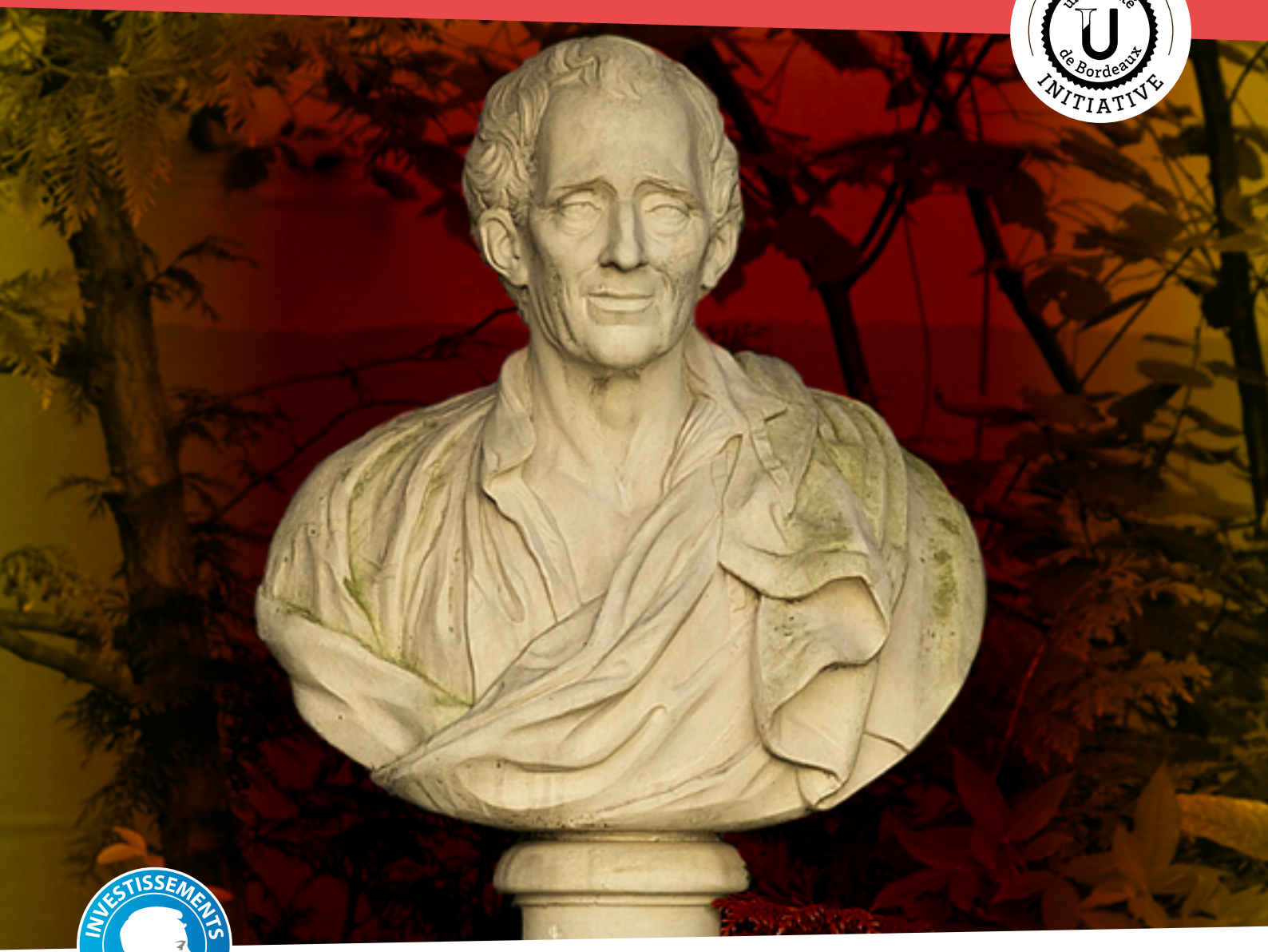

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Dialogues:

"Why have labour law?"*

Professor Alain Supiot

Why have labour law? There is a question to which it is tempting to answer: "why ask that question?". Haven't magistrates already enough to do in learning about the content of labour law, without being bombarded with recent questions which can't be asked in a straightforward way, such as what is labour law? Where does it come from? And where is it going? Mr Verdier, President of this University, who has organised this conference, dispelled that initial doubt by pointing out that labour law cannot be applied and interpreted without bearing in mind its *raison d'être*. Thus convinced of the point of the question, we then find ourselves facing two initial difficulties in addressing it.

First difficulty: it is a hackneyed issue. It emerged with the first workers' laws and has continued to fuel political and doctrinal debate ever since. In recent years it has, it is true, taken on a new lease of life with the debates on deregulation. "Should the *Code du travail* (Labour Code) be burned?" wondered the title of a conference held in Montpellier in 1986 (1). "Labour law, a living law!" echoed another conference, held in Lyon two years later (2). However, it would appear that the "case file" of recent reasons for labour law is far from closed, judging by (amongst other things) the recent *Droit social* conference, which emphasised the difficulties surrounding these general issues by the use of an ellipsis: "Liberty, equality, fraternity… and labour law" (3).

It is very difficult to approach the subject without rehashing it. It will suffice here to sketch out the map of recent explanations for labour law. On this map, there are two "cities" – not one on the right and the other on the left, but rather the cities of Economism and Humanism.

The City of Economism would be placed at the bottom of the map, because those encamped there see labour law as the vassal of economic relations, an expression of conflicts of interest (3a). It has its right-wing party (which upholds the established order) and its left-wing party (which wants to overthrow it), but both accept the primacy of the economy. This is epitomised by a phrase from Professor Teyssie, quoting A. Roudil: "Let us not forget in any event that: "Labour law does not control the economy". The truth is quite the opposite". (4)

The City of Humanism would be at the top of the map, close to the Heavens as, conversely, labour law is seen as an instrument for subordinating economic relations to moral values. As Paul Durand wrote, "The fundamental contribution made by labour law is a moral one. Modern society does not accept that labour should be treated as a material good, subject to market forces. Labour relations are subject to a special law because they involve a worker's person. By virtue of that fact – whether we are aware of it or not – labour law is presented as a reaction against a materialist philosophy" (5). This moral interpretation of labour law is shared by both parties which at times either clash or join forces: the Christian party (6), founded on the Church's social doctrine; and the secular party, successor to utopian socialism or "solidarism" (7).

This map will seem particularly basic. But its sole *raison d'être* is to avoid getting mired in debates that have raged a thousand times over, i.e. so as not to become embroiled for a thousand and first time.

There remains a second initial difficulty resulting from the ambiguity of the question "why have labour law?". The question may be understood in three ways. In "why?", we may understand "to what end?"; which then raises the question of the ultimate purpose of labour law, the aims pursued through it. But we may also understand "what is it for?", which itself raises the question of the functions of labour law, of its effective role in society. And, finally, we may understand "what is the point?", which raises the question of the uselessness of labour law: could we not just do without it?

Now, since the consolidation of labour law as an independent branch of law, what is most striking is the gradual swing through each of these three questions. Up until the end of the 1960s, the question asked in French legal doctrine was that of the purpose of labour law, and the unanimous response can be summed up in a single word: that of the *protection* of salaried employees (8). In the 1970s, the debate shifted and it was the question of "what is it for?" that sparked discussion. The purely protective nature of labour law was cast into doubt, and an examination of its "functions" serves to emphasise the interest it also holds for employers (9). These debates resulted in an assertion as to the *ambivalence* of labour law: it serves salaried employees *and* employers (10). Lastly, in the 1980s, the question of "what is the point?" emerged, featuring in every debate on the topic of deregulation or flexibility and is captured perfectly in the title of the Montpellier conference cited above, "*Should the Labour Code be burned*?". In reality, nobody has ever seriously considered burning it – and especially not lawyers, who make their living from it. However, those debates led to the emergence of a new, consensual concept: that of *balance* (11), which can be used in the invocation of the necessary (always necessary!) balance struck between economic and social matters, security and freedom, efficiency and equity, the individual and the collective, etc.

Protection, ambivalence, balance; all useful concepts, and especially the first which is, in truth, the only one to have any distinctive value for labour law as the remaining two – ambivalence and balance – may be applied to any other branch of law, and therefore all we learn is that labour law is indeed an integral part of the law.

The most remarkable (aspect) lies elsewhere: in the fact that labour law's *raison d'être* has always been sought outside of the legal order: in morality or in economics. Not that it is improper to look in that direction, but could we not look first to the legal system? In the same way that a word only has meaning in relation to other words in a language, so labour law only has legal meaning in relation to other branches of law. The first question to ask is therefore "Why labour law and not civil law?"; more succinctly, "why not civil law?". It is only once this ever-challenging issue has been evoked that it will be possible to open the door once more to the social sciences in order to tackle today's problems. In other words, the structural reasons for labour law (section I) will be examined before its economic reasons (section II).

I – Structural reasons: why not civil law?

The issue of the relationship between civil law and labour law has long been poisoned by mutual suspicion. On the *civiliste* side, labour law has been suspected of being a class law (12) – that of

the working class – which allegedly undermines the unity of civil law and, therefore, civil society itself. Meanwhile, on the "workers'" side, they harboured the opposite suspicion, whereby civil law is allegedly the class law: the law of the capitalist and wage-paying class (13). A few decisive studies served, if not to bring the discussion to an end, at least to mute it, by bringing proof that civil law was not, by its very nature, unfavourable to salaried employees (14). But then, this makes the question all the more pressing: why does civil law not govern labour relations?

In order to be instructive, I will use imagery to approach the issue and compare the relationship between civil law – or, more precisely, between the law of obligations and labour law, to that which exists between a car and a ship. Their purpose is ultimately the same (to travel), but they meet different requirements (the former being adapted to a solid surface, the latter to a liquid one); so that we can see both certain similarities and enormous differences between them. Equally, civil law and labour law ultimately share the same purpose, which is to "civilise" social (15), i.e. to substitute legal relations for power relations. However, while the civil law of obligations evolves on solid ground – that of the person, master of his own body and will – this is absent in matters of wage labour. The latter carries with it two structural requirements that the law of obligations is unable to satisfy and render it inoperable: the objectivization of the human body and the subjugation of the human will (16). Labour law originates precisely in these two difficult questions:

- How to guarantee the physical safety of individuals who are subject to production constraints?

- How to confer rights to individuals who are subject to the will of others?

A – Physical Coercion

If there is a fundamental principle of the rule of law – i.e. of a "civilised" society – it is certainly the safety of individuals, to be understood as physical safety. Civil law concepts have proved unable to guarantee that safety within a firm, because the civil law of obligations cannot manage a situation in which individuals no longer have the mastery of their own body, where this becomes a source of energy within a material organisation conceived by another. "*It must be said*", as Ripert (17) wrote, "*that labour is man himself, in his body and in his mind, and there is nothing therein that may serve as a possible purpose for a private law contract*". The first purpose of labour law was to compensate for this failure in the civil law of contract, and extend the principle of the safety of persons within firms.

Need we recall here the scale of the provisions drafted for that purpose? Naturally, we think firstly of the provisions that guarantee a technical protection for workers, such as the rules on health and safety, occupational health, accidents in the workplace and occupational diseases. However, the scope of this concept of physical safety is, in reality, infinitely greater and extends to all rules relating to health (for instance, those on the restriction and organisation of working hours, or those relative to illness), reproduction (maternity protection), ageing (age discrimination, retirement, etc.), wellness (issues of the minimum and the continuity of the means of subsistence, which have dominated the legal rules on salaries) (18), or its intimacy (rules on searches, alcohol testing, or case law relative to dress codes within companies) (19).

This concept of physical safety has been, and remains, at the very heart of labour law. It is this concept that is to be found at the root of all European labour law; it is this concept that, in those

systems that are most strongly marked by State abstentionism in labour relations, constitutes the irreducible part of a labour law imposed by the State; lastly, it is this concept that is found at the heart of the construction of European social law, as can be seen for instance in the Single European Act (20). It is a central concept, then; but its significance is often unknown, judging for example by the small place occupied by the reference to circadian constraints in recent debates relating to the organisation of working hours in France.

B – The Subjugation of the Will

Labour law also originates in the inability of the civil law of obligations to apprehend a relationship dominated by the notion of the subordination of one person to another. While, in civil contracts, "*la volonté s'engage*" (the will commits itself), in labour relations, it submits itself. Commitment expresses freedom; submission denies it. The result of such a contradiction between free will and the subordination of the will is that the salaried employee, as a *sujet de droit,* a legal person, disappears from the horizon of civil law when he enters the firm, giving way to a person full stop, subjugated to the standardisation power held by the entrepreneur (20a). Labour law has always and continues to have as its main purpose the task of compensating for that shortfall, which is to say to "civilise" the power of employers, providing it with a legal framework for its exercise. This framework has also implied – oh, the irreducible ambivalence of the law – a legalisation and a curbing of that same power.

As it is a matter of civilising labour relations, it is no surprise to find techniques drawn from civil law, but adapted to the dictates of subordination. Just as aboard a boat, we find a rudder (which resembles a steering wheel) or a propeller (which resembles the drive wheel), so does labour law adapt certain concepts taken from civil law to the demands of labour relations, such as those of the contract or agreement; legal persons; representation etc. However, it also borrows from those branches of law which, like labour law itself, also have to do with power relations: public law (21) (misuse of power), criminal law or procedural law (the rights of the defence) (22).

Key to this adaptation was the granting of a place to the collective in the definition of rights. This reference to the collective will immediately bring to mind those legal concepts belonging to labour law, such as that of "firm" (and, in its orbit, those of "establishment", "group", "economic and social unit", etc.) or of "branch", "negotiation", or "collective representation", of "strike" or "trade union". In reality, however, the collective is always there implicitly, even in the definition of the individual rights conferred to salaried employees. Is it a question of presenting individual claims, or attending the individual interview prior to redundancy? An employee may seek help from the union representative. Is it a matter of finding out the minimum salary that an employee can expect, or the maximum number of working hours that can be asked of him? An employee will be able to plead collective, legal or conventional rules. Is it a matter of bringing an individual legal action? The employee can be assisted and represented by the union which is even, in a growing number of cases, authorised and qualified to act in the employee's place. And the collective even casts its shadow as far as which court has jurisdiction, as the *conseil des prud'hommes* or industrial tribunal is elected and parity-based.

The creation of labour law as a separate branch of law was brought about by a continued decline in the individual contract as the sole legal framework for labour relations, and of the recognition of collectively-defined rights (collective rights or collective regulations) which form the basis of or

reinforce individual rights, i.e. rights that each employee has against their employer. From that perspective, one of labour law's most unusual concepts is that of an individual right exercised collectively, an idea that lays at the heart of the French conception of the right to strike, the right to belong to a trade union or the right to collective bargaining. Thus is posited not only the issue of the protection of the individual *by* the group, but also that of the protection of the individual *from* the group, an issue which occupies an important place in English or American law and which, even in France, has recently made the headlines in the field of constitutional law.

All of this is obviously complicated, difficult to handle, and the perpetual to-ing and fro-ing between the individual and the collective, subjugation and freedom, the contract and legal status, is enough to make a *civiliste* feel quite seasick. Lawyers/practitioners run the same risk. You know that unlike real sailors, who dread it, freshwater sailors like to be in sight of land, and rush towards it with the unfailing instinct that leads to great shipwrecks. It is the same risk run by a jurist tempted to return to the *terra firma* of civil law in order to handle labour relations. That does not mean to say that any borrowings from civil law are forbidden to him. But he cannot content himself with purely and simply fitting a civil law provision into the labour law apparatus, without first checking that the provision in question meets the latter's specific requirements.

Indeed, we must reconcile ourselves with the fact that labour law has become the ordinary law governing relations of economic dependence, insofar as it has its own logic which makes itself felt in other branches of law. The concepts wrought in the field of labour law have spread to all legal situations in which the notion of dependence can be found. Social security (25), the civil service (26), rural law (27), transport law (28), commercial law (29) and civil law itself where it has to govern unequal relations (30), have all taken it upon themselves to adapt this or that of those concepts to their own needs. Current events (31) show the momentum that the concepts of trade union law, the right to strike, to collective bargaining or even to a minimum or guaranteed wage, can gain within liberal professions – such as doctors or lawyers – now torn between the assertion of their legal independence and the fact of their economic and financial dependence on the State or on the social security apparatus.

The place thus occupied by labour law in the French legal system obviously means that it is more exposed to change than other branches of law (32). From this perspective, the question "Why have a labour law?" is put in different terms, as a current problem: beyond its structural reasons, what are the cyclical reasons for having labour law?

II –Cyclical Reasons: Labour Law Forcing Change

In order to tackle the issues of the day, I will distinguish between the two meanings of the concept of labour law: on the one hand, labour law as a collection of legislation governing labour relations; and, on the other hand, labour law as the science of that legislation. The question "Why have labour law?" is then split in two, and leads us to wonder not only what purpose that legislation serves, but also what purpose the science of that legislation may serve. It is difficult to remain unbiased on such questions; that is to say, at the very least, not to give precedence to some of the possible answers. Taking sides fairly clearly in order to make potential refutations easier, I will argue that while labour law – as a "science" of legislation – may serve in analysing change, labour law – as a legislative practice, and singularly as a judicial practice – must serve in mastering it.

A – The Science of Legislation and the Analysis of Change

Some excellent writings have examined what the "tasks" or "functions" of doctrine are, especially in labour law (33). These examinations get straight to the point and concern the various facets of knowledge of this legal phenomenon and naturally emphasise the role that doctrine plays within the legal system (34). It is useful to come back to this, and I would rather highlight a more marginal interest of the science of legislation, which is to contribute to the understanding of what the legislative texts tell us; in other words, of giving us an unrestricted view of economic and social change. Whilst undoubtedly being marginal, this perspective – which restores the law's cultural dimension – may claim to have some illustrious precedents in French legal doctrine (35).

To speak of "change" – a catch-all phrase if ever there was one – amounts to saying in less choice terms than those used by Montaigne, that "the world is a perennial see-saw". There remains the task of characterising, defining today's disruptions. Labour law, as the science of legislation, can contribute to the proper way of putting this question. By the structural position that it occupies, at the crossroads between the individual and the collective, of the physical and the mental, of the economic and the social, labour law offers a viewpoint on change that it would be a shame to ignore.

If we glance at it today, by paying a small amount of attention we will observe three essential things, three "heavy trends" in our society: trends towards individualisation, decentralisation, and duality (36).

To the *individualisation* column (37), we can add: the diversification of legal forms of employment; the reassessment of the individual employment contract; the principle of non-discrimination on grounds of sex; the increased flexibility in the organisation of working hours (including working life: prohibition on "guillotine clauses" in retirement matters), the right of expression, the rights to individual leave (sabbatical leave, to set up a business, child-care leave, training etc.), conversion rights, the right to retire, etc.

To the decentralisation column, we can add: on the one hand, the signs of a trend towards decentralisation (expansion of treaty law and company-level agreements, the questioning of the notion of public social policy); and, on the other hand, those of a reverse trend, towards internationalisation (38) (emergence of European social law (39), of groups' rights).

In the duality column, we find the pieces of the "second type" of labour law which thrives in the shadow of the old law: fixed-term contracts, temporary employment, part-time employment, on-call contracts, legal forms of employment (the multitude of internships and joint work/training contracts), provision of labour etc. These are all of the second type because most of the fundamental concepts of labour law (employer, firm, representation, strike, even the concept of employee) are lacking.

Furthermore all of this can be seen elsewhere than in labour law: individualisation can also be read in family law (40), decentralisation in public law (41), and duality in social security or social assistance law (42).

These trends have undoubtedly been observed elsewhere, in economics or in sociology (43). However, the legal analysis can serve in identifying their meaning and scope; for instance, by showing how, behind the speeches magnifying the emancipation of the individual by a contract, the legal relationship changes and weaves new kinds of groups and social constraints (44). Labour law therefore serves better to grasp and understand the changes that it expresses and registers. In the eyes of the humble observer, that would suffice to justify the purpose. However, those who practise labour law are unlikely to settle for such a speculative purpose. Magistrates in particular cannot content themselves with observing, as they have the power and the task of judging. For them, the fundamental question is that of knowing whether legislative practice serves in mastering the changes thus observed.

B - Legislative Practics and Mastering Change

Each of the major trends revealed by the study of legislative texts is the bearer of both good and bad, and may be taken as an opportunity as well as a risk (45).

The individualisation trend, for example, may be analysed as the chance to loosen constraints that the group exerts over the individual; in other words, as a factor in liberating individuals and giving them a greater sense of responsibility. Instead of his working hours (46), his expected earnings, the expression of his opinions being covered or defined collectively (by the State, the employer or the trade union), it is the employee himself would become the author of these various aspects of his professional life.

However, we can see that on the flipside of individualisation is the risk of reducing the protection afforded to the individual by the group, otherwise said to be a factor of anomie. While the collective definition of the rules governing labour relations gave each employee legal rights against the power wielded by employers, individualisation would amount to the dismantling of those rights, which are rooted in the collective. The promised land of the individual who is master of his own destiny would only be open in effect to the small number of employees able to give substantive content to those individual rights. For all the others, the ebbing of collective protective measures will clear a space for new forms of normalisation and operation (within the firm and without) (47). More generally, we can speculate that the economic and social integration role that has always been played by labour law tends to benefit only a proportion of employees , while for the rest that right has become an extra factor in their exclusion.

The courts have a vital part to play here.

In truth, they have always played a vital role in the construction of labour law, sometimes as a driving force, sometimes as an anchor, making it move forwards and preventing it from drifting. This is how we owe it a hotchpotch of concepts: the principle of the liability of the head of the firm for health and safety (48), the technique of suspending an employment contract (49), the concept of economic and social unity (50), the technique of converting successive non-permanent contracts (51), etc.

They will play a decisive role in the developments to come, and we can expect both good and bad from them.

Naturally, in French case law, the bad is the exception! Nevertheless, here is an example. It concerns employees in the second category, working for companies in the service sector (restaurants, security, cleaning, etc.), employees for whom collective rights are more or less devoid of meaning because they work *de facto* for an employer who is not theirs *de jure*; employees who ultimately constitute cheap, outsourced labour and know nothing of the individualisation and duality of salaried employment but its bad side. These employees had one and only one protection: case law known as "*laving-glace*" (52), which prevented competition between service providers from playing out on the basis of low salaries and the exploitation of workers (53). This only form of protection was removed by the Court of Cassation (in the *Nettoitout* case (54)), under pressure from an economic line of argument, the nature of which was subsequently revealed as being approximate to say the least. The denial of that line of argument, issued by social partners themselves (55), then the position adopted by the Court of Justice of the European Communities (56), gives us hope that the Court of Cassation will soon reform the *Nettoitout* case law (56a), which resembles what J-J Dupeyroux termed "the Matthieu effect" in social security law (57): from those who have nothing, even what they do have is taken…

Examples of the good are naturally much easier to find, because there are many more of them. I will confine myself to two, which both concern the individualisation process.

The first relates to the conversion of employment contracts. We know that one of the practical forms of individualisation consists for some companies in changing the status of their own employees to that of sub-contractors; the purpose of the operation is, of course, to exclude employees from the scope of labour law, thus "self-employed". The Social and the Criminal Chambers of the Court of Cassation have shown themselves to be especially firm in the same scenario. Indeed, their case law stands by the principle, recently reaffirmed by the *Assemblée plénière*, according to which "*the intention of the parties alone [is] powerless to remove from the interested party the social status which necessarily arises from the conditions under which he performs his work*" (58). The significance of this case law cannot be stressed enough: the conversion of an employment contract is the bolt which the court cannot open without running the risk of thrusting thousands of workers beyond the remit of any kind of protection.

The second example is that of the *Raquin* case law on the amendment of an employment contract (59). Yet again, this involves the individualisation process, as it is a matter of reinvigorating the stipulations contained in an individual contract. Part of the work done at this conference must be devoted to the developments of this new jurisprudential line, and I do not doubt that such work will highlight the technical difficulties that the new line may raise (60). It is useful to recall at this juncture that the *Raquin* decision enshrined a sensible solution for which doctrine had long been calling. This solution does not prohibit change within the company, as it leaves the employer free to decide on the substantive amendments to be brought to the contract. However, it imposes a duty to treat the employee as a genuine person, consulting him on the amendment in order to secure his express consent/assent, or even a refusal which would lead to the launch of redundancy procedures, or even to a negotiation with the employee as to the conditions for the amendment.

The balance thus struck by the *Raquin* decision between the collective constraints inherent to the life of the company and the respect due to individuals is not palpably different to that which the

Constitutional Council has just defined as regards trade unions bringing individual legal actions by requiring that the express agreement of the employees concerned be secured (61). In both cases, it is a matter of treating the employee as a genuine particular person, but in circumstances which safeguard/preserve the necessary prerogatives of the head of the company or of the trade union.

Today's problems thus join the ranks of the problems that have always existed, and it is on that point that I wish to conclude. The role of the court is not to apply the real or supposed laws of economics; it is to apply laws full stop. And while it is necessary to support the court and encourage change in the society in which it exists, it is by ensuring that labour relations remain the preserve of the law – which is to say, briefly, that they remain civilised relations.

Notes:

*Introductory report for the conference held by the French National School for the Judiciary and the *Association francaise de droit du travail et de la Securite sociale* (Paris, 2 February 19900, titled "Labour law – a law apart?" ; its oral form (of delivery) has been retained.

(1) Proceedings published in *Droit social*, special issue, July-August 1986, pp. 559-604

(2) Proceedings published in *Droit social*, special issue, July-August 1986, pp. 537-597

(3) *Droit social*, special issue, January 1990, 146 pages.

(3a) Georges Scelle summed that opinion up perfectly when he wrote: "*We cannot hide (...) from the fact that neither the sense of social justice, nor the incitement/incentives of economics/economic incentives, nor even the pursuit of progress and the national interest, cannot be permanent and deciding factors in social legislation, against class interests. None of that would have driven the capitalist, wage-paying middle class to give the waged/salaried working class sufficient legal weapons, had it remained the sole/exclusive holder of political power/had political power remained solely in its hands. There are no good tyrants, whatever the Physiocrats may have said, especially in a democracy. One class legislates in its own interests with an instinct so fatal that it verges on good faith"* (in *Le Droit Ouvrier*, Paris, A. COLIN, 2nd edition 1928, pp 12-13).

(4) B. Teyssié, "*Propos autour d'un projet d'autodafé"*, *Droit social* 1986, issue n°17, p. 561, citing/quoting P. ROUDIL, "*Flexibilité de l'emploi et droit du travail, "la beauté du diable"*", *Droit social* 1986, 94).

(5) P. Durand, "*Traité de droit du travail*", Paris, Dalloz, volume 1, issue n°94, p. 113; on this personalist reference, see F. Perroux, "*La personne ouvrière et le droit du travail*", Esprit, fasc. 42, 1st March 1936, pp. 866-897; and, by the same author, "*Le sens du nouveau droit du travail*", Paris, Domat-Montchestien, 1943. See, in the same sense, the declaration that opens the 2nd edition of *Traité du droit du travail*, by A. Brun and H. Galland: "*In labour law, doubtless more than in any other branch of law, the "spiritual" must prevail over the "material"; humanitarian inspiration must take precedence over narrow, technical regulation, as the ultimate purpose of this law lays in/resides within man*" (Paris, Sirey, 1978, volume 1, issue 1, p. IX).

(6) See, for example (referring explicitly to the Catholic Church's social doctrine as the basis of his institutional examination/assessment/analysis of business) the works of J. Brethe de la Gressaye, "*Le syndicalisme, l'organisation professionnelle et l'Etat*" (Paris, Sirey, 1931, 362 pages); "*Les transformations juridiques de l'entreprise patronale", Droit social* 1939, pp. 2-6; "*Les bases de l'organisation professionnelle*", *Droit social* 1941, p. 2.

(7) See the quote/citation from Léon Bourgeois at the top of the first treatise on industrial legislation by Paul Pic ("*Traité élémentaire de legislation industrielle. Les lois ouvrières*", Paris, Rousseau, 1st edition 1904, 6th edition 1931) in 1904: "*I believe that above us, all around us, there is a natural solidarity from which we cannot escape. We are all born indebted to one another".*

(8) See P. Durand, *op. cit.*, volume 1, issue n° 206, p. 261; and, in the same vein, J.-C. Javillier, *Droit du travail*, 1st edition 1978, p. 39.

(9) See B. Edelman, "*La légalisation de la classe ouvrière*", Paris, C. BOURGEOIS, 1978, 254 pages.

(10) See A. Jeammaud's contribution to the collective work *Le droit capitaliste du travail* (Grenoble, PUG, 1980, 3rd part: *"Les fonctions du droit du travail*", pp. 149-254): "*The eminent role that [labour law]plays in the constitution and safeguarding of capitalist production interests demands that relativiser son intérêt pour les travailleurs, but it does not allow it to be denied"* (*op. cit.* p. 254).

(11) On this problem of balance and transactions (already present in G. Scelle's writings, cited above, p. 13). See F. Ewald, "*Le droit du travail : une légalité sans droit*", *Droit social* 1985, PP. 723-728. Also, J. Courdouan and B. Doerflinger, "*Avant-propos*" (Foreword) to Proceedings from the conference titled "*Le droit du travail, un droit vivant*", *Droit social* 1988, p. 539.

(12) L. Josserand, "*Sur la reconstitution d'un droit de classe*", *Dalloz*, H. 1937, *chronique* 1.

(13) Cf. G. Scelle, *op. cit.,* loc. cit.; G. Lyon-Caen, "*Du role des principes généraux du droit civil en droit du travail*", *Revue trimestrielle du droit civil* 1974, pp. 229-248; A.-J. ARNAUD, "*Essai d'analyse structural du Code civil français. La règle du jeu dans la paix bourgeoise*", Paris, LGDJ, 1973, 182 pages.

(14) G. Couturier, "*Les techniques civilistes et le droit du travail*", *Dalloz* 1975, Chr. 151-158 and 222-228. Also: *Droit social,* "*Droit civil et droit du travail*", special issue May 1988.

(15) It is P. Legendre who reminds us that "*in the historic and least known sense of the word, civilization is nothing more than civil law*" (in *L'Empire de la vérité*, Paris, Fayard, 1983, P. 171). The meaning eludes Norbert Elias, for example, in *Über den Prozeß der Zivilisation: Soziogenetische und psychogenetische Untersuchungen* (translated to French under the title "*La civilisation des moeurs"*, Paris, Calmann-Lévy, 1973, 342 pages).

(16) For an overview, see "*Le juge et le droit du travail*", the author's own PhD thesis defended at Bordeaux I, 1979, pp. 35-272

(17) In "*Les forces créatrices du droit*", Paris, LGDJ, 1955, issue n° 109, p. 275.

(18) See Y. Saint-Jours, "*Du salaire au revenu salarial*", in *Les transformations du droit du travail, Mélanges G. Lyon-Caen,* Paris, Dalloz, 1989, PP. 317-330.

(19) See B. Tessié, "*Personnes, entreprises et relations de travail*", *Dr. soc. Droit civil et droit du travail*, special issue cited above, pp. 374-383; O. Kuhnmunch, "*Personnes, entreprises et relations de travail, éléments de jurisprudence*", *idem*, 1988, pp. 384-386; J. Savatier, "*La liberté dans le travail*", *Droit social*, "*Liberté, égalité, fraternité et Droit du travail*", special issue cited above, pp. 49-58.

(20) Article 118A; V. I. Vacarie, "*Travail et santé: un tounant*" in "*Les transformations du droit du travail*", *Mélanges G. Lyon-Caen* cited above, pp. 331-348.

(20a) On this concept, see "*Délégalisation, normalisation et droit du travail*", *Droit social* 1984, 296. Legal analysis is necessary and sufficient to characterise this alteration in the status of *sujet de droit* - which is not, as it happens, a simple matter of fact (contrast this with J. Carbonnier "*sur les traces du non-sujet de droit*", *Arch.,* volume 34, Paris, SIrey, 1989, 197-207, specifically pp. 201-202).

(21) J.-L. Crozafon, "*L'emprunt de techniques de droit administrative par le droit du travail*", Th. Paris-I, 1984.

(22) See Proceedings from the conference titled "*Les droits de la défense et le droit du travail*" reproduced in "*La Gazette du Palais*" and in "*La Semaine sociale*" of 24 May 1988, as a supplement to issue n° 410; cf. specifically J.-M. Verdier's report on the defence's rights in the interests of the company.

(23) On the issue of the constitutionality of substitution actions: C. Constit. 25 July 1989, *Droit social* 1989, 627, decision commented by X. Prétot in *Droit social* 1989, p. 702 and subsequent.

(24) Rapp. In the same vein, J. Laroque, "*Réflections sur la jurisprudence de la Chambre sociale de la Cour de cassation*" in Mélanges G.-H. Camerlynck, Paris, Dalloz, 1978, specifically p. 28.

(25) Cf. J.J. Dupeyroux, "*Droit de la Sécurité sociale*", Paris, Dalloz, 11th edition 1988, n°56 and 140-141.

(26) Cf. The *Conseil d'Etat*'s recognition of general principles, by which labour law "is inspired", such as that of maternity protection (C.E. Ass. 8 June 1973, Peynet, *ADJA* 1973, 608, conclusions by Grevisse) or the minimum wage (C.E. 23 April 1982, *Ville de Toulouse*, Rec. 152, conclusions by Lateboulle).

(27) Cf. "*L'élevage industriel face au droit du travail*", *Revue de droit rural*, special issue October-November 1983, pp. 325-331.

(28) Cf. F. Ewald, "*L'accident qui nous attend au coin de la rue*", Paris, La Documentation française, 1982; and, by the same author, "*L'Etat providence*", Paris, Grasset 1986, specifically p. 437 and subsequent.

(29) See e.g. the status of VRPs, or the decisive place occupied by labour law in the constitution in the form of group rights.

(30) Cf. J. Mestre, "*L'influence des relations de travail sur le droit commun des contrats*", lecture given at the "*Droit civil et droit du travail*" conference, *Droit social* 1988, 405; one will always benefit from referring to the theses by G. Berlioz on "*Le contrat d'adhésion*" (LGDJ, 2nd edition, 1976) and G. Virassamy "*Sur les contrats de dépendance en droit privé*" (LGDJ, 1986).

(31) The Legal aid strike by lawyers, or the doctors' strike in the context of the negotiations surrounding the new agreement with the *Caisse Nationale d'Assurance Maladie*. See also, for a general overview, G. Lyon-Caen, "*Le droit du travail non salarié*", Paris, Sirey, 1990, 208 pages.

(32) See Antoine Lyon-Caen, "*Changement politique et changement du droit du travail*" in Mélanges G. Lyon-Caen, cited above, pp. 1-10, and J.-E. Ray, « *Mutation économique et droit du travail* », eod. loc. pp 11-31.

(33) P. Durand, "*La connaissance du phénomène juridique et les tâches de la doctrine moderne du droit privé*", Dalloz, 1956, Chr. 73; Ch. Atias, "*Progrès du droit et progrès de la science du droit*", *Revue trimestrielle du droit civil* 1983, 696. J.-C. Javillier and Ph. Auvergnon, "*Elements pour un bilan sur la recherche en droit du travail*", *Droit social* 1985, 211; G. Couturier, *(Pour) la doctrine* in "*Les transformations du droit du travail*", *Mélanges G. Lyon-Caen* cited above, pp. 221-242.

(34) See e.g. G. Couturier (article cited above, n°7 s., p. 226 s.) who distinguishes between the functions of knowing rules, receiving rules and finally of controversy, i.e. argument and reasoning.

(35) Without going back to Montesquieu or Portalis, suffice it to mention here the name of Ripert, or of Dean Carbonnier, whose works reveal, beyond the legal phenomenon, the societies into which that phenomenon fits.

(36) This development follows the same outline of comparative work currently being conducted by Professors U. Muckenberger (HWP, Hamburg) and B. Bercusson (IUE, Florence).

(37) In a legal sense, individualisation may be understood as the allocation of individual rights independently of membership of a collectivity or a specific institution. From this perspective, it ought to be separate from "subjectivisation" which consists in in recognising individual rights in the context of a collectivity or an institution (i.e. apprehending the employee as a *sujet de droit* or legal person within the company). This concept is itself different from "objectivisation", which consists in treating the individual as a mere *sujet de droit*, as a part entirely subordinate to an institutional set-up.

(38) See V. Blanc-Jouvan, "*L'internationalisation des rapports de travail*", *Mélanges G. Lyon-Caen* cited above, pp. 67-82 ; J.-M. Verdier, "*L'apport des normes de l'OIT au droit du travail français*" éod. loc. pp 51-65.

(39) See P. Rodière, "*Construction européenne et droit du travail*", *Mélanges G. Lyon-Caen* cited above, pp. 33-49.

(40) E.g. in the liberalisation of divorce, in the equalisation of property rights of married couples, in the evolution from paternal power to parental authority, in the liberalisation in the law on filiation, in the rights recognised as being held by partners, etc. All of these legal provisions tend to free the individual from the family institution understood as a non-derogable legal framework.

(41) Decentralisation laws on the one hand, European integration on the other.

(42) See Proceedings of the conference held at Nantes, "*Les sans-emplois et la loi*", Quimper, Calligrammes, 1987, 228 pages; J.-J. Dupeyroux, "*Droit de la Sécurité sociale*", Paris, Dalloz, 11th edition 1988, n°89-5 and subsequent ; E. Alphandari (dir.), "*L'insertion*", *Revue du droit sanitaire et social,* special issue, Paris, Sirey, 1989.

(43) See for example the masterful analyses put forward by M. Verret, "*La culture ouvrière*", Saint-Sébastien, éd. ACL, 1988, 296 pages; and, by the same author, "*Où en est la culture ouvrière aujourd'hui ?*", *Sociologie du travail*, 1989, issue 1, pp 125 and subsequent. See also V. Gorz, "*Métamorphoses du travail, Quête du sens*", Paris, Galilée, 1988, 303 pages; and the economic point of view of A. d'Iribarne, "*Compétitivité, défi social, enjeu éducatif*", Paris, Ed. CNRS, 1989, 287 pages.

(44) Cf. "*Dérégulation des relations de travail et autoréglementation de l'entreprise*", *Droit social* 1989, 195-205, specifically p. 203.

(45) V.-U. Muckenberger & S. Deakin, "From deregulation to a European floor of rights: Labour law, flexibilisation and the European Single Market", Zeitschrift für auslandisches und internationals Arbeits - und Sozialrecht, Heidelberg, Müller, Jul./Sept. 1989, pp. 153-256. Rapp. What J. Habermas calls the state of "new uncertainty" in *Die Neue Unübersichtichkeit*, Frankfurt, Suhrkamp. 1985.

(46) Working hours, but also training, retirement, children's education, etc.

(47) Individualisation does indeed go hand in hand with a trend towards the standardisation of cultural models, particularly favoured by the media. The decomposition of intermediate groups leaves clear space for values and representations (essentially those of the trading sphere, as the market becomes the only common point of reference) which claim to be universal and are imposed all the easier on individuals as the latter can no longer counter this

with values inherent to their social group. This phenomenon can be discerned for instance in the crisis in labour relations in the public sector (see "*La crise de l'esprit de service public*", *Droit social* 1989, 777).

(48) Crim. 26 August 1859, S. 1859, I, 973.

(49) See J.-M. Beraud, "*La suspension du contrat de travail*", Th. Lyon, 1979, Paris, Sirey, 1980.

(50) See. R. de Lestang, "*La notion d'unité économique et sociale d'entreprises juridiquement distinctes*", *Droit social* 1979, 5.

(51) See G.H. Camerlynck, "*Le contrat de travail*" in *Traité de droit de travail*, Paris, Dalloz t.1, 2nd edition 1982, n°624, p. 642. See recently in the same vein as this case law: Soc. 20 Dec. 1988, *Droit social* 1989, 300 ss. art. G. Poulain "*Le travail intermittent par conclusions de contrats à durée déterminée*".

(52) Amongst many decisions, see Soc. 5 Dec. 1974, B. civ. V, n°592, p. 553; Soc. 24 Nov. 1976, B. civ. V, n°616, p. 500; Soc. 8 and 30 Nov. 1978, Dalloz 1979, J. 277, critical note by J. Pélissier.

(53) Cf. "*Groupes de sociétés et paradigme de l'entreprise*", *Revue trimestrielle du droit commercial*, 1985, specifically note 67, p. 632.

(54) Cass. Ass. plén. 15 Nov. 1985, two decisions: "*Nettoitout*" Gaz. Pal. 1986, I, 38, note by M. Rayroux; and "*Nova*", *Droit social* 1986, 1, conclusions by G. Picca and note by G. Couturier; Soc. 12 June 1986 "*Desquenne et Giral*", *Droit social* 1986, 605 ss. Conclusions by G. Picca; on this turnaround, see G.H. Camerlynck and M.-A. Moreau-Bourles, "*Le contrat de travail*" in the treatise cited above updated 1988 n°104, p. 46 and subsequent; H. Blaise, "*Les modifications dans la personne de l'employeur; l'article I. 122-12 dans la tourmente*", *Droit social* 1986, 83); Arnaud Lyon-Caen, "*A propos de l'arrêt Desquenne et Giral*", *Droit social* 1986, 848.

(55) See the amendment agreements adopted in the restoration of local authorities (agreement of 28 Feb. 1986, order of extension of 6 June 1986 published in the *Journal Officiel* of 7 June), in railway maintenance (agreement of 24 Feb. 1986, order of extension of 13 May 1986, published in the *Journal Officiel* of 23 May) and in the cleaning of premises (agreement of 4 April 1986, order of extension of 17 June 1986, published in the *Journal Officiel* of 22 June), on these various agreements, see J. Blaise, article cited above, *Droit social* 1986, p. 842 and subsequent.

(56) ECJ Case 324/86 10 Feb. 1988 (Foreningen af Arbejdsledere i Danmark (Danish Association of Supervisory Staff)) *Droit social* 1988, 455, conclusions by M. Darmon, note by G. Couturier; ECJ Case 101-87 15 June 1988 (Bork); on the incidence of this European case law, see G. Couturier, "*Le maintien des droits des travailleurs en cas de transfert d'entreprise*", *Droit social* 1989, 557.

(56a) This hope has been fulfilled by the latest turnaround in case law, Cass. Ass. plén. 16 March 1990, published in the May edition of this *Revue*.

(57) "*Droit de la Sécurité sociale*", Paris, Dalloz, 11th edition 1988, n°84, 117 s. 173-1, 315.

(58) Ass. plén. 4 March 1983, Dalloz 1983, J. 381, conclusions by Cabannes; see, in the same vein, Crim. 29 Oct. 1985, juri-social 1986, F2; Soc. 19 Jul. 1988, B. civ. V, n°478; for an overciew of the issue, see the thesis by Mrs. Th. Aubert-Montpeyssen, "*Subordination juridique et relation de travail*", Toulouse, éd. du CNRS, 1988; also, A. Jeammaud, "*Les polyvalences du contrat de travail*", in *Mélanges G. Lyon-Caen* cited above, pp. 299 and subsequent.

(59) Soc. 8 Oct. 1987, *Droit social* 1988, 138, note by J. Savatier; Dalloz 1988, J. 58, note by Y. Saint-Jours; *Juri-Social* Dec. 1987, 41, observations by A. Lyon-Caen.

(60) A sizeable proportion of those difficulties are the result of the retroactive effect of any turnaround in case law, a problem which obviously exceeds *Raquin* and cannot, therefore, constitute a strong argument against it!

(61) C. const. 25 July 1989, cited above.

Commentary

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There is doubtless no question more important/essential than that asked by Alain Supiot in this study published in *Droit social* in 1990, for those seeking to understand *how* modern labour law was born in the 19th century, and *why* it is necessary to fight *today* for the survival of a labour law that embraces its own objectives and gives concrete expression to the aspirations – and tensions – inherent to working relationships and social relations.

Compiled with other equally fundamental/essential discussions in the remarkable *Critique du droit du travail* published by the author in 1994 with *Presses universitaires de France*, this discussion/reflection arose/emerged in a very precise context. The second half of the 1980s was the setting of a harsh reconsideration of a labour law accused of encouraging/favouring, even creating, the conditions for the economic crisis, and thus to be consigned to the flames. Too expensive and overly restrictive, the *Code du travail* (French Labour Code) allegedly stifled economic initiatives and ought therefore to be removed so as to leave economic players free to choose a legal framework applicable to businesses that most closely resembled the realities in the field. After a few years in which the Court of Cassation had seemed tempted by the prevailing neoliberalism's siren song, its Social Chamber stepped in after the emblematic decision in *Raquin* to undertake the enormous task of rebalancing relations between employees and employers; to the great surprise (real or feigned) of those who believed that civil law could be of no help, it was those rules contained in the Napoleonic Code – and especially the principle of the inviolability of contracts, which gave salaried employees the means to resist employers' management powers.

Nowadays, in 2015, the question of the usefulness of a heavily/strongly framed and codified labour law continues to be asked, even though the context has changed substantially since 1990. The successive reforms of collective negotiations in 2004, and of union representation, reforms which took place in 2004 for workers' organisations and 2014 for employers' organisations, have resulted in new threats circling around *statutory* labour law; collective labour agreements now enjoy greater legitimacy that competes with – even threatens – that of the law accused of offering only a one-size-fits-all option where businesses may need a made-to-measure solution.

We must therefore delve into the memory of labour law in order to find the deeper reasons that led to its birth and which make it, now more than ever, essential in ensuring that the balance of power and interests is respected.

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