LABOR LAW: A LAW FOR THE WORKERS OR A LAW FOR THE UNIONS?

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Labor law is currently in a state of crisis. This observation has often been made and requires no lengthy demonstration. At the very most, one might inquire as to whether the ever increasing signs suggest a mere alteration or a veritable "collapse."[1] That inquiry is far from unimportant insofar as a search for a remedy to the present situation is concerned. However, semantic quarrels are to be avoided here, and it would seem that, in any event, the task of the jurist is about the same. While no one would dream of wiping out the past, it is clear that mere superficial reforms will not do. A veritable "reconstruction" is in order: the time has come perhaps to undertake a comprehensive rethinking of the meaning and the scope of this branch of law, which has always inspired so much passion and has provoked such ardent controversy. This crisis in labor law seems so fundamental and universal as to interest all jurists, particularly specialists in labor relations and comparative lawyers. For these reasons, we believe it fitting to offer the following remarks regarding developments in this area in France to the memory of Ferd Stone, in recognition of his untiring efforts to promote a better understanding of foreign and comparative law.

Of all the signs of the present crisis, emphasis is most often placed on those of a rather formal nature relating to technical aspects of labor law as it has been practiced for a number of years. Thus there are often complaints about the profusion of governmental regulations intended to protect the workers which, by their own excess, lose much of their value and efficacy. It is well known that legislative "inflation" is one of the tell-tale signs of "the demise of law"[2] and that too many laws eventually prove to be more destructive than helpful. Given that the size of the French Labor Code has doubled within a span of twenty years, the choice is rather simple. On the one hand, an attempt could be made to apply all of its existing provisions to the letter. This

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1. The term "effondrement" (collapse) appeared in the title of an article by Gerard Lyon-Caen published in LE MONDE on October 31, 1978.

2. In French "*le déclin du droit*," title of an acclaimed work by George Ripert published in 1949 by the Librairie générale de droit et de jurisprudence.

strategy would imply, however, a rather cumbersome administrative and policing mechanism, not to mention imposing constraints on businesses and individuals capable of producing perverse effects, injuring those whom the law was designed to protect. As a result labor law would become uneconomical and antisocial. On the other hand, one could decide to put aside the most problematic regulations as circumstances demand. Thus, to avoid tempting the parties to violate a rule (thereby exacerbating the ineffectiveness for which labor law is often reproached), to spare the legislator from the political risk of undoing past reforms (which would appear to be hardly acceptable),[3] and to save the judge from the anguish of "burning the Labor Code,"[4] the tendency has been toward the famous "flexibility" which had been at the heart of the debate in the 1980s. To restore the flexibility which the law had lost and which is often necessary to both the survival of businesses and the protection of jobs, legislation began expressly to authorize parties in labor negotiations to derogate from applicable law in their collective agreements. This process, however, has certain dangers insofar as it is prejudicial to the hierarchy of legal norms. It must be limited in scope and practice.[5] In any event, this is nothing but a variation on the more general theme--ever in vogue--of deregulation, and the debate on that subject is far from over. One thing however is certain: the process thus begun leads not to a reduction in the quantity of regulatory texts, but, on the contrary, adds to their volume as well as to the unwieldiness of procedures, further adding to the existing ills. Above all, the accent placed on the relativity, the fragility and the instability of labor law threatens, unfortunately, to discredit the whole field by making it seem, all too often, a mere bargaining chip in political battles.

All the same, this aspect of the present crisis in labor law will not be the subject of our discussion, for the crisis of today does not relate only to the sources of the law. It relates even more to the very foundation, general orientation and, one might almost say, the legitimacy of labor law itself. No doubt, the foremost end of labor law

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3. Although legislators were indeed called upon recently to take such action regarding temporary work (including limited duration contracts) and administrative authorization for mass layoffs imposed in 1975 and abolished by a law passed on December 30, 1986.

4. As suggested by the title of another article by Gérard Lyon-Caen which appeared in LE MONDE on August 26, 1986 and of a symposium organized in 1986 (excerpts published in DROIT SOCIAL, 1986, p. 559 and ff.).

5. It has been used above all in relation to work scheduling. *See* Xavier Blanc-Jouvan, *La flexibilité du temps de travail*, REVUE INTERNATIONALE DE DROIT COMPARÉ, 1990, p.693.

is the protection of workers, on the premise that the mere application of common law is not enough to secure them the guarantees they need, given their inferior status or condition by comparison with that of their employer within the individual employment contract. The genesis of labor law was a reaction against certain types of exploitation, and there is hardly need to recall the extent to which its development has been instrumental in improving labor conditions. For many years labor law bore the mark of what George Scelle called "political interventionism"[6] and took the form of an avalanche of regulations aimed at providing workers with a veritable legal status. Later, following the progressive development of collective alliances of workers, a new type of law began to take shape: an organizational law, granting unions certain rights and enabling them to provide for the effective representation of workers and the defense of workers' interests. Rather than replace the preexisting law, this new law coexisted with the latter, ushering in a number of its own techniques (such as strikes, collective bargaining, participation in management decisions, etc.). This evolution was certainly normal and desirable to the extent that it afforded an improved balance of power in the field of industrial relations. Of course, the major risk was that after having at first overly exalted the individual worker by ignoring workers' organizations (as was the case for the greater part of the nineteenth century), one would go in the opposite direction, and little by little one came to think that the protection of workers (in the sense of equitable guarantees and limitations on arbitrary decisions) could not come about except by the increase of collective rights. Indeed, one might now ask whether through this progressive evolution labor law has not gone too far, and if it has not somehow strayed from its original vocation, on occasion taking account of the rights of unions more than those of workers themselves.

The question, as provocative as it may sound, is certainly worth asking, and we must be permitted to answer it, though perhaps in rather unorthodox terms, without fear of going down a path that is without doubt unusual (and imprudent) to travel. It seems, indeed, that in this period, characterized by the decline of unions, the advance of individualism and the rehabilitation of the enterprise, one might well inquire as to the appropriateness of certain rules that grant considerable powers (I), with no counterbalance (II), to unions that do not always demonstrate their capacity to use such powers in the best interest of workers (III).

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6. GEORGE SCELLE, LE DROIT OUVRIER, 2nd ed., Armand Colin, 1929, p. 212 and ff.

I

The powers granted to labor unions are exercised in various domains and extend well beyond the field of industrial relations. In fact, a distinctive characteristic of labor unions in continental Europe is that they appeared in the political arena before they actually moved onto the industrial scene. They were thus able progressively to assume a role in society, becoming one of the essential parts of the democratic process. Their capacity to impose themselves as a special interest group, particularly on economic and social policy, explains why they are today necessarily consulted at all levels of governmental decision-making. Consequently, they appear in countless commissions and advisory counsels in which they play an important role; and they are in almost permanent contact with policy makers. In this respect, the falsity of the popular perception that French labor unions suffer from weakness cannot be overstated: while their membership is rather low, and division among them often precludes common action, they constitute nevertheless a political force which must be reckoned with.

The status of collective bargaining powers is obviously somewhat different. Here the weaknesses of our system of labor organizations are most evident; no one would deny that our unions carry less weight to the bargaining table than their counterparts elsewhere. But here too, one must be very careful. This inferiority is rooted above all in particular inter-union tensions and in certain strategies tending to focus on confrontation rather than on collective bargaining: the inferiority is not imputable to the law, which on the contrary assures the unions a very powerful position that they know perfectly well how to use in some circumstances.

One thing should be well understood. The recognition of broad powers in labor organizations is perfectly legitimate so long as its final purpose is to serve the interests of workers. Free market liberalism has so clearly proven its destructive potential that one hardly needs convincing of the necessity of a powerful labor movement. The isolated worker is easy prey for the employer, and no one would dream of jeopardizing the existence of organizations able to act on his behalf; such organizations are obviously the only means of forestalling the abuses common during the golden age of capitalism. It even seems somewhat surprising that it has taken so long fully to recognize the rights of organized labor and to provide labor unions with the means of effective action, particularly in the workplace, through the recognition of enterprise union sections (by the law of December 27, 1968) or through the establishment of a true right to bargain collectively (by the

law of November 13, 1982). These achievements of our labor law, though slow in coming, have nevertheless been beneficial and should under no circumstances be challenged.

But, other aspects of this law would seem more debatable from the point of view of protecting individual rights as they confer upon unions--and particularly upon certain unions--a veritable monopoly not always in the workers' best interests: precisely these aspects are today the source of certain regrettable excesses.

The union monopoly is in itself questionable when it precludes or renders ineffective all forms of worker representation outside of union channels. Without doubt one understands the reasons for the legislature's particular mistrust of certain types of groups which may not benefit from adequate independence vis-à-vis the employer. Such is the danger of any system of employee representation that is purely internal to the enterprise and does not benefit from outside support. But is it then necessary to place all means of participation uniquely under the control of unions and to reject all schemes which would allow workers to be heard through another channel within the framework of the company?

The French position in this regard is well known. An elected set of representatives fulfills an important role alongside the employer (particularly as concerns information and consultation) through the intermediary of employee delegates and works committees. But the system of elections provided by the law affords such an important role to unions (due to their exclusive ability to present candidates in the first round of elections), that these representative institutions in practice often seem to issue more from unions themselves than from the workers. One goal sought by management is precisely the establishment within the company of a truly autonomous employee representation scheme, with complete freedom of choice left to the workers.

Similarly, the very great reserve, even the hostility of unions has almost unquestionably led to the failure of most past attempts at establishing employee representation within corporate management structures. Hardly surprisingly, only in the public sector has the law been able to impose a tripartite or a bipartite form of management in which workers theoretically have the right to one third of the seats on the administrative or supervisory counsel. When such a system was implemented for the first time, during the first large wave of nationalizations after the Second World War, unions, in most cases,

could assign these seats themselves, thereby exercising important powers of control. The law of July 26, 1983, on "the democratization of the public sector" took a slightly different route by deciding that employee representatives would be thereafter elected by the entire corps of personnel. However, the rule remained that listed candidates must be endorsed either by a representative union organization or by 10% of elected employee representatives (themselves having in most cases benefitted from union support during their own elections). In the private sector, where the ordinance of October 21, 1986, instituted the same type of system, on a purely optional basis, employees running for the position of administrator must be elected upon nomination by a union or by a portion (fixed at 5%) of the personnel. The union monopoly is in this case repealed, but this repeal has occurred unfortunately in a situation where employee participation has remained, even until today, an almost exclusively theoretical possibility.

A way out of this situation could have been in the workers' use of the right of expression recognized for the first time by the law of August 4, 1982.[7] While that law is not truly a tool for management participation, it is nevertheless a useful means for workers to make themselves heard directly, without passing through the channels of elected representatives or unions. But precisely this aspect of the law has sparked the mistrust of labor organizations, fearing they may become divested of their role as forced intermediary. And the more than reserved attitude adopted by many unions,[8] although insufficient to prevent the passage the law, has certainly been largely to blame for the relative failure, in practice, of this institution which could have had very positive aspects for workers. Its highly individualistic character understandably produced reticence on the part of those who believe only in collective forms of labor participation.

Finally, unions enjoy yet another exclusive power in matters of collective bargaining. Without doubt, it is hard to accept that collective agreements, intended to cover the entire corps of workers, could be reached by an employer with groups which do not offer sufficient guarantees of independence. But the question remains as to whether it would not be fitting to recognize the validity of agreements reached with the works committee (exceptionally, the law already recognizes

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7. This law, which was only experimental in nature, was later modified and made permanent by the law of January 3, 1986: article L.461-1 and ff. of the Labor Code.

8. Certain organizations, and notably the CFDT, have from the outset been very much in favor of this right of expression, which in fact seems to be a sort of recognition of a fundamental freedom of the workers and a favored means of corporate democratization (as well perhaps as of the labor movement).

the validity of so-called profit-sharing agreements; and we can certainly regard as a sort of informal bargaining the process which takes place within the works committee under the guise of a mandatory consultation, even if it does not result in an agreement in due form)--and there is a certain following today for a "collective enterprise contract" which would be concluded with elected representatives without any union intercession. The drawbacks of the present situation appear even more clearly in light of the fact that collective bargaining often constitutes the sole means for relaxation of the rigidity of existing regulations. This explains why nothing can be done in the field without the backing of labor organizations, regardless of the real desires of workers. In addition, the law often provides, as a precautionary measure, that the power to derogate applies only to agreements reached at the highest level, that is, with the leaders of the unions--those most distant from the rank and file and their concerns. One can easily imagine the potential tensions and divergent interests which may ensue. Tension was acutely evident in the matter of the flexibility of work schedules: the inability to reach a formal agreement at the industry level resulted in informal understandings reached with the workers within the framework of the company or the plant, and even in unilateral decisions taken by employers in contravention of the law and implemented with the implicit agreement, or at least the acquiescence of employees. Precisely this fear of possible excesses in such illegal practices prompted legislators recently to intervene[9] by introducing more flexibility into our law, as a response to the workers' needs. The texts presently in force, however, continue to authorize unions to block moves in the field.

Moreover, the consequences of union monopoly are further aggravated by an increasing[10] concentration of all of the powers discussed thus far in the hands of a few organizations which are considered representative. This concept is not beyond criticism in a country where the principle of pluralism dominates the structure of labor organizations. But sufficient justification could certainly be found if the mechanism for evaluating representativeness were more clearly defined and its application were unobjectionable. That is, however , not at all the case. The criteria incorporated in the law[11] are

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9. Particularly with the law of June 19, 1987, relating to the duration and to the arrangement of work schedules.

10. In fact, only since the law of July 13, 1971, has the power to conclude collective agreements been vested solely in representative unions.

11. Labor Code article 133-2, whose persistence in our law is questionable, enumerates "the membership, the independence, the dues, the experience and seniority of the union, the patriotic attitude during the occupation."

anachronistic and poorly adapted, and the only valid instrument of evaluation--the "influence" (*audience*)--in the absence of any other true means of measure,[12] remains largely subjective. In addition, the use of the notion of "borrowed representativeness"[13] is a source of abuse to the extent that it can lead one to consider a union to be representative though, in the final analysis, it has no members and no real influence. This is in truth only a means of reinforcing established positions and existing unions by granting the right to exist and to act, permanently and without possible contradictory showing, to organizations whose sole virtue is their affiliation with one of the five large confederations existing on a national and interprofessional level.[14] This system has been criticized quite often, but, because of political implications, it hardly seems open to question.

One might say that the situation in France is not unique and that the monopoly recognized for unions is even more pronounced in other countries, for instance the United States. But the difference is that this monopoly is accompanied by countervailing factors which do not exist in French law.

II

There are, in truth, several counterweights of this kind. They consist as much in certain duties imposed on unions and in the potential application of their responsibility, as in the democratic control of their operation. In each of these three areas, however, our law appears somewhat deficient.

A. The absence of duty is particularly noticeable in the area of collective bargaining, where unions clearly benefit from a privileged position with respect to employers, in the course of both preliminary negotiations and the implementation of the agreement finally reached.

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12. The results of professional elections obviously cannot fulfill this role since they are themselves distorted by the exclusive right to present candidates in the first round of elections which is granted to unions already deemed to be representative.

13. This consists of the automatic consideration of any union as representative at its own level (viz. industry-wide, regional, local, company-wide or plant-wide) so long as it is affiliated with an organization declared representative at a national level, without taking into account any other factor.

14. These are at present the CGT, the CFDT, the CGT-FO, the CFTC and the CGC.

To the extent that the duty to negotiate exists in France--it is modest at both the company and the industry level--it is enough to recall that this duty, far from reciprocal, is strictly unilateral in nature. Indeed, this seems to flow from the notion that, in the vast majority of cases, the union ordinarily asks to open discussions and the employer is led to the bargaining table. But the question looks somewhat different once one admits that the duty to bargain is not merely one to meet and to exchange proposals, but also a duty to adopt a certain behavior. Without going quite as far as American law which recognizes a whole series of consequences tied to the idea of good faith, French law takes certain measures to assure that the discussion is not purely formal: the Labor Minister, in an executive memorandum concerning the law of November 13, 1982,[15] has stipulated that the negotiations must be "real." But the fact that such a constraint falls only on the employer means that unions are sheltered from any control over their deportment during the bargaining process. This explains why certain unions consider themselves authorized to act in ways that distort the entire scheme thus established and which in addition reveal their bad faith (e.g., the refusal to inscribe certain questions on the daily agenda, or insistence on such and such "precondition" to negotiation, nonattendance at meetings or recourse to dilatory tactics, such as allowing discussions to go on in vain, compromising the success of discussions by intemperate declarations or a sudden change in position just as agreement seems near in order to try and obtain additional advantages, refusal to make the slightest concession which might lead to compromise, etc.). How could one believe in the benefits of collective bargaining when one of the parties clings to unjustified or unreasonable positions, interrupts the bargaining process without a valid reason or leaves the bargaining table early to avoid ratifying an agreement which, of course, gives him less than complete satisfaction? Such practices, however, are not rare, and are even encouraged in France both by union pluralism (source of competitive bidding) and by the rule, an inevitable rule in truth, by which an agreement, once signed by a single representative organization (even if representative of only a minority of employees), inures to the benefit of the entire corps of employees. The result is a sort of abdication of responsibility that considerably weakens the whole collective bargaining process.

Another cause for this weakening appears in the absence of a veritable peace obligation requiring, in case of reaching an agreement, a real commitment on the part of signatory unions. This problem has existed for some time, and legal arguments certainly can be advanced

15. DRT circular no. 15, October 25, 1983.

for the position that the duty to respect collective bargaining agreements weighs equally on both parties. The situation is however otherwise in present French law which, while providing numerous ways to compel an employer to respect his word, does not provide means for similarly controlling unions--and more particularly for compelling unions to abstain from all collective action, such as strikes, which would tend to call in question the agreement during its remaining time in force.[16] There is an article in our Labor Code, article 135-3, which could be used to that end.[17] But that provision, introduced into our legislation in 1919 and never since amended, remains practically a dead letter, and the courts have always refused its application in this area. The subject itself even seems taboo in the sense that the principal union organizations manifest a resolute opposition to any system that would bring about the slightest limitation to the right to strike; and the possibility of modifying our law on this point was not even envisaged when the law of November 13, 1982 was passed. The difficulties raised by such a reform are certainly understandable. Even as regards its practical efficacy, one might well ask whether it would be opportune in the present context to add the weight of such a duty on unions, which are already so strongly tempted not to sign agreements. The situation is nevertheless extremely troublesome to the degree that it creates an imbalance between the employer (held to the duties of both bargaining and respecting the agreement reached) and the unions (which escape all duty), and precludes collective bargaining agreements from taking on the character of true contracts. Something in this distorts the process of collective bargaining (by removing its give-and-take character) and finally imperils our system of industrial relations.

B. The subject of strikes brings us to yet another problem, that of the responsibility of unions. The right to strike is indeed an essential right, in fact one guaranteed by the Constitution. But besides not being absolute, (contrary to what certain persons would have us believe), it clearly cannot be exercised without a corresponding responsibility. However, one may observe that in reality there is no such responsibility, and our law permits what might be called "risk-free strikes." Certain legal rules attempt to limit the right to strike, at least in

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16. The question here is assuredly not that unions totally renounce their right to strike (which would be the equivalent to an *absolute* peace obligation), rather merely to abstain from reopening points regulated by the agreement (a *relative* peace obligation).

17. This article expressly provides that "employees' organizations bound by collective labor agreement or accord are obligated to do nothing of a nature likely to compromise its good faith performance."

public services,[18] and allow a line to be drawn between licit and illicit strikes; case law also has carried the notion into the area of abuse of right and has allowed the judge to characterize a certain number of strikes as abusive. But the resulting consequences hardly touch unions, which most often escape the collective sanctions called for by the imposition of civil responsibility. Reasoning that strikes are above all acts of employees who are not agents of their organization,[19] courts have long hesitated to pursue unions, even when in practice the unions have played a decisive role in triggering or conducting the operation and, by their incitement or their encouragement of strikers, have committed a fault. The reasons for this abstention were both practical (the magnitude of the harm suffered by the victim often being far beyond the union's solvency), legal (the difficulty consisting in establishing a sufficiently precise causal link between the fault committed and the resulting prejudice), and above all political: judges clearly expose themselves to very intense reactions when they dare to challenge groups considered untouchable by a certain segment of public opinion, and are quickly accused of undermining the sacrosanct right to strike.[20] Over the past several years an opposite movement has come into being and civil liability suits against unions for their role in strikes have tended to multiply. But no mistake should be made: while these suits sometimes result in a judgment against the union (which is itself rare enough as, very often, the employer, after being subjected to all sorts of pressure, abandons the suit), in the majority of cases such judgments are not carried out and amount to little more than a moral victory. The case law clearly fails accurately to reflect, in this regard, the social reality.

One might think that unions are at least indirectly affected by the individual sanctions which could be levied against workers, due either to their participation in an illegal strike or to illegal acts which they may have personally committed during the strike. But such sanctions themselves are limited in scope. Penal sanctions can be imposed only if expressly allowed by law (e.g., in case of illegal confinement of

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18. This was one of the objects of the law of July 31, 1963: Art. L.521-2 and ff. of the Labor Code.

19. In France, the right to strike is considered an individual right and is vested solely in workers.

20. This tide of opinion is so strong that it led legislators, in 1982, to pass a measure attempting theoretically to prohibit all civil liability suits "for the reparation of damages caused by a collective labor conflict or upon the occasion thereof." This provision went so much against the general principles of our law that it was finally struck down by the Constitutional Council (decision of October 22, 1982, D.1983.189, note by Luchaire).