

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

Xavier Blanc-Jouvan*

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

* Professor at the Université de Paris I (Panthéon-Sorbonne).

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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

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).

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

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 intervene⁹ 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 increasing¹⁰ 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 law¹¹ are

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.

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 department 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

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

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).

persons or violation of the right to work) and they are, in reality, quite exceptional. Civil liability is rarely invoked because, there too, the strikers' insolvency and the disproportion between their individual acts and the damage caused by the strike in most cases make suits for compensatory damages illusory. Disciplinary sanctions are certainly more practicable, in both the public and the private sectors (a complex regime having been established by various legislative provisions in the former, while in the latter such sanctions include the termination of the employment contract in case of serious fault). Their effect is all the more noteworthy in that, as all strikers can not be sanctioned, they are most often imposed against the leaders--who are in most cases the union officials. Experience has shown, however, that, there too, sanctions are imposed parsimoniously, for fear of aggravating tensions at a time when it is more important to calm the atmosphere and to return the parties to the negotiating table. This explains why such sanctions are frequently lifted upon conclusion of an agreement ending the conflict, thus serving as a bargaining chip given up in exchange for a return to work. In practice the sanctions are rarely enforced except in cases of clear fault, where an example is to be made or where the union is in a particularly weak position, to the point that it might be said that the true distinction is not between legal and illegal strikes, but between strikes which succeed and those which fail.

As we have seen then, our arsenal of sanctions is far too weak to assume the deterrent role theoretically assigned to it--and certain persons see that aspect as a veritable encouragement to illegality. Moreover, one could argue that even withholding pay does not always constitute a serious threat for strikers (who in any event are assured that they will not lose their jobs),²¹ to the extent that such practice is far from being the rule (especially in the public sector) and, when it is followed, lost work hours may often be made up (more or less completely and sometimes rather symbolically). That too is an important issue in the bargaining process which takes place toward the end of the strike and depends upon the parties' relative bargaining power. In addition, a number of strike techniques can completely interrupt the operation of a company though limited to a small number of employees. Such a liberal system--which contrasts in principle with the prohibition of the lock-out²² and makes our law on strikes a model

21. By the terms of article L.521-1 of the Labor Code, a firing in response to a strike, but in the absence of serious fault, "is null and void by law." That is, such a termination must normally be followed by the reintegration of the employee.

22. In fact, the lock-out is only legal when it is organized in response to an illegal strike, at which time it can be an effective sanction, though dangerous to manage.

of ineffectiveness--can in the present context become a source of abuse: that is, it does not necessarily promote order and industrial peace.

This situation is all the more troubling because it is accompanied by a total absence of any guarantee regarding the organization and operation of unions. This is another missing counterbalance to union power.

C. The problem of union democracy is hardly mentioned in France, where it is popular to think that unions, having in mind the welfare of workers, are essentially democratic organizations beyond suspicion in this regard and that they therefore escape all constraint and control. However, reality requires that we temper such judgments, on the level of both so-called internal and external democracy.

On the internal level, that is, in the relationship between union leaders and members, democratic principles would require that bodies vested with power exercise that power truly in the interests of the members and that members may make their voices heard in all decisions concerning them. While many countries have taken measures in that direction, that is not at all the case in France, where all legal intervention in the workings of unions would be regarded as unjustified meddling in the internal affairs of a private organization. It is true that there is a basic contradiction between democracy and union autonomy; and no one should deceive himself about the danger that would result from excessive control by public authorities of organizations justifiably concerned with their independence. However, in a number of other equally private organizations, legislators do not hesitate to intervene for various reasons, particularly to protect members or minorities. If they do not do the same in union matters, it is due to well established tradition and political reasons. In any case, the fact remains that the law says practically nothing in this regard, and goes no further than to subject unions to the extremely liberal common law of associations. The Labor Code provides only that all members, French and foreign, not having been the subject of certain condemnations, may serve in the administration or the direction of a union.²³ But the law is completely silent on fundamental questions such as the powers and the operation of the general assembly, the method of nomination, the allocation and scope of the responsibility of the various administrative bodies, the relationship between, as well as the rights and duties of, the union and its members (besides the right to resign from the organization "at any

23. Art. L.411-4 and L.411-6.

time notwithstanding any clause to the contrary").²⁴ And the silence of the law has as its natural corollary the silence of the courts, which can intervene in this area only on the basis of general principles of law or of rules common to all associations (e.g., to assure equality between members, to protect members against certain types of malfeasance on the part of officials or the majority, or to enforce certain fundamental individual rights).

This is certainly not to say that public authorities take no interest in the question, but simply that they prefer to trust the organizations themselves freely to establish their own internal democracy, notably by means of their bylaws. The conception is that of an autonomous democracy and not one that is imposed or controlled. The question remains whether such confidence in unions is justified or rather the result of a somewhat idealistic view. In fact, any picture that one might have of the French situation on that score must be nuanced.

On one hand, the liberal framework of French law unquestionably creates favorable conditions for democratic operation. Unions are, in fact, subject to a certain number of influences that incite or oblige them to adapt their structure and procedures to account for the wishes of their members; and in this sense there exists a whole socio-cultural environment which they cannot fail to feel. Employees today accept less and less being subject to constraints and excluded from management of matters that concern them, and they are making this known by the deunionization movement and by the use of so-called spontaneous actions. Above all, two essential characteristics of the French union system, which are obviously the best guarantees of democratic operation, should be recalled here: the purely voluntary character of membership and union pluralism. These are, in fact, two aspects of labor union liberty set forth by the Constitution which no one has ever questioned. They play a major role in the field. The exclusion of all forms of mandatory union membership allows members freely to express their dissent by quitting the union without running the risk of losing their jobs, and the absence of a monopoly creates a competitive situation among the union organizations that encourages them to appear more receptive to claims formulated by the membership at large.

Nevertheless these principles have no absolute value. The prohibition of the closed shop is not always respected in practice (particularly in certain sectors, such as news printers or longshoremen)

24. Art. L.411-8.

and no one would deny that unions have means for pressuring workers into becoming members. In addition, a whole set of factors work against democratic practices within unions. Without stressing the practical obstacles stemming from the passivity and absenteeism of the members, and the sociological unwieldiness, in France as elsewhere, of bureaucratization and centralization, one must admit that democracy of the masses is often poorly adapted to the particular needs of unions; for as we all know, the effectiveness and energy of unions derive more from the drive of a handful of disciplined active militants than from an apathetic and disorganized mass.

But more than anything else, the ideological and structural bonds maintained by certain unions with political parties constitute threats to their internal democracy. These ties may, of course, be unavowed, and many times denied--but they are nevertheless real and often close ties, which tend to substitute passwords from the leaders for the decisionmaking power of the membership at large. This is inevitable in a liberal regime because it is difficult to distinguish the areas of political and union action. This danger, however, seems particularly great in France, where it appears that certain political parties have a regrettable tendency to use unions as transmission lines or ballast for their own ends and to impose their will rather than follow the wishes of members. This submission to the party line can amount to a kind of seizure of the union, risking serious compromise of its independence.

One might contend that the effects on the internal democracy of the union are not so serious because after all, at least in theory, unions are voluntary organizations grounded in the free consent of their members. But that argument misses the mark insofar as workers' organizations today seem to fulfill another, quasi-official function of representation, no longer only of their members, but of entire segments of workers (viz. in a given company, profession or industry). The requirement of democracy is no less important at this level, but here the problem is rather one of external democracy, concerning the relationship of the union with employers and public authorities. The question is whether the union, when exercising the powers allocated to it, acts in accord with the wishes of the employees for whom it is the spokesman. Once more, it appears here that our law is inadequate. If democracy on the whole is preserved, this is more by virtue of informal means than legal rules.

The law, in fact, hardly addresses this problem. While it reserves a monopoly for representative unions in the most important

areas (in matters of collective bargaining or management participation), we have already examined what must be thought of that aspect of the law, and one could easily show that the representativeness requirement does not guarantee sufficient contact between union management and the membership at large. In addition, our Labor Code contains no equivalent of the duty of fair representation which is imposed for instance in the United States on the majority union. Here again, it would appear that union pluralism provides the true protection. At the very most one might also look to a relative decentralization of union structures and a certain autonomy left to local organizations or enterprise union sections (which were made the employer's mandatory bargaining partner by the law of December 27, 1968) to reduce the role of top union management and to allow the employees to put rather strong pressure on decisionmaking bodies. Unions sometimes use various mechanisms, without any legal basis, to ask workers to express themselves directly through referendum on a precise matter (such as whether to ratify a collective agreement or to begin or end a strike). But these union actions remain in the final analysis rather rare.²⁵ Overall, employees are often unable to exercise sufficient control on unions, and, as a result, they are sometimes left out of discussions in which they would have liked to participate, or on the contrary, are drawn into unwanted actions. This situation has disturbing implications for our labor relations practices.

III

It is a general principle that those vested with power are tempted to abuse it: unions, of course, are no exception. The danger is that, in acting to the detriment of workers, unions strengthen the position of their adversaries and contribute to their own demise.

A. The goal of our present discussion is certainly not to put union activities on trial. That theme is already sufficiently covered today²⁶ and would lead us to disregard the union's useful, indispensable role in the protection of workers. Our discussion will therefore focus on certain notably negative traits--bearing in mind, of course, that in a pluralist system differences between various organizations must be taken into account, and that our observations

25. In addition, the conditions in which such employee consultations arise are not always perfect (vote by a showing of hands, various pressures, etc.).

26. See, for example, Gérard Adam, *Le pouvoir syndical*, Dunod, 1983; Pierre Rosanvallon, *La question syndicale*, Calmann Lévy, 1988; Michel Noblecourt, *Les syndicats en question*, Les éditions ouvrières, 1990.

here do not have the same relevance with regard to all labor organizations.

One of the criticisms most frequently heard concerns the overall conservative attitude of unions and their refusal to adapt to the numerous, fundamental changes that characterize modern society.

It is typical, for example, to deplore the tendency, all too common in certain union circles, to ignore economic realities to the point of opposing, very often, reforms that later events show to be necessary. An example is the great battle that took place in the 1980s over flexibility. Without going over that debate again, which is no longer current today, it is enough to recall that for a long while unions had tried to check the movement aimed at relaxing certain labor laws and had even foiled certain attempts which by their scope could perhaps have eased the effects of recession. This type of union behavior led certain commentators to assert (notably during the famous interprofessional negotiation of 1984) that the unions had missed an historic opportunity. The same tendency was manifested in connection with the issue of employment and working hours. One will recall the rearguard fighting led by certain organizations against the abolition of administrative authorization for layoffs (the drawbacks of which had become increasingly poignant) or the difficulties experienced in having them recognize the "new types of employment" (fixed-term contracts and temporary help) that market forces nevertheless successfully imposed.²⁷ It would certainly have been preferable if the unions had negotiated the reforms that legislators were forced to enact authoritatively. In a more general way, the refusal--even in a time of crisis--of all forms of concession bargaining might well have resulted, in many cases, in disadvantageous situations for workers, to the extent that it led to closing down businesses and loss of jobs. It is symptomatic in this regard that union management is not always supported by the membership and that members sometimes accept arrangements officially opposed by union leaders. Here the differences in perception as to the true interests of workers are readily apparent.

Similar remarks can be made regarding certain attitudes about technological changes, which either preclude useful developments or delay those that are inevitable. We have seen unions struggle, usually in vain, to obstruct necessary reorganizations (in the postal service for example), changes in work methods (e.g., following the automation of

27. That position caused legislators to back down several times--unfortunately casting discredit on various aspects of our labor law.

postal sorting, the computerization of banks, techniques permitting improved aircraft piloting with smaller crews, etc.), indispensable modernizations aimed at refurbishing workplaces (such as Renault's Billancourt automotive works), and even to obstruct closing down hopelessly unprofitable businesses (e.g., Lip, Manufrance, the Ciotat shipyards, etc.). All of this was done without much concern for realism, under the laudable pretext of avoiding job losses, while pretending not to notice that the actions taken were, in fact, dictated by economic imperatives or, more simply, attempting to pressure public authorities to provide aid that would have been used more judiciously elsewhere. The same reservations came to light in relation to work scheduling (particularly on a yearly basis) proposed recently to afford better use of equipment and material: here the unions abandoned their systematic refusal only after having understood that, as the movement could not be stopped, they were better off internalizing it in order to prevent an uncontrolled development.²⁸ Besides producing damaging effects, such battles, lost before they start, bear witness to a fear of innovation that tarnishes the image of unions.

The disregard for certain psychological and social changes and the inability to adapt to the needs of the "new working class" explain the impasse into which certain organizations have been led. Clinging to the encompassing demands of the past, these organizations have difficulty taking into account the prevailing individual aspirations of many workers. Who could question, however, that times have changed? The great "social conquests" are now attained and cannot be extended out indefinitely (in the direction of diminishing the workweek, increasing vacation time or lowering the age of retirement, etc.). As for new demands, a number of these (for example the prohibition of layoffs without prior placement) are, above all, demagogic in nature and are condemned by their own excessiveness to remain utopian for a long time. Uniformity and equality are no longer in the air these days, and archetypal ideas (such as the full-time contract of indefinite duration with hours and salary established for all on a clearly defined basis until the age of retirement) are all disappearing. Today employees are more apt to request individualized remuneration or work scheduling arrangements for which unions are ill prepared. Unions' reservations concerning new schemes such as part-time work,

28. Here again, unions fought to see that the exceptional derogations authorized by the law might be limited by strict conditions, and more particularly that they be reached, most often, on an industry-wide rather than a company-wide level. Such a requirement naturally makes this type of agreement more rare insofar as acceptance by upper-level union management is more difficult to obtain than that of employees who are directly concerned.

variation of work hours, and work on Sundays are often poorly perceived by those workers actually affected who seek to satisfy real needs of their own. All of this--and not merely economic and technological imperatives--justifies a search for greater flexibility. This misunderstanding is so deep that unions at times are accused of serving their interests ahead of those of workers. This was particularly the case when the matter of *horaires à la carte* ("flex time," selective scheduling) arose. While this derogation from the principle of fixed and collective hours corresponded to the profound desire of many workers, notably women, the system presented the major drawback, in the eyes of unions, of maintaining contact with workers--and thereby collective action--more difficult. The proposed system therefore met with opposition that considerably slowed its development.²⁹ Indeed, it seems that workers are today aspiring to an improved situation in which unions no longer play a role. The present unease will persist for so long as the organizations continue to give priority to demands relative to their own status (protection of employee representatives and union delegates, time off for union duties, etc.), as if union action were an end in itself rather than a mere instrument in the service of workers.

This leads us to another criticism often levelled at unions, namely that the union movement is too attached to its old myths and ideological dogmas to play a really constructive role in today's world. The new labor law unquestionably must take into account the new reality--social as well as economic--which the enterprise has become. Unions must, instead of turning their backs on the enterprise, recognize that it is more a place of converging interests than diverging ones. This implies change on the part of unions in several areas.

Firstly, they must admit that the well-being of the enterprise is a necessary condition to job security and affords improvement of workers' lives. This elementary requirement is enough to do away with those actions that serve needlessly to sap the authority of employers (notably by weakening their disciplinary power, whereas such power is an unavoidable necessity and one in which unions very

29. Unions were able to persuade legislators to pass a law conditioning this practice on the absence of opposition on the part of employee representatives (in fact under union control). Indeed, this is the only instance where employee representatives are given true veto power (Labor Code art. L.212-4-1, enacted by the law of December 27, 1973). In practice, this veto power was frequently exercised until pressure from workers put an end to its use and the practice progressively gained popularity--to the point that legislators themselves relaxed their position in 1982.

often refuse to participate in a responsible manner)³⁰ or to weaken the company's posture in the marketplace (by divulging confidential information or by systematic disparagement of management).³¹ Union action can hardly be supported when it serves such causes.

Even more important is the frank acceptance of the notion of participation by all negotiating partners. Many workers have difficulty understanding union entrenchment in positions of permanent contestation and excessive demands that lead to a purely negative role. They criticize the systematic refusal to share power and to accept part of the responsibility in the management of the enterprise--whether this takes the form of a right of veto granted to a committee, the naming of representatives to managerial bodies or, above all, the development of true collective bargaining at the workplace. One can hardly help but recall here the "progress contracts" experiment in the late 1960s which was tried in certain public sector businesses in order to permit the formation of flexible, limited-duration agreements, awarding specific benefits to employees in exchange for their commitment to industrial peace. This experiment should have succeeded but for the intransigence of certain organizations, opposed in principle to any limitations on the right to strike.

Precisely here arises the other point on which a change appears indispensable. We are seeing today, without doubt, a corruption of labor law whose meaning is wholly changed from that which it originally had. Even if the number of days lost on strikes is currently on the decline, public opinion seems to accept certain work stoppages less and less easily, particularly those affecting the public sector--the place where strikers risk the least and inconvenience users the most. The practice of using the public as a hostage in labor conflicts in which it is not otherwise involved may pay off in the short term, but it creates disquiet that could become dangerous in the long run. The abuses committed in this area are even resented by certain union leaders themselves who do not hesitate to call for a "reevaluation of the right to strike."³² The solution is to be found in a change in behavior and attitudes, not in an overabundance of regulations, both for theoretical reasons (certain myths are too powerful to be attacked directly), and

30. It is not altogether rare that unions support indefensible positions on such questions; for example, in the recent "Renault ten" affair, where the CGT tried to have sanctions lifted, the grounds of which were incontestable.

31. We would refer here to certain incidents that occurred within recent years and whose consequences have notably impacted the field of international relations.

32. See the statement of Edmond Maire, then General Secretary of the CFDT, of October 28, 1985 (reported in *LE MONDE*, October 30, 1985).

practical ones (strikes, by their very essence, ignore interdictions and restrictions). It may well be, in fact, that a majority of workers disapprove of this ideology of "struggle at all costs"; they may believe, perhaps obscurely, that the strike should not be the only arm at their disposal to make themselves heard, and that the law should provide them with other means of resolving conflicts. The strike should be the *ultima ratio*, a means of provoking and maintaining labor dialogue; and it should be carried out with respect for minimal rules of good behavior. Such a vision is, however, clearly removed from current practices.

B. It is small wonder then that we observe a reaction of public opinion--and of workers themselves--in the face of such excesses. The flagging strength of the union movement has been cited frequently enough to make insistence on this point hardly necessary. The decline in membership is striking, even if somewhat difficult to evaluate due to the absence of statistics and, above all, the uncertainty in France of the concept of member (formal member of the organization? active participants who follow organization directives? dues-paying members?). The level of union membership, always low in France, appears today to have reached a critical threshold (in the neighborhood of 10%, and only 5.6% in the private sector), thus making France unique in Europe and forcing unions to live less from membership dues than from subsidies paid directly or indirectly by the State or by employers. Such aid doubtless keeps them alive more or less artificially, but it results in still weaker ties with their members and goes against the requirements of democracy. This crisis is so profound that some have seriously spoken of "unions without members," reduced to no more than a structure supporting an ideology and representing a vague force in society. Would this be the solution of the future?

One might certainly say that the power of labor unions in France has traditionally rested less on the number of members than on the number of sympathizers--those who vote for union candidates presented in various elections (elections of employee representatives, labor court judges, etc.) or join in union actions. But the same phenomenon is occurring in this domain and in a palpable fashion. Unions are manifestly losing much influence and are seeing their hold progressively diminished. Weakened by internal divisions and rivalries, discredited by initiatives that do not succeed to mobilize a sufficient number of workers and that often end only in failure, they run the risk today of becoming increasingly marginal, and either of confronting the apathy of the masses, or on the contrary of being left

behind by those who organize spontaneously and take action without them. It goes without saying that their real potential for action thereby suffers: while they still retain an important role in political circles, their *bargaining power* at the enterprise level is nevertheless singularly affected.

It would be foolhardy, however, for employers to attempt to profit from this situation, which is, in reality, full of dangers. It would be a serious delusion to believe that employers could do without unions and could replace them with elected representatives³³ or even deal directly with employees without passing through the channel of an organization.³⁴ This is all the more apparent when certain "coordinations" are created, in cases of conflict, which are much more sensitive to passionate movements and therefore much more difficult to discipline. The danger would then be to reawaken radical ideologies which one had thought, rightly, to be held in check by the creation of intermediary bodies. Unions are, in fact, irreplaceable in a democratic system and constitute indispensable bargaining agents. Still they must be strong enough to merit worker confidence. This implies both that they be better recognized by employers (who would be wise to renounce certain harassing practices and accept without qualification the principle of participation) and that they adopt a more credible behavior within the enterprise. Nothing would be more damaging to healthy industrial relations and to the future of social peace than maintaining the present state of under-unionization.

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The paradox is obvious: unions possess considerable power but are undergoing a clear decline. There is no doubt that they are not making the best of all the privileges conferred by law. Certainly a very close link exists today between the crisis of unionism and that of labor law. It is because they constitute a very strong pressure group that unions have been able to obtain the enactment of eminently beneficial legislation. But this legislation has encouraged a corporatist attitude which consists, in certain circumstances, in looking after their own interests more than those of workers. This behavior works against

33. Proposals presented in this sense--particularly those in favor of a "company collective contract" that would be concluded directly with elected employee representatives--harbor many dangers in this respect.

34. This is, however, the goal of new human resource management techniques aimed at competing with unions (progress groups, quality circles, etc.). These are, in fact, mere management techniques and not true participation schemes.

them and explains, to a large degree, the disaffection they are now suffering.

Indeed, all of the problems created by this situation can not be resolved by constraint, and law is often powerless in this area. It nevertheless seems that it can contribute to improving the climate by becoming a more balanced law--a law that would serve not just one of the parties in labor relations, but which would take into account the interests of all actors on the economic scene: producers (employers and workers) as well as consumers and users. The whole of the legislation passed in 1982 and 1983 was perhaps too unilateral, principally favoring unions; and it is uncertain whether unions have known how, in the years that followed, to make the best use of their powers for the good of workers. If a new reform is in order today, it must lead to the development of structures for bargaining and participation at the workplace, conferring on each party not only more power, but more responsibility. Many workers have already grasped the coming changes and unions must not fall behind. Labor law must aid them by centering increasingly on the enterprise. This is labor law's best chance for survival.

