

SYNTHESIS

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The questions raised by the use of the concept of regulation were examined at the first France/ILO conference at Annecy.¹ There was no point in re-opening this debate, but it was certainly necessary to take account of the results of this earlier conference. The concept of regulation – drawn from physics and mechanics – was taken over by molecular biology before being applied to mankind and society by economists and sociologists. This transposition is only possible subject to certain precautions regarding the science of the method. In human affairs there can be no regulation without a regulator, in other words without the institution of a Third Party, which is the distinctive sign of the constitutional State. And in a democratic order there can be no regulation without a balance between the forces that are to be regulated.

When used under these two conditions, the concept of regulation has the advantage that it makes the Western concept of law relative and makes room for other forms of dogmatics that operate in other civilizations. At a time when the economy is being globalized, the greatest danger lies in giving free rein to the Western world's naïve belief that its ways of thinking are universally applicable. In order to have a deep understanding of the changes in working life in the countries of the North, we would need to call on the knowledge and experience of the countries of the South, for just as we would understand nothing of the present situation of the Southern countries if we did not take account of the omnipresence of the Western model, likewise we will not understand much about the anthropological changes that are taking place in our own countries if we do not look at them from an outsider's point of view, as recommended by Montesquieu.²

So we were only too happy to consider the economic problems that were the subject of this symposium, because we combined them with a comparative analysis that enabled us to re-examine the normative dimension inherent in all working life in all its diversity. Hence our twin attempts to put things in

¹ P. Auer and C. Daniel (ed.): *The future of work, employment and social protection. The search for new securities in a world of growing uncertainties. Report on the France/ILO symposium, Annecy 2001* (Geneva, ILO, 2002) p.131 et seq.

² Montesquieu, *Lettres persanes*.

perspective in this panel: putting the labour market in perspective against the transformations observed in other markets,³ and putting into perspective national or regional differences between labour markets.

There are perfectly good grounds for comparing the labour market with other markets since it is a requirement common to all of them that there have to be regulators guaranteeing balanced relations between operators. However, such a comparison must also take account of the wholly specific nature of the labour market, which deals in people rather than things.

We were only able to compare national and transnational systems on a limited scale given the composition of the panel, which did not include either a specialist on the “Scandinavian” model (which we know exerts a lasting fascination for Europe) or an expert on the Southern countries. Our comparison basically focused on two models: the one where collective bargaining dominates (the UK and the USA) and the one where legislation dominates (Continental Europe). The question remained open whether the European Union is where these different models combine.

Considered from a legal point of view, the regulation of the markets has three dimensions in normative terms. The first is the wealth that changes hands on the market,⁴ and in the case of the labour market this is human wealth, intelligence and the labour performed by men and women at work. The operators on the market are the second dimension: these are mainly the businesses employing the workers and the trade unions representing them. The regulators guaranteeing the smooth operation of the market are the third dimension, in the shape of some sort of legislator or judge. These three dimensions are what we explored in our work. All three are being affected by changes that we should neither overestimate nor underestimate if we want to succeed in controlling them. We therefore tried to assess the transformations affecting each of them before attempting to identify the new balances emerging within them.

WEALTH: MEN AND WOMEN AT WORK

This first dimension of regulation concerns individual working relationships and the individual rights conferred on workers. On this level, as on others, our work enabled us to identify what is not changing (factors of stability), what is changing (factors of transformation) and what is emerging (prospects for reorganization).

What is not changing might be summed up in the famous statement by Rabelais: “Je ne bâtis que pierres vives, ce sont hommes!” (“I only build with living stones: men!”).⁵ The ‘living stone’ is the perfect image for the objects that

³ See the report by A.-M. Frison-Roche: “The joint need for an analogous regulation of industrial relations and globalised markets”

⁴ On the changes in the idea of wealth in economic theory see D. Méda: *Qu'est-ce que la richesse?* Paris, Aubier, 1999, p. 423.

⁵ Rabelais : *Le Tiers Livre*, Chap. VI.

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are bought and sold on the labour market. It enables us to grasp straight away the wholly singular nature of the market and the structural dimension of some of the problems it faces. The market economy sees man both as a free subject and as a determinable and programmable object, as a sovereign being and as submissive. Such ambivalence is not peculiar to the labour market,⁶ but it is only there that it assumes a legal dimension. An employee is both the subject and the object of a contract, and so has to be given rights limiting the effects of the self-dispossession inherent in the contract of employment in order to restore the unity of the human person.⁷

There are two structural problems as far as labour law is concerned, and these will continue to apply in the future as they have in the past. The first is how to reconcile the short period of contractual exchange with the long period of human life and reproduction. The second is how to reconcile individualization and interdependence, which are the two inseparable products of the division of labour and responsibilities, and which are both exacerbated by technical progress and magnified by social security. This need for reconciliation on two fronts requires each worker to have an occupational identity guaranteeing him/her the free use of his/her economic capacity in the long term. Made up of an indivisible package of rights and duties, this occupational identity brings the worker within a solidarity system, which stretches from initial training to retirement and thus necessarily extends beyond his generation to include the previous one and the next. In the industrial world it was employment that formed the cornerstone of occupational identity, since the contract of employment confers a wage-earning status defined from outside by legislation or collective bargaining.

What is changing, in terms of occupational status, are the institutions on which the employment model is based, in other words the firm and the family. Wage-earning status developed in a world where there was a clear dividing-line between working life and family life, and where tasks were divided between men, who were in charge of work outside and the income of the household, and women, who were in charge of work inside and the well-being of the household. It also developed with reference to the large industrial undertaking, firmly rooted in the national economy, with stable capital, a stable workforce and a strictly hierarchical organization. But families and undertakings have changed over the last 30 years.⁸ They are no longer so clearly or permanently defined, their hierarchical organization has been challenged, their size has been reduced and the exposure to risks has increased. This is why the protections that belonging to these institutions afforded in the long term have been greatly eroded: both at home and at work a general principle of uncertainty has spread over everyone's

⁶ It can be seen in techniques for manipulating consumers; on the links between workers and consumers. See the records of the Annecy conference, op.cit.

⁷ See A. Supiot: *Critique du droit du travail*, Paris PUF, 1994.

⁸ See the reports in this volume by M.J. Piore (The Reconfiguration of Work and Employment Relations in the United States at the Turn of the Century) and S. Deakin (The Evolution of the Employment Relationship).

lives, while the number of people seesawing in and out of insecurity has grown steadily.

What is emerging in this context is a shift in the terms of the wage-earning exchange.⁹ Where, in the employment model, subordination was given in exchange for security, two new types of exchange are now being pursued which have yet to find permanent expression in law.

First, there is the exchange between the mobility that is now demanded of workers and what is called in technocratic jargon “employability”,¹⁰ but which should more appropriately be called “occupational capacity”. Workers cannot reasonably be expected to cope with transformations in their jobs or to move from one job to another without being given the means to be able to do so. An ancient concept derived from Roman law, ‘capacity’ refers to the ability to engage on the legal stage. Traditionally, a distinction is drawn between legal capacity, which is derived from the legal qualification of the person concerned (being of age, for example, or nationality) and the de facto capacity derived from his actual person (physical or mental soundness, for example).¹¹ Occupational capacity should be classified as part of the latter, particularly in the light of the concept of capability put forward in economic theory.¹² Occupational capacity is not an abstract attribute. It differs from one person to another and needs to be formed and maintained in the long term by appropriate mechanisms, particularly training and skills enhancement, to which all workers, whether employed or self-employed, should have access throughout their lives.

Secondly, there is the exchange between the worker’s responsibility for the results of his/her work and the freedom without which this responsibility has no foundation. Workers working in a position of strict subordination are not supposed to have their own will. They are merely the instrument of the will of their employer, which is why the employer is held responsible for the errors they commit in doing their jobs. Although the sole beneficiary of his workers’ successes, he also has to face the consequences of their failures. This balance is broken when the workers have obligations to produce results imposed on them, or conversely when the protection of their individual freedom is given precedence over the employer’s managerial authority.¹³ A new balance can then only be established by activating the freedom/responsibility combination and indexing the workers’ degree of responsibility to the degree of freedom they are

⁹ See the report in this volume by B. Trentin: *Potential changes in systems of industrial relations*.

¹⁰ It seems incompatible with human rights, and in particular with the principle of human dignity that there are men and women who are “unemployable”. There are no human beings who are sound of mind and body who cannot be employed in some useful task, so it is the concept of employability that is actually unemployable, legally speaking.

¹¹ See P.F. Girard: *Manuel de droit romain*, 5th ed. (Paris, Rousseau, 1911) p. 463 et seq.

¹² See A. Sen: *Inequality Reexamined* (Oxford University Press, 1992). Fr. trans. *Repenser les inégalités*, Paris, Seuil, 2000.

¹³ See in France, for example, the case law of the Court of Cassation guaranteeing workers a degree of personal freedom in using their office computers (Soc. 2 October 2001, *Droit Social* 2001, 1039, obs. J.-E. Ray).

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allowed. This can only be done if the workers have the occupational capacity required to carry out the action in question.

The binary balance between dependence and security is thus tending to give way to a three-part balance between freedom, responsibility and occupational capacity. The search for this new balance has led to the emergence of a new generation of social rights. These are new in that they cover subjects unfamiliar to industrial wage-earners: rights to training, to appropriate working hours, to a family life, and to occupational redeployment and retraining. Their scope is also new, since in most cases they tend to extend beyond wage earners to cover small-scale self-employed workers, the semi-self-employed and those in quasi-subordinate positions. Lastly, they are of a new nature, since they are often social drawing rights, which allow workers to draw on collective solidarity, within certain financial limits, in order to exercise new freedoms.¹⁴ Thus new forms of security spread which are no longer seen as being given in exchange for subordination, but as the foundations of freedom, active securities which go hand-in-hand with the worker's initiatives instead of restricting them. The thinking behind social drawing rights is the same as the current thinking on the prevention of occupational accidents, where passive protection, which constrains the worker's body and makes him subject to the operation of the machine (such as restraints preventing the worker's hands from coming into contact with the blade of the machine), is being replaced by active safety mechanisms which adapt the operation of the machine to the workers' freedom of movement (such as photo-electric cells which prevent the blade from cutting the worker's hands).

If these trends continue, the gulf dividing guaranteed rights ("rights of..." or "enduring rights") from virtual rights ("rights to..." or "credit rights") in the economic and social field could well disappear and with it the distinction usually drawn between first and second-generation human rights. The reason for having this distinction was that first-generation civil rights (individual freedom, ownership, etc.) restrict the power of the States, whereas social rights are like credits whose value remains suspended until the public authorities take positive action.¹⁵ This contrast is becoming less relevant every day. The new social rights that are emerging today have as much to do with freedoms as with credits. On the other hand, the right of ownership, which is a perfect example of a genuine right, becomes a mere credit when it relates to non-material things and no longer involves the physical possession of the objects it concerns. Intellectual property, trade marks and patents, which we all know are of crucial importance in the globalization of the economy, only exist through the laws in which they are enshrined, just like the right to social security, health or education.

Since economic rights and social rights are thus now in the same register and can no longer be ranked according to their legal density, new ways are

¹⁴ On this idea see A. Supiot (ed.): *Au-delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe* (Paris Flammarion) 1999, Eng.trans. *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001) 245 p.

¹⁵ See F. Sudre: *Droit international et européen des droits de l'Homme* (Paris, PUF) 5th ed. 2001, no.21, p. 38 et seq. and no.133, p. 197 et seq.

becoming available to reconcile them. An important lesson was learned at the latest World Trade Organization (WTO) meeting, when the right to health of the African peoples affected by the AIDS pandemic was given precedence over the right of pharmaceutical patents. The same lesson can be learned from the draconian measures taken in the USA to combat anthrax terrorism: it took little more than 48 hours for the Federal Government to subordinate the rights of the pharmaceutical companies to the right to health. These precedents could have considerable impact if an authority is appointed to reconcile respect for economic rights with respect for social rights in international trade.

THE OPERATORS: BUSINESSES AND TRADE UNIONS

The second dimension of regulation concerns collective labour relations and collective workers' rights.

What is not changing in this field is the need for balanced relations between operators on the labour market. The labour market cannot exist unless workers are seen as both the equal of their employer and his subordinates. They must be his equal so that their relationship can be contractual, and they must be his subordinates so that the employer can make use of the rights that the contract gives him. This contradiction is thus inherent in the contract of employment, which combines the principle of equality with the hierarchical principle. It is the source of a structural imbalance which can only be corrected by establishing a level of collective relations where the conditions for a contractual balance can be restored.¹⁶ In terms of regulation, this requires the existence on the labour market of operators negotiating the conditions for the exploitation of "human resources" on an equal footing with each other. On the employers' side, these operators are businesses or their representatives. On the workers' side it is the trade unions that have, historically, played this role.

What is changing is the framework within which these operators act. In the industrial world the economic action of the businesses and the collective action of the trade unions both formed part of the same national legal framework that shaped the way the labour market was organized. Collective labour relations thus came under the umbrella of the same national law that applied both to businesses and to the trade unions. The free movement of goods and capital has taken businesses out of this national legal framework, unlike the trade unions, whose activities are still confined within national geographical and legal limits. This imbalance is particularly evident in European Community law, which gives businesses transnational freedom of establishment and freedom to provide services, but which excludes industrial action and strikes from its scope.

The trade unions have also been weakened by the individualization of lifestyles and behaviour, which are making working communities less homogeneous, reducing the appeal of and support for the trade unions and making it unlikely that collective interests will be found that workers can identify with.

¹⁶ See A. Supiot: *Critique du droit du travail*, op.cit.

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Labour law is no longer identified with a social class, the working class, united in having the same rights and sharing the same political and cultural references. The vast majority of the population are now wage earners, but this empire is being broken down into different, contradictory interests for which it is becoming increasingly difficult to find a unified representing voice.

At the same time, the trade unions are facing competition from new identity groups. The rise of these groups is particularly evident in the USA, where they have been developing for the last 30 years following the model of the civil rights movement that brought the black community together in the 1960s and enabled it to fight discrimination.¹⁷ This model of collective action, which emphasizes judicial action and is based on solidarities other than those relating to wage-earning, subsequently became widespread and has been used to defend the interests of a broad range of groups: women, ethnic minorities, homosexuals, immigrants, etc. Although it is less marked in Europe, this trend is also reflected in the growing presence on the social stage of associations set up to defend women, immigrants, the unemployed, the socially excluded, homosexuals, etc. Today it is the associations, much more than the trade unions, which embody the values of commitment, particularly in the minds of young people. Their representativeness is based on their effectiveness and their ability to mobilize the media and to obtain recognition as the legitimate partners of governments and international organizations.

For these various reasons the balance of power between businesses and the trade unions has now been broken, to the detriment of the trade unions. This breakdown is probably the most powerful factor involved in social deregulation. In the USA, it has been reflected in what Michael Piore called the collapse of the collective bargaining system introduced at the time of the New Deal. In Europe, it is seen both in the move away from trade unionism and in what Bruno Trentin calls the “corporate disintegration” of the trade union movement. No longer able or willing to represent the collective interest of the workers, the unions have tried to fall back on defending narrowly defined occupational groups, in other words those that are still strong enough to defend their own particular interests, though at the expense of those of other workers. This trend, which is seen particularly clearly in the civil service, is also becoming widespread among certain self-employed workers providing general-interest services, such as doctors, who no longer hesitate to go on strike or to refuse to treat patients in order to defend their pay or working conditions.

This corporate degeneration is essentially just the projection, in the trade union world, of an economic model that is designed to release operators from having to consider anything other than the pursuit of their own advantage. This model of predatory capitalism is now vigorously defended by certain company managers and endorsed by certain international organizations that deny the very principle that firms should have a social responsibility. It is therefore not

¹⁷ See Piore report, *op.cit.*

surprising that it should give rise, in return, to a predatory trade unionism, which is also indifferent to its “negative externalities”.

What is emerging in this context is a shift in the subject of collective relations.¹⁸ In the industrial model, such relations dealt with purely economic matters and involved the collective definition of conditions for exchanging certain quantities: a certain amount of pay for a certain period of work. These aspects are still present today, of course, but they are merely elements in the much wider problem of how the economy is integrated into society. Collective relations go beyond the economic sphere when they deal not just with wage bargaining but also with reconciling the interests of firms with those of society as a whole. Collective representation, action and bargaining then take on a qualitative dimension that varies from one country to another.

In the USA, which historically resists State intervention in industrial relations, the activities of the identity groups are mainly based on the principle of equality before the law and, as a corollary, the prohibition of all discrimination on the grounds of identity. It is the affirmation of a separate identity (Afro-American, Hispano-American, “gay American”, “gender American”, etc.) which forms the basis for collective action and enables those concerned to win individual rights which firms then incorporate in company codes of conduct in order to avoid costly legal disputes.

In the UK, new opportunities for collective action are provided by the doctrine of corporate governance.¹⁹ This needs to cover the interests of all partners in the firm if it is to do more than just protect the shareholders’ short-term financial interests. This shift from shareholding to partnership means that, under the ‘stakeholding’ theories, collective relations can be opened up to a broader range of interest groups: workers of every type, but also consumers, women, environmentalists, minorities, etc.

In Continental Europe, the shift in the subject of collective relations is reflected in the development, under the aegis of the public authorities, of relational rather than transactional collective bargaining.²⁰ Agreement is reached on projects rather than subjects, the idea being to support career pathways rather than defining occupational positions. The growing use of framework agreements and the emergence of territorial bargaining are signs of this change in collective relations and in the ways of taking account of the enormously wide range of different interests involved.

Despite the differences in national experiences there are a few features that every country has in common. Trade unionism is universally at a crossroads and is either managing to reorganize itself into networks including other forms of action and collective representation, or else is submitting to corporate disintegration and falling back on defending occupational groups which are increasingly narrowly defined and increasingly indifferent to the fate of other workers.

¹⁸ See Trentin report, *op.cit.*

¹⁹ See Deakin report, *op.cit.*

²⁰ See Trentin report, *op.cit.*

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Everywhere there is a growing need for a legal framework for new forms of collective action (labels, boycotts, etc.) that go beyond strikes in being able to transcend national borders and link workers' actions to those of other interest groups (consumers, environmentalists, women, immigrants, the homeless, the socially excluded, etc.).²¹

THE REGULATORS: LEGISLATOR AND JUDGE

This last dimension of regulation is the Third Party that guarantees the exchanges operating on the market. Here again we attempted to distinguish factors of stability, factors of change and prospects for reorganization.

What is not changing is the structural need for a Third Party to guarantee exchanges. This is a requirement which is common to all types of market²² and which was analysed at the Annecy conference.²³ It is based on a number of obvious facts: there is no market without a contract, no contract without law and no law without a judge.

The impact of this requirement is seen particularly clearly in the development of the labour market in the USA.²⁴ The collapse, or at least the considerable decline, in the collective bargaining system has increased the power of heteronomous sources of law. Faced with the decline of agreement-based labour law the Federal Government has taken steps to regulate various aspects of labour relations (equal treatment, health and safety, the protection of older and disabled workers, the operation of pension systems, parental leave, redundancies, etc.). As for judges, they have increasingly had to deal with cases brought by the wealthiest workers, mainly senior management. But the rulings in these cases have established precedents creating a body of social case law that all workers can rely on.

What is changing is the face, or rather the faces, of this regulating Third Party. There are two strong trends emerging.

First, the regulating Third Party is becoming fragmented. This fragmentation is a constant, even if it takes different forms in different countries. The role of the legislator is not in decline anywhere. Quite the reverse, its role is increasing in places where it used to be limited, such as the USA, and it is increasing where it was already important, as the growth of legislation in France shows. But the legislator no longer has a monopoly on regulation anywhere. In Europe, the growing influence of the Community has to be dealt with, whether it be Council directives, legislative agreements negotiated by the social partners, the case law of the Court of Justice, or to a lesser degree the European Court of Human Rights. At infranational level the fragmentation may be seen in the growing

²¹ See on this point the work of the first France/ILO conference.

²² See Frison-Roche report, op.cit.

²³ See P. Auer and C. Daniel (ed.), op.cit. p. 135 et seq.; A. Supiot: The Dogmatic Foundations of the Market, *Industrial Law Journal*, vol. 29, no. 4, December 2000, pp. 321-345.

²⁴ See Piore report, op.cit.

number of specialized agencies, such as in the USA, or in an increased role for collective agreement law, such as in Continental Europe.

The second general trend is the increasingly powerful role of the judge. Filling the space vacated by the decline of the trade unions, judges are increasingly being called upon to intervene in labour relations. Their role is expanding as a result of the individualization of social rights, which both feeds case law and is fed by it in turn. In order to guard against judicial intervention firms may be tempted to resort to arbitration. What this trend ultimately leads to then is the privatization of the figure of the Third Party, as we can see in the case law of the Supreme Court in the USA, which accepts the lawfulness of arbitration clauses in contracts of employment.

Because they are not being controlled, these developments are clearly leading to legal complexity and uncertainty. As a result certain situations are experiencing hypernomia (too many rules), while others are being abandoned to anomia (no rules at all). Hence the absurd debates that we are currently seeing in France between those who support everything-by-agreement, who claim to need no regulator, and those in favour of everything-by-legislation, who refuse to allow the social partners any independence. Neither the anarcho-capitalism of the former nor the State militarism of the latter are legally workable approaches. The problem is actually not in choosing between the law and the contract, between regulator and operators, but in allowing everyone to be able to play their part in full.

What is emerging or might emerge here are the following three approaches.

First, the regulator becomes refocused on his responsibilities, which are to guarantee fundamental human rights at work and to establish the procedures for ensuring their application. These two aspects are equally necessary. It is just as illusory for the regulator to claim to dictate the detailed rules that are to govern labour relations as for him to offload the definition of all those rules onto the operators.

Secondly, the operators become separated from the regulators. This separation is a requirement that is common to all markets²⁵ and is a reflection of the current resurgence of the old distinction between power and authority, which has become blurred since the birth of the modern State.²⁶ This requirement should lead us to rethink the forms which tripartism takes. The governments and the social partners all need to be able to derive benefit from joint structures, but it is contrary to the basic principles of sound regulation that they should be on an equal footing and that the representation of individual interests should thus be confused with the representation of the general interest. This necessary separation of regulators and operators should lead us in particular to review the operation of the International Labour Conference. The joint presence of representatives of the social partners and the governments within the ILO will only become a real force and a source of dynamism in the eyes of other international

²⁵ See Frison-Roche report, *op.cit.*

²⁶ See on this point the work at the Annecy conference, *op.cit.*

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organizations when their respective powers and responsibilities are clearly distinguished and defined.

Thirdly, proper social market authorities are created at international level. This is the approach taken by the European Union, whose 40 years of experience show that opening up borders to the free movement of goods and capital cannot work in the long term without fixing common rules for labour relations. On a global level this need for a social authority clearly raises the question of relations between the ILO and the WTO. Going back to an idea put forward at the Annecy conference, our work suggests that we should consider a division of labour between these two institutions. If a commercial dispute presents a problem to do with social protection, the WTO should refer the problem for a preliminary ruling by the ILO as the sole competent body. The introduction of this mechanism would of course require the ILO to have a body for the settlement of disputes, in other words judicial powers. The figure of the judge is the only universal judicial figure. While the establishment of social clauses in international trade treaties may smack of protectionism by the countries of the North, the judicial method on the other hand allows account to be taken on a case-by-case basis of differences in the levels of development between the countries involved in the dispute. This sleight of hand could gradually lead to the development of rules that would not be projecting the regulations of the Northern countries onto those of the South, but would be the product of balanced arbitration between the interests of both.