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DELEGALISATION AND NORMALISATION

by

Alain SUPIOT

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European University Institute
Badia Fiesolana
I-50016 San Domenico (FI)

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Alain Supiot

(University of Nantes - France)

In France, putting the law on trial has long been a Marxist speciality, though it was only very late (post-1968) that it broke through into the Faculties of Law. Today, it is on the way to becoming one of the main lines of the liberal platform, which, in political opposition since 1981, has been acquiring new energy. To be sure, aspiring after the withering away of the law is not exactly the same thing as dreaming of "de-legalisation" (if only because of the inelegance of the latter term). It is indeed not the same thing from the political or economic point of view, but from the legal point of view there is in both cases a questioning of the legitimacy of the rule of law, a cross-examination of the notion of legality.

Two difficulties arise here. Firstly, the theme of de-legalisation is put forward chiefly as part of a discourse of an economic nature. This is particularly true in France, where it

has appeared on the one hand in the form of denunciation of the legal stranglehold that is allegedly slowly stifling free enterprise, and on the other in the theoretical aspect of various works, the most important of which is Friedrich Hayek's on "Law, legislation and liberty" (1). These works have in common their adoption of a perspective of political economy. Lawyers have thus largely remained outside a debate that has involved economists, politicians and trade-unionists (2).

Secondly, analysis of the idea of de-legalisation necessarily refers back to the definition of the concepts of law and legality, questions so overdiscussed that the mind is bedazzled rather than illuminated by all the light that has been thrown on them.

Starting with labour law will perhaps allow these two difficulties to be got round. Like Ariadne's thread, it should help us not to get lost in discussions on the economic usefulness or otherwise of legislative intervention, or in the labyrinth of the innumerable definitions of Law. It has the further advantage of being a branch of Law which, while in part linked with "bourgeois" legality, is at the same time one of the favoured targets of the supporters of "de-legalisation". We may, then, hope to catch out both the Marxist and the liberal critique of legalisation there.

It is true that the aspects of labour law criticised in the two cases are not the same. At first sight, it would even seem possible to draw a sharp distinction between two sides of this law: one

side, of liberal inspiration, articulated round concepts of ownership and contract, and one side of state interventionism, including collective rights (union rights, right to strike, etc) norms of individual protection of wage earners (minimum wages, maximum working hours, health , safety etc.). Thus, the apparent unity of labour law in fact conceals two radically opposed legal logics (3), so that bringing the Marxist critique aimed only at liberal side of labour law and the liberal one that attacks its interventionist part together would be tantamount to playing word games.

Things are in fact more complicated, since on each side it i the very legitimacy of social law that is at stake, whether in th name of a radical critique of legal form like that developed by t emulators of Pasukanis, or in that of a no less radical critiqu the project of social justice, as developed by Hayek. The distinction between these two critiques does not then correspond internal distinctions of labour law, but to opposing analyses of and of legality. For the former, labour law must be criticised because it is no different from the rest of Law, because it is l For the latter, on the other hand, it must be criticised because is not really law, because it does not meet the logical and form requirements of the definition of Law.

Thus, analysis of these critiques necessarily sends us back that of the specificity - denied by one side and affirmed by the other - of the legal forms of labour law.

The obligatory starting point for thinking about de-legalisation therefore lies in the specific features of legalisation of the work relationship (I). Only on the basis of such a study does it become possible to grasp what separates (II), and what unites (III), the two types of accusation against labour law.

I. LEGALISATION

A. Labour law and sociology

Sociology presided over labour law even in its cradle. For the first time in the history of law, the legal treatment of a social relationship was preceded by sociological knowledge of that relationship. That fact would be enough to distinguish social law radically from civil law. The French Civil Code, whatever its historical and ideological roots (4), presents itself as a work of Reason. It is set out axiomatically, as a showcase of thought, which, from a few postulates (the autonomy of the will, ownership, contract), deduces the whole set of rules of law applicable to civil society. The sociological approach to the matters it deals with was to be embarked on only much later, and the effect of this sociological knowledge on law was later still. As regards the family, for instance, it was only after the 1960s that legislative endeavour in France began to incorporate certain sociological data (5).

This is exactly the opposite of the case with the work relationship. The proletarian is not an object of legal thought in the Civil Code; he is indeed absent from it (6). Excluded as he thus was from legal rationality (7), he was by contrast at the centre of the first sociological research. That first research saw itself in fact as a sort of social physiology, seeking to track down the causes of social dysfunctions, most notably crime and disease (8). In so doing it inevitably led to the highlighting of the importance of social determination in criminality and morbidity, that is, the importance of working-class poverty. The working class therefore very soon came itself to constitute an object of study, such as that by Villerme (9) or Guépin (10). Whether these studies proceed from or oppose the questioning of the atomistic and individualistic model of liberal society (11) of which the civil Code was the legal systematisation, they are closely linked with it.

In the face of the crushing finding of the wretched proletarisation of overexploited human masses, the legal principles of equality and responsibility could appear only as monstrous fictions, with no other object than to disguise the oppression suffered by the great majority. Science brought down this disguise by showing that law, like religion, is only a technique of social wizards at the service of the rulers, a metaphysical fraud (12). Two reactions then arise, the course of which can perhaps be followed right up to the present. The first is the rejection of Law, as irrevocably condemned by the "scientific" projects of new social relationships, as diverse -apparently - as those of Comte and Marx.

As Comte wrote: "Positivism, always taking the social viewpoint, can include no notion of law .... The notion of law must be completely eliminated as relating purely to the previous system, and directly incompatible with the final system, which admits of duties only in accordance with functions" (13).

The second is the project of building up another Law founded not on a philosophy or a metaphysic but on knowledge of social facts (13a). The first social laws thus proceeded directly from the sociological finding of the poverty of working families (14). The civil law thus came to be opposed by a social law, in the broad sense meant by G. Gurvitch (15), that is, a law whose paradigm is the group and not the individual. A whole part of labour law is a response to this project, of which it along with social security law is the most visible realisation (16). Clearly, with this kind of law a new type of legal rationality is making its appearance.

B. Substantive rationality and formal logical rationality in labour law

Max Weber's ideal types in legal sociology supply a first key to understanding here. As as well known (17), Max Weber distinguishes laws of irrational and rational type, and among the latter opposes substantive rationality to formal logical rationality (18). While the last is based on a systematic set of abstract concepts created by legal thought itself, "the norms to which substantive rationality accords preeminence comprise ethical,

utilitarian imperatives, or rules for particular occasions, or else political maxims that break the formalism ... of the logical abstraction" (19). This does not mean that the concepts applied by formal logical legal rationality are totally cut off from social reality, and in particular from a definite system of values, but they do bring about, between this reality and the legal system, an abstract mediation that does not exist within a rationality of substantive type.

While the Civil Code is clearly related to a rationality of formal logical type (20), the first "workers' laws" brought a resurgence of substantive elements in the legal system. The concepts inherent in this industrial legislation in fact emerged directly from the practice of industrial relations. It was initially the facts observed and denounced by inquiries into workers' conditions that broke through into the legal order. Where for instance, the law of obligations saw only a bilateral exchange of considerations between contracting parties, the first laws limiting working hours or setting up a specific system for compensating work accidents brought out at legal level the central place of the human body in the work relationship (21): bodies of children working in mines, bodies of workmen disembowelled by machines. Labour law was thus constituted progressively through systematisation of specific ideas take directly from social practice, which had - as legal notions - to be imposed against the abstract categories of civil law: strikes, against the concept of wrongful non-performance of a contractual obligation; collective

agreements, against the principle of the relative effect of contracts; reinstatement, against the concept of monetary fulfillment of obligations to perform, etc.

This share of substantive rationality in the process of legalising the work relationship explains most of the specific features of labour law.

Firstly, it allows a better grasp of its legal and sociological position within the field of law.

From the sociological viewpoint, this position could only be a low one, to the extent that the prestige of a branch of law is directly proportional to its degree of formal rationalisation. But not only is labour law essentially an ordinary law as being addressed to the generality, to the mass of men. Additionally, its lack of abstraction from the social is not the kind of thing that can corroborate the high position that lawyers draw from formal logical legal rationality. Both universities and the courts have therefore looked on labour law at best with paternalistic condescension, as the law of the poor, and at worst with suspicion, as a law of doubtful legality.

From the legal point of view the combination, in the very heart of labour law, of the substantive rationality intrinsic to it and the formal rationality inherited from civil law was fuel for an interminable debate on the "autonomy" of labour law. The efforts of

doctrine went in two directions. Some sought to reinsert the work relationship into a rationality of formal logical type, either by a rearguard action aimed at preserving the weight of civil law in it (22), or else by vantguard action aimed at transposing into it the argumentation of public law: this was the object of the institutional theory of the firm (23). Others undertook to systematise the substantive rationality inherent in labour law, thus asserting, against civil-law axiomatics, general principles capable of being the basis for a "social" axiomatics (24). The theory of conflict of logics proceeds from the same approach, and undoubtedly constitutes, from a strictly legal viewpoint, the clearest conceptualisation of the opposition between substantive and formal logical rationalities that labour law is the scene of (25).

This share of substantive rationality also allows a better understanding of the place of labour law in the social domain. Like the industrial tribunals that apply it, it is felt to be, as law, closer to ordinary things and common sense. Lacking the abstract mediation that characterises formal logical rationality, it is much less distant from society. This closeness to the social makes the legal autonomy of labour law much more fragile than that of civil law. To see this fragility, all one has to do is compare the shelves on labour law with those on civil law in any library. The latter show impeccable legal categorisation, with works truly inaccessible to non-lawyers, about suit, about sale, about admissibility or about the action "de in rem verso", or whatever.

The former are full of works that seem to have just as much to do with sociology, economics or political science as with law.

This interpenetration with other fields of knowledge is because labour law shares the same subjects with them: work, unions, strikes, power, communications, etc. By contrast with civil law, its concepts are not exclusive to it. This explains why it has been the favoured ground for Marxist analyses. Nowhere else would it be as easy to show the law as a reflection, a recording, of social struggle. But this equally explains its low social legitimacy. This is obvious from the employers' side, but equally so from the union side. Since labour law shares the same vocabulary with both, its provisions will never be spontaneously treated as belonging to an extrinsic legal rationality, but always and only to a political or ideological one (26). More than any other law, it will be seen more as part of the stakes than as part of the rules of the game.

This position on an equal footing with the social aspect, which labour law derives from its substantive rationality, likewise allows an understanding of the extremely ambiguous relationships that can be found there between legal categories and sociological categories. No one would think of claiming that the civil-law concepts of trustee or assignee correspond to any sociological entity whatsoever. But in labour law, the legal categories are seen as pure copies from sociological categories. For instance, the legal concept of wage-earner is still seen spontaneously as the equivalent of the common-sense notion of a wage-earner, that is, as covering a

population of blue-collar and white-collar workers, petty administrators, etc.: in short, the ruled, labouring class, or the working class. This equivalence is clearly completely false: many company directors are legally wage-earners (27), while many small employers (in the legal sense) belong sociologically to dominated classes (28). But however inaccurate it is, the equivalence still works in a social way: the defence of "wage-earners' rights" is treated in trade-union language as being the same as that of "workers' rights", thus allowing total concealment of the enormous inequalities which, from a sociological viewpoint, separate some of these wage-earners from others. And there are lawyers who make a strict rule of defending only wage-earners (though they be managers) and refusing to defend employers (though they be craftsmen) (29). Doctrine itself does not escape these crossed lines, and more or less well-learned sociological terminology is tending to spread into accounts of positive law, thus contributing to maintaining the confusion between legal and sociological categories (30). So much so that the accusation of concealing the reality of social relationships traditionally levelled at civil law might just as well or even more be directed at labour law.

It could, if this accusation had a meaning. But it does not, since it presupposes that legal categories ought to be the faithful image (reflection !) of social categories. But this is not the case: legal rationality, even of substantive type, is an autonomous rationality vis-à-vis the social aspect, and this autonomy is of the very essence of a rational law. (his 31?)

The outlines of the specific features of the legalisation of the work relationship can now be seen. Proceeding from sociology, labour law brings into the legal order a rationality of different type, but no less a legal one, i.e. alien to sociological rationality; its concepts are borrowed directly from the social, but being integrated into a legal order, they are cut off from those social roots.

If we may use, or rather misuse a piece of terminology from commercial law, one might say that labour law has both a "legal object" and a "social object". This particularity throws light on the ambiguities of the notion of de-legalisation in this area.

II. Delegalisation

The idea of delegalisation is necessarily bound up with a critique of labour law. But this critique has a different content depending on whether it is aimed at the "legal object" or the "social object" of this law. In other words, the project of delegalisation has not one but two possible meanings, according to whether what is disputed is the legal rationality of labour law or the substantive character of that rationality.

A. The critique of the legal rationality of labour law

The radical critique of Law took root, as we have seen, in the current of thought that began during the first half of the 19th

century to question the liberal model. It can be found both in Saint-Simon or Fourier and in Comte (31). Marx's and Engels's thoughts on Law are part of this current of thought.

As the luckless Pasukanis (32) to care to recall, it is the legal form itself that is the object of Marxist criticism, as a form indissolubly linked with class domination and therefore bound to disappear with the advent of a classless society: this disappearance of Law is an integral part of the radiant future prophesied by Marx (33). While this critique extends to all forms of law, it aims primarily at the formal logical legal rationality at work in bourgeois legality, which represents the most complete expression of Law as an instrument of class domination. This thesis is too well known to need repeating. It is instead useful to recall the difficulties that arose in applying it to social law. Marx's own analysis of the first laws limiting working hours already contains in embryo all the ambiguities that were to fuel disputation among the doctors of Marxism: "These laws curb capital's unrestrained thirst to absorb labour, by putting an official limit on the working day in the name of a State governed by capitalists and landlords. Not to mention the working class movement, more threatening day by day, the limitation on industrial working was dictated by necessity; the same necessity that led to the spreading of guano on the fields of England. The same blind cupidity that was exhausting the soil was attacking the nation's vital strength at its very roots" (34). But Marx noted also that Capital was refusing to apply these laws (35), for the extension of

which he prayed (36). Thus, then, social laws are the product of workers' struggles and must be defended as such, but nonetheless form an integral part of bourgeois legality and must therefore disappear with it. The dispute among his successors arose because some put the stress on the first proposition, seeing in labour law a "law of democratic and popular interest", a"counter-law" (37), while others clung to the second one, affirming that "there is no 'labour law'; there is bourgeois law applied to labour, that is all" (38). The debate is an old one, as old as the workers' movement itself (39).

But it has no meaning. For where a labour law exists, that is, in neo-liberal societies, the substantive rationality of this law brings it into a relationship of conflictual participation in the liberal legal order: it shares in it through its "legal object"; it is opposed to it through its "social object" (40). In the Marxist terminology, its structure should therefore be called dialectical (41).

In Soviet-type systems, it ought finally to be realised that the project for the withering away of Law has in fact been achieved (as, by the way, have many other Marxist prophecies (42)). To be sure, in a rather unexpected sense; but this was also the case with the realisation of the revolutionary prophecies of 1789. These systems are in fact characterised by a negation of legal rationality. This is the meaning of the idea of socialist legality: "Dissociating the law and the legality of the economy, analysing the

legal system independently of existing economic relationships, represents ... a method that is incompatible with the basic principles of Soviet legal science" (43). In consequence, Article 5(1) of the fundamental principles of the USSR Civil Code provides that : "Civil rights shall be protected by law, excluding cases where they are used in contrast with the aim of such rights in a socialist society in the period of construction of Communism". Similar formulas occur in all socialist codes. For instance, Article 8 of the Polish Labour Code: "No one may use his right in a way contrary to the socio-economic goal of that right, or to the rules of life in society in the Polish People's Republic. Such action or omission shall not be regarded as exercise of the right and shall not enjoy legal protection" (44). These provisions correspond exactly to Pasukanis's statement that "any endeavour to present the social function as what it is, i.e. simply as a social function, and to present the norm simply as an organising rule, signifies the death of legal form" (45). It is a pity that our doctors of Marxism, when they harp on the thesis of the fetishism of legal ideas (46), do not update what they say by analysing these texts, which actually shatter the fetish (47); for what do these provisions mean but that the rules of law must blend into the rules of life in society? This amounts to saying that legal categories have no autonomy relative to social categories; it is to set about a critique of legal idealism (48). But that idealism, consisting as it does in dealing with legal concepts outside their specific social content (49), is absolutely identified with legal rationality (his 51?).

The Soviet normative system thus constitutes the de facto negation of this rationality and the accomplishment of a project of total delegalisation. It has clearly been harder or easier for this accomplishment to become a fact, depending on the weight of legal tradition in the country concerned. The weakness of legal tradition in Russia and to a lesser extent in the Balkans (50) manifestly presented the most favourable terrain, while the countries with a strong legal tradition, namely Hungary, Poland and Czechoslovakia (51), proved less ready to give up legal idealism and espouse the notion of socialist legality. The difficulties encountered by the Polish Government in delegalising trade union freedom or strikes show what a stubborn grasp on life legal fetishism has in that country.

Labour law is not spared by such a process of total delegalisation. And paradoxically, in a system that its opponents call "collectivist", it is the collective rights - trade-union freedom, right to strike, right to collective bargaining, right to collective representation - that are the first to be denied by it. The paradox is only apparent: "In a society where there are no capitalists, laws regulating the relationships between capitalists and wage-earners do not mean anything. They are not breached; they are merely absurd" (52).

This shows, if there were any need, that the opinion that "socialist law" is nothing but the flowering of labour law, its ultimate extrapolation (53), is a total misconception. It will all

the same have a fair future in front of it, because of the rhetorical use it lends itself to (54) for the supporters of a quite different project for delegalising the work relationship: that of our neo-liberals.

B. The critique of the social rationality of labour law

The basis of this critique is very well expressed in the quotation from Kant that Hayek puts at the head of his chapter on the notion of social justice (55), to the effect that what depends on material circumstances is incapable of a general rule (56). This summarises the essence of the neo-liberal critique of social law. By contrast with the Marxist critique, the liberal critique denies not the legal idealism but on the contrary the legal materialism of social law. This critique proceeds from the opposition made between what Hayek calls "universal rules of just conduct" or "rules of spontaneous orders", and "rules of organisation" (57). According to what the author says, this opposition would correspond to our distinction between public law and private law (58). The fundamental difference between these two sorts of rules is that the former derive from conditions of a spontaneous order (namely the order of the market) not created by man, while the latter are used for the deliberate building up of an organisation with definite objectives. The former are both necessary (they merely express practices already followed) and abstract (they are general, permanent and organised into a system), while the latter are contingent (combined arbitrarily by the mind) and concrete (created

for specific objectives) (59). There is no need for any profound legal culture in order to see that this typology, on which Hayek claims to found a general theory of law and justice, is a pure and simple copy of the distinction between "common law" and "statute law" (60). This explains the decisive role that he assigns to the judge in elaborating the rules of just conduct (61) and to the State in promulgating rules of organisation (62). Social legislation is supposed to have blurred this distinction by making its rules out to be universal rules of just conduct whereas in reality they are only an oblique form of rules of organisation. The concept of social justice is alleged to allow this obscuration by making it seem that social law refers to the need for justice, though it is in fact only a product of political arbitrariness. This leads Hayek to devote the central part of his work to a refutation of the notion of social justice. It is said to be only a "mirage", a "vocable devoid of meaning or content", since the concept of justice could not be applied to the way in which material benefits are divided up in a free society (63). This phantasm of social justice would be a harmless utopia, did it not in reality undermine the very foundations of this free society by spreading the idea that political power ought to decide the material situation of each individual or group, thus leading to an absorption of civil society by the State and the cancerous growth of rules of organisation to the detriment of universal rules of just conduct.

One might be tempted to see in these theses nothing but a repetition of the most classic liberal ideas; old thinking, with

nothing to contribute to a critique of State interventionism that is as old as the interventionism itself (64). But this would be to underestimate the new impact that liberal theory draws from the experience of actual historical social revolutions. Just as the extraordinary force of the Marxist criticism of liberal thought came from the relentless disclosure of what 19th-century liberalism was in actuality, so the force of the neo-liberals comes from knowledge of what communism is in reality. When Hayek describes the way the holders of power to impose social justice entrench themselves in their dominant position by handing out their favours to their hangers-on and to the praetorian guard that ensures that their personal conception of "social justice" (65) is firmly applied, he is not merely bringing out a political bogey,; he is appealing to concrete historical experience (66).

These theses must, then, be given consideration, not only because of their present and future political resonance, but also because they bring to bear systematic questioning of the legitimacy of social law. Hayek pushes this questioning very far, by openly contesting trade-union freedom (67) or the principle of the minimum guaranteed wage (68), that is, the basic principles of labour law. Analysis will, by the way, be confined here to labour law only. Social security law seems to us to raise problems of another nature and in any case to go beyond the limits of our considerations.

The liberal critique of labour law is twofold. It relates first of all to the nature of this law: instead of being the

spontaneous product of a free society, it is alleged to be the deliberate product of political power. Secondly, it relates to its content: instead of being a system of abstract rules, it is alleged to be the chaotic expression of the conflict of group interests. But the principle of neither of these criticisms can stand up to analysis.

Regarding the first, it must nevertheless be mentioned that only the "free" societies possess a labour law, and that it disappears along with the market order (69). It is only in the socialist societies that the ultra-liberal ideal of firms disencumbered of free trade unions, strikes and collective bargaining is fully realised (70). But this is too elliptical (and too polemical) to convince those who see labour law as a cancer, bound to perish with the organism that it has destroyed.

Accordingly, the argument must be made stronger. The great weakness of the liberal theses, as rightly pointed out by Pierre Rosanvallon (71), is to start from a denial of the social aspect. Their sociology comes down to a summation of economic knowledge and a morality. For want of a sociological view of the world, they are able to see in social legislation only a gift from heaven (or rather, from hell), but in no way a spontaneous product of capitalist society. The conditions for the historical emergence of labour law are obscured by their argumentation. But it is clear that, far from having been invented by the legislator, labour law derived above all from sociological findings (72). To see it as a

set of rules of organisation (in Hayek's sense), arbitrarily decided by government, is to forget that trade unions, strikes, and collective agreements existed well before they were legalised.

It is also to forget what pure liberalism was as a reality. Not only is labour law not by nature constituted of rules of organisation, but still more, it meant and still means progress in the "spontaneous rules of just conduct" in an area formerly entirely left up to rules of organisation: that of firms. For if there is any exemplary form of what Hayek stigmatises under the name of rules of organisation (73), it is the firm (whether private or public), entirely subject to the organising power of its head. These enterprises have generated a "law", an infra-law, that is radically at variance with the legal principles of a "free society", and constitutes the normative emanation of the "despotism of the factory". It is this despotic law of organisation that labour law has come along to curtail, by introducing into the firm itself such principles of the "free society" as the guarantee of areas of autonomy or legal protection against the power of the employer (74), or the principle of free bargaining (75). It is therefore hardly surprising for this law to disappear along with the "free society" of which it is the ultimate legal expression, since this disappearance means the extension to the whole society of the "despotism of the factory", and the generalisation of rules of organisation. Lenin explicitly stated the objective of the social revolution as making "the whole society /be/ nothing but a single office and a single workshop", a single vast factory built on the

Taylorist model, in which "the masses unreservedly obey the single will of the directors of labour" (76).

It is, then, not labour legislation but on the contrary the despotism of the factory that constitutes the embryo in capitalist society of despotism tout court, the model of a social order entirely subject to rules of organisation and rid of all notions of legal subject or of individual freedom.

The other critique relates to the content of labour law, and consists in saying, to take up Kant formula already mentioned, that what depends on material circumstances is incapable of general rules. Outstanding testimony to this impossibility is alleged to be the failure of attempts made to discover criteria of justice applicable to conciliation or arbitration procedures in wage disputes, that is to say, a priori criteria for defining the fair wage (77). In other words, from the issues it deals with, labour law is alleged to be incapable of meeting the conditions of abstraction, generality and systematisation proper to a genuinely legal system. It is supposed to be by nature swung back and forth at the whim of developments in the relationships of force between opposing groups and incapable of abstracting from the social material it covers. This critique means, in sum, that because of the materiality of its concepts, labour law is incapable of any genuine legal rationality. It is the very possibility of a material legal rationality that is being denied.

This denial is based on an indisputable peculiarity of social law, namely that it presides over disputes that do not come under an existing rule of law, but are aimed at defining that rule itself. It is a well-known paradox of the right to strike that it is nothing more or less than a right to oppose the law (78). But this denial very much downplays the complexity of labour law, which, though it does not supply general, abstract rules applicable to the object of these disputes, instead confines their unfolding within rules of this type. This is certainly the object of trade-union law and of collective representation, of strike law or the law of collective bargaining: not to lay down directly the substantive content of the "exchange" between labour and wages, but to supply the legal framework for determining that content. Likewise, when the law sets minimum wages or maximum working hours, it supplies a framework for the determination of actual wages and actual hours worked, which remains autonomous; it circumscribes areas of free negotiation, differing in no way on this point from civil-law legal rationality. A large number of the constraints surrounding wages or dismissals denounced today result much more from freely concluded collective agreements than from positive prescriptions of the law. It is only when the law claims to lay down the specific content of the work relationship, for instance by setting an obligatory scale of wages, that it can no longer meet the criteria of generality and abstraction. It then becomes a technique of normalisation, no longer one of regulation (79).

The framework rules that constitute the essence of labour law meet the needs for generality, abstraction and systematisation that characterise legal rationality. Thus the accusation levelled, of the materiality of labour law, arises from a confusion between on the one hand the disputes that may be called under the law, which have to do with a solution justifiable in law, and on the other hand the conflicts which might be termed about the law, which can on the contrary be referred only to value judgements, though the very distinction between these two categories of strife is one of the fundamental data of labour law (80). As long as this distinction is respected and labour law does not aim to prescribe the material situation of each worker but only to supply the legal instruments for that situation to be determined freely, the liberal criticisms aimed at it are devoid of any legal foundation.

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This refutation might appear suspect to all those who, with or without a smattering of sociology, might be tempted to see it as a plea in his own cause by a lawyer interested in defending the object of his profession, and as a particularly hypocritical manifestation of the prevailing corporatism. That would be a regrettable error of interpretation, since the prosperity of lawyers seems better assured nowhere than where a proliferation of norms is masking the decay of the law.

Moreover, the scope of this objection is just as sociological as legal. Over and above their manifest differences, the projects for the withering away of law and for de-legalisation have in common the dream of a pacified world of labour, where everyone would uncomplainingly accept the place assigned to him by the invisible hand of the market, or the visible hand of total planning. This is a utopia of a social order where rule would generate no tensions and could be carried on trouble-free. What can always be made out behind these dreams is the nightmare of naked violence.

The defiance that the prophets of delegalisation must inspire makes it all the more necessary to reconsider the notion of legality, specifically in application to labour law.

III. Normalisation

Part of the success of the idea of delegalisation is because it seems to be the answer to the proliferation of laws. This inflation is a real problem, not only because it strangles civil society, but also because the overabundance of laws brings about their devaluation (81). In this sense, it is undoubtedly the most reliable agent of outright total delegalisation. The wiser therefore suggest, not to eradicate social legislation and preach resignation to the poor, but to set off in search of criteria of legislative non-intervention (82).

In this search, Weber's typology might again provide us with an operational pathway, which one can see being followed, in more or less pertinent forms, by other authors. The relevant distinction is the one between "administrative ordinances" (Verwaltungsordnungen), which regulate "group activity", and "regulatory ordinances" (Regulierungsordnungen), which regulate all other social activities and guarantee the actors the chances opened up to them by this means (83). Under the concept of "administrative ordinance", Weber brings all rules "valid for the aims whose pursuit the rules seeked seek to ensure, through positively instituted activity of the administration and its members, which these ordinances methodically prescribe" (84). In this type of ordinance, "the individual and his interests are, in the legal sense of the term, fundamentally objects and not subjects of law" (85).

This distinction throws light on the oppositions later introduced by Foucault between "law" and "discipline" (86), by Hayek between "rules of just conduct" and "rules of organisation" (87), or by Pasukanis between "legal norms" and "technical norms" (88).

To clarify the idea (though at the risk of still greater obscurity), this distinction will be expressed here by opposing "legal rules" on the one hand to "rules of normalisation" on the other. Weber's terminology might in fact cause confusion because of the meaning today given in positive law to the term "administrative ordinance", which is not the same as the one Weber gives it.

Rules of normalisation and legal rules are based on two different conceptions of legality. The first takes its origin from power within the home, from the unlimited capacity of the head of the family, while the second has its source in arbitration between tribes. "It is only in the latter case that there is discussion of "claims", and thus of subjective rights, and that a verdict is rendered. It is only here ... that we find precise forms, time limits, rules of evidence, in short, the beginnings of legal procedure. But the paterfamilias's is way of doing things ignores all that" (89).

Rules of normalisation and rules of law thus appear as two types of legality which are at the same time opposed and combined in one and the same social order.

They are opposed by the nature of their relationships with the other social rules. The legal rule starts from a break with the other social rules. Though research on the criteria of legality has not made it possible to say exactly where that break is located (90), its very existence is the starting point for that research, the point on which everyone can agree. The result is that legal thought necessarily has a certain autonomy by comparison with other ways (political, ideological, sociological or whatever) of thinking about social matters. This autonomy may vary depending on the degree of abstraction of the legal concepts applied, but it is nonetheless constitutive of legal rationality.

Among the concepts thus abstracted from the social necessarily appears the legal subject, understood not in a philosophical sense but in its technical acceptation: the person that "the positive legal order empowers to bring into play the legal effect of a rule of Law" (91).

The legal subject has no other social reality than this empowerment. In this sense it corresponds to the definition of subject given by Wittgenstein: it "does not belong to the world, but constitutes a limit to the world" (92). The subject is what can produce its effects on the autonomy of legal thinking, by comparison with other ways about thinking of social matters, particularly the political way. In this sense, the existence of legal rules in political society necessarily allows the existence of an opposition, whether these rules be good or bad (93). Since legal categories are no more able than words to coincide with the things they designate, they only ever apply delimitations within which there irreducibly persist parts of non-law, which are so many areas of freedom. Since control of observance of rules is a control of the non-transgressing of the limits set by law, it is essentially *a posteriori* control, aimed at verifying respect for legal prohibitions, not *a priori* control aimed at authorising this or that conduct.

The autonomy of the legal rule vis-à-vis the social aspect it governs likewise explains why such a rule can always be discussed at two different levels, that of its legal meaning and that of its

social meaning. Legal discussion feeds on conflicting sources: the ambiguity of words and the need for logic, for non-contradiction. Social discussion relates to the appropriateness of a rule or a judgement to the social situation they govern, irrespective of their legal validity. This twofold level of analysis is entirely characteristic of legal discussion and constitutes its specific province.

By contrast, the rule of normalisation is absolutely identified with the social rule, and any break between what is and what ought to be is repudiated in it. With it, the point is not to delimit but to model behaviour, to bring it everywhere into line with the will of the normative authority, to incorporate in individuals a way of being which should become second nature for them. These rules do not require to be observed, but to be lived.

Where the author of the legal rule refrains from dealing with specific individuals, concerning himself only with abstract subjects, the author of the rule of normalisation breaks the abstraction of the subject in order to deal with individuals as his objects. Examples here are quota rules, or positive discrimination ("affirmative action"), whereby the idea of formal equality between abstract subjects is discarded in favour of a search to reproduce in the rule a number of sociological variables (origin, sex, age, etc). Applied to access to employment, such quota rules aim at substituting the sociological technique of sampling (so many jobs for women, so many for the handicapped, so many for each social and

professional category, etc) for the legal technique of the competition.

As another consequence of negation of the subject, these rules are based more on authorisation than on prohibition, that is, on a priori rather than a posteriori control.

The renunciation of abstraction leads to a diversification of norms: in order to encompass every nook and cranny of social life, everything has to be said and stipulated. The desire thus endlessly to squeeze social complexity into rules leads to a normative logorrea that makes these rules progressively indecipherable (94) and makes the power to compell respect for the rules into an arbitrary power. The description of the asylum by E. Goffman (95) or of prison by M. Foucault (96) supply almost perfect examples of such systems of rules aimed at respect for a "normal" comportment of the inmate.

By contrast with legal rules, these rules of normalisation have no twofold level of analysis: to discuss them is to discuss the social order as a whole. There is no place for an analysis of the mutual articulation of these rules, since the search for coherence of a legal system is entirely replaced here by that for an adaptation of the rules to a social order which is by nature alien to formal logic. Accordingly, mutual contradiction between rules, or their differential application to specific individuals, can always be justified by the needs of this adaptation. Moreover,

infringing the rule amounts to passing not from lawful to unlawful, but from normal to pathological. For the most modern forms of rules of normalisation are all linked with an assertion of scientific knowledge of social relationships. This scientific claim is clearly illusory, since it is one particular social class that in any case holds the power to identify the function of social norms with the use it makes of the ones it determines the content of (97). But the claim nonetheless leads on this side or that to the treating of common-law criminals or political opponents as sick people, more in need of treatment than of judgment (98).

Thus opposable term by term, legal rules and rules of normalisation in practice combine in a veritable relationship of complementarity. The history of labour law could be re-written in the light of this complementarity: the rules of civil law first of all supplied employers with the means to develop rules of normalisation in factories that treat the wage-earner as an object (99); in a second phase the grip of rules of normalisation was limited by the development of rules of labour law that gave the wage-earner back his position as a legal subject, that is, a subject empowered to bring into play the legal effect of certain rules vis-à-vis the employer (100).

Certain signs may lead one to wonder whether a third phase has not perhaps arisen with the appearance within labour law itself of techniques that have more to do with the rule of normalisation than with the legal rule. This is apparent every time the legislator

ceases to treat employers and wage-earners as legal subjects whose relationship must be regulated, in order to deal with firms with a view to normalising their functioning, treating employers and wage-earners as objects of Law. The distinction between legal rules and rules of normalisation then supplies an instrument for analysing the contemporary evolution of labour law.

A number of recent laws are aimed at perfecting the hemming round of the normative power of the boss by legal rules which in sometimes complex ways establish the wage-earner as a legal subject in the firm: this is the case of, for instance, the recognition of a disciplinary right, a right of expression (101) or a right to negotiation (102) in the firm.

But other recent laws are related to techniques of normalisation. This is certainly the case with laws on nationalisation, at least to judge by the elusiveness of the administrative autonomy that nationalised firms are supposed to be guaranteed. It is also the case with law no. 75-5 of 3 January 1975 relating to dismissals for economic reasons (103), about which it was rightly observed when it was promulgated that it constituted an instrument for normalising dismissals (104). The desire to submit every economic dismissal to prior administrative authorisation means applying an a priori control technique and treating employers and wage-earners as mere objects of government employment policy. And so the usual harvest of normalisation systems came in: inequality of treatment, with the actuality and

strictness of control varying from one region, firm or dismissal to another; absence of genuine legal recourse against unfair dismissal decisions, since the administrative control, albeit a sham, immunises the employer against any further contestation; unclarity of the applicable law, since French law on dismissal has become a labyrinth in which the well informed employer can get rid of his workers without any risk. Treating the dismissal as economic is in fact a way of avoiding legal rules governing dismissal for individual causes (105), in particular for avoiding a posteriori legal verification. By contrast, most wage-earners, and small employers, being poorly informed, inevitably get lost (106). Here as elsewhere, rules of normalisation allow economic and social inequalities to produce their full effects.

The retreat of legal rules is thus reciprocated by an advance in rules of normalisation, and conversely, a growth in legal rules leads to a holding back of rules of normalisation. In regulating a particular social relationship, one has in a certain sense to deal with a constant-sum set. In these circumstances, the term delegalisation may have two contents: it may either designate a labour relationship from which any rule (whether legal or of normalisation) would be excluded, in which case it is a term devoid of meaning, since social rules are consubstantial with social relationships; or else it merely designates the elimination of the legal rules, necessarily implying a proliferation of rules of normalisation, whether the latter be created by the State or by the employers. In this case, delegalisation and normalisation of social

relationships amount to one and the same concept, a concept that carries in its womb the victory of Power over Law.

NOTES

(1) Routledge and Kegan Paul, London and Henly, 1973-1979, Paris, PUF., 3 t 1980-1983 for the French translation. A French translation of J. Rawls' A Theory of Justice was announced for 1984. These ideas are just starting to become popularised in France by essays, such as Y. Cannac's "Le juste pouvoir. Essai sur les deux chemins de la démocratie", Paris, J.-C. Lattès, 1983, 255 p. (See also J.-L. Harouel, "Essai sur l'inégalité", Paris, P.U.F., 1984, 288 p.).

(2) In France this argument is above all concerned with the Welfare-state: see P.Rosanvallon, La crise de l'Etat-providence, Paris, Seuil, 1981, 2nd ed. 1984, 183 p., and also the interview of this author with Y. Cannac published in Le débat, Paris, Gallimard, no. 26, Sept. 1983, pp. 69-92.

(3) This argument, called "conflict of logics, was particularily developed in France by lawyers of the labour union CFDT: see CFDT aujourd'hui: "Le droit du travail dans la lutte des classes", janvier-février 1977, no. 23, pp. 4-20.

(4) see A.-J. Arnaud: Les origines doctrinales du Code civil français, Paris, LGDJ, 1969, 319p.

(5) see J. Carbonnier: "Tendances actuelles de l'art législatif en France", in Legal Science Today, Acta Universitatis Uppsaliensis, Uppsala, 1979, repeated in "Essai sur les Lois", Paris, Rep. Defrénsis, 1979, p. 231f.

(6) see A. Tissier: "Le Code civil et les classes ouvrières", in Livre du centenaire, Paris, Ed. Rousseau, 1904, t. 1, pp. 71-94.

(7) but not excluded from all regulations, since the law of 22 Germinal, Year XI, relating to factories, mills, and workshops, put workers under a system of police control, notably by the institution of the worker record book.

(8) see Pour une histoire de la statistique, ouvr. collectif, Paris,

INSEE, Impr. Nat. 1977, 593 p., and particularly the contributions by M. Perrot ("Premières mesures des faits sociaux: les débuts de la statistique criminelle en France (1780-1830)", pp. 125-136) and B. Lecuyer, ("Médecins et observateurs sociaux: les Annales d'hygiène publique et de médecine légale (1820-1850)", pp. 445-475).

(9) Tableau de l'état physique et moral des ouvriers employés dans les manufactures de coton, de laine et de soie, Paris, Renouard, 1840, reprint EDHIS, Paris, 1979, 2 t.

(10) A. Guépin et E. Bonamy: Nantes au XIXe siècle. Statistique topographique, industrielle, et morale, Nantes, P. Sébire, 1835, Ed. Savante, univ. de Nantes, CRP. 1981.

(11) Thus, Guépin's and Bonamy's research is linked directly to their Saint-Simonian involvement (see Nantes au XIXe siècle, op.cit. : Présentation, p. 7 sq.). Engels' work on The Situation of the Working Class in England (Leipzig, 1845, trad fr.: Paris, Ed Sociales, 1975) is based on the data of Journal of the Statistical Society of London, and of the Report to the Home Secretary from the Poor Law Commissions, on an enquiry into the sanitary condition of the laborious classes of Great Britain, presented to Parliament in 1842.

(12) For example, see E.B. Pasukanis: La théorie générale du droit et le marxisme, 1924, trad. fr. Paris, EDI, 1970, p. 134; this opinion had extraordinary success, and it is still expressed today in the writings of P. Bourdieu, who criticises Max Weber for not having adopted it. (see P. Bourdieu, Ce que parler veut dire, L'économie des échanges linguistiques, Paris, Fayard, 1982, pp. 20-21). Its great interest is that it:

1) corresponds to common sense, which sees in legal procedure

a set of utterly incomprehensible mumbo-jumbo;

2) exempts non-lawyers from any effort to understand law, and what is more in the name of science, which is doubly interesting;

3) legitimises all law violations by autocrats of all kinds who have been taught that law is only a manipulation technique at the beck and call of superiors.

(13) In Catéchisme positiviste, 1852, quoted by G. Gurvitch in L'idée du droit social, Paris, Sirey, 1932, p. 295; our emphasis

) See. E. Durkheim "De la division du travail social", 1893, Paris, P.U.F, 10 ed, 1978, 416 p. and "La morale professionnelle et l'éthique de sociologie", Paris, 1937, 1 ed, 1950

(14) see Y. Brissaud: "La déchéance de la famille ouvrière sous la Restauration et la monarchie de Juillet aux origines de la législation sociale" in Le droit non-civil de la famille, Publications de la Faculté de droit de Poitiers, t. 10, Paris, PUF, 1983, pp. 65-103.

(15) G. Gurvitch: L'idée du droit social, op. cit. Also the analysis of this notion of social law in F. Ewald: "le droit du travail: une légalité sans droit?" Notes de la Fondation Saint-Simon, no. 1, Paris 1983, MS , 17 p.

(16) but not the only one, notably because of the extraordinary dynamism of certain concepts proper to social law, such as risk socialisation, or collective bargaining.

(17) There would be no need for such a reminder if "Rechtssoziologie" were easily accessible to French lawyers and sociologists. It is stupefying to note that no French translation has, to this day, been published so that Weber's legal sociology is often no better known than by what has been said by G. Gurvitch (in Traité de sociologie, Paris, PUF, t. 2, 1960 p. 181 sq.), J. Carbonnier (in Sociologie juridique, Paris, PUF, 1978, p. 132 sq.) or A.J. Arnaud (in Critique de la raison juridique t. 1:"Où va la sociologie du droit?" Paris, LGDJ, 1981, p. 106 f.)

that is to say, analyses that are critical and, inevitably, abridged. A translation was made for a thesis by J. Grosclaude, La sociologie du droit de Max Weber (Introduction et traduction) Thesis, Strasbourg, 1960, 385p; References will be made to the English edition of Economy and Society, University of California Press 1978, 2 volumes, 1469 pp.

(18) Weber, op.cit. p. 654 f., and the analysis of this typology by J. Grosclaude, p. 38 f.

(19) Weber, op. Cit., p. 67

(20) see the analysis of the Civil code made by Weber, op. Cit., p. 340.

(21) see A Supiot, Le juge et le droit du travail, theris, université de Bordeaux-I, 1979, p. 68 f.; Droit Social, Mai 1980 pp. 60-61

(22) The term "rearguard" (like "vanguard" below) does not imply any type of value judgement, but simply tries to situate the doctrine in relationship with acquired positions of civil law in labour relation matters. Measured by the yardstick of protection of wage-earners, application of civil-law logic may prove more advantageous than that of the rules proper to social law (see G. Couturier: "les techniques civilistes et le droit du travail", D. 1975, chr, pp. 151-158 et 222-228, and "Les nullités du licenciement", Dr. Soc. 1977, pp. 215-230

(23) see P. Durand: "Rapport sur la notion juridique de l'entreprise," travaux de l'Association Henri Capitant, t. 3, 1947, pp. 45-60; M. Despax: L'entreprise et le droit, thesis, Toulouse, 1956, Paris LGDJ, 1957, 433p.

(24) G. Lyon-Caen: "Du rôle des principes généraux du droit civil en droit du travail" R.T. Civ., 1974, pp.229-248; Les principes généraux du droit du travail, Etudes G.H. Camerlynk, Paris, Dalloz, 1978, pp. 33-45.

(25) CFDT Aujourd'hui, art. cit.; J.C. Javillier: "Une illustration du conflit des logiques (droit à la santé et droit des obligations).

le contrôle "médical" patronal des absences en cas de maladie du salarié" Dr. soc. 1976, pp. 275-284; "Une nouvelle illustration du conflit des logiques (droit à l'emploi et droit des obligations): Normalisation du licenciement et sauvegarde des pouvoirs du chef d'entreprise", in Etudes G.H. Camerlynk, cit., pp. 101-145

(26) Thus, the critique of judgements has a tendency to be a directly political or ideological critique, finessing in consideration of the legal rationality of these judgements: the judges political colour is spontaneously and directly incriminated, be it red (see P. Cam: "Juges rouges et droit du travail", Actes de la recherche en sciences sociales no. 19, Jan. 1978, pp. 1-27), or white (see F. Ewald: "Le droit des socialistes", in Libération , fév. 1983)

(27) see G. Lyon-Caen: "Quand cesse-t-on d'être salarié? (le salarié-employeur)" D. 1977, chr. p.108

(28) In this respect, a typical case is the situation of farmers bound by an integration contract (see A. Supiot "L'élevage industriel face au droit du travail", Rev. droit rural, no. spéc. octobre-novembre 1983, pp.325-331)

(29) see J.N. Rétière: Formation et information des avocats en droit du travail. Enquête sur le barreau nantais, mémoire DEA, univ. Nantes, 1983, 110p.

(30) Cf. the reservations made by G. Lyon-Caen on the development of this sociologism (in "A propos de quelques ouvrages de doctrine" Dr. soc., 1978, p. 292 f.)

(31) see infra III

(32) see G.Gurvitch: L'idée du droit social, op. Cit., pp. 288 f..

(33) see La théorie générale du droit et le marxisme, op. Cit.

(34) "In a higher phase of communist society, when the slaving subordination of individuals to the division of labour and, with it, the opposition between intellectual and manual work have disappeared; when work will not just be a way to live, but itself the prime necessity of life when, with the multiple development of individuals, productive forces will also be enhanced, and all sources of collective wealth will burst forth in abundance, only then will the limited threshold of bourgeois law be crossed forever, and society will be able to write on its banners "from each according to his abilities, to each according to his needs!" (Marx, Critique of the Gotha Program, French translation by Editions de Pékin, 1972, p. 16)

(35) Das Kapital (1867) book I, Ch. X, sect. 3, § 2

(36) Das Kapital, op. cit., sect. 3, § 6,

(37) Critique of the Gotha Program, op. cit. , pp. 31-32

(38) This is the orthodox formulation by M. and R. Weyl: La part du droit dans la réalité et dans l'action, Paris, Ed. Sociales, 1968, quoted from p. 101 and p. 119

(39) This is the heretical expression of B. Edelman: La légalisation de la classe ouvrière, Paris, C. Bourgois, t. 1, 1976, p. 12; (see also A. Jeammaud : ""Propositions pour une compréhension matérialiste du droit du travail", Dr.Soc. 1978 pp.337-345, v. no. 3). It is in the straight-and-narrow of the analysis of Pasukanis, and joins in its conclusion the ever-defended argument of anarchists. Also see in the same (Marxist) perspective the collective work: Le droit capitaliste du travail, Grenoble, P.U.G., 1980, 218p.

(40) see P. Bance: Les fondateurs de la CGT à l'épreuve du droit, Paris, Ed. La Pensée sauvage, 1978, 253 p.

(41) see above.

(42) cf G. Lyon-Caen: "Les fondements historiques et rationnels du droit du travail", Droit Ouvrier 1951 pp. 1-5

(43) see A. Zinoviev: Le communisme comme réalité, Paris-Lausanne, Julliard/L'Age d'Homme, 1981, 333p.

(44) see M. Tchikvadze: "Socialist Legality in the USSR", in Le concept de légalité dans les pays socialistes, Cahiers de l'académie polonaise des sciences (XXI, 1961)

(45) Verbatim from article 90 of the Polish constitution. Art. 7 of this same Work Code gives the corresponding legal interpretive method: "The provisions of Labour law must be interpreted and applied in conformance with the socialist system's principles and the aims of the People's Republic of Poland."

(46) La théorie générale du droit et le marxisme, op. cit., p. 93

(47) see e.g. F. Miaille: Une introduction critique eu droit, Paris, Maspéro, 1976, passim.

(48) Thus observes R. David in Les grands systèmes de droit contemporains. Paris, Dalloz, 7e éd. 1978, no. 167, p.211

(49) see this critique in Miaille, op. cit. p. 48 sq.

(50) cf. Miaille, op. cit. p. 49

(51) see infra III

(52) cf. R David, op. cit., nos. 125 and 128

(53) ibid, no. 127

(54) A. Zinoviev: Le communisme comme réalité, op. cit., p. 271

(55) B. Edelman: La légalisation de la classe ouvrière, op. cit. p. 12

(56) See e.g. Hayek, op. cit., t. 2, p.104, note 34 that refers to Pasukanis to argue the inaness of the idea of social law.

(57) In Law, legislation and Liberty, op. cit., t. 2, "The mirage of Social Justice", ch. IX,

(58) Wohlfahrt aber hat kein Prinzip, weder für den, der sie empfängt, noch für den, der sie austeilt (der eine setzt sie hierin, der andere darin); weil es dabei auf das Materiale des Willens ankommt, welches empirisch und so einer allgemeinen Regel unfähig ist" (Der Streit der Fakultäten, 1798, sect. 2, § 6, no. 2).

(59) cf Hayek, op. cit. t. 1 Rules and Order, 184 p. This analysis is deliberately centered on Hayek's work. It is not a case of underestimating the contribution of J Rawls(A Theory of Justice, Oxford, Clarendon Press, 1972) or of R. Nozick (Anarchy, State and Utopia, New York, Basic Books, 1974) But, apart from the fact that these studies are based more on the State's role than on the role of legal rule, and that they have been extensively analysed and commented (see P. Rosanvallon, La crise de l'Etat-Providence, op. cit. p. 79 f ., and the bibliography cited, p. 183 f .), Hayek's ideas seem to have the most influence in France today. (see e.g. Y. Cannac, op. cit.) Besides, all this research is only a variation on the same intellectual approach, as Hayek himself points out (op. cit., prefaces to t. 2 and 3,)

(60) Op. cit., p. [illegible] .

(61) Hayek, op. cit., t. 1, pp. 122 - 123 .

(62) This bias is, moreover, explicit: according to Hayek, the Common Law system explains why England was the only country to build up the modern conception of freedom according to law (op. cit. t. 1, p. 84); and "continental thought" is responsible for attacks on this concept (see e.g. op. cit. p.48)

(63) Hayek, op. cit., t. 1, p. 94.

(64) op. cit. p. 124 f. In truth, Hayek more readily uses the terms "government" or "legislator" than "State", which to him seems to be "tainted by continental thought". (op. cit. p. 48) This allows him a bit to bypass the _____ problem of defining the minimal State, a stumbling-block for liberal thought (cf. P. Rosanvallon, op. cit.).

(65) F. Hayek, op. cit., vol.2: "The mirage of social justice", chapter 9, conclusion.

(66) See liberal right-wing reactions to the first social laws limiting the workday of children cited by Y. Brissaud, op. cit. p. 83

(67) Op. cit., loc.cit.

(68) This experience played a crucial role in the intellectual biography and evolution of men such as Hayek or K. Popper who in their youth were socialists. (see K. Popper, The Unended Quest, 1976, French translation by Calman-Lévy, Paris, 1981)

(69)

(70) Op. prec. , chapter 15.

(71) see above.

(72) Moreover, multinationals knew how to take advantage of these exceptional social conditions (see Ch. Levinson, : Vodka-Cola, Paris, Stock, 1977)

(73) Op. cit., p. 97 f .

(74) see above.

(75) "What distinguishes the rules which will govern action within an organisation is that they must be rules for the performance of assigned tasks. They presuppose that the place of each individual in a fixed structure is determined by command and that the rules each individual must obey depend on the place which he has been assigned and on the particular ends which have been indicated for him by the commanding authority. The rules will thus regulate merely the detail of the action of appointed functionaries or agencies of government." Hayek, op. cit. t. 1, p. 49

(76) On this idea of autonomous zones or protective zones, see: Le juge et le droit du travail, thesis, op. cit. p. 158 sq. Dr. Soc. May 1980 , p. 28

(77) On the difficulties of this transposition, see A. Supiot "Les syndicats et la négociation collective,", Dr. Soc. 1983 p. 63, no. 5-22

(78) Quoted by J. Querzola: "Le chef d'orchestre à la main de fer. Léninisme et taylorisme", Recherches no. 32-33 "Le soldat du travail," September 1978 pp. 57-94

(79) cf Hayek, op. cit.,vol 2, chapter IX.

(80) cf P.D. Ollier: Droit du travail, Paris, A. Colin, 1972 pp. 338-369

(81) see _____ III below.

(82) E.g. it is found clearly expressed in article L 525-4 of the French Labour Code.

(83) cf. J. Carbonnier: "L'inflation des lois" in Essais sur les lois, op. cit., p. 271 f.

(84) op. cit., p. 271 f.

(85) M. Weber, "Wirtschaft und Gesellschaft". Mohr. 1956, Tübingen, English ed., cit., vol. 1, p. 85.

(86) Rechtssoziologie, p. 645.

(88) M. Foucault, Surveiller et punir. Naissance de la prison. Paris, Gallimard, 1975, 318 p.

(89) see above.

(90) "La thôrie générale du droit et le marxisme", op.cit., p. 69 f, p. 86 f.

(91) M. Weber, Rechtssoziologie, p. 645

(92) see J. Carbonnier, Sociologie juridique, op. cit., p. 174 f.

(93) cf. H. Motulsky, Principes d'une réalisation méthodique du droit privé, Paris, Sirey, 1948, no. 29, p. 32. On the history of this concept see P. Nerhot,

(94) Tractatus logico-philosophicus, 1921, § 5,632

(95) The logical proof of this was done by Alexandre Zinoviev: in Les hauteurs béantes, Lausanne, L'Age d'Homme, 1977, p. 236

(96) The search for the confusion between "legal rules" and social rules indeed results undeniably in a normative system as complex and therefore as unintelligible as the social matters themselves. On the contrary, legibility is above all the aim of legal rules; traffic lights give an almost perfect example of such legal legibility in organising the exercise of formal liberty (freedom of movement) by abstract subjects (the driver and the pedestrian). The school system during these last twenty years

has been the scene of a progressive replacing of legal-type rules by normalisation rules, motivated notably by educational sociology. In the belief that this implied a condemnation of selective rules that treat the pupil as an abstract subject (limited-time examinations, on a defined matter, corrected anonymously) psychological techniques of orientation have been developed concurrently whose result could only be to disorient the most culturally deprived, or rather surceptitiously to steer them along dead-end paths, thus debarring them from the objective chances of selection, and hence of social promotion, offered them by the traditional school system. The negation of the formal equality and abstract rules that were the cornerstone of the ideology of leaves the ground open for class-based determination pure and simple.

(97) E. Goffman Asylums, French trans. by Ed. de Minuit, Paris, 1968. See the remarkable transposition of Goffman's works done by D. Loschak "Droit et non-droit dans les institutions totalitaires. Le droit à l'épreuve du totalitarianisme" in L'institution, collective work, Curapp, Paris, PUF 1981, pp. 125-184. Also J. Verdes-Leroux, "Une institution totale auto-perpétuée: le parti communist français", Actes de la recherche en sciences sociales, no. 36/37, fév.-mars 1981 pp. 35-63

(98) M. Foucault Surveiller et punir, op. cit.

(99) cf G. Canguilhem, "Le normal et le pathologique", Paris, PUF 1966, 3d ed.: 1975. pp. 182-183

(100) Formal court procedure and the freedom of expression linked to it— are radically incompatible with systems entirely regulated by normalisation rules (i.e. totalitarian systems). This allows the understanding of preferences for psychiatric internment techniques, or kidnapping and disappearance, manifested by régimes, even though they are able to dictate judges' verdicts.

(101) "Le juge et le droit du travail", thesis, op. cit., p. 339 f . In the labour contract, it is in fact the wage earner that is the object, as observed by Ripert (in Traité élémentaire de droit civil by Planiol, Ripert, and Boulanger, Paris, LGDJ, vol. II, 2d éd., 1947 no. 2498)

(102) cf Motulsky's definition, mentioned above.

(103) Law no. 82-689 of 4 August 1982 relative to the freedoms of workers in a firm (see article L 122-40 f. in the French Labour code)

(104) Law no. 71-571 of 13 July 1971 and no. 82-957 of 13 Nov. 1982 relative to collective bargaining (see Fr. Labour Code, art. L-132-27 f.)

(105) Fr. Labour Code, art. L 321-3 f.(106) see J.C. Javillier: "Normalisation du licenciement et sauvegarde des pouvoirs du chef d'entreprise", art. cit., Etudes G. H. Camerlynk, pp. 101-145

(107) law no. 73-680 of 13 JULY 1973: Fr. Labour Code, art. L 122-4 f.

(108) see Ph. Langlois, "Le labyrinthe infernal du salarié licencié pour cause économique", Dr. soc. 1981 , p. 290; A Lyon-Caen , "La loi du 3 janvier 1975: loi morte?" Droit Social 1981 p. 287 . On French law of dismissals as a whole, see Pélissier, "Le nouveau droit du licenciement", Paris, rey, 2d ed. 1980, p. 379.

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