FUTURE DIRECTIONS FOR LABOR LAW SCHOLARSHIP AND INTERNATIONAL COLLABORATION

Jacques Rojot†

One is to some extent the outcome of one's history at any point in time. Therefore, unavoidably this paper will consider new directions for scholarship and international collaboration from the standpoint of both industrial relations and the French point of view. From this aspect, it is to be noted that the situation for French industrial relations is much worse than the one brilliantly described for Canadian labor law by Professor Arthurs. France trails all developed countries with a rate of union organization standing at around 8% and has a record and growing number of conflicting union centers sharing a smaller and smaller part of the eligible labor force.

First, within the scope of the other papers and from this perspective, three important lessons can be learned from the experience of the Labor Law Group. Foremost among them is the importance of preparatory work, prior to international comparison. We cannot take things, and specially institutions, at face value. A long preliminary analysis among specialists is necessary to agree about what exactly is going to be the object of common work, before the comparative process can even begin. Since the work of the labor law group, we know that collective bargaining is not exactly either "négociation collective" nor "negociacion colectiva" in all countries and that works councils are very different from "betriebsrat." There is plenty of room to apply the same analytical treatment to concepts as encompassing and as fuzzy as "globalization," "flexibility," and the like. To give a practical example, with typical old world creativity, French labor law has been recently enriched, for small enterprises, with what could be called a "two years long contract of employment for an indefinite duration with no job tenure." It is in fact a contract for an indefinite duration, which, during the first two years can be broken at will without cause, exempt from the rules applying to

† Prof. de Gestion, University de Pantheon Assas (Paris II), France.

contracts of employment for a definite duration (even though there is a term of two years), and during those two years also exempt from the rules applying to contracts of indefinite duration, under which it falls thereafter. The attempt to extend this type of contract beyond small businesses to all enterprises for the employment of youths resulted in the fracas widely shown on television all over the world and ultimately to its withdrawal, although, to this day, it remains valid for small businesses.

Then, generally speaking and somewhat paradoxically, a good understanding of one's own system of labor law and industrial relations should start with a comparative analysis. By considering how other systems, in different circumstances, in different national environments have dealt with similar issues one gets better insights into the specificities of one's system. We tend to take the obvious for granted, simply because it is there and it is the way it has always been. Comparative labor law and industrial relations demonstrate that it is not so.

Also, an important point has already been made by scholars at this meeting or is implicitly present in their contributions. It can be reinforced, however, from the standpoint of Industrial relations: comparative labor law attains its full meaning and can have an impact on policy only if it is considered within the broader framework of Industrial relations and employment policy. On the one hand, the comparison simply of the letter of the law is misleading. A case in point is the one of labor arbitration. One could proceed to a rich and detailed comparative hermeneutic of the provisions of the French Labor Code and of the U.S. judge-made law on labor arbitration. However, it would be meaningless if one does not take into account the fact that the code provisions are almost never used in practice in France. On the other hand, we should consider the limits of the power of the law. Labor law in France gives what is probably in developed Western economies the strongest and maximum protection of employment security for employees by narrowly regulating individual as well as collective dismissals, be they for cause or for economic reasons. However, comparative surveys in Europe tend to show that the fear of losing one's job and of the consequences of unemployment are nowhere stronger than in France.

Keeping within the lessons learned from the work of the Labor Law Group, we can now go back to the future, and the directions for labor law scholarship. What could comparative labor law do to earn its keep in a pragmatic world?

Again, seen from the French point of view, indubitably, a good look abroad would have the priceless benefit of helping to solve the mystery of what has become of French labor law. It could assist in explaining how the law of the worker and the workplace, which its founders meant to be simple, clear, and understandable easily by both the employer and the worker,[1] has become so complex that few can fully understand it and almost no one can predict its judicial outcomes. Indeed labor law has become one of the most complex areas of the law. This reaches the point that, in some small- and medium-sized businesses, which have no professional lawyer on the staff, some of its most sophisticated provisions are simply ignored, not willfully, but simply because of the lack of knowledge of its subtleties, by both the employer and the employee representatives, when any are present. Even for the professional, the outcome of a legal dispute on labor grounds is full of uncertainties. For example, an employer may have to wait around five years to find out if he was within his rights in dismissing an employee for cause. The level of uncertainty is such that there is a joke in legal circles that there are two types of gambling in the country: the lottery and the Labor Court. Management lawyers tend to add that they stand better chances to win at the lottery. Finally, it has become such a straightjacket that in some cases, both employer and employee have conspired to avoid its provisions. Such is also the case for dismissals that managerial level employees and employers have in some cases disguised as "negotiated resignations." Of course, in that instance, the Courts intervened to prevent the parties to proceed as they wished by requalifying their agreement as a dismissal. There has to be a problem with legal provisions that both parties agree to evade.

Another major benefit of comparative labor law, understood in the wider meaning of its industrial relations and employment policy framework, would be to understand fully the purpose and workings of a given provision before "borrowing" it from a foreign legal system and implementing it nationally in another country. Such attempts have generally resulted in, at worst, dismal results and/or total failure, and, at best, unforeseen consequences, quite different from the results expected and hoped for. The reason for such disappointments are quite obvious: a given legal provision is embedded into the national legal culture, the industrial relations system, and a global system of institutional relations. Exported outside of its context, it will be subject to the new national legal culture, industrial relations, and

1. George Scelle, *Le Droit Ouvrier: Tableau de la Législation Française Actuelle* (1922).

institutional web of institutions, and therefore will be understood totally differently.

A topical example is the borrowing of duty to bargain from the U.S. system by French labor law in 1982. The duty to bargain has had a major impact on U.S. industrial relations as a tenet of a public policy promoting collective bargaining and has had a major influence in shaping the way to reach agreement between management and labor. Its results, when considered in the perspective of reviving collective bargaining in France have been very disappointing,[2] except for sponsoring yearly rounds of formally enacting wage increase agreements additions to existing collective agreements. There are presently debates about extending the little used legal provisions for mediation as well as a concern about providing legal restrictions on the right to strike for employees of essential services. Before enacting statutes, a recourse to comparative analysis would be, in our view quite useful.

Conversely, this not to say that the inner workings of a legal national system cannot evolve toward results or institutions similar to the ones of a different country. This takes place through its own cultural evolution though, rather than by borrowing and forced implementation. A case in point is the reinstatement of an unlawfully dismissed employee. During decades the French courts have systematically invalidated all statutory provisions with the goal of reinstatement, while, in the United States, arbitrators routinely reinstated in the union sector of the economy. The legal argument took its root in civil law, applying the law of contract to the contract of employment. In case of breach of contract, no duty to perform, or not to perform, the contractual duties could be imposed by the courts. They were limited to awarding damages for non performance. Thus reinstatement was excluded and wrongful dismissal could only bring a compensatory amount for damages. However, now reinstatement has crept into the system, through and beyond statutory law. The basis is now the violation of essential freedoms or civil rights. Thus, interestingly, the same outcome was reached by very different processes.

An interesting issue in the same line of thought is whether comparative labor law could help explain why the rate of organization has reached such depth in France as to be the lowest one among the developed countries (8% of the wage earning labor force in an

2. Yves Delamotte, *La Loi et la Négociation Collective en France: Reflexions sur l'Expérience 1981–1985*, 42 REL. INDUS. 92 (1987).

optimist view, including retired union members, with the strongholds in the public sector). Indeed, France is not the only country where union membership has plummeted, the United States is another case in point. However, not all European countries have followed that path and no developed country has such a low figure. The argument sometimes made that Non-Governmental Organizations (NGO), in the post modern society are called to play the part that the union played in modernist times is worth considering. Indeed new forms of non-union employee organizations such as worker's "coordinations" have emerged (for nurses for instance), often to disband after a conflict however. Attempts also have been made to organize the unemployed as well as the self-employed. However, they remain of marginal importance, with a few exceptions, such as for instance the "strikes" (actually traffic blockades by truck drivers/owners). There is also a danger in that perspective. For instance an NGO and a union sharing the same leadership can result in the union members becoming pressed into the fight for the NGO's societal and ideological goals, while the members' interests are conveniently forgotten.

At this point, having considered the potential benefits, a relevant question must be raised: what are the obstacles in the path of the useful use of comparative labor law? Foremost among them stands the ideology of the concerned parties certainly, but as much if not more from the part of the theoreticians and scholars in the discipline. Some of the latter tend to adopt positions of an even more militant nature than the practitioners. It is probably the case for two reasons: one the one hand they are more remote from the field and from the constraints and pragmatic realities that weigh on the day to day running of labor relations. On the other hand, for some of them, they feel that they have to make up for this lack of involvement, by adopting the most extreme positions. However, some of the parties themselves, but certainly not all, employers and union representatives, as well as some labor inspectors and judges, do not shy from references to class struggle positions and motivations. For a foreign observer the shared references (for or against) to the Marxist terminology and concepts is strikingly surprising.

Also surprising is the lack of basic economic knowledge and the interpretation of the impact of labor relations outcomes on economic and employment consequences in an extremely partisan light with surprising, and unquestionable, assumptions. This was, for example particularly obvious in the case of the debate around the thirty-five hours work week.

Finally, one should note the reluctance to face the new developments that can hardly be tackled in the perspective of the traditional framework of industrial relations and the classic scope of labor law. Both were conceived and adapted to the historical circumstances of the dominance of large manufacturing industrial sectors, the so-called "fordist" model. Many well known factors,[3] such as the impact of new technology and communication developments, the displacement (partial) of the industrial worker by the knowledge worker, the eruption on world markets of newly developed countries, consumers' new demands, etc., have rendered the old tools ill adapted to a deeply transformed field.

Management also has changed. On the one hand it certainly, in large firms, has become more professional and better trained. First, foremost, it is subject to new requirements because job contents have to some extent and for some of them, been transformed due to the move of the economy toward services and the growing part played by the new technologies in industry. One of the consequences of this complex movement is conflicting pressures on the management of the labor force. On the one hand, management seeks to control costs to introduce as much as flexibility in manpower as possible. On the other hand, the more complex content of jobs, notably including behavioral skills, drives management toward a participative trend in order to gain the willful cooperation of the employee. Obviously, labor law conflicts with these new requirements that transform industrial relations. Thus a comparative analysis of national responses would be of great use.

To conclude, for all these reasons, there is indeed a bright future for international collaboration in comparative labor law and industrial relations scholarship. It should not occur however for the wrong reasons. Recent developments in European Union law are here a useful reminder of what could go wrong in that area. A planned new EU directive on services in the internal market,[4] introduced a deep change in method, for it abandoned the former procedure of harmonization of the law and regulations of the Member States, and instead was given a generalized application of the principle of the country of origin. Thus, the directive provided that the law applicable to the provision of services would no longer be the one of the State

3. Jacques Rojot, *Industrial Relations in Europe: Recent Changes and Trends*, 4 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS (1988).

4. THE DIRECTIVE ON SERVICES IN THE INTERNAL MARKET (Roger Blanpain ed., forthcoming).

within which they are provided, but the one of the State of origin of the provider. Thus several national laws would have to be simultaneously applied, in competition, on any single national territory in the EU. More generally, given the huge scope of the field covered by the directive, one should underline the risks of the concurrent application by the courts of each member state of the civil, labor, and commercial law of all the other Member States, depending on the countries of origin, with the foreseeable divergences in the application of the rule of the law. There would be room there indeed for comparative labor law, each magistrate, and presumably each lawyer, having potentially to master the labor law of the twenty-five Member States! This nightmare is probably going away because the more recent versions of the planned directive, if not completely abandoning the principle of the country of origin, have strongly mitigated its effects.