

The Concept and Developpement of Labour Law

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Parity boards and apprenticeship commissions, just like governments, public authorities, liberal professions, and others, are not perfect. But if we consider the work they have accomplished in so short a time, and without serious reasons for criticism, there is no doubt they can withstand comparison with the most efficient and meritorious institutions.

Improving the technical language of a trade or profession is only a very small part of the task which falls to parity boards and apprenticeship commissions; but from my point of view this work is so important, so necessary, and so urgent, that if the boards and commissions had done nothing but that, they would already have proved their worth.

THE CONCEPT AND DEVELOPMENT OF LABOUR LAW

RENÉ H. MANKIEWICZ

Definition and scope

Labour law can be defined as "the body of rules either deviating from, or supplementary to, the general rules of law, which regulate the rights and duties of persons performing or accepting the work of a subordinate". The validity of the labour contract is of no importance for the application of these rules to a given case. The rights and obligations of the persons concerned result directly from the performance or acceptance of labour under the direction of somebody else. Thus it has been admitted by certain courts that the employee has to be paid the wages established by a collective agreement or similar regulations even if the labour contract is void, e.g., when a minor hires out his services without having the capacity to do so. Likewise, according to certain national laws the absence of a valid contract does not affect the rights which the employee may have in regard to social insurance benefits, etc.

The difference between an "employee" in the meaning of labour law and any other individual who is working for, or giving services to, another person lies in his state of "dependence" in regard to the employer. This dependence is to be understood in a purely material sense. It signifies a real subordination of the employee to the employer. It finds its most precise expression in the "right to direct" the employee, thus permitting the employer to tell him what kind of work to do, and to prescribe the working conditions, working hours, etc. of each particular job.

Nevertheless there are people who, while not subordinated to somebody else and in charge of their own job and its material organisation, find themselves however in a state of economic dependence vis-à-vis a principal. Such are home workers, hairdressers who rent their chairs, taxi

drivers, etc. Labour law identifies them with employees precisely on account of their lack of economic independence and freedom of movement.

On the other hand, there are men who work for another person and who yet keep a high degree of autonomy and liberty of action, remaining masters of their work and of the use of their time. This is for instance the case of presidents, executive managers and other corporation heads. They are subordinated to the corporation, a legal person, represented by the shareholders or some other qualified body. However, since these assemblies and bodies cannot direct and supervise them at every moment, general directors, executive officers and other "statutory representatives" of a legal person normally have the role, not of employees, but of employers, exercising in the place of the legal person the rights and duties which labour law establishes for the latter. This rule is not without exceptions and their number and extent vary according to the status of the director and his position within the company, and also according to the national law involved. Highly interesting legal decisions on all these questions can be found in the twelve volumes of the *International Survey of Legal Decisions on Labour Law* published by the I.L.O. For the years 1925 to 1938/39 this survey analyses and digests the most important cases on labour law decided by the Law Courts of England, France, Germany, Italy and the United States. One can only regret that the I.L.O. did not resume this publication after the war.

The rules of labour law as embodied in statutes, administrative regulations, legal decisions and collective agreements, are not always limited to the relations between the dependent employee and his employer. Since they create special rights and

duties in connection with the performance or acceptance of the work of a subordinate, they apply not only to those who perform it or benefit therefrom, but also, at least in some instances, to members of their families, and even to their "dependents" or legal heirs. In this respect, it may be noted that statutes dealing with social problems tend to disregard more and more the bond of kinship and to replace it by an economic criterion i.e. the fact that a person "depends" upon the employee for his livelihood (*personne à charge du travailleur*). Quite often (as in the case of family allowances, social insurance benefits, protection against the attachment of wage claims, etc.) this person has a personal right (*droit subjectif*) to these benefits which can not be explained by any legal relationship between him and the employee. This right derives entirely from the fact that he lives at the expenses of the labourer.

We may also note here another peculiarity of the status of the labourer's family: instead of including all the minor children, this family, in the eyes of the law (for example, in respect to the amount of certain allowances), often comprises only those children who have not reached the legal age for admission to employment; but, contrariwise, it may comprise a divorced wife or a foster child when the employee provides in fact their livelihood.

The term "législation industrielle", traditionally employed in France to designate this branch of law known elsewhere as "Labour Law", "Social Legislation", "Arbeitsrecht", "Diritto del Lavoro", etc., really applies only to the body of police regulations dealing exclusively with the equipment, operation, heating, etc., of industrial and commercial establishments, the prevention of industrial accidents, occupational sickness, arbitrary exploitation of workers, etc. The traditional French expression does not take account, as do its English, German, and Italian equivalents, of the considerable mass of statutes enacted for the improvement not only of the general working conditions, but especially of the living standards and the social security of workers and employees of all classes and categories. Thus the expressions "droit du travail" (labour law) or "droit social" (social law) seem preferable, and they are, as a matter of fact, coming more and more into use.¹

(1) Cf. The title of the review "Droit Social" directed by M.P. Durand, professor at the Faculté de Droit of Nancy.

Labour law — an autonomous division of the law

Taken in the broad sense adopted today, labour or social law forms an "autonomous division of the law". It is independent of the classical distinction between private law and public law. This "summa divisio", inherited from Roman law, was valid till the beginning of the 20th century. Since then — as has often been noted² — this distinction has become blurred. Today it does not correspond anymore to reality. The encroachment of private law upon public law — a common trend in the last century — has given way to the encroachment of public law upon the province of private law. Like economic law³, and well in advance of it, labour law has been caught up in this movement. It became emancipated from the traditional distinction between private law and public law and comprises legal rules taken from both of them. Here are some of their sources: public law (special labour courts, advisory councils, etc.), administrative law (factory inspection, accident prevention, statutes dealing with, and regulating, trade-unions, etc.), criminal law (breach of contract, violation of the Sunday or weekly rest, payment of wages in a currency that is not legal tender, hiring of foreign labour without special permission, etc.), fiscal law (imposition of wages, etc.), procedural law (procedure before labour courts, conciliation and arbitration, attachment of wage, claims, etc.); family law (legal "emancipation" of married women who accept employment, right of a minor to dispose of his wages, etc.), law of property (low-cost housing, extension of the lease for the benefit of the unemployed, etc.), law of industrial and commercial property (continuation of the contract of labour by the purchaser of a business, inventions by employees, etc.), law concerning the press (statutes regarding journalists, trade-union newspapers, etc.), insurance law (accident insurance, social insurance, etc.).

(2) Cf. MANKIEWICZ, Rene H., *Le travail en équipes internationales*, Lyon, Institut de droit comparé, 1938, p. 138 ss., and the articles assembled in the *Recueil Lambert, Introduction à l'étude du droit comparé*, tome III, chap. V, especially those of REIZLER, MORELLET and JOSSERAND. Also: JOSSERAND, *L'essor moderne du concept contractuel*, in *Recueil d'études sur les sources du droit en l'honneur de François Geny*, tome II, p. 347; ROUAST, *Le contrat dirigé*, in *Mélanges juridiques dédiés à Sugijama*, p. 317.

(3) Cf. DE KIRALY, *Le droit économique, branche indépendante de la science juridique*, in *Recueil Geny*, tome III, p. 111.

These heterogeneous rules imported from all the classical branches and subdivisions of the law are clustered around one social phenomenon: the performance or acceptance of work by a subordinate. *They are brought together in the same division of law not by reason of their legal nature but by the identity of the social situation to which they apply.* This social datum is their *raison d'être* and, consequently, links them together⁴. After uniting these various rules, of different origin, in an autonomous body of the law, the latter produces new rules and moulds the interpretation of all of them. It creates new principles and brands those which it has drawn from other branches of the law. Indeed, each coherent body of legal rules creates its own "spirit" and introduces it into their application. French administrative law was formed this way since it was built by the *Conseil d'Etat* around the social phenomena produced by acts and institutions of public administration.⁵ Using an expression introduced by M. G. Renard⁶, these "autonomous bodies of legal rules" may be designated "institutional" divisions of the law (*droits institutionnels*) which create and shape their own statutory, judicial and "corporate" norms for the government of the social institutions which form their living core.

Labour law is one of these autonomous or "institutional" bodies of law, with its spontaneous life and its particular spirit. The modern legislator is so well aware of this fact that special jurisdictions (labour courts) have been established for the administration of labour law, and in these courts, the representatives of the employees and employers who have had no legal training have more weight than the learned judge who presides over them.⁷ The reason for the establishment of these courts is that men who are permanently in contact with the social situations created by "labour" respond more readily than lawyers to the "spirit of the laws" which animates this particular body of legal rules, known as labour law.⁸

Labour law before modern times

It would be a mistake to consider labour legislation as a completely new legal discipline. Ever since one man has worked for another without belonging to his family there have been legal norms for this relationship.

It is true that this labour relation has not always been governed by rules of private law, nor always by the principle of equality between the worker and his master. Thus, in ancient times, labour was furnished by slaves who were the property of their masters, and the peasants of the Middle Ages were subject to forced labour for the lords of the manor, a consequence of their social status that was determined by public law.

Certain authors insist upon the fact that, although there are no labour relations without legal norms applicable to them, ancient labour law did not have the special character of its modern counterpart, which is like a body of rules to protect those who perform work in the service of somebody else. However, the urge of the employer to abuse his "position of power" does not date from today. In ancient Greece as well as in Imperial Rome there were laws designed to protect the slave labourers against the unscrupulous masters. Moreover, in the Middle Ages we find detailed regulations dealing with "dependent" labourers. These rules, however, were rarely made by government, whether provincial or municipal. They were established by the guilds.

The guild, in virtue of its power over its members, enacted very strict norms concerning recruiting, training, wages, treatment, etc. of their workers (apprentices, journeymen, etc.). However, as for the few administrative regulations in respect of certain trades and industrial establishments, these guild statutes were not enacted solely in the interest of the workmen. Their essential purpose was to restrict competition between the "entrepreneurs" and to achieve prosperity for the trade or craft, as well as for the city and the whole of the country. As early as then, people realized the effect of "cartelisation" that is produced by the uniform regulation of working conditions in business enterprises. As early as then, they also realized that reasonable protection of labour is

(4) Cf. *Le travail en équipes internationales*, p. 142.

(5) HAURIU, *Précis de droit administratif*, p. 48.

(6) RENARD, *Théorie de l'institution*.

(7) *Les tribunaux du travail*, publication of the I.L.O., 1935. BINET, *La juridiction du travail dans les différents pays*, in *Recueil Lambert*, tome II, p. 536 ss.

(8) On the general question of classification of legal rules according to social and economic data see RIPERT, *Ebauche d'un droit civil professionnel*, in *Recueil Capitant*, p. 677, and by the same author, *Le régime démocratique et le droit civil moderne*, also, *L'ordre économique et la liberté contractuelle*, in *Recueil Gény*, tome II, p. 347. ROUAST, *Le risque professionnel et la jurisprudence française*, in *Recueil Gény*, tome III, p. 228. JOSSEMAND, *Configuration du droit de propriété dans l'ordre juridique nouveau*, in *Mélanges juridiques dédiés à Sugiyama*,

p. 95. "Even more than in the feudal age, the "geography" of the law of a country threatens to become a mosaic of a hundred different shades; thus, as has happened with common law in general, the law of property is split up and broken down into a multitude of special rules, made to the measure of the profession or of the class: in spite of all the efforts made in order to modify its evolution, history always repeats itself, and each social group hopes to have its own particular law."

the best insurance against social troubles and economic crises, which, more often than not, are let loose by inequitable wages and a too high percentage of unemployed.

At the height of the Middle Ages the guild rules were particularly favourable to apprentices and journeymen. Wages were determined on the basis of the scholastic idea of the "just wage". Night work was forbidden — although it is true that there was this practical reason for this prohibition, namely that after nightfall members of the guild could not so easily control each other's production but wanted nevertheless to prevent each other from doubling their production by working at night. Charitable institutions supported by the guilds came to the aid of sick workers and helped their families in case of the death of the breadwinner. The scrupulous observance of religious holidays took the place of paid vacations.

Tradition has got us into the habit of seeing in the guilds only the abuses of the later period. We forget easily all the good which they did through out many centuries. Later on workers have had to fight for several hundred years and to wage battles, often bloody and ending with death, to obtain a legal, economic and social status comparable to that of the journeymen of the Middle Ages. In many countries they have not yet achieved this.

Power and rôle of trade-unionism

France was the first European country to outlaw the guilds. Holding a monopoly on the labour market, the guilds had come to consider only their own interests and paid no attention to the needs of workmen seeking employment. Moreover, they enjoyed considerable privileges which were incompatible with the new order based upon the equality of all citizens before the law. The Act of June 14th, and 17th, 1791, known by the name of its sponsor as "Loi Le Chapelier", declared illegal any association between persons engaged in the same trade. During the nineteenth century other European countries enacted similar statutes. They intended to break the monopoly of the guilds and to guarantee the "freedom of work and trade". In fact, these statutes resulted in preventing the workmen from joining together to obtain better working conditions through collective action than employers would grant when dealing individually with each worker in search of employment.

Although the foregoing statutes were directed against employers as well as against employees,

they did not always prevent the establishment of employers' associations. The entrepreneurs succeeded indeed easily enough in uniting their forces for the common defence of their own interests. French legislation even went so far as to employ two measures in the fight against illegal associations. The law was more severe for workers than for entrepreneurs; cf. Article 291 of the Criminal Code of the First Empire, and the statute of April 10, 1834 which accentuated the inequality established by the Criminal Code.

In face of unscrupulous exploitation, workers in all countries succeeded, however, in establishing, under different forms and names, the friendly societies, mutual associations, brotherhoods, etc. which they had formed in the Middle Ages within the guilds. In all countries⁹ the history of labour legislation during the 19th century and at the beginning of the 20th is characterized by the struggle which workers carried on to obtain the twofold freedom of association: the (positive) freedom for the employee to join a trade-union of his choice and the (negative) freedom not to join a trade-union, if abstention was preferred. This struggle for the liberty of the individual and for the freedom of association was won in all countries, but its ultimate result was not without affecting the very principles which had been the battlecry.

The development of modern labour legislation is due largely to the initiative of trade-unions, and sometimes also has been the result of the pressure which they put upon employers and governments. The strong bargaining power of unions and associations freely created by workers or employers of their own volition has done away with the weak bargaining position of the individual; it secures financial and social benefits which an individual would have found difficult to attain by himself.

Sometimes this power has weighed heavily against the government. Thus, from time to time the legislator has been compelled to adopt "class rules" which have not always been for the common welfare of the nation. It has even happened that trade-unions or employers' associations have exercised a strong pressure on their adherents and on those of their class who were not "affiliated". Finally, the concessions obtained at one time or another were often secured only at the end of costly struggles, strikes and lockouts, which disturbed

(9) Cf. for France: LEVASSEUR, *Histoire de la classe ouvrière en France*, and DOLLEANS, *Histoire du mouvement ouvrier en France*; for England, WEBB, *History of Trade-Unionism*.

the economic life of the country for the benefit of but a few.

Today employees and employers in most countries have the right to adhere to the professional organization of their choice or to abstain from any affiliation. If the freedom of contract has been perceptibly limited by statutes and collective agreements, the freedom of association is now protected by the law, although such protection may not always be very effective.¹⁰

As a matter of fact, trade-unions are indispensable for the development of reasonable working conditions, in order that those imposed unilaterally and arbitrarily by employers may be avoided. Indeed, the legislature is not equipped to intervene properly and conveniently in the legal relations between workers and employers. Legislative bodies do not possess that intimate knowledge of the operation of each firm or plant which is necessary for enacting legislation to take into account the needs of the business as well as the legitimate demands of the employees. The type of work varies from one firm to another and the living conditions of the employees are not identical in all parts of the country. Legislation, necessarily uniform, is therefore unfit to work properly in this field. On the other hand the "largeness" of the legislative body prevents the proper preparation of the hundreds and thousands of detailed regulations which would be necessary to cope with local and industrial condi-

tions.¹¹ Therefore the government delegates to freely formed trade-unions and employers' associations the right to prepare and adopt the necessary regulations by means of collective bargaining and agreements.

To-day's problems

The situation at the present time is characterized by the triumph of regulations, by government or through collective agreements, over freedom of contract, i.e. over freely negotiated contracts between individuals, the employee and his employer.

Determined to break the feudalism of money, the State pays special attention to the working class and accords to professional organizations the right to formulate and enact principles of public policy, which are binding upon their affiliates. However, there is the danger that this attention may develop into a regime where labour would be the slave of the State or of its own trade-unions.

This proves once again that the choice is between protection and freedom. The evaluation of them varied considerably at different times in history and the attainment of a just balance between these two principles continues to remain the unending task of every civilised society.

(11) On the difficulties with which parliaments are constantly faced by reason of the "technicality" of the statutes they are asked to enact, cf. our study "*Le travail en équipes internationales*", p. 79 s.

(10) For details on this question, cf. the recent studies made at the request of trade-unions by the I.L.O. and the U.N.O.

LABOUR JURISPRUDENCE

Powers of Minimum Wage Commission

Claiming that they had not been paid time and a half for overtime work, thirteen employees of the defendant company made application to the Minimum Wage Commission. The Commission took action against the company.

Decision: The court decided to maintain the action in respect of twelve of the employees. The purpose of the Minimum Wage Act is to protect salaried workers. Now although this Act must be strictly interpreted in so far as it derogates from the common law of the province, yet the dispositions must be interpreted in a way that will assure the accomplishment of its object. Hence the Commission has the power not only to determine minimum wages but also to provide for the payment of additional amounts of overtime. If one of the orders of the Commission establishes that overtime is payable at the rate

of time and a half, that provision is legal, even if the basic wage is higher than the minimum fixed by the Commission (see Ordinance No. 2, s. 3, Quebec). The Commission also has the power to provide for the payment of an indemnity in case of cancellation of contract of lease and hire of services (see Ordinance No. 3, s. 13, Quebec). The terms of section 14A of the Act directly cover the former, and the latter is covered by interpretation of section 14, since the Commission has the right to establish payment of wages on other than an hourly basis. Section 12 of Ordinance No. 4, establishing regular work weeks, and section 60, establishing overtime rates, were also discussed.

(Minimum Wage Commission v. Duke Equipment Co. Limited, 1949; C.S. 319, Montreal Superior Court, August 26, 1949; Justice Salvas; C.L.L.R. 31,125 No. 35,154.)