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Michel Lallement, Olivier Mériaux^{*}

Status and Contracts in Industrial Relations. „La Refondation sociale“, a new Bottle for an old (French) Wine?^{**}

Since 1999, the main French employers' organisation (Medef) has been promoting a radical transformation of the institutional framework of industrial relations and the welfare state. This initiative, known as the „Social Re-foundation“ agenda, has started to be implemented through a new cycle of inter-sectoral negotiations with the unions, on major issues such as the reform of the social security and unemployment insurance schemes: „the ways and means for the development of collective bargaining“, etc. Echoing the trends observed in many national industrial relations systems in Europe and also at the UE level, the „Social Re-foundation“ represents the most ambitious attempt ever made in France at redefining the boundaries between legal and contractual rules in the regulation of employment relations. In order to assess the issues at stake with the „Social Re-foundation“, the paper first provides a brief historical overview of the French industrial relations institutions, focusing on the „shameful corporatist“ mechanisms through which labour and capital were authorised to apply, spell out, in some cases also modify state regulations in this field. Then the authors question the assumptions and the motives of the ‘social re-founders’ when they claim to promote the „collective autonomy“ of social partners against state law, by showing how their dualistic conception of law and contract is not in accordance with the complex institutional reality. Finally, it is suggested that the main aim of the Medef's strategy is to favour contractual autonomy at the lowest levels of collective bargaining, so as to develop firms' self-regulation. This would also mean a return to the individualist contractual philosophy of civil law, i.e. the very opposite conception on which labour law and industrial relations institutions have been built up since the late 19th century.

Vertrag und Gesetz in den industriellen Beziehungen. Die „refondation sociale,“ – ein alter (französischer) Wein in neuen Schläuchen?

Seit 1999 betreibt der französische Arbeitgeberverband (Medef) eine radikale Umwandlung des institutionellen Rahmens der industriellen Beziehungen und des Wohlfahrtsstaats. Diese Initiative wird als „soziale Neugründung,“ bezeichnet. Um die Bedeutung dieses Vorgangs würdigen zu können, wird in dem Papier zunächst ein kurzer historischer Überblick über die Institutionen der industriellen Beziehungen in Frankreich gegeben. Besondere Aufmerksamkeit wird dabei den „schändlichen,“ korporatistischen Mechanismen geschenkt, die Arbeit und Kapital die Aufgabe übertragen, staatliche Normen in diesem Bereich anzuwenden, zu konkretisieren oder in definierten Fällen auch zu modifizieren. Die Autoren hinterfragen anschließend die Annahmen und Motive hinter dem Anspruch der „sozialen Neugründer,“ die „kollektive Autonomie,“ der Sozialpartner gegenüber staatlichen Gesetzen zu stärken, indem sie zeigen, dass die dichotomische Konzeption von Gesetz und Vertrag nicht mit der komplexen institutionellen Wirklichkeit übereinstimmt. Abschließend wird die Annahme begründet, dass das wichtigste von Medef angestrebte Ziel in der Förderung der Vertragsfreiheit auf der untersten, der betrieblichen Ebene der industriellen Beziehungen besteht, um die dezentralen Gestaltungsmöglichkeiten der Unternehmen zu erweitern. Dies würde allerdings eine Rückkehr zum individualistischen Begriff des Einzelvertrags im bürgerlichen Recht als Basis der industriellen Beziehungen implizieren, also zum Gegenteil dessen, worauf Arbeitsrecht und industrielle Beziehungen seit dem späten 19. Jahrhundert aufgebaut wurden.

Key words: Collective bargaining, contract, corporatism, France, Durkheim

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Introduction

In November 1999, after yet another conflict with the government over the implementation of the 35-hour working week, the main French employers' organisation (Medef) invited the five trade-union confederations (see insert 1) to discuss the establishment of a „new social constitution”¹. All „social partners” agreed on an agenda for inter-sectoral negotiations on major issues such as the reform of the social security and unemployment insurance schemes, „the ways and means for the development of collective bargaining” and the overhaul of the vocational training system. Beyond the issues specific to each particular topic, this global initiative – known as the *Refondation Sociale*, i.e., „social re-foundation” – is the most ambitious attempt ever made in France at reinforcing the regulatory function of rules stemming from collective bargaining between labour and capital representatives *vis-à-vis* the State and its legislation. While France, more than any other European country, is characterised by the considerable importance of state law in industrial relations' regulations, the „social re-foundation” has given birth to a wide debate on the boundaries between the respective jurisdictions of the social partners and the government. These questions even took an important space in the 2002 presidential candidates' electoral programmes. Adopting the employers' organisation's analysis, the new right-wing government (elected in June 2002) announced its intention of „freeing” collective bargaining from its „legislative straightjacket” by giving greater autonomy to the social partners.

This issue has not only arisen in France. In several European countries, such as Italy, Netherlands, Germany, or Spain, recent reforms or governmental projects aiming at reforming the principles of collective bargaining and unions' representativeness has raised the same debates about the extent and content of social partners' „collective autonomy”. At the EU level, these questions have arisen in a very salient way ever since the Maastricht Social Protocol, which was subsequently incorporated into the Amsterdam Treaty (Articles 137 to 139). Indeed, the EU Treaty now includes a compulsory procedure for consultation of the European social partners before the Commission presents any proposals in the social policy field. If the social partners decide to begin negotiations on the subject in question and if a collective agreement is signed, it can at the joint request of the signatories be incorporated in a ‘Council decision’, on a proposal from the Commission².

Significantly, this joint production of European law, in which many observers have seen the basis of an „Euro-corporatism”, is considered as an example to be fol-

¹ We would like to thank George Ross (Harvard University, United States), as well as the referees, for their comments on an earlier draft of this article.

² It was on this basis that the first negotiations took place, and agreements were signed on parental leave (1995), part-time work (1997) and fixed-term contracts (1999) and subsequently implemented as directives.

lowed by the French social partners engaged in the „social re-foundation”. More generally, there is, amongst French social and political leaders, a very widespread feeling that employment relations in France are behind the times when compared to other European countries. On the Medef’s side, the rhetoric of the „adaptation” of French industrial relations to the competitive international environment is central to the discourse advocating the necessity of the reforms. Convinced of the virtues of economic liberalism, the originators of the „social re-foundation” consider that the ingredients of a national competitive economy are well-known and firmly demonstrated by what they observe abroad and the „indisputable” analysis of international organizations such as the OECD. One of the first goals to attain is to eradicate „social rigidities”, by deregulating the labor market and promoting a more decentralized collective bargaining system, where the general rules of labour law could be adapted to the specific situation of each firm.

The trend towards the decentralization of industrial relations systems is common to many European countries. It is particularly perceptible in neo-corporatist countries, such as Sweden or Germany, where „opening clauses” (*Öffnungsklauseln*) have been widely introduced into branch-level agreements, allowing firms to diverge from collectively agreed standards. F. Traxler, S. Blaschke and B. Kittel (2001) have shown that these metamorphoses of labour relations do not add up to a convergence between national models or a general „deregulation” of employment relations. Nevertheless, over the last few decades, all national industrial relations’ systems in Europe have been characterized by an increased inter-dependence between employment legislation, employment policies and collective bargaining and the trend has been for regulation to be increasingly delegated to the social partners at EU, national and firm levels.

This conjunction between the decentralisation of collective bargaining and the increasing autonomy of the social partners has deeply affected, albeit to varying degrees, the former equilibrium reached under the Fordist-Keynesian era between rules emanating from contractual relations engaged by labour and capital on one hand, and legally prescribed rights and obligations on the other (Streeck 1998). Indeed, the general trend towards „contractualisation” that has spread to all areas of social activity (Supiot 2001b) produces very strong disruptive effects in the field of employment relations, as their regulation is founded upon a series of rules and social institutions „which ensure that the employer-employee relationship is not primarily determined by market forces” (Hyman 2000: 1). This function is fulfilled essentially by the definition of equilibrium between what individuals can exchange through their employment contract and an intangible basis of statutory rights that individuals „possess as members of a social group independently of individual agreements, which they cannot negotiate away by contract” (Streeck 1992: 51).

The current attempt to reform the French industrial relations system offers a very rich field from which to analyse this „great transformation” in the ways status and contracts are articulated in the regulation of employment relations. If the case is

so exemplary for our research purpose, this is partly because of the unbounded ambition of the social „re-founders”, who explicitly aim at redefining the respective roles of the market and social institutions in taking responsibility for the risks inherent in the development of post-industrial societies (Kessler 1999; Kessler/Ewald 2000)³. But it is also and mainly because of the peculiarities of the long and conflictual French social history. In France, the current trends towards a greater autonomy of contractual norms from rules of status proceeds from a general reluctance – shared by the State, trade unions and employers’ associations, for different reasons to which we will soon come back – to recognize the complexity of French industrial relations institutions. Within these are linked and coexisting „autonomous” regulations (collective agreements and bodies which emanate from it) and „heteronomous” ones produced by public authorities. Due to the fundamental jacobinist nature of the national political culture, the very relative „contractual autonomy” of social partners became a tangible principle only through a constant hybridisation of statutory and contractual features. This insured, on the one hand, the participation of individual interests in the construction of the general interest, and this, in the absence of a legitimising „neo-corporatist” doctrine. On the other hand, it also allowed for the necessary counterbalancing between the different actors involved in industrial relations, a necessity due to the subordinate position of labour in a capitalist economy.

The first part of this paper will examine these aspects by first giving a brief historical overview on how labour and capital were authorised to supply State intervention in the regulation of employment relations. Then, we shall explain why the collective agreement and the main institutional manifestation of collective bargaining – the jointly managed bodies which define the field of the so-called „parity doctrine” – can be considered as a neo-corporatist mediation between the State and civil society (even if this remains unacknowledged in the French context). This is precisely the reason why, according to us, the ‘social re-founders’ promote a fallacious and antagonistic conception of the relations between the political domains and an idealised „autonomous social sphere”. Medef’s initiative is also in keeping with the employers’ general strategy since the mid 1980’s that aims at emancipating the firm in its function of regulating employment relations. Given the well-known weakness of the French trade unions (in terms of membership and cohesion), contractual autonomy at the lower levels of collective bargaining should easily lead to a self-regulation of firms. As we shall see in the second part of the paper, by examining the positions of trade unions and of the state on the controversial „social re-foundation”, all actors do not share the same vision of the dangers and opportunities created by this change.

³ It is significant that the originators of the ‘social re-foundation’ were two specialists (university academics) of risk management: D. Kessler, economist, is Medef’s vice-president and one of the directors of the „Fédération Française des Sociétés d’Assurances” ; F. Ewald, now research and strategy director in the same federation, was also assistant to M. Foucault at the Collège de France, studying the origins of the Welfare State.

Finally, we suggest that the real issue for the reform of industrial relations should to be the invention of new procedures that allow for the articulation of status and contracts aimed at maintaining a socially regulated labour market. What we observe from Medef's strategy is a long way far from this. Ignoring the social embeddedness of contracts and the need for a „third party” in any contractual relations, its ideology refers less to the contract as it has been constructed by labour law since the late 19th century, and much more to an individualist philosophy of civil Law.

Insert 1: A brief overview of the French trade unions and employers' associations
(Sources: Eironline; Jobert/Goetschy 2002)

Union density has traditionally been low in France. It was around 23 per cent in the mid-1970s, fell to about 16% by 1985, then declined to around 9% by the mid-1990s. Moreover, pluralism, if not division, is a fundamental feature of French trade unionism. Five confederations (or national and multi-industry trade union organizations) have been recognized as representative at national level (see below). These are the *Confédération générale du travail* (CGT), the *Confédération générale du travail-Force ouvrière* (CGT-FO), the *Confédération française des travailleurs chrétiens* (CFTC), the *Confédération française démocratique du travail* (CFDT) and the *Confédération française de l'encadrement-confédération générale des cadres* (CFE-CGC).

The **CGT**, the oldest French confederation, was established in 1895, but has faced severe internal dissensions throughout its history. The most noteworthy occurred in 1948 when the non-communist minority established the current CGT-FO. The strong links between the CGT and the Communist Party have been slowly relaxed since the end of the cold war. In 1999, the CGT strategy marked a clear turning point toward a modernized approach seeking to articulate industrial action, dialogue, negotiation and a trade unionism of proposal-making. Between 1976 and 1990, the CGT lost two thirds of its members, with a total membership of 600,000 by the end of the 1990s, behind the CFDT with its claimed 730,000 members. In December 2002, at the last elections of „prud'hommes” councillors (joint industrial tribunals), which are used in France as a de facto gauge of the influence of the various unions in the private sector, the CGT still ranked first, with 32,1% of the voters.

Established in 1948, the **CGT-FO** claims to be the true heir of the CGT's traditional policy of political independence. Its membership is estimated to be close to 300,000 members. Its « doctrine » emphasises the defence of workers' job interests, independently of any political party, promotes collective bargaining and the union's role in representing the interests of workers. Since the election of Marc Blondel as general secretary in 1989, the CGT-FO has adopted a more radical strategy (for example in 1995 against the « Juppé Plan » reforming the Social security system), in which many observers see the growing influence of a small minority of trotskyst activists at the head of the confederation. The CGT-FO ranked third at the 2002 industrial tribunal elections, with 18,3% of the voters.

The **CFTC** (*Confédération française des travailleurs chrétiens*) was formed in 1919, with the objective of promoting a peaceful collaboration between capital and labour, according to the social doctrine of the Catholic Church. The CFTC split in 1964, when the minority group retained the religious orientation and kept the name CFTC. It emphasizes the development of contractual relations, the rejection of the politization of unions and the defence of the family. CFTC total membership is around 80,000, and it obtained 9,7% of the votes at the last industrial tribunal elections.

Following the CFTC's 1964 split, the majority group formally abandoned the social-catholic doctrine and formed the **CFDT** (*Confédération française démocratique du travail*). After having

adopted elements of a far-left ideology and promoted direct workers' control on production in the aftermath of May 1968, the CFDT engaged a doctrinal revision in 1979 and began to emphasise union adaptation to economic change. This back-to-the-centre strategy (*recentrage*) entailed constructive dialogue with government and employers and the promotion of the various features of social democracy. This « reformist » strategy was successful in terms of unionisation — mainly amongst white collar workers and managerial staff — but also created a lot of internal factional conflicts in the 1990's. Amongst the 5 major trade unions confederations, the CFDT occupies the first place in terms of membership and the second place in terms of electoral audience (25,2% in 2002)

The **CFE-CGC** (*Confédération française de l'encadrement-Confédération générale des cadres*) was originally formed in 1946 and then known simply as the CGC. It is the only one of the five confederations possessing recognized representative status at national level which is intended for a single occupational category (management staff), whose definition is in any case uncertain. Its declining membership reach 80,000 by the end of the 1990s. The CFE-CGC won 7% of the votes at the last industrial tribunal elections.

These five confederations are reputed to have an « indisputable presumption of representativeness » at national level. This legal status attributes to each union some exclusive rights, such as the nomination of candidates in the system of employee representation within the firm, in terms of representation on numerous governmental and other consultative bodies, but also open up public funding and empowers them to negotiate on behalf of larger groups of workers than their actual members.

Founded in 1993 by independent public sector trade unions, the **UNSA** (*Union Nationale des Syndicats Autonomes*) has not yet been recognized as representative at national level. Despite its efforts to extend its recruitment and union organisation into the private sector, 80% of UNSA's claimed 360,000 members is still comprised of public sector employees. UNSA made a breakthrough into the private sector at the 2002 industrial tribunal elections (winning 5% of the vote). Besides these confederations, a looser gathering of unions called 'the group of ten' was formed in 1981, carrying a radical « class struggle » doctrine. It includes 18 unions and 80,000 members, while its two major union affiliates are the tax collectors (SNUI) and post and telecommunication workers (SUD-PTT) unions. The SUD grouping (post, railway, banks and education) has gathered ex-members of the CFDT (who left the CFDT in 1989 and 1996). Some of the unions among 'the group of ten' are considered 'representative' in their respective sectors.

By contrast with the plurality of trade unionism, at a national level the employers are more united in their main confederation, the **MEDEF** (*Mouvement des entreprises de France*), formerly *Conseil national du patronat français* (CNPf). The CNPF was established in 1945, though employers had already been organised in a range of industry-level federations since the early nineteenth century, and at national level from 1919 onwards in a forerunner to the CNPF. The MEDEF includes more than three-quarters of all French enterprises, but conflicts between the major sectoral federations and the heterogeneity of its members' interest makes collective action often difficult, except when it focuses on the alleviation of tax and social contributions. Having to face a socialist government for much of the time since 1981, the CNPF has adopted a policy of 'conflictual cooperation' with the government, rather than one of ideological confrontation. The election of Mr Seillière in 1997 inaugurated much more conflictual relationships both with the government and with the unions. These are also largely due to the MEDEF's fierce opposition to the law on the 35-hour week.

The Confederation of Small and Medium-sized Enterprises or **CGPME** (*Confédération générale des petites et moyennes entreprises*) is a rival employers' organisation, which nevertheless has common roots with the CNPF and often cooperates with it. Founded in 1944, it aims to bring together „true,, employers in small and medium-sized enterprises (SMEs) – the „real,, employers – rather than managers. It comprises 400 sectoral and intersectoral federations, to which are affiliated more than 3,500 organisations, both sector-based and local. Facing deep internal management prob-

lems since 2000, the CGPME has great difficulty finding a place for itself in the world of employers' representation in the wake of the 1998 transformation of the National CNPF into the MEDEF. The third employer organisations representative at national level is the UPA (*Union professionnelle artisanale*). It accounts for about 250 000 very small enterprises with 2 million employees and has taken several initiatives in the recent years to promote social dialogue in SME.

The historical foundations of political regulations through intermediary bodies: a practice devoid of doctrine?

Influenced by a Rousseauist vision of the State as one which has a monopoly over the production of the general interest, French political culture has never encouraged the creation of an autonomous space of industrial relations independent of the political sphere. The persistence of the revolutionary ideal of a general interest, based on the Nation's quasi-mystical notion of sovereignty, is often identified as the root of a „French impossibility to see the general interest as a compromise between individual interests, as in the Anglo-Saxon model” (Rosanvallon 1988:180). Indeed, if the functional necessity of collective regulation of industrial relations' has encouraged the development of actors and institutions, the absence of doctrinal foundation has made it overly fragile.

Corporatist ambiguity

The historiography of French politics has often stressed that since the French revolution the construction of the State has taken place along the the lines of an utopian project aimed at the creation of society by the State: „This State (...) cannot simply think of managing procedures and rules or of having corrective and compensating actions as in the case of an *Etat de droit*. Rather, it thinks fundamentally of itself as a social actor and not as a judge or as a referee. The idea that there can be an autonomous and self-sufficient civil society is actually foreign to this State” (Rosanvallon 1990: 125).

However, from the end of the 19th century, the abstract metaphysical notion of a 'general interest' has had to deal, with the difficulties of accommodating the formal rights of citizenship with the concrete situation of workers in a capitalist liberal economy. This is the context in which the „social issue” (*question sociale*) seems to threaten French society and in which the legal recognition of unions emerges with the law of March 21, 1884. This was seen both as a means to channel workers' demands and as a remedy to the atomisation of society, and this by compensating for individualist democracy's weaknesses with an organic representation of interests. Nevertheless, this legal ratification did not solve the problem of unions and their place in the republican power structures. Some observers thought this was simply a transition phase preceding the creation of corporatist structures that would associate all producers. The celebration of the corporatist organisation's virtues did not only include nostalgic proponents of the Old Regime. E. Durkheim himself became a pro-

ponent of a renewed corporatist regime and was involved in the emergence of the „reformed corporatist” doctrine whose influence was felt until the 1930s (Le Crom 1995; Rumillat 1988).

One must note that the role E. Durkheim intended for occupational associations went well beyond the social field: it applied to the whole political system as well (Didry 2000; Gautier 1994; Supiot 1987). Organised along the corporatist model, occupational associations were seen as a necessary condition for individual emancipation (Durkheim 1995). For the founder of French sociology, these groups offered several advantages. They created a collective moral basis that could, on its own, protect individuals against the anomie, which tends to increase with the development of industrial societies. These intermediary bodies were seen as necessary to prevent the State from being oppressive against individuals as well as the State’s independence from the individual. In other words, they offered to the collective interest the means to distance itself from individual interests. The occupational association is indeed a place of socialisation that „participates in a process of extension of individual interest to the common good: collectively, its members create more general views (and at the same time, they create rules) that represent less directly their own interest” (Gautier 1994: 854).

Occupational associations were thus intended to find a role to play in the „moralisation” of economic life and determine the rights and duties of economic agents in different industries. One could, however, imagine the State (a „social brain” according to E. Durkheim) fulfilling these functions. But for E. Durkheim, the State was a sociological monstrosity as well, because it was so distant from individual interests that it could not take all of them into account. Consequently, its interventions created new problems. Thus, political regulation and moralisation could only be the result of interested groups.

Fundamentally, what we find here is a justification for social democracy. But, as A. Supiot (1987) pointed out, the problem for E. Durkheim was in his choice of words. Indeed, „occupational association” is the translation of the French expression: *corporation de métier*. Nowadays, the notion of „corporatism” refers to the excessive privileges of professions and to the Vichy regime. The term „corporatist” is even banned from the French political vocabulary and this rejection is also a reason for the cautious attention paid by political science to neo-corporatist theories. Even with this unfortunate choice of words, however, E. Durkheim’s theory of the occupational associations remains a fruitful way to explain the strength of political imperatives in the history of the institutionalisation of industrial relations in France. At the very least, it can account for the permanent tensions between the „metaphysical” principles of Jacobine culture and the State’s pragmatic concerns to improve the efficiency and legitimacy of its policies, by relying on the mediation capacities of Labour and Capital’s organised interests.

The collective agreement: a hybrid between law and contract

The historical development of collective bargaining in France has always been closely related to the need for the State to ensure social peace⁴. Even though collective agreements are theoretically limited to a precise object – i.e., the definition of rights and obligations of those involved in the employment relation, their normative effect goes well beyond this. As such, collective agreements, which are neither pure contract nor law, constitute a means for achieving more efficient and legitimate social governance.

If law is voted by elected representatives, it remains external to those to whom it is applied and who often submit to it more than they actually accept it. On the contrary, the purpose of collective agreement is to enable social partners to develop and make contracts over their own solutions. This starts from the assumption that the efficiency and the legitimacy of norms are greatest when those interested in the issue are involved in their elaboration. In so doing, public authorities turn to unions as organs of social democracy in important ways (Despax 2000). This would not be the case if collective agreements were only bound the members of the signatory organisations. But in France, as in many European countries, the legal provisions regarding „union representativeness” and the extension of collective agreements have progressively meant that agreements can stipulate compulsory applicable dispositions for all firms falling under its application field⁵.

These provisions give signatory members a normative power that goes well beyond the restricted private contractual relations, and thus contribute to blurring the traditional dichotomy between „on the one hand the law which is deliberate and unilateral, reflecting the general interest, and on the other hand the contract, which is negotiated, bilateral and reflects individual interests” (Supiot 2001b: 9). A collective agreement thus borrows both from the contract (its form) and from the law (its heteronormativity). In other words, it has „the body of a contract but the spirit of law” as Cornelutti, an Italian jurist, put it (quoted in Despax 2000).

If the collective agreement, as A. Supiot named it, is a « hybrid » of law and contract, whose development was encouraged by the welfare state as an alternative

⁴ At the beginning of the 20th century, collective bargaining mostly aimed at ending strikes involving important conflicts and leading to specific agreements. This led to an evolution of rules whose major steps were the laws of 1919, 1936, 1950 and 1971.

⁵ France is peculiar in having the lowest union’s density amongst European countries, but one of the highest rates of collective bargaining coverage. This is due to the « extension » procedure, a technique whereby the Minister of labour makes a collective agreement generally binding within its occupational and territorial scope. The conditions to which it is subject and the procedure which must be followed (consultation of the social partners seating at the National Collective Bargaining Commission) are specified by law in considerable detail (Source : EMIRE, Eiro).

or as a complement to legislative action, the process of hybridisation eventually was taken a step further with the procedure of „negotiated law” that appeared in France in the 1970s, particularly in the field of vocational training (Verdier/Langlois 1972; Mériaux 1999). In this case, „social partners” are invited by the State to negotiate, at the inter-sectoral level, an agreement whose provisions are to be subsequently enforced by law. Nothing obliges the State to proceed in this manner, except for the shared conviction that negotiated solutions will be better adapted than those arising from the legislator. ; This delegation of legislative competence to the „social partners” was the precursor to the „neo-modern law of public policy” already in place in other spheres (Morand 1999). Even more than a collective agreement, a negotiated law constitutes a „corporatist contractualisation” in law production (Morand 1991: 218), which deeply shakes the ordering of normative sources. It must be emphasised here that, unlike in the German situation where collective autonomy is a constitutional right, French public law does not have a judicial foundation for this type of procedure. Rather, the negotiated law mechanism comes from „tradition” and has never been consolidated judicially. Thus, devoid of any „external guarantee”, its perpetuation depends on the good will and the mutually understood interest of all signatory members. This implies that negotiated law in France does not benefit from the stability and the routines so characteristic of the neo-corporatist mechanisms existing in other European countries⁶.

„Paritarisme” as corporatist-style mediation between state and society

As a social regulation procedure, collective bargaining and the legal representativeness status on which it rests constitute the means by which „democracy within democracy” is organised (Borenfreund 1991: 687). But this is not the only means by which industrial relations’ actors have been allowed to „counterbalance the sociological deficit at the root of the French political model” (Rosanvallon 1998: 257). The development of a „consultative administration” (Hauriou 1907) at the end of the 19th century, with the creation of multiple „superior councils” (work, agriculture, industry and commerce) in which we find representatives of groups involved or interested in policy-making, was an initial form of corporatist regulation that allowed for,

⁶ In contemporary political theory, neo-corporatism does not signify corporatism in Durkheimian sense. As P. Schmitter first suggested, the neo or new corporatism can be defined as « a system of interest representation in which the constituent units are organised into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognised or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports » (1979: 13). Despite the different definitions which have been proposed after P. Schmitter’s one (Williamson 1989), Nordic countries have very often been presented as the paragon of neo-corporatism.

although this was never actually admitted, the implementation of new relations between State and society.

After WWII, the generalisation of jointly managed bodies followed a very similar logic (Duclos/Mériaux 1997, 1998). Adopting the principle of „management by interested parties”, the State granted unions’, employers’ and mutualists’ representatives important prerogatives in the general Social security scheme, including seats on the managing boards of the various social security funds (pensions, family allowances, health) at national and local levels. Parity doctrine then freed itself further from State control in the institutions set up by way of collective agreement to manage complementary pension schemes for management staff (1947) and for all wage-earners (1961). It was mostly due to a State initiative that social partners enlarged this model of joint management to unemployment insurance in 1958. Since 1970, the parity doctrine has again been used to implement a continuing vocational training system, in which social partners are entitled by the State to manage training insurance funds for collecting the compulsory payments which enterprises are required to make towards the general funding of further vocational training.

Considering the vast field of *paritarisme* (between 20 000 and 30 000 members’ mandates in unions and employers’ organisations, and a budget greater than that managed by the State), it is undeniable that it has provided a major means for French unions, and to less extent the employers associations, to maintain political influence way beyond the strength of their membership and the finances necessary for their very functioning. Paradoxically, until recently, this cornerstone of the French industrial relations system has remained relatively unrecognized by both social actors and observers. The explanation for this lies in the persistence of the „corporatist taboo”, which makes it difficult to emphasise how closely *paritarisme* is linked to the imperatives of political governability. However, it is clear that whatever their form (administration councils, technical committees, consultative commissions, etc.), their degree of autonomy relative to the State or the arithmetic formula structuring their make-up, these bodies are integrated into institutions that have a general interest mission or that implement a national public service. Within this institutional framework, the representatives of particular interests are mandated to administrate general interest services. The „social partners” interpret and manage short-term demands arising from their rank-and-file so as to implement them according to a long-term interest (Marin 1985). As this process channels the expression of particular interests and avoids the multiplication of demands by different groups on the State, it comes near in many ways to the type of action described and promoted by E. Durkheim in his corporatist model.

Even with the risk of getting criticised by the very actors it legitimises, the State has reaped considerable advantages by playing the card of *paritarisme*, and indeed its intervention (or non-intervention) has always been decisive in the creation of these institutions. Relying upon the workers’ and employers’ organisations’ capacity to aggregate support and to produce compliance, the State has discovered a means to

increase its legitimacy and the efficiency of its policies. For the State, the development of jointly managed institutions represents a way of ensuring that the behaviour of the social parties is both more compatible and predictable, even when the uncertainties inherent in policy making are strong (Jobert/Muller 1987).

However, and this is what makes the French case quite difficult to place in the usual corporatist typologies, the participation of intermediary bodies in political regulation has never been made explicit. Such a move would have required actors to accept to assume a counterpart role to the institutional resources and powers conferred by the State. However, even if it is central to any kind of societal corporatism, the logic of „political exchange” (Pizzorno 1978) goes too much against the myth of a social power and of autonomous organisations, which French unions refuse to shed (with the CFDT’s possible exception).

An important idea arises out of this historical portrait: far from forming an autonomous whole, the French industrial system retains dependent relations with the State that are also multiple and dialectic. This configuration is the child of a „shameful” corporatist heritage. Its peculiar characteristic is that workers’ and employers’ unions „differ fundamentally from most other pressure groups in that they can, through collective agreement, decide for themselves the rules to be applied in a vast field” (Reynaud 1989: 117). But despite the social partners’ belief that they can implement and create laws on their own, their contractual autonomy is only relative. In French law making, „collective autonomy does exist but it is tempered by its foundations in law” (Yannakourou 1995: 74).

„Social Re-foundation”: issues and position-taking.

When we examine the historical roots and the operating logic of *paritarisme* and collective agreement, that are so central to French industrial relations, we quickly see how false the classical binary categorisations (law/contract, public/private, general-individual interest) are. Indeed, reality is far more complex, in an institutional system within which hybrid forms of autonomous regulation (the collective agreement and the institutions arising from it) and external regulations by political authorities are embedded. The contemporary debates on the „social re-foundation” and the many implicit and continued ambiguities regarding the place taken by social partners in the socio-political regulation game is an illustration of the French specificity in this area (Duclos/Mériaux: 2001).

The meaning of the „social re-foundation”

One wonders about Medef’s objective when it invited workers’ unions, in November 1999, to discuss about a new „social constitution” (renamed afterwards „social re-foundation”). Officially over one million members strong, the most important

French employers' association⁷ criticised the „current confusion between the issues concerning social partners and those concerning the State in the spheres of social protection and employment relations”⁸. Indeed, adds the Medef, „it is the increasing, destabilising and unceasing State intervention that threatens the very existence of an autonomous ‘social sphere’” (*ibid.*). Medef thus uses a two-track rhetoric. On the one hand, it talks of an „autonomous social sphere” within which social partners would define, through „a social dialogue and freely negotiated agreements”, the rules relating to work relations and to social protection. On the other, it argues for a sphere that would fall strictly under the State's sole jurisdiction.

Despite the much more complex institutional reality depicted above, the surprising part is that, Medef has succeeded in imposing its own lexicon and arguments on all parties involved in the controversy, i.e. trade unions and numerous politicians. The media coverage of the open conflict on the unemployment insurance reform, „social re-foundation”'s first target (see insert 2), certainly enhanced its public profile. Its consequence was a heightened cleavage between the parties, two opposing camps thus appearing and continuing to face each other today. On one side were the supporters of the contractual approach, i.e. those who signed the June 2000 agreement on unemployment insurance (the employers' unions, the CFDT and the CFTC). The other side was formed of a social-republican alliance made up of non-signatory unions (CGT, FO, CGC) and the left-wing government, who all put forward the defence of the public social order, and thereby the legislator's primacy. However, looking at this more closely, we can see, that these coalitions are far more heterogeneous than they seem. Among the partisans of contractual autonomy, the shared belief in the superiority of a freely negotiated law hides substantial differences.

Insert 2: The „social re-foundation”'s labours

1. Unemployment insurance.

Signed on June 14th, 2000, this was the first agreement arising from the „social re-foundation” initiative. This agreement, signed by the CFDT and the CFTC, abandons the regressive nature of unemployment benefits and implements a back-to-work assistance plan (PARE) which made official a more personalised follow-up of beneficiaries. Ratified by small unions, this agreement opened an important controversy with the government which then forced signatory parties to revise the agreement's content several times. The government finally instituted the agreement on December 6th, 2000.

⁷ One should not forget the depth of structural divisions which continue to divide employers in different camps according to different values and interests: small-scale provincial employers are generally opposed to economic globalisation. They differ from the economic elite who are more mobile and have greater experience regarding the frictions between share-holders' demands and managers' strategies. Obviously, Medef's rhetoric is far from corresponding to homogenous interests that would be recognised as such.

⁸ „Pour une nouvelle constitution sociale” („For a new social constitution”), text adopted by Medef's executive council, November 2nd, 1999.

2. *Health at the workplace.*

An agreement on this issue was signed with the CGC, the CFTC and the CFDT. Medef gave up its project of transferring to city doctors the industrial medicine sphere. It also accepted to give greater importance to unions in watchdog institutions such as the INRS (the national institute for research and security).

3. *Complementary retirement plans.*

Started in December 2000, discussions on this theme have been conflictual. For Medef, the issue is one of balancing the increasing number of retirements without increasing contributions. This is why it has suggested an increase in the duration of contributions which, implicitly, raises the question of the principle of retirement at 60 years old.

4. *Industrial Vocational Training.*

This issue also arose in December 2000. The problems associated with it are the improvement of the quality-cost relationship of industrial vocational training and of decreasing access inequalities. Medef hopes employers will undergo training outside of working hours.

5. *Collective bargaining.*

This was at the heart of the „social re-foundation” approach. Medef presented a text on December 18th, 2000 that aimed at revising the founding principles of the French industrial relations’ system, especially those principles related to the articulation between law and contract. The issue of unions financing was also raised. Discussions concluded with a common text (July 16th 2000) signed by employers and unions (with the exception of the CGT) demanding that it only applies to majority agreements.

6. *Health insurance:*

On November 21th, 2001, MEDEF presented a proposal for reforming the social security system that aimed at opening up the management of health insurance to private competition. Medef also proposed to unify the different retirement plans. A point system would replace the current one, based on the length of contributions.

7. Other issues which have been delayed or for which negotiations have not been yet started include family allowances, the role of management and gender equality.

The contract as an embodiment of modernity?

In the battle for a „social re-foundation”, one finds the defence for contractual policies at the debate’s core. But what is its real significance? For Medef, a contractual autonomy that could be embodied in a renewed *paritarisme* has a direct and clear goal: it has to „optimise social expenses in France because they represent an exorbitant amount”⁹. But this optimisation (i.e., the decrease of contributions to social security funds) must focus on facilitating the restructuration of social protection along the line of a „new risk government” whose objective „would be less to transfer to the State the risks citizens must take than it is to allow them to rely on institutions that do not take responsibility away from them” (Ewald/Kessler 2000: 71). As far as industrial relations are concerned, Medef proposes to „reverse the pyramid by transforming firms, and even the establishment, into the system’s enlarged base and to

⁹ G. Jollès, Medef’s president of the social protection GPA, quoted in *La revue des entreprises*, Jan-Feb. 2000, n° 618 bis: 24.

give law its role of defining principles”¹⁰. Subsidiarity takes on the primary role and law becomes a supplement to contract: contractual autonomy thus aims at reversing the hierarchy of norms, in which the law is at the top – symbolically at least – and where collective agreements at branch level set up the main part of the various obligations incumbent on the parties to an employment contract.

This perspective is much less revolutionary than it appears because it continues the trajectory of collective bargaining of the past two decades. It has shown „most importantly an increasing freedom from the State but also the emancipation of the different negotiation levels from each other” (Morin 2000: 81). Indeed, it has been a long time since the „favour principle”, stating that collective agreements can only be at least as favourable to workers as the legal provisions, was replaced by a more pragmatic conception of subsidiarity. Contrary to demands for greater autonomy in the social protection field, Medef’s discourse on collective bargaining does not represent a fundamental rupture with the well-entrenched tradition. But in both cases, the logic of efficiency must take precedence over the reinforcement and the re-foundation of collective guarantees: adaptation to the „new competitive world” and the search for „social and economic optimisation” must guide the reform of rules and social institutions.

The argument that the weakness of industrial relations regulations is the consequence of insufficient collective bargaining autonomy is also taken up by some unions, among which we find the CFDT. With the CFTC, the CFDT shares the same Christian-democrat ideological background. They are alone in claiming a „corporatist” heritage, albeit by using a euphemistic language of „intermediary institutions” that have a role to play in the French democratic system. For N. Notat, the CFDT’s general secretary until 2002, „the State, looking for new forms of public regulations (...), finds its interest in a civil society regulating itself through contracts and through intermediary institutions representing the different interests inherent to them” (Notat, 2000). However, this position is not as simple as it seems. Contrary to the Medef, the CFDT does not propose to substitute law by contract wherever this is possible. Instead, N. Notat proposes the creation „of a better articulation between contractual politics and the State’s production of rules and legislation” (*ibid*). This gets more complicated still when we see that different points of views exist within the confederation¹¹.

¹⁰ Medef declaration at a joint meeting on the theme of „Means and ends to strengthen collective bargaining”, March 14th, 2000.

¹¹ M. Caron, the organisation’s national secretary describes the situation: „The issue is to take *paritarisme* towards a stable and productive work relation mechanism and collective contract that *would be free from the State*” (2000: 13, our emphasis).

The compromise found with the Medef regarding the unemployment insurance issue¹² confirms that the CFDT has not yet stabilised nor adjusted its internal doctrine. It becomes even more obvious when we compare Medef's and the CFDT's analyses of labour market regulations. The employers' confederation gives priority to the firm, on which level it wants to optimise rule production and the degree of social protection, which are to be linked to the conditions of competition. As for the CFDT's position, the hope placed in a new industrial relations dynamic is linked to a commitment „to build effective and adapted social guarantees”. Behind the contractual philosophy both organisations display, one can thus find rather incompatible ambitions. But the communication strategy is not without effect: Medef is very convincing in its argument that there is a convergence with the CFDT on fundamentals, while remaining rather evasive on the precise limits of the social public order it is willing to „give up” to the State.

The argument for the „social-republican alliance”

One of the major effects of the media coverage of the „social re-foundation” debate was to polarise positions radically. Against the „all-contract” approach proposed by Medef and the CFDT, the public authorities, the CGT and Force Ouvrière proposed an „all-law” approach, each still insisting on the State's decisive role of third party in a dynamic where contractual autonomy can only exist within an area of heteronomy. Ms. Aubry, minister of Employment and Solidarity at the time when the „social re-foundation” project was launched, underlined that it is the law's responsibility to delimit the general framework of the social public order. At the same time, she argued that social negotiations never occur between equal parties and that freely negotiated agreements do not erase inherent inequalities existing in the relationship between employers and employees¹³. Without ignoring the tactical aims of a minister engaged in a fierce battle with the Medef on the 35 hour working week, one must acknowledge that this argument shows a very clear understanding of the French labour law's historical construction. This, indeed, is the very *raison d'être* of labour law: the introduction of the principles of equality and freedom in a space of subordination, what A. Supiot (1994) has named „civilising the firm” (Supiot 1994). Based on such a rationale, the minister of Employment differentiates between the different registers in which laws and collective bargaining are embedded. While access to fundamental rights and the establishment of principles reflecting the general interest fall under the jurisdiction of the law, collective bargaining only has a functional legitimacy: it rests upon its capacity, recognised by policy-makers, to come up with solu-

¹² Carried along by its employers' logic of „contract-or-nothing” the CFDT has contradicted its own principles when it signed a protocol (on unemployment insurance) containing a „self-destruct” clause if the State refused to recognise the agreement in its totality.

¹³ Ms. Aubry, Minister of Employment and Solidarity, speech to the economic and social council, March 14th 2000.

tions „that optimise the exigencies linked to economic competition and those related to work conditions and employees’ lives” (Aubry *ibid.*). Thus, laws and collective bargaining cannot be substituted for one another.

As with governmental authorities, the CGT and Force Ouvrière criticise the sterility and the dangers of a discourse based on a competitive vision of the relationship between law and contract. The CGT emphasises procedural conditions to a greater contractual autonomy and especially the revision of the union representativeness legal regime. This should not be surprising. Whether one considers the functioning of parity bodies or of collective bargaining, the CGT has been the first victim of a system that allows employers to govern parity institutions and to negotiate collective agreements by relying on minority unions. Force Ouvrière’s position is also interesting as its argument relates directly to the issue of corporatism and the logical limits of contractualism. While recalling its historical attachment to contractual politics, Force Ouvrière refuses to put social partners in the position of legislator. On the one hand, contracts cannot do without laws as „the right of contract parties is based on law and not on the right that these parties would give themselves”¹⁴. On the other hand, the confederation’s leaders argue that a complete autonomy for contractual regulation would be incompatible with the republican system. For M. Blondel, Force Ouvrière’s general secretary, this would amount to „putting power into the hands of the occupational associations’ members, to return to the *Ancien Régime* and purely and simply giving up the republican rule of law”¹⁵.

The risks of contractual autonomy

Beyond the debates raised by the issues proper to each of the different fields concerned by the „social re-foundation”, transversal cleavages have emerged, which involve various, even opposing, ways of conceptualising the workings of French social democracy. In this light, the contract’s primacy (especially in decentralised contracts) can thus easily be demanded by the Medef as this does not threaten the employers’ prerogatives. How are we to understand that well-balanced solutions be arise even while the unionisation rate does not go above 9% in France as a whole (and 5% in the private sector)? Behind the fiction of an autonomous social order which triumphs over the political sphere, what we actually see witness is the return of employers’ unilateral power (Supiot 1989). With the demands for contractual autonomy and the priority given to firm level bargaining, there is the risk of an employers’ self-management shoving unions aside. This ‘weak governance’ (Lallement 2000) has threatened to increase further in importance, because the Medef seems to be unwilling to amend the very liberal regime of union’s representativeness that,

¹⁴ Declaration of CGT-Force Ouvrière during its first employers-unions meeting on February 3th, 2000.

¹⁵ Editorial, *FO Hebdo*, January 19th, 2000, n° 2461.

helped by the unions' internal divisions, allowed it to strengthen its position further in the bargaining process (Lyon-Caen 2001).

From this perspective, the common position on the reform of collective bargaining signed in July 2001 by the employers' organisations and workers' unions (with the exception of the CGT) does not dissipate all doubts. Subjected to a word-by-word discussion for months, the text does bring new elements contributing to a better equilibrium in negotiations. At the same time, and this shows the necessity for a guarantor in all contractual processes, social partners have asked the State to reform the collective bargaining procedural framework so as to increase its efficiency and legitimacy, by introducing majority rule for the validation of collective agreements. As for the articulation between the law's field of application and collective bargaining, the signatory parties propose to introduce in French law a mechanism similar to the EU Treaty's articles 137 and 138.

The declaration's text is thus quite different from the initial employers' expectations as it reaffirms the principles of respect for social public order dispositions and for the collective agreements' classical hierarchy. But the essential procedural guarantee mentioned by the declaration is put in the hands of the firm's negotiators. Since then, especially with the failure of the negotiations on vocational training, Medef has interpreted the text as if it gave great autonomy to firms, thus enabling it to distance itself from decisions taken at a higher level.

Conclusion: on E. Durkheim's continued relevancy

In a union context such as that in France, one is led to question the consequences of contractual autonomy demanded by the proponents of a social partnership freed from the State. Historical research on this issue reminds us strongly that contractual autonomy only became a concrete principle when founded upon complex mechanisms that combine law and contract. This ensured the participation of labour and capital in the development of the collective interest, while counterbalancing the relationship of subordination between the actors (Supiot 2001). The contemporary debates on the „social re-foundation” bring us to such a conclusion. Indeed, we have to recognise that Medef's reformist ambition goes hand in hand with the production of a discourse that, because it is based on the fallacious dichotomy between law and contract, is problematic for anyone with knowledge of the issue's historical and sociological underpinnings. By referring to a doctrine of subjective rights which considers that situations of right can arise out of a simple agreement of mutual wills, outside of any consideration for the social conditions of their implementation (for example, inequality or subordination), the Medef's contractual philosophy voluntarily repudiates the very logic of labour law.

It is thus not pure coincidence if, in order to criticise the „diminution of the contractual order” (Ewald 2000), some analysts deeply involved in the employers' confederation strategy have called for the re-valorisation of the civil rights contract against the employment contract : it implies an independence of the individual, con-

trary to the de facto inequality of contract signatories in employment relations. The same authors invoke L. Bourgeois, L. Duguit and E. Durkheim in order to argue that the „social re-foundation” goes back to the very foundations of the Republic and its belief in the virtues of contract. But can one really link this to E. Durkheim and more generally to the social solidarity theorists? Indeed, one of E. Durkheim’s main points revolves around the inadequacy of the idea of inter-subjective consent as a basis for political justice (Pharo 1999). When E. Durkheim argues in his famous phrase that „not everything is contractual in a contract”, it is after he had understood that, in modern societies, „it is not enough that the contract be agreed upon, it has to be just and the manner by which consent is given then should become an external criterion of the contract’s level of equity” (Durkheim 1995: 231). Doing so, E. Durkheim criticises the thesis according to which a contract is a meeting of autonomous wills and designates the State as a third party guaranteeing the contract’s justice. This obviously undermines any possible link between his thoughts and those of today’s „social re-founders”. But E. Durkheim’s contemporary pertinence can also be found in a methodological imperative, now more necessary than ever: one should maintain a critical distance from the actors’ discourses who, for multiple strategic reasons, forget that their contractual ideology is perhaps nothing more than an old wine that cannot easily be recycled in the new bottle of French industrial relations...

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