

Labor Law as a Base for Firms' Organization

Didry, Claude

Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

GESIS - Leibniz-Institut für Sozialwissenschaften

Empfohlene Zitierung / Suggested Citation:

Didry, C. (2019). Labor Law as a Base for Firms' Organization. *Historical Social Research*, 44(1), 212-230. <https://doi.org/10.12759/hsr.44.2019.1.212-230>

Nutzungsbedingungen:

Dieser Text wird unter einer CC BY Lizenz (Namensnennung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier:

<https://creativecommons.org/licenses/by/4.0/deed.de>

Terms of use:

This document is made available under a CC BY Licence (Attribution). For more Information see:

<https://creativecommons.org/licenses/by/4.0>

Labor Law as a Base for Firms' Organization

*Claude Didry**

Abstract: »*Das Arbeitsrecht als die Grundlage für die Unternehmensorganisation*«. This contribution explores the relation between labor law and organizations in a historical and institutional perspective based on the French case. The adoption of labor law transforms the articulation between commodity exchanges and production activities. Initially, commodity markets were considered as the main test for the capacity of products to find a social utility that conditioned the level of production activities taken in charge by contractors. Labor law has contributed to a renewed conception of production as organized labor, i.e., a specific activity distinct from the other activities of individuals (e.g., family life, leisure). Recruitment and career opportunities become the main test situation for individuals, conditioning their access to occupations and resources for buying the very commodities they make. But, the renewal of corporate governance is undermining this organizational significance of labor law and valuing restructuring, lay-offs, and entrepreneurship, in order to restore market mechanisms.

Keywords: Market, organization, labor law, labor contract, labor conventions, Keynesian convention, workers, employers.

1. Introduction

In a classical social history and welfare state perspective, labor law is conceived as a part of a social protection regime, contributing to what is sometimes called “decommodification” of labor (Esping-Andersen 1990). It supposes a previous “commodification” of labor, seen as consubstantial to the emergence of capitalism and leading immediately to the subordination of workers to employers (Polanyi 2001 [1944]). Then, Fordism and more generally rational organization of labor reinforced work discipline, but created simultaneously the condition for a social protection in which labor law was characterized by its ability to protect workers against exploitation through working time limitation and minimum wage guarantee. Wage society could be characterized as the equilibrium found through the corrective of market’s failure brought by welfare state and an increase of purchase power, in order to absorb production (Castel 2003 [1995]).

* Claude Didry, Centre Maurice Halbwachs, Ecole Normale Supérieure, 48 Boulevard Jourdan, 75014 Paris, France; claude.didry@ens.fr.

Convention theory that emerged at the end of the 1980s introduced a renewed attention to coordination between economic actors, in face of the focus of neo-classical economy on individuals freed from any collective ties in their action. Conventions as repeated coordination suppose the identification of institutional (such as the contract) and cognitive frames, enabling individuals to situate their action one to each other (Dupuy et al. 1989). It introduced a renewed analysis of the socio-economic process attached to the recognition of labor law, through a rereading of Keynesian theory that overcomes its assimilation to a corrective policy against the failures of market macro-economy expressed by a high level of unemployment. It implies going deeper into the analysis of economic transactions and following Keynes's criticism against the assimilation of economic activities to the paradigm of stock-exchange markets, which is – according to Keynes – a convention characterized by a level of instability as high as in a beauty contest insofar as rational behavior implies an alignment on the common opinion (Favereau 1989). Labor issues and unemployment provided the opportunity of pioneering implementation of the concept of "convention," as they suppose the existence of labor organizations that emerged progressively through the 20th century (Salais and Thévenot 1986; Salais et al. 1999 [1986]; Diaz-Bone 2018), as coordination's paradigms of persons involved in production, i.e., "labor conventions" (Salais 1989). Organization cannot be reduced to coercive mechanisms, alternative to market allocations of resources that proved to be more efficient in certain circumstances (Williamson 1985). It has to be considered as the base of goods' production, leading to a conception of goods' markets as "markets of organizations" (Favereau 1989). Thus, Keynesian theory appears as rooted in a set of economic ordinary interactions, emerging during the 20th century and presented by Salais et al. (1999 [1986]) as a Keynesian convention.

What is the role of labor law in the emergence of such a Keynesian convention?

Labor law cannot be reduced to a protection of the employee against the abuse of her subordination to the employer, limiting the freedom of the parties in the labor contract, but has to be conceived as a support for the deployment of the labor contract. From this perspective, labor contract opens a set of interactions between the employees and the employer, and between the employees themselves outside the opportunistic drifts encouraged by market mechanisms. As such, it institutes labor as a specific social activity of the individuals (Didry 2016).

This text aims at articulating law, convention theory, and history in the wake of Diaz-Bone, Didry and Salais (2015). Firstly, it addresses the situation of a society without any labor law. Secondly, it envisages the emergence of labor law in the economic life, during the 20th century. Finally, it analyzes the evolution of the firms, i.e., the employers, in the last decades, underlining the deflationary effects (Favereau 2016) of the financial markets on the organization of the firms.

2. Capitalism without Labor Law, the Case of 19th Century France

2.1 The Reign of Commerce and the Organization of the Markets

Commerce appears as the driving force of capitalism since the Middle Ages, through the fairs (e.g., the fairs of Champagne) or the freedom granted to cities by landlords. It takes a new dimension during the affirmation of the monarchy, as a tool for attracting gold and financing wars for the monarch (Weber 1927). We can consider that commerce implies, historically, the *organization* of markets by the public forces exerted by both landlords and monarchy, and by merchants themselves:

- firstly through the acceptance of free exchanges places between private parties, like fairs and cities, in which transactions are ruled by codes of conduct (North 1990);
- secondly through the guarantee of pacific transactions, based on the repression of the use of violence, through communal wards or policemen.

Mercantilism, with the figure of Colbert in France, is a good example of this national policy based on the discipline of markets imposed by manufactures inspectors disseminated on the kingdom's territory (Minard 1998). But it lead also to the unification of the rules followed by the merchants in their transactions, under a royal order or code elaborated in 1673 by Savary at the request of Colbert. This order was the base of the commerce code promulgated by Napoleon, in 1808 (Ripert 1951). Under the wing of the monarchy, commerce prospered in France and transformed the meaning of urban corporations monopolizing the practice of trades: artisans became at least partly furnishers of merchants emerging of these corporations and integrating the operations of the trades in the goods they sold. It penetrated also the countryside, by giving peasants and their family the opportunity to produce fabrics or other articles in many areas of the country (Minard 1998). The problem was, for the monarchy, the absence of reliable firms able to build fortresses and ships against eventual attacks from outside. Thus, major words of the economic theories were borrowed from the vocabulary of war, such as *enterprise*, which was initially synonymous to the siege of a city and designated finally economic actors able to address public orders, for example in Vauban's writings (Vérin 1982).

The French Revolution encouraged the development of these disseminated production activities for the commerce, with the transfer of land ownership from the landlords to the peasants. Thus, contrarily to England with enclosures (see Polanyi 2001 [1944]), France remained, in a lasting way, a rural society with more than half of the active population in agriculture during the 19th century. A large part of the production was excluded from monetary transactions and was embedded in the housekeeping, both in rural and urban areas.

But the commercial production of peasants and urban artisans freed from the disciplinary framework of corporations, developed continuously during the 19th century, under the lead of merchants. As Marx wrote in the first sentence of the *Capital*:

The wealth of societies in which the capitalist mode of production prevails appears as an ‘immense collection of commodities’; the individual commodity appears as its elementary form. Our investigation therefore begins with the analysis of the commodity. (Marx 1976 [1867], 123)

Following classical economists, labor was sometimes presented as the substance of the exchange value. However, according to Marx this statement was but obvious:

Let us now look at the residue of the products of labour. There is nothing left of them in each case but the same phantom-like objectivity; they are merely congealed quantities of homogeneous human labour, i.e. of human labour-power expended without regard to the form of its expenditure. (Marx 1976 [1867], 128)

These sentences by Marx suggest the importance of the markets of goods (becoming then *commodities*), with little considerations from the consumers and the merchants for the conditions of their production.

2.2. The Lease of Work as an Answer to Workers' Quest of Independence

The French Revolution is often seen in a destructive dimension through the dismantlement of corporations and prohibition of coalition often interpreted as the prohibition of strikes (Sirot 2002; Castel 2003 [1995]). This point of view results in the formation of a relation between a worker and an employer, assuming the spontaneity of production's organization in factories. But the French Revolution didn't change dramatically the conditions of production; it confirmed the importance of commerce with the recognition of tribunals of commerce in 1790 followed, in 1807, by the code of commerce promulgated by Napoleon. Mechanization remained limited (Jarrige 2015; Horn et al. 2010), and production spread in rural areas around cities renowned for some specialties, such as sheets in Rouen, silk fabrics in Lyon, or silk ribbons in Saint-Etienne (Noiriel 1986; Woronoff 1994).

The constructive dimension of the Revolution, with the elaboration of common institutions for the French citizens, such as the Civil Code posing the rules for the capacity of the individuals to own, inherit, acquire, and rent goods and estates, was adjusted to this economic orientation. The Civil Code devotes no less than twenty articles to a contract formalizing the relationships between

merchant and workers or artisans: the lease of work (*louage d'ouvrage*).¹ The lease of work emerged during the French Revolution as a claim of the workers, based on the *locatio operis* of the Roman law, in the wake of the abolition of corporations (Cottereau 2002). It became the major reference for the engagement of workers by merchants (*négociants*), reducing the “service contract” (*location operarum*) to almost nothing (two articles on the hiring of workers and domestics) at a moment where domesticity was considered as a symbol of the Ancient Regime. Thus, lease of work was defined as the engagement of a person to do something for another person, at a fixed price, and opened the possibility for each of the parties to break it whenever she wants. Under this rule, workers paid by the piece were considered as “contractors as to the part of the work they undertake”² (article 1799 of the Civil Code). It meant they had the freedom to organize their activities, as they were able to deliver the piece for which they were hired by merchants.

This legal regime confirmed the former practices that had emerged during the 18th century both in rural and urban areas. Workers could be urban artisans, in their workshops with the tools and machines they owned, or peasant family members, dealing with merchants or their attorneys. They were each assigned one of the operations (“*ouvrage*”) necessary to get the good completed, with for example, in the case of the textile industry (cotton, silk, or wool): spinning, weaving, and dying. As contractors or, in the case of the Lyon’s silk weavers, as “home workshop foremen” (*chefs d’atelier*), workers used to associate family members to the production activity and, sometimes, to hire other workers (called in Lyon “companions” [*compagnons*]). They were also at the front for the negotiation of tariffs with the merchants or the entrepreneurs, such as in Lyon with a succession of strikes since the 18th century, which culminated in the riots of 1831 and 1834. Thus, the lease of work regime confirmed the freedom of breach for both of the parties to the contract, refuting the affirmation of a strike prohibition resulting from the French Revolution.

2.3 Embeddedness of Labor as Its Invisibilization

As suggested by Marx in the first chapter of the *Capital*, labor was hard to identify as a specific activity in the social life of individuals. Most of the production activity was dissolved in family life, suggesting a situation close to informal economy in today’s developing countries. One could argue that the “invisible hand” of the market relies, in fact, on the invisibilization of production activity behind the contractor. The lease of work contributed to anchor production activities into what Salais calls an “interpersonal production world”

¹ Lease of work is the official translation for “*louage d'ouvrage*,” see <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> [Accessed August 8, 2018].

² Official translation.

(Salais 1994), based on traditional trade skills and family-like relations. The difficulties of unemployment census at the end of the 19th century indicate the importance of such a production's regime at that time. For example, most of the production of garments in department stores came from workshops and home productions of women, contracting with middlemen. These women began to consider themselves as unemployed in "off-season" periods, but statisticians as Lucien March refused to see them as "out of work" because there remained a contractual relationship with those middlemen representing the department stores (Salais et al. 1999 [1986]).

The importance of the "male bread winner" as a contractor can also explain the difficulties to implement legislations prohibiting children's labor, because of domestic production, and also because of piecework in mechanized factories. A judgment of the "*Cour de cassation*" (French supreme court), in 1902, reveals a situation in which the director of a factory rejected the responsibility of the employment of a child on a worker he had hired, and the latter had to be considered as a contractor free to hire other workers to help him (Didry 2016, 57). This argumentation was rejected only through the intervention of the minister of justice to quash the judgment. Such a situation helps imagine a general contractors' regime in countries like France, or Britain, as Marx suggests in the *Capital*:

piece-wages allow the capitalist to make a contract for so much per piece with the most important worker – in manufacture, with the chief of some group, in mines with the extractor of the coal, in the factory with the actual machine-worker – at a price for which this man himself undertakes the enlisting and the payment of his assistants. *Here the exploitation of the worker by capital takes place through the medium of the exploitation of one worker by another.* (Marx 1976 [1867], 695; emphasized by Claude Didry)

I propose to summarize this first step into capitalism with Table 1. What prevails is the organization of markets, firstly through pacification of ordinary interactions owing to the monopolization of violence by the State with, for example, the deployment of police forces and safe road building and secondly by legislations rationalizing commercial codes of conduct in commercial codes. Then, a specific production derives from orders addressed by merchants to renowned artisans or sometimes peasants (for example as weavers), free to hire other workers. It describes a general "Pre-Keynesian" convention, in which constitutive rules such as commercial law and civil code formalize the possibility of repeated exchanges and subcontracting, leading to a common sense on commerce and trades. Market orientation is undermining traditional production spheres such as family or neighborhood.

Table 1: Commodification of Production

| | Organization of markets → | → Lease of work (or subcontracting) regime |
|--|---|---|
| Main test situation ("épreuve principale") | Raw materials and goods markets | Markets of "works" (" <i>ouvrage</i> "), depending on demand expressed on good markets |
| Constitutive rules | Constitutive rules: commercial law as the framework of supply and demand | Constitutive rules: civil law as the framework of supply and demand of contractors (without taking the reproduction of the coordination and tools of production into consideration) |
| Common sense | Centered on exchanges - Supports: merchants and intermediaries - Forms: price or interest rates as balancing variables summarizing the knowledge on the product | Subcontractors are intermediaries, trying to fix the price of the pieces through tariffs - after collective actions - or observations of the litigation resolution |
| Dynamics | Fashion as a distinctive mechanism generating new mimetic behavior (evoking Orléan [1989] for financial markets) | Production depends on demand variations i.e. on fashion and seasons |

3. Labor Law as an Organizational Strain

3.1 Labor Law as a Disruptive Legislation

Labor law – as a protective device against workers' exploitation – is often conceived as the result of a causal influence of Taylorism and, more generally, of organization of labor. Such a view supposes the spontaneous emergence of a hierarchical organization dominated by the employer to whom the worker is deemed subordinated. But, in a situation where independent workers, hiring often other workers, took in charge production operations, organization doesn't emerge spontaneously in capitalism. Even in mechanized facilities, lease of work, called more and more often "*marchandage*" (*subcontracting*), remained the reference for the workers, even if social historians ignored it, outside the pioneering writings by Cottereau (2002) and Lefebvre (2003). The model was that of the peasant or the artisan, who owned his tools and workshop. Thus law was based on the civil code, as the common reference of the citizens mobilized also in cases of trouble.

The juridical and legislative debates on a labor code and simultaneously on a more specific law project about the labor contract, in France at the beginning of 20th century, reveal a deep change in law, with a new impetus toward codes that altered the high degree of rationality reached with the civil code. It

corresponds to what Weber (1978, 880) characterized as the “modern law,” in which legislation was conceived in a purely functionalist way, as a tool for addressing economic and social issues. It means that law was no longer rooted in bills of rights attached to a human nature; it no longer had to be presented in the systematized way of the civil code. According to Arthur Groussier, the socialist deputy who wrote, in 1898, the first project of labor code that launched the discussions on this issue:

Just as we have a commercial code that regulates the relations of the merchants, a rural code that regulates the relations of farmers, we ask for a labor code that regulates the relations of workers and their employers. (quoted in Didry 2016, 73)

At that time, labor had become a category that designated social and economic realities the French Labor Office (“*Office du travail*”) was observing. With Groussier’s code, labor became the focus of a legislative structure gathering the existing laws and adding socialist innovations. Labor was then defined in a very marginal way, as an activity that could be either manual or intellectual. Further discussions in a law professors’ association specified the definition of labor contract in a law project (elaborated between 1904-1908), insisting on the continuity of the relation between a worker (or an employee³) and an employer.

The distinctive criterion of labor contract was not *subordination*, but the usual destination of the activity of the worker and the economic dependence it caused: the recipient of work had to be a person; and if it was the public, it was not a labor contract. This contract was individual, and led to the recognition of work as an individual activity. Such recognition allows avoiding the informality of the activity of family members involved in the lease of work, insofar as these members were considered as employees of the principal (merchant or workplace director). It also allows to identify the employer of people working at home, who was initially seen as the principal in a cascade of intermediaries.

Finally, these legislative and juridical debates, as they clarified the distinction between employees and employers, also led to a renewed conception of labor collectivities, collective actions, and industrial relations. Collective agreements became distinct from tariffs fixing the price of pieceworks, and were conceived as contracts between employers and groups of employees regulating the conditions of individual labor contracts. Employees gathered on the same workplace, in contract with the same employer, could be conceived as the personnel of the firm, for which a Millerand’s law project on work councils (“*conseils du travail*”) – proposed in 1900 – organized an elected representation.

³ These French legislative debates paralleled legal recognition of the "employment at will" by the States legislations in the US (Vinel 2013).

3.2 The Emergence of Production Organizations

With this new labor code – whose first book on “labor conventions” was adopted in 1910 – all the workers shared the same condition as *employees*, from the manual workers to the engineers, including technicians and clerks. With the labor contract, employees were hired by a common employer, instead of having a system of subcontracting, and were supposed to work with another in a workplace. Labor law has had a creative effect on economic dynamics, insofar as it made possible the cooperation between engineers and workers in the elaboration of prototypes before the industrialization of new products. As such, labor law was an opening to new “possible production worlds” (Salais 1994): “industrial production worlds” planned by engineers (themselves employed by management) and “immaterial production worlds” based on systematic innovation targeted by research & development (R&D) departments. It accompanied an unprecedented industrialization of the country (Noiriel 1986) and supported the development of new industries such as car or aviation industries, which highlights the creative dimension of labor. It enhanced the innovative dynamic held by the firms, before its recent “deformation” by finance (Favereau 2016; Hatchuel and Segrestin 2012).

Labor law remained mostly a legislative project before World War 1 (WW1), and entered the practices of economic actors only progressively. During WW1, the organization of war economy (based on large facilities in order to mass-produce weapons required by army) was an important opportunity for the implementation of this new law, through incentive wage standards and the institution of shop stewards. After WW1, the legislation on the eight-hour day encouraged the negotiation of labor schedules at the levels of the workplaces, and of the industry. It required translating piece rate into time wage. Social protection, with the legislation on occupational injuries (1898) and social insurance (up to 1928), was also a strong leverage to foster the clarification of the condition of people working at home, in order to identify who was submitted to social contributions as employee or employer. The implementation of labor law defined the perimeter of production organizations in which management was responsible for accidents and health of the employees. The problem was not only the reversal of the burden of the proof, now resting on the employer,⁴ and the transition from an individual liability to insurable risks as presented in Ewald (1986). It was the very existence of the employer, as in the case of loggers claiming for the implementation of law to their activity considered as a harvest sold to lumber merchants. During the 1920s, judges addressed this issue in considering loggers as employees, grounding the identification of labor contracts on economic dependence (i.e., the fact that workers earned their living with a labor the employer could stop at any time) (Didry 2016, 97). But, in

⁴ Who was presumed responsible of the accident.

the 1930s, they took subordination (as the exercise of a direct surveillance of employers) as the main criterion of the labor contract, in order to exclude people who worked at home. Finally, the subordination criterion has been maintained until today, but strongly relaxed, in extending subordination to all situations of labor in which the absence of control of the eventual employer could not be proved.

Thus, labor law appears as a condition for the emergence of organizations, through the rationalization of labor, which took several forms during the inter-war period (Moutet 1996).⁵ In this perspective, organization can't be reduced to the affirmation of the employers' authority upon labor, in a way that evokes the authoritarian conception of Williamson (1985). Organization of labor and, more generally, of production through labor law meant the formalization of networks of "isolated workers," in order to fix their ultimate employer in a subcontracting cascade, as in the case of the seamstresses who made garments for department stores. It covered also innovative sectors such as aviation industry, which in France was led by small firms focused on the fabrication of prototypes through cooperation between high skilled workers and engineers (Chadeau 1987; Didry and Salais 1995), and thus could be seen as close to Storper and Salais's "immaterial worlds of production" (Storper and Salais 1997).

The discipline resulting from the rational organization of labor by engineers could not be reduced to a form of modern slavery (Supiot 2000), but meant also a "microphysics of power" (Foucault 1977). Following Foucault, power exerted by employers, engineers, and foremen implies resistance to its directive and attempts to reverse control on the disciplined action. This microphysics of power resulting from workers' resistance at the workplace level is a dimension of the "labor conventions" identified by Salais (1989). It was progressively triggered by the action of restructured unions on the issue of labor, that led progressively to a "macrophysics of politics" based on a vision of the economic and social development. The creation of a General Confederation of Labor (*Confédération Générale du Travail*, in short CGT) at the end of the 19th century led to a deep restructuring of the federations in the first half of the 20th century, from trade (based on the know-how shared by a community of workers) to industry (as the aggregation of workplaces sharing common technical characteristics) (contrôle ouvrier). The catholic unions followed it, with the French Christian Workers Confederation (*Confédération Française des Travailleurs Chrétiens*) created in 1919. Workforce gathered in a workplace became the target of unions' action, which aimed, since the beginning of the 1920s, at a "workers' control" on labor conditions at the level of workplaces, especially in order to weight on rationalization. This orientation took off in the 1930s, in the context of the economic crisis and of the fascist threats in Europe. The strategy

⁵ The rationalization corresponded mostly to wage formulas varying according to the inspiration of engineers. Thus, it gave the impression of an irrational rationalization.

of organizations such as the CGT was to anchor union in the firms, through section or workplace committees that emerged during strikes. The objective was the negotiation of collective agreements at the level of the branch (i.e., the industry) recognized in a law passed by the Popular Front majority in 1936. It led to the elaboration of wage hierarchies at the branch level, based on common categories: workers (*ouvriers*), but also clerks (*employés*), technicians, foremen (*agents de maîtrise*), and engineers. The aim of collective actions run mainly by workers (*ouvriers*) was to cover the entire staff in a workplace, and thus to lay the foundation of its organization.

The huge strike movement of 1936, which followed the election of a left-wing Popular Front majority at the Chamber of Deputies, initiated a deep dynamic that was pursued after WW2. On the one hand, the Temporary Government systematized employments' classification at the branch level, between 1945 and 1947 (Saglio 2007). On the other hand, the creation of works councils elected by the workforce in 1945 consolidated the importance of the workplace. Nationalizations of strategic industries, such as electricity, railways, aviation, or banking completed the picture, as they undermined the counter-effects of the financial markets on organizations (Andrieu et al. 1987).

3.3 The Perspective of an Organized Market Economy

Labor law is a strong force for the organization of labor inside firms. Organization doesn't mean only forms of domination based on sanctioning deviant behaviors, as in the Williamsonian conception. It means firstly the formalization of wage hierarchies in which labor positions are based on skills, i.e., sets of capacities required to occupy these positions. Assembly line is not only the imposition of a general rhythm to the workers, labor organization gives to each of the workers a view on the process of production, and on the place he or she has in it (Stark 1980). The existence of a R&D department systematizes the elaboration of lab devices, prototypes, and the industrialization of new products that suppose the cooperation between engineers, technicians, and high skilled workers. Thus, firms as organizations can be considered as "internal labor markets," as they offer their employees career opportunities and create the condition of innovation through organizational learning.

Favereau (1989) rereading the Keynesian Theory emphasizes the priority given to organization – as organized labor – in countries such as postwar France, that enabled firms to elaborate and industrialize new products (such as television, radio, electrical household appliances). Wages supported by collective bargaining and by welfare state benefits give people the resources to access to this growing set of new products. It means that markets of goods have to be seen as markets of organizations, since goods symbolize the activity of organizations such as firms.

Table 2: From Anti-Market Organizations to Markets of Organizations

| | Anti-market organizations → | → Markets of organizations |
|--|---|--|
| Main test situation ("épreuve principale") | Labor (anti) Market Organization in large firms/ recruitment promotion layoff | Markets of Goods as innovative products elaborated by the firms, creating new needs and demand |
| Constitutive rule | Constitutive rules: Labor contract (and labor law) as anti-competition rules, base of labor conventions (Salais 1989, 1994) | Constitutive rule: Commercial law as the base of competition between goods produced by organizations |
| Common Sense | Common sense as organizational learning process, shaping an innovative mass production | Common sense based on forecast of demand |
| Dynamics | Development of products (innovation) and of production. Price, as predictable production costs including wages and profits in the added value produced | Predictable sales, as the base of the funding of organizations (wages and investments) |

Table 2 shows that firms as employer play a leading role in the economy, through their ability to innovate, based on the cooperation between engineers and workers in an organized environment. The main test in society is no longer the sale of commodities, but the engagement of workers in stable employments, opening to them the access to career opportunities and resources to buy innovative products such as TV, cars, dish washers, etc. During the immediate post-war period, French firms were most of the time family owned or had been nationalized in the wake of the CNR⁶ program, and thus were preserved from the pressure of financial markets. Thus, labor law can be seen as a framework enabling workers and employers to identify labor as a specific activity in a specific duration and workplace, distinct from the domestic activity. Unemployment becomes obvious for everyone, as labor is based on the belonging to an organized collectivity. Labor law limits competition through specialization of the individuals and their solidarity. Common knowledge is related to innovation, technical improvements and increase of efficiency as components of an “organizational learning process” (Argyris and Schön 1978). The regulated distribution of added value between wages and profits (through minimum wage legislation or collective bargaining) shapes consumption and investments.

⁶ *Conseil National de la Résistance*, National Council of Resistance (which grouped the main political forces of the French Resistance around General de Gaulle during WW2).

4. (Financial) Markets Strike Back

4.1 The Threatened Stability of Employment

In comparison to what followed WW2, one could think that the 1970s crisis led to the progressive dismantling of labor law. The increase of fixed term employment contracts in the 1990s was the starting point for questioning labor law, as being obsolete in a globalized and digitalized economy making flexibility unavoidable (Boissonnat 1995). The disappearance of full employment was seen as irreversible, in face of a long lasting high level of unemployment (Castel 2003 [1995]). This statement cleared the way for reform propositions, in order to facilitate the breach of permanent contracts, and to align their legal framework with the legislation on fixed-term contract in a unified form of employment contract (Cahuc and Kramarz 2005). Does that mean the end of internal markets through a general precariousness of the workforce?

These debates on structural reforms of the labor market, which we still know today, mask evolutions that contribute to increasing the weight of labor and labor law in the life of the workers. Women's activity started a continuous increase in the 1960s that crisis hasn't stopped, and that contributed to a more general increase of the French active population. Historically, labor law kept on developing during the 1970s with the legal definition of the permanent contract (*contrat à durée indéterminée*) in 1973. The labor law passed at that time required "real and serious motives" for the breach of permanent contracts, i.e., the obligation for the employer to present objective data (real motive) and to justify lay-off as the only answer to the issue (serious motive). It strengthened internal markets, and, in the same time, the base for the enactment of precarious contracts (temporary work in 1972, fixed-term contract in 1978 and 1982). Thus, the increase of precarious employment during the 1980s could be conceived as an institutional learning in the use of these new contracts, instead as a growth of precariousness in an "insiders-outsiders" model. The extension of monthly payments for workers during the 1970s meant also a unification of the workforce, reinforcing the relevance of internal markets.

This evolution is confirmed today, with a dominance of permanent employment representing more than 70% of the workforce (*population active*) in France in 2015. In parallel, the increase of workers' seniority in the firm alongside the increase in age suggests that lifetime employment remains a reality. Thus, precariousness has several aspects: precarious contracts affect in the first instance young workers oscillating between unemployment and activity before finding a permanent position around the age of 30. Precariousness corresponds also to the threat on permanent contracts and their fall after the age of 60, which are related to the frequent restructuring of the firms.

4.2 The Hegemony of the Financial Markets and the "Deformation of the Firm"

Firms' restructuring and its consequences on employment are seen today as the expression of the financial markets pressure on firms (Favereau 2016). It suggests conceiving precariousness first of all as a precariousness of the firms, and thus employment precariousness as a consequence of the former. At a macroeconomic level, the prevalence of corporate governance means a weakening of investment in favor of dividends and of the valorization of shares on financial markets. Paradoxically, the financial crisis of 2008 has strengthened this mechanism, with a fall of investments and a threat on credit leading to the destruction of more than 500 000 jobs in France. At a microeconomic level, the prevalence of corporate governance questions the rationality of the economic actors who hold the power in firms. The main source of profit is no longer production, but speculation on financial markets resulting from workers' resistance at the workplace level. In fact, the most relevant comparison could be to a horse race, in which prevails the capacity of the firms (equivalent to horses) to maximize their EBITDA (equivalent to stay in the race) in order to value their share. It leads to a continuous restructuring, based on the search for the most profitable structure. The leverage is here the minimization of the wage bill through relocation of production activities in areas with low wage costs, but also through outsourcing peripheral activities in order to focus on the core business (Zingales 2000). The ultimate strategy for the firms is subcontracting fabrication (fabless), as in the case of Alcatel at the beginning of the 2000s, which was concluded, after the merger with Lucent in 2005, by the absorption of Alcatel-Lucent by Nokia in 2013.

This mechanism is based on the deregulation of financial markets in the 1980s, which questioned the industrial strategy of the management in the firms. It first affects employment, but also labor conditions with the development of quantitative evaluation numbers, which transform the meaning of the individual activity of the workers (Favereau 2016). Workers are seen as human resources, i.e., as individual cost and profit centers to which is applied the maximization strategy of the financialized firm. But if this evaluation conceives workforce as an aggregation of "*homo economicus*," this underlying conception of the employee as an individual rational actor (in the meaning of the orthodox economic theory) creates a general distrust contradictory to the coordination required by the achievement of an innovative production. It has huge consequences on labor conditions, as a raise of psycho-social risks for the employees. Moreover, beyond such a pressure on labor conditions and wage costs reinforced by the threat of redundancies, big corporations tend to become integration centers of subcontracting systems constituted by smaller enterprises (Kristensen and Zeitlin 2005). The MEDEF,⁷ the new national business association that re-

⁷ *Mouvement Des Entreprises de France* (Movement of the French Enterprises).

placed the CNPF⁸ in 1998, focused on entrepreneurship, down to the level of individual employees held as responsible for their employability and considered as “entrepreneurs of themselves” (Lallement 2007). It symbolized the main “deformation” of the firm, i.e., its marketization, attacking the “anti-market organization” of the internal labor market that labor law has produced (Table 3).

4.3 Labor Markets Structural Reforms and the New European Convention of Market

This “marketization” of labor is today reinforced by the recommendation of the EU Commission to the Member States of the Union. Such a situation corresponds to a form of radicalization of liberalism in Europe, threatening today the European institutions themselves (Salais 2012). It puts into question the Keynesian convention experimented in postwar France (Salais et al. 1999 [1986]), and its eventual extension at the EU level through directives aiming at harmonizing national legislations. Labor flexibility has become the unquestioned objective of reforms that aim at reducing unemployment and thus deficits resulting from unemployment benefits. Liberalism is no longer conceived as the need for the State to maintain market competition of market competition, it has become a permanent research to deepen market mechanisms in several economic and social areas, such as labor or social security (Salais 2012).

To summarize the impacts of financialization and of European marketization, I propose in Table 3 to place the organization of market as the core organization from which results the evolution of labor law and economic organization.

Table 3: The Marketization of the Firm

| | Organization of the markets → | → Marketization of organizations |
|--|--|---|
| Main test situation (“épreuve principale”) | Financial assets markets, benchmark and speculative added value | Labor market, benchmark and performance indicators (Bruno and Didier 2013) |
| Constitutive rules | Constitutive rules: bet on profitability of the assets and companies, stock-options for CEOs | Constitutive rules: threat on stable employment reinforced by mass unemployment |
| Common sense | Common sense as expectations on profits. Based on the expertise of financial consultants | Common sense as costs killing. Based on the expertise of external consultants accompanying restructuring |
| Dynamics | Variation of prices through stock exchange indexes | Adaptation of wage costs to prices variations |

⁸ Conseil National du Patronat Français (National Council of French Employers).

Table 3 shows that the organization of markets, starting with financial markets, appears as the framework of the management activities in firms. Behind the stability of employment in firms (Didry 2016), this evolution questions the meaning of the firm itself as the place of labor conventions (Salais 1994). In Salais's view, it first affects "unemployment conventions" through the permanent threat for employees of losing their jobs, and also the "productivity conventions" by a dismantling of the collective division of labor in production.

Firms cease to conceive themselves as employers, and become management entities focused on the costs issues with CEOs presenting themselves as *costkillers* (Boussard 2017). It leads to a conception of the employee as a costly "homo economicus," which damages seriously its psychological stability.

Stock exchange indexes become objectives for the profitability expectations of the firms, relayed by the report of financial consultants paving the way to reach them.

External consultants implement reorganizations, in the wake of proposals made by financial experts, in order to reduce wage costs.

5. Conclusion: On the Politicization of Economy

In addressing simultaneously the issues of labor law, organization of firms, and financialization, convention theory is able to reach a diagnosis on the current situation, but also to imagine reforms that oblige to stick together the development of workers representation in the firm and a new conception of the firm itself (Favereau 2016).⁹ Thus, convention theory has to assume a form of political economy that doesn't only challenge orthodox economy in the field of theory, by underlining the role of institutional frameworks in the economic activities against the naturalization of "laissez-faire." Convention theory goes also beyond the *critique* of orthodox economic mechanisms based on the market model, in order to raise the discussions to a *propositional* position (Favereau 2016). It draws a path, which appears symmetrical to the orthodox economic path from the critique of welfare state (for example in *The Route to Serfdom* by Hayek) to the political implementation of the neoliberal program in the 1980s (Mirowski and Plehwe 2009).

As such, French labor developments in the direction of German codetermination model (Favereau 2016) could provide an enlargement of the reflection on the legal framework that shapes the firm. But the proposition on representation of the workers at the corporate level of firms can't be separated from the labor contract, and it would be absurd to gain a representation of workers in the governance instances of the firm, without workers stable enough to exert their

⁹ As in projects elaborated by lawyers in the field of commercial law (Blair and Stout 1999).

mandate (Favereau and Jeammaud 2017). Reform of the firms in the direction of codetermination affects the way labor contract itself is conceived and implies to rediscover labor – beyond subordination – as an engagement of the worker in a coordination that can't be reduced to the power of the employer (Dockès et al. 2017). In face of platforms such as Uber or Deliveroo, such a renewal in the conception of labor contract appears as urgently necessary.

References

- Andrieu, Claire, Lucette Le Van, and Antoine Prost, ed. 1987. *Les nationalisations de la Libération: De l'utopie au compromis*. Paris: Presses de Science Po.
- Argyris, Chris, and Donald Schön. 1978. *Organizational learning: A theory of action perspective*. Reading: Addison-Wesley.
- Blair, Margaret, and Lynn Stout. 1999. A team production theory of corporate law. *Virginia Law Review* 80 (2): 248-328.
- Boissonnat, Jean. 1995. *Le travail dans vingt ans*. Paris: Odile Jacob.
- Boussard, Valérie. 2017. *Finance at work*. Oxon: Routledge.
- Bruno, Isabelle, and Emmanuel Didier. 2013. *Le benchmarking. L'Etat sous pression statistique*. Paris: Zones (La Découverte).
- Cahuc, Pierre, and Francis Kramarz. 2005. *De la précarité à la mobilité: vers une Sécurité sociale professionnelle*. Rapport au ministre de l'Économie, des Finances et de l'Industrie et au ministre de l'Emploi, du Travail et de la Cohésion sociale. <<https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/054000092.pdf>> (Accessed November 20, 2018).
- Castel, Robert. 2003 [1995]. *From manual workers to wage laborers: Transformation of the social question*. New York: Transaction Publishers.
- Chadeau, Emmanuel. 1987. *De Blériot à Dassault: L'industrie aéronautique en France: 1900-1950*. Paris: Fayard.
- Cottreau, Alain. 2002. Droit et bon droit, un droit des ouvriers instauré puis évincé par le droit du travail. *Annales Histoire et Sciences Sociales* 57 (6): 1521-61.
- Diaz-Bone, Rainer. 2018. *Die "Economie des conventions". Grundlagen und Entwicklungen der neuen französischen Wirtschaftssoziologie*, 2nd ed. Wiesbaden: Springer VS.
- Diaz-Bone, Rainer, Claude Didry, and Robert Salais. 2015. Conventionalist's perspectives on the political economy of law. An introduction. *Historical Social Research* 40 (1): 7-22. doi: 10.12759/hsr.40.2015.1.7-22.
- Didry, Claude. 2016. *L'institution du travail. Droit et salariat dans l'histoire*. Paris: La Dispute.
- Didry, Claude, and Robert Salais. 1995. Troubles sur les produits d'Etat et écriture des conventions collectives. In *L'inscription sociale du marché*, ed. Annie Jacob and Hélène Vérin, 110-34. Paris: L'Harmattan.
- Dockès, Emmanuel, and GR PACT. 2017. *Proposition de Code du Travail*. Paris: Dalloz.
- Dupuy, Jean-Pierre, François Eymard-Duvernay, Olivier Favereau, André Orléan, Robert Salais, and Laurent Thévenot. 1989. Introduction [to the special issue on Conventions]. *Revue économique* 40 (2): 141-5.

- Esping-Andersen, Justa. 1990. *The three worlds of welfare capitalism*. Princeton: Princeton University Press.
- Ewald, François. 1986. *L'Etat-providence*. Paris: Grasset.
- Favereau, Olivier. 1989. Marchés internes, marchés externes. *Revue économique* 40 (2): 273-328.
- Favereau, Olivier. 2016. *The impact of financialisation of the economy on entreprises and more specifically on labor relations*. Geneva: International Labor Office.
- Favereau Olivier, and Antoine Jeammaud. 2017. Qu'est devenue l'idée démocratique en droit du travail? *Revue de Droit du Travail*, November: 576.
- Foucault, Michel. 1977. *Discipline and punish*. London: Penguin Books.
- Hatchuel, Armand, and Blanche Segrestin. 2012. *Refonder l'entreprise*. Paris: Seuil.
- Horn, Jeff, Leonard N. Rosenband, and Merritt Roe Smith, ed. 2010. *Reconceptualizing the industrial revolution*. Cambridge, MA: MIT Press.
- Kristensen, Peer Hul, and Jonathan Zeitlin. 2005. *Local players in global games. The strategic constitution of a multinational corporation*. New York: Oxford University Press.
- Lefebvre, Philippe. 2003. *L'invention de la grande entreprise: travail, hiérarchie, marché*. Paris: Presses Universitaires de France.
- Marx, Karl. 1976 [1867]. *The capital. A critique of the political economy*. London: Penguin Books.
- Minard, Philippe. 1998. *La fortune du colbertisme. État et industrie dans la France des Lumières*. Paris: Fayard.
- Mirowski, Philip, and Dieter Plehwe, eds. 2009. *The Road from Mont Pèlerin. The making of the neoliberal thought collective*. Cambridge, MA: Harvard University Press.
- Moutet, Aimée. 1997. *Les logiques de l'entreprise, la rationalisation dans l'industrie française de l'entre-deux-guerres*. Paris: Editions de l'Ecole des Hautes Etudes en Sciences Sociales.
- Noiriel, Gérard. 1986. *Les ouvriers dans la société française, XIX^e-XX^e siècles*, Paris: Le Seuil.
- North, Douglass C. 1990. *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press.
- Orléan, André. 1989. Pour une approche cognitive des conventions économiques. *Revue économique* 40 (2): 241-72.
- Polanyi, Karl. 2001 [1944]. *The Great Transformation. The political and economic origin of our time*. Boston: Beacon Press.
- Saglio, Jean. 2007, Les arrêtés Parodi sur les salaires: un moment dans la construction de la place de l'État dans le système français de relations professionnelles. *Travail et Emploi* 111: 53-73.
- Salais, Robert. 1989. L'analyse économique des conventions du travail. *Revue économique* 40 (2): 199-240.
- Salais, Robert. 1994. Incertitude et interactions de travail: des produits aux conventions. In *Analyse économique des conventions*, ed. Orléan A, 371-403. Paris: PUF.
- Salais, Robert. 2012. Employment and the social dimension of Europe. What constitutive convention of the market? In *Transforming European employment*

- policy: Labour market transitions and the promotion of capability*, ed. Ralf Rogowski, Robert Salais and Noel Whiteside, 255-82. Cheltenham: Edward Elgar.
- Salais, Robert. 2013. *Le viol d'Europe: Enquête sur la disparition d'une idée*. Paris: Presses Universitaires de France.
- Salais, Robert, and Laurent Thévenot, ed. 1986. *Le travail. Marchés, règles, conventions*. Paris: Economica.
- Salais, Robert, Nicolas Baverez, and Bénédicte Reynaud. 1999 [1986]. *L'invention du chômage*. Paris: Presses Universitaires de France.
- Sewell, William H. 1980. *Work and revolution in France: The language of labor from the old regime to 1848*. New York: Cambridge University Press.
- Stark David. 1980. Class struggle and the transformation of the labor process: A relational approach. *Theory and Society* 9 (1): 89-130.
- Storper, Michael, and Robert Salais. 1997. *Worlds of production. The action frameworks of the economy*. Cambridge, MA: Harvard University Press.
- Supiot, Alain. 2000. Les nouveaux visages de la subordination. *Droit social* 2: 131-45.
- Vinel, Jean-Christophe. 2013. *The employee. A political history*. Philadelphia: University of Pennsylvania Press.
- Weber, Max. 1927. *General economic history*. Glencoe, IL: Free Press.
- Weber, Max. 1978. *Economy and society. An outline of interpretative sociology*. Berkeley: University of California Press.
- Vérin, Hélène. 1982. *Entrepreneurs, entreprises. Histoire d'une idée*. Paris: Presses Universitaires de France.
- Williamson, Oliver E. 1985. *The economic institutions of capitalism*. New York: Free Press.
- Woronoff, Denis. 1998. *Histoire de l'industrie en France. Du XVI^e siècle à nos jours*. Paris: Le Seuil.
- Zingales, Luigi. 2000. In search of new foundations. *Journal of Finance* 55 (4): 1623-53.