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EDITORIAL

This report discusses an issue of fundamental social and economic importance and has the advantage of combining the positions of economist and legal specialists alike.

Despite its highly regulatory framework, social legislation in France not only fails to provide an adequate level of protection for workers, but also lacks in economic merit.

Today, reform is needed if we are to better reconcile these two priorities and can only be achieved by alleviating regulatory law in favour of contractual law and contracts. However, this in turn is subject to several prerequisites: the heightened legitimacy of the social partners involved, an impro-vement in the way collective bargaining is carried out, and the more effective processing of legal disputes with greater importance afforded to conciliation and mediation, etc.

Innovation without compromise: this report discusses the groundwork needed for effective reform.

Christian de Boissieu
Executive Chairman of the CAE

Reforming Social Legislation: Reconciling Worker Protection with Efficient Economics

Report by Gilbert Cette and Jacques Barthélemy

The profound changes to economic life, notably those driven by the progress made in information technologies and communications, call for the extensive reform of current social legislation –not only in terms of labour law, but also when it comes to social protection. Social legislation must be able to uphold its protective calling and accommodate social and economic change. Its very structure must allow it to adapt and anticipate. Even if France's civil law system is more conducive to regulatory rather than contractual social legislation, the authors of this report believe that the reverse should apply. Moreover, in their opinion, the key to this reform is the greater capacity of contracts, particularly collective agreements, to combine social protection with economic performance.

With this in mind, this report by Jacques Barthélemy and Gilbert Cette focuses primarily on the value of a contractual legal framework and how to bring about the necessary changes. First, they discuss the conditions needed to give genuine legitimacy to those involved and the code of conduct required for successful bargaining. In short, how to improve and develop social dialogue. Second, they recommend a review of current methods in resolving legal disputes and non-compliance with social legislation, more notably the choice between civil, criminal or administrative sanctions as well as the use of incentive measures and collective bargaining. According to the authors, an improvement in the efficiency of industrial tribunals and the conditions required to significantly increase recourse to mediation and arbitration are needed. Last, they examine a more flexible approach to employment security ('flexicurity') which in turn imposes a different approach to social protection and the divorcing of worker rights from employment contracts in order to encourage pooling of commitments. This report was discussed on January 19, 2010, in the presence of the French Minister for Labour, Family and Social Affairs. This letter was published under the responsibility of the permanent group and presents the main conclusions drawn by the authors.

The need for reform

Social legislation in France is highly regulatory by nature (compared to other countries). The consequences of excessive regulation, notably stringent legislation governing the labour market, are well-known. While the indicators that support this theory are varied, they all point to the same conclusions. The negative effects of highly regulatory social legislation on the macro-economics of a country are two-fold in that it affects both productivity and the balance of the labour market –two factors which are fundamentally linked. An overly strict regulatory framework hampers the best compromises at a local level, limits performance and reduces the level of employment. Newcomers to the labour market, particularly the young, are the first victims because it makes finding a job all the more difficult and

job security all the more fragile.

While job protection does penalise the macro-economic balance to a certain extent, it is nonetheless justified if it has a positive impact on an employee's well-being by lowering their sentiment of insecurity. Nonetheless, the available studies listed in this report firmly argue to the contrary and that insecurity appears to grow as job protection improves. The explanation for this paradox is that job protection shields those that enjoy a stable position (the 'insiders') but, in reducing the flow of the labour market and its transitions, makes it more difficult for others to enter the job market or for those who have lost their job to find new employment (the 'outsiders').

At the same time, several studies also point to weak trade unions and poor social dialogue in France. The relatively widespread rejection of the market economy suggests expectations of strong government intervention.

The starting point of this report is therefore to note that the situation in France is highly contradictory: highly regulatory social legislation and weak trade unions coexist alongside a strong sentiment of insecurity, poor social relations and a lack of confidence in institutions. The weight of regulatory law in France is undoubtedly one of the major reasons behind the country's weak unions, and yet they are vital for the promotion of worker rights and the creation of a more contractual legal framework. These contradictions cannot be ignored and are taken into account by the authors in their proposed reform for social legislation.

Structuring reform

Given the above, social legislation which gives priority to contractual law appears necessary since contracts can be more easily adapted to local needs than regulations themselves. Here, the authors begin by presenting the conditions needed to implement this reform:

- encourage collective bargaining;
- safeguard the protective vocation of labour law;
- reduce the complexity of labour law;
- reduce the sources of inequality that social legislation can create;
- reduce the risks and fears linked to having recourse to the courts in resolving disputes.

These conditions must be met whilst also avoiding the implementation of an arsenal of interventionist measures and excessive faith in contracts, and whilst taking account of the applicable legal constraints.

While several avenues appear possible (liberalisation, simple encouraging of the development of contractual law), the authors believe that there is only one genuinely credible way forward: *the moderation of regulatory law THROUGH the development of contractual law.* Furthermore, the two must be carried out in tandem to ensure that at no point will worker protection be weakened. As such, the incentive to veer towards contractual law will depend on the legal (and sometimes financial) gains to be made.

It is therefore this last channel that is proposed in this report. The aim is to define a framework for social legislation that provides as much if not more protection for workers and which is more efficient in economic terms. Two fundamental principles apply to this reform and the development of contractual law:

- collective contracts may not infringe law and order as defined by civil law;
- but can 'depart from' all other provisions of the French Labour Code.

This avenue has begun to be explored in recent years.

Defining contractual law: actors and terms

The strategy put forward for social legislation reform in France, namely the simultaneous development of contractual law and reduction of regulatory law, requires the collaboration of legitimate and representative social partners, which is not possible without strong trade unions.

One strategy often cited to develop trade union representation is to favour the syndicalism of services, in other words clients, as is the case in the Scandinavian countries. The authors, however, believe that this goes against the principle of equal rights amongst workers. They therefore place greater value on several other strategies:

- the implementation of union vouchers;
- increased awareness of the advantages of belonging to a union;
- improved methods and means of communications for unions.

A more contractual approach to social legislation also requires quality social dialogue which in turn calls for a better articulation between consultation and bargaining. To achieve this, the authors propose transforming the law governing social dialogue between worker representatives and employers as well as structuring the levels of sectoral social dialogue. Lastly, so that a contract alone can be taken as absolute law between parties –which is mandatory for its independent status– it is necessary to define and concretely implement code of conduct rules to govern the bargaining process.

The authors' proposals are also intended to go beyond the new legal ordering between collective agreements and the law on the one hand, and agreements at different levels on the other. The qualification of quasi-regulations is imposed for France's national cross-industry agreement (*Accord national interprofessionnel* or ANI). The independent status of collective agreements makes it necessary to differentiate between the legal nature of a sector agreement and a company agreement because, if we do not, there is a risk of legal insecurity. Moreover, thanks to its purely contractual nature, a company agreement can be used as a management tool which makes it easier to factor in employee interests in strategies and match them with the general interests of a company. The idea of incorporating a company's collective agreement in employment contracts merits reflection.

All told, the proposals put forward by the authors are an extension of the changes introduced by the laws of May 4, 2004 and August 20, 2008. These changes are not cited here as they were respectively preceded by the 'common declaration' of July 2001 and the 'common position' of April 9, 2008. The independent status of a collective agreement makes this reconciliation possible in that it allows for the adaptation of legal standards.

Improving the processing of legal disputes

Reform based on more contracts and less regulations requires a review of the different forms of penalty applied in the event of non-compliance with the Labour Code, and the manner in which both individual and collective disputes are resolved. It is for this reason that the authors have devoted part of their report to France's labour inspection units (*Inspection du travail*) and the legislation governing legal disputes. This section looks at the country's industrial tribunals which, despite the value of both sides of the industry's involvement, present serious

shortcomings. The report gives detailed information on the work of industrial tribunals in France and, based purely on the time it takes to resolve disputes, the outlook is not good. On average, verdicts by the industrial tribunals are delivered more than 15 months after a case is brought before them. In the event of an appeal or petition, the average timeframe increases to over 30 and to over 50 months respectively. What is more, more than half of the verdicts rendered by the industrial tribunals end in appeal, hence the justification for finding alternative solutions in order to shorten procedures.

One of the reasons why the industrial tribunals are submerged is the low rate of success of attempts at reconciliation. Reconciliation is not tantamount to failure as the example of the United Kingdom, where disputes are more often resolved in this way, clearly shows. The reasons for this low rate of success are analysed in this report, as are the conditions required to make reconciliation procedures more effective.

Resolving the problem of excessive recourse to the courts in settling work-related disputes and increasing the degree of legal security when it comes to social legislation is a major priority. The motivation of company directors and their subsequent propensity to recruit new staff is dependent on it. Here, the authors propose to explore the use of collective contracts to open up the way for alternative solutions. Collective agreements could be used to define the process and precise scope of alternative methods in resolving disputes. Here it is important to distinguish between individual and collective disputes. When it comes to individual disputes, most of which are currently brought before an industrial tribunal, the contractual termination of an employment contract permitted by the law of January 25, 2008 is a step forward. Mediation is another possible solution, as are other potential alternatives to industrial tribunals such as arbitration subject to certain terms and conditions set out in this report. For collective disputes, the legal ramifications of reconciliation and arbitration, and even the interpretation of contractual texts, must be enhanced and clarified to ensure they are both used and effective (which is generally not the case).

A flexible approach to employment security (*flexicurity*) and contractual social protection

The final part of the report explores the need for a more flexible approach to employment security and its implications. In the point of view of the authors, for companies to make workers redundant they must provide employees with the necessary tools to allow them to quickly find a new job, without for as much compromising the rights linked to their years of service. In other words, the authors argue in favour of increasing the security of an individual's professional career. A battery of training is one way of achieving this objective where, provided an employee training savings account is set up alongside a training plan decided on by the employer (which constitutes an immaterial investment for the company),. The transferability of the employee's individual right to training (*droit individuel à la formation* or DIF) is obviously a step in this direction, but we need to be more ambitious.

Profiling redundancy indemnities in order to foster greater employment stability is one possibility presented in this report. In the same vein, factoring in a worker's length of service within their profession and not simply with their employer can only make the sudden change in employer imposed on a worker easier to bear. Moreover, it can also encourage this change, particularly in view of promotion and even a change in worker status.

Altogether, this can only encourage the pooling of commitments between firms. It can also help in resolving the delicate issue of the negative effect on a company liabilities of postponing the mandatory retirement age, which works to the advantage of an employee as they alone are able to decide when they want to stop working. Mutual agreements can also be a solution in resolving other problems such as the lack of job security linked to certain types of contracts. To achieve this, the social partners will need to define new scopes for social guarantees.

Recommendations

All in all, this report argues for new social legislation which is more contractual and less regulatory. Regulatory law would continue to apply fully to areas where law and order are at stake, and in other areas where a contractual legal framework is lacking.

Above all, this would mean the full application of the law of January 31, 2007[1]. Social legislation through the proposals presented in this report requires the joint approval of the social partners involved and, where they deem necessary, the drawing up of national cross-industry collective agreements. The next step would then be to apply the principle that contracts shall take precedence over regulations in all domains, provided they do not breach public order, as well as when it comes to resolving individual and collective disputes.

The recommendations put forward in the report are grouped by sub-theme, each of which could be governed by a specific joint agreement between social partners at a national level.

The first series of recommendations put forward by the authors are aimed at *improving and developing social dialogue*, namely:

- the definition of a charter for social dialogue;
- the implementation of union vouchers in order to increase union member numbers;
- the reduction of the number of sector agreements;
- the widespread implementation of a single workers representative body (*délégation unique du personnel* or DUP);
- the definition of the notion of a 'common position' (between the two sides of industry) and its own legal framework;
- the modification of the composition of works councils and the way in which their members are elected;
- the ability to easily transfer bargaining powers to a single workers representative body or to a works council, and the setting up of referendums within very small companies, are all concrete proposals put forward by the authors.

In order to *broaden the scope of application of contractual law*, the report contains a number of suggestions including the redefinition of 'social public order' based on the principles of civil law and the application of the principle that collective agreements may deviate from the law insofar as they comply with such a social public order. Based on

(1) Article 1 indicates that all draft reforms envisaged by the government linked to individual and collective relations in the workplace, employment and vocational training, as well as those that fall within the scope of nationwide and inter-sectoral bargaining, require prior consultation with national and inter-sectoral employee and employer trade unions. To this effect, the government has provided them with the relevant documentation presenting the conclusions drawn and analyses made to date, the objectives set and the main options. Once they have indicated their intention to engage in this bargaining process, these unions shall also inform the government of the timeframe they believe is needed to carry out said bargaining.

the principle of the creation of an independent legal status, the authors recommend restructuring the legal ordering of agreements taking into account labour law, sector regulations and the binding contractual terms of company agreements.

In order to *make it easier to resolve conflicts and non-compliance with social legislation*, the authors propose reducing the scope of criminal sanctions and increasing the scope of administrative sanctions, as well as reviewing the grounds for economic redundancies:

• that improving the efficiency of industrial tribunals requires the actual presence of the parties involved (in the process of reconciliation);

• that mediators may not be one of the four judges assigned to the case;

• that the right conditions be put in place to encourage widespread recourse to mediation;

• the setting up, by sector agreement, of the option of arbitration for individual disputes and the structuring of contractual sector procedures to resolve collective disputes, namely arbitration with recourse to a magistrate.

Finally, in the interests of *greater security for an individual's career path*, the report advises:

• the profiling of minimal or contractual redundancy indemnities in order to encourage job stability;

• the implementation of solidarity payments when an employee is made redundant in order to contribute towards financing the cost of unemployment benefits and the outplacement of workers when this is not carried out by the company;

• the discouraging of precarious employment (part-time and fixed-term contracts) via the implementation of additional solidarity payments where precarious contracts are not covered by a collective agreement, or via a sliding scale for employer contributions to unemployment benefits;

• the definition of the conditions for outplacements that are not carried out by an employee's company and redundancy plans, as well as the implementation of occupational social security systems in order to allow for a flexible approach to employment security.

A reduction in the number of thresholds by differentiating between those applied by employee representative bodies and those that have an impact on the level of social security contributions is also recommended.

Comments

In his comments, ***Jean-Paul Fitoussi*** notes that a consensus can easily be reached for many of these proposals. His remarks focus on three points.

First, in his opinion, the fact that France ranks high in international surveys based on macroeconomic results alone as well as in other ratings than those cited by the authors (which reflects either its social cohesion or the rigidity of the employment market), casts some doubt on the initial observation on which the report bases its proposed reform to social legislation. He therefore deems it regrettable that the grounds for reform, which he nonetheless feels are founded and reasonable, are based on what he considers to be approximate data.

Jean-Paul Fitoussi then points out that while we can easily subscribe to the opinion that, under the supervision and control of the state, France's social partners are capable of finding the right compromise when it comes to the regulations governing employment, wages and the settlement of disputes, that does not for as much justify a rejection of all direct government intervention. In his opinion, a thorough analysis of tripartite social bargaining is important and lacking in this report.

Lastly, Jean-Paul Fitoussi insists on the need to remember that a coherent social model is a prerequisite if it is to be effective[2]. As such, in his opinion, there is a need to further broaden the debate to encompass the entire economic, social and political system.

Pierre Cahuc, for his part, welcomes the report. He does, however, state that he is not certain that it would be wise to reinforce contractual law if this is carried out by social partners that are do not represent the interests of a large majority of their potential subscribers. In his opinion, the report tackles the issue too quickly and does not subsequently propose a clear solution. This he feels is regrettable as it constitutes a precondition for the development of a quality contractual legal framework. Moreover, Pierre Cahuc notes that the objectives of Jacques Barthélemy and Gilbert Cette behind the development of contractual law are highly ambitious, and expresses his doubts as to whether these can all be achieved at the same time without the risk of this resulting in a more complex legislation. In his opinion, the advantages and drawbacks of contractual law merit further examination in the report. Finally, he believes that the report contains a number of valuable conclusions that point to the need for reform to France's social legislation. He proposes a legal process for the definition of contractual standards, particularly since the potential consequences they have in terms of inequality, over-simplification and legal security should be examined more closely.

(2) *Cf.* Jean-Paul Fitoussi, Olivier Passet and Jacques Freyssinet (2000): *Réduction du chômage: les réussites en Europe*, CAE report No 23, La Documentation française.

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