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The Sources and the Interpretation of Labour Law in France

by

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The judicial decisions which put industrial laws into effect or settle problems of labour law not yet covered by legislation are bound to claim an increasing place in the publications of the International Labour Office. A reader who wishes to use these documents intelligently must necessarily have some idea of the machinery of the particular judicial system discussed, the tribunals by whose activities that system is developed, its relation to legislation and other sources of national law, and finally the legal or de facto authority enjoyed by each of its component parts. For England the necessary information has been provided by a master hand in an article published by the International Labour Review in 1924¹. In this article my friend and colleague, Professor H. C. Gutteridge, has answered all the essential questions which a jurist, and a fortiori a layman, must ask when he embarks upon the exploration of a foreign judicial system, and has set out his material in a logical sequence which it would be hard to better. The ground plan of his article may therefore well serve as a model for a description of the administration of French Labour law, in so far as the differences in structure of the French and English legal systems will permit.

Part of the article is due to the expert collaboration of two of my colleagues at Lyons. Mr. Paul Pic has contributed an analysis of the respective functions of the various civil, industrial, and administrative tribunals which together help to build up industrial law; and Mr. Pierre Garraud has done the same for the criminal tribunals. My own contribution consists of an account of the sources and growth of industrial law, the whole being intended to form a complete reply to the questions suggested by the earlier article on England. I may add that I have throughout had the advantage of Mr. Garraud's valuable help.

Edouard LAMBERT.

¹ Vol. X, No. 2, August 1924, pp. 209-235: "The Interpretation and Administration of Labour Laws in England", by Prof. H. C. GUTTERIDGE.

THE RELATIONS BETWEEN INDUSTRIAL LAW AND GENERAL LAW IN FRANCE

LABOUR legislation to-day constitutes a special branch of French legislation, and has been officially recognised as such in the many decrees and orders which, during the last quarter of a century, have in turn defined the curricula for instruction in law. These curricula, by classing it as a separate subject under the somewhat ambiguous name of "industrial legislation", have given rise to a number of textbooks which differ from the corresponding English works, such as those of Sir Henry Slessor, in that they do not merely contain a commentary on the various labour laws, but give a synthetic survey of all the problems raised by the conflict between the interests of employers and of employed. The French Legislature has tried to hasten this process of the individualisation of labour law by promulgating in successive instalments a Code of Labour and Social Welfare.

The Labour Code and its Relation to Other Codes

The Labour Code, it has been said, is one only in name. It bears little resemblance to the systematic codifications of the beginning of the nineteenth century which ensured the absolute independence of criminal law and the relatively wide autonomy of commercial law. It contains no general regulation of all the problems connected with the conditions of industrial wage earners, such as that established by the Russian Labour Code of 1918 revised in 1922. It is a mere juxtaposition of laws of different date and dissimilar intention, and resembles the English consolidated Acts or even the American Compiled or Revised Statutes much more than it does the French codes of the nineteenth century¹.

Moreover, the Code is as yet incomplete. Book I on "agreements relating to labour" was promulgated in 1910; Book II on "the regulation of labour conditions" in 1912; since then a further part, entitled "jurisdiction, conciliation and arbitration, vocational representation", has been completed, forming Book IV, promulgated in the Act of 20 June 1924. Subsequent laws on subjects already dealt with by the Code have been incorporated

in it; for instance, those of 25 March and 25 June 1919 on collective labour agreements, the detailed provisions of which have been compressed into sections 31 and 32 of Book I in a manner most inconvenient for reference. Similarly, the Act of 23 April 1919 on the 8-hour day and that of 31 January 1926 on special provisions concerning the use of white lead in painting form sections 6 *et seq.*, and sections 79 and 173, of Book II. Yet so far only three books of the Code have been issued, although it is ultimately to consist of seven.

There are, too, a large number of Acts which are essentially within the field of labour law, but are not in the Code; for instance, the Act of 9 April 1898 on the liability for accidents to workers during their employment and the supplementary texts; the Act of 9 April 1910 on workmen's and peasants' pensions; the Act of 22 November 1918 for guaranteeing to mobilised workers the resumption of their contract of employment; the Acts of 21 March 1884 and 12 March 1920 on trade associations; the Act of 26 July 1925 establishing chambers of trade; etc.

Further, some of the provisions belonging to labour law are to be found scattered in other codes or in Acts connected with these codes. Thus, in the case of the Civil Code, there is the Act of 13 July 1907 concerning the rights of married women to their earnings; section 1780 on the hiring of domestic servants and workers; section 2203 on privileges with respect to the payment of wages; section 2271 on limitation of action with respect to the payment of the hire, supplies, or wages of workers and labourers; in the case of the Commercial Code, there is Book II, Title V, concerning the engagement and wages of sailors and members of the crew; in the case of the Penal Code, there are section 14 and 415 on attacks on the freedom of work.

The Relations between Industrial Law and Civil Law

In the present state of the Labour Code industrial law can form neither a wholly original body of law like administrative or criminal law, nor so specialised a branch of private law as commercial law. As a matter of fact, it did not begin to stand out from the general background of civil law until the end of the nineteenth century, when the reaction against the policy of economic *laissez faire* was beginning to find expression in legislation. Though certain elements, such as factory inspection and the regulation of safety and health conditions, link it up with both administrative

¹ On the codification of labour law, cf. P. PIC: *Traité élémentaire de législation industrielle*; *Les lois ouvrières*, 5th edition, 1922, Nos. 169 *et seq.*, pp. 90-94; BRY: *Les lois du travail et de la prévoyance sociale*; *Législation ouvrière*, 6th edition, revised by PERRAUD, 1921, Nos. 41-42, pp. 29-30.

and criminal law, while others, such as social insurance, offer a really independent field of activity, its central features are still closely bound up with the Civil Code, from which their general structure is derived.

The individual contract of employment comes within the sphere of civil as well as of industrial law, and the many provisions on this subject in Book II of the Labour Code are but modifications, due to the influence of new conceptions of collective law, of the individualist principles of the Civil Code which are still the general law. Even collective agreements for fixing rates of wages and other general conditions of work are not free from this subjection to the guiding principles of civil law. It is true that Book I of the Labour Code (Act of 25 March 1919) made important exceptions to these principles in favour of collective agreements covered by the definition in section 31: "any agreement . . . concluded between representatives of a trade association or any other group of workers, of the one part, and representatives of an industrial association or any other group of employers, or several employers contracting individually, or even a single employer, of the other part". But the restrictive terms of this definition leave two classes of agreements on wages or conditions of work under the exclusive control of the Civil Code, namely: (1) definite agreements for this purpose between a workers' organisation and workers, some belonging to the organisation, others not, which agreements were recently declared by a judgment of the St. Etienne Civil Court of 2 January 1925¹ to be touched by none of the provisions of the Act of 25 March 1919; (2) rules of employment, which, although in fact drawn up by the employer, are considered by the courts as transformed into true collective labour agreements by the tacit consent given by the workers on entering the workshop; conditions of publicity are imposed on these rules, but in all other respects they are covered by the rule of the absolute sovereignty of contracts laid down in section 1134 of the Civil Code. Even for collective agreements subject to the Act of 25 March 1919, the legal validity of the means of economic pressure which trade associations must in fact use to obtain their signature and ensure their observance, as well as the conditions under which such pressure may be brought to bear, are always determined by the Civil Code. Thus the central portion of industrial law remains dovetailed into and in large part merged with the general mass of the Civil Code.

¹ Dalloz hebdo., 1925, 281.

More and more, however, it is becoming dissociated from the traditional background of civil law. This is chiefly owing to the multiplication of labour laws, which reinforce one another and interlock into an increasingly compact structure, and also, though to a much less extent, to the tendencies of judicial enforcement. The supervision by the Court of Cassation of the course of judicial decisions in industrial as well as in civil cases may tend to maintain the subordination of industrial to civil law; but, as an offset to this, the dissociation of the two is favoured by the fact that the lowest tribunals in the hierarchy dealing with the administration of labour law consist of representatives of employers and of workers. To these popular judges, the importance assigned to local and trade customs in the practical regulation of labour agreements is an inducement to take the initiative in investigating and fixing such customs. Since they owe their position to election, they are much less sensitive than professional judges to the censure of the Court of Cassation, and are likely to be more afraid of the censure of the trades they represent. An important example is the growing tendency of the probiviral courts (*conseils de prud'hommes*), under pressure of the workers' refusal to treat rules of employment as a true contract since they are not subject to free bargaining, to reject clauses of these rules which they consider unfair or too widely opposed to local or trade customs as found, for instance, under true collective agreements. And this tendency persists, in spite of the consistency with which the Court of Cassation quashes such decisions in the name of section 1134 of the Civil Code and of the freedom of contracts¹.

In this way the legal ideas current in the labour world ultimately react on the practice of the professional judges, sometimes even without the intervention of the probiviral courts. The way in which these reactions of popular opinion work and their scope may be illustrated by an example drawn from the judicial effect given to sections 50 and 51 of Book I of the Labour Code, which run as follows:

50. There is no compensation to the advantage of employers as between the wages due from them to their workers, and any sums due to them for various supplies of whatever nature, except for:

¹ Cf. Civil Chamber of the Court of Cassation (in future referred to as Civ.), 19 February 1923, Dalloz, 1925, I, 129, and note Pic (clause by which employer can dismiss worker with one hour's notice only); Civ., 6 July 1925, Sirey, 1925, I, 349 (clause fixing unequal facilities for looking for work during the period of notice according as notice is given by the worker or the firm); Civ., 9 December 1925, *Gazette du Palais*, 1926, I, 281 (clause depriving a dismissed worker of the right to output bonuses not yet calculated); etc.

- (1) tools and instruments needed for the work;
- (2) substances and materials in the charge and use of the worker;
- (3) sums advanced to procure the above articles.

51. If an employer makes an advance in cash other than as provided for under head (3) of the previous section, he can recover it only by means of successive deductions, not exceeding one-tenth of the wages due.

These sections were taken without appreciable change from the Act of 12 January 1895, which was passed under the pressure of the workers' organisations at a time when they were chiefly concerned to protect their members against the truck system and against the risk of seeing a large proportion of their wages swallowed up by expenditure effected by the management, often without adequate opportunity for discussion. The authors of the Act of 12 January 1895 left completely out of account the other possible applications of the system of compensation of mutual debts as between employers and workers.

Subsequently, employers called in the civil-law theory of compensation in their search for an economically effective sanction for the obligations imposed on the workers with respect to the conditions of denunciation of the contract of employment, in particular the periods of notice. Some of them claimed that they should deduct from the wages due to the worker, but not yet paid, the compensation due from him for premature or irregular denunciation of the contract. By a judgment of 31 May 1907¹, the Civil Chamber of the Court of Cassation admitted this claim as being consistent with the spirit of section 1289 of the Civil Code, and authorised the complete compensation of the sums mutually due between the employers and the workers up to the amount of the larger of the two.

The strong theoretical objections raised by this decision led to a first change of view on the part of the Civil Chamber, when in two judgments, of 28 June 1910 and 8 November 1911², it adopted a compromise. Without abandoning the field of civil law, it corrected or tempered its decision of 1907 by referring to the third paragraph of section 1293 of the Civil Code, under which compensation does not apply to debts which have for their cause aliments declared not liable to seizure, and also to the provision of labour law (now section 81 of Book I of the Labour Code), which declares that only one-tenth of wages is liable to seizure, so that nine-tenths are given

the status of sums due for aliment. The 1910 and 1911 judgments, while still maintaining that employers' claims on workers, other than those for supplies or sums advanced for supplies under sections 50 and 51 of Book I of the Labour Code, may be compensated out of wages in accordance with the general terms of sections 1921 and 1923 of the Civil Code, limited the effect of such compensation to that tenth part of the wage which is liable to seizure.

A second and more decisive change of view seems to have been made when the Court of Cassation, in a judgment of 15 July 1924³, dealt with the legal validity of a decision of the Court of Beauvais authorising an employer to postpone the payment of wages due until the worker had vacated the premises which he occupied under the contract of service and unduly refused to quit. The Civil Chamber quashed this judgment on the following grounds:

With reference to section 51, Book I of the Labour Code: whereas this section does not authorise deductions from the wages due to workers other than for the purpose of refunding to the employer cash advances to the extent specified; ... whereas by granting the employer a right to make deductions from wages due, in a case outside the strict limits laid down by the law, the decision appealed against has falsely applied, and therefore violated, the aforesaid section.

If the opinion adopted in this judgment of 1924 was formulated with full recognition of its import, and if it is intended to be maintained — the reasons for the query will be indicated later — it will constitute the final breach between this part of labour law and the Civil Code. The Civil Code, in fact, lays down as a general principle that the system of compensation applies to all claims satisfying the conditions of section 1291 of the Code; exceptions to this were authorised by sections 50 and 51 of Book I of the Labour Code, not by admitting the application of the system to certain classes of claims, but by rejecting it for others. The judgment of 15 July 1924, on the contrary, substitutes for this civil-law conception a general principle of industrial legislation according to which the freedom of wages — of the whole wage and no longer only of nine-tenths — from liability to compensation becomes the rule, and which introduces into French law a new conception of the social and economic functions of wages.

This evolution of the judicial theory of compensation as applied to wages gives a simplified and magnified picture of the general evolution of French industrial law, which, merged at first in the

¹ Sirey, 1909, I, 153, and critical note Albert Tissier.

² Sirey, 1912, I, 185, and note LYON-CAEN; Dalloz, 1912, I, 449, and note DALOZ.

³ Sirey, 1925, I, 125. Savin v. Vilain.

mass of civil law, has partially freed itself by combining the old civil-law elements with the new contribution of the labour laws, and is already showing a tendency to become independent of extraneous backgrounds. But the last stage, that of complete emancipation, is still inchoate and confused. All that can be asserted is that the links between the principles of industrial and of civil law are daily becoming looser and more flexible.

The Scope of Industrial Law

There is similar instability, also due to the rapid growth of labour law, in the determination of the frontiers which separate this from other branches of French law. The scope of industrial law is not yet fixed with any permanence, either as regards subject matter, or as regards the persons covered.

There is a steady increase in the number of subjects dealt with. Among the causes of this increase are state regulation of new industries or new forms of activity of industry; the increased duties devolving upon factory inspectors as regards supervision of the workers' conditions of health and safety; the growth of legislation dealing with the organisation and hours of work; the accretions to social insurance legislation, such as that produced by the Act of 25 October 1919, which added liability for occupational diseases to the existing liability for industrial accidents, section 2, subsection 2 of the Act specifying that the list of such diseases may be revised and supplemented by further Acts.

The classes of persons which industrial legislation is intended to protect are increasing in number with equal steadiness. At first this protection hardly extended beyond wage earners in factories or industrial undertakings, so that "industrial legislation" and "labour laws" could legitimately be used as synonymous terms. But its scope has been extended, and tends more and more to extend, in certain respects, to salaried employees and even technical workers in commerce on the one hand, and to agricultural workers, state and public workers and subordinate officials, domestic servants, seamen, etc. on the other.

Any forecast as to the future course of this steady tendency to widen the scope of French labour law is rendered more difficult by the fact that the French phenomenon is itself strongly influenced by the trend of labour legislation in general.

It may be added that French legislation can show nothing to correspond to the English Acts quoted by Professor Gutteridge,

which guarantee the economic and disciplinary self-government of the trade unions against interference by the judicial authorities. There is no equivalent to the Trade Unions Act of 1871, which prohibits any legal proceedings instituted with the object of the "direct enforcement" of the rules of a union, nor to those sections of the Trade Disputes Act of 1906 which render trade unions and their officers or members as such immune from civil proceedings for actions committed in the course of a trade dispute. In France no exception is allowed to the general law concerning the admissibility of proceedings instituted against a trade union or its leaders, whether by members of the union or by third parties who wish to resist the activities of the unions. The courts have full powers to determine the legal validity, and sanction the consequences, of collective agreements on wages and conditions of work. These agreements do not constitute merely "gentlemen's agreements", as in England, but are treated, in each of the three classes already discussed, as judicially enforceable contracts. In this respect the jurisdiction of the courts is wider in France than in England.

THE SOURCES OF INDUSTRIAL LAW

The sources of industrial law are in the main the same as those of general law, but differently combined, and with some modification of the relative importance customarily attached to each, in order to meet the special requirements of the subject. For its own development this branch of law, being connected with both criminal and administrative law, as well as with civil law, must necessarily employ and combine the instruments in use of each of the three. Moreover to solve the complex, variable, and novel problems which constitute its special sphere, it needs to draw very largely on methods of lawmaking which, in the older branches of French law, have been relegated to the background or completely discarded.

Reference has already been made to the influence on the course of French labour legislation of international treaties for the protection of the workers or for the regulation of conditions of work in general or in certain occupations. This influence is bound to be much more marked in the future, but even now the results are far from negligible. It was of course only in consequence of the ratification by France of the relevant conventions that reforms of this kind were introduced into French law, and it was only by

the enactment of national laws that they were effectively realised¹. But the model for these national laws themselves, as well as the motive force behind them, lay in the sources of international labour law. Instances are the Act of 17 December 1908 and the Decree of 23 January 1910, confirming the decisions of the Berne Conference (1906) on the prohibition of the use of white phosphorus in the manufacture of matches; the Act of 15 July 1908 and the Decree of 13 September 1910 (now section 21 of Book II of the Labour Code), confirming the decisions of the same Conference on the prohibition of the night work of women in industry; the Act of 31 January 1926 amending Book II, Title II, Chapter IV of the Labour Code, and confirming the decisions of the Third Session of the International Labour Conference on the use of white lead in painting.

No less effective than the part thus played by international labour law in the progress of French labour legislation is that of administrative practice, when provisions in favour of the workers are inserted in the specifications for official contracts, especially those for public works. These clauses have been the germ of a series of reforms (concerning treatment and compensation for industrial accidents, minimum wage, family allowances) which have gradually been introduced in private industry by collective or individual agreements between employers and employed, sometimes even by the spontaneous initiative of employers, and have ultimately been given legislative sanction. To some extent such clauses, regulating conditions of work, have been codified in administrative law (Decree of 10 August 1899 on conditions of employment under contracts made with the state, departmental, or communal authorities or with public charitable institutions).

The pressure exerted by international law and administrative practice, however, is still no more than an external force setting in motion or accelerating the action of the internal sources of French industrial legislation. Customs of the trade, on the other hand, do not stop short at providing a stimulus to action; in many cases they directly define rules of labour law. Even while the contract of employment — the first nucleus of industrial law — was

¹ This assertion of the independence of national laws is modified, however, by the provision of the last paragraph of section 7, Book II of the Labour Code (Act of 23 April 1919), under which the regulations issued for the administration of the Eight-Hour Day Act "must be revised when the time limits and conditions laid down therein are contrary to the provisions of international agreements on the subject".

still governed by the civil law, it already gave prominence to local and trade customs, particularly with respect to notice and compensation for premature dismissal¹. To-day this traditional function of trade customs is explicitly sanctioned by section 23, paragraph 3 of Book I of the Labour Code. Owing to the development of collective bargaining and the increasingly frequent inclusion in collective agreements of clauses aiming at the establishment of industrial police regulations on similar lines, such customs are tending to play a much greater part in building up labour law.

The Act of 23 April 1919 (section 7, Book II of the Labour Code) even gave official recognition to agreements between employers and workers' organisations as a factor in the administrative measures provided for carrying the Eight-Hour Day Act into effect. The second paragraph of section 7 lays down that the public administrative regulations provided for "shall be drawn up either on official initiative or upon the demand of one or more national or district organisations of employers or workers concerned"; that "in either case, the workers' or employers' organisations concerned must be consulted"; and that "these regulations must take into consideration the agreements, if any, between employers' and workers' organisations"². The Act of 25 March 1919, on the contrary, refused to admit that collective agreements between employers' and workers' organisations can *per se* constitute the law, even the local or district law, for the occupation concerned, or that they can apply to others than the members of the signatory organisations or affiliated persons or bodies. In point of fact, however, the result of the general adoption in these collective agreements of the same clauses and conditions is to focus attention on trade customs which are increasingly claiming the respect of those judges who are in direct touch with the persons within their jurisdiction. Hence the reluctance already noted of the provincial courts to enforce clauses of rules of employment which are too violently opposed to the provisions of collective agreements in force in the particular district and occupation. Sometimes the reluctance of the popular judges is felt even by the professional judges of the civil courts. An illustration of this will be found in the decision of the Civil Chamber of 22 February 1926³ quashing

¹ Cf. Paul Pic: *Traité de législation industrielle*, Nos. 1196 and 1199.

² Section 43a of Book II of the Labour Code takes an equally strong line, assigning a particularly important function to agreements between employers' and workers' organisations in carrying into effect the law on weekly rest.

³ *Dalloz hebdomadaire*, 1926, 221.

a judgment of the Bordeaux Civil Court, which, in spite of the contrary provisions of the rules of employment, granted compensation to a workman who had been dismissed without notice, on the ground that the right to compensation had been established "as a custom with the force of law" by an agreement between trade organisations to which neither the employer nor the worker in question belonged.

The continued objection of lower and especially of popular tribunals to applying established rules which govern the decisions of the Court of Cassation has often proved the precursor of changes in the law which come about under the pressure of economic forces. This may well be the case here. It is more than probable that the juridical customs arising out of collective agreements will become one of the most important factors in labour law. As yet, however, their part is but subsidiary, and the principal sources of this branch of law are represented by legislation and judicial practice.

Judicial Practice

The contrast between French and English jurisprudence is most marked in the matter of the importance attached to judicial practice, or case law, a contrast which at first sight seems absolute. But as usual it is found to lose in force when regarded more closely and in a realistic spirit. For it is partly due to the persistent habit of French jurists of following the theoretical plans laid down in the first half of the nineteenth century when describing the machinery of lawmaking in their textbooks, instead of representing what actually happens.

In England, as Professor Gutteridge points out, the fundamental part of jurisprudence consists in judicial decisions, the Common Law, while the law enacted by Parliament, or Statute Law, remains the exception in spite of its steadily growing importance. But in France the belief in "the logical self-sufficiency of legislation", as François Gény¹ so well describes it, has been traditional since the codification period. It sees in legislation not only the fundamental source of law, but one admitting of no rival, except for certain concessions to local custom and the delegation to administrative authorities of the power to issue regulations. The authors of the French Codes of the beginning of the nineteenth century

believed that they could put a stop to the creative activities of the judiciary, partly by forbidding judges, in section 5 of the Civil Code, "to pronounce by way of general regulations on cases submitted to them", partly by continuing the barren expedient of referring a law back to the legislature for interpretation (*référé législatif*). This attempt to react against the sociological laws which govern the evolution of law has of course long since proved abortive. But the general theory of the sources of law, formulated under the influence of the illusions which were created by the codification and are now dispelled, still reappears even in the most recent works on French law.

It follows that when an English or an American jurist whose views of the machinery of French law or of codified law in general are coloured by these literary fictions, studies their working on the spot, he is liable to suffer an unexpected shock. For instance, Mr. William L. West, the chief editor of the important American collection of law reports *The National Reporter System*, has described the revelation which direct contact with German law had been to him, during a visit to Berlin in 1923 or 1924. He refers in the course of a circular letter to the impression current in the United States that in countries with a written law all legal disputes are settled by reference to the Codes, an impression which, at least as far as Germany is concerned, he considers quite mistaken. The German courts have latterly had to settle a growing number of cases in which the Codes were of little assistance, and much of the law at present in force can only be found in the decisions of the courts. During the last six years, he remarks, there has in fact been a startling development of what is sometimes called judge-made law.

If, instead of studying a country where codification is comparatively recent, Mr. West had chosen one like France with Codes dating back 120 years, he could have satisfied himself that there judicial practice is of even wider importance, and that French lawyers are as ready as Americans to have recourse to "the hunt for legal precedents" in their search for the last word in jurisprudence.

In the sphere of criminal law, and therefore in the related parts of industrial law, the French judicial authorities unquestionably act merely as interpreters. For in virtue of the principle of modern public law which sprang from the French revolution, *nullum crimen nulla poena sine lege*, judicial practice cannot create criminal law in the twofold sense that : (1) the courts cannot apply penalties

¹ *Méthode d'interprétation et sources en droit privé positif*. First edition, 1899; second edition, 1919, §§ 7 et seq.

to actions not provided for by a law or regulation prescribing such penalty; (2) in applying the provisions of the criminal law their methods of interpretation must be restrictive.

Matters are otherwise, however, for private law. Even where it has been codified, the various sections of the Acts can be applied only with and through the interpretation given by the judiciary, an interpretation which may extend or limit their scope, strengthen or weaken their force, and sometimes even change them into something quite different. The effects of judicial practice are more original in a branch of law such as labour law, in which codification is still incomplete and is more apparent than real. Subjects of capital importance, such as the line of demarcation between the right of free competition and freedom of association, between freedom of contract and freedom of work and of bargaining, the determination of the laws of industrial war and peace as constituted by the settlement of labour disputes, are governed almost exclusively by the law as made or defined by judges. This is so even where the judge is required or professes to base his decision on a written text. But all that he need do is to preface his judgment by the traditional formula "with reference to (*vu*) section 1121", "with reference to section 1134", "with reference to section 1382 of the Civil Code". These are some of the most usual screens adopted, and it matters little whether there is any actual connection between the question raised and the text quoted. In many a case the reference is a pure formality, and the judge has to find the reasons for his decision elsewhere. And before deciding to act on his own initiative or personal opinion, he looks for precedents in the decisions of the courts above him or of his own predecessors.

Even in the presence of statutes, the judiciary takes a part in developing the law, and nowhere is its constructive power — sometimes too its destructive power — so marked as in the interpretation of labour laws. A sufficient instance of this is the decision of the Civil Chamber of the Court of Cassation of 11 December 1911¹, which overthrew the fundamental principle of the Act of 5 April 1910 on workmen's and peasants' pensions, the principle of compulsion, by making the application of the system in practice optional for the worker.

In the sphere of labour law, therefore, the judiciary, side by side with the legislature, performs the same creative and construc-

tive work in France and in England, and with much the same intensity; though with this difference, that in England its mandate is officially conferred by the law, whereas in France it acts in spite of the absolute prohibition of the corresponding law. This difference in the starting-points of judicial practice in the two countries will be seen to have led to differences in the nature and working of the authority of the judiciary.

Legislation : Acts and Regulations

Officially the normal source of labour law is legislation in the widest sense of the word, taken as covering both actual statutes and the regulations which in some respects take their place.

(a) The technical name of "Act" (*loi*) is reserved for the texts discussed and passed by the legislature (Chamber of Deputies and Senate) and promulgated by the Executive (President of the Republic) under the conditions laid down in the Constitution of 1875. However active the output of labour laws may have been since the end of the nineteenth century, their effects are necessarily limited. The machinery of legislation takes so long to set in motion that it cannot always intervene in time in the settlement of the new problems arising out of industrial progress and change. Further, the legislature can only lay down general principles applying to the country as a whole. It must leave other authorities to determine the detailed application to individual industries and districts of the standards it has formulated. Hence the special importance of regulations as a source of labour law.

The form of "regulations" varies with their nature and the authorities issuing them. Of those which contribute to the making of labour law there are, first, the regulations issued by the Executive (the President of the Republic), which may be either ordinary decrees or public administrative regulations. The difference is that the latter are adopted on the recommendation of the Council of State; this recommendation, which is not binding on the President of the Republic, is referred to in the decree by the use of the formula "the Council of State having been consulted" (*le Conseil d'Etat entendu*). As a matter of fact, in most cases public administrative regulations are prepared and drafted by the Council of State.

Secondly, there are the regulations of the administrative authorities, which take the form of prefectorial and mayoral orders.

¹ Dalloz, 1912, I, 83. Cf. Criminal Chamber of the Court of Cassation, Sirey, 1913, III, 49, and literature quoted by Pic: *Législation industrielle*, p. 1006, No. 1.

(b) The next point to consider is within what limits and on what grounds the various authorities entitled to issue regulations exercise this power.

In the case of the President of the Republic, his power derives from section 3 of the Constitution of 28 February 1875, which provides that "the President of the Republic shall supervise and ensure the carrying into effect of the laws". But in administrative practice the literal meaning of this clause has long been exceeded. To-day the field open to the decrees of the head of the State may be defined by two rules :

(1) The President of the Republic by the regulations issued in his name creates written law in matters not covered by existing legislation, whether this is intended to deal with a situation which the legislative authorities have not yet been able to consider (e.g. in the field of labour law, the Decrees of 10 August 1890 on conditions of employment under contracts made with the State, Departments, etc.), or with a matter which is traditionally left by the legislature to be dealt with wholly or in part by regulations issued by the head of the State (e.g. the police supervision of aliens in France is governed simultaneously by Acts, such as that of 8 August 1893 on the stay of aliens in France and the protection of national labour, and by regulations, such as the Decrees of 18 November 1920, 3 June 1922, and 25 October 1924 on the supervision, stay, and identity of aliens and particularly of alien workers in France).

(2) The President of the Republic by the regulations issued in his name supplements statute laws by adapting them to particular circumstances and local conditions. He can do this on his own initiative, either by ordinary decrees or by public administrative regulations. In practice, however, in most cases, especially in the sphere of labour legislation, the head of the State exercises his power of issuing regulations on the invitation of the legislature. When the Chambers pass an Act they entrust to the President of the Republic the duty of completing it and providing for its detailed administration by the issue of public administrative regulations. It may be stated that all great labour reforms have followed and will follow this procedure. Its importance and the functions it assigns to Acts and regulations respectively in making labour law may be illustrated by the Act of 23 April 1919 on the Eight-Hour Day. After laying down the principle of the 8-hour day (section 6 of Book II of the Labour Code), this Act provides (section 7, paragraph 1) that :

Public administrative regulations shall determine for any given trade, industry, commercial employment or class of occupation, for the whole of France or for a single district, the time limits and conditions under which the preceding section shall be applied.

The contribution of prefectorial and mayoral orders to the making of labour law is dependent on certain general provisions (especially those of the Act of 5 August 1884) under which mayors and prefects have the power to issue orders concerning "public order, safety, and health". A prefect may adopt regulations of this kind applying to all or some of the communes in his Department. If regulations are considered necessary for a single commune the prefect cannot act until the mayor has been duly asked to exercise his right of priority and without result.

In the sphere of labour law the prefects sometimes receive direct instructions from the Executive to issue orders providing for the enforcement of the law in their Departments. Thus the provisions of the Labour Code on "weekly rest and holidays" (section 43a of Book II) provide that :

If an agreement is concluded between the employers' and workers' organisations in a given occupation and district on the conditions under which a weekly rest period shall be granted to the workers in one of the ways specified in the preceding sections, the prefect of the Department may, on the request of the organisations concerned, issue an order providing that the undertakings in the occupation or district shall be closed to the public during the whole day of such rest period.

(c) The question whether there is any difference in kind between Acts and regulations and between the different forms of regulations is still a matter of controversy. But on one point — the only one which is here of importance — there is full agreement. All regulations, whatever their form and whatever the authority issuing them, are a source of private and administrative law, and therefore also of labour law, on the same terms as are Acts of the legislature. Consequently the form of their publication is governed by rules similar to those for the publication of Acts. Above all, the courts draw the same conclusions from the existence or contravention of regulations as from the existence or contravention of Acts. Thus a contravention of regulations may be followed by a sentence to pay damages¹; an appeal to the Court of Cassation

¹ For instance, cf. Cass. Req., 13 July 1897; Sirey, 1901, I, 519; Justice de Paix, Ivry-sur-Seine, 29 December 1938; Act of 30 March 1909.

may lie against the sentence¹; and the contravention may lead to the cancelling of an official contract. The necessity of observing such regulations may also constitute a case of *force majeure* exempting from the performance of a contractual obligation².

There are two points, however, on which the value of regulations as a source of written law is less than that of an Act. Only an Act can impose taxes — a traditional principle recalled in the last section of the Finance Acts³. And only an Act can impose penalties. Reference should, however, be made to section 471 of the Penal Code, which fixes a penalty of a fine of from 1 to 5 francs inclusive for "persons who contravene regulations lawfully adopted by the administrative authorities or who fail to comply with regulations or orders issued by the municipal authorities". It is a firmly established practice of the courts to consider that this clause attaches a punitive sanction, in advance and in a general way, to all prefectorial and mayoral orders. But as it is explicitly limited to administrative regulations it is not considered to apply, in ordinary circumstances and without legislative intervention, to decrees issued by the head of the State⁴. In the case of these decrees there must be an explicit provision in a special Act imposing a particular penalty, or referring to section 471 of the Penal Code, for contraventions of a specific decree of the President of the Republic. In actual fact, all labour laws which provide for their administration by means of presidential or prefectorial regulations fix in advance the penalties to be attached to these regulations. For instance, section 165 of Book II of the Labour Code fixes a fine of 5 to 100 francs for heads of undertakings who contravene public administrative regulations issued under the Eight-Hour Day Act.

THE EFFECT OF JUDICIAL PRACTICE ON LEGISLATION

There are two distinct ways in which the tribunals can affect regulations, namely, by decisions as to their legal validity, and by interpretation. For Acts, only the second of these ways is available.

¹ Instances are frequent. E.g. Cass., 22 April 1901; Sirey, 1901, I, 336. According to this principle, a charge drawn on the ground of the alleged illegality of administrative regulations may be referred to the Criminal Chamber of the Court of Cassation. Cf. for instance, on the question of the weekly rest, Cass. Crim., 1 May 1925; *Gazette du Palais*, 1925, II, 294.

² Cf. Council of State, 8 March 1901; Sirey, 1902, III, 73.

³ "All direct and indirect contributions other than those authorised by the laws in force and by this Act ... are formally prohibited."

⁴ This practice was general during the war (1914-1918), when the Criminal Chamber of the Court of Cassation refused to attach punitive sanctions to decrees and orders for securing national supplies adopted without special legislative instruction. Cass. Crim., 3 Nov. 1917; Sirey, 1917, I, 145.

Decisions as to the Legal Validity of Regulations

In France, Acts properly so called must be respected by the judges on the sole ground of having been issued in the forms laid down by the Constitution, whatever their substance may be. In constitutional practice the courts cannot refuse to assist in enforcing an Act on the ground of its provisions being inconsistent with the higher principles of constitutional law. It is true that during the last few years certain students of French public law, such as Hauriou, Berthélemy, and especially Duguit, have tried to prove that it is one of the natural prerogatives of the judiciary to see that labour legislation is constitutionally correct, and that the judges could exercise this prerogative if they so wished. Since, however, in accordance with laws dating back to the revolutionary period, French courts of justice have considered for more than a century that any such encroachment by them on the freedom of action of the legislature is rigorously forbidden, the sincerest advocates of the introduction in France of judicial control, on American lines, of the constitutionality of legislation do not as a rule expect that this reform can be effected except by an amendment to the Constitution. French constitutional practice is in agreement with English in proclaiming the supremacy of the legislature over the judiciary in the sphere of lawmaking. No doubt the courts can in fact temporarily paralyse the administration of statutes by force of legal interpretation, as they did in the case of the Act of 5 April 1910 on workers' pensions; but the legislature can always defeat resistance of this kind by explanatory or complementary Acts. If lawgiver and judge disagree on a question of labour law policy, the former can always have the last word, if he wishes.

But this is so only for Acts; and regulations, which are an inferior and subordinate source of law, are in quite a different position. In no case can regulations decide on matters already governed by an Act, nor can they exempt from general provisions established by law. For instance, regulations to which a punitive sanction attaches in virtue of section 471 of the Penal Code cannot adopt principles opposed to those of the Penal Code on attempted crime, criminal complicity, or criminal responsibility. Finally — and this point is of particular importance in the regulation of labour conditions — regulations cannot interfere with the individual rights which are considered to be the bases of French public law and are enshrined in constitutional texts such as the

" Declaration of the rights of man and of the citizen " of 1789. Among the rights which cannot be touched by regulations — bearing a close resemblance to those in America which are protected by the judicial [power of deciding whether legislation is constitutional or not — it is sufficient to recall those of individual liberty, the right of property, the equality of citizens, and the freedom of trade and of industry.

It should be added that there are degrees in the power to issue regulations. An ordinary decree cannot modify what is already governed by public administrative regulations, and an administrative order cannot deal with a point governed by an ordinary decree or regulations issued by the Executive.

The sanction for these principles, which limit the creative power of regulations, will be found in the recognised power of the courts to decide as to their legal validity, a power which on one particular point is established by section 471 of the Penal Code authorising a punitive sanction only for " lawfully adopted " regulations. This obviously means that when the criminal courts are asked to guarantee a prefectorial or municipal order by imposing the penalty provided by the Code, they have the right to examine whether the order is in accordance with the law or not. But it is now definitely recognised that courts of all descriptions may examine the validity of regulations, civil¹ as well as criminal courts, administrative as well as judicial tribunals. Further, all regulations, even those which are most closely related to Acts and are usually adopted on the direct invitation of the legislature, namely, public administrative regulations, are subject to judicial control of their legal validity².

The next point to consider is the criteria which the courts apply to determine whether regulations are legal. In the first place, they must be issued by an authority which is competent to do so. In the second place, they must be in the form and satisfy the conditions laid down for the drafting and publication of regulations. Further, if they are issued in pursuance of an Act (e.g. public administrative regulations for carrying into effect a special Act,

¹ Cf. Civ., 24 Oct. 1917; Dalloz, 1918, I, 5. Lyons Civil Court, 23 June 1909; *Gazette du Palais*, 1909, II, 448.

² This principle was clearly formulated for the first time in the decisions of the Council of State of 6 December 1907 (Sirey, 1908, III, 1) and 26 December 1908 (Sirey, 1911, III, 55; Dalloz, 1910, III, 73). Since then it has frequently been applied, particularly in connection with the legal validity of public administrative regulations issued in pursuance of labour laws. Cf. for example Council of State, 8 Feb. 1924; *Bulletin du Ministère du Travail*, 1925, p. 195.

orders adopted under laws governing in a general way the police powers of prefects and mayors) they must keep within the limits defined for them by the Act in question. Finally, even if they are clearly not contrary to the provisions of any special Act, they must not contravene the great constitutional principles governing and limiting the scope of regulations.

With respect to this last condition it is necessary to recall one of the normal consequences of the principle that it is not for the courts to examine whether an Act is constitutional or not. Suppose that administrative regulations issued in pursuance of an Act are manifestly contrary to the principle of the freedom of trade and industry, which is held to be one of the fundamental principles of French public law. These regulations must nevertheless be considered legal if they merely govern the detailed administration of the restriction of freedom of trade and industry imposed by the Act under which they are issued. For the legislature may reduce or even suppress the freedom of trade or of industry without rendering itself liable to censure by the courts. The essential result of legislative intervention in labour law may in fact be described as a gradual sapping of this principle, itself a fruit of revolutionary individualism¹.

Further, the nature of this control of the legal validity of regulations varies considerably according as it is exercised by judicial or by administrative tribunals.

The judicial tribunals must keep strictly to an examination of the criteria of validity enumerated above. It is not their business to determine the expediency, efficacy, or equity of administrative orders². Consequently, they must enforce an inexpedient or unjust regulation if they recognise that it is legally valid³. If a court

¹ It is particularly in connection with mayoral orders that this control of legal validity is needed as a brake on abuses of the issue of regulations, and it is in this field that the courts most frequently allege an attack on fundamental individual rights as a reason for not enforcing regulations. To take an example connected with labour law: the regulation of the work of hawkers, small traders, and agents working on the public highway. Among the decisions fixing the limits placed by the principles of the freedom of trade and industry on the powers of the administrative authorities to issue regulations, the following may be cited: Cass., 23 June 1908, *Gazette du Palais*, 1908, II, 55; Council of State, 5 June 1908, Dalloz, 1910, III, 17; Cass., 13 Feb. 1909, Sirey, 1909, I, 529; Cass., 27 Feb. 1909, *Gazette du Palais*, 1909, I, 479 and Sirey, 1910, I, 401.

² This principle is consistently observed; cf. for instance Cass., 4 May 1923, Sirey, 1923, I, 396.

³ This rule is all the more important in that a criminal court when dealing with regulations which it considers illegal or inexpedient may not suspend its decision while waiting for a decision of the Council of State as to their cancellation. Cf. Cass., 3 May 1912, Sirey, 1912, I, 420; 17 Jan. 1914, Sirey, 1914, I, 423 and Dalloz, 1914, I, 144.

considers that regulations which it is asked to enforce are illegal, this affirmation of opinion can have only an isolated and negative effect. The court cannot annul the illegal order, but can merely refuse in the particular case before it to enforce the regulations referred to it and the sanction attached to them. In particular, if a punitive sanction is attached to the regulations, all that a criminal court which considers them illegal can do is to discharge the accused. But this does not mean the annulment of the regulations themselves, and the next day the same court or a neighbouring court may have to deal with another prosecution against another person on a charge arising under the same regulations.

On the other hand, when the Council of State as an administrative tribunal is required to determine the legal validity of an administrative order in consequence of an appeal on the ground of excess of jurisdiction¹, its investigations are not confined within the limits assigned to judicial tribunals. The Council of State examines not only the legality of the order in the strict sense; it also determines whether in spite of its apparent legality it does not involve an abuse of powers, whether, in other words, by its class spirit or by its intrinsic injustice, its spirit and its results are not contrary to those intended by the Act when establishing the right to issue regulations. Further, when the Council of State recognises that regulations are illegal or involve an abuse of powers, it annuls them, its decision thus being both general and positive².

In view of the considerable importance of regulations as a source of labour law, it has been necessary to insist on the limits imposed on their authority by the double control of the judicial and the administrative tribunals. A further important reason for discussing this control is that suits for its exercise constitute one of the principal forms of activity of employers' and workers' trade organisations under that provision of the Act of 12 March 1920 which recognises them as competent to institute legal proceed-

¹ It should be observed in this connection that when a labour law contains a special and formal provision under which public administrative regulations issued for its enforcement may be referred to the Council of State, it is the constant judicial practice to regard such a remedy, both in procedure and results, as a true action for excess of jurisdiction. This applies for instance to actions against prefectural decrees on the weekly rest. Cf. Council of State, 26 March 1909, *Sirey*, 1911, III, 118, *Dalloz*, 1910, III, 127.

² An important effect of the general and absolute nature of this annulment is that regulations annulled by the Council of State cannot be used as a basis for prosecution and condemnation before a criminal court. Cf. *Cass.*, 4 July 1908, *Gazette du Palais*, 1908, II, 154.

ings in any tribunal in respect of "matters which directly or indirectly prejudice the collective interests of the trade they represent". Undoubtedly, this control gives the tribunals a powerful technical means of influencing the evolution of labour law, whether in a conservative or a progressive direction. It should be added finally that this French system of judicial verification of the legal validity of regulations has the disadvantage, owing to its dual form, of sometimes leading to a difference of opinion as to the validity of one and the same set of regulations between the judicial and the administrative tribunals, between the Court of Cassation and the Council of State.

Judicial Interpretation of Acts

The cases in which the total abstention of the legislature leaves a free field to the judiciary are less numerous in France than in England; but in return the French judiciary enjoys much greater freedom in the interpretation of legislation. In the English view of the functions of judicial interpretation, the courts are required to keep to the letter of the law and may not seek for the intentions of the legislature "outside the four corners of the Act" — to use an expression of Sir Henry Maine's — and must interpret the law in accordance with the ordinary meaning of the words used. In France, on the contrary, the judge is required not to keep solely to the wording of his text, which is too often misleading, but to seek for the very spirit of the law so that this may prevail; and in order that he may discover the real intention of the authors of the clause in question, he is expected, if need be, to examine the historical circumstances in which it came into being. The English judge may consider only what the legislature has said, even though he may be convinced that it has not said what it meant; whereas the French judge must understand and apply what the legislature meant, even though the expression given to its thought may be clumsy, incomplete, or erroneous.

The opposition between these two conceptions of interpretation may best be illustrated by the fundamental principle of English jurisprudence — so rightly placed in the foreground by Professor Gutteridge, and the real motives of which French jurists find it so hard to understand¹ — which prohibits the courts from taking into consideration parliamentary documents and debates as evidence

¹ Cf. the communication of Mr. Lévy ULLMANN and the comments thereon in the *Bulletin de la Société de législation comparée*, XLVIII, pp. 53 et seq.

of the intentions of the authors of a legislative provision, and from using these to limit or extend the scope of the wording of the law. In France, on the contrary, consultation of the preliminary proceedings has long been the favourite instrument of judicial interpretation, and it still is one of the most important. The process does not even stop short at quoting the more impersonal reports submitted in the name of committees, which, it may be remarked, are allowed in American judicial practice to temper the rigour of the traditional prohibition of English law¹. The courts find their illumination of the spirit of the law in the explanations given during the parliamentary debates and not only in those of the reports. The pursuit of this "spirit of the Act" through the often confused and contradictory mass of the preliminary work obviously allows a wide field for the initiative and discretion of the judge in selecting and interpreting his material.

During the last few years abuses of this method of interpretation have unquestionably provoked some signs of reaction. But this reaction is rather in the direction of still more freedom; in particular, it favours the tendency to consider the text in point as living and growing with the whole of the legislation of which it is a part, as being subject to the influence of all the general tendencies of this legislation, and therefore to be construed in the light of the "spirit of the law" in general — and not that of the particular Act — as it is at the moment when the Act is to be applied, and not as it was when the Act was passed.

The practical importance of the apparently absolute contrast between the French and Anglo-Saxon systems of judicial interpretation must not of course be exaggerated. In expert hands, literal interpretation may sometimes produce fairly substantial modifications of the Act as it came from the brain of the lawgiver. It must even be admitted that the French judiciary has never shown so much independence of the written law as that displayed by the American courts of justice in enforcing the Trust Acts², or federal labour laws³. But such results were possible only in the United States and in the limited field of social legislation, because here interpretation was strengthened by the proximity

¹ Examples of such modifications of the English principle by the American courts may be found in the annotation in *VII American Law Reports Annotated*, 607; the particulars given by Judge SATER in 287 *Federal Reporter*, 572; and LAMBERT and BROWN: *La lutte judiciaire du capital et du travail organisés aux Etats-Unis*, p. 208, No. 3.

² Cf. LAMBERT: *Gouvernement des juges*, pp. 130-166.

³ LAMBERT and BROWN: *op. cit.*, pp. 163-276.

and assistance of the judges' power of deciding whether legislation is constitutional or not.

In the particular field of labour law, where differences of policy between the legislature and the judiciary have always been most frequent and intense, the French interpretation of the law can no doubt hardly expect to reach the full freedom of movement enjoyed by American interpretation under the protection of this power of the judiciary. But it has freer scope than English interpretation.

Judicial practice is thus of capital importance in labour law, perhaps more so than in any other branch of codified or partly codified law. It therefore becomes necessary to examine the various tribunals which take part in building up the system.

TRIBUNALS ADMINISTERING INDUSTRIAL LAW

The enforcement of labour laws involves two kinds of sanction, civil and administrative on the one hand and penal on the other. To these two kinds of sanction correspond two groups of judicial authorities, civil and administrative tribunals on the one hand and criminal tribunals on the other.

I. Civil and Administrative Tribunals

(1) Civil Tribunals

Some of the civil authorities which are competent to settle disputes between employers and employed are special tribunals created for particular occupations or trades; others are the ordinary law courts, which have jurisdiction either as courts of first instance in the absence of special tribunals, or as courts of appeal.

The disputes themselves may be divided into two distinct groups. The first consists of individual disputes between an employer and a worker (or employee or apprentice) arising out of a contract of employment (or apprenticeship). It is always easy to find judges competent to settle disputes of this kind, the only question being whether to apply to the ordinary courts or to a special tribunal.

The second group is composed of collective disputes consequent on a combination, strike, or lockout, in which the issue is between an employer and his workers or between organisations of employers and of workers. For the settlement of these disputes, which sometimes have important political and social effects, the ordinary courts are powerless, and resort must be had to preventive or conciliatory bodies, i.e. conciliation committees or arbitration councils.

A. Individual Disputes

(a) Probiviral Courts.

The tribunals which take cognisance of individual disputes are in principle the probiviral courts (*conseils de prud'hommes*). These were-

created in 1806, and their jurisdiction has been steadily extended by a series of recent laws, the most important being those of 27 March 1907, 3 July 1919, and 24 December 1925, incorporated in Book IV of the Code of Labour and Social Welfare.

The probiviral courts are special tribunals set up on a joint basis for the settlement, by conciliation if possible, and by authority if conciliation fails, of all disputes pending either between employers and their workers or employees, or between employers or heads of workshops and apprentices. Whatever the amount in dispute, the probiviral courts are competent in all actions concerning the contract of employment or apprenticeship between employers and workers, employees, or apprentices, in industry or commerce (manufacture, mining, wholesale trade, retail trade, transport, warehousing, etc.). Theatrical employees also come within the jurisdiction of the probiviral courts. It should be observed, however, that although commercial employees and agents have been within the jurisdiction of these courts since the Act of 1907, the plaintiff may if he prefers institute proceedings before a commercial court when the amount in dispute is over 2,000 francs. Further, the probiviral courts have no jurisdiction over state and municipal workers and employees, rural workers, and domestic servants.

Differences between shipowners or fishermen-employers and seamen are within the jurisdiction of special maritime probiviral courts (*prud'-hommes pêcheurs*), the organisation of which varies according to whether the court is for an Atlantic or Mediterranean port.

A probiviral court consists of an equal number of employers and workers (or employees), there being at least two of each¹. The president and vice-president are elected annually by the members of each group, one being an employer and the other a worker or employee. These offices must be held alternately by a representative of each group.

The chief function of the probiviral court is that of conciliation, and an attempt at conciliation must always precede the contentious procedure. Hence the court works through two committees (*bureaux*), a special or conciliation committee and a general or judgment committee.

The special committee consists of two members, one employer and one worker, who take it in turns to preside. It must sit at least once a week.

The general committee consists of an equal number of employer and worker (or employee) members of the probiviral court, not less than two of each, including the president or vice-president, who sit alternately. If the voting is equal the matter is referred at the earliest possible date to the same general committee under the chairmanship of the local justice of the peace or one of his deputies.

The probiviral courts take final decisions, except on questions of competence, when the amount in dispute is not more than 600 francs. Above this figure an appeal lies to the civil court (Act of 24 December 1925, section 80 of Book IV of the Labour Code). An appeal will lie to the Court of Cassation from decisions either of the probiviral court acting as a court of last instance, or of the civil court acting as a court of appeal, on the ground of incompetence, excess of jurisdiction, or contravention of the law.

¹ For voting qualifications and conditions of eligibility see sections 5 and 6 of the Act of 27 March 1907. It should be observed that since 1907 women have the right to vote and are eligible.

(b) Other Tribunals.

Justices of the Peace. In a district where there is no probiviral court the justice of the peace (*juge de paix*) has jurisdiction over disputes arising out of contracts of employment or apprenticeship. Where the amount in dispute exceeds 600 francs (Act of 1 January 1926), he decides only in the first instance, and an appeal lies to the civil court.

Further, his jurisdiction replaces that of the probiviral court: (1) in disputes between masters and domestic servants or agricultural wage-earners, and between the state or the communes and their paid workers; (2) in certain questions connected with industrial accidents (medical and pharmaceutical expenses, accidents involving mere temporary disablement and giving the right to half wages (Act of 9 April 1898)).

Civil Courts and Commercial Courts. As already stated, the civil courts act as courts of appeal for decisions given in the first instance by a probiviral court or a justice of the peace in the conditions specified. They also have jurisdiction in disputes concerning: (1) the engagement of persons not deemed to be workers or domestic servants (clerks, secretaries, etc.), and of state or communal employees, provided that the action does not raise a question of the interpretation of an administrative order; (2) the enforcement of collective agreements between employers and trade unions; (3) annuities and pensions due to the victims of accidents resulting in death or permanent disablement, or to their dependants, etc.

The jurisdiction of the commercial courts extends, as a temporary measure, where commercial sections of the probiviral courts have not yet been organised, to actions arising out of the contract of employment between commercial employers and their employees. Even if there is a commercial section, the commercial courts may try any dispute between employers and employees in which the sum involved exceeds 2,000 francs. Finally, they have jurisdiction over cases of unfair competition between employers' organisations¹.

If the amount at issue exceeds 1,500 francs, the court, whether civil or commercial, decides only in the first instance, and an appeal lies to the court of appeal of the district. Judgments rendered in the last instance, or the decisions of the court of appeal, may be taken to the Court of Cassation.

Central Wage Committee. The French Act of 10 July 1915, based on the British Act of 20 October 1909 on Industrial Councils, introduced a legal minimum wage for women home workers in the clothing industry. The rates are calculated on a rather complicated system by departmental wage committees and are published in the *Recueil des actes administratifs* of the Department. During a period of three months after publication either the Government or any association or person concerned in the industry may lodge an appeal with the Central Committee sitting at Paris at the Ministry of Labour. This is a joint committee presided over by a judge (*conseiller*) of the Court of Cassation.

Civil proceedings, whether taken by an individual or an association,

¹ For instance, the dispute between the Association of Manufacturers of Champagne Wines and the Association of the Manufacturers of Sparkling Saumur Wines concerning the use of the trade mark "Champagne".

on the ground of the non-payment of a duly approved wage rate, to the prejudice of a woman worker, are within the jurisdiction of the probiviral court, or, in the absence of such a court in the district, of the justice of the peace.

B. Collective Disputes

(a) Conciliation Committees and Arbitration Councils.

The object of the Act of 27 December 1892 on conciliation and arbitration was not to confer new rights on the parties, for the power of recourse to arbitration is a basic right, the legitimacy of which cannot be disputed. The innovation in the Act of 1892 was therefore not that it decided that collective disputes between employers and workers may be settled by arbitration, but that it offered them a ready-made organisation, every part of which is intended to encourage the substitution, whenever possible, of rational and peaceful methods for strikes or brute force.

There are three main features of this official organisation for promoting social peace :

(1) The organisation is general, and capable of being adapted to all collective disputes concerning conditions of employment between employers and wage earners in industry, commerce, and agriculture. Thus the scope of the Act of 1892 coincides with that of the Act of 1884 on trade associations.

(2) It provides a standard, defining the procedure to be followed in each particular case for setting up the conciliation committee, or, if this cannot be done, of the arbitration council, which is to settle the dispute, but it does not create a permanent authority.

(3) The new organisation is essentially optional. There is never any obligation on the parties in dispute, as in certain other countries (e.g. Australia and New Zealand), to have recourse to the legal procedure.

Conciliation Committees. If there is no strike, proceedings may be initiated only by one of the parties concerned, i.e. employers on the one hand and workers or employees on the other. The method of electing the delegates is left to the discretion of those concerned, but their number may not exceed five.

If a strike has been declared, the justice of the peace is empowered by section 10 of the Act to initiate conciliation proceedings.

As soon as both parties have accepted the proposal for conciliation submitted to the justice of the peace by either of them, or, in the event of a strike, addressed to them both by the justice of the peace, the committee is virtually constituted and the justice of the peace must immediately call a meeting. The meetings are held in his presence and he must be prepared to act as chairman at the request of the committee. It is important to see clearly what his functions are. He is neither a judge nor an *ex officio* chairman with a casting vote. He is simply an assessor, required to render assistance and, if requested, to preside, but even then he has no power to vote. A conciliation committee, in fact, can in no respect be considered as a court of justice, nor even as a deliberating assembly in which the majority impose their decisions on the minority. The exchange of views is not followed by a final vote, and can lead only to one of two results : either the unanimous agreement of the delegates, or lack of agreement. If they agree, the terms of the

agreement are recorded in a report drawn up by the justice of the peace and signed by all the delegates. This report constitutes a collective labour agreement, the binding force of which is defined in detail in the Act of 25 March 1919 incorporated in the Labour Code. In the opposite case, the justice of the peace draws up a report of the failure of the proceedings.

Arbitration Councils. If no agreement is reached, the justice of the peace invites the parties to designate one or more arbitrators each (in equal numbers), or a common arbitrator. Arbitration, like conciliation proceedings, is purely optional, and the parties are therefore entirely free to decline this invitation. This refusal is publicly posted up.

Unlike the delegates on the conciliation committees, arbitrators need not be selected from among the parties concerned. The only limitation on the freedom of choice of the parties is the stipulation in section 14 of the Act that the arbitrators — seeing that they will have to exercise true judicial functions — must be French citizens ; it follows that women, who may be members of conciliation committees, may not be selected as arbitrators.

If the arbitrators cannot agree, they may choose a referee (*arbitre départiteur*). If they fail to agree both on the settlement of the dispute and on the choice of the referee, they must make a statement to that effect in writing, and the referee is then appointed by the president of the civil court.

When the arbitration award has been drawn up and signed by the arbitrators, it is transmitted to the justice of the peace and deposited with the clerk of the court. The preservation and authenticity of these decisions being thus secured, they constitute a sort of charter of usage, to which the competent courts must refer in settling individual disputes. For an arbitration award accepted by both parties has all the characteristics of a collective agreement and is therefore legally binding.

The difficulty is to obtain the approval of both parties, which is needed to convert the arbitration award into a collective agreement, for no coercive sanction is attached to the decisions of the councils. For the same reasons as made Parliament reject the principle of compulsory arbitration (namely, the illusory nature of an enforced decision directed against the workers), it was thought impossible to make the decisions of the councils enforceable by civil proceedings, or to attach punitive sanctions to contraventions of the awards.

(b) The Permanent Arbitration Council for Shipping.

While the 1892 Act made no provision for a permanent council, the Act of 22 July 1909, on the contrary, set up a permanent arbitration council to settle collective disputes between shipping companies and their crews. This council consists of an equal number of representatives of shipowners and of seamen, together with two judges outside the industry (magistrates or professors of law). Its awards are in no respect binding, but the fact that it is permanent confers on it real authority. Its work is governed by a recent decree of 25 December 1925, replacing that of 19 June 1910.

(2) Administrative Tribunals

In a general way, the work of supervising and controlling the enforcement of the various administrative regulations which govern economic

activity is in the hands of the administrative authorities (prefectural councils and the Council of State).

To take a few examples : the administrative tribunals have cognisance of the many disputes arising out of the interpretation and enforcement of public contracts between the state or the municipalities and the companies holding concessions for public services (water, gas, electricity, motive power, transport) ; disputes concerning orders granting permits for dangerous, unpleasant, or unhealthy establishments, or granting exemption from the Weekly Rest Acts ; disputes relating to the payment of workmen's and peasants' pensions, the payment of relief, etc.

In principle, the case is first brought before the prefectural council, and on appeal before the Council of State. Nevertheless, the Council of State may take cognisance immediately of an appeal from a prefectorial or municipal decree for excess of jurisdiction.

Disputes as to competence between a judicial and an administrative tribunal are settled by a disputes tribunal (*tribunal des conflits*), consisting of an equal number of representatives of the Court of Cassation and of the Council of State, which settles this point and refers the parties to the competent tribunal.

Pensions Courts.

Under the War Pensions Act of 31 March 1919, amended by the Acts of 30 April 1920 and 1 April 1923, all disputes arising out of the administration of these Acts are dealt with in the first instance by the departmental pensions court for the place of residence of the person concerned, and on appeal by the regional pensions court. These courts consist of magistrates and high administrative officials, doctors, and pensioners selected by lot. Appeals lie to the Council of State only for excess or abuse of jurisdiction, formal defects, or contraventions of the Act.

II. Criminal Courts.

The criminal courts whose judgments serve as precedents for the formation of labour law are of three kinds : (1) the correctional police courts of the first degree (*tribunal correctionnel*) and of the second degree (the correctional appeal chambers of the court of appeal) ; (2) the ordinary police courts (*tribunal de simple police*) ; (3) the Criminal Chamber of the Court of Cassation.

A correctional court consists either of a civil court of first instance, i.e. the district (*arrondissement*) court, trying criminal cases, on the principle of the unity of the two jurisdictions — the same tribunals, consisting of the same judges, trying both civil and criminal cases — or, where the district court consists of several chambers, of the correctional chamber of the court of first instance. The correctional court tries misdemeanours (*délits*), i.e. offences punishable by " correctional " penalties, of which there are two : imprisonment (*emprisonnement correctionnel*) if fixed by the law at six days to five years inclusive, and fine (*amende correctionnelle*) if fixed by the law at 16 francs or more. It tries such cases in the first instance, that is to say, all the parties to the case have the right to appeal from its decisions to a second and higher judicial authority, the court of appeal, one chamber of which, the correctional appeal chamber, has the special function of examining appeals from the judgments of the correctional courts.

An ordinary police court is constituted in each canton by the justice

of the peace, who tries criminal cases in sittings or parts of sittings distinct from those in which he tries civil cases. In large towns there is only one ordinary police court, composed of the justices of the peace of the different cantons. In Paris and Lyons the justices of the peace composing the ordinary police courts specialise in criminal cases and never try civil cases. These courts try petty offences (*contraventions*), that is to say, offences punishable by a " police " penalty, which is either imprisonment (*emprisonnement de police*) if fixed by the law at 1 to 5 days inclusive, or fine (*amende de police*) if fixed by the law at 1 to 15 francs inclusive. In principle the ordinary police courts decide in both the first and the last instance, in this sense that from most of their decisions no appeal is allowed. Nevertheless, the accused have a personal right, not attaching to the prosecuting parties, and therefore not to the public prosecutor in an ordinary police court, nor to collective or individual civil plaintiffs, to appeal from judgments of ordinary police courts sentencing them either to a term of imprisonment whatever its length, or to a fine or payment of compensation to the civil plaintiffs (damages, restitution, etc.) exceeding 5 francs (section 172 of the Code of Criminal Procedure). Such an appeal lies to the correctional court for the district in which the police court rendering the judgment in question is situated.

An appeal on a point of law to the Court of Cassation (*pourvoi en cassation*) lies against decisions taken in the last instance, i.e. where proceedings by way of ordinary appeal are not allowed, or where an appeal from the decision has already been brought. In accordance with this general formula, this right of appeal exists in the case of judgments of the ordinary police courts against which there is no appeal ; judgments of the correctional courts in ordinary police cases heard on an appeal against the sentence of an ordinary police court from which appeal is allowed under section 172 of the Code of Criminal Procedure ; finally, decisions of the courts of appeal on appeals against judgments rendered in correctional cases by the correctional courts. An appeal to the Court of Cassation is in principle open to any of the parties to the case : the public prosecutor, the civil plaintiffs, and the accused. Only questions of law may be submitted to the Court of Cassation ; that is to say, this tribunal must consider the findings of the lower courts (ordinary police courts, correctional courts, courts of appeal) on questions of fact as not open to question, and must examine only whether the decision submitted to it has correctly applied the law to these facts.

There are two main types of appeal to the Court of Cassation. An appeal in the interest of the parties may be brought against a decision which has not yet received the authority of final judgment ; it may affect the legal situation of the various parties to the case as determined by the decision in question. Appeals on the order of the Minister of Justice, and in the interest of the law are brought, as is clearly shown by the name of the second, in the interests of sound procedure, in order to enable the Court of Cassation to censure any decisions of the lower tribunals which are contrary to the law, and so to reach uniformity of practice in the interpretation of criminal law. In principle, these appeals cannot alter the legal situation in which the private parties, i.e. the civil plaintiffs and the accused, are placed by the judgment or order submitted to the Court of Cassation, at least not in a manner unfavourable to their interests.

Appeals against decisions in criminal cases are submitted to the Criminal Chamber of the Court of Cassation, the Chamber of Petitions (*Chambre des requêtes*) having no jurisdiction in criminal cases. Nor-

mally, its decision takes the form either of dismissing the appeal (*arrêt de rejet*), or of quashing the decision appealed against (*arrêt de cassation*). In principle, if the decision is quashed, the case is referred back to a tribunal of the same order as that which gave the original judgment: for instance, if the judgment of an ordinary police court is quashed, the case is referred back to another ordinary police court for a new trial. This tribunal must re-examine the whole case both on the law and on the facts, and it is not bound to conform to the decision of the Criminal Chamber. If, however, its judgment coincides with the quashed judgment of the first tribunal, this indicates a difference of opinion on a question of law between the tribunal to which the case is referred back and the Court of Cassation; and in a question of law the opinion of the Court of Cassation must ultimately prevail. In order to secure this supremacy of the Court of Cassation, the Act of 1 April 1837 lays down that if in such circumstances a new appeal is brought against the decision of the court to which the case has been referred back, the latter decision being contrary to the view of the Criminal Chamber, the Court of Cassation shall decide in a joint sitting of all its chambers ("*toutes ses chambres réunies*"). The tribunal in question must accept the decision of the Joint Chambers, being bound "to comply with the decision of the Court of Cassation on the point of law judged by that Court".

THE AUTHORITY OF JUDICIAL DECISIONS

The practical consequences of the difference between the views of official French and English jurisprudence on the relative value of the sources of law become most apparent in the matter of the authority given to judicial decisions. This authority exists in both countries and in large measure, but while to the English jurist this is a normal and regular phenomenon, for the French it should not exist, and its operation is therefore contraband.

Thus in English judicial theory and practice equal attention is paid to the machinery of Common Law and to that of Statute Law, and detailed rules have grown up for the working of both; but in French theory and practice there has been no occasion to specify the conditions under and the extent to which judicial precedents may acquire authority, since according to the constitutional theory or fiction they have no competence to acquire such an authority in any form or any degree. In England, therefore, when a judicial precedent satisfies certain requirements, it constitutes an authentic part of the "Common Law", and has legal authority, being binding on all judges in the future. In France a judicial decision, however high the court from which it issues, and however carefully considered it may be, can never, according to the constitutional theory or fiction, claim the slightest legal authority outside the concrete case to which it applies. It is true

that France has her "decisions of principle", which define, and therefore make, the law as effectively as do the English "leading cases"; but this is a sociological phenomenon which official jurisprudence ignores because it considers it undesirable and illegitimate. The authority of the French precedent, however powerful it may become in reality, can therefore never be more than a *de facto* authority.

This leads to three important results:

(1) *As regards the tribunals which co-operate in interpreting the law.* In France there is no room for the distinction, recognised in England and emphasised by Professor Gutteridge, between the higher courts, whose opinions go to constitute judge-made law, and the lower courts, which are powerless to create binding precedents. As all the courts without exception are officially refused the power to take decisions which shall be legally binding, their only means of acquiring this power is by usurpation, and all the courts can share in this usurpation to the extent of their ability. The decisions of humble justices of the peace and modest courts of first instance have the honour of being included in the great collections of judicial decisions, and of being quoted in court. And it has already been observed that the awards of mere probiviral courts are not without influence on the ultimate tendencies of general judicial practice in labour law. Obviously this influence will vary with the position in the judicial hierarchy of the tribunal taking the decision which is invoked as a precedent. But it is not possible, as in England, to determine uniformly for each class of tribunal the scope and the force of its sentences, since its authority exists solely *de facto*, and all *de facto* authority necessarily varies with the circumstances.

(2) *As regards the determination of the materials which are to constitute legal precedents.* In England the recognition that judicial practice is a fundamental source of law has led to the definition of the factors concerned in its production. English jurisprudence adopts a fundamental criterion: the distinction between the legal decisions taken by a judge in settlement of a point of law raised by the parties and argued by counsel — judicial *dicta* — which alone have legal authority, and the views and arguments put forward as collateral or incidental to the decision on this point of law — *obiter dicta* — which have only theoretical or persuasive value. French jurists adopt quite a different criterion, which is purely mechanical or formal, to determine the parts of the judgment which may claim *de facto* authority as a precedent. They

The birth and disappearance of judicial rulings cannot be dated with the same precision as in England, because in most cases they are only the progressive outcome of a train of decisions. It is only after the event that the "decision of principle" can be distinguished in the series, the decision, namely, which leads to the creating or fixing of a judicial precedent.

CONCLUSION

Legislation in France, as everywhere else, is one of the chief factors in the evolution of labour law. It is the instrument by means of which the boldest reforms are brought about, but it is far from being the only source of this branch of French law. Its particular rival is judicial practice, which not only settles independently the many matters not yet dealt with by the legislature, but also has important effects on the practical working of statute law. While the constitutionality of the higher form of legislation, the Act properly so called, is not liable to that judicial scrutiny which in the United States so often holds up the administration of labour law, this is not so for the lower form, or regulations. The legal validity of these may be subjected to the scrutiny of the courts; even their expediency may be questioned in consequence of an appeal on the ground of excess of jurisdiction. Further, when they come to be applied in practice, both Acts and regulations bear the aspect given them by a judicial interpretation which admits of a large measure of initiative and creative activity. The various tribunals form a kind of melting-pot in which are fused and blended all the materials derived from other sources of law. They therefore offer the most favourable field for observing the actual working of labour law to-day. But owing to the very conditions under which the body of judicial precedent is formed, lives, and dies, its constituent elements are scattered in a number of voluminous collections of judicial decisions.

Overproduction and Underconsumption : A Remedy

by

P. W. MARTIN

The anomaly involved in the parallel existence of producers unable to dispose of their goods and consumers suffering for lack of those same goods has rarely been so marked as in the years following the war, although it is at least as old as the present industrial system, and it may fairly be considered one of the most acute economic problems of the day. An increasing volume of research has been devoted to seeking the fundamental defect in the economic system which causes this state of things. Mr. P. W. Martin, who is the author of two books on this subject¹, here puts forward a new analysis of the basic reason for the shortage of markets from which the industrial world intermittently suffers, and presents a remedy based on this analysis. In view of the far-reaching social consequences which would follow if, as is here claimed, markets could be made permanently adequate, the editors of the Review, while reserving their judgment in the matter, present this article to their readers as an independent contribution to the subject.

ABILITY to make goods but inability to find markets for them is one of the outstanding characteristics of modern industry. Machinery, power, and methods of mass production have rendered it possible to produce in quantities immensely greater than ever before. The difficulty is to sell these goods once they are made. Statistical record shows that every industrial country from the time it becomes industrialised suffers from a recurrent scarcity of markets; which scarcity of markets in turn gives rise to scarcity of employment, restriction of production, a reduced standard of living, and, sooner or later, international complications growing out of the world-wide struggle to find outlets for

¹ P. W. MARTIN : *The Flaw in the Price System*; London, P. S. King, 1924; 109 pp. *The Limited Market*; London, Allen and Unwin, 1926; 125 pp.

In the United States the Pollak Foundation for Economic Research would appear to be following a substantially similar line of research. Cf. W. T. FOSTER and W. CATCHINGS : *Profits*; New York, Houghton Mifflin Co., 1925; 465 pp.