The Theory of the Collective Labour Contract in France

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SINCE the war the problem of collective bargaining has presented itself in France under new forms. Collective agreements during these last few years have increased in number and extended their scope. While an attempt has been made, by means of judicial decisions and legislative action, to supply an adequate legal basis to such bargaining, students of jurisprudence have also sought earnestly for an explanation of its working, and to that end pursued enquiries completing and correcting the suggestions put forward by earlier writers. It seems a favourable moment in which to attempt an analysis of the information which has come to us as a result of these enquiries. If we look back on collective bargaining as it was just before the war broke out, it is easy to see what ground has been covered; indeed, it is perhaps permissible to estimate more precisely than hitherto the future place of collective agreements in the economic system.

THE FACTS

Prior to the war collective agreements had only secured a very precarious hold in France. In the mining and printing industries the opposition to them which had been current at the end of the XIXth century had been finally overcome, and at the beginning of the XXth century they became widespread in the building trade. In all other branches of industry they remained quite exceptional, still more so in agriculture, while in commerce they were almost unknown. The statistics collected by the Department of Labour prove how little progress was being made. Between 1910, the first year for which we possess complete and reliable statistics, and 1913, the last normal year, the number of new collective agreements of which the Department had notice steadily decreased; from 252 in 1910 they fell to 202 in 1911, to 104 in 1912, and to 67 in 1913. And not only were collective agreements previous to the war restricted in number; their scope also was in most cases limited and uncertain. They usually applied to a single firm only, or to the firms in one place only. A few mining, textile, or building agreements

applied throughout a district; in no case did their scope in any given trade extend to the whole country. They were generally the result of a strike or of the threat of a strike (1), and embodied a compromise bearing on wages, with no pretence to finality; as soon as economic changes make it necessary to re-adjust wages, the agreements cease, as a rule, to be observed, and a new strike breaks out, which is only ended, quickly or slowly, in proportion to the respective powers of resistance of the opposed parties, by a new temporary agreement (2). This was the position in 1914. It was not brilliant, certainly not when one compares it with the rapid development of collective bargaining in the principal countries other than France—England, Germany, and the United States.

During the first three years of war, collective bargaining, in common with all phases of our national economic life, stagnated (3). In 1917, however, it took on new life, and rapidly developed to an extent hitherto unparalleled (4). The climax was reached in 1919, when the number of agreements was more than double the highest figure recorded in the best pre-war year. While collective agreements were increasing in number, they were also extending in scope. They tended to cover, instead of a single locality, a whole district; for instance, in the printing trade, five district agreements were drawn up, which between 1920 and 1924 were to take the place of innumerable existing agreements. Where before the war the district collective agreement had already become common, progress was made towards national agreements. Although the national agreement drafted by the Miners' Federation met with steady opposition from the Central Committee of Mineowners, national agreements were concluded in the building trade on 19 March 1919; in the metal industry on 17 April and 24 May 1919; and in the printing trade on 11 June 1919. These wider agreements were intended to be at once more complete and more permanent. Their principal object was not to provide a provisional and temporary solution of a question of wages; they aimed at fundamental regulation, to be as general and as stable as possible. This is especially true of the great agreements of 1919; in many cases they contained no reference

(1) In 1913, of 171 collective agreements, 138 were concluded after a strike. Cf. R. PICARD, *Le développement des contrats collectifs en France*, in *Revue économique internationale*, June 1914; p. 476.

(2) For the story of the famous Arras Agreements, see B. RAYNAUD, *Le Contrat collectif en France*, pp. 35-51. Paris, Rousseau. 1921.

(3) In 1914, 51 fresh agreements were recorded by the Ministry of Labour; in 1915 one only, and in 1916 four.

(4) 134 agreements were concluded in 1917; 253 in 1918; 557 in 1919; 267 in 1920.

to wage-scales, leaving these to be determined by local agreement; on the other hand, they formed a charter of the industry regulating the length of the working day, the employment of foreign labour, etc.

Once the agreement is signed, an attempt is made to forestall risk of future disputes by the institution of permanent bodies to facilitate the friendly settlement of all difficulties. The national agreements in the building trade and in the printing and publishing trades contain provisions for joint committees, entrusted both with the settlement of disputes arising from the application of the agreement itself, and with the examination of all questions affecting the trade.

A further change, resulting from those already mentioned, and by no means the least significant, should be noted. Whereas before the war collective agreements appeared to be entirely voluntary transactions, with which the state had no concern, the agreements concluded during and after the war are marked both in form and content by the close interdependence of public policy and private agreement. Nearly two-thirds of the collective agreements signed between 1914 and 1918 were the result of action by the government, agreement between the interested parties being achieved at the suggestion of, and sometimes under strong pressure from, the authorities. Not only did the state assist in concluding the agreement; it lent its aid in enforcing and extending its application. Under the Act of 11 June 1917 respecting the Saturday half-holiday, and that of 23 April 1919 on the 8-hour day, existing voluntary private agreements between employers' and workers' organisations were extended by Decree to the whole of an industry or district. The provisions of these agreements forthwith applied to all employers and all workers, whether they were or were not parties to them, and the labour inspectorate was empowered to enforce their application. It may even be said that collective agreements have become essential to the working of the Acts of 11 June 1917 and 23 April 1919; these Acts only lay down certain general principles, leaving the determination of details to Administrative Regulations, which must first and foremost take into account agreements between employers' and workers' organisations. The Regulations obviously need not follow these agreements strictly; the government "preserves the right of amending and redrafting the collective agreements when it makes use of them" (5). In practice, however, the Ministry of Labour generally embodies the majority of the provisions of a collective agreement which it has recognised (6).

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(5) RAYNAUD: op. cit., p. 122.

(6) RAYNAUD: op. cit., pp. 98 et seq. De la Bigne de VILLENEUVE; *L'idée de réglementation mixte dans la loi du 23 avril 1919*; thesis. Rennes. 1920. P. GRUNEBAUM-BALLIN: *La participation des organisations professionnelles à*

Henceforward, therefore, collective bargaining is the instrument of genuine industrial regulation. But it must not be thought that in this respect the war has created an entirely new situation; it has only precipitated a development which would otherwise have taken place much more slowly. Even before 1914 the value of the collective labour contract for the regulation of industry had become evident in certain cases (7), but its scope was limited and hampered by the small number and precarious character of existing agreements. Today conditions have changed; in actual practice there are a large number of collective agreements of sufficient scope and authority to justify and make possible their transformation into public acts.

Theory

Before the war a large number of works dealing with the theory of the collective labour contract appeared, and one was sometimes tempted to wonder whether the ingenuity and subtlety of their authors did not tend to complicate rather than to elucidate the problem. With the greater perspective of today and the new light on the subject resulting from recent research, we can see how the true nature of the collective labour contract has gradually emerged from the apparently chaotic interplay of opposing theories. We may attempt to distinguish the main stages in this development and the climax to which it appears to be tending. The paramount question is how to explain the nature of the obligation binding the parties concerned, employers and workers, to comply with the terms of a collective agreement. The answers which have been given to the question may be placed in three groups, which have both a logical and a chronological sequence.

The first group of writers — the earlies and most numerous (8) — maintain that the obligation of the individual is based on an act of individual will. The individual is bound, because he has contracted an obligation, whether express or implied, personally or through an agent, at the moment of the conclusion of the agreement, or by subsequent ratification of it. The basis of his obligation is always the consent given personally or by another on his behalf. The theories of

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l'exercice du pouvoir législatif, in *Revue politique et parlementaire*, 10 Jan. 1920. G. Scelle: *La loi de huit heures*, in *Revue politique et parlementaire*, 10 Oct. 1920. V. Bergonzo: *Le développement des contrats collectifs de travail pendant la guerre*; thesis. Paris. 1920.

(7) G. Pirou: *Intervention légale et contrat collectif de travail*, in *Revue d'Economie politique*, 1913, pp. 733 et seq.

(8) Cf. Bergeron: *Le droit des syndicats d'ester en justice*; thesis. Paris. 1898. Reynaud: *Le contrat collectif de travail*; thesis. Paris. 1901. Bourdon *Les contrats d'utilité générale passés au profit d'une collectivité*; thesis. Paris. 1905. Laronze: *De la représentation des intérêts collectifs et juridiques des ouvriers dans la grande industrie*; thesis. Paris. 1905.

agency and representations on behalf of third parties are merely particular forms of this general theory. While this is not the place to criticise them (9), it may be pointed out that, apart from the many legal objections to which these explanations are subject in detail, they possess a common defect, which has led to their being properly discarded by recent authors. To adopt the tendency which they indicate would be to give to the collective contract a legal character contrary to its aim and purpose. Labour conditions are being increasingly determined today by collective action; this is due not only to the fact that the workers find in organisation a means of overcoming their inferiority in the labour market as long as they remain isolated and driven to conclude hasty contracts, but also to the fact that under the present economic system conditions of labour and of production inevitably involve the application of uniform rules. The diversity of individual situations which was compatible with small workshops is no longer possible in large-scale production, and the only real alternative is whether these general rules and uniform conditions shall be applied by the employer alone, acting solely in his own interest, or by co-operation between employers and workers. If the sphere of application of a collective agreement does not include all employers and all workers, there will be found, alongside those who are working, or furnishing work, in accordance with the collective wage-scale, other employers and workers accepting other conditions; such differences cannot long continue, and conditions will inevitably be standardised at the lowest level by the ruthless play of the very competition which the collective agreement attempted to avoid. As Mr. Jean Brèthe has very justly pointed out :

> Conscientious employers, who wish to continue paying the wages promised, will either be unable to maintain the struggle with their unorganised competitors, or else they will prefer to engage workmen with whom they have no previous agreement. The workers, on their side, will, under the circumstances, voluntarily give up the advantages accruing to them under the collective agreement, to avoid being replaced by non-union men ready to accept wages below the scale fixed. The agreement which was signed is then wiped out; so many breaches have been made in it that it will fall out of use. If it is to last it must cover the whole industry (10).

To ensure that a collective agreement be both lasting and stable, therefore, it is not enough that those who signed it should loyally respect its provisions in their mutual relations; the conclusion of employment contracts contrary to these provi-

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(9) For such criticism, cf. M. NASH: *Les conventions collectives relatives à l'organisation du travail*; thesis, pp. 120-156. Paris. 1908.

(10) BRÈTHE: *De la nature juridique de la convention collective de travail*; thesis, p. 8. Bordeaux. 1921. Also R. JAY: *Qu'est-ce que le contrat collectif de travail?* in *Revue d'Economie politique*, 1907; p. 565. P. BUREAU: *Ce qu'on peut attendre du contrat collectif de travail*, in *Reforme sociale*, 1911, I, p. 500 et seq. G. MORIN: *La révolte des faits contre le Code*. Paris. 1920.

sions should be impossible even between persons not parties to the collective agreement. It is unecessary to prove at length that such an extension of the scope of collective agreements cannot be effected by the theories of agency or of representations on behalf of third parties. By their insistence in basing a voluntary act on individual liability, these theories tend to reduce to a minimum the sphere of action of collective agreements. They guarantee the minority, which refuses to consent to an agreement, against the application of the common rules, even though it be a minority of one. In this they deserve the support of the apostles of individualism, but, by this very fact, they must be rejected by those who seek a legal formula on which to base the authority and development of the collective labour contract.

A second group of theories marks the transition from the individualistic to the regulative conception of the collective labour contract. These theories are based on a desire to reconcile the principle of individual liberty with the necessities of collective rights—that is, the conception of contract with that of law. According to Mr. Saleilles, for instance, a collective agreement is a contract, since it results from transactions "between parties who are opposed to one another, who negotiate, and who compromise" (11); but, at the same time, it tends to establish an industrial law, "a charter of the factory, a charter of industry" (12). The problem consists "on the one hand in resolving the conflict between the collective and the individual, on the other, in reconciling the conception of a general law of a coercive and obligatory nature with the contractual basis on which it is founded" (13).

Various attempts have been made to achieve this reconciliation, this expansion of the contractual form, the limitations of which have already been noted. According to Mr. de Visscher, collective agreements entered into between two associations bind all members of the associations, even if they have refused to adhere to the agreement. By joining the association, they have bound themselves in advance by any decisions which may be taken by the majority. They have agreed, once and for all, to submit their individual will to the collective will as expressed by the majority. In consequence, an agreement accepted by an association may be said to express the will of all its members, even of those who were in the opposing minority; "for they are party to the agreement in the same way as those who voted for it" (14). It is easy, nevertheless, to demonstrate that Mr. de Visscher's

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(11) R. SALEILLES; *Préface* to de VISSCHER: *Le Contrat collectif de travail*; p. VII. Paris. 1911. By the same author: *Note sur le contrat collectif de travail*, in *Bulletin de la Société d'Etudes législatives*, 1908; p. 79 et seq.

(12) SALEILLES: op. cit., p. X.

(13) *Ibid.* p. XIX.

(14) De VISSCHER, op. cit.: p. 140.

analysis only succeeds by a "roundabout deception" (15) in reconciling conceptions fundamentally opposed. It is really difficult to maintain that the obligation on the opposing minority is based on an act of its own will, when it has openly stated its refusal to agree. On the other hand, the proposed extension founded on the original contract of association, which binds the members, has its limits in that contract itself. It is impossible, therefore, to justify on this basis an extension of the application of the agreement to non-members, and thus to give the force of a general industrial regulation to the collective agreement.

On an entirely different basis, and therefore, in my opinion, nearer the truth, is the theory propounded by Mr. Rouast (16). By an ingenious analogy, Mr. Rouast compares the collective agreement to a composition in bankruptcy (17); in both cases the will of the majority is binding, and its point of view is imposed, because the general enforcement of the will of the majority is the only means of avoiding the catastrophe of a strike or bankruptcy. The obligation of the minority to conform to a composition or a collective agreement is not explained by consent previously given, but by the existence among the members of the association, as among the creditors of a bankrupt, of a state of "necessary common interest", which creates a collective right overriding the individual rights of the members of the group. The advance made by this analysis is evident. The obligation on all members of the group to respect the collective agreement is not the result of a voluntary act—the act of association— but of necessity, that necessity being the common interests of workers in the same trade (18). Though otherwise adhering to the conception of contract, Mr. Rouast has perhaps paved the way for the regulative conception of the collective contract.

Before the final step in the development of the theory of the collective labour contract could be taken, a wider use of collective agreements in industrial life was necessary. The study of the important agreements of 1919 will lead modern theorists to discard entirely the idea of contract and replace it by that of law. Even before the war, certain writers had noted the extra-contractual nature of collective agreements. Mr. Jean Cruet, for instance, wrote : "It may be said that a

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(15) BRÈTHE : op. cit. p. 56.

(16) ROUAST : *Essai sur la notion juridique du contrat collectif dans le droit des obligations*; thesis. Lyon. 1909. YANKOVITCH : *La convention collective de travail*; thesis. Lyon. 1900.

(17) *Concordat*; the agreement by which creditors accept a composition.

(18) For a similar development of theory regarding the nature of industrial association (*groupement syndical*) cf. E. PERROT'S notes on G. MORIN : op. cit., in *Nouvelle Revue historique*, 1920; p. 565. "The industrial association (*syndicat*) should be the legal form to embody the fact of the community of industrial interests, which results not from voluntary agreement but from common conditions of existence".

labour contract contains scarcely any element of contract; the collective contract is a law imposed unilaterally by the industrial association on the industry" (19). The Abbé Lemire wanted to find "something intermediate between a contract binding only on the contracting parties and a law binding on all; in fact, a labour agreement applying to all those in the same trade, or living in the same country"(20). Mr. Maxime Leroy declared that the idea of a collective wage scale was a new one, to which it was impossible to apply the individualistic formulae of civil law, and added that collective agreements constitute in fact "union laws" which are imposed upon the whole community in the interest of the workers (21). But the conception had merely been outlined in forms which in some respects were debatable. It was only to find its full development in quite recent years. In the new edition under preparation of his *Traité de Droit constitutionnel* (22), Mr. Léon Duguit, reverting to and amplifying a theory which he had already suggested in his *Manuel* (23), emphasises the differences between the collective agreement and the ordinary contract. Whereas in a contract the two parties have different objects in view, in a collective agreement they wish to attain the same end : that is, the regulation in common of conditions of labour. And whereas a contract is based on the legal relations of creditor and debtor and reciprocal undertakings, collective agreements are the basis of a general, permanent, and objective legal provision (24). Mr. Jean Brèthe (25), a follower of Mr. Duguit, expounds similar views, and insists even more upon the conflict of function between the collective agreement and the contract. In his opinion a contract involves a particular, concrete, and temporary obligation. It affects only creditors and debtors, aiming solely at determining their individual positions; the contract is therefore fundamentally individual and particular. On the other hand, a collective agreement lays down the principles of the law which will apply to a whole class of persons, all those, that is, who are in the position of employer or of employee, either in the given trade, or in the given district, to which the agreement applies. The agreement does not, therefore, create any obligations as between individual members of the two groups involved; it does set up an imperative rule

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(19) Jean CRUET : *La vie du droit et l'impuissance des lois.* Paris. 1908.

(20) *Le Contrat de Travail.* Published by the *Association nationale pour la protection légale des travailleurs;* Paris. 1907.

(21) Maxime LEROY : *La Coutume ouvrière.* Paris. 1913. Also BOISSARD : *Contrat de Travail et Salariat.* Paris. 1910.

(22) Vol. 1; pp. 305-308. Paris. 1921.

(23) First edition, 1907; p. 549.

(24) Cf. also Léon DUGUIT, *Collective Acts as distinguished from Contracts,* in the *Yale Law Journal,* Vol. XXVII, No. 6, Apr. 1918; p. 753 et seq.

(25) Op. cit., particularly pp. 66-93 and 171-189.

for all parties, any violation of which would be a tort in the same degree as failure to observe provisions of law. In support of his argument Mr. Brèthe points to the present tendency to incorporate collective agreements in the text of Administrative Regulations. This incorporation shows that collective contracts and public regulations are fundamentally akin in character and content; that is to say, they aim at establishing the rules of industry in advance, on general lines of principle, without regard to concrete cases of particular employers or particular workers (26).

Step by step with the advance of theoretical analysis and economic development, collective bargaining, limited originally in extent and effect by the will of the parties and by the relative nature of the agreement, is enlarging its scope and prospects. It is essential that existing law should place no obstacles in the way of the completion of this evolution, but hitherto law has, *pede claudo*, lagged far behind the progress realised both in theory and fact.

Existing Law

Legal practice previous to the passing of the Act of 1919 was entirely governed by the contractual conception of collective agreements. It recognised these agreements as valid, but only gave them a limited legal scope. In the first place, persons not parties to the contract, who have not subsequently expressly ratified it, are not bound by it. This is an application of Article 1165 of the Civil Code, under which agreements are only binding upon the contracting parties. Certain decisions, mostly given by probiviral courts (*conseils de prud'hommes*) (27), have attempted to evade this solution by treating the agreement as a trade custom, but the Court of Cassation on several occasions, particularly in its decision of 7 April 1919 (28), upheld the limited interpretation, which appears to have been definitely accepted.

In the second next, what has been done by voluntary agreement can be undone by an agreement to the contrary. It follows, therefore, that an employer and employee, both members of associations which have signed a collective agreement, are at liberty to depart from it, if such is their

(26) The theory of Messrs. Duguit and Brèthe is expressed by its expounders in terminology which I have deliberately avoided, because its use gives rise to controversies which cannot be discussed here, and which concern abstract metaphysics rather than positive sociology.

(27) Conseil de Prud'hommes, Seine, 13 Apr. 1895; in *Revue pratique de droit industriel*, 1895, p. 205. Conseil de Prud'hommes, Seine, 31 Oct. 1918; in Raynaud, op. cit., p. 150.

(28) Cour de Cassation (hereafter cited as Cass.), 7 Apr. 1919; in *Recueil Sirey* (hereafter cited as S.), 1919, V, 120. Also Cass., 6 Mar. 1911; S. 1914, I, 154.

formally expressed intention. They are, of course, liable for the payment of damages to the associations to which they belong, but the individual labour contract entered into between them nevertheless remains valid. There is no principle of law to prevent workers and employers who are benefiting under a collective wage scale from departing from it by individual agreement, since the scale in question involves no element of public policy ([29]).

Similarly, action by an association in pursuance of an agreement can only be taken in so far as the association is party to it. It is not entitled to act by the mere fact that the general interests of the trade are imperilled by breach of the agreement. An association is entitled to proceed against those who violate a collective agreement in virtue of the fact that they undertook to respect it and have failed to do so. " It only protects the interests of the trade within the limits of its contract, and its power to take legal action is based on its power to contract " ([30]). It is well known, on the other hand, that when there is any failure to observe a legal obligation (such, for example, as the illegal practice of medicine), pre-war legal practice admitted the validity of action by an association as soon as the illegal practice and professional injury had been proved. But this was a case of tort, whereas the infringement of a collective agreement only gives rise to a breach of contract, upon which only those included in the contracting parties can take action.

Such an interpretation of collective agreements is, nevertheless, so manifestly contrary to their nature and to their fundamental tendencies that recent legal practice has been obliged to alter it considerably, though indirectly. The question arose over the validity of a clause by which employers who had signed a collective agreement undertook to employ in future only union workmen; this clause, it is argued by its opponents, tends to make membership of the union compulsory, and thus restricts the liberty of those workers outside the agreement. In fact, it is quite certain that if, in a given district and in a given trade, there is only one union in existence enrolling the majority of the workers, and if the collective agreement has been drawn up by this union on the one hand, and by the majority of the employers on the other, the working of the clause in question will make it practically impossible for non-union workmen to find employment. Nevertheless, the Civil Court of Lille on 28 November 1912, the Court of Appeal at Douai on 13 June 1913, and the Court of Cassation by its judgment of 24

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(29) CASS., 16 Dec. 1908; in *Recueil Dalloz* (hereafter cited as D.), 1909, I, 76. For a similar ruling see CASS., 2 Aug. 1911, in *Bulletin de l'Office du Travail* (now *Ministère du Travail et de la Prévoyance sociale*), 1911, p. 1093. To the contrary see CASS., 7 July 1901; D. 1911, I, 201.

(30) BRÈTHE: op. cit. p. 101.

October 1918 (31), all recognised the validity of such a clause. In future, therefore, third parties, though they may remain legally outside the scope of a collective agreement, are nevertheless in practice liable to its consequences, and may be compelled to accept union law and the collective wage scale, if they wish to avoid changing their trade or their place of residence. We have already laid sufficient stress on the economic necessity of common regulation to show that this view does not strike us as startling; but it will readily be understood that the supporters of the individual and contractual conception of collective bargaining have criticised the decision in question very severely (32). It should be noted, however, that the Court of Cassation, judging by the wording of its decision, did not seem desirous of laying down an absolute principle in answer to the problems laid before it. The Court cited in support of its decision the fact that the clause excluding non-union workmen was only of very limited scope in the case in question, for it applied only to the town of Lille and for a period of six years. Similarly, the Court of Appeal at Douai stated that " freedom of labour and the worker's right to join a union or not are to be respected, and one of the duties of courts of justice is to maintain and safeguard these liberties ".

The decisions of the three courts are none the less significant, and constitute evidence of the " radiating power " (33) of collective bargaining. In the present state of law, this power cannot be fully recognised in legal practice, but it is becoming more evident and upsetting the traditional principle of individual liberty and the limited conception of collective agreements.

The Act of 25 March 1919 (34) is based on existing practice in defining and regulating collective agreements; it expressly affirms, in Section 31, the contractual nature of collective agreements. Some of its most important provisions rest on this conception. Only those who have consented to the agreement are bound by it; consent may be given by personal signature, by a written mandate to the signatories, or by tacit ratification through failure to take advantage of the eight days' grace allowed by the Act for withdrawal from the group concluding the agreement, thus indicating

(31) S. 1920, I, 17.

(32) Cf. note by Mr. J. BONNECASE in *Recueil Sirey* under the above judgment.

(33) RAYNAUD : op. cit., p. 256.

(34) For a general commentary on the Act of 25 Mar. 1919, which in the text we have sketched in principle, cf. CREPIN : *La Convention collective de travail*; thesis. Paris. 1919. Pierre LOUIS-LUCAS : *Les conventions collectives de travail*, in *Revue trimestrielle de droit civil*, 1919, pp. 65 et seq. René MOREL : *Les conventions collectives de travail et la loi du 25 mars 1919*, in *Revue trimestrielle de droit civil*, 1919, pp. 417 et seq. Also BRÊTHE : op. cit. and RAYNAUD : op. cit.

a desire to remain outside it. When a collective agreement has been concluded for an indefinite period, which is most frequently the case, either party may withdraw at any time by giving a month's notice of his decision to the other parties. If the withdrawal comes from a group, it entails the withdrawal of all persons composing that group, subject, however, to the right of the members of the withdrawing group to adhere individually to the agreement at a later date. These provisions are all based on the idea that a collective agreement should be binding only on those who desire it, and only so far as they desire it. Collective agreements as defined by the Act thus exclude third parties. The Bills proposed by the Government (35) and the Society for Legislative Studies (*Société d'Etudes législatives*) (36) had admitted the idea that a collective agreement, when only one exists in the district and trade involved, should be presumed to have been accepted as a basis for individual agreements entered into by all the employers and workers. The Legislature abandoned this idea, and, since the Act is silent upon the point, the maxim *res inter alios acta...* no doubt applies.

Action under the Act of 25 March 1919 is also based on the contractual conception. Advocates of a larger sphere of action for associations demanded that these should be given the right of prosecuting every breach of a collective agreement even though they were not parties to its conclusion (37). The Legislature refused to admit this, and only allowed associations to take legal action in connection with collective agreements to which they were party, or by which, at any rate, their members were bound. In the first case they defend their rights as a contracting party; in the second, they act in the interests of their members, that is to say, their action is never based solely upon considerations of the general interests of the trade.

In spite of its insistence on the individual and limited conception of collective agreements, the Legislature, like the courts, and to an even greater degree, has had to modify this conception in some respects. In the first place, it nullifies individual contracts between an employer and a workman in subversion of a collective agreement (38). The courts had been unable to declare such contracts null and void; they held themselves bound in this respect by the principle of freedom of contract. Collective agreements will henceforth seriously limit the action of parties to them; and members, once bound, will no longer be able to escape by the simple expedient of the individual contract.

(35) Section 18 of the Bill of 1906.

(36) Section 50, Clause 3, of the Sub-Committee's Bill.

(37) P. GEMABLING : *Les actions syndicales en justice*; thesis. Paris. 1912. Also *La règlementation légale de la convention collective de travail* ; in *Publications* of the *Association nationale française pour la protection légale des travailleurs;* new series, No. 4, 1913, pp. 106-107.

(38) Section 31 (*q*).

Further, if a private contract is concluded between an employer bound by a collective agreement, a worker similarly so bound, and a third party, the provisions of the agreement are deemed to be incorporated in the contract. The parties can easily except themselves from these provisions, but unless they expressly do so, the collective agreement will automatically become applicable. It is not then necessary for the party invoking its provisions to prove that the agreement does, in fact, constitute a trade usage or custom (39). The importance of these provisions, by which the Act of 25 March 1919 increases in certain respects the binding character and the scope of collective agreements, should not, however, be exaggerated. As the presumption created by Section 31 (*r*) can be set aside by an express stipulation to the contrary, it is, therefore, quite compatible with the conception of individual liberty. Although the principle of the nullity of private contracts which are subversive of a collective agreement is strictly irreconcilable with the principle of contract, and though it implies that the collective agreement is at least a species of super-contract, it nevertheless has the effect of widening the scope of the agreement to include persons who have not, at one time or another, consented to its provisions. As regards one who expressly rejects such provisions the agreement is powerless. The passing of the Act has not fundamentally changed the situation. The law as it stands in France has not given to collective agreements the force of general trade rules (40).

If collective agreements are to have a legal status corresponding to the economic realities of today, one factor in those realities, which must be faced resolutely, is the deficiency and diversity of organisation among employers and workers. We ourselves maintained some years ago that there is a particular type of collective agreement corresponding to each phase in the development of the organisation of labour (41). As soon as France possesses unified industrial associations including, either in fact or in law, all or nearly all employers and workers, recognition of the regulative character of collective agreements will no longer raise serious objections. But we are still far from such a situation. The percentage of workers and employers not members of associations is still high; those who are members are grouped in a multiplicity of organisations, divided by strongly marked political, religious, and social differences. Even within the

(39) Section 31 (*r*).

(40) Cf. CAPITANT ET CUCHE : *Cours de Législation industrielle*; p. 480. Paris, 1921. " Collective agreements, as regulated by the new Act, contain elements both of contract and of law, but it cannot be denied that the contractual remains the dominant element. "

(41) G. PIROU : *Les conceptions juridiques successives du contrat collectif de travail en France*; thesis; pp. 3-5 and 445-449. Rennes. 1909.

trade unions affiliated with the General Confederation of Labour disputes of notorious violence are being waged. It is clear that the agreements concluded by these different groups are of very unequal force. In some cases they are drawn up by an insignificant minority only of employers and workers; it would be impossible to give these general validity *ipso facto*, or to force the majority of employers and workers in an industry or district to comply with them.

A suggestion has been made (42) by which a joint trade council (*conseil mixte du métier*) would be superimposed on the existing associations, with members elected by all those engaged in the trade, whether organised or not, for drawing up measures for the regulation of labour conditions. It is a scheme to be rejected absolutely; its great defect is that it would substitute artificial machinery entirely created by the state for an institution which has at least developed spontaneously and possesses an independent existence. Collective agreements should be drawn up by existing industrial organisations, and it is to these inter-association agreements that the state should give its support, on the condition that before transforming a collective agreement into a binding regulation the administrative authorities should ascertain if the agreement submitted to them is really fit to become the law of the trade.

The system here sketched in outline was unanimously accepted in 1918 by the employers' and workers' members of the Joint Committee for the Department of the Seine (*Commission mixte de la Seine*), and has been advocated in the Senate by Mr. Strauss (43), and in the Chamber of Deputies by Mr. J. Lerolle (44). Both the Committee of the Senate and the Government supported Mr. Strauss' proposal even in 1919, but strong opposition was aroused in the Senate, where individualism in economic doctrine finds ardent supporters. In order to wreck Mr. Strauss' counter-proposal, Mr. Touron produced the text of the Bill passed by the Chamber in 1913, which became the Act of 25 March 1919. This is a significant incident, revealing the real meaning of the Act of 1919; it was far more a means of avoiding a form of regulation which would have been bold and effective than a mark of the sympathy of the legislators with the idea of collective bargaining.

It is true that many theorists may consider that to empower the administrative authorities to transform agreements into trade regulations is an unsatisfactory and ambiguous solution. It will alarm the supporters of the traditional conception of the state, because it leaves the preparation of labour law to

(42) See BRÈTHE : op. cit., pp. 186-187.

(43) *Journal officiel*; *Documents parlementaires, Sénat*; 1919, p. 769 et seq.

(44) *Journal officiel, Doc. parl., Chambre*; 1918, p. 1824. Mr. Lerolle's proposal differs from that of Mr. Strauss in several points. Cf. RAYNAUD, op. cit., pp. 194-196.

industrial bodies. It will encounter uncompromising opposition from leaders of the liberal school, owing to the fact that it proposes to compel individual preferences to submit to a common law. It is also probable that it will not satisfy the apostles of trade unionism, since it reserves for the state the right of supervision, control, and discrimination with respect to union decisions. But though it realise none of the great classic schemes of social reconstruction, the proposed scheme appears nevertheless to be in full harmony with the fundamental tendencies of contemporary economic evolution (45).

That this evolution will not be in the direction of individualism we have already stated; and it is scarcely necessary to revert to this point. It is more important to show that, if we are moving further and further away from the individualist form of society, we are not therefore tending towards entire state control, or towards pure syndicalism. In proportion as the state has seen its economic functions grow, it has been driven, and will increasingly be driven, to make its forms of intervention more flexible ; it will have to accept and even to solicit the co-operation of all the individual and collective forces over the interplay of which it watches, so that this growth in function may not involve an unbearable and crushing tyranny (46). For this reason it has turned its attention to collective agreements, encouraged their extension, and incorporated their main provisions in its regulations (47). But this does not necessarily mean that the state is gradually being replaced by these groups to such an extent as will eventually result in its complete effacement, as many theorists and trade union leaders, conscious or or unconscious disciples of Proudhon, would like to think (48). They advocate the substitution of the administration of things for the government of men, and declare that the workshop will replace governments. But these hopes are largely made up of illusion. To believe that society can function permanently without political authority to maintain order; to picture the world of tomorrow as composed of a collection of self-contained and independent industries, whose mutual relations are governed by free contract; to suppose that such interplay of collective action would naturally result to the common good : this is indeed utopia. Such a vision of the future may have its uses as an impelling force or as a social ideal;

(45) Cf. J. LEROLLE : *La réglementation professionnelle du travail et le contrat collectif* (*Association nationale française pour la protection légale des travailleurs ;* new series, No. 16). Paris, Alcan-Rivière. 1919.

(46) G. PIROU : *La liberté individuelle et l'après-guerre*, in *Grande Revue*. Oct. 1918, p. 655 and seq.

(47) Cf. Recommendations concerning seamen's labour passed at the International Labour Conference at Genoa.

(48) See Maxime LEROY; *Les techniques nouvelles du syndicalisme*; pp. 108-110. Paris. 1921. G. PIROU : *Proudhonisme et Syndicalisme révolutionnaire*; thesis, pp. 194-243. Paris. 1910. M. HARMET : *Proudhon et le mouvement ouvrier* in *Proudhon et notre temps*; pp. 33-36. Paris. 1920.

but it must be admitted that it has little chance of realisation. In the society of the future, as in that of the past, the individual, the group, the state, will each possess its function and its place. Only their relative importance will differ. If the groups are called upon, as we believe, to occupy the foreground, they will never be able entirely to eliminate either individual effort, which is legitimate in so far as it contributes an element of originality to the body of common rules, or state action, which is an indispensable agent of co-ordination and unification.

One last point, which can only be suggested here, remains to conclude our sketch of the future of the collective labour contract. It is perhaps true that collective bargaining is vitiated by a kind of internal contradiction. On the one hand, if the determination of labour conditions by collective agreement is to become general, it is essential that the trade union movement should increase in power and cohesion. Only if the workers' organisations are strong and united, only if the masses rally round them, can collective agreements concluded by them possess the necessary moral authority, without which they will never succeed in ruling industry, no matter what support the law may give them. On the other hand, it is at least possible that, when the trade union movement is fully developed and organised, its aspirations will increase. It may no longer be content to regulate industry in agreement and on an equal footing with the employers, but may propose to take into its own hands the entire direction of production. It would seem as if such a development can be traced today, that the workers' organisations are more and more turning their attention to preparing for a fundamental transformation of the economic system. The present differences between trade unions bear solely on the choice of means by which this transformation, desired by all, can be most rapidly and rationally effected. If this tendency continues and strengthens, if capitalism, syndicalism, and the class war are successive and inseparable links in a brazen chain, there is no hope that collective agreements will ever become the basis of a fundamental regulation of labour conditions. Mere truces between struggles, their one historic function will be gradually to undermine the supremacy of capital and the employer until that supremacy is finally overthrown. But this eventuality, though it will naturally occupy the attention of the economist and sociologist, is outside the sphere of the jurist and the state. Their task is to ensure, so far as possible, the maintenance of peace by law in the relations between the classes. Only by greater reliance on the new forms which combine and balance state intervention and agreements between industrial groups, by supporting collective agreements and by deriving support from them : only so will they have some chance of successfully discharging their difficult task.