

Labour Law, Legal Pluralism and State Sovereignty

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Introduction : Sovereignty and the state monopoly on force

1. In a recent study on whether the concept of a state monopoly on the legitimate use of force is still pertinent today,² Catherine Colliot-Thélène draws on the work of the late nineteenth and early twentieth-century German sociologist, Max Weber, to show how the modern state gradually claimed exclusive authority to make and enforce legal rights. This purported monopoly on lawmaking (which never fully existed in practice) represented a sharp contrast to what Weber referred to as the “law communities” (*Rechtsgemeinschaften*) of pre-modern law, and especially to the type of legal pluralism that prevailed under feudalism. Whether the state makes a particular legal rule directly or through the exercise of delegated authority, the fact that it is the sole repository of the legitimate use of physical constraint was seen by Weber as a defining feature of the modern state, and perhaps of any state. However, Colliot-Thélène concludes that at the dawn of the 21st century, states may be losing that monopoly, because of the resurgence of legal pluralism – or in her words, “the proliferation of legal and political mechanisms to which individuals and groups may have recourse – mechanisms that may exist alongside those of the state, or above them, or as part of them.”³

2. Indeed, Weber did not deny that even in the modern era, there were many legal spheres outside those of the state. In a key passage on the relationship between the legal order and the economic order, he said:

For all the reasons given above and, in particular, for the sake of terminological consistency, we categorically deny that ‘law’ exists only where legal coercion is guaranteed by the political authority. For us, there is no practical reason for such a terminology. A ‘legal order’ shall rather be said to exist wherever coercive means, of a physical or psychological kind, are available, i.e. wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of “legal coercion”.⁴

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² Catherine COLLIOT-THÉLÈNE, « La fin du monopole de la violence légitime? », in Michel COUTU, Guy ROCHER, *La légitimité de l'État et du droit. Autour de Max Weber*, Québec/Paris, Presses de l'Université Laval/LGDJ, 2006, pp. 23-46.

³ Catherine COLLIOT-THÉLÈNE, « La fin du monopole de la violence légitime? », *loc. cit.*, p. 46.

⁴ Max WEBER, *Economy and Society*, Guenther Roth and Claus Wittich (ed.), Berkeley, University of California Press, 1978, volume 1, p. 316-317.

3. Weber gave several examples of what he saw as non-state legal orders. Among them were organized boycotts in matters of credit and housing⁵, ecclesiastical law⁶, the enforcement of so-called honour debts⁷, and the law governing trades, non-profit organizations⁸, cartels and other such economic arrangements⁹. To Weber, absolute state sovereignty, where “the ruler alone can give orders, to which everyone else can only react,” was never more than an abstract theoretical model¹⁰.

4. Nevertheless, using the concepts of legitimacy and the monopoly of physical force, Weber did distinguish between state sovereignty and non-state legal orders. To him, what made state law different was not the mere existence of legal constraints, but the nature of those constraints. In modern societies, in the last resort, only the state may legitimately use violence, through the police and the armed forces. Weber looked at the symbiotic relationship that existed between state law and the private legal order established by employers in the workplace.¹¹ In this starkly worded passage, he described how state authority backed up the remarkable degree of constraint exercised by employers over nominally free and autonomous workers:

Just as the parts of a machine work together according to ‘man-made rules’, so workhorses, slaves and even ‘free’ workers in factories work in accordance with some logical plan... What subjects workers to that overall scheme are carefully calibrated ‘psychological constraints’, based on the prospect of being shut out of the factory for breaking a ‘work rule,’ the prospect of empty pockets, the prospect of a starving family, and so on... The worker’s mind is full of images. Experience teaches him that if he is to have food to eat, to have clothes to wear, and to be able to keep warm, he must give the right formulaic responses when he is called into the ‘office’, and he must acquiesce in the terms of what lawyers call a ‘labour contract’... Just as a hunter becomes aware of how his dog will behave, an industrialist knows that although people are hungry, men in spiked helmets will stop them from using physical force to find sustenance.¹²

5. Hunger, cold and poverty are obviously more than psychological constraints in the usual sense of the term. Among the examples of non-state law that Weber gave, it is the internal rules of the workplace, made and applied by the employer, that in the modern

⁵ *Ibid.*, p. 317.

⁶ *Ibid.*, p. 316.

⁷ *Ibid.*, p. 317.

⁸ *Ibid.*, p. 318.

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 319.

¹¹ Max WEBER, « R. Stammlers ‘Ueberwindung’ der materialistischen Geschichtsauffassung », in *Gesammelte Aufsätze zur Wissenschaftslehre*, Tübingen, J.C.B. Mohr (Paul Siebeck), 1988, p.291-359. See the French translation: Max WEBER, *Rudolf Stammler et le matérialisme historique*, translated by Michel Coutu and Dominique Leydet with Guy Rocher and Elke Winter, Québec/Paris, Presses de l’Université Laval/Cerf, 2001. There is also an English translation by Guy Oakes: Max WEBER, *Critique of Stammler*, New York, The Free Press, 1977.

¹² Max WEBER, « R. Stammlers ‘Ueberwindung’ der materialistischen Geschichtsauffassung », *loc.cit.*, p. 325 [our translation].

context have exercised the most constraint on the greatest number of people. When Weber spoke of “what lawyers call the labour contract,” he was drawing on a classic treatise on German labour law by Philip Lotmar¹³, which Weber praised highly in 1902¹⁴. Lotmar strongly emphasized the practical significance of the labour contract for millions of people – a view Weber no doubt shared. Even by the beginning of the 20th century, labour law deferred almost entirely to the will of the employer, with almost no state intervention – although it was ultimately backed up, as Weber said in the passage quoted above, by “men in spiked helmets.” This continued deference of state law to the wishes of employers showed how persistent legal pluralism was in an area so central to people’s lives.

I. Labour law and the problem of sovereignty

6. A look at the more recent trajectory of labour law gives us excellent insights into what is happening to state sovereignty today. Labour law really came into its own when workers began (with varying success) to bring economic pressure to challenge the predominance of the employer’s will. The impact of this nascent area of law was reinforced by the rise of the welfare state,¹⁵ of which a major focus was on the workplace and on the exclusion from it through temporary or permanent unemployment. Despite the intervention of the state, however, labour law continues to have some features of what Gunther Teubner has called reflexive law – that is, a form of interaction between state and private ordering, in which private parties are expected to reflect on their own conduct and to regulate it in a way that is consistent with the social objectives of the particular area of law.¹⁶ In other words, labour law is still partly a product of collective self-determination.¹⁷ This fits well with the

¹³ Philip LOTMAR, *Der Arbeitsvertrag*, 2nd ed. (M. REHBINDER, ed.), Berlin, Duncker & Humblot, 2001, 1941 p.

¹⁴ Max WEBER, „Rezension von: Philip Lotmar, „Der Arbeitsvertrag“ (1902), in *Max Weber Gesamtausgabe 1/8: Wirtschaft, Staat und Sozialpolitik Schriften und Reden 1900-1913*, Wolfgang Schluchter, ed.), Tübingen, J.C.B. Mohr, 1998, pp. 37-61.

¹⁵ Pierre ISSALYS, Denis LEMIEUX, *L'action gouvernementale. Précis de droit des institutions administratives*, 2nd ed., Cowansville, Éditions Yvon Blais, 2002, p. 35: “L’État social...repose sur le constat que la seule régulation de l’appareil étatique sur la base de droits visant à protéger l’autonomie individuelle contre l’action gouvernementale ne garantit en rien la stabilité des sociétés et des États. En effet, elle n’apporte aucun correctif aux antagonismes sociaux, qui expriment des rapports de pouvoir ancrés dans la structure de classes de la société. La maîtrise de ces antagonismes exige une régulation étatique du système économique ».

¹⁶ Gunther TEUBNER, “Substantive and Reflexive Elements in Modern Law“, (1983) 17 *Law & Society Review* 239-285. Ralf ROGOWSKI, “Autopoietic” Industrial Relations and Reflexive Labour Law in the World Society”, in Ton WILTHAGEN (ed.), *Advancing Theory in Labour Law and Industrial Relations in a Global Context*, Amsterdam, North-Holland, 1998, pp. 67-81.

¹⁷ The concept of collective self-determination owes its theoretical foundations to Hugo Sinzheimer. In 1931, Georges Gurvitch gave a prominent place to Sinzheimer’s ideas. See Georges GURVITCH, *Le temps présent et l’idée du droit social*, Paris, Librairie philosophique J. Vrin, 1931, First Section : “ Current trends in the theory of labour law and the idea of social law “). On Sinzheimer, in French, see also: Ulrich ZACHERT, « Hugo Sinzheimer : Juriste praticien et pionnier du droit moderne. Autonomie collective, liberté individuelle et démocratie sociale », in Carlos M. HERRERA (ed.), *Les juristes de gauche sous la République de Weimar*, Paris, Éditions Kimé, 2002, pp. 49-67; Ulrich ZACHERT, « La légitimité des rapports juridiques de travail. À propos de la conception de la légitimité chez Max Weber et Hugo

idea of legal pluralism, as first put forward in the field of labour law by Hugo Sinzheimer in the 1920s and more recently taken up by Harry Arthurs and others.¹⁸ Yet, as Colliot-Thélène notes, new forms of legal pluralism are causing the pendulum to swing away from a state monopoly on effective legal authority. This phenomenon of the decentering of the role of the state is leading to a new type of crisis in labour law, which we will now look at more closely.

The current crisis of labour law

7. In the North American context, labour law is clearly in crisis. Especially in the United States, there has been a dramatic decline in unionization and collective bargaining, coupled with a considerable growth in atypical and precarious employment.¹⁹ An eminent Canadian labour law scholar, Harry Arthurs, has written of “the demise of industrial citizenship”, as reflected in the decline of the model of industrial relations that has been a cornerstone of the Canadian welfare state for many years²⁰. A widely used law school casebook²¹ now includes a section entitled “The Crisis in Industrial Relations and Labour Law”²². At first sight, Québec may appear to be an exception, with its unionization rate of 40% and its impressive array of legally mandated labour standards. However, in Québec as elsewhere in the country, the effectiveness of labour law is being undermined by job instability,²³ by enterprise restructuring and large-scale layoffs²⁴, by the increasing

Sinzheimer», in Michel COUTU, Guy ROCHER (dir.), *La légitimité de l'État et du droit. Autour de Max Weber*, Québec/Paris, Presses de l'Université Laval/LGDJ, 2006, pp. 306-325. Sinzheimer himself commented on Gurvitch's analysis, pointing out that, contrary to Gurvitch's idea of social law, social self-determination and State intervention are not mutually exclusive; both have a role to play in labour regulation Hugo SINZHEIMER (1936), “Eine Theorie des sozialen Rechts”, in Hugo SINZHEIMER, *Arbeitsrecht und Rechtssoziologie*, Gesammelte Aufsätze und Rede, tome 2, O. Kahn-Freund et T. Rahm (ed.), Frankfurt-Köln, Europäische Verlagsanstalt, 1976, pp. 164-187.

¹⁸ On the idea of legal pluralism in labour law, see Hugo SINZHEIMER (1936), „Eine Theorie des sozialen Rechts“, *loc.cit.*, p. 164-187. Harry ARTHURS, “Labour Law without the State?”, (1996) 46 *University of Toronto Law Journal* 1-45. Harry ARTHURS, “Landscape and Memory: Labour Law, Legal Pluralism and Globalization”, in Ton WILTHAGEN (ed.), *Advancing Theory in Labour Law and Industrial Relations in a Global Context*, Amsterdam, North-Holland, 1998, pp. 21-34. Adelle BLACKETT, “Global Governance, Legal Pluralism & the Decentered State: A Labor Law Critique of Codes of Corporate Conduct.” *Indiana J. Glob. Legal Stud.* 2001; 8:401-447. Guylaine VALLÉE « Le droit du travail comme lieu de pluralisme juridique : aspects historiques et enjeux actuels » in C. SAINT-PIERRE and J.P. WARREN, *Sociologie et société québécoise. Présences de Guy Rocher*, Montréal, Presses de l'Université de Montréal, 2006, pp. 241-265.

¹⁹ Cf. Joseph B. ROSE, Gary N. CHAISON, “Unionism in Canada and the United States in the 21st Century. The Prospects for Revival”, (2001) 56 *Relations Industrielles/Industrial Relations* 34.

²⁰ See Harry ARTHURS, “The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration”, (1999) 7 *Cdn. Labour & Employment Law Journal* 45-63.

²¹ Labour Law Casebook Group, *Labour & Employment Law: Cases, Materials and Commentary*, (Toronto: Irwin Law) 7th ed., 2004, p. 913ff.

²² *Id.*, pp. 913 ff.

²³ See generally Jean BERNIER, Guylaine VALLÉE, Carol JOBIN, *Les besoins de protection sociale des personnes en situation de travail non traditionnelle*, Québec, Gouvernement du Québec, 2003.

contractualization of work relationships²⁵, by a decline in union activity,²⁶ and by the growing phenomenon of social exclusion.

8. This crisis of labour law brings to the fore the basic question of the role of the state in that field. As we have seen, labour law grew up as a response to the chronic absence of state regulation in a central area of human activity. As Weber might have put it, workers in the classical liberal state were formally free, but they remained totally under the yoke of workplace rules. Classical liberalism sees the employment relationship as being outside the reach of the state, except for situations when the state steps in to preserve the existing social order. In effect, labour law consists only of the various manifestations of legal pluralism that are found outside the realm of state law, in factories and other workplaces.

In the case of Germany, labour law's first breakthrough came at the turn of the twentieth century, as part of quest for the social facts behind the law (the *Rechtstatsachenforschung*) which was initiated in this field by Philip Lotmar. Its accomplishment was to catalogue the complex web of private legal ordering and bring its underlying normative orientation to light. Tired of waiting for help from the state that never seemed to come, workers took action that gave a new meaning to legal pluralism. Using a form of private legal ordering -- collective bargaining and the threat of strikes – they sought to renegotiate the basic rules of work. The great labour law theorist, Hugo Sinzheimer, authoritatively laid out the history of this move toward “collective self-determination,” and explained why it happened and what its legal significance was.²⁷

The dual sources of labour law – autonomus regulation and state action

9. In Québec and elsewhere in the western world, labour law has been built on two distinct but complementary pillars:²⁸ first, the development of an autonomous right to

²⁴ Michel COUTU, « Licenciements collectifs et fermetures d'entreprise au Québec: Le cas Wal-Mart », *Travail et emploi*, no 107, janvier-mars 2007, p.39-50.

²⁵ Gilles TRUDEAU, « La contractualisation du droit des relations professionnelles : une illustration des tendances Nord-américaines », in Philippe AUVERGNON (ed.), *La contractualisation du droit social*, Bordeaux, Centre de droit comparé du travail et de la sécurité sociale, 2003, p. 55.

²⁶ Christian LÉVESQUE and Gregor MURRAY, “Globalization and Union Renewal : Perspectives from the Quebec Labour Movement” in P. KUMAR, C. SCHENK (ed.), *Paths to Union Renewal. Canadian Experiences*, Peterborough, Broadview Press, 2006, pp. 113-126.

²⁷ See Hugo SINZHEIMER (1922), „Philipp Lotmar und die deutsche Arbeitsrechtswissenschaft“, in Hugo SINZHEIMER, *Arbeitsrecht und Rechtssoziologie*, Gesammelte Aufsätze und Rede, tome 1, Frankfurt-Köln, Europäische Verlagsanstalt, 1976, O. Kahn-Freund and T. Rahm (eds.), pp. 408-415. Hugo SINZHEIMER, «La théorie des sources du droit et le droit ouvrier», in *Le problème des sources en droit positif, Annuaire de l'Institut international de philosophie du droit et de sociologie juridique*, Paris, Sirey, 1934, p. 73.

²⁸ Pierre VERGE and Guylaine VALLÉE, *Un droit du travail? Essai sur la spécificité du droit du travail*. Montréal, Éditions Yvon Blais, 1997, p. 52.

collective bargaining as described above,²⁹; and second, the emergence, toward the end of the Second World War, of government intervention in the form of the welfare state.

The autonomous right to collective bargaining generally came first, as an outgrowth of trade union activity. Both in the civil law and common law systems, the law of contract and other aspects of the common law were based on the assumption of formal equality between the parties; the law ignored the actual inequality of economic power. Faithful to its liberal and individualistic roots, the common law was resolutely hostile to union claims³⁰. Gradually, however, the unions succeeded in forcing collective bargaining upon employers at workplace level. That set the stage for the emergence of a body of labour law which departed from the precepts of civil and common law³¹. This new body of law did not enjoy state support; its growth depended on the interplay of economic power between the parties.³²

However much it has grown over the years, state intervention in labour matters remains a relatively recent phenomenon. Before the Second World War, such intervention in Canada was of two rather limited types. One type dealt with specific areas of conflict, largely through injunctions and ad hoc legislation. The other provided minimal protection against the most glaring abuses of economic liberalism, through laws on such matters as minimum wages and workplace safety, enforced by labour inspectors. Only with the emergence of the welfare state, and the accompanying change in perceptions of the state's role, did intervention in labour matters become more intensive.

10. In the result, two historical trajectories came together to bring about the labour law we know today. One was a trajectory of direct state intervention, which brought specific protective measures and the extensive administrative machinery needed to implement those measures. The other was a relational trajectory, which looked to collective bargaining and required that group autonomy be respected not only by private parties but also by the state itself³³.

11. Today, however, labour law as we have come to know it is being called into question by transformations both in state law³⁴ and in the scope of collective autonomy. As noted

²⁹ Compare Claude DIDRY, *Naissance de la convention collective. Débats juridiques et luttes sociales en France au début du 20^e siècle*. Paris, Éditions de l'École des Hautes études en sciences sociales, 2002, p. 94.

³⁰ Marie-France BICH, «Droit du travail québécois : genèse et génération», in H.P. GLENN (ed.), *Droit québécois et droit français : communauté, autonomie, concordance*, Cowansville, Éditions Yvon Blais, 1993, pp. 515-563.

³¹ François EWALD, « Le droit du travail : une légalité sans droit ? », *Droit social*, no 11, November 1985, pp. 723-728. Hugo SINZHEIMER, «La théorie des sources du droit et le droit ouvrier», in *Le problème des sources en droit positif, Annuaire de l'Institut international de philosophie du droit et de sociologie juridique*, Paris, Sirey, 1934, p. 73.

³² Harry ARTHURS, "Developing Industrial Citizenship: A Challenge for Canada's Second Century", (1967) 45 *Canadian Bar Review* 786.

³³ Pierre VERGE, Guylaine VALLÉE, *Un droit du travail? Essai sur la spécificité du droit du travail*. Montréal, *op. cit.* Antoine MAZEAUD, *Droit du travail*. 3rd ed., Paris, Montchrestien, 2002, p. 175. Gonzalo MAESTRO BUELGA, *La constitution del trabajo en el Estado social*, Granada, Editorial Comares, 2002, p. 14.

³⁴ On the crisis of the welfare state, see Jacques CHEVALLIER, *L'État post-moderne*. Paris, L.G.D.J., 2003.

above, many important changes are afoot: the decline of collective bargaining and union membership, the accelerating pressures of economic globalization, the proliferation of business reorganizations and mass layoffs, the transformation of labour contracts, and the growth of unstable jobs and social marginalization. These developments are linked to the complex crisis of the welfare state as a whole, which can be attributed to a variety of economic, political and ideological factors³⁵. What is certain is that the state is now far less willing, and perhaps less able, to intervene in the economy and in industrial relations than it was during the three decades of the “golden age” that followed the Second World War.

II. Competing paradigms of labour law

12. To deepen our analysis, we need to look not only at what is actually happening in labour law, but also at its theoretical foundations. In North America at least, what emerges is the existence of a fundamental misapprehension of the role of law and the state in the area of labour. This problem has been aggravated by the intersection of two distinct paradigms: legal positivism on the one hand, and on the other hand, industrial relations theory of two sorts – that is, industrial pluralism and systems theory.

Legal positivism has traditionally been the dominant theoretical paradigm among jurists, including many labour lawyers. It sees the law as consisting only of the traditional manifestations of state regulation (the constitution, statutes, regulations, case-law and the like). The positivist paradigm gives little legal status to collective autonomy, and relegates it to the realm of industrial relations theory.

13. The industrial pluralist variant of industrial relations theory takes the idea of political pluralism -- an idea that is central to liberal democracy, at least in the United States³⁶ -- and transposes it to the field of collective labour relations. The *Wagner Act*³⁷ model that prevails in North American labour law reflects an industrial pluralist approach. The parties to a collective agreement are seen as a sort of legislative assembly, making legal norms that are to be applied by a judiciary. That judiciary, which is the cornerstone of the system, consists of arbitrators chosen by the parties.³⁸ In a 1967 article on industrial citizenship, Harry Arthurs set out a detailed vision of industrial pluralism as bringing a sort of mini-democracy to each workplace through collective bargaining³⁹. Although the idea of industrial pluralism

³⁵ See Michel COUTU, “Crisis of the Welfare State: Decline in Social Citizenship? A Sociolegal Perspective” in *Law and Citizenship*, Law Commission of Canada (ed.), Vancouver, University of Columbia Press, 2006, pp. 119-143.

³⁶ Clark KERR et al., *Industrialism and Industrial Man: The Problems of Labor and Management in Economic Growth*, Cambridge, Harvard University Press, 1960.

³⁷ *National Labor Relations Act*, 29 U.S.C. §§ 151-169 (1935).

³⁸ Katherine STONE, “The Post-War Paradigm in American Labor Law”, (1981) 90 *Yale Law Journal* 1509.

³⁹ See Harry ARTHURS, “Developing Industrial Citizenship: A Challenge for Canada’s Second Century”, *loc. cit.* See also Judy FUDGE, « Après la citoyenneté industrielle: la citoyenneté marchande ou du travail? », in M.

originated with institutionalist economists -- R.J. Commons at first, and then Clark Kerr and John T. Dunlop⁴⁰ -- it has been adopted as a fundamental paradigm by many North American labour law scholars,⁴¹ and it continues to play a significant role in the development of Canadian and Québec labour law⁴².

14. Systems theory originated with a sociologist, Talcott Parsons.⁴³ It was transposed to the field of industrial relations a half-century ago by John T. Dunlop⁴⁴, who is widely considered the most important industrial relations theorist to date⁴⁵. Dunlop's systems approach is imbued with the institutionalist perspective that was dominant at the time among labour economists.⁴⁶ It is strongly influenced by his practical outlook and his wide concrete

COUTU and Gregor MURRAY (eds.), *Travail et citoyenneté: Quel avenir?*, Québec, Presses de l'Université Laval, 2007 (forthcoming).

⁴⁰ Bruce E. KAUFMAN,, *The Origins & Evolution of the Field of Industrial Relations in the United States*, Cornell Studies in Industrial and Labor Relations, Ithaca (New York), ILR Press, 1993, p. 42 and 211n.

⁴¹ Katherine STONE, "The Posteriori Paradigm in American Labor Law", *loc. cit.*

⁴² See the lucid presentation by Guylaine VALLÉE, «Le droit du travail comme lieu de pluralisme juridique : aspects historiques et enjeux actuels», *loc. cit.*, pp. 247 ff. The paradigm of *industrial* pluralism should not be equated with that of *legal* pluralism. Industrial pluralism has a normative and ethical thrust – that of advancing the ideal of industrial democracy. Legal positivism is basically descriptive. The difference is highlighted by Harry ARTHURS, "Landscape and Memory: Labour Law, Legal Pluralism and Globalization", *loc. cit.*, pp. 23 ff., especially at 28-29: "This analysis differentiates *legal* pluralism from *industrial* pluralism in at least three aspects. First, legal pluralism does not regard the law of the workplace as unique: it is simply one manifestation of a ubiquitous social phenomenon... Second, because legal pluralism regards the existence of a distinctive "law of the workplace" as descriptive, rather than prescriptive, it does not assume *a priori* that workers are "industrial citizens" who enjoy a full range of democratic rights and freedoms... Third, legal pluralism, in particular, is willing to acknowledge what industrial pluralism is accused of neglecting: that employment relations are power relations...". Yet the fact remains that the concept of industrial pluralism was developed in an effort to explain and promote collective autonomy. It can clearly be interpreted, as Guylaine Vallée has done, as a reflection of the plurality of legal orders that coexist in the workplace – but a reflection which is distorted by its normative presuppositions.

⁴³ For an overview of Parsons' work, see Guy ROCHER, *Talcott Parsons et la sociologie américaine*, Paris, Presses universitaires de France, 1972, 238 p.

⁴⁴ John T. DUNLOP (1958), *Industrial Relations Systems*, Revised Edition, Boston, Harvard Business School, 1993.

⁴⁵ See Alton W.J. CRAIG, «Les relations industrielles au Canada: Aspects principaux», in Gérard HÉBERT et al. (eds.), *L'état de la discipline en relations industrielles au Canada*, Montréal, École de relations industrielles, 1988, pp. 13-54. Anthony GILES and Gregor MURRAY, «Trajectoires et paradigmes dans l'étude des relations industrielles en Amérique du Nord», in Gregor MURRAY, Marie-Laure MORIN and Isabel DA COSTA (dir.), *L'état des relations professionnelles. Traditions et perspectives de recherche*, Québec, Presses de l'Université Laval/Octares, 1996, pp. 64-92. Isabel DA COSTA, «La théorie des relations industrielles aux États-Unis: de Dunlop au débat actuel», in Jean-Daniel REYNAUD et al. (eds.), *Les systèmes de relations professionnelles. Examen critique d'une théorie*, Paris, Éditions du CNRS, 1990, pp. 25-42. Bruce E. KAUFMAN, *The Origins & Evolution of the Field of Industrial Relations in the United States*, Cornell Studies in Industrial and Labor Relations, Ithaca (New York), ILR Press, 1993. Annette JOBERT, «Les relations professionnelles», in Jacques FREYSSINET (ed.), *Travail et emploi en France. État des lieux et perspectives*, Paris, La documentation française, 2006, p. 105.

⁴⁶ R.J. COMMONS (1934), *Institutional Economics. Its Place in Political Economy*, Macmillan, Revised Edition, 1990: New York, Transaction Publishers.

experience in labour relations. The relative flexibility, pragmatism and simplicity of Dunlop's systems model (especially in comparison to Parsons' highly abstract work) explains why it has been so influential, even well beyond North America⁴⁷.

Under the influence of the systems approach, industrial relations theory avoids the pitfall of legal positivism's overemphasis on state law. However, it goes too far in the opposite direction, unduly downplaying the role of law and legal dynamics in the workplace.⁴⁸ Dunlop described the system of industrial relations as being essentially a "web of rules," and he saw the objective of the study of industrial relations as being "to understand and to explain changes in the rules of the workplace"⁴⁹. The problem is that, in empirical reality, these workplace rules, as Dunlop saw them, are nothing less than *legal* rules, and his "systems" are nothing less than de facto legal orders.⁵⁰ He therefore failed to draw a satisfactory line between legal regulation and social regulation.⁵¹ In this respect, his work suffered from the same shortcoming as other sociological approaches to industrial relations, such as Jean-Daniel Reynaud's theory of social regulation.⁵²

Thus, neither the legal positivist paradigm which prevails in legal theory nor the systems approach which prevails in industrial relations theory succeeds in illuminating the role of law and the state in the workplace. Labour law theory has been overly eclectic, drawing indiscriminately on both legal positivism and systems theory, despite the inconsistencies between them. By relying on these two flawed paradigms, labour law theory has denied itself the tools it needs to develop an adequate understanding of the relationship between law, state and society in the regulation of work.

⁴⁷ See, e.g., Jean-Daniel REYNAUD, « Les systèmes de relations professionnelles. Quelques thèmes de réflexion », in Jean-Daniel REYNAUD et al. (eds.), *Les systèmes de relations professionnelles. Examen critique d'une théorie*, Paris, Éditions du CNRS, 1990.

⁴⁸ The normative presuppositions of industrial pluralism limit its capacity to explain the role of law in the workplace, insofar as the ideal of industrial democracy no longer reflects reality and collective bargaining is no longer the centrepiece of the industrial relations system, at least in North America. See Harry ARTHURS, "Landscape and Memory: Labour Law, Legal Pluralism and Globalization", *loc. cit.*, pp. 23 ff.

⁴⁹ John T. DUNLOP (1958), *Industrial Relations Systems*, Revised Edition, *op. cit.*, p. 13.

⁵⁰ *Comp.* Max WEBER, « R. Stammers 'Ueberwindung' der materialistischen Geschichtsauffassung », *loc.cit.*, p.348 ff.

⁵¹ See Antoine JEAMMEAUD, « Théorie de la régulation sociale et intelligence du droit », in Gilbert de TERSAC (ed.), *La théorie de la régulation sociale de Jean-Daniel Reynaud. Débats et prolongements*, Paris, La Découverte, 2003, 219-230, p. 223 : "Cet intérêt majeur des écrits de J.-D. Reynaud n'empêche pas que le théoricien du droit, et peut-être le sociologue du droit, se résigneront mal à ne pas disposer d'une distinction de ce qui relève de la catégorie du droit et de ce qui appartient à d'autres espèces de la normativité sociale. »

⁵² See Jean-Daniel REYNAUD, *Les règles du jeu. L'action collective et la régulation sociale*, Paris, Armand Colin, 1997, pp. 120 ff., 200 ff. While Reynaud acknowledges the important social role of law, he sees law as being only that which is made by the state, and ignores the crucial distinction (recognized by Weber) between ideal and empirical legal norms. Reynaud's approach therefore leaves only limited scope for legal regulation.

15. If we are to come to grips satisfactorily with the transformation of the North American model of industrial relations and the attendant crisis of labour law, we need a basic paradigm shift. Two countervailing imperatives have to be kept in mind. First, we must move away from a state-centred vision of law which focuses solely on state rules (and usually does so in a very conventional way, adhering to a simplistic model based on Kelsen's pyramid of rules and on the complete identification of law with the state).⁵³ Such an approach may fit with the practice of law, but it is far from adequate for analyzing the relationship between law and society. Second, at the opposite extreme, it is just as important not to fall into the trap of totally conflating legal regulation and social regulation, thereby losing sight of what is distinctive about law. As we have noted, this is the crucial shortcoming of Dunlop's theory of industrial relations and of some approaches to the sociology of professional relations (including Reynaud's). It has also been a problem in the sociology of organizations⁵⁴.

16. When these pitfalls are kept in mind, the most promising basis for a new approach would seem to be the paradigm of legal pluralism.⁵⁵ As we have seen, that paradigm was a part of the critical theory of labour law from the outset⁵⁶ -- that is, from the time of Sinzheimer. One strength of legal pluralism lies in its recognition of the fact that law is not entirely state-created. Another strength is that by its very nature, legal pluralism posits a distinction between social facts and legal facts. Unfortunately, however, this does not take us very far; legal theory is rife with different and often totally contradictory approaches to legal pluralism.

So we face a daunting challenge: when we try to look for tools to analyze the crisis of labour law, no existing theory suffices; events have passed them all by. We need to nurture a new theoretical approach, and in order to do it, we have to weed out the epistemological and methodological undergrowth that clutters the field of legal pluralism. We also have to pay close attention to what is happening around us, because no theory of society can survive unless it fits with hard factual reality.

Conclusion: A critical approach to legal pluralism

⁵³ Hans KELSEN, *Reine Rechtslehre*, *op. cit.*

⁵⁴ See Michel CROZIER, Erhard FRIEDBERG, *L'acteur et le système*, Paris, Seuil, 1977.

⁵⁵ See especially Harry ARTHURS, "Landscape and Memory: Labour Law, Legal Pluralism and Globalization", *loc. cit.*, p. 27: "Legal pluralism seems to be a particularly appropriate way to describe the construction of social order in the workplace, which is notoriously contingent, variable, and polycentric".

⁵⁶ See Georges GURVITCH, *Le temps présent et l'idée du droit social*, Paris, Librairie philosophique J. Vrin, 1931 (First Section : « Les tendances actuelles de la doctrine du droit ouvrier et l'idée de droit social »). Hugo SINZHEIMER (1936), „Eine Theorie des sozialen Rechts“, *loc. cit.*, p. 164-187. See above, note 21, for recent works by Harry Arthurs, Adelle Blackett and Guylaine Vallée.

17. This paper is part of what is still very much a work in progress⁵⁷. At this stage of the project, we can offer only a tentative conclusion, which can be summarized as follows.

In his work on the sociology of domination, Max Weber, who gave us what became the standard definition of the modern state, described the process through which the state gradually acquired a monopoly on the legitimate use of physical force. However, Weber was fully aware of the limitations of that process. In particular, he carefully avoided the illusory legal monism (the one-dimensional view of law) which is implicit in legal positivism, and which does not fit with a more multi-dimensional empirical reality. He underlined the existence of many private legal orders, and he acknowledged that in the modern era, they continued to generate bodies of non-state law.

Nowhere else, in our view, does private legal ordering have as much constraining power, or as much impact, as it has in the area of labour. For this reason, legal pluralism – a term Weber himself did not use – is a concept that helps us understand the turbulent history of labour law since the end of the 19th century. The insights of legal pluralism have become even more pertinent in light of the crisis in labour law brought about by the advent of a globalized economy and the resulting decline in effective state sovereignty. However, we cannot rely on ready-made ideas from the past, or on those that are currently in vogue, to spare us the need to work constantly toward theories that will stand up to changing factual reality. Just as the facts around us are far from unequivocal, so is the concept of “legal pluralism,” which encompasses a whole world of contradictions.

18. Thus, in order to lay the groundwork for a new paradigm that will be of more help in understanding the challenges facing the North American model of industrial relations, we have to take a critical look at the various meanings of legal pluralism. In the project we now have underway, we will examine the variant of legal pluralism that is based on so-called action theories,⁵⁸ and the variant that is based on systems theory.⁵⁹ In particular, we will confront the following hard questions, which no serious reassessment of legal pluralism can avoid.

1. *Defining the state.* Is the state a monolithic entity? Or can it give rise to pluralistic forms of law?⁶⁰

⁵⁷ A team of researchers affiliated with the Inter-University Research Centre on Globalization and Work (CRIMT) is working on the theme of legal pluralism and labour law. The team includes Renée-Claude DROUIN, Isabelle DUPLESSIS, France HOULE, Jean-Marcel LAPIERRE, Guy ROCHER, Dominic ROUX and the author.

⁵⁸ The term “action theories” is used broadly here, without reference to any specific current of sociological thought. In the French context, see, e.g., Monique HIRSHHORN, « L'actionnisme », in Jean-Michel BERTHELOT, *La sociologie française contemporaine*, Paris, Presses universitaires de France, 2000, pp. 47-58. On the dichotomy in sociology between theories of action and systems theories, see Jürgen HABERMAS, *Théorie de l'agir communicationnel*, Paris, Fayard, 1987 (translated from German by Jean-Marc Ferry and Jean-Louis Schlegel).

⁵⁹ See Gunther TEUBNER, “The Two Faces of Janus: Rethinking Legal Pluralism”, (1992) 13 *Cardozo Law Review* 1443. Teubner draws from Niklas Luhmann's theory of autoreferential systems. See *Das Recht der Gesellschaft*. Suhrkamp, Frankfurt, 1993.

⁶⁰ For the latter view, see Max WEBER, *Economy and Society, op. cit.*, volume 2, pp. 880 ff. In the Québec context, see Daniel MOCKLE, « Ordre normatif interne et organisations », (1992) 33 *C. de D.* 965-1056. France

2. *The perils of “wall-to-wall” law.* How can we avoid the pitfalls of “panjuridism” – that is, the tendency to treat as law every norm produced by any sort of regulatory process? In other words, how can we develop appropriate criteria to distinguish social regulation from legal regulation?⁶¹
3. *Power and domination.* Must legal pluralism be seen in terms of relationships of power and domination? Can it be seen instead in terms of cooperation? Or as a combination of domination and cooperation?⁶²
4. *Sociology, or legal dogmatics?* Should legal pluralism be seen as an instrument of sociological inquiry⁶³, or as a new way of refining legal doctrine⁶⁴? Or can it serve both purposes at the same time?
5. *Methodological issues.* As a corollary to the last question, what is the most appropriate methodological approach for legal pluralism to take: a sociological approach or a normative approach?
6. *Systems theory or action theory?* Adherents of the different schools of social theory each claim the paradigm of legal pluralism as their own. Must one choose between systems and action? Can the systems paradigm and the paradigm based on the theory of action be reconciled, and if so, how?⁶⁵

Until we can find clear answers to these questions, there is little reason to expect that we can come up with a new theoretical paradigm in labour law and industrial relations to help us

HOULE, *Les règles administratives et le droit public : aux confins de la régulation juridique*, Cowansville, Éditions Yvon Blais, 2001, pp. 208 ff. See also Michel COUTU, «Juridicité et normativité dans la théorie sociojuridique de R. A. Macdonald», (1997) 28 R.G.D. 337-347. *Id.*, «Le pluralisme juridique chez Gunther Teubner: la nouvelle guerre des dieux?», (1997) 12 *Canadian Journal of Law & Society* 93-113.

⁶¹ See Jean-Guy BELLEY, «L'État et la régulation juridique des sociétés globales. Pour une problématique du pluralisme juridique», (1986), *Sociologie & sociétés*, vol. 18, no 1, pp. 11-32. Gunther TEUBNER, “The Two Faces of Janus: Rethinking Legal Pluralism”, *loc. cit.*

⁶² Compare Harry ARTHURS, “Landscape and Memory: Labour Law, Legal Pluralism and Globalization”, *loc. cit.*, p. 30 and Jean-Guy BELLEY, « Le pluralisme juridique comme doctrine de la science du droit », in Jean KELLERHALS, Dominique MANAI, Robert ROTH (eds.), *Pour un droit pluriel. Études offertes au professeur Jean-François Perrin*, Geneva/Basel/Munich, Helbing & Lichtenhahn, 2002, pp. 135-165.

⁶³ Jean-Guy BELLEY, *Le contrat entre droit, économie et société*. Cowansville, Éditions Yvon Blais, 1998.

⁶⁴ See also Jean-Guy BELLEY, « Le pluralisme juridique comme doctrine de la science du droit », *loc. cit.*

⁶⁵ See e.g. Gunther TEUBNER, “The Two Faces of Janus: Rethinking Legal Pluralism”, *loc. cit.* Jacques VANDERLINDEN, «Vers une nouvelle conception du pluralisme juridique», *Revue de la recherche juridique – Droit prospectif*, vol. 2, (1993), p. 573. Jean-Guy BELLEY, “Law as *Terra Incognita*. Constructing Legal Pluralism”, (1998), *Canadian Journal of Law & Society/Revue canadienne Droit & Société*, vol. 2, no 12.

understand the significance of the limited but nonetheless real decline in state sovereignty that is now taking place.