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## SOME BASIC FEATURES OF AMERICAN AND EUROPEAN LABOR LAW: A COMPARISON\*

IN the last pre-Hitler editions of Hueck and Nipperdey's<sup>1</sup> and Kaskel's<sup>2</sup> texts on German labor law the discussion of concerted action (*Arbeitskaempfe*) was restricted to two to four per cent of these volumes. Similarly, a French text devotes less than two per cent of its contents to the subject of *coalitions* or *conflits collectifs*.<sup>3</sup> The remainder deals with the legislation controlling the individual employment relationships, the representation of personnel in the *entreprise* or *Betrieb*, the collective bargaining contracts, the various kinds of social insurance, and the jurisdiction of the special courts dealing with causes arising out of the employment relationship. Italian texts on labor law display a similar organization. In Professor Ferruccio Pergolesi's *Diritto Del Lavoro*, discussion of labor disputes comprises no more than four of the 251 pages of the work.

By contrast, the first edition of James M. Landis' case-book on American labor law, published in 1934, concerned itself in its seven hundred pages exclusively with labor dis-

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\*The substance of the paper constituted a national report submitted to the Third International Congress of Comparative Law in London, 1950.

1 HUECK UND NIPPERDEY, *LEHRBUCH DES ARBEITSRECHTS* (2d ed. 1929-30).

2 KASKEL, *ARBEITSRECHT* (4th ed. Dersch 1932).

3 Cf. ROUAST ET DURAND, *PRECIS DE LEGISLATION INDUSTRIELLE* (3d ed. 1948).

putes.<sup>4</sup> Said the editor in its preface: "The problems of labor law as *popularly conceived today* . . . at bottom resolve themselves into a consideration of the extent to which combinations may pursue variant policies. The element of *concerted effort* distinguished from individual action dominates the field."<sup>5</sup> True, as a result partly of the National Labor Relations Act of 1935 and partly of the immense expansion of mediation and arbitration during the war years, the peaceful aspect of labor relations presently is being given a greater share in the labor law courses than the pathological phase of economic warfare which previously completely dominated the subject.<sup>6</sup> However, it is likewise true that aside from the national legislation on minimum wages and maximum hours, the contents of the employer-employee relationship is not determined by legislation or common law, but is the outcome of private action. A little less than one half of American trade and industrial workers are organized in labor unions. As for them, their economic status in the enterprise is contingent upon the bargaining power of their organizations. The express or implied threat to use the

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<sup>4</sup> LANDIS, *CASES ON LABOR LAW* (1934). At that time the National Labor Relations Act, 49 STAT. 449 *et seq.* (1935), 29 U. S. C. §§ 151 *et seq.* (1946), inaugurating governmental intervention for the promotion of collective bargaining through a national administrative agency, the National Labor Relations Board, was not yet enacted. Exec. Order No. 6511 of December 16, 1933 and Exec. Order No. 6580 of February 1, 1934 and the National Industrial Recovery Act, 48 STAT. 195 *et seq.* (1933), which later was declared unconstitutional, *Schechter Poultry Corp. et al. v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), had provided some machinery for the determination of labor disputes, but at the time of the publication of Landis' book they were entirely new and had not yet produced important judicial comment.

<sup>5</sup> LANDIS, *op. cit. supra* note 4 at 8 (1934). [Emphasis supplied.]

<sup>6</sup> 1 LABOR LAW: CASES AND MATERIALS 11 (Mathews preliminary mimeographed ed. 1948): ". . . the emphasis in this field had heretofore been characteristically placed upon the break-down in labor-management relations. That this is an untrue emphasis is unequivocally shown by the 50,000 or more collective contracts, currently in operation, renegotiated annually and usually without strife, and periodically interpreted by hundreds of arbitrators, whose final awards are never questioned. Casebooks and law teaching too often have been directed to the peripheral area of legal pathology rather than to the healthy core of practical working cooperation." But still labor law courses rarely deal with the individual employment relationship as such. For example, see CCH, LABOR LAW COURSE (1948).

economic weapons of strike or lock-out, and eventually the actual resort to such concerted action, plays the decisive role as to the terms under which jobs will be given or taken. For the more than fifteen million unorganized workers the legal situation is more or less the same as it was in former eras of the Anglo-American common law. An American case-book published in 1948, referring to the fact that in the last two or three decades both the federal and state governments have legislatively intervened in the field of labor relations, characterizes this legislation as being "of no substantial relevance since . . . [it] is largely peripheral and hits only at extremes."<sup>7</sup>

Since this is true, its explanation must be found in the fact that contractualism still constitutes the soul and life-blood of American labor law and that here the essentials of labor relations, in contrast to those on the Continent, have no *origine étatique*, as French jurists would call it. An exemplifying comparison restricted to a very few essential items of the employer-employee relationship supplies an illustration of this thesis.

## I.

### *The Common Law Status of the Individual Employee: In America*

Every employment relationship, in absence of an express agreement providing for a definite term or requiring a period of notice, is terminable at will.<sup>8</sup> In 1908, the Supreme Court read into the constitutional freedom of contract the right of

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<sup>7</sup> COX, CASES ON LABOR LAW vii (1948).

<sup>8</sup> The Elizabethan Statute of Artificers, 1563, 5 Eliz. c. 4, which provided, *inter alia*, for long hiring and a quarter's notice, was not adopted by the colonies. See AN ABRIDGEMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER (Greenleaf ed. 1773). Often agreements contained provisions for a term or a notice; hiring by day was frequent. For details see MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 218 (1946). In England the law requires that a month's notice be given for menial servants and a reasonable notice for other employees. See the cases collected in COOPER, OUTLINES OF INDUSTRIAL LAW 42 (1947). But these provisions are subject to parties' stipulations to the contrary.

an employee to quit the service of an employer for any reason whatever as well as the concurrent absolute right of the employer to dispense with the services of the employee.<sup>9</sup> Today, the Supreme Court would not go so far, and where organizational labor—*i.e.*, those engaged in union activity—is concerned, some restrictions have been placed by the Supreme Court on the “right to hire and to fire.”<sup>10</sup> But in the absence of legislative intervention protecting union activities against discrimination, no law prevents an employer from terminating an employment relationship at any moment, even if the discharge would carry with it an inequitable hardship for the employee. Likewise, no statute has been enacted providing for a two-sided procedure for the settlement of individual grievances or for a participation by employees in the administration of plant disciplinary measures. In absence of collective contract terms to the contrary, no union or group of workers can tell an American entrepreneur how to run his business, and the chances for the enactment of a statute which would require organization of a “Works Council” (*Betriebsrat*) in the shop or plant, with its delegates appointed to the directorate of the enterprise, are certainly nil. In absence of contractual ties, an employer might arbitrarily terminate the relationship with an employee of thirty years’ good standing without any obligation to pay severance money. If during the course of his employment, an employee, because of illness, or the illness or confinement of his wife, or because of his performance of public duties such as jury service, cannot work, he has forfeited his right to compensation for the period of his absence, because by the common law such absence is a failure of consideration. Compensation is restricted to the time during which an employee actually works.<sup>11</sup> Under this strictly contractual view, a

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<sup>9</sup> *Adair v. United States*, 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908).

<sup>10</sup> This right is elaborately treated in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

<sup>11</sup> See the cases collected in *Fischoff v. Adels-Loeb, Inc.*, 192 Misc. 221, 83 N. Y. S. (2d) 548 (1947). A waiver of employer’s right to make deductions from the salary might be readily inferred from the holding in this case.

worker is fortunate if, in the event his illness is of an extended duration, his employer does not terminate the employment contract, although its specified term has not yet expired.<sup>12</sup>

A statutory right to a vacation with pay is unknown in American law. Equally unknown is a right to a testimonial or to a reference. To the objective law of the United States, the idea is still alien that the business enterprise presents an integration of personal and impersonal elements, a unit maintaining its identity, a change in the ownership notwithstanding. Thus, the death of the employer or the sale of his business is deemed to terminate the employment relationships, even if they are founded on a contract for a period of time which had not yet expired.<sup>13</sup> It is true that some criticism such as that expressed by Professor Williston has opened inroads upon this old theory<sup>14</sup>—the question now being whether the employment by its nature was tied up with the person of the employer or with the business.<sup>15</sup> But still the death of a partner, for example, terminates an employment contract made with the firm although only the partnership is dissolved and the business enterprise itself continues.<sup>16</sup> It is only consistent with this attitude, that the law does not burden the purchaser of an enterprise with the wage structure fixed previously by a collective contract

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<sup>12</sup> See the reasoning in *Donlan v. City of Boston*, 223 Mass. 285, 111 N. E. 718 (1916), following the common law doctrine laid down in *Poussard v. Spiers and Pond*, 1 Q. B. D. 410 (1876). As for a short illness, e.g., one week, see *Cuckson v. Stones*, 1 El. & El. 248, 120 Eng. Rep. 902 (1858).

<sup>13</sup> *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. 452 (1890); *Farrow v. Wilson et ux.*, L. R. 4 C. P. 744 (1869).

<sup>14</sup> 6 WILLISTON, *CONTRACTS* § 1941 (Williston and Thompson ed. 1938). It is significant that Louisiana, the only civil law state in the Union, provides for the continuation of the obligation on the part of the employer's heir. LA. CIV. CODE ANN. art. 2007 (1945).

<sup>15</sup> *Brearton v. DeWitt et al.*, 252 N. Y. 495, 170 N. E. 119 (1930).

<sup>16</sup> E.g., *Griggs v. Swift*, 82 Ga. 392, 9 S. E. 1062 (1899); *Greenburg v. Early et al.*, 4 Misc. 99, 23 N. Y. S. 1009 (1893), following the English rule as laid down in *Harvey v. Tivoli, Manchester, Ltd.*, 23 T. L. R. 592 (1907), and *Tasker v. Shepherd*, 6 H. & N. 575, 158 Eng. Rep. 237 (1861). Dissolution of a partnership because of the retirement of a partner does not bring about the termination of an employment contract. *Brace v. Calder et al.*, [1895] 2 Q. B. 253.

made between the seller and a union representing his personnel, unless the purchaser has assumed the burden.<sup>17</sup>

The recent labor relations legislation has not changed the strictly individualistic contractual view; it has only provided for the choice of representatives of the employees for the purpose of collective bargaining, so that in absence of a collective contract the status of the employment relationship remains as it was at common law.

Only legislation, which means statutory regulation, could bring about a fundamental change. Such legislation is, for example, in France, Germany, and Austria at pains to look at the enterprise as a social integration, *une universalité de fait*<sup>18</sup> or *eine Arbeitsgemeinschaft* based on the joint cooperation of management and personnel.<sup>19</sup> Certainly, one has to recall the so-called New Deal legislation in the 1930's if one wants to display a full picture of the present American labor law and its ideology. Since the salient purpose of that legislation was to encourage collective bargaining and, therefore, organizational activities of the employees, their right to self-organization and representation has been defined by the American courts as a "public right." Thus, a solution was found by which the old common law approach to the individualistic contractual structure of the employment relationship was reconciled with the new legislative guaranty accorded the formation and maintenance of labor unions. This is accomplished by enforcing the public right almost exclusively through the National Labor Relations Board.<sup>20</sup> Incidentally, such a dichotomy between public and

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<sup>17</sup> *Carouso v. Empire Case Goods Co. et al.*, 271 App. Div. 149, 63 N. Y. S. (2d) 35 (1946), in which the defendant-seller was held liable for vacation pay contracted for between him and the trade union four days before his sale of the business to the defendant-purchaser.

<sup>18</sup> ROUAST ET DURAND, *op. cit. supra* note 3, § 131, at 157.

<sup>19</sup> German: *Allgemeine Lokal-und Strassenbahngesellschaft v. A. et al.*, German Supreme Court, 1923, 106 *Entscheidungen des Reichsgerichts in Zivilsachen* [hereinafter R. G. Z.] 272.

<sup>20</sup> *Amalgamated Utility Workers, C. I. O. v. Consolidated Edison Co.*, 309 U. S. 261, 60 S. Ct. 561, 84 L. Ed. 738 (1940).

private rights is in and of itself a novelty in a common law country. Such a division of rights, public and private, does not coincide with the civil law classification. Under civil law the determinative of whether a right is public or private is the *nature of the relationship*, while under the common law the test is: who has the right of action, private parties or public authority. It follows that only for a very restricted social objective is the new approach—of vindication of private contractual rights by public authority—available. Solely for organizational purposes can it be said that “it is the industry that is sought to be regulated” and that “it would be an implausible contention that the death of a partner subject to restraint [by an administrative order based upon the National Labor Relations Act] relieved survivors of its burden.”<sup>21</sup>

## II.

### *The Status of the Individual Employee: Abroad*

In absence of achievements obtained through union activity even the new American law reveals no tendency to make jobs more secure than it allowed in the past. The European law differs impressively therein from our law. One may match the American personnel-contract concept with the solution offered in Article 23 of the French *Code du Travail*.<sup>22</sup> This article burdens the new entrepreneur with all employment relationships which were in effect at the date of the change in the former entrepreneur's *situation juridique*. The law specifically provides such a change to include death of the owner, sale or merger of the enterprise, transfer of its

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<sup>21</sup> NLRB v. Colten et al., 105 F. (2d) 179, 183 (6th Cir. 1939). Similarly, for the purpose of a state labor relations act, the statutory representative of Company A's employees was held to maintain its status when in the wake of A's bankruptcy these employees were taken over by Company B which had contracted with another union. New York State Labor Relations Board v. Club Transportation Corp., 275 App. Div. 536, 90 N. Y. S. (2d) 367 (1949). ;

<sup>22</sup> France: CODE DU TRAVAIL, Book I, title II, art. 23(7), as amended, Law of July 28, 1928.



assets, or modification of its status through the formation of an association (the French counter-part of a corporation). Naturally, where contracts are involved, the succession of the new entrepreneur to them cannot, except by a novation, release the old employer from his contractual liability.<sup>23</sup>

From the aspect of job security, this is far from being the only protection accorded the employee by continental labor legislation. As early as 1920, the German Works-Council Act, which assumed control over all employers<sup>24</sup> of at least ten employees, provided for the right of an employee to file objections with the Works Council if he were discharged without any reason being given, or where discharge caused an inequitable hardship to him.<sup>25</sup> The fact that the employer has observed the statutory requirements of notice and the period of notice does not relieve him from his duty to continue the employment relationship under these circumstances.<sup>26</sup>

The Austrian Works-Council Act of 1947 goes even beyond this to protect jobs (*Kuendigungsschutz*). In the first place, the Act makes the notification by the employer to the Works Council of a forthcoming notice to the employee of discharge a condition precedent to the validity of the discharge. A notice given to an employee before the expiration of a three-days' period (which runs from the date of the notification to the Works Council) is invalid *per se*. In the second place, the Works Council may communicate to the employer its disapproval of the discharge. If the employee is nevertheless discharged, the employer faces a dispute be-

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<sup>23</sup> To the same effect, Italy: Decreto-Legge of Nov. 13, 1924, art. 11. Austria: Theatrical Employment Act of July 13, 1922, [1922] BUNDESGESETZBLATT [hereinafter B. G. B.] 441, § 33.

<sup>24</sup> The exceptions made for domestic servants and for crews of merchantmen are here omitted.

<sup>25</sup> Provided that the discharge was neither warranted by economic or technical conditions affecting the enterprise (*Betrieb*), nor occasioned by the employee's conduct.

<sup>26</sup> The German Works Council Act, § 84(1), also referred to other grounds than those mentioned in the text upon which an objection against a discharge might be predicated.

fore an administrative tribunal (*Einigungsamt*). The Act provides for a proceeding, when the objection is founded, *inter alia*, upon the fact that the discharge would entail, in the light of social policy, a hardship upon the discharged employee. However, the objections will not suffice if the discharge is necessitated by economic conditions affecting the enterprise. In the event that the Works Council refuses to intervene on behalf of the employee, the Act authorizes the latter to initiate the proceedings himself.<sup>27</sup> An analogous feature is included in the recent 1948-50 Works-Council Act of Hesse; the place of the administrative tribunal is there, however, taken by the Labor Court.

A similar effect through a different method was brought about by the French *ordonnance* of May 24, 1945, which required an employer to apply for previous authorization to terminate an employment relationship in the event that his enterprise belonged to a class listed by the *Ministre du travail*.<sup>28</sup>

It was previously noted that the temporary absence from work by an employee from causes originating in his or her person, such as short illness or confinement,<sup>29</sup> does not affect the right to compensation for the period of the absence. Most continental nations have allowed the maintenance of this claim, even when the employment is terminated at the time of the sickness, because otherwise an employer might evade his obligation to pay during the time of the absence by terminating the employment as soon as the employee became ill.<sup>30</sup> Of course, the employment could be terminated only when it was for an indefinite period. The Austrian law

<sup>27</sup> Austria: Law of March 28, 1947, [1947] B. G. B. 97, § 25.

<sup>28</sup> ROUAST ET DURAND, *op. cit. supra* note 3, § 343, at 383.

<sup>29</sup> A great many continental statutes charge the employer with the obligation of giving female employees a leave of absence for a substantial period—in France twelve consecutive weeks—before and after confinement.

<sup>30</sup> For example, Germany: CIVIL CODE § 616 (1896); COMMERCIAL CODE §§ 63, 72(2) (1897); INDUSTRIAL CODE § 133(c) (1883); Law of July 26, 1926, § 4. Austria: CIVIL CODE § 1156B (1811). Belgium: Law of Aug. 7, 1922, art. 8.

generally, for any sickness,<sup>31</sup> and the French law for childbed,<sup>32</sup> extend their social policy to the degree of prohibiting the termination of the employment relationship during absences due to these causes. The French courts also have prohibited discharge where the absence caused by the illness was not long enough to necessitate the hiring of a new employee.<sup>33</sup>

It must be realized that absence caused by sickness or childbirth belongs to that class of occurrences which lie, as the German doctrine dubs it, "within the sphere" of the employee. Generally, under this doctrine, the employer is not liable for compensation for the time of idleness caused by circumstances within the sphere of the employee. But the statutory provisions requiring the payment of compensation during periods of absence caused by illness are an exception to the general doctrine in favor of labor.

On the other hand an employer is under an obligation to pay wages when a plant's operation is discontinued due to a lack of raw materials, the timely procurement of which was not impossible for him, for according to the continental doctrine such an occurrence falls "within the sphere" of the employer.<sup>34</sup> French and German courts relieve an employer from the wage risk only when interruptions in the operation of his business are caused by *force majeure*, such as acts of external violence or by the elemental forces.<sup>35</sup> This idea

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<sup>31</sup> Austria: Salaried Agricultural Employees Act of Sept. 26, 1923, § 9(1); Theatrical Employment Act of July 13, 1922, [1922] B. G. B. 441, § 12.

<sup>32</sup> CODE DU TRAVAIL, Book I, title II, art. 29.

<sup>33</sup> French: Cour de cassation, Chambre Civil, Feb. 7, 1934 [1934] Recueil hebdomadaire de jurisprudence de Dalloz [hereinafter D. H.] 165; Cour de cassation, Chambre Civil, Dec. 3, 1934 [1935] D. H. 84.

<sup>34</sup> For example, Germany: CIVIL CODE § 615. Austria: CIVIL CODE § 1155. France: Ordonnance of June 30, 1945, art. 30; Law of Dec. 14, 1945; Law of Oct. 21, 1946.

<sup>35</sup> See the principle announced in Reichsarbeitsgericht [1928] 3 R. A. G. (Slg. Bensheimer) 35, and Professor Hueck's note thereto. The Austrian courts have burdened the employer with the risk even in the case of *force majeure*. See for example the decisions cited in III-2 KLING, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 254 (1928). Bankruptcy of the employer has not been considered

carried to its ultimate consequences places the burden of wage payments upon an employer in the event of a partial strike. In other words, when some of the personnel walk out while the employees in another department of the business report for duty, but cannot work because of the dependence of that department upon the one being struck, the law burdens the employer with the wage risk.<sup>36</sup>

No doubt, all these features prove that the continental law of the employer-employee relationship has maintained only slight contractual characteristics ever since the great trend developed towards a labor law based primarily upon protection by government of the unpropertied classes.<sup>37</sup> But certain protective measures antedate the rise of socialistic legislation. First by the medieval guilds, and later through statutory commands and administrative regulations, the employment relationship lacking a specified duration was bit by bit deprived of its terminability at will. The requirement of a notice, old as it is, has grown in extent and severity. Germanic and Romanic laws require notice, which means the lapse of a certain time between the announcement of severance and the termination of the relationship (*délai-congé*, *preavviso di licenziamento*, *Kuendigungsfrist*). The length of the period varies according to such diverse factors as the type of enterprise, the category of services, and the length of service.<sup>38</sup> Functionally, the requisite of notice

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a case of *force majeure*. Italy: Law of March 18, 1926; Decreto-Legge of Nov. 13, 1924, art. 11. Germany: Bankruptcy Act § 22 (1898); ROUAST ET DURAND, *op. cit. supra* note 3, § 339.

<sup>36</sup> Austrian Supreme Court [1921] 3 S. Z. 84. In Germany the question has been widely disputed. On the one side, see Allgemeine Lokal- und Strassenbahngesellschaft v. A. et al., German Supreme Court [1923] 106 R. G. Z. 272. On the other, see the decisions of the Reichsarbeitsgericht cited in III-2 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 322 (9th ed. Nipperdey 1928).

<sup>37</sup> Fundamental in this respect was A. MENDER, DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN KLASSEN (1890). See also DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLEON (1920); Tissier, *Le code civil et les classes ouvrières* in LIVRE DU CENTENAIRE (1904).

<sup>38</sup> A great many laws have been enacted in Austria besides the employment contract provisions of the Civil Code dealing with employment in a variety of industries. There are, for example, statutes concerning employees in industrial enterprises, agriculture, pharmacies, theaters, newspapers, and even janitors and

operates to make jobs steady, but its chief purpose is to absorb the evil social effects of an abrupt displacement by giving the employee the opportunity to look for another job before he is finally discharged and ceases to receive wages. The achievement of this objective is facilitated where legislation such as that of Belgium and Austria obligates the employer who gave notice to allow the employee to be absent from work for the purpose of job hunting without any deduction from his compensation for the time of his absence. The time is usually fixed, and extends in Austria, for example, to eight working hours for every week during the period of notice.<sup>39</sup>

Thus, notice requirements have become an indispensable feature of European labor legislation. It is true that the French *Code civil* does not expressly provide for a fixed period of notice as a condition precedent to the validity of job termination; but it is equally true that France found it necessary to fill this gap in 1928. This came to pass when, after the first World War, that country was faced with the alternative either to continue German law, which abounds with notice provisions, in Alsace-Lorraine which had then returned to France, or to change the French law as it then existed. The extension of the latter law to Alsace-Lorraine was out of the question because that step would have deteriorated the legal status of the working class in that highly industrialized province. Consequently, the French legislature preferred to change the French law for the entire country.<sup>40</sup> The new law did not prescribe the period of notice in terms of a specific time but ordained

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domestics. The Civil Code itself and many of the aforementioned statutes differentiate in their provisions between salaried employees and wage-earners; in addition, their notice provisions vary the required period (depending upon length of service) from one week, CIVIL CODE § 1159, to one year in section 8 of the law concerning journalists. See Adler in KLANG, *op. cit. supra* note 35, at 287.

<sup>39</sup> Austria: Law of May 11, 1921, B. G. B. 292, § 22. See also Belgium: Law of Aug. 7, 1922, art. 13, and Germany: CIVIL CODE § 629.

<sup>40</sup> France: Law of July 19, 1928, incorporated in CODE DU TRAVAIL Book I, title II, art. 23(2).

the observance of such a period as is usual in the locality and trade concerned.

Finally, discontinuance of his business does not relieve the employer from the obligation to give notice.<sup>41</sup>

Non-compliance by the employer with the notice provisions entitles the employee to a claim for the whole compensation such as would have been owed to him for the period of notice.<sup>42</sup> French law does not allow further damages where the failure of the employer to observe his notice requirement has prejudiced the chances of the employee to find another position.<sup>43</sup> However, the French law provides for an *additional* indemnity for which an employer becomes indebted to an employee, even though the former has strictly complied with the period-of-notice provisions, if the termination of the employment is not founded upon a *motif justifié*, and is therefore considered an *abus de droit*. Thus, the French courts hold the employer liable not only where the motive for the discharge of an employee was found in the latter's union activities,<sup>44</sup>—a result similar to that reached in this country through the concept of an unfair labor practice—but also merely where a justifiable motive, such as an economic one, for the discharge is absent.<sup>45</sup> A general concept as this is certainly unknown to American law.

One not familiar with continental labor law must be on his guard not to confuse the employee's right to damages for his discharge in the case of an *abus de droit* with his

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<sup>41</sup> CODE DU TRAVAIL Book I, title II, art. 23(8).

<sup>42</sup> Analogous provisions exist in Austria, Adler, in KLANG, *op. cit. supra* note 35, at 324, and in Italy, Decreto-Legge of Nov. 13, 1924; Law of March 8, 1926, art. 10(4).

<sup>43</sup> ROUAST ET DURAND, *op. cit. supra* note 3, § 349. For the same result reached in Austria, see Adler, in KLANG, *op. cit. supra* note 35, at 324.

<sup>44</sup> French: Cour de cassation, Chambre Civil, October 19, 1937, [1937] S. I. 373.

<sup>45</sup> The reduction of personnel in order to cut down the overhead expenses was held a good motive. *Compagnie des Chemins de fer de Pau, etc. v. Etchepare*, 1933, [1933] Gazette du Palais I, 401.

right to liquidated damages, on the basis of his salary or wage, for the termination of the employment without proper notice. The two claims differ not only in the amount of the recovery but also in their legal basis. It must be well understood that the rationale for the former claim rests upon an articulate social policy against the termination of the employer-employee relationship for other than fair motives. The latter claim is the statutory solution to mitigate the economic hardships caused by an abrupt discharge. One can easily perceive that an employee who lost his position might be entitled to indemnity on both grounds. This is not only true by French law; the laws of other foreign countries have gone even further. In many European countries an employer incurs, by the mere fact of severing his relationship with an employee of relatively long and good standing, a statutory obligation to pay a severance fee (*Abfertigung*),<sup>46</sup> besides his obligation to pay the compensation for the period of notice where he improperly failed to give notice. Nor is the right to severance money conditioned upon the absence of a good motive (*motif justifié*) for the discharge of an employee. Furthermore, the severance fee is considerable and may reach a sum of money equal to twelve months compensation. It is pertinent to add that, the statutory waiting period for old-age insurance having run, the employee might obtain a pension in addition to his wages for the period of notice and his severance money.

### III.

#### *Statutory Barriers against a Mass Lay-off: Abroad*

Whether or not employees in a plant have a voice in matters of job assignments, demotion, promotion, work

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<sup>46</sup> LENHOFF, *DIE ABFERTIGUNG* (2d ed. 1935). Provisions similar to those of the Austrian law have been enacted in Italy: Salaried Employees Act of Nov. 13, 1924; Law of March 8, 1926, art. 10(5); CARTA DI LAVORO art. XVII (1927). Ecuador: Law of April 6, 1936. Norway: Law of June 19, 1936 § 33. Venezuela: LABOR CODE § 37 (1945). For other countries which have adopted this principle, see HAWKINS, *DISMISSAL COMPENSATION* (1940).

schedule, lay-offs and so on, is a question the answer to which in the United States depends upon the strength of the labor organization concerned, and upon the degree to which the organization can project the employees' desire for participation in plant policy making into the collective contract.

By contrast, beginning with 1919 in Austria, legislation in most of the European countries has created a method of job protection through representatives of the employees in every plant, called "Works Councils" (*Betriebsräte, délégués du personnel*). It goes without saying that the statutory provisions requiring the election of Works Councils for each shop cannot be bargained away by the employees; these provisions apply regardless of peremptory commands by the employer to the contrary, and in spite of the absence of any labor organization and any collective contract. It was chiefly with reference to this mechanism for the participation of the employees in the control of the enterprise over its labor force that a leading Socialist in Europe, who later was the President of the Republic of Austria, could speak as early as 1929 of a "partially socialized economy."<sup>47</sup>

It is not within the scope of this article to expatiate on the jurisdiction of the Works Councils. Their functions have been outlined in other studies.<sup>48</sup> But for an appraisal of the influence exercised by Works Councils, reference must be made first to their role in the protection of an individual worker against the loss of his job, as has been previously mentioned. However, the Works-Councils Acts of Austria and Hesse as enacted in the post-Nazi era have gone much beyond that protection created in the pre-Nazi era. It is the

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<sup>47</sup> RENNER, *WEGE DER VERWIRKLICHUNG* (1929), as quoted in 1 GULICK, *AUSTRIA FROM HABSBURG TO HITLER* 50 (1948). It may be noted that elections of Work Councils are required for shops employing a minimum number of employees, the number varying from five to twenty employees according to the different statutes.

<sup>48</sup> 1 LABOR LAW: *CASES AND MATERIALS*, *op. cit. supra* note 6, at 98 n. (2d temporary ed. 1950).



“right of co-determination” (*Mitbestimmungsrecht*) given Austrian and Hessian employees by the recent statutes in matters of lay-offs and discharge which denotes the difference between a mere “industrial democracy” and an actual “participation of labor in managerial policy.”<sup>49</sup>

The Austrian law of 1947 on Works Councils provides for a procedure before, and decision by, an administrative tribunal, the National Economic Commission, with which a Works Council may lodge objections against an intended shut-down.<sup>50</sup> The Hessian Act of 1948 (in effect since 1950) goes much further. In the first place, the Works Council’s statutory power of *co-determination* in questions of this type is not limited, as in Austria, to enterprises employing more than 500 employees. In Hesse, any mass lay-off (*Massenentlassung*) calls for the Council’s intervention; the law applies to the concept of such a lay-off, a test based on numbers and time. Consequently, a lay-off involving nine employees within four weeks in a shop employing less than one hundred people falls within the definition of a mass lay-off, and in a shop employing more than one hundred the ratio is ten to every hundred; a lay-off of more than fifty employees is considered as an equivalent thereto.<sup>51</sup> Moreover, management must seek a settlement with the Works Council at least four weeks prior to the intended mass lay-off. In absence of a settlement, an administrative agency has to decide, and either side is given the right of appeal from the decision to an Appeal Board.<sup>52</sup>

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<sup>49</sup> “The old works council did not have a material share in the conduct and management of the establishment. It is the latter function, however, which is part and parcel of a true and effective system of industrial democracy.” HILLEGEST, BETRIEBSRAETEGESETZ 7 (1947).

<sup>50</sup> Austria: Law on Works Councils, 1947, § 14(3).

<sup>51</sup> Hesse: Law on Works Councils, 1948, § 41 (authorized by Allied Military Government, 1950).

<sup>52</sup> Hesse: Law on Works Councils, 1948, §§ 41, 57, 62.

## IV.

*Unionism as the Main Vehicle in Present American  
Labor Law*

This discussion of foreign law so far has touched only on the single, though ever so important, topic of legislative interference with an employer's right to terminate a job. It is perfectly clear, of course, that the strong policy of intervention does not stop at this one subject. For example, statutes, nay, constitutions provide for vacation with pay.<sup>53</sup> And all of the discussed legislation creates rights for the employee which are not subject to waiver.

Certainly, protection against "discharges without cause," a system of making promotions and lay-offs in the enterprise dependent upon seniority, establishing vacation with pay or right to a leave of absence with pay in the case of illness or performance of public duties, and provisions for notice and periods of notice, are not unknown in the American law, but—and this is the crucial point—in the United States all these rights require contractual consent on the part of the employer. In other words, where these rights exist here, their basis is in contract, particularly the collective contract. If one compares this with the statutory rights of the European countries, he sees at a glance a striking difference in the structure of the two legal systems.

The elements which combine in the present state of labor law in America are derived from many sources. Still, the faith in the principally unshackled direction by man of his economic activities lies at the foundation of American society. For a social order of such a pattern, competition must

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<sup>53</sup> Italy: CONSTITUTION art. 36(3) (1947) (*ferie annuali retribuite*). Bavaria: CONSTITUTION art. 174 (1946). Wuerttemberg-Baden: CONSTITUTION art. 22 (1946) (*Urlaub*). France initiated this legislation on *conges payes* with the law of June 20, 1936, amended repeatedly since then. The first country to enact compulsory provisions for holidays with pay was Austria: Law on Salaried Employees of January 16, 1910, REICHSGESETZBLATT 20, § 17. Subsequently, Denmark, Finland, Great Britain, Spain, Czechoslovakia, Poland, Rumania, Argentina, Brazil, Cuba, Chile, Mexico, Peru and Venezuela have passed similar statutes.

remain the predominant stimulus to the reaching of the goal: acquisition of affluence or at least of economic independence. In this respect, the majority of American workers and the American entrepreneurs are brothers under the skin. The time might have passed when every worker counted upon his own shop or farm in the future, for there is no longer a frontier, but this "capitalistic" spirit has not yet yielded to the socialistic creed characteristic of the industrial worker in Europe. Competition is still the hallmark, not only between the entrepreneur, but also in no less degree between capital and labor, and with qualifications to be presently discussed, even within labor. The terms of transactions, therefore, result from bargaining at arm's length, the legal vehicle of which is a contract, not legislation, for a system based upon competition necessarily abhors *réglementation*. Assuredly there is some legislation, but it contents itself with negative rather than affirmative measures; it prohibits activities which fly in the face of free competition, such as cartellization or monopolization and unfair exertion of bargaining power. Comparatively speaking, the Sherman and Clayton Acts, primarily interested in and directed against monopolistic tendencies of the enterprises themselves, have their counterparts in anti-closed shop statutes, which ban or limit the use of strong bargaining positions by unions to write into collective contracts union maintenance and closed shop clauses.

The recent enactment of national and state labor relations acts does not contradict the basic structure of American labor law. As their name indicates, they neither force terms and conditions upon an employer, nor substitute a compulsory contract for terms not agreed upon by the parties. The only object enforced by those laws is bargaining. During the great depression of the thirties, national and state legislation sought in this way to strengthen labor's side at the bargaining table. Legislative compulsion upon employers and unions to bargain was deemed the extreme

to which, in a free economy, a government may resort. It is characteristic that the only two European countries which depart from the continental regulatory pattern, namely Sweden and Great Britain, have followed the American lead: Sweden generally, and Great Britain only for public corporations established under her recent nationalization laws.<sup>54</sup>

The solution established by its labor relation laws evinces the originality and resourcefulness of America in legal fields, for they keep in line with her traditional economic philosophy. Almost one hundred years ago, a great American judge found that ratiocination for the workers' right to form combinations in the great tenet of freedom of contract.<sup>55</sup> The new legislation encouraged the formation of permanent and effective labor organizations, acting to restore the process of bargaining which, so long as the employer can deal with the individual worker, simply does not exist. The continental legislation also interfered, as we saw, with an employer's unilateral laying down of working conditions, but it did not replace it with an entirely bilateral process, as is employed in the United States.

Furthermore, whereas the source of the continental legislation, as it developed in the decade from 1918 to 1928 in Germany and Austria, and from 1928 to 1948 (except for the interval, of course, of Petainism) in France, lay primarily in the conquest of political power by socialistic parties,<sup>56</sup> the American legislation from 1933 to 1938 was not merely a political creation; it originated with theorists, chiefly economists, who being devoted disciples of Keynes

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<sup>54</sup> Sweden: Law of Sept. 11, 1936, No. 506, c. 2, § 4. (The statute is not confined to particular industries.) Great Britain: Electricity Act of 1947, 10 & 11 Geo. 6, c. 54, § 53; Transportation Act of 1947, 10 & 11 Geo. 6, c. 49, § 95; Coal Industry Nationalization Act of 1946, 9 & 10 Geo. 6, c. 59, § 46. The Canadian Industrial Relations Act of 1948, 11 & 12 Geo. 6, c. 54, has likewise been modeled after the American plan.

<sup>55</sup> Shaw, C. J., in *Commonwealth v. Hunt*, 4 Metc. 111 (Mass. 1842). See also Lenhoff, *A Century of American Unionism*, 22 B. U. L. REV. 357, 364 (1942).

<sup>56</sup> See for example KESSLER, in 1 HARMS, *STRUKTURWANDLUNGEN DER DEUTSCHEN VOLKSWIRTSCHAFT* 431, 440 n. (1928); ROUAST ET DURAND, *op. cit. supra* note 3, § 31.

and Hansen thought in terms of an increase of purchasing power among industrial workers *as consumers* rather than in terms of a revolutionary democratization of business enterprise.<sup>57</sup>

Since bargaining thus remains the only instrument for obtaining more favorable working conditions, standardization of these conditions depends on the degree to which unionism expands or at least preserves its strength and succeeds in procuring collective bargaining contracts. This would restrict the competitive struggle to one between management and labor by the elimination of competition among job seekers themselves, who otherwise undercut their own working conditions, if—and this modification also calls for attention—the wide stage of the American economy were, in the labor part, domineered by organized labor. But first of all, the labor relations statutes do not control the whole of labor; they exempt important economic activities, for example agriculture, from their scope. Furthermore, the principle adopted by the statutes embraces majority action. This means that the rates and conditions standardized in a collective contract constitute the universal terms only if a majority among a group of employees, which forms an appropriate unit for collective bargaining, have agreed upon these rates through the process of collective bargaining, and in addition have agreed upon representation by a particular organization for that process. There is much room left for the formation of an anti-union spirit among personnel who have not yet been won over to the idea of organization, and look, individualistically, askance at the entrance fees and weekly contributions. It must also be realized that company unions still play an important role in American labor relations in contrast to Europe where the single-employer collective contract is disliked or not even tolerated.

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<sup>57</sup> See Stone, *Trade Unionism in a Free Enterprise Economy*, 14 U. OF CHI. L. REV. 399, 403 (1947). See also SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 78, 83 (1948).

Finally, particularly in the last few years, legislation, national and state alike, has been enacted to counteract the growth of unionism by restricting the bargaining power of labor organizations.<sup>58</sup> Bans of or restrictions on union maintenance and closed shop clauses have been mentioned. But this tells only part of the story. The Taft-Hartley Act has expressly included in the "Bill of Rights"<sup>59</sup> of the Wagner Act the right of a worker to refrain from union activities, a right which is called by the Germans "the negative freedom to combine." However, one must keep in mind that post-Hitlerian Germany has done away with this right.<sup>60</sup> The strength of unionism also depends upon the efficacy of organizational discipline. It hardly can be alleged that the Taft-Hartley Act contributes to the internal strength of unionism, for it prohibits the discharge of an employee on the ground of his disciplinary expulsion from the union. This provision compels union employees to work side by side with fellow employees who have been expelled from the union, although an otherwise valid collective contract calls for good standing in the union as a condition of employment.<sup>61</sup>

These are not by far the only difficulties which beset American unionism at the time of this writing. There are too many of them even to list. But one more demands mention because in a crisis it may substantially affect the domain of collective contracts in America. It is the provision which deprives strikers of the right to participate in the choice of the representative of labor in a particular business unit.

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<sup>58</sup> National Labor Relations Act of 1935, 49 STAT. 449 *et seq.* (1935), 29 U. S. C. § 151 *et seq.* (1946), as amended by the Labor-Management Relations Act of 1947, 61 STAT. 136 *et seq.* (1947), 29 U. S. C. § 141 *et seq.* (Supp. 1950). There are ten state statutes modeled after the federal legislation.

<sup>59</sup> This expression describing the rights stated in Section 7 of the National Labor Relations Act of 1935 is taken from GREGORY, LABOR AND THE LAW 418 (rev. ed. 1949).

<sup>60</sup> Germany: BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Bonn Charter) art. 9(3) (1949).

<sup>61</sup> Discharge is allowed in the case of an expulsion from the union for non-payment of periodic dues or initiation fees. 61 STAT. 140-1 (1947), 29 U. S. C. § 158(a)(3) (Supp. 1950).

Consequently, the replacements hired during an economic strike might determine whether the union calling the strike will continue as the representative of the workers of the plant or industry striking.

To those who counter that a similar consequence would result under similar circumstances abroad, the answer is that there the effects would be entirely different, for in Europe the substantial part of the employment relationship is created and governed by statute, whereas here the status of the individual employee stands or falls with the existence of and the standards established by the collective contract negotiated by the union representing the employee.

In this connection, another source of intrinsic vulnerability must not be overlooked. Constitutional law in European countries considers labor, with some qualifications for domestics and agricultural workers, as a matter of national legislative jurisdiction. This concept is polar to our constitutional ideology which looks, with regard to labor, at state law as the rule and at federal regulation as the exception. To exemplify this statement one can point to the fact that it is for the states to prescribe not only for the form of labor organization, admission and expulsion of members, capacity to sue and be sued, but also to fix the limits for concerted actions in industrial conflicts, excepting only the area positively preempted by the Federal Constitution and the few national labor relations laws. Since it is true, as it was very ably particularized in a recent study,<sup>62</sup> that since 1939 "the trend in state enactments has been rather steadily away from the protective type of labor law and towards legislation which restricts rather than enlarges labor's rights"—a trend strictly opposite to the European one—much has been done and might be done in the future to prevent unions' trees from scraping the skies. In its last two sessions the Supreme Court of the United States, which in the decade

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<sup>62</sup> Millis and Katz, *A Decade of State Labor Legislation 1937-1947*, 15 U. OF CHI. L. REV. 282 (1948).

before was at pains to restrict the area of state legislation impinging upon constitutional guaranties such as freedom of speech and of assembly, has "returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." <sup>63</sup>

There is good reason, on the one hand, why a system of labor law in which the source of the employee's rights lies in collective contracts, runs into fundamental difficulties when legislation attempts to restrict union activities. How could collective contracts become the generally accepted rule if every trade and profession throughout the country cannot be embraced by them? But, on the other hand, legislation in a democracy reflects public opinion; it is not a one-way operation. Not labor, but other substantial portions of the public are annoyed by the concentration of power in one union, a fact which might affect the whole economy of the nation. In an economic order which in legal terms is expressed in a contractualism permeating all labor relations, a break-down in contract negotiations restores to the parties freedom of economic action. Bearing in mind these two factors, one cannot escape the conclusion that wasteful as a strike may become to the general populace, for the individual worker it means, if the strike is lost, the destruction of substantial rights granted to him before the strike through the agency of a collective contract. His position after a strike might thus approximate the precarious status of an employee in a business which is not bound by a collective contract.

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<sup>63</sup> *Lincoln Federal Labor Union et al. v. Northwestern Iron and Metal Co. et al.*, 335 U. S. 525, 536, 69 S. Ct. 251, 93 L. Ed. 212 (1949). See also *Building Service Employees International Union et al. v. Gazzam*, 339 U. S. 533, 70 S. Ct. 308, 94 L. Ed. .... (1950); *Giboney et al. v. Empire Storage & Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949). See the reference to the recent turn in the Supreme Court's approach to labor in *State v. Traffic Telephone Workers' Federation*, 2 N. J. 335, 66 A. (2d) 616 (1949).



## V.

*Aspects of the Foreign Law on Collective Contracts*

It has been pointed out that under the American system, job security depends upon the protection accorded by the terms of a collective contract. The quality of working conditions, vacation with pay, leave of absence in the case of illness, the existence of seniority rights, and provisions for employee welfare also depend upon the existence of a collective contract. Moreover, in absence of a collective contract no statutes provide for the adjustment of grievances, or for the handling of disciplinary measures. By necessity then, virtually all collective contracts include, for example, grievance settlement clauses, which provide for various steps ranging from intervention of the departmental foreman, union representative, union grievance committee, or union officer, to arbitration. If one looks for the continental counterparts of all these features, not only the last mentioned one, one finds that the contrast between the democratic and the regulatory structure of industrial self-government can be seen in its every trait. Why, for instance, is the question of closed shop or union maintenance not as important on the other side of the Atlantic Ocean as on this side?

German law was averse to the recognition of these clauses if they were formulated in terms of limiting the dispensation of jobs to members of a particular union. (Incidentally, the new Canadian Industrial Relations Act of 1948 has formulated a prohibition to this effect in its Section 6.) But for the status of the German worker, a closed shop clause was of much less importance than the statutory establishment of a Works Council and other legislative measures taken for his benefit. Now, union rivalism is gone in Germany. Stipulations conditioning employment upon membership in a labor organization will hardly encounter legal hostility, since any genuine organization is affiliated with the single federation as it now exists.<sup>64</sup>

The situation is different in France, with her multiplicity of federations, such as the *C. G. T.*, the *C. F. T. C.*, the *C. G. C.*, and so on. Whether the *liberté syndicale* can be stretched to the point so as to tolerate a closed shop agreement remains to be seen. The *Cour de cassation*, in 1916, had given such an agreement legal recognition<sup>65</sup> and the post-war legislation has shown a tendency to accord great prerogatives to the organizations which are the "most representative confederations." The most important of these prerogatives is the statutory monopoly for making collective bargaining contracts. By the law of December 23, 1946, which was drawn upon this basis, collective contracts had no effect before their approval by the *Ministre du travail*. The recent Act of February 11, 1950,<sup>66</sup> has abrogated that law and restored the full *liberté syndicale* to the "most representative organizations," from among the many unions.<sup>67</sup> Only they have the capacity of making national collective contracts which lay down all the terms of employment, including those qualifying an employer's right to hire and fire. The formation of these contracts takes place through a so-called "Mixed Commission" (*commission mixte*) which is composed of representatives of all these "most representative organizations." The Commissions are convened at the request of one of the unions or an employers' national organization, or by the *Ministre du travail* who may act on his own initiative. Consequently, there can be only a single "general" collective contract for one trade, whereas for the individual classes (*catégories professionnelles*) within the trade, supplementary

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<sup>64</sup> Where unions affiliated with different federations were parties to one collective contract, a closed shop in their favor was, under pre-Hitler law, held good. 2 HUECK UND NIPPERDEY, *op. cit. supra* note 1, at 448.

<sup>65</sup> French: Raquet v. Syndicate d'Halluin, *Cour de cassation*, 1916, [1916] D. P. I. 246.

<sup>66</sup> France: Law of Feb. 11, 1950, [1950] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [hereinafter J. O.] 1688. Title I, §§ 31-31zc of the Act dealing with collective contracts are incorporated in the CODE DU TRAVAIL, Book I, title II, c. IV "bis."

<sup>67</sup> C. G. T. (Confederation generale du travail); C. F. T. C. (Confederation francaise des travailleurs chretiens); C. G. C. (Confederation generale des cadres); F. D. (Force ouvriere).

agreements to the principal contract can be entered into (*conventions annexes*). Parallel to the requirement for the general contract, the supplementary contract must be negotiated by the "most representative organizations of the class concerned."

In a similar way, regional or local collective contracts may be made; but, where a general, *i. e.*, a national contract is in effect, its terms control, so that, as for these regional and local contracts, the parties' freedom to contract is restricted to that of adapting the terms of the general contract to the particular conditions of the region or locality. However, the parties are authorized by the Act to agree on matters not covered by the general contract, or even to change the latter's terms provided—a very important proviso, indeed—that the modifications are more favorable to the employees.<sup>68</sup> Surely, this also sharply sets off continental labor law from American law.

It is important to observe, that by the continental, particularly the French law, the terms of a collective contract automatically become the terms for any individual employment relationship if and when an employer is subject to a collective contract; but an employer can agree upon terms more favorable to an employee than those fixed by the national, regional or local collective contract which otherwise controls.<sup>69</sup> In absence of a collective contract, employers and their organizations may freely bargain as to wages with the "most representative labor organizations" of their trade.<sup>70</sup> Naturally such agreements cannot, with any more effort than national, regional, or local collective contracts, bargain away legal terms and conditions imperatively imposed by codes and statutes.<sup>71</sup>

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<sup>68</sup> The discussion in the text is based on CODE DU TRAVAIL, Book I, title II, articles 31f, 31h, 31i. See also Professor Paul Durand's study of the new law of Feb. 11, 1950, in 13 DROIT SOCIAL 93, 186-7 (France 1950).

<sup>69</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31e.

<sup>70</sup> France: Law of Feb. 11, 1950, [1950] J. O. 1688.

<sup>71</sup> France: CODE DU TRAVAIL, Book I, title II, art. 31a(2).

A great many features of the individual employment relationship are fixed in France, as in other civil law countries, *by law*.<sup>72</sup> The law prescribes the matters which must be dealt with in a collective contract.<sup>73</sup> It also enumerates the tests for the determination of the quality of being "most representative" with regard to an organization.<sup>74</sup> Finally, quite recently, an Order of Council, based on a provision of the new Act has fixed minimum wages.<sup>75</sup>

At present, the French Act embodies a feature which first evolved in the German labor law: the administrative extension of a collective contract within its territorial limits beyond the parties thereto, to all employers and employees engaged in the same trade.<sup>76</sup> This matter will be discussed presently in connection with the German law on this subject.

But first, mention will be made of a theory which, developed originally by German and Austrian courts between the two wars, recently has found its way into statutory law. It is the theory of the continuing effect of the employment terms laid down in a collective contract after the expiration of the contract (*Nachwirkung*).<sup>77</sup> This theory offers another

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<sup>72</sup> This term "law" as used in the civil law countries embraces only the body of those legal rules or directives which are enacted by state authorities. The Civilians call them "law in the objective sense." That is, *L'ensemble des lois*. See 1 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 2 (9th ed. 1922). One might translate these words as "the aggregate of legal rules, principles and concepts" in contrast to the *subjectives Recht*, i.e., an individual right or power which might derive from transactions allowed by the *objectives Recht*. Cf. RADBRUCH, *EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT* 52 (1913). By this view, American labor law is, for the major part, *subjectives Recht*.

<sup>73</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31g.

<sup>74</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31f(4). They are: number of members, independence, amount of fees, experience and seniority, and attitude during the German occupation. It is for the Minister to determine in accordance with these tests whether an organization is "most representative." Cf. Durand, *supra* note 68, at 186-7.

<sup>75</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31x. The order was enacted on August 22, 1950.

<sup>76</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31j. Thus, France has re-enacted in 1950 what was originally adopted in 1936 but shelved in 1940.

<sup>77</sup> Decisions of the highest courts in Germany and Austria which have espoused the doctrine are collected in Lenhoff, *Beitragte zu der Lehre von den*

interesting contrast to our legal view of the same incidents, a view sharply brought into focus by the formula of America's colorful labor leader, John L. Lewis: "No contract, no work." Upon the expiration or termination of a collective contract in this country, all the provisions, including those which go only to the individual employment relationship, continue to operate only if employer and employee agree to such a continuation, while by German and Austrian law the opposite is true; for they cease to operate only if employer and employee agree to a discontinuation. Thus, the continental theory of *Nachwirkung* is careful to avoid a break-down of production.

This theory, now expressly adopted by the new German statute of 1949 on collective contracts, is stated therein as follows: "After the expiration of a collective contract, its norms<sup>78</sup> continue to be in effect up to the time of their replacement by another agreement."<sup>79</sup> The importance of this principle can truly be measured if one takes into account its operation together with that of another principle—*i.e.*, the extension of the terms of collective contracts beyond the parties to them—which, like the former one, has no parallel in this country. The new French law produces an analogous effect by the provision that upon its termination a collective contract, although made for a specified time, is deemed to remain in effect as if it were for an indeterminate period.<sup>80</sup> Among the matters which must be included in a collective contract is the provision for giving notice of termination.<sup>81</sup> In view of the extensibility of the more important collective

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*Quellen des Arbeitsrechts* (Part B: *Werden und Wesen der Kollektivvertrage*), 2 Festschrift fuer Maurovic 627, 674 n. 86 (1935).

<sup>78</sup> These norms are, according to section 4(1) of the Act, those provisions of the collective contract which deal with the contents, the establishment, and the termination of individual employment relationships, and also such provisions as concern the operation and the rights of management and employees in the administration of the business.

<sup>79</sup> Germany: Tarifvertragsgesetz of April 9, 1949, [1949] WIRTSCHAFTSGESETZBLATT [hereinafter W. G. B.] 11, § 4(5).

<sup>80</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31c(2).

<sup>81</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31g(7).

contracts which will be subsequently discussed, the practical significance of this legislative step can not be overemphasized.

Naturally, the framers of the post-World War II labor laws in France and Germany have utilized ideas which were more or less clearly indicated in pre-war laws. In addition, the "more-favorable-conditions" clause was in operation in the pre-Nazi era in Germany; its adoption by post-war France supplies one more example of the improvement of a legal system through the guidance of comparative law.

Another example of statutory control over collective contracts is the compulsory extension of contract terms beyond its parties. First resorted to in Germany during the First World War,<sup>82</sup> the theory of administrative extension of a collective contract beyond its parties and their members (*Allgemeinverbindlichkeitserklaerung*) has been widely accepted and incorporated in the statutes of several European countries.<sup>83</sup> Even Great Britain, whose legislation has always been so cautious as to embark upon new ideas step by step rather than by general enactment, adopted the extension idea in her Cotton Manufacturing Industry Act of 1934.<sup>84</sup> This Act authorizes the Minister of Labor "to bring into force," by order, the wage rates laid down in a collective agreement as to *all* persons employed in the industry of the class and description to which the agreement relates. Plainly, the order makes the collective agreement rates enforceable, through civil and criminal actions, as minimum

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<sup>82</sup> Credit for the invention must be given to the New Zealand legislation on arbitration of labor disputes enacted in 1894. The Prussian generals who had been placed in control of labor relations upon the outbreak of World War I adopted the device. For an example of such an extension order by the *Oberkommando in den Marken* in 1915, see UMBREIT, *DER KRIEG UND DIE ARBEITSVERHAELTNISSE* 117 (1928).

<sup>83</sup> Austria: Law of Dec. 18, 1919, [1920] *STAATSGESETZBLATT* 16. Italy: Law of April 3, 1926, N. 563, art. 10(1). France: *CODE DU TRAVAIL*, Book I, title II, c. IV "bis", art. 31vd. See also, Switzerland: Federal Order of Aug. 30, 1946, [1946] 62 *Recueil Officiel* [hereinafter R. O.] 112; Federal Order of June 23, 1943, [1943] 59 R. O. 853; Federal Order of Oct. 1, 1941, [1941] 57 R. O. 1141.

<sup>84</sup> Cotton Manufacturing Industry Act of 1934, 24 & 25 Geo. 5, c. 30, § 1.

terms for the individual employment relationships.<sup>85</sup> As terms of a collective agreement pure and simple, they would not be enforceable at law, presenting, thus, in the terminology of the Civilians, a case of a "natural obligation."<sup>86</sup>

With variance in details of definition, common to all laws governing the extension of collective contracts is the requirement that the parties to the contract which is to be extended must have a representative position in the industry concerned.<sup>87</sup> By the French law of 1950 a distinction is drawn between the "extensible" collective contracts and the non-extensible ones. The national, regional, and local collective contracts are susceptible of administrative extension, whereas the effects of ordinary collective contracts are restricted to the parties thereto and to an organization of the same branch by way of *adhésion* (declaration of accession to the contract).<sup>88</sup> The former are required to be made by a "Mixed Commission," which is open only to the very few confederations which are the "most representative" ones among the twenty odd "branches" of industry such as chemical industries, metal work, construction and public works (forming one branch), stevedoring and transportation (one branch), and so on.<sup>89</sup> The latter, of course, are subordinate

<sup>85</sup> See Kahn-Freund, *Minimum Wage Legislation in Great Britain*, 97 U. OF PA. L. REV. 778 (1949).

<sup>86</sup> In Great Britain, compliance with collective agreements rests entirely upon the good faith of the parties. Legally, an employee could bargain away, in an individual employment contract, standards collectively agreed upon, although his employer and his union were parties to the collective contract. Cf. Kahn-Freund, *supra* note 85, at 779; Report of the Commission on Industrial Relations in Great Britain 65 (U. S. Dep't. of Labor 1938). For the rise and character of the concept of *obligatio naturalis*, see BUCKLAND, A TEXTBOOK OF ROMAN LAW 552 (1932).

<sup>87</sup> Germany: Tarifvertragsgesetz of April 9, 1949, [1949] W. G. B. 11, § 5(1), requires not only that such extension be deemed to satisfy a public interest, but also that the employers who are parties to the collective contract have in their service no less than half of all employees engaged within its local and occupational sphere.

<sup>88</sup> CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31c(6). Such *adhésion* is a simple notification to the office of the labor court (*conseil des prud-hommes*) with which every collective contract is to be filed. CODE DU TRAVAIL, Book I, title II, c. IV "bis", articles 31c(7), 31d(1).

<sup>89</sup> Only the ordinary collective contracts can be made for mere *categories* such as wage-earners, salaried employees, engineers, etc. The "extensible" con-

to the extensible contracts. The extension of a local branch contract in the chemical industry, for example, supplants, therefore, a collective contract previously made, within that local area, between a soap factory, for example, and the union of salaried employees in the soap industry.<sup>90</sup>

Exactly as by German law, so by French law the extension is effected by an administrative order of the *Ministre du travail*, and is, therefore, in matters of law and correct procedure, assailable before the competent administrative court, which in France is the State Council (*Conseil d'Etat*).

Once the contract has been entirely or partly extended,<sup>91</sup> all employers and employees who fall within the scope of it, whether specified by the branch of industry or a particular territory covered by it, are inescapably subject to it for the future. Conversely, the *Cour de cassation* has decided that an extension order cannot be made retroactive.<sup>92</sup>

Under these two principles in combined operation, economic shocks caused by the expiration of the collective contract are absorbed; for, because of the continuing effect given the contract after it terminates (*Nachwirkung*), it continues to operate between the employer and his employees, and by reason of an administrative extension order this effect is not restricted to the parties to the contract, but extends to the whole class of the industry to which the parties belong.<sup>93</sup>

Unquestionably, the extension principle developed also as an attempt to protect, in a buyers' market, the competi-

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tracts can be made only branchwise. The idea behind this structure of the Act was that of "unification," i.e., of "a common front of employees." See *debats parlementaires*, [1949] J. O. 7642. Thus, the question of an appropriate unit cannot arise.

<sup>90</sup> CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31e(3). See also the comment on that provision by MALEZIEUX, *LES CONVENTIONS COLLECTIVES DE TRAVAIL* § 9 (1950).

<sup>91</sup> The Minister may, inter alia, exclude from the extension those provisions which in the "reasoned view of the High Commission for Collective Contracts," an advisory agency, are not suited to the situation of the branch within the territory contemplated. CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31j(3).

<sup>92</sup> French Cour de cassation, May 11, 1938. See the comment in MALEZIEUX, *op. cit. supra* note 90, § 31.

<sup>93</sup> KASKEL, *op. cit. supra* note 2, at 124.



tive position of unionized enterprises against nonunionized competitors who otherwise might dislodge them by means of price cutting, made possible by the paying of substandard wages. To be sure, this reasoning underlies our Fair Labor Standards Act,<sup>94</sup> but at present this objective partakes of a bit of make-believe rather than of actuality. The American statute contains minimum wage rates invariably fixed without differentiation for the various classes of industries, and these rates are far out-distanced by union standards. By contrast, the English legislation of the post-war period displays a high degree of flexibility and variability for diverse types of industries. It employs agencies capable of adjusting wages in the whole field to union standards; and these agencies are able to operate where existing contracts contain either devices inadequate to prevent a disruption in labor relations, or where the machinery provided by them for this purpose is likely to break down.<sup>95</sup>

## VI.

### *Avoiding and Settling of Disputes: Abroad*

The effects of the principle of *Nachwirkung* are not limited to those mentioned in the preceding section of this article. The continuation of the employment terms after the expiration of the contracts permits and even demands peaceful negotiation on new terms.

However, neither the German nor the French law has raised these statutory enactments, which deal with the post-expiration effects of a collective contract upon the individual employment relationships, to the dignity of bargain-

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<sup>94</sup> Fair Labor Standards Act of 1938, 52 STAT. 1060 *et seq.* (1938), 29 U. S. C. § 201 *et seq.* (1946), as amended, 63 STAT. 910 *et seq.* (1949), 29 U. S. C. § 201 *et seq.* (Supp. 1950).

<sup>95</sup> For the various devices established by English legislation, particularly in the Wages Councils Act of 1945, 8 & 9 Geo. 6, c. 17, § 3, see COOPER, *op. cit. supra* note 8, at 199. Other wage-regulation statutes are restricted to particular industries such as the Road Haulage Act of 1938, 1 & 2 Geo. 6, c. 44, and the Catering Wages Act of 1943, 6 & 7 Geo. 6, c. 24.

proof provisions (*lois impératives; ius cogens*), which is the usual status of continental labor law provisions. The parties to the collective contract may, from the beginning, bargain away these statutory enactments.<sup>96</sup>

The German employer and his employees in the post-contract period are in no way prevented from entering into *individual* employment agreements which are at variance with the original contractual terms.<sup>97</sup> It is noteworthy that the French law, by contrast, attributes to the collective contract provisions, which continue to have control over *individual* employment relationships notwithstanding the expiration of the contractual period, the quality of *normes impératives*. Accordingly, the employer and the employees are bound by the provisions of the old contract until one party thereto notifies the other of his desire to terminate. Since upon the end of its stipulated duration a collective contract is deemed to be a contract for an indeterminate time, it is subject to termination by notice.<sup>98</sup> But since a contract made for a specified term terminates, under general rules of law, upon the consummation of its term, usually there is no provision for a period for giving notice (*préavis*) in the contract; for this reason, the statutory provision prescribing the inclusion of such a stipulation can hardly be applied.<sup>99</sup>

It goes without saying that upon the coming into effect of a new collective contract all persons subject to it are bound by its terms.

The obligatory contents of an "extensible"<sup>100</sup> French collective contract include clauses providing machinery for

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<sup>96</sup> Germany: Tarifvertragsgesetz of April 9, 1949, [1949] W. G. B. 11, § 4(5). It has been interpreted so as not to present an imperative legal norm. HUECK UND NIPPERDEY, TARIFVERTRAGSGESETZ KOMMENTAR 103 (1950). The text of the new French law, CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31c(3), clearly indicates the same result: "A défaut de stipulation contraire, la convention . . ."

<sup>97</sup> HUECK UND NIPPERDEY, *op. cit. supra* note 96, at 102. The words "another agreement" in section 4(5) of the German act lends great support to this view.

<sup>98</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31c(2) and (3).

<sup>99</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31c, 31g(7).

<sup>100</sup> For the whole concept of "extension" of collective contracts in French law, see the preceding section of this article.

the settlement of "collective disputes" which might arise during the period of the contract. The French theory on "collective labor disputes" (*conflits collectifs de travail*) excludes from their orbit any controversy on the interpretation or application of the provisions of an existing contract, controversies which are called in this country "disputes on rights."<sup>101</sup> These are distinguished from "disputes on interests" which are the disputes over terms which a future agreement ought to include. It is only the latter "conflicts" for which a peaceful settlement procedure must be provided in the contract.<sup>102</sup>

Much can be said for this view. The theory of collective contracts in France, as well as in other civil law countries, reads into every collective contract a "peace-obligation" which is imposed upon every party and every group bound by its terms. The Germans call this implied obligation *Friedenspflicht*,<sup>103</sup> and the French *exécution loyale de la convention*.<sup>104</sup> It is a negative obligation rather than an affirmative one, because it prohibits the obligors from engaging in any work stoppage such as strike or lockout, or blockade or boycott or any other similar hostile action.<sup>105</sup> However, two qualifying remarks must be added. First, the new French law (in contrast to its predecessor of 1946) strikes out the statutory provision which made the contracting organization a "guarantor" for the observance of the implied peace obligation by its members. Now, to exist, such a guaranty must be created by the contract.<sup>106</sup> In the

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<sup>101</sup> For the French theory on *conflits collectifs* see MALEZIEUX, *op. cit. supra* note 90, § 48.

<sup>102</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31g(8); Law of Feb. 11, 1950, [1950] J. O., c. II, art. 7.

<sup>103</sup> For details, see HUECK UND NIPPERDEY, *op. cit. supra* note 96, 41 n.

<sup>104</sup> In contrast to the German statute, the French CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31qu, includes an express provision.

<sup>105</sup> Sweden: Collective Contract Law of June 22, 1928, [1928] SVENSK FOERTFATTNINGSSAMLING 253, § 4. This statute is the source of the definition.

<sup>106</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31qu(2). But see Law of Dec. 23, 1946, art. 31h; ROUAST ET DURAND, *op. cit. supra* note 3, § 208. The German theory has never imposed a "guaranty" upon the organization, but

second place, the "peace obligation" inheres in the contract only as to matters dealt with therein. As for other matters, the parties' right to resort to concerted actions is denied only if the contract expressly prohibits it.<sup>107</sup>

On the other hand, one has to remember that the dominant American doctrine, solidly based on inveterate contractualistic concepts, has not yet accepted the view that strikes for a change in contractually regulated terms present an outrageous challenge to common sense even in the absence of a no-strike clause.<sup>108</sup> In Europe, the handling of disputes arising out of controversial interpretations of such terms is left to the labor courts whatever their designation,<sup>109</sup> but courts, nevertheless, to all intents and purposes.<sup>110</sup>

The German theory applies the words "collective disputes" (*Gesamtstreitigkeit*) only to labor disputes "on interests."

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it recognized, besides the peace obligation, an implied obligation of the organization to make its influence felt with its members so that they will perform their work loyally in accordance with the terms of the contract (*Durchfuehrungspflicht*). HUECK UND NIPPERDEY, *op. cit. supra* note 96, 45 n.

<sup>107</sup> ROUAST ET DURAND, *op. cit. supra* note 3, § 208. The Germans speak of an "absolute" peace obligation in such a case in contrast to the implied one which, restricted to matters settled in the contract, is only "relative."

<sup>108</sup> GREGORY, LABOR LAWS: CASES, MATERIALS AND COMMENTS 1159 (1948).

<sup>109</sup> In France, they are called *conseil de prud'hommes*. The idea of labor courts was first established by Napoleon I by the act of March 18, 1806, only one example of his creativeness in the field of law. Since 1805, these tribunals have operated in divisions consisting of a learned judge and two lay assessors taken from employer and employee groups, respectively. Labor courts in other countries are organized upon the same pattern. Appeals are taken to the ordinary courts.

<sup>110</sup> Their jurisdiction is exclusive as for the adjudication of all disputes "on rights." This is one characteristic which distinguishes them from the nearest American counterpart, the National Railway Adjustment Board, created by section 3 of the Railway Labor Act, 44 STAT. 579 (1926), as amended, 48 STAT. 1189 (1934), 45 U. S. C. § 153 (1946). Not even in the interpretations most favorable to its jurisdiction such as expressed in *Slocum v. Delaware, L. & W. R. R.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 534 (1950), and *Order of Railway Conductors et al. v. Pitney et al.*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946), can the Board claim exclusive jurisdiction in legal actions. *Moore v. Illinois Central R. R.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941). The other essential difference lies in the composition of the adjudicating division, for in the labor courts it is a learned, impartial judge who in all cases presides over the division and really conducts the action, not a "referee" resorted to in the absence of an "agreement" and picked for the occasion as is the case under 48 STAT. 1191 (1934), 45 U. S. C. § 153(1) (1946).

With respect to them, the labor law of the free German republic since 1923 had provided for compulsory arbitration (*Zwangsschlichtung*).<sup>111</sup> France followed that German pattern from 1936, until the suspension of the arbitration laws by a decree of September 1, 1939, at the outbreak of the war. Then, owing to systems based on dictatorial powers of government, which with respect to wages and salaries remained in effect until the statute of 1950, there was no need for a resort to arbitration.<sup>112</sup> Now, since the Act of February 11, 1950, the parties' autonomy in the field of labor relations is fully reestablished; but the Act does not include a compulsory arbitration feature because, as it was said during the process of passage of the Act, "the hostility to the principle of compulsory arbitration is evident."<sup>113</sup> The post-war German legislation likewise shows that hostile attitude. Even the Allied Control Council, when restoring essential features of pre-Hitler conciliation and arbitration proceedings, expressly declared in Law No. 35 of August 20, 1946, that such an arbitration award is binding upon the parties only if they accepted it, or previously agreed to be bound by it.<sup>114</sup> The present French law calls for a compulsory attempt at conciliation by official labor authorities before a strike or lockout where other preventive machinery is not provided for in the contract.<sup>115</sup> The German law does not even take that step. In neither one is a cooling-off period required.

The concept of a constitutional right to strike, as it is now expressly accepted by constitutional provisions in France, Italy, and in several German *Laender* is hardly reconcilable

<sup>111</sup> KASKEL, *op. cit. supra* note 2, at 400.

<sup>112</sup> ROUAST ET DURAND, *op. cit. supra* note 3, §§ 230-8, at 281-91.

<sup>113</sup> See the quotation from the debates in MALEZIEUX, *op. cit. supra* note 90, § 49.

<sup>114</sup> Germany: Control Council Act of Aug. 20, 1946, [1946] AMTSBLATT KONTROLLRAT 174, art. X. Under article II of the Act, an exception is made where the dispute "affects the interests of the Allied Occupation"; in that case the Allied Commander may direct the German authorities to require the parties to submit the dispute to an arbitration board.

<sup>115</sup> France: Law of Feb. 11, 1950, [1950] J. O. 1688, title II, c. II, § 8.

with compulsory arbitration as a general proposition. In the German constitutions the constitutional privilege is confined to strikes authorized by a labor union.

Also the Italian *magistrature del lavoro*, which had compulsory jurisdiction since 1926 in disputes "on interests," have ceased to exist since fascism's downfall. Naturally fascism had defined a strike as a crime but the constitution of post-Mussolini Italy approaches the concept of a strike (as does the *Préambule* to the post-war French Constitution) as a constitutional privilege, even though subject to statutory regulation.<sup>116</sup> The constitutional protection given to concerted work stoppages marks the natural reaction which could not fail to come after the collapse of dictatorial regimes which quite naturally had outlawed strikes.

In its turn, the popular attitude after the war did not content itself with the creation of those constitutional safeguards, and carried in France the right to strike far beyond the position given it in the pre-dictatorial era, when a strike was still regarded as a substantial reason for the termination of the employment relationship of the strikers.<sup>117</sup> The recent law of 1950 contains a provision that a strike does not terminate the job of a striker except when he is chargeable with very severe guilt.<sup>118</sup> It remains to be seen whether the French courts will exclude strikes for other than economic objectives from this far-reaching protection. If the courts include them, the calling of political strikes so frequent—alas—in France will be encouraged.<sup>119</sup>

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<sup>116</sup> Italy: CONSTITUTION art. 40 (1947). The qualification opens the gate to three types of limitations on the freedom to strike, the first running to requirements to be complied with prior to the proclamation of the strike, the second requesting participation in conciliation proceedings, and the third securing the continuous operation of services essential to the community. Cf. PERGOLESI, *DIRITTO DEL LAVORO* 44, 215 (1949). France: CONSTITUTION Preamble, clause 7 (1946). Wuerttemberg-Baden: CONSTITUTION art. 23 (1946). Hesse: CONSTITUTION art. 29 (1946). Wuerttemberg-Hohenzollern: CONSTITUTION art. 97 (1947). Baden: CONSTITUTION art. 38 (1947).

<sup>117</sup> ROUAST ET DURAND, *op. cit. supra* note 3, § 345 at 385.

<sup>118</sup> France: Law of Feb. 11, 1950, [1950] J. O. 1688, title II, c. I, art. 4.

<sup>119</sup> For the debate on this question see MALEZIEUX, *op. cit. supra* note 90, § 47.

In the light of the twentieth century history of European labor law, one notes that there is more than one method for a democratic government to overcome the evils inherent in strikes for objectives which are unrelated to employment matters, or in strikes which seriously affect the whole community. For example, the Norwegian and the Danish governments on various occasions when faced with greater strikes than could be settled through the usual means of conciliation or voluntary arbitration, have enacted legislation providing for compulsory settlement.<sup>120</sup>

The new French law of 1950 does not immunize a labor organization whose members are subject to collective contract standards from the responsibility of a strike authorized by it, even though the binding effect of the contract results from an extension decree and not from the organization's participation in or *adhésion* to the contract. Equally, a violation of the peace obligation may give rise to a damage action or to a right to rescind.<sup>121</sup> By German law even specific performance can be had, which amounts to a mandatory injunction, as we would call this type of decree. In France, by way of *astreintes*, which are penalties imposed in ever increasing amounts upon a recalcitrant obligor, an obligation of this type might be indirectly specifically enforced.<sup>122</sup>

On the other hand, the French and Italian law authorize a union to bring action against an employer on behalf of a member for violation of the standards fixed in the collective contract, for example, for paying substandard wages.<sup>123</sup>

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<sup>120</sup> For example, Norway: Law of May 5, 1927 authorizing the King to submit the dispute to compulsory arbitration at the request of the "State Conciliator." As for Denmark, see Galenson, *Some Aspects of Industrial Relations in Denmark*, in 2 INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, PROCEEDINGS, 1949, pp. 230, 239 (1950).

<sup>121</sup> French: Cour de cassation, May 1, 1923, S. 1923. 1.372.

<sup>122</sup> This is not expressly noted in the new French law of 1950 as it was for arbitral awards under the law of Nov. 12, 1938. ROUAST ET DURAND, *op. cit. supra* note 3, § 234, at 286.

<sup>123</sup> France: CODE DU TRAVAIL, Book I, title II, c. IV "bis", art. 31t. Italy: CODICE DI PROCEDURA CIVILE art. 411 (1940).

This is an important development in the law of collective contracts because, in the absence of direct union control, an individual employee might be loath to take a chance of losing his job by going to court with his employer.

### *Conclusion*

An article comparing characteristics representative of the two great legal systems in the world for a specific branch of law, can at most offer a very incomplete survey. To say more on the labor laws of France, Germany, and Italy would call for the writing of a voluminous book. Relatively few topics of the law of labor relations have been discussed, but they are subjects which have great significance at this economic and social stage of a world in confusion and change. In addition, they point to differences so glaring that they obviously contradict the Marxian theory of the universalistic effect of industrialism.

It is true, of course, that industrialism has created a great many phenomena which are similar, and even identical, on both sides of the Atlantic (disregarding, as this paper did, the law in countries subject to despotism). Such phenomena—to mention only a very few—are presented by the rise of labor organizations and their concerted actions, by the emergence of employers' combinations, by the establishment of collective contracts, by the struggle of industrial workers for participation in the formulation of managerial policies in order to safeguard their jobs as well as to secure a substantial share in the social product. This exemplification indicates a few of the problems with which every free industrial society is confronted.

This being so, the substantial differences in their legal treatment, which have been discussed, must be explained by differences in tradition, in national character, and in conceptual thinking, the latter difference being often attributable to historical and political currents and crosscurrents, as well



as ignorance. Using the word ignorance in this connection, one means ignorance of the political and legal institutions of other nations. No doubt, it is human inertia which keeps lawyers and legislators ignorant of foreign laws, and causes them to entertain no doubts that there is only one good legal system—their own. The study of comparative law is no easy task. But it is fascinating and its inspiration will greatly contribute to destroy instinctive prejudices, by *Aufklaerung*.

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