The Evolution of Industrial Relations Law in France since the Liberation

by

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During the Second World War industrial relations law was radically transformed in France, with the result that most of the rights won by employers and workers since the second half of the last century were suppressed. With the return of peace the pre-war principles were re-established one by one; but, whether in the field of collective agreements or in the settlement of industrial disputes, concepts and methods have nevertheless undergone a change.

In the present article Mr. Durand, who has written a number of works on the subject [1]*, traces the main trends of this evolution over the last decade.*

AMID the great body of labour law the law of collective relations holds a special place. Instead of affording direct protection to labour, it makes it possible for social groups to organise and smooths the relations between them, its function being similar to that of the rules that regulate political societies. In short, unlike the law governing individual labour relations, it bears the stamp of the prevailing ideology of a society and of a people's most deeply rooted characteristics. The development of the law governing industrial relations in France since the Liberation accordingly warrants close examination.

Before the Second World War the law governing collective relations was based, despite the absence of any comprehensive legislation, on a number of vital principles. The first was the right of all employers' and workers' organisations to regulate industrial relations as they saw fit ; the most remarkable mani-

[1] See, in particular, Vol. III of his *Traité du droit du travail* (Paris, Librairie Dalloz, 1956), published in collaboration with André VITU, Professor in the Faculty of Law of the University of Nancy, which deals with industrial relations law.

festation of this was the right of collective agreements to prescribe the contents of individual contracts of employment and thereby to create what amounted to a separate body of labour legislation. In the second place this law derived from the same principles as political democracy. It was liberal in character and took particular pains to safeguard the individual liberties and freedom of action of the members of each occupation. The principle of freedom of association and the limited authority of collective agreements over employers and workers are clear examples of this. The last characteristic feature of this law was the principle of independence from the State, which was particularly marked in the case of trade union law. It was only in the years immediately preceding the war, when the State extended its powers to regulate industrial relations and substantial privileges were granted to the unions recognised as being the most representative, that a new trend became apparent. But such changes as occurred were only minor.

With these underlying principles the law governing industrial relations rested on three institutions : *(a)* collective labour agreements (the legal status of which had been defined by the Act of 25 March 1919 [1] and which, under the Act of 24 June 1936 [2], could be extended if they were concluded by the most representative trade unions) ; *(b)* the right of strike and lockout, granted by the Act of 25 May 1864 ; and *(c)* conciliation and arbitration in labour disputes, which were made optional by an Act of 27 December 1892 and compulsory under the Act of 24 June 1936, already mentioned, and those of 31 December 1936 [3] and 4 March 1938.[4]

This system underwent far-reaching changes once hostilities began. Every war brings about an extension of the State's powers and in a planned economy the rights of employers' and workers' organisations are bound to be curtailed. A legislative decree dated 10 November 1939 [5] required the approval of the Minister of Labour for any new collective agreement. The same decree, supplemented by another dated 1 June 1940, gave the Minister complete power over wages ; a vital issue was thus removed from the province of the employers' and workers' organisations. Strict government control of the employment of labour, whereby some workers were placed in reserved occupations while others were directed into different jobs, restricted the right to declare strikes and lockouts. Lastly, a decree dated 1 September 1939 suspended the concilia-

[1] Cf. *I.L.O. Legislative Series* (hereafter referred to as *L.S.*), 1919 (Fr. 1).
[2] Ibid., 1936 (Fr. 7).
[3] Ibid., 1936 (Fr. 17).
[4] Ibid., 1938 (Fr. 1).
[5] Ibid., 1939 (Fr. 22A).

tion and arbitration procedure used in collective disputes, since in a planned economy conditions of employment could not be freely agreed between the parties or settled by an arbitrator who was not responsible to the authorities.

Even more far-reaching changes in the law governing collective labour relations occurred after the Armistice.

Under the influence of its corporative ideology, which was hostile to the unions and indeed to the class war in any shape or form, the Vichy Government tried in its Labour Charter to found a completely new social order. Strikes and lockouts were forbidden, labour courts were set up to deal with individual or collective disputes, while the unions were reorganised along new lines and relegated to a minor role in society. The key part in this system was played by the social councils set up in each branch of industry, one of whose chief duties was to negotiate collective agreements. All these bodies were placed under strict government control.

Needless to say, the Labour Charter was a failure. It proved impossible to breathe life into an organisation that ran so completely counter to the traditional French legal concept of collective relations and was imposed by a government that had antagonised the majority of the people by its policy of collaborating with the enemy. It was condemned by the National Resistance Council and abolished as soon as the Liberation occurred. Trade union law was restored and the principle of freedom of association was reaffirmed. Despite this, however, the Trade Union Act of 21 March 1884 is the only piece of pre-war legislation to survive. Nothing is left of the comprehensive legislation on collective agreements and conciliation and arbitration in collective disputes. A new legal structure has been created. The preamble to the Constitution of 27 October 1946 gave constitutional sanction to the strike. The law of collective agreements was amended by the Acts of 23 December 1946 [1] and 11 February 1950.[2] The latter introduced an innovation by ruling that strike action did not involve breach of a contract of employment unless the worker concerned was guilty of serious misconduct. Lastly, the conciliation and arbitration machinery was overhauled by the Act of 11 February 1950, and under the decrees of 5 May 1955 [3] and 11 June 1955 [4] a new mediation procedure was established.

Generally speaking, the law of collective relations is based on the same principles as before the war. The power of the unions

[1] *L.S.*, 1946 (Fr. 15).

[2] Ibid., 1950 (Fr. 6A).

[3] No. 55-478. *Journal officiel de la République française*, 87th Year, No. 108, 6 May 1955, p. 4493.

[4] No. 55-784. Ibid., No. 139, 12 June 1955, p. 5923.

over the workers in each trade has, however, been extended. Both the employers' and workers' organisations have become more chary towards the State, although the Government has retained certain powers, the most noteworthy of which is the right to fix the national minimum wage. But wartime legislation has left some mark and, moreover, within society at large, the relative bargaining power of the employers' and workers' organisations is no longer the same. Accordingly, although the law of industrial relations has now resumed its place in the direct line of tradition, it displays a number of new features in its treatment of agreements between organised capital and labour and of disputes between them and their settlement.

The Law of Collective Agreements

During the period following the Armistice and until the Liberation the trade unions were reduced to impotence. Any form of state regulation of working conditions gives wage earners the impression that they are unable to stand up for their rights against the employers. In addition successful collective bargaining wins the unions prestige with their members ; it gives the trade union movement a sense of purpose. The unions looked back longingly at the social gains they had achieved through collective bargaining. Comparing the conditions of the working class before and after the war, they attributed the fall in their members' standards to government regulation of working conditions. But at the same time the French economy immediately after the Liberation was in such bad shape that economic planning was essential and it seemed out of the question to allow the unions complete freedom. The Government was thus caught in a cleft stick. It had to revert to a " contractual system of employment " (in the words of the National Resistance Council) and at the same time to maintain the controls required by a planned economy and by the need to maintain the level of prices and the value of money. An attempt to reconcile these two needs was made by the Act of 23 December 1946, which allowed collective agreements to be negotiated but only under strict government supervision.

The Act of 23 December 1946

The 1946 Act restored the unions' right to conclude collective labour agreements, but subject to very different conditions from those prescribed by the 1919 and 1936 Acts. Only the most representative employers' and workers' organisations had power to conclude collective agreements. An order of priority was intro-

duced whereby regional and local agreements could only be negotiated after national agreements had been signed. There could be only one agreement in each branch of activity, and the authors of the Act, together with the manpower authorities, proposed to recognise only a small number of such branches. In each of the latter the agreement applied to all individual employment relationships and to all occupations. Lastly, the agreements applied to all establishments, and within these establishments to all employers and workers in the occupation and area concerned.

The Act of 23 December 1946 thus gave the most representative trade unions a great deal of power over all the members of the occupation concerned. On the other hand it also gave the authorities an equal amount of power over the unions. Two features were particularly significant in this connection. Firstly, as a provisional measure collective agreements were not allowed to contain any provision dealing with wages or fringe benefits. Secondly, each agreement had to be approved by order of the Minister of Labour. This order superseded the extension order making a collective agreement generally binding, which had been introduced by the Act of 24 June 1936, and the approval order introduced by the legislative decree of 10 November 1939.

In this way the Act of 1946 tried to reconcile two conflicting needs. But its theoretical success in achieving this aim was unfortunately not borne out in practice, and it remained virtually a dead letter and led to a breakdown of collective bargaining machinery. During the three years following passage of the Act barely a dozen agreements were signed. The seriousness of this situation can be gauged from the fact that some 8,000 agreements were concluded between 1936 and 1939.

The reasons for this complete failure, which is almost without parallel in the history of French social legislation, are worth analysing. They go deep and touch the foundations of the trade union movement. The failure was partly due to relations among the trade unions themselves regarding the selection of the most representative organisations. The General Confederation of Labour and the French Confederation of Christian Workers were at loggerheads not only with each other but also with the General Confederation of Executive Staffs. The position worsened still further after a split took place in the General Confederation of Labour and the General Confederation of Labour—*Force ouvrière* was formed. By a joint ruling given on 8 April 1948, the Prime Minister and the Minister of Labour tried to find a reasonable way out of the dispute. But this obstacle had hardly been overcome when a more serious difficulty arose in the relations between the trade unions and the State. The very rigid framework imposed on the negotiation of

collective agreements, the need for the approval of the Minister of Labour and the ban on the inclusion in collective agreements of clauses dealing with wages made it far more difficult to negotiate such agreements or else robbed them of some of their value. It will be noted, and this is the important point, that labour law in France is largely derived from government legislation. Thus, not only are statute law and customary law inevitably brought into competition with each other, but the large-scale growth of statute law constantly encroaches on the field of collective agreements. The breakdown in collective bargaining was to some extent the result of the unbalanced relationship between the trade unions and the State.

The failure of the 1946 Act, however, had another, more deep-seated cause. The breakdown of collective bargaining machinery was also due to a third set of relationships: those between the employers' organisations and the unions. The negotiation of collective agreements, and in particular the draft collective agreement for the metal-working industry, revealed how wide a gap existed between the unions' claims, especially those of the General Confederation of Labour, and the concessions that the employers were willing to make. It was found that the employers and workers were unable to agree on some 60 points. At bottom the dispute turned on two main questions, viz. the extension of trade union activities in undertakings and the cost of the workers' demands. There were so many fundamental points of difference, however, that negotiations over most of the agreements broke down and the intervention of the Minister of Labour provided for by the 1946 Act was without avail. Further legislation would clearly have been necessary even if it had not been precipitated by events. The purpose of the Act of 11 February 1950 was to meet this need.

The Act of 11 February 1950

The intention of the authors of this Act was simple—to scrap the system set up under the Act of 23 December 1946 and to revert to the law as it existed before the war. The Act sweepingly authorises all trade unions to negotiate collective agreements, although it does grant agreements concluded by the most representative unions the privilege of being extended, if appropriate, by order to the entire occupation. The characteristic feature of the 1950 Act is thus its complete break with the principles of the 1946 Act and its reversion to the principles of pre-war legislation. But human societies can never turn the clock back in this way. They always bear the imprint of institutions that have disappeared and of the experiences through which their members have passed. In

this way the law progressively becomes enriched from different sources and philosophies ; in its latest form, therefore, the law of collective agreements has certain new features.

Break with the Act of 1946.

The break with the Act of 23 December 1946 led to a far more liberal treatment of relations between the employers' and workers' organisations.

(1) The Act of 1946 only allowed for one type of agreement—that negotiated by the most representative employers' and workers' organisations. Once such an agreement was approved it applied to all establishments falling within its scope. The 1950 Act on the other hand provides for several types of agreement. First, ordinary collective agreements can be freely negotiated but are restricted to a section of the employees; on this point it reverts to the principle embodied in the Act of 25 March 1919. Secondly, the Act allows collective agreements to be negotiated by the most representative employers' and workers' organisations in the various branches of activity ; these agreements may be extended by order to cover all employers and workers in the branch concerned. Thirdly, works agreements may be negotiated between one or more employers and the delegates of the most representative trade unions in the establishments concerned. Lastly, wage agreements can be concluded between employers and the most representative trade unions without waiting for collective agreements to be signed ; such wage agreements are, however, only minor forms of the employer-worker relationship and cannot be extended.

(2) The Act of 1950 breaks with the 1946 Act in a second respect. The strict priority laid down in the latter has been abolished and a regional or local collective agreement can now be negotiated without waiting for the national agreement to be signed. This applies not only to ordinary collective agreements but also to those negotiated by the most representative organisations.

(3) In the third place the 1946 Act only recognised collective agreements of one kind, viz. those covering whole branches of economic activity, of which it was only proposed to recognise twenty-five or so, covering the whole of the economy among them. The 1950 Act retains the principle that collective agreements should be negotiated for whole branches when they are signed by the most representative organisations, but it avoids giving too broad a definition of the branch of activity. Ordinary collective agreements, works agreements or wage agreements may be concluded for a whole branch of activity, an industry, a trade or even an individual establishment or group of establishments.

(4) Lastly, the 1946 Act only allowed a single agreement to be concluded for all grades of staff. Here again the 1950 Act marks a distinct gain in flexibility. All collective agreements may now be negotiated for separate grades of staff (e.g. there may be one agreement for the wage earners and another, entirely separate, for the executive staffs). The only restriction is that these agreements may not be extended.

The break with the principles of the 1946 Act not only affects the relationship between the employers' and workers' organisations but also involves their relations with the State. The legal controls that curtailed the freedom of the employers' and workers' delegates and were the counterpart of the economic controls have also been swept away. The Act of 1950 abolished the need for approval by the Minister of Labour and restored to the employers' and workers' organisations the right to include wage clauses in their agreements. Collective agreements negotiated by the most representative organisations are even required to include provisions dealing with wages and bonuses for arduous jobs. They may, if so desired, contain other clauses dealing with special conditions of work and piece-work rates.

New Features.

The 1950 Act undeniably marks a turning-point in a trend that had been almost continuous since 1939. It abandons the former inflexible legal approach and reduces the powers that, owing to the war, shortages and the demands of economic planning, had been granted to the State ; but it does not mark a complete reversion to the pattern that had previously existed for so long, for it includes a number of new features which call for some analysis. These features can be related to certain general principles.

(1) In the first place, the framework within which collective agreements are negotiated has changed. In their practical effect on industrial relations the Acts of 1919 and 1936 were inseparably bound up with the compulsory arbitration procedures laid down between 1936 and 1939. It is true that the 1950 Act institutes a compulsory conciliation procedure, but it does not impose compulsory arbitration. As a result it is very uncommon for working conditions to be regulated by arbitration awards such as were made before the war when the parties could not negotiate a collective settlement or agree on the operation, interpretation or revision of existing agreements.

(2) The Act of 1950 has a second new feature in that it has kept some trace of the legislation passed in the years following 1936. It will be noted, first, that the scope of the legislation on collective

agreements is far wider than before the war. This is particularly true of agreements concluded by the most representative employers' and workers' organisations. The 1936 Act only allowed collective agreements to be extended in industry and commerce. The new Act also applies to agriculture, the professions, public servants, domestic servants, employees of savings funds and wage earners employed by non-trading corporations, trade unions and associations of any kind. The Act also applies to establishments whose workers are not subject to special statutory regulation through being employed by a publicly-owned undertaking. All these workers had previously been affected by the wages orders, and since wages were no longer fixed by the State the authors of the Act sought to give the workers another safeguard in the form of collective agreements. In the second place, the most representative employers' and workers' organisations have been given wider privileges. They not only sign collective agreements that may be extended but they may also conclude works and wages agreements. At the national level the privileges of these organisations deserve special note, since they are now entitled to negotiate regional and local collective agreements (whereas it was formerly decided either regionally or locally whether or not an organisation was representative). Thus a nationally representative organisation is empowered to negotiate any type of collective agreement, even if its regional or local organisation is weak. In the third place, collective agreements whether national, regional or local must, before they can be extended, regulate the conditions of all grades of worker. It is thus impossible to conclude a collective agreement of this type governing the conditions of only one grade. In this respect the new Act has preserved the principle laid down in 1946, the only exception being the right, once a general agreement has been signed, to negotiate supplementary agreements to it (or codicils to agreements dealing with individual grades). Such agreements define in detail the conditions of work of the grades concerned and are discussed by the delegates of the most representative trade unions. Naturally, they too can be extended. The last, but not the least important, relic of the intermediate legislation is the right of the State to fix the national minimum wage. This wage is fixed by order of the Council of Ministers on the detailed recommendation of the National Collective Agreements Board and in the light of the general economic position.

Development in the Theory of Collective Agreements.

This enduring influence of the legislation passed after 1939 is not the only reason for the distinctive characteristics of the

Act of 1950. A third and final factor has made itself felt—the development that has taken place in the theory of collective agreements. This can be summarised briefly as follows.

To start with, the members of the organisations that sign an agreement have lost the right given to them under the 1919 Act to repudiate an agreement by resigning from their organisation. The 1950 Act still makes it possible to repudiate the agreement before it is signed, but once this has taken place the contents are binding and cannot be evaded.

Even more important is a second rule laid down by the Act. When an employer is bound by a collective contract of employment its terms apply to all contracts concluded with him, i.e. he is bound to abide by these terms in dealing not only with members of the signatory unions but also with all the members of his staff even if they are non-unionists. In this way the unions are able to regulate the conditions of all workers in a given occupation and there is far more incentive to negotiate ordinary collective agreements than there was under the Act of 24 June 1936.

Thirdly, the contents of the collective agreements concluded by the most representative employers' and workers' organisations are far wider than those prescribed by the 1936 Act, for the reason that since 1936 additional legislation has been passed to deal with a number of questions, e.g. the position of shop stewards. The authors of the Act set out to compel the parties to settle a number of other problems in any new collective agreements they negotiated. Among the matters for which, under the Act of 1950, provision must be made are differentials, bonuses for arduous, dangerous or unhealthy jobs, special conditions for women and young workers, and works committees, particularly the financing of welfare facilities run by these committees.

Lastly, the national minimum wage is calculated on the basis of a model budget worked out by the National Collective Agreements Board. Thus for the first time there is a link between the level of the wage and the needs of the workers. Of course, the Government is not bound to follow the recommendations of the Board, but there can be no doubt that its opinions have had a definite psychological and political influence. It is of great importance that this idea of a minimum wage based on a working-class budget should have been embodied in French legislation.

The Present Position

Let us now compare the legal theory with social practice to see whether the Act of 1950 has suffered the same fate as its predecessor of 1946. The Ministry of Labour statistics on this point

give a conclusive answer: by 10 August 1956, 6,997 collective agreements had been signed. Thus the Act of 1950 had widespread practical results and this is undoubtedly one of its greatest merits. Nevertheless these figures require some interpretation. There is no need to pay any attention to the fairly large number of codicils (1,366), which merely supplement or amend a collective agreement. Taking the agreements as a whole a distinction should be drawn between the wage agreements, numbering 5,050, and collective agreements proper, numbering 581. It will be noted that wage agreements are far commoner; but despite their influence on living standards they are by no means equal in importance to the collective agreements, which are far wider in scope. But even the collective agreements proper vary in importance. They include 204 works agreements, 194 local, 70 regional and 113 national agreements. Thus there was wide coverage of the various branches of the economy by collective agreements. But the dominant impression remains that such agreements are difficult to negotiate at the regional and national levels and that in the majority of cases negotiations are carried out at the works or local level.

The number of collective agreements is not the only yardstick. It may also be asked how far recent agreements have contributed to the progress of labour law based on contract.

On analysis these collective agreements sometimes prove disappointing. In order to enlarge the scope of agreements negotiated by the most representative organisations French law makes it compulsory for quite a large number of clauses to be included; unfortunately it has ignored the technical difficulties involved in requiring the parties to contract an obligation. The result is that the parties insert certain clauses purely for the sake of form and either refer to current legislation or paraphrase its wording. Obviously clauses of this kind are of no significance.

On the other hand there is no need to be too pessimistic on this point, for the new agreements do mark a definite advance on the law in force before the war. For example, there are clauses which lay the foundations of what may be termed industrial constitutional law. Some of them deal with the exercise of trade union rights and safeguard the jobs of union leaders; some even provide for the posting up of union announcements. Commoner still are clauses dealing with shop stewards and works councils. Although they do not settle any essential problems they nevertheless supplement the statutory requirements on the subject and help to ease the task of representing the workers.

Of even greater interest are clauses prescribing working conditions. These regulate such matters as the trial period, wage scales and productivity. The agreement of the Renault automobile

works signed on 15 September 1955 contains an undertaking by the firm to raise wages by not less than 4 per cent. during each of the following two years in order to link earnings with the growth in the firm's efficiency ; the same undertaking is also found in a number of other agreements following the example of Renault. Other agreements try to link wages with the cost of living. Another type of provision regulates actual working conditions. It is common to find detailed clauses dealing with holidays with pay (the Renault agreement granted three weeks' holiday). Clauses are also found regulating transfers of workers within the firm and their pay when shifted in this way. Many provisions deal with the termination of the employment relationship in line with the persistent trend of French law to give the workers stability in their jobs. This concern can also be traced in the protection given to workers' jobs in the event of disciplinary action, the requirement to pay a dismissal indemnity after a certain length of service and the priority given to former employees when re-hiring takes place. Nor has the impact of the policy of productivity on employment been neglected. Lastly, there are clauses dealing with certain special circumstances such as the position of research workers with regard to patents and of employees who have bound themselves not to work for a competitor.

Clauses regulating the relationship between the signatory organisations to an agreement are less common. The most important should be those dealing with the settlement of collective labour disputes, but although it is quite common to find provisions calling for conciliation in the event of such a dispute—this being compulsory by law—it is quite exceptional to find any clause arranging for disputes to be taken to arbitration.

Recent agreements can hardly be said to have revolutionised industrial relations. They have nevertheless brought about undeniable progress in French industrial law and it is significant that they have paved the way for the statutory extension in the length of holidays with pay. A new type of interaction between collective agreements and legislation thus emerges : a collective agreement grants benefits to certain wage earners in certain occupations and these benefits are then made general by legislation. To quote Mr. Albert Gazier, Minister of Social Affairs, during the parliamentary debate on the Holidays with Pay Act, which was passed on 27 March 1956—

> The Government has undertaken to extend to the whole economy the agreements that were recently signed in certain branches of industry and in certain large firms . . . . It was difficult to decide which of the many agreements that have been concluded in recent months should be chosen as a model for the new Act . . . . The Government has followed one of the

best of these, the much publicised agreement between the Régie Renault and the major trade unions, to which even the non-signatory unions have asked to become parties.

The 1950 Act and recent practice have between them managed to set the collective bargaining machinery running again, but it must be admitted that all is not well with the general structure of industrial relations and that the underlying causes of the failure of the Act of 1946 have not completely disappeared. As far as relations between the trade unions are concerned it is true that the procedure for ascertaining the most representative trade unions has been laid down by law since the Liberation. It is also true that a very great effort has been made by industrial organisations to free themselves of state supervision. But the authorities still wield extensive powers. The Minister of Labour, for example, has discretion to extend a collective agreement or to rescind his order extending it. Above all the Government has the power to fix the national minimum wage by order and is not bound by the recommendations of the National Collective Agreements Board. Moreover, the State has continued to pass legislation on industrial relations and these encroachments by statute law are steadily tending to reduce the scope of collective agreements. With regard to the third type of relations—those between the employers' and workers' organisations—it is obvious that the law merely acts as a framework within which these relations operate but that it cannot by itself create understanding between the parties. The divergences between employers and workers are still a major obstacle in the way of collective agreements. As the purpose of the latter is to improve industrial relations, they should mark a step forward by the workers and can only come about when the balance in industrial relations has been tilted in the workers' favour. This was, in fact, the case during the social crisis of 1936 ; today, however, the position is totally different and for various reasons, which it would not be difficult to analyse, the workers in recent years have lost ground to the employers. Nevertheless, during the second half of 1955 a number of new collective agreements were signed as a result of the efforts made by the manpower authorities to bring persuasion to bear, the setting up of mediation machinery, the abandonment by the unions of certain claims regarding their activities which had been partly responsible for the failure of the negotiations held under the Act of 23 December 1946 and, lastly, the number and severity of the strikes that took place during the summer of 1955. In late years the strike has been used as a weapon to overcome the opposition of managements and its effectiveness has been increased still further by the protection now afforded to the employment relationship. While the effects

of this evolution of the law are marked enough in the realm of collective labour agreements, they are even more striking in the theory of collective disputes, as it concerns both the legal status of combinations and the procedure for the settlement of disputes.

The Law of Collective Labour Disputes

The Right to Strike

When war broke out in 1939 the law of collective labour disputes was characterised by the almost unqualified principle of freedom of direct action (strike and lockout). However, in the first place both legal theory and the lower courts ruled that the right to strike existed as long as its purpose, viz. to safeguard occupational interests, was fulfilled and that political strikes were therefore unlawful. Secondly, French law forbade unlawful means to be used to further the purpose of a strike and the criminal code made it an offence to obstruct an individual's freedom to work. Any offences committed in the course of a collective dispute could be dealt with under criminal law.

Within these limits freedom to strike enabled the workers to make substantial social gains. In striking, however, they still ran some risks for it was consistently ruled by the *Cour de cassation* that by doing so they were breaking their contracts of employment. Advocates of new legal theories based on a closer analysis of the collective phenomenon constituted by strike action and more in line with the teaching of experience argued in vain that contracts of employment were only suspended during a strike. A few half-hearted attempts were made by the *Cour de cassation* to mitigate the effect of its principle that a strike involved a breach of contract. On the other hand the theory that the contract was only suspended was wholeheartedly accepted by the National Arbitration Court in its rulings regarding the settlement of collective labour disputes.

The juridical status of strikes and their effect on contracts of employment ceased to be an issue during the period of the Armistice as the Labour Charter prohibited all strikes and lockouts. Moreover, the strict controls on employment and the harshness with which the occupation authorities put down any organised stoppage of work made them quite impracticable.

With the Liberation there was a complete change. Attempts to disorganise the enemy's defence during the final weeks of the Occupation, the exhilarating return of freedom after years of oppression, the persistent failure of wages to catch up with prices and the desire of some trade unions to support the Communist Party, which had been ousted from the Government, resulted in waves

of strikes. Just as the practical setting changed so did the legal basis of the right to combine. The Vichy legislation was repealed and the preamble to the 1946 Constitution contains the curious formula that " the right to strike shall be exercised as may be regulated by law ", by the ambiguity of which an attempt was made to reconcile conflicting needs. But this formula at least had the advantage of stressing the problem of regulating strikes and, by giving constitutional sanction to the right to strike, of bringing about a reversal of the rulings handed down by the *Cour de cassation* regarding the effect of a strike upon a contract of employment.

In the main this latter question has now been settled. The courts were soon called upon to deal with the strikes that took place after the Liberation but, whereas their rulings before the war had been broadly in line with the views of the *Cour de cassation,* after the war they were almost unanimous in asserting that a strike only entailed suspension of a contract of employment, unless the strikers had abused their rights. This interpretation, which tallied with the previous rulings of the National Arbitration Court, was also in harmony with the preamble to the Constitution. How could the exercise of a constitutional right be held to be an offence on the part of the strikers or a breach of their individual contracts of employment ? The existence of this clause in the preamble to the Constitution inevitably led the *Cour de cassation* to accept the principle that the contract of employment was only suspended.

The position was clarified still further by the Act of 11 February 1950, section 4 of which states that " a strike shall not put an end to any contract of employment, unless the employee is found guilty of serious misconduct ". Generally speaking, therefore, a strike no longer entails breach of contract of employment except when the employee is guilty of serious misconduct.

Unfortunately, it is the fate of legal rules to give rise to new disputes in settling old ones. What exactly is serious misconduct ? If such misconduct is committed, in what way does the breach of contract take place ? Is the contract of employment automatically broken by the strikers or does the commission of serious misconduct merely entitle the employer to terminate the contract (while being at the same time naturally relieved of the obligations normally imposed on the person responsible for termination) ? But these difficulties are only secondary compared with the main problem, viz. the legal definition of a strike. Does a go-slow, a lightning strike or working to rule legally constitute a strike ? Should a minimum number of wage earners take part in a strike ? What of those wage earners who stay out after the majority have gone back to work ? Have the definitions of a " political strike "

and a " sympathy strike " any legal foundation ? Should not a distinction be drawn between a strike on the one hand and *force majeure* or discharge from liability by breach of the contract by the other party ? These problems are not of course new, for they were becoming apparent before the war. As the strike at that time involved breach of contract of employment, the trade unions advocated a restrictive interpretation of strikes in order to safeguard their members' jobs. Since the 1950 Act a similar line has been adopted, this time by the employers, who are anxious to avoid the inconveniences associated with the suspension of a contract of employment. The rulings of the *Cour de cassation* appear to be tending towards this very narrow interpretation of strike action. One important verdict concerning go-slows states " that there is no stoppage of work when such work is carried out slowly " ; another asserts that " while the right to strike allows an employee to suspend his contract of employment without breaking it, it does not authorise him to perform his work other than as specified in his contract or practised in his occupation ".

The same desire to circumscribe the principle of freedom to combine is also apparent in the regulations governing strikes. The wording of the preamble to the Constitution implied that legislation would be enacted under the Fourth Republic to regulate strikes. So far this has not been done, but this should not surprise those who are familiar with the difficulties encountered by every country in regulating the right to strike. Nevertheless the idea is gaining ground that the laws and decrees of the Third and Fourth Republics, together with the general principles of French law which are considered to be the sources of our positive law, do in fact constitute regulation of the right to strike. The lower courts have tended to follow the *Cour de cassation* in treating political strikes as illegal. Above all the courts have clearly felt that in safeguarding their own interests strikers must defer to the interests of the community at large. The former complete ban on strikes in public utilities has been withdrawn ; but the *Conseil d'Etat*[1], which imposed it, soon added the rider that " recognition of the right to strike in no way invalidates the restrictions imposed on this as on any other right in order to prevent abuse or its exercise in a way detrimental to law and order ". If the Government is responsible for the running of a public utility it can itself impose restrictions on the right to strike. Subject to approval by the administrative courts it can forbid a strike which would make it impossible for vital public business to be discharged. Moreover, the Government can break any strike in essential services by

[1] The highest administrative jurisdiction.

issuing an injunction, provided that this only covers those members of the staff who are absolutely necessary to keep the service running.

Lockouts

In this development in the law of collective disputes, lockouts have not been passed over. For many years the legal position of lockouts was virtually ignored and it was thought that the law as it affected strikes was equally applicable to lockouts.

But a change has taken place. It is certainly incorrect to assert, as is sometimes done, that lockouts have become illegal and even that they constitute interference with freedom to work. But an analysis of the sociological and moral factors involved clearly shows the distinctive character of the lockout and the impossibility of treating it in the same way as the strike. The preamble to the Constitution sanctions the right to strike but does not mention the lockout. The latter certainly cannot involve suspension of the contract of employment, for the result would be to force workers to remain in the employer's service and to be ready to resume work whenever he wished unless they ended their individual contracts of employment. This hardly seems acceptable and one is forced to conclude that the lockout, unlike the strike, must be interpreted as a breach of the contract of employment by the employer. This interpretation makes him liable to pay compensation for loss of wages if he fails to observe the regulations governing the termination of the contract. There is a possibility that the evolution of French law will in time define the limitations of the lockout more clearly. There have already been a number of Bills to curtail its use, but none has so far reached the statute book. Nevertheless, they do suggest that there will be a steady divergence between the interpretations given to the lockout and the strike.

The Settlement of Disputes

While the legal treatment of the effects of strikes and lockouts is better and more realistic than before the war, the approach to collective disputes appears to mark a definite step backwards. The compulsory conciliation and arbitration procedures which were suspended at the beginning of the war were not restored by the Act of 23 December 1946. Re-establishment of machinery for the settlement of disputes was only contemplated when the Act of 11 February 1950 was framed but it was by no means the same as that set up under pre-war legislation. The employers' and workers' organisations themselves were determined to reduce state intervention in industrial relations, while the consecration

of strike action by the preamble to the Constitution greatly weakened the effectiveness of these procedures.

Arbitration.

The Act of 11 February 1950 only set out to provide voluntary arbitration in collective disputes and it hardly even troubled to ensure that it was efficient. In practice neither party has availed itself of it and the highest body to be set up, the National Arbitration Court, which acts as a court of cassation, has only rendered five decisions in its five years of existence. The disappearance of the compulsory arbitration machinery is a matter for regret. Disputes arising out of the negotiation of collective agreements have remained unsettled, and the operation of works councils has been cramped by the very strict and incomplete regulations laid down in the order of 22 February 1945 instead of being allowed to develop under the guiding influence of a series of equitable awards. Last, but by no means least, the need to settle certain collective disputes has sometimes meant that arbitration has been left to the labour inspectorate ; thus civil servants, together with the Minister to whom they are responsible, have been granted the formidable power of acting as judges.

Conciliation.

The conciliation machinery, on the other hand, is compulsory but its failure has not been any the less complete. By 1 August 1956, 839 disputes had come before the conciliation boards : 25 before the national board, 270 before the regional boards and 544 before the departmental panels. But, since there were over 10,000 disputes in the period following the passing of the Act of 11 February 1950, it will be seen that only a very small proportion were submitted for conciliation. Moreover, the proportion of failures was also high. The boards reported deadlock in 567 disputes, while in three other cases they did not consider themselves to be competent. Partial conciliation took place in 59 disputes and complete success was achieved in only 210.

The Act of 11 February 1950 thus made it possible to settle a certain number of disputes and it must at least be allowed this merit. The fact remains, however, that a very small number of disputes were dealt with through this procedure even though it was supposed to be compulsory, and moreover, the number of cases of agreement is trifling compared with the total number of collective disputes. In addition, the number of disputes taken to conciliation fell off sharply after 1952, as did the number of agreements reached.

There are two reasons for this. The first is the state of the relations between employers and workers. If conciliation is successful it should result in the signature of a collective agreement, but this has been prevented by the irreconcilability of the views of employers and workers. Some conciliation boards have, in fact, deplored the uncompromising attitude of certain employers, some of whom have refused to appear before them.

The second reason is due to the defects of the conciliation machinery itself. There is often too long an interval between the outbreak of a dispute and its submission to a board. There are no penalties to compel recourse to the conciliation procedure or to punish refusal to appear. Furthermore, the composition of the conciliation boards does not help towards the settlement of disputes. They are composed in the main of representatives of employers' and workers' organisations. This idea would have worked in a setting of small-scale capitalism where a labour dispute involved an individual employer and his workers, and the employers' and workers' organisations who were not direct parties to the dispute could make helpful proposals. But in the modern economy the employers' and workers' attitudes are decided by powerful trade associations or unions and since the Liberation these organisations have had greater control over their members than ever. If the dispute is the outcome of decisions taken by these organisations, how can it be expected that their representatives on the conciliation boards will be able to help in settling a dispute for which they are themselves responsible ? Lastly, the members of the boards are often poorly informed about disputes. Each party states its case and members of the boards are unable to check their allegations or to make worthwhile proposals for an agreement. Sometimes, however, it must be admitted that the boards have made recommendations to the parties which have later served as a basis for agreement.

These shortcomings point the way to the kind of reforms needed in the conciliation procedure. There should be penalties for failure to appear and the representatives should, by law, be empowered beforehand to conclude an agreement. Above all, the task of conciliation should be vested in a different type of body and the members of the board should have opportunities of finding out the facts for themselves so as to have a clearer insight into the dispute and to be able to weigh the claims put forward by each party. Lastly, it would be desirable to encourage the practice of making recommendations if conciliation itself should fail.

A number of Bills have been drafted along these lines ; one of them, presented by two members of the National Assembly, Mr. Meck and Mr. Bacon, made provision in the conciliation

procedure for obtaining an expert opinion. If conciliation failed an expert with wide terms of reference would be instructed to make a report containing a recommendation for the settlement of the dispute. Both the report and the final recommendation would be published. The chairman of the conciliation board would then call the parties together once more and the board would try to reach an agreement on the basis of the expert's conclusions.

These Bills have not yet passed into law but the idea behind them was embodied in the labour code for the overseas territories, in which, for the first time, provision was made for an expert opinion, including a recommendation, which is communicated to the parties and becomes binding unless the parties express their opposition.

While this development was taking place, the trade unions, or at least the Christian trade unions, showed an interest in the American practice of appointing a fact-finding board of prominent individuals to make a thorough inquiry in order to settle major industrial disputes.

Under the influence of this shift in opinion, the Ministry of Labour drafted a Bill setting up a fact-finding and conciliation procedure for all collective industrial disputes. This idea was taken up a few months later by Mr. Bacon, who was by then Minister of Labour and had been one of the sponsors of the Bill dealing with conciliation procedure mentioned above. He incorporated it in the Act of 14 August 1954 which granted the Government special legislative powers. As a result a mediation procedure was introduced into French law by the decree of 5 May 1955.

Mediation.

As this procedure is intended to be quite separate from conciliation and from compulsory arbitration in collective disputes, the best way of bringing out its originality is to compare it first with conciliation and then with arbitration.

(a) *Distinction between Mediation and Conciliation.*

The mediation procedure forms part of the general machinery for the settlement of collective disputes which was set up by the Act of 11 February 1950. It may be employed not only in industry and commerce but also in agriculture or the merchant marine. It also applies to collective disputes in publicly-owned undertakings whose staffs are not subject to statutory regulation, e.g. in the nationalised banks whose employees are not covered by the bank staffs' collective agreements.

If we compare conciliation and mediation within this general

framework we find that they differ in three ways—the type of dispute with which they deal, the authorities responsible for settling collective disputes and lastly the functions of the conciliator and the mediator. Mediation thus appears to be a quite separate procedure from conciliation although this idea should not be pursued too far as there are certain affinities between the two types of machinery.

(1) In the first place mediation at the present time differs from conciliation in its scope. The conciliation procedure must be set in motion to settle all collective labour disputes irrespective of their purpose and of whether they are legal disputes or economic disputes. The decree of 5 May 1955, on the other hand, only refers to disputes concerning wages and fringe benefits. This is because the decree was issued under the Act of 14 August 1954 which curtails the Government's legislative powers and authorises the Government to issue special regulations for the improvement of purchasing power and earnings. But there is some regret in trade union circles that the mediation procedure should have been limited in scope in this way instead of being used for the settlement of other collective disputes. The criticism is a fair one and in fact it must be feared that, as at present constituted, mediation will not lead to the settlement of many disputes.

Moreover, mediation is more restricted than conciliation because it deals only with disputes arising out of the negotiation, revision or renewal of collective agreements and wage agreements. In other words, it deals only with economic disputes and does not touch legal disputes arising out of the operation or interpretation of clauses in collective agreements. The distinction is a natural one since a legal dispute must be settled at law in accordance with the collective agreement and not merely on the recommendation of a mediator. Every legal dispute must be ended by an enforceable verdict.

Yet another difference sometimes distinguishes the two procedures. The decree of 5 May 1955 only submits national, regional and local disputes to mediation. The implications of this restriction become apparent only if we look at the special provisions for the settlement of disputes in individual undertakings. The Minister of Finance was anxious that these disputes should be excluded, as he feared that it might otherwise be easy to secure wage increases in the most prosperous firms which would then steadily spread throughout industry as a whole. The decree does, however, empower the Minister of Labour to set the procedure in motion in individual enterprises if the seriousness of the dispute and the number of workers involved warrant. There have been ten instances in

which he has considered mediation to be justified in the public interest.

(2) Secondly, conciliation and mediation rely upon a different authority to settle disputes. Conciliation is in the hands of a board that is largely composed of representatives of the employers' and workers' organisations. Mediation, on the other hand, is conducted by an individual. The decree of 5 May 1955 states that mediators must be chosen for their personal standing and experience in economic and social matters. A supplementary decree stated that they may be chosen from the senior staffs of certain public bodies. The national, regional, departmental and local lists of mediators have been compiled by the Minister of Labour. They include lawyers (professors of law faculties, members of the *Conseil d'Etat* or the *Cour des comptes* and members of the judicature), members of the technical staffs of the Government or the nationalised industries, and lastly members of the *Conseil économique*. However, owing to the type of disputes submitted to mediation the Ministers have mainly chosen technical experts who, by the nature of their work, are familiar with the difficulties encountered in industry and themselves often take part in wage negotiations.

By thus calling upon the staffs of public bodies, the authorities have avoided creating and paying a special group of full-time officials engaged in mediation, and have kept the fees payable to mediators at quite a low level. This system is workable provided the number of disputes taken to mediation is not very great. Otherwise it will be difficult to ask officials who already have their own work to do to carry out mediation as well—a point which had already been made about arbitration before the war. If the scope of mediation is to be extended, however, it will certainly be necessary to set up a special body to deal with the settlement of collective industrial disputes.

(3) Lastly, mediators differ from conciliators by virtue of their functions. The members of a conciliation board try to reconcile the parties' points of view, but they only examine the dispute as presented to them by the parties and are unable to check any of the allegations made. The mediator on the other hand has considerable discretion. He inquires into the financial position of the firms involved and into social conditions among the workers. Both parties make him a report containing their comments. He can request the information he needs from the firms and trade unions, he is entitled to require the parties to produce any document or facts and he can also call in any person likely to be of assistance to him, including accountants. He can hold such hearings as he thinks fit, and request the parties to appear personally if necessary. The mediator can

thus obtain a thorough grasp of the position in any particular branch of industry, although at the same time he is bound to secrecy.

This clearly shows how the mediation procedure differs from conciliation. Nevertheless it would not be quite true to say that there are no similarities between the two.

The mediation procedure is similar to conciliation in its initial stages, and can begin in three sets of circumstances. It may be employed at once if both parties agree, and in this case, being more effective, it takes the place of conciliation. It also occurs if the conciliation procedure fails and it can be set in motion at the request of one or other of the parties or by order of the Minister of Labour. Lastly, it may be set in motion in serious disputes affecting an individual firm, but only by order of the Minister of Labour himself. In practice mediation usually takes place when conciliation fails. A report is made to the chairman of the conciliation board stating the points subject to dispute ; the chairman adds his own personal comments to this report and forwards the file to the Minister of Labour, who places it in the hands of the mediator.

Another respect in which mediation resembles conciliation is the practice of making a fresh attempt at conciliation after the mediator has finished his inquiry but before he winds it up by making his recommendation. This idea was suggested in a circular issued by the Minister of Labour. " Before framing his proposals " said the Minister " the mediator must try to reconcile the two points of view and to bring the parties to agreement. This is the chief aim of the Act and it is only when his efforts fail that the mediator should put his proposals to the parties with a view to settling the dispute." This suggestion has generally been welcomed. The mediators are not directly involved in the dispute as are the representatives of the employers' and workers' organisations who sit on the conciliation boards. Their authority is greater and the fact that the parties are unaware of the mediators' intentions is itself an incentive to come to an agreement. If this further attempt at conciliation fails the mediator submits his proposals to the parties in the shape of a reasoned recommendation with a view to settling the dispute. This recommendation forms the last stage in the procedure and recalls the award by which an arbitrator ends a collective industrial dispute. It remains to analyse the distinctive character of the recommendation and the relation between it and the arbitration award and between mediation and arbitration.

(b) *Distinction between Mediation and Arbitration.*

The form taken by the mediator's recommendation is not prescribed by any decree. In some cases it has been given orally,

but normally it is written. As a rule, it is drafted like a judicial decision, although some mediators submit their recommendations in the form of a report or a short memorandum. The recommendation is then notified to the parties. Mediation is thus similar to an arbitration award, but the difference between the two procedures is that the recommendation is only binding if the parties agree to accept it. The procedure finally leads to a collective agreement and in fact the mediator has sometimes been called an "industrial relations adviser". Thus in the last resort the recommendation forms part of the collective bargaining rather than the arbitration machinery.

Should the procedure fail the mediator allows 48 hours to elapse, this being the maximum time granted to the parties to make up their minds whether or not to accept the settlement. He then makes a report to the Minister of Labour and attaches his recommendation, which may be published either in the *Journal officiel* or through modern mass communication media such as the press or the radio. In other words the effectiveness of the mediator's proposals ought to depend on the degree of public support for his recommendation. In practice, however, publication in this way has never yet been authorised, although it is not clear whether this is because the Minister is afraid of undermining the institution itself by antagonising the party that refused to accept the recommendation or because he feels that a recommendation to which both parties do not agree is of little value.

The difference between mediation and compulsory arbitration is thus apparent. In one case an award is made which has the same authority as a judicial decision and is *inter alia* enforceable; it could for instance render a strike or lockout illegal. In the other case the effectiveness of the recommendation depends entirely on the goodwill of the parties, and cannot prevent either a strike or a lockout.

But the position changes considerably if arbitration in collective disputes is voluntary; this was introduced in France by the Act of 27 December 1892, which has since been repealed, and what is now called mediation is not fundamentally different from voluntary arbitration in collective labour disputes. If the parties are at liberty not to abide by the award, what difference is there between mediation and voluntary arbitration? An unenforceable award is nothing more or less than a recommendation and the idea of giving publicity to the award in order to ensure compliance is found as early as the Act of 1892. It should, however, be added that mediation in its present form differs considerably in spirit from the voluntary arbitration introduced by that Act. The mediator appointed by the Minister of Labour is a prominent individual, who has been included in the list with the approval of the employers' and workers' organisations. This was not true of the arbitrators

who could formerly be appointed by the president of a civil court. Over the past half century the employers' and workers' organisations have become powerful forces able to give strong backing to their members and they now play an important part in the inquiry into a dispute, while at the same time public opinion is more alive to social problems. But these differences, although important, are social rather than legal.

(c) *The Effectiveness of Mediation.*

Although mediation is only a recent institution, its effectiveness can already be reasonably assessed. By 1 August 1956, 59 disputes had been submitted to mediation, two of them national, 47 regional or local and ten in individual undertakings. Mediation was completely successful in 31 disputes and partially successful in six. These figures are low compared with the total number of disputes and they explain why the Minister of Labour has refused to set the mediation procedure in motion when requested by only one of the parties. Indeed it would have been pointless to do so against the will of the other party, since the recommendation has to be accepted by both parties if the procedure is to succeed. But the number of successful mediations is considerable compared with the number of awards made since the 1950 Act. Above all the proportion of successes is great and there can be no doubt that mediation has proved its usefulness. The reversal of the employers' attitude towards mediation is significant. Their early hostility was disarmed by the results obtained during the social strife of the summer and autumn of 1955.

The decree of 5 May 1955 may, however, mark only one stage in the development of French law. An attempt is being made by the Minister of Labour to enlarge the scope of the procedure and to add to the mediators' powers; and, moreover, there are marked differences between the decree and the Bills now before Parliament. Neither the trade unions that inspired these Bills nor the political parties that tabled them appear to think that the decree has made them unnecessary. Parliament will have an opportunity of improving the existing procedure in the light of practical experience unless of course the hostility towards arbitration weakens (as there are signs that it will) and the National Assembly takes the view that arbitration, at least to a limited extent and in certain cases, is the best way of settling collective industrial disputes.

Conclusion

This account of the evolution of French industrial relations law helps to give a picture of its achievements and setbacks. It must be admitted that French practice has not yet succeeded in creating

smooth employer-worker relations in industry. The negotiation of collective agreements is still difficult, the problem of the regulation of strikes has not yet been properly dealt with, and the conciliation and arbitration procedures have as yet only given meagre results. Against this, however, we must set the fact that collective agreements now amount to nothing less than an industrial code of law with increasing authority over the members of each occupation ; the principle that the contract of employment is only suspended safeguards the workers' right to strike ; the need to reconcile the exercise of this right with the public interest is now better appreciated ; the frequently unfair practice of lockouts seems to be declining ; and the new procedure of mediation has been introduced.

Provided that an improvement takes place in the social setting in which the powerful forces of capital and labour meet, few technical changes would be needed, apart from a return to compulsory arbitration, to achieve a satisfactory system of industrial relations in France.