are irrelevant. Their impact can, however, strange as it may at first seem, be measured only by their negative consequences, the everyday implications of a 'freely' established employment relationship as well as an ever more complex re-regulation and re-corporation. Irrespective of their specific motives, the statutes aiming for a progressive shortening of working hours, a lessening of health and safety risks, and continuous improvements in training, as well as the corresponding collectively agreed conditions of employment, mark the stages along the employee's journey from 'persona miserabilis'[73] to a self-reliant individual. However paradoxical it may therefore sound, the very principles that made labour a commodity, and so established and consolidated the employees' subordination, set in motion a development that ushered in the preconditions for restoring their autonomy.

As long as these provisos are taken into account it is both convincing and correct to state that neither the quest for a system of rules governed by the liberty of contract and the freedom of industry nor the reactions to its consequences are typical or even unique features of a particular national law. On the contrary, none of these developments can really be understood unless the ever present insistence on the uniqueness, for whatever grounds, of the various national laws is abandoned. A comparative analysis intentionally going beyond the frontiers of a purely formal collection of statutes and decisions, especially if based on a thorough examination of the economic and political background, is thus both an antidote against an often historicist sublimation of the differences between national laws and a constant reminder that they are ultimately no more than alternative answers to common questions. It is in exactly this sense that the comparison is an indispensable tool for a better understanding of any national approach.

[73] M. Rood, 'Labour Law in the 21st Century', in Lord Wedderburn, M. Rood, G. Lyon-Caen, W. Däubler, and P. van der Heijden, *Labour Law in the Post-Industrial Era* (Aldershot, 1994), 83–92, 89.

9

Industrial Tribunals and the Establishment of a Kind of Common Law of Labour in Nineteenth-Century France

Alain Cottereau

Industrial tribunals (*conseils de prud'hommes*) are a little-known French institution, not merely in international comparative social history but even in French social history. There are many reasons for this lack of interest, starting with a wide variety of ideological rejections. The distrust of the law once prevalent among working-class and Marxist movements in France consigned to oblivion a device of social relations based on the ideal of justice and conciliation. The mainstream of economic liberalism also avoided taking an interest in an institution for regulating social relations whose success did not fit into the *laissez-faire* framework. The traditions of paternalism likewise took no interest in it, because mediators belonging to the *notables* were ruled out by the fact that employer and worker *prud'hommes* were appointed by direct election. However, the most decisive reasons for the underappreciation of industrial tribunals were not external. From the outset, they were linked to the very mechanics of the institution's functioning. The fact is that during the nineteenth century, the operation and success of industrial tribunals required them to occupy a unique position, separate and distinct from both public institutions and private arrangements; the device, based on individual conciliation of conflicts, mobilized the opinions of the occupational milieux of employers and workers and invited them to work out a collective consensus while eschewing publicity and overt collective representation. Following this original logic of limited publicity, a kind of customary or common law, never formulated in terms of principle, administered on a day-to-day basis, was established and maintained on the margins of, and occasionally

in conflict with, the prevailing system of French law. This exclusion from the national public sphere formed part of the system of industrial-tribunal law, which helps to explain why, until recently, so little interest was taken in it.

The originality of the status of this labour law dispensed by the industrial tribunals leads me to refer in my title to 'a kind of common law'. My use of the Anglo-Saxon term is provocative and must clearly not be taken too literally. But it does draw attention to certain features of the establishment of this labour law, far removed from the kind of *légicentrisme* that had been in place in France since the Revolution and closer to a typically English kind of law as seen through continental eyes: a law constituted essentially by judicial decisions, developing on a case-by-case basis, rationalizing itself by using precedents, and appealing more to common sense and the sense of justice than to the interpretation of statutory texts when it came to justifying its legislative activity.

This essay will outline the content and operation of this French labour law by drawing a comparison with English employment law during the same period, the first two-thirds of the nineteenth century. On the French side, the essay draws on studies carried out over the last fifteen years of industrial-tribunal records and various other records, often unknown or unclassified at the time when they were studied. There are few publications based on examination of actual decisions of industrial tribunals. As a result, the evidence cannot, so far as France is concerned, be supplied in terms of detailed references to published works and available sources.[1] By contrast, as regards comparison with England, I

[1] Where this essay does not refer to a particular source or publication, it is based on my investigations of the records of industrial tribunals. The chief publications are as follows: a general outline of the institution of the industrial tribunal and of the investigation is given in Alain Cottereau, 'Justice et injustice ordinaire sur les lieux de travail d'après les audiences prud'homales (1806–1866)', *Le Mouvement social*, 141 (Oct.–Dec. 1987), 25–61. Since then, research has widened to include some fifteen industrial tribunals and has brought to light fresh records, though without altering the broad lines laid down in 1987. This special issue of *Le Mouvement social* includes two other articles based on first-hand research: Paul Delsalle, 'Tisserands et fabricants chez les prud'hommes dans la région de Lille-Roubaix-Tourcoing (1810–1848)', 61–80, and Heinz-Gerhard Haupt, 'Les Employés lyonnais devant le conseil de prud'hommes du commerce (1910–1914)', 81–100, as well as articles by jurists based on secondary legal sources. A contribution in A. Cottereau and P. Ladrière, *Pouvoir et légitimité: Figures de l'espace public* (Paris, 1992), focusing on the 'public sphere' (*espace public, Öffentlichkeit*) also throws some light on industrial tribunals. A more specialist publication, Alain Cottereau, 'L'Embauche et la vie normative des métiers durant les deux premiers tiers du XIX^e siècle français', *Les Cahiers des relations professionnelles*, 10 (Feb. 1995), 47–71, studies a segment of labour law governed by industrial tribunals, *marchandage* or face-to-face bargaining. An essay in English, Alain Cottereau, 'The Fate of "Fabriques Collectives" in the Industrial World: The Examples of the Silk Industries of Lyons and London, 1800–1850', in C. Sabel and J. Zeitlin (eds.), *Worlds of Possibilities: Flexibility and Mass Production in Western Industrialisation* (Cambridge, 1997), 75–152, compares the economic regulation exercised by the Lyon industrial tribunals with the deregulation exercised during the same period in London's silk trade.

rely on published social history and reports in the *Parliamentary Papers*.

Comparing the two legal systems in the field of labour law brings out a major contrast: whereas in England, until the reforms of 1867 to 1875, the statutes governing employment reinforced the classification of workers as servants, the contrary was the case in France. From 1789, jurisdiction solemnly drew a strict distinction between the employment of workers for a specific job, known as *louage d'ouvrage*, on the one hand, and the hiring of domestic servants or casual labourers for service, known as *louage de service*, on the other. From 1866, however, an inversion in case law and doctrine took place in France, tending to lessen the distinction between *louage d'ouvrage* and *louage de service*, whereas at the same time, England was beginning to question its 'master and servant' legislation. This development is well known for England, but less so as regards France. The next section will therefore summarize the main features of developments in France.

The French Revolution and the liberty of workers

In 1789, French jurisdiction was characterized by a constant ambiguity giving rise to conflict: wage-earners, that is, manual or skilled workers or craftsmen working 'pour compte d'autri', were sometimes treated as 'lessors of labour' (*locateurs d'ouvrage*), in positions of legitimate commercial reciprocity with their employers, and sometimes as servants, subject to obligations of subordination that ruled out legitimate reciprocal bargaining. Historians of the Second Empire and the Third Republic, echoed by historians of labour law, mainly stressed the legal obligations of subordination implicit in the regulatory decisions of the king and the courts.[2]

[2] This has been pointed out by the best known of the founders of labour history, Émile Levasseur, *Histoire des classes ouvrières en France depuis la conquête de Jules César jusqu'à la Révolution* (Paris, 1859).

However, a recent study, the first to have taken a close look at eighteenth-century legal debates about labour and to have taken into account the views expressed by parties to litigation, has demonstrated the extreme instability and conflicting nature of the norms put forward throughout the eighteenth century.[3] In that diversity, one thing that stands out is the constant opposition between, on the one hand, the legitimacy of the freedom of workers, insisted on by journeymen and occasionally upheld by some workers and employers, and on the other hand the necessity of submission of *service*, periodic attempts to impose which were made by coalitions of employers. They were usually backed in this by the higher echelons of the judiciary and the administration, whereas local magistrates were more inclined to compromise or to recognize workers' demands as legitimate.

That legitimacy, commonly embodied in negotiating practices at the workplace, found a framework of expression in the invocation of natural law against positive law. 'We are not slaves' ('Nous ne sommes pas des esclaves'), was a recurring theme. This referred to the Latin term which did not distinguish between servant and slave, bypassing the secular distinctions of status established between slavery, voluntary servitude, and domestic service. The invocation of natural law was not so much an appeal to a specific doctrinal content as an act of autonomy of judgement, indicating a competence to criticize the soundness of positive law in the name of higher principles, common to all humanity. Such criticisms also invoked a common law (*droit commun*) or a law of nations (*droit des gens*), though without considering their technical legal significance, instead giving them more or less the same significance as a critical appeal to the common principles of humanity.

This historical background is crucial to understanding the emancipatory power of the French Revolution in the field of labour law. The declaration of the rights of man, the proclamation of the principles of political and civil liberty, the abolition of all kinds of corporative regulation, the famous *Loi Le Chapelier* did not simply enshrine 'economic freedoms' such as were dear to classical economists and equally dear to the old clichés of the 'bourgeois Revolution'. These upheavals were experienced intensely as a real emancipation of the workers, as a triumph of good old causes, and as the establishment of a real ability to negotiate on an equal footing with employers. It was not simply a question of new formal civil rights but of actually achieved possibilities, which were used on a massive scale. It was what in the everyday language of the day was called a 'revolution of manners' ('une révolution des mœurs').

[3] Michael Sonenscher, *Work and Wages: Natural Law, Politics and the Eighteenth-Century French Trades* (Cambridge, 1989).

This aspect of the emancipation of workers found little expression in legal texts or in declarations of new rights. To appreciate it, local judicial decisions before and after 1789 must be examined and placed in the context of industrial relations. The *tabula rasa* of the former statutory regulations then takes on a very precise significance in each local history. In the case of the Lyon silk industry, for example, the abolition of the old regulations and the industry's old jurisdictions led to a new system of relations between merchants, master-workers (*maîtres-ouvriers*), journeymen, and apprentices. Everywhere, the removal of the statutory restrictions on leaving jobs and changing employers was used as a fresh opportunity to negotiate working conditions and pay on an equal footing: periods of notice before leaving or dismissal became strictly reciprocal, and the permanent threat of leaving for more favourable conditions of remuneration enabled master workers and journeymen to keep up with the most favourable tariff scales (*cours de façon*).[4]

There is a great deal of evidence for this 'revolution of manners'. Among the most remarkable sources are the reports and petitions of employers between 1794 and 1804, when it was necessary, following the Reign of Terror, to build or rebuild an industrial order on the basis of new principles. The many letters, petitions, and memoranda sent by manufacturers and their associations to local or national authorities all note a new climate in labour relations, whether as a matter for regret or as something simply to be accepted: the spirit of liberty affecting all social relations left its mark on the workplace and ruled out any possibility of a return to the old rules of submission. The most vivid descriptions come from manufacturers demanding just such a return to the earlier regulation of labour. Drawing a disastrous picture of their 'impotence' in the face of the 'spirit of liberty' affecting workers, they asked for the support of the authorities in order to re-establish the old regulations and customs and thus 'to restore subordination'. Employer petitions even pointed out that a

[4] A more detailed analysis of these changes in Lyon before and after the Revolution may be found in Cottereau, 'The Fate of "Fabriques Collectives"'.

manufacturer merely mentioning the ancient customs of hiring and dismissal faced the threat of physical violence.[5]

The arguments and anecdotes related in all these petitions highlight the contrast between the old limitations on workers' freedom to quit and the new situation that had been in place since 1790. In a variety of languages ranging from approval to disapproval, they explain how former jurisdictions of control, entrusted with upholding obedience, had restricted individual bargaining, while the new system, on the contrary, gave free rein to discussion on an equal footing. Some, for instance, described how workers indulged in 'blackmail', threatening to quit their jobs if their employers did not revise their conditions of work and pay in line with this or that competitor. However, other employers, and with them the commercial courts and advisory authorities (*bureaux consultatifs* having replaced chambers of commerce during the Revolution), tended to hold that these instances of alleged 'blackmail' by workers should not be regarded as insubordination but as the legitimate exercise of the new liberty. Government and police authorities adopted this position. The few exceptions, mainly on the part of the police, seeking to suppress insubordinate behaviour on the strength of denunciations by employers in the spirit of pre-revolutionary paternalist supervision, were invariably rejected by the judicial and administrative hierarchy.

The example of the livret ouvrier *and freedom to leave*

A good illustration of the new climate of worker freedom may be seen in the discussions about reintroducing the *livret ouvrier* and subsequently in the case law implementing it. What is called *livret*

[5] For example, a petition from the weaving manufacturers of Rouen (July, 1804, Archives Départementales de Seine Maritime 10 M 4) talks about the workers' spirit of liberty and their habit of switching employers as soon as conditions or the price no longer suited them, all in the name of new principles of liberty as opposed to the regulations of the *ancien régime*. The petitioners demanded a return to those old regulations, to restrictions on the right to quit, and to penal sanctions. They did not obtain satisfaction, and neither did large numbers of petitioners throughout France. All these demands to restrict workers' freedom to change jobs were opposed by the successive governments of the Directory, the Consulate, and the Empire on the basis of the new, intangible principles of liberty, implying reciprocity of negotiations and sanctions. There are many files of this kind in local, departmental, and national record offices, classified either chronologically or according to commercial and judicial topics. Others are scattered in the files of various branches in the Archives Nationales, series F 12 for the periods concerned.

ouvrier in France was a document whose origins lay in various statutory regulations and judicial decisions of the *ancien régime*: in most manufacturing districts, no worker could leave an employer unless he had a 'ticket of leave' (*billet de congé*) from the employer, certifying that he had met his obligations and was not in debt. The different local statutory regulations modified this rule and laid down the periods of notice (which were often obligatory for workers only, or were longer for workers than for employers). In many instances, the local regulations stipulated that the 'ticket of leave' had to state why the worker was leaving, or even assess his conduct and 'habits' (*mœurs*) for the information of his next employer.[6] Between 1794 and 1803 there was some discussion as to whether these regulations should be re-established. Remarkably, there was a broad consensus, not only among workers but also among employers and government authorities, against reintroducing them.

Instead, a body of legislation put in place in 1803–4 provided for a *livret* (that is, a single booklet of various certificates of discharge) based on very different foundations. First, it transformed the *livret* from a document of supervision delegated by the authorities to the employers into a document required by private contractual law and designed to record certain aspects of the labour contract, just as commercial law stipulated that ledgers contain certain entries and record certain transactions. The *livret* had to certify an engagement for a specific job and its completion (*quittance*), or to acknowledge that the worker had not yet paid off advances received on wages, and that this debt remained to be deducted from future wages by the new employer, within limits compatible with workers' presumably low levels of solvency. The private law character stressed by legislators and jurisdiction meant

[6] As an illustration, one article from the 'Regulations and Statutes' of the Elbeuf wool trade, dated 19 Apr. 1667, is quoted here. It covers the obligatory nature of moral investigation and indicates the lack of symmetry in terms of giving notice: 'XXIV. A weaver may not quit his master until the piece of work with which he has dressed his loom has been completed, and in this connection he shall be obliged to notify his master when setting the piece up. And if the worker owes anything to his master, the person for whom he is going to work shall have a duty to inform himself regarding the life and habits of the said worker and the reason why he left the said master. The new master shall be obliged to pay what the said worker owes to the master he has left, as also in respect of what he owes for mistakes made in his work. Nor may the master dismiss a worker without 24 hours' notice.' Other articles stipulate that 'physical coercion' may be used to force workers who have quit without leave or without 'just cause' to return to their masters.

that the *livret* was separate from any considerations of public order. This character was expressed mainly in the fact that it no longer contained a repressive element, unlike the ticket of leave regulations under the *ancien régime*. Henceforth non-observance of *livret* legislation was punished neither by prison, nor fine, nor obligation to return to the employer. Breaches of contract were liable only to damages and interest, payable to the injured party, whether employer or worker. Industrial-tribunal decisions show, in fact, that damages and interest were paid at least as frequently to workers as to employers in the early days of implementation of these rules: workers wishing to leave their employment, for example, for better pay, and whose *livrets* were withheld by their employers without sufficient, proven cause, commonly had their *livrets* restored by industrial tribunals, together with compensation for lost time and wages.[7]

Secondly, the rules and subsequently the judicial decisions concerning registration of debts in fact operated according to the spirit of the promoters of the new civil law, giving rise not to measures restricting changes of employment but on the contrary to measures facilitating mobility. Registering debts in the *livret* was an arrangement that made it possible for a worker to change employers before he had paid off the advances received in respect of

[7] For more information about *livrets*, see Cottereau, 'Justice et injustice' and id., 'The Fate of "Fabriques Collectives" ', which gives a detailed example of a judgment in which a *livret* was restored to a (female) factory worker with damages and interest (pp. 26–9). It is particularly important to stress the liberal operation of *livret* legislation, because from the beginning of the Third Republic it gave rise to some extremely imaginative historical writing: ultra-individualist, anti-reformist jurists (notably Marc Sauzet, 'Le Livret obligatoire des ouvriers', *Revue critique de droit et de jurisprudence* (1890), 21–30; and id., 'Essai historique sur la législation industrielle de la France', *Revue d'économie politique* (1892), 353–6, 890–930, 1097–136) sought to demonstrate, from the 1880s on, that there had been a continuity of 'interventionism' and police discretion between pre- and post-revolutionary legislations, particularly with regard to labour law and the *livret*. The works of Sauzet contained many such false and ill-founded assertions in terms of historiographical and legal documentation. For instance, he put forward the theory of a continuity between the *ancien régime*'s 'ticket of leave' (*billet de congé*) and the *livret* introduced in 1803, playing with anachronistic meanings of the old French notion of *police* and arguing as if penal sanctions had not been abolished irrevocably under the Revolution. His dogmatic statements masked a total ignorance of local judicial decisions. There would be no need to mention this author had he not unfortunately been often repeated without critical examination in French academic traditions of legal history. As a result, English authors who accepted these traditions at face value were led astray on key points of comparison: they thought they could establish a similarity between English employment law and alleged French restrictions on freedom to quit during the period 1800 to 1870.

wages, tools, or workshop equipment.[8] Whereas the old common law would allow the employer to retain a worker who was in debt by exerting economic pressure, the jurisdiction concerning *livrets* allowed debts to be circulated from employer to employer. When a worker who was in debt wished to change employers, whether he worked at home or in a factory, he could ask for his debt to be registered. That meant that the new employer became responsible for reimbursing the previous employer by deduction from the worker's future wages up to a limit of one-eighth. The worker thereby found his negotiating strength increased, and the employer had a relative guarantee of reimbursement, enabling him to take out a loan for workshop heads and to finance the recruiting, tooling, and equipping of workshops.

The *livret* now functioned as a kind of register of bills of discount on work and became the instrument of a free credit arrangement for workers and their workshops. It gave those who held it the opportunity to obtain free advances, guaranteed simply by their future work for successive future employers, on the strength of their *livret* and with possible backing from industrial tribunals. In the event of non-reimbursement, there were no penal sanctions or punitive constraints, unlike the sanctions of commercial law. Workers who could not repay did not repay, with no other dissuasive effect than some difficulty in obtaining credit again from the same employers in times of economic downturn. Granted, the arrangement inevitably gave rise to 'abuses': workers used the system to obtain multiple advances without repaying them, and employers tended despite everything to use debts to keep their workers. But industrial tribunals and justices of the peace appear to have curbed such abuses with some success, according to retrospective parliamentary inquiries carried out in 1848–50.

Thirdly, industrial tribunals and justices of the peace banned any kind of assessment of the person or conduct of *livret* holders. The *livret* was to contain no more than what was required by law:

[8] The laws created an obligation on the part of employers to allow workers in debt to leave when the initiative for terminating or modifying the terms of hire came from the employer. By contrast, in law the employer could demand prior repayment when the termination or modification was requested by the worker. However, most industrial-tribunal decisions applied the rule of freedom to quit before repayment without seeking to establish where the initiative originated.

shoemaker Odger, a London workers' representative, provides an interesting framework for comparison. Rather than focusing on abuses likely to be exceptional, it describes a habitual difficulty in utilizing the law to the advantage of workers:

> As it affects my own trade . . . I would observe that the Act [on Masters and Servants, 1823] is almost inoperative.
>
> —From what cause?—For this reason, I believe that the breaches of contract occur more frequently on account of the conduct of masters than on account of the conduct of men; our work . . . is all piece-work, and frequently an employer bargains to give out work; but when we go for the work he only gives us a part of it, and we cannot go on with the work; say, for instance, he gives us the leather to make the bottoms, but he does not give us the uppers, and the man has the work by him, and cannot proceed with it; it has been ruled in a case many years since in the City, that the contract commenced by the fact of the work having been given out; but still I never knew of but one case where a workman summoned the master for a breach; but invariably they wait until the master is prepared to give out the uppers, and when they get them they go on with their work; I have known a man wait about, sometimes nine or ten days, and from that to a fortnight before he could get all the things necessary to go on with his work; well, of course, under such circumstances, if the men were to be continually summoning the masters, we should have the most abominable amount of ill feeling, and everything else that could be conceived of as bad, and men prefer to make the best of it, and wait to their uppers, and when they get them go on with the work, or go somewhere else and try to get a pair from some other employer. That creates the difficulty at once, because if he should get a pair from another employer to make, then the other employer might say 'I will give you some more work as you seem to be slack'. Should the man under these circumstances keep the first employer's work out longer than the eight days allowed by law, he would be amenable to consequences of breach of contracts.

giving occasional examples of appeals to the courts (*PP* 1824 (51), v, *Artisans, Tools and Machinery Exportation* . . . [Joseph Hume] . . . , *PP* 1825 (414, 437), iv, *Combination of workmen* . . . , 1818 i, *PP* 1818, *Report from Committee on Silk* . . . , i, ii, iii, *PP*, (HL), 1823, clvi. 57, *Minutes of evidence . . . persons employed in the manufacture of silk*. For a point of departure see Daphne Simon, 'Master and Servant', in John Saville (ed.), *Democracy and the Labour Movement* (London, 1954), 160–201. In addition, see John Styles, 'Embezzlement, Industry and the Law in England, 1500–1800', in M. Berg, P. Hudson, and M. Sonenscher (eds.), *Manufacture in Town and Country before the Factory* (Cambridge, 1983); D. C. Woods, 'The Operation of the Master and Servants Act in the Black Country, 1858–1875', *Midland History*, 7 (1982), 93–113; Norma Landau, *The Justices of the Peace, 1679–1760* (Berkeley, 1984); Robert J. Steinfeld, *The Invention of Free Labour: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill, NC, 1991); and the essays by Douglas Hay and Willibald Steinmetz in this volume.

> —Then, what is the result: frequent prosecutions on either side?—No: they seldom, if ever, occur.[16]

In France, on the other hand, in home-working as well as in workshop or factory labour, worker summonses for non-observance of contract were very frequent, as were worker summonses generally, in every domain of employment for a specific job (*louage d'ouvrage*). In the case of home-working, local courts allowed workers to enforce verbal promises received, and they awarded damages and interest to punish delays on the part of entrepreneurs more severely than delays on the part of workers, deeming the former to be in most circumstances less excusable than the latter. Here is an example from the Lyon silk industry, very ordinary in local terms but chosen here for the striking contrast it presents with regard to Odger's testimony. In line with usual judicial practice, time lost through the fault of merchants was indemnified, as were the costs of adapting hand looms to the particular features of the pieces of cloth promised, costs that industrial tribunals made sure were compensated for by further orders for work, on penalty of damages and interest. The following record of an industrial tribunal session was made by *L'Écho de la fabrique*, a master workers' newspaper that was in the process of establishing itself as a journal reporting extensively on judicial decisions:

> Master Giraud [a workshop head] is suing Mister Napoly [a manufacturer] for the sum of 144 francs in respect of a large number of days lost through the fault of his [i.e. Mister Napoly's] employees. He states that, being on the point of settling, because at the time he found more lucrative work, he was promised, if he wanted to continue making the thing that he was working on, three pieces of 60 ells each; and notwithstanding this promise he received only one of them and was refused the others.
>
> Mister Napoly's response is to the effect that he no longer wishes to employ this worker because of his conduct, and states that he does not recall his promise of three pieces, given, he says, that he had only two to manufacture and was unable to promise more; but he nevertheless acknowledges that he was very slow in providing the first piece and has caused the worker to lose several days between that time and this; he thinks he has compensated for this, either by raising the price of handkerchiefs from 75 c. to 80 c., or by an increase of 10 c. on the penultimate piece and 20 c. on the last one.

[16] Odger, *PP* 1866 (449), xiii, Nos. 1809–10.

Giraud replies that the 20 c. increase is wrong; that it is clear that the figures have been redone. Never, he says, did I ask for more than 90 c. per handkerchief; this increase, entered as a bonus, was made purely with the intention of proving to the court that I had received satisfaction for the days lost. I constantly paid my worker at the rate of 80 c. for the first pieces and 90 c. for the last; so the price according to tariff was certainly not for meeting my expenses for time lost. I am now refused work because I have committed the great crime in the eyes of these gentlemen of saying I had been paid at 90 c. to a master who manufactures the same article at a cost of 80 c. That is why I am being refused the pieces I had been promised. But I wish to bring proceedings against Mister Napoly as guilty of forgery in private correspondence for having redone my figures without my consent.

After lengthy deliberation, the board sentenced Mister Napoly to pay an indemnity of 20 francs to Master Giraud.[17]

We see here two logics leading to opposite solutions: on the English side, as a result of a logic of industrial subordination, the judgement of entrepreneurs on the proper use of time was accepted without further enquiry. So far as French industrial tribunals were concerned, a concern for equity in individual bargaining led them to compensate for inequalities of economic situation through procedures of genuine reciprocity in bargaining, a reciprocity that in this case implied taking into account time lost as a result of the manufacturer's management of affairs. The same logical dualism is capable of explaining conflicting operations of the burden of proof in disputes over verbal promises. Daphne Simon writes: 'while the courts readily assumed that wages were due, they also assumed that the wages had been paid unless the servant could show otherwise', and she cites a case,

[17] *L'Écho de la fabrique*, 10 (10 Mar. 1833), 80. The master-worker's argument as reported concerns an entry in his 'account book' (a document required by law, distinct from the *livret*, the *livre de compte* was kept in duplicate, one with the merchant, the other in the possession of the master-worker). The merchant had entered a bonus after the event in the account book in order to avoid acknowledging an increase in the making-up price (*prix de façon*), i.e. an increase in the rate at which he had the type of cloth in question woven. The manœuvre was designed to avoid giving rise to negotiated demands for price increases. But the industrial tribunal repudiated it, condemning the manufacturer at the same time as it granted the request for compensation for time lost. Note that the master-worker paid a worker to make up the piece. Since the custom sanctioned by industrial tribunals was always to give a fixed proportion of the *prix de façon* as wages for journeymen, and since journeymen were in the habit of checking making-up rates in the books of master workers, it followed that the journeyman's wage here provided proof of the making-up rate agreed in advance and corroborated the accusation of forgery of documents brought by the master worker against the merchant.

reported in the 1837 edition of Burns's handbook for justices of the peace:

> A case tried some time back at the Guildhall which was an action by a workman at a sugar refiner's: a witness proved that the plaintiff had worked there for more than two years, but Lord Abbott said that he should direct the jury to presume that men employed in that way were regularly paid every Saturday night unless some evidence was given on the part of the plaintiff to satisfy the jury that the plaintiff had in point of fact never been paid; and as no such evidence was produced the plaintiff was nonsuited.[18]

In French industrial tribunals, the arguments and presumptions rested on quite different foundations. The system of proofs was derived from the traditions of commercial law, as interpreted by commercial courts. Manufacturers and merchants had obligations to keep regular accounts, and these obligations were sanctioned in the commercial courts by systematically giving the benefit of the doubt to the opposing party where accounts were lacking. When these rules were transferred to industrial tribunals, they were adapted to the unequal conditions of employers and workers by a similar logic of compensation: only employers were obliged to keep regular accounts; workers' demands in respect of payment due were systematically met if employers' account books, if necessary after expert appraisal, failed to prove otherwise.

The concern for fairness in negotiations might thus go so far as judicial decisions correcting and compensating for inequalities of economic situation. In the same spirit, rules had become established concerning the restitution of materials entrusted to homeworkers. Whereas in England, statutes and case law remained repressive, sometimes going so far as to establish a presumption of theft if restitutions were late or deficient, French legislation, which before the Revolution had been as repressive as English law, took a very different course after the Revolution, following some initial hesitation. Under the First Empire, demands from employers and even from members of industrial tribunals proposed deploying police searches against pilfering and embezzlement, but such preventive and repressive measures were rejected in the name of safeguarding civil liberties. Industrial tribunals then established precedents on which employers and workers could

[18] Simon, 'Master and Servant', 163.

agree. The tribunals went so far as to grant workers a 'right of retention', that is, the right to keep materials entrusted to them as security in case their wages were paid late, or not at all. Emergency industrial-tribunal hearings then served to produce amicable agreements to get things moving again when home-workers had refused to go on working.

The distinction between louage d'ouvrage *and* louage de service *in France, compared with the unitary English doctrine on 'master and servant'*

In France, industrial tribunals, justices of the peace, and commercial courts saw the employment of workers as conferring an obligation to deliver a particular result. Workers had the duty to produce a material product following the *règles de l'art* (rules of responsibility embedded in professional skill). Only the 'hiring of services' (*louage de service*), a term that did not apply to workers, by nature implied submission to the master's orders. In England, jurisdiction seems always to have regarded the employment of workers as an undertaking to obey, whatever the legal justification for this: customs and statutes of varying degrees of age, then new statutes of the nineteenth century, functional justifications of good industrial management, and theories of the implicit contract of obedience as formulated, for example, by the 1837 edition of Burns's handbook: 'The servant impliedly contracts to obey the lawful and reasonable orders of his master within the scope of the services contracted for.'[19]

In France, it is above all examination of local jurisdiction rather than legal doctrines or national jurisdiction that makes it possible to identify the distinction between employment for a particular job (*louage d'ouvrage*), and the relation of subordination implied in any 'hiring for services' (*louage de service*). It could be pointed out, however, that these differences in practice also corresponded to differences in doctrine that have now been forgotten but were present in most French handbooks of civil and commercial law between 1804 and 1870. Moreover, they were occasionally referred to in decisions of the *Cour de Cassation*. The technical vocabulary went back to the traditional terms *prix-fait* (since the sixteenth century, the French translation of *locatio conductio operis*) or *louage*

[19] Quoted by Simon, ibid. 163–4.

d'ouvrage. The authors of these handbooks connect these 'made-price' contracts with subcontractor undertakings, and more generally with all undertakings to manufacture a specific article, whereas service undertakings are of a different nature. The industrial jobs of day labourers (*journaliers*), unlike the industrial jobs of workers (*ouvriers*), were comparable to domestic service and other service relationships precisely to the extent to which they involved being placed at the disposal of the master's will, with no possibility of discussing and assessing the tasks to be carried out. Moreover, the legal distinction between 'worker' and 'day labourer' echoed an obvious social distinction in the industrial milieu: industrial workers looked down on industrial day labourers, seeing them as domestic servants or valets in subjection to their masters and considering, as did the courts, that they had relinquished their independence. Statistically, day labourers accounted for some 10 per cent of industrial wage-earners at the end of the Second Empire, and are not to be confused with the far larger British category of the unskilled.

The difference in the legal status of *journaliers* and *ouvriers* was particularly pronounced in the rules of evidence in force between 1803 and 1868; article 1781 of the Civil Code stated that 'the master's statement is believed in respect of the quota of wages; in respect of payment of the previous year's wages; and in respect of advances given for the current year'. Jurisdiction, with very few exceptions, deemed this article to apply to domestic servants and day labourers, but not to workers. It has already been shown that the tradition of commercial rules of evidence placed the burden of proving that workers' wages had been paid on employers alone.

A further illustration of the duality between *louage d'ouvrage* and the subordination implied by *louage de service* is the lengthy opposition put up by industrial tribunals to workshop rules (*règlements d'atelier*). When employers posted up factory rules and demanded obedience to their agents' orders, industrial tribunals almost invariably objected to the contractual fiction according to which the worker who had entered a workshop was deemed to be aware of and to have accepted these rules. The tribunals confined themselves to the lawfulness of a contractual reality, taking it upon themselves to verify, case by case, the reality of the supposed agreement and objecting to any rule that did not seem to them to be fair on the grounds that, where unfair rules were present, there could not have been a totally free agreement. Moreover, they

placed a higher, compulsory value on local customs recognized in the trade or occupation.

It was only later, from the 1860s to the 1880s, that a change in judicial practice occurred, accompanied by a change in legal doctrines. The judicial hierarchy, followed by a section of the employers and their organizations, launched an initiative to have it considered that every time a worker entered into a contract of employment, he thereby undertook to obey the employer's orders. Railway companies rather than the manufacturing sector took the lead in this campaign. Doctrine soon accepted the idea that when the worker entered into a contract of employment, this was an undertaking 'of industrial service'. An equivalence was established between 'industrial-service hiring' and the new expression 'labour contract' (*contrat de travail*).[20]

From the 1880s on, this doctrine gained acceptance in the courts, starting from the top of the judicial hierarchy. It subsequently spread down the hierarchy, more by way of authority than conviction, when appeals were lodged against industrial tribunals and justices of the peace. From a comparative viewpoint, it was only then that French employment law moved closer to English law. From this point in time, the French worker once again became a kind of 'servant', an idea that was totally incompatible with the emancipation brought about by the Revolution. To make up for the constraints of submission, workers became the object of protective legislation and supported legal union representation. In England, on the other hand, the convergence resulted from a process of liberalization: penal sanctions for breach of contract were abolished, completing the development towards a purely contractual justification of master–servant relations.[21]

[20] Several aspects of this change, notably, as regards workshop regulations, are described in Cottereau, 'Justice et injustice', 55–8. The first occurrence of the term *contrat de travail* that I have been able to trace dates from 1885.

[21] A profound comparative misunderstanding was spread on the basis of a myth that took root in France under the Third Republic: republican writers on labour law pretended to themselves and persuaded others that 'service hiring' was a category of the Civil Code that had applied to the employment of workers from the outset. The comparative considerations of Otto Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment', in *Law Quarterly Review*, 93 (Oct. 1977), 508–28, for example, were led astray by the French authors in whom he had placed his faith. Post-revolutionary authors using the work of Pothier — Robert-J. Pothier, *Traité du contrat de louage, selon les règles tant du for de la conscience que du for extérieur* (Paris, 1764); id., *Traité des contrats de louage maritimes* (Paris, 1769)—were more precise than Kahn-Freund thinks, and deliberately modified Pothier's doctrine.

Workers' sense of justice and its institutional treatment in France and England

As the comparison is explored more deeply, a broader question arises: what relationships were established between sense of justice, legitimacy, and legal systems? A key to comparison has already been suggested: the institution of the industrial tribunal was able to establish and harness views of justice shared by elected representatives of employers and workers without going down the usual road of public representation. The contrast is particularly noticeable with English trade unions and their recognition in nineteenth-century England.

If we take as our point of departure the 1820s, the decade that, in England, saw simultaneously the extension of penal sanctions in the administration of the master and servant laws, the abolition of the last statutory regulations concerning labour, and the liberalization of trade union law, we find a pattern of perfect inverse symmetry between face-to-face negotiation and collective negotiation by public representatives. In France, collective negotiation by public delegation was prohibited and punished, while face-to-face negotiation was protected, encouraged, and judicially regulated in favour of workers; in England, face-to-face negotiation, which was already strategically weaker than in France, because of the demographic and economic conditions of industrialization in England, was subject to overt judicial intervention, inequitably favouring employers, whereas collective adjustments, traditionally practised in a dialectic with the law and local magistrates, were encouraged by law in the name of a liberalism that admitted collective representation on a voluntary basis.

To understand the extent of the contrast, it is important first of all not to underestimate the institutional reality and success of appeals to industrial tribunals.[22] Unlike the usual kind of judicial

[22] For more details on the success of industrial tribunals, see Cottereau, 'Justice et injustice'. There is still a need to assess and compare the success of French justices of the peace with that of the industrial tribunals, a task which French historiography has not yet performed. My trawls through the records of justices of the peace suggest a far greater variety of practices, with some cases looking more paternalistic, others more repressive, and lastly many cases that take their cue from industrial-tribunal precedents in the name of equity and protection of the weak.

appeal, reference to an industrial tribunal was neither a declaration of hostility nor a transfer to a remote and superior world of the law, likely to hand down arbitration. Nor is this the paternalistic system of English justices of the peace (although comparisons are possible, at best, with popular magistrates, who had the reputation of being particularly fair).[23] Unlike the corporative, municipal courts of *ancien régime* France, the institution of the industrial tribunal was based on conciliation rather than on arbitration. Between the two, the philosophical gulf was complete: arbitration was compatible with a 'paternal justice' that gave notables an arbitrary power of peacemaking in the name of their superior understanding and lofty social position; conciliation, on the other hand, presupposed that the parties in disagreement had been invited by their industrial-tribunal advisers to re-evaluate their position themselves until a solution was found that was acceptable to all points of view in attendance. It presupposed a capacity for judgement on the part of workers as well as on the part of employers, under institutional conditions organized accordingly: industrial tribunals did not have an overall 'employer majority' up until 1848, as has too often been written. They were composed under a kind of tax-based internal suffrage in worker milieux as well as in employer milieux. But above all they nearly always operated on the idea that a consensus of justice should be reached, not just among tribunal members but also among the parties who came before them. This consensus was always aimed for and frequently achieved. It was simultaneously symbolized and organized by 'special boards' of conciliation, an initial stage at which between 80 and 100 per cent of disputes registered were settled: such boards comprised one employer and one worker, whereas organs of conciliation under the *ancien régime*, which had

[23] See also C. R. Dobson, *Masters and Journeymen: A Prehistory of Industrial Relations* (London, 1980), and Landau, *Justices of the Peace*. Gail Malmgreen, *Silk Town: Industry and Culture in Macclesfield, 1750–1835* (Hull, 1985), is the only monograph that allowed me to draw comparisons between the records of silk factory industrial tribunals and judgments of local courts in the same branch in England during the same period. The few scraps of information she provides (particularly on pp. 40–1), on the basis of the notebook of a local magistrate with a reputation for fairness, show that the causes of litigation and judicial arguments were similar and that the number of appeals in relation to the population was quite high, though still a long way below the level of French appeals to industrial tribunals. There was approximately one worker appeal to two employer appeals, which seems a surprisingly high proportion for England, whereas in France worker appeals were generally far more numerous than appeals by employers.

been appealed to much less frequently and had been much more controversial, had usually consisted only of masters.

The system of face-to-face conciliation, wrongly termed 'individual', had an important collective significance. It fostered an ongoing debate within occupational circles and gave rise to real systems of unwritten rules, managed on a day-to-day basis under the supervision of the whole of the milieu concerned. Take the example of *tarifs de façon* in Lyon, which were more or less equivalent to 'piece-rates'. From their very first sessions (January 1807), the industrial tribunals of Lyon laid down a scale of prices, which was printed like the 'lists' of the Spitalfields Acts system. The lists were periodically updated until 1831, when a newly negotiated update was repudiated by the government; the people of Lyon were told, after a section of employers complained, that the new rates could not have compulsory but only moral status. This repudiation triggered the famous first revolt of the *Canuts*. Here a key feature emerges, over and above many analogies with the lists negotiated by trade unions: in England, we find around the same time that the moral power of a joint agreement, with the active support of the unions, was expressed in the cases involving the least conflict, through actual respect for the settlements negotiated, without either judicial or executive backing.

In Lyon, as throughout France, respect for the rules could not be viewed in this way. A new system was established there from 1832 on, typical of how the country's industrial-tribunal regulations operated until the 1860s. Despite the withdrawal of the official scale, the *Canuts* had in part gained their case. If there was no list of compulsory prices, there was a semi-official system of reference prices, known as *le cours*, that industrial tribunals supported and helped to gain acceptance for. In conciliation, and even in judgment, they pronounced a wage increase wherever the agreed price was deemed insufficient. This was in flagrant contradiction to official liberalism and doctrines of civil law (though it was not inconsistent with commercial law). The notables of Lyon, like factory owners in many other French towns and cities, spoke a dual language: smooth operation of industrial relations had its local rules, but for reasons of efficiency it was important not to expose these to 'public opinion' (that is, to the national public sphere of the period). It was a kind of secret system that could survive only in so far as the notables who ran it achieved sufficient

credibility and discipline among their peers to avoid appeals to the hierarchy of the courts.

If one had today to find a nineteenth-century English expression for the consensual practices of industrial tribunals, it would be by inverting a recurring theme of the skilled workmen of the period who protested against 'unprincipled competition': the regulations of the industrial tribunals worked towards '*principled* competition'. It might also be pertinent to see here some kinship with Thompson's moral economy, revisited in 1991, provided that that notion is not reduced to a strictly working-class point of view but enlarged into a more complex dialectic of recognition and legitimacy. The regulations of the industrial tribunals could then be considered as a different historical case in which political economy and equity interpenetrate in a way that is incomprehensible in the light of classical economic theory, for reasons similar to the opaqueness of moral economy.

In England during the period 1820 to 1870, areas of initiative to prevent, expose, or correct unprincipled competition had to do with a topology of the public sphere very different from that of the French public sphere.[24] Beyond what the Webbs, in *Industrial Democracy*, in an excessively managerial, evolutionist way, called the different methods of legal enactment, of collective bargaining, etc., there possibly operated, at a deeper level, a different system of the sense of justice, of publicity, and of power to intervene, a system common to the whole of English political life. To the French reader, a striking symptom of this different system is the use that English workers made of such terms as 'legal (illegal) men, lawful men, fair men' about workers who respected or failed to respect the rules laid down by the unions[25]—rules that were sometimes established by joint negotiation, but also rules that were unilaterally drawn up, in opposition to and in a state of declared war with government, judicial, and/or employer legality. In the latter case, the terms 'legal (illegal) men, lawful men' would have been untranslatable and incomprehensible in France at the time.[26]

[24] The term 'public sphere' draws both on the Habermas tradition (see the Preface to Jürgen Habermas, *Strukturwandel der Öffentlichkeit* (17th edn., Frankfurt and Main, 1990), 11–50) and on Hannah Arendt, *The Human Condition* (Chicago, 1958).

[25] The terms are taken from *PP* 1824 (51), v, *Artisans . . .*, and from E. P. Thompson and E. Yeo, *The Unknown Mayhew* (London 1973).

[26] 'Incomprehensible' only gradually, from the 1820s on. Previously, under the *ancien régime* and at the beginning of the Revolution, French worker assemblies had also had their

In the most comparable situations, when French worker collectives secretly imposed rules of negotiation and working conditions, they did not claim to have any independent legal force. Except in highly exceptional circumstances of overt, organized conflict, they did not have procedures of assembly and debate that were sufficiently open (clandestinely or publicly) to allow them subsequently to claim to be speaking for a duly established collective interest. Yet where there was a shared conviction of the justice of the case, an attempt began to gain recognition from local magistrates and the more accessible employers. This tactic frequently appears to have been successful.[27] When it failed, the occupational milieu concerned did not in consequence become subdivided into legal men (or legal shop) and illegal men. Semantically, there were not two legalities. On the one hand there was a legitimacy, a conviction of justice regarding the principles for which respect had to be secured. On the other hand there was an occupational milieu, employers and workers, that had to be convinced and improved, if necessary by appealing to 'the' law, redressing its misinterpretations and altering its pronouncements where these would lead to unfair practices.

In other words, the processes and areas in which the gap between legitimacy and legality occurs are not the same. In England at the time of the Chartist crisis, the first expansion of the electorate, and the miscarriages of the judicial system, the law became more remote from the citizen, and the state attracted more expectations and thus gave rise to more disappointments. If

own apparatus for drawing up rules, and they used the same vocabulary as that used in national procedures of judicial, legislative, or administrative deliberation. Examples of extensions are found during the first half of the 19th century, but they become increasingly rare.

[27] The reality of these successes is not easy to establish in the present state of historiography. There is a need for investigations reconstructing the normative life of occupational milieux, recognitions and repudiations of rules in different economic climates, which means going beyond the confines of heroic, detective, or management approaches to occupational conflicts. Police or court records, which generally give accounts of setbacks and violent confrontations, nevertheless carry traces of these searches for recognition. Frequently, researchers report that worker delegates arrested on the occasion of conflicts were astonished to be treated as criminals when what they were doing was pursuing a moral struggle for fair working conditions. Whether such disappointments were sincere or the historian suspects them of having been feigned for the purpose of defending the interested parties does not alter the conclusion that may be drawn here regarding the normative polarization of the sphere in which they were situated: tactical opportuneness presupposes a plausibility and admissibility that it makes sense to display.

self-help redistributed collective irresponsibilities, radical movements of workers for their part raised the search for answers to the injustices of industrialization to the level of national debate, and made a government issue of it. In this context, universalist exasperation and sensitivity to class discrimination went hand in hand. In the case of England, however, the tension between universalist legitimacy and class particularisms did not stop at the symbolic life of justifications, and that is a big difference from the situation in France at the same period. In England incompatible grounds for legitimacy organized themselves, both as worker logics and as dominant-class logics. The discriminations contained in master and servant law and workers' sense of justice complemented and underpinned each other.

In contrast, the regulations of French industrial tribunals from the beginning of the century to the 1860s represented a different way of dealing with the tension between legitimacy and legality, between universalist justice and class particularities. In France, no one renounced the universal recognition of *le bon droit*, neither the workers with regard to employers and the authorities, nor the authorities and employers with regard to workers. The historical experience of industrial tribunals shows how the public sphere was established in France under the Revolution, and was then curbed without being crushed during successive regimes from the First Empire to the Second Empire. To be sure, a chronic fear of mobs, demagogy, and public demonstrations notoriously caused bans or restrictions on press freedom and freedom of assembly. But the corollary of this locking of doors at the national level was the emergence of local public spheres. Not merely spheres of expression of opinion but spheres of deliberation: here local authorities, both administrative and judicial, remained under the control of local citizens; they were obliged to secure recognition of the validity of their actions from a multitude of moral constraints, however appointed. In the legal domain, the invention of a common law of industrial tribunals constituted an original response to these requirements.

10

Master and Servant in England
Using the Law in the Eighteenth and Nineteenth Centuries

Douglas Hay

Introduction

'Private law' in English usage means the civil law, 'those relations between individuals with which the State is not directly concerned', but such definitions concede, however reluctantly, that issues of public policy always arise that involve the state.[1] A central issue of public policy for most regimes is that of sustaining, stabilizing, explicating, and defending existing social relations in conditions of great social inequality. In the workplace, in England, the law that did so was termed, well into the twentieth century, 'the law of master and servant'.

This large corpus of law was based on medieval, Tudor, and Stuart legislation, reinforced in the eighteenth and nineteenth centuries by new enactments, and glossed in a large number of reported cases. The servants described and circumscribed by master and servant law constituted a large and variable class of people. The old terms servant, servant in husbandry, covenant servant, servant on a general hiring, recur in statute, case law, and court records. The unwritten, verbal 'general hiring' of the 'servant in husbandry', usually at Michaelmas, for a year, was the root category, derived from the Statute of Artificers and Apprentices (5 Eliz. I c. 4, 1562), and refined in the case law.

Other forms of service were fitted into the regime from the beginning, embedded in case law, occasionally modified, extended, or confirmed by statute. There was apprenticeship, with substantially similar requirements, but within the framework

[1] Earl Jowitt, *Dictionary of English Law* (London, 1959), tit. 'Law', from which the quotation comes. The research for this essay was supported by the Social Sciences and Humanities Research Council of Canada, and assisted by Chris Frank and Doug Harris.