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The law-technology cycle in the French legal and industrial relations system. From government to governance and return*

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1. *Introduction*

Questions concerning the setting of optimal regulation have cyclically emerged in response to both radical and incremental transformations in society, led by technology as a main driver of change[1]. Labour law and industrial relations have been particularly exposed to the law-technology cycle. With the rise of industrial capitalism, labour law was rationalised as "a technique for the humanisation of the technique"[2]. Due to the impact of a new

*This article is part or the research project PRIN 2017EC9CPX "Dis/Connection: Labor and Rights in the Internet Revolution", funded by the Italian Ministry of University and Research, with the involvement of the University of Bologna, the University of Naples Federico II, the University of Udine, and the University of Venice Ca' Foscari.

[1] KOLACZ, QUINTAVALLA, *The Conduit between Technological Change and Regulation*, in *ELR*, 2018, p. 143. *See* also BROWNSWORD, YEUNG, *Regulating Technologies: Legal Futures Regulatory Frames and Technological Fixes*, Hart Publishing, 2008.

[2] SUPIOT, *Travail, droit et technique*, in *DS*, 2002, p. 13. *See* also RAY, *Nouvelles technologies, nouveau droit du travail ?*, in *DS*, 1992, p. 519.

wave of technological change on the division of labour, the law-technology cycle has come again under the spotlight of labour law scholarship in recent debates on the future of work and its regulation[3]. Labour law and technology have been construed as social systems that interact and co-evolve systemically, although in uneven and unpredictable ways[4]. This implies that labour law "does not simply respond to technological change; it also facilitates and mediates it"[5].

The idea of law and technology as mutually interacting systems resonates with systemic approaches to the analysis of industrial relations institutions[6]. According to Dunlop, any system of industrial relations is shaped by three interrelated forces: technology, the market, and power relations among the State, employers, and trade unions. In contrast to technological determinism and the ideology of social predestination, Dunlop argued that industrial relations are not determined, in some narrow and mechanical way, by technology. The technical variable "is only a part of the whole context and interacts with the other two aspects in varying patterns"[7]. However, he maintained that technology is decisive to the outcomes of any industrial relations system, namely the creation of a complex network of rules regulating the employment relationship. While the technical context is given, it might be expected to change. And technological change "tend to alter the rules, the organization of the hierarchies, and the operations of an industrial relations system"[8].

Drawing on responsive regulation theory, as elaborated by Ayres and Braithwaite[9], this article looks at the French legal and industrial relations systems' adjustments to technological change as an example of how law and tech-

[3] Deakin, Markou, *The law technology cycle and the future of work*, in *DLRI*, 2018, pp. 445-462. See *also* Aloisi, De Stefano, *Your Boss Is an Algorithm. Artificial Intelligence, Platform Work and Labour*, Hart, 2022 and, for questions concerning the impact of new technologies on unions and worker representation, Forsyth, *The Future of Unions and Worker Representation. The Digital Picket Line*, Hart, 2022.

[4] Deakin, Markou, *cit.*, p. 447.

[5] Deakin, Markou, *cit.*, p. 445.

[6] In addition to Dunlop, *Industrial Relations Systems*, Holt, 1958, *passim*; see Sorge, Streeck, *Industrial Relations and Technical Change: The Case for an Extended Perspective*, in Hyman, Streeck (eds.), *New Technology and Industrial Relations*, Basil Blackwell, 1987.

[7] Dunlop, *cit.*, p. 34.

[8] *Ibid.*

[9] Ayres, Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992.

nology develop in parallel with each other in a mutually constitutive way. Apparently, during the last three decades the French State has given up significant shares of power to market forces because of technological innovation and the following reconfiguration of the division of labour. More recently, the rationale of the major labour market reforms enacted by French governments was to make labour law and collective bargaining more responsive to technological change, on the grounds that "faced with the digital revolution and the "uberization" of our economy, the wage relationship, in the conception forged by our labour law, is expected to disappear"[10]. A reorientation of labour law towards the contested idea of flexicurity[11] and on the labour market as a core normative referent is consistent with this assumption[12].

Arguably, the seeming erosion of the French legal and industrial relations system has followed, like in other Western countries, what Alain Supiot defines as the "governance by numbers"[13], which seeks to "subject the law to calculations of utility, where traditional liberalism made calculations of utility subject to the rule of law. Once presented as a product in competition on a market of norms, the law is transformed into pure technique, to be assessed in terms of effectiveness and no longer of justice"[14]. In the context of a state-centric jurisdiction and industrial relations system, this institutional change has contributed to workers' and union disempowerment vis-à-vis firms[15]. The overturning of legal sources' hierarchy in favour of firm-level collective agreements, and the rise of "managerial social dialogue" are both emblematic of this process[16], in which collective bargaining is manipulated as a tool for deregulation[17].

[10] Combrexelle, *La négociation collective, le travail et l'emploi*, 2015, p. 13. Similar claims have been advanced by Bruno Mettling in his report *Transformation numérique et vie au travail*, 2015.

[11] Bugada, *La flexisécurité, fille des politiques sociales comparées*, in Albarian, Moréteau (eds.), *Le droit comparé et /Comparative law and..Actes du congrès annuel de Juris Diversita*s, Presse Universitaire d'Aix-Marseille, 2016.

[12] *See* Sachs, *La consolidation d'un droit du marché du travail*, in *RDT*, 2016, pp. 748-753.

[13] Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance*, Hart Publishing, 2017.

[14] Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, in *ILR*, 2021, p. 3.

[15] *See* Amable, *The political economy of the neoliberal transformation of French industrial relations*, in *ILR*, 2016, pp. 523-550 and Howell, *The transformation of French industrial relations: Labor representation and the state in a post-dirigiste era*, in *PS*, 2009, pp. 229-256.

[16] Giraud, *Derrière la vitrine du dialogue social: les techniques managériales de domestication des conflits du travail*, in *Agone*, 2013, pp. 33-63.

[17] Lokiec, *Collective bargaining as a tool of deregulation*, in *IUR*, 2014, pp. 16-18.

Yet, on closer inspection, the analysis of the French case offers the opportunity to provide a complementary interpretation of how legal and industrial relations institutions mediate and evolve in response to technological change. Rather than a redistribution of power relations in favour of the market, greater contamination and porosity of roles and functions between the actors of the industrial relations system is observable. If, on the one hand, new technologies allow employers to gain normative power over the discipline and the management of the employment relationship, this power is still conditional to institutional control by the trade unions and the State. Tripartite institutions participated by workers' representatives and other relevant stakeholders have been established, at different levels, to address emerging labour market challenges. Moreover, a new generation of rights have been enacted to adapt labour market regulation to technological change and likewise attune its impact on the globalised division of labour beyond the "great dichotomy". Empowered by information and communication technologies, governance has championed a new normative ideal of attaining public policy objectives. These objectives, however, are not necessarily economic. The *long durée* "sacralisation" of the right to property and economic freedom in the French civil code was questioned. Legislation was passed in the field of civil law and commercial law to rationalise the rising of the solidarity economy and to steer traditional economic activities towards broader societal goals. In line with a responsive regulation model, this institutional change not only resulted in an uncertain shift from government to governance[18]. But the emphasis of statutory regulation shifted also from the pursue of the firms' *social utility* (in terms of employment growth and redistribution of power and economic resources from capital to labour) to the promotion of the firms' *social function* (in terms of contribution to socially and environmental progressive goals).

2. *Technological change and trajectories of change in the French legal and industrial relations system*

In 1907, Paul Louis noted that French unionism did not fit anymore the Webbs' popular definition of trade unions as a "continuous association

[18] SUPIOT, *Governance by Numbers*, cit., *passim*.

of wage earners for the purpose of maintaining and improving the conditions of their working lives"[19]. The programme of French unions had broadened and radicalised so much that, ultimately, they aimed at capitalism collapse[20]. This revolutionary turn was presented as paradoxical, as long as trade unions were, like in any other country[21], "the direct product of capitalist concentration"[22]. Instead of "killing the father", French unionism evolved plurally within capitalism[23], and divided itself along ideological orientations[24]. Overall, it has continued to reflect the broader contradictions of the country's state-centric model of capitalism, the lights and shadows of its social democracy, and its unique tension between change and conservation.

In both legal[25] and industrial relations scholarship[26], the specificity of France is associated with the lack of an historical compromise between capital and labour in the post-World War I period[27]. If before World War II the State

[19] WEBB, *Industrial democracy*, in Green and Co., 1894, p. 1.

[20] LOUIS, *Historie du mouvement syndical en France (1789-1906)*, Félix Alcan, 1907, pp. 1-2.

[21] HYMAN, *Industrial relations: a Marxist introduction*, Macmillan, 1975 and HYMAN, *Marxism and the sociology of trade unionism*, Pluto Press, 1971.

[22] LOUIS, *cit.*, p. 3.

[23] Drawing on John R. Commons and Selig Perlman scholarship, Peter Stearns deconstructed the thesis of the intellectual and revolutionary origin of French unionism: STEARNS, *Revolutionary Syndicalism and French Labor: A Cause without Rebels*, Rutgers University Press, 1971, *passim*. *Contra*, *see* MITCHELL, *The Practical Revolutionaries: A New Interpretation of the French Anarchosyndicalists*, Greenwood Press, 1987.

[24] CLARK, *A History of the French Labor Movement (1910-1928)*, University of California Press, 1930; REYNAUD, *Trade Unions and Political Parties in France: Some Recent Trends*, in *ILR*, 1975, pp. 208-225; HYMAN, *Understanding European Trade Unionism: Between Market, Class and Society*, Sage, 2001, pp. 44-45; HOWELL, *Regulating Labor: The State and Industrial Relations Reform in Postwar France*, Princeton University Press, 1992, pp. 44-49. For a legal discussion of trade union pluralism in France, *see* FORDE, *Trade Union Pluralism and Labour Law in France*, in *ICLQ*, 1984, *passim*.

[25] According to Fuchs, French unions "have been indisposed to foster such instrument of compromise with capitalism as collective agreements" (FUCHS, *The French Law of Collective Labor Agreements*, in *YLJ*, 1932, p. 1006).

[26] Howell notes that, unlike Germany, Italy and Britain, "France did not develop an institutionalized collective bargaining system, its trade unions were weak and legally insecure in the workplace, wage determination occurred primarily through the labour market, and leftist parties played little or no role in the political life of the country" (HOWELL, *Regulating Labor: The State and Industrial Relations*, cit., p. 37).

[27] Among the root causes of such development, Reynard mentioned "the French spirit of individualistic liberty" as opposed to "the very basic concept of collective bargaining", the theory of class struggle that framed collective bargaining "as a reprehensible form of collaboration",

had kept out of trade unions and employers' associations affairs, French legal and industrial relations traditions have long remained dependent on the hegemony of the political power since the post-war period. Unlike what could be observed in market-oriented (e.g., Great Britain) or meso-corporatist regulation models (e.g., Germany and Italy)[28], the role of the State has aimed at stabilising and promoting good labour-management relationships – a purpose that French unions and employers failed to achieve autonomously.

Faced with a conflicting trade union culture, and with the employers' reluctance to engage in social partnerships, the regulatory centralism typical of the French legal tradition has been reflected in the legislation on collective bargaining. From the post-war period to the end of the Nineties, French governments have extensively intervened in the regulation of trade union activity and collective bargaining. Based on the respect of sources' hierarchy and of the principle of *favor*[29], the system of industrial relations itself has been embedded within the State realm, with sectoral level collective bargaining construed as a functional equivalent of the law. In the name of protecting the so-called *order public social*, the collective interest mediated by the industrial relations institutions has been encompassed and rationalised within the broader category of the general interest[30]. One of the consequences of this state-centric approach is the mechanism to provide *erga omnes* power to sectoral collective agreements: by extension of the Ministry of labour, collective agreements become binding for any employee and company whose activity falls within their scope.

This institutional acquis has gradually changed in parallel to technological evolution. The long and winding transition away from the Fordist model of production in the period 1970-2000, has come with significant restructuring of economic activities, and the reconfiguration of the overall division of labour in firms and society[31]. The struggles of May and June 1968

"inter- and intraunion friction of a political nature", and "the rapid and early growth of social legislation": REYNARD, *Collective Bargaining and Industrial Peace in France*, in *AJCL*, 1952, p. 216.

[28] BOYER, *How and Why Capitalisms Differ,* in *ES*, 2005, pp. 509-557.

[29] LAULOM, MERLEY, *La fabrication du principe de faveur*, in *RDT*, 2009, pp. 219-227.

[30] For extensive discussion of this issue, *see* REYNARD, *Collective Bargaining and Industrial*, cit. and NYE, *The Status of Collective Labor Agreement in France*, in *MLR*, 1957, pp. 655 and 672. For broader historical examination of French legal theories on collective agreements, see PIROU, *The Theory of the Collective Labour Contract in France*, in *ILR*, 1922, 5, p. 35.

[31] PARSONS, *French Industrial Relations in the New World Economy*, Routledge, 2005, pp. 6-24 and 94-101.

marked the peak of working-class militancy in France, as well as a symbolic exhaustion of the post-war model[32]. The strike wave of 1968 was not translated into sustainable material gains for workers[33]. To the contrary, since the end of the 1970s, France has been plagued with persistent high levels of unemployment, coupled with a dual labour market with an explosion of very short-term contract jobs in the last two decades[34].

Such developments have contributed to reshape the role of the State and the contours of social dialogue, increasingly faced with demands of economic competitiveness[35]. The withdrawal of the State from authoritative regulation went hand in hand with an increasing regulatory responsibility devolved to the social partners and civil society[36]. Although this goal was largely achieved in the decade following 1978, there was an *increase* in State intervention and involvement in labour regulation at certain critical moments[37]. While the rationale of State regulation to promote firm-level collective bargaining was, originally, to democratise industry by reinforcing the position of employees and their collective organisations within the workplace[38], things started to change in the Eighties[39].

When the government of François Mitterrand came to power in May 1981, high on its agenda was a plan to fundamentally restructure French industrial relations. With the 1982 Collective Bargaining Act firms were obliged to negotiate annually over hours and pay at company level. This was seen as encouraging employers to become more aware of their social responsibilities, and trade unions more aware of the technological and economic constraints within which the firm operated[40]. The then Ministry of Labour was clear that the reform aimed to "adapt to the variety of economic and human sit-

[32] Howell, *Regulating Labor: The State and Industrial Relations*, cit., p. 27.

[33] *Ibid*.

[34] Gazier, *Opportunities or Tensions: Assessing French Labour Market Reforms from 2012 to 2018*, in *IJCLLIR*, 2019, p. 333.

[35] Groux, *Le grand chambardement. De l'État à l'entreprise*, in Groux, Noblecourt, Simonpoli (eds.), *Le dialogue social en France. Entre blocages et Big Bang*, Odile Jacob, 2018, pp. 107-108 *See* also Howell, *Regulating Labor: The State and Industrial Relations* cit., p. 28.

[36] Howell, *Regulating Labor: The State and Industrial Relations*, cit., p. 29.

[37] *Ibid*.

[38] Andolfatto, Labbé, *The Future of the French Trade Unions*, in *MR*, 2012, p. 351.

[39] Parsons, *cit*., pp. 120-124.

[40] In addition to Parsons, *cit*., p. 120, *see* Glendon, *French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining*, in *AJCL*, 1984, pp. 449-491.

uations, to inevitable technological advances, and, finally, to the emergence of new social aspirations"[41]. Since the Nineties, French governments have adopted measures consistent with such aspirations, giving more functional autonomy to collective bargaining vis-à-vis the legislator and the law[42]. It is in this context that firm-level collective bargaining has become central in French industrial relations, along with the gradual reconfiguration of the favourability principle and the hierarchy of labour law sources[43].

While this normative pattern paralleled a trajectory of change followed by other EU countries, including Germany and Italy, the French political power continued to reflect a tension between State interventionism in industrial relations (as inherited from the post-war period) and respect for the autonomy of the social partners and collective bargaining[44]. Greater autonomy of firm-level collective bargaining did not come in a normative vacuum. To accommodate market pressures stemming from globalisation and technological change, instead, France have embraced a model of responsive regulation that has contributed to reform the overall system of industrial relations and beyond.

2.1. The French way to responsive regulation

Responsive regulation theory sets a pathway between regulation and deregulation in which State and non-State actors can work in tandem towards the enforcement of legislation and policies[45]. By questioning the conceptual contraposition between public intervention in the economy and laissez-faire approaches to policy, responsive regulation reproduces some of the main features of "reflexive law"[46], under which the State role is not to

[41] Auroux, *Un nouveau droit du travail?*, in *DS*, 1983, p. 3.

[42] Béthoux, Mias, *How does state-led decentralization affect workplace employment relations? The French case in a comparative perspective* in *EJIR*, 2019, 27, 1, pp. 5-21 and Amable, *cit.*

[43] French scholars refer to this process in terms of "inversion of norms": *see* for example Gazier, *Opportunities or Tensions,* cit., p. 337.

[44] Freyssinet claims that this tension is the main *spécificité* of French labour law: Freyssinet, *Les modes de production des normes de la relation d'emploi*, in *RDT*, 2016, p. 745. *See* also Groux, *Le grand chambardement*, cit., pp. 107-108.

[45] Ayres, Braithwaite, *cit.*

[46] Teubner, *Substantive and Reflexive Elements in Modern Law*, in *L&S Rev*, 1983, pp. 251 and 254-55. For broader discussion of reflexive law applied to labour law, *see* Rogowski, *Reflexive Labour Law in the World Society*, Edward Elgar, 2013, *passim*.

prescribe normative goals or taking regulatory responsibility for substantive outcomes. The role of the State is to provide an institutional basis for self-regulation and the coordination of interaction between subsystems, preventing the inequities that both laissez-faire and authoritative models of regulation involve.

The central tenet of responsive regulation lies in the possibility to transcend the deregulation debate because "in equilibrium regulatory tasks are privatized and carried out in a practical sense by markets – but the community does not need to cede judgments about welfare wholly to the unconstrained forces of the market"[47]. The focus of responsive regulation is not on the presence or absence of rules posed by central authorities that is the State or national collective bargaining as a functional equivalent of the law. The focus is on how the regulation process is shaped, how different levels of regulation interact, how regulatory goals are achieved and enforced. For example, in his analysis of French labour market reforms from 2012 to 2018, Gazier argues that "the French specificity lies in a paradox: a deregulating and high spending State"[48]. Yet, the paradox exists only if deregulation is contrasted with public intervention in the economy, on the grounds that the two processes are conceptually and practically alternative. As noted by Amable, instead, State intervention in the process of promoting the decentralisation of collective bargaining is not a contradiction in terms: "neoliberalism should not be mistaken for laissez-faire"[49].

In contrast to the vague reference to neoliberalism as an analytical category[50], two concepts are key to understanding responsive regulation: tripartism and delegation. Tripartism is conceptualised as a process in which "relevant public interest groups (PIGs) become the fully fledged third player in the game" of regulation[51]. According to Ayres and Braithwaite, PIGs include trade unions empowered to defend the interests of their members in employment regulation at both national and decentralised level. Complementary to tripartism, delegation is defined as the process through which certain regulatory tasks are delegated to private parties (e.g., to the PIGs or firms themselves). Contextually, this delegation is reinforced by traditional

[47] Ayres, Braithwaite, *cit.*, p. 162.

[48] Gazier, *Opportunities or Tensions*, cit., p. 335.

[49] Amable, *cit.*, p. 546.

[50] Dunn, *Against neoliberalism as a concept*, in *Cap&Class*, 2017, pp. 435-454.

[51] Ayres, Braithwaite, *cit.*, p. 56.

forms of regulatory monitoring to prevent market inefficiency. Gino Giugni looked at delegation as a form of devolution technique, which is used to achieve increased flexibility while avoiding deregulation *sic et simpliciter*[52].

2.2. State-led decentralisation of collective bargaining as a channel for responsive regulation

Reforms of the labour code promoted by French governments in the decade 2007-2018 are consistent with a responsive regulation model, and so are the most relevant policy documents underpinning them[53]. In terms of tripartism, the so-called Larcher Act of 2007[54] made the government obliged to consult the most representative trade union confederations when a legislative intervention in the field of social policy was undertaken[55]. In line with the EU model of social dialogue, if social partners reach an agreement, this is transposed into legislation and presented to Parliament for approval. If not, the government directly elaborates and enacts the law through the normal legislative procedure.

Access to tripartite policy making is subject to the representative status of social partners. In 2013, a formal system for measuring the representativeness of trade unions and employers' associations was introduced, overcoming the vague and updated criteria established in 1950[56]. The representative status of social partners is also functional to the validity of collective bargaining, as well as to the possibility for the extension of sectoral collective agreements, if their potential economic consequences are positively assessed and specific provisions for small firms are provided therein.

In harmony with the delegation technique, statutory norms empowered collective bargaining with normative tasks over many subjects. While industry level collective bargaining is now entitled to cover topics that were previously regulated by law, decentralised collective bargaining has gradually become a

[52] GIUGNI, *Juridification: Labour Relations in Italy*, in TEUBNER (ed.), *Juridification of Social Spheres*, Walter de Gruyter, 1987, p. 203.

[53] *See* for example COMBREXELLE, *cit.*, and METTLING, *Transformation numérique et vie au travail*, 2015.

[54] Law No. 2007-130 of 31 January 2007 on the Modernisation of Social Dialogue.

[55] SUPIOT, *La loi Larcher ou les avatars de la démocratie représentative*, in *DS*, 2010, pp. 525-532.

[56] *See* NYE, *cit.*, pp. 670-671 and FORDE, *cit.*, pp. 138-140.

key element of labour regulation in France[57]. As a result of such a "state-led model of decentralization"[58], the nexus between the labour code, sectoral collective bargaining and firm-level collective bargaining is currently articulated into three types of relationships based on the imperative or semi-imperative character of central regulation. The first category refers to provisions that the labour code explicitly excludes from firm-level collective bargaining derogation, including minimum wage, job classification systems, part-time work, training funds, and social protection measures. The second type of relationship involves subjects that can only be regulated by firm-level collective bargaining if sectoral level collective bargaining provides so (e.g., policies to hire disabled workers). Beyond these two categories, firm level collective bargaining prevails over sectoral collective bargaining, which has become a secondary source of regulation with respect to many relevant subjects, including the controversial issues of working time limits, the regulation of fixed-term contracts and new generation rights such as the right to disconnect.

Despite being endowed with more functional autonomy, firm-level collective bargaining remains a highly regulated institution in France. The cornerstone of industrial relations at firm level is the Comité Économique et Social (*i.e.,* the economic and social committee), which now encompasses the information and consultation functions that were previously assigned to different workers' representation bodies[59]. In firms where it is established, the social and economic committee is the central institution for workers' information and consultation when new technologies[60], automatised systems of human resource management[61] and any means that imply control-

[57] VINCENT, *France: the rush towards prioritizing the enterprise level*, in MULLER, VANDAELE, WADDINGTON (eds.), *Collective bargaining in Europe: towards an endgame. Volume II*, Etui, 2019, pp. 217-238. *See* also MIAS, *Quelles négociations collectives dans les entreprises ?*, in *RDT*, 2017, pp. 317-323.

[58] BÉTHOUX, MIAS, *How does state-led decentralization affect workplace employment relations? The French case in a comparative perspective*, in *EJIR*, 2019, pp. 5-21.

[59] Precisely, the Comité d'Entreprise (*i.e.,* the works council), the Comité d'Hygiène et de Sécurité et des Conditions de Travail (*i.e.*, the hygiene, safety and working conditions committee), and the Délégués du Personnel (*i.e.*, the personnel representatives) have been merged into a single Comité Économique et Social (*i.e.*, the economic and social committee).

[60] Article L.2312-8 of the labour code provides that the social and economic committee shall be informed and consulted prior to the introduction of new technologies.

[61] Article L. 2312-38 of the labour code provides that the social and economic committee

ling employees' activities are introduced[62]. In addition to such direct competences over technological innovation[63], the social and economic committee is entitled to play an indirect role when it comes to preventing and possibly contrasting the risks of new technologies on workers' health and safety, as well as in the context of mandatory collective bargaining on quality of life at workplace and on forecast management of occupations and competences[64].

Along with the economic and social committee, union delegates are entitled to negotiate with the employer, provided that they are set up by representative trade unions. Unlike other jurisdictions, firm-level collective bargaining in France is mandatory: firms are required to bargaining (but not to conclude an agreement) periodically over compulsory subjects, such as the annual negotiation on wages, profit sharing and working time. Although firm-level collective bargaining is now entitled to redefine the scope and timing of regulation, the labour code provides that negotiation over mandatory subjects shall take place at least once every four years. Furthermore, the validity of firm-level collective bargaining is subject to majority-based rules linked to the representative status of trade unions. To be valid, any agreement must be signed by one or more trade unions that received 50% of the votes' cast. In case the signatory trade unions only have 30 to 50% of the votes, other democratic mechanisms apply, including the referendum approval by the majority of the company's workers. Specific rules apply to enable access to collective bargaining for micro-businesses and small and medium-sized enterprises (SMEs) without union representation by allowing direct negotiation on all subjects, with an elected staff representative for SMEs or with employees for micro-businesses that do not have elected staff representatives.

shall be informed in advance about the introduction or modification of any automatized system of human resources management.

[62] Article L. 2312-38 of the labour code provides that the social and economic committee shall be informed and consulted prior to the implementation of any means that imply controlling the employees' activities.

[63] For further analysis on the role of the social and economic committee regarding the introduction and management of new technologies, including the artificial intelligence, *see* Leroy, *Le comité social et économique face à l'intelligence artificielle*, in Adam et al. (eds.), *Intelligence artificielle, gestion algorithmique du personnel et droit du travail*, Dalloz, 2020, pp. 131-138.

3. *State and trade union responses to the* uberization *of labour relations*

If any industrial relations system is "bound together by an ideology or understandings shared by all the actors"[65], the digital transformation of the economy and society is *a fait accompli* of the French twenty-first century capitalism. Fuelled by State-led industrial policies and massive public incentives, the *transformation numérique* has come with large consensus of both employers and trade unions. Despite none of the actors of the French industrial relations system arguing against the digitalisation, digital technologies have brought about significant changes in the division of labour and in the labour-management relationship[66]. Supiot, for example, claims that "the digital revolution on the organization and division of labour is at least as significant as that of the second Industrial Revolution, which led to the emergence of the welfare state"[67].

Technological change cannot be neutral in terms of power balances[68]. The effects on labour power are at best ambivalent. Newly emerging technologies and organisations are not just about whether existing jobs will be maintained or automated. New statuses and new labour relationships emerge[69], questioning some of the traditional features of wage labour[70], along with the classical trade union logics of collective action[71].

[64] *See* Articles L2242-1, L2242-13, L2242-17 and L2242-20 of the labour code.

[65] Dunlop, *cit.*, p. 8.

[66] Mettling, *cit.*, *passim*. For comments drawing on this report, *see* Pontif, *Transformation numérique et vie au travail: les pistes du rapport Mettling*, in *RDT*, 2016, p.185; Bidet, Porta, *Le travail à l'épreuve du numérique*, in *RDT*, 2016, p. 328 and Gratton, *Révolution numérique et négociation collective*, in *DS*, 2016, p. 1050. Before the debate on the Mettling report, *see* Ray, *À propose de la revolution numérique*, in *DS*, 2012, 934.

[67] Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, in *ILR*, 2021, p. 2.

[68] Aloisi, De Stefano, *cit.*, *passim*.

[69] *See* Abdelnour, Méda, *Les nouveaux travailleurs des applis*, Presses Universitaires de France, 2019, *passim*; Méda, *The future of work: The meaning and value of work in Europe,* ILO Research Paper, 2016, n. 8, pp. 10-15; Gaulard, *La Fin du salariat*, Bourin, 2013.

[70] In addition to the Mettling and Combrexelle reports, *see* also Groux, *Le grand chambardement*, cit., pp. 122-123 ; Pasquier, *Sens et limites de la qualification de contrat de travail. De l'arrêt Formacad aux travailleurs "ubérisés"*, in *RDT*, 2017, n. 2, p. 95 and Bento de Carvalho, Tourneaux, *Actualité du régime du contrat de travail*, in *DS*, 2019, p. 57.

[71] Vicente, *Les conflicts collectifs ayant pour support l'algorithme*, in Adam et al. (eds.), *cit.*, pp. 187-197.

As part of an historical process started with the computerisation of society in the 1970s, the "transformation numérique" has threatened unskilled jobs, but at the same time the integration of digital technologies into the economy has created new jobs that are highly qualified[72]. On the one side, high-skilled workers are internalised, both as independent contractors or subordinate employees with higher spaces of autonomy and self-coordination. On the other side, labour intensive activities are mainly outsourced. As a result, highly qualified workers tend to be managed-by-objectives and, to a great extent, are expected to self-organize their working time patterns, with their work organisation being more and more decoupled from time and space limits. To the contrary, low-skilled workers are contracted with non-standard employment schemes or self-employment contracts falling outside traditional labour law protections[73].

French scholarship and policy making qualify this pattern in terms of "uberization" of the employment relationship, in which the contested boundaries between subordination and self-employment blurs. As anticipated by Supiot, within traditional, high-skilled jobs, workers' autonomy increases; within the area of self-employment, workers' autonomy reduces[74]. Irrespective of their employment status, both categories of workers benefit from the increased spaces of freedom and capability stemming from technological innovation. The so-called "digital picket line" can certainly be used by workers and unions to contest exploitation and develop collective strength[75]. But both categories of workers remain at the same time exposed to the *governance by numbers*, under which human work is modelled on computers, and physical control over workers is being compounded by intellectual control over them[76].

To anticipate and contrast market imbalances and inefficiencies linked

[72] Groux, *Le grand chambardement*, cit., pp. 120-121.

[73] Lokiec, *Externalising the Workforce: Lessons from France*, in Ales, Deinfert, Kenner (eds.), *Core and Contingent Work in the European Union: A Comparative Analysis*, Hart Publishing, 2017, *passim*.

[74] Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, 2001, *passim*.

[75] Forsyth, *cit.*, *passim*. In the French debate, *see* Vicente, *cit.*, *passim* and Gratton, *cit.*, spec. Section II.

[76] Supiot, *Labour is not a commodity*, cit., p. 4. *See* also Lokiec, Rochfeld, *Nouvelle surveillance, nouvelle subordination. Travail sous* Big Data*: les transformations du pouvoir*, in Jeammaud, Le Friant, Lokiec, Wolmark, *À droit ouvert. Mélanges en l'honneur d'A. Lyon-Caen*, Dalloz, 2018, p. 545.

to this technology-led shift of labour relations, the State has embraced responsive regulation in the field of individual and collective labour rights, by either transposing existing provisions introduced via collective agreements, delegating detailed regulation to collective bargaining, or introducing promotional legislation in both self-employment and subordination domains.

3.1. Responsive regulation within and beyond the "great dichotomy"

Despite France belonging to "those countries where there is a binary distinction between self-employed and employees with employment rights only afforded to employees"[77], exceptions to the sharp dichotomy exist for certain categories of (self-employed) workers, including journalists, artists, models, caregivers, home workers, employees of building, attendants and nursing assistants. Depending on the different occupations, these workers are selectively entitled with the protections recognised to employees, including collective labour rights. Unlike other jurisdictions where judges and legislators are still struggling to accommodate competition law to collective bargaining out of subordination[78], promotional legislation in France has introduced representation rights for certain types of self-employed workers[79], entitling those who perform jobs using digital platforms to establish and join a trade union with the aim to defend their collective interests[80]. Consistent with a responsive regulation approach, State intervention in the area of self-employment was primarily aimed at setting the institutional conditions for

[77] Adams-Prassl, Laulom, Maneiro Vázquezat, *The Role of National Courts in Protecting Platform Workers: A Comparative Analysis*, in Miranda Boto, Brameshuber (eds.), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models*, Hart Publishing, 2022, p. 76. *See* also Digennaro, *Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal systems*, in *LLI*, 2020, p. 26.

[78] Paul, McCrystal, McGaughey, *Labor in Competition Law*, Cambridge University Press, 2022. *See* also Forsyth, *cit.*, pp. 150 and 222.

[79] *See* Loiseau, *Travailleurs des plateformes de mobilité: où va-t-on ?*, in *SJ,* 2021, pp. 1-7, Gomes, Sachs, *The Battle between the Legislator and Judges over Platform Worker Accountability: The French Case*, in Carinci, Dorssemont (eds.), *Platform Work in Europe. Towards Armonisation?*, Intersentia, 2021, pp. 83-94 and Chatzilaou, *Can digital platforms challenge French Labour Law?*, in Bellomo, Ferraro (eds.), *Modern Forms of Work. A European Comparative Study*, Sapienza Università Editrice, 2020, pp. 93-106.

[80] *See* Article L.7342-6 of the French labour code, as amended by Ordonnance No 2021-484 of 21 April 2021.

workers' and employers' associations to regulate the platform economy, and giving legal recognition to existing autonomous initiatives by trade unions[81].

In addition to protective measures granted to platform workers' representatives, including training and paid leaves to engage in union-related activities, the labour code was amended in 2022[82] to introduce mandatory[83] and voluntary[84] collective bargaining at sectoral level. Pursuant to article L7343-49 of the labour code, such collective agreements can be extended to all the platforms and the self-employed workers falling within their scope, upon decision taken by the "Authority for social relations of employment platforms". Created on 21 April 2021[85], this authority is a public institution supervised by the Ministry of labour and the Ministry of transportation, whose goal is to regulate and enhance social dialogue between the platforms and the workers bound to them by a commercial contract[86]. As another example of responsive regulation achieved through a decentralised form of tripartism, the authority relies on an ecosystem of actors representing a wide variety of interests, such as associations for the defence of consumers and users, officials from local public authorities, qualified experts in the fields of digitalisation, transportation and social dialogue, as well as representatives of self-employed workers and platforms.

Turning to the area of subordination, telework stands out as an example of normative porosity between statutory legislation and collective bargaining[87].

[81] VICENTE, *cit.*

[82] *See* article 2, Ordonnance n. 2022-492 of 6 April 2022.

[83] Mandatory provisions shall regulate the modalities to compensate platform workers, including the price of their service, as well as the conditions to exercise their professional activity, the working time arrangements and the implications of algorithms on the organisation and performance of work. *See* article L7343-36 of the labour code.

[84] Voluntary collective bargaining provisions are expected to cover all the other elements of the work organisation, including the ways through which platforms and workers exchange information on their commercial relationships, the modalities through which platforms control the performance of work, and the conditions to terminate the contract. See article L7343-37 of the labour code.

[85] Autorité des relations sociales des plateformes d'emploi. *See* Article L7345-1 of the labour code, modified by article 3 of Ordonnance No 2022-492 of 6 April 2022.

[86] Core functions of the authority include support in the process of measuring the representative status of platform workers' trade unions, organisation of training courses, mediation activities, data collection and analysis, and other administrative functions linked to the governance of commercial contracts.

[87] For discussion about the relationship between the law and collective bargaining in

Since the so-called Warsmann Law of 22 March 2012, teleworking has been governed by legal provisions that apply to all employers and employees in the private sector[88], as well as by the national interprofessional agreement of 19 July 2005 that transposed the European framework agreement on telework[89]. While some collective agreements had already regulated telework, Article 57 of the Loi Travail launched a consultation with the social partners on how to adapt the discipline of remote working to technological innovations and their impact on the employment relationship. As an outcome of this consultation, and the extensive use of remote working made compulsory during the pandemic because of imposed confinement, on 26 November 2020, French social partners concluded a national interprofessional agreement on telework[90], seeking to provide a framework on the rules and conditions governing teleworking both as a normal practice and in exceptional circumstances[91]. In line with a responsive regulation model, rather than setting prescriptive or normative binding rules on firms, the agreement emphasises the importance of social partnership and negotiations between employers and trade unions as a means of implementing teleworking arrangements. In case trade union representatives are not present or an agreement with them has not been concluded, telework shall be regulated through an employer's charter after due consultation of the social and economic committee (if such a body exists). In the absence of both a firm-level collective agreement and a charter, where employees and employers decide to implement working from home outside the company premises, they are allowed to formalise their agreement by any means[92].

The right to disconnect is a further example of how responsive regulation mediates technological change[93]. As early as 2013, a national cross-sec-

the regulation of telework, *see* Ray, *Légaliser le télétravail: une bonne idée ?*, in *DS*, 2012, pp. 443-457.

[88] *See* articles L1222-9 and following of the labour code, as amended by Ordinance No. 2017-1387.

[89] ETUC, UNICE, UEAPME, CEEP, *Framework agreement on telework*, 16 July 2022.

[90] Ray, *De l'ANI du 26 novembre 2020 sur le télétravail à l'avenir du travail à distance*, in *DS*, 2021, pp. 236-243 and Véricel, *L'accord sur le télétravail: un accord de compromis qui reste à la marge du normatif*, in *RDT*, 2021, pp. 59-63.

[91] *See* Article L. 1222-11 of the French labour code.

[92] Article L. 1222-9 of the French labour code.

[93] For early conceptualisation of the right to disconnect, *see* Ray, *Naissance et avis de décès du droit à la déconnexion: le droit à la vie privée du XXIème siècle*, in *DS*, 2002, p. 939. *See* also Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, in *RDT*,

toral agreement on quality of life and of working conditions encouraged firms to refrain from any intrusion in employees' private lives by introducing time slots and periods when ICT devices should be switched off. On the one side, this national agreement was informed by provisions already introduced via firm-level collective bargaining[94]. On the other side, it gave further impetus to negotiations over limits to use digital devices and communication tools out of the core working hours, in both telework[95] and normal work arrangements[96]. The provisions laid down by collective bargaining were then qualified as the "right to disconnect", as regulated by the El Khomri law of 8 August 2016, precisely at article 55 of chapter II, named *Adaptation du droit du travail à l'ère numérique*. The right to disconnect is currently consolidated in the labour code as a mandatory subject of negotiation, within the section concerning the annual collective bargaining on gender equality and the quality of life and of working conditions[97]. In case an agreement is not concluded, the employer shall draw up a charter in consultation with the social and economic committee. This charter shall define procedures for exercising the right to disconnect and provide training and awareness-raising actions on how digital devices should be used reasonably.

Beyond the "great dichotomy", industrial relations institutions are involved in the governance of professional training through several institutional

2016, n. 10, p. 592 and Péretié, Picault, *Le droit à la déconnexion répond à un besoin de régulation*, in *RDT*, 2016, p. 595. For further references to the French debate on the right to disconnect, see Morel, *Le droit à la déconnexion en droit français. La question de l'effectivité du droit au repos à l'ère du numérique*, in *LLI*, pp. 4-16.

[94] See, for example, Article 7, section 3, of the firm-level collective agreement on professional equality between women and men and diversity at workplace, concluded at Renault on 16 May 2012.

[95] See, for example, Article 9 of the firm-level collective agreement on telework, concluded at Thales on 25 April 2015.

[96] See, for example, Article 4, section 4 of the firm-level collective agreement on the control of the workload of managerial staff in forfeit regime, concluded at Michelin on 16 Mars 2016.

[97] According to article L2242-17, firm-level collective bargaining shall introduce procedures for the full exercise of the right to disconnect, along with mechanisms for regulating the use of digital devices, with a view to ensuring compliance with workers' rights to take rest and leave times while respecting their personal and family life. Among the first implementations of this provision is the firm-level collective agreement on digital transformation signed at Orange on 27 September 2016. See Turlan, *France: First company-level agreement on digital transformation signed at Orange*, Eurofound, 13 January 2017.

channels, covering all types of work activities, irrespective of the employment status. Recent reforms have endorsed the EU idea of lifelong learning and active labour market policies as tools to promote transitions between occupations in response to rapid obsolescence of jobs and competences induced by technological innovation[98]. The individual learning account system (*compte personnel de formation*, CPF) is exemplificative in this respect[99]. This is an individual right recognised to every member of the active population, whose aim is to enhancing access to training and to promoting lifelong learning. Since its creation in 2015[100], the scope of this scheme has been expanded to include self-employed workers as of January 2018, and new training programs have become eligible to tackle the labour market challenges of the digital transformation. The account is entirely transferable from one occupation to another. It is preserved when changing or losing one's job. The emphasis on governance is particularly evident in the management of the personal training account and its funding system. This is based on a network of institution and bilateral bodies consisting of workers and employer's representatives, including the joint bodies entitled to collect the training levies enterprises need to pay[101], those financing the individual training leave and collecting enterprises' mandatory contributions for training purpose[102], and the bilateral funds for securing professional career paths[103]. At a higher level of coordination, the law n. 2018-771 of 5 September 2018[104] established *France compétences*, a public institution whose goal is to improve the efficiency of the professional training and apprenticeship system, and to promote equal access to increase skills development. As an example of responsive regulation via tripartism, the governance of *France compétences* is constituted by the State, the Regions, and social partners at a national and inter-professional level, with the aim to facilitating social dialogue between key actors of the vocational-education and training system.

[98] For critical assessment, *see* GAZIER, *Opportunities or Tensions*, cit., p. 342.

[99] LUTTRINGER, *Le compte personnel de formation rénové*, in *DS*, 2018, pp. 994-999 and MAGGI-GERMAIN, *L'accompagnement des travailleurs*, in *DS*, 2018, pp. 999-1006.

[100] *See* also MAGGI-GERMAIN, *Vocational Training in the Context of Law of June 14th 2013 on Employment Security: The "Personal Learning Account"*, in *E-JICLS*, 2015, pp. 1-35.

[101] Organisme paritaire collecteur agréé (OPCA).

[102] Organisme paritaire agréé au titre du congé individual de formation (OPACIF).

[103] Fonds paritaire de sécurisation des parcours professionnels (FPSPP).

[104] Law No 2018-771 of 5 September 2018 (pour la liberté de choisir son avenir professionnel).

4. *Invisibility of new-generation technologies and their externalities*

Not only technological change has reshaped the organisation of the employment relationship and the labour market internally. It has also changed the external contours of the division of labour, prompting the rise of business models vertically disintegrated[105], where the firm is organised as a dispersed network[106]. Unlike the idea of "mondialisation", in which communities in different areas and jurisdictions join in cooperative and solidaristic networks[107], this development was mainly the outcome of competitive pressures, and came with new market cleavages and inequalities along geographical lines. As noted by Forsyth, "putting organised labour even further on the defensive, in the last 30 years, employers have adopted a range of business models to distance themselves from responsibility for minimum employment standards – and keep unions at bay"[108].

Driven by new generation technologies, this evolution of the market economy has made the social (and environmental) externalities of technological production increasingly invisible. State and industrial relations responses to invisibility of new generation technologies have primarily sought to make French companies accountable and responsible by limiting the possibility to externalise the negative effects of their operations on society and the environment. Along with Germans' companies, French multinationals and (global) trade unions pioneered the rise of transnational collective bargaining as a regulatory channel transcending the national boundaries[109]. In parallel to attempts to regulate nomad capitalism through transnational collective agreements, a proposal to encourage collective bargaining in supply chains was put forward at a policy level[110], despite remaining uncharted in

[105] GOLDIN, *Enterprise Transformations, Externalization Processes and Productive Decentralization*, in PERULLI, TREU (eds.), *Enterprise and Social Rights*, Kluwer Law International, 2017, pp. 75-91.

[106] LOKIEC, *Externalising the Workforce*, cit., p. 63.

[107] *See* Supiot's analysis of the concept of *mondialisation* as opposed to the one of globalization: SUPIOT, *Homo faber: continuità e rotture*, in HONNETH, SENNETT, SUPIOT, *Perché lavoro? Narrative e diritti per lavoratrici e lavoratori del XXI secolo*, Fondazione Giangiacomo Feltrinelli, 2020, pp. 53-54.

[108] FORSYTH, *cit.*, p. 22.

[109] SPINELLI, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in *this journal*, 2022, pp. 103-118 and RIBEIRO, *Collective Bargaining and MNEs and Their Supply Chains*, in this journal, 2022, pp. 119-128.

[110] *See* COMBREXELLE, *cit.*, p. 99.

practice[111]. To overcome the limits of autonomous regulation, French governments enacted new pieces of legislation in different normative domains, including civil law and corporate law. Although this new legislation has not always direct implications for industrial relations institutions, it has potential to steer technological innovation towards socially and environmentally progressive ends, thus contributing to labour (and environmental) sustainability.

4.1. The social utility and the social function of the corporation reconsidered

In the wake of the Rana Plaza disaster in Bangladesh, a law on corporate duty of vigilance was passed on 27 March 2017[112], with large consensus by trade unions[113]. The law applies to any company employing at least five thousand employees (including those employed in direct and indirect subsidiaries), whose head office is in France, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located eighter in France or abroad. Legislation on duty of vigilance can be seen as a further example of responsive regulation as long as it involves mechanisms for self-regulation and forms of tripartism and delegation to enforce it. In collaboration with the stakeholders, including trade unions, the companies shall establish a "vigilance pla" providing measures to identify and prevent violations of human rights and fundamental freedoms in their supply chains. *Inter alia*, the plan must provide an alert mechanism regarding the existence or materialisation of risks, established in consultation with the representative trade unions within the company. Failure to comply with the relevant duties shall be liable and oblige the firm to compensate for the harm that due diligence would have permitted to avoid. The action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so. Remedies might involve the constituent parties

[111] Lokiec, *Externalising the Workforce*, cit., p. 80.

[112] *See* Article L. 225-102-4 of the French commercial code.

[113] Spinelli, *cit.*, p. 111. For critical appraisal to the French law on duty of vigilance, and further references to the French debate, *see* Savourey, Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, in *BHRJ*, 2021, *passim* and Gualandi, *Addressing MNEs' Violations of Workers' Rights through Human Rights Due Diligence. The Proposal for an EU Directive on Sustainable Corporate Governance*, in this journal, 2022, pp. 85 and 97-100.

of the company (i.e., employees, managers and shareholders), as well as the stakeholders of the entities targeted by the law, such as employees of a subcontractor, trade unions and NGOs.

In addition to alert procedures provided by the law on duty of vigilance, and those laid down in occupational health and safety legislation[114], workers and workers' representatives have also been involved in the prevention of technological disasters. Precisely, the Law n. 2013-316 of 16 April 2013[115] integrated the labour code with special provisions concerning the alert in the event of "serious" risks for public health and the environment[116]. This is also a typical example of responsive regulation, in which relevant public interest groups are actively involved in law enforcement. Articles L4133-1 and L4133-2 of the French labour code provide that the worker or the workers' representative elected in the social and economic committee shall immediately alert the employer if they consider that the products or the manufacturing processes used in the plant might expose public health or the environment to serious risks. Once the alert is registered under conditions determined by regulation, the employer shall inform the worker or examine the risk jointly with the workers' representative to the social and economic committee. In case of disagreement, or in the absence of employers' follow-up within one month, the worker or the workers' representative might refer the procedure to a state agent of the relevant district.

Further to specific provisions to rationalise the development of the so-called social and solidarity economy[117], normative efforts to increase corporate accountability and responsibility have led to the enactment of new legislation beyond labour law, with the aim to promote the social function of economic activities or at least to make it more visible. In revising the definition of "corporate purpose" in the civil code for the first time since it was drafted in 1804, the so-called "Action Plan for Business Growth and Transformation"[118] made mandatory for corporations to consider the social

[114] From article L4131-1 to article L4131-4 of the labour code.

[115] Law No 2013-316 of 16 April 2013.

[116] For an early conceptualisation of the droit d'alerte, see SUPIOT, *L'alerte écologique dans l'entreprise*, in *DV*, 1994, pp. 91-110. *See* also VERICEL, *Institution d'un droit d'alerte en matière de santé publique et d'environnement*, in *RDT*, 2013, pp. 415-417 and VANULS, *Regards sur la précaution en droit du travail*, in *RDT*, 2016, pp. 16-26.

[117] Law No 2014-856 of 31 July 2014 (relative à l'économie sociale et solidaire).

[118] The "Plan d'Action pour la Croissance et la Transformation des Entreprises" (so-called Loi "PACTE") of 22 May 2019. For discussion about the labour law implications of the Loi

and environmental implications of their operations[119]. Voluntarily, instead, corporations might introduce a purpose beyond profits. The revised Article 1835 of the French civil code provides that a corporation can specify in its by-laws a *raison d'être* – the principles it gives to itself to guide its business policy and strategic decisions[120]. The law also created a new corporate statute called *société à mission*. According to Article 210-10 of the commercial code, a public or a private company is entitled to register as *société à mission* provided that the corporate by-laws define a mission, or a social or environmental goal beyond profit, and the procedures for monitoring how the execution of the mission is achieved. Consistent with a responsive regulation model, these procedures shall establish a mission board, distinct from the board of directors, including at least one employee, with the aim to assessing and monitoring whether and how the company's mission is fulfilled.

5. *Discussion and conclusions*

Despite legal pluralism supplanting state-centric legislation, and governance displacing government, adjustment of French industrial relations to technological change can hardly be rationalised in terms of liberalisation or deregulation *only*. Undoubtedly, many of the French reforms passed in the last decades are vulnerable to criticism. One might always claim that "the devil is in the details". Regulatory flaws are visible in all the provisions mentioned, and many other normative examples might be critically discussed to show how legislation has surrendered to the "forces of the market" and the

"PACTE", *see* Géa, *Loi PACTE: quelle contribution au renouveau du droit du travail ?*, in *RDT*, 2019, pp. 99-110 and the dossier *Loi PACTE*, in *DS*, 2019, especially Desbarats, *De l'entrée de la RSE dans le code civil*, in *DS*, 2019, pp. 47-56.

[119] The revised version of Article 1833 of the civil code provides that "Every company must have a lawful purpose and be incorporated in the common interest of the shareholders. The company is managed in its corporate interest, while taking into account the social and environmental issues related to its activity".

[120] The revised version of Article 1835 of the French civil code provides that "The by-laws must be established in writing. In addition to determining the contributions made by each shareholder, they set out the form, corporate purpose, name, registered office, share capital, and term of the company, and the rules governing how it functions. The by-laws may specify a raison d'être, comprised of the principles that the company adopts and will allocate resources to uphold in the conduct of its business".

technique. Yet, arguments on liberalisation or deregulation of the French legal and industrial relations system lack of analytical capacity when they tend to underestimate that law and technology are both part of the problem and part of the solution. And so are industrial relations institutions.

The narrative on the seeming neoliberal turn of the French legal and industrial relations system is a popular one[121], but it is unconvincing. Among the most cited essays of *Capital & Class*[122], Bill Dunn's article criticises the use of neoliberalism as a slippery concept, neither intellectually precise nor politically useful[123]. The author observes how this concept was mainstreamed by the academic left, which used it as a category that catches selectively whatever a particular author chooses and disapproves, with a tendency to reproduce the binary idea that the State is good, and the market is bad. The reality is that State-society (and market) boundaries are erected internally, as an aspect of more complex power relations. Their appearance can certainly be historically traced to technical innovations of the modem social order, whereby varieties of organisation, regulation, and control internal to the social processes they govern create the effect of a state structure external to those processes[124]. But on closer inspection, the analysis of the evolution of French industrial relations confirms that the State should not be construed as a free-standing entity, located apart from and opposed to another entity called "society". Although the State might seem to stand apart from society, the boundaries between the two dimensions do not mark a real edge. They are not the border of an actual object[125].

A "reconfiguration of state institutions and practices"[126] in the light of technological change seems a better approximation. Although the rationale of the French reform process was mainly to make collective bargaining more responsive to competitive pressures and technological innovation, the State upheld its regulatory prerogatives, despite now being exercised in a less cen-

[121] In addition to AMABLE, *cit.*, *see* DENORD, *French neoliberalism and its divisions. From the Colloque Walter Lippmann to the 5th Republic*, in MIROWSKI, PLEHWE (eds.), *The Road from Mont-Pelerin: The Making of the Neoliberal Thought Collective*, Harvard University Press, 2009 and DENORD, *Néo-libéralisme version française. Histoire d'une idéologie politique*, Demopolis, 2007.

[122] *Capital & Class* is among the most influential scientific reviews of Marxist critique.

[123] DUNN, *cit.*

[124] MITCHELL, *The limits of the State: beyond statist approaches and their critics*, in *American Political Science Review*, 1991, p. 78.

[125] MITCHELL, *The limits of the State*, cit., p. 95.

[126] HARVEY, *A Brief History of Neoliberalism*, Oxford University Press, 2015, p. 78.

tralistic manner. Gazier is right in pointing to "strong and visible continuity" between labour market reforms enacted by left and centre-right governments in France[127]. But this is exactly because both governments have embraced responsive regulation as a model to respond to and mediate innovation and technological change, whose significant and impactful advances move at a much more rapid pace than it used to be in the past[128]. While debates on deregulation stem from distrust to the efficacy of the contemporary regulatory State, responsive regulation shows that a more dynamic interplay between statutory norms, self-regulation and enforcement exists. An interplay that, in principle, might overcome the alternative between laissez-faire approaches to policy of the right and the regulatory centralism of the left[129].

As Ayres and Braithwaite suggest, by delegating certain regulatory tasks to private parties, "government can more closely harmonize regulatory goals with laissez-faire notions of market efficiency"[130]. This implies that if the regulatory role of the State is vulnerable to the deregulatory capacity of the firm, business is also vulnerable to the associational order of public interest groups (like trade unions, tripartite institutions, and state agencies), provided they are empowered with adequate rights and channels of voice[131]. Probably this also explains why the rush towards prioritising the enterprise level of collective bargaining has remained largely ineffective in France[132]. Firm-level collective bargaining has made scant use of the derogatory functions recognised by the law[133], making it difficult to claim that the French system of industrial relations has fully followed the common European neoliberal trajectory identified by Baccaro and Howell[134]. Unlike liberalisation processes

[127] Gazier, *Opportunities or Tensions*, cit., p. 336.

[128] Kolacz, Quintavalla, *cit.*, p. 143.

[129] Groux, *L'action publique négociée. Un nouveau mode de régulation ? Pour une sociologie politique de la négociation*, in *Négociations*, 2005, pp. 57-70.

[130] Ayres, Braithwaite, *cit.*, p. 158.

[131] Ayres, Braithwaite, *cit.*, p. 14.

[132] Vincent, *France: the rush towards prioritizing the enterprise level*, in Muller, Vandaele, Waddington (eds.), cit.

[133] Béthoux, Mias, *How does state-led decentralization affect workplace employment relations? The French case in a comparative perspective*, in *EJIR*, 2019, p. 18 and Leonardi, Pedersini (eds.), *Multi-Employer Bargaining Under Pressure. Decentralisation Trends in Five European Countries*, ETUI, 2018, p. 34.

[134] Baccaro, Howell, *Trajectories of Neoliberal Transformation. European Industrial Relations Since the 1970s*, Cambridge University Press, 2017.

promoted in other countries, whose trajectories of change paralleled deregulation *sic et simpliciter* (low coordination and low coverage) or dualization patterns (high coordination and low coverage), France has probably followed what Thelen defines as a "socially embedded model of flexibilization" (low coordination and high coverage), contributing to disentangle the broad relationship between coordinated and egalitarian varieties of capitalism and industrial relations systems[135].

The achievement of this institutional balance was not painless. Arguably, it was the result of mobilisations by trade unions and other social forces that were promoted throughout the reform process, especially in the context of the so-called El Khomri law, which entitled firm-level collective bargaining to derogate from the legislation on the 35-hour week – one of the symbols of the French labour movement. However, in spite of the recrudescence of such protests, and their impact on social media, the social-movement reminiscence of French trade unionism overshadows an undeniable reality: over the past thirty years, the intensity of social conflicts has fallen considerably in France, and the amount of strikes is at an extremely low level compared to that of the 1950s and 1970s. Between the image of a very conflictual society and the reality of industrial relations, there is a gap which constitutes an important paradox[136]. The idea that «*il faut faire saigner les patrons*» does not work anymore in French industrial relations.

This paradox is probably the most relevant obstacle for responsive regulation to succeed in bringing justice in a post-industrial era. Extensive State interventionism in French industrial relations resulted in an ever-increasing production of texts, laws, standards. Yet, ironically, *L'État de droit* has turned itself into the *State of rights*, whose exponential growth has often blurred their actual implementation and effectiveness[137]. Rights and subsidies of all kinds that French governments granted to the unions were sold as a public good aimed at benefiting workers[138]. But at the same time, they have reduced the incentive for union activism and independence from both the State and employers. This reflects the eternal tension in the identity of unions as both social movements and institutionalised organisations which has wider

[135] Thelen, *Varieties of Liberalization and the New Politics of Social Solidarity*, Cambridge University Press, 2014.

[136] Groux, *Le grand chambardement*, cit., p. 107.

[137] *Ibid.*

[138] Andolfatto, Labbé, *cit.*, p. 351.

implications for understanding the possibilities and limitations of human emancipation in capitalism[139].

On the one side, any idea of legal pluralism cannot be divorced from the premises of a conflict of interests underpinning the labour-management relationship, and the existence of a power balance between the social forces that are supposed to represent and regulate those interests[140]. This lesson was learnt in the Eighties and the Nineties. Economic crisis, employer pressure and labour vulnerability all conspired to ensure that the outcomes of the French socialist reform of collective bargaining were not as initially intended[141]. The history seems now to repeat itself. For the first time, French delivery workers and ride-hailing drivers were called to cast votes online to elect their representatives between May 9 and May 16, 2022. The participation in the vote, however, was far below the expectations: only 1.83% of delivery workers and 3.91% of ride-hailing drivers took part in the election, thus undermining the representative status and collective bargaining power of the elected unions[142].

On the other side, the mix between globalisation, deindustrialisation and technological change has moved a significant share of conflicts of interest out of the area of wage labour, further fragmenting and weakening the trade unions outreach and power. This is "indicative of a growing representation gap, because the trade unions must switch from a focused spearhead strategy to dispersed forms of action"[143]. But like legislators and courts[144], industrial relations institutions require a certain amount of time to handle the challenges that technological change brings about. Perhaps unsurprisingly, new trade union movements, alternative to the historical confederations, are emerging from the ashes of the French industrial era to fill that representation and solidarity gap[145]. While these movements seek to give voice to broader

[139] Connolly, *Union renewal in France and Hyman's universal dualism*, in *CC*, 2012, *passim*.

[140] Kahn-Freund, *Labour and the Law*, Stevens, 1983, *passim*.

[141] Howell, *The Contradictions of French Industrial Relations Reform*, in *CP*, 1992, 24, 2, p. 182.

[142] Petit, *Les travailleurs des plateformes ont largement délaissé l'élection de leurs représentants*, in *CJ*, 2022, p. 1.

[143] Mundlak, *Organizing Matters. Two Logics of Trade Union Representation*, Edward Elgar, 2020, pp. 87-88.

[144] Kolacz, Quintavalla, *cit.*, p. 143 and Deakin, Markou, *cit.*, p. 446.

[145] Connolly, *Renewal in the French Trade Union Movement: A grassroots Perspective*, Peter Lang, 2010, *passim* and Connolly, *Union renewal in France,* cit., for further references too.

societal needs that seemingly outdo workers' material interests[146], they are actually contributing to tackle the root causes of labour vulnerability and disempowerment.

[146] For example, *Le Printemps écologique* was founded in January 2020, with the aim to reinventing trade unionism, by engaging employees in the socio-ecological shift.

Abstract

Drawing on responsive regulation theory, this article analyses the trajectories of change in the French legal and industrial relations system over time. Empowered by information and communication technologies, governance has championed a new normative ideal of attaining public policy objectives, in which social actors are given primacy in the regulation of the labour market. Although the rationale of the French reform process was mainly to make legal and industrial relations institutions more responsive to competitive pressures and technological innovation, the State upheld its regulatory prerogatives, despite now being exercised in a less centralistic manner. However, in spite of the seeming solidity and internal consistency of the French legal and industrial relations system, social cohesion shows signs of erosion, questioning the ability of the regulatory shift from government to governance to succeed in bringing justice in a post-industrial era.

Keywords

France, responsive regulation, technological change, labour market, industrial relations.