CHAPTER 2

DISTINGUISHED SPEAKER: LABOR RELATIONS AND THE LAW IN A CHANGING WORLD

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It is a great honor and pleasure to address the distinguished members of this Academy. But it is also difficult for me to address you in English because you are more familiar with the practical realities of labor relations and arbitration. I am a mere French professor who, while enjoying ideas and principles, instead of teaching law to 1,000 students and more in an amphitheater in Paris, comments on the labor code without seriously analyzing the facts or training students for a professional career. Obviously, this speaker, a bit wary of criminal prosection in North America, pleads guilty.

Whether one is a European common law lawyer or not is perhaps not so important as it seems at first. At the end of any century, people tend to believe that change is so prevalent that debate on the evolution of an industrial relations system is inevitable. Perhaps Europeans who are directly confronted with sweeping historical change that will have important consequences for labor relations and political democracies are particularly caught up in this debate. Before the fall of the Berlin Wall and the end of the Russian Empire, very few Europeans believed democracy would be possible prior to the 21st century. Now with the emergence of the new European Community, anything is possible. But these events are not the only changes: the progress of technology, the flexibility of productions, and the globalization of markets are as important as political or social revolutions.

We have a common goal that we share and wish to promote: collective autonomy, the possibility that employers and unions—in the language of the European Community, "social partners"—may

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create, implement, and interpret the laws regulating their labor relations. And it is not so easy for a lawyer with a French education to admit that employers and unions can create and interpret laws with a great degree of autonomy. In France, as well as in many other countries, judges have the task of implementing or interpreting, in a narrow sense, the law. "L'ordre public" is always a cornerstone of industrial relations. No lawyer can oppose the principle that at some point the rule of law must be enforced by judges, in the case of individual, as well as in collective, labor relations.

But I would like to briefly stress how the concept and practice of autonomy has been linked with the culture and history of labor relations. It is also necessary to gain a historical perspective on this. Without a doubt, we exist in a world buffeted by profound and permanent change both from a practical and an intellectual point of view. In such a permanently and quickly changing world, collective autonomy cannot be achieved in the same way that it had been in a more stable environment. Collective autonomy must be linked with adaptation of both the enterprise and workers. It seems that promoting collective autonomy requires a critical analysis of our industrial relations systems. No one can avoid the terrible task. Every system is under pressure to adapt, and sometimes not in order to develop but merely to survive. Adapt or perish? Is there a "crisis" not only in collective bargaining but, more broadly, of the democratic model of collective autonomy in modern societies? We must create new institutions and methods of representation for citizens, as well as of workers, for collective action. An open world means also that there are no longer institutions that can—even by law—be artificially maintained through monopolies. The law of competition also has something to do with industrial relations.

One must consider in such a perspective the different elements that are at the very core of the functioning of collective bargaining. Among these elements, we can stress at least three that always must be considered when reviewing questions related to collective autonomy: (1) state intervention, (2) legitimacy of the parties involved, and (3) efficiency of regulations.

State Intervention

In many countries there has been a change regarding state intervention. A hypothesis can be presented. In many countries

state intervention has become less important than it had been at the beginning of this century. The nature of state intervention can be defined as the regulation of labor relations, that is to say, the establishing of basic employment and working conditions. It has been a "Latin tradition," in Europe, on the continent, more in the south than in the north. This state intervention has not been very favorable to the development of collective bargaining and collective autonomy. The more the state regulates working conditions, the less the employer and the union, and more generally the "social partners," have about which to bargain. This is why there is support for abstention of the law. What the state does, it can suppress; but what the employer and the union do, is harder for the state to change. In other words, sometimes less is more.

If we look at Europe, it seems that state intervention has been decreasing for years. But one also must consider that in countries where abstention of the law is a tradition, there is now a tendency toward state intervention, if not at a national level, at the European Union level. There are also interactions and influences from one labor law and industrial relations system to another. That is why it seems incorrect to say that state intervention is not "a la mode," or always decreasing. Rather, one might say that the very nature of state intervention is changing.

One must also consider the different ways by which the state (developing heteronomy as opposed to autonomy) can also interfere with collective autonomy. There is a movement in many countries toward the intervention by judges in labor relations. Hence, what results is greater judiciarisation of the system. Perhaps this development is not limited to labor relations. Some Europeans see this movement as a result of American influence: more and more people are seeking relief in the courts, and judges are more frequently interfering in social and economic life. One hypothesis to explain this situation is that when the state intervenes less, even to the point of deregulating labor relations, judges may be saddled with the responsibility to maintain an equilibrium between employers and employees, especially in situations where there is no collective bargaining. The courts can also restore collective relations when the law ignores them, as it seems happened recently in New Zealand.

Without a doubt, law is very complicated machinery, where a very sophisticated equilibrium can be reached over many years in industrial relations as well as in other areas. But this complexity is

closely linked with the fact that industrial relations is more than an instrument for obtaining immediate and quantitative results. It also permits the implementation of values that are built on experiences and goals for those who are part of society, and more precisely, part of a state of law. Of course, collective bargaining always expresses political and social values that are at the core of democracy itself, and not only of industrial democracy. In that sense, state intervention to promote collective bargaining is closely linked with the will to express different interests that coexist in a free society.

This is why one must be very cautious when discussing the opportunity of diminishing, if not suppressing, state intervention in the field of industrial relations. The question is indirectly related to the methods for studying labor law and industrial relations institutions. State interventions of the 1930s and 1950s in Europe were analyzed in terms of their high cost to society. Here, there is a risk that we may underestimate the impact of industrial relations on democracy and on the great social equilibrium that is needed for long-term development. As usual, the risk is that of sacrificing the long-term view to short-term analysis. In industrial relations and in other matters, it should not be paradoxical to think that the state has an important role to play in promoting collective bargaining. But it is also necessary to look at other experiences and methods in order to promote not only collective bargaining but, more broadly, social dialogue. In many countries such as those of central and eastern Europe and Latin America, a tripartite attempt at the national level to adapt social regulations and protection to structural changes (economic as well as cultural revolutions more than evolution) can be very useful. Social dialogue is a process that can stimulate collective bargaining even while strengthening the social partners. In the final analysis, what must be remembered is that social peace requires workplace justice.

Legitimacy of the Parties Involved

All over the world, with very few exceptions, there are decreasing numbers of unionized workers. All the statistics published internationally—by the International Labour Organization (ILO) as well as by the Organization for Economic Co-operation and Development (OECD)—express the same trends, at least in the private sector. Many reasons can be given to explain this "crisis" in

unionization: the restructuring of the economy (especially in some important industrial sectors such as the metal industry), changing ideologies (particularly increasing individualism), and a changing workforce (the increasing number of young people and women). It is true that the influence of unions is not limited only to the number of unionized workers, but one must consider how different the consequences are between the decreasing number of workers unionized under collective bargaining agreements and the consequences in systems where there is no direct link between workers and unions. In many European countries, there is no direct relation between worker participation and collective bargaining. Workers' representatives can be elected from outside the unions (but very often having relations with them); these institutions have the right to be informed and consulted on very important matters, such as layoffs or restructuring.

How surprising and quite unthinkable from the point of view of a French lawyer that there should be an "exclusive bargaining agent"! This is surprising for many reasons, but particularly because there are in France, so many cheeses—and consequently so many political parties; but also, and seriously, pluralism is fundamentally linked to an ideological or political approach to union activity in European social history. It is difficult to admit that a union's existence must be based only, or substantially, on collective bargaining. From the employer's point of view in such countries—and not only in France—the union is seen as a foreigner in the enterprise, having the goal not only of bargaining but also, and perhaps mainly, of transforming the whole society through political revolution. Vive la lutte des classes! In such a context the legitimacy of workers' delegates or of a works council is far greater from the employers' point of view. It is also perhaps true to say that from the employees' perspective, the same analysis can be made today. But one must emphasize that these elected bodies do not have the right to bargain with the employer. The unions (at every level, plant as well as regional or national) have the monopoly to bargain. This situation may change—in some countries at least—in the near future.

The impact of decreasing unionization differs in relation to the different industrial relations systems. It must be stressed that the consequences are of far greater importance where there are no elected workers' delegates at the plant level and where there are few state regulations for employment and working conditions. Can

we consider that the major mechanism for the election of the sole bargaining agent is in danger? It is certainly true when we analyze the direct consequences of the absence of unionization: without a collective agreement, without labor law (in the European sense), there can be no basis for compromise. No majority, no union; no union, no collective bargaining.

But in another context, the decreasing number of unionized workers also has an important impact. When collective bargaining is no longer linked to direct democracy and the majority vote, especially when there are legal presumptions of union representatives, as there are in France, there is a crisis of legitimacy that can affect the whole system of industrial relations, not only collective bargaining.

Efficiency of Regulations

It is of very great interest to compare industrial relations systems in different countries and see how deeply rooted they are in history and culture. Do law and other forms of regulation have the same function in our contemporary societies? It is true that we are all (or almost all) on the World Wide Web. In the global village we are all living in, everyone thinks, "God save e-mail." But it is perhaps dangerous that we are all thinking of the regulation of industrial relations in the same way. Are lawyers in southern and in northern Europe really implementing (national as well as European) law in the same way (and as seriously)? There are differences. Surely the word has a very profound meaning for those who think that law means nothing unless it takes into account the economic, social, as well as cultural context. So many wonderful labor codes exist in countries where there is, without any doubt, no social protection in practice. Who knows better than the National Academy of Arbitrators what the implementation of the rules really means in daily life.

But if there is a global village, it is true that those involved in regulating labor relations, especially labor lawyers, are confronted with a terrible situation. Who is living in our industrial relations village? So many started out, and at the end of this century, so few have arrived at the harbor. In many countries, not to say all over the world, regulations and their enforcement are in big trouble. It seems particularly true to stress that today more and more people are apathetic toward collective bargaining and labor law in gen-

eral. There are many essential reasons for this that must be seriously and carefully analyzed. Some believe that those protected by labor law are the most privileged in our contemporary world: they have jobs and earn a livelihood. In some countries, there is another debate: what does protection for workers mean? What are the interests of these workers? Are they in contradiction with those who are excluded, those who generally have no qualifications and no job? The terrible accusation is not far from being voiced: privileges built on labor codes and collective agreements. It is wrong to consider social protection as such as a privilege; but it is true that the system's lack of flexibility can contradict the general interest of society, limiting the necessary adaptation of the enterprise in the context of increasing global competition. If we want the industrial relations system to survive, one must consider that it is urgent to adapt and promote flexibility as well as solidarity in the whole of society. This is in the interest of the employer as well as of the workers and the unions.

In many countries social dialogue can help to facilitate these changes. "Social dialogue": the terminology is vague. But its very vagueness points toward the different ways the parties can improve the system and find new solutions. This is not to say that everything can happen without conflict. One of the most important and delicate elements of social dialogue is related to the distinction between individual and collective interests. Structural adjustment, which we all need, in one way or another, immediately or in the future, implies institutional and practical experiments. And social dialogue is necessary not only at the national level but also at regional and international levels. Collective bargaining has some new goals: to fight social dumping and the violation of human rights and workers' dignity internationally. American companies and unions have supplied remarkable examples of what can be achieved by social dialogue. Governments and international organizations have yet to rival their accomplishments.

What is perhaps really very new and important is the fact that there is no system that can thrive as a closed microcosm. The most homogeneous system—such as the one in which you live and act as arbitrators—will become less homogeneous and more heterogeneous. We must think of the legitimacy and dynamics of the arbitration process with a view toward the future. The past is living in the present; but the present is building the future. New perspectives should be included in any analysis of the present situation of industrial relations.

Perhaps there is a profound anxiety in society, on any continent, about the immediate future. At the end of the century, so many are nostalgic and anxious about their identity, their goals, their values. And you, my friends, the arbitrators of Canada and the United States, should you be involved in individual and nonunionized affairs? And we, the labor lawyers who are in favor of collective autonomy, must we fight the increasing involvement of judges in labor relations at the plant level?

Especially in Europe, there is a common anxiety regarding the increasing role of law in social life as well as in economic life and contemporary society, partly as a result of American influence. Do we need to install limits to prevent law from invading and destroying some reasonable nonlegalistic equilibrium? This is a curious possibility to a non–common law lawyer. I am not sure that we could solve the problem by listening to Shakespeare to "kill all the lawyers." Perhaps it is a service to society that lawyers are aware of their mortality. As Sir Otto Kahn-Freund argued, one must admit that "Law is a secondary force in human affairs, and especially in labour relations."[1]

It is a great privilege for me to be with you in Toronto, as I have been so impressed by the quality and profundity of your activities and analysis. It is a great honor to speak to you, dear members of the National Academy of Arbitrators. But we are never speaking between only us as if we existed in a closed world. We cannot ignore the messages from the ILO. Everyone—governments as well as employers, employees, and unions—is confronted by radical change. The "old world" is announcing a "new" one, the one about which many labor lawyers are anxious.

More than ever, the arbitration experience in Canada and the United States will be of paramount importance and highest legitimacy for all those who support justice in the workplace. Your experience is an integral part of democracy, an example offered to the free world from North America. More than ever we must proclaim that industrial relations is essential to these basic values and are not merely technical instruments for some contingent work. The dignity of human beings in the workplace must be at the core of any industrial relations system. As arbitrators, you are the guardians, the trustees, of these values at the workplace. But we are

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[1]Kahn-Freund, *Some Reflections on Law and Power*, in Labour Law: Text and Materials, 2nd ed., eds. Davies & Freedlund (Weidenfeld & Nicolson 1983), 13.

convinced also that in a changing world American arbitrators will most certainly show us the kinds of adaptations institutions need to make in the face of constant change if we are to achieve justice in the third millennium. This time of change is a great opportunity for you to lead the way and rise to the challenge.

Thank you very much for the opportunity to meet with you and for your kind attention.