Dilemmas of Law in the Welfare State

Edited by

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Foreword

This book ist part of a larger research project of the European University Institute in Florence. "Alternatives to Delegalisation" is the general theme of this project which has been conducted in the last three years by my friend and colleague Terence Daintith and me. The project aims at making a contribution, from the standpoint of law, to the current debate on the capacities and limits of the Welfare State. This debate reveals an increasing disenchantment with the goals, structures and performances of the Regulatory State. The political movement of de-legalization is just one manifestation of a much broader reappraisal of the systems of law and public organization, to which we want to contribute from both the standpoints of legal theory and legal practice.

One part of the project was oriented towards questions of legal theory. In a seminar series on the theme of "The Functions of Law in the Welfare State" we asked leading legal and social theorists from different countries to discuss with us the dilemmas which result from the transformation of the law in the Welfare State. This book reflects the results of the lively and stimulating discussions we had in the "jurisprudence group" under the guidance of the Institute's President, Werner Maihofer. It represents a continuation of earlier activities at the Institute on law and welfare state, especially the work on "Access to Justice in the Welfare State" carried out by Mauro Cappelletti and Joseph Weiler.

Given the variety of languages, cultural backgrounds and intellectual traditions, the editing process for such a book is not an easy task. Constance Meldrum who was heavily engaged in the editing process, especially with the linguistic problems, was faced with the problem of attempting to strike a balance between authenticity and accessibility, especially in the cases of French structuralism and German critical theory. Iain Fraser who translated some of the texts had similar experiences. I would like to thank both of them for their dedicated work. For thorough and precise editorial assistance my thanks go to Thomas Abeltshauser, Regina Etzbach and Elizabeth Webb, as well as to Brigitte Schwab, the Institute's Publications Officer, for her professional help in the final publication process.

Firenze, January 1985
Gunther Teubner

A Concept of Social Law*

François Ewald
Paris

What is the crisis of the Welfare State?[1]

The fact that, because of the economic crisis, the growth in social security expenditure has been accelerating while revenue has been declining? Not just that; but more deeply, the awareness that we members of the developed societies are now living within a new type of State. The very name given to it — "Welfare State" — suffices to show that as yet it has scarcely been considered in its positive aspects[2]. It denotes a State that, while no longer analysable in terms of the liberal model, is not seen as being in transition to a future socialist State either.

This hypothesis suggests a thorough reconsideration of the perspective from which both the institutions and the practices that characterise this new positive entity should be looked at. They ought no longer to be analysed as a mere set of measures aimed at correcting the harshness and injustices of a liberal State, but as the coordinates of a new type of political space with an internal logic of its own.

This is the case for *social law*, which is the term for the legal practices that typify the Welfare State. It ought not to be analysed as a series of particular provisions in the two areas of labour and social security, but as the formation of a new legal system from the viewpoint of sources as well as logic and modes of application. What makes social law is much more than the legalisation of objects or situations too long excluded from law. It is rather a process of transformation, able to move through the whole set of legal disciplines, from civil law to international law via administrative law; and this is a process of socialisation. This process amounts to the transformation of the political and governmental rationality linked up with the sociological conception of society that characterises the Welfare State. What changes the old legal system into the new one is the way of

* Translated from the French by Iain Fraser.

1 The analysis below concerns the French example.

2 The term "Etat-providence [Welfare State]" was the one used by liberals in the nineteenth century to deride the social reformers' projects.

thinking about the relationships of the whole to its parts, about the mutual relationships of individuals, about the whole they set up thereby; in brief, the way in which the social contract is conceived. Whereas the classical contract is analysed as an immediate relationship between sovereign, autonomous individuals, from which there emerges a State with powers limited to guaranteeing contracts arrived at more or less without it, in the social law concept ot the contract the whole has an existence of its own independently of the parties — it is no longer the State, but Society — and the parties can never undertake obligations directly, without passing through the mediation of the whole. "Socialisation" designates this way of conceiving of obligations, where the link between one individual and another is always mediated through the society they form, with the latter playing a regulatory, mediatory and redistributive role (cf. Broekman's argument regarding the unalterable character of the legal subject infra).

If social law is thought of both as a process of transforming the law, bound up with specific governmental practice, and as the development of a new type of law with a structure no longer the same as the old one, it takes on quite a different sense from that given to it by its reduction to labour and social security law alone. Firstly, because clearly the structure of social law does not necessarily belong to labour or social security law, for these types of law may well be conceived of as existing without obeying the rules of social law. Secondly, because the process of socialisation of law is not limited to this or that field of law, so that the two classical types of social law should be regarded as only two examples, no doubt noteworthy albeit special, of a law with a more universal application. For instance, it is clear that, as regards liability, the development of a *law on accidents* belongs directly to social law (Tunc, 1981). It will be seen as has been noted, that, as regards contract, the appearance of *consumer law* points to a general trend in contract law to move toward social law[3]. In public law, *environmental law* i.e. protection against nuisances and other pollution, has a structure typical of social law (Caballero, 1981). The same is true of international law, for everything connected with the new international economic order and *development law*. As we see, the process of socialisation of law is no respecter of the distinctions between legal disciplines. Furthermore, the foregoing enumeration does not bring out the importance of the area covered by these new practices from either the quantitative or the strategic viewpoint.

Social law has taken on a sufficiently wide range for one to cease regarding it as a *solution* brought in to fill the lacunae or shortcomings of classical law. It is time to approach it in its own positive being, having

3 Cf., for France, the Law of 10 January 1978 on *protection of consumers against improper clauses*.

regard to the specific problems that its structure poses for the law itself. What is social law if thought of in its own positive being? What is its own logic? What are its limits?

I. Settlement

The fundamental law that set up labour law, and social law in general, is certainly the law of 9 April 1898 on the "liability for accidents to workers in the course of their work". It not only organised a system for compensating industrial accidents according to a principle of spreading burdens that opened the road to social insurance and the future social security provisions, but in doing this it was to go beyond the classical notion of a contract for the hire of services (Civil Code Art. 1780) and think of the wage relationship as a *labour contract*. An understanding of how this law was at all possible may be essential to an appreciation of the inherent structure of labour law and social law.

The law of 9 April 1898 first of all organises a system for compensating industrial accidents on the basis of more or less *a priori* employer liability. The head of the undertaking is declared liable for accidents that his workers may be subject to within the work relationship. This was not possible as long as the wage relationship was conceived of on the basis of the classical contract of hire — which involves only the exchange of work for a wage — and as long as accidents were analysed in the terms of Civil Code Art. 1382 ff., whose articulation of the concept of fault implied a principle of selection in compensating for damage. How then was the head of the undertaking to be made liable *a priori* for accidents at work? The legislator's fundamental idea in 1898 was to be, not the counterposition (i.e. to compensation based on fault) of compensation based on *risk*, as perhaps too often maintained by a particular legal tradition, but the conception of the solution to the problem as a *settlement* between conflicting rights: the worker would always be entitled to compensation, but this would no longer be in full but only according to a scale. The law of 9 April 1898 on work accidents is not so much a law laying down who is liable for accidents (whence its most singular status in liability law), as a law laying down a legal settlement. It is indubitably here that its profound novelty lies, which changes the very structure of the law. The legislator can in fact be seen as abandoning the consideration of an action or a piece of behaviour in itself, so as to sanction it in terms of what it ought to be. He does not say what should or should not be done. He thinks of the *relationship* between two activities, the one as essential as the other. Or rather, he defines the terms of their relationship.

This completely new way of thinking about the law is characteristic of social law. It in turn refers back to a transformation in political rationality

without which this legal transformation is not itself comprehensible. This was the transition from the liberal political rationality that dominated the nineteenth century until the advent of the Third Republic to a rationality of the solidaristic type — though this term is not to be understood in the restricted sense given to it in the doctrine of Léon Bourgeois (1896). This transition from one political rationality to another was accompanied by a transformation in political doctrine itself — from a doctrine based on philosophy and morals to a sociology — and in the very notion of the *social contract*: the Rousseauist contract (for instance), articulated round the notion of exchange (and by the same token presupposing the principle of property, for all had to have something to bring into the initial contract) was succeeded by the practice of what may be called *solidarity contracts*, founded on ideas of fair distribution or equitable allocation of social burdens and profits (for the development of a similar view see Preuß infra). Specifically, the settlement was to define the general form of these "solidarity contracts", of which the labour contract was but one example.

The term settlement is defined in Article 2044 of the Civil Code: "a contract whereby the parties end a conflict that has arisen, or provide against one that may arise". There follow three propositions: a settlement is a *contract*; it presupposes a *dispute* or conflict; and finally, *mutual sacrifice*[4]. Does this correspond to the practice in social law?

1. The settlement as contract. Specifically, social law is a fundamentally contractual law, a law which to the extent that it presupposes relationships of interdependence and solidarity among all and each is brought to thinking that beyond or before any declared intent there is a contractual relationship of all with each. Everyone lives by others, profits by their activity and their labour and would be nothing without them; it is up to society to ensure that the burdens and profits produced by all these interdependent activities, which all need each other, are equitably distributed (see also Friedmann supra). This can be articulated only on the basis of solidarity contracts, the clauses of which are, at least in part, for 'society' to determine[5]. In labour law, this is precisely the way the labour contract is conceived of. The contributions of workers and of employers are not only equally necessary, but could not exist without each other. They are interdependent, and it is appropriate for the law that is to regulate this labour relationship to correspond accordingly to the relationship of solidarity that sets it up.

2. Second idea: settlement presupposes a conflict or dispute. To speak of social law as a law of settlements assumes that it is supported by a

[4] Cf. Planiol and Ripert (1954: 1011); Mazeaud and Mazeaud (1980: 1082); Boyer (1976); Giroud (1901); Rabinovics (1936); Boulan (1971).

[5] This is the doctrine developed by Bourgeois (1896), with his theory of "social quasi-contract".

philosophy or a sociology that makes objective the whole set of social relationships as a conflictual order. That was certainly the positivist conviction most widely shared at the end of the nineteenth century; it may be summed up in a term borrowed from G. Clemenceau: "The social fray"[6].

[6] Clemenceau (1895). Here are some extracts from the preface:
Is it not truly remarkable that humanity needed centuries of thought, observation, research, the thinking effort of the greatest minds, to arrive, with surprise after so many ages, at the discovery of the *struggle for existence?* ... (i).
The struggle for existence! The fight for life! As soon as the word was uttered, generalisations abounded, and the law of each and all appeared. What are bodies but a more or less stable balance of forces? The same law for living beings: with the difference that, in proportion to its sensitivity, each organism, big or small, oscillates, in joy or pain, between the forces of conservation and evolution that are in conflict. To maintain the resultant, which is life everything strives, everything toils, whether plant or animal or near-divine man. The one's law of development clashes with the other's. Conflict. Battle. There must be a victor and a vanquished. (ii-iii).
Death, everywhere death. The continents and the oceans groan with the frightening sacrifice of the massacre. It is the arena, the immense Colosseum of the Earth, where everything that could not live except by death bedecks itself with light and life in order to die. From the grass to the elephant, there is no law but the law of the strongest. In the name of the same law, the last-born of living evolution throws everything alive together into a monstrous hecatomb offered to the supremacy of his race. There is no pity. The flea comes back, and deals out death. The ungrateful soul repudiates the ancient solidarity of beings interlinked in the chain of transformed generations. The hardened heart is closed. Everything that escapes the premeditated, desired carnage kills its fellows for the delectation of the great barbarian. The glory of life's flowering is extinguished in blood, is reborn from it, founders therin anew. The arena, continually emptied, is continually refilled ... (vii).
Patience. Here comes the avenger. The law has said, "The strongest kills." And man has killed. Through him, everything that lives succumbs, and is born again only to expire at his hand ... (vii).
He does not cease. He killed the weakest of the animals. He kills the beaten man. He kills him to live too, to appease the inexorable hunger that cannot wait. Nothing is sacred but the need to live at any price. and so the dumb victim has bequeathed his vengeance to the executioner. Against the man that tortured the beast arises man torturer of man. He wields the sword, he rends, he racks, in the anticipated joy of the feast or in the intoxication of slaughter he kills, he eats ... (viii).
Since the first murder, symbolised by Cain, man has remained the murderer of man throughout the earth ... (ix).
And Clemenceau goes on:
"Slavery, serfdom, 'free labour' of the wage-earner, all these stages of progress rest on the common foundation of the defeat of the weaker and his exploitation by the stronger. Evolution has changed the terms of the fight, but under the changing appearances, the mortal combat remains. Taking over others' lives to aid one's own is, from the cannibal to the slaveowner or serfmaster, to the feudal baron, to the big or small employer of our own days, the whole effort of the most active. Man has barely ceased being an object of commerce when his labour becomes a commodity, and a one-sided contract still binds him with a solid chain ... (xv)
Such is the law of evolution.

The motor of history, the principle of evolution, lies in war: race war (A. Thierry), class struggle (Marx--Engels) and, more generally, struggle for existence (Malthus, Darwin)[7]. To be sure, the natural-law theorists too had seen the origin of society in war, the struggle of all against all (Derathe, 1970: 125). But there are two differences: 1. This war was not seen as a positive historical fact; it was, as Rousseau stressed, a rational construction aimed at realising what ought to be — in a certain sense retroactively — the nature of the State which was to put an end to it. 2. For the natural-law theorists, the state of society puts an end to the state of war. The passage from the state of nature to the civil state sets up a radical break in history, a before and after, not recognised by the theoreticians of social law, for whom war, struggle and confrontation are, no doubt for ever, constitutive of social life — as both the savage play of economic competition and the violence of social movements were to graphically illustrate in the nineteenth century[8].

The solidarist programme is based on the idea of conflictual interdependence of the various elements making up society[9]. Solidarist solidarity is qualified solidarity: solidarity in suffering , exploitation of the weak by the strong, solidarity included within relationship of hostility which solidarist policies aim at regularising and pacifying; the institution of a legal order does not constitute the act giving birth to society. On the contrary, the state based on the rule of law is, as it were, still to come. It is a guiding idea, an "idea with force" in the expression used by A. Fouillée, towards which one should seek to move, and which is no doubt progressively being realised, but the definitive arrival of which is infinitely postponed (Fouillée, 1920; Clemenceau 1895: XXII).

In connection with this conflictual, divided vision of the nature of society, social law arrives at the abandonment of the idea that the law ought to be the same for everyone; firstly, because this type of law could

[7] This positivist idea that social reality consists of conflict, that life is first and foremost struggle for life, was the most widespread one at the end of the nineteenth century. Cf. for instance Fouillée (1920); Prins (1910: 37); Tanon (1900: 94); Chamont (1927: 119). The story of this history of society, from antagonism to association, is expressed by the followers of Saint-Simon (1924). For a summary, one may consult Nicolet (1982).

[8] As was brought out very well in Emile Zola's work, especially *Germinal*, "The struggle for life is, then, the major principle of society;" comment by de Lattré (1975: 159).

[9] Cf. for instance Buisson (1908: 211). The realist positivism of L. Duguit, who sees in the State nothing but the relationship of forces "between rulers and ruled", proposes a similar "polemical" model of the political functioning of society. Cf. e.g. Duguit (1901: 265; 1928: 22) "Within the nation, a differentiation is effected between weak and strong, and it is this very fact that constitutes the State". Also Jèze, (1927: 165); Hauriou (1896: 84) has one paragraph headed "The universal contradiction"; "Social material is formed and lives in the midst of contradictions".

not be the expression of any kind of social compact, but solely of the interests of some class or group; and secondly, because in its abstract universality it can only be an instrument of oppression of the weak by the strong[10]. (cf. Aubert supra). The 1789 Declaration of Rights, with its ideas of liberty, equality and property could thus become, if not the statement of the bourgeoisie's rights of domination, at any rate an inadequate text needing completion through a list of economic and social rights[11]. The idea of social law is at the opposite pole from the idea of law put forward by Kant, namely a set of rational statements which, detached from desires, interests, and passions — even moral ones — might be the foundation for an order of coexistence of liberties. Social law, it is important to note, does not define an order on which, despite differences, agreement might be reached. On the contrary, it arrives at the dissolution of this idea: social law seeks to be an instrument of intervention which is to serve to compensate and correct inequalities, to restore threatened equilibria[12]. Social law is a law of preferences, a law of nonreciprocity, a law of positive discriminations[13]. If social rights can through abstractness of statement — right to life, to health, to housing, to development, etc. — look as if they may constitute common rights, it would be contradictory if in practice they gave the same rights to all.

Social law is seen as an political instrument, as an instrument of government. In defiance of the classical opposition between legality and appropriateness, governing becomes something for the sake of the law; rights are refused any autonomy. Special rights are distributed as so many counterweights. The right is no longer the general framework, the abstract rule within which special forces can be picked out and can enter freely into confrontation with each other in open interplay; it is instead now seen as a weapon, a strength, an advantage one should seek to have[14], and as being for government to distribute differentially to each in line with policy needs (for a parallel discussion on the transformation of 'rights' see Preuß infra). *The issue is no longer so much being in the right, as having rights.* By becoming objectified, the right becomes a force comparable with other forces: for

[10] Cf. Thaller (1904: 478); Tessier (1904: 73); Gaudemet (1904: 975). Also Glasson (1880).

[11] Karl Marx's criticism, (Marx, 1919) of the notion of equality of rights is familiar. A list of social rights can be found in Gurvitch (1944). This list cannot, be it noted, be exhaustive in principle, for social rights are unlimited. Cf. note 16 below.

[12] Lacordaire's saying goes: "Between the strong and the weak, it is liberty that oppresses and the law that liberates".

[13] This is the principle of thresholds and transfers in internal social law. It is what governs the measures taken in favour of the developing countries in international economic law. Cf. Carreau et al. (1980: 343).

[14] The point is to secure the ability to make the coercive power of government act in one's favour, for one's own advantage. Cf. e.g. Ripert (1949: 27).

instance, the worker's *right* is balanced against the employer's power[15]. To the idea of the identity of right, social law opposes a multiplicity of differentiated rights. This is why one speaks of social rights in the plural[16].

[15] This is the principle of labour law, which, let us note, has no meaning as long as the conflict is kept on an individual level.

[16] Here are some extracts from the declaration of social rights, as formulated by Gurvitch (1944). These are not rights of man and citizen, but of producer and consumer:
The preamble to the Declaration should indicate that the French people: Convinced that the absence of guarantees of the rights of *producer* and *consumer* may compromise the effectiveness of the rights of man and citizen, has resolved solemnly to proclaim a *Declaration of Social Rights*, to complement and strengthen the Declaration of political and human rights, the validity of which is thereby reaffirmed. (91).
Art. IV — The social rights of producers consist in: the *right to work*, guaranteed to every healthy man or woman in accordance with their ability and training, and providing renumeration to assure them of the dignity of their condition; the *right of labour* to participate on an equal footing in the control and administration and in the profits of the firm, the occupation, the industry and the entire economy, in functional, regional, national and international aspects; the *right to leisure and to retirement*; the *right of trade-union freedom* and the *right to strike.*
Art. V — The social rights of consumers consist in: the *right to subsistence* in conditions worthy of man, freeing them from oppression through poverty; the *right to share in the distribution of the products of the national economy*; the *right to economic security, guaranteed by an independent insurance scheme, freeing them from threats and fear*; the *right of user associations to participate on an equal footing with producers in running services, firms and industries, and in the direction of the regional, national and international economy*; the *right of consumer cooperatives to participate on an equal footing with user associations in such direction*; the *right to freedom of cooperatives, user associations and their federations.*
Art. VI — All the wealth of the country, whoever be the owner, is subordinate to the Right of the Nation. Ownership confers obligations; it should in all its forms be considered as a social function. Any form of property contrary to the interest of the Nation, the interest of the National Economy (for instance ownership by trusts, cartels, banks and private insurance companies), and the rights of producer, consumer, man and citizen, is forbidden. Any ownership privilege contrary to the rights of labour and the dignity of man as such, as producer and as consumer or user, is abolished.
Art. VII — The social rights of man consist in: the *right to life* (rights of the mother, rights of childhood, rights of large families), *right to equality of the sexes*; *right to an education worthy of man*; *right of immigration and emigration*; *right fo free choice in joining or leaving at will the various economic, political and cultural associations.*
Art. VIII — All, producers and consumers, men and citizens, as individuals and as groups, shall have the capacity to defend their social right by appeal to the various types of court, and to ask the protection of groups and assemblages acting as counterweight to other groups and assemblages where they may also be members.
Failing these different means of protection, individuals and groups whose social rights have not been safeguarded shall have the ultimate recourse of the right of resistance to oppression.
Art. IX — The individual and collective liberty guaranteed by the social rights is limited only by the equal liberty of all other individuals and groups, by their fraternity and by the general political, economic and cultural interests of the Nation.
Art. X — Any abuse of individual and collective freedom that brings it into conflict

Social law does not complement the old civil law; it is not that it fills up lacunae in it. Its programme is no longer the same; social law introduces and organises the conflict of rights. Its novelty lies not so much in the content of the rights that it grants[17] as in *its way of bringing the conflict under the law*[18]. The law is no longer a factor external to the conflict whereby it may be resolved. The revolution introduced by social law is to make law, if not the sole issue, at least one of the principal one in disputes. It is this kind of inversion of the relationship between conflict and law which explains why social law can have no other form than that of settlements.

3. The final characteristic of the settlement is that it presupposes sacrifices and mutual concessions. This characteristic too is constitutive of the contract in social law and inseparable from the idea of solidarity. Since each exists only in relationship to all, no-one can claim to exist independently of others and demand the enjoyment and the exercise of absoute rights. Social law necessitates at least the limitation of individual sovereignties in line with the respect for mutuality. Social law asks each to compromise on what he might consider as his absolute right[19]. Social law is a great promotor of mutual concessions, between rich and poor, between individual interests and social groups, which relate precisely to these rights: civil rights (in particular that of ownership) and social rights[20]. Social law may

with the principles of equality and fraternity or with the various aspects of the general interest founded on the balance of contrary interests shall be suppressed. This suppression shall be the responsibility of each organisation, to the extent that it represents an aspect of the general interest. Should the separate action of one of these organisations be insufficient, their joint action shall be provided for. In the event of conflicts among these organisations, abuses shall be suppressed by the joint tribunals of various categories, and in the last instance by a Joint Supreme Court acting in the name of the National Community (94).

The sequel contains: — the *social rights of producers* (9 printed pages); the *social rights of consumers and users* (4 pages); the *social rights and duties bound up with ownership* (4 pages); the *social rights of man* (5 pages); to a total of 58 articles.

17 Which, from the viewpoint of content, are in the main nothing but the development of those represented by the object of charity of the past. However, the technique is different.

18 Perhaps it was the German jurist R. von Jhering who most radically erected conflict into the principle of law. Cf. von Jhering (1878; 1881; 1916).

This idea that the conflict is within the law (and not that the law serves to resolve conflicts) haunts whole edifice of social law. It was, no doubt, G. Ripert, who made it the basis of his legal philosophy, that gave it the most radical formulation. Cf. in particular Ripert (1918; 1955). More recently, cf. Javillier (1973: 157 a). Supiot (1979) has shown in masterly fashion how the conflict ran through labour law. His demonstration might be extended to many other areas.

As far as international law is concerned, cf. Bettati (1983: 124).

19 Cf. e.g. Fouillée, (1896: 261). Also, below, the study on the issues of abuse of law.

20 The model of such a settlement is supplied by the law of 9 April 1898 on accidents at work.

thus be seen as a great teacher of mutual tolerance. We must understand that what has to be tolerated is not only the difference, the otherness, the equal value of the other, but even, for our benefit, the restriction of our right. Social law is symbolic of a mass society in which, because space is running short, each must learn to put up with the other and his unavoidable encroachments. Putting up with each other because we rub shoulders with each other: that is the new meaning of tolerance.

Paradoxically, while the solidarity-based societies refuse to locate their birth in a primitive contract, the ideology of the contract dominates them much more than the old liberal society, about which, nevertheless, it has frequently been said that the contract constituted the basis of the political and legal system[21]. Henceforth there is to be a simultaneous realism and idealism on contract. The factor of solidarity has replaced the contract as the primitive form of the social bond. At the outset, there is no law, but instead war. And the history of humanity is one of advancing awareness of solidarity, of the need to substitute "arrangements" (Bourgeois, 1896), and therefore law, for the non-law of the struggle for existence[22]. Specifically, it is through the notion of contract that the fact of solidarity is held to become progressively aware of itself, and law to be substituted for force. The ideal, with one of its first formulations no doubt being that of Proudhon, continues, as we all know, to inspire our politicians[23]; it is that every social relation should take on the form of a contract. The contract becomes the bearer of all virtues. Thanks to its reign, justice will be achieved: "He who says contractual, says just"[24]. More, it is to be the instrument which allows one to contemplate the disappearance of the State and its constitutional oppressiveness: thanks to it, society could become

21 From reading Portalis (1827), which contains (vol. II) a whole criticism of the idea of a primitive social contract, one may judge as rather excessive the retrospective theses of Gounot (1912: chap. 1), "La doctrine de l'autonomie de la volonté", concerning the imperialism of the contract at the beginning of the nineteenth century. The civil-law contract, which is a practical tool, has no need of a primitive social contract for it to render the services expected of it.

22 The development of social law is steeped in a whole eschatology of the contract and of law. "The future form of societies will be contractual; their original form was not", Worms (1896); Durkheim (1950: 198), "Le droit contractuel"; this contractual progressivism has certainly been best developed by A. Fouillée (1896: 42) with the notion of "contractual organism". "Mechanism at the beginning, contract at the end, that is the whole history of society", (1896: 124); Leroy (1908: 202). There is a distant echo of this contractual dream in the speech by E. Maire (1983) for the CFDT: "We need a state power that lets the contractual outweigh the legislative".

23 Mr J. Delor's contractual policy is after all nothing but the latest manifestation of this government programme. That it could seem new at the time proves nothing but our amazing powers of amnesia.

24 Fouillée (1896: 410). It will be seen in the conclusion why this political rationality implied the equation justice = contract, and with what logical inconsistency.

self-managing, and social obligations could be the norms of liberty[25]. In brief, the generalised conversion of social relations into contractual ones would finally enable society to coincide with itself[26]. The contract would thus become the bottom line of politics, the privileged tool of a new social "management": beside planning contracts, solidarity contracts or economic contracts (Laubadère, 1979: 433), the civil code contract can certainly no longer lay claim to primacy, "take-off of the contractual concept", some say, with pompous certainty (Josserand, 1935: 333); in any case, an expansion of contract, which comes under very different legal provisions when the only "contractual" thing about it is the name[27]. But this is a magic word, the mere invocation of which might well give birth to the real thing, with all the virtues that surround it. Specifically, social-law contracts would not be able to be embraced by the too-rigid framework of the civil-law contract. They should, as it were, be variable-geometry, to be able to adjust to the diversity of social needs, to the constant state of flux of solidarity relationships. Strictly, one ought not any longer to speak of the social contract in the singular, but of flexible social contracts, manifold and amendable: in a word, the term "contract" no longer refers to a well-defined legal category, but to an order, the *contractual order*.

[25] The theme of self-management, i.e. of the opposition of civil society to the State, dates back to Saint-Simon. It was taken up again by Proudhon (and Marx) and has become the political dream of the most rigorous theoreticians of social law, and even the objective assigned to the new type of law. This is, for instance, what is meant by by Duguit (1928: 58) with the notion of *public service*: "The State is not, as has been made out and as was for some time believed, a power that commands, a sovereignty; it is a cooperation of public services organised and controlled by governments". Cf. also the commentary by Pisier-Kouchner (1972: 141) and Leroy (1909: 202).
"Thus, the authoritarian State will be succeeded by the cooperative State, with officials instead of leaders. The notion of law will disappear; there will no longer be democracy in development, authority that expands and spreads; it will be occupational unionism that there will be, with the federalist rules that Proudhon was the first to observe. No more laws; in their place, contracts. And even if general rules seem needful to the freely associated, they can only be, as contemporary trade-unionists say, 'indicative decisions', no longer orders, but a sort of teaching, and in any case of a nature to accord with the Saint-Simonian theory."

[26] This coinciding now constitutes the moral ideal that each should seek to attain. It is the principle of every social and moral obligation. It will be noted that it is a purely formal ideal, indifferent to the content of the will: one ought to will "evil" if it were thereby that society could coincide with itself. For then evil would be good, and there can be nothing better than the good. This is a curious formulation of the problem of ends, of the moral problem that characterises its *sociological* position. In a word, evil is transcendence.

[27] Have we not heard the President of the Republic, Mr. Mitterand, launching the idea of a "contract of trust" between the State and managers? "L'enjeu" magazine, TF 1, 15/9/83.
On these "wildcat" usages of contract, cf. Boy (1979: 400).

Besides law of settlements and law of groups in conflict, social law may also be characterised as law of *interests*. It would assuredly be in no way false to see its birth in the chapter of the *Geist des römischen Rechts* where R. von Jhering, abandoning the definition of law in terms of will, declared, "rights are legally protected interests" (v. Jhering, 1888). This formulation contained the critique of the whole classical construction of law: critique of natural law, critique of subjective rights as absolute rights, in favour of a teleological vision of law where the individual will is made subordinate to a social purpose of the laws. This reversal is found explicitly in a disciple of Jhering's, L. Michoud:

> What the law seeks to protect when it sanctions will is not the act of volition in itself, but its content. One cannot will without willing *something*; it is that something which is the object of legal protection, not solely because it has been willed, but because it is in conformity with the ideal, whatever that be, that the legislator has formed of order and justice. The law protects not the will, but the interest represented by that will (Michoud, 1932: 105).

For the law, to objectify its subject as *will* is to enable it to will everything it can will, to offer it a sphere of autonomy and of impunity, and thus to refrain from controlling it from within, from the viewpoint of motives or of goals pursued; to objectify it as *interest* is, on the contrary, to make the laws, the State, the body that will have the power to determine what interests are worthy of protection, into the master of the law and of rights: it is to socialise the law[28].

Jhering's formula was put forward not only as a positivist recognition of a hitherto unrecognised truth. It had a programmatic value. Firstly, it implied a positive policy on the part of the legislator: to organise the protection of those interests judged by society as useful to protect. The task of the law was now to recognise socially legitimate interests and give them the means to fulfil their social function[29]. (See also Friedman supra). Inversely, in this new economy of the law no one could any longer hope for a social existence except by having the social legitimacy of the interest he might represent recognised. In other words, grouping, association, organisation or unionisation round identical interests became a necessity for all; and all the more so because interests, as we know, naturally exist in conflict. If in theory a sociological conception of society led to conceiving

[28] Does this socialisation of law through interests imply the disappearance of the "rights of the human person" in favour of "limitless power conferred on the State to determine what interests it deems worthy of protection"?, asks Michoud (1932: 110). No, he replies, opposing — (1932: 112) an "*objective* law" existing "outside the State, at least as power idea" to *positive* law. "The State," he says, "does not create nor concede the law; it recognises it and takes up its defence". But, he clarifies, in a concluding formula that states the problem in all its acuteness, "The whole difficulty is knowing what rights it *must* recognise".

[29] Thereby aiming to resolve the legal theory of corporate personality.

it as made up of simultaneously solidary and antagonistic groups, in practice the idea that rights were nothing but protected interests led each to identify his personal interest with some collective interest, and therefore to group and to unionise[30]. A law of interests is unavoidably a law of groups; and for these groups the law becomes a fundamental stake, to the extent that it will decide on their existence and on the share of the general interest that will go to the interests that they represent.

To be sure, "interest" already had a legal existence; there was the familiar opposition and articulation between general interest and particular interest[31]. But the new interest approach overthrew that old allocation. The interests that now had to be recognised were of a different type; they were "collective" interests.

> Man is a social being. His destiny can be fulfilled only if he associates his efforts with those of his fellows. Isolated in the face of nature, he can achieve nothing through his own individual strength alone. For humanity to reach the degree of civilisation we have seen him attain, what was needed was the collective, continued work of successive generations. If the law is to meet humanity's needs, to find the formula that most exactly expresses the relationships that exist in human society, it must not only protect the individual's interest, but also guarantee and elevate to the dignity of subjective rights the *collective and permanent interests of human groupings*. (Michoud, 1932: 115).

On the one hand, the collective interest tends to absorb an individual interest which itself no longer has social existence except as the individualisation of a collective interest[32]. (For an opposing view cf. Broekman infra). On the other, the collective interests obey a logic which leads to the dissolution of the notion of the general interest understood as the common interest of a group[33]. The collective interest cannot be reduced to the idea of particular interest; the principle of recognising it socially

[30] The programme can be found formulated by Duguit (1908: 121): trade-unionism is the organisation of this amorphous mass of individuals; it is the formation within society of strong, coherent groups with a clear legal structure, made up of men already united by community of social task and occupational interest — let it not be said that it is the absorption, the annihilation of the individual by the trade-union group. By no means. Man is a social animal, as was said long ago; the individual, then, is all the more man for being more socialised, I mean for being part of more social groups. I am tempted to say that it is only then that he is a superman. The superman is not at all, as Nietzsche made out, he who can impose his individual all-powerfulness; it is he who is strongly tied in to social groups, for then his life as social man becomes more intense."

[31] Cf. e.g. Rousseau (1762: book II, Chap. I) "That sovereignty is inalienable". Commentary in Derathé (1970: chap. I), "Theory of sovereignty" (248), Appendix III: "the notion of legal personality" (397).

[32] When indeed the individual interest and the collective interest remain legally separate.

[33] "It must be understood from that that what makes the will general is not so much the number of votes as the common interest that unites them." See Rousseau (1762: book II, chap. IV).

presupposes that it is the bearer of the general interest, that it "represents" it, and that therefore the general interest is reached through the recognition of collective interests, the solidarity and conflictual interplay of which will enable it to be arrived at. Once society is conceived of as divided into groups and the possibility of an identity of interest between particular interests has faded into the fact of polemical solidarity, the general interest takes the form of collective interests. The general interest cannot then any longer exist as a totalising principle, but only as a compounding of particular interests with respect to each other, bearers though they all equally be of the general interest. The general interest can no longer be defined by a content alleged to be special to it; it is a form, a goal, namely the maintenance of the interplay of solidarities. And the general interest, understood as the interest of the State, is itself no more than a particular interest vis-à-vis the collective interests. So much so that the proposition according to which the particular interest must yield to the general interest loses its meaning. We arrive at a logic of interests which is no longer that of the subsumption or subordination of the particular in or to the general, but of balance, of equilibrium, and therefore of arbitration[34]. This transformation of the notion of general interest has been pithily put by G. Vedel, who explains that

> the public (or general, since it amounts to the same thing) interest is not the sum of the particular interests. That would be absurd, for the public interest would then be the sum of the interest of alcohol producers and that of victims of alcoholism ... The public interest is not different in essence from the interest of persons or of groups; it is an *arbitration* among the various particular interests (Vedel, 1980: 414).

The societies based on solidarity are, in theory and practice, organised so as to be able continually to compromise with themselves. This is on the one hand a sociological objectification of society, segmenting it into groups, classes and orders endowed with genuine social existence — individuals never being anything but an individualisation of the group from which they draw the essence of their being[35]. On the other hand, it is a legal recognition of groups as legal subjects. Social law, as is well known, is a law of groups, of associations, of bodies corporate; in particular, a law of occupational groupings[36]. Though one might maintain that the series of

[34] Which is why we speak of "general interests" in the plural, without asking whether the very notion of general interest does not imply the singular. The general interests are themselves in conflict and need to be arranged in a hierarchy, cf. Linotte (1975).

[35] "Society is not composed directly of individuals. It is composed of groups of which the individuals are members." See Worms (1903: 63). On the idea of "group democracy" cf. Vedel (1947).

[36] Cf. Gurvitch (1932: 11) which precisely defines social law as that law which is autonomously secreted by social groups: "social law is the autonomous law of communion whereby every active, concrete, real totality that embodies a positive value is objectively integrated". Also Leroy (1913); Paul-Boncour (1901); Morin

public freedoms that were to be recognised at the end of the nineteenth century — trade-union freedom, freedom of the press, freedom of assembly and association — owes its existence less to the ineluctable advance of liberty alleged to be the essence of the Republic than to a need of a political and constitutional nature; the setting up of the new political rationality known by the name of "democratic government"[37] would not have been possible otherwise. How, indeed, can one imagine the introduction of a law of groups without collective freedoms, that is, without giving them the means to act?[38]

This dream of a truly sociological administration of society, of a political economy that is social, decentralised, associative (Brice, 1892), federalist (Paul-Boncour, 1901) and syndicalist[39], in which contractual order would take the place of State sovereignty, brought with it a whole series of legal problems that are characteristic for social law. Among these are the problem of the *legal personality* of groups, of their capacity to act legally, of the definition of the interests they are fitted to defend, the problem of their *representativity*, of their capacity to express the group's interests, and finally the problem of their normative power both over their members and over those they are held to represent[40]. This means the pursuit of a whole range of legal issues, about which one cannot but say that they are at the opposite pole from any revolutionary conceptions or assumptions[41]. These issues,

(1920). See also the two great masters of public law, Hauriou and Duguit. "The starting point is that, more than other branches of law,social law is close to the practical reality it is built on; a reality constituted by the existence of *social groups* in situations of conflict over questions affecting their conditions of existence." Fournier and Questiaux (1982: 699).

37 The term "democratic government" was currently employed at the end of the nineteenth century to denote this type of government, held to constitute an alternative to liberal government. Cf. Nicolet (1982: part 1).

38 One might perhaps say that, as the individualism of the Revolution went via the recognition of individual liberties, so the sociologism of the late nineteenth century implied that of collective liberties.

39 It is in fact the trade union that represents the political form in which, at the time, the achievement of the organisation of civil society by itself was imagined. Cf. Paul-Boncour (1901),subtitle "Study on compulsory trade-unionism"; Gurvitch (1937); Morin (1920), pleaded for compulsory trade-unionism; "The growth of associations and foundations is the most characteristic phenomenon of our age, and shows to what extent the genuine right of social solidarity is penetrating the minds of all. The social and political future is there", Duguit (1901).

40 The basic work here is that of Michoud (1932).

41 Such as may have been expressed through the *Le Chapelier* law. This phenomenon of the reconstitution of "class law" could not fail to arouse legal thought. Views differed widely: see Dabin (1938: 66), is more than favourable. Josserand (1937: 1), fears that by binding a man to his occupation one may be loosening the bond linking him to his country (4); he is further afraid that its development may be a seed of civil war (4).

as one can see in connection with consumer, environment or compensation problems, have lost nothing of their topicality[42]. Nor is this surprising, since the political imagination has hardly changed since the turn of the century.

The new contractual order could not be satisfied with mere recognition of these new legal subjects, the groups. It further implied development of those practices by which "society" was continually able to compromise with itself. In principle, settlement excludes the trial, i.e. a mode of conflict resolution where the law says that one party is in the right and the other in the wrong. The policy of settlements or compromises must be accompanied by forms of conflict resolution outside the courts, more in line with the solidarist idea that conflicts structure the social order, that conflict does not mean contradiction (rather interdependence), that the rights of the one are just as worthy of respect as those of the other and that therefore recognition of one set of rights need not exclude others', and that what has to be reached through a settlement is not the crushing of one by the other, but the affirmation ot their solidarity.

This gives rise to the fundamental practice of *collective bargaining and agreements*, initially encouraged and regulated in the area of labour, but with much more general application[43]. This is a major practice of social law,

42 A most recent example is furnished by the law of 22 June 1982, known as the Quillot law.

43 Collective bargaining, like the collective agreement that concludes it, indubitably constitutes the major politico-legal innovation of the century. It encapsulates the issues referred to by the term democratic government.
Its prehistory would take us back, no doubt, to the demand for a "tariff" by the silk-weavers of Lyons in 1830-31. That scale was to be declared illegal by the administration of Louis-Philippe. Cf. Levasseur (1867).
The first official experiment with a collective agreement was presumably the wage agreements in the mines in Nord and Pas de Calais, known as the "Arras agreements", concluded in 1891 between the miners' union and the Nord and Pas de Calais Collieries Committee. On the origins of that agreement cf. Gillet (1973: 161). The practice, born in the area of work, continues to dominate our political imagination, as shown, in particular, by the recent Auroux laws, esp. the law of 13 November 1982. Cf. Auroux (1982: 30): "The contractual policy must become the favoured practice of social progress ... negotiation [must] be made the normal mode of operation in social relations" (31); "In the parliamentary debates, the Labour Minister again stressed the philosophical foundations of the reforms, which represented 'two ideas that can bring freedom, solidarity and responsibility; bargaining and the contractual policy'," cited by Javillier (1984: 351). Also Supiot (1983: 63).
These ideas of the Minister's were echoed by the trade-unionist Murcier (1982: 532): *Negotiation, the regulator of change.*
For the CFDT change constitutes a dynamic that must be regulated by negotiation. It is the best way of adapting change to the diversity of situations it has to be applied to and the levels on which it has to be achieved. Negotiation also enables all who will be concerned by the decisions being taken to be consulted. There is no better

but not the only one it has sought to promote: apart from settlements in the civil sense of the term[44], there are the practices of *conciliation, arbitration and mediation*[45]. From collective bargaining to mediation, there is a whole

way of starting from solid reality, and also of arousing intelligence, imagination and creativity, in an ever more complex society. At a more general level, negotiation is essential for any society that wants to avoid despotism, whether political or economic. It is necessary to the development of social life, to the overcoming of economic challenges, to changing the content of work; in short, to the participation of men and women in the construction of a new society.
Working men and women have their role to play in change. They must become its movers.
This vision of affairs means that, for change, it is not solely the law that is to be relied on. The temptation is great when there is a left majority in Parliament; it seems to make everything go faster and farther than through collective negotiation.
Certainly the law's role in the institution of new individual and collective freedoms is irreplaceable; certainly it is for the law to define the social minimum of protection guaranteed to every worker, whatever firm he works in. But workers and unions must be allowed to intervene themselves to change the situation they find themselves in. The law must guarantee the necessary free space for their interventions."
The question has for more than a century been the object of a considerable literature. An important bibliography will be found in Despax (1966).
Note should be taken of an important issue of the journal POUVOIRS, 1980/15, devoted to *negotiation*, in particular the articles by Merle (1980) and Raynaud (1980), which show that negotiation sets up a legal order of its own, since the object of a piece of bargaining is at least as much the (formal) law that will govern it as the content of the decisions taken. It will thus be understood how the contractual policy and collective bargaining can be put forward as an *alternative* form of social regulation to the classic democratic representative rule. But there is the difficulty — or advantage — that whereas in classical democracy the rule is laid down once and for all (it is the constitution), in the case of an order of negotiation the rule is itself perpetually negotiated and is the object of negotiation.

44 The economic importance of which seems considerable, in both civil and administrative law; in 1962, out of 12 000 tax offences, 11 790 were settled; in customs matters, 95% of disputes are settled. (Cf. Boulan, 1971: 5).
Compensation for traffic injury to the person is mainly through settlements; cf. Commaille (1956: 214). As far as compensation for material damage arising out of the same accidents is concerned, it is by settlement all through, because of the knock-for-knock agreements among insurance companies.
On the law of administrative settlements see Delvolvé (1969: 103).

45 These practices were an integral part of the social programme of the Second Republic. Cf. Pic (1919: 1041). On the law of 27 December 1892 on optional conciliation and arbitration, (1084). On the Millerand project for a system of contractual if not compulsory arbitration (1098). On the historical background to these practices see Perrot (1974: 193).
The Popular Front declared arbitration compulsory in matters of collective labour dispute (law of 31 December 1936 and 4 March 1938). Cf. Laroque (1938: 365); Savatier (1938: 9). Laroque (1953: 468) stressed the interdependence of the practices of collective bargaining and compulsory arbitration, while emphasising that compulsory arbitration had certainly become unconstitutional with the Constitution of 27 October

range of practices aimed at allowing "society" continually to reach a compromise with itself, to bring forth its own law, its own normativity (see Willke's "relational programmes" infra). These practices, made compulsory in a law of settlements, bring along the dream of a self-managing society. And as we know, in the main the "new" rights of workers adopted after May 1981 are aimed directly at strengthening them[46].

The policy of settlement has not solely had the effect of creating new forms of conflict resolution; it was also to transform the old ones. It will be seen how, with the increased use of the equity approach in judgments — characteristic of the logic of social law — the procedural forms themselves have tended to align themselves on the model of the settlement[47]. But in a system of social law, the practice of settlements and the establishment of the contractual order remain fundamentally within the powers of parliament: if the law is tending to take on the form of a settlement, the settlements must take on the formal garb of the law[48]. The decisive reason for this is that, since social law is no longer referred to a rule of abstract, external and intangible justice — in a word, to a primitive

1946, which states: "The right to strike shall be exercised within the framework of the laws regulating it".
The *Auroux Report* (1981) stresses the organic need for recourse to mediation if collective bargaining is itself to succeed (61). It is well known that the Minister of Labour did not hesitate to call on the mediation of M. Dupeyroux in two major labour disputes (Citroën, Talbot). *Le Monde* for 22 March 1983 also states that M. Dupeyroux had been given a sort of mediation mission in a dispute between UNEDIC and the staff of ASSEDIC. This new appeal to mediation was incorporated in the law of 13 November 1982.
These practices are obviously not tied down to the work situation. But they are to one type of law. There is every chance of their invading other areas; let us recall in this connection the institution of *medical conciliators* following the MacAleese report. And the report sent by P. Bellet, Honorary President of the Court of Appeal, in 1982 to the Keeper of the Seals on reform of traffic accident compensation proposes the institution of a conciliation body (34).

46 For the programme, see J. Auroux, *Les droits des travailleurs*, Paris, 1982. For the achievements, cf. in particular the law of 28 October 1982 on the development of staff representative institutions; law of 15 November 1982 on collective bargaining and the settlement of collective labour disputes.
This legislative series has been the object of numerous commentaries, in particular in the journal *Droit Social*, No. 4, April 1982 and No. 5, May 1982.
A colloquium was held on the evaluation of the "newness" of these reforms.

47 See, below. It may further be noted that the Conciliation Boards (set up by Napoleon in 1806) for settling individual differences between employers and workers had from the outset a settlement set up. Cf. Pic (1919: 1063); Supiot (1983: 342).

48 Which is why the hypothesis that the development of civil society could go only against the State is at least disputable. It may equally well be maintained, and the history of the last century would tend to testify, that social or sociological administration of society instead implies ever more State. G. Ripert in particular has sought to show this.

social contract — but to "society", to division, to conflict and the ever-present clash of interests therein, it is only a constitutional body like parliament, where "society" is held to be represented as a whole, that can decide which "collective" interests ought from time to time to be given legal personality, can render the necessary arbitration in terms of the general interest, and at the same time decide which settlements are legitimate, and which necessary and therefore to be made compulsory — even if that affects certain particular interests[49]. While the social partners can, no doubt, thanks to collective bargaining, determine the terms of contract as far as they are concerned, only parliament is in a position to define general social obligations concerning the population in relation to itself. This is the case, for instance, with the right to health: what should the amount of that right be? Who is to pay for whom? According to what rule of justice? Only parliament is in a position to decide. Some people have been able to entertain the dream of a system of generalised settlements enabling the development of a continually negotiated legal order that would allow one to create the economy of the law[50]. They forgot that the segmentation of society into groups, and indeed the very principle of collective bargaining, impose as their necessary correlative a body that, if not central, is at least federal, and represents the interests of society as such.

Correlatively, the fact that the law is no longer so much the expression of the general will as the form taken on by the endlessly renewed settlements of society with itself profoundly changes its economy. The law no longer conceals that it is at once the effect and the prize of particular interests in conflict. Its value is no longer related so much to its constitutional status as to its technical advantages as an instrument for the sociological administration of society[51]. That legislation is class legislation is no longer a characteristic that condemns it; instead, it defines the new legislative

[49] It has several times been noted that the law was tending, in the most diverse areas, to take on the explicit form of settlements; to be sure, one thing always to be mentioned is the law of 9 April 1898 on work accidents; but more recently, laws tending to make settlement compulsory: compulsory arbitration, 1936-38; compulsory collective bargaining in the Auroux laws in the work area; law of 1976 on protection of the environment. In quite another context, the law of 10 July 1975 on divorce. Cf. Carbonnier (1979: 151); Commaille (1982: 47); Commaille and Marmier-Champexois (1978:205). More recently, cf. the above-mentioned law of 22 June 1982, known as the Quillot law.

[50] Let uns mention among these dreamers Gurvitch (1931; 1932); Morin (1920); Paul-Boncour (1901).

[51] Leroy (1908: 330) noted this already for legislative practice at the beginning of the century. He explained that this shift in the characteristics of the law ought to be thought of in relation to the shifts in the conception of law in the exact sciences. The law would become "experimental".

arrangement[52]. There is no longer anything but group interests jockeying to assert themselves as being the general interest[53]. The law thus becomes particular in source, as well as in its object (see also Heller infra). The positive law will depend on the relative strength of the groups attacking or asserting it. "The law," in G. Ripert's expression, "becomes the law of the strongest"[54]. We are in a system of *compromises*[55]. This amounts to saying that the enactments of social law must not be expected to obey over-rigorous plans or too rational programmes; the fine edifice with a planning rationality that had seduced its advocates is liable to become rapidly transformed, in terms of the interests present, into a composite structure. The history of social security from social insurance to the abandonment of the single fund in favour of a multiplicity of occupational schemes and special arrangements supplies a good example of this[56].

In terms of this new programme where the law can no longer be conceived of as an immutable and intangible legal principle but as an arrangement, an ever-revisable compromise among groups and interests in conflict, the problem ought to be posed of parliament's capacity to do the job it now has to perform. Should the law of numbers (one man one vote) not be replaced with more adequate representation of the true social actors: groups, unions and associations with their own interests? These problems, of *proportional representation* in the broad sense, have been haunting the organisation of democracy for a century, in France for example, giving rise in 1925 to the institution of the National Economic Council, which has since become the Economic and Social Council[57].

[52] "Have we entered the age of merciless struggle for existence, where those most in favour with the legislator abuse this to shift the game in their favour, thanks to the guilty compliance of the laws?" Waline (1969).

[53] Cf. e.g. Ehrlich (1971); he shows how the interplay of interest groups intensified with the Welfare State (174).

[54] Ripert (1949: 28) also Ripert (1948) "Modern France is a democracy which universal suffrage makes force of numbers rule" (2) ... "The laws have become special and temporary; many are only improvised solutions to difficulties of ever-changing aspect" (24) ... "The law is no longer anything but the momentary representation of the success of a part of a man" (35); Ripert, (1955: 92).

[55] Leroy (1908: 329); "The laws are peace treaties between various forces", Ripert (1946: 6); "The law is almost always the result of a compromise between opposing forces," Ripert (1955: 83). A remarkable example of the *constitutional* character of the compromise in the contemporary legal system is supplied by the preamble to the constitution of 13 October 1946. Cf. Rivero and Vedel (1947).

[56] On Social Insurance, i.e. the amendment of the 1928 law by the 1930 one under pressure form the internalist and mutualist farmers, cf. Durand (1953: 79). On Social Security and the attack on the principle of the single fund, cf. Galant (1955: 105), and Laroque's preface to that work (xv—xvi).

[57] This problem, as old as the institution of universal suffrage, has given rise to a considerable literature; cf. e.g. Benoist, (1899); Duguit (1924: 667); Cruet (1907: 321).

If the notion of the settlement provides a description of the practices of social law, the general form of the obligations of the new legal order, it does not suffice for its characterisation. One might, indeed, very well maintain that the law is by nature a matter of compromise[58]. This idea was given expression by the authors of the Civil Code at the conclusion of their work: not only should the practice of settlement be encouraged, as a far superior means of conflict resolution to the trial[59], but that the signal merit of this new code is that it constitutes the great settlement thanks to which the French people, hitherto legally and socially divided, would be able to find the peace of coinciding with itself: "How can one pronounce this word [settlement]," says the Albisson Tribunal, "without one's mind going back with lively satisfaction to the proximate achievement of our Civil Code, which is itself the greatest, most useful and most solemn settlement that any nation has ever shown the world?" (Fenet, 1827: 120).

If then social law can be described as the law of settlement, that does not suffice to characterise it. It will be noted that, for its authors, the reason why the code can have this function of settlement is that it formulates a *law* (Fenet, 1827: 114). An order of settlements does not, as might seem, exclude the law; on the contrary, it calls for it (see also Luhmann infra). Let us, indeed, imagine an order of settlements not regulated by law: instead of making possible the desired social pacification, it would immedediately produce the opposite effect. It would be merely so many opportunities for the strong to abuse strength and exploit the weakness of the weak. An

A good presentation of all these problems will be found in de Laubadère (1979: 136). On the Economic and Social Council cf. Rivero (1947: 35).
Let us recall finally that the 1969 referendum, the "no" at which brought about General de Gaulle's departure, related to a reform of the Senate to merge it with the Economic and Social Council.

[58] Let us think of the judgment(s) of Solomon. Carbonnier (1979: 278).

[59] Bigot-Préameneu speaks of it as the "most desirable of all the means of putting an end to disputes. Each party then abandons all prejudice, and in good faith and with the desire for conciliation balances the advantage that would result from a favourable verdict with the loss that a condemnation would bring; it sacrifices part of the advantage it might hope for, so as not to suffer all the loss it might fear ... which one cannot in coming to terms, for whatever sacrifice that imposes, the gain in return is the greatest of all goods, namely tranquillity ... Better a bad settlement than a bad trial", cited by Giroud (1901: 7).
And the Albisson tribunal declares that "settlements deserve the favour of the law, whose final end must be to maintain the peace among the citizenry", and continues, "the usual effect of settlements is to stifle the spirit of contention, fatal to the repose of society; to reunite long-divided families, to renew old friendships; and the more this touching sight might be repeated, the more its influence might be felt on the agreeableness and smoothness of society", Fenet (1827: 113).
Accordingly, the law's function is not to permit trials, but to avoid them. Perhaps this is also what is meant by J. Carbonnier (1979: 18) in speaking of case-law and courts as pathological law.

order of settlements, if it is not immediately to cancel itself out in injustice, needs to be regulated by a system of law. And it may be said that social law found its first historical bases in the recognised need to legalise "wild", improper, inconscionable or burdensome settlements[60]. Even in an order of settlements, not all settlements can be either possible or permissible. How then is the choice to be made between good and bad settlements? How, on what principle, is one to select, to distinguish? All these questions are raised by the problem ot the settlement logic of social law, i.e. the problem of its very identity. At bottom, it is nothing else but a recasting in other terms of the old problem, unavoidable in study of law, of tracing the *boundary* between what is proper and what cannot be: the problem of the demarcation line between the just and the unjust.

II. Balance

As for social law's logic of settlements, the answer is in no doubt. This whole enquiry has never stopped coming up against the key notion of the new law, the one whereby lawyers themselves apprehend and plan the transformations of legal practice: the notion of *balance*. What principle does the new law of liability obey, if not the concern for a balance to be restored between the victims of damage and those responsible?[61] What governs the discriminatory provisions of labour law, or social security policy, if not again the idea of balance?[62]. What is the key notion of environment law? (Caballero, 1981: 93) What is the concern dominating consumer law? (Ghestin, 1980: 138) In penal law, what concern does victim compensation policy pursue?[63] In each and every case, the idea of a balance, to be maintained, arranged or restored.

Let us be clear that when, from the late nineteenth century on, lawyers use the term "balance", it is obviously not to designate the vague idea, tautologically contained within that of justice and claimable by any legal system, that being just means keeping an equal balance between two parties[64]. The term is instead used diacritically, to draw a distinction. There are two major usages. Firstly, a philosophical one, in connection with the

[60] This is obviously the case with work accidents and the law of 9 April 1898.
More generally, the practice of settlements, bound materially to increase with the growth in accidents, called for regulation by legislative intervention. Cf. e.g. the note by T. Bouzat, under cass. 14 March 1934, S. 1935, 1, 377.

[61] Cf. Savatier (1951: 1); Stark (1972: 34). The theory of the "guarantee" developed by that author rests entirely on the idea of equilibrium. For a more general viewpoint cf. Husson (1947: 127, 335).

[62] As is implied by the notions of transfer of distribution.

[63] Cf. the *Law improving protection for victims of offences*, National Assembly, 6 April 1983.

[64] Still less the idea that a "just" judgment must be balanced, weighed, without excess, and be a just mean.

foundations of law, which are now set side by side with a sociology: the notion of balance designates both what the social logic is and what it ought to be. It is used in this first sense both by Proudhon, and by M. Hauriou, R. Saleilles or G. Gurvitch, to name but a few[65].

But it is mainly found used in a second, more legal and more polemical, sense: to designate what constitutes the logic of a law that has finally arrived at a social self-awareness. It is, then, the concern which is held to govern, and rightly so, the practices of social law. This could make the new law of obligations "just" where classical civil law proves "unjust".

We shall give two examples.

This principle, which might be called the principle of the *balance of interests arising*, ought to guide the jurisconsult in his interpretation of the law just as it guides the legislator or the customary bodies whenever, lacking an adequate and legitimate private arrangement, it is necessary to enact with authority the rules of conduct that constitute the positive legal organisation. The latter's object is, in fact, none other than to give the most adequate satisfaction to diverse rival aspirations, whose just conciliation seems needful in order ro realise the social objective of humanity. The general means for securing this result consists in recognising the interests arising, evaluating their relative strength, weighing them, as it were, in the scales of justice with a view to ensuring the preponderance of those more important in accordance with some social criterion, and finally, establishing among them the supremely desirable balance[66].

The concept of subjective right has benefitted from this profound renewal, the practical reality of which it attests; of old, such rights as ownership, *patria potestas* or marital authority were thus considered as powers conferring on their holders absolute prerogatives, with no effective reciprocation. They were seen as unilateral relationships putting all the benefits on one side and all the duties on the other. Then that simplistic, worn conception grew old; if it gained a new lease of life under the impetus of the French Revolution and through the intermediary of the Declaration of the Rights of Man and Citizen, which bears the stamp of an extreme individualism, it has for years now fallen into ever more perceptible discredit. Henceforth, rights are considered as synallagmatic relationships, imposing on their holders, in compensation for the prerogatives they assure them, more or less numerous and far-reaching obligations; as relative, social values, to be used in accordance with the spirit of the institution. *The idea of the balance of rights has supplanted the dogma of sovereignty* (Josserand, 1936: 160).

These are two examples, from among many others[67], which testify that the notion of balance designates very precisely what seems to us capable of characterising a system of law: its *rule of judgment*, that is, the type of rationality whence law and jurisprudence proceed, and whereby, at a given moment, the justice of a judgment is identified[68]. It is through the notion of balance that the endeavour has been made (and is still being made) to understand the difference between the rule of judgment of social law and the old rule of civil law, still aligned on liberal political rationality, on notions of fault, will, freedom; in a word, of responsibility.

The notion of balance functions on two levels. First, a political level: balance describes the political rationality that corresponds to the practice of settlements. This rationality defines a policy of law wherein the latter appears as an element in the sociological administration of society. There is a series: *conflict — balance — settlement*. On the basis of a society conceived of as naturally conflictual, where the protagonists of conflicts are considered as equally deserving of respect because all contribute to the common effort, settlement and balance become two commutative notions, referring back to each other (Prins, 1895: 33). But over and above this political logic, the notion of balance also describes the structure of a type of law, a legal logic, or rationality: social law's logic of judgment. That is, that whereby one may distinguish what may or may not be proper — the criterion of *juridicity* — and also the content and system of the rights to be accorded. This is why, after a certain point, it was to be "discovered" that there were gaps

[65] Cf. Proudhon (1930: 298): "How the idea of the principle of balance is given us by the opposition of interests"; (vol. II, chap. VI, 74): "economic balances". G. Guygrand, in his introduction to the work, writes, "If equality is the moral name for justice, its scientific name, as an objective reality, is *balance*. Balance, symbolised by the pans of the scales, is a constant concern for Proudhon. His whole philosophy is a system of economic, political, national and international balances ... Balance is order, is peace. All social disorders come from breaches of that fundamental law", On Proudhon as founder of social law cf. Gurvitch (1932: 327). Hauriou (1896: 27, 187, 257; 1929: 34) "The social order"; "The viewpoint of order and balance", cf. Hauriou (1909). for an overall view see Sfez (1966: 7) "The theme of balance or movement, the fundamental theme of the entire work". Saleilles: "Social reality is in the mystery of *counterbalancing antinomies*", quoted by Gurvitch (1932: 633).

[66] Cf. Gény, (1919: 167). Also Gény (1922: 50):
"At bottom, the law finds its own, specific content only in the notion of the just, a primary, irreducible and indefinable notion, implying essentially, it would seem, not only the elementary precepts of not wronging anyone (*neminem laedere*) and assigning to each his own (*suum cuique tribuere*), but the profounder idea of a balance to be established between interests in conflict, with a view to assuring the order essential to the maintenance and progress of human society."

[67] The idea had been expressed with great force by von Jhering (1916): "The idea of justice represents the balance imposed by society's interest between an act and its consequences for the person doing it ... legal dealings bring about this balance in the most perfect way. Thanks to them, each contracting party receives back the equivalent of what he has given ... ".
It can be used just as well to express the rule of judgment of criminal liability; cf. in addition to R. Saleilles and L. Josserand, already cited, Teisseire (1901), which on p. 170 gives this formula for the liability: "All damage must be allocated between perpetrator and victim according as each has caused it by his act"; also Ripert, (1902: 330); for the demand for a new contractual justice, cf. esp. Maury (1920); Pérot-Morel (1961).
The idea of balance was to be put forward explicitly by the Standard school as what ought to supply the rule of legal judgment: Al Sanhoury (1925: 7); Stati (1927: 159). From a more general viewpoint, cf. Husson (1947: 335); Henriot (1960: 32).

[68] Cf. Sfez (1966: 104), gives a good example: M. Hauriou's analysis of the Council of State ruling of 17 July 1925, "Bank of France staff association".

in the civil code and that there was a need to set up a whole series of social rights. The traditional idea that social law is never anything but the historical product of workers' struggles leads one to overlook the fact that, for these struggles to have an effect on the law, a transformation of legal rationality itself was called for. It must be repeated: what characterises social law is not so much the proliferation of legislative and regulatory measures that go more or less beyond the common law, as the fact that such measures have been taken and have been deemed necessary. It is the rationality of social law that explains the content of social-law legislation[69]. (Cf. Heller infra).

It will have been understood that the point is not to claim that one had to await the end of the nineteenth century for issues of balance to appear in policy. Everyone knows that the notion is an old one, used by the Greeks in both philosophy and medicine (Svagelski, 1981), that it has a whole political presence among the moderns both in international politics, with the issues of the "European balance" (Livet, 1976), and in internal matters with the problem of the separation of powers (Montesquieu, 1948), and that it constitutes one of the fundamental concepts of political economy (Granger, 1955; Stewart, 1967). Nor is it the point to say that the notion is entering the law for the first time; M. Villey has adequately shown that it forms part of the categories of law in antiquity (Villey, 1975: 36; 1978: 77).

The problem is by no means to establish in what time and what field the notion of balance was used in for the first time. Such an endeavour would have little sense, given that this notion, in contrast to a Platonic idea, does not designate an essence for ever condemned to remain identical with itself. When lawyers, philosophers or sociologists use the notion, in the circumstances of the end of the nineteenth century, it is not in application of a preconstituted essence, but as a polemical and pragmatic notion. It was the notion that seemed to them best suited for understanding the transformations of law of which they were both the actors and the commentators[70]. That is to say that while since the end of the nineteenth century the term "balance" does not cease to turn up in legal literature as an instrument for identifying and describing the new logic of the law, there are no legal texts where the notion was pondered in itself. On the other hand, by comparing judicial and legislative practice with the doctrinal commentaries, it is possible to construct the concept there was of it.

[69] Which clearly does not mean that social struggles have no importance in the production of law. Since the contrary is true, one must endeavour to evaluate the kind of positive effect they have been able to have on the structure of the legal system.

[70] It should moreover be noted that the lawyers of that time were not only well aware of their difference, but were so of the need the time they lived in created to differentiate themselves. Cf. Bonnecase (1933).

One may give four main characteristics of the rule of judgment articulated round the notion of balance.

1. The notion of balance serves first of all to designate a type of judgment where weight is given to the *relationship* between two (or more) terms, rather than to the intrinsic quality of each of them. In connection with contracts, for instance, the point is no longer so much to know whether the consent given is valid, but rather to evaluate the appropriateness of the terms of the exchange. A problematic of 'causa' and of the equivalence of 'causae' doubles the problematic of 'consent'[71]. In connection with liability, the point is no longer so much to compare the conduct of an individual with an abstract model of impeccable conduct (the good husband and father), as to determine, given that one or the other culprit or victim, must bear the burden of damage, albeit resulting from two activities of equal usefulness, why one rather than the other ought *fairly* to bear that burden. This may be answered using the idea of fault, but also by taking account of a social inequality to be compensated[72]. A judgment of balance will necessarily be much more social than moral[73]. The axis of judgment is brought down from reference to abstractly defined good or evil to an axis of social relationships[74]. This is the *principle of socialisation of judgment*.

[71] As shown by the process of increasingly wide recognition of amendment of contracts for *burdensomeness*. Consumer law can only be a law of burdensomeness, for it there seems that protection of consent is no longer capable of ensuring contractual justice. Durkheim (1950: 232) had already sought to reduce the causes of nullity of contracts to burdensomeness.

[72] It is true that the preparations for the Civil Code contain this awareness for balance. Thus, Bertrand de Greuille, in his report to the Tribunate on the future articles 1283 ff, declares: "Each individual is guarantor of his act; that is one of the first maxims of society. Thence it follows that if such act cause some damage to another, he by whose fault it occurred must be bound to make reparation. This principle admits of no exception ... it leads even to the consequence of reparation of wrong resulting only from negligence or rashness. One might at first sight wonder whether this consequence be not too exaggerated, and whether there not be some injustice in punishing a man for an action that partakes solely of weakness or misfortune ... the reply to this objection is to be found in the great principle of public order, that the law may not hesitate between him who errs and him who suffers." Cf. Fenet (1827: 474). But as the continuation of the text shows — "Wherever the law finds that a citizen has undergone a loss, it considers whether it was possible for the person that caused that loss not to have done so" — the idea of balance here supplies less the principle of judgment of liability than the principle that should delimit the extension of the notion of fault. It is also true, as the history of case-law on work accidents shows, that the natural derivative of such a definition of the notion of fault was its own elimination in favour of considerations of the legal balance between the parties.

[73] In fact there is only inversion of the relationship between the two terms, not elimination of one of them in favour of the other.

[74] The proof of this was given in masterly fashion by Ripert (1902: 332 and 408); Appert,

2. The judgment of balance must be a flexible judgment; it must always be able to adapt to history, to development, to social change[75]. It must not get hung up on *a priori* respect for principles. The judgment of balance seeks its justice as a judgment of adaption of society to itself. The value of things, or of actions, cannot be derived from their nature. A thing may very well at the same time be itself and its opposite: good, an evil; evil, a good. One can no longer say of an action that it is good *or* bad. It depends: in some cases yes, in others no; up to a certain threshold still, beyond no longer. Only the background, the circumstances, the relationship of this activity to others, and to the common good, can allow this to be decided, and then only for the moment[76]. This is the *principle of the generalised relativity of all values*.

3. Judging in terms of balance presupposes the focussing of all attention on *distribution*, on *allocation*. The whole goes before its parts; any attribute of the parts is first of all an attribute of the whole. Where classical law reasoned in terms of individual appropriation (contract) or accident (offence), one acts as if nothing ever happens to anyone which is not first of all a happening to all. Wealth is counted twice; as individual property, and as part of a common good individually distributed. The misfortune that happens to you may leave you alone in your suffering, but it is never anything but the statistical distribution of a common sum of ill. To be just is to restore the equality in individual distribution of social goods and evils. Liberal "justice" was aligned on the principle of "truth", that one should not (by regulation) contradict the natural play of distributions effected by the economy. Likewise, what was just according to society ought to follow what was just in nature; they were confused, with no way of distinguishing between them. Now the social order of distribution (or of justice) is split off from the economic order of production[77] (for a similar view see Preuß infra). So much so that the question of *who* produces the wealth, on what terms and at what prices tends no longer to be relevant when it comes to the social question of its distribution. The natural

note on Bordeaux, 5 March 1903, S. 1905, II, p. 41; more recently, Linotte (1975: 210) has shown how the Council of State ruling "Ville nouvelle Est" was articulated round such a transformation of the rule of judgment: before, he says, "the judge confined himself to verifying that the project considered was among those that might legally be carried on by way of expropiation" henceforth the judge would evaluate the operation *in concreto*, in relative terms, from the viewpoint of consequences, balancing the drawbacks and advantages (Linotte, 1975: 305, 413).

[75] Cf. Ripert (1902) and especially, below, the theory of abuse of law.

[76] Which as will be seen cannot fail to upset the problem of the sources of the law. It immediately becomes apparent that such a logic of judgment is contrary to the principle that it should only be application of a law.

[77] It is this principle of reduplication of everything that permits the existence, if not of the social, at least of an autonomy of the social.

allocation of wealth can no longer be just because justice has deserted nature in favour of society. There then arises the anguished question, with all the force of vertigo in the face of the sudden vanishing of a goal, of the "measure" in the new relationships of justice — which till then had seemed obviously solved. Justice is no longer linked to relationships of causality; it is read in the social relationships of *equality and inequality*. And there opens the chasm of knowing what ought to be the just combination of the two. This is the *principle* (and problem) *of social justice*.

4. The idea of balance goes back to that of the *scales*, and that in turn to the *counterweight*. Specifically the image of a pair of scales is a good expression of the idea of conflictual solidarity. Equilibrium is maintained only because one pan balances the other. The point is neither to sacrifice one pan or privilege the other; the whole art of judgment must be to maintain the balance between them. *The judgment of balance presupposes a whole art of compensation* (Svagelski, 1981). It may also call for a principle of comparison that allows a fair evaluation of the relative value of everything. The operation is already difficult where there exists an equivalent, such as a price[78]. One may wonder how it can be at all possible where, as with the environment, the point is to balance incommensurables[79]. Judging in terms of balance presupposes a generalised principle of equivalence, a possibility of determining the value of all values; that the whole can have an adequate knowledge of itself. This amounts to the possession of absolute knowledge[80]. If truth is defined by the appropriateness of a discourse to its object, it would seem that truth is debarred from a judgment of balance, which implies that a judgment is just only as a continually updated judgment of society about itself. There is no longer any referent. The subject vanishes into the object, the content into its expression, and vice versa. That is, unless "society" finds a way to split itself in two, to stand aside from itself, to oppose itself to itself as subject and object. Socialisation of judgment implies sociologisation of judgment — sociology being taken to be that branch of knowledge which enables social judgment to find the conditions of objectivity that it needs.

[78] This problem of the "common measure" is admirably formulated by Aristotle (1955: para. 1133). Also von Jhering (1916).

[79] This is the problem posed by the Council of State ruling "Ville Nouvelle Est", already cited, and similar ones. "It is not conceivable to bring fundamentally different interests to balance. How can one compare the interest of traffic with that of public health?" B. Odent, on C.E. 20 October 1972 "Société civile Sainte-Marie de l'Assomption", quoted by Linotte (1975: 381).

[80] Which involves a completely totalitarian virtuality. Knowledge is a fundamental stake for the "social": finding a generalised equivalent, a general principle of evaluation, which would, by the way, be nothing else but the social itself. We know that sociology is the knowledge that should fulfil this function.

One term sums up the whole set of characteristics of this logic of legal judgment: the term *norm*. A judgment of balance, in the social law sense, is a *normative* judgment[81]. Judging in terms of balance means judging the value of an action or a practice in its relationship to social normality, in terms of the customs and habits which at a certain moment are those of a given group. In therefore means judging relatively: the same act may at one place be punished, at another not[82]. What furnishes the principle of the sanction is not the instrinsic quality of the act, but its relationship to others: it is the abnormal, the abuse, the excess — what goes beyond a certain limit, a certain theshold, which in themselves are not natural but social, and therefore variable with time and place. Not that the abnormal is amoral or wrong. Quite the contrary; it may be useful and necessary, like industrial development with its accompanying nuisances. But it introduces a social imbalance which it seems just to compensate for, in terms of a certain idea of equality in the collective distribution of burdens[83].

[81] The term should be understood in its proper sense, and not the vague sense — coming no doubt from Germany — of a generic word to designate any type of obligations whatever. Rule, law, obligation, provision and norm are not synonyms. A rule is not a norm, if the term is to have a meaning, except when it obeys a specific regime of formation, the one that might be called "sociological". G. Canguilhem, in the fundamental work on the meaning of the concept of norm (1966: 182) indicates that the term "normal" dates from 1759, and "normality" from 1834. It is clear that the authors of the Civil Code could not conceive of drawing up "norms" in the sense we understand thereby today. Otherwise the Civil Code would have had to begin, instead of with the (deleted) preliminary section stating that "there exists a universal and immutable law, which is the source of all the positive laws: this is none other than natural reason, as it governs men" (art. 1), with a treatise on sociology.
One may hypothesise that the inflation of the notion of norm in law dates from the late nineteeth century, from sociologisation, from the time when, specifically, the rule of law was mixed up along with social norms. Cf. e.g. Duguit (1928: 65). Gény (1919: 146), says:
"The interpreter of positive law must put at the basis of his evaluation the notion of normality, as dominating all overall judgment", and refers in a note to Durkheim. When below we use the term "norm", it is in this precise sense, and not to denote any type of constraint whatever.

[82] This type of judgment certainly found one of its privileged areas of expression with the question of troubles between neighbours. Cf. esp. Ripert (1902: 408).

[83] Cf. Saleilles (1905:336):
"We have recognised that there are in our social world bodies functioning in a quite regular and legal way, indubitable manifestations of genuine law, which however can only achieve their end by sowing around themselves risks and damage. The most lawful acts, those included in the material content of law, may become generators of damage, and will be so without ceasing to be lawful acts, that is, acts performed in full conformity with the law whose expression they are.
Take a factory, a large manufacture, using dangerous machines: it cannot work towards the social goal it must fulfil save by making victims and causing individual damage. Not only damage to the workers, who are, it is only too true, but cogs; but also damage to third parties living in the neighbourhood and to properties in the immediate vicinity. Certainly, the factory manager will be obliged to take all precaution appropriate to his process; and if he does not, the damage resulting from that professional error will come under the sanction and under the formula of Article 1382, in the sense that the act will have acquired the character of a wrongful act, or if you wish a quasi-crime. But we must go further. Whatever be the precautions taken, there will always come a time when one comes up against the irreducible, the unforeseeable, the unpreventable — except by closing the factory. Will it be said that the acts and accidents whence such damage, which I shall call occupational, arises are still wrongful acts? One does have to, with the archaic terminolgy and still more archaic conception of Article 1382. At bottom there is the fact of risk. There is neither fault, nor crime, nor quasi-crime. There is a perfectly lawful act performed in pursuance of a right; but it is an act which, while being lawful, is performed at the risk and peril of those involved.
It is lawful; for if it were not, justice could require removal of the cause, and that cause is the factory. Is one to require closure of the factory because it is an inevitable cause of damage? One will content oneself with charging to the industry the risks that are its necessary concomitant. There are rights which can be exercised only on condition of paying for the risks involved. To eliminate the right on grounds of the dangers inherent in its exercise would be to strike a mortal blow at individual activity in its most productive aspect, to dry up one of the wellsprings of the national life. To exempt the exercise of the right from the risks which are its inevitable concomitant would be to disregard individual interests and rights, and to put all the benefits on one side, without the burdens they imply. There would be a violation of social justice. This has finally been understood as far as industrial risks go ...
The idea is bound to grow and develop incrasingly. Do we not see every day how human activity, even by private individuals, takes on forms that are assuredly lawful in themselves, but all imply risks that constitute the price to pay? Does not the mere fact of driving along a road in a motor car, event a moderate speed, in all justice imply that he who benefits from a sophisticated but dangerous means of transport should assume all the risks, however unforeseeable, that may arise? The car is proceeding at a normal pace — what could be more lawful? But suddenly a tyre blows out and a passer-by is injured. There is no fault on the part of the driver, but purely and simply the act of the machine, the risks of which must be imputable to him who, in his own assuredly legitimate but exclusive interest, uses a means of transport that in itself constitutes a permanent danger. There is no reason for treating the owner of the machine any differently from a railway company in a similar situation. The area of fault is becoming ever narrower, and the area of risk gaining all the territory lost; and one might wonder whether the most appropriate way for our modern social State might not be to reword Article 1382 as follows: "Any act whatsoever of man, performed in circumstances such as to imply, according to received usages and social conventions, that it is done at the risk and peril of the doer, shall oblige the latter to make reparation for damage caused.
Be that as it may, there is a trend here that cannot be impeded, and a case law that will go on growing stronger, for case law perforce follows the drift of mores and of opinion. There will increasingly be facts of ownership considered lawful in themselves

One might of course fear the arbitrariness of such judgments. It will be asked who sets the thresholds of abnormality. It will be wondered at that one may be condemned while not only exercising one's rights but per-

forming an activity that is useful and ultimately beneficial to all. There will be fears of a certain woolliness about obligations such that one may, for the same act, be at one place condemned and at another absolved. There will be denunciations of the attacks on the principle of equality that such judgments might involve[84]. But this would be to fail to understand that what is being disputed in this new legal logic is not a fault, but very exactly the effect sought. The norm is mobile, changing, variable; it changes like society and with it. Or better, the norm designates both a fact and a value[85]. The norm is found; it has the objectivity of a statistical average. At the same time, it supplies a principle of obligations that are immediately in line with what the social order requires at a given moment. The wonder of the norm is that it allows the passage from is to ought, from *Sein* to *Sollen*, from the descriptive to the prescriptive, that some had thought to see as the ultimate stumbling-block to the project of defining moral and social obligations on the basis of the sole consideration of social positivities. Thanks to the norm, "society" will be able to judge itself in continual adjustment to itself, which is what the social lawyers have been claiming as the ideal to aim at.

Since the end of the nineteenth century, concern for the norm has not ceased to penetrate (and to transform) the law of obligations[86]. It is what explains the systems of liability for risk, the principle of which can, as we have seen be found in the need for equitable distribution of social benefits and burdens. The norm is here set up as a principle of justice. Again, it is the foundation for the system of redress for troubles between neighbours, which was the occasion for the construction of the theory of *"dommage*

but exercised only at the risk and peril of the owner. And this will be true of most facts of freedom; the more human activity multiplies its initiatives, the wider open it will find the field of freedom. But in exchange and as a compensation, it will run the risk only on condition of accepting, whether there be fault or no, the costs."

84 It would doubtless be fairer to speak not so much of attack on the principle of equalitiy as of a specific legal practice of equality, with negative and positive aspects. Thus, the principle amounts to favouring equality of situations or conditions over equality of right considered *in abstracto*. In Vedel's happy phrase (1980: 375): "The point is not so much equality as non-discrimination". Two individuals in identical situations should have the same treatment, and different treatment in different situations. But this may also lead to justifying some rather shocking inequalities: it will, for instance, be judged that a given pollution from a factory in a working-class suburb is "normal", whereas the same pollution in a middle-class residential area would entail liability and compensation. Cf. G. Appert, note on Bordeaux, 5 March 1903, cit. Ripert (1902:409). The liability, he says, depends on the "usages", on "customs", on the "commonly accepted" (425).

85 Cf. Lalande (1962), article on "norme"; Canguilhem (1966: 81); "The concept 'normal'," explains Canguilhem elsewhere (178), "is itself normative."

86 But not only there; one could certainly say as much of family law. Cf. Commaille (1982).

anormal" as a ground of liability, apart from any consideration of fault (Girod, 1901: 47; Caballero, 1981: 193). It is again what we find at the basis of government liability, where it is expressed in the form of the principle of equality vis-à-vis public office (Michoud, 1932: 276; Delvolve, 1969: 260, 272, 371, 378, 415; Henriot, 1960: 32). In contractual matters, the demands for "fair wages" and for "fair remuneration" (in salary matters) or a "fair price" (in consumer matters) are not to be understood in the sense of what their true value would be if objectively calculated, but by reference to an average. A fair price is a price which, in relation to the average of prices charged, is not excessive; a fair wage is a "normal" wage, both socially and in the occupation, in relation to needs and to what at a given time is considered the subsistence minimum.

Thus, social law should be conceived of in relation to the notion of *norm*. Of course, this term designates, not certain legal expressions, but a system for formulating certain expressions, and a specific way of judging. In classical law, the Law — we give it a capital to distinguish it from the individual laws promulgated by the legislator — designated such a system for formulating expressions. In order to belong to the legal order, these had to take the form of (or derive from) the Law, a general expression intended to have perpetuity. For social law, the norm corresponds to what the Law could be for classical law.

The passage from classical law to social law should, then, be analysed as the passage "from the Law to the norm" (Foucault, 1976: 189). The notion of norm would thus allow the putting forward of a concept of social law, and the identification of what in any given legal system has to do with social law: it is where judgment becomes of the normative type. At the same time, however, it is on the basis of the notion of norm that the limits and problems of social law ought to be thought about.

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