The Scope of Labour Law and the Notion of Employee: Aspects of French Labour Law

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French labour law grants the employee a status, whose application depends on the existence of a contract of employment. The importance of the protective rules contained in the status makes the qualification of contract employment a central issue for labour law and generates important litigation.

The issue of the scope of labour law has attracted much attention in the last few years in France, for two reasons at least. First, the criteria for the application of labour law, that is to say the criteria that determine the existence of a contract of employment, have encountered important evolutions in the last ten years. Second, there have been debates on the issue of para-subordination, with a discussion on the adequacy of the traditional criteria of subordination. The issue is of particular importance, considering the scope of social security law is closely linked to that of labour law.

The following issues will be dealt with[1]:

1. The general context: changes as to power within the company
2. Labour law and social security law
3. The notion of employee
4. The extension of the scope of labour law

I. General Context: Changes as to Power Within The Company[2]

The scope of labour law rests on the idea of subordination. The criterion of subordination has been, in the last decades, under criticism, considering it does not fully cover all aspects of power within employment relationships. As a matter of fact, the vertical conception of power on which the idea of subordination is based, is strongly called into question. The development of networks is an example of these evolutions, considering the legal autonomy between the enterprises (franchiser and franchisee for instance). Is a franchisee likely to benefit from the application of labour law ? The power relationship relies on economic dependence rather than subordination. Another aspect of the issue is the transformation of job functions within the company. The classical model where the employee is dominated by the organisation, to such a point that he or she has no real initiative, is questioned. Another model develops, which gives more importance to the individual within the organisation. In this respect, the firm, today, relies more and more on the person and its personal capabilities.

The granting of more autonomy to the employees questions the classical idea of subordination, considering power becomes more diffuse. This helps to understand the calling into question of the border between dependent and independent work.[3] On the one hand, the employee is not necessarily anymore an « agent » within a vertical organisation, dominated by a hierarchy and deprived of all initiative. On the other hand, the independent worker is not necessarily anymore free of all initiative. The question is thus raised of a law that would apply to dependant and independent workers.

In this respect, a major question, particularly raised by Professor *A. Supiot*, is that of the application of protection rules, at least rules relative to social protection, to the self-employed. The issue is complex, considering there exists no unity within independent work. However, self-

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[1] Most cases referred to in the following text can be consulted by connecting to: www. legifrance.com/

[2] The following points have been underlined by A. Supiot. A. Supiot, *Les nouveaux visages de la subordination*, Droit social, 2000, p. 131; Same author, *Au-delà de l'emploi, transformations du travail et devenir du droit du travail en Europe*, Flammarion, 1999.

[3] See Supiot.

employed workers have in common that they bear the risks of their activity. This may explain why they have, for a long time, not benefited from social security, the latter being seen as a counterpart for dependence.

This conception has weakened with the trend of generalisation of social security. This is evident in countries with a universalist conception of social security, such as the UK. It is not so evident in countries such as France with a social security that has been built on a professional basis. But, these have generalised the protection against certain risks (illness, old age; *see further*). This generalisation has been reached, either by creating new regimes for categories of independent workers, or by extending the initial regimes to independent workers.

It may be underlined that the qualification of « worker » in the field of social security law at European Community level is not based on subordination: it rests on the person who lives through his or her work, and who is ensured, to that purpose, in his or her own country.[4]

This leads us to the relationship between labour law and social security law, as far as the notion of employee is concerned.

II. Labour Law and Social Security Law

After preliminary statements, the general framework of the system of social security will be described.

1. Preliminary statements

The French model of social protection is built on a professional basis. Historically, the application of social security rules thus depends on the existence of a contract of employment, although it is not formally required by the provisions of social security law.[5] The general debate as to subordination is thus as essential with regard to social security law as it is within labour law. In this respect, the definition of subordination is the same for labour law as well as social security law, to such an extent that the Court of Cassation[6] frequently refers to the provisions of the labour code as well as those of the social security code in its decisions relative to subordination.

This professional basis must be tempered in two ways.

First, the protection afforded to an employee is extended to his family (French law uses the concept of "*ayant droit*" which should not, however, be assimilated with that of family), that is to say his sons and daughters, his wife or husband, or the person with whom he might have a contract of partnership.[7]

Second, the general context (see above) has led to an extension of the scope of social protection on criteria other than work. An essential evolution is « universal protection against illness » (*couverture maladie universelle- CMU*.) which extends illness protection to all persons who have their residence (a stable residence) in France. This applies to any person, whatever his or her situation with regard to work. This fundamental evolution was decided with a purpose to fight against exclusion in the French society.

2. General framework of social security law

Social security law is divided into two types of regimes: the general regime and the special regimes.

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4 See G. Lyon-Caen, le droit du travail non salarié, Paris, Sirey, 1990

5 Art . L311-2 Social security code : « are obligatorily affiliated to social assurances, whatever their age and even if they have a pension, all persons whatever their nationality, whatever their sex, employed or working (…) for one or several employers and what ever the amount or nature of their remuneration, the form, nature or validity of their contract » ("Sont affiliées obligatoirement aux assurances sociales, quel que soit leur âge et même si elles sont titulaires d'une pension, toutes les personnes quelle que soit leur nationalité, de l'un ou l'autre sexe, salariées ou travaillant à quelque titre que ce soit pour un ou plusieurs employeurs et quels que soient le montant et la nature de leur rémunération, la forme, la nature ou la validité de leur contrat ».)

6 The highest Court with regard to private law issues.

7 It is a "revolution" in French familly law : the recognition of a contract between two unmarried persons (who can be of the same sex) that grants them legal recognition in different spheres of law (social security, tax, …)

a) The general regime

The general regime (by far the most important) is composed of four branches:

1. Illness, maternity, invalidity, death
2. Old age
3. Industrial accidents and industrial illness
4. Family

The principle is that a contract of employment is necessary for the application of the "general regime." Yet, there exists broadly two exceptions.

First, the benefit of family allowances is not dependent on the existence of a contract of employment.

Second, the creation of the "universal protection against illness" extends the protection. The criterion is stable residence in the French territory, the only exception being an irregular title of stay in France. It must be stated that the universal protection is limited to the costs for care (*prestations en nature*). The daily indemnities that are meant to compensate the absence of wages do not apply to the CMU, considering they have been elaborated to apply to workers.

b) The special regimes

Some professions (agriculture for example) have "special regimes." An interesting point is that these regimes are rarely dependant on the existence of a contract of employment. They are rather "corporatist," so that the criteria of application depend on activity.

Despite these exceptions, the scope of social security law and labour law rely on the notion of employee.

III. The Notion of Employee

With the exceptions stated above, the notion of employee determines the application of both labour law and social security law. More precisely, the issue is not presented as one of definition of the employee, but as one of definition of the contract of employment (these are only formal differences).

Three preliminary remarks are necessary.

First, there exists discussion as to the requirement of a written statement for the validity of the contract of employment. In principle, according to the rules of contract law, the validity of the contract does not require a written statement; in French law, a written statement is exclusively (with some limited exceptions outside labour law) a requirement of proof. Labour law follows this rule, and the requirements of a written statement laid down by European Community law[8] are not a requirement of validity. Yet, there exists numerous exceptions with regard to specific contracts, that, as a rule, do not lead to nullity. It is the case for fixed terms contracts, that are re-qualified into unfixed terms contracts if they are not made under the proper written statement.

Second, the definition of the contract of employment is not a statutory definition. The fact that it developed through case law explains the adaptability of the definition to the evolutions in labour relations. However, this adaptability has raised criticism, in the name of stability and "legal security." A statute law of 11th February 1994[9] that introduces a presumption of self-employment for workers registered as self-employed[10] is an example of this. Recently, a group named to make proposals for the reform of labour law has suggested to introduce a provision in the labour code that would define the contract of employment, including subordination.[11] The main purpose is undoubtedly legal security.

Third, the parties are not entitled to chose the qualification of the contract: « the existence of an employment relationship depends neither on the will expressed by the parties, nor on the denomination that the parties have given to their convention, but on the factual conditions

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8 Directive n° 91/533/CE, adopted on the 14th October 1991.

9 Art. L 120-3 Labour code.

10 There exist different registers (Registre du commerce et des sociétés, répertoire des métiers, …)

11 Rapport De virville, proposal n° 21, www.travail.gouv.fr/pdf/rapdeVirville.pdf

according to which the activity of workers is accomplished ».[12] This can be understood by referring to the idea of status, that has an important heuristic value in French labour law. Status, unlike contract, applies independently of the will of parties. The idea of status explains the unity in the definition of employee with regard to labour law and social security law. Both branches of the law take part in the definition of the status of employee.

The contract of employment is defined as a contract whereby a person puts her activity at the service of another, under her authority, in consideration of a remuneration.

Three criteria are required : the employee has to perform work; he must receive wages, which excludes unpaid workers from the qualification of employee. The main distinctive requirement is subordination, which deserves particular attention.

Central to the understanding of subordination in French labour law is the debate that developed at the beginning of the 20th century, between an analysis of subordination as economic dependence and one as legal subordination. Although subordination has not moved to proper economic dependence, the analysis of case law demonstrates that the judge does not content himself with the analysis of the provisions of the contract of employment, considering the latter does not always describe the true modalities of work. The analysis of subordination is thus a factual issue, that involves the analysis of the employment relationship in the context. The judges take account of multiple factors based on the control by the employer of the activity of the worker. It is only in 1996, in a social security law case, that the classical contextual approach to the notion of subordination has been consolidated by the Court of cassation. In a case decided on 16th November, 1996,[13] the French Court has, for the first time, drafted a definition of subordination, by laying down criteria. The definition is the following: subordination is characterised by the « execution of work under the authority of an employer who has the power to give orders and directives, to control their execution, and to sanction the breaches of his subordinated ».[14]

Although French labour law has not recognised economic dependence, the movement in the 20th century is that of an extension of subordination. An important stage in this movement of extension was, in the seventies, the admission of a new approach to subordination, that echoes what is qualified in other countries as the integration test.[15] A worker can be considered as an employee if he is integrated into service within the company, which implicates that the modalities of his work, such as working time, the place of work, or the material used to work, are determined within the service. This criterion has enabled the application of labour law to some doctors, house employees, professional sportsmen, or lawyers.

The movement of extension is tempered by the introduction, in 1994, of a presumption According to Article L 120-3 of the labour code, those who are registered at the register of trade and industry[16] are presumed not be under a contract of employment. The presumption can be overruled if the worker proves that he is under permanent subordination with his employer. The definition of subordination elaborated by the Court of cassation can be understood in the light of this evolution. Indeed, the Court does not content itself with laying down criteria to define subordination. It limits the scope of the integration test, by asserting that integration can only be taken account if the working conditions are unilaterally determined by the employer[17].

The notion of subordination, as defined by case law, has left relationships governed by mere economic dependence outside the scope of labour law. It is through statute law that these relationships have, in part, been integrated.

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[12] Cass. Ass. Plén. 4th March, 1983, see Legifrance.com/

[13] Cass. soc. 16th November, 1996, Legifrance.com/

[14] Le lien de subordination est « caractérisé par l'exécution d'un travail sous l'autorité d'un employeur qui a le pouvoir de donner des ordres et des directives, d'en contrôler l'exécution et de sanctionner les manquements de son subordonné ».

[15] See notably Catherine Barnard's paper.

[16] This also includes other registers.

[17] Cass. soc. 16th November, 1996, see above.

IV. The Extension of the Application of Labour Law

The labour code contains provisions that extend the application of its provisions, or of some of its provisions, to workers other than those who meet the requirement for a contract of employment.

Two approaches may be distinguished.[18]

The first consists of a legal qualification of a contract of employment. The second consists of an assimilation of some categories of workers to employees. In the first case, the worker is an employee. In the second, he is not an employee but benefits from the application of some labour law protection. Despite this distinction, the overall logic remains in both situations to extend the benefit of the employment status to categories of workers that do not meet the criteria of subordination.

1. The legal qualification of a contract of employment:

Without the intervention of the legislator, some journalists, some artists, and other workers in a relationship of dependence, would have been independent workers. Despite the absence of true subordination – which is not the case for all workers within these categories, labour law takes account of their dependence. The idea is not only to protect these categories of workers, but also to reduce the uncertainty that characterises their situation. These employees have sometimes been called « employees by determination of the law ». Rather than developing a general approach and, thus, define a third category, that could be designated as workers, French law has had an instrumental approach to the issue, leading to specific provisions referring to different categories of workers.

a) Sales representatives

As far as sales representatives are concerned, the requirements of the labour code to benefit from the presumption are close to those of the traditional contract of employment.

According to article L 751-1 of the labour code, conventions whose object is the representation , between sales representatives (freelance workers) and their « employers », are contracts of employment when certain conditions relative to their activity are met (exclusive and constant activity, absence of commercial operation for their own interests, determination of an area of activity, …). The contract, or each of these contracts, between the sales representative and one or several firms, which complies with the latter requirements, is deemed to be a contract of employment. There is no room to reverse the presumption, and prove that there was no subordination.

b) journalists

Concerning journalists, the requirement bears more originality. Article L761-2 of the labour code refers to a "principal, regular and paid occupation" that provides to the person "most of his or her resources." This can be applicable to any professional activity. However, the laws adds that this activity must be exercised "in one or several daily or weekly publications (…)." This requirement of permanence thus excludes the occasional journalist.

The classical requirement of subordination reappears when the courts overrule the presumption where the journalists chooses freely the subjects that he deals with, on his own initiative, without instructions, directive or orders.[19]

c) Artists and models (Art. L 762-1 Labour code)

The presumption of artists and models is far from the idea of subordination. The presumption of *artists*, indeed, remains "what ever the modality and amount of the remuneration, as well as the qualification given to the contract by the parties. It is not overruled either if there is proof that the artist keeps his freedom of expression of his art, that he owns part or all of the material used or that he employs one or several persons to assist him, if he

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[18] On the difference between these approaches, cf A. Jeammaud, *L'assimilation de franchisés aux salariés*, Droit social, 2002 p. 158.

[19] Cass. soc. 9th February 1989, Legifrance.com.

personally takes part in the performance.

Concerning models, the presumption is not overruled by the fact that the model keeps the entire freedom of action on the execution of his work as a model.

2. The assimilation to employees

Some individuals are assimilated to employees on grounds of economic dependence, but are not employees. In this respect, the reluctance of the labour courts to recognise economic dependence as an alternate to subordination is limited by these legal provisions that recognise, in limited situations, economic dependence. These are not employees, and their contract is not a contract of employment.

a) Articles L 781-1 ff. Labour code

According to articles L 781-1 and forward of the labour code, some individuals at the head of an individual enterprise can benefit from the rules of the labour code. The criteria are mainly economic: exclusive or quasi exclusive activity for a dominant company, prices imposed by this last company. These provisions enable the application of the labour code in the absence of true subordination. Examples of application include managers of petrol-stations, licensees, exclusive distributors and, more recently, franchisees.[20]

It must be stated that, contrary to the legal qualification of employee, the assimilation does not grant the quality of employee, which means that the labour code is not necessarily applicable as a whole. In this respect, these categories of workers are entitled to invoke the qualification of employee and obtain the qualification of contract of employment, if they happen to meet the case law definition of subordination. Those who benefit from articles L 781-1 ff. can also opt out of this provision, in order to benefit from a conventional status. This is however strongly criticised, concerning it denies the imperative effect of these provisions of the labour code, and more generally, of the provisions of the labour code.

b) Articles L 782-1 ff. Labour code

Articles L 782-1 ff. authorise the application of certain provisions of the labour code (notably those relative to minimum wages) to managers expressly named “non – employees.”

c) Articles L 721-1 ff. Labour code

Articles L 721-1 ff. Labour code apply to home workers, to whom the provisions of the labour code are applicable (article L 721-6 Labour code).

d) Art L 784-1 ff Labour code[21]

The legislator, in 1982, has dealt with the situation of a person who is employed by his wife or husband. Although the legislator had referred to a requirement of “authority”, subordination is not required anymore, according to a recent case of the Court of cassation. The reasons for this court decision may be found in family law. Requiring subordination would have been, indeed, contrary to the principles of family law that consider the equality between the husband and his wife as a fundamental principle. It is sufficient that the wife or husband effectively takes part in the activity of the enterprise and receives wages above the minimal standard.

The lack of a general approach to the question of para-subordination, concept borrowed from Italian law to define the situation of those workers at the border from employment and self-employment, is open to criticism. Rather than elaborating a general category of worker[22], that would be wider than that of employee, French law contents itself with specific provisions.

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[20] Cf A. Jeammaud, *L’assimilation de franchisés aux salariés, see above.*

[21] “The provisions of the labour code are applicable to the husband or wife of the head of the company, employed by him or her, and under the authority of whom he is deemed to work, if he or she effectively takes part in the company or to the activity of his wife or husband as a professional and regularly, and receives wages that are not be lower than the minimal required” :“Les dispositions du présent code sont applicables au conjoint du chef d’entreprise salarié par lui et sous l’autorité duquel il est réputé exercer son activité dès lors qu’il participe effectivement à l’entreprise ou à l’activité de son époux à titre professionnel et habituel et qu’il percoit une rémunération horaire minimale égale au salaire minimum de croissance.”

[22] Contra. UK law, see Catherine Barnard’s paper.

The issue is however complex. The elaboration of a category of worker would undoubtedly affect the foundations of labour law, that rest on subordination. The question remains open, for more comparative discussions.