

---

# The Dogmatic Foundations of the Market

## (Comments illustrated by some examples from labour law and social security law)

ALAIN SUPIOT\*

*Les croyances dogmatiques sont plus ou moins nombreuses, suivant les temps. Elles naissent de différentes manières et peuvent changer de forme et d'objet; mais on ne saurait faire qu'il n'y ait pas de croyances dogmatiques, c'est-à-dire d'opinions que les hommes reçoivent de confiance et sans les discuter.*

Alexis de Tocqueville, *De la Démocratie en Amérique* (vol II, 1, 2)

### ABSTRACT

This paper analyses the legal foundations of a market order in which informal contracting plays the central role. It charts the development of a 'contract culture' across the global economy and the dominance of contract as the appropriate way of analysing relationships in society. It then turns to examine the legal pre-conditions for an effective law of contract, in particular recognition of the legal force of informal promises. The author traces the development of this notion from Roman law, which never accepted it, through mediaeval canon law which did, to the role of the state in modern societies as the guarantor of promises. Finally, the article examines the tensions to which globalisation has subjected the state guarantee in modern times and analyses the hybrid forms which have resulted from the use of contract to govern relations previously wholly subject to public rather than private ordering.

### 1. INTRODUCTION

**O**n being kindly invited to present a contribution as a counterpoint to a paper on the economic justifications for labour law, I decided that the most stimulating thing would be for me to offer, from my side, an examination of the legal foundations of economic analysis. For when confronted with the question: 'What justifies labour law in economic terms?', we are prompted to ask ourselves: 'What justifies such a question?'. This is because the question itself

\* Professor, University of Nantes. This paper was delivered at a joint ILS/SPTL seminar, funded by the Industrial Law Society, and held at the London School of Economics and Political Science on 3 June 2000. A further paper delivered at the seminar by Professor Hugh Collins will be published in a later issue of the *Journal*.

presupposes conceiving of economics as a basis for judging the legitimacy or non-legitimacy of a given situation in law. Nowadays, this conception goes without saying. All employment policies pursued over the past thirty years, whether liberal or interventionist in style, have viewed the market as an overriding given factor whose operation the law is able only to facilitate or, alternatively, restrict. In accordance with this view, there is the market on the one hand and law on the other. All that law can do is to implement the harsh laws of economics, to give them a human face the better to ensure their inexorable application, and whereas that implementation is subject to national variations, the actual laws of the market are universal. It is this universality which is at work in the 'globalisation' of the economy, and the dictates of the market are therefore in a fair way to becoming the common basis for evaluating national or regional systems of labour law.

Clearly, this way of viewing the relationship between law and economics forms part of an ideology whose history has been recounted in remarkable detail by authors such as Karl Polanyi<sup>1</sup> and Louis Dumont.<sup>2</sup> My intention is certainly not to go over that history again, still less to censure the ideology itself, but rather to approach it from a juridical angle, that is, a normative and dogmatic angle.<sup>3</sup> For to talk of the laws of the market, or to refer law to the market, necessarily implies treating the Market as a normative source. Every normative source, however, rests on dogmatic foundations, that is, on prime imperatives which draw their strength from belief and are not induced from what is demonstrated by experience. The subject on which I hazard a few observations is therefore that of the dogmatic foundations of the market. Clearly, such a subject extends beyond the strict context of labour law. In an attempt to excuse myself for this transgression in the eyes of the seminar organisers, I shall concentrate on choosing examples from that particular branch of the law to illustrate my thesis.

Among the dogmatic foundations of the market, a distinction could be made between, on the one hand, everything to do with operators on those markets and, on the other, everything to do with transactions between those operators. As far as operators are concerned, the market would not be conceivable without the concept of the person, that great fiction invented by western legal culture for which modern-day economics never ceases to uncover, day by day, new and

<sup>1</sup> K. Polanyi, *The Great Transformation* (1944); French trans, *La Grande Transformation. Aux origines politiques et économiques de notre temps* (Paris: Gallimard, 1983).

<sup>2</sup> L. Dumont, *Homo Aequalis: Genèse et épanouissement de l'idéologie économique* (Paris: Gallimard, 1977); English edn, *From Mandeville to Marx: The Genesis and Triumph of Economic Ideology* (Chicago UP).

<sup>3</sup> Cf on this concept the works of Pierre Legendre, particularly *L'empire de la vérité. Introduction aux espaces dogmatiques industriels* (Paris: Fayard, 1983); *Sur la question dogmatique en occident* (Paris: Fayard, 1999).

unsuspected manifestations. Whether as regards natural persons or legal persons, economics postulates the existence of ‘contracting entities’ capable of deciding and acting and of being held liable for the decisions and actions imputed to them. These operators are not natural objects but dogmatic constructions. There is a great deal to be said, for example, concerning the role played by the law in the construction of operators in the labour market. In order to be the subject of a market, labour has to be treated as a possible object of a contract, that is, as an exchange value—that value cannot exist without having been formed and being maintained throughout human life. Since it is indissociable from persons, it is wholly bound up with the upbringing, the life and the reproduction of persons. This link is further reinforced in step with technical progress, which increases the demand for highly-skilled labour, that exclusively human labour which no machine can perform. It is here, therefore, that the abstract notion of the person which suffices for the general law of contracts is caught out, because labour involves the physical and mental faculties of the concrete human being. Consequently, a labour market could not exist without an occupational status for persons which enables the ‘sellers of labour’ to reconcile the discontinuity of the remuneration of labour on the market with the continuity of human life. The institutive role of labour law also occurs in relation to the other operator in the labour market: the employer. This figure, necessary to economic analysis, is threatened with dilution in the proliferation of fictions authorised by the general law of legal persons. And labour law has had and continues to have the function of reconstituting, beyond corporate groups, company networks and subcontracting operations, the legal figure of the employer without whom no labour market is conceivable.

Since I have already written a good deal on this aspect of the matter,<sup>4</sup> rather than repeat myself I should like to focus my observations on the notion of the contract, which alongside the person constitutes the second dogmatic foundation of the market. I shall therefore be developing the hypothesis that markets cannot do without the contract concept (and everything it implies, particularly the existence of things as the subject of transactions, as separable from the person). For the market economy to become universal, it is therefore necessary for all nations to be converted to the contract culture (section 2). But that culture is itself founded on faith in a guarantor of the spoken word; this function of guarantor, initially fulfilled by God, was subsequently assumed by the State, and in particular by the welfare state (section 3). Consequently, in destabilising states ‘globalisation’ is also destabilising the institutional foundations of the

<sup>4</sup> See, for example, *Critique du droit du travail* (Paris: PUF, 1994); *Au-delà de l'emploi. Transformation du travail et devenir du droit du travail en Europe* (ed), (Paris: Flammarion, 1999) (trans to be published by Oxford University Press).

market economy and opening up the way for new forms of refeudalisation, of which labour law offers some remarkable illustrations (section 4).

## 2. NO MARKET WITHOUT CONTRACT

### A. Belief in the universality of the laws of exchange

The idea of universality of the laws of exchange is of long standing. It was first advanced by jurists, who based contract law upon it: 'The law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal.'<sup>5</sup> From one century to the next, this certainty of the universality and timelessness of the laws of exchange was adopted as their own by economists. A former chief economist at the World Bank expressed it very eloquently: 'One of the things I have learned in my short time at the bank is that whenever anybody says "But things work differently here", they are about to say something dumb.'<sup>6</sup>

Dedicated as it is to the immutable laws of the market, standard economic analysis urges distrust of the laws by means of which States seek to regulate markets. As long ago as the 1860s, Henry Sumner Maine noted that 'the majority of people versed in political economy are inclined to think that the general truth on which their science rests must become universal, and when they move on to applications their efforts normally tend to increase the domain of contracts and to reduce that of imperative law to what is necessary for the performance of contracts'.<sup>7</sup> This observation illustrates perfectly the present-day relationship of standard economic analysis and law. Thus, the law and economics movement (whose fascination is even overtaking law faculties in France!) generalises to all human behaviour what may be called the rustic anthropology of contract law, that is, the figure of the man who knows what he wants and what is best for him.<sup>8</sup> That anthropology forms the basis (first step)

<sup>5</sup> Addison, *Traité des contrats* (1847), quoted by P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) at 17.

<sup>6</sup> L. Summers, chief economist at the World Bank, quoted by C.A. Michalet, 'Le nouveau rôle des institutions de Bretton Woods dans la régulation et la mondialisation' in M. Berthod-Wurmser, A. Gauron and Y. Moreau (eds), *La régulation sociale: le rôle des organisations européennes et internationales* (Paris: IEP, 1997) at 66.

<sup>7</sup> H. Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861), French trans by C. Seneuil (Paris: Durand et Pédone, 1874) at 289.

<sup>8</sup> See, in particular, R.A. Posner, *Economic Analysis of Law* (Aspen Law and Business, 1st edn (1972), 5th edn (1998)); R. Cooter and Th. Ulen, *Law and Economics* (Glenview-Illinois: Scott and Foresman, 1988), 2nd edn (1996).

of the economic analysis of law as depicted to us by its most notable representatives: 'Let us outline the steps in a complete economic analysis of a legal problem. The first step is to assume that the individuals or institutions who make decisions are maximising well-known and clearly specified economic objectives, for example, that businesses are maximising profits and that consumers are maximising wealth and leisure. The second step is to show that the interaction among all relevant decision makers settles down into what economists call an equilibrium, a condition that does not spontaneously change. The third step is to judge the equilibrium on the criterion of economic efficiency.'<sup>9</sup>

Viewed from this standpoint, contract law neither precedes nor conditions the market economy: it is its instrument (a Marxist would say superstructure), not its foundation. The theoreticians of law and economics stress this point: it is not the legal principle of contractual freedom which forms the foundation of free-trade, because free-trade is a given fact of economic life and the function of contract law is merely to accompany and facilitate it.<sup>10</sup> We find once again here the old certainties of the nineteenth century, with the difference that natural law has been replaced by economic science as the foundation of contract law and that efficiency has the role of assessment criterion formerly occupied by justice. Thus, the law and economics movement seems set to winning over jurists to an idea which Marx had been unable to convince them of: the necessity of restoring law to its 'real' footing, that is, its economic basis. Hence the flood of legal literature primarily concerned with relating every rule of contract law to a law of economics: incapacities to the stability of the rational actor's preferences, the fault of duress to the rational actor's freedom of choice, the fault of mistake and obligations to provide information to the transparency of the market, etc.<sup>11</sup> The method is amazingly reminiscent of the Marxist critique of law which also sought to relate every legal rule to its economic determination.<sup>12</sup> The difference is that Marxist analysis sought to condemn the 'legal form' by unveiling its adjustment to the laws of economics, whereas that adjustment fills our modern-day economist analysts with infinite wonder. Both cases, however, involve referring law to a natural order which explains and transcends it.

To say that the contract is universal or that the market is universal is more or less to say the same thing. For without the contract no market is conceivable, and where the contract exists there is negotiation and therefore business dealings and the possibility of a market. Consequently, internationalisation of

<sup>9</sup> R. Cooter and Th. Ulen, *op cit* at 7.

<sup>10</sup> Cf A.T. Kronman and R.A. Posner, *The Economics of Contract Law* (Boston-Toronto: Little Brown, 1979) at 2-3.

<sup>11</sup> See, for example, R. Cooter and Th. Ulen, *op cit* at 234 et seq, and Table 6.1 at 241.

<sup>12</sup> See, for example, M. Miaille, *Une introduction critique au droit* (Paris: Maspero, 1976).

the market economy has as its necessary corollary the fact that positive laws yield ground to contracts. In general, French-usage people talk of law and of contract in order to distinguish between these two types of relationship which bind us together and produce the effect of binding us together: in the case of law there are the texts and words which impose themselves upon us independently of our will, and in the case of the contract those which derive from a free agreement with another. Thus, every person is bound simultaneously by the status which the law assigns to them and by the commitments which they have entered into contractually. Saying that society is becoming contractualised implies that the proportion of prescribed bonds within society is declining in favour of agreed bonds, or, to put it in more scholarly terms, that heteronomy is giving way to autonomy. This thesis of the contractualisation of society is of long standing. In a famous book published as early as 1861, Henry Sumner Maine was already interpreting the entire history of western law as that of a transition from status to contract.<sup>13</sup> A few years later Léon Bourgeois, who was instrumental in popularising the notion of solidarity in French political philosophy, also characterised modernity by the fact that the contract would become 'the definitive basis of human law'.<sup>14</sup> These scholars saw the contract as the eventual and final outcome of a historic progression releasing man from the shackles of statutes and affording him access to freedom. In their view, the history of law has a direction and that direction is leading us to an emancipated world in which man is bound by no chains other than those he fastens on himself.<sup>15</sup>

## B. The conversion of nations to the virtues of the contract

In the wake of these leading lights, the idea took root that this process of emancipation by way of contract was universal in scope and would one day extend to all nations still in their infancy. Once decolonised, these nations were invited to join the international institutions which guarantee the freedom to contract across national frontiers. Adoption of the contract culture became the condition of access to modernity and to the concert of nations. Today, for example, this is the case with the former communist countries, those which an earlier Romano-canonical legal culture had familiarised with the idea of the contract (and in particular the contract of employment) have had little difficulty

<sup>13</sup> H. Sumner Maine, *Ancient Law*, French trans cited above at 288 et seq.

<sup>14</sup> L. Bourgeois, *Solidarité* (Paris: A. Colin, 1896), 3rd edn (1902) at 132.

<sup>15</sup> It took the exceptional lucidity of a Tocqueville not to succumb to an optimism of this kind and to discern both the good and the bad facets of this ideology; for a discussion of the theses of Sumner Maine as applied to labour law, see A. Fox, *Beyond Contract: Work, Power and Trust Relations* (London: Faber & Faber, 1974).

in returning to the notion of the market economy. By contrast, in countries which, like Russia, have never been profoundly suffused by the civilisation of civil law, it needed all the ingenuousness of the international 'experts' even to begin to imagine that the market economy could flourish without some preliminary period of apprenticeship for the contract culture. Hence the only too predictable failure of the market economy missionaries who were dispatched there in large numbers and at considerable cost. Because where there is no faith in the legal force of the spoken word, to preach competition and stigmatise the State cannot help but pave the way for all kinds of 'mafia'-type developments. The market economy is, therefore, not a state of nature which flourishes spontaneously when a controlled economy collapses. People still have to be converted to western legal dogmatics, and in particular have to be persuaded to believe in the obligatory force of the contract.

The example of Japan demonstrates that this conversion need not necessarily be total and that it is possible for a country to adopt western legal concepts without also having to abandon its own culture. The idea that a contract concluded at a given point in time can be binding in the future, whatever the supervening circumstances and any prejudice caused by its performance, is alien to Japanese culture and deeply repugnant to it. In such a culture, commitment finds expression not in words but in actions. The strength and performance of bonds between persons are dependent not on the words exchanged but on the preservation of the harmony which prevailed when they were expressed. And that preservation depends on the capacity of each party to maintain the links which bind it to others, on its ability to adjust its expectations to the changing nature of people and circumstances. To expect from another what may have become something prejudicial to him, or something which he is no longer able to do, is contrary to the elementary rules of social convention: to the rules of *giri*,<sup>16</sup> whose content varies with age and social class. *Giri*, which may be translated as 'obligation, duty, moral debt',<sup>17</sup> is not founded on a contract which is discharged once its object has been achieved. Depending on the concrete persons whom it binds, *giri* is a source of a 'lasting, non-revocable relationship which incorporates the subject's own view of himself and the regard in which he is held, and is entrusted to his discretion and sense of what is honourable. It is necessary to render some benefit in return, or rather to show that it is not forgotten, and this reward, which in fact does not cancel out but nourishes the

<sup>16</sup> See the instructive presentation of this key concept in R. Benedict, *The Chrysanthemum and the Sword* (1946), French trans *Le Chrysanthème et le sabre* (Arles: Ed. Ph. Picquier, 1955) at 157 et seq; also I. Kitamura, 'Une esquisse psychoanalytique de l'homme juridique au Japon', *Rev Int dr Comp* (1987) 4, discussed in T. Awaji et al, *Etudes de droit japonais*, op cit at 25 et seq.

<sup>17</sup> R. Benedict cites this definition of *giri* as found in a Japanese dictionary: 'something which one does regardless of personal wishes in order not to owe the world apologies' (op cit at 158).

relationship, may take a thousand discretionary forms . . .<sup>18</sup> Thus, *giri* weaves a powerful chain of flexible obligations which are mutually strengthening and preserve the harmony of the community.

Since the *Meiji* era, Japan has joined the school of western legal culture (French, then German and finally American) and is now equipped with a contract law which conforms with the canons of internationalisation.<sup>19</sup> It might therefore have been expected, if the contract was actually as it is seen by the West, namely, a self-contained and universal form beyond the reach of any legal relationship, that *giri*, as the 'archaic' form of exchange, would be progressively swept aside by modernity. Not at all, however. Originating from the barbarians in the West, the contract culture enables the Japanese to do business with those barbarians; but it has had very little influence on their internal relations.<sup>20</sup> Much of the economic success of Japan (and tomorrow, perhaps, China) is in fact explained by this very alchemy which mingles two cultures: that of law and contract, imported from the West; and that of order and duty, inherited from Confucianism. This is particularly true in the field of employment relationships, where, behind the screen of a formal western-style law based on contract,<sup>21</sup> the Japanese have established within the company their communal culture based on *giri* and employment for life.

Obviously, we must guard against attributing to this cultural relativity of the contract a permanence which it does not possess. There are certainly signs that the contract culture, initially accepted to meet the needs of international business, is very gradually gaining ground within Japanese society itself, although undergoing transformation on contact with its particular civilisation.<sup>22</sup> But this trend is not one-way. The inherent values of the Japanese culture have themselves also permeated into the attitudes of westerners, to the benefit of international trade. This influence is apparent in managerial echelons, where Japanese methods of mutual agreement have found currency as a model for the management of western companies. This Japanese model has also been echoed in the legal domain in the shape of the relational theory of contracts, which has been the subject of numerous studies, particularly in the United States.<sup>23</sup>

<sup>18</sup> M. Pinguet, *La mort volontaire au Japon* (Paris: Gallimard, 1984) at 345.

<sup>19</sup> See E. Hoshino, 'L'évolution du droit des contrats au Japon' in *Etudes de droit japonais*, op cit at 403 et seq.

<sup>20</sup> A single statistic is enough to demonstrate the continuing vitality of *giri*, the art of compromise and the avoidance of legal remedies: whereas the USA has one lawyer for every 300 inhabitants, the figure in Japan is one for every 10,000. See R. Abel and Ph.S.C. Lewis (eds), *Lawyers in Society* (California UP, 1988).

<sup>21</sup> See K. Sugeno, *Japanese Labor Law*, trans from Japanese by L. Kanowitz (Washington UP, 1992).

<sup>22</sup> Cf T. Awaji, 'Les japonais et le droit' (1976) *Rev Internat dr Comp* 2, discussed in *Etudes de droit japonais*, op cit at 9.

<sup>23</sup> See I.R. MacNeil, *The New Social Contract. An Inquiry into Modern Contractual Relations*

The contract has therefore not always been a universal category, but is in the process of becoming one, thereby evidencing that the western way of viewing man and society is capable of spreading throughout the entire world. That, at least, is the credo of 'internationalisation', extolling in a single movement the virtues of free-trade and those of the contract, which is regarded as flexible, egalitarian and emancipatory, as opposed to the burdensome weight of States and the shortcomings of law, which is regarded as rigid, unilateral and enslaving. Discarding the robe of natural law for the new clothes of economic analysis, jurists can continue to rely on the idea that a world order transcends national systems of legislation, which must be made its instruments. In the orchestration of the theme of internationalisation, economic science has taken over the leading part in the founding discourse on the universal order, leaving law with only human rights as its own meagre score.

Even those who are anxious to curb this process of internationalisation base their challenge not on law but on 'regulation'. This notion derived from molecular biology approaches living beings as machines whose mechanisms of adaptation to their environment can be formalised. It, too, results in a purely instrumental view of law. Regulating society consists in searching out the mechanisms of mutual adaptation which allow men to survive, and in then formalising those conventions. As the final phase of organicism, regulation leaves no room for heteronomy beyond that at work in the science of qualified experts in regulation.

Thus, any law which does not derive from a convention has become suspect and all efforts are devoted to founding every obligation on the mutual agreement of the parties subject to that obligation. Hence the generalisation of contractual vocabulary, which is spreading into all areas of human life, including the public sphere. This trend is affecting labour law in particular. One of the features which for the past thirty years has been common to all developed countries is that in labour law the contract has been given precedence over law. At Community-level this underlying trend has found expression in the promotion of the 'social dialogue' in the conservation of European law on social policy. This vague concept has made it possible to combine the two political variants of contractualism: the right-wing variant, which places the emphasis on the individual contract of employment, and the left-wing variant, which by contrast places the emphasis on the collective agreement. The 'social dialogue' was eventually enshrined in a major institutional innovation in the Treaty of

---

(NewHaven: Yale UP, 1980). This concept of 'relational contracts' has fuelled major doctrinal discussions; see, in particular, M.A. Eisenberg, 'Relational Contracts' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Paperbacks, 1997) at 291-304.

Amsterdam.<sup>24</sup> Adopting the wording of the Maastricht Social Agreement, this Treaty established the idea of the subsidiarity of law to the collective agreement as regards regulation of the labour market.<sup>25</sup>

To grasp the significance of the contractualisation trend, we need to start by returning to its beginnings: why and for how long has man been able to bind himself verbally?

### 3. NO CONTRACT WITHOUT A GUARANTOR OF AGREEMENTS

#### A. *Pacta sunt servanda*

'*Pacta sunt servanda*': without this principle of respect for the informal promise, the contract would never have become the universal abstraction to which we nowadays attempt to relate every kind of social relationship. The freedom of parties to arrange their own affairs would be devoid of all legal effect without this highly heteronomous rule. And the possibility of thus affirming that the exchange of mutual agreement was sufficient to constitute a contract was dependent on the fact that the very notion of contract had itself already come into being. Thinking in terms of contracts presupposes making a radical distinction between the world of things and that of persons; and that also presupposes accepting that the future may be dictated by words. Although the prehistory of the contract already involves alliance and exchange, they are an alliance and exchange which specifically do not yet make a clear distinction between things and persons and use roundabout devices to exert control over time.

In the case of alliance, things are caught only through persons. This is because alliance was initially conceived as a particular form of relationship. It could result either from a marriage or from an 'artificial relationship'<sup>26</sup> created through an alliance blood ritual—the *blood covenant*—whose imprint has been preserved by the various recorded religions.<sup>27</sup> With the blood alliance as also with marriage, the bond to another is effected through a change of status. The

<sup>24</sup> EC Treaty, Article 38 in the consolidated version.

<sup>25</sup> On this 'horizontal' dimension of the principle of subsidiarity, see B. Bercusson, *European Labour Law* (London: Butterworths, 1996) at 505 et seq.

<sup>26</sup> Cf G. Davy, *La foi juré. Etude sociologique du problème du contrat. La formation du lien contractuel* (Paris: Alcan, 1922). Ethnologists have frequently described rituals of this kind, which are found in most 'archaic' societies and always have a religious dimension. See the familiar description by Herodotus of an exchange of sworn oaths or solemn compacts among the Scythians ('they fill a large earthenware bowl with wine and drop into it a little of the blood of the two parties to the oath') in *The History*, Book IV, 70, English trans (Harmondsworth: Penguin, 1954) at 264.

<sup>27</sup> See A. Chouraqui, 'L'alliance dans les écritures' (1995) *Rev de sc morales et pol* at 5; F. Ost, *Du Sinai au Champ-de-Mars. L'autre et le même au fondement du droit* (Brussels: Lessius, 1999).

relationship is the device which makes it possible to create a state of obligation over the long-term.<sup>28</sup> But the subject of this state of obligation — the things and services to which it applies — are necessarily still undefined at the time when the alliance is concluded; the content of the obligation will depend on the vicissitudes of the life of the parties and their respective needs. This type of arrangement, whereby a relationship of obligation is derived from something apparently artificial, is still present in our legal heritage. The very idea of *patronat*, which French employers have only recently relinquished,<sup>29</sup> demonstrates the lasting influence of the paternal dependence model on the employment relationship, since it has extended from Roman law (in which it denoted the relationship binding a freedman to his former owner, the person who had launched him into civil life<sup>30</sup>) up to the law of paid employment.<sup>31</sup> Our modern-day contract of employment is the instrument whereby there flows from a change in occupational status (access to employment with what it implies regarding subordination and security) an obligation whose precise content becomes apparent only during the course of the contract's performance.

With exchange, on the other hand, persons are caught through things. The first form of exchange, as is known, results from a concatenation of the obligations to give, to receive and to repay. What creates the obligation to repay, as Mauss showed in his celebrated essay on the gift, is the *hau*: 'the spirit of the thing given'.<sup>32</sup> To give a thing is a way of binding to oneself for the future the person of the recipient, who will be able to release himself only by giving a thing in return himself. This concatenation, from which the obligation to pay one's debts emerged, implies that a third principle — in this case, the spirit of the thing — intervenes to guarantee restitution. Nor has this type of arrangement disappeared from our law. Our pension schemes based on distribution establish a bond which has been called 'a contract between generations'<sup>33</sup> but which in

<sup>28</sup> Cf Davy, *op cit* at 72 et seq.

<sup>29</sup> The Conseil National du Patronat Français (CNPFP, the National Council of French Employers) was renamed the Mouvement des entreprises françaises (Médéf) in 1998.

<sup>30</sup> The *patronus* gave personality to the freedman, rather like a father to a child: see P.F. Giraud, *Manuel de droit romain*, 5th edn (Paris: Rousseau, 1911) at 123.

<sup>31</sup> The insurance of employees under the social security system has released employers from this artificial paternity with respect to their employees and shifted it onto solidarity institutions. The concept of solidarity ('shared risk'), which is a hybrid of law of obligations and family law (cf 'Les mésaventures de la solidarité civile', *Dr Soc* (1999) at 64) establishes, in its turn, an artificial relationship between those insured. But in social security exchange comes first and the relationship between people is merely its consequence (see below with regard to pensions).

<sup>32</sup> M. Mauss, 'Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques', *Année sociologique* (1923–24), presented again in *Sociologie et anthropologie*, 8th edn (Paris: PUF, 1983) at 145 et seq.

<sup>33</sup> See *Un contrat entre les générations*. Government White Paper on pensions (Paris: Gallimard, 1991) with a preface by M. Rocard. The idea of a contract between generations betrays our inability to think of bonds between people other than in contractual terms. But it is the same with bonds

fact corresponds far more to the 'archaic' concatenation of the obligations to give, to receive and to repay. The chain of credits and debts at work in filiation (receiving life from the previous generation, giving it to the next generation and, by giving it, repaying it to the previous generation) is matched, in the pension system based on distribution, by a chain in the opposite direction: giving for the previous generation, receiving from the next generation, which thereby repays what it has been given. It is through this interplay of credits and debts that a pension system creates a bond of solidarity between persons.<sup>34</sup>

It is to Roman law that we owe our contract concept and we also owe to it our clear distinction between things and persons. All the same, the distinction took a long time to become established. In the *nexum*,<sup>35</sup> the relationship of obligation again ensued from a change of status (the virtual servitude of the obligee) and possibly also from a *gffi* (the bronze ingot, in reality more of a burden than a benefit, handed over to the obligee until his debt was discharged).<sup>36</sup> And although Roman law made a clear distinction between person and things,<sup>37</sup> it did not treat all men as persons (the question of employment is intermingled with that of slavery<sup>38</sup>), and it remained attached to the concrete diversity of things. It therefore recognised contracts, whose regulation differed according to their object, their *negotium*, but it did not concern itself with defining the contract as a generic category.<sup>39</sup> It was never deemed that the mere exchange of consents, called a pact or agreement, was the same thing as a contract: to progress from agreement to contract required, as a matter of

---

between people and nature, which likewise, according to one of our eminent natural philosophers, can be protected only by means of a 'contract' concluded with it (M. Serres, *Le contrat naturel* (Paris: F. Bourin, 1990)). Thus, social law and environmental law submit to contractualism, but this is by subverting the distinction between things and people.

<sup>34</sup> The question of the legal nature of the right to a pension is a headache for the jurist equipped only with the concepts of contemporary law because it is resistant to our distinctions between the contractual and the tortious and between the individual and the collective. It becomes clearer if we accept that it involves a reappropriation by social law of forms of legal relationship which are older than those distinctions. The relationship can no more be called contractual than *potlatch* can, but like *potlatch* it establishes on the basis of a reciprocity of patrimonial obligations a solidarity between groups.

<sup>35</sup> On the *nexum* and its difficulties of interpretation, see P.F. Giraud, *Manuel de droit romain*, 5th edn (Paris: Rousseau, 1911) at 478 et seq; P. Noailles, *Fas et Jus. Etudes de droit romain* (Paris: Les Belles Lettres, 1948) at 91 et seq; P. Ourliac and J. de Malafosse, *Histoire du droit privé*, 2nd edn, vol 1 (Paris: PUF); *Les obligations*, no 15 and the bibliography cited at pp 36–7.

<sup>36</sup> Cf M. Mauss, op cit at 229 et seq, particularly 230.

<sup>37</sup> Cf the scheme of the Institutes of Justinian, on which the civil code was based and which follows the tripartition passed on by Gaius: every right presupposes a *person* who is its holder, who exercises it; a *thing* which is its object, to which it relates; and an *action* which is its sanction and enables its realisation to be ensured (cf Girard, op cit at 7 et seq).

<sup>38</sup> Cf R. Robaye, *L'obligation de garde. Essai sur la responsabilité en droit romain* (Brussels: Publications des Facultés Universitaires Saint-Louis, 1987) at 157 et seq.

<sup>39</sup> Cf M. Villey, Préface historique à l'étude des notions de contrat, loc cit at 7.

principle, forms (those of the *stipulatio* or the sworn oath) or physical acts (the handing over of a thing) which varied according to particular contracts. The binding force of real contracts flowed from the transfer of the thing to the obligee; that of the *stipulatio* had religious roots, as did the sworn oath. Thus, the spirit of things or the spirit of the gods remained present in the creation of bonds between men. If there is one principle in Roman law it is, most particularly, therefore, that of the lack of legal effect of the informal promise. *Ex nudo pacto, actio non nascitur*:<sup>40</sup> the rule was never revoked, even under Justinian, despite the increasingly numerous adjustments applied to it.<sup>41</sup>

It is to the mediaeval canonists that we owe the inverse rule *pacta sunt servanda*, in accordance with which we are legally bound by the mere promises.<sup>42</sup> The Church opposed the use of the sworn oath in transactions because it considered that before God a simple promise represents just as much of an undertaking. The acts of a Christian must always be founded on Truth. A believer must always be true to his word; anyone who makes a promise and does not keep it is acting contrary to the Truth, is deceiving his neighbour and committing a mortal sin. Respect for the spoken word was therefore initially presented as a moral rule, based on the Scriptures and the case-law of the Fathers of the Church. It was in the thirteenth century that this moral rule was transformed into a legal obligation. That process had to establish itself in the face of the opposite principle inherited from Roman law and the contractual formalism of the feudal age. However, it eventually prevailed and was finally adopted in France in the first half of the sixteenth century.<sup>43</sup> The Napoleonic Code gave it its present-day formulation: 'Agreements created on a basis of equality take the place of law with respect to those who have made them.'<sup>44</sup>

It is, therefore, because there was belief in the existence of God, who is all-seeing and before whom no falsehood must ever be uttered, that legal force was eventually given to the spoken and written word of men. This is a profoundly western idea which flows from the creative function which we attribute to the Word in the system of the World, and which is expressed so clearly in the well-known initial verses of the Gospel According to St John: 'In the beginning was the Word, and the Word was with God, and the Word was God. The same was

<sup>40</sup> Ulpian (I, 7, §.4, D.2, 14 *de pactis*); Paulus (*Sententiae* 2, 14, I).

<sup>41</sup> See P.F. Girard, *op cit* at 432.

<sup>42</sup> See F. Spies, *De l'observation des simples conventions en droit canonique* (Paris: Sirey, 1928); also in the same direction, H.J. Berman, *Law and Revolution, The Formation of the Western Legal Tradition* (Harvard UP, 1983) at 246 et seq; P. Legendre, *Les enfants du Texte. Etude sur la fonction parentale des Etats* (Paris: Fayard, 1992) at 269; compare J. Bärmann, 'Pacta sunt servanda. Considérations sur l'histoire du contrat consensuel', (1961) *Rev internat. de droit comp* at 18 et seq.

<sup>43</sup> Cf F. Spies, *op cit* at 139 et seq.

<sup>44</sup> Article 1134. On the origins of this wording, see F. Spies, *op cit* at 258; A.-J. Arnaud, *Les origines doctrinales du code civil français* (Paris: LGDJ, 1969) at 199 et seq.

in the beginning with God. All things were made by him; and without him was not anything made that hath been made.<sup>45</sup> It was only in the West, with the secularisation of the promise as operated by law,<sup>46</sup> that it was felt that, in the image of God, every man could make use of the legislative power of the Word on his own account.

In other words, the modern-day contract concept is rooted in a monotheistic culture and could not have developed without faith in a universal Guarantor of the promise. Moreover, that promise is valid only in so far as it conforms to the law of the Guarantor: formerly divine law, which requires that an agreement has a just cause,<sup>47</sup> nowadays the law of the State, which confers legal force only on agreements concluded between parties on equal terms. To express it in geometric terms, the horizontal dimension of exchange or alliance would not have become this homogeneous and abstract plane on which the market economy prospers, without the vertical dimension of the universal guarantor under whose aegis contracts are established.

## B. The State as guarantor of agreements

Since the turning-point of the enlightenment, it has been the State which occupies this position of guarantor, at least in the western secular States. We have moved from a religious culture in which the word of the believer had been placed under the aegis of divine law to a secular culture in which the rational individual commits himself under the aegis of the State. This 'secularisation' in no way signifies that the contract is now able to do without faith, without belief in a guardian of the promise. At the heart of the rational calculation authorised by a contract, there is still belief, all that has changed is its object. Tocqueville, even in his day, said that '*si (l'homme) n'a pas la foi il faut qu'il serve, et s'il est libre, qu'il croie.*'<sup>48</sup> The comment is entirely applicable to contractual freedom, which is not conceivable without a shared faith in a third-party guarantor of agreements. Legal analysis makes it possible to demonstrate the omnipresence of this third-party figure in the contract structure. In domestic law, only agreements between parties 'on an equal footing' have binding force. Inter-

<sup>45</sup> Gospel According to St John, 1, 1–3.

<sup>46</sup> Cf L. Gernet, 'Droit et prédroit en Grèce ancienne' (1951) *L'Année sociologique* at 21, presented again in *Droit et institutions en Grèce antique* (Paris: Flammarion, 1982) cited at 110.

<sup>47</sup> The theory of the fair price, in particular, flows from this requirement. See H.J. Berman, op cit, loc cit; A. Söllner, 'Die causa im Konditionen- und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanoniken' (1960) *Zeitschrift des Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 77, 182–269; K.S. Cahn, 'The Roman and Frankish Roots of the Just Price of Medieval Canon Law' (1969) *Studies in Medieval and Renaissance History* 6,1.

<sup>48</sup> *De la démocratie en Amérique* (II, 29) quoted by L. Dumont, *Homo hierarchicus* (Paris: Gallimard, 1996) at 29.

national law has enshrined this structural requirement: by always permitting the choice of one or more laws as applicable to an international contract, it applies the principle that ‘a contract shall be governed by the law’.<sup>49</sup> For there is no contract, nor can there be one, without a law which, at the very least, establishes the personality of the contracting parties and gives binding force to their word.<sup>50</sup> The presence of the third-party guarantor finds expression, secondly, in the reference to money in the list of contractual obligations. Money does not allow itself to dissolve away in standard economic analysis.<sup>51</sup> In order to fulfil its function of financial asset or instrument of payment, it must necessarily institute a community of contracting parties who believe in its value. And what unites that community of believers does not depend on the individual will of each of its members. Despite the contemporary fantasies of autoreferential money, there is no such thing as money, and there can be none, without a third-party guarantor of its value.<sup>52</sup> We need only look at a dollar to read on it—*In God we trust*—that monetary symbolism continues to mobilise religious faith.

By monopolising the pronouncement of law and the minting of money, modern States had succeeded in preserving the essence of the medieval construction. The historical dynamic introduced by the mediaeval idea of a universal guarantor continued to produce its effects. In holding together in its own hands the principal attributes of that guarantor, the State enabled the abstraction of the contractual relationship, an abstraction without which the social relationship could not be placed under the aegis of the rational calculation of interests, to be further developed and completed. The *Primus* and *Secundus* of Roman law were thus succeeded by the mathematical symbols of economic equations. For the purposes of that calculation, persons have to be caught as simple contracting entities, viewed in the abstract (concept of the person, independent of physical contingen-

<sup>49</sup> Rome Convention (19.6.80) on the law applicable to contractual obligations, Article 3(1).

<sup>50</sup> No attempt will, therefore, be made to enter into the debates which the fantasy of a contract without law has engendered in international private law. For a useful treatment, the interested reader can consult P. Mayer, *Droit international privé*, 4th edn (Paris: Montchrestien, 1991) n 700. The only hypothesis in which the idea of contract without law has any firm foundation is that of a ‘contract’ concluded with a State; but States are not, really, ordinary contracting parties and the agreements they conclude are always unamenable to contract law (see below). On the very complex relations which nowadays exist between law and contract, see Ph. Gérard, F. Ost and M. van de Kerchove (eds), *Droit négocié, droit imposé?* (Brussels: Publications des facultés universitaires Saint-Louis, 1996).

<sup>51</sup> As the best economists put it: ‘money is not an economic entity, even in our societies, because it is the thing which makes economics conceivable, which can be so only with something that is not otherwise economic’: M. Aglietta and A. Orléan (eds), *La monnaie souveraine* (Paris: Jacob, 1998) quoted at 20; also G. Simmel, *The Philosophy of Money* (London: Routledge and Kegan Paul, 1978 (first published 1900)); and for a recent legal analysis, R. Libchaber, *La monnaie en droit privé* (Paris: LGDJ, 1992) and the bibliography cited.

<sup>52</sup> Cf A. Orléan, ‘La monnaie autoréférentielle: réflexions sur les évolutions monétaires contemporaines’ in M. Aglietta and A. Orléan (eds), op cit at 359 et seq.

cies) and as formally equivalent (dynamic of the equality principle), or even as pure fictions (legal persons) to which we attribute the same legal existence as to human beings.<sup>53</sup> Goods and services, all differing in their uses, have to be treated as commodities, all comparable in terms of their monetary value and equally open to exchange (hence the dynamic of patrimonialisation—of name, works, etc—which empties things of the ‘spirit of things’). Time, except when it is obliterated by technical progress, has to be a homogeneous and quantifiable given, a chronometric time suited to the evaluation of trade (working time, calculation of interest, etc) and always referable, ultimately, to a sum of money.<sup>54</sup> Lastly, space has to be a continuous space, cleared of any obstacle to the free movement of goods, workers and capital.

The contract can then be regarded as an abstract relationship, independent of the diversity of persons and things, giving legal force to the calculation of interest. But it can be so only in so far as its validity is guaranteed by a State, which is also guarantor of a qualitative definition of persons (civil and occupational status), of things (transactions which it can prohibit or limit), of time (which it regulates) and of space (which it divides into territories). As the development of the market economy proceeded, this taking over by States of the qualitative dimension of trade grew ceaselessly. Thus, the State as Policeman (Herrschaft) was succeeded by the Welfare State, which took charge of everything that, in industrial society, eluded the calculation of interest at work on markets.

### C. Welfare State and labour market

The Welfare State, the great invention of the twentieth century, has two faces which too often tend to be viewed separately even though they are structurally linked.<sup>55</sup> The first is the notion of public service. Providing all citizens uninterruptedly and impartially with a certain number of services which are regarded as essential increases the rights of individuals while making them interdependent. Although it is found in different forms in all countries,<sup>56</sup> it is in France that the theory of public service has known the most remarkable developments. Its

<sup>53</sup> As modern spirits, we are shocked at the proceedings which the mediaeval West brought against animals, and yet we, in all seriousness, make legal persons subject to the rigours of the penal code.

<sup>54</sup> Cf the famous saying by Benjamin Franklin, ‘Time is money’ and the no less famous comment made on it by Max Weber in *The Protestant Ethic and the Spirit of Capitalism*, English edn (London: Unwin, 1971).

<sup>55</sup> The passage which follows is a reprise of an analysis already published in ‘Du bon usage des lois en matière d’emploi’ (1997) *Droit Social*, 229.

<sup>56</sup> Cf Y. Moreau, *Entreprises de service public européennes et relations sociales* (Paris: ASPE, 1996).

link with employment is as strong as it is unrecognised: the configuration of the labour market varies according to whether, for example, vocational training is seen as mainly a matter for the public service, which is to say the State, as in France, for companies as in Germany or for the market as in the United Kingdom. The fact of viewing or not viewing vocational training as a right signifies promoting or not promoting the principle of equal opportunities on the labour market (everything thereafter depends on the concrete content attached to the recognition of that right). Similarly, the fact of viewing or not viewing energy, health, transport and childcare as collective goods profoundly influences the physiognomy of the labour market and the condition of workers.

The second face of the welfare state was the notion of employment, as understood in its individual sense. The invention of employment as a status mandatorily attached to every contract of employment is of German origin. Systematised by German jurists as early as the end of the nineteenth century, it spread in diverse forms into all European countries. It consisted in incorporating in the contract of employment a status which protects the employee against the risks of impairment of his earning capacity.<sup>57</sup> Employment in this sense is the shared baby of labour law and social security. Through social security, employment enrolls its holder in a financial solidarity with respect to those risks.

Over time, protection against some of the risks swung over to the other face of the welfare state, with responsibility for them assumed within the context of a public service. This is true in particular of the invention, this time in the United Kingdom, of the national health service which organises universal social protection against the risk of illness. Adopted in a number of European countries (the Nordic countries, Italy) and transposed into others at the cost of a deformation of the professional systems, this national protection of health illustrates the dynamic of certain rights derived from work which progressively establish themselves as rights of the citizen.<sup>58</sup>

The dual reconciliation thus operated between on the one hand the individual and the collective (through legal mechanisms of solidarity) and on the other the time of exchange and lifetime (through the occupational status inherent in employment) plucks work from its condition of being a commodity, the object of contract, and turns it into an element of the identity of persons. Thus, the legal notion of employment took over from the old corporatist systems in providing each individual with what in the nineteenth century was

<sup>57</sup> Cf *Critique du droit du travail*, op cit at 13 et seq.

<sup>58</sup> An evolution of the same kind can be seen in Community law with the generalisation of the right of freedom of movement to all citizens of the European Union (Treaty of Rome, Article 8A, drafted at Maastricht).

still called an *état professionnel*.<sup>59</sup> By treating work both as an exchange value and as an element of the status of persons, labour law created the conditions for a durable functioning of the labour market. Reference to employment took the place of reference to particular trades, and the possible types of occupational identity were reduced to two: employer and employee. Hence a reversal of the terms of exchange on the market: supply of labour changed into demand for employment. To use the words of Lord Beveridge, it may be said that the welfare state slid a plank under the market economy, that is, it provided it for a time with the institutional bases necessary to its functioning.

But those bases remained national, and we are at a point where the dynamic of rationalisation by calculation is weakening States themselves, because it no longer adapts itself to their local and concrete character, nor to their fundamental heterogeneity. With the opening-up of frontiers and the growth in regionalisms, markets are tending towards freeing themselves from the supervision of States. However, they cannot do so without weakening the contractual foundations on which they rest. For the weakening of the welfare state is sending back to the market, and hence to contracts, responsibility for the qualitative dimension of trade. The wave of contractualisation which is accompanying internationalisation and the retreat of States therefore has a hidden face which needs to be mentioned now.

#### 4. INTERNATIONALISATION AND REFEUDALISATION

##### A. The two faces of contractualisation

The contract is establishing itself more than ever as an abstract universal which is overwhelming the normative compartmentalisation of States. However, the influence of the contract can prevail over States only by including the concrete values they harbour. The most visible is the movement towards universalisation of the contract, which tends to bring under its sway both States and the condition of persons.

Yesterday still the sole guarantor of trade, today the State is viewed on the international scene as an obstacle to trade.<sup>60</sup> New institutions are contending with it for the role of guarantor, once it comes to deciding the law on trade or watching over currency. The international institutions whose identity and function is vouched for by an economic credo (WTO, OECD, World Bank,

<sup>59</sup> Cf W.H. Sewell, *Work and Revolution in France. The Language of Labour from the Old Regime to 1848* (Cambridge UP, 1980).

<sup>60</sup> See, for example, along these lines the diagnosis of a management theorist, P. Drucker, *Management's Challenge for the Twenty-First Century* (New York: HarperCollins, 1999).

European Bank, Commission in Brussels) have acquired the essentials of power both materially (granting credits) and spiritually (propagating faith in the virtues of free trade). Under their aegis, the contract has the aptitude to replace law, as is demonstrated, for example, by the provisions of the Treaty of Amsterdam (incorporated from the Maastricht Social Agreement) which establish collective bargaining between social partners as an alternative to parliamentary deliberation. By contrast, the organisations responsible for 'social' matters (ILO, UNESCO, WHO, etc) have neither money nor certainties to distribute and are continually revising their ambitions downwards. Yesterday, they were still concerned with granting all men access to western well-being; today, there is a withdrawal to the minimal demands which were those of the first social philanthropists of the nineteenth century: containing epidemics, prohibiting forced labour, limiting child labour, etc.

Internationalisation of the laws of free trade, and the contractualisation accompanying it, are also unsettling certain aspects of the condition of persons, and in particular their occupational status. The tendency of the contract to break away from the bounds within which the State enclosed it is manifested in the decline of everything which, in the definition of persons or time, could impede the free-play of its negotiation. The separation of things and persons is re-emerging as an imperative category, calling into question the legal constructions which, under the aegis of States, united the 'economic' and 'social' dimensions of work. Thus, the deregulation of labour law on the one hand, and the generalisation of social minima on the other, seem like the two sides of the same coin where work figures as a thing divested of the person and available for purchase and sale, and the person features only in the case of 'needs' which are so compelling that they cannot be ignored by the collectivity. Although the opening-up of frontiers in Europe had been accompanied by the promise of 'harmonisation while the improvement is being maintained',<sup>61</sup> what has very often been witnessed is a worsening of living and working conditions. This deterioration is obvious in the case of the unemployed or the working poor. But it is also very often the lot of 'those who are lucky enough to have a job'. Quite apart from the deterioration in their environment, the pressure of international competition has resulted in people being required to adapt themselves ever more closely to the demands of machines and the market. This is particularly visible where flexibility has been interpreted as something one-way, as adjustment of size of the workforce to the smallest fluctuations in the market, and not as something two-way, as the reconciliation of entrepreneurial freedom and freedom of labour. In the welfare state model, work was the locus of a founding exchange between economic dependence and social security. Although

<sup>61</sup> Treaty of Rome, Article 117 (Article 136 of the Amsterdam consolidated version).

the individual who had a job thereby subjected himself to another's authority, he was guaranteed, in return, the conditions of a normal life within society. It is the bases of that founding pact which today are being called into question. The economic pressure is stronger than ever (for those who have a job as well as for those who do not) but it is no longer compensated by a security of existence.

These disappointments make very clear the artificial nature of the opposition of the economic and social on which the Treaty of Rome had been based. At the time it was thought possible to internationalise the economy without implicating national social models. Events have shown that it was impossible to dissociate the one from the other. Moreover, every jurist knows very well that the question whether a contract of employment is an economic relationship or a social relationship is utterly meaningless: it is indissolubly both one and the other. Consequently, it is something of a sham to refer to a mythical 'social Europe'. The sole merit of this notion is that it calls attention to the inadequacy of standard economic analysis; it becomes dangerous once it is, in its turn, viewed autonomously. To talk about 'social Europe' runs the risk of strengthening a schizophrenic view of the world in which the economy and society are perceived as two different types of reality. This schizophrenia leads to repairing from the left hand (social) the damage caused by the right (economic). Much of public policy has been working in this direction for thirty years; dealing with social matters has consisted, for States, in assuming responsibility for the 'negative externalities' of economic activity. In the case of France, this evolution has meant a rather spectacular reversal of the role of the State. Whereas in the Colbertian tradition it readily saw large companies as instruments serving its policy, it has become the instrument of those companies and has borne the bulk of the 'social' cost of restructuring operations. In the legal sphere, the result has been the advent of an employment law which is purely instrumental, adjusted day-by-day to fluctuations in the economic situation. From being the third-party guarantor of agreements, the State has become the third-party manager of the 'social'. The growth in its role of administering employment policies has been accompanied by a decline in its legislative function, to the benefit of the collective agreement or individual contract.

But this emancipation of the contract with respect to the State and the condition of individuals forces contracts to assume charge of the matters which they thereby take away from law. With contractualisation, laws are divested of substantive rules in favour of rules on negotiation. This trend—called proceduralisation—shifts into the contractual sphere the concrete and qualitative matters which had previously been regulated by law. For example, contractualisation multiplies the possible situations of conflict of interests and hence the need for a contractual deontology based on consideration of concrete individuals. It leads to a diversification of the legal regulation of the contract

according to its object, that is, a rapid multiplication of 'special contracts' which is bringing us back to the technique of the 'nominated contracts' of Roman law. It necessitates returning to a qualitative assessment of time, which means that the solidity and permanence of an individual relationship prevails over the mechanical play of abstract obligations (as is nowadays demonstrated in France by the problems encountered in implementing the law on the 35-hour-week, which reveal the non-viability today of the purely chronometric conception of working time). Lastly, the weakening of the figure of the State is producing its effects not only upwards, through a homogenisation of the normative area on a world-wide scale, but also downwards, through its (re)territorialisation. In face of the commercial contract, which is becoming internationalised, we then have to accommodate the entire contractual panoply which has accompanied decentralisation, regional development policy, agricultural policy and employment policy. In labour law this evolution has meant a decentralisation of the sources of law: from statute law to collective agreement, from industry-level agreement to company-level agreement, and from company-level agreement to individual contract of employment. The corollary of this contractualisation of the sources of labour law has been a change in the functions attributed to collective bargaining. The latter no longer has the sole purpose of improving the legal status of employees but also includes opening up alternatives to that status (flexibilisation function), involving employees in economic decision-making within the company (management function), implementing legal provisions (regulatory function) and even taking the place of those provisions (legislative function).<sup>62</sup>

This motley world of agreements no longer has the State as its single guarantor. The weakening of States is inevitably being accompanied by a break-up of the figure of the third-party guardian of pacts; hence, for example, the proliferation of independent authorities charged with the task of contractual policing within a particular area. Far removed from the view of a planetary legal order united by respect for the combined rights of man and of the market, and far removed from the dreams or nightmares of 'internationalisation', this hypothesis offers a glimpse of specified, concrete references and therefore increased relativity of the contract. In the guise of contractualisation it is thus possible to predict what Pierre Legendre called a refeudalisation of the social relationships.<sup>63</sup>

<sup>62</sup> Cf *Au-delà de l'emploi*, op cit at 141 et seq.

<sup>63</sup> Cf P. Legendre, *Sur la question dogmatique en Occident*, op cit, particularly at 235 et seq.

## B. Contractualisation and refeudalisation

In its canonical form the contract binds equal persons who have freely undertaken obligations that are generally reciprocal. One or other of these characteristics is often lacking in modern-day forms of contract, which have as their only common feature the fact that they generate obligations. The principle of the relative effect of agreements has been brought to a halt by the development of agreements which, following the collective agreement model, are not only binding on the contracting persons but also commit the groups represented by them. The contract is thus a hybrid of regulation and extends its effects to groups encompassing an indeterminate and fluctuating number of people. The principle of equality may thus be diminished, particularly in the context of policies on the decentralisation of organisations (public or private), when the purpose of the contract is to hierarchise the interests of the parties or those they represent, to establish a power of control for one over the other, or to implement imperatives of collective interest which are not negotiable in terms of their principle. From the integration contract to planning contracts, from agreements on social security to contracts for subcontracting, examples of such contractual figures abound, in public law, social law, international law and business law. Lastly, violence is done to the actual freedom to contract every time that the contractual route is imposed by law. The growth in insurance obligations gives an idea of the dynamics of these legal obligations to contract, as amplified by the wave of deregulation and privatisation of public services: the user changes into a contracting party entering into obligations and finds himself burdened by new responsibilities, starting with the choice of his co-contractor.

Taken as a whole, these various changes indicate the emergence of contracts of a new type. Their primary purpose is not to exchange specified goods nor to formalise an alliance between equals, but to organise the exercise of a power. The dynamics of the principle of equality, which has been at work in the West for two centuries, is leading, as far as it is possible, to the contract replacing the unilateral exercise of power, the bilateral replacing the unilateral and autonomy replacing heteronomy. But as it encroaches on the territory of heteronomy, contract law is becoming imbued with it and is itself turning into an instrument of subjection. Sustained by the principle of equality it is invading the sites of the exercise of power, but as Louis Dumont showed clearly it can do so only by incorporating its opposite: the inevitable hierarchisation of persons and interests.<sup>64</sup> To its spheres of exchange and alliance contract law is now adding the sphere of *allegiance*, through which one party places himself within the scope of

<sup>64</sup> Cf L. Dumont, *op cit*.

another's power. Two types of contract, often combined in practice, embody this element of allegiance: contracts of dependence and controlled contracts.

The salient feature of *contracts of dependence* is that they subject the activity of one person to the interests of another.<sup>65</sup> Although the contract of employment is still the most typical example, the formula initially enshrined in it—freely accepted subordination to direction and control—is losing its currency, because subordination is no longer sufficient to satisfy the needs of institutions which reject the pyramidal model in favour of the network structure.<sup>66</sup> Thus, self-employment and employee status are being included within a single new logic of the exercise of economic power. This is because for network-based organisation neither simple obedience to instructions nor absolute independence is sufficient. It has to harness to its own objectives the capacity of individuals to take the initiative and to assume responsibility in the course of their work. New hybrids are flourishing which organise the voluntary allegiance of their members to another's power. These hybrids are already firmly established in economic life (distribution, subcontracting, agricultural integration, etc.). They dominate the management culture, both public and private. Marrying freedom and servitude, equality and hierarchy, they are advancing on labour law<sup>67</sup> and the law on liability<sup>68</sup> from the rear and opening up the way for hitherto unknown forms of power. They are instituting new ways of controlling people which are evocative of feudal vassalage: a relationship of allegiance is formed which does not deprive the vassal of his status as a free man but obliges him to devote that freedom to serving the interests of his superior or lord.<sup>69</sup> Of course, just as serfdom was not a fief, employee status is not the same thing as the economic integration of the self-employed worker. But they both derive from a single cultural scheme which is leading towards regarding their relationships in terms no longer of opposition, but rather of linkage.<sup>70</sup>

The particular property of *controlled contracts* is that they are aimed not only at reconciling the specific interests of the parties to the contract but also at serving the realisation of a collective interest. The advent of the controlled contract was observed thirty years ago.<sup>71</sup> But these contracts represented only a

<sup>65</sup> G. Virassamy, *Les contrats de dépendance* (Paris: LGDJ, 1986).

<sup>66</sup> On the legal analysis of networks, see the seminal article by G. Teubner, 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors' in J.M. McCaferly, S. Picciotto and C. Scott, *Corporate Control and Accountability* (Oxford UP, 1993) at 41.

<sup>67</sup> See *Au-delà de l'emploi*, op cit at 25 et seq.

<sup>68</sup> C. Del Cont, *Propriété économique, dépendance et responsabilité* (Paris: L'Harmattan, 1997).

<sup>69</sup> On the vassalage relationship, see M. Bloch, *La société féodale*, 1st edn (Paris: Albin Michel, 1939) reprinted 1994 at 209 et seq. The hypothesis of the contemporary refeudalisation of social relationships has been advanced by P. Legendre in various publications and most recently in *Sur la question dogmatique en Occident* (Paris: Fayard, 1999) particularly at 235 et seq.

<sup>70</sup> Cf. 'Les nouveaux visages de la subordination' (2000) *Droit Social*, 131.

<sup>71</sup> L. Josserand, 'Le contrat dirigé' (1933) *Rec hebdo Dalloz*, 32, particularly p 89.

first generation of mutants. They still formed part of a pyramidal conception of the controlled economy, which sought to subject them to observance of rules on general interest laid down by the State.<sup>72</sup> By contrast, the most recent products of contractual technology delegate to these controlled contracts not only the implementation of collective-interest imperatives, but also participation in their definition. And this technique of controlled contracts is no longer the monopoly of the State; it has spread into the private sector in the form of framework agreements defining rules of collective interest to which contracts failing within their sphere of application must conform. The planning contracts, medical agreements and law-making agreements introduced into Community social law are all of them manifestations of this new type of contractual dirigisme which associates a large number of persons, whether public or private, in the exercise of power. The contractualisation of public action<sup>73</sup> is merely the most glaring manifestation of this leasing-out of power, which appears to have been invented and first tried out in private companies.

The common feature of all these forms of contract is that they involve persons (whether natural or legal, private or public) in the exercise of the power of another without prejudicing, at least in formal terms, the principles of freedom and equality. The upsurge in these relationships of allegiance is accompanied by a transgression of our distinction between public and private and a fragmentation of the figure of the guarantor of agreements (in particular, the proliferation of independent authorities). Any illusions of the 'contractual whole', therefore, have to be discarded. Far from signifying the victory of contract over law, the 'contractualisation of society' is far more the symptom of a hybridisation of law and contract and the reactivation of feudal ways of weaving the social relationship.

It is better to take due note of this refeudalisation and attempt to bring it under control, rather than deny it and cultivate a faith in a 'glorious future' in which we shall be freed from all laws other than those of science. For two centuries that faith has been the ferment of the denial of man. Even today, it remains the breeding-ground of unknown monstrosities. We surely cannot subscribe to the modern-day variant of totalitarian ideology, which has replaced the class or race struggle with natural selection of the best by the market. Not only is this social Darwinism unacceptable from a legal point of view (it is

<sup>72</sup> Cf A. Rouast, 'Le contrat dirigé', *Mélanges juridiques dédiés au prof. Sugiyama* (Tokyo: Maison franco-japonaise, Assoc. fr. des jurists de langue française, 1940) at 317–27; R. Morel, 'Le contrat imposé' in *Le droit français au milieu du XXèmes, Etudes offertes à Georges Ripert*, vol. 11 (Paris: LGDT, 1960) at 116.

<sup>73</sup> See Conseil d'Etat *L'intérêt general*, Government Report (Paris: La documentation française, Etudes et documents du Conseil d'Etat 50 (1999) at 323 et seq); see earlier J. Caillosse, 'Sur la progression en cours des techniques contractuelles d'administration' in L. Cadet (ed), *Le droit contemporain des contrats* (Paris: Economica, 1987) at 89 et seq.

contrary to the fundamental rights enshrined by the international or European legal order), but it would also inevitably lead, like all totalitarian ideologies, to a social implosion whose premises are already visible.

\* \* \*

Perhaps the final service which legal analysis can render economic analysis is to assist it in the necessary psychoanalysis of objective knowledge<sup>74</sup> without which any science is in danger of becoming a totalising ideology. Spotting the dogmatic foundations of economic analysis can only help to advance economic science. And jurists are in more need than ever before of a true economic science which puts the observation of real events before the interpretation of figures. The most recent developments of economic theory represent, in fact, a move in this direction. Based on the pure abstraction of the rational actor maximising his utilities via the virtues of calculation, standard economics (and the law and economics movement with all its baggage) has, it could be said, remained confined to the abstractions of contract theory. But the validity of this type of analysis is nowadays being challenged. Rediscovering the position of belief, cultures, work and concrete products in an understanding of the material life of man, the economics of agreements<sup>75</sup> is restoring to the centre stage of economic analysis the manner in which particular individuals agree to act.<sup>76</sup> For its part, the economics of regulation has demonstrated the importance and the role of institutions in the understanding of economic phenomena.<sup>77</sup> Although they do not consider the question of the third-party guarantor,<sup>78</sup> these studies are very fruitful and illuminating for legal analysis, which they help to emerge from its particular isolation.

<sup>74</sup> Cf G. Bachelard, *La formation de l'esprit scientifique. Contribution à une psychanalyse de la connaissance objective*, 1st edn (Paris: Vrin, 1938; 14th edn 1989) particularly at 211 et seq.

<sup>75</sup> See the collected contributions in 'L'Economie des conventions', *Revue Economique* 40(2), special issue (March 1989); also M. Storper and Robert Salais, *Worlds of Production: The Action Frameworks of the Economy* (Cambridge, MA: Harvard UP, 1997).

<sup>76</sup> In standard economic analysis, the individual does not act he exhibits behaviour but in reality 'les hommes concrets ne se comportent pas, ils agissent avec une idée en tête, fût-elle de se conformer à l'usage'. L. Dumont, *Homo hierarchicus*, op cit at 19. Reintroducing action signifies, in particular, reintroducing the fact that the purpose of acts can develop in the course of action; this is at odds with the abstraction of the man who always knows in advance what it is he wants.

<sup>77</sup> Cf R. Boyer and Y. Saillard (eds), *La théorie de la régulation: Etat des savoirs* (Paris: La Découverte, 1995).

<sup>78</sup> Although the economics of agreements tackles the question of institutions in its most recent publications, it is with the purpose of reducing them to the status of a product of agreements. R. Salais, E. Chatel and D. Rivaud-Danset, *Institutions et conventions. La réflexivité de l'action économique* (Paris: Ed. de l'EHESS, 1998). Nor has the economics of regulation succeeded in shaking free from its conception as something instrumental to law, perceived as just one form of 'regulation' among others. The question of the institution of the subject remains absent in all these publications. However, it is difficult to hold economists to task for having neglected institutional aspects which even today are not properly recognised by standard legal analysis.

