

# A LABOUR CODE FOR THE 21ST CENTURY

ARTICLE BY  
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Today's labour laws were designed for a world of work that no longer exists. The pressures of neoliberalism on the individual and society require labour laws that go beyond defending or destroying past certainties and that instead give workers power over the quality, organisation, and purpose of their work.

**Y**ou'd have to be blind to deny the need for fundamental reform of labour laws. Throughout history, technological advances have always led to a restructuring of institutions. This was the case in past industrial revolutions which, after overturning the old order by opening the floodgates to proletarianisation, colonisation, and the industrialisation of war and killing, resulted in the rebuilding of international institutions and the invention of the welfare state. The post-war period of peace and prosperity enjoyed by European countries can be credited to this new kind of state and the foundations upon which it was built: integrated and efficient public services, a social safety net covering the whole population, and labour laws that guaranteed workers a minimum level of protection.



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## **ET SI L'ON REFONDAIT LE DROIT DU TRAVAIL...**

Les évolutions politiques et sociales appellent à une réforme sérieuse du droit du travail pour mieux protéger mais aussi pour dépasser l'économisme rampant.

These institutions, born of the second industrial revolution, have now been called into question, undermined by neoliberal policies that lead to a social, fiscal, and environmental race to the bottom between nations, and by the digital revolution that is dragging the world of work from one of manual labour to one of knowledge.<sup>1</sup> 'Connected' workers are no longer expected to follow orders like robots but instead to respond in real time to the information they receive. These political and technological factors work together. Even so, they should not be conflated, because neoliberalism is a reversible political choice whereas the digital revolution is an irreversible fact that can serve different political ends.

Technological change fuelling current debates around automation, the end of work, and ‘uberisation’ could exacerbate the dehumanisation of work engendered by Taylorism just as easily as it could lead to the adoption of the “humane conditions of labour” stipulated in the constitution of the International Labour Organization (ILO). This constitution sets out to achieve employment in which workers have “the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being.”<sup>2</sup> Such a prospect would be an improvement on the salaried employment model, rather than a return to the ‘commodification of work’.

## EMPLOYMENT IN THE 21ST CENTURY: AN EVOLVING BARGAIN

Until the 1970s, employment involved a bargain: obedience in exchange for security. Employees gave up any sort of autonomy over their work in return for a limit on working hours, collective bargaining, and protection against loss of work. This model, implemented in various legal forms in every industrialised nation, reduced social justice to the quantitative terms of the exchange of labour and physical safety at work, and to trade union freedoms. But work itself – its content and conduct – was excluded from this bargain. In both capitalist

and communist societies, work was considered a question of ‘scientific organisation’ – or so-called Taylorism. There was no place for autonomy, which remained the privilege of senior executives and the self-employed.

The digital revolution offers a chance for all workers to acquire greater autonomy, yet at the same time it risks subjecting everyone – including the self-employed, executives, and professional classes – to aggravated forms of dehumanised work. This revolution is not limited to the spread of new technologies; it is shifting the centre of gravity of economic power, which lies less in the material ownership of the means of production than in the intellectual ownership of information systems. Today, this power is exercised less in orders to follow than in objectives to meet.

Unlike previous industrial revolutions, it is not physical exertion that new technologies save and surpass, but mental ones, or more precisely, memorisation and calculation capacities that can be deployed to complete any programmable task. They are incredibly powerful, fast, and obedient but also, as computer scientist Gérard Berry says, totally stupid.<sup>3</sup> They allow humans to concentrate on the ‘poetic’ side of work – that which requires imagination, nuance or creativity, and is therefore not programmable.

1 Michel Volle (2017). Anatomie de l'entreprise. Pathologies et diagnostic. In Pierre Musso (Ed.), *L'Entreprise contre l'État?* Manucius, Paris.

2 Declaration of Philadelphia (1944).

3 Gérard Berry (2008). Pourquoi et comment le monde devient numérique. *Annuaire du Collège de France*.

The digital revolution will also be a source of new dangers if, rather than placing computers at the service of humans, we organise human work on the model of computer work. Instead of subordination giving way to greater autonomy, work would take the form of rule by numbers, extending to the mind the grip that Taylorism once held over the body.

This quixotic quest to programme human beings cuts them off from the experience of reality; it explains the growth in mental health problems and the rise in exactly the type of number-fiddling once seen in planned Soviet economies. Tasked with hitting impossible targets, a worker has little choice: either sink into depression or game the system to satisfy performance indicators that are removed from reality. The cybernetic fantasy underlying governance by numbers chimes perfectly with the neoliberal promise of globalisation, namely the self-regulation of a ‘large open society’ by the forces of an all-encompassing market. That is why this type of government is spreading, to the detriment of what the Universal Declaration of Human Rights terms rule of law.

It is not, therefore, in the time-worn formulas of neoliberalism that we can hope to find the legal tools for taming information technology and civilising its use so that it frees rather than alienates the human mind. These formulas, administered in massive doses over the last 40 years, have helped to shape the world we

live in: one of overuse of natural resources, the domination of the economy by finance, sharply rising inequalities of all kinds, the mass migration of people fleeing war and poverty, the return of religious violence and nationalism, the decline of democracy, and the rise to power of strong men with weak ideas. Common sense would have it that, rather than persevere in error by mechanically applying the ‘structural reforms’ prescribed by those responsible for this disaster, we should instead learn from these mistakes, particularly in the field of law.

What is unique to neoliberalism – and sets it apart from classical liberalism – is the way it treats the law in general, and labour law in particular, as a legislative product competing in an international market for regulations where a race to the bottom in social, fiscal, and environmental standards reigns supreme. Rule of law is thus replaced by law ‘shopping’, subordinating the law to economic calculations rather than vice versa.

## **RE-FRAMING LABOUR LAW: LOOKING BEYOND EMPLOYMENT**

The great simplifiers who today rail against labour laws are the very same people who, year after year, do everything they can to make them more complicated and burdensome. Before the ink is dry on the latest law they are already drafting the next. As the government

can no longer pull any of the major macroeconomic levers (control of currency and borders, the exchange rate, public spending) that affect employment, it yanks ever harder on the only lever it has left: labour laws, which are characterised as an obstacle to employment. Yet no serious research backs up this argument.

Since the requirement for prior authorisation of dismissal was abolished in France in 1986 (something that remains in force in the Netherlands, which has an unemployment rate of 5.1 per cent), the extraordinary promises that accompany each new deregulation of the labour market have never materialised. Indeed, in Europe, unemployment rates remain highest in the southern countries that have championed deregulation.<sup>4</sup> But there has been no review of reforms to company law (for example, allowing share buybacks that permit shareholders to enrich themselves without giving up anything in return, destroying capital and undermining investment), accounting law (like the abandonment of conservatism in favour of ‘fair value’<sup>5</sup>), or finance law (such as the existence of private banks that are ‘too big to fail’ and therefore enjoy an inviolability denied to indebted states). Changes whose negative effects on investment and employment are proven. In current newspeak, limiting compensation for unfair dismissal is described as a ‘brave reform’, whereas limiting the gains from stock options that an executive may receive through such firings is seen as demagoguery.

Any serious reform of labour laws – the last reform worthy of the name in France was in 1982 – should aim for more economic democracy, otherwise political democracy will only continue to waste away. Ideally, it should give everyone more autonomy and control in their working lives by providing new active safeguards, which allow people to take the initiative and complement the passive safeguards inherited from the

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<sup>4</sup> In 2017, the official unemployment rate was 11.2 per cent in Italy, 17.2 per cent in Spain, and 21.5 per cent in Greece. Eurostat [june\_rt\_a].

<sup>5</sup> Replacing the old accounting principle of prudence or conservatism, this standard indexes the value of a company’s assets against their estimated market price, conjuring up purely hypothetical wealth. See Jacques Richard (November 2005). Une comptabilité sur mesure pour les actionnaires. *Le Monde diplomatique*. [bit.ly/2qMw8dT](http://bit.ly/2qMw8dT)

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Fordist model. But this cannot be done without taking into account the profound changes in the organisation of companies and work that have occurred since the 1980s.

The first condition for such a reform would be to extend labour law beyond employment to encompass all types of economically dependent work. Today, the digital revolution and the start-up model are resurrecting hopes of empowerment through self-employment and small cooperatives. But in reality, there has been a blurring of the lines between independent self-employment and dependent self-employment, with workers bound by ties of fealty that reduce their autonomy to varying extents. In the same way, the idea that digital platforms that bring together workers and the users of their services will be a boon for self-employment is not borne out by the facts, as shown by class actions filed by Uber drivers, with some success, to force the company to recognise them as employees.

In the face of this change, economic dependence should be the criterion for an employment contract, as recommended by a thought-provoking set of proposals put forward by a group of French academics.<sup>6</sup> Adopting this criterion would simplify labour law while linking the degree of protection enjoyed by workers to their dependence. Management by objectives has seen the return of the old legal structure of 'feudal tenure', in which a tenant would pledge fealty to a landlord in return for the right to work a plot of land. The re-emergence of such ties has been made possible by digital tools that allow owners to control the work of others without giving them orders.

These ties of fealty form the legal framework of the network economy and are found in different guises at every level of work: from chief executives subject to the whims of their shareholders or customers down to salaried employees, of whom flexibility is demanded – they

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<sup>6</sup> Emmanuel Dockès (2017). *Proposition de code du travail*. Dalloz, Paris.

have to be responsive and available at all times. Debates around uberisation highlight the need for a legal framework that can keep promises (of autonomy) and mitigate the risks (of exploitation) inherent in these situations of fealty.

## ENVISIONING REFORMS

In this context, any reform that places company-level bargaining at the centre of labour law is clearly obsolete and irrelevant. This may have been appropriate in the United States in 1935, when the National Labor Relations Act was adopted as part of the New Deal, but it does not resolve the problems posed by today's interconnected and transnational organisation of work.

The first question is: which mechanisms allow workers to take back a degree of control over the meaning and content of their work? In France, the right of employees to collective expression, enshrined in the 1982 Auroux laws, started this process, which should be continued by making work design and organisation a matter for collective bargaining and individual awareness. Today, the issue is only addressed negatively, when this organisation leads to suicides or psychosocial disorders. It needs rather be addressed positively and preventively.

It should be possible to conduct collective bargaining at the correct levels, not just at industry or company level. Two of these in particular merit attention: supply-chain and territory levels. Such bargaining would enable the specific interests of dependent businesses to be taken into account; these may converge with those of their employees in relation to the companies on which they depend. Or it may involve all stakeholders with an interest in a particular region's dynamism. The head-to-head dynamic of employer/employee in a company or industry is no longer adequate; it requires the presence of other stakeholders around the negotiating table.

A third area for reform concerns the sharing of responsibilities within networks of companies. These networks allow those who control them to exercise economic power while palming off their responsibilities onto subordinates. It is therefore a matter of linking the responsibility of each member of the network to the degree of autonomy that they actually enjoy.<sup>7</sup> Such a reform would clarify the grey area surrounding corporate social responsibility as it currently stands, which is to neoliberalism what paternalism was to liberalism. Where necessary, it would make dominant companies jointly responsible for the harm caused by the work organisation that they create and control.

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7 Mireille Delmas-Marty & Alain Supiot (2015). *Prendre la responsabilité au sérieux*. PUF, Paris.

At an international level, we should fully acknowledge what is stated in the preamble to the ILO's constitution: "The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." And we should take account of the fact that the international division of labour and our environmental impact on the planet are inseparable. Social and environmental standards must therefore be given the same legal force as those governing international trade. This would require the creation of an international dispute settlement body with the power to authorise countries complying with these standards to close their markets to products made under conditions that do not.<sup>8</sup> The European Union could regain political legitimacy by championing such a reform, thus renewing the commitment enshrined in EU treaties to "improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained", rather than encouraging a social and fiscal race to the bottom between Member States, as its Court of Justice does.

Ambitious reform of labour law should also include unpaid work, such as raising children and caring for elderly parents, which is as

vital for society as it is ignored by economic indicators. Ever since artificial lighting made working 24 hours a day possible, labour law has provided a spatial and temporal framework compatible with our biological clock and the (human) right to respect for private and family life. This framework is now threatened by neoliberalism and information technology, which together extend paid work to any place and any time.<sup>9</sup> The price, particularly in terms of family life, is exorbitant but never acknowledged by those obsessed with Sunday and night working, which are destroying the last vestiges of social time to have escaped the commodification of human life.



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<sup>8</sup> The use of new forms of collective action, including boycotting such products, would also be recognised as a right inherent to freedom of association and the right to organise.

<sup>9</sup> Laurent Lesnard (2009). *La famille désarticulée. Les nouvelles contraintes de l'emploi du temps*. PUF, Paris.

