

PRIVATE LAW AND PUBLIC LAW NARROWLY INTERLINKED IN THE FRENCH SOCIAL SECURITY SYSTEM

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Abstract: *As well historically as in the present times, the French Social Security system is particularly complex in what concerns the respective parts of private law and public law. It is characterized by a crossing of these two branches of law and this crossing is manifest in the general organization of the system than in many of its elements and this crossing is manifest as well in the general organization of the system as in many of its elements. So, one of the main questions today is to know towards which direction the French Social Security System will make its way in the future. It is not sure at all that the intricacy of public and private law, very complex though it is, will be abandoned in the following years.*

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1. As everybody knows it, France was the homeland of the very famous philosopher René Descartes, in the seventeenth century. Everybody knows too his very famous opus, called *Discours de la Méthode*, which is at the basis of what we call the Cartesianism, with its scope of clear thinking and reasoning. Nevertheless, some mischievous French observers are not very far from thinking that French people are perhaps the less Cartesian people in the world! The example of the construction and organization of the French social security system could prove them right. Effectively this system is characterized by a very strange overlapping or intermingling of private law and public law so that the best scholars in that scientific field confess sometimes a feeling of deep despondency.

2. First, it is necessary to give an as clear as possible view of the French legal terminology in matter of Social Security and what we call in France Social Protection.

2.1. Social Protection is the larger term, which includes Social Security, Social Assistance, Indemnification of Unemployment and Complementary Social Protection.

2.2. Naturally there is a neat distinction between Social Security and Social Assistance for Social Assistance serves non contributory benefits and helps to people with no sufficient means for covering their personal and family needs. Logically, Social Assistance is financed by taxes and, more largely, by the fiscal system and, logically too, Social Assistance pertains to public law.

2.3. In its current configuration, Indemnification of Unemployment is a mixture of social insurance and social assistance. Social Insurance concerns unemployed workers who have already sufficiently paid contributions to perceive during a certain period the benefits of unemployment insurance. On the opposite, social assistance concerns people who have never paid contributions to the social unemployment insurance or who have not paid sufficient contributions to cover the indemnisation of a long period of unemploy-

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ment. Social Insurance is financed by social contributions, social assistance is financed by taxes. On that field we see again, more or less precisely, a distinction between private organisation and public one

2.4. As for complementary social protection, it serves benefits which add to those of Social Security, particularly in case of sickness, of old age pensions and of invalidity. Those complementary or supplementary benefits are financed by social contributions and not by taxes and they are managed by non public organisations. So it is a field in which private law is largely concerned.

3. If we focus on the Social security system, in the French meaning, which is narrower than many foreign ones, we can observe that it is a mixture of the Bismarckian and of the Beveridgian conception of social security.

3.1. In the Bismarckian meaning, social security is very much linked to the employment or more largely to the vocational or professional occupation or activity. So the quality of social insured person depends more or less strictly on the exercise of a professional activity, the financing of the social benefits is provided by social contributions calculated on the professional income and the organisms which manage the social coverture are directed by representatives of the employers and of the employees.

In the Beveridgian meaning, on the opposite, social security is linked to the residence on the national territory and the quality of social insured person depends largely on that residence. The financing of social benefits is provided by taxes and the organisms of social security are public ones.

So it is clear that the part and panel of private law are more important in the Bismarckian system than in the Beveridgian one.

3.2. Is the French social security system rather Beveridgian or rather Bismarckian? As you can perhaps already guess it, the French system is a mixture of the two different conceptions of Social security. At the moment of its creation, at the very beginning, in 1945, the French system was neatly Bismarckian. As for now, the Bismarckian influence has remained important even if some elements issued from the Beveridgian conception have been integrated in our Social security system. So, we can understand that the French social security system falls within both public law and private law.

4. Since its creation, the French social security system has never been considered as a part of the State organization or system. In that first sense, the French Social Security System has always been of Bismarckian nature. In France, the social security system is not a public Administration, directly dependant from the State. Even if the national organisms in what we call the General Scheme are public administrative organisms, they are not included in the State hierarchy and the local organisms of the General Scheme are private organisms, that is to say that they fall within the empire of private law, even if they manage a public mission.

As for the schemes for the independent workers and for agriculture, even the national organisms depend on private law.

5. Let us go and look closer at the organization of the Social Security system in France. The French system is more founded on the professional affiliation than on the principle of universality. It is composed of several great schemes, essentially according to the pro-

fessional activity. So there is what is called the general social security system, which is the scheme for the major part of the salaried workers and employees. There is too the scheme which covers the autonomous workers or self-employed people, the scheme which concerns the farmers and farm workers. There are too some specific schemes for specific categories of dependent workers (for instance the scheme for civil servants). Naturally, that division into schemes is quite revealing of a professional system but it is too very narrowly linked to a strong wish to keep under private law an important part in the Social Security system organization.

Nevertheless, there are more and more marks of the principle of universality in the organization of our social security system and particularly the increase in importance of the role of taxes in the financing of the system, so that if social contributions go on representing a majority of means of the means of the system (more or less 60%), taxes represent currently 40% of the means of financing.

However, the increase of the principle of universality does not question one of the main characteristics of the Social Security litigation in France, since that litigation falls in majority within the competence of courts of the judicial order and not of the administrative one, with the tribunal for social security affairs in the 1st degree, the courts of appeal in the second degree and, at the summit, the Court of cassation.

Moreover, the criteria of affiliation to the major schemes are more or less linked to private law. It is notably the case of the more important scheme, that is to say the General Scheme, which covers principally salaried people. So any salaried person, with a contract of employment, depends in principle on the General Scheme. Conversely, independent workers depend of the Autonomous Scheme.¹ Consequently, the issue to know whether a person must be affiliated to the General Scheme or to the Autonomous one is regulated by a pure analysis of private law. The question is to know whether the contract between the beneficiary of the work of the contracting party and the worker is truly a contract of employment, with subordination of the worker, or a contract of provision of a service, without subordination of the worker. In the first case, the worker will depend on the General Scheme, in the second case, he will depend on the Autonomous one. Even if the social security tribunals and courts have a long time tended to interpret more largely than the labour courts the criteria of the contract or employment, in order to provide more largely for the benefits and the better coverture of the General Scheme, they have always reasoned in the frame of the private law and go on doing it.

6. Let us see now the organization of the General Scheme, which is the main scheme of the French social security system, for the major part of the salaried people.

6.1. At the summit, there are three National Offices, the National Health Insurance Office, the National Old Age Pensions Office and the National Family Allowances Office. Each of these three offices has the statute of Public Establishment but none of them is a part of the State Administration. Each of them is managed by a Board, which is composed of representatives of both salaried workers and employers, as well as of specifically qualified

¹ We must observe however that a very recent draft of reform of President Macron and his Government is to integrate the Autonomous Scheme into the General one, from now to 2020.

people. The Board is headed by a President, which is elected by the members of the Board whereas the Director of the National Office is nominated by the Government. That is a very convincing example of the imbrications of private law and public law.

At the regional level, there is in each Region an Office for the Old Age Pensions and Health at Work (in the French abbreviation, *Carsat*). Each *Carsat* is a private law organism, managed by a Board with representatives of salaried people and employees and specifically qualified people; The President is elected by the Board and the Director, who is a salaried worker, is nominated in principle by the Board but with a very strong influence of the corresponding National Office.

These characteristics are again manifest at the local stage, with, in each department, at least one health insurance office and one family allowances office. These offices are private law organisms, they are managed by a Board, the President of the Board is elected by the members of the Board and the Director of the office, who is a salaried person, is hired by the Board but with a very strong influence of the corresponding National Office in the process of recruitment.

So we see that a great majority of the workers in the Social security system are private law workers, protected by French Labour Law, included the Directors of the local and regional offices. In the same time the recruitment of the Directors is not entirely in the hands of the corresponding offices. There is an implicit hierarchy between national and regional and local offices. Of course, such an implicit hierarchy evokes public law.

6.2. As for the functioning of the whole system, we must not exaggerate the autonomy of the social security system with respect to the State. This autonomy has been seriously infringed since several decades and especially in 1996 with the reform which is called *Juppé Réforme*.²

The gist of that reform has consisted in increasing powers of Parliament in the main decisions concerning the financing of Social Security system. From 1996 on, the French Parliament has the competence to vote each year an Act which is called Act for the Financing of the Social Security system. In this Act, voted in December of each year, the Parliament determines the projected amount of means and expenses for the next year.

That reform was very sharply discussed by all those who are attached to the traditional conception of French Social Security. They asserted social contributions were not taxes but parts of the global remunerations of the employees and that the Parliament was not competent to deliberate on them. However, the Government remained steadfast in adversity, with two major arguments; First, it should be odd that the French Parliament had nothing to say on a budget which is ahead of the State Budget. And second, in the Acts on the financing of Social Security System, contrarily to the Acts on the Financing of State, the Parliament does not set the means and the expenses, it merely establishes provisional amounts.

In fact, we can see that the *Juppé Reform*, by increasing the powers of Parliament in the financing of the Social Security system, also increased the role of public law with regard to private law.

Naturally one of the main problems of that reform is that the sanctions of the exceeding of the legal provisional amounts are very vague. It is the great difference with the Acts of

² It is so called from the name of the former Prime Minister and current Mayor of Bordeaux.

Finance. Nevertheless, the legislator of 1996 has set up an important legal mechanism which tends to guaranty more or less the application of the provisional estimations of the legislator. Curiously enough, this mechanism consists in the setting of contractual links, first between the Government and the National Offices of the Social Security system, which are called *conventions d'objectifs et de gestion*, in English target and management agreements, and second between each National Office and the regional and local offices in its field, which are called *conventions de gestion* (in English management agreements). These contracts or agreements determine some respective commitments, and particularly the commitment of the offices to respect as far as possible the provisional amounts of expenditure which have been determined in the Social Security financing law. At this point, it is very interesting to highlight the very complex organization which has been settled, with a rather strict custody on the offices, which comes from a public law conception of the Social Security system, and the recourse to the way of contracts or agreements, which comes rather from a private law vision of the Social Security.

7. The crossing of public law and private law in the French system of social security is particularly important and significant in what concerns the supervision of the acts and people of the organisms of social security. If we were in the strict field of private law, such a supervision would not exist because, in private law, organisms and collective bodies are in principle free to run their business as they want. If we were in the strict field of public law, it would not be merely a supervision but well and truly a hierarchy and a power of injunction and command of the State over the inferior collectivities and bodies.

And yet, in the social security system, a supervision is organized, first on the nomination of the managers of the organisms and too on some acts and decisions of the organisms, to make sure that they will not be contrary to the legislation or jeopardize their financial balance. This supervision is in the major cases an *a posteriori* supervision. We must add that, in relation to the complexity of the French social security system, there is such a supervision of the Government on the national organisms and what looks like a supervision of the national organisms on the regional and the local ones. So, in the French social security system, no organism is completely free nor completely dependent.

8. What is the future of the French system of social security? Is it a future of privatization or a future of publicization? Or, on the contrary, will the future maintain of the imbrications of private law and public law?

8.1. The privatization of Social security is likely wished by some observers, liberal politicians and a part of business community but it is a dead end. Privatization of Social security is a formula which looks like an oxymoron. In fact, Social security is unthinkable without an important web of compulsory norms and rules. Facultative Social Security is an absurdity. If Social Security was only facultative, young and active people with average or high incomes would rather go to private insurance, because, contrarily to the amount of social contributions, the price of private insurance depends on the importance of the risk and not of the importance of the income. So people with low risk and high incomes would prefer leave or avoid Social security and go to private insurance. And, consequently, Social security would be sought only by people with lower incomes and higher risks. Such a situation could not last a long time without serious financial losses.

Thus the perspective of a complete privatization is extremely unlikely. However, what could happen would be rather a regression of Social Security down to minimum standards with, for a better coverage, the recourse to private insurance. It is a perspective which is not very probable but that cannot be set aside too rapidly. The current trend towards a bigger role of the complementary social protection could be a sign of relative privatization if it were not mastered enough in the decades that are coming.

8.2. Complete publicization could be another possible trend in the evolution of the French social security system. In 1995, while presenting his draft of reform of the French social security system to financial balance, Mr Juppé, former Prime Minister, said that it was the last chance of the maintain of the traditional system before a radical and complete change and, without any doubt, he thought that, in the case of failure of his plan, the French social security system would risk to be completely publicized, financed by taxes and entirely managed by State and no more by the social partners. Naturally, the gloomy predictions of Mr Juppé had too for scope to convince a very reluctant opinion to admit the severe savings he wanted to do and the rigorous framing of the National and Local offices.

The relative success of the *Juppé Plan* has put off the perspective of global publicization. However, this perspective is not completely unthinkable. First because it could be mixed with a privatization of what the State would not want to take in charge. Privatization and Publicization are not absolutely antinomical. Second, and notably since the *Juppé Plan*, because the supervision of the State on the organisms is such that the part of privatization is perhaps more technical than really politic. And we may ask ourselves who leads today effectively the French social security system. In other terms, what does remain really from the autonomy of social security system in France? For all that, it is still true that, as a whole, the French social security system is not (is not yet?) completely publicized.

8.3. So the current state and the condition of the French social security system, as regards the parts of private law and public law, are very complex.

The role of public law is very important, at least from two points of view. First, and logically, the system is founded on compulsory norms, compulsory affiliation, compulsory financing. The part of free will in these fields is not absolutely equal to zero but it is very weak. In this perspective, social security law is very different even from Labour Law and naturally still more from private law in general. Second, considering the financial and political importance of the Social Security system, the supervision of State on National, Regional and Local Offices is very deep, not only at the legislative level, with the Acts for Financing the Social Security system, but at any level from the top to the bottom of the system.

It is clear, however, there is too a presence of private law and that this presence is neither trivial nor insignificant. This presence is particularly meaningful as for the criteria of affiliation, but also in the litigation, in the financing of the system, and even in the organization of the social system, with the web of offices the majority of which is of private nature. So, the rights issued of the social security system, which are social rights, can appear as a third family of rights, between the purely private ones and the purely public ones. In that sense, social security law can be perceived either as an articulation of public law and private law or as an overtaking of this distinction. Is that situation too much complex? Is a radical simplification necessary? Some observers have that opinion but we may say that for the majority of observers and scholars, that complexity is in this instance unavoidable. The relations between private law and public law are as necessary as tumultuous and perhaps the social security system is, from this point of view, a particularly eloquent example.