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THE REGULATION OF COLLECTIVE LABOUR RELATIONSHIPS: AN ASSESSMENT OF THE OLIVER WILLIAMSON'S PRIVATE ORDERING-PUBLIC ORDERING DIVIDE

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Abstract

This research article proposes to undertake a critical review of Oliver Williamson's law and economic theory from the analysis of collective labour relationships in the United States. From a positive point of view, the 2009 Nobel Prize laureate explains that law determines the rules of play (public ordering), and then individuals freely negotiate the rules that constitute the institutions of governance (private ordering). From a normative perspective, Williamson argues that this partition is efficient with respect to the economizing logic of individuals. However, we show that, actually, the American law of labour relationships is based on legal pluralism and that the model of private ordering, which has been less and less used since the 1980s, has strong limitations. In this context, the analysis of the public ordering/private ordering framework that Williamson proposes is of little interest.

Keywords

Private ordering, public ordering, labour relationships, law and economics, Williamson's transaction cost economics

JEL Classification. J50, L20, K00

Introduction

In several research articles, Williamson sheds light on the interdisciplinary aspect of his thoughts. His main aim is to contribute to the development of a 'science of administration' (Williamson, 1990, 1993a, 1993b, 2005) that combines economics, organisation theory, and law. The close relationship between organisation theory and transaction cost economics (TCE) 'has been often ignored in theoretical debates on the firm' (Baudry and Chassagnon, 2010: 477). However, this shortcoming also seems to be the case for the relationship between law and TCE. Indeed, if some studies have revealed an interest in this relationship from a general perspective (Dugger, 1996 or Hodgson, 2009), the importance of labour law in TCE has rarely been seriously investigated.

Williamson has often explained his approach to law in different papers (Williamson, 1998, 2000, 2002). According to him, there is a combination of formal rules that result from the public ordering and the rules that come under the private ordering. This connection between different types of rules is based on the distinction he makes between four levels of social analysis. Level 1 is the level of social embeddedness, whereas level 4 is based on the allocation of resources. The institutional environment and the domain of governance, which refer, respectively, to levels 2 and 3, on which TCE focuses, correspond to the two types of ordering.

Regarding level 2, the legal rules that constitute the public ordering are included in the institutional environment, and they fix a positive legal framework. These rules are, hence, the product of the political regime, and they provide the rules of play from which economic activities are organised (North, 2005). Political and legal systems and administrations are located at this level, in which the laws of private property are crucial. All of these legal instruments form the formal rules of play. Level 3 concerns the institutions of governance, the main level of analysis of Williamson's TCE. The rules of play of level 2 appear to be parameters, whereas level 3 is the domain of play of the game (of the exercise conditions of play). Thus, level 3 is the domain of private ordering. Indeed, for Williamson (2000), it seems evident that regarding the imperfections and incompleteness of both the legal system and the contract safeguards, 'much of the contract management and dispute settlement action is dealt with directly by the parties—through private ordering' (Williamson, 2000: 599). Contracting parties have the latitude to arrange this framework in accord with their preferences and goals to implement the best governance structure. Hence, Williamson refers to the works of Llewellyn (1931) and MacNeil (1978) to affirm that the contract constitutes only a simple legal framework. In this view, the play of the game 'is usefully interpreted as private ordering efforts to influence order and, thereby, thereby to mitigate conflict and better realize the mutuality of advantage voluntary exchange' (Williamson, 2002: 440; Buchanan, 1987).

According to Williamson, neither the private ordering nor the public ordering (legal centralism) are 'pure forms' of ordering. Williamson (1985) argues that 'between contrasting fictions, the private ordering fiction is at least as instructive as that of legal centralism' (Williamson, 1985: 168). However, as we will see in the next sections, this fiction is too far away to be close to the reality of the labour relationships, notably since the beginning of the 1970-1980 period. The very general theoretical framework of Williamson is applied to the labour relationships in the United Sates, which strengthens the interest in his approach. More precisely, it seems that Williamson has been strongly influenced by the dominant model of the post Second World War period in building this specific theoretical framework. Indeed, for Williamson, this model 'consecrates' the autonomy of parties (employers and unions) that characterises private ordering by isolating the firm from the central legal ordering – i.e., public ordering. That is why Williamson matches this private model of labour regulation against the judicial model of labour regulation.

Hence, the reasoning of Williamson seems to be the following: he wants (1) to shed light on the importance of private ordering in the collective labour relationships in the United States and (2) to show the superiority of private ordering compared to public ordering in terms of efficiency. In other words, in the economizing logic of TCE, the fact that the private ordering model is prevailing could be seen as a consequence of the efficiency of this mode of coordination of employers and employees. The research

objective of this article is, hence, to question the interest in and relevance of these three complementary propositions. Is the Williamson theoretical framework empirically correct in the case of collective labour relationships in United States? What is really the meaning Williamson gives to the notion of private ordering? Is the divide between private and public orderings accurate? If this fiction seemed to be partly right until the 1970s, it is no longer the case after this period, owing to the evolution of both collective labour relationships and the role of the State. Therefore, is the model of collective labour relationships analysed by Williamson more efficient than the judicial one? What is ultimately the nature of the conception of law advocated by Williamson? Following the economizing logic characterising the rational individual and the argument of State dysfunctions, is the intervention of the State completely useless? Is the dichotomy between level 2 and level 3 accurate and empirically right?

To answer these questions, this article is organised into two main sections. In Section 1, we examine the labour relationships that prevailed in the United States after the Second World War in relation to the utilisation that Williamson makes of them. Additionally, we focus on the elements that lead Williamson to perceive the efficiency of this model of labour relationships regulation. In Section 2, we shed light on the ambiguity and confusing aspects of Williamson's thought. Indeed, even if it is true that Williamson is acquainted with the law of collective relationships, his analysis of private ordering is not clear because the American model of labour relationships regulation is

based on legal pluralism (Galanter, 1981). This lack of clarity means that there are different sources of law, including the private ordering of the firm. Furthermore, the evolution of State law in the United States since the 1970s, on the one hand, and the decrease in union member workers and, therefore, the effectiveness of the collective bargaining model, on the other hand, cast doubt, from both a positive and empirical perspective, on the relevance of the Williamson model, based on a clean break between private ordering and public ordering. This deficiency is why, even from a normative point of view, the private ordering model has serious limitations. It explains Williamson's decline as an authority for several years. Furthermore, the role of the State seems to be more and more important in the regulation of labour relationships.

The Williamsonian Model of Collective Labour Relationships Regulation: Private Ordering and Efficiency

After presenting the system of labour relationships prevailing in the United States after the Second World War, we relate this system to Williamson's concept. Then, we show the arguments Williamson used to justify the efficiency of this specific model.

The collective labour relationships originating from the Wagner Act: the foundations of the private ordering model

American collective relationships have been legally framed by the Wagner Act and the National Labor Relations Board (NLRB), which regulate the creation and control of collective norms in American firms. The National Labor Relations Act (NLRA) of 1935 (amended in 1947, 1959 and 1974) is at the core of the distinction between the so-called

organised sector, which includes all the firms whose employees are represented by union organisations, and the so-called non-organised sector, which does not benefit from representation. This distinction is crucial because these two models correspond to two distinct fields of American law: labour law and employment law. It is important to add that the percentage of union member employees was 35% at the beginning of the 1950s. This fact means that the organised sector represented less than half of a firm's employees (this rate has regularly been decreasing from the 1950s and the organised sector is currently a large minority (apRoberts and Simonet, 2009).

Concerning the bargaining process of the firms in the organised sector, two phases can be observed. The first phase consists of determining the framework in which the collective bargaining will take place – what is called the appropriate bargaining unit. The second phase refers to collective bargaining, as such. The appropriate bargaining unit is the domain according to the size of the employer, the organisation, the building trade or a sub-unit of one of these units. The NLRB considers that the organisation is the more appropriate unit. It is within this framework that employees' rights to be organised are pushed forward. These rights result in employees being represented, at the conclusion of an absolute majority voting, by a union to negotiate with the employer. If the majority of employees declares itself in favour of a union, this union becomes the exclusive representative of all employees composing the unit. The collective bargaining process leads to an appropriate law that governs the labour relationships in the given

unity. This legal dimension occurs at two levels. The first level involves the legislative procedure: the collective convention becomes the 'law of the firm'. This convention applies to all aspects of the labour relationship, such as wages, qualification, working hours, and security. The second level is the administrative one. It consists of governing the agreement and, notably, the dispute settlement that could be individual or collective. Here, arbitration, which encompasses the totality of collective conventions, plays a crucial role.

Arbitration is used in dispute resolution by designating, by mutual agreement, an impartial third party. Thus, the conflicting parties accept being linked and guided by a given resolution. This approach is a private mode of dispute resolution. The role of private arbitration is, hence, settling conflicts coming from the application and interpretation of the collective agreement. Parties themselves choose the arbitrator, pay for that person, establish his or her competences and determine the procedure to which he or she must submit. The conflict remains within the unit chosen during the bargaining process because the arbitrator allows bypassing the recourse to a judge representing the public authority. The competences and powers of the arbitrator result from the normative autonomy of parties, and they are totally subordinated to the volition of the social partners. Additionally, the union that 'signs' the collective convention can deprive the employees of the right to bring the dispute to justice, when an arbitrator has been assigned to resolve the disputes resulting from the application of

the collective convention. The growth of arbitration in the United States confirms the existence of a professional legal ordering that is recognised by the State legal ordering.

Regarding Williamson's books of 1975 and 1985, which constitute the only two contributions to collective labour relationships, we can observe that he has a good knowledge of productive law and of the more influential scholars' works on labour law that have analysed the American model. Moreover, what Williamson characterises as private ordering seems to strongly correspond to the model of collective labour relationships that we have just described – notably one concerning the so-called organised sector. In his 1985 book, Williamson quotes the Wagner Act and the National Labor Relations Board that governs the production and control of the collective norms in the American firm. Globally, the two main components of the collective relationships asserted by the Wagner Act are (1) a bargaining and collective agreement concluded between the employer and the union and (2) a procedure for the settlement of disputes based on the private ordering resolution. When Williamson analyses the logic of the internal labour market (Doeringer and Piore, 1971), he argues–for example, in his 1975 book–that the rules of these specific markets are implemented through collective bargaining. Williamson is also interested in the second aspect of collective labour relationships, namely, the mechanism of private arbitration. He devotes great attention to it in his 1975 and 1985 books. He uses, notably, the expression, 'special arbitration

machinery' (Williamson, 1985: 10). Thus, in agreement with the positive law, Williamson shows that it is the union that controls disputes and conflicts.

Williamson reminds us of the importance of the works of some lawyers, such as Shulman (1955), Cox (1958), Summers (1969, 1982) and Stone (1981). These legal scholars are useful for Williamson in the sense that they raise the question of the nature of the collective agreement concluded between the employer and the union. The answer that they bring to this question is crucial because they consider that the collective agreement is a long-term contract establishing a simple legal framework. Williamson uses, in support of this thesis, the paper of Cox (1958), for whom 'the collective bargaining agreement is an instrument of governance as well as an instrument of exchange' (Cox, 1958: 22). He also quotes Shulman, who considers that the Act should be appreciated as a legal framework in which the private ordering between management and labour takes place. In addition, Summers (1969) gives real interpretative latitude to legal rules. Through his specific conception of law, Williamson proclaims that private ordering is the dominant model of labour relationships regulation.

Finally, the American model of collective labour relationships and the associated distinction between the 'organized firm' and the 'non-organized firm' seem to empirically correspond to what Williamson calls the private ordering. The NLRA is not an instrument of public interventionism in professional relationships. It is simply a law that gives parties (employers and employees) the resources to produce a conventional

law of the firm through the collective bargaining process. The autonomy of co-contractors (employers and unions) is, in this view, complete, from the bargaining to the conflict settlement processes. The system developed by the NLRA appears to be a self-contained and self-sufficient system, in which the power is shared between the employer and the representing union of the workforce. The notion of private ordering used by Williamson seems, therefore, to be confusing and ambiguous (see the assertion below) because for him private ordering is an efficient source of law, even though it is different from State law.

The efficiency of Williamson's private ordering model

The works of Williamson also have a normative dimension because he wants to show the superiority of the legal model, based on private ordering in terms of labour relationships, compared with the model based on legal centralism and public ordering. Indeed, if Williamson does not contest the existence of positive legal rules, his ambition is clearly to supplant 'the academic concept of contract as legal rules by that of private ordering and by inquiring into the mechanisms through which transaction cost economizing is accomplished' (Williamson, 2005: 388). Thus, it is important for Williamson to show that the role of the State is providing help in the individual coordination of labour relationships. To justify the superiority of the model of private ordering in the case of collective labour relationships, he uses three distinct arguments.

First, according to Williamson, collective bargaining with unions serves the efficiency of the relationship in different ways. The union has the role of 'agent' to play

in terms of information on the preferences of employees. Additionally, and more fundamentally, the union also has the role of governance because it has to insure the continuity of the relationship between the employer and 'his' employees when some important specific human assets are engaged in the economic relationship. The union also contributes by moderating a potentially excessive increase in employees' wages that could penalise the financial health of the firm. It is important to add (and it is an argument complementary to the previous ones used to justify the superiority of arbitration over judicial action) that giving control over individual conflicts to the union allows it to gain acceptance as serving the interests of the group and not the interests of the individual. In the view of Cox (1958), Williamson argues that entitling an individual to use the procedure of arbitration would discourage the employer and the union from cooperating in everyday activities.

Therefore, because of collective bargaining, the firm implements an internal labour market endowed with explicit and institutionalised rules in terms of both the wage grid and the promotion system. Departing from the work of Doeringer and Piore (1971), Williamson (1975) notices that 'the internal labour market achieves a fundamental transformation by shifting to a system where wage rates are attached mainly to jobs rather than to workers' (Williamson, 1975: 74). These formal rules lead to efficiency because they foster a cooperative attitude from employers and employees, who have the common interest of continuing the exchange relationship.

Finally, it is evident that the question of dispute and conflict settlement is crucial for Williamson. He underscores, several times, the superiority of arbitration and

grievance procedure over judges and courts in the presence of disputes and conflicts. In the view of Galanter (1981), Williamson considers that, in a lot of different situations, protagonists can find private solutions to settle disputes that are more efficient than the solutions proposed by judges, who are forced to apply general rules without having a good knowledge of the nature and the context of these disputes and conflicts. In other words, in a perfect world, where economic transactions are based on a perfectly identified good, i.e., the model of the pure exchange, a court can be efficient for settling disputes and conflicts. The challenge is very different in the case of the employment relationship based on a long-term, incomplete contract (Coase, 1937; Simon, 1951). Indeed, the parties engaged in an internal conflict have a better knowledge of the context and 'circumstances' of this conflict than does the court with its information. Furthermore, Williamson (2002) explains that settling these disputes by way of the courts would reduce the efficiency and integrity of the hierarchy. In any case, courts refuse to judge intra-firm disputes about transfer prices between divisions, delivery time, and quality default. Finally, Williamson's model of resolution of disputes constitutes for him a way to preserve a healthy organisational atmosphere, whereas, on the contrary, the recourse to courts to resolve conflicts is a threat to the integrity of the firm (Baudry and Chassagnon, 2010).

Williamson analyses the private ordering from the lens of the advantages of the grievance and arbitration procedure. This procedure, which is assessed by Williamson

(1975) 'in the language of the organizational failures framework' (Williamson, 1975: 76), has several advantages. First, this disposition allows for overcoming the problem of asymmetrical information because the arbitrator is able to analyse, more deeply, the facts in relation to different judicial procedures. Indeed, the arbitrator can notice the idiosyncratic character of the firm. Additionally, the knowledge that the arbitrator has of the firm can dissuade opportunistic behaviours, which gives the union control over individual conflicts to the advantage of collective interests. The important powers given to the union reveal the supremacy of collective rights over individual rights. The group has its own interest, which is defended by the union. Thus, every individual demand is given up to the advantage of the group's choice. Therefore, the grievance procedure and arbitration must be preferred to the judicial disposition of conflicts settlement in consequence of the negative effects, resulting from a conflicting process, on the continuity of the relationships (see Williamson, 1985). Ultimately, arbitration is an efficient and rational mechanism of coordination for Williamson, owing to the fact that the collective agreement (concluded between the employer and the union) is incomplete. Thus, Williamson shows that this incompleteness is a 'concession' (1975: 75) on the circumscribed rationality. Rather than anticipating all the events that could occur, the agreement is voluntarily incomplete and, therefore, flexible, which makes it 'attractive' but also 'hazardous' (Williamson, 1975). That is why contractors implement specific arbitration machinery. Williamson (1975) explains that 'a grievance procedure, with

impartial arbitration as the usual final step, allows the firm and the workers to deal with continually changing conditions in a relatively non-litigious manner' and concludes that 'contract revision and renewal take place in an atmosphere of mutual restraint, in which the parties are committed to continuing accommodation' (Williamson, 1975: 81).

Williamson is very critical of the alternative model of disputes settlement, which he calls 'the judicial model.' This model has been described in the works of Stone (1981, 2007). According to her, the supposed advantages of arbitration (the expertise of arbitrator, the informal aspect of the procedures, and the flexibility of the recommendations) could also be achieved if conflicts were settled by the NLRB. In contrast, for Williamson, entrusting to the NLRB, and so to a judicial entity, means that the settlement of disputes does not allow the parties to harmonise their interests by adapting their contractual relationship on a long-term basis. Consequently, imposing on parties a judicial regulation could lead them to give up making investments in specific assets (Williamson, 1985).

To conclude this first section, we argue that the Williamson analysis ultimately uses a large part of the recommendations proposed by the theorists and partisans of industrial pluralism, who have largely influenced the evolution of American labour relationships from the 1930s to the 1980s. Industrial pluralism is an application of the idea of political pluralism – which is at the heart of free market democracy – to collective labour relationships. In this model that developed on the basis of the Wagner

Act, parties to collective bargaining are seen as a sort of 'legislative assembly' that publishes its own legal norms. These norms are submitted to the arbitrator of grievances, who is a private judge nominated by the parties themselves (Stone, 1992). As Stone argues, industrial pluralism is based on a simple metaphor: collective bargaining is designed as an 'industrial self-government' (Stone, 1992: 622). One of the more important arguments in favour of the industrial pluralism model is about the fact that disputes based on collective agreement are not dealt with by courts. The Supreme Court of United States used, for a long time, the arguments developed by the partisans of industrial pluralism and considered that the collective agreement constituted a real constitutional law, with its own judge – the arbitrator – to control the process. In this view, employees were submitted to the legal and imperative enforceability of the convention. Finally, the study of the works of Williamson on collective labour relationships seems to be a confirmation of the logic that this author develops when he analyses the institutions of capitalism: from the lens of organisational failures, the aim is to show that the rules governing the firm and the employment relationship are based on economizing logic (minimisation of transaction costs).

The positive and normative limitations of Williamson's approach to the private ordering: A critical analysis of the Williamsonian conception of law

As we have explained in the previous section, the theoretical framework of Williamson, which is based on the public ordering–private ordering divide, is, in part, in line with

the collective labour relationships that predominated in the United States from 1930s to the 1970s. However, the divide that Williamson proposes is not clear, and furthermore, his analysis has become obsolete on numerous points owing to the large modifications that have affected labour relationships since the 1980s. Additionally, the limitations internal to the private ordering model, as such, have also cast doubt on this model, which raises the question of the role of the State in labour relationships regulation.

The American model of collective labour relationships: legal pluralism and the decline in the collective convention

Two main critical assessments of Williamson's positive analysis of collective labour relationships can be addressed. The first one is about the confusion he introduces between the judicial model of the public ordering and the private ordering model. The second assessment concerns the concealment of the important mutation that American labour law has been set against since the 1980s.

It seems that Williamson makes a strong distinction between the legal domain and the economic domain characterised by economizing logic. As a consequence, Williamson seems to ultimately neglect the role of positive law and institutions, such as State, Court and judge, in the functioning rules of governance structures. In fact, we argue that the position of Williamson is more complex. In our view, this ambiguity results from the notion of 'private ordering' that points out the fact that this ordering is totally dissociated from the public ordering system. Nevertheless, it is possible to mitigate this argument. In fact, the American model of collective labour relationships is

based on what lawyers call 'legal pluralism' (Galanter, 1966, 1981; Hooker, 1975; Griffiths, 1986; Merry, 1986). This notion characterises the approach to law that was in favour with a lot of American lawyers, who used the collective labour relationships model of the post-Second World War period. In the view of this specific approach, law is not confused with State authority because there are plenty of generative sources and autonomous seats of law that compete with the public domain of law. The model of collective labour relationships coming from the Wagner Act is in line with this analysis. From this perspective, the American firm is a law-creating entity. Indeed, American law establishes the principle of the normative autonomy of parties and, thus, creates a legal order distinct from the State order; this order is not opened to the external sources of law, such as legislator or judge. The recognition of private arbitration is a proof of this legal order.

Nevertheless, can the normative autonomy of parties be reduced to private ordering? In our view, the answer is clearly 'no' because, in fact, this is an autonomy provided by the State. Unions and management must respect some important State rules. When Williamson speaks about private ordering, in fact, he refers to private legal rules, even though they are produced in a broader professional environment (in several articles, Williamson opposes his analysis of contract laws to the all-purpose laws of contracts, but he never uses the notion of legal pluralism, as such). In other words, there are different sources of law (the State, the firm, the employer) that coexist in modern

and occidental legal systems. That is why the methodology of Williamson is set *a priori*. The gap between public ordering and private ordering (levels 2 and 3 of the global Williamsonian analysing framework) – i.e., the gap between the judicial model and the private model – does not correspond to both the effective coordination and real sources of law that are, by their essence, plural.

The study of labour relationships proposed by Williamson is also not accurate because, from a positive point of view, the 1980s were characterised by a double movement that has profoundly modified the model for the legal organisation of collective labour relationships. On the one hand, there was a real decline in the use of the model of the post-Second World War period. On the other hand, there has been a significant increase in the individual rights of employees (Stone, 1981, 1992, 2009; Supiot, 2010). The decline in the use of the post-Second World War model results from the remarkable decrease in the number of American union members. The percentage has decreased from 35% in the 1950s to less than 12% in 2008 (apRoberts and Simonet, 2009). The new individual rights are provided by different sources. A portion of the sources refer to a liberal conception of employees' rights that sheds light on the autonomy and private lives of employees. Other sources, like the measures concerning the closing of plants, portray the State's willingness to protect employees against massive suppression of jobs and employment. Some of the rights involved are larger and aim to fight against unfair lay-offs. These rights are the product of judicial

innovations at the common law level, notably in the cases in which managers have lost their jobs in consequence of firm restructurings.

In other words, in terms of the production of legal rules, it is the State that has become predominant and to the detriment of professional environment-based rules. Finally, these two movements – the increase in employees' individual rights and the decrease in the protection given to employees by collective bargaining – are at the origins of a new model of labour relationships. This new effort is the 'minimal terms/individual rights model of labour relations' by Stone (1992: 636). Thus, we disagree with the fact that Williamson – who does not hesitate to revise his work by including a hybrid form in his 1991 article – has not taken into account the crucial modifications of the institutional environment that constitute, from the end of the 1970s and the beginning of the 1980s, the evolution of the American system of collective labour relationships. In this view, the divide between private ordering and public ordering is, nowadays, empirically accurate for only a very minor part of labour relationships. Collective bargaining, which was the main source of collective labour relationships, has become an exception, when, following economizing logic, collective bargaining must constitute a general rule of coordination. This important problem of the obsolescence of the theoretical Williamson is also evident in a normative point of view.

The normative limitations of the Williamsonian analysis: a critical analysis of both the economizing logic and the poor relationships between the State, power, and law

We defend the idea that two types of criticism – by essence, different – can be addressed in the analysis of Willamson. The first one is linked to the limitations of the legal model of labour relationships resulting from the Wagner Act. The second one refers to the specific conception of both law and the relationship between law and power that Williamson develops.

In the context of Williamsonian analysis, individuals implement institutions with an economizing logic, so that the model of collective relationships of the Wagner act is supposed to be an efficient model. However, we can be astonished by the reappraisal of this model. Indeed, the analysis of Williamson is not understandable in relation to the mechanisms of the evolution of institutions of capitalism. Two series of limitations linked to the evolution of the Wagner Act model have led to the undermining of this model.

On the one hand, certain authors, like Stone (1981, 1992), do not agree with the analysis of Williamson that considers private arbitration an efficient mechanism of coordination. Stone argues that this system has not provided employees with satisfactory ways to enforce their collective rights. For her, arbitration is inefficient because it does not allow for utilising the protective devices of public courts. For example, the investigations that the arbitrator runs are much less complete than the investigations run by judicial institutions. Additionally, compensations required by arbitrators are not as effective and generous as compensations required by judicial

authorities; most arbitrators know that they do not have the power to impose and verify their decisions. Arbitrators are not forced by previous decisions, and decisions are not published. Lastly, by definition, there are no appeal rights for the 'sentence' pronounced by the arbitration.

On the other hand, this model came to see minor use because of the disaffection of employees with unions. However, according to Stone, this disaffection results from the limitations inherent in this model, and, notably, from the dichotomy it created between the law coming from collective bargaining and that coming from State law. The private dimension of collective bargaining has made it legally incompatible with the new and emergent system of employees' individual rights. Regarding the private aspect of dispute settlement through arbitration, we must note that the union member employees did not have access to courts – which is advocated by the partisans of industrial pluralism. More precisely, these employees whose claims were pre-empted did not benefit from both the external courts and tribunals and the elements of individual protection brought by the State as a consequence of the supremacy of collective agreement. This fact results from the interpretation of Section 301 of the Labor Management Relations Act. Although the collective agreement was enforceable by a federal court, the restrictive interpretation that has been borrowed by the United States Supreme Court has led to the fact that all the claims on a collective agreement composed of an arbitration clause must be addressed with the arbitrator and not with a

court. Hence, the only recourse for the employee was the procedure involving the private arbitrator. Similar, in all the domains in which the States have extended the employees' individual rights, the union member employees who have tried to affirm these rights have seen their claims pre-empted (Stone, 1992). Finally, the system of collective labour relationships coming from the Wagner Act has confirmed a divide between collective bargaining and employees' individual rights. From this perspective, the State seems to be a sphere disconnected from the system of collective bargaining. However, it is important to add that refusing employees access to judicial courts has contributed to depriving employees of new individual rights that have been provided only since the 1980s.

The second series of criticisms is about the conceptions of law and of the role of the State in the regulation of labour relationships that Williamson develops. By defending the principles of the autonomy of private regulation and of economizing reasoning, Williamson builds the idea that economic agents can coordinate independently of public judicial intervention. Though private ordering agreements are efficient, and thus positive, State law must be 'put on the back burner' and relegated to the background. However, one of the more important arguments of the partisans of interventionism in labour regulation is the one-sidedness of the position between employer and employees. That is why Williamson tries to show that the role of the State is useless in trying to create a balance. This issue is very interesting because, as

Williamson notices, the balancing of power between employers and employees is among the objectives of the Wagner Act. In this regard, Williamson quotes the works of Stone (1981), for whom the Act has created a 'political reform' in which law 'must intervene actively to alter the definitions of property rights in order to create true equality' (Stone, 1981: 1580). Additionally, Williamson considers that the balancing of power is an ambiguous criterion. In fact, he is very critical of the concept of power (Williamson 1985, 1995, 1996a) and considers that 'the main problem with power is that the concept is so poorly defined that power can be and is invoked to explain virtually anything' (1985: 237–238). To reinforce his position, Williamson does not hesitate to quote March (1966), who thinks that 'power is a disappointing concept' (1966: 70).

Williamson is convinced that restoring balanced power relationships from law is a vague and consequently irrelevant initiative. According to him, the intervention of State positive law to protect employees' rights is needless because there are other instruments and mechanisms that depend on the private ordering domain and that infuse order and prevent conflicts. There are three main mechanisms that fit into this picture.

The first instrument involves collective bargaining that allows for the implementation of mechanisms fostering investments in specific assets. The rules of the internal labour market are central here. Employees who try to escape from the power of the employer can choose either to invest in human assets that can be deployed elsewhere

or to invest in specific assets. However, in the last case, they want, *ex ante,* to have a 'protective governance structure' (Williamson, 1985), namely, the rules of the internal labour market. In the case of the second instrument, employers have an interest in keeping 'their' employees and, therefore, do not want to exploit their position; otherwise, they would have to endure some important turnover costs, and employees would not invest in specific assets. The reputation of employers is also an important argument that plays an essential role. Finally, the third mechanism that Williamson uses applies to the possibility of adjusting the level of cooperation. According to him, employees who must accept less favourable work conditions have another defensive instrument, namely, their ability to not cooperate beyond the minimal level required in their contracts. Employees can 'adjust quality to the disadvantage of a predatory employer' (Williamson, 1985: 262). Because the employment contract is a long-term, incomplete contract, Williamson (1975) affirms that each employee is able to choose between two types of cooperation: the perfunctory (minimal) cooperation and the consummate (maximum) cooperation.

These three instruments are questionable. Concerning the first one, collective negotiation does not allow for really achieving a real balancing of power relationships. In fact, except for some items, such as the determination of wages, the rules of promotion, and the physical conditions of production, collective bargaining did not address many strategic aspects of the management of the firm, such as investment

policy or price policy. In other words, as Stone (1981) explains, 'management and labor do not resemble political parties in a legislature that jointly determine the rules of the workplace; doctrines, such as retained rights and the mandatory permissive bargaining distinction, limit the union's ability to contribute equally to the most crucial aspects of plant life' (Stone, 1981: 1566).

Though employees are not passive and powerless facing their employer, some believe that a strong limitation exists on their 'real ability' to exert credible threats and punishments toward their employer. In this point of view, the absence of reference to the functioning rules and conditions of labour markets in the works of Williamson is a real problem insofar as the existence of a significant unemployment rate strongly reduces the ability of employees to implement credible threats (Bowles and Gintis, 2008). In a world where there is a high level of unemployment, the analysis of power relationships is even more complex because it is difficult for employees to find a job again and to start a new cycle of valuable, specific human investments. Do employees really have the choice to invest or not invest in specific assets (Rajan and Zingales, 1998)? For that matter, what does it mean to 'invest in specific assets'? We leave these questions for future studies.

It is important to say here that the reduction of the number of union members and the decline of the post-Second World War model raise, in new terms, the question of power relationships between employees and employers. Taking into account only rules

coming from unions and management to achieve a balancing of the labour relationship is inadequate. In this sense, the Williamsonian approach to law concurs with that of the partisans of 'legal absenteeism' in labour law; the question of absenteeism was crucial in the United Kingdom during the 20th century (Collins, 1987). This issue can be linked to the conception of industrial pluralism. In light of these two currents of thought, collective bargaining is seen as a way to introduce democracy and justice in the firm. The partisans of absenteeism consider that legislative intervention is justified only in a few cases. Their main idea is the following: law must refrain from intervening because collective bargaining is sufficient to balance power relationships between employers and employees and, therefore, to resolve the contradiction between the values of civil society and the values of political society (Collins, 1987).

The differences between the model of labour relationships in the United States and the French model of labour regulation are also very informative. In the United States, labour relationships have been considered private law contractual relationships, whereas in France these labour relationships have been submitted to public ordering rules intended to protect the weaker party in the contract (see Supiot, 2010, on the evolution of these two models of labour law). The American model, very well explained by Williamson, is ultimately based on economizing logic, whereas the French model rests more on a political conception of labour relationships. As a consequence, the American model can function and can contribute to the balancing of power between employers

and employees only if there is a union representation powerful enough to foster this balancing. However, as we have previously explained, the growing disaffection of employees with unions and the limitations due to the absence of openness to external sources of law have led to the marginalisation of this model, with labour relations law being limited, in these circumstances, to only the individual contract.

Conclusion

The originality and analytical insights of Williamson's works relate to the building of a legal and economic approach to the internal organisation of capitalist firms (Williamson, 1984). Williamson considers his theory to be an unorthodox one (Williamson, 1996b) that strongly differs from the Chicago legal and economic approach (Posner, 1979). However, academic literature often undermines this originality and ignores, as a blind spot, the question of the critical assessment of this legal and economic approach to the firm and to labour relationships. This article aims to fill in this gap in literature by proposing a critical analysis of the conception of law that Williamson defends in his analysis of the management of labour relationships. More exactly, the objective of Williamson is to show both that the private ordering-public ordering divide is empirically justifiable and that the model of private ordering is more efficient than the model of public ordering.

From a positive perspective, we note that the Williamsonian analysis is well-founded regarding the post Second World War American model of collective labour

relationships regulation – at least, concerning the so-called organised sector. Nevertheless, we have seen that the evolution of this model and its limitations have contributed to a large reduction in the role of the private ordering model in labour relationships regulation. The role played by the organised sector has, thus, become quite minor. Consequently, it is the individual labour contract and not the collective convention that is the dominant model of regulation of labour relationships. It is a model in which the State has a strong role to play and is the first and main source of law. Additionally, what Williamson calls private ordering depends, in fact, upon the perspective on legal pluralism. This argument leads us to put the economizing logic and efficient reasoning that justifies the superiority of the private ordering model into perspective. However, it also causes us to argue that it is these very limitations that have led to the disaffection of employees with this model.

Thus, the theoretical framework of Williamson and the resulting analysis that he makes are of little interest and even seem to be irrelevant in the light of the current situation of labour relationships in the United States. That is why, to conclude, we want to draw the attention of readers to the necessity of adding to the Williamsonian incomplete analysis a historical viewpoint to shed light on the crucial issue of institutional change (North et al., 2009).

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