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## The compensation scale for unfair dismissal as a technique of government

1st Saint Sauveur workshop, march 22, 2019

### *Summary*

The compensation scale for unfair dismissal has been introduced by executive orders in 2017 in order to simplify the work of labour jurisdictions that have to evaluate the prejudices of the workers in the context of unfair dismissals. The aim of the paper is to examine, with the tools of the philosophy of technique, the epistemic principles of an objective and uniform scale in such judiciary processes. The point is that the introduction of this type of instrument requires a clarification of the criteria of judicial efficacy, which cannot be considered apart from political conceptions of social justice.

### **Introduction**

In this presentation I will try to analyse a recent reform held by French president Macron in September 2017, soon after his coming in office. These decisions were taken as legislative decrees (“ordonnances”), that is to say, without any real control of the Parliament. They aimed at regulating labour market, upon the hypothesis that economic growth was being slowed down by its structural rigidities, favouring, in particular, “insiders” and preventing “outsiders”, that is, unemployed people, to get a job.

Since I am not a specialist of social policies, I won't try to discuss this reform directly. I will simply focus on a point, which was one of its most symbolic and discussed aspects: the compensation scale for unfair dismissal. Concretely, it entails a framing of judicial decisions, with a minimum and a maximum amount of money to be allowed to the former employee, according to the seniority of the employee in the corporation until the date of his or her dismissal without any real and serious motive.

What I find particularly striking here is the degree of automaticity and impersonality conveyed to judicial decisions by this measure. Hence, rather than to interrogate its intrinsic legitimacy, I would like to focus on its rationality as a technique of government. In this respect, what is striking with the Macron decree is the search for something as a mechanical precision, which conveys not only the idea of a technique of government, but of an *automatic* settlement, so that the judicial decision should not only be impartial, but also *impersonal*.

There is no doubt that governing is an increasingly technical matter, as a series of recent studies have shown. This is due to several factors, among others increasingly technical aspects of public policy (e.g. dealing with health, energy, environment, and so forth), and the rise of New Public management and its policy indicators. However, it should be noticed that as such, the notion of government is fundamentally related to a technique, namely the technique of steering a boat. Consequently, a technical measure can be examined with regards to its intrinsic rationality as a technique.

I am referring here to a set of philosophical theories of the technical object, in particular this of Gilbert Simondon (*Du mode d'existence des objets techniques*, 1958, not translated). Simondon underlined the point that what characterizes a technical object is not only its adequation to an end, but also its insertion into an associated environment.

For instance: one can evaluate a technique considering

- its goal (e.g. declaring one's own incomes, in order to pay income taxes)
- its means (e.g. a computer, or a simple pen)
- its associated environment (the infrastructures of communication, and also the power supplies without which the latter could not stand).

The point here is that the associated environment should not be forgotten. For is it worth for me buying a computer just to declare my incomes? Do I have an Internet access anyway? These are important questions, as the public administration technological modernization tend to raise serious difficulties with people who don't have not enough resources to benefit them. Only focusing on means and ends thus tends to be misleading. In particular, in economic analysis, efficacy, efficiency and economy tend to be the only three criteria that guide public decision.

The notion of associated environment derives from the philosophy of life, and especially from the study of living beings. The influential French thinker Georges Canguilhem, synthetizing some prominent biological work of his time, underlined the fact that for a living being, its immediate environment was not only an energy reserve, nor did function merely as a filter in the selection process of the species, but was to be considered as its positive condition of development, in a symbiotic fashion. Therefore, in the same way should be considered the insertion of a technical object in the environment in which it functions and makes sense.

But before turning to the analysis of the Macron decrees in that respect, I will start by a reminder of some classical theories of justice in order to point out in what way these decrees can be said to meet some standards of equality and fairness. I will then examine the main difficulty of the macronist approach, which I will call the ambiguity of the concept of order,.

## **1. Compensation and justice: classical references**

In Plato's *Republic*, justice was defined as the corollary of the ordering of a City. A just City was a City put in order, that is to say, rationally organized according to the criterion of goodness. Plato's student, Aristotle, shed light on the process of restoring the order that had been breached. And to do so, as he said in the famous fifth book of *Nicomachean Ethics*, justice consists in giving to each what belongs to him, or in latin words, *suum cuique tribuere*.

The scale of compensation corresponds to the case of a conflict between two individuals with a law that determines in advance a proper reparation for the prejudice. The problem is to determine a principle from which one can deduce a fair amount for the compensation. Which is always difficult because the law cannot properly foresee every possible particular case. Therefore, Aristotle says, the judge can use a tool of correction, which he calls equity.

I quote:

The same thing, then, is just and equitable, and while both are good the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.

Thus, strictly taken, the law is unfair, but taken with equity, it is just again. The necessity of equity is founded on a very strong argument, of an ontological kind: the very nature of what he calls "the matter of practical affairs", characterized by a native, irreducible indeterminacy:

In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.

If we now turn now to the Macron decrees, these quotations may at first glance be interpreted as a condemnation of the compensation scale, for it being too strict as a frame of judicial decision, contrary to this principle of indeterminacy emphasized here. However, this would probably be misleading. As a matter of fact, such a scale is indeed a measure of a practical order that comes to fill the gap between a general principle (this of a fair compensation) and the unpredictable particular case. Equity, Aristotle argues, allows the one who knows he is right to accept to receive *less* than he should. I quote again:

It is evident also from this who the equitable man is; the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law off his side, is equitable.

In this perspective, the government intervenes to supply the judge in order to give him a corrective mediation, a relatively flexible rule (with a minimum and a maximum amount) very much alike the one used by the Lesbian masons. What is more, this rule is based on an objective criterion, the seniority of the employee. Hence this law resembles what Aristotle calls a “decree”, and in fact even the term seems to be appropriate. Therefore one has to understand here that the aim of the equitable mediation is not to protect the victim, but to protect, in a way, the aggressor, the one who, violating the law, also damages the right of somebody else.

Of course, this presentation is in many respects, counter-intuitive, not to say slightly provocative. One would rather think that an equitable judgement should qualify situations of over-indebtedness, when a creditor, taking into account the situation of his debtor, accepts not to receive what he is allowed to do. And the reason is that in this case, the debtor is too weak to act as a free agent. But weakness and strength are not among the criteria of equity Aristotle tells us about here. Therefore the controversial character of the measure appears to come from this point in particular. Now how can we understand the concept of order that is at stake here?

## **2. Understanding the order of compensation**

### **2.1 Rational economic order vs. irrational moral order**

In fact, the Macron device does not only allows the law to adapt to the fact: it deeply modifies the ordinary account of the law itself, that is to say, the spirit of the law, the very principle of the compensation. For the employer here is no longer considered as a moral agent but as an economic one, who can be defined by his belonging to a general system, the functioning of which has to be carefully monitored. What is at stake is to reduce the uncertainty of the employers who are susceptible to be condemned if they appear to have dismissed someone without any real reason to do so. In this perspective, the absence of a compensation scale, introducing a kind of “judiciary insecurity”, has to be considered as a factor of systemic risk. On the contrary, reducing the judge’s interpretation margin by the mechanization of the judicial process appears as a way to enhance the general efficacy of society’s economic regulation.

But then what about the employee? Granted, he is also an economic agent, the security of whom has to be taken in consideration. But as such, he fundamentally depends on his employer, who is the true cornerstone of the system, the condition of possibility of the employee as such: consequently, the case of the latter should be treated in priority.

Therefore, all this reasoning implies a redefinition of the order as such. The order that the judicial process has to restore is not anymore the moral order as it is roughly conceived by the concerned individuals, but it is the product of a deliberate construction: it is an **economic** public order. By contrast, moral conceptions of order and justice are considered as essentially subjective, relative, unpredictable, and finally irrational. Economic public order is a product of the market, an institution composed of economic agents, who are supposed to act essentially on the base of quantified information that can take the form of costs and benefits. As a matter of fact, the compensation is not calculated with regard to the damage that the employee has suffered, but to a costs and benefits calculus of the employer, who is the only economic agent that has to be taken in consideration here. Which means that the fault of the employer is integrated to the series of costs that he may have to take in charge.

## **2.2 The two-folded legitimacy of a political technology**

In that sense one can say that modern technology of government by the market, that is commonly defined as economic liberalism, constructs its own object, or aims at building the associated environment of economic agents with market infrastructures, in order to produce market value. It is a technology in that sense that it is a set of techniques articulated to a general theory, the rationality of which being defined from the exclusion of so-called irrational behaviours. This is the reason why its critiques, in a large extent, appear as pointless. Either ordo-liberals or members of the Austrian school as Hayek take for granted that markets are in no way natural to human societies, but represent the best tool ever invented in order to guarantee individual freedom.

It is thus pointless to point out the fact that social order, in the ordinary way it is perceived, does not correspond to economic order: for this is exactly the reason why, for its advocates, the latter has to be supported. Simply, because social reality is not economic order, it is of primary importance to reduce the gap between the two, not by reintroducing ordinary social and moral points of view in economic reasoning, but by transforming human behaviour so as to build a market as rational and inclusive as possible. The only alternative in this respect being, for lack of a better grid of analysis of social reality, to sink into a form or another of chaos, indeterminacy, or in a more economic fashion, in a general impoverishment.

A problem though is bound to remain unsolved: the advocates of such common good policies are doomed to suffer universal reprobation. For during a long period of time, until the definitive and universal settlement of the market throughout the world, a good deal of vulgar moral reasoning will remain vivid. For instance people will continue to consider that an employee who is victim of an unfair dismissal suffers a damage that is essentially different of, and superior to, this of his employer. So they will perpetually have to justify themselves, invoking reason, pedagogy, economic education, while confronting the irrationality, more or less deliberate ignorance, or crude sentimentalism of their opponents. Waiting for them to eventually recognize the objective success of their economic policy, and the final coincidence between economic agents and political actors, that is to say, the electoral body. So that finally, the object of governmental technology will be fully identical to the collective subject that gave it its legitimacy: the people, finally identified with the economic agents of the market society. Of course, such an ideal has to be asymptotic, but it not necessary to reach it to consider its critiques as deeply irrational.

From a technical point of view, the salient point in the political technology revealed by this tool of government is its constructivist inspiration, expressed by its automatic fashion. Being constructivist, it is undoubtedly bound to neglect the primary social environment in which it appears in the first place. How should we define social order as such? I think it is, in fact, not necessary to have in mind such a concept to understand the conflict between the two interpretations that raise from the use of this tool of government.

### 3. Two concepts of social order

These interpretations also entail a conflict on the concept of disorder. On the one hand, disorder is the opposite of the social rationality that the scale of compensations aims at building, on the other hand, disorder is the effect of such a constructivist conception of social relationships. In this last perspective, it should be noticed that an alternative conception of what social order is or should be is not needed. One has just to consider that the instrument does not properly fit into its social environment, and does not, or even raises, difficulties that it aims at overcoming.

I will not here try to set an exhaustive view but just to point out some salient elements of the debate.

- Objectivity & impersonality of the scale *vs* subjectivity & relative obscurity of the claim

First of all, concerning the conception of justice. The compensation scale for unfair dismissal introduces, as I said, an objective criterion, that guarantees to all parties an equal treatment whatever the jurisdiction on the national territory. Being impersonal, it transcends the infinite struggle of subjectivities, and the inscrutable nature of the damages.

- Automaticity of the compensation *vs* institutional regulation of social conflicts

But it does so at the price of transferring the conflict on a whole new ground, the economic field. However, one can say, a social conflict essentially implies non strictly economic dimensions, even when it takes place in the workplace. The judicial process also has a symbolic dimension in this regard. A court decision has a social value, and heavy social consequences for both parties. One of the objectives of the reform is precisely to avoid this trial, and consequently to reduce the charge of work of the concerned jurisdictions, enhancing their own performance. For indeed, if the result can be known in advance, there is evidently less incentives to go to trial.

- Quantification of work experience (seniority) *vs* qualitative evaluation of the worker

In this perspective, the automaticity of the decision tends to conceal all the non-economic dimensions of the conflict, in particular by reducing the compensation criteria to the sole and unique element of the abstract seniority in the corporation. The qualitative dimension of work experience is thus replaced by a merely quantitative approach. What is more, in this perspective, this goes alongside with another reform of the Macron decrees, that is the programmed disappearance of the *Comités d'Hygiène et de Sécurité au Travail*, literally Committees for Hygienic and Security issues in the Workplace, an independent structure that was bound to allow the different members of a corporation to discuss and overcome all non-economic aspects of their work. One can doubt that the disappearance of such instances will automatically entail the disappearance of social conflicts: on the contrary, it may as well be viewed as a promise of future brutalization of social relationships. Hence, such building of economic order seems to be blind to the symbolical aspects of social life.

- Economical agency *vs* symbolical aspect of social life

The settlement of a scale of compensations can thus be connected to the general trade of benchmarking, that allows the comparison, on abstract bases, of heterogenous production processes, such as the management of stocks in different corporations, or, in the field of services,

the management of the queue in hospitals or in the post office. The enhancement of productivity is based on performance quantified indicators that are non-easily contestable. But, as some authors have shown, this entails some real difficulties.

- The first being an oversimplification of complex realities. About the queue in the emergencies at the hospital, benchmarks tend to point out only one factor, that is the efficacy of the team in charge. But there are also systemic environmental factors such as the number of physicians in the area, which is out of the scope of the emergency team. Hence the comparison involves unfair judgements and does not really contribute to solve the problems it points out.
- In this respect, the use what is (curiously) called “quality indicators” tends to induce a merely procedural and superficial treatment of problems, rather than a real confrontation with the difficulties of the field. What is worse, rather than being encouraged to adapt to their environment as living beings do, social agents, requalified as economic agents, are led to evaluate their action on the sole criterion of the indicators and to neglect all the non-quantifiable aspects of their work. So, rather than facing responsibilities, they are encouraged to avoid to see themselves as moral autonomous agents. People just conform to what they are told to be the “best practices”.

In our case, the compensation scale can be viewed as a unique procedure for various and complex situations, simplifying them while aiming at reducing a “risk factor”, this of the judicial uncertainty for the employers, while eliminating all other aspects of the problem.

## **Conclusion**

The philosopher is not in position to take public decisions. It can only appreciate the rationality of the reasonings that lead to them. Therefore, I will not try to estimate the efficacy of the scale in the perspective, either of economic growth, or of social justice; and it is anyway difficult to say how and even if this measure will in the end be applied (the question of its conventionality with regard to international texts still being discussed).

What can be said is that such efficacy is subject to conflicting interpretations as long as one takes into account the environment and not only the means and ends of the technical instrument.