

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 4, No. 2 May-June 2015



**ADAPT**  
www.adapt.it  
UNIVERSITY PRESS

**ADAPT** *International School of Higher Education in Labour and Industrial Relations*

*Scientific Directors*

Lauren Appelbaum (USA), Greg Bamber (Australia), Stuart M. Basefsky, (United States), Daria V. Chernyaeva (Russia), Richard Croucher (United Kingdom), Maurizio del Conte (Italy), Tomas Davulis (Lithuania), Tayo Fashoyin (Nigeria), József Hajdu (Hungary), Ann Hodges (USA), Richard Hyman (United Kingdom), Maarten Keune (The Netherlands), Chris Leggett (Australia), Guglielmo Meardi, (United Kingdom), Shinya Ouchi (Japan), Massimo Pilati (Italy), Valeria Pulignano (Belgium), Michael Quinlan (Australia), Juan Raso Delgue (Uruguay), Raúl G. Saco Barrios (Peru), Alfredo Sánchez Castaneda (Mexico), Malcolm Sargeant (United Kingdom), Jean-Michel Servais (Belgium), Silvia Spattini (Italy), Michele Tiraboschi (Italy), Anil Verma (Canada), Stephen A. Woodbury (USA)

*Joint Managing Editors*

Malcolm Sargeant (Middlesex University, United Kingdom)  
Michele Tiraboschi (University of Modena and Reggio Emilia, Italy)

*Editorial Board*

Lilli Casano (Italy), Francesca Fazio (Italy), Emanuele Ferragina (United Kingdom), Antonio Firinu (Italy), Valentina Franca (Slovenia), Maria Giovannone (Italy), Erica Howard (United Kingdom), Karl Koch (United Kingdom), Lefteris Kretsos (United Kingdom), Attila Kun (Hungary), Felicity Lamm (New Zealand), Cristina Lincaru (Romania), Nikita Lyutov (Russia), Merle Muda (Estonia), Boaz Munga (Kenya), John Opute (UK), Eleonora Peliza (Argentina), Daiva Petrylaite (Lithuania), Ceciel Rayer (The Netherlands), Aidan Regan (Ireland), Marian Rizov (United Kingdom), Salma Slama (Tunisia), Francesca Sperotti (Italy), Araya Mesele Welemariam (Ethiopia), Barbara Winkler (Austria), Machilu Zimba (South Africa)

*Language Editor*

Pietro Manzella (ADAPT Senior Research Fellow)

*Book Review Editor*

Chris Leggett (James Cook University, Australia)

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 4, No. 2 May-June 2015

**@ 2015 ADAPT University Press**

---

Online Publication of the ADAPT Series  
Registration No. 1609, 11 November 2001, Court of Modena  
*www.adaptbulletin.eu*

The articles and the documents published in the *E-Journal of International and Comparative LABOUR STUDIES* are not copyrighted. The only requirement to make use of them is to cite their source, which should contain the following wording: **@ 2015 ADAPT University Press.**

# Regionalisation of Labour Law in Africa: The OHADA Project

Philippe Auvergnon \*

---

The regionalisation of labour law can be conceived as the implementation of labour rules and institutions that are specific to a group of States from one part of the world. Although this phenomenon is quite distinct from that of labour law universalisation, it is not necessarily in contradiction with it. Universalisation is promoted and conducted essentially under the aegis of the International Labour Organisation. Via ratifications of its conventions and the application of its recommendations, significant moves are being made towards harmonisation between the labour laws of Member States.

In the case of Africa, leaving aside the period when rules were applied that were specific to the various colonial areas or “empires”,<sup>1</sup> developments in labour law post-independence have been influenced more by universalism than by regionalism. In a way, the process has been much the opposite, for example, of the development of Community social law within the European Union. Although there was a sort of harmonisation of labour legislations in the final quarter of the 20<sup>th</sup> century, with the application of “structural adjustment plans” and “forced” revision of many labour codes or legislations, this was very much driven by the international context and pressures from “donors” (World Bank, IMF) and in no way by any regional will to proceed in such a way.

---

\* Director of Research at the National Centre for Scientific Research (CNRS), Centre for Comparative Labour and Social Security Law, Bordeaux University (France).

<sup>1</sup> Cf. *inter alia*, the survey of labour regulations in Africa in Belgian, British, French and Portuguese “territories” (“Les problèmes du travail en Afrique”, ILO Geneva 1958, 791 p.)

However, the question of labour law and social protection is present in many national Constitutions<sup>2</sup> and Declarations of Rights, such as the African Charter on Human and Peoples' Rights<sup>3</sup> or the Charter of Fundamental Social Rights in the Southern African Development Community.<sup>4</sup> The precise question of labour law harmonisation, meanwhile, has been raised by economic integration projects. Although such undertakings obviously place the emphasis on rights of an economic nature (Customs regulations, taxation, protecting free competition, etc.), the creation of a "Customs union" or "common market" necessarily implies free movement not only of goods, but also of people. On this point, it can be noted that the African Economic Union Treaty (AEU) expresses the commitment of the 51 Member States to take the necessary individual measures, on bilateral or regional levels, to move gradually towards the free movement of people.<sup>5</sup> The Founding Treaty of the Economic Community of Central African States (ECCAS) also makes provision, among its objectives, for the gradual removal of obstacles to the free movement of people, goods, services and capital, and for the right of establishment.<sup>6</sup> The Treaty of the Economic Community of West African States (ECOWAS) is much more explicit, asserting that "Member States undertake to (...) harmonise their labour laws and social security regulations".<sup>7</sup> The West African Economic and Monetary Union

---

<sup>2</sup> In reality, it is usually in the lists of entitlements in the constitutions or in their preamble that "labour law" is found (e.g. Ivory Coast, Congo, Senegal, etc.)

<sup>3</sup> Charter adopted in 1981 by the Organisation of African Unity, now the African Union (*Cf. inter alia*, the recognition of the freedoms of association (art.10), of assembly (art. 11) of movement (art. 12) and that of the right to work and to equal pay for equal work (art. 15).

<sup>4</sup> Charter adopted in 2003 by Angola, Botswana, DR of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

<sup>5</sup> At the initiative of the OAU, the Treaty establishing the AEC was signed on 3 June 1991 in Abuja (Nigeria). It came into force on 12 May 1994.

<sup>6</sup> Art. 4-1, e of the Founding Treaty of the ECCAS of 18 October 1993. The ECCAS comprises the following countries: Angola, Burundi, Cameroon, the Central African Republic, Congo, Gabon, Equatorial Guinea, Rwanda, Sao Tome and Principe and Zaire (currently named the Democratic Republic of Congo). The Treaty establishing the Economic and Monetary Community of Central Africa of 16 March 1994 between six countries (Cameroon, Central African Republic, Congo, Equatorial Guinea and Chad) makes no reference to the free movement of people. This subject seems much more sensitive in Central Africa than in West Africa.

<sup>7</sup> Art. 61, 2, b of the Founding Treaty of ECOWAS of 28 May 1975, as revised on 24 July 1993. ECOWAS includes the following countries: Benin, Burkina Faso, Cape Verde,

(WAEMU) Treaty, meanwhile, states that “subject to those limitations justified on grounds of public order, public safety and public health, the nationals of one Member State shall benefit throughout the territory of the Union from freedom of movement and residence, which shall imply: the abolition of any discrimination based on nationality between the nationals of Member States, in their search for or exercise of their employment, except for civil service jobs.”<sup>8</sup>

That economic integration projects should bring with them a will to harmonise part of labour law is in no way surprising. What appears more original, running parallel to this phenomenon, is the development in Africa of “integration via norms”. Rather than harmonisation, this has seen the unification of certain laws: intellectual property law,<sup>9</sup> insurance law<sup>10</sup> and banking law.<sup>11</sup> It will be noted that all these laws relate to trade and business.<sup>12</sup> Social security<sup>13</sup> and social welfare law can also be added to this list.<sup>14</sup> The “Treaty of Harmonisation of Business Law in Africa”<sup>15</sup> is part of this movement. It states that it is pursuing this objective by “the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by

---

Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

<sup>8</sup> Art. 91 paragraph 1 of the WAEMU Treaty of 14 November 1973 after its revision of 29 January 2003. The WAEMU includes the following countries: Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal, Togo.

<sup>9</sup> *Cf.* the African Regional Intellectual Property Organisation (ARIPO) created in Bangui on 2 March 1977.

<sup>10</sup> *Cf.* the Inter-African Conference on Insurance Markets (CIMA) created in Yaoundé on 10 July 1992

<sup>11</sup> *Cf.* the banking laws of the WAEMU and ECCAS.

<sup>12</sup> Those laws are more “technical” in nature than “socially sensitive”, such as family law.

<sup>13</sup> *Cf.* The General Convention on Social Security of the Joint Afro-Malagasy Organisation (OCAM). This organisation dating back to 1965 ceased its activities in 1985 and the social security convention signed by its members now seems to be “dormant”.

<sup>14</sup> *Cf.* The Inter-African Conference on Social Welfare (CIPRES) set up in 1992 by the same States that were to create the OHADA in 1993. The CIPRES aimed to contribute to rationalising social welfare systems and facilitating harmonisation of national provisions applicable to social security system organisations, including by studies.

<sup>15</sup> The Treaty establishing the OHADA was signed in Port Louis (Mauritius) on 17 October 1993 between the following 14 States: Benin, Burkina-Faso, Cameroun, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. Since then, the following have also become OHADA members: Guinea, Guinea Bissau and the Democratic Republic of Congo (formerly Zaire). OHADA thus comprises 17 States.

encouraging arbitration for the settlement of contractual disputes”<sup>16</sup>. Business law is defined as “regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect of credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration; are also included the following laws: Employment law, Accounting law, Transportation and Sales laws (...)”<sup>17</sup>. To date, nine “Uniform Acts” have been adopted and, for some of them, revised.<sup>18</sup>

As early as 1999, labour law was written into the harmonisation schedule of the OHADA.<sup>19</sup> Aware of the “delicate and complex” nature of the subject, the Council of Ministers<sup>20</sup> asked the Permanent Secretariat “to involve the Ministers for Labour and social partners of the Contracting States in the harmonisation process”. In 2001, the International Labour Office, at the request of OHADA, conducted a comparative study of labour laws in the “Contracting States”, accompanied by proposals to secure uniform legislation.<sup>21</sup> The principle of drafting a “Preliminary Draft” for uniform acts was adopted, without raising any genuine challenges.<sup>22</sup> The heritage of the 1952 French Overseas Territories Labour Code, common to a large part of the countries in the OHADA area, and convergence via the reforms of national codes under pressure from donors, was seen as factors that could facilitate or even justify harmonisation. The economic and social interest of regionalising labour law prevailed, especially as many eminent African legal experts had long been advocating the need for “a relatively uniform, relatively

---

<sup>16</sup> Art. 1, Treaty on the harmonisation of business law in Africa (<http://www.ohada.com/traite.html>)

<sup>17</sup> Art. 2. The OHADA Treaty was revised in Quebec on 17 October 2008, without amending Article 2. (<http://www.ohada.com/traite-revise.html> ; see: P.-G. Pougoué (dir.). “Encyclopédie du droit OHADA”. Ed. Lamy Paris 2012, 2275 p.; Cl. Moore Dickerson (ed.). “Unified Business Laws for Africa. Common Law Perspectives on OHADA”, Second edition, IEDP, London 2012, 191).

<sup>18</sup> <http://www.ohada.org/actes-uniformes.html>

<sup>19</sup> Cf. OHADA Council of Ministers meeting in Ouagadougou (Burkina-Faso) on 11 March 1999.

<sup>20</sup> The Council of Ministers is composed of the Ministers for Justice and for Finance of the OHADA Treaty Contracting States. The Presidency is held in turn by each of the States for a one-year term. This body has powers to adopt “uniform acts” (unanimously).

<sup>21</sup> Cf. J.-M. Béraud. “Etude préalable à l’adoption d’un Acte uniforme en droit du travail dans le cadre de l’OHADA”. ILO Geneva: IFP/Dialogue, 2003, 102 p.

<sup>22</sup> Cf. G. Minet, C. Vargha. *Perspectives du droit du travail en Afrique : entre la voie de l’OHADA et les recommandations de la Banque mondiale*, Education ouvrière 2006/2-3, n° 143-144, sp. p. 76.



homogenised and sufficiently strong legal order”.<sup>23</sup> Some enlightened spirits did raise the question, however, of the scope within which social law should be made uniform.<sup>24</sup>

After a long and complicated elaboration process, a draft uniform act on labour law received the approval, subject to some reservations, of the OHADA National Commissions of the “Contracting States” in autumn 2010.<sup>25</sup> As all OHADA uniform acts require unanimous adoption by the Council of Ministers,<sup>26</sup> the unofficial reluctance of at least one Central African State would seem to explain the fact that the text still remains a draft in 2015. However, if our aim is to study labour law in Sub-Saharan Africa today, the OHADA draft must be taken into account. It is already a benchmark, as seen in recent reforms of national codes, for example.<sup>27</sup> At all events, its content bears testimony to the influence of international trends in labour law (I), as well as to an original normative tradition (II).

## I. The Mark of International Trends

The technical and financial support provided by the ILO in elaborating the OHADA draft act is not enough in itself to explain the presence in the first title of the act of the “fundamental rights of the person at work”. This “head-on” position indicates not only the importance given to promoting fundamental rights (A), but also the role of points of reference, of keys for reading and therefore interpreting, that they are supposed to fulfil for the text as a whole. In times of free-market economic policies, this recognition of fundamental rights at work is not really in contradiction with the quest to make labour law more flexible (B).

---

<sup>23</sup> K. MBaye. *L'unification du droit en Afrique*. Revue sénégalaise de Droit, 1971, n° 10 p. 67.

<sup>24</sup> J. Issa-Sayegh. *Questions impertinentes(?) sur la création d'un droit social régional dans les Etats africains de la zone franc*. Bulletin de droit comparé du travail et de la sécurité sociale, 1999 sp. p. 87 et s.

<sup>25</sup> The National Commissions, “extended” to include representatives of the labour administration and social partners in all the Contracting States, were represented in Lomé from 27 September to 2 October 2010.

<sup>26</sup> Cf. Article 8 of the OHADA Treaty: “Adoption of the Uniform Acts by the Council of Ministers requires unanimous approval of the representatives of the Contracting States who are present and who have exercised their right to vote.”

<sup>27</sup> While contributing to the process of drafting a uniform act intended to replace a large part of their national laws, a number of States have adopted new labour codes in recent years (Togo 2006, Burkina-Faso 2008 and Niger 2012) or are in the process of doing so (e.g. Benin, Ivory Coast and Guinea Bissau).

## A. Promoting Fundamental Rights

The writers of the draft intentionally avoided making any express reference to the conventions considered as “fundamental” by the ILO Declaration of 18 June 1998. The text often comes close to them although, in a way, it still remains short of the Declaration (1). At the same time, that is not all there is to it, in that the text also goes beyond the sole “fundamental rights” referred to in the ILO Declaration (2).

### 1. Short of the 1998 ILO Declaration

The ILO 1998 Declaration indicates that all Member States have an obligation to respect, promote and realise, in good faith, the following principles: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.<sup>28</sup> What about the OHADA draft?

The principle of the freedoms of association and collective bargaining acknowledged by ILO Conventions Nos. 87 and 98 is stated in Article 5 of the draft. The article emphasises, however, that both “workers and employers” benefit from these freedoms. Somewhat surprisingly, although certainly with the intention of asserting identical rights, the same article states that “employers, workers and their representatives enjoy a right of expression on the content, conditions and organisation of work”. The elimination of forced or compulsory labour is stated in Article 3, almost in the same terms as those in ILO Convention n° 29. However, it is not the influence of the 1998 Declaration that should be seen here, but the tradition of absolutely prohibiting forced labour in African national laws and codes, some of them following more particularly the French Overseas Labour Code of 1952.<sup>29</sup> At most, it could be emphasised that in precisely taking up the passage in Convention OIT n° 29 indicating what the term

---

<sup>28</sup> Declaration on fundamental principles and rights at work, adopted by the ILO on 18 June 1998 (*Cf. inter alia*, J.-M. Servais, La Déclaration adoptée par l’OIT en 1998, nouvelle méthode de régulation?, in Ph. Auvergnon (dir.), Les régulations sociales en devenir, Chronique sociale, Lyon, 2008, p. 186).

<sup>29</sup> *Cf.* Art. 2 of the French Overseas Labour Code (Law of 15 December 1952).

“forced or compulsory labour” does not include, the aim was to “protect” certain legal and socio-cultural particularities.<sup>30</sup>

Concerning the abolition of child labour, Article 4 of the text includes the reference to the age of 15 from ILO Convention n° 138. It also mentions, and fortunately so in light of national realities, the variations provided by the international standard. In addition to this, Article 4 lists the “worst forms of child labour” that are prohibited, using the terms of ILO Convention n° 182.<sup>31</sup> Finally, in line with ILO Convention n° 111, Article 6 of the draft prohibits “any discrimination in employment and working conditions”. However, some differences can be noted from the international standard as regards certain grounds or criteria of discrimination, such as the omission of “social origin” but the addition of “ethnic group” and “trade union membership”. In addition to this, no mention is made, even implicitly, to Convention n° 100 and to “equal remuneration”. Strangely, it is in the heart of the text, in Article 115, that it is stated that “For equal working conditions, qualifications, productivity and service quality, wages shall be equal for all workers, whatever their gender.”<sup>32</sup>

## 2. Beyond the 1998 ILO Declaration

Article 7 of the OHADA draft asserts one right that is missing, astonishingly, from the 1998 Declaration: “All workers are entitled to protection of their health and safety at work”. At a time when the ILO, building on the 1998 Declaration, is promoting “decent work”, is it not, indeed, an essential right to be able to work in safe, healthy conditions? We know the extent to which this question, for obvious economic but also cultural reasons, is a sensitive one in OHADA countries<sup>33</sup>. Of course, it is physical health and safety that are referred to here in most cases. However, it is also the “fundamental” protection of the psychological or mental dimension of worker health that is intended. Evidence of this is

---

<sup>30</sup> Cf. Art. 2, pt 2 of ILO Convention n° 29 (e.g. minor communal services).

<sup>31</sup> Cf. *inter alia*, P. Kalay, Application de la convention n° 182 de l’OIT en République Démocratique du Congo. Cas des enfants soldats, Editions universitaires Européennes, 2012, 128 p.

<sup>32</sup> Cf. *inter alia*, N. Silue, L’égalité entre l’homme et la femme en Afrique noire francophone. Essai sur la condition juridique de la femme en droit social ivoirien, PhD Thesis, University of Paris Ouest la Défense, 2008, 634 p.

<sup>33</sup> Cf. *inter alia*, Ph. Auvergnon (dir.), Du droit de la santé et de la sécurité au travail en Afrique subsaharienne, Ed. L’Harmattan, Paris, 2014, 282 p.

the fact that the fundamental right asserted in Article 7 is followed in Article 8 by another innovation, prohibiting “any violence resulting from a situation in which the worker is persecuted, threatened or assaulted, mentally or physically, in the execution of the employment contract (...)”, and “any moral or sexual harassment at work resulting from abusive and repeated conduct of any origin”. It is clearly the person as a “whole” who is being granted a fundamental right to health and safety at work.

Another original contribution of the draft certainly resides in the prohibition, in the “fundamental rights” chapter, of “any discrimination against a worker with a disability or serious illness, in particular HIV, who is fit for employment”. Such an assertion bears clear testimony to a determination to take account of certain realities but also, and above all, to reject any exclusion for which there is no objective justification. Given that fundamental rights, including at work, do contribute to the model of society, it is not surprising to see that Article 9 of the draft states that any breaches of those rights “give rise to charges.”<sup>34</sup>

### **B. Making Labour Law More Flexible**

The project contains a definition of the term “worker” implying that of the “employment contract”. It states (possibly echoing the forced labour of the colonial days?) that this contract is individual and entered into freely.” It seems realistic, in light of the usually informal employment relationships, when it states that “the existence of the contract is ascertained, subject to the provisions of this Uniform Act, in the forms the contracting parties choose to adopt”. But in reality it makes extensive provision for formal relations. De facto and de jure, the OHADA draft intends to provide workforce management tools for investors, rather than large corporations in fact, by diversifying contract forms (1), offering possibilities for adapting working time (2) and facilitating contract termination (3).

---

<sup>34</sup> OHADA powers include the definition of criminal qualifications, but it does not have the power to set the applicable sentences. That power remains in the hands of each Member State.

## 1. Diversified Contract Forms

Unlike French law, but like in Spanish law for example, it is not stated that the common law employment contract is an open-ended one: “the contract may be for a fixed term or open ended”.<sup>35</sup> The “normal” contract may therefore be a fixed-term one. When this is the case, the employment relationship is subject to genuine formal requirements. It is drawn up in writing<sup>36</sup> and, in principle, signed for at least two years, renewable once.<sup>37</sup> However, this principle of non-renewal does not apply to a certain number of workers,<sup>38</sup> including workers employed by the day, seasonal workers, workers taken on to carry out work resulting from an exceptional and temporary increase in activity, those employed for the provisional replacement of a worker, or workers in sectors of activity in which it is habitual not to enter into open-ended contracts. If we also note that use of fixed-term contracts is not restricted to precise hypotheses, it will be seen that they can be used very freely and, in certain cases, without any limits (replacements, increases in activity, daily workers, seasonal workers, etc.).

The “part-time contract”, meanwhile, is defined by the duration of work, which must be at least one-fifth less than the official or normal working hours. The reference to the former French rules of 1982 is evident here. Whether the contract is open-ended or for a fixed term, it must be in writing and contain a certain number of items of information (qualification, pay, weekly working hours, etc.). Provision is made for the possibility of doing “additional” hours on top of those specified in the contract, subject to the worker’s agreement, paid as “normal” working hours and not as “overtime”.<sup>39</sup>

Finally, we should note the generalisation, if not the consecration, by the OHADA draft of “temporary agency work”,<sup>40</sup> with the existence of a “temporary employment contract entered into in writing between the temporary employment agency and the user company”.<sup>41</sup> Unlike fixed-

---

<sup>35</sup> Art. 11.

<sup>36</sup> Art. 20.

<sup>37</sup> Art. 22.

<sup>38</sup> Art. 23.

<sup>39</sup> Art. 24.

<sup>40</sup> Art. 72.

<sup>41</sup> *Idem*.

term contracts,<sup>42</sup> there are conditions on the use of temporary contracts which “must not have the purpose or effect of filling a position linked to the normal, ongoing activity of the user company on a lasting basis. Workers from temporary employment agencies may only be used for the execution of a precise, temporary task, referred to as an “assignment”, particularly in the following cases: replacements of a worker whose employment contract has been suspended; temporary increases in the activity of the company; seasonal work. In no case may the temporary work contract be entered into to replace a worker whose contract has been suspended further to a collective labour conflict or to carry out particularly dangerous work”.<sup>43</sup> The temporary contract is in writing and must contain “a precise term” or “be entered into for a minimum term”.<sup>44</sup> In all cases, its duration may not exceed two years, renewals included.<sup>45</sup>

## 2. Adaptations of Working Time

Given the habitual scale of agricultural holdings and the traditional ways in which workers are managed in agriculture, it might be seen as surprising to find annualised working time specified for farms, set at 2,400 hours.<sup>46</sup> Is the aim here to target large companies, and in particular forestry? Whatever the case, it is far from certain that there is any great demand for annualised working time management among most of the agricultural holdings in the African countries concerned here! More generally, certain provisions on working time demand resources and skills that are rarely available in a small or medium-sized company; such is the case of equivalent working hours<sup>47</sup>, hours of duty on call<sup>48</sup> and monthly or annual overtime allowances without the authorisation of the Labour Inspector.<sup>49</sup> Other provisions may also appear somewhat “out of synch” with certain socio-cultural realities, such as the notion of hours worked.<sup>50</sup>

---

<sup>42</sup> The difference in the treatment of these two forms of “precarious” contract reveals different periods in the reworking of the draft and also the variety of experts involved and of the “minds” that made their contributions.

<sup>43</sup> Art. 73 of the draft.

<sup>44</sup> Art. 75.

<sup>45</sup> *Idem*.

<sup>46</sup> Art. 81 of the draft.

<sup>47</sup> Art. 82.

<sup>48</sup> Art. 84.

<sup>49</sup> Art. 86.

<sup>50</sup> Art. 83.

Mention should also be made of the highly technical nature of certain forms of working time adaptations. It is stated that “To meet the demands of the workers or needs of the company, the employer may depart from the rule after obtaining the opinion of worker representatives, if there are any, and informing the Labour Inspector”.<sup>51</sup> While “Each Contracting State sets the terms of application of individualised working hours within the framework of the regulations, collective and branch agreements”,<sup>52</sup> it is stated that “Individualised working times may, within the limit of a number of hours set by each Contracting State, cause working hours to be carried over from one week to another, without those hours having an effect on the number and payment of overtime hours, provided that they are the result of a free choice by the worker in question”.<sup>53</sup> It is even specified that “Individualised working times may comprise a fixed time to be respected by all workers and a mobile time placed either before or after the fixed time, to allow the worker to choose their times of arrival at, or departure from work freely”.<sup>54</sup> Mention could also be made of the provision on the organisation of working hours in the form of a work cycle.<sup>55</sup> We will also note the very free conception of making up any working time lost further to a collective work stoppage<sup>56</sup>, on account of the “notably” preceding the indication of the different cases... and therefore allowing, *de facto*, all time to be made up, including for the purpose of limiting the financial effects of any collective conflicts.

### 3. Facilitating Termination

Regarding economic redundancies, the OHADA draft confirms the abolition of any requirement of authorisation from the labour administration, replacing it by a simple opinion.<sup>57</sup> It also contains a certain number of provisions facilitating terminations by mutual agreement. For instance, the employment relationship may be terminated by “the expression of the common wish of the worker and employer to end the employment contract amicably<sup>58</sup>, whether the contract is open-ended or

---

<sup>51</sup> Art. 87.

<sup>52</sup> *Idem.*

<sup>53</sup> *Idem.*

<sup>54</sup> *Idem.*

<sup>55</sup> Art. 89 of the draft.

<sup>56</sup> Art. 90.

<sup>57</sup> Art. 38.

<sup>58</sup> *Idem.*

for a fixed term”.<sup>59</sup> It is also specified that “the economic redundancy procedure is not applicable in the event of an amicable termination agreement freely negotiated between the employer and the worker.”<sup>60</sup>

The key variable in facilitating contract terminations certainly remains the question of compliance with proper procedures and of the penalties in the event of unjustified redundancies. On the former point, the draft achieves genuine uniformity, making provision only for the possibility of “damages” and limiting the amount of any such damages: “If the redundancy is made on legitimate grounds but without observing the formal procedure of serving written notice of the redundancy or indicating the grounds, or without the worker having had the possibility of explaining himself or herself, or during their period of leave, this redundancy shall be considered irregular in its form but may not be considered an unfair dismissal. The Labour Tribunal may, however, award the worker compensation for the failure to comply with these rules, although the amount of said compensation may not exceed two months of gross wages”.<sup>61</sup> On the second point, that of penalties for any redundancies made on personal or economic grounds that prove to be unjustified, we know that the national laws in question have very largely dropped the sanction of reinstatement, preferring payment of damages in reparation for the prejudice suffered by the employee.<sup>62</sup> Some national laws make provision for a minimum and/or maximum, others neither a minimum, nor a maximum. Judges have been seen to sentence employers who have made unjustified redundancies to very high damages of as much as three or even five years of wages, without any motivation of any kind in terms of the actual prejudice suffered by the employee.<sup>63</sup> In these conditions, visibly seeking to “rein in” the judges, the draft states that the amount of damages may not be less than three months of wages and may

---

<sup>59</sup> Art. 60 of the draft

<sup>60</sup> Art. 57.

<sup>61</sup> Art. 41.

<sup>62</sup> Cf. J.-M. Béraud, *op. cit.*, p. 37 et s.

<sup>63</sup> From the point of view of “securing the business world”, it is logical that a ceiling be placed on damages. From the social justice point of view, however, it is more debatable. We should stress that none of the countries concerned has an unemployment benefit system. Workers who are made redundant “unfairly” have no replacement income. Also, “their” wage provides for a family that does not have the limited scope of European families, but often comprises tens of people... It is therefore far from stupid that judges in Africa should decide “in the light of the future rather than of the past” (Cf. *inter alia*, A. Koné, *Précarité et droit social ivoirien*, PhD thesis, University of Paris Ouest Nanterre La Défense, 2011).



not exceed one month wages per year of service in the company.<sup>64</sup> This is very clearly in line with the “quota restrictions” approach adopted to provide security for employers and other potential investors, without being too restrictive in the framework applied to judges in setting the amounts of damages.

## II. Part of a Normative Tradition

The aim here is in no way to claim any return to an improbable “customary labour law”. Although we cannot deny the presence of legal phenomena in pre-colonial Africa,<sup>65</sup> historically, labour law is –sometimes, unfortunately, still – an imported product in Africa.<sup>66</sup> The reference normative tradition is primarily that of the old colonial powers, meaning essentially Belgium, France and Portugal for the OHADA area. On this point, it should be emphasised that the roots of current labour laws do not draw on the laws that applied in the colonising States, but on the legislation and regulations that they produced specifically for “their” colonies. Finally, while the legal traditions of the colonial countries have shaped what is essentially a State norm, it has evolved since then in line with the different political histories of the countries after independence. A part of the provisions of the OHADA draft thus refer to a labour law designed to be “progressive” and “protective”. Such is the case of the reference to the application of the more favourable norm in social terms (A). It also places original obligations upon employers to respect and provide for the time the worker has for their life outside working hours (B). In line with the different national laws, the draft is attentive to respect for authority and to avoiding conflicts in companies (C).

### A. Reference to the More Favourable Norm

In the provision defining what a “branch agreement” or a “collective labour agreement” is, a clear reference is found to the so-called principle

---

<sup>64</sup> Art. 46 of the draft.

<sup>65</sup> *Cf. inter alia*, H. Lévy-Bruhl. *Introduction à l'étude du droit coutumier africain*. RIDC 1956, p. 67-77 ; J. Vanderlinden, *Les systèmes juridiques africains*, PUF, coll. *Que sais-je ?*, n° 2103, 1983, 127 p.

<sup>66</sup> *Cf. inter alia*, A. Emame. *Le droit du travail à la croisée des chemins : l'exemple du Gabon*, *Bulletin de droit comparé du travail et de la sécurité sociale*, 1999, p. 154.

of the more favourable norm. Admittedly, it is simply stated that “The branch or collective agreement may contain provisions that are more favourable to the workers than those in the present Uniform Act and the laws and regulations in force in the contracting State”,<sup>67</sup> and that “The provisions of branch or collective agreements may not depart from those of public policy”.<sup>68</sup> However, it is also stated, regarding the territorial or professional scope of the branch or collective agreement, that “except for clauses to the contrary that are more favourable to workers, an establishment collective agreement cannot depart from a collective agreement of a company to which the establishment is attached”, that a “company collective agreement cannot depart from an ordinary or extended branch agreement to which the company is subject” and that a “branch agreement cannot depart from an inter-professional collective agreement”.<sup>69</sup> The hierarchy of agreements is thus clearly set out, with the only acceptable exemption being a reference to a provision that is more favourable to the worker.

In these times of economic globalisation and of calls to adapt labour law by means of collective agreements, it might seem astonishing that the OHADA draft should remain true to the old principle of “public social policy” which once prevailed in the countries of mainland Europe but is now being challenged.<sup>70</sup> The absence of any debate on this point during the preparation of the OHADA draft raises questions. It would seem that those drafting the text made the choice, through the harmonisation-uniformity process, to give priority to streamlining and to making individual rights more flexible. The “sacrosanct principles”, such as the application of the more favourable norm and collective rights, have not been “attacked”, or only a little. Visibly, the aim was to limit the risks of social or political reactions, and in particular not to provoke the trades

---

<sup>67</sup> Art. 202.

<sup>68</sup> *Idem*.

<sup>69</sup> Art. 202. As a general rule, mention should be made of the few references found in the OHADA draft to this specific feature of certain African national labour laws, the “national inter-professional branch agreement” (*Cf. inter alia*, M. Samb, “La convention collective nationale interprofessionnelle en Afrique noire francophone”, Thesis, Dakar University, 1988).

<sup>70</sup> *Cf. inter alia*, the undermining of branch agreements in Germany by the development of atypical company bargaining. From 1982 onwards, meanwhile, French law saw the development of legal possibilities for “*in peius*” exemptions by means of negotiation. Since 2004, inter-professional, branch or company agreements can contain provisions varying entirely or in part from the provisions that are applicable under an agreement covering a broader territorial or professional scope.

unions. We may also wonder, however, whether this “non-discussion” is not a sign of the formal nature of certain parts of the laws of countries in the OHADA area. In this respect, there would appear to be little problem in asserting such a principle given the ineffectiveness of collective bargaining in Africa<sup>71</sup> and the extent of “informal” employment relationships. However that may be, the formal attachment to the principle of applying the more favourable norm and allowing no possibility to negotiate a “less favourable” standard, is the sign of a law that continues to strive to “protect” workers, above all else.

## B. “Non-working” Hours

The OHADA draft also displays its protective spirit in very practical terms, by placing transport and travel expenses at the expense of the employer (1). More classically, in principle, it provides a framework for a certain number of absences from work, considering some of them as effective hours worked and thereby implicitly allowing certain socio-cultural particularities to be taken into account (2).

### 1. The “Positive” Right to Transport Expenses

In the OHADA draft, traces can be found of colonial regulations placing “travel and transport expenses” at the expense of the employer.<sup>72</sup> This is not a formal resurgence. This type of provision is present in some labour codes<sup>73</sup> and is effectively applied to a certain extent. It can be seen as an example of the sometimes very practical nature of African law.<sup>74</sup> It refers to “the travel expenses of the worker, their spouse and minor children”<sup>75</sup>

---

<sup>71</sup> *Cf. inter alia*, P.-G. Pougoué et J.-M. Tchakoua. *Le difficile enracinement de la négociation collective en droit du travail camerounais*. Bulletin de droit comparé du travail et de la sécurité sociale, 1999, p. 198.

<sup>72</sup> *Cf.* Art. 125 to 132 of the Overseas Labour Code, *op. cit.*

<sup>73</sup> For example, Article 94 of the Cameroon Labour Code, Articles 156 et seq. of the Senegalese Labour Code, Articles L. 164 et seq. of the Malian Labour Code... In general, the branch agreements make provision on this point.

<sup>74</sup> *Cf. inter alia*, G. Chrétien-Vernicos, Introduction historique au droit, Cours Paris 8 University, 2001-2002, sp. p. 70.

<sup>75</sup> It should be noted, however, that the family referred to here is always wisely limited to the children habitually residing with the worker and “his or her” spouse.

and “expenses for transport of their luggage”,<sup>76</sup> notably on journeys “from the place of work to the habitual place of residence and vice versa” in the cases of “normal leave, redundancy, termination during the probationary period”, but also expiry of a fixed-term contract, except for “gross misconduct by the worker”, etc. Some might be surprised by the continuation of such provisions which increase the “social charges” of the employer when the spirit of the draft is very much a free-market one on so many other points. Others will point to certain perverse effects, such as discriminatory recruitment practices.<sup>77</sup> Obviously, the realities will differ from one sub-region to another and even from one country to another. We can also see these provisions as revealing a singular trait of labour relations in Africa, and more particularly the idea that prevails there of the role and obligations of the head of the company, who is more than just a “boss” or an “employer”. In many ways, he is a “father” on whom workers rely, but from whom they also expect protection, or at least a certain attention.<sup>78</sup>

This latter type of explanation may help us understand why the OHADA draft provides that “Workers who have finished their service and are waiting for the means of transport designated by their employer to return to their habitual place of residence, receive from their employer an allowance equal to the wage they would have received if they had continued to work,”<sup>79</sup> and that they “continue to be entitled to fringe benefits”.<sup>80</sup> Finally, we will note the astonishing provision, and one that is highly revealing of the role of the employer and of the values of society, that in the “case of a death in the place of work of a displaced worker or of a member of the family whose journey was at the expense of the employer, repatriation of the body to the habitual place of residence is at the expense of the employer”.<sup>81</sup> This is an undeniable example of the

---

<sup>76</sup> Art. 106 of the draft act.

<sup>77</sup> According to Labour Inspectors, as these provisions are somewhat effective in Senegal, employers today would seem to take care to ensure that they employ only workers who do not need to travel

<sup>78</sup> Cf. *inter alia*, O. Sidibé, *Réalités africaines et enjeux pour le droit du travail*. Bulletin de droit comparé du travail et de la sécurité sociale, 1999, p. 130 et s.

<sup>79</sup> Art. 107 of the draft.

<sup>80</sup> *Idem*. It is stated, however, that in order to benefit from this provision, the worker must make a “written request” within “a period of three months as of termination of his or her contract” (Cf. Article 107). It is not certain that such a procedure corresponds to the way in which such problems are really dealt with in practice...

<sup>81</sup> Art. 108 of the draft.

adaptation and integration of labour law in relation to major socio-cultural realities.<sup>82</sup>

## 2. Recognised and Potential Grounds for Absence

The OHADA Uniform Act takes little in the way of risks when it indicates that “official holidays are determined by the contracting State, as is the applicable system of work and remuneration.”<sup>83</sup> It remains very “classical” on the determination of paid leave and acquisition of paid leave entitlements.<sup>84</sup> Certain cases in which the contract is suspended are considered, fairly habitually, as “effective hours worked”; such is the case of “illness duly ascertained by a physician”, occupational accidents or illnesses, the “rest period for women benefitting from the provisions relating to maternity”, strikes and lock-outs “organised in compliance with the procedures”, “temporary or economic lay-off periods” and “educational leave”.

Any “absence of the worker authorised by the employer by virtue of the regulations, branch or individual agreements” is also considered as part of the “effective hours worked”.<sup>85</sup> This provision makes it possible to take account of a variety of grounds for absence, depending on the country, but above all of those that are often imposed *de facto* on employers in Africa relating to social rituals and, more singularly, situations of bereavement.<sup>86</sup> This is confirmed in a way by the provision in the draft stating that “Within the annual limit of ten working days, any exceptional permission granted to the worker on account of family events directly affecting his or her own household may not be deducted from their paid leave entitlement.”<sup>87</sup> The word “directly” is visibly intended to be restrictive. The fact still remains, however, that everyone is aware that “in African culture, the obligations of the worker towards the company do not take precedence over their duties to society.”<sup>88</sup> Certain absences, sometimes long, must be respected. If it is to be effective to some extent,

---

<sup>82</sup> *Cf. inter alia* O. Koné. Contribution à l'étude d'un droit du travail adapté à l'Afrique subsaharienne francophone à travers l'exemple des Etats d'Afrique de l'Ouest. PhD Thesis, Toulouse I University, 2010.

<sup>83</sup> Art. 100 of the draft.

<sup>84</sup> Art. 101, paragraphs 1 and 2.

<sup>85</sup> Art. 101, paragraph 3.

<sup>86</sup> *Cf. inter alia*, O. Sidibé, *op. cit.*, p. 130-141.

<sup>87</sup> Art. 102, al. 1.

<sup>88</sup> O. Sidibé, *op. cit.*, p. 136.

it appears important that labour law, particularly in Africa, must “espouse” certain socio-cultural realities. This is the case, somewhat timidly, of the OHADA draft.

Other provisions concerning “non-working” hours should also be mentioned. For instance, there is a provision for “authorisations of absences without pay (...) granted to workers to allow them: to follow an official training course, popular education or international sports training, or to attend congresses of any trades union for which they hold an office or regular mandate, or to take school, university or professional examinations.”<sup>89</sup> The hypothesis can be put forward here that this is a sign of a certain African “political correctness”, or at the very least of a trace of the sort of provisions that were characteristic of certain “socialist” labour laws in the wake of independence. The attention paid to the “sports” question is perhaps more “real and serious”. Football is not explicitly mentioned, but its social and therefore political importance everywhere in Africa is well known. The draft does not hesitate to encourage Contracting States to provide “within an annual limit of thirty working days, (...), a special complementary regime for the authorisation of absences, (...) for the benefit of workers called upon by the competent administrative authority to take part in training courses for sports administrators or preparatory training sessions for national sports selections.”<sup>90</sup>

### 3. Respect for Authority and Conflict Avoidance

The extent to which “social relations in traditional societies can be described as communitarian”<sup>91</sup> has already been stressed, with people being grouped in a variety of communities, and although it is not that they are never perceived as isolated individuals, it is only with difficulty that they are seen as such,<sup>92</sup> with legal personality existing only through their place and their status in the community. This community is not defined

---

<sup>89</sup> Art. 102, paragraph 2.

<sup>90</sup> Art. 102, paragraph 3.

<sup>91</sup> G. Chrétien-Vernicos, Introduction historique au droit, *op. cit.*, p. 67.

<sup>92</sup> This explains, for example, the fact the question of individual liberties at work, although not totally foreign, is addressed in Africa as a problem of given communities or categories (*Cf. inter alia*, E. Kalula, P. H. Bamu, Non-discrimination au travail et responsabilités familiales : perspectives sud-africaines, in Ph. Auvergnon (dir.), “Libertés individuelles et relations de travail : le possible, le permis et l’interdit”, Presses Universitaires de Bordeaux 2011, p. 339.

by resemblances, but by the fact that people share the same life.<sup>93</sup> This places greater emphasis on specific features, which are seen as being complementary, than on similarities, and on the hierarchy or hierarchies than on equality. The specificity of each individual is necessary for the life of the others. In addition to this, the community “coincides with an area in which the same rules apply”,<sup>94</sup> in the priority interest of the collective group. Once again, there is no question here of saying that the law on labour relations in Sub-Saharan Africa has as its ancestor a customary law that in fact has never existed. It is not forbidden, however, to consider that its reception and appropriation after independence have been shaped by specifically African approaches to social relations. Whatever the case, like most of the labour laws of OHADA member countries, the draft seems to be careful not to challenge the authority of the head of the company (1) and to avoid collective conflicts (2).

### **1. Protecting Authority within the Company**

Do the obvious need to respect order within the company and the powers of figure at its head explain the brief nature of the provisions in the Act on discipline? Whatever the case, the disciplinary law that is introduced is not particularly binding (a). In addition, priority is given to an “integrated” representation of the personnel, with an obvious effort to boost “ties” rather than trouble (b).

#### **a) Loose Disciplinary Law**

A whole “chapter” of the draft is dedicated to the company rules and to disciplinary law, but it contains only three articles.<sup>95</sup> It is merely stated that company rules “are drawn up by the employer”<sup>96</sup> and that their content is exclusively limited to rules relating to the technical organisation of work, to discipline, to occupational health and safety guidelines and to wage payment terms”.<sup>97</sup> It is indicated that “any other clause, notably relating to

---

<sup>93</sup> Cf. not. G. Chrétien-Vernicos, *op. cit.*, p. 67-70.

<sup>94</sup> *Idem.*

<sup>95</sup> Art. 110, 111, 112 of the draft.

<sup>96</sup> Art. 110, paragraph 1.

<sup>97</sup> Art. 110, paragraph 2.

setting remuneration, is null and void by rights”<sup>98</sup> and that “entry into force of the company rules is subject to those rules having been disclosed to the worker representatives, when there are any, and to approval by the Labour Inspector”.<sup>99</sup> However, the scope of application, and therefore of the obligation of drafting company rules, remains highly uncertain, given that “the terms of disclosure, filing and display of company rules and the number of workers in the establishment above which such company rules become compulsory, are defined by the contracting State”.<sup>100</sup>

The only “positive right” in this part of the draft resides in the assertion that “it is prohibited for the employer to impose any fines”<sup>101</sup> and in the provision that “the only penalty under the disciplinary powers of the employer which may result in the employee being deprived of wages is suspension, the maximum duration of which is eight days”.<sup>102</sup> In passing, it is not uninteresting to note the use of the term disciplinary “powers” of the employer. Although everything seems to have been done to allow the employer to act as freely as possible, we should not come to too hasty a conclusion that a choice has been made here to allow what would be termed “arbitrary” employer powers in other parts of the world. This again raises the question of deference to the community spirit. The head of the company may do many things, but not just anything. It has been stressed that “in African culture”, the boss is “considered quite simply like a chief, meaning a benefactor”;<sup>103</sup> he is the guardian of the necessary and unchallenged order but cannot do anything himself that “breaches” the rules governing that order. For example, a worker “would consider any penalty for arriving late due to a major social event to be totally unjustified”.<sup>104</sup> The fact remains, however, that rules could have been provided here to govern the right to punish people within the company, without necessarily imposing a cumbersome disciplinary procedure that would not be suited to actual practices and which is rarely provided by national legislation anyway.<sup>105</sup>

## b) “Integrated” Worker Representation

---

<sup>98</sup> Art. 110, paragraph 3.

<sup>99</sup> Art. 110, paragraph 4.

<sup>100</sup> Art. 110, paragraph 5.

<sup>101</sup> Art. 111.

<sup>102</sup> *Idem*.

<sup>103</sup> O. Sidibé, *op. cit.*, p. 136.

<sup>104</sup> *Idem*.

<sup>105</sup> *Ex. Equatorial Guinea and Guinea Bissau (J.-M. Béraud, op. cit., p. 46).*



Although a whole title of the draft Act is devoted to worker representation and trade union rights, and nineteen articles address the question of “worker representatives”<sup>106</sup> and twenty that of “trade unions”,<sup>107</sup> priority is clearly given to promoting elected representation within the company rather than “trades union representatives”. Should this be seen as a sign of wariness towards any forces that are “external” to the working community and which are more likely to challenge order than to contribute to internal regulation?

The draft clearly adopts an approach of harmonising the majority national options. With the exception of Equatorial Guinea which has no worker representation, all the countries in the OHADA area have elected “worker representatives”. However, only a minority of national legislations provide for the possibility of “trades union representatives”.<sup>108</sup> The option that was chosen is therefore that “when at least ten workers are employed, the workers elect their representatives”. The elections are organised at the “initiative” and held “under the responsibility of the employer”.<sup>109</sup> Although it is stated, somewhat surprisingly, that “Any worker representative may be dismissed during their term of office by the college of workers that elected them”,<sup>110</sup> the choice of the duration of that term of office is left to each Contracting State.<sup>111</sup> The States are also authorised to create “other types of worker representation, the members of which may benefit from the same protection as that granted to worker representatives”.<sup>112</sup>

A minimum allowance of fifteen hours for worker representatives is defined for them to fulfil their missions.<sup>113</sup> In addition to the monthly

---

<sup>106</sup> Art. 163 to 181 of the draft

<sup>107</sup> Art. 182 to 201.

<sup>108</sup> This is the case of Burkina-Faso, Congo, Ivory Coast, Mali, Niger, Chad and Togo (since the 2006 code). The workforce threshold above which the “designation” or “appointment” of trades union representatives is possible varies from 11 to 100 employees.

<sup>109</sup> Art. 163, paragraph 1.

<sup>110</sup> Art. 164, paragraph 2.

<sup>111</sup> Art. 167.

<sup>112</sup> Art.169. We can think here of the introduction of protection for “trades union representatives” or members of original institutions in certain countries (“Standing Committee for Economic and Social Consultation” in Gabon, “Works Committee” in Niger, etc.). At the same time, we may have concerns as to the permission given to employers to create “rival” or “alternative” representation bodies.

<sup>113</sup> Art. 170, paragraph 1.

meeting with the employer,<sup>114</sup> these missions include presenting the employer with any “individual or collective claims”, “opinions or remarks on any economic redundancy measures that are being envisaged” and referrals to the Labour Inspector of “any complaints or claims”, and also informing the employer of “suggestions and observations to improve the organisation and productivity of the company” and “negotiating collective agreements in the absence of trades union representatives”. On this point, we can question this *de facto* transfer of collective bargaining within the company – when there is any! – to worker representatives who are the only people in the company, by the terms of the draft, to benefit from a “protective status” requiring authorisation by the Labour Inspector of any redundancy plans concerning them.<sup>115</sup>

At this point, we should point out two national “reservations” expressed regarding the OHADA draft. The first concerns the provision requiring the reintegration into the company of any worker representative whose redundancy has been invalidated by a judge.<sup>116</sup> The second concerns the freedom of movement in the company of the worker representative within the framework of their use of the allowance of hours for their mission.<sup>117</sup> These two “reservations” and the absence of any compromise<sup>118</sup> show, if any such evidence were necessary, the determination to preserve the status of the head of the company and the acceptance of an “integrated” or even “controlled” form of worker representation, or at least one that does not challenge authority and order.

## 2. Focus on Conflict Avoidance

The OHADA Draft Act bears testimony to a wish to maintain a balance between the different interests present in the work community and to avoid any social tensions to the extent possible. It shows a particular determination to prevent collective conflicts (a). However, although preference is given to negotiation “when working relations become turbulent”,<sup>119</sup> “cold” collective bargaining seems not to be very

---

<sup>114</sup> Art. 171.

<sup>115</sup> Art. 179, paragraph 1.

<sup>116</sup> Art. 180, paragraph 3.

<sup>117</sup> Art. 1 did not come to an agreement

<sup>118</sup> *Cf.* The summary report of the meeting of OHADA national commissions held in Lomé in 2010 mentions these two articles as “articles on which the Contracting States did not come to an agreement”.

<sup>119</sup> P.-G. Pougoué and J.-M. Tchakoua, *op. cit.*, p. 198.

“dynamic”, singularly in French-speaking Sub-Saharan Africa.<sup>120</sup> On this point, the project has little in the way of innovation or incentives, merely proposing to harmonise a very formal law (b). Finally, it conserves an important role for the labour administration (c).

### a) A Law to Prevent Collective Conflicts

In Sub-Saharan Africa, there is a tradition of preventing – if not to say sometimes prohibiting – collective conflicts. History, and notably the colonial past,<sup>121</sup> coincide here with a “cultural” desire for conflict avoidance and to protect the interests of the company,<sup>122</sup> but also a more political wish to control social movements.<sup>123</sup> Without distancing itself from such a tradition, the draft proposes a “modernising” harmonisation of the national normative solutions. For example, “lock-outs” are only treated on an equal footing with strikes in a minority of the legislations of the OHADA area,<sup>124</sup> while the others simply prohibit them or only allow them in response to the illegal organisation of a strike or when a strike makes it impossible to ensure safety. The draft adopts the majority view: “A lock-out is legal notably in cases of force majeure or in response to an illegal strike paralysing the activities of the company”.<sup>125</sup> This is therefore a right granted to the head of the company but on a minimal basis. In no way does it take account of the theory of “equality of arms”.<sup>126</sup>

---

<sup>120</sup> While a country like Mali does not have this original type of “national inter-professional collective agreement”, other countries do, such as Benin (agreement revised in 2005), Burkina-Faso (1974 agreement), Ivory Coast (1977 agreement), Togo (revised in 2011). The CCNI of Senegal dating from 1982 and that of Niger dating from 1972 are currently being revised in 2014.

<sup>121</sup> Article 218 of the Overseas Labour Code of 1952 in force in the French colonies stated that strikes and lock-outs were prohibited whenever they were held before exhausting all the reconciliation and recommendation procedures. This wording is included today in certain labour codes (e.g. Art. 388 of the Burkina-Faso Code).

<sup>122</sup> Cf. *inter alia*, J. Ndyaye. *Droit du travail Sénégalais et transfert de normes*. Bulletin de droit comparé du travail et de la sécurité sociale, 2005, sp. p. 174.

<sup>123</sup> Cf. *inter alia*, J.-M. Tchakoua. *Sources d'inspiration et logique du droit camerounais des conflits collectifs de travail*. Bulletin de droit comparé du travail et de la sécurité sociale, 2005, p. 177.

<sup>124</sup> E.G. Cameroon, Gabon, Senegal, Chad.

<sup>125</sup> Art. 243 of the draft.

<sup>126</sup> Unlike, for instance, article 157 (5) of the Cameroon Code defining lock-outs as the closure of an establishment “to put pressure on workers who are striking or threatening to strike”.

Strikes, meanwhile, are defined as “the collective and coordinated cessation of work with a view to backing professional demands or defending the economic and social interests of the workers”.<sup>127</sup> This is undeniably a liberal definition. For strikes, there is a conflict prevention procedure organised around a “negotiation-conciliation” phase of a maximum duration of twenty days<sup>128</sup> and, failing a solution, three-day advance notice of the strike.<sup>129</sup> The model provides an incentive for negotiation over conflict, although it does not necessarily lead to a de facto ban on the (legal) exercise of the right to strike, as can be the case when legislations provide for periods of fifty or seventy days prior to the strike.<sup>130</sup> We should not conclude too hastily, however, that the approach is a permissive one. The spirit of avoidance or even countering of conflicts would appear to have prevailed when the general assertion is made that “the right to strike implies an obligation to provide a minimum service”,<sup>131</sup> the terms of which are defined by the “competent administrative authority”, at the same time as the “list of occupations” necessary to provide “essential services”,<sup>132</sup> and that in case of “a failure to comply with the minimum service”, it is possible to proceed “at any time with the requisition of those workers in private companies or public establishments and services who occupy positions that are indispensable for the safety of property and people, for maintaining public order, for the continuity of public services or for the satisfaction of the essential needs of the community”.<sup>133</sup>

## **b) Formal Bargaining Rights**

In addition to being perceived as a threat to the powers of the head of the company, the development of collective bargaining supposes a certain number of prerequisites, such as genuine autonomy of the parties and “in-

---

<sup>127</sup> Art. 244 of the draft.

<sup>128</sup> Art. 244, paragraph 2.

<sup>129</sup> Art. 244, paragraph 4.

<sup>130</sup> 13 days for conciliation followed by a 30-day advance notice in Senegal, 50 days in Togo, 70 days at least in Equatorial Guinea, etc. On procedural restrictions on the right to strike in West Africa: P. Kiemde, *La réglementation du droit de grève au Burkina-Faso*, *op. cit.*, sp. p. 60-61.

<sup>131</sup> Art. 246, paragraph 1.

<sup>132</sup> Art. 246, paragraph 2.

<sup>133</sup> Art. 246, paragraph 3.

depth knowledge of the elements of the negotiation”.<sup>134</sup> In such matters, the situation is often one of “great deprivation of trades union organisations: from a technical point of view, skills are few and far between and their mastery of economics is very relative. From the point of view of internal organisation and field presence, the trades unions are far from showing a reassuring face. Moreover, new-found pluralism poses a crucial problem that was long hidden by monolithic trade unionism: the question of the representative nature of trades unions”.<sup>135</sup>

The call put out by some to “liberate the forces of collective bargaining”<sup>136</sup> does not appear to have been much heeded by those writing the OHADA draft. There is no obligation to negotiate within the company, although it is possible to make agreements, the main purpose of which is to “adapt to the specific conditions of the company or establishments in question, the provisions of the inter-professional collective agreements, branch agreements, professional or inter-professional agreements or regulations adopted by the contracting State in the absence of branch agreements.”<sup>137</sup>

In a very classical manner, this “adaptation” is made in compliance with the more favourable norm principle referred to above.<sup>138</sup> The scope of bargaining within the company is not specified in any more detail; only those branch agreements that are likely to be extended are subject to a list of mandatory themes.<sup>139</sup> In reality, what seems to have been done here is a very classical, formal harmonisation of collective bargaining law that provides little incentive. The only original contribution resides in the determination of the representative nature of the trades union<sup>140</sup> or employers’ organisation<sup>141</sup> taking part in bargaining. However, the draft would appear to reserve this obligation to be “representative” only to those organisations negotiating an agreement that is likely to be the subject of an extension<sup>142</sup> and would not appear to apply it to those in

---

<sup>134</sup> P.-G. Pougoué, J.-M. Tchakoua, *op. cit.*, p. 201.

<sup>135</sup> *Idem.*

<sup>136</sup> J. Issa-Sayegh, *op. cit.*, p. 189.

<sup>137</sup> Art. 216 of the draft.

<sup>138</sup> Art. 202

<sup>139</sup> Art. 210.

<sup>140</sup> The representative nature of a trades union “is ascertained (...) on the basis notably of the results of the workers representative elections or any other professional election organised by the Contracting State (Art. 209 paragraph 1).

<sup>141</sup> The representative nature of a employers’ organisation “is determined (...) either on the basis of the workforce of the member companies in the geographical area or sector of activity, or on the basis of the number of workers in the geographical area and sector of activity” (Art. 209 paragraph 3).

<sup>142</sup> Art. 207, paragraph 2 of the draft.

contact with the employer within the company.<sup>143</sup> Finally, within the framework of collective bargaining, there is no “protective status” allocated to worker or trades union representatives as such.

### c) An Important Role Left to Labour Administration

The powers of the OHADA do not extend to the administrative organisation of the Contracting States. Therefore, “the very conception of the labour administration, its structures, services and the missions entrusted to it, specifically or in collaboration with other bodies, cannot be part of the Uniform Act. However, the powers of the Labour Inspectors who exist in all the States of the OHADA area are within the scope of the normative action of the Organisation”.<sup>144</sup> On this point, the draft takes no risk when it indicates that each Contracting State fixes “The terms of organisation and operation of the services of the labour administration”,<sup>145</sup> and the “specific status of Labour Inspectors and Occupational Health Inspectors”.<sup>146</sup> It makes an implicit reference to the ILO conventions when it demands that “the Contracting State ensures that these personnel benefit from a status and conditions of service that provide them with stability in their employment and make them independent of any undue outside influence”.<sup>147</sup> It is also up to the State to define “the remit, powers, offence ascertainment procedures and status of Labour Inspectors and Occupational Health Inspectors”.<sup>148</sup>

More fundamentally, note can be made of the large role the project leaves to intervention by government administration in labour relations. Aside from protecting the labour law institutions, the purpose of this is generally to ensure social peace in the working community and, more broadly, the national community.<sup>149</sup> In addition to their activity supervising

---

<sup>143</sup> Art. 216 of the draft. (*Cf. inter alia*, I. Y. Ndiaye. La représentation collective au Sénégal. in Ph. Auvergnon (dir.), “La représentation collective en droit social”, *Comptrasec* 2004, sp. p. 140).

<sup>144</sup> J.-M. Béraud, *op. cit.*, p. 93.

<sup>145</sup> Art. 248 of the draft.

<sup>146</sup> *Idem.*

<sup>147</sup> *Idem.*

<sup>148</sup> *Idem.*

<sup>149</sup> *Cf. inter alia*, Ph. Auvergnon, S. Laviolette, M. Oumarou. *Labour administration in sub-Saharan Africa: Functions and challenges in the light of ILO Convention n° 150*. *International Labour Review* 2011, vol. 150, p. 81-98.

companies,<sup>150</sup> the Labour Inspectors authorise (or otherwise) the dismissal of worker representatives,<sup>151</sup> overtime hours exceeding the allowances<sup>152</sup> and night work by young people.<sup>153</sup> Their opinion is required for lay-offs on technical or economic grounds,<sup>154</sup> for individual and collective economic redundancy projects<sup>155</sup> and on the representative nature of trades union and professional organisations.<sup>156</sup> Company rules may only come into force with their approval.<sup>157</sup> Most importantly, the Labour Inspector and, more generally, the labour administration, acts as conciliator in individual disputes and collective conflicts. Finally, in a way that is somewhat revealing of the limited autonomy of the social partners, bargaining of any collective agreement that is likely to be extended (by the Labour Ministry) only appears possible within the framework of a joint commission<sup>158</sup> convened and chaired by the representative of the Ministry for Labour.<sup>159</sup>

## Conclusion

The draft Act establishing a labour law in today's seventeen OHADA Member States is marked by a number of different tendencies. On the one hand, they are visibly derived from the intrinsic ambivalence of labour law, a law that protects workers and recognises the powers of the employer. Other features betray not only the colonial sources and the way in which the law was received in Sub-Saharan Africa, but also the changes that came in the wake of independence. While providing security for investors quite logically prevails in a project in "business law", international labour law and the French legal tradition are necessarily very present. The text received a positive opinion, subject to a few reservations, from the OHADA National Commissions composed of representatives of Labour Ministries, employers' and workers'

---

<sup>150</sup> Art. 145 of the draft.

<sup>151</sup> Art. 179.

<sup>152</sup> Art. 86.

<sup>153</sup> Art. 94.

<sup>154</sup> Art. 34.

<sup>155</sup> Art. 53.

<sup>156</sup> Art. 209.

<sup>157</sup> Art. 110.

<sup>158</sup> Art. 207.

<sup>159</sup> Art. 208.

organisations. It was sent on to the OHADA Council of Ministers.<sup>160</sup> Since then, the project seems to have been in something of a “deep freeze”. More than ten years on from its launch, this leads to new questions as to its “feasibility” and, in particular, on the method used.

Has the extent to which States will transfer their legislative and regulatory sovereignty in labour law matters to a supra-national body not been over-estimated, in political more than in legal terms? Although the majority of the States concerned share the same French Overseas Code, other legal traditions have brought their influences to bear in the region.<sup>161</sup> Since independence, as different political choices have been made, the laws of each country have become increasingly diversified. In fact, like in Europe although to a lesser extent, labour law has become rooted in, and linked to national political projects. Although its effectiveness is only very relative, it continues to be perceived as a conquest, a “sensitive” asset linked to the exercise of national sovereignty. This in no way ruled out the possibility, in a legal integration process conducted in an area of economic integration, of considering the creation of a regional social law,<sup>162</sup> provided that a clear distinction could be made between the scope of strict uniformity and those areas in which harmonisation was desirable but variable, with the latter being left to national sovereignty, including in order to take account of sub-regional diversity and allow regular adaptations to be made more easily.

Being within the framework of an organisation such as OHADA, in which the “uniform act” is the sole available legal instrument,<sup>163</sup> it initially seemed that the only possibility was to propose a “full labour code” to replace all the national laws and regulations overnight. Ultimately, that was what the first version of the draft sought to do. This impressive work had the merit of providing absolute security regarding the applicable law, but also the main difficulty that it concerned two zones, West and Central Africa, in which, among other things, “economic integration has perhaps

---

<sup>160</sup> The OHADA Council of Ministers, meeting in Bissau on 16-17 June 2011, was informed that most of the Contracting States in West Africa considered “that they no longer have any remarks to make” on the draft. For the contracting States of Central Africa, “for whom a consultation is still under preparation”, the permanent Secretary was called upon to send them a reminder “to accelerate the organisation of said consultation” (<http://web.ohada.org>).

<sup>161</sup> Cf. *inter alia*, ILO “Les problèmes du travail en Afrique”, *op. cit.*

<sup>162</sup> J. Issa-Sayegh, *op. cit.*

<sup>163</sup> For the moment, the OHADA has not wished to diversify its “legal toolbox”, unlike other organisations in Africa that have a variety of instruments, such as the WAEMU: regulations, directives, decisions, recommendations and opinions.



not reached the same outcome.”<sup>164</sup> In addition to the issue of giving up sovereignty in a politically “sensitive” area, seeking to establish strictly identical social norms could therefore raise questions and resistance. The approach adopted from 2006 onwards was radically different. Although it was done quickly, sometimes chaotically and certainly insufficiently, the preliminary draft was reviewed, looking each time at the degree of uniformity required on the questions addressed. The “approved” draft makes a distinction first of all of those norms that are strictly uniform, prohibiting any national variations or adaptations, secondly those standards “framing” national law and therefore contributing to asserting an “economic and social model” and, third and finally, those normative areas left to the intervention of the State or social partners.

In an organisation whose clear objective is uniform law, much has been done to come up with a common labour law that allows national interventions and adaptations to persist. In the OHADA project, there is now uniform law alongside the framework directive and recommendations. If the draft should end up not being adopted, it could quite easily provide inspiration – and perhaps quickly – for two very different types of projects. The first could be to define a framework directive going beyond a mere declaration of fundamental rights, although without challenging the specifics of national frameworks. Such an objective could be relevant as part of an economic integration project involving States of different legal cultures, such as the fifteen ECOWAS States.<sup>165</sup> The second type of project could pursue an objective of close technical harmonisation between States that are neighbours not only geographically, but also historically and in their legal cultures, such as the eight WAEMU Member States.<sup>166</sup> But that is another story...

---

<sup>164</sup> J. Issa-Sayegh, *op. cit.*

<sup>165</sup> Economic Community of West African States.

<sup>166</sup> West African Economic and Monetary Union.





# Adapt International Network



**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at [www.adapt.it](http://www.adapt.it).

For more information about the E-journal and to submit a paper, please send a mail to [LS@adapt.it](mailto:LS@adapt.it).

