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The Birth of Modern Labor Contract in Belgium

In 2004, Mats Kumlien published his book '*Continuity and contract*', in which he reconstructs the historical emergence of the employee's duty of obedience in Sweden.¹ As a full blood comparative legal historian, Kumlien not only studied the Swedish case, but also analyzed the evolutions in other European countries such as Germany, France and Great-Britain.² Belgium however, was left out of his comparative analysis. This is not that surprising, as Belgium is only a tiny country without much importance on the European theater, often considered as a copy of big brother France.³ Moreover, thorough studies on the history of labor contract in Belgium were simply lacking at the moment Kumlien was writing his book.⁴

In this contribution, I will try to fill this gap. First I will analyze the legal framework of the nineteenth-century labor contract in Belgium. Next I will concentrate on an interesting figure, Charles-Xavier Sainctelette, who in 1884 published a book containing a new theory, which implied

¹ Kumlien, 2004.

² Kumlien, 2004, p. 141–169.

³ From 1795 till the defeat of Napoleon in 1813, the Belgian territories were part of the French Empire. As a result, French legislation, with the Napoleonic codes, was in force in these territories. After the French rule, this legislation remained in force. Also, from 1830 on, when Belgium became an independent Kingdom, Belgian law was still heavily influenced by French law, insofar that Belgium indeed could be considered a legal colony of France.

⁴ At that time, there were a small number of studies on the history of the labor contract in Belgium, but these were mostly in Dutch and rather superficial. Meanwhile, more research has been done on the matter. For instance, in 2012, a conference was organized on the history of labor contract in Belgium. It resulted in the following publication: Debaenst, 2013.

a modern view on the labor contract.⁵ Although Sainctelette's theory was rejected by the Belgian judiciary, it had a lasting impact, as it resulted in the 1900 Labor Contract Act, which was the legal basis of modern labor contract in Belgium.

Principles of the nineteenth-century labor contract in Belgium

The origins of the liberal, nineteenth-century Belgian labor contract go back to the French period (1795–1815). The French Revolution caused a number of fundamental economic changes, such as the replacement of the corporate structures by the freedom of enterprise,⁶ followed by the coalition prohibition.⁷ Less known is that these revolutionary accomplishments brought many problems in economic life, such as dishonest competition, poor product quality and unreliable workers.⁸ When Napoleon reinstated a strong central power, he turned France into a police-state interfering in all aspects of life, including the economy.⁹ Typical for Napoleon, he opted for a mix of revolutionary and reactionary elements,¹⁰ which the Act of 22 Germinal XI (12 April 1803) '*relative aux manufactures, fabriques et ateliers*' illustrates.¹¹ In this text, almost nothing was said about the labor contract, with the exception of a few

⁵ Sainctelette, 1884.

⁶ The famous 'Decree D'allarde' of 2–17 March, 1791.

⁷ 'Loi Le Chapelier' – Decree 14–17 June 1791.

⁸ In a 2002 article, the French sociologist Alain Cottureau described the entreaties of the economic elite to reintroduce at least partially old regulation to end these abuses that disrupted economic life. Cottureau, 2002.

⁹ After all, a well-organized economy was vital for a state that was constantly at war. Pacification of economic life, including labor relations, was urgent. In fact, the chaos of the previous years was used as legitimization for state intervention in industry. Kiefer, 1987, p. 10.

¹⁰ One can refer to the Napoleonic approach towards the Church (where he also maintained revolutionary elements – such as the confiscation of church goods – but re-established the Church as state religion) and the bar (where the profession of 'avocat' was reintroduced, but within a new Napoleonic framework).

¹¹ It contained revolutionary accomplishments, such as the coalition prohibition (articles 6–8) and the limitation of the duration of the labor contract (article 15), but also prerevolutionary elements, such as a regulation of the apprenticeship (articles 9–11) and the workers passport ('livret', article 12). Act 22 Germinal XI (12 April 1803).

general principles, such as the obligation to respect the labor contract¹² and the limitation of its duration.¹³ Shortly thereafter, the famous Napoleonic civil code was promulgated, also containing a few provisions on the labor contract.¹⁴ One can wonder why the civil code did not contain more information regarding these important contracts in the world of labor.¹⁵ This quandary is difficult to answer, as the preparatory works or discussions of the civil code remain silent.¹⁶ There have been given a number of explanations,¹⁷ but the most likely one can be found in the liberal view on labor at that time.

¹² The workers passport obviously had a disciplinary character, to limit the workers mobility, which was beneficial both for the government as well for the employers. Act 22 Germinal XI, article 14.

¹³ The workers could not be hired for a period over a year. It was possible to foresee exceptions for certain categories of workers, such as foremen, who could make a written contract. Act 22 Germinal XI, article 15.

¹⁴ In general, all contracts had to be respected according to good faith ('bonne foi'-article 1134). Further, article 1780 repeated the limitation of the labor contract in time. The code also discussed the contract of rent of work (*contrat de louage d'ouvrage*), in article 1710 described as the contract whereby one party worked for another who paid for this. (The terminology is not always very clear in the civil code: in article 1779 for example, there is mention of the '*louage d'ouvrage et d'industrie*': 'Il y a trois espèces principales de louage d'ouvrage et d'industrie: 1° Le louage des gens de travail qui s'engagent au service de quelqu'un, 2° celui des voituriers, tant par terre que par eau, qui se chargent du transport des personnes ou des marchandises, 3° celui des entrepreneurs d'ouvrages par suite de devis ou marchés.' Heirbaut and Baeteman, 2004, p. 1765.)

¹⁵ In the 1801 project of civil code by Louis Costaz, there were some stipulations about the necessary rules of interior order in the industry. Costaz foresaw in obligatory work place regulations, made by the employers and to be obeyed by the workers. These stipulations were not inserted in the final version of the civil code. Bodeux, 1896, p. 480.

¹⁶ Brand mentions Locré, Favard en Bousque. He points at the fact that the labor contract has not been discussed in the 'Conseil d'état'. Brand, 2006, p. 67.

¹⁷ Some scholars try to explain it by pointing at the fact that there were plans for a comprehensive Labor code ('Code du travail'), of which the Decree of 1803 was only the first step. (Cottureau, 2002, p. 1525.) This can explain why the code civil does not provide much information about the labor contract. It raises the question, however, why the authors of the civil code included these few rules überhaupt, when there was another code to follow. Another possible explanation is the fact that the writers of the civil code, Portalis, Tronchet, Bigot de Préameneu and de Maleville, due to lack of time, relied heavily on the eighteenth-century lawyer Pothier. In his works, Pothier himself did not pay much interest for the regulation of the labor contract, as this was part of administrative law. (Bürge, 1991, p. 475.) Yet another explanation for the scarcity of labor regulations in the civil code is more plausible: the labor relations at that time were foremost a local issue, with different regulations in the different economic sectors. Because of this, there

After the French revolution, workers saw themselves as ‘citizen-owners’ (*‘citoyens-proprétaire’*), who regarded their labor with absolute freedom.¹⁸ The civil code only procured the contractual framework (article 1711). Within this ‘legal box’, the contract parties negotiated the labor conditions (price, working conditions, etc.), without interference from the state. This revolutionary shift has been described as the transition from status to contract.¹⁹ In the old system, everything was fixed by corporate regulations, while the new system was very flexible and gave almost total freedom to the contracting parties. Contractual freedom was the cornerstone of labor relations throughout the nineteenth century, with each worker as a *‘petit entrepreneur’*, who negotiated with his soon-to-be employer about labor and wage.

During the nineteenth century, new forms of industry and labor relations emerged, but the legal framework, as described above, remained the same, as the first Belgian railroad accident cases illustrate.²⁰ For the

was no need for national regulation. Several examples can illustrate this. For example, the local administrations promulgated local industrial regulation, if necessary. Also, in a number of industrialized departments, specific tribunals were installed to deal with the local labor conflicts (*‘conseils de prud’hommes’*). (David, 1974, pp. 3–19; Olszak 1987, pp. 101–119.)

¹⁸ Simitis, 2000, p. 187.

¹⁹ Veneziani applied this transition from ‘status’ to ‘contract’ on the labor contract. Veneziani, 1986, pp. 31–72. According to Cornish, this transition from status to contract was a long evolution that took several centuries. Cornish, 2010, p. 625.

²⁰ Court of Appeal Brussels, 18 May 1868, *Belgique Judiciaire* 1868, 694–695; Cassation 7 May 1869, *Pasinomie* 1869, I, pp. 330–338. To give one illustration: On 20 December 1864, Lammertyn, a train driver at the Belgian State railroads, died when his locomotive collided with another train. The next year, on 29 March 1865, conductor Henri De Vos was condemned to one month imprisonment for this lethal accident. Two years later, on 21 February 1867, Lammertyn’s widow started a lawsuit to remedy the damage she and her children had suffered because of the death of her husband. This lawsuit is very interesting because it offers a glimpse on the legal interpretation of the underlying labor relations, by the judiciary. The Belgian State (defendant, owner of the railroad and employer of Lammertyn) claimed that Lammertyn in exchange for his work got his wage and additional benefits such as the right on a pension for him and his widow and children (*‘en s’engageant à remplir l’emploi de machiniste au chemin de fer de l’Etat’* and *‘par le motif que l’auteur des demandeurs était lui-même employé de l’Etat et qu’en cette qualité ses droits auraient été nettement définis et restreints au traitement de son emploi, à la pension de retraite, à la pension pour cause d’infirmités accidentelles et à la participation aux caisses de secours’*). The fact that Lammertyn had agreed to work for this wage and additional benefits, implied that he had accepted all the occupational risks. *‘(...) en acceptant l’emploi pénible et dangereux de machiniste au chemin de fer,*

Belgian judges, the labor relationship was nothing more than the exchange of work for wage (and benefits): *‘en leur payant le salaire, il ne fait qu’acquitter le prix du travail, et la pension n’a pas pour objet la réparation d’un dommage imprévu’*.²¹ If a worker was injured during his occupation, he or his relatives could, based on extra-contractual liability rules, sue the employer to compensate the damage suffered. After all, the labor contract was only the exchange of labor for wage, nothing more, nothing less. The content of the labor contract was (only) the working power of the worker, having a price in accordance with its exchange value.²² Labor as commodity. In 1884, this very narrow interpretation of the labor contract was contested by Charles-Xavier Sainctelette.

The 1884 theory of Charles-Xavier Sainctelette²³

His starting point was (again) a railroad accident case.²⁴ The Brussels judges stated that the accident was due to the negligence of the railroad workers, but surprisingly, they did not base their decision on extra-contractual liability law, as before, but on contractual liability law!²⁵ In a

l’auteur des demandeurs s’est soumis par avance aux dangers inséparables de cet emploi’). As a result, he could not sue his employer when an accident occurred. (‘Ils trouvent dans leurs salaires et dans la pension, le cas échéant, une compensation du dommage qu’ils pourraient éprouver’.) Cassation 7 May 1869, *Pasinomie* 1869, I, 333. In another, similar law suit before the civil tribunal of Liège, the judges had a similar point of view: ‘L’Etat objectait en outre que le salaire extraordinaire attribué aux machinistes du chemin de fer, les pensions relativement considérables assurées à leurs familles, avaient précisément pour but de compenser les chances qu’ils courent et mettaient la responsabilité de l’Etat à couvert’. Civil tribunal Liège 15 June 1872, *Belgique Judiciaire* 1873, 63.

²¹ Cassation 7 May 1869, *Pasinomie* 1869, I, p. 338.

²² Veneziani, 1986, p. 57.

²³ Already an article in 1883, but book with the elaboration of his theory dates from 1884.

²⁴ On the night of 20 June 1880, sergeant-major Thibaut became victim of an unfortunate accident: while leaning against a train door, the unlocked door opened and he fell on the rails. He was heavily injured and filed a lawsuit against the Belgian State. On 20 November 1881 the Court of Appeal of Brussels ruled its decision, in favor of Thibaut. Brussels 20 November 1881, *Pas.* 1882, II, 136.

²⁵ The judges wrote in their judgment that the administration of the Belgian railroads had concluded a contract with Thibaut to transport him with all the care necessary to warrant his safety. In this case, it was obvious that the Belgian State (as operator of railroads) had neglected this task, so it had to pay damages, according the articles 1147 and 1149 of the civil code.

number of following cases, the Court further developed this ‘contractual obligation of guarantee’ for the railroads.²⁶

In the same period, Charles-Xavier Sainctelette was Secretary for Public Works (*‘ministre de travaux publics’*) and as such responsible for the administration of the Belgian Railroads.²⁷ This made him aware of these railroad accident lawsuits, which were likely at the forefront of his thoughts. Why did the court not ground its decision on extra-contractual liability law, as usual? Why did it apply contractual liability law? Could this ‘obligation of guarantee’ be applied on other contracts? Again, case law showed him the way. This time, a horrible railroad accident in Bas-Silly led to a number of law suits against the Belgian State. Most plaintiffs were passengers, who could base their action on the new ‘obligation of guarantee’ principle, as established by earlier case law. The train driver however, also victim of the accident, was forced to base his legal action on extra-contractual liability law and so, he had to deliver the (difficult) proof of a fault of the Belgian State as administrator of the Belgian Railroads. For Sainctelette, this unequal treatment between the passengers and the train driver made no sense.²⁸

It was the prelude to his new legal theory on ‘liability and guarantee’ (*‘de la responsabilité et de la garantie’*). Essentially, Sainctelette generalized the ‘obligation of guarantee’-principle to all contracts. He started from the division between obligations *‘out of contract’* and obligations *‘out of tort’*, between contractual and extra-contractual liability law. In a number of cases, contractual law foresaw the use of a *‘guarantee’*, to prevent or compensate any damage. If damage arose out of non-contractual wrong-doing, then the terminology was liability (*‘responsabilité’*). In 1883 he had already published a small article in the *Belgique Judiciaire*,

²⁶ Sainctelette, 1884, p. 97.

²⁷ He was in office from 1878 till 1882.

²⁸ To illustrate this: during the session of the Chamber of Representatives on 12 December 1883, within the context of a discussion of reform of the commercial code, Sainctelette argued that all personnel of the Belgian Railroads had to be able to enjoy the ‘obligation of guarantee’-principle. Eudore Pirmez, the president of the commercial code reform commission disagreed. He said that the ‘obligation of guarantee’-principle only applied to transportation contracts. The railroad personnel only constituted part of this contract. Pirmez felt that railroad workplace accidents needed to be treated no different than workplace accidents in the mines and the factories. In his opinion, it was wrong to make an exception for one category of workers (railroad workers). He suggested the workplace accident problem should be dealt with later.

summarizing it as follows: '*La garantie naît du contrat; la responsabilité, de la loi d'ordre public*'.²⁹ Unfortunately, according to Sainctelette, in the past, the legislator had not always been very accurate with this terminology and '*de la loi, la confusion a passé dans la jurisprudence et dans la littérature*'.³⁰

After two introductory chapters describing the general principles of his theory, Sainctelette applied it on a number of contracts involving the transport of goods and passengers, the insurance contract, some minor contracts such as the deposit contract and... the labor contract.

Sainctelette and the 'modern' labor contract

For his analysis of the labor contract, Sainctelette started from reality. He stated that modern industry could not be compared with the old, artisanal workshops. An artisan was a man who enjoyed great freedom in the execution of labor, which he conducted with his own force, skills, taste, personality, hands, etc. The modern industry on the contrary was not anthropocentric at all, as here the machinery was the most important. The modern industry was also characterized by a division of labor, wherein every worker played a specific role. The worker had become a soldier or even almost a machine, Sainctelette claimed.³¹ By using the railroad example, he showed that everything had to be organized into detail in order to operate the complex mechanism in safety and every worker had to fulfill his specific task with accuracy.³² Every little deviation could lead to catastrophes. Workers had to be obedient and to do what they were told.³³

In his study Sainctelette only used the concept of '*labor contract*' once.³⁴ He primarily used the traditional terminology such as the '*contrat de louage de services*', or descriptions such as '*rappports entre patron et ouvrier*'. However, one should not attach too much importance to this. More important is his interpretation of the content of this contract between

²⁹ Sainctelette, 1883, p. 386.

³⁰ Sainctelette, 1884, p. 10.

³¹ Sainctelette, 1884, p. 122.

³² 'Le maître doit régler jusque les moindres détails avec une précision et une suite irréprochables' Sainctelette, 1884, p. 122.

³³ Sainctelette, 1884, p. 122.

³⁴ 'Je ferai, dans le cours de cet Essai, l'application, aux actions nées du contrat de transport et du contrat de travail (...)' Sainctelette, 1884, p. 39.

employer and employee. Although Sainctelette claimed he did not want to design a general theory on labor relations but only wanted to propose a suitable solution for the problem of workplace accidents, we do find in his study a clear interpretation of the labor contract.³⁵ In his eyes, this contract was much more than the mere exchange of work and wage. Authority (*'surveillance', 'autorité'*) of the employer and subordination (*'subordination', 'dépendance directe'*) of the employee were also important constitutive elements.

For Sainctelette, authority implied a number of things, such as the right to give clear and specific orders, to design the workplace, to install the machinery and to lead all operations involved.³⁶ In the labor contract, the employer was the one with authority, while the worker was subordinated. This subordination meant that the worker offered his services to another, that he was no longer in charge of the operations and that he worked in a specific environment organized by the employer. Also, the benefits of his labor were not his, but the employer's. Thus, this kind of 'dependent worker' was the exact opposite of the traditional independent, artisanal worker.³⁷

According to Sainctelette, the authority of the employer was linked with a safety obligation. The employer had to make sure that his workers could work in a safe environment. If he wanted to reduce this obligation, he had to cut down his authority. In case law, one could find some examples of this safety obligation. To start with, employers were convicted because they had instructed inexperienced children to perform dangerous tasks that were not suitable for their age. Also, the employer had to take the necessary technical preventive measures, such as protective shields over moving parts of the machinery, to protect workers against their own clumsiness.

From retrospect, this interpretation of the labor contract appears very modern. In fact, any Belgian lawyer will immediately recognize the definition of the labor contract as grounded in 1900: *'the contract by which*

³⁵ Sainctelette, 1884, p. 115.

³⁶ '(...) que l'autorité ne résulte pas seulement du droit de donner des ordres précis et particuliers, elle est prouvée tout aussi bien par le droit de disposer l'ensemble du milieu où le fait le travail et de diriger l'ensemble de l'œuvre'. Sainctelette, 1884, p. 153; see also: 'd'après ses ordres, sous sa direction et sous son contrôle'. Sainctelette, 1884, p. 116.

³⁷ According to Sainctelette, an independent worker was his own master, who worked in his own environment, for his own account, with his own money and tools and on his own risk. Sainctelette, 1884, p. 152.

a worker commits himself to work under the authority of an employer in exchange for a wage'.³⁸ One potential danger of this retrospective point of view is that we would think of Sainctelette's ideas as obvious. In 1884, they were not. On the contrary, they were highly innovative.

In 2002, Cottureau wrote an article in the famous *Annales*.³⁹ He claimed that in 1886, Ernest Désiré Glasson, a famous French professor who specialized in civil law and legal history, published a text that was a rupture with the old labor doctrine, because his '*Le Code civil et la question ouvrière*' dared to criticize the civil code and to ask for a legislative update.⁴⁰ Glasson wondered why the authors of the civil code had 'forgotten' the workers and he proposed the legislator to fill this gap. Another important accomplishment of Glasson was the introduction of a new legal concept: the 'labor contract' ('*contrat de travail*'). Accordingly, Glasson had borrowed this term from Emile Delecroix.⁴¹ Cottureau spoke about a dogmatic tour de force of Glasson: he explained that the French civil code made a distinction between two categories, the '*working contract*' ('*contrat de louage d'ouvrage*') and the '*services contract*' ('*contrat de louage de service*'). The main distinction between these two categories was the clear presence of subordination in the '*services contract*'. By inspiring the new '*labor contract*' on the '*services contract*', the subordination element was legally introduced in the majority of the labor relations.⁴² This was an abrupt rupture with the past. After all, the absence of subordination was an essential element in most labor relations after the French revolution. At that time, the introduction of the principles of liberty and independence in the world of labor was seen as a major achievement in comparison with the dependency of the Ancien Régime labor relations.

The analysis of Cottureau is correct, with one important nuance: the so-called '*dogmatic tour de force*' was already applied earlier by our Sainc-

³⁸ Act 10 March 1900.

³⁹ Cottureau, 2002, p. 1521–1557.

⁴⁰ Glasson, 1886.

⁴¹ Delecroix was a lawyer from Lille in the North of France, who had written an article in the 1885 *Revue de la législation des mines*. Delecroix, 1885.

⁴² 'Et c'est là que résidait l'innovation du 'contrat de travail', au-delà du changement de vocable: sous couvert de l'équation présumée contrat de travail = louage de services, tous les contrats de salariat étaient rabattus au rang du louage de services; il s'ensuivait alors l'admission de la subordination comme catégorie juridique inhérente au contrat de travail.' Cottureau, 2002, p. 1524. To learn more about the further development of the concept 'labor contract' in French jurisprudence, see: Tholozan, 2004.

telette. The chronology is obvious. Saintelette published his ideas in 1883–1884, while the texts from Glasson and Delecroix date from respectively 1886 and 1885. Moreover, I have above explained how Saintelette came to his insights: inspired by Belgian railroad accident case law, he developed a new theory, which he also applied to labor relations.⁴³

⁴³ For all clarity: Saintelette was not the only one to come up with new solutions for the existing workplace accident problem: his ideas were part of a larger, innovative tendency in the Belgian-French legal world (and elsewhere: see Veneziani, 1986, pp. 31–72. Specifically for Germany: see Becker, 1995). Already as soon as 20 May 1880, Vavaseur published an article ‘De la responsabilité des accidents de fabrique’ in *Le Droit* (as quoted by Saintelette, *Commission du travail*, 1887, p. 260). Vavaseur had noticed the many difficulties workers faced to be compensated for damage caused by a workplace accident. He suggested to alter article 1780 of the civil code, in order to oblige the employer to pay compensation, unless he could prove that the accident was due to a fault of the worker himself. He wanted to add the following phrase: ‘Celui qui emploie les services d’un autre doit garantie des accidents résultant du travail, à moins qu’il ne prouve que les accidents sont dus à la faute de la victime’. This idea was soon adopted by Martin Nadaud, who submitted on 29 May 1880 the first proposal regarding workplace accident compensation in the French parliament: ‘Lorsqu’un homme, louant son travail à un autre homme, s’est blessé ou tué à son service, l’employeur sera de plein droit responsable, à moins qu’il prouve que l’accident a été le résultat d’une faute commise par la victime.’. In a previous life, Martin Nadaud (° 17 November 1815) had been worker – and victim of a workplace accident himself: on 4 May 1831 he had fallen from the third floor into the basement and had broken both of his arms. He had to recover for three months and would forever be invalid. This personal experience explains his great interest for workplace accidents (Aminot, 1978, pp. 109–127). It was the start of the French parliamentary process that would finally result in the 1898 French labor insurance Act. Another example of this specific legal ‘Zeitgeist’ was Marc Sauzet, who also developed a new theory in 1883. (Sauzet, 1883) Inspired by the proposals in the parliament, he asked himself: when an employer has contracted a worker for the exploitation of a dangerous or unhealthy industry and this worker is victim of an accident or affected by an occupational disease, what is then the employer’s responsibility? According to Sauzet, the answer to this question could be found in contemporary French case law, which stated that employers had to take all possible measures to warrant the worker’s safety. In the current system, victims of a workplace accident had to prove their employer’s mistake. Sauzet disagreed with this: he believed it should be the employer who had to prove he had taken all possible preventive measures and that the accident was due to coincidence or a mistake from the worker himself. In other words, he developed independently the same ideas as Saintelette. Even though Saintelette was not the only one to come up with new ideas, his theory was very well balanced and offered an excellent legal alternative for the procedural difficulties of workplace accident victims. Not surprisingly, his book was welcomed with great enthusiasm by his colleagues. Eminent French scholars such as Labbé, Planiol, Pascaud and Demangeat showed their appreciation. It is Saintelette himself who mentions these names in his 1887 proposal (*Commission du travail* 1887, 261; see also Halpérin

Finally, it can be mentioned that the contemporaries already acknowledged the important role of Sainctelette in the development of these new ideas.⁴⁴

The merits of Sainctelette's study lay first and foremost in its realistic approach of things. Sainctelette started from the reality as he saw it in daily life. *L'examen du fait.* From his background as practicing lawyer, he criticized the unworldly scholars who never left their libraries.⁴⁵ Not without a sense of humor, he tried to imagine how workers would react if someone would tell them that the legal scholars taught their students that the employer did not have authority over his workers. They would simply laugh and ask how they suddenly became so fortunate.⁴⁶ More in general he criticized legal scholars and called them conservatives.⁴⁷ He especially disliked the exegetic school, which he called '*la fâcheuse école du texte*'.⁴⁸ This school considered legislation as the most important source of law. The scholars limited themselves to comment on the existing codes, such as the civil code, without taking the reality of a changing society into account. After all, to the legal exegete, society had to adapt to the law and not the other way round.

Sainctelette on the contrary realized that the existing codes were not perfect. If a problem arose which could not be solved by existing legislation, one should be a little creative, just like the British lawyers.⁴⁹ After

2001, p. 271 and Saleilles, 1897, p. 13.) The theory of Sainctelette was even discussed in German doctrine. Bölderndorff for example wrote that Sainctelette's study was interesting for specialists of French law, 'obwohl auch andere Juristen das Studium derselben nicht betreuen werden' (Bölderndorff 1885). More in general the contractual theory led to huge debates among legal scholars in France (Hesse, 1979, p. 23).

⁴⁴ Joseph Blanc for example testified in his 1888 doctoral thesis: 'M. Sainctelette, ancien ministre de Belgique, à qui revient la mérite d'avoir le premier développé cette idée et de s'en être fait l'apôtre convaincu (...)', Blanc, 1888, p. 178.

⁴⁵ 'Voilà ce que c'est d'écrire des livres de droit sans sortir de sa bibliothèque. A force de lire, on désapprend d'observer. Si sensé et si savant que l'on soit, on est exposé, par l'ignorance volontaire où l'on se tient du fait, à professer des choses invraisemblables'. In this fragment, Sainctelette is criticizing Demolombe, one of the great French scholars of the exegetic school. Sainctelette, 1884, p. 125.

⁴⁶ 'En leur disant que, à l'école de droit, c'est un axiome que la surveillance de l'ouvrier par le patron est presque toujours impossible. Ils demanderaient, en souriant, de quelle fée la baguette magique leur aurait donc fait faire fortune.' Sainctelette, 1884, p. 126.

⁴⁷ '(...) de tempérament et d'habitude, les juristes sont conservateurs'. Sainctelette, 1884, p. 49.

⁴⁸ Sainctelette, 1884, p. 91.

⁴⁹ Sainctelette, 1884, p. 47.

all, law was nothing more than a problem-solving tool. When this tool did not fit the job, it needed to be slightly modified to fulfill the new expectations. In other words, Sainctelette had an instrumental view on law. As such, he can be considered an early representative of the so-called '*École de la libre recherche scientifique*', which would a decade later have François Gény as its most important representative.

A schism in Belgian case law

Sainctelette's theory soon led to a schism in Belgian case law.⁵⁰ All judges recognized that there was a contract underlying the labor relations, but the interpretation of it was very different. In the traditional, conservative vision, the contract of rent of work meant only work in exchange for wage. This minimalistic interpretation was the result of a literally, legal exegetic lecture of the '*contrat de louage d'ouvrage*' in the civil code. In the modern, progressive vision, the '*contrat de louage de services*' received a broader interpretation and the concrete labor conditions were also taken into account.

⁵⁰ In its 1886 judgment, the Cassation Court said that the obligation of guarantee did not make part of the essential elements of the '*contrat de louage*', as the legislation did not mention this. Therefore, the employer was not held to offer an absolute protection to the employee. In short, Cassation rejected the Sainctelette theory. If the relatives of a workplace accident victim wanted to get compensation from the Belgian state (or other employers) then they had to deliver the necessary proof of a fault from the employer based on extra-contractual liability law. (Cassation 8 January 1886, *Belgique Judiciaire* 1886, 129–135). This opinion was shared by a number of other courts and tribunals. Nevertheless, at the same time, there were also a number of judges that stood positive towards Sainctelette's new theory and they granted compensation to the victims of a workplace accident or their relatives, based on the underlying labor contract and its presumed legal consequences: Commercial tribunal Mons 29 April 1885, *Belgique Judiciaire* 1885, 572–573, with comment from Sainctelette; Court of Appeal Liège 18 June 1885, *Belgique Judiciaire* 1885, 998–999, with comment from Sainctelette; Court of Appeal Brussels 2 November 1885, *Belgique Judiciaire* 1885, 1544–1546, with comment from Sainctelette; Court of Appeal Brussels 12 November 1885, *Belgique Judiciaire* 1885, 1553–1554; Tribunal Mons 14 November 1885, *Belgique Judiciaire* 1885, 1554–1556; Tribunal Charleroi 29 November 1885, *Pasinomie* 1886, III, 117; Commercial Tribunal Brussels, 28 April 1885, *Belgique Judiciaire* 1885, 571–572; Commercial Tribunal Antwerp 21 September 1885, *Belgique Judiciaire* 1885, 1556–1557; Tribunal Brussels 29 December 1884, *Belgique Judiciaire* 1885, 8; Tribunal Namur 24 December 1884, *Belgique Judiciaire* 1885, 14; Tribunal Brussels 25 April 1885, *Belgique Judiciaire* 1885, 569.

This different interpretation implied a number of far reaching consequences. To the traditionalists, the worker had knowledge about the job content at the moment the contract was made. Thus, he not only knew what he was hired to do, but he also agreed on the risks that accompanied the specific labor. In other words, there was an acceptance of labor risks. Moreover, the risk was included in the wage. To the progressives on the other hand, it was impossible for the worker to foresee all risks, for he was put in a strange environment created by somebody else. So, he could not accept the risks unknown to him beforehand.

These two views in case law differed also on the authority of the employer. In the traditional vision, the employer had a certain authority towards the worker, but this authority was limited. After all, the worker had a complete freedom to conduct his daily tasks and it was impossible for the employer to have a constant supervision and control over all of his many workers. Sainctelette and his followers in the judiciary had a completely different vision on authority. In the modern industry, workers did not have any freedom at all. Their labor task was clearly defined and was part of a complex production process, which left utterly few freedom to conduct the way they pleased to.

These diametric opposed attitudes towards the labor agreement in regards to the acceptance of risk and authority, had a direct impact on the question of guarantee. To the traditionalists, the employer had no contractual obligation of guarantee at all because there was no legal ground for this in the civil code. He had to take a number of precautions, but this obligation was just an application of the principle that he had to behave as a 'good housefather', to prevent others from being hurt (= the normal extra-contractual liability rule). To the progressives, the obligation of guarantee was an integral part of the modern labor contract and the natural pendant of the labor risks to which the worker was exposed.

Put into a broader perspective, the conservatives opted for an abstract legal, a-contextual approach towards labor relations. They applied the legal rules on the concrete cases, without taking the underlying reality into account. "*Dura lex, sed lex.*" These judges were not estranged from reality, but they preferred to hold to the rules, because they believed it to be their role. In other words, they were legists. One example can illustrate this: in the Masy Case, the judges from the Brussels Tribunal declared that judges had to apply legislation, as intended by the legislator.⁵¹ Their task was not

⁵¹ Brussels 7 August 1884, Belgique Judiciaire 1885, 1–6.

to make new interpretations themselves, *contra legem*, how humane and noble their intentions.

The progressives on the other hand opted for a pragmatic-juridical, contextual approach. They felt less bound by the literal text of the civil code and they had an eye for social reality. They understood, just as Sainctelette did, that the traditional legal view on the labor relationship was outdated and that there was a need to give a new content to the labor contract. In the existing system, workplace accident victims all too often remained helpless because of the heavy burden of proof which rested on their shoulders.

The conservative, traditional tendency in the judiciary would win the battle. The Cassation court ordered the judiciary to continue seeing the labor contract as a '*louage d'ouvrage*', the sheer rental of work, in which work was exchanged for money.⁵² This was the result of a literal, exegetic reading of the civil code and a minimalistic interpretation of the labor relation.⁵³ Nothing less and certainly nothing more. When a worker contracted with an employer, he accepted voluntarily all working conditions, included all the risks that accompanied labor. In other words, the worker accepted the professional risks.⁵⁴ Moreover, part of his wage had to be seen as a premium to cover these risks. The Sainctelette theory was thus rejected, as it did not fit in the exegetic reading of the civil code. The only way for his theory to become reality was through legislation.

⁵² Cassation 6 January 1886, Belgique Judiciaire 1886, 129–135.

⁵³ 'Attendu que le louage d'ouvrage qui s'est, en effet, conclu entre Masy et l'Etat, est, suivant la définition de la loi, un contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre moyennant un prix convenu entre elles. Que les seules obligations du maître sont donc de mettre l'ouvrier à même de faire l'ouvrage dans les conditions prévues par le contrat et de lui payer le salaire stipulé.' Brussels 7 August 1884, Belgique Judiciaire 1885, 3. 'Attendu qu'aucune disposition de loi ne définit ni ne précise la garantie que peut devoir le maître à l'ouvrier quant à de semblables dangers.' Cass. 6 January 1886, Belgique Judiciaire 1886, 134.

⁵⁴ 'Que si le travail est dangereux, comme celui d'un garde-convoi, d'un machiniste, d'un ouvrier mineur, d'un marin, c'est précisément pour le faire que l'ouvrier s'engage, qu'il en connaît les périls et consent librement à s'y exposer.' Brussels 7 August 1884, Belgique Judiciaire 1885, 3; 'Que celui-ci (= the worker) a accepté en connaissance de cause le travail qu'on lui a proposé et s'est soumis de son plein gré, en vue des avantages qu'il stipulait, aux dangers inhérents à ce genre d'ouvrage.' Brussels 2 November 1885, Belgique Judiciaire 1885, 1545; 'La victime a parfaitement connu tous les dangers de l'emploi qu'elle avait sollicité et elle en a retenu pour elle tous les risques.' Requisitoir van eerste advocaat-generaal Mesdach de ter Kiele. Cass. 6 januari 1886, Belgique Judiciaire 1886, 130.

The 1900 Labor Contract Act

On 24 January 1891, a commission was installed to write a project on the labor contract.⁵⁵ In their project, they defined the labor contract as follows:⁵⁶ *‘The rent of services from workers or servants is a contract by which they engage to accomplish a task or services under the authority, the direction or the surveillance of an industrialist or employer, or the chief of a household, in exchange for a retribution by them.’* The commissioners noted that the essential point of this definition was that the work had to be done under the authority, direction and surveillance of an employer.⁵⁷ This element of authority of the employer in the execution of the contract was crucial to distinguish the labor contract from other kind of contracts. In other words, the commissioners adopted Sainctelette’s insights in their proposal.⁵⁸ This was also the case in the 1896 and 1898 proposals,⁵⁹ and finally also in

⁵⁵ ‘La Commission sera amenée à étendre son examen aux diverses formes d’assurances des risques ouvriers, proposées en Belgique et à l’étranger été même admises dans la législation de certains pays; mais l’objet essentiel de sa mission est l’avant-projet d’une loi sur le contrat de louage de services, (...). Commission instituée auprès du département de la justice pour la préparation de l’avant-projet d’une loi destinée à régler les effets du contrat de louage des ouvriers et des domestiques. Procès-verbaux des séances. Projet de loi. Rapport. Parliamentary pieces Chamber 1891–92, nr. 13, 17 November 1891, p. 5.

⁵⁶ ‘Le louage de services des ouvriers et des domestiques est un contrat par lequel ils s’engagent à accomplir un travail ou un service sous l’autorité, la direction et la surveillance d’un chef d’industrie ou patron, ou d’un chef de ménage, moyennant une rétribution à fournir par ceux-ci.’ Commission instituée auprès du département de la justice pour la préparation de l’avant-projet d’une loi destinée à régler les effets du contrat de louage des ouvriers et des domestiques. Procès-verbaux des séances. Projet de loi. Rapport. Parliamentary pieces Chamber 1891–92, nr. 13, 17 November 1891, p. 36.

⁵⁷ ‘Le point essentiel à noter dans la définition de l’article 1er, c’est que le travail ou le service doit se faire sous l’autorité, la direction et la surveillance d’un chef.’

⁵⁸ In their motivation, they refer explicitly to Sainctelette: ‘Le texte de la loi empêchera ainsi de se produire l’équivoque où M. de Courey (Le droit et les ouvriers) est tombé dans sa critique du système de M. Sainctelette, et que celui-ci a rectifiée suffisamment, à l’avance, dans son ouvrage, Responsabilité et Garantie, p. 119 n° 5, 120 n° 6, 153 n° 16, puis dans ses brochures. Proposition de lois, p. 18, et Accidents de travail, pp. 14 et suiv.’ Commission instituée auprès du département de la justice pour la préparation de l’avant-projet d’une loi destinée à régler les effets du contrat de louage des ouvriers et des domestiques. Procès-verbaux des séances. Projet de loi. Rapport. Parliamentary pieces Chamber 1891–92, nr. 13, 17 November 1891, p. 58.

⁵⁹ Projet de loi sur le contrat de travail, Parliamentary Pieces Chamber, 27 November 1896, n° 26; Projet de loi sur le contrat de travail, Parliamentary Pieces Chamber, 24 February 1898, n° 7.

the 1900 Act, of which the first article proclaimed: '*The present act deals with the contract by which a worker agrees to work under the authority, the direction and the surveillance of an industrialist or employer, in exchange for a remuneration to be delivered by the latter.*'⁶⁰ In execution of this principle of authority, the worker had to execute his labor as a *pater familias*, when, where and how was convened and he had to act accordingly to the orders and instructions that had been given by his superior.⁶¹ As such, the subordination of the worker had become an integral part of the labor contract, just as Saintelette had explained in his 1884 theory.⁶² In return, authority included the acceptance that labor was not just a commodity.⁶³

Surprisingly enough, adding the element of authority (and subordination) in 1900 did not change fundamentally the nature of the Belgian labor contract, as it was only recognition of reality. Also, acknowledging the presence of authority and subordination did not change the fundamental liberal character of the labor contract.⁶⁴ The 1900 labor contract was as liberal as the preceding one, in the sense that it remained a contract between two so-called 'equal' parties. In reality, this was of course a legal fiction: the employer remained the strong party that could impose his conditions to a weaker party, the worker...

⁶⁰ 'La présente loi régit le contrat par lequel un ouvrier s'engage à travailler sous l'autorité, la direction et la surveillance d'un chef d'entreprise ou patron, moyennant une rémunération à fournir par celui-ci (...)' Labor Contract Act, article one.

⁶¹ Articles 8–10 Labor Contract Act. He had also to respect the rules and good manners. He was forbidden to do anything that could hurt his own safety or that of his co-workers or others. He also had to keep the tools and the raw materials in good order and could be held liable if these got destroyed because of his wrongdoing.

⁶² 'Il faut noter, à l'article 8, la disposition qui fait à l'ouvrier le devoir d'agir conformément aux ordres et aux instructions qui lui sont donnés par le chef d'entreprise ou ses préposés, en vue de l'exécution du contrat. Ces derniers mots ont leur importance: ils marquent que la subordination de l'ouvrier, vis-à-vis du chef d'entreprise, est contenue tout entière, au point de vue juridique, dans les bornes du contrat même. C'est ainsi qu'il faut entendre, en droit, l'autorité patronale dont parle l'article 1^{er}.' Labor Contract Act, p. 83.

⁶³ 'Au point de vue du droit strict, le patron n'est pas libéré par cela seul qu'il paye le salaire convenu; le contrat de travail n'est point assimilable à une vente de marchandises: la prestation de travail met en jeu la personnalité même, physique et morale, de l'ouvrier.' Labor Contract Act, p. 84.

⁶⁴ As Secretary Cooreman put it in the Chamber: 'Un autre caractéristique du projet de loi, c'est le respect de la liberté et de l'égalité juridique des contractants. Le contrat de travail est une convention synallagmatique où les obligations sont réciproques et établies avec tout le parallélisme que comportent les relations juridiques des parties en présence.' Parliamentary debates Chamber, 24 February 1899, p. 693.

Conclusion

In 1900, the juridical fiction of '*labor as commodity*' was finally abandoned in Belgium, for a more realistic approach towards wage labor.⁶⁵ As has been illustrated in this contribution, the introduction of '*authority and subordination*' in the modern Belgian labor contract is undeniable a legacy of Sainctelette and his original 1884 theory. This way, the Belgian case certainly deserves a place in Kumlien's comparative analysis of the historical emergence of the employee's duty of obedience.

Bibliography

- Act 22 Germinal XI (12 april 1803) relative aux manufactures, fabriques et ateliers, *Pasinomie*, series I, XII, 64–66.
- Aminot, Jean-Pierre, "Martin Nadaud et les accidents du travail", in: *Histoire des accidents du travail* 1978, p. 109–127.
- Baker, John, *The Oxford history of the laws of England*, XIII, 1820–1914, Fields of development, Oxford University Press, Oxford 2010.
- Becker, Martin, *Arbeitsvertrag und Arbeitsverhältnis in Deutschland: vom Beginn der Industrialisierung bis zum Ende des Kaisereichs*, Klostermann, Frankfurt am Main 1995.
- Blanc, Joseph, *Des délits des esclaves en droit roman – de la responsabilité des patrons en matière d'accidents en droit français*, Chaspoul, Digne 1888.
- Bodeux, Michel, *Etudes sur le contrat de travail*, Leuven 1896.
- Bölderndorff, "Ch. Sainctelette (avocat, représentant, ancien ministre), De la responsabilité et de la garantie (accidents de transports et de

⁶⁵ This was acknowledged during the parliamentary debates. As an illustration the following statement of member of parliament Renkin: 'L'importance sociale du contrat de travail justifie encore l'intervention du législateur. Jadis, on le considérait comme une vente. L'ouvrier livrait son travail, le patron payait le salaire. Ils n'avaient point d'autres obligations. Mais cette conception ancienne et servile fait place de plus en plus dans les esprits à une conception plus humaine et plus juridique. On comprend de mieux en mieux aujourd'hui que ce contrat ne suppose pas seulement une livraison d'un travail, contre payement d'un salaire. On s'aperçoit qu'il intéresse directement la personne de l'ouvrier; son existence tout entière, sa santé physique et morale, son intelligence, sa liberté, sa vie et celle de sa famille en dépendent. (...) Le contrat est la vraie source de la misère ou de la prospérité des travailleurs. Et comme l'objet de ce contrat n'est point une chose, une marchandise, mais l'acte humain lui-même, il réclame des règles différentes de celles du louage des choses.' Parliamentary debates Chamber, 3 March 1899, p. 746.

- travail), Bruxelles et Paris 1884, 8°, 258 p.”, in: Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 1885, p. 434–440.
- Brand, Jürgen, Der Code civil als Brücke zum französischen und deutschen Arbeitsrecht, in: Dölemeyer, Mohnhaupt and Somma (red.), 2006, p. 61–104.
- Bürge, Alfons, Das französische Privatrecht im 19. Jahrhundert. Zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus, Klostermann, Frankfurt am Main 1991.
- Commission du travail, Rapports. Propositions des sections et conclusions, Lesigne, Brussels 1887.
- Cornish, William, Part Three. Labour law, I, From Labouring to Employment: 1820–1867, in: Baker (red.), 2010.
- Cottureau, Alain, “Droit et bon droit. Un droit des ouvriers instauré, puis évincé par le droit du travail (France XIXe siècle)”, in: Annales HSS 2002, p. 1538–1539.
- David, Marcel, “L’évolution historique des conseils de prud’hommes en France”, in: Droit social 1974, p. 3–19.
- Debaenst, Bruno, Van status tot contract. De arbeidsovereenkomst in België vanuit rechtshistorisch perspectief, Die Keure, Brugge 2013.
- Decree 2–17 March 1791 ‘portant suppression de tous les droits d’aides, de toutes les maîtrises et jurandes, et établissement de patentes’, *Pasinomie*, series I, II, p. 230–234.
- Decree 14–17 June 1791 ‘relatif aux assemblées d’ouvriers et artisans de même état et profession’, *Pasinomie*, series I, III, p. 22.
- Decree 9 Frimaire XII (1 December 1803) ‘relatif au livret dont les ouvriers travaillant en qualité de compagnons ou garçons devront être pourvus’, *Pasinomie*, series I, XII, 287–288.
- Delecroix, Emile, Le contrat de travail. Etudes des propositions de lois concernant les ouvriers mineurs, in: Revue de la législation des mines 1885, p. 65–124.
- Dölemeyer, Barbara, Mohnhaupt, Heinz and Somma, Alexander (red.), Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen ausserhalb Frankreichs, Rechtsprechung Band 21 Klostermann, Frankfurt am Main 2006.
- Employee Contract Act of 7 August 1922, *Moniteur Belge* 16–17 August 1922.
- Ewald, François, L’Etat providence, Grasset, Paris 1986.
- Glasson, Ernest, Le code civil et la question ouvrière, Pichon, Paris 1886.

- Halperin, Jean-Louis, *Histoire du droit privé français depuis 1804*, PUF, Paris 2001.
- Heirbaut, Dirk and Baeteman, Gustaaf (red.), *Cumulative editie van het Burgerlijk Wetboek. De huidige en de originele tekst met alle wijzigingen in België van 1804 tot 2004*, Kluwer, Mechelen 2004.
- Hepple, Bob (red.), *The making of labour law in Europe. A comparative study of nine countries up to 1945*, Mansell, London 1986.
- Hesse, Pierre-Jean, “Les accidents du travail et l’idée de responsabilité civile au XIX^e siècle”, in: *Histoire des accidents du travail* 1979.
- Kieffer, Monique, “La législation prud’homale de 1806 à 1907”, in: *Le mouvement social* 1987, p. 9–24.
- Kumlien, Mats, *Continuity and Contract. Historical Perspectives on the Employee’s Duty of Obedience in Swedish Law*, Institutet för rättshistorisk forskning, Stockholm 2004.
- Labor Contract Act, 10 March 1900, *Moniteur Belge* 14 March 1900, *Pasinomie* 1900, n° 80.
- Le Crom, Jean-Pierre (red.), *Les acteurs de l’histoire du droit du travail*, PUR, Rennes 2004.
- Le Gall, Yves, *Les comportements politiques face à la loi du 9 avril 1898 sur les accidents du travail*, in: *Histoire des accidents du travail* 1981, p. 1–233.
- Olsak, Norbert, “Les conseils de prud’hommes: un archétype judiciaire pour le mouvement ouvrier?” in: *Le Mouvement social* 1987, p. 101–119.
- Saintelette, Charles-Xavier, “Droit commercial. Du contrat de transport. Transport des choses. Obligations du voiturier. Difficultés principales”, in: *Belgique Judiciaire* 1883, 386–387.
- Saintelette, Charles-Xavier, *De la responsabilité et de la garantie (accidents de transport et de travail)*, Bruylant, Brussels 1884.
- Saillies, Raymond, *Les accidents du travail et la responsabilité civile*, Rousseau, Paris 1897.
- Sauzet, Marc, *De la responsabilité des patrons envers les ouvriers*, in: *Revue critique de législation et de jurisprudence* 1883, p. 596–640 and 677–704.
- Simitis, Spiros, “The case of employment relationship. Elements of comparison”, in: Steinmetz (red.), p. 181–202.
- Steinmetz, Willibald (red.), *Private law and social inequality in the industrial age. Comparing legal cultures in Britain, France, Germany and the United States*, Oxford University Press, Oxford 2000.

- Tholozan, Olivier, “L’apparition de la notion de contrat de travail dans les theses des facultés de droit (1890-1901)” in: Le Crom (red.), 2004, p. 59–68.
- Veneziani, Bruno, “The evolution of the contract of employment”, in: Hepple (red.), 1986, p. 31–72.
- Workplace Regulation Act of 15 June 1896, *Moniteur Belge* 25 June 1896, *Pasinomie* 1896, 184–203.
- Workplace Accident Compensation Act, 24 December 1903, *Moniteur Belge* 28–29 December 1903, *Pasinomie* 1903, 286–324.