

The Framework of French Labour Law and Recent Trends in Regulation

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At the beginning of the twenty-first century, French labour law, as others, faces important challenges. Globalization, new technologies at work, the rise of precarious work, productive decentralization are some of the complex issues it has to deal with. It is in the context of a widespread criticism of the French model of labour law, in large part governed by legislation and the idea of status, that these challenges occur. Too rigid, too complex, French labour law would be in need for reforms. Understanding the overall logic of a system is necessary to understand its evolutions. As a consequence, the paper will describe the overall system of sources, before analysing some of the evolutions that labour law has lived in the recent years, or could live in the coming years, according to the reforms that are at a planning stage.

I. SOURCES¹

The general context of labour law in 2004, with regard to sources of law, is that of a criticism of State regulation of employment relationships. Two figures are the object of criticism.

The first is the judge, who has had in the last twenty years, a fundamental role in the evolution of labour law. He is often criticised for going beyond his role of applying and interpreting the law, and for introducing insecurity in labour law.

The second is the legislator, criticised for excessive interventionism within labour law. The interesting point here is not the criticism in itself, which has existed since the separation of labour law from the civil code, but the alternative proposed to statute law. It is remarkable to note that, on the part of employers, the development of collective bargaining is seen as a priority.

The following developments will consist of a description of the sources of French labour law, as well as their articulation.

A. Description of Sources

The purpose of the paper is not to focus on the international sources, considering they are not specific to French law – the specificity would mainly concern the implementation of European norms in national law –. These are bilateral treaties, conventions of the International Labour Organisation, European Community law, with a special mention to the Charter on fundamental rights recently adopted.

It is suggested to draw a distinction between classical sources and professional sources.

1. Classical internal sources

a) *The Constitution*

The Constitution plays an increasing role in labour, to such an extent that an important subject for French labour law is that of the “constitutionalisation of labour law.” However, this movement has only been possible through an enlargement of the concept of Constitution. It is considered, indeed, that constitutional value should be granted to norms others than the very text of the Constitution:

It has been considered that the Preamble of the French Constitution, which refers to the Declaration of Human Rights of 1789 and the preamble of the Constitution of 1946 (which refers to the “fundamental principles recognized by the laws of the Republic”), has the same value as the Constitution itself. As a consequence, these texts and principles have constitutional

¹ Most cases referred to in the following text can be consulted by connecting to : www.legifrance.com/

value.

Particular attention should be given to the preamble of the Constitution of 1946, which contains social and economic rights (right to work, right to strike, right to collective bargaining...), as opposed to the Declaration of Human rights which contains rather civil and political rights, and is usually considered as a rather “liberal” text. It may be interesting to underline that this declaration is regularly invoked, sometimes successfully, to call into question interventionist legislation. It is the case, in particular, of freedom of enterprise, which is not explicitly referred to in the Declaration, but may be linked to the general principle of freedom stated in article 4 of the declaration.²

Among the constitutional principle, the principle of equality deserves particular attention. It is, indeed, often invoked to contest the validity of a legislative provision, notably when the provision draws distinctions between different categories of workers.

This pretension is rarely successful before the Constitutional Court (*Conseil Constitutionnel*), which states that “the principle of equality does not preclude the fact that the legislator should rule differently different situations, neither that he should derogate to equality for reasons of general interest, in so far as the difference of treatment that results from it is linked with the object of the law.”³ Intelligibility and clarity of the law are also invoked since they have been granted constitutional value by the Constitutional council.⁴

b) Statute law

It is needless to say that Statute law plays an essential part in French labour law. The history of labour law is indeed that of an emancipation with regard to the law of contracts, through the laying down of specific rules by the legislator, notably in the name of workers’ protection. Most statute law is inserted in the labour code. Codification is indeed an essential part of French private law.

c) Case law

The importance of case law in French labour law, notably that of the Court of cassation, is such that it can be ranked among the sources of law – although it is not a formal source of law. The social chamber of the Court of cassation has, indeed, played a decisive role in the evolutions of labour law, notably in individual employment law. For instance, the question of the alteration of working conditions has been nearly exclusively dealt with through case law. The Court of cassation has also played an essential role in the law relative to economic dismissal, notably with regard to the regrading of employees after such a dismissal, but also with regard to the justifications for economic dismissal.

2. Professional sources

Professional sources are mainly customs, work rules and, especially collective agreements.

a) Custom

Two types of customs can be isolated.

The first are professional customs. It is not surprising that this source of law has not encountered considerable evolution.

The second type are the company customs, whose legal recognition originates from case law; they are important in practice, notably with regard to notice in the case of an employment, or awards granted by the employer in addition to wages. The contents of the custom can be of different kinds; it can be the fact of applying voluntarily a collective agreement, of applying a collective agreement that does not normally apply to the company, of granting collective advantages regarding collective representation, of granting individual advantages to all employees of the firm, or at least to all employees of the same category.

² A. Lyon-Caen, *Le droit du travail et la liberté d’entreprendre*, Droit social 2002, p. 258.

³ Conseil Constitutionnel, Déc. 13rd January 2000, 99-423 DC, RJS 2/00, n° 175.

⁴ Conseil Constitutionnel, Déc. n° 98-401, 10th June 1998, Rec. 258 ; Déc. n° 99-421 DC, 16th December, 1999, Rec.136.

For a company custom to be valid, it has to be general (apply to all employees of the company or, at least, to all employees within the same category), invariable, and constant. Its revocation requires the information of the employees along with that of their representatives, and the respect of a reasonable notice.

They have legal value in themselves, independently of the contract. This means that incorporation within the contract is not required for the custom to bind his author, that is to say the employer. How can their legal value be explained? It is sometimes explained through an assimilation with another source of law, that has only been recently recognised (by case law again): the unilateral engagement of the employer. At present, it is difficult to define the latter concept with precision. It is sometimes said, through a comparison with the mechanism of estoppel (which does not exist in itself in French law), that its binding force comes from the expectations created towards the employees.

b) Works rules

The labour code contains provisions regarding the “Règlement intérieur,” which contains company rules relative to discipline, health and safety. It is obligatory in companies employing regularly more than twenty employees.

c) Collective agreements

Collective agreements are the most important of professional sources.

1. Their legal nature

As far as their legal nature is concerned, collective agreements are both contracts (binding for the social partners who have signed them), and normative acts (that contains rules that go beyond the circle of the signers). It is with regard to their normative effect that French collective agreements are commonly associated with statute law.

2. Their scope of application

The applicability of collective agreements depends on the employer having signed it, having adhered to it, being member of the employers’ organization that has signed the agreement, or having adhered to it. If it is applicable, it applies to all contracts of employment concluded with this employer.

Some sector agreements are made applicable to all employers and companies within the sector concerned: this is called “extension.”

3. Their level

Three levels of collective bargaining are considered in French labour law:

1. national
2. sector
3. company (which is subdivided in establishments)

The evolution is that of a weakening of the traditional and typical level of collective bargaining in French law, which is the sector level. Since the 1980’s, company level bargaining has increased, due to an obligatory annual negotiation on wages and working time instituted by the legislator in 1982, but also to a possibility to derogate in a manner that is not necessarily favourable to employees. This evolution has increased employers’ interest for collective bargaining at company level.

National level bargaining has also developed, as an important instrument of social dialogue (see further, the development of social dialogue). It is an important source of proposals for legislative reforms.

4. The actors of collective bargaining

As a rule, only representative trade unions can conclude a collective agreement (There exist two ways to obtain representativity. Some trade unions are per se representative, due to their affiliation to one of the five national trade union organizations that are deemed representative). Those who are not affiliated must prove their representativity, through criteria such as independence or audience at industrial ballots.

Although Trade unions have for long had a monopoly of collective bargaining, an important

exception, in the theory of labour law at least, was introduced by a statute law of the 12th November 1996. It may be underlined that this exception was considered as compatible with the Constitution, due to the absence of constitutional value of trade unions with regard to collective bargaining.⁵

The exception is the following:

In companies that have no trade union representation, and where a sector agreement allows it, a collective agreement can be concluded:

- either by the elected representatives (Comité d'entreprise or délégués du personnel)
- or by one or several employees of the company, that have been given a mandate by one or several representative trade unions.

The objective was to develop collective bargaining in small or medium size companies, that frequently lack trade union representation.

Although essential in theory, this exception was however of a limited scope in practice. The law of 1996 was only “experimental.” It can be observed that a new trend in French labour law is to lay down experimental statute laws, that are bound to be re-examined with regard to the success or failure of their application for a limited number of years. Even though the law of 1996 was not a failure, the success turned out to be limited, considering less than forty agreements were concluded.

The Statute law of 19th January 2000, relative to the reduction of working time to thirty-five hours, introduces a similar legal mechanism. It opens the possibility of giving a mandate to employees, without a sector agreement (which has been strongly criticised), but with a strict legislative framework, and a majority ratification. The project of statute law that is currently before Parliament intends to reactivate the mechanism established in 1996.

B. The Articulation of Sources

The articulation of sources is different from that of civil law, which is based on hierarchy. In labour law, the articulation is not based on the position of the norm within the hierarchy, but on its contents. More precisely, the rule is that the most favourable provision applies.

How to compare a collective agreement and a provision of statute law? The comparison must be carried out advantage by advantage, according to the specific situation of each employee. Yet, some state that this mode of comparison is not appropriate for concession bargaining.

Although the principle is the possibility to derogate in a more favorable way to a source higher on the hierarchy, it does not apply were core rules are at stake. Some rules laid down by statute law are thus absolutely imperative, and cannot be derogated to, even more favourably for the employee. These are notably the rules regarding jurisdiction, criminal sanctions and some rules concerning employee representatives.

II. RECENT EVOLUTIONS IN FRENCH LABOUR LAW

As is the case in other countries, it is common, in France, to distinguish between individual and collective labour law. Only some of the evolutions will be considered in the following developments. Some have already been adopted. Others are at a planning stage, or merely in perspective.

A. Individual Labour Law

The following developments aim at examining some of the important evolutions that French labour law has encountered in the recent years.

1. Statutory intervention

The legislative activity is intense in French labour law. Among many, three statutory interventions will be contemplated.

⁵ Cons. const. D. 96-383 of 6th November 1996, Legifrance.com.

a) The reduction of working time

The complexity of the legal regulation of working time does not enable a detailed description. Two main points may be underlined.

The first concerns the contents of the law itself: it organizes a general reduction of working time to 35 hours.

The second point is of particular interest. It concerns the method of elaboration of the law. Its interest regards the relationship between collective bargaining and statute law.

Two statute laws were, indeed, successively adopted. The first, adopted on the 13th June 1998, financially incites companies to negotiate collective agreements on the reduction of working time to 35 hours. These are “anticipation agreements.” The logic that lies behind this first statute law was to enable and encourage companies to negotiate the reduction of working time, rather than having it imposed by statute law. Indeed, unless an agreement was reached, the reduction of working would be an operation of statute law in the year 2000, which has been the case for a large number of companies. The second step was, indeed, the statute law of 13rd January, 2000, that imposes the reduction to 35 hours.

This articulation between collective bargaining and statute law reflects the links that develop between these sources of law, the legislator referring more and more to collective bargaining, whose legitimacy (local - company agreements - or professional - sector agreements -) adds to the legitimacy of statute law. The legislation on working time has been amended in 2003,⁶ with a purpose notably to introduce more flexibility.

b) The law against sexual and moral harassing

The introduction of a new section of the labour code on “harassing” deserves attention. Indeed, a statute law of the 17th January 2002, reinforces the provisions on sexual harassing and introduces a protection against moral harassing.

1. The scope of protection

Two successive provisions of the labour code protect employees against harassing.

The first is relative to sexual harassing (Article L 122-46 Labour code): “no employee, no candidate for recruitment, or a training period can be sanctioned, dismissed or be the object of a discriminatory measure, should it be directly or indirectly, for having been the victim of, or refused, acts of sexual harassing, whose task is to obtain favours of a sexual nature to his profit or to that of another person.

The second is relative to moral harassing (Article L 122-49 Labour code): “no employee, no candidate for recruitment, or a training period can be sanctioned, dismissed or be the object of a discriminatory measure for having been the victim of or refused repeated acts of moral harassing having as an object or an effect a degradation of the working conditions likely to violate his rights and dignity, to alter his physical and mental health or compromise his professional future.”

The employee who denounces such acts is also protected.

2. Measures of prevention

The employer has to take all the necessary provisions in order to prevent acts of sexual or moral harassing (Article L 122-48 Labour code).

3. Mediation procedure

A person who has been the victim of moral harassment (but not sexual) can open a mediation (Article L 122-54 Labour code).

4. Proof

The proof of sexual and moral harassing is derogatory with regard to the general rules of civil law. It is a recent evolution in French law, under the influence of European Community law with regard to non discrimination. Proof is divided in two stages. The first consists of the proof by the employee of facts that enable to presume sexual or moral harassing. If such facts are

⁶ Loi n° 2003-47 of the 17th January, 2003.

established, it is then to the person accused of harassing to prove that these elements do not constitute harassing, and are justified by objective reasons, that have nothing to do with harassing.

5. Sanctions

Sexual or moral harassing can lead to three kinds of sanctions. The first is the nullity of the decision eventually taken as a consequence of the refusal of the employee to bear sexual or moral harassing (dismissal, sanction). The second sanction is relative to discipline. If the individual who committed the acts of harassing is an employee, he faces disciplinary sanctions. The third type of sanctions are criminal sanctions.

2. The contract of employment and its evolutions

a) The rehabilitation of the contract

An important aspect of French labour law is the rediscovery of contract.

French labour law has developed in reaction against contract law. Yet, contract and contractual analysis tend to be rehabilitated. First, contract is and has always been an instrument of individualisation of the employment relationship. Second, it appears as one of the core mechanisms of employee resistance to change, should it emanate from collective agreements or from unilateral decisions by the employer. The Court of cassation, in the late 20th century, has put emphasis on this aspect, stating notably that a collective agreement can not, per se, modify the contract employment. The most obvious example concerns resistance against unilateral change by the employer.

b) The issue of change

Among the evolutions that the contract of employment, and its regime, have encountered in the recent years, the alteration of terms and conditions of employment deserves particular attention. The rules applicable to change have been elaborated by the Court of cassation.

1. The analysis of the change

For a long time, the changes in the employment relationship were governed by the following rule: *if the modification of the contract was substantial, an agreement between the employer and the employee was required. If it was of minor importance (non substantial), the employee was not able to refuse it: it could be unilateral by the employer.* In other words, the issue of changes in the employment relationship was governed by a distinction according to the importance of the change, according to the circumstances.

The Court of cassation revised its case law in several decisions of the 10th July 1996. Its former rule had been criticised with regard to the principles of contract law. Indeed, the admission of a unilateral modification of the contract, should it be non substantial, was considered as a breach of the principles of contract law. Requiring no agreement of the parties in the case of non substantial modification of the contract was evidently contrary to article 1134 of the Civil code, according to which contracts are binding between the parties. This may explain the new rule. Since 1996, the distinction is between the modification of the contract - which requires the agreement of the parties - and the changes in working conditions decided by the employer in the exercise of his power of direction.

The change is two-fold.

First, the concept of non substantial modification of the contract has been replaced by that of “change in working conditions ...” The purpose of this change was to put an end to the idea of a unilateral modification of the contract, even non substantial. The possibility to change the working conditions is then seen as an exercise of power by the employer. The labour law approach to change in working conditions is thus reconciled with contract law.

Second, the partition between contract and power, that is to say between the changes that require the agreement of the employee, and those that can be unilaterally decided by the employer, departs from that adopted under the former rule.

Instead of analysing the circumstances and qualify the change with regard to the particular circumstances of the employment relationship, the Court of cassation instituted a purely

objective test. Some elements are necessarily part of the contract, and thus their alteration is *per se* a modification of the contract: wages, working time, job function and work place. The other elements are mere working conditions, that can be unilaterally changed by the employer. In this perspective, the partition is purely objective. Was it not too objective? The partition, which had the advantage of being predictable was nevertheless considered as too rigid. It meant that a change of working place within Paris itself required, in theory, the agreement of the employee.

As a consequence, from 1998 onwards, the Court of cassation introduced flexibility within the system, which is today as follows: changes in wages and working time are, whatever the importance of the change, modifications of the contract. Changes in the job function are modifications of the contract, if they alter the contractual definition of the job function. New tasks within the contractual job function are mere changes in working conditions. For instance, changing the task of a secretary from hand writing to computer writing is a mere change in working conditions, and does not require the agreement of the employee.

The change of work place is an issue that has attracted major attention. Considering the requirement of an agreement of employees for all changes of this type, even within the same city, was excessive, the Court of cassation introduced flexibility. If the change lies within a “geographical sphere,” it is qualified as a mere change in the working conditions. If it goes beyond, it is a modification of the contract. The difficulty here is the definition of the “geographic sphere.” Some clarification is expected from the social chamber of the Court of cassation in the coming months.

An element of complexity concerning alterations of the work place is the mobility clause: if the contract contains such a clause – and if its use is not abusive, the change in the location of work is considered as a change of working conditions, unless the use of the mobility clause by the employer is abusive.

2. The Consequences of the refusal

The issue of alteration of working conditions is closely linked to that of dismissal. The refusal of a change in working conditions is in principle a misconduct, that can be a ground for dismissal. On the other hand, the refusal of modification of the contract is not in itself a ground for dismissal. A ground for dismissal is necessary, such as an economic ground.

If the employer decides to dismiss the employee, it will have to establish a ground for dismissal other than the refusal of the contractual modification.

3. Article L 120-2 of the Labour code and the respect for fundamental rights

Article L 120-2 of the labour code is not as recent as the statutory interventions evoked above. Yet, it is only in the last few years that its importance has appeared in case law. This provision, adopted in 1992, has remained quite anonymous for several years before becoming one of the core provisions of the code with regard to the individual relationship. It states that “nobody shall impose restrictions to the rights of the persons, to his or her individual and collective freedom, that are not justified by the nature of the task to accomplish and proportional to the aim pursued.” Article L 120-2 can be summarised as requiring the proportionality and the justification of employer decisions.

This provision has been mobilised to control different types of decisions. It is the case of an employer decision to change the work place of an employee, according to a mobility clause inserted in the contract of employment. Even though the employer is entitled to change the work place of the employee, by virtue of the contract, the use by the employer of a mobility clause can not lead to the imposing of excessive restrictions to the rights of the employee, notably the right to have a normal family life.⁷

Recently, the question of dressing at work was raised before the Court of cassation, and the issue was again that of the proportionality and justification of the decision of the employer to refuse the wearing of short trousers at work.⁸ More generally, the issue of privacy at work, which

⁷ Cass. soc. 12nd January 1999, Legifrance.com.

⁸ Cass. soc. 25th May 2003, Legifrance.com.

has been fundamental in recent labour law,⁹ is deemed to be regulated by virtue of article L 120-2. For example, the control of the bags of the employees, when entering the building of the company, is legal only if it is justified by outstanding circumstances and proportional to the aim pursued in certain circumstances (security control).¹⁰

Inevitably, the selection operated above was arbitrary. Other evolutions could have been studied.

B. Collective Labour Law

Even though the main evolutions concern collective bargaining, employee representation within the company, notably as a way to control economic decisions, has developed.

1. Collective representation and control of power within the company

The ideas of corporate governance have had some impact in French law in the last few years. Although it is mostly an issue for company law (control of directors by shareholders, changes in the structure of company boards...), it has also had some impact in the field of labour law. The impact concerns notably the information and consultation of works councils, who are obligatorily informed and consulted on issues concerning the organisation, management, and general functioning of the company, and notably, the measures that are likely to affect the number or structure of employees. In other words, works councils are part of the governance of the company, even though they have no decision making power.

Their prerogatives are notably the following:

In the shareholders' companies, works council have the same rights of information and communication of documents as shareholders.

A statute law, whose name is significant (statute law on new economic regulations¹¹) (15th May, 2001), has, in this respect, reinforced the role of works councils, notably in the case of a takeover bid; the works council of the company that is threatened by the take over bid is specifically informed and has the right to convoke and hear the initiator of the takeover bid. The sanction is remarkable, in that the initiator of the take over bid is deprived of his rights to vote (art L 432-1 Labour code).

The same statute law has also enacted, in order to improve the implication of the works council within the company, that works council can require from a court the designation of a person mandated to convoke the general meeting of shareholders in the case of urgency. In addition, works council can require the insertion of resolutions in the agenda of the general meeting of shareholders.

It may also be underlined that works councils can designate two of its members to attend the general meetings of shareholders; they may be heard, at their request, in the case of resolutions that require the unanimity.

These elements tend towards an approach of corporate governance that would not be exclusively based on shareholders' interests. It is however with regard to collective bargaining that the recent evolutions are the most striking.

2. The reform of collective bargaining

a) The increasing role of collective bargaining (general statements)

Traditionally, French labour law is based on the intervention of the State, in accordance with French tradition which is not favourable to intermediary bodies. In this respect, the history of the recognition of collective bargaining in France is closely linked to the State. Collective bargaining is usually considered as a delegation by the State to the social partners, to such a point that the idea of collective autonomy is of limited heuristic value in French labour law. A common idea today, embraced notably by the employer organisations and the current Government, is that the State occupies too much place in labour law. The role of Statute law

⁹ For instance, case law on the respect of privacy as to e-mails, Cass soc 2nd October 2001, Legifrance.com.

¹⁰ Cass. soc. 3rd April 2001, Legifrance.com.

¹¹ Nouvelles régulations économiques.

should be limited, and its contents should be modified, notably with a view to simplify it. More space should be given to “social democracy,” a key word in social relations today. The idea is to grant more autonomy to the social partners, notably by delegating them the regulation power. It is sometimes proposed that the hierarchy of sources should be reversed: the legislator would state broad principles, whereas collective agreements would determine the rest. The idea is not new. In 1945, the same principle of social democracy had led the creators of the Social Security to transfer its management and organisation to the social partners. The reasons advanced to delegate power to collective autonomy are notably the globalisation of the economy, the requirements of competitiveness for companies, the growing implication of the civil society in changes and the increasing complexity of the organisation of work. In this respect, some suggest that it should be possible to decide that some European directives can be transposed through collective agreements.

b) The changing function of collective bargaining

One of the central evolutions of collective bargaining is the change in its function. It is not considered anymore exclusively as a way of completing the law with a view to grant better protection to employees. From 1982 onwards, the social partners can derogate from a statute law, even to decrease the rights granted by statute law. It constitutes a major change in labour law, considering statute law is no more a minimum standard common to all employees. The derogation must be expressly stated by the legislator, which is the case for several provisions concerning working time. Derogatory agreements have substantially transformed collective agreement within the company, and indeed, it has favoured its development considering employers were more keen to negotiate.

Alongside “derogatory agreements,” two other kinds of collective bargaining have developed: concession bargaining and, closely linked to the latter, collective bargaining on the issue of employment – notably with regard to economic dismissals. The change of functions of collective bargaining is radical here: it is an instrument of organisation of the company, rather than an instrument of workers’ protection. From an instrument of workers protection, it moves to an instrument of management. As a consequence, collective bargaining becomes associated with the exercise and control of the power of the employer.

Collective agreement on economic dismissals are a very recent example of this (Statute law of 3 January 2003, on collective bargaining relative to economic dismissals¹²). Yet, this statute law is even more interesting with regard to the introduction of an original type of agreement: « method agreements ».

c) Conventional proceduralisation

A rather original type of collective agreement has been introduced. These are called “method agreements.” Their object is not to lay down substantive rules, but procedures of negotiation or dialogue. The idea is not to solve the problems, but to provide the conditions (procedures) to solve them. This is sometimes called conventional proceduralisation,¹³ according to a theory of law that examines a move from substantive to procedural legal regulation.¹⁴

Method agreements have four characteristics, according to the statute law of 2003:

First, they are experimental, in that the legislator has stated that it would legislate again, taking account of the agreements that would have been concluded.

Second, they are « derogatory », in that the collective agreement is not necessarily more protective than statute law. Yet, limits have been stated. For instance, the agreement should not deprive the works council of its right to be informed and consulted.

Third, these agreements must be signed by the majority of trade unions.

Fourth, the « method agreement » must be the object, prior to its conclusion, of a

¹² “relance de la négociation collective en matière de licenciement collectif”

¹³ Cf G. Couturier, *Le choix de la procéduralisation conventionnelle*, Semaine sociale Lamy, 19 janv. 2004, p.8.

¹⁴ DE MUNCK J. et LENOBLE J., *Droit négocié et procéduralisation*, in *Droit négocié, droit imposé ?*, Publications des facultés universitaires Saint-Louis, Bruxelles, 1996, p. 185.

consultation of the works council. It is an interesting example of articulation between elected representatives and trade unions, all the more so as it is a requirement for the validity of the agreement.

d) The project of statute law reforming labour law

An essential statute law on the reform of collective bargaining is currently before Parliament. It could substantially transform the approach to collective agreement in French law. Its main aspects are as follows:

1. The additional character of the sector agreement

There exist traditionally two “obstacles” to the full development of company bargaining. The first is that certain subjects (not numerous) are opened exclusively to sector bargaining, at the exclusion of company bargaining. The second is the traditional mode of articulation of sources according to which company agreements can only contain rules that are more favourable for employees than sector agreements.

The proposal is that the company agreement should have the same regime as the sector agreement with regard to collective bargaining. In this respect, conventional norms at sector level would only apply in the absence of a company agreement.

Furthermore, all the provisions that could exclusively be derogated to by sector agreements, would have to be modified in order to include company and establishment agreements, which demonstrates the central importance attributed to company agreements in the project.

The limitation of the legal efficacy of sector agreements would have to be tempered in three respects. First, the hierarchical value of the agreements already concluded would be maintained. Second, the rule would not apply in some domains (wages, job function, collective rules on social security, ...). Third, the signatories of a sector agreement could decide that their agreement will not be subsidiary.

A second major aspect of the reform is the introduction of the majority rule for the conclusion of collective agreements.

2. The majority rule

The majority rule has been proposed as a response to the rule according to which a single representative trade union can conclude, with the employer, a collective agreement that is binding upon all employees. In French law, considering the collective agreement will apply to all employees, it is understandable that the collective agreement should be signed by trade unions that have gained the majority of votes at the elections.

The statute law on collective bargaining proposes to introduce the “majority rule,” and offers two ways to implement the rule:

The first is a “right of opposition” to the agreement, which already exists as far as “derogatory agreements” are concerned. The agreement is valid, even if it is signed by one representative trade union, but it becomes void if a majority of trade unions make a veto to it. The new statute law would extend the rule to all collective agreements. This can be called a “negative” majority rule.

The second is a true majority rule: the majority would become a requirement for the validity of the agreement. This can be called a positive majority rule.

The rule, as laid down by the legislator, is under severe criticism, considering the modalities proposed rely on the majority of trade unions, which is a purely quantitative approach.

3. The capacity to negotiate

If a sector agreement provides for it, it would be possible for companies having no trade union representatives to have elected representatives negotiate and conclude collective agreements. In the absence of such representatives, employees mandated by trade unions could play the same role. As was stated before, a similar rule was laid down in 1996.

4. Group negotiation

Group negotiation, that has developed in practice, gains recognition with the new statute law. French labour law is certainly, at the beginning of the 21st century, at a core moment of its

development. It is particularly important, at a moment when rules of workers' protection are under considerable pressure, notably with regard to market efficiency, that labour law should be scrutinised, and analysed with regard to its mechanisms, but also to its functions and tasks, that are inevitably plural. Comparative law study, in the context of which this paper has been elaborated, plays an essential part in this reflection.

