LABOUR LAW REFORM IN FRANCE: THE *MACRON* EFFECT

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The European social model continues to be under pressure from the seemingly unstoppable forces of globalisation. At the level of the European Union the tension between the competing ambitions of economic flexibility and social (employment) stability has been captured in the aptly coined construct of 'flexi-curity'. While various individual EU member states are heeding the call for flexicurity, to date French labour law has proved rather more resistant to change. The newly elected President of the Republic Emmanuel Macron, assisted by his newly created La République En Marche! political party, displays a laudable determination to reinvigorate the debate about modernising French labour law, including its infamous Code du travail. This article discusses both content and context of the 2017 reforms affecting France's Labour Code. It concludes that the Macron reforms represent a psychologically important but ultimately modest legal step towards flexicurity.

Le modèle social européen subit lui aussi les conséquences apparemment inéluctables de la mondialisation

Au niveau de l'Union Européenne, la mise en œuvre du concept dit de «flexi-sécurité» apparaît comme étant en mesure de concilier la notion d'adaptation économique dans un monde en perpétuelle évolution avec le maintien d'une stabilité sociale et de l'emploi.

Alors que différents États membres de l'UE ont, sous des formes différentes mis en œuvre ce concept, l'auteur fait observer que le droit du travail français apparaît jusqu'à présent être plus réticent au changement.

M Emmanuel Macron, Président de la République française nouvellement élu, bénéficiant d'une confortable majorité parlementaire grâce au parti de La République En Marche! semble cependant afficher sa détermination pour relancer au sein de la société française le chantier des réformes de la modernisation du droit

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du travail français et ce y compris en modifiant son célèbre et sacro-saint Code du travail.

Cet article traite à la fois du contenu et du contexte des réformes de 2017 qui concernent le Code du travail en France.

Si les réformes proposées par M Macron représentent une étape importante dans le changement des mentalités des acteurs du monde économique et social français, l'auteur estime néanmoins qu'au delà de l'effet d'annonce, cela reste en fin de compte une avancée bien modeste vers ce qu'il convient d'entendre par une véritable flexi-securité.

I INTRODUCTION

Throughout much of the 20th century Europe built an enviable, and rather sophisticated social model aimed at protecting the citizen against the excesses of an unfettered economic liberalism. The origins of the European social model can be traced to 19th century Germany and, more specifically, to the efforts of Chancellor Otto von Bismarck. In the final decades of the 20th century that model started to come under serious pressure, triggered by a deep economic recession with ripple effects throughout the world. In a first phase, national policy makers reacted by seeking to untangle some of the rigidities that had become embedded in core areas of social regulation, including labour law. The so-called 'de-regulation' of the employment relationship then is a phenomenon that typified much of the 1980s and 1990s in Europe.[1] Other parts of the world did not remain unaffected either. Thus, the introduction of the Labour Relations Act 1987 in New Zealand, for instance, can be seen in the same light as its primary objective was the abolition of a century-old system of top-down (ie centralised) and hands-on (ie compulsory) conciliation and arbitration for the resolution of industrial disputes by the State in the public interest.[2]

At the start of the 21st century a second, and generally more constructive, phase of labour law reform has sought to move beyond the seemingly *tabula rasa* emphasis of deregulation. Coined 'flexi-curity', henceforth the focus is shifting towards ensuring that the essence of the social model can be preserved by somehow combining (economic) flexibility for employers in the running of their business with (social) security for employees whose livelihood is typically tied to on-going gainful

1 For a closer analysis, see Martin Vranken "Deregulating the Employment Relationship: Current trends in Europe" (1986) 7 Comparative Labor Law 143-165.

2 For a detailed discussion, see Kevin Hince and Martin Vranken "Legislative Change and Industrial Relations: Recent Experience in New Zealand" (1989) 2 Australian Journal of Labour Law 120-140.

employment. Of note is that, whereas the first, deregulatory phase had largely been driven by the national authorities of individual member states, flexicurity quickly made its way onto the supra-national stage and into official EU parlance - commencing with a 2006 European Commission Green Paper on 'modernising' labour law.[3] While the member states of the EU have responded with varying degrees of enthusiasm, in France attempts at labour law reform repeatedly encountered profound obstacles. Not surprisingly, perhaps, as it will be discussed further below, there is no single explanation for this lack of enthusiasm among the French population at large. In any event, the Macron reform programme is but the latest but also, or so it would seem, the most promising attempt to date at bringing the country in line with its European counterparts.

II ANTECEDENTS

History shows that in France labour law reform is not for the feint-hearted. Starting with François Mitterrand, in the past 30 years no fewer than four Presidents - from all sides of the political spectre - tried to instigate change only to be met with profound public resistance. History further reveals a remarkable consistency in terms of both the substantive focus and the legislative method of executing labour law reform in France. In this regard incoming President Emmanuel Macron then simply continues down a well-worn path towards articulating a peculiarly Gallic answer to the forces of globalisation.

In the mid-1980s already, a period of political co-habitation between socialist President Mitterrand and his conservative (then) Prime Minister Jacques Chirac indeed resulted in some measures to facilitate business restructuring through the relaxation of a traditional requirement for economic dismissals to receive prior administrative authorisation. The broader idea behind this reform was to address a reluctance by employers to hire new employees for fear of a *de facto* inability to fire existing members of the workforce.[4] The same rationale was behind measures, again adopted in 1986, to facilitate the use of temporary over permanent employment contacts. Of particular interest is that both reforms took the shape of an executive decree or *ordonnance*. Tellingly, three decades later Macron would adopt the same *modus operandi*.

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3 For a discussion, with cross-references to Australia as well as New Zealand, see Martin Vranken "Labour Law and Flexicurity: Comparative Perspectives" (2011) 17 Comparative Law Journal of the Pacific – Revue juridique polynésienne 49-78.

4 Michel Despax, Jacques Rojot and Jean-Pierre Laborde *Labour Law in France* (Kluwer, The Netherlands, 2011) 52.

In the first decade of the 21st century President Chirac succeeded in enabling further flexibility for business by 'loosening' the 35-hour 'cap' on the working week. This made it easier – and cheaper – for employers to add extra hours as required.[5] Elected on promises of a pro-business 'renaissance',[6] President Sarkozy next raised the official retirement age from 60 to 62, but further reform stalled in the face of public protest. President Hollande succeeded Sarkozy to the Élysée Palace in 2012, and it was under his watch that the controversial El Khomri Act of 2016 was introduced. The Act, so named after Hollande's (Morocco-born) Minister for Employment Myriam El Khomri, came under vocal criticism from Emmanuel Macron – the then Minister for Economics – who took objection to the legislation ultimately adopted because it was said to be but a watered-down version of the original reform plans. Once elected, President Macron in 2017 sought to pick up where the El Khomri Act had come short.[7] Of note is that the *Loi* El Khomri itself, once again, had been passed without a separate vote in the National Assembly.

A Absence of Unified Central Union Structure

The reasons for the on-going difficulty in modernising French labour law are diverse. Unlike its English or German counterpart, the French union movement traditionally is split along ideological lines.[8] It means that whichever government happens to be in power, it is forced to negotiate with multiple parties and, as indicated above, in the past this has proved problematic when executing fundamental labour reform. Most commonly, no fewer than five major national union confederations can be in play at any one time. These range from the proudly hard-line CGT (*Confédération Générale du Travail*) and its more constructive off-shoot the CGT-FO (*Force Ouvrière*), to the distinctly moderate CFTC (*Confédération Française des Travailleurs Chrétiens*) and its secular emanation the CFDT (*Confédération Française Démocratique du Travail*); in addition there exists, for managerial-level employees, the CFE (*Confédération Française de l'Encadrement*) since renamed the CFE-CGC (*Confédération Générale des Cadres*). At a single-digit

5 Gregory Viscusi "Macron lights Fuse on 'Mother of all Reforms' to Renew France" at <www.bloomberg.com/news/articles/2017-06-28> (accessed on 13 October 2017).

6 Charles Brenner "France's Macron gambles where all his predecessors have failed" *The Times* 2 September 2017 as reported in *The Australian* newspaper at <www.theaustralian.com.au/news/world> (accessed on 29 September 2017).

7 The Macron reforms have subsequently invited comparison with the El Khomri legislation: see Anne-Aël Durand "La réforme du code du travail est-elle vraiment une <<loi El Khomri XXL>>?" at <http://lemonde.fr/les-decodeurs/article/2017/09/21/la-reforme-du-code-du-travail-est-elle-vraiment-une-loi-el-khomri-xxl_5188926_4355770.h...> (accessed on 26 September 2017).

8 The Belgian and Dutch union movements are also split along ideological lines but to less dramatic effect.

percentage, organised labour in France is small in terms of its actual employee coverage, even when the various confederations are totalled.[9] It can nonetheless be extremely vocal. Ideology provides an explanation in part: the (communist) CGT union, in particular, continues defiantly to fly the class-warfare banner. More tellingly, the right to strike is enshrined in the Constitution of the Fifth Republic.[10] A willingness and readiness to resort to public (often political) demonstration arguable forms a staple ingredient in the make-up of the French psyche.[11]

The presence of multiple unions, each with employee representative status, can cause problems at the level of individual businesses. In 2008 legislation was passed which sought to ease the burden for employers somewhat when dealing with union pluralism at the place of work. Prior to the 2008 Act any union affiliated with one of the five nationally recognised confederations was entitled to establish a union section within a workplace, regardless of its actual employee membership. Pursuant to the Act of 20 August 2008 a union must demonstrate a minimum employee representation of 10 percent locally. As it will be discussed further in this article, the 2017 Macron reforms seek to build upon the 2008 legislation.[12]

B Cumbersome Code du Travail

Apart from a fragmented and ideologically divided union movement, a second, peculiarly French explanation for the slow progress in national labour law reform concerns the sheer complexity of the regulatory framework. To be clear, the individual employment relationship is fundamentally contractual in nature, and the general provisions on contract contained in the *Code civil* therefore apply. But, much more detailed regulation is additionally – and increasingly – contained in a separate

9 At less than 8% French union membership is said to be among the lowest in the OECD. See Patrice Laroche "Employment Relations in France" Chapter 7 in Greg J Bamber, Russell D Lansbury, Nick Wailes and Chris F Wright *International and Comparative Employment Relations* (6th ed, Sage Publications, Los Angeles, 2016) 153 at 153. Even the national unemployment rate – 9.2% for the second trimester of 2017 – is higher than the rate of unionisation: INSEE (*Institut national de la statistique et des études économiques*) figures.

10 The 1958 Constitution was not even the first to recognise a right to strike. It was also granted by the 1946 Constitution and is therefore said to be a 'fundamental' right: François Gaudu "Labour Law" Chapter XV in George A. Bermann and Etienne Picard (eds) *Introduction to French Law* (Wolters Kluwer, The Netherlands, 2012) 395 at 410.

11 An illuminating, contemporary account can be found in Laroche, above n 10, 153-178.

12 Jacques Rojot "Main Directions of Change in French Industrial Relations and Labour Law" Conference paper presented at the Institute for Labour Relations, Faculty of Law, Catholic University of Leuven, *Game Changers in Labour Law. Shaping the Future of Work*, 3-4 November 2017 (copy on file with the author).

Code du travail. The latter is a code in name only. Its origins can be traced to an Act from 28 December 1910, enacted some 100 years after the adoption of the more famous *Code civil* of 1804. When compared to the Code of 1804, the *Code du travail* displays none of the features that make European-style civil codes so attractive.[13] France's Labour Code does not have the superior moral authority of the Civil Code. It does not signal a new start. It does not seek to break with the past. It is not revolutionary in nature. And it does not display the unique drafting style of the *Code civil* whose provisions typically strike an appropriate balance between generality (which allows ta code to be comprehensive as well as timeless) and specificity (which allows a code to be meaningful in terms of its contents). To paraphrase Professor Bergel, the French *Code du travail* is a formal code in the nature of an American Restatement, not a substantive code.[14]

A formal code need not be a bad thing *per se*. Much depends on the purpose of the exercise in codification itself. Where a primary consideration is to make the law in a particular subject area accessible, while perhaps simultaneously removing uncertainty about what that law is at a particular moment in time, a 'mere' consolidation of existing law may 'suffice'. Formal codification thus may perform a useful function. A famous example of a formal code taken from history is the compilation of Roman law by East Roman Emperor Justinian in the *Corpus Iuris Civilis*, also known as the *Corpus Iuris Justinianis* or Justinian Code. There is also the codification of French (then unwritten) customary law ordered by King Charles VII in the Middle Ages. No doubt it can indeed be convenient to have most if not all laws on a specific subject matter available for consultation in a single document. Only, the problem with the contemporary Labour Code is that it continues to being added to – reaching some 3.500 pages at last count! Ironically, as it will be discussed further below, the Macron reforms further add to the already cumbersome size of the *Code du travail*. The contrast with the *Code civil*, comprising a mere 2.300 (often one-sentence long) provisions (rather than pages) then is particularly sharp.

To be fair, even a substantive code will need revision occasionally. Remarkably, though, there have been very few substantial amendments of the *Code civil* in the past 200 years. To be clear, at the first centenary of the *Code* special legislation was adopted to facilitate access by victims to compensation for industrial (ie workplace) accidents. In a similar vein, the impact on victims of motor vehicle accidents was addressed by the legislature at the time of the *Code*'s second centenary, in 1985. Most

13 See Martin Vranken "Codes and Codification" Chapter 3 in *Fundamentals of European Civil Law* (2nd ed, Federation Press, Sydney, 2010) 41 at 43-52.

14 Jean Louis Bergel "Principal Features and Methods of Codification" (1988) 48 Louisiana Law Review 1073-1097.

recently, a further legislative update of note concerns the modernisation of the law of obligations more generally. In this France follows an earlier lead by the German legislature.[15] Thus, *Ordonnance* no 2016-131 of 10 February 2016, in effect since 1 October 2016, amends the 1804 *Code civil* provisions on, in the first instance, the law of contract.[16] A detailed account is beyond the scope of this article. From a comparative perspective, though, a most striking change is the abolition of the unique, if not entirely without intrigue, *causa* concept. Further reform seeks to extend the modernisation of the law of obligations to the law of tort. Draft legislation to this effect was released, following a period of public consultation, on 13 March 2017.[17] While at the time of writing some uncertainty attaches to its eventual adoption into law, a renumbering of Code provisions in the aftermath of the 2016 contract reform has meant that the classic corner-stone provision on French delict and, arguably, the single most famous provision in the 1804 *Code Napoléon*, Article 1382, henceforth becomes Article 1240.

III THE MACRON EFFECT

A Chronology of Events

Macron's preoccupation with bold labour law reform predates his 2017 campaign for the Presidency. Even so, the sheer speed of developments in the immediate aftermath of his May election victory bears witness, not just to the incoming President's determination to affect change but also to his acknowledgement that negotiation and persuasion are to be preferred wherever possible over and above unilaterally imposed change. For good measure the timeline of relevant events can be set out as follows:

(European) Summer 2017: consultative process with unions and employers extending over some 50 meetings and spanning three months to discuss Macron's plans for reform of the Labour Code.

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15 *Gesetz zur Modernisierung des Schuldrechts* (Act on the Modernisation of the Law of Obligations), 26 November 2001, *Bundesgesetzblatt*, I, 29 November 2001, 3138 (in effect since 1 January 2002).

16 In addition, the 2016 *Ordonnance* contains provisions on the law of obligations more generally as well as on the law of evidence. For an insightful, contextual account in English, see Jan Smits and Caroline Calomme "The Reform of the French Law of Obligations: *Les Jeux sont Faits*" (2016) 23 *Maastricht Journal* 1040-1050.

17 *Avant-projet de loi relative à la réforme de la responsabilité civile* (*Ministère de la Justice*).

31 August 2017: Prime Minister Edouard Philippe and Employment Minister Muriel Pénicaud officially unveil a range of proposals to reform France's labour laws aimed at removing regulatory rigidities, lowering unemployment, and reinvigorating the job market.

12 September 2017: a divided union front results in a national day of action by the CGT union while more mainstream unions (the CFDT and FO, in particular) abstain from officially joining in the protest action; the CFDT instead announces plans for a separate rally to be held in Paris on 3 October 2017.[18] The Ministry for the Interior estimates that 223,000 demonstrators marched across the country, while CGT figures are closer to 500,000.[19]

16 September 2017: legislation authorising the government to reform the labour code by means of *ordonnances* is formally published in the *Journal officiel*. The *loi d'habilitation*[20] sets a timeframe for implementation of six months from the date of its promulgation.

22 September 2017: 36 labour law reform proposals spanning 159 pages presented to the Council of Ministers; President Macron signs five executive decrees in a live televised ceremony at the Élysée Palace, hailing the reforms as 'without precedent' in the post-war Fifth Republic.[21]

23 September 2017: date of a separate march organised by Jean-Luc Mélenchon, leader of far-left political coalition *La France Insoumise* (literally: France unbowed); the unions reportedly are displeased with Mélenchon for stealing their limelight as protest figurehead.[22]

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18 Evan Lebastard "Front syndical uni: des manifestations rares, mais qui mobilisent" at <www.lemonde.fr/les-decodeurs/article/2017/09/12/front-syndical-uni-des-manifestations-rares-mais-qui-mobilisent_5184480_4355770.html> (accessed on 13 September 2017).

19 "La manifestation contre la réforme du code du travail a rassemblé entre 223 000 et 500 000 personnes" at <www.lemonde.fr/politique/article/2017/09/12/des-dizaines-de-milliers-de-manifestants-en-france-contre-la-reforme-du-code-du-travail_51845...> (accessed on 13 September 2017).

20 *Loi no 2017-1340 du 15 septembre 2017 d'habilitation à prendre par ordonnances les mesures pour le renforcement du dialogue socia*l (Act to authorise the use of ordinances to strengthen the social dialogue).

21 Caroline Mortimer "Emmanuel Macron signs sweeping new labour law reforms amid union outcry" at <www.independent.co.uk/news/world/europe/macron-labour-laws-reforms-new-france-union-protests-a7962141.html> (accessed on 26 September 2017).

22 Henry Samuel writing for *The Telegraph* newspaper on 12 September 2017:"'*France isn't liberal England', hardliners tell Emmanuel Macron, as tens of thousands protest labour reforms*" at <www.telegraph.co.uk/news/2017/09/12> (accessed on 14 September 2017).

25 September 2017: changes to the Labour Code take effect upon their publication in the official Gazette; both the European Commission and employers 'welcome' the reforms.[23]

27 September 2017: ratification Bill submitted to Parliament by Employment Minister Muriel Pènicaud.[24]

28 November 2017: ratification of the new labour laws by a very large majority (463 votes to 74, with 20 abstentions) in the Lower House (*Assemblée nationale*) of the French Parliament.

1 January 2018: earliest anticipated date for examination of the so-called *Loi travail* in the Senate.

B Subject Matter of the Reforms

In terms of their substance the Macron labour law reforms can be divided into three main subject matters.[25] They are recruitment and dismissals, employee representation at the place of work, and collective bargaining.

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23 "Brussels welcomes French labour reforms as unions and left camp complain" at <www.euractiv.com/section/economy-jobs/news/brussels-welcomes-french-labor-reforms-as-unions-and-left-camp-complain/> (accessed on 26 September 2017).

24 *Projet de loi ratifiant diverses ordonnances prises sur le fondement de la loi no. 2017-1340 du 15 septembre 2017 d'habilitation à prendre les mesures pour le reforcement du dialogue social* (bill to ratify various ordinances issued pursuant to Law no 2017-1340 of 15 September 2017 to authorise the issuance of ordinances on measures to strengthen the social dialogue).

25 The five ordinances are numbered from 2017-1385 to 2017-1389; all are dated 22 September 2017. Their specific contents is only suggested in general terms in their headings as follows: (1) *Ordonnance no. 2017-1385 du 22 septembre 2017 relative au renforcement de la sécurisation des relations du travail* (Ordinance on the strengthening of collective negotiations); (2) *Ordonnance no. 2017-1386 du 22 septembre 2017 relative à la nouvelle organisation du dialogue social et économique dans l'entreprise et favorisant l'exercise de la valorisation des responsabilités syndicales* (Ordinance on the new organisation of the social and economic dialogue at the workplace favouring the exercise and validation of union responsibilities); (3) *Ordonnance no 2017-1387 du 22 septembre 2017 relative à la prévisibilité et la sécurisation des relations de travail* (Ordinance on the predictability and protection of labour relations); (4) *Ordonnance no 2017-1388 du 22 septembre 2017 portant diverses mesures relatives au cadre de la négociation collective* (Ordinance pertaining various measures as regards the framework of collective bargaining); (5) *Ordonnance No 2017-1389 du 22 septembre 2017 relative à la prévention et à la prise en compte des effets de l'exposition à certains facteurs de risques professionnels et au compte professionnel de prévention* (Ordinance about preventing and dealing with the effects of exposure to certain professional risks).

1 Hiring and Firing

Any changes to the legal rules affecting the start or end of the individual employment relationship warrant closer scrutiny since these rules directly affect people's ability to earn a living. Traditionally, French employees could challenge their dismissal in the employment court and generally they had a period of two years within which to do so (one year if the dismissal was for economic reasons). If the court deemed the dismissal unsubstantiated ('*sans cause réelle et sérieuse*'), the employer had to pay compensation. The amount to be paid depended on both the salary and seniority of the employee at the time of dismissal. This continues to be the case. Only, the Macron reforms reduce the period within which to challenge the dismissal to one year and cap the amount of dismissal compensation at one month's wages for every year of seniority with an overall maximum of 20 months.

Even where termination of the employment relationship is said to be for economic reasons, the reason as stated by the employer must nonetheless be 'real' as well as 'serious'. A dismissal for reasons of company restructuring may be real yet still fall foul of the law for lack of seriousness. Thus, in the past, an employee having been 'let go' for being 'too expensive' successfully challenged the termination of his employment relationship by pointing at the company's overall profit figures.[26] The Macron reforms do not as such alter this state of affairs. However, the economic difficulties of companies operating in more than one country henceforth are to be assessed by reference to their financial position in France alone. While seemingly modest, the anticipated effect of this change is to make foreign investment into France more attractive.

New Zealand labour lawyers will be familiar with the distinction between substantive and procedural fairness when executing employee termination decisions. In France, procedural irregularity can render the dismissal null and void. That remains the case today. However, the Macron reforms seek to reduce the chances of an employer getting the procedure wrong and the 'penalty' for any such procedural irregularity in the future is being limited to one month's wages.

Facilitating dismissals ideally, if indirectly, facilitates hiring. Any of the above Macron dismissal reform measures therefore can act as a reduced barrier to recruitment. Jacques Rojot from the Department of Management at Université Paris II – Panthéon Assas comments on the unpredictability of the employment court's dismissal decisions in the past, with the potential of "disastrous financial consequences for small and very small enterprises".[27] Professor Rojot reminds us

26 Cass soc, 24 April 1990: *Bull civ* V n 183 as cited in François Gaudu, above n 11, 398.

27 Rojot, above n 13, at 12.

that small and medium-sized enterprises employ some 50% of employees in the private sector.[28] Unlike employment courts elsewhere, the French *conseil de prud'hommes* (literally: council of wise men) continues to be composed of lay persons – a representative of the employer and employee organisations each - with a professional judge only added when necessary to break a deadlock.[29] Court proceedings are free and legal representation is not required. The overwhelming majority of cases before the employment court deal with dismissals and 96% of cases are brought by employees.[30]

A more direct employment-promotion reform allows employers to resort to temporary employment contracts for purposes of performing a specific project. Previously, this type of contract was only available in the construction industry. While modest, it is a reform that chips away at the traditional preference for open-ended ('permanent') employment contracts.

2 Employee Representation at the Workplace

Various institutionalised forms of employee representation at company level co-exist in France. The function of each institution differs from handling staff grievances by a personnel delegate (*délégué du personnel*) and formulating claims in the context of collective bargaining by a union delegate (*délégué syndical*) to less adversarial forms of employee participation at plant level. The latter range from sharing economic and financial company data and providing advice on social matters through a works council (*comité d'entreprise*) to addressing occupational health and safety matters in a separate committee for health, safety and working conditions (*comité d'hygiène, de sécurité et des conditions de travail*).

The Macron reforms do not fundamentally change the traditional approach to employee representation at the place of work. Even so, an effort at rationalisation, especially in smaller companies, is meant to reduce complexity while also allowing for greater contact with employees directly - rather than employers always having to operate through the union as an intermediary. Specifically, the Macron reforms seek to streamline the functions of the various employee representation institutions

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28 Ibid, at 8.

29 See Martin Vranken "Specialisation and Labour Courts: A Comparative Analysis" (1988) *9 Comparative Labor Journal* 497-525 at 500; Martin Vranken and Kevin Hince "The Labour Court and Private Sector Industrial Relations" (1988) 18 Victoria University of Wellington Law Review 105-140.

30 Rojot, above n 13, at 12.

operating in French companies. Ironically, somehow this is meant to be achieved through the creation of two new institutions as outlined below.

Previously, small and medium-sized companies (fewer than 300 employees) were already able to merge the functions of the personnel delegate and the works council within a single personnel delegation (*délégation unique du personnel*). Henceforth such a merger is automatically extended to all companies regardless of their size. In addition, a single body now usurps the health and safety committee in a newly created social and economic committee (*comité social et économique*). The latter committee even may take on the traditional role of the union delegate; in that case the committee is to be known – somewhat confusingly - as the enterprise council (*conseil d'entreprise* rather than *comité d'entreprise*). Intriguingly, and again somewhat confusingly, employees and employers nonetheless remain free to agree upon the continued existence of separate institutions through enterprise bargaining.

3 Collective Bargaining Levels

Collective bargaining in France occurs at multiple levels. These range from the national, inter-industry level to the industrial branch and, ultimately, individual company levels. The outcome of national bargaining for the entire private sector in effect represents a form of delegated legislation by the social partners of unions and employer organisations. In terms of the contents of collective bargaining, a strict hierarchy traditionally applies. Centralised bargaining thus takes precedence over decentralised bargaining. In practice this means that any employee entitlements, once acquired at a higher, centralised level, cannot be removed or reduced at a lower, decentralised level.

Legislation prevails over all agreements, regardless of the level at which they have been negotiated. In effect, legislation traditionally represents the main source of employment law in France and the outlet *par excellence* for this legislation is, of course, the *Code du travail*.[31] Rojot argues that, under President Macron, the government at long last can be seen to take the promotion of self-regulation through collective (enterprise) bargaining seriously as a general policy in France, thus lessening the traditional centrality of statutory law.[32]

As for the regulation of employment conditions through collective negotiation, the Macron reforms do not remove the scope for multi-employer, multi-level bargaining as such. Even so, decentralised (enterprise) bargaining henceforth is

31 Brice Dickson "Labour Law" Chapter 11 in *Introduction to French Law* (Pitman Publishing, London, 1994) 186 at 187.

32 Rojot, above n 13, at 8.

being accommodated to a far greater extent than ever before. Specifically, individual companies are permitted to deviate from the employment conditions negotiated at a higher level, even if the net result is less advantageous for individual employees. While the provision for any such 'derogation' is not entirely new, the sheer scope of its application has turned the exception into the norm. Certain safeguards remain in place, though. Centralised negotiations concerning minimum wages, gender equality or – most strikingly – the terms and conditions for inserting trial periods into individual employment contracts, cannot be 'sacrificed' in enterprise bargaining agreements. It has been suggested that, in the result, the Macron reforms by no means effectuate a complete reversal of the traditional hierarchy of legal norms in French labour law, contrary to what may have been heralded initially.[33]

IV IN CONCLUSION

When taking stock of achievements after six months in office, it must be appreciated that, with four-and-a-half years of his Presidency still to go, it is too early for a comprehensive evaluation of Macron's ambitious reform agenda. Certainly, any initial criticism of being a President for the rich only has been strongly rejected by Macron himself.[34] In any event, even his critics must admit that the incoming President has hit the road running. Labour law reform can be singled out as an early, noteworthy achievement.

Academic commentators tend to agree that the five *Ordonnances* of 2017 do not entail a fundamental 'transformation' of French labour law. Rather, they merely continue an 'evolution' which started over a decade earlier. Thus, the shift away from top-down government regulation towards a greater emphasis on allowing scope for collective bargaining (whether at branch or company level) by the so-called 'social'

33 Jean-Emmanuel Ray "Hiérarchie des norms – les cinq ordonnances du 22 septembre 2017 sont parues: où est <l'inversion des normes> partout dénoncée?" *La semaine juridique*, 16 October 2017, 1105, p 1914.

34 Bastien Bonnefous "A Tourcoing, Emmanuel Macron se défend de faire <<une politique pour les riches>>" *Le Monde* 14 November 2017 at <www.lemonde.fr/politique/article/2017/11/14macron-applle-a-une-mobilisation-nationale-pour-les-villes-et-les-quartiers_5214644_823448.html> (accessed on 14 November 2017).

legislature (ie the collective representatives of employers and employees) themselves, while also increasing flexibility for employers in the running of their own businesses, has been a gradual one.[35]

The Macron labour law reforms are part of a bigger agenda to change the status quo, both nationally and internationally. At home, a second and not entirely uncontroversial[36] round of reforms targets social security law – in particular, the twin issues of unemployment regulation and employment training.[37] Abroad, Macron champions deeper European integration notwithstanding, or perhaps because of, a more cautious Angela Merkel following the September 2017 federal parliamentary elections in Germany.[38] He also has displayed signs of wishing to pursue a more activist foreign policy elsewhere.[39]

Returning to the narrow subject matter of this article, an undesirable side-effect of the new labour regulations – occupying some 90 pages in the *Journal officiel*, is that they risk making an already unwieldy Labour Code even more complex. Arguably, this represents a missed opportunity.

35 Bernard Teyssié "Les ordonnances du 22 septembre 2017 ou la tentation des cathédrals" *La semaine juridique* 9 October 2017, 1068, pp 1829-1838. To the same effect, see Christophe Radé "Réformer le droit du travail – ou le mythe du roi thaumaturge" *La semaine juridique* 24 July 2017, 856, pp 1450-1451.

36 See eg the following heading in the New Zealand general press: "Workers get paid to 'stay home' under Macron plan" *Dominion Post* 20 October 2017, B3.

37 Macron launches second round of labour reforms at <www.thelocal.fr/20171012/macron-launches-second-round-of-labour-reforms> (accessed on 12 November 2017).

38 Charlemagne "The Audicity of l'Europe" *The Economist* newspaper, 11 November 2017, 50.

39 "Hop, Skip and Jump: What to make of Emmanuel Macron's frenetic international efforts" *The Economist* newspaper, 16 December 2017, 44.