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07/08/2015

NEWSLETTER – 02/2015

Dear colleagues,

This is the third Newsletter of our network, European Lawyers for Workers, with the invitation for our **next conference** concerning very urgent questions of labour law in Europe:

UNDER PRESSURE OF THE TROIKA – THE IMPACT ON COLLECTICE LABOUR RIGHTS IN SOUTHERN EUROPE AND IRELAND, 17th October 2015, Madrid

and other important documents for our work as labour lawyers.

Contents:

Please join the Network - see the application form at the end

Please do send us interesting information or arcticles – like commentaries on recent jurisdiction or legislation – for our next Newsletter or Website.

★★★

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INVITATION

SAVE THE DATE – and register now (see next page) !

European Labour Law conference

UNDER PRESSURE OF THE TROIKA – THE IMPACT ON COLLECTIVE LABOUR RIGHTS IN SOUTHERN EUROPE AND IRELAND

17th October 2015, Madrid, Savia Solar – Sala de conferencias : Calle Escuadra, 11, 28012 Madrid
Simultaneous translation: Spanish, English, French, German

The themes of the conference are to be:

- *Collective Rights of workers (trade union rights, collective bargaining, freedom of association, freedom of assembly …)*
- *Deconstruction of collective labour rights*
- *Criminalization of social movements*
- *What's happening in the EU and in the ILO*
- *Impact of the EU – US and Canada Trade agreement (TTIP, CETA)*
- *The relationship between collective and individual rights in this context*

The draft programme:

09h30 registration

10h00 Start
1. Welcome Speech, Manuela Carmena, Mayor of Madrid (invited)
2. Welcome Speech, Marina Albiol, MEP, Valencià
3. Introduction: Dr. Aristea Koukiadaki (Senior Lecturer in Employment Law, School of Law), Manchester

3.1 **Countries under pressure, reports**, each 20 min.,
- Spain, Professor Antonio Baylos Grau (Universidad de Castilla-La Mancha), La Mancha
- Italy, Professor Antonio Loffredo (Universita degli Studi di Siena), Siena

11h30 -11h50 Coffee break

3.2 **Countries under pressure, reports**, each 20 min.,
- Portugal, Professor Jose J. Abrantes (Universidade Nova de Lisboa), Lisbon
- Greece, Apostolis Kapsalis (Special Secretary in the Ministry of Labour), Athens
- Ireland, Esther Lynch (ICTU, Legal & Social Affairs Officer), Dublin

13h00 lunch

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14h30
3.3 **Other country reports**, each 10 min.

- France, Jean Luc Wabant, Paris
- England, John Hendy Q.C., London
- Belgium, Leila Lahssaini, Progress Lawyers Network, Antwerp/Brussels
- Germany, Dr. Detlef Hensche, Lawyer, President of IG Druck und Papier (printers union) for many years, Berlin
- Sweden, Susanne Forssman, Stockholm (invited)

15h30-15h50 tea break

16h00
4. Plenary session:
   Introduction by Professor Tonia Novitz (University of Bristol Law School) Bristol and Jeffrey Vogt (Director of the Legal Unit, ITUC) Brussels
   followed by panel discussion together with
   Dr. Aristea Koukiadaki (Senior Lecturer in Employment Law, School of Law) Manchester,
   Raul Maillo, Trade Union lawyer (CGT), Valencià,
   Greece, Apostolis Kapsalis (Special Secretary in the Ministry of Labour), Athens
   Professor Antonio Loffredo (Universita degli Studi di Siena), Siena
   chair John Hendy Q.C. , London

17h30 Conclusions

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Organizers of the Conference:

- European Lawyers for Workers (ELW-Network), www.elw-network.eu
- European Association of Lawyers for Democracy & World Human Rights (ELDH), www.eldh.eu
- Left-Wing Lawyers Forum – Democratic Lawyer Network of Spain (Foro de abogados/as de Izquierdas (FAI-RAD)

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Further Details about the programme and the registration will be published on the website of the ELW-Network www.elw-network.eu and on the website of ELDH www.eldh.eu

★★★

Registration (name, profession, address): Please register now office@elw-network.eu

Registration fee (approximately, we are still preparing the conference): Some time after your registration you will receive the definite amount. Of course you will still have the option to cancel your registration.

- Registration fee for lawyers and other professions (lunch included):
- 90 € for booking and paying until 15th September 2015,
- afterwards 120 € (payment at the conference only in cash)
- Registration fee for students (lunch included): 30 €
- Others: free

Transfer of the registration fee to the ELW-Network bank account
bank account: ING (name of the bank), ELW (account holder),
Chaussée de Haecht 55, BE - 1210 - Brussels, Belgium
IBAN BE14 3631 2954 7883, BIC/SWIFT BBRUBEBB

ELW european lawyers for workers network

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Invitation

First Conference on International Labour Standards
European Union and Council of Europe
– their relationship in the area of fundamental (social) rights

International labour standards are of increasing importance not only for Member States' national law but also for European law. Following this development, the Hugo Sinzheimer Institute for Labour Law (HSI) in Frankfurt/Main and the Institute for Labour Law and Industrial Relations in the European Union (IAAEU) at the University of Trier are jointly initiating a new series of conferences on "International Labour Standards", starting in November 2015. The series will bring together expert speakers and participants to discuss important issues of international labour law. Events will be held every two years, alternating between Frankfurt and Trier.

The opening event is entitled European Union and Council of Europe – their relationship in the area of fundamental (social) rights and will take place in Frankfurt/Main. The conference will be focused on the current impact of Council of Europe instruments on fundamental (social) rights in the EU. The second thematic focus will be the accession process of the EU to the ECHR, which has been delayed by the Opinion of the CJEU, and accession prospects in relation to the Revised European Social Charter. We are pleased to announce that Professor Jochen Abr. Frowein will give the keynote speech. The conference languages are English and German (a simultaneous translation will be provided).

The conference will take place on

Wednesday, 25 November 2015, from 9.30 to 16.45
at the Head Office of IG BAU
(Industrial trade union for construction, agriculture and environment)
Olof-Palme-Straße 19
D 60439 Frankfurt/Main, Germany
Conference Room C1.05

For further information, please find enclosed the conference programme together with directions to the venue and hotel information. Please register by 31 July 2015 using the registration form provided.

We look forward to welcoming you to the conference and to lively and stimulating discussions.

Professor Monika Schlachter (IAAEU)

Dr Johannes Heuschmid (HSI)

ELW european lawyers for workers network

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Enclosures

First Conference on International Labour Standards
European Union and Council of Europe
– their relationship in the area of fundamental (social) rights

25 November 2015
Frankfurt am Main
Chairman: Professor Manfred Weiss (HSI)

9.30 Welcoming address
9.45 Keynote speech
Professor Jochen Abr. Frowein, Max Planck Institute for Comparative Public Law and International Law (Heidelberg), formerly Judge ECtHR
10.30 Coffee break

Current impact of Council of Europe instruments on fundamental (social) rights in the EU
11.00 Potential impact of Council of Europe instruments on fundamental (social) rights in the EU – A view from the CJEU
Judge François Biltgen, CJEU
11.30 Potential impact of Council of Europe instruments on fundamental (social) rights in the EU – A view from the doctrine
Professor Monika Schlachter, IAAEU (University of Trier)
12.00 Discussion
12.30 Lunch break

EU accession to Council of Europe instruments in the aftermath of the CJEU's opinion on the Draft Accession Agreement
13.30 The Opinion of the CJEU on the draft Agreement on the EU accession to the ECHR
Dr Dieter Kraus, CJEU
14.00 A view from the Council of Europe regarding the accession of the EU to the ECHR
Professor Jörg Polakiewicz, Council of Europe, Saarland University
14.30 Discussion
15.00 Coffee break
15.30 The European Social Charter
Professor Olivier De Schutter, Catholic University of Louvain (Belgium), College of Europe (Natolin, Poland)
16.00 Discussion

16.20 Concluding remarks

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Registration form – Conference International Labour Standards

Please fill in the registration form and send it back until 31 July 2015. Please use the gray button (below) for this purpose. Should an automatic submission not be possible, please save the document an send it either
by e-mail to: **info@hsi-frankfurt.de**
or by Fax to: **+49 69-6693 2791**

I will participate in the conference **"European Union and Council of Europe – their relationship in the area of fundamental (social) rights"** on 25 November 2015 in Frankfurt/Main.

Yes.

Surname, Name:

Institution/Organisation:

E-Mail:

Country:

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3

Title
Supreme Court of Canada recognises constitutional protection for the right to strike

Contributor
Peter Barnacle lives and practices labour law in Saskatoon, Saskatchewan. He was co-counsel for the Saskatchewan Federation of Labour with Craig Bevis and Rick Engel QC at the Supreme Court of Canada

Standfirst
The Canadian Supreme Court has greatly expanded the recognition and protection of freedom of association concepts under the Canadian Charter of Rights and Freedoms

Standfirst
The Court has made extensive reference to international sources of law and practice around issues such as the right to strike

Photos
Contributor

In a 5-2 decision issued 30 January 2015, *Saskatchewan Federation of Labour v. Saskatchewan*, the Supreme Court of Canada recognised that the right to strike is constitutionally protected as an essential element of meaningful collective bargaining pursuant to s.2 (d) freedom of association in the Canadian Charter of Rights and Freedoms.

In reaching this profound conclusion, the Supreme Court has completed a move from a restricted interpretation of freedom of association that was set out the 1987 *Labour Trilogy* and a subsequent 1990 case, *Professional Institute of the Public Services of Canada ('PIPSC').* In those cases, the constitutional protection of worker freedom of association was found to be limited to activities that could be performed by individuals and not those collective activities, which could only be performed as a result of association.

Under this initial case law, the right of workers to form associations was protected, but not collective bargaining or the right to strike. Indeed, the Court went on in as late 1999 to find, in the *Delisle* case, that the right to organise itself did not mean that Royal Canadian Mounted Police ('RCMP') officers were entitled to the benefit of a collective bargaining regime already in place for other public service workers in Canada. As a result, the 'in-house' association set up by management for representation of the police officers was not unconstitutional.

The remarkable shift that has occurred from this earlier case law began in 2001 with the *Dunmore* case. In *Dunmore*, the Court held that the *Charter* guarantee of freedom of association included the right of farm workers in the Province of Ontario to at least make *collective* representations to their employers (see 'Scope for Optimism in Canada', *IUR* 9.1 2002). The outcome reflected the Court's adoption of a 'purposive' approach in the interpretation of the rights set out under the Charter. This included consideration of international labour law in giving meaning to freedom of association. In *Dunmore*, the Court applied the purposive approach to navigate around the earlier restrictive interpretation, but did not overturn that case law.

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That changed in the next case, *Health Services*, where the purposive approach led the Court to overturn its earlier case law in finding s. 2(d) freedom of association under the *Charter* provided constitutional protection for the process of collective bargaining. As a result, legislation by the Government of British Columbia tripping away collective bargaining rights for health care workers (and later teachers) was found unconstitutional. The significance of *Health Services is* also reflected in the Court's extensive review of international law ('Supreme Court Applies International Labour Law', *IUR* 12.2 2007).

Canadian labour lawyers were subsequently concerned that the Supreme Court may have been backtracking in its seeming progression to recognition of fundamental collective rights. That is, the 2011 *Fraser* decision where Ontario farm workers were held to the minimal representation rights set out in *Dunmore.* However, the Supreme Court has now emphatically confirmed constitutional protection for a meaningful process of collective bargaining that includes, as we will see below, the right to organise independent associations for the purpose of collective bargaining and, in overturning the final piece of its earlier case law in *SFL*, incorporates the right to strike.

The Saskatchewan Public Services Essential Services Act permitted a broad range of public sector employers to unilaterally 'designate' employees (as essential workers) and hence to require them to continue to perform their duties in the event of a work stoppage ('Saskatchewan challenge to workers' rights', *IUR* 15.3 2008).

The Saskatchewan Act went far beyond essential services legislation in any other Canadian jurisdiction. It provided the broadest definition of essential services, covered the greatest number of public sector employers, all without any effective means to challenge whether the services were in fact essential, let alone the designation of employees themselves, and with no alternative dispute resolution process to otherwise resolve a workplace dispute. The effect was to so drastically interfere with the right to strike as to make its exercise meaningless. The Saskatchewan labour movement claimed the Act was in violation of what should be a constitutional protection of the right to strike. In 2010, the ILO Committee on Freedom of Association found the situation violated the right to strike, but this had no impact on the Saskatchewan Government. The Government refused to make the requested revisions and the SFL action proceeded to trial.

The path to the Supreme Court began with the 2012 trial judge's decision that the right to strike was constitutionally protected under the Charter. That decision was overturned on appeal by the Government of Saskatchewan in early 2013 and the matter moved to the Supreme Court of Canada where it was heard in May 2014. In a great display of effective solidarity, the Canadian Labour Congress co-ordinated the efforts of the diverse trade unions and labour organisations, along with the CLC itself, that intervened in support of the Saskatchewan Federation of Labour.

In reaching its conclusion, the Supreme Court majority found support in its previous caselaw, in the application of Charter values promoting dignity in the workplace, in the role of strikes in labour history, international treaties, and in the acceptance of a constitutional right to strike in other states as well under the European Convention on Human Rights ('ECHR'). The majority also relied on expert evidence admitted at trial on the content of international law from Canadian professors Michael Lynk, Patrick Macklem and Roy Adams. The Court referenced many published articles and, while this included respected Canadians such as Judy Fudge, Eric Tucker and Paul Weiler, this also included others familiar to IUR readers as Sir Bob Hepple, John Hendy QC, Keith Ewing, Jean-Michel Servais and Manfred Weiss.

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As part of the international law analysis, the majority considered the Charter of the Organisation of American States, the ECHR, the European Social Charter, ILO Convention 87, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The majority reviewed the commentary and decisions pursuant to the two UN Covenants and the ILO Committee on Freedom of Association and Committee of Experts. In doing so, the Court ignored the claim that the dispute generated by the Employers' Group at the ILO Committee on the Applications of Standards undermined the Committee of Experts support of a right to strike (this dispute is also discussed in this edition of IUR, at pp16-18).

In the opening segment of the *SFL* decision, writing for the majority, Madam Justice Abella makes a powerful observation when she states that the Court's recent case law recognised that freedom of association under the Canadian Charter protects a meaningful process of collective bargaining and, as such, 'the arc bends increasingly towards workplace justice'. Justice Abella then went immediately to the majority's conclusion that the right to strike is an indispensable component of that meaningful process of collective bargaining and the time has come to 'give this conclusion constitutional benediction'.

In support, the majority decision then went on to find that labour history in England and Canada established the right to strike as an essential component – the 'powerhouse' - of collective bargaining. It promotes equality in that bargaining process. Further, in considering *Charter* values, at the point of impasse in collective bargaining the right to strike is the affirmation of the dignity and autonomy of employees in their working lives.

Canada's international human rights obligations also 'mandate protecting the right to strike as part of a meaningful process of collective bargaining'. The Charter, the majority stated, relying on previous Supreme Court case law, should be interpreted to provide at least as great a level of protection as found in international human rights documents Canada has ratified. The majority points to the ECHR case law, in finding 'an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike'. This is also supported by the express constitutional protection of the right to strike in other States[1].

The test for constitutional infringement is then held to be where legislative interference with the right to strike substantially interferes with collective bargaining. Where it does, then the analysis moves to whether the nature and scope of such interference can be justified. The justification provision of the Charter under s. 1 is worded and applied in much the same way as Article 11(2) of the ECHR. The Government fails the s.1 justification test in *SFL*. The legislation was accordingly declared invalid, with one year's grace to the Government to come up with alternatives if it wished, and court costs at all levels were awarded to the Saskatchewan Federation of Labour.

The *SFL* case must also be read with another significant decision released by the Supreme Court of Canada two weeks earlier, *Mounted Police Association of Ontario ('MPAO').* In a revisit of its 1999 *Delisle* decision, the Court held that the right to organise is also protected as part of a meaningful process of collective bargaining under s. 2(d) of the *Charter*. In doing so it confirmed *Health* Services and 'clarified' Fraser. As such, the right provides employees a degree of choice and independence in selecting their associations that is sufficient to allow RCMP officers to determine and pursue their collective interests. The associational system imposed by Government regulation for members of the RCMP was not free from management influence and hence unconstitutional. The Court then

[1] The ILO background paper to the meeting of the Applications of Standards in February 2015 notes that the right to strike is included in the constitutions of 97 countries and has been interpreted as being protected under the constitution of four others, including Canada following the *SFL* case.

overturned *Delisle* in finding that a provision of the public service labour relations legislation that excluded RCMP members from collective bargaining was also unconstitutional.

SFL and *MPAO* together illustrate that the turnabout in the Court's interpretation of freedom of association was accomplished by centring both the right to organise and the right to strike as necessary to protect a meaningful process of collective bargaining. The progression in case law (*Dunmore, Health* Services) thus removed the barriers arising from the Court's earlier case law to providing meaningful recognition to worker freedom of association under the Canadian constitution.

Observers of the European Court of Human Rights ('ECtHR') case law will note a parallel to that Court's own progression in giving meaning to worker freedom of association pursuant to Article 11 of the *ECHR (*see, for example, 'Freedom of Association in Canadian and European Human Rights Law'*, IUR* 16.3, and the more recent ECtHR case of *RMT v UK*). However, Canadian labour lawyers may hope that the recent setback in *RMT* will not be repeated in Canada. The ECtHR's decision that secondary action banned under the UK labour legislation was justified under the saving provision of Article 11(2) of the *ECHR*, rather contrasts with the finding of the Supreme Court of Canada in the 2002 *Pepsi-Cola* case that secondary picketing is a protected *Charter* activity under s. 2(b) freedom of expression.

Be that as it may, the *SFL* decision is a proud victory for the Canadian labour movement and hopefully it will play its own part in cementing the recognition in the wider international community that the right to strike as an essential component of worker freedom of association.

Author: Peter Barnacle

First published in International Union Rights – the journal of the International Center for Trede Union Rights

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Extract from the majority judgmet of the Canadian Supreme Court in Saskatchewan Federation of Labour v. Saskatchewan , 2015 SCC 4 (CanL II) – http://canlii.ca./t/gg40r - handed down on 30 January 2015:

[53] In *Health Services*, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(*d*) (para. 81). And, most recently, drawing on these same values, in *Mounted Police* it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(*d*) aims

> to protect the individual from "state-enforced isolation in the pursuit of his or her ends". . . . The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and

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> desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

[54] The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[55] Striking — the "powerhouse" of collective bargaining — also promotes equality in the bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the *Alberta Reference*, Dickson C.J. observed that

> [t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. [p. 368]

And this Court affirmed in *Mounted Police* that

> [Section] 2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way. . . [the] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals.

(at paras. 70-71)

> Judy Fudge and Eric Tucker point out that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" (Prof. Michael Lynk, "Expert Opinion on Essential Services", at par. 20; A.R., vol. III, at p. 145).

[56] In their dissent, my colleagues suggest that s. 2(*d*) should not protect strike activity as part of a right to a meaningful process of collective bargaining because "true workplace justice looks at the interests of all implicated parties" (para. 125), including employers. In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying. It drives us inevitably to Anatole France's aphoristic fallacy: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

[57] Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. And, as the trial judge recognized, strike action has the potential to place pressure on *both* sides of a dispute to engage in good faith negotiations. But what it does permit is the employees' ability to engage in negotiations with an employer on a more equal footing (see *Williams v. Aristocratic Restaurants (1947) Ltd.*, 1951 CanLII 24 (SCC), [1951] S.C.R. 762, at p. 780; *Mounted Police*, at paras. 70-71).

[58] Moreover, while the right to strike is best analyzed through the lens of freedom of association, expressive activity in the labour context is directly related to the *Charter*-protected right of workers to associate to further common workplace goals under s. 2(*d*) of the *Charter*: *Fraser*, at para. 38; *Alberta (Information and Privacy Commissioner)*, at para. 30. Strike action "bring[s] the debate on the labour conditions with an employer into the public realm": *Alberta (Information and Privacy Commissioner)*, at para. 28. Cory J. recognized this dynamic in *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CanLII 99 (SCC), [1992] 1 S.C.R. 901:

> Often it is only by means of a strike that union members can publicize and emphasize the merits of their position as they see them with regard to the issues in dispute. It is essential that both the labour and management side be able to put forward their position so the public fully understands the issues and can determine which side is worthy of public support. Historically, to put forward their position, management has had far greater access to the media than have the unions. At times unions had no alternative but to take strike action and by means of peaceful

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> picketing put forward their position to the public. This is often the situation today. [p. 916]

[59] As Dickson C.J. observed, "[t]he very nature of a strike, and its *raison d'être*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual" (*Alberta Reference*, at p. 371).

[60] Alternative dispute resolution mechanisms, on the other hand, are generally not associational in nature and may, in fact, reduce the effectiveness of collective bargaining processes over time: Bernard Adell, Michel Grant and Allen Ponak, *Strikes in Essential Services* (2001), at p. 8. Such mechanisms can help avoid the negative consequences of strike action in the event of a bargaining impasse, but as Dickson C.J. noted in *RWDSU v. Saskatchewan*, 1987 CanLII 90 (SCC), [1987] 1 S.C.R. 460, they do not, in the same way, help to realize what is protected by the values and objectives underlying freedom of association:

> . . .as I indicated in the *Alberta Labour Reference*, the right to bargain collectively and therefore the right to strike involve more than purely economic interests of workers. . . . [a]s yet, it would appear that Canadian legislatures have not discovered an alternative mode of industrial dispute resolution which is as sensitive to the associational interests of employees as the traditional strike/lock-out mechanism. . . . [pp. 476-77]

That is why, in the *Alberta Reference*, Dickson C.J. dealt with alternative dispute resolution mechanisms not as part of the scope of s. 2(*d*), but as part of his s. 1 analysis: p. 374-75.

[61] The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, the "irreducible minimum" of the freedom to associate in Canadian labour relations (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 69).

[62] Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. These obligations led Dickson C.J. to observe that

> [T]here is a clear consensus amongst the [International Labour Organization] adjudicative bodies that [*Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* (68 U.N.T.S. 17 (1948))] goes beyond merely protecting the formation of labour unions and provides

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> protection of their essential activities — that is of collective bargaining and the freedom to strike. [*Alberta Reference*, at p. 359]

[63] At the time of the *Alberta Reference*, Dickson C.J.'s reliance on Canada's commitments under international law did not attract sufficient collegial support to lift his views out of their dissenting status, but his approach has more recently proven to be a magnetic guide.

[64] LeBel J. confirmed in *R. v. Hape*, 2007 SCC 26 (CanLII), [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

[65] Given this presumption, Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(*d*). Canada is a party to two instruments which explicitly protect the right to strike. Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 to which Canada acceded in May 1976, provides that the "States Parties to the present Covenant undertake to ensure. . . (*d*) *the right to strike, provided that it is exercised in conformity with the laws of the particular country*". (See also affidavit of Prof. Patrick Macklem (Expert Report), sworn December 21, 2010). In Dickson C.J.'s view, the qualification that the right had to be exercised in conformity with domestic law appeared to allow for the regulation of the right, but not its legislative abrogation (*Alberta Reference*, at p. 351, citing *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 1980 CanLII 1108 (AB QB), 120 D.L.R. (3d) 590 (Alta. Q.B.), at p. 597; see also Hepple, at p. 138).

[66] In addition, in 1990, just over two years after the *Alberta Reference* was decided, Canada signed and ratified the *Charter of the Organization of American States*, Can. T.S. 1990 No. 23. Article 45(c) states:

> Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, *including the right to collective bargaining and the workers' right to strike*, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;

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[67] Besides these explicit commitments, other sources tend to confirm the protection of the right to strike recognized in international law. Canada is a party to the International Labour Organization (ILO) *Convention (No. 87) concerning freedom of association and protection of the right to organize*, ratified in 1972. Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention: see Pierre Verge and Dominic Roux, "L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?", in Pierre Verge, ed., *Droit international du travail: Perspectives canadiennes* (2010), 437, at p. 460; Janice R. Bellace, "The ILO and the right to strike" (2014), 153 *Int'l Lab. Rev.* 29, at p. 30. Striking, according to the Committee of Experts, is "one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests": *Freedom of Association and Collective Bargaining* (1994), at para. 147; Jean-Michel Servais, "ILO Law and the Right To Strike," (2009-2010), 15 *C.L.E.L.J.* 147, at p. 150.

[68] Under the *International Covenant on Economic, Social and Cultural Rights* signatory states are not permitted to take "legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in [*Convention No. 87*]": Article 8(3) of the *ICESCR*. The principles relating to the right to strike were summarized by the Committee on Freedom of Association as follows:

> **521.** The Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests.
>
> **522.** The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.
>
> **523.** The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.
>
> . . .
>
> **526.** The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to

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> economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. [References omitted.]

(ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev.) ed. 2006))

[69] Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court: Lynk, at para. 9; *Health Services*, at para. 76; *Alberta Reference*, at pp. 354-55, *per* Dickson C.J. The relevant and persuasive nature of the Committee on Freedom of Association jurisprudence has developed over time through custom and practice and, within the ILO, it has been the leading interpreter of the contours of the right to strike: Bellace, at p. 62. See also Roy J. Adams, "The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille" (2008), 14 *C.L.E.L.J.* 317, at p. 321; Neville Rubin, in consultation with Evance Kalula and Bob Hepple, eds., *Code of International Labour Law: Law, Practice and Jurisprudence*, vol. I, *Essentials of International Labour Law* (2005), at p. 31.

[70] Canada is also a party to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (*ICCPR*), which incorporates *Convention No. 87* and the obligations it sets out: see Article 22(3); Tonia Novitz, "Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact" (2009-2010), 15 *C.L.E.L.J.* 465, at p. 472; Roy J. Adams, at p. 324.

[71] Additionally, there is an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike. The European Court of Human Rights now shares this view. After concluding in *Demir v. Turkey* [GC], No. 34503/97, ECHR 2008-V, that freedom of association under Article 11 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, protects a right to collective bargaining, it went on in *Enerji Yapi-Yol Sen v. Turquie*, No. 68959/01, April 21, 2009 (HUDOC), to conclude that a right to strike is part of what ensures the effective exercise of a right to collective bargaining:

> The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests. Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests. . . . The Court also observes that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the

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> Convention, see *Demir et Baykara*. . .). It recalls that the European Social Charter also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining.
>
> (Unofficial translation of *Enerji Yapi-Yol Sen*, at para. 24, cited in K. D. Ewing and John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2009-2010), 15 *C.L.E.L.J.* 165, at pp. 181-82 (text in brackets in Ewing and Hendy); see also *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, No. 31045/10, April 8, 2014 (HUDOC).

[72] Even though German labour relations are not based on the Wagner model, German courts too have concluded that strike action is protected when it is complementary to collective bargaining, that is, when the strike action is aimed at the achievement of a collective agreement and is proportionate to that aim (Hepple, at p. 135; Manfred Weiss and Marlene Schmidt, *Labour Law and Industrial Relations in Germany* (4th rev. ed. 2008), at paras. 484-86).

[73] Israeli courts have also held that freedom of association is a basic right, derived from the right to human dignity. They have interpreted freedom of association to include the right to organize, the right to bargain collectively, and the right to strike: *Attorney-General v. National Labour Court*, [1995-6] Isr. L.R. 149 (H.C.J.) at p. 162; *New Histadrut General Workers' Union v. State of Israel* (2006), 25 I.L.L.R. 375, at para. 10; *Koach La Ovdim v. Jerusalem Cinematheque* (2009), 29 I.L.L.R. 329, at p. 331. Guy Davidov, "Judicial Development of Collective Labour Rights — Contextually" (2009-2010), 15 *C.L.E.L.J.* 235, at p. 241.

[74] And strikes, as collective action, are protected globally, existing in many countries with labour laws outside the *Wagner Act* model: J. Servais, at p. 148. Moreover, several countries have explicitly included the right to strike in their constitutions, including France (Constitution of 1946, § 7 of the preamble), Italy (Constitution of 1948, art. 40), Portugal (Constitution of 1976, art. 57), Spain (Constitution of 1978, art. 28(2)), and South Africa (Constitution of 1996, s. 23(2)) (Hepple, at p. 135). The *European Social Charter* similarly recognizes the importance of the freedom to strike for meaningful collective bargaining (E.T.S. No. 35, 1961(revised E.T.S. No. 163, 1996), Article 6(4)).

[75] This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2(*d*) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can

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continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.

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COLLECTIVE BARGAINING IN SOUTHERN EUROPE

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1. Introduction

Today, it is extremely difficult to write about Europe for any labour lawyer from the Mediterranean, because we are seeing a two-fold fragmentation of Europe: in territorial terms and in legislative ones as well. There is a territorial division because a divide is becoming apparent between the north and the south – or, in reality, the south and east of Europe against Central- and Northern Europe – which results in a different, unfair treatment of those countries whose sovereign debt has increased because of the growing difficulties of their banking systems; which are encountering major problems in funding the debt in the markets, even at low interest; whose economies are experiencing intervention or control by a monetary-administrative pool (the ECB, the European Commission and the IMF). This process has given rise to another fracture – a legislative-institutional division – because in parallel with an "ordinary" constitutional legality for the EU, as is set out in the proceedings agreed upon in the Treaty of Lisbon and the EU Charter of Fundamental Rights, there is another, very different legality: that of "economic governance", which has its own instruments of normative action, from the Euro Plus Pact to the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, in March 2012, and so on, and this other parallel legal system not only comes into direct conflict with the European system of rights, but also renders ineffectual and destroys a large portion of the political-democratic guarantees given in the national constitutions of the Member States, considered to be "impediments" or "obstacles" to the application of the "austerity policies".

Thus, it seems we are about to witness the change of an era. Until the outbreak of the Economic Crisis of 2007-2008, affairs in Europe were based on the forces of economic and social privilege's acceptance of a compromise with regard to democracy and civil

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participation and the signing of a social pact with the lower classes. This compromise was manifested in the national constitutions of the various countries making up Europe, and was particularly evident in the constitutions of the Allied nations which toppled the fascist regimes. However, acceptance of these standards of political behaviour did not prevent a certain amount of wrangling within the allowed standards to try to tip the correlation of forces in favour of a certain party, and thereby ensure the maintaining of the asymmetrical relations of economic, social, cultural and political power in comparison to the contrary positions of levelling of those relations – or, on the other hand, to try to shift the views of the majority of civilians to positions of firm social levelling and incisive economic control of free enterprise and trade.

For a long time, this starting position was accepted throughout Europe – even with the spreading of neo-liberal and conservative values during the 1980s. The fall of the Berlin wall did not alter this configuration of a constituent social pact, although emphasis was placed on market economy as the central element of the assignment of resources and the gradual isolation of the political sphere from civil participation. That is, the progressive, hegemonic establishment of political values associated with economic and social neoliberalism in the democracies of the internal laws in the European Union, and the simultaneous profound de-structuring of democratic socialism in those countries and its practical liquidation as an alternative social project, actually did not change this starting point; instead, they forced a reformulation, explicit or implicitly, of the terms of this agreement: accentuation of the formality of the representative democracy, limitation or incapacitation of the political pluralism by electoral laws and parliamentary regulations, manipulation of public opinion by control of the media, increasing of the violence of salary exchange by gradual re-commercialisation of labour relations, growing privatisation and public services.

With the economic crisis that began in 2008 and its effects which are still being felt today, a qualitative leap took place: that which directly clashed with the neoliberal political and economic hegemony and the democratic agreement into which it fitted. Whilst it is not possible to find or formulate a political alternative to neoliberal capitalism, a direct consequence of this is that it makes no sense to accept the democratic pact that couples together the administration of the reality and the social project with different visions to that held by the liberal and capitalist outlook – which, today, is fundamentally supported by the funding of the global economy.

This is the anti-democratic environment in which the EU policies operate, which were generated in a specific institutional environment – impenetrable to any civic intervention or participation, and which is actually situated as a control centre higher than the government- and decision centres subject to democratic logic, as much in the European Union, and still with the democratic deficit underlying its structures, as it is mainly in the various Member

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States, making the adoption of sovereign decisions impossible and degrading any kind of democratic- or civic mediation.

The central axis of these policies has been the reversal of States' social spending – and the attendant tightening of the welfare state – and the so-called "structural measures" of reform of the "labour markets" which, truly, consisted of the synchronised implementation of an immense operation of de-structuring and dismantling of the rights derived from work – i.e. the very right to work, understood as a suitable instrument to ensure the right to dignified work.

This is a crucial point: seeing how this type of political-economic measures for countries that are overindebted as the result of public bail-outs of private financial institutions is progressively altering the system of constitutionally-guaranteed rights as set forth in the national constitutions and in the EU Charter of Fundamental Rights. The current process of de-constitutionalisation is justified by arguments that we are in an economic state of exception, which enables the public authorities to substantially alter the framework of civil rights on the basis of the compromises adopted by virtue of the *entente* protocols laid down as a function of the different types of financial bail-out.

In this agenda, a particularly important part is played by the weakening of trade unions as a social figure representing all workers, and the neutralisation of their contractual power, seen in their ability to collectively bargain over the working- and living conditions of a significant majority of the working population. The trade union is a form of general representation of citizens, qualified by their belonging to a social situation marked by inequality and exploitation of the workforce, which projects its influence vertically from the workplace and the conditions in which human activity takes place in the process of production of goods and services for other, to the branch activity, in the territory where companies establish themselves and where the men and women who depend on the work (or lack thereof) exist, and finally, in the unions' relation with the public authorities as a political interlocutor for negotiation and dialogue about general decisions on fiscal, economic and social policy, and general conformity with the Welfare State. Trade unions have been extremely important actors along the path taken by the European social democracies, lending stability to the system, unreservedly accepting the initial constituent pact mentioned above, and have legitimised the economic system whilst constructing an intense network of protectorates fundamentally employing the instrument of collective bargaining.

Above all this, there may be the due criticisms, nuances or questions raised, in relation to the actual evolution of European trade-unionism, its representativeness and its high degree of institutionalisation or, sometimes, atrophy in the development of its functions, but the map offered by the regulation of the labour rights for European workers is non-dissociable

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from a dense network of collective agreements that govern salary "coverage" and the working conditions of most people that provide their services to enterprises and productive entities.

Economic and political liberalism has always and shown hostility toward trade unions and their means of action: primarily toward strikes, but also obviously toward trade unions' ability to break the individualised consideration of workers considered singularly and bring them together as a unified, collective body, fighting for the interests of a group that is socially determined by its subordination in economic and political terms. The liberal regulation paradigm was wholeheartedly taken up by the Nazi/fascist dictatorships firstly, and later by the military dictatorships surviving from that dark period of European history (such as Spain or Portugal), or in Latin America (Brazil, Argentina, Chile), which expressly affirm the principle of free enterprise and capitalism without democracy as a form of government. This is a line which, today, is not without significant ideological support in financial centres of global decision-making.

The fact is that in Europe, a broad program has been initiated to reduce and shrink trade unions' power by dismantling collective bargaining and rerouting it to an instrument functionalised as the increase of the productivity in particular companies, ruining the business plan developed at the branch of activity and the territory. Especially after the Pact for the Euro, the political-monetary authorities in the region have opted directly to introduce reforms of the respective labour laws which subject and restrict the trade unions' autonomy and the capacity for collective bargaining over general working conditions. This is not a harmless initiative, nor a merely "technical" one: it is a programme which is committed to dismantling the labour- and social guarantees present in the national Constitutions by the work of the respective national governments which, institutionally, are obliged to safeguard trade-union action and ensure its development, although this action of demolition is deliberately hidden in the descriptions of the objectives and achievement of the "austerity policies" and "structural reforms" as a way out of the crisis.

This is an incontrovertible fact, about which the dominant media – dominated by the major economic groups – and public opinion itself does not inform about or mention, making it impossible to gain a true perception of the problem. The prevailing consideration of collective bargaining and of trade-union work as primarily national phenomena also prevents an overall approximation on this authoritarian objective of invalidation of collective bargaining throughout Europe. Nonetheless, there have already been outstanding efforts made to demonstrate that the impact of the economic and financial measures on the collective, trade-union dimension in the whole of Europe is extremely important and includes the violation of standards on salaries and working conditions by breaking down the collective bargaining system in the different European sets of laws. The Trade-Union-related

Research Institute (TURI) has carried out a great deal of research and awareness-raising on this topic, which has given rise to a large number of works[2], but these are not known to the general public, nor are they handled as they should be in the area of democratic politics. The trade unions in the countries most affected have also carried out an analytical and informative effort on this aspect, such as that carried out by Fundación 1° de Mayo in Spain.[3]

This study fits in with this line of analysis and awareness-raising. We have expressly chosen three sets of national laws in order to be able to carry out a comparative examination, because this enabled us to demonstrate a uniform trend with different forms of expression in each of the countries. We refer to Italy, Portugal and Spain because all of them belong to the Mediterranean area, and to the group of overindebted countries, and we have left out Greece because the special characteristics of that country, and the fury with which the policies dictated by the Troika have been implemented in the country's social web and in the negation of labour- and civil rights, meant that it is a very unique case in relation to the situations experienced in the other three Mediterranean "brothers".

Italy is our first example, followed by Portugal and finally Spain, with constitutional models that have stemmed from the collapse of the fascist regimes and incorporate the system of individual and collective rights corresponding to a social democracy and are based on the figure of the trade union as a crucial player not just in the regulation of labour relations, but in the actual political-democratic structure of each of the respective countries. In these countries, the incidence of the reform measures urged by the political-financial conglomerate grouped around the *Troika* has generated significant political turbulence, and they have suffered deep-cutting legal reforms, but in Italy and Spain there has been no remuneration for an economic "bail-out" on the part of the European financial authorities. Thus, we can show that only by way of a multi-scale, multi-level approximation can we appropriately identify the spaces where the relevant decisions are constructed in the determination of the framework of individual- and collective rights and the conditioning of the contractual power of the trade union. The national-state arena – and therefore the *government* of that state – continues to be a crucial place in order to define these aspects.

A simple description of the reform processes and their effects, as is given in the continuation of this book, demonstrates the genuine harmonisation that is occurring in those processes,

[2] Recently, N. BRUUN, K.LÖRCHER and I. SCHÖMANN, *The Economic and Financial Crisis and Collective Labour Law in Europe,* Hart Publishing, Oxford and Portland, 2014.

[3] The Fundación 1° de Mayo has been very active in the promotion of studies and investigations into the economic, labour, trade-unionist and democratic repercussions of the neoliberal European policies to try to climb out of the crisis in collaboration with other trade-union institutes in other European countries. See a very recent study, edited by F. ROCHA (with contributions from G. FEIGGI, S. LEONARDI, J.P. PERNOT, A. STOLEROFF, L. TOMEV and C. TRIAFANTAFILLOU), *The new EU economic governance and its impact on the national collective bargaining systems,* Fundación 1° de mayo, Madrid, 2014.

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in a direction which seriously jeopardises the central elements of trade-union autonomy and the contractual power of the union. That is to say, there is a policy which essentially aims to dismantle the complex mechanisms that collective bargaining has gradually constructed in these countries, to reduce the unions' capacity to set rules governing salary, working hours and other conditions of employment, and to increase company domination over the management and control of the work provided, reducing its value by constant salary devaluations.

The consequences of the reforms and the model which is being gradually implemented (in the time span between 2010 and 2014 primarily, although the financial crisis has been an unavoidable presence for six years now) are being felt not only in terms of the negative effects mentioned above, but also in an extensive crisis of political legitimacy, which is consistent with the anti-democratic root that underlies this labour model.

In concrete terms, in the three countries in question, there is increasing rejection of the labour model imposed by Europe's new economic governance. This rejection is expressed to different degrees, but is found generally, not just on the part of the trade unions, but also a large majority of civil society. In Spain and Portugal, but also in Italy, following the recent clash between Renzi's government and the country's largest trade-union confederation, not only can we see the forming of a majority public opinion which rejects the labour model that is degrading of individual and collective labour right, but also, steps are being taken to reverse the situation.

Perhaps this is a time when labour lawyers, along with the critical and interpretative analysis of the norm and the conditions of its application in terms of judicial interpretation and collective mediation, need to debate and discuss the type of labour model that is felt to be most appropriate for the situation that is likely to arise in the immediate future, with the political and theoretical expiry of the normative structures put in place during the state of exception imposed anti-democratically by the private and public powers in the three countries examined here. That is, the design of the new model of the right to work, in terms of its content and its means of development, fit with the principles of the welfare state and recognition of work as the axis of attribution of civil rights. Hence, they hamper the permanence and irreversibility of these anti-democratic directions that the EU's new economic leadership wishes to stabilise and reinforce as a general, homogeneous rule throughout the various sets of laws that make it up.

Thus, the situation requires new rules to democratically discipline the subjects representing the various forces at play, the (re)presentation of classes and sub-classes struggling for hegemony in the administration of the course of things that are truly important for the

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citizens of a given country. Therefore, increasingly, the field of the constituent is being defined as a battleground wherein it is important to construct a political agenda that facilitates a significant expansion of the democratic mechanisms. These mechanisms are not exclusively – nor fundamentally – located in the field of political participation or civil liberties, but directly affect the power relations in the workplace and in the progressive configuration of instruments of workplace emancipation.

2. European social model and workers' fundamental collective rights

The definition of the European social model is a complex task. This is due, in part, to a lack of solid theorising having contributed to a clear definition and thorough understanding of this concept, but also, this difficulty is attributable to the existence of a large number of social models, which tend to be classified into four main groups – and relatively recently, a fifth category has been added, which pertains to the so-called Mediterranean social model.[4] Ultimately, the difficulty in grasping a concept such as that of the European social model stems from its abstract-ideological construction, which depends on the political balances at work within it and, therefore, is subject to the same ideological fluctuations that the European Union itself is constantly experiencing.

Yet in spite of the lability of the concept, there are a few characteristics which can help us to understand the most relevant aspects of its meaning, and the evolution which it has experienced over the course of the past decade. In concrete terms, we are interested in highlighting that vision of the European social model which aims for a society that combines sustainable economic growth which constant improvement to working- and living conditions. This is a European social model that supports the development of a set of public policies aimed at full employment, the creation of high-quality jobs, equal opportunities, social protection and citizen involvement in the decisions that affect them[5] – or, which is tantamount, recognition of the existence of a solid social dimension to the European Union, with full adherence to the letter of the regulation put in place, amongst other standards, by the Treaty of Lisbon and the EU Charter of Fundamental Rights.

Thus, we can state that the objectives of the European social model include social progress, justice and social protection (art. 3 TEU), the promotion of a high level of employment, the ensuring of adequate social protection, the struggle against social exclusion and a high level of education and health protection (art. 9 TFEU), along with constant improvement of living- and working conditions (art. 151 TFEU). All of this falls under the normative assumption that the European legislator is not a competent authority in

[4] A. GIDDENS, *Europa en la era global.* Paidós, Barcelona, 2008, pp. 12+.
[5] ETUC, "A new path for Europe: ETUC plan for investment sustainable growth and quality jobs", 2013. Available at http://www.etuc.org/documents/new-path-europe-etuc-plan-investment-sustainable-growth-and-quality-jobs#.VE90f_mG9qU.

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terms of salaries (art. 153 TFEU) and, therefore, it must promote the role of social agents, taking into consideration the diversity of the various national systems and respecting the autonomy of the different countries (art. 152 TFEU). Owing to the need to respect "Member States' own traditions", considered to be "acquired data" under European law, the three pillars on which the European social model must rest are the Welfare State, trade-union representation of workers and means of action for them – especially participation in the company, collective bargaining and strike action – and, finally, social citizenship, understood not only as a political expression, but as corresponding the declaration of preservation of human dignity.[6]

In summary, it must be noted how the paradigm of co-existence enthroned by the European social model should ensure constant improvement of the working- and living conditions by enacting public policies that are aimed at creating high-quality jobs and public services that work against the inequality which can arise as a result (amongst others) of the situation of unemployment. This goal should be served within a framework where, as a consequence of the attribution of competency, there must be profound (promotional) respect for the activity of social agents, accounting for the diversity of the principle of collective autonomy in the different national systems. In other words, the identifying feature of the European social model is peaceful, balanced co-existence between the economic freedoms (recognised at the level of the EC) and respect for the collective fundamental rights of workers as set out by each Member State. This aspect is confirmed by art. 53 of the EU Charter of Fundamental Rights, which quite literally states that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

Nonetheless, the evolution experienced by the European social model between the 1990s and the present day has gradually countered the very statements of the coexistence laws in force internationally, noticeably affecting the political recognition – and judicial regulation – of fundamental collective labour rights and, in the final instance, the political value of work as a means of access to social citizenship where trade-union representation and collective bargaining were being erected as the basic instruments for regulation of living- and working conditions. In this respect, we can state that the objective of the European social model has been gradually cut back over time, going from being a political conception that identified work and regulation thereof as the starting point to advance in the social ranks of the society to being a system of rules which promotes economic freedoms

[6] J.P. LABORDE, "Cosa resta del modelo sociale europeo", *Lavoro e Diritto* 3/2013, pp. 327-329.

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and individual decision on the part of entrepreneurs as *the one and only way* to economic development and progress.

The outbreak of the financial crisis has revealed the weaknesses of the European social model, reinforcing the primacy of economic freedoms, with deregulation of the markets being one of the main causes of the economic recession that is sweeping across the Euro zone. The European Commission's wholehearted support for a way of getting out of the crisis based on the pooling of monetary policies, with economic austerity and internal devaluation constituting its main tools, has seriously damaged a number of certainties that characterised the normative framework governing labour relations in the different national systems. Nonetheless, the impact of the crisis in the area of interest to us here – the current situation of collective bargaining in Europe, or more specifically, the situation developing in the southern European countries – cannot be analysed from a standpoint which only takes the start of the crisis as its temporal point of reference. On the contrary, it requires a series of preliminary considerations relating to the change of direction in the European social model since the EU enlargement to the East and the consolidation of what was then the EU 27.

Indeed, since 2007, we have seen a change in the political balances within the European Union, which has had a series of consequences for the political integration of the European Union, and the more negative effects have been felt in the area of regulation of subordinate labour and, fundamentally, the collective subject of representation of workers' interests: the Trade Union.[7]

In this respect, since 2006, in the EC, we see a determined effort to drive forward a change in the regulation of subordinate work which responds to the social and economic challenges posed by certain transformations in the area of production and the workplace. This particular way of tackling the challenges that supposedly face labour law in the 21st Century, as the centrepiece of regulation, adopted the imprecise and variable notion of *flexicurity*, whose inevitable premise came to be a sort of functionalisation of Labour Law to the economic situation and, ultimately, to the joint needs of businesses considered individually. Thus, the EU's Green Paper on Modernising Labour Law, which was published in the EC Bulletin in 2007, pointed at the need to create an arena for debate about what Labour Law model could be developed supra-nationally to deal with those social and economic challenges. The content of that document, published by the European Commission, was based on a number of ideological presuppositions which, essentially, converged on three *idées-forces* that are extremely simple but have a very high capacity for

[7] For a detailed discussion of the concept and effect of the social model, see A. BAYLOS, "La quiebra del modelo social europeo y la crisis de la política como acción colectiva", in *Sin Permiso*, 28 November 2010. http://www.sinpermiso.info/textos/index.php?id=3743.

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conviction: i) the system of rights and guarantees provided by Labour Law is responsible for the employment slump; ii) Labour Law should serve no purpose other than mediation between employment and the situation of the work market; and, iii) the collective face of Labour Law – especially collective bargaining and strike action – is analysed as a historical throwback and an obstacle to economic progress which, as such, needs to be overcome.[8]

In addition to this theoretical framework set by the Commission – which, far from promoting an interesting debate at European level, tried to launch a partisan assault on the traditional assumptions upon which Labour Law is founded – was added, almost without a continuity solution, the action of a renewed Court of Justice which, from 2007 onwards, devoted itself to revising and reinterpreting its jurisprudential line in relation to collective bargaining and strike action. This action on the part of the ECJ, initiated by the *Viking*, *Laval* and *Rüffert* cases, was the first departure from the delicate balance between these fundamental rights of workers and the economic freedoms recognised in the European Treaties.

In summary, through the aforementioned court cases, an attempt was made to clarify whether, and to what extent, the exercise of workers' fundamental rights – specifically the right to collective bargaining and strike – could constitute a limit to the exercise of trade economic freedoms in Europe, so that it was necessary to establish a weighting system between the rights in conflict. In essence, we can state that what the ECJ settled, with the aforementioned cases and other later ones, was the question of whether or not the defence of workers' rights falls under the remit of general interest which serves as the guiding principle for the EU legislation.

The result of this series of sentences handed down by the ECJ, which has become unduly well known, was a substantial erosion of these collective rights, as the ECJ consolidated the idea of their functionalization/subordination to economic freedoms, in such a way that legitimate exercise of those rights is only possible as long as it does not conflict with the (more important) respect of the fundamental economic freedoms. In turn, the consolidation of the principle of application to workers of the labour law in the country where the employing company is based (and not, as happens in the case of workers' exercising of the right to free circulation in Europe, of the labour law in the country where the service is to be provided) served to legitimise the idea of commercial competence in Europe, judged on the basis of the various levels and intensities of protection of the socio-labour laws or (which is the same thing), on the basis of *social dumping.*

[8] In A. BAYLOS and J. PÉREZ REY, "Sobre el Libro Verde: modernizar el derecho laboral para afrontar los retos del siglo XXI", in *Cuadernos de la Fundación Sindical de Estudios, 5/2006.*

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More generally, the new jurisprudential line opened up the floodgates for a political- and judicial view whereby the exercise of workers' fundamental collective rights was only assured by the defence of a very reduced set of rights outlined in Directive 96/71/EC, of 16 December 1996, *on the posting of workers in the framework of the provision of services*, which is binding, which rendered inapplicable the model of "voluntary" or "independent" collective bargaining which is characteristic of the central-European and Scandinavian countries. Furthermore, in purely salarial terms, the jurisprudential line tends simply to set the minimum wage in the country in which the work actually takes place, so the trade-union movement in Europe and a number of left-wingers began proceedings to modify this directive and its aim of harmonising working conditions in the face of the free provision of services. It is unacceptable that if a trade-union organisation calls on collective actions for the defence of workers' rights beyond what is allowed in the minimum content of Directive 96/71/EC, those fundamental rights should be ignored – "modulated", to use the judicial language – to ensure judicial security in terms of economic freedoms.

The logic which underlies both the movement of the EC and that of the ECJ, prior to the outbreak of the crisis, was pretty clear: to decidedly erode the collective face of labour regulation and, therefore, collective bargaining itself, due, according to some, to its tired existence, which would impede appropriate judicial security that guarantees businesses the ability to freely provide services in any Member State.

3. New economic governance and collective bargaining

The neoliberal orientation of the construction of the European project has never ceased to be present from its very beginnings as a consequence of the objective and function with which it was created[9], related to the construction of the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).[10] Unconditional confidence in the market's ability for self-regulation, and with it, for subordination and reorientation of political intervention to serve the requirements of liberalisation of the common market – and later unique and interior – has always been the identifying feature of the European integration project and the seed of

[9] Much more present and evident in the European Union's trade relations with certain Regions where the behaviour can be qualified as neocolonialism. See the interesting work of A. M. GASCÓN, "Los Acuerdos de Cooperación y Comerciales para el Desarrollo en el ámbito comunitario: exigibilidad de su contenido social", in AAVV (L. GAETA and R. GALLARDO, eds), *Los empresarios complejos: un reto para el Derecho del Trabajo".* Bomarzo, Albacete, 2010, pp. 351-388.

[10] A suggestive reading of the formation and consolidation of the European project prior to the crisis can be found in J. APARICIO, *Introducción al Derecho Social de la European Union.* Bomarzo, Albacete, 2005.

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the growing imbalance between economic integration objectives and actual social and political integration objectives.[11]

However, the present moment must not be viewed from a theoretical point of view as the classic tension between the economic and the social in the European Union, which, in view of the political balances that exist at all times, can be said to have given rise to some interpretations that lend greater or lesser potency to the social dimension of the European Union. Put differently, it does not seem that in today's world, judicial and political debate can be held about the impact or influence that the economic powers exert, *de facto*, on the design, development and/or application of the standards introduced by the European Union, but instead, the economic powers in the current climate of crisis "act directly in the field of standard production", giving rise to a binding and coactive normative heritage.[12]

In addition to undermining the EU's very principles of operation[13], this situation is giving the rise to a new *set of supra-national judicial para-rules* by the legislative encouragement of the international financial-market regulating bodies, which use threat and blackmail on the basis of the indebtedness of the peripheral countries to force the various governments to implement the set of standards those organisations have created, at state level. Thus, not only does the regulatory model that arises from the so-called new economic governance not respect the law-making procedures in the supra-national environment, in view of its current reorientation toward a strictly-intergovernmental nature[14], but nor does it respect those procedures set out by each Nation State, or of course in the Universal Declarations of Rights made internationally. All of this occurs in a framework where the sovereign-debt crisis has triggered a debate whereby, in addition to setting countries from Northern and Southern Europe against one another, and pitting Central Europe against the peripheral countries, encourages the idea that the rights system upon which democracy is built in the peripheral countries is a nectar of which their citizens have drunk too deeply – that is, the rights system has been used *beyond its capabilities*. Put another way, certain countries seem to be fated

[11] Paradigmatic, on this subject, is the text of art. 2 of the EECT which defines the purposes of the recently-established European Economic Community. In that document, on the one hand, it is absolutely clear that the Community's "mission" was to "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it". On the other hand, though, there was no doubt that this goal was to be achieved "by establishing a common market and progressively approximating the economic policies of Member States". The liberal idea of the origins of the European integration project therefore led to a conception of social betterment as a natural and spontaneous consequence of economic integration.

[12] In A. BAYLOS, "La desconstitucionalización del trabajo en la reforma laboral de 2012", in *RDS*, nº 61, 2013, pp. 20-21.

[13] S. SCIARRA, *L`Europa e il lavoro. Solidarietà e conflitto in tempo di crisi.* Laterza, Roma-Bari, 2013.

[14] The allusion to the new intergovernmental nature of the process of standard creation in the European supranational arena is intended to the point out the control and imposition of countries such as Germany and France.

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not to be able to construct a Welfare State that offers their citizens a dignified existence with the rights that constitute social citizenship.[15]

Broadly speaking, it can be said, prior to the analysis of the set of normative instruments established during the management of the crisis, that the decisions made by the European Commission, the European Central Bank and the International Monetary Fund on the basis of the crisis of the Euro in Greece have followed this pattern of conduct. In the specific field of our object of study, those standards have imposed certain liberalising measures in terms of collective bargaining, which force through the dismantling of the collective bargaining structures in the workplace in countries whose tradition in this regard was, precisely, collective bargaining based on social cohesion which offers collective agreement in a given sector. This fact has given rise, amongst many other actions, to the reporting of various States to the ILO for violation of the right to trade-union freedom. Up until that point, these complaints about the infringement of the right to trade-union freedom were restricted to latitudes far from the old continent, with this situation constantly being associated with the lack of social progress.

The situation briefly illustrated above forms part of the *new* European social model, which is being consolidated by the *new* economic governance. Up until the outbreak of the crisis, economic governance in the EU was rooted in the idea of achieving an internal market where the Member States must facilitate free trade and competition law. In spite of the increasing centrality given to the market as a favoured vehicle and means of achieving all the objectives of integration, there was still a firm desire to ensure a certain degree of rationalisation in its functioning. With this in mind, its liberalisation was accompanied by the gradual recognition of a collection of social rights as an inescapable premise, not open to interpretations of competition, which would legitimise the degradation of social rights as a *condition sine qua non* of that liberalisation (a "race to the bottom"). Thus, the objective was to ensure that competition in the liberalised market could take place on an even playing-field of socio-labour rights, understood as instruments to make sure the market worked properly.[16]

[15] This is a situation which relates to the characterisation of our current era of struggle, which is surely more defensive in nature, constant in the defence and application of the rights recognised in the various standards. This idea is discussed in detail in S. RODOTÀ, *Il diritto di avere diritti.* Laterza, Roma-Bari, 2013.

[16] This is the ultimate meaning of the approval, during the 1970s and 1980s, of the first labour Directives. The reference is essentially to the Directives relating to collective redundancies (Directive 75/129/EEC, of 17 February 1975), to the safeguarding of employees' rights in the event of transfers of undertakings businesses or parts of businesses (Directive 77/187/EEC, of 14 February 1977), to the protection of employees in the event of the insolvency of their employer (Directive 80/987/EEC, of 20 October 1980), to gender equality (Directive 75/117/EEC, of 10 February 1975, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Directive 79/7/EEC, of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social

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However, despite this reading of the early moments of economic governance before the crisis, the serpent had already laid its eggs with the entry into force of the Treaty on the European Union in 1993. In the context of burgeoning disaffection and challenging of the commercial nature of the integration project, the Treaty signed in Maastricht, on the one hand, attempts to deal with the "euro-sclerosis" with the introduction of small advances in social terms. On the other hand, it deepened and accelerated the process of radical inversion of the relation between the political and the economic embedded in 20th-Century European constitutionalism. No longer is it a question of avoiding or removing the obstacles to free competition in the market. The abandonment of the original liberal principle of non-intervention has resulted in an increasingly-strict functionalization of political activity (that of the Union and of the Member States) toward ensuring the centrality of the market.

The result of this genuine re-writing, in the neoliberal sense, of the European economic constitution is, primarily, the maintaining of the perspective of the (mere) negative integration in the face of the gradual "spill over" of the supranational rules of the market and of competition. These rules are becoming capable of conditioning the Member States' actions in all areas of public intervention, and especially in social aspects, beyond the formal system of competition distribution between Member States and European institutions, giving rise to an alleged process of regulating competition between the national worker protection systems.

In addition to this, we see the imposition of strong economic-financial links forged to advance the construction of the Economic and Monetary Union (EMU), aimed at ensuring the primacy of the objective of monetary stability. Those economic-financial links are included in the Maastricht Treaty and the convergence criteria of the Stability and Growth Pact, which incorporate the neoliberal principles (reduction of social spending with a view to containing the public debt and deficit, control of inflation in response to the need to ensure stability of exchanges and prices, etc.), which correspond to a precise aim of de-regulation of the Welfare State at national level. These economic-financial links, ultimately, are designed uniformly for all countries on the edge of the significant differences between them, and therefore, they provide only nominal convergence between the different national economies, whilst also conditioning the margins of public intervention by the state. This is even more paradoxical when we consider that the loss of national economic sovereignty derived from the *spill over* of the negative integration an of the macro-economic links constructed in Maastricht, cannot be compensated at supranational level, given the political-institutional *impasse* that afflicts any attempt to advance in terms of positive integration.

security). All of these were justified on the basis of the need to ensure a certain amount of uniformity in the cost of labour in Europe. Put differently, the aim of enforcing relative uniformity of workers' rights in the European market was to ensure loyal competition between companies in Europe – i.e. competition that was not judged on the basis of social dumping.

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The "weak" nature of Europe's economic governance, centred on simple coordination of national economic policies to serve common objectives, and marked by the prevailing respect not only for the principle of division of competences, but also (above all) the conditions derived from the choice of the model: "open market economy with free competition" (stability of prices and exchanges and of balances of payment, solidarity of funding and monetary conditions, etc.), contrasts with the "strong" nature of the control exercised over the actions of the Member States[17] with a view to ensuring the unconditional centrality of the market.[18]

In this scenario, the half-hearted attempts to strengthen integration on the social level are (and always have been) of little use. Primarily, we refer, here, to the writing of the Social Policy Agreement (SPA) as the continuation of the path taken in 1989 with the ratification of the Community Charter of the Fundamental Social Rights of Workers, aimed at strengthening the action of the Union and of the Member States in areas relating not only to the improvement of working conditions, equal treatment, the struggle against social exclusion and promotion of employment, but also to the collective rights of workers and the encouragement of social dialogue. The United Kingdom's stark rejection of the adoption of any subsequent social commitment, indeed, meant that the Agreement had to be relegated to the status of a separate Protocol. Even with the Treaty of Amsterdam, when the British government's change of heart meant the SPA could be incorporated into the main set of EU regulations, it had already been shown that a Member State could opportunely choose to withdraw from the links and social commitments, so the problem of "opting out" was not only a "British problem" – although it would continue to be so, fundamentally.[19] However, during Jacques Delors' presidency of the European Commission, emphasis was placed on the development of social dialogue as the necessary form to legislate on social policy. Also during this period, the possibility of collective bargaining was developed for Europe, and the European Works Council Directive was published, amongst other important aspects to construct, through standards, the rudiments of a space of collective rights at European supranational level.

The other fundamental landmark measure to attempt to compensate for the economic drift of the newly-founded European Union and counteract the growing disaffection on the

[17] For example, see E. MAESTRO BUELGA "Estado de mercado y constitución económica: algunas reflexiones sobre la crisis constitucional europea", ReDCE, n. 8/2007, pp. 43+.
[18] Thus, it has been stated that the purpose of the Broad Economic Policy Guidelines drafted by the European institutions is not so much the economic control of the market, but rather the control of the Member States' behaviour in view of the need to ensure healthy conditions of operation of the system. Ibídem, p. 58.
[19] It would continue to be so right up until the present day, as a firmly-rooted position taken by the UK's Conservative Party, in the by-elections in May 2014 – also under pressure from UKIP. A good discussion of the problem (in Spanish) is to be found in J. CABEZA, "El UKIP y la agenda del Partido Conservador", http://conjaimecabeza.blogspot.com.es/2014/11/el-ukip-y-la-agenda-del-partido.html.

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part of Europe's population was the creation of "citizenship of the Union". However, its close tie-in with the restrictive, regressive and exclusive nationality requirements[20], its uncoupling of the recognition of the value of work and the condition of the subject as a worker, and the prior recognition of a set of fundamental social rights which provided the social backbone of the European constitutional order, largely depreciated its integrative power.

After the Maastricht Treaty, there were a series of standards enacted which, with the effects of that work, culminated in the Dublin European Council in 1996 by the establishment of an instrument which has remained in force and has served as a link with the design of the new economic governance: the Stability and Growth Pact[21], which already provided a mechanism for multilateral supervision and a process for controlling any possible deviations of the deficit. On 1 June 1998, the Central European Bank was founded, as an organisation independent of the political authorities, whose purpose was essentially to safeguard the purchasing power of the Euro, and with it, the stability of prices in the Euro zone, thus completing the model upon which the economic governance of the European Union was to be based. That governance, as readers know, was founded on two main pillars: 1) the ECB as the sole competent authority on monetary policy; and 2) the Commission's overseeing of the coordination of the economic policies in the individual Member States, which went as far as proposing sanctions to the European Council.

In parallel to this model of governance, there were a series of experiments, such as the Luxembourg Strategy for employment, the Social Agenda and the Gothenburg Agenda. These measures, in spite of their lack of coordination and effect on the writing of legislation, actually gave rise to the Lisbon Strategy (2000-2010), which was intended as a response to a situation of loss of productivity in relation to that which the United States was achieving at that time: so much so that the Lisbon Strategy's listed main objective was to "make the EU the most competitive and dynamic knowledge-based economy in the world[,] capable of sustainable economic growth[,] with more and better jobs and greater social cohesion". The outbreak of the crisis cut short the aims of the Lisbon Strategy, although it must be admitted

[20] Indeed, both art. 9 of the TEU and art. 20 of the TFEU identify a citizen of the Union as being "[any] person holding the nationality of a Member State", so that "Citizenship of the Union shall be additional to and not replace national citizenship". Hence, in the European arena, it is nationality (i.e. the subject's belonging to the territory of one of the Member States), rather than work and its social and political value, which is established as a prerequisite for recognition of the condition of citizenship, and with it, social rights.

[21] Finally adopted at the Amsterdam European Council in June 1997, the primary aim of the Pact was to prevent too great a budget deficit in the Euro zone when the single currency came in. In particular, it aimed to prevent laxity in the management of public finances in certain Member States affecting the rest of the states and monetary stability. From a formal perspective, the Pact was substantiated by a European Council Resolution adopted in Amsterdam on 17 June 1997, and by two European Council Regulations on 7 July of the same year, which detail the technical means of supervision of the budgetary situations in the different nations, coordination of the economic policies of the Member States and application of the procedure on excess deficit. The Pact was revised first in 2005 and then again in 2011 (Regulation 1175/2011/EU of 16 November 2011).

that the indications about the project through its star instrument, the Open Method of Coordination, were not overly promising.

Thus, the 2008 crisis exposed the weaknesses of the European economic governance in at least three respects: i) the existence of a Central European Bank lacking the capacity to drive forward anti-cyclical policies and to lend directly to the Member States, with speculation and trade in the banking sector on the basis of the sovereign debt having taken place or been facilitated; ii) a banking union that served as a containment dam against the contagion of the public funds, where the conversion of private debt into public debt had proved much more difficult; and iii) a federal European government.[22]

The first defining act of the new economic governance de la European Union was the creation of instruments to *rescue* (or bail out) those countries which were in serious financial trouble, as was the case of Greece, in particular, at the time. Thus, the period 2010-2013 saw the implementation of the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility; the latter is not strictly European, but instead is inter-governmental, with the involvement of the International Monetary Fund. The time-periods which were eventually imposed to grant access to these two organisations rendered some of their functions void, such as that of preventing Greece's debt from contaminating the Euro zone. In addition, it must be noted that, even from its early days, trade meant that the European Financial Stability Facility had to take loans at a 3% rate of interest, whilst Greece paid 6.5% interest on the first part of its bailout.

What, at first, seemed to be a markedly temporary mechanism was soon made into a permanent one, by the European Council on 2 February 2012; from this moment on, the collateral measures demanded of governments who had *enjoyed* the aid of the European Financial Stability Facility became more stringent.

Yet the most relevant mechanism from the point of view of the new economic governance came not from the organisations mentioned here, but from the "Europe 2020" strategy, which brought in the cycles of economic regulation known as the European Semester. As readers know, the European Semester consists of two types of actions, distributed throughout the year. The first of these relates to the Member States' action in terms of revising their budgetary and structural policies, so that during the latter half of the year, the European institutions can review the States' actions.

Hence, the sequencing of the European Semester begins in January, when the European Commission initiates the cycle with the so-called Annual Growth Survey, which imposes

[22] On this point, see R. BAEZA, "La nueva gobernanza económica de la Unión Europea: una perspectiva crítica", in AAVV (R. BAEZA, ed.), *Gobernanza económica de la Unión Europea y salida de la crisis.* Fundación 1º de Mayo, Madrid, 2013, pp. 21-22.

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obligations that Member States must conform to in areas such as macro-economic and fiscal policies, structural reforms and growth-promotion measures. In March, the Spring European Council meets to approve the economic reform and fiscal policy programme; meanwhile, between April and May, each Member State must present its respective National Reform Programme to the European Commission and the other Member States. Finally, in June, the European Commission evaluated the national reports and presents the concrete recommendations for each country to implement to the Council.

In addition to the European Semester, it is worth pointing out the Euro-Plus Pact, because of its importance in the design of the new economic governance of the European Union. The "Euro+ Pact" was born of an inter-governmental initiative on the parts of the German and French governments, signed in March 2011, following a reform of its content which tempered the primitive measures included in the Euro Pact: the Six-Pack, formed of five regulations and a directive, which were passed in December 2011, the fundamental aim of which is budgetary convergence of the different Member States. It was the Six-Pack that set out a true sanctioning procedure in the event of Member States showing too great a deficit – i.e. in the event that the deficit in the State in question were greater than 3% of its GDP or that public debt were greater than 60% of the GDP. The sanction may reach up to 0.5% of the GDP of the country in "non-compliance", and can only be waived by a qualified majority of the Council.

Finally, there are two more instruments which, at present, belong to the new economic governance of the European Union: firstly, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, and secondly, the so-called Two-Pack.

The Treaty on Stability, Coordination and Governance, known as "Fiscal Compact", came into force in January 2013, having been agreed between the representatives of the different governments and without its content having been opened up for public debate, by way of the internal instruments, so that the governments could enact emergency legislation. Put differently, the Treaty on Stability, Coordination and Governance takes the judicial form of an international agreement, having been ratified by 25 Member States – all apart from the United Kingdom and the Czech Republic. Thus, we can state that it only affects its signatories, and that it does not yet form part of the European Union's legislative heritage. The most relevant content of this Treaty is the express obligation that national budgets should either balance or show a surplus. Thus, if the States did not present a set of standards to serve this purpose, preferably constitutional, those Member States could be sanctioned.

For its part, the Two Pack comprises two community regulations which reinforce the Six Pack, were approved in February 2013, and had impacts for the elaboration of the different budgets for 2014. Essentially, these new community regulations allow for the consolidation

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of European Commission auditing of the non-conforming countries of the objectives introduced in the Stability and Growth Pact. Thus, the first of the regulations stipulates that each year, before 15 October, every country must present its budget to the European Commission, so that if the Commission believes the budget does not conform to the desired objectives, it can demand that the budget be redone. On that point, it is noteworthy that this audit takes place prior to the budget's being debated in the national parliaments. The second regulation laid down a series of rules for increased vigilance over those countries in the Euro zone that a) are experiencing major difficulties in terms of their financial stability; or b) are receiving financial aid.

When these last two regulations came into force, there were discussions about new instruments of economic governance within the European Union, without an agreement having been reached to establish tools different to those analysed here – all this in spite of the fact that, in November 2012, the European Commission published a communication (*A blueprint for a deep and genuine economic and monetary union: Launching a European Debate*)[23], which set out a variety of measures, dealing with the granting of long-term Eurobonds, the drafting of a common budget for the Euro zone and the possibility of collecting taxes within the EC. However, those measures were indefinitely postponed to consolidated the European new economic governance described in this section.

4. Austerity and salary devaluation policies as the limits to the principle of collective autonomy

We have already had the opportunity to see how the design of the governance model which is currently in force in the European Union was fundamentally characterised by inter-governmental action[24], where Germany and France are fairly comfortable from a political point of view, as opposed to a more federalised style of governance, whereby a more horizontal system of enactment of decisions is encouraged, which favours the interests of the European Union instead of those of the individual Member States.

With this *new economic governance*, two lines of action have been adopted, which are recommended and are generally being imposed in the peripheral countries of the European Union: austerity and salary devaluation, which clearly exemplify the dramatic effect of the imposition, in certain countries, of determination of economic policies at supranational level.

[23] COM (2012) 777 final, Brussels, 20 November 2012.
[24] This situation has always been present in the institutional framework of the European Union, with the result being that "the bodies which actually make the decisions are the least responsible, from a democratic point of view, whilst the most representative body – the European Parliament – is relegated to a subordinate position". In G. PISARELLO, "La Constitución europea o los dilemas del aprendiz de brujo", in *Revista de Derecho Social,* nº 34, 2006, p. 51.

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Thus, in regard to austerity policies, to begin with, we see how the ideological premise – later turned into an unavoidable technical question which, in spite of its awful effects on society, is seemingly absolutely necessary – has to do with custody of the national interests of certain countries (as with Germany, in particular). In this respect, the views held by a large proportion of national and international economists, whose ideological-professional commitment prevents them from *enjoying* the advantages of the policies they advocate, are based on the idea that the current crisis is the result of the economic-financial fracturing of a group of countries, who wished to *live beyond their means*, and have therefore caused situations of excessive deficit and public debt – so much so that the only way to remedy the situation was to implement harsh austerity policies. However, as has been pointed out in various fora (political, trade-unionist, academic), the premise for the imposition of austerity policies in these countries was wrong.

The clearest example of this ideologically-biased, and therefore erroneous, analysis is offered by Spain, which, in 2009, published public-deficit and public-debt figures that belie the theory that the origin of the present economic crisis lay in the failure of the fiscal policies of certain peripheral countries in the European Union. Spain's public debt, in 2009, was at 52.9% of its nominal GDP, which was much lower than the average in the European Union (around 70%). Meanwhile, private debt, around the same time, was three times this amount. The most relevant effect of the implementation of the austerity policies, in the case of Spain (but in other countries as well), was the conversion of private debt into public debt, which then rose to over 90% of the nominal GDP.[25] The very same bodies which originally championed this theory as to the origin of the financial crisis (though not without a certain amount of discursive wavering and major contradictions) acknowledged the ill-foundedness of the austerity policies, lamenting this effect.

For its part, the implementation of the other main pillar of the new economic governance – internal devaluation by way of structural reforms in the world of work – was also based on a particularly-painstaking analysis of the interests of certain countries in the Union. The lack of a rigorous debate about the introduction of policies aimed at external devaluation, as the best option in supranational terms, must be viewed in the context of an action to protect the interests of certain countries from the effects of such a devaluation: namely a rise in the cost of imports and a drop in the price of exports. In addition to this circumstance, the favouring of internal devaluation solely by means of salary degradation prevented the drafting and direction of public policies which have the ability to control prices and equitable division of the costs or sacrifices caused by the crisis. This is an issue which, although it was not explored from a judicial-constitutional point of view in Italy and

[25] For a detailed case study of Spain, see J. PÉREZ INFANTE, "Crisis, reformas laborales y devaluación salarial", in X Jornadas de Economía Laboral, UAM, Madrid, July 2013. Available at https://www.uam.es/otros/jaeet13/comunicaciones/19_Reformas_laborales/Perez_Infante.pdf.

Spain, did find a means of judicial composition in the case of Portugal, by a series of important pronouncements by the Constitutional Court: amongst others, a significant portion of the measures included in the Plan of reforms derived from Portugal's bailout was declared unconstitutional, because it violated the principle of equality in the distribution of the burden of the economic crisis.[26]

Both sets of measures – austerity and salary devaluation – converged in a method of action which in Spain, Portugal and Italy, undermined the fundamental right to trade-union freedom by laws that limited the capacities of the right to collective bargaining. In collective bargaining in both the public and private sector, we see the publication of a piece of legislation whose essential goal was to lessen the linking force of the collective agreement with the support of the heteronomous norm, negating its equalising function in socioeconomic terms, and omitting it in relation to the governmental policy decisions concerning the sacrifices and limitations that workers might suffer because of it.

This type of measures adopted in the field of exercise of executive power was able to alter, on the one hand, the dialectics that endures even up to today in terms of separation of powers, with a process of purging the specific tasks of the national parliaments, whose paroxysm is projected onto the European Parliament itself. This was, ultimately, an assault on the democratic principle, which significantly altered the function of legislative power, which is short-circuited by the action of the executive authority. This strategy can be extrapolated to the relations between the law and collective bargaining.

In the area of legislation production aimed at regulating labour relations, reforms such as the structure of the agreement, the capacity for non-application of essential labour conditions collectively agreed upon, the substitution of the trade-union subject for workers' commissions in the enforcement of decisions such as the abandonment of the collective agreement, modification of the rules that regulate the implementation of the collective agreements entails, firstly, a profound alteration of the hierarchy of legislation which transcends pure judicial formalism, to attack one of the founding principles of Labour Law – the function of collective bargaining as the source of Labour Law which necessarily tends to correct the asymmetry of structural power between the entrepreneur and the worker, in addition to its function of correcting inequalities in the socio-labour area.

Therefore, we are seeing a tendency to bypass the debate about garnering the individual agreement of the parties, the working contract, as a way to liberate and realise the workers themselves[27], in order to enthrone the unilateral will of the entrepreneur as an ideal-

[26] The latest example is the judgement handed down by Portugal's Constitutional Court, nº 187/2013, 5 April 2013.

[27] A relevant analysis can be found in N. CASTELLI, *Contrato, consenso y representación. Reflexiones sobre la juridificación de las relaciones laborales.* Trotta, Madrid, forthcoming.

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standard to regulate labour relations, with the aim of making guarantees to counter the production challenges posed by the current situation of crisis. In some cases, such as in Italy, this preference for the entrepreneur's unilateral capacity even extends to the law itself, which, by collective agreement in the entrepreneurial arena, could be rescinded *in peius.*

Ultimately, these reforms to limit collective bargaining and the principle of collective autonomy have a dramatic effect on trade unions' task of representing the rights and interests of workers and of the democratic principle in the enforcement of labour law in view of the economic-financial crisis.[28]

5. The new regulation on collective bargaining in the Southern European countries: Spain, Italy and Portugal

There can be no doubt whatsoever that the most antisocial effects in the area of industrial relations are being felt in the countries in the south of the European Union. It may be a little hasty, perhaps, to state that the structural reforms implemented between 2010 and 2014 can foreshadow a systemic change in terms of industrial relations, but what is certain is the impact that those reforms have had in many of the most significant labour-relations institutions in those countries (such as collective bargaining and, therefore, a redistribution of income and, generally speaking, the noticeable worsening of living- and working conditions for workers affected by those structural reforms. Put more convincingly, the structural reforms that affect collective bargaining are undermining one of the basic principles of labour regulation: the quest for a greater degree of equality[29], with the firm objective of shifting the balances in terms of distribution of wealth that have been seen in the past few decades. In addition, these are reforms which, by intervening in an authoritarian fashion on the structure and content of the collective bargaining processes, ultimately affect the recognition of the principle of collective autonomy.

5.1. A look at the national systems for industrial relations and collective bargaining in Spain, Italy and Portugal

It is strange to see how these structural reforms apply to countries which shared some common characteristics in terms of industrial relations such as, e.g., a high rate of coverage of collective bargaining and a tendency toward centralisation of the agreed standards for individual sectors.[30] Furthermore, in the countries examined in this book, there is a different

[28] This, however, was not reflected in the trade-union election results in any of the countries analysed here – that is, those which measure representativeness by way of an electoral process: Spain and Portugal.
[29] On this subject, see J. PILLINGER, *Bargaining for Equality.* ETUC, Brussels, 2014. Available at http://www.etuc.org/sites/www.etuc.org/files/publication/files/bargaining_equality_en.pdf.
[30] However, there were differences between the most frequent territorial area within the sector.

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type of common frame of reference, such as the habitual use of the right to strike as a means for trade unions to defend workers' rights.

However, it is also worth pointing out a few differences that cast doubt on the criticisms voiced in the various national spheres as a justification for the reforms introduced later on. For instance, in the case of Spain, use was frequently made of criticism of the exotic and disproportionate nature of the effectiveness *erga omnes* of the collective agreement or its ultra-activity which, nonetheless, did nothing to prevent the imposition of that set of structural reforms in other countries such as Italy and Portugal, where the system is different.

Indeed, the collective bargaining systems presented here share the common heritage of their transcendental function in the regulation of labour relations. Thus, since the 1980s, collective bargaining in those countries developed, incorporating into its DNA the principle of *favor laboratoris*, interpreted in its most conventional sense. In this respect, collective agreements were conceived of as instruments to improve legal provisions in terms of working conditions. Consequently, with this fact, collective agreements became an instrument to improve living- and working conditions and beyond what is stipulated or set by the heteronomous norm. However, in the 1990s and during the first decade of the current millennium, a significant change seems to have taken place in these collective bargaining systems. That is to say, in this period, we saw a change in the objectives of collective bargaining, on the one hand aimed at satisfying the interests of companies in introducing larger doses of flexibility, fundamentally in terms of internal flexibility; on the other hand, during the said time-period, it we witnessed how there was a tendency to re-orientate the function of collective agreement to improving employment levels.

This "new" function of collective bargaining exhibited significant differences between the countries analysed here. Whilst, in Italy, this process was based on negotiators' freedom to determine the balances between the interests of the parties (*flessibilità contrattata*), in Spain and Portugal the law took on a more invasive role, directly setting subjects and limits in terms of labour flexibility which had to be observed necessarily in the collective bargaining processes. It was gradually agreed upon that collective bargaining should allow room for regulations that were less favourable for the workers' interests than those contained in the heteronomous standards.[31] Thus, in the cases of Spain and Portugal, the relations between the law and the collective bargaining mechanisms were altered. Whilst that alteration continued to give preference to collective bargaining as a source of regulation of labour relations, it is also true that the law maintained an auditing role – particularly in terms of labour flexibility.

[31] In PALMA RAMALHO, "Portuguese labour law and industrial relations during the crisis". Working Paper, nº 54, ILO, Geneva, November, 2013, pp. 1-2.

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Since, and during, the crisis, these relations between the law and collective bargaining experienced a subsequent evolution which opened up the way to substitution of the law by the governments' decision by the disproportionate use of the regulation characterised by extraordinary and urgent necessity. Thus, on the one hand, there was a gradual purging of content from the function of Parliament in labour terms – and not only – and we saw a loss of democratic debate in relation to the function of labour legislation: specifically in terms of collective bargaining, in relation to the economic crisis. Especially expressive of this situation is the content of a recent pronouncement from the Spanish Constitutional Court[32], given that ultimately, far from characterising and limiting the action of the public authorities in dismantling the guarantees of Labour Law as a consequence of the financial crisis, the interpretation of the Constitution agreed that it was up to the government to make "the decision about the rhythms and intensity of the state of exception caused by the crisis".[33] Thus, the Constitutional Court in Spain gives judicial justification to direct production of standards which modify the institutional framework of labour relations on the part of the Executive, including if they involve the affectation of fundamental rights and public freedoms, as is the case in collective bargaining and trade-union freedom.[34]

All of these circumstances seem to still be meeting with understanding and support in the new European Commission, which arose in the latest European elections, as a mechanism to satisfy certain requirements on the part of countries which were indebted as a consequence of the discoveries left by the various national banks.[35]

[32] STC 119/2014, of 26 June 2014.

[33] In A. BAYLOS, "Rechazo y reversibilidad del modelo laboral de la crisis", available at http://baylos.blogspot.com.es/2014/11/rechazo-y-reversibilidad-del-modelo.html.

[34] As can be seen from the complaints presented, in the case of Spain, by *Comisiones Obreras* and the *Unión General de Trabajadores* in 2011 and 2012. Case nº 2918: (http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:3056434) and Case nº 2947: (http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:3063806).

[35] In the area of social rights, the continuism of the new European Commission wasted no time, presenting a plan to revise the Directives in social material, *Fitness Check*, with the aim of simplifying the European judicial framework through legislation: all within the broader framework of the European Commission's Regulatory Fitness and Performance programme (REFIT). The European Trade Union Confederation warned about the use of this revision mechanism as a way of reformulating the scope of the rights recognised in the social directives, restricting their efficacy or imposing interpretations that ran counter to their development and expansion. An explanatory overview of this rejection is available in the document published by Hans Böckler, of the DGB (German trade-union confederation): *An exercise in mislabelling* (http://www.boeckler.de/36195_51061.htm). An ample commentary on the concept and objective of the REFIT programme can be found in I. SCHÖMANN, "Guter Klang, aber schlechte Folgen für Europas Arbeitnehmerschaft": http://www.boeckler.de/pdf/p_mbf_report_mai_2014.pdf.

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5.2. Main changes in terms of collective bargaining in the public- and private sector

In order to fully comprehend the impact of the crisis in terms of collective bargaining and, in particular, of the anti-crisis measures, it is essential to conduct an overview of the characteristics of the industrial-relations systems and the enterprise structure in Spain, Italy and Portugal before the outbreak of the crisis. In this respect, it is worth pointing out the following:

i) The majority of businesses in Spain, Italy and Portugal are micro-businesses, with fewer than ten employees[36], but together, they employ less than 50% of the working population.[37]

ii) The systems analysed in this book have a long-standing tradition of social dialogue between the respective governments, business associations and trade-unionist organisations – particularly at the highest level of representation. Social dialogue in these countries has, generally, consisted of consultation between the governments and the business associations and trade-unionist organisations in the passing of new labour legislation, except in the case of Italy, where in the majority of cases, specific stipulations were made as to the distribution of wealth, as well as the design and reform of the Italian trade-union model.[38]

iii) The experiment with collective bargaining has consolidated implementation and experience, whose structure in all three countries is highly similar, at sectorial level – national, regional and provincial – which was most common. That preference for a collective bargaining structure, based on the sector, is due to the size of companies in the different countries. That is, in the various national experiments, attempts were made to find a collective bargaining structure that would produce the result of cohesion and homogenisation in terms of living- and working conditions. In particular, this occurs in the case of Italy, where the national agreement covers the function of establishing a minimum threshold of rights, including the minimum salary for the sector,

[36] In Italy, 95% of businesses employ fewer than 10 workers (source: ISTAT. http://www.istat.it/it/archivio/4870); in the case of Portugal, as well, around 95% of business employ less than 10 workers (source: Instituto Nacional de Estadística); whilst in Spain, the percentage of companies employing fewer than 10 people is 97.8% (source: Instituto Nacional de Estadística http://www.ine.es/daco/daco42/dirce/dirce08.pdf).

[37] Perhaps Spain is the most representative case for examining these effects, because 99% of businesses are small or micro-businesses: http://www.ine.es/inebmenu/mnu_empresas.htm.

[38] In this sense, see CESE, *EU national economic and social councils and similar institutions.* Brussels, 2011.

with the second level of negotiation (territorial and intra-company) able to improve the working conditions thus agreed upon.

iv) Legitimacy to negotiate collective agreements, at all levels, lies mainly with trade-union organisations, except at the intra-business level, where unitary representation fairly frequently acts in the negotiation of collective agreements. In this respect, there are some differences between the national experiences: particularly in the case of Italy, where, from 1993 onward, the Inter-confederal Agreement (*Protocollo Giugni*, of 23 July 1993) stipulated that a third of members of the unitary organ of representation in the business were reserved and elected by the trade-union organisations.[39] Following the set of Interconfederate Agreements signed between 2011 and 2014[40], that reserved quota has been eliminated, resulting in the strict application of the criterion of proportionality for the distribution of jobs in the organ for unitary representation.[41] It is worth mentioning, in regard to the effects of this characteristic, that it is at the business level where the highest doses of flexibility are introduced.

v) In terms of the effectiveness of the collective agreements, in spite of the different instruments used for the purpose, it is possible to extend the result of the negotiation to all workers affected by the area of collective agreement. Hence, although in Italy[42] and Portugal, the general principle is that of the application of what was agreed by the trade-union organisations having signed the agreement and the businesses associated with the respective negotiating associations, in practice it is possible to extend the contents of the collective agreement to all workers, even if they are not affiliated with the signing trade unions[43] – in Italy by way of judicial interpretation[44], and in

[39] Collective bargaining then came to depend on the principle of mutual recognition; the agreements reached were not legally binding, and their contents were formally applicable only to the signatories of the agreements.

[40] The reference is to the Interconfederal Agreement of 28 June 2011, the Protocollo d'Intesa of 31 May 2013 and the Interconfederal Agreement of 10 January 2014, known as the "Testo Unico sulla rappresentanza" (Sole text on representation).

[41] However, the elimination of the reserved third did not result in a trade-union unlinking of the elective organ. The control of the external union is maintained by the establishment of "an electoral mandate with associative links". This means that any change in "trade-union membership" on the part of a component of unitary representation determines the loss of the right to form part of the unitary representative organ and brings with it the immediate substitution on the part of the first of those not elected in the original membership list of the one it substituted.

[42] On this subject, see G. FERRARO, "Trade Union representation in Italy", in C. LA MACCHIA *et al.*, *Representing employee interests: trade union systems within the EU.* Bomarzo, Albacete, 2013, pp. 171-178.
The exception in this respect is the public sector, where, since the late 1990s, there has been a legally-established regulation which defines the criteria of measurement of trade-union representativeness, and of the general personal effectiveness of the collective agreement thus reached. The regulation, which is now contained in the Legislative Decrees 296/1997 and 165/2001, establishes a minimum of 5% consensus in order to be able to participate in the negotiation of the collective agreement, but also makes the actual effectiveness of the agreement a secondary issue to whether it has the consensus of unions which represent at least 51% of

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Portugal as the result of an administrative procedure. The major difference between Spain's system and the Portuguese and Italian systems is that the Spanish system allows for the implementation of the principle of general application of the agreement (effectiveness *erga omnes*) in all cases where the rules of legitimacy set out in the Estatuto de los Trabajadores (arts. 87 and 88 ET) are obeyed. However, the case of Spain also includes the possibility of reaching agreements with limited applicability in those cases where the legal prescriptions in terms of legitimacy to bargain for collective agreements[45] are not followed.

vi) One of the most significant characteristics shared by the Italian, Portuguese and Spanish systems on collective bargaining pertains to the length of applicability of the collective agreements. Put differently, in these collective bargaining systems, the collective agreements have validity until they are replaced by a subsequent agreement. In some cases, such as that of the system in Italy, this situation conforms to a stipulation reached by collective bargaining itself. Meanwhile, in the cases of Spain and Portugal, that aspect of the system was actually a legal prescription. This type of legislative prescriptions gives workers a greater level of security in terms of their working conditions, although at the same time, we do see a certain dynamic of impoverishment of collective bargaining in terms of renewal of the agreed standards.

vii) Finally, the coverage in these countries has, traditionally, been very high. In Italy, the degree of coverage in 2008 was 80%[46]; in Portugal, it was between

workers. The 5% minimum is calculated by use of a mixed criterion: one which is both electoral and associative. Therefore, it is a criterion constituted on the basis of the mean between the results obtained by each union in the elections to the unitary bodies of representation of workers in the workplace, and their affiliation. The general effectiveness of the collective agreement thus reached is also determined by the sending of representatives of all public Administrations to a single body (the ARAN – Agency for Bargaining Representativeness of Public Administrations), and the duty of that body to apply and respect the collective agreements reached in accordance with the law.

[44] For this purpose, the Italian legal system made instrumental use of article 36 of the Republic Constitution of 1948, in terms of recompense. This constitutional precept, at the highest level of the judicial system, recognises the worker's right to fair recompense – i.e. a wage which is not only proportional to the quantity and quality of the work done, but also "always sufficient to ensure the worker and his/her family have a free and dignified existence". In the attempt to give concrete definition to the parameters of proportionality and sufficiency required by the Constitution, the legislators decided that "fair" recompense was to be that agreed upon by collective bargaining; by that token, the amount extends to all workers belonging to the same category – at least in terms of the financial part of the agreement.

[45] However, the effectiveness of the so-called "extra-statutory" collective agreements is negligible, given that the numbers of these agreements handled by the *Comisión Consultiva Nacional de Convenios Colectivos* (National Consulting Commission on Collective Agreements) is no more than 3% of the total.

[46] http://www.eurofound.europa.eu/sites/default/files/ef_files/eiro/country/italy.pdf.

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71 and 80%[47], and in Spain, depending on which source we consult, the collective bargaining coverage prior to the economic crisis was between 80 and 85%[48] or 74.5%.[49] Viewed in relation to the previous salient characteristic, these coverage rates were due, amongst other things, to the mechanisms of extension of the content of the collective agreement, and also in the case of Spain, the efficacy of the collective agreement.

In accordance with the prescriptions of the European Commission and the financial-market regulating institutions, such as the Central European Bank and the International Monetary Fund, the measures aimed at reducing the public deficit needed to be accompanied by decisive action on the part of the governments to drive forward profound "structural reforms" in the area of labour relations, social security and the collective bargaining system: all of this with the express objective of creating or preserving jobs. In other words, whilst macro-economic policies focused strictly on reducing the public deficit and, therefore, shrinking the public sector, the efforts to maintain and/or create jobs took place in the area of continuous reviewing of the regulation of labour relations and social protection. In that sense, we can distinguish two main avenues of action which negatively impacted the collective-bargaining systems.[50]

The first relates to the "inevitable" nature of austerity measures and reduction of the public deficit as the only way out of the crisis and to economic recovery. Since the beginning of the crisis, the political- and economic debate has been re-orientated from a change in productive model to the necessary austerity reforms as a means of strengthening economic activity, absolving the businessmen and women who had actually triggered the crisis of their rightful responsibility. It is in this first line of action that collective bargaining in the public sector was noticeably affected, because of the non-application of the planned salary reviews, with public employees actually suffering salary freezes or even cuts, depending on the country one looks at.[51] These policies – in addition to casting doubt on the work of public employees and, ultimately, the actual need for certain public services that ensure non-commercialised arenas of intervention to compensate for the inequities caused by the market – opened the door to a series of reforms, particularly in Spain's legislation, aimed at

[47] Source: *Livro Verde das Relaçoes Laborais,* ed. Ministério do Trabalho e da Solidariedade Social, 2008, p. 86.
[48] EPA (2008): particularly useful is the report published by *Comisiones Obreras* on the register of collective agreements (REGCON). On this subject, see Cuadernos de Acción Sindical, La negociación colectiva tras dos años de reforma laboral, July 2014, pp. 28.
[49] Social Security Register (2008).
[50] A. BAYLOS and F. TRILLO, "El impacto de las medidas anti-crisis en la protección social y el empleo. La situación en España". Consejo Europeo Económico y Social, Brussels, 2011. Available at http://www.eesc.europa.eu/resources/docs/espagne-es.pdf.
[51] In Spain, this situation was created by the Royal Decree-Law 8/2010, of 20 May, approving extraordinary measures to reduce public deficit.

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reducing or even eliminating collective action on the part of trade-unionist organisations – especially in terms of collective bargaining. In the case of Spain, the most intense moment of these structural reforms came with Royal Decree-Law 8/2010, and later Royal Decree-Lay 20/2012, of 13 July, article 7 of which authorises Public Administrations to suspend and/or modify the agreed standards when there was a substantial alteration in economic circumstances.

Ultimately, the measures adopted in the public sector (the most significant of which are listed below) gave rise to a sort of trivialisation of collective bargaining in the public sector – particularly in regard to statutory personnel:

a) Suspension of pension reviews, with the exception of the lowest and non-contributory pensions.
b) Salary reduction and freezing for public employees – notably the 10% salary reduction in Portugal and 5% in Spain.[52]
c) The reduction of the rate of reinstatement of public employees to 0%, except in specific sectors, where reinstatement was allowed up to 10%, such as education, healthcare or the armed forces.
d) Increase in the working hours of public employees which, once again, had an impact on collective bargaining, in view of the importance of this issue as a working condition necessarily settled upon by collective agreement.

In the various national experiences in terms of collective bargaining reforms in the public sector, in addition to a sort of trivialisation of collective contracting, of the function of public servants and even of public services, unacceptable levels of authoritarianism were reached, causing a genuine elimination of that right in the public sector. As a notable result in the case of Spain, this meant that collective bargaining over working conditions and employment in the public sector was reduced to its minimal form, giving way to the unilateral determination of such conditions by the governing bodies in the Public Administrations. In combination with other circumstances, such as the reform of article 135 of the Spanish Constitution, which enthroned the balancing of the budget as the sole basis for policy-making in the public sector, this has led to a loss of the constitutional meaning attached to the public-services conglomerate.

Furthermore, this so-intense form of affecting of the right to trade-union freedom in the public sector gave rise to the lodging of many complaints with the Committee on Freedom of Association (part of the ILO); particularly noteworthy are the complaints made by the two most representative trade unions in Spain: *Comisiones Obreras* and the *Unión*

[52] In the case of Spain, it is worth taking this figure with a pinch of salt, because the autonomous local governments have also enacted further reductions to public-sector salaries.

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General de Trabajadores. Indeed, in November 2011, both organisations jointly presented that complaint[53], on the occasion of the Government's decision to unilaterally alter the standard on salaries agreed by collective bargaining only a few months previously. In June 2013[54], the Committee made its ruling, criticising the Spanish government for the authoritarian nature of that decision, which, in keeping with international legislation, ought to have been subject to a consultation period. However, in all probability, the most interesting aspect of the effects of this work pertains to one of the Committee's conclusions about the crucially-important function of collective bargaining in times of crisis, as opposed to authoritarian and unilateral behaviour.[55]

The second line of action, which is closely linked to the former, relates very closely to the reforms enacted in the field of labour relations, using the premise (which has not even been corroborated empirically) that the creation and maintenance of jobs depends on the level of rights and guarantees that the labour legislation offers workers. Thus, we see an intensification in that trend of blaming Labour Law – especially collective bargaining – for its part in the destruction of jobs, creating the sensation that workers in Spain, Italy and Portugal were living beyond their means from the labour point of view. This view of labour legislation (which, it must be admitted, is by no means new) insists on contrasting the creation of jobs with a judicial statute that protects employees, allowing for a fairly dignified

[53] We refer, here, to Case N°. 2919 (Spain).
[54] Definitive report, N°. 368, June 2013.
[55] Because of the importance of the Conclusion, article n°. 362 of that case is directly transcribed below: "The Committee wishes to highlight the complexity of this case, connected in large part to the commitments stemming from adhesion to the Single Currency of the European Union, moreover in the context of an economic crisis seriously affecting a certain number of countries. The Committee notes that the Government emphasizes that the allegations concerning the supposed infringement on collective negotiation refer to a small nominative rise of 0.3 per cent of the wage sum in circumstances of economic difficulty. The Committee points out that the negotiated increase in question adopted and improved the previous wage and that the decree which suspended it led to a wage cut greater than 5 per cent. Collective bargaining being a fundamental right, the Committee recalls that, in context of economic stabilization, priority should be given to collective bargaining as a means of determining the employment conditions of public servants, rather than adopting legislation to restrain wages in the public sector [see Digest, op. cit., para. 1040]. The Committee also recalls that, if, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards [see Digest, op. cit, para. 1024]. In addition, in previous cases, the Committee considered that, if a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force [see 365th Report, Case No. 2820 (Greece), para. 995]. The Committee has highlighted the importance of maintaining permanent and intensive dialogue with the most representative workers' and employers' organizations and that adequate mechanisms for dealing with exceptional economic situations can be developed within the framework of the public sector collective bargaining system [see 364th Report, Case No. 2821 (Canada), para. 378]."

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existence, without offering alternatives to the situation of poverty and inequality caused by these policies.

As happened in the public sector, legislative measures undermining the trade-union right to collective bargaining in the private sector came into general application in 2010. The structural reforms imposed generally in the countries of the southern flank of the European Union can be summarised as the legal preference for the primacy of the collective agreement in the world of business, as opposed to the traditional structure followed in Spain, Italy and Portugal. In that sense, it is worth highlighting:

- The priority given to collective agreement in the business environment in terms of certain essential working conditions, such as salary, recompense for extra hours, division of the working day, professional classification and measures to reconcile personal, family and working life. Prior to these reforms, collective agreement for the sector was the most typical means of regulation of these working conditions, which also already include mechanisms of adaptation to businesses' concrete needs because of economic, technical, organisational or productional factors.
- The significant increase in material which necessarily forms part of the minimum content of a collective agreement, in parallel to a reduction in the parties' freedom to decide on the content of that agreement.
- The restriction of the validity of the collective agreement, with the introduction of mechanisms for obligatory arbitration when the parties are unable to reach a consensus as to the renewed terms of the collective agreement.
- The substitution of trade unions and/or unitary representations by workers committees elected within the company by the workers themselves.

Of the various measures adopted in the area of collective bargaining, it is worth highlighting that which stipulates that a collective agreement ceases to be valid in cases where there is no consensus about its renewal. Generally speaking, until the enactment of the reforms in this area because of the crisis, the existed working- and employment conditions were simply extended, in this situation, until a settlement could be reached on the renegotiation of the collective agreement. However, since the entry into force of the latest labour reforms, there has been the possibility of workers finding themselves without the coverage of any collective agreement, as a consequence of the lapsing of their existing one and the lack of any other applicable piece of legislation. In this respect, judicial debate, with broad political scope, has taken place to determine which working conditions would be applicable to the workers affected under the remit of the collective agreement in question. The opinions of labour lawyers oscillate noticeably. On the one hand, there are a very great many lawyers who see this reform as the *inevitable* annulment of the rights acquired by way of the collective agreement which is no longer applicable, meaning that the employer absorbs the power to decide on labour relations and eliminating collective autonomy. On the other, there are those who believe that the loss of applicability of the collective

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agreement does not imply the loss of the conventional rights, owing to the automatic incorporation of those rights into the actual working contract. This would solve the problem of which working conditions to consider applicable to those workers already affected by the collective agreement, but would not resolve the unknown fate of newly-recruited workers.[56]

6. Impact of reforms in terms of collective bargaining

The aim of this last section is to evaluate how the labour reforms imposed because of the economic crisis – especially those in the area of collective bargaining – conditioned employment relations, with the main result being a gradually-increasing degree of inequality between workers. In order to carry out this analysis, it is crucial to look at the statistical information available in a particular context, such as the present one, where the tendency of political power is contradictory, given that on the one hand, any negative impacts of the structural reforms are being denied, and on the other, in the face of creditors, we are seeing a reality which is transformed in a very negative sense.

6.1. In terms solely of the effect on national collective-bargaining systems

To begin with, it must be pointed out how the anti-crisis measures have affected collective bargaining in three main areas: i) increased "decentralisation" of collective bargaining, or, more accurately put, the imposition of collective agreement in the enterprise as the ideal and preferable sphere for regulation of employment- and working conditions; ii) non-application (abandonment) of the working conditions decided upon by collective agreement, both in job sectors and in specific enterprises, as the main instrument to facilitate the long-awaited internal devaluation by conventional deregulation of salaries and of working hours; and iii) establishment of limits on the application of collective agreement as the only way to adapt working- and employment conditions to companies' needs at any given time. Whilst all of these reforms were the result of the intervention of national government, it must be noted that these measures were driven forward and strengthened by the so-called Memorandums of Understanding.[57]

[56] In the case of Spain, the judicial debate has not been resolved in spite of the existence of certain judicial pronouncements which appear favourable to that less-restrictive view of the principle of collective autonomy. At doctrinal level, it is worth pointing out that there has been a movement by university professors who, for the first time, have agreed to jointly sign a doctrinal work that offers a plausible alternative to the liquidation of the validity of the collective agreement. Various authors. "Sobre la ultra-actividad de los convenios colectivos en la reforma del 2012". *Revista de Derecho Social,* nº 61, 2013, pp. 11-17.
[57] ETUI, Benchmarking *Working Europe (2014)*. Brussels, 2014, p. 69.

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In regard to the significant increase in company-specific collective bargaining, this measure was particularly widely adopted by the countries we are looking at here, with a salient characteristic being the intensity with which it was implemented by the Italian judicial apparatus, where the conflict at Fiat ended in legal recognition of the preference for company-based collective agreement with power to overrule not only any national sectorial collective agreement, but also the actual heteronomous standard.[58] The theoretical hypothesis used to justify the introduction of this type of measures was based, firstly, on improving the company's competitiveness in the national market[59]; and secondly, on improving its competitiveness on the international stage. In other words, it was based on the enthronement of internal devaluation as the only way to revive companies' competitiveness in international markets, and once that was achieved, to revive the national economies. In this respect, the statistical information available is highly representative of the success of these policies – particularly in the case of Spain where the increase in intra-company collective agreements was spectacular. 708 company agreements were recorded in 2011; in 2012 that number increased to 835 and in 2013 it increased again to 1,361.[60]

[58] In Italy, 22 January 2009 saw the signing of the Tripartite Agreement for the Reform of Collective Bargaining, without the participation of the CGIL (General Confederation of Italian Workers), against the position of this trade-union confederation. The new rules formally safeguard the two levels that have traditionally characterised the structure of collective bargaining in Italy, with sector-wide collective agreement continuing to serve as the minimum rights threshold within the sector and at national level. The applicability of that agreement was fixed at three years for the normative and economic parts. The new system, born of the 2009 Agreement, was aimed at strengthening the second level of collective bargaining, at intra-company or territorial level. The recovery of unity of action between Italy's three main trade-union confederations has only been possible because of the substantial acceptance, by the largest trade union (CGIL), of the rights policy lines along which the 2009 Agreement was built, and which, since the outbreak of the crisis, have inspired both national and European public policies. Thus, the interconfederal agreement of 28 June 2011 and its derivatives (*Protocollo d'Intesa* of 31 May 2013 and *Testo Unico* on representation of 10 January 2014) both emphasise a pronounced decentralisation of the negotiating system by the granting, to the company-wide agreement, of the possibility to leave behind the conditions derived from the necessary respect of the standards of protection contained in the national sector-wide agreement. On the other hand, although in the Italian system, unity of action is an unavoidable condition for its effectiveness and capacity for operation, it must not be forgotten that the new rules governing the collective bargaining system preserve their conventional origin, as they are the result of Collective Agreements. Therefore, for lack of the legal development of the system of effectiveness *erga onmes* designed in the IC, they are rules that only bind the signatories and their affiliates. Therefore, there was an increase in appeals to the legislator to intervene in the development of generally-applicable rules, inspired by those agreed upon collectively. However, the legislational interference by way of Decree-Law 138/2011 (which was to become Law 148/2011, of 14 September) known as "*Sostegno alla contrattazione collettiva di prossimità*" (In support of local collective bargaining), merely contributed to the interpretative and applicational problems. Thus, article 8 of that standard allows local collective bargaining (either intra-company or territorial) to deviate not only from what is set out in the applicable state-wide sectorial agreement, but also from what is prescribed in the law itself, thus opening the door to a substantial de-structuring of the whole labour law system.

[59] This is plainly demonstrated by the case of Italy, where Fiat threatened its workers and the Italian government itself with shifting its corporate activity, as a consequence of the high costs of labour as reached in the national collective agreement.

[60] See http://www.empleo.gob.es/estadisticas/cct/CCT13DicAv/cc1/cct_12_2013_top_HTML.htm.

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The tendency expressed here must be viewed in direct relation with the consequences it could have for the labour relations models, with the productive and corporate context of Italy, Portugal and Spain, where over 90% of businesses are small of micro-businesses. In this respect, the preference for corporate collective agreement *de facto* requires a profound process of tailoring of labour relations. However, in spite of the general tendency in terms of the structure of collective bargaining, there were some cases – particularly in Italy – where, in the face of the risks involved in this type of legal interventionism on the structure de la collective bargaining, certain agreements were reached in terms of trade-union representativeness and of collective bargaining. Specifically, we refer here to the Agreements of 28 June 2011 and 2013, signed by Confindustria, CGIL, CISL and UIL, which confirmed the primacy of the sectorial level in industry, with the possibility of adopting agreements in the intra-business arena to modify those terms only when allowed by the sector-wide agreement. These agreements were ratified by the majority of the unitary representation assigned by the collective agreement (RSU).

In regard to the second salient point, pertaining to the non-application of the collective agreement and the objective of internal devaluation, it is important to remember how these types of policies were used even before the crisis – at least in the Portuguese and Spanish legal systems. The purpose of this legal prescription was, firstly, to satisfy the economic needs of businesses in order to facilitate the viability of the business project and, secondly, to maintain employment in those cases where the businesses were in a critical financial situation. Hence, business owners had to justify the situation of economic crisis and reach an agreement with the representatives of workers as regards the intensity of salary cuts, the duration of those reductions (the salary recovery plan). It is surprising to see how this instrument of salary cuts by sector-wide collective agreement did not satisfy the demands from businesses because, in their view, the method was overly rigid. Thus, for this purpose, the crisis has actually satisfied business owners' demand to, ultimately, strengthen their capacity to unilaterally modify the content of a collective agreement, without the obligation to negotiate anything with the workers' representatives. Today, employers are not obliged to negotiate, but instead need only hold a consultation period. In addition, this type of legal prescription offered the possibility to break away not only from the sector-wide collective agreement, but also from respecting the working conditions settled upon by the collective agreement within a company itself. Once again, out of the three countries examined here, the clearest illustration of this type of policy is offered by the case of Spain. In 2012, there were 748 salary cuts, affecting 29,352 workers; in 2013, that number rose to 2,512 failures to apply the terms of an agreement, adversely affecting the working conditions of 159,990

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workers. For 2013, deviations from collective agreements were cited in 1,932 cases, in terms of salary, and the rest in terms of the length and of the division of the working day.[61]

Finally, the limitation of the applicability of the collective agreements has been a further aspect in common between Spain, Italy and Portugal. The theoretical basis given for the adoption of this measure was, again, the excessive rigidity of a system based on the application of an agreement until it is replaced by a subsequent one, meaning that in case of disagreement, the content of the expired agreement is prolonged indefinitely. Portugal and Spain have planned a reform in this regard.

In Portugal, the period of validity of collective agreements has been regulated, since 2003, by the Labour Code, and was modified in 2006 and again in 2009. The latest regulation, in concrete terms, dictates that the collective agreement itself should normally define its own period of validity, which, in general, is a year for salary tables and two years for the rest of the working conditions. However, if one of the parties wishes the collective agreement no longer to apply after its expiry date, they must communicate that desire to the other party, and must offer to negotiate a new agreement. The minimum renegotiation period is 18 months, and this can be extended by consensus of the parties when they believe that an agreement is within reach. Otherwise, if the renegotiation of the collective agreement fails, one of the parties would communicate that situation to the Labour Ministry, and 60 days after that notification is received, the existing collective agreement will cease to be applicable. In those circumstances, working conditions will be regulated on the basis of the situation which exists in relation with other collective agreements, so that if there is no applicable second-level agreement, then the stipulations of the labour code itself would automatically apply to the workers affected by the expiry of the previous agreement. In practice, though, this possibility of declaring the expiry of the collective agreement to the Labour Ministry has only actually been exercised on 34 occasions since 2003 – mostly with sector-wide agreements.

As we have seen, the reality of the legal system in Portugal in this extreme has little in common with the reforms introduced in the Spanish judicial code, whereby the collective agreement ceases to be valid one year after the initiation of negotiations for the new agreement if no conclusion has been reached by a *sui generis* obligatory arbitration process.

Before we go on to analyse the main consequences of the reforms of collective bargaining in terms of employment and working conditions, it is important to point out how the anti-crisis measures outlined here have so far resulted in a pronounced drop in the

[61] http://www.empleo.gob.es/estadisticas/cct/CCT13DicAv/cc1/cct_12_2013_top_HTML.htm, pp. 29-30.

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degree of coverage of collective bargaining, which varies from one country to another.[62] This indicator clearly shows the tendency for change or reorientation of the European social model in terms of labour relations – or, which amounts to the same, the new European labour model appears to be based on individual agreements between business owners and workers – at least in those countries where the majority of businesses are small or even micro-businesses.

6.2. Salary, inequality and poverty

This return to the principles of economic liberalism appears to be justified in terms of governance – *new economic governance* – by the European institutions (particularly the European Commission).[63] In addition, this democratic worsening of labour relations is causing, amongst other effects, a profound inequality between certain Member States, as was recently reported by the OECD.[64]

As a direct consequence of the anti-crisis measures – especially those introduced in the area of collective bargaining – we have seen how, in the past four years, there has been an intense process of weakening of labour relations in the countries examined here.

Indeed, a direct relation is becoming apparent between certain aspects of collective bargaining, such as its validity and its structure, and workers' situation in terms of employment and working conditions. In that sense, in Spain, we are witnessing the substitution of indefinite contracts by involuntary part-time work and temporary work.[65] Generally speaking, at least in Spain, this means that collective bargaining is losing its effectiveness as a tool to redress the balance between the interests of employers and those of workers. In some cases, this is due to the fact that employers are not applying the working conditions agreed by collective bargaining, but on other occasions, the new content of the labour standard is actually aimed at strengthening the business owner's ability to unilaterally make decisions on setting the working conditions.

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[62] Thus, in Italy, the degree of coverage of collective bargaining, for 2013, was around 80%; in Portugal, it was 90%, whilst in Spain, the reforms introduced have had a more severe impact, reducing the degree of coverage to 70%. Source: *ETUI, Worker participation, 2013*. However, in the case of Spain, there have been very recent studies which show that the degree of coverage has approximately halved, falling from over 6,000 collective agreements in 2007 to nearly 3900 in 2013. On this point, see A. OTAEGUI, "Desequilibrio negocial y debilitamiento del actor sindical como efectos de la reforma laboral", in *Cuadernos de Relaciones Laborales,* Vol. 32, N$^{o.}$ 2, 2014, pp. 348+.

[63] A balanced critique of the concept of economic governance in the European Union is to be found in the European Parliament, "Better legislation, subsidiarity and proportionality and smart regulation" (2011/2029(INI)), 14 September 2011.

[64] OECD (2014), *Society at a Glance 2014. OECD social indicators. The crisis and its aftermath,* pp. 109-119. *http://www.oecd.org/els/soc/OECD2014-SocietyAtAGlance2014.pdf*.

[65] In Spain, 62% of part-time workers claim that they are in that contractual situation because they are unable to find a full-time job. See F. ROCHA and E. NEGUERUELA, "El mercado de trabajo en España. ¿Hacia una recuperación frágil y socialmente injusta de la crisis? *Fundación 1º de mayo*. Report, nº 87, March 2014, p. 97.

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Another of the salient effects of the anti-crisis measures in regard to collective bargaining has, generally speaking, been the rapid rise in unemployment in Italy, Portugal and Spain. In 2008, the rates of unemployment in those countries were considerably lower than they currently are. Thus, in Italy – the country out of the three where unemployment has risen least – it rose from 11.3% in 2012 to 12.7% in 2013; in Portugal, over the same period, we saw a 1.5% drop in unemployment (from 17% to 15.5%). Meanwhile, in Spain, the rate of unemployment for 2013 was 26.7%.[66] Although it seems that the trend in terms of job losses is changing direction, job creation is much slower than was hoped, and the situation is precarious in terms of social protection.[67]

Closely linked to what is said in the previous paragraph, the collective bargaining reforms are affecting so noticeable an area as equality between men and women. The available statistical information shows a very similar trend between Spain, Italy and Portugal. It seems that both men and women are experiencing the negative effects of unemployment stemming from the anti-crisis measures[68], but it is less certain that they are equally experiencing the positive effects in terms of access to good jobs. In other words, at least in Spain, the main type of contract by which the gradual recovery of employment is taking place is the part-time contract of very short duration, which is affecting women in particular.

As far as young workers are concerned, there is also a process of convergence between the three countries with regard to workers of less than 25 years of age, consisting of an extremely high and worrying unemployment rate. In this respect, Spain shows the worst rate of unemployment among those less than 25 years old, with nearly 60% unemployment.[69] Similarly, the rates of long periods out of work in Spain, Italy and Portugal are horrifying. Again, Spain and Portugal show the highest percentages of long-lasting unemployment, with 4,658,000 workers in Portugal affected in 2013,[70] and 3,456,400 workers for the same year in Spain.[71]

Along with unemployment and precarious job creation, we must directly cite the effect on salaries because of the modifications imposed in the area of collective bargaining.

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[66] Source: Eurostat:
http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08012014-BP/EN/3-08012014-BP-EN.PDF.

[67] On this point, for an examination of the case of Spain, see, F. ROCHA and E. NEGUERUELA, "El mercado de trabajo en España. ¿Hacia una recuperación frágil y socialmente injusta de la crisis? Fundación 1º de mayo. Report, nº 87, March 2014:
http://www.1mayo.ccoo.es/nova/files/1018/Informe87.pdf.

[68] http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08012014-BP/EN/3-08012014-BP-EN.PDF.

[69] In Italy, the situation of unemployment is afflicting 41.6% of young people, which equates to 659,000 young workers; in Portugal, it affects 36.8% (150,000 young workers); and in Spain, 57.7% (983,000 young workers). http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08012014-BP/EN/3-08012014-BP-EN.PDF.

[70] Instituto Nacional de Estadística (National Statistics Institute).

[71] INE. http://www.ine.es/jaxiBD/tabla.do.

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An analysis of the data reveals, firstly, a continual drop in agreed nominal salary between 2008 and 2012, with a very noticeable drop in 2010. Hence, whilst in 2008 there was an agreed nominal salary rise of 3.1%, in 2012 that increment had fallen to 1.4%.[72] Put differently, there has been a sharp reduction in both nominal and real salaries, which was especially acute during 2011 and 2012.[73] However, regarding the salary reduction, it is helpful to analyse how, at certain times during the crisis, we have seen general growth in salaries, due mainly to the employment composition effect. That is to say, in Portugal, as also happened in Spain and Italy, during 2008 and 2009, we saw salary growth in line with the average in the European Union, as a consequence of the instant expulsion from the labour market of the lowest salaries, essentially found with temporary workers.

However, from 2010 onwards, the story changed significantly as a result of the freezing of the minimum wage and the salary cuts in public employment. Furthermore, despite the fact that 2013 saw a slight recovery of salaries in Portugal, it did not compensate for the drop in salaries experienced previously. In 2013, salaries accounted for 55.8% of GDP in Portugal – 2.6% less than in 2008.

The main result of this process was the substantial transfer of income from work to the capital and the consolidation of a so-called *low-cost* salary model. Beyond a doubt, this involved an increase in inequalities and poverty in Portugal. Thus, we observe that the number of people over 18 years of age at risk of poverty or social exclusion has increased since 2010, from 24.5% to 24.6% in 2012.[74] The same result is found if we look at the Gini coefficient: in 2010, in Portugal, this indicator was at 33.7 points; in 2011 it was 34.2, and in 2012 it reached 34.5 points.

This situation can be explained as the combination of two different processes. Firstly, we have the profound deterioration of the jobs market – particular in regard to long-term unemployment and increased rates of unemployment. Secondly, we have the impact of the austerity measures, including internal devaluation and cuts in social welfare – as happened, in particular, with social services and pensions. All of this led to major social deterioration in Portugal, and the situation is only expected to worsen over the next few years.[75]

In Italy, for its part, inequality and poverty have also resulted from internal devaluation, although even before the outbreak of the crisis, such inequality had been noted and identified as potential causes of crisis. Between 1980 and 2008, the contribution of salaries

[72] Source: DGRT.
[73] The aggregated data do not account for differences between workers, which could be very significant in terms of level of qualification, company size and productive sector.
[74] Source: Eurostat, 2014.
[75] See, amongst other works, Oxfam, *The true cost of austerity and inequality. Portugal Case Study*. Oxfam, 2013.

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to Italy's GDP dropped by 10%. In real terms, this represents over 130 billion Euros: a vast sum of money which was not reinvested in productive activity and in the "real" economy.

In Italy, the levels of inequality are measured by the Gini coefficient, with over 36 points in 2010; this represents one of the highest levels of inequality in the European Union.[76] In relation to the thirty countries in the OECD, Italy is the sixth worst in terms of inequality.[77] In addition to these figures, it must be pointed out that Italy is one of the countries where there is harshest inter-generational inequality: in Italy, the richest 10% of the population owns 40% of the country's entire holdings.

As indicated by the data from Istat, between 1990 and 2012, income grew by more than 80%. However, investment as compared to business revenues fell, during the same period, by 40%. This would seem to disprove the liberalist myth whereby a good performance of the economy, and of the country's companies, will automatically bring about an improvement in living- and working conditions, because in spite of the aforementioned increases in commercial revenues, there was not an attendant improvement in employment, in either qualitative or quantitative terms.

Because of the combination between high flexibility and low job security, in Italy, the portmanteau "FlexInsecurity" was coined to describe the new labour situation imposed by the austerity policies. The number of people at risk of poverty is rising year upon year, and we also see a confirmed phenomenon linked to the instability of jobs – the existence of poor workers.

Finally, in the case of Spain, during the past decade, we have seen behaviour in collective bargaining on salaries which attempted to make salary increases concomitant with inflation, which, over time, has actually resulted in a process of salary moderation.

During the first two years of the current crisis, there was a certain deviation between the evolution of salaries agreed upon by collective bargaining and the growth of GDP which seems to show salaries recovering during those years. However, the situation changed toward greater salary moderation as the result of the *Primer Acuerdo de Empleo y Negociación Colectiva* (First Agreement on Employment and Collective Bargaining) for 2010, 2011 and 2012, signed in May 2010. That agreement set the following thresholds for salary increases: up to 1% in 2010; between 1 and 2% in 2011; and between 1.5 and 2.5% in 2012.

[76] P. ACCIARI and S. MOCETTI, S *Una mappa della disuguaglianza del reddito in Italia* (The Geography of Income Inequality in Italy, in Italian). Roma: Banca d'Italia, Questioni di Economia e Finanza (Occasional Papers), nº 208, 2013.
[77] OECD, *Divided we stand: why inequalities keep rising*. Paris, 2011. Available at: (http://www.oecd.org/els/soc/49170768.pdf).

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In May 2012, this agreement was renegotiated as the *II Acuerdo para el Empleo y la Negociación Colectiva*, which established the following thresholds for salary increases: up to 0.5% in 2012 and 0.6% for 2013. Put differently, the salary increases agreed upon were lower than those set by the previous agreement. The evolution of nominal salaries also experienced a similar pattern of behaviour. In this respect, we can point to two periods.

During the first of these periods, between 2008 and 2009, there was a recovery of nominal salaries in spite of the effects of the economic crisis. The trend during this period can be explained in terms of the "composition effect" caused by the massive and dizzying destruction of unstable and temporary jobs.

During the second period, between 2010 and 2013, the trend in salary growth in Spain was lower than the average in European Union. In that sense, the process has been extended because of the cuts in the public sector in terms of salaries and jobs, which are the keystones of the austerity measures implemented in Spain from 2010 onwards.

The process of salary devaluation is even more evident, if that is possible, in regard to real salary. Whilst real salaries increased between 2008 and 2009, due – as stated previously – to the so-called composition effect of jobs, since 2010 there has been a fall in real salaries, the most significant peak of which can in 2012, with a 2.2% reduction.

In summary, we can state that the worsening of the economic situation caused by the austerity policies was the culmination of a significant process of internal devaluation in Spain. As a result, there was a drop in salaries that was especially marked in 2012.

This situation of acute internal devaluation, mainly from 2012 onward, is reflected in the indicators on inequality and poverty in Spain for the period 2008-2013.

Thus, the contribution of salaries to the GDP fell from 57.1% in 2008 to 53.3% in 2013. For its part, the Gini coefficient experienced a negative rise from 31.9 to 33.7 for that same period. The same can be said of the 80/20 indicator, which increased from 5.7 to 6.3; and the percentage of people at risk poverty or social exclusion has increased from 24.5% to 27.3%.[78]

6.3. Increased socio-labour conflict

One of the most significant effects of labour reforms and collective bargaining was the significant increase in socio-labour conflict. Thus, the combination of the austerity policies and internal devaluation, in the ways analysed above, led to the progressive impoverishment

[78] Source: Eurostat.

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of the population, in addition to indignation because of the authoritarian and anti-democratic spiral triggered by the implementation of those reforms.

In this section, we shall focus mainly on analysing the strikes that were staged in the various countries, and a general context in which they were carried out.

In the case of Italy, the number of days not worked because of the exercise of the right to strike was 48% in the past two decades – i.e. between 1990 and 1999 and between 2000 and 2009. From 2000 onwards, during that decade, the holding of strikes in Italy remained relatively high, as a consequence of the defence of employment, triggered by the destruction of jobs during that period in the industrial sector. In addition to the high number of strikes held, there was a significant wave of mobilisations that were called by the CGIL in opposition to the austerity policies implemented by Berlusconi's government.

During those years of crisis, there were a variety of forms of social protest. Some of them maintained a close relationship with the labour situation – particularly in terms of company restructurings, closures and mass dismissals. In other cases, the origin of the strikes was the delay in the renewal or renegotiation of the national collective agreement, with the resulting degradation of the working conditions.

At an inter-union level, though, trade-union division has generated many problems in terms of the intensity of mobilisation. As mentioned, the predominance of the industrial conflict meant that FIOM-CGIL (a federation of Italian metallurgists) played a leading role, truly acting as a pre-political subject, catalysing and encouraging major social mobilisations, surrounding the idea of work with rights, which cause a certain-amount of difficulty for the confederal leadership of the CGIL in its relations with the governments supported by the *Partito Democratico*. Now, though, the labour reforms proposed by Renzi's Government have managed to restore unity within the CGIL, which called an enormous demonstration in Rome (October 2014) and a general strike for December of the same year.

On the political level, the most relevant and specific characteristic of social mobilisation in recent years was the *Movimento Cinque Stelle* (Five Star Movement). Its main characteristics can be summarised as the profound rejection of "traditional" political parties, in light of an endless series of corruption scandals, as is also seen in the case of Portugal and of Spain. From the small businessman, suffocated by the taxes he has to pay, to the youngest unemployed person, claiming a source of income because of the impossibility of finding a job, Italians have been attracted by the M5S, and in the past two years they have led a sustained mobilisation right up until the last elections, although in the area of work, that political movement's agenda contained no relevant contributions.

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In the case of Portugal, for the period 2010-2013 we can distinguish the following mobilisations and strike actions, and the union(s) which called them.[79]

It must be pointed out how, in terms of strikes called in Portugal, the first took place on 24 November 2010, called by the CGTP and the UGT. It was a general strike, which was repeated a year later, to the day. In 2012, in March, the CGTP again called a general strike, this time without united action with the UGT. That same year, on the European Day of Action and Solidarity, called by ETUC, the CGTP and fourteen federations belonging to the UGT held a day of general strikes (on 14 November 2012). During 2013, two strikes held were particularly noteworthy: one called by the CGTP and UGT, and another on the part of public service workers (8 November). It is worth calling attention to the immense mobilisations that took place in Portugal with the aim of managing the crisis. Thus, during March 2011, a large number of demonstrations took place under the banner of *Geração à Rasca* (Managing the Crisis). The main unifying cause was the rejection of insecure work and, very likely, these were the greatest demonstrations called from outside of the political parties since the Carnation Revolution. That same year, there were at least another three relevant demonstrations: one on 1 October, called by the CGTP; one on 15 October; and one on 24 November, as part of the 15 October Movement.

In regard to Spain, this relation between reforms to collective bargaining and increased labour conflict led to an exponential increase in the holding of strikes and the exercise of other fundamental rights of civic participation – in particular, the right to demonstrate.

In terms of collective actions, and specifically strike actions, we see a significant increase in the use of strikes as a tool. Thus, in addition to the general strikes called during 2010-2013 (one in 2010 and two in 2012[80]), we must also count the 810 strikes carried out in 2008, 1001 in 2009, 964 in 2010, 777 in 2011, 878 in 2012 and 994 in 2013.[81]

Beyond the labour conflict, it is important to note the progressive increase in social unrest as a consequence of the austerity policies. This process, which had not hitherto been channelled in a collective, political, trade-unionist or social subject, began as the *Indignados* movement, which later became the well-known 15-M movement, later concentrating on the social drama of the "evictions" (PAH). Social movements, during the management of this crisis, achieved a high level of protagonism, being the first to stage mass mobilisations, with a high degree of acceptance among the populace.

[79] This examination is made possible by the wonderful work of M. CAMPOS and A. ARTILES, "Descontentamento na Europa em tempos de austeridade: Da açao coletiva à patricipaçao no protesto social", in *Revista Crítica de Ciências Sociais*, nº 103, 2014, p. 143.
[80] These figures do not include either of the two general strikes in the Education sector that were carried out in 2012.
[81] Source: Ministerio de Empleo y Seguridad Social.

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In this respect, the trade-union organisations launched various initiatives aimed at strengthening alliances with the social movements, giving rise to the formation of the so-called "*Cumbre Social*" (Social Summit), which was particularly active in defence of the dismantling of the public services – mainly Health and Education. It is noteworthy that the Summit is made up of more than 150 organisations, in addition to the trade unions.

This type of civic action, which was amalgamated by workers and citizens, produced a vigorous response from the PP government, to discourage civic participation through protest. Today, in addition to the reforms in the Penal Code, it must be pointed out that over 300 people have had criminal charges brought against them for their participation in the calling of strikes.[82]

7. Epilogue

The policies of austerity and internal devaluation as the backbone of the *new European governance* are being presented as essential elements of a new European civilisation[83], characterised by the insouciance and disdain of the public authorities for the promotion of a set of rights (political, social and economic) which facilitate access to social welfare, although it has to do with the existence of a "market" where workers offer their services in exchange for a salary with which to buy a series of goods that allow those workers to live a more dignified life. This disdain for the quest for some foundations upon which to build solid European citizenship can be seen not only in the austerity policies (and therefore the reduction and contraction of the welfare state as a political formula, although it was designed to prevent the public authorities from losing sight of social issues), but also in the policies of internal devaluation, which stress the idea of the contingent nature of socio-labour rights which, ultimately, condemn workers to an existence conditioned by unrealistic recovery of an economy which, it has been said, shows signs of improving, although this improvement is not yet sufficient for ordinary citizens to begin to feel the benefit.[84]

[82] On this point, see A. BAYLOS, J. APARICIO, R. GÓRRIZ, F. LEZCANO and R. BENITO, *Ofensiva penal contra el derecho de huelga*. Fundación 1º de Mayo, Colección de Estudios nº 37, 2014.

[83] Fiscal adjustment as a political value causes exponential growth in the level of poverty, which, today, affects 24% of the population of the European Union. Put differently, poverty and social exclusion affect 123 million people with the consolidation of the new European social model. International Labour Organisation, "Social protection global policy trends 2010-2015", Geneva, 2014.
http://www.ilo.org/global/publications/working-papers/WCMS_319641/lang--en/index.htm.

[84] This is based on a change in direction of the objectives of the European Union, defined as follows: "We are now seeing a new strategy (and probably a new ideology as well). If we may put it so bluntly, Europe no longer wishes to export the European social model to the rest of the world; it wants to compete on a global scale, employing the same tools as developing countries – that is, by lowering its prices. The European Union – and, in

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In parallel, though, we are seeing an economic enrichment of a very small portion of the population, who own an increasingly large portion of the wealth.[85] A main contributing factor to this situation has been identified as the *investment of the elites in politics*.[86] However, this diagnosis must be viewed in a nuanced manner or be supplemented in relation with some of the instruments which facilitated that *investment in politics*: the transfer of income from work to the capital which, in the European Union, is occurring because of opportune modifications made to the national collective-bargaining systems to open the door to tragic internal devaluation, which is ultimately the outcome of these types of situations.

For this reason, along with other political and judicial ones, the recovery of collective bargaining in Europe, and specifically sector-wide bargaining at European level, proves to be an indispensable factor for a more equal distribution of income[87], which accounts for the economic, social and productive differences that characterise the various Member States, thus connecting the whole value chains which, at the moment, seem segmented and isolated in their respective nation-states.

It is worth pointing out that our current situation as regards work, which the European institutions merely regard as a factor of production whose degradation is necessary to obtain specific economic results[88], is the product of decades of public policies that placed emphasis on the functionalization, and on the subordination of labour rules to the proper functioning of the companies, and therefore the proper (or improper) function of the creation/maintaining of jobs.[89] Thus, we can state that the past three decades of labour regulation in Europe have consisted of a re-concentration on the issue of employment, gradually supplanting the political value of labour. Ultimately, this has led to a substantial loss, both quantitative and qualitative, of political representation of labour, and today this is impeding the establishment of common terms for the debate, because of the invisibility

particular, some of its Member States – believe that this will bring about an increase in their exports, and that if exports increase, then so too will employment rates as a direct consequence, thus remedying the main problem which plagues the economies in the Euro zone." Translated from María L. RODRÍGUEZ FERNÁNDEZ and C. VINCENT, "Presentación". *Cuadernos de Relaciones Laborales,* Vol. 32, N$^{o.}$ 2, 2014, p. 266.

[85] Thus, a recent study showed that, in the United States, just 0.01% of the population holds 11% of the country's wealth. E. SAEZ and G. ZUCMAN, "Wealth inequality in the United States since 1913: evidence form capitalized income tax data", Working Paper 20625, National Bureau of Economic Research, Cambridge, October 2014. http://gabriel-zucman.eu/files/SaezZucman2014.pdf.

[86] http://vozpopuli.com/blogs/5136-juan-laborda-la-inversion-de-las-elites-en-politica.

[87] A brilliant doctoral thesis on the situation of collective bargaining in Europe in the various sectors of activity is A. GARCÍA-MUÑOZ ALHAMBRA, *La negociación colectiva sectorial en Europa, ¿hacia un modelo autónomo de negociación colectiva en el nivel europeo?* Forthcoming, 2014.

[88] Some such methods are questionable – e.g. the current use of internal devaluation as a mechanism for businesses to deal with their indebtedness in view of the "credit crunch".

[89] This is a reflection which appears transversally in the work of A. LETTIERI, "El origen social de la crisis". *Informes de la Fundación*, nº 36, May 2011, Fundación 1º de Mayo, Madrid.

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which this vital question has experienced (and continues to experience). In other words, we are seeing a phenomenon which has a long history, where labour and its political (and social) representation are becoming diluted in comparison to a type of social demands which, whilst they are closely related to the effectiveness and exigibility of social rights, are not capable of expressing a more-or-less-complete programme of access to social welfare.

Also, whilst it is closely linked to the issue presented above, the reorientation of the institutional framework for labour relations in Europe by the management of the economic crisis which broke out in 2008 has necessitated the gradual erosion of the functions of trade unions in determining the public policies that govern labour relations. As a result of the crisis, and with greater intensity from 2010 onwards, we see an institutional re-examination of the role of representation of workers' interests by the collective subject which is the trade union. Indeed, the diatribes against trade unions have most often been based on their supposed servitude to the action of the public authorities, which would also make them hindrances to economic development and social progress. According to this school of thought, which includes people on both sides of the political spectrum, this characteristic would prevent trade unions from providing an acceptable representation of workers' interests, as there would be a separation between the representatives and the people they represent. The idea has been promulgated and fuelled by the political authorities themselves, by the undermining of the unions' main tools, as is the case with collective bargaining. This situation must be viewed in relation to the question of how the evolution of labour since the 1970s has led to a gradual de-politicisation of industrial conflict and its reorientation toward the intra-company environment as a consequence of industrial re-conversion.[90]

In this description of the current state of public policies in the areas of labour and employment, as we have seen, there are different topics that emerge which, ultimately, converge in a sort of ideological re-examination of the suppositions upon which, with greater or lesser conviction, the European social model – and with it, European citizenship – were based, resulting in an anti-European resurgence capable of influencing fundamental freedoms in the European agenda, such as the free circulation of persons.

A good indication of this is the growing hostility toward the intensification of intra-European migration and, especially, toward the arrival of increasing numbers of workers from the south and the east of Europe in search of better working opportunities and more

[90] This situation opened the door to the involvement of trade unions in the corporativist political process. For an examination of the evolution of corporativism, see S. GONZÁLEZ BEGEGA and D. LUQUE BALBONA, "¿Adiós al corporatismo competitivo en España? Pactos sociales y conflicto en la crisis económica". *Revista Española de Investigaciones Sociológicas,* 148, 2014, pp. 79-102.

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dignified living conditions.[91] This is lending legitimacy to highly-restrictive interpretations of the European legislation on the main social right associated with European citizenship – freedom of circulation – with a view to counteracting what is inappropriately known as "social tourism". In addition to this, we must consider the snapshot of the concept and meaning of European citizenship within the commercialising margins that permeate the functioning of the European Union.

This political context and the aforementioned restrictive tendencies in terms of free circulation are well illustrated by the recent pronouncement from the European Court of Justice. The judgement passed on 11 November 2014[92] by the European High Court, in a restrictive interpretation of the derived right in terms of free circulation, endorsed the denial of social aid to unemployed European citizens who are not actively seeking work. According to the court itself, "To accept that persons who do not have a right of residence under Directive 2004/38[93] may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State."[94] Hence, it is deemed legitimate and valid

[91] En este sentido, ha de interpretarse la convocatoria en Suiza de un referéndum popular por parte de la Unión Democrática de Centro, partido de extrema derecha, a través del cual los ciudadanos de ese país han decidido (aunque por una muy estrecha mayoría – el 50.3%) introducir cupos a la entradas de personas procedentes de países miembros de la UE, así como restricciones al acceso a los beneficios sociales y a la reagrupación familiar. Llama la atención también la expulsión de Bélgica de 4.812 ciudadanos europeas realizadas a lo largo de 2013 al amparo de la Directiva 2004/38/CE relativa al derecho de los ciudadanos de la Unión y de los miembros de sus familias a circular y residir libremente en el territorio de los Member States. Ésta se se interpreta en el sentido de autorizar las expulsiones de ciudadanos europeos cuando éstos se conviertan en una carga excesiva para la asistencia social del Member State de acogida. Del mismo modo, Reino Unido y Alemania están elaborando reformas que posibiliten la restricción en el acceso a las prestaciones sociales y la expulsión de desempleados europeos.

[92] Case C-333/13.

[93] Para estancias superiores a tres meses e inferiores a cinco años, la norma mencionada distingue entre quienes ejercen una actividad profesional (por cuenta ajena o propia) y quiénes no. Solo los primeros son titulares de un derecho pleno a la igualdad de trato con los trabajadores nacionales del país de acogida en todo lo relativo no solo al acceso al empleo y a las condiciones de trabajo, sino también en relación a cualquier tipo de ventaja social o fiscal. Para el segundo grupo de ciudadanos europeos, sin embargo, el derecho a la residencia en otro Member State está condicionado a la demostración de la disponibilidad, "para sí y los miembros de su familia, de recursos suficientes para no convertirse en una carga para la asistencia social del Member State de acogida durante su período de residencia, así como de un seguro de enfermedad que cubra todos los riesgos en el Member State de acogida" (art. 7.1.b) Directiva 2004/38. En el caso de auto, se trataba de una ciudadana rumana de 25 años de edad con un hijo menor a cargo que no había desempeñado ni en su país ni en Alemania, país de acogida, ningún tipo de actividad laboral, ni resultaba que estuviese buscando trabajo.

[94] F.J. 74 of the judgement.

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under European law to "prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence".[95]

Aside from the concrete details of the judgement, the sentence, on the one hand, corroborates the not-entirely non-commercial nature of the right to free circulation (which only applies fully to subjects who are economically active). On the other hand, it confirms the impossibility of using the condition of citizenship to claim recognition of basic social rights or, which is tantamount, the irrelevance of the condition of citizenship as a pretext for the recognition of social rights[96] – even in spite of the fact that with the Treaty of Lisbon in 2009, the right to free circulation became a fundamental right of European citizens.

Having arrived at this point, we now only need to outline some final reflections on the meaning and the broader reach of the impact of the reforms to the national collective bargaining systems in the countries of Southern Europe, which could be summarised as the exercise of intense violence by the public authorities in charge of designing, coordinating and executing policies that inflict major suffering on the vast majority of European citizens.

From that point of view, the collective bargaining reforms as an instrument in the service of austerity and internal devaluation need to be viewed as acts of force. This is how a phenomenon of violence incrusted in the current characterisation of authority, of the public powers. Hence, the marketing of those policies and the language that goes with them attempts to present them through expressions that mask their true nature: *the only possible alternative*, *necessary sacrifices… collateral damage?*

"The term 'collateral damage' was recently coined in the vocabulary of expeditionary military forces, and then spread by the journalists reporting on the actions of those forces, to denote unintentional or unforeseen effects […]. Applying the label 'collateral' to certain destructive effects of military action suggests that those effects were not taken into consideration when the operation was being planned and orders were being given to the troops who were to carry it out; or indeed that the possibility of such effects was pointed out and given due consideration, but it was nevertheless felt that the risk was worth taking, in view of the importance of the military objective: and this second option is much more predictable (and much more probable) if we consider that the people who make the decisions about the advantages of a risk are not the same people who would suffer the consequences". It is reasonable to extrapolate this description to the conception of collateral damage in the area of collective bargaining, and to state that what is at stake is something more than the marginalisation of the worker toward the territories of instability and precariousness.

[95] F.J. 76 of the judgement.
[96] A previous move in this direction is represented by ECJ judgement of 7 September 2004 (Case C-456/02).

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"We consciously ignore the fact that this act greatly upsets the cultural- and social models which govern a form of life in society, and the actual historical- and moral element contained in any process of determination of the value of the global workforce". The thought process which is governed by collateral damage tacitly assumes a pre-existing inequality of rights and opportunities, insofar as the unequal distribution of the costs involved in the taking of an action (or indeed ceasing it) is accepted *a priori*. There is a selective affinity between social inequality and the probability of becoming victims of disasters, whether "natural" or "manmade", although in both cases it is said that the damage was neither intentional nor planned. Occupying the very lowest rung of inequality and becoming a "collateral victim" of a human action or a natural disaster are positions which interact like the opposing poles of a magnet: the two tend to gravitate towards one another."

Hence, the objective of putting an end to the traditional functions of collective bargaining in certain geopolitical arenas cannot – and indeed should not – be blindly considered to be a measure to govern labour relations, from the moment when its unmeasured use implies the transformation of the European social model, in relation with its social clause, and the ultimate objective of removing the obstacles that prevent us from reaching certain levels of material equality. As we know, this last circumstance appears to be closely linked both to the existence of a decent job and to the rendering of particular public services as an instrument of redistribution of wealth and assurance of particular standards of equality[97], indicating that some of the current consequences cannot be reserved solely to the decision of the various executive powers, but that must be contrasted with a social model that allows for peaceful coexistence.

[97] Cfr, OCDE, *Seguimos divididos: ¿Por qué la desigualdad sigue aumentando?*

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5

'The Reform of Joint Regulation and Labour Market Policy during the Crisis': Executive Summary of an EC-funded project, led by the University of Manchester

Coordinating team: Dr Aristea Koukiadaki, Dr Isabel Tavora and Professor Miguel Martinez Lucio

1. Introduction

Against the background of a profound economic crisis in Europe, wide-ranging labour market reforms have radically transforming the national systems of collective bargaining in a number of EU Member States. A research project, funded by the European Commission and coordinated by academics in the University of Manchester with the collaboration of teams from European universities,[98] sought to understand how the crisis-driven policy reforms translate into changes in collective bargaining in manufacturing. Specific questions included: What have been the effects of the reforms for the process and content of collective bargaining at the national, industry and company level? How do employers and trade unions respond to the new regulatory framework and what have been the implications for the outcomes of collective bargaining on issues such] as wages, employment conditions and gender equality? How can the comparison of the reforms, their respective effect and social partners' strategies be used for EU and national policy-making as well as cross-national learning and knowledge exchange for social partners?

The research took a comparative approach to examine the ongoing changes in seven of the countries most affected by the crisis and which had undergone major labour market reforms: Greece, Ireland, Italy, Portugal, Romania, Slovenia and Spain. The focus of the research was on manufacturing because, being an important sector in the business structure of all the countries, it was also an industry with a long tradition of collective bargaining, enduring industrial relations institutions and good practices of multi-level bargaining. The research in each country involved the collection and analysis of primary and secondary data on the social partners' approach (employers, trade unions and the state) and strategies to the reforms in collective bargaining. A number of company case studies were also carried out in sub-sectors of manufacturing, including metal but also food and drinks, textiles and footwear, medical devices and chemical and pharmaceutical. This executive summary synthesizes the

[98] National partners included the following: Tony Dundon (NUI Galway, Ireland), Sabrina Colombo and Ida Regalia (Università degli studi di Milano, Italy), Maria do Pilar Gonzalez (University of Porto, Portugal), Charoula Kokkinou (University of Manchester, UK), Aurora Trif (Dublin City University, Ireland), Aleksandra Kanjuo-Mrčela and Miroslav Stanojević (University of Ljubljana, Slovenia), Carlos Jesús Fernández Rodríguez and Rafael Ibáñez Rojo (Universidad Autónoma de Madrid, Spain).

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main issues, reports key findings and discusses their policy implications for national and EU policy-making in the area of social policy and industrial relations.

2. The supranational pressures and the national response to the economic crisis

Against the context of a deepening economic crisis exposing the structural weaknesses of certain Member States but also the Eurozone governance, the response at supranational level has been multi-faceted. In the case of Greece, Ireland, Portugal and Romania, they became subject to economic adjustment programmes, consisting of loan agreements and accompanying Memoranda of Understanding (MoU) outlining a range of fiscal policies and structural reforms in labour market regulation. While Italy, Slovenia and Spain were not the subject of such assistance (with the exception of the financial sector in the case of Spain), they were still subject to reinforced EU monitoring of public deficit and macro-economic imbalances, whilst at the same time being the recipient of more informal means of influencing domestic developments in the labour market (including secret letters from the ECB in the cases of Italy and Spain).

In terms of subject-matter, the above-mentioned interventions were aimed at a policy of 'internal devaluation', seen as the only feasible route to the restoration of the competitiveness of the national economies in terms of unit labour costs. The promotion of such measures has challenged the pre-existing consensus on the European Social Model, which was characterised by its uniqueness in including a high coverage rate of collective agreements and a designated role to trade unions and employers (European Commission, 2010). In this context, the reforms are inconsistent with previous judicial, legislative and constitutional acknowledgement of the role of freedom of association, trade unions and collective bargaining in the 'European Social Model'. In terms of regulatory instruments, the institutional response to the crisis at supranational level has meant an increase of harder forms of intervention, marking a significant departure from the previous approach of the EU largely limiting itself to making more or less non-binding recommendations on national wage and labour market policies as part of its economic and employment policy guidelines. On the basis of these developments, there is evidence of transfer of decision-making from the national to the supranational level, accelerating as a result the process of European integration in the area of social policy and industrial relations.

At the national level, the reforms of collective bargaining and labour relations systems have been exhaustive. The move to unilateral actions by the state was response to a specific set of externally led conditions being placed on these nations, and thus allowed governments to transfer culpability and legitimate the lack of social dialogue in terms of these reforms. There have been moments where social partners have attempted to address the outcomes of such reforms in terms of the high levels of precarious work amongst younger people and those effected by the crisis, but these have been less than effective at the national level and restricted by the state focus on collective bargaining reform and austerity measures. The role of the social actors in the adoption of reforms is a complex issue, as in some cases the state

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has been reluctant to engage with them; and even when there has been involvement of social partners the focus has been on specific types of minor reforms of a piecemeal nature (with the exception of Portugal) with very few concessions in the way of worker rights or social support. Many of these reforms respond directly to the paradigm shift within MoU and the Troika, which extol the decentralisation of collective bargaining as a panacea and solution to both the crisis and the structural problems facing the European economy. They have also emerged in a context where the trade union movement has been politically challenged not just by the troika but the national governments forcing through reforms.

3. The crisis-related labour market reforms in the context of existing traditions of industrial relations

Collective bargaining and joint regulation in the seven countries were coordinated through various national and sector level arrangements. However, there was more flexibility and room for manoeuvre than at first meets the eye. There were relatively coordinated industrial relations systems in these seven countries, sustained by an element of renewal and change. In five of the seven cases (Greece, Portugal, Romania, Slovenia and Spain) these systems had been forged during difficult transitions from hierarchical and authoritarian political contexts during the 1970s or early 1990s. The notion of a static and dysfunctional system of collective bargaining prior to 2008 is an unfortunate - and in our view - incorrect stereotype which fails to outline the relatively mature development of social dialogue which included innovations on learning, training, equality and other agendas. The subsequent crisis of labour market regulation after 2008 was driven by agendas that deemed sector level and national level regulation as somehow problematic or anathema to economic efficiency. Much of this was driven by political interests and orthodox economic views.

At a broad level, the labour market reforms were consistent with the commitments undertaken by the governments in the context of financial assistance programmes or other instruments of coordination at EU level, most notably the European Semester. As such, the provisions of the latter have been indeed very intrusive, albeit to varying extent, to national systems of labour law and industrial relations In summary, national labour market reforms have taken place with respect to four main pillars of the employment relationship: a) they challenge the role of full and open-ended employment and promote instead flexible forms of employment, b) they encourage working time flexibility that is responsive to the companies' needs; c) they mitigate employment protection against individual and collective dismissals; and d) they modify the pre-existing configuration in the systems of collective bargaining and wage determination. In terms of the latter, the measures included first restricting/abolishing extension mechanisms and time-limiting the period of which agreements remain valid after expiry; secondly, measures related to the abolition of national, cross-sectoral agreements, according precedence to agreements concluded at company level and/or suspending the operation of the favourability principle, and introducing new possibilities for company

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agreements to derogate from higher level agreements or legislation; and, finally, weakening trade unions' prerogative to act as the main channel of worker representation (Marginson, 2014: 7-8). In introducing these changes in all four pillars the reforms have substantially increased the scope for unilateral decision making on the part of the management and have undermined the support for joint regulation of the terms and conditions of employment. Overall, the reforms have shifted the regulatory boundaries between state regulation, joint negotiation and unilateral decision-making by management, with significant implications for the role of the industrial relations actors.

4. The impact of the reforms on the structure of collective bargaining

Overall, the impact of the reforms on industrial relations and social dialogue has consisted in a crisis of collective bargaining at different levels, including not only national but also sectoral and company levels. However, the degree to which different EU Member States have been affected at different levels is not the same. The research findings from the project suggest that three types of systems of collective bargaining have emerged following the emergence of the crisis and the implementation of labour market reforms: systems in a state of collapse, systems in a state of erosion and systems in a state of continuity but also reconfiguration (see also Marginson, 2014). The most prominent examples of systems in collapse are Romania and Greece. While other national bargaining systems are doing slightly better, they still face significant obstacles in terms of disorganised decentralisation, withdrawal of state support and as such experience erosion (i.e. Spain, Ireland, Portugal and Slovenia). Finally, Italy is in a process of continuity but also reconfiguration, with changes in the logic, content and quality of bargaining.

Three key factors may explain the differences and similarities in terms of the impact of the reforms on the bargaining systems. The first is the pre-existing strength of the bargaining systems, including how well articulated and coordinated they were pre-crisis (e.g. compare Italy with Spain, Greece and Romania). The extent to which the procedural innovations introduced by the reforms were incremental or radical in nature was also important (Streeck and Thelen, 2005). In cases where the reforms departed completely from the pre-existing norms of bargaining, such as in Greece and Romania, the reforms have led to the breakdown on existing arrangements. In cases where the reforms were rather incremental, Italy being a case here, the risk of conflicts leading to a breakdown has been minimised. The second factor accounting for the similarities and differences in terms of the impact is the extent of the economic crisis and the reforms adopted in light of the crisis. Whilst the reforms targeted both employment protection legislation and bargaining systems, the extent to which they were far-reaching and wide-ranging was different (e.g. compare Greece and Romania with Italy and Portugal). Finally, the third explaining factor is the extent to which the reforms were introduced on the basis of dialogue and agreement between the two sides of industry and the government. There is evidence to suggest that where the reforms have been introduced on the basis of consultation with the social partners and are less influenced by the Troika, the

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effects are less destabilising rather where the reforms are introduced unilaterally (e.g. compare Italy and Portugal with Greece and Romania).

5. The impact of the reforms on the content and outcomes of collective bargaining

As the economic downturn led to extensive restructuring processes in manufacturing that had an immediate and significant impact on employment, trade unions in the seven countries became increasingly concerned with minimizing job losses. While these circumstances led to a general downward pressure on wages, their actual impact depended on a number of factors that varied across countries. These included firstly, the breath and magnitude of labour market reforms, namely the extent of decentralization of collective bargaining and of the reduction in coverage as well as the degree to which they enabled downward wage flexibility at the firm level. These processes appeared less pronounced in Italy and Slovenia - where the social partners were able to retain to considerable extent their role in wage setting, than in Greece, Ireland and Spain - where the changes enabled individual employers to use wage reductions as part of their responses to the crisis, with trade unions unable to avoid them and in some cases even agreeing to them in an effort to minimize job losses. In Romania, the dismantlement of national and sectoral bargaining also severely constrained unions' ability to achieve wage increases and to protect workers from low pay in a country where wages were already extremely low. A second factor was how these processes interacted with developments in national minimum wages. In some cases, such as Greece and Ireland, cuts in the minimum wage contributed to aggravate a downward trend with the most extreme example being Greece, where the 22% reduction in the national minimum facilitated reductions in firm-bargained and individually contracted wages. This effect was the opposite in Slovenia, where a significant increase of the minimum wage played a protective function on bargained wages. In some cases, other forms of state intervention in pay setting, as in the case of Portugal where a statutory reduction of overtime pay superseded collectively agreed higher rates, negatively affected the earnings of manufacturing workers. Finally, the pre-existing system of collective bargaining and the way the social partners responded to the reforms was pivotal in mediating their impact on wages. For instance, in Italy, unilateral state intervention facilitating derogations was counteracted by a bilateral inter-sectoral agreement that contributed to limit the impact of the derogations. In both Italy and Slovenia, the impact on wages was also mitigated by the responses of employers, who used new derogation opportunities for increasing working time flexibility at the firm level but refrained from doing so for reducing or avoiding increases in wages.

Our country cases support the idea that the reforms contributed to the adaptability of firms mostly by facilitating their ability to adjust working time, employee numbers and above all, quickly and drastically reduce labour costs. In this sense, the governments' objective of greater wage flexibility at the firm level has been achieved. However, the extent to which they helped resolving the problems of the countries most afflicted by the crisis is contested on the basis the path of crisis-exit strategy focused on internal devaluation and downward wage

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flexibility rather than productivity gains may not lead to long term competitiveness and sustainable economic growth. In addition, as the reforms weakened trade unions and constrained joint regulation, the social costs of these changes were not duly considered. Indeed, there is evidence to suggest that they led to increasing divisions and inequities in the workforce such as differences in pay and working conditions between existing and new employees, along gender and age lines and between those in permanent contracts and those in atypical employment. In addition, in some countries such as Greece and Romania, the reforms led to unintended negative outcomes, such as the growth of the grey market and undeclared payments that reduce the state's revenue from taxes and social security contributions. It turn, in line with Marginson's et al. (2014) argument that collective bargaining can address the negative externalities generated by the market, a number of cases from the countries studied illustrate how collective bargaining helped achieving improved responses that minimized costs not only for employers but also for employees.

6. Employers, trade unions and the state in the new panorama of labour relations: Responses and perspectives

Overall, the response by trade unions and employers to the changing landscape of collective bargaining reveals a range of issues and tensions in terms of the decentralization and reform of collective bargaining. The responses illustrate that there is no clear paradigm shift in the manner in which collective bargaining change is being engaged with. Instead, what we are experiencing is a process of change and fragmentation which is uneven and ambivalent in terms of its outcomes. The reforms are being used in many cases to undermine and change the role of joint regulation: in some cases they are being used to bring compliance and change without the actual reforms being directly used. There is a growing pattern of employer strategies which are premised on bypassing the roles of collective worker voice. There is also a state role which has facilitated this at various levels.

However, the extent of these changes varies. There are signs that in some cases there is a greater caution in undermining the legacies of social dialogue and the roles they have played. Social dialogue – albeit truncated and limited – has sustained itself in many organisational spaces. There are also visible signs of unease from many employers. There is concern with the risk of greater fragmentation in terms of collective bargaining and the ability of personnel managers to systematically work through the labour related questions. There is also the risk of a growing politicisation and change – especially the undermining of those trade unions with a culture of social dialogue in some cases as in Spain and 'realistic' bargaining. There is an increasing space for worker responses which may challenge management in more direct forms. Human Resource managers are also concerned with the ability of local management to cope with greater decentralisation and change. The pressure of local and site level management and Human Resource specialists appears to be growing.

Trade unions have been increasingly constrained in their ability to regulate and policy agreements although they have begun to formulate strategies of sustaining their role in core

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sectors, raising the awareness around low pay issues, and sustaining a combination of mobilisation and negotiation strategies. The trade unions have referenced broader worker rights to representation in their responses and raised the impact on the democratic process of such reforms. A real problem appears to be the growing dysfunctional features of the state and the failure of the state to work in tandem with social partners on the implementation of worker rights in terms of enforcement. The state is being brought into the management and support for new forms of bargaining in more direct and interventionist ways yet this is occurring just as the ability of the state to respond is being tested by the impact of austerity measures on such areas as labour inspection, judicial processes and state mediation services.

7. Conclusion and policy recommendations

The evidence from this study suggests that the policy approach promulgated by supranational institutions and adopted by national governments, has achieved the intended objective of internal devaluation, which was geared towards reducing labour costs, directly via straightforward cuts in wage levels but also indirectly via wide-ranging and radical reforms in the systems of collective bargaining. But despite the impact of these interventions on labour costs, the extent to which national economies have become more competitive, the prime objective behind internal devaluation policies, can be highly disputed, as the experience of depressed growth in the EU Member States so far suggests. Instead, significant externalities have emerged, ranging from increasing social divisions and inequalities, lower tax revenues due to high unemployment, growth of the grey market and undeclared payments to increasing discontent, social unrest and the rise of extremist movements. From an industrial relations perspective, a real concern becomes how the social actors and their capacity to respond and regulate is being undermined with serious long terms effect.

Against this context, it becomes necessary to reconsider at both European and national governance levels the role played by multi-employer collective bargaining in acting as a mechanism of 'beneficial constraint' minimizing the externalities of market and policy-driven adjustments. Central in this is a re-adjustment at national level of public policies in the area of labour market regulation towards viewing social dialogue and collective bargaining as part of the solution steering EU Member States out of the crisis and not as part of the problem. The establishment and support, via arbitration and mediation and enforcement of labour standards, of institutional mechanisms for greater coordination and articulation of bargaining at multiple levels should be considered. To that end, the evidence of continuing support for social dialogue and collective bargaining by employers, especially at sectoral level, is significant. Combined with trade unions efforts to improve the coordination of their bargaining strategies within their respective organisations and movements, there would be an increase in the scope for deliberation and consensual agreements on terms and conditions of employment. In turn, these policies would not only counteract but would also reduce any incentives for unwarranted intervention on the part of the state.

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At European level and following the European elections and the signs of global economy recovery, there can be still scope for strengthening the social dimension of the EU with a particular focus on promoting social dialogue and collective bargaining. In order to do this, there needs to be a move away from the current promotion of 'regulated austerity' under the current institutional conditions of the 'Six Pack' and the Treaty on Stability, Coordination and Governance, but at the cost of depressed growth in certain Member States. Instead, measures for the promotion of an alternative concept of a European 'solidaristic' wage policy (Deakin and Koukiadaki, 2013; Schulten and Muller, 2014), which is based on strong collective bargaining institutions and equitable wage developments should be promoted by both EU institutions and EU social partners. These would then provide a basis for a more sustainable economic development across different EU Member States.

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6

TTIP, ISDS and INTA; the elephant in the room

by

Professor Keith Ewing and John Hendy QC

I

The Transatlantic Trade and Investment Partnership (TTIP) is the secret trade deal currently being negotiated between the EU and the USA. Its text is a closely guarded secret shared only by the negotiators (including representatives of multinational corporations). Drafts are withheld from both MEPs and members of all the European national Parliaments (as well as US congress and senate members).

On 28 May 2015 the voice of almost two million Europeans who have petitioned against TTIP was ignored when the European Parliament's International Trade Committee (INTA) led by the Socialist and Democrat group of MEPs agreed to a shabby compromise resolution supporting TTIP. The compromise paves the way to a vote of the full European Parliament in the week of 8 June 2015.

Amongst other things, the compromise supports the much criticised 'Investor-to-State Dispute Settlement' procedure (ISDS) known to be in the TTIP draft. ISDS is found in practically all of the new generation of international trade agreements between States (of which there are now some 3,000). ISDS is a legal procedure which allows multinationals ("investors") to sue States for millions of dollars on the basis of (actual or threatened) alleged breaches of international trade agreements such as TTIP. The usual claim is for future loss of profits on the ground that the laws of the State have not accorded the multinational "fair and equitable treatment", or because national law has resulted in "expropriation" of the multinational's assets.

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The most recent United Nations survey of ISDS proceedings in international trade agreements (where they have leaked into the public domain) shows that the number of claims by multinationals against States under ISDS mechanisms is rising and that claims in 2014 ranged between US$ 8 million and US$ 2.5 billion. The largest award made in 2014 was US$ 50 billion, though the median award in 2012 was a mere US$ 10,694,000.

ISDS claims made in 2013 included claims for alleged losses arising from the imposition of levies on solar power plants in the Czech Republic and from a reduction of subsidies for renewable energy in Spain. There was a claim (for €824m) against Cyprus for increasing its stake in the Cyprus Popular Bank as a stability measure in the crisis. A claim was made for the equivalent of an injunction against the Slovak Republic for proposing legislation said to involve the expropriation of a privately held stake in a Slovak health insurer. Canada is being sued by one company for compensation for the loss of its gas exploration permits as a consequence of Quebec's moratorium on fracking, and by an electricity supplier for contractual losses arising from Ontario's moratorium (on health and environmental grounds) on offshore wind-farms. Swedish power company Vattenfall has brought a claim against Germany for €4.7bn for lost profits caused by Germany's decision to phase out nuclear power stations.

II

The EU recently carried out a consultation exercise amongst European citizens on ISDS and found 97% of the 150,000 responses to be opposed to ISDS. But ISDS has not been left out of TTIP. The compromise agreed by INTA addresses a couple of the objections to ISDS but simply ignores the major problem.

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First and foremost, the Socialist and Democratic majority of MEPs on the International Trade Committee having been formerly totally opposed to ISDS have reversed their position. The Committee resolved to accept that ISDS is to remain part of TTIP - though it avoids use of the name "ISDS". It confronts the problem of secrecy of ISDS private arbitration by lawyers by proposing that ISDS should be, in the long term, conducted by publicly appointed, independent professional judges in public hearings. "In the medium term, a public International Investment Court" is proposed as the acceptable form of ISDS.

Those proposals would certainly improve on the standard ISDS mechanisms already built into the EU trade agreements with Canada (CETA), South Korea and Singapore – and dozens of other EU international trade agreements.

But in reaching their compromise, the Committee seems to have blinded itself to the fundamental flaw in any form of ISDS. The elephant in the room, invisible to the Committee, is evident in the very name "Investor-to-State Dispute Settlement" procedure. It reflects the extraordinary nature of ISDS. The multinational corporations seeking profit ("investing") in the States to be covered by the agreement make a jaw-droppingly arrogant demand of those very States. They seek the unique legal privilege of a special procedure to enable them - and no-one else - to bring claims for alleged breach of the agreement. And such claims are to be against … those very States!

This demand is in addition to the unique privilege of limited liability conferred on these very corporations by the law of every State in the EU and by the US. The demand is on top of the benefits to the multinationals of TTIP itself, an agreement which is intended to achieve "harmonisation of regulations" – i.e. to reduce legal obligations on corporations to the lowest common denominator (so much for the sovereignty of Parliaments).

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The fact that the State parties to the agreement are not permitted to bring claims against the multinationals through the ISDS mechanism is not enough. Nor can a citizen of the States involved use ISDS to bring a claim for breach of the trade agreement against a multinational - nor even against a State. So workers (and their trade unions) cannot claim that a multinational has subjected them to a lack of "fair and equitable treatment" or expropriated their wages or other property. So lop-sided is ISDS, that even if a multinational claimed against a State that its laws on trade unions were not fair and equitable and so caused it loss of profit (perhaps because its laws permitted a strike), the union would have no right to be heard in the ISDS hearing.

Yet these failures present only a frontal view of the elephant. A side view highlights that if a multinational were unhappy with a judgment of a national court (or the Court of Justice of the EU), it could seek to override the court by taking its case to the ISDS. This is not, of course, an option for citizens or governments. But it is exactly what a large tobacco corporation did in challenging legislation requiring plain paper packaging for cigarettes in Australia. Having lost its case in the highest Court of Australia, Philip Morris then took its case to an ISDS tribunal in a trade agreement between Australia and Hongkong (outcome of the arbitration is awaited). Likewise the drug company Eli Lilly has sought $500 million compensation against Canada (under the ISDS of the North America Free Trade Agreement) by way of challenge to Canadian court decisions that patents on two drugs were invalid.

The EU International Trade Committee refers to the legitimacy of the ordinary courts but does not suggest that the multinationals should be obliged to use them instead of the separate ISDS scheme. In fact the proposal to refine the ISDS scheme by using qualified judges in public hearings is an acceptance by the Committee that multinationals *will* be able to use ISDS to circumvent the ordinary courts. The compromise resolution even proposes a special right of appeal from ISDS, not to proper courts, but to a special ISDS appellate panel. So much for the rule of law. So much too, for the distaste of the present government to judgments of 'unelected foreign judges' which usurp the function of our Supreme Court.

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III

The fact that citizens and their organisations - such as trade unions - cannot sue either multinationals or States under ISDS is important in relation to one of the justifications for the decision of the International Trade Committee to back TTIP. TTIP (like CETA, the EU-Korea and EU-Singapore agreements) contains reference to the minimum core labour standards of the International Labour Organisation (ILO). These deal with freedom of association, the prohibition of forced labour, the elimination of discrimination, and the abolition of child labour, with the EU and Korea committing themselves to respect, promote and realize in their laws and practices the principles concerning these 'fundamental rights'.

The latter seem to be standard provisions in free trade agreements negotiated by the EU, and they are also to be found in the many free trade agreements to which the US is a party. In the case of the US agreements there is often an additional commitment relating to wages, working time, and health and safety at work. The undertakings are, however, largely meaningless given that the United States has not ratified several of the core ILO Conventions on which these principles are based, and that it has no intention of ever doing so. Nor is there any evidence that the Americans have changed their federal labour law to bring it into line with ILO standards, despite having been told by the ILO Freedom of Association Committee that its law fails to meet ILO standards.

On freedom of association alone, this would be true in relation to the right to organise, the right to bargain and the right to strike. All of which is to suggest that the labour chapters of these agreements contain hollow commitments by which no one intends to be bound. But we should not single out the United States. The EU entered into a free trade agreement with Korea in which both parties undertook to abide by the provisions of a labour chapter. But

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not only has Korea ratified just four of the eight core ILO conventions, it has been found to be seriously in breach of ILO principles on freedom of association. Korea is a country with serious restraints on the right to strike, with trade unions routinely sued for substantial damages in a manner without parallel in any industrialised country.

There is no possibility of the United States being required by TTIP to ratify ILO Conventions 87 and 98, or to change the National Labor Relations Act to give effect to these obligations. Any such obligation would in any event be unenforceable, as both measures would almost certainly be vetoed by the US Congress, in thrall to US corporate special interests. So how are these ILO standards in TTIP to be enforced? The International Trade Committee compromise undertakes to ensure that "the sustainable development chapter" of TTIP "is enforceable". Whether this chapter of the secret text of TTIP is substantially the same as the "trade and labour chapter" in the CETA (which is published) is not known. CETA certainly does not require that the core ILO standards in the trade and labour chapter are enforceable, merely that each State "shall ensure that its labour law and practices embody and provide [the] protection" of ILO core standards.

In other words, the free trade agreements impose obligations on States not on corporations, albeit the obligations on States are very weak. Trade agreements – including EU free trade agreements to date - do not require the multinational investors to observe those ILO standards. That being so, it is inconceivable that TTIP will permit unions (or even States) to sue multinationals in the ISDS for breach of labour standards. TTIP will certainly not give unions or workers the right to sue the multinationals for breach of ILO standards in ordinary national courts or the Court of Justice of the EU. The trade agreements such as TTIP do not even require ILO standards to be taken into account in ISDS cases. Yet the only serious way in which the International Trade Committee could have achieved its ostensible objective (given that it accepted the principle of ISDS) was to open the doors of ISDS to trade unions (and States) so they could sue corporations for breach of core ILO Conventions.

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But the political realities of global corporate power are such that this will not happen. The danger of the International Trade Committee's position is that we will end up with an ISDS mechanism in which the elephant is more visible, with all manner of dubious claims being made about the new legitimacy of ISDS. Alongside that we will continue with a meaningless commitment to labour standards by parties who have no intention to be bound by the obligations they undertake, and with no machinery in place to ensure that they are bound. The reality is highlighted by the British government which will no doubt accept the labour chapter in TTIP (as Cameron accepted the labour chapter in the EU-Korea FTA), while being about to introduce new restrictions on the right to strike that will take the United Kingdom even more deeply into violation of ILO standards which TTIP is supposed to enshrine.

Finally, it is a matter of great regret that the Socialist and Democratic Group of MEPs has not demanded observance of the core ILO standards as a non-negotiable condition for any multinational investing in the EU (or the USA come to that) and a non-negotiable condition for tendering for public contracts. Having established that principle, the only question would then be how to satisfy the need for the proper auditing of companies to ensure that they do comply with minimum ILO standards. Labour standards are non negotiable, and they should not be part of a bargaining process about ISDS, which has no place in a democratic society governed by the rule of law. As pointed out succinctly by Adrian Weir of Unite the Union, 'a different version of ISDS in exchange for the chimera of binding ILO Conventions seems a poor exchange'.

2 June 2015

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7

Vertical Inequality

As a legacy of Nelson Mandela presidency, the South African law includes a provision calling for the elimination of disproportionate vertical income differentials. The provision is part of the Affirmative Action Chapter of the South African Employment Equity Act (EEA) and addresses vertical income inequality. This law seems to be invisible in the everyday reality of South African. The fact is that South Africa is one of the most unequal societies in the world according to the ILO wage report 2014/2015. The provision to correct this is in place and the next step is to do what is necessary to put it into practice. A new project based at the Institute of Development and Labour Law (IdLL) at the University of Cape Town (UCT) aims to change this by putting this specific provision into practice. But what can be understood as the legal concept of vertical inequality in this context?

Hepple[1] characterised the concept of vertical inequality - in contrast to horizontal inequality - as `what may be called vertical equality between the parties to the employment relationship.' Legal action based on the maxim `equal pay for equal work or work of equal value' aims to achieve equal pay for disadvantaged groups. Hepple[2] defines this goal of the equality legislation as horizontal equality. The provision referred to here is about income differentials between the occupational levels. In this context I use the term vertical inequality in respect to these income differentials. Vertical pay discrimination means `disproportionate income differentials' between the occupational levels.

Oelz et al.[3] use the term `vertical occupational segregation' to describe the under-representation of women at highly paid job levels and the occupational gender segregation. The ILO Committee of Experts noted in its general observation published in 2007 that ` historical attitudes towards the role of women in society, along with stereotypical assumptions regarding women's aspirations, preferences, capabilities and "suitability" for certain jobs, have contributed to occupational sex segregation in the labour market. As a result, certain jobs are held predominantly or exclusively by women and others by men. These views and attitudes also tend to result in the undervaluation of "female jobs" in comparison with those of men who are performing different work and using different skills, when determining wage rates.'[4]

The `glass ceiling' caused by the gender-stereotyping and discrimination in job evaluation had to result in the gender pay gap. Oelz et al. point out that these factors not only affect one´s professional career, they also affect everyday wages because it affects work evaluation. In occupations with a predominant large number of women, lower wages are justified by using different skills influenced by stereotypes and prejudices. This key message of the committee of experts took place with regards to the ILO Convention 111. The principles for equality are worldwide within the states that ratified the

[1] Hepple, Bob: *Equality and empowerment for decent work*, International Labour Review, Vol. 140 (2001), No. 1, p 12
[2] ibid
[3] Oelz, Martin; Olney, Shauna & Tomei, Manuela: *Equal Pay – An introducery guide,* ILO (2013), p 17
[4] International Labour Conference, 96th Session: Report of the Committee of Experts, chapter Equality of Opportunity and Treatment General observation clause 2, Report III (part 1A)-2007

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ILO Conventions 111 and the ILO Convention 100 in respect to the requirement of these Conventions the same. All kinds of discrimination may be eradicated by access to justice and affirmative action.

In 1953 the South African Bantu Education Act was enacted. On 16 June 1976, when students in Soweto started protesting for a better education, the police responded with teargas and bullets. Today 16 June - Youth Day - is a national holiday in South Africa, which honours the young people who lost their lives in the struggle against Apartheid and the discriminatory education system. The fight against apartheid took decades and its social consequences can still be seen until today. To overcome the different forms and the consequences of discrimination is a challenge for the society and for the law. A closer look at the finding of the Committee of Experts shows the general effect of long term discrimination. One effect is the vertical segregation at the workplace. Stereotypes and prejudices divide occupational levels between advantaged and disadvantaged groups and also influence the evaluation of the different levels. This resulted and still results in disproportionate income differentials to the disadvantage of vulnerable groups. Groups which are seen as significantly less important in a society are vulnerable. When such prejudices make us think that women are less important for the economy, their contribution becomes undervalued. In a case of a typical 'female job' the income is highly influenced by this undervaluation. As a result, disproportionate differentials are created between the occupational levels. This is the case with typical 'immigrant jobs' as well as with 'non EU citizen jobs' in Germany and in the EU. In South Africa, this can also be seen with typical 'black jobs' particularly for the unskilled. There is even more to it than that. Additionally, within these groups of disadvantaged, women are also affected by gender discrimination.

Rather then developing norms and benchmarks against the vertical pay gap, the solution was to provide a provision as part of the affirmative action legislation. This provides the necessary guidelines to indicate how legal tools should be used to close the gap. Disproportionate income differentials have to be reduced progressively, resulting in a proportionate wage structure from top to bottom. These tools include collective bargaining, the implementation of norms and benchmarks set by the Employment Condition Commission or other effective instruments which may be combined with occupational training.

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