

Regulation of Dismissal and Mobilization of Labor Rights: a Critical Perspective on the Spanish System*

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Abstract: In recent times, reflections on the institution of dismissal have focused almost exclusively on understandings of employment protection as a cost for the employer and on the supposed negative effects of these costs for net employment creation. These approaches –more or less favourable to the regulatory intervention of the State– are usually in debt to the paradigm that sees labor law as consisting of a number of restrictions on the “free” market established in order address certain social issues.

This paradigm is not so much wrong as it is incomplete. For that reason this work aims to start from a different approach. Certainly, labor law isn’t an element disconnected from the labor market that distorts the “pure” interaction between the supply of and demand for labor, but it plays, amongst others, a role in forming that market. Market construction, in terms of maximization of its social effectiveness, is carried out through a re-balancing of power between employees and employers which requires the empowerment of workers. The “protection” of workers is not an end in itself, but rather a tool to provide them with power in the context of unequal relations of production.

Taking these distinct approaches as a starting point, this article argues that dismissal is the main institution through which the legislator’s intervention may have a significant impact on the power relationship between the parties. Hence it is the cornerstone of labor law, determining its entire effective application and, therefore, the mobilization of rights ‘in the shadow of the law’ in the day by day of employment relations. This article identifies the elements that dismissal regulation should have in order to be effective, offering at the same time a global critique of the Spanish model of employment protection, with special consideration to the alterations suffered under the Labor Reform of 2012.

Keywords: Employment protection legislation, mobilisation of worker rights, effectiveness of labor law.

1. Labor law and the “empowerment” of workers

In recent times, theoretical approaches regarding dismissal regulation and so-called “labor reforms” have been focused fundamentally on the perspective of considering that employment protection legislation provides job security to the worker but implies a labor cost to the employers. Thus, it is claimed that the legal mechanisms of employment protection involve “excessive” costs for enterprises that hinder employment creation, make it difficult to manage human resources adequately or reproduce

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labour market segmentation. The academic debate may and must address seriously this question in order to move beyond the mere expression of ideological prejudices. In my judgement, the emphasis that is placed on these aspects obviates some issues of transcendental importance.

This is a consequence of the fact that law in general and labor law in particular end up being contemplated from a perspective originating in the prevailing discourse in economics. This perspective is not worthless, but neither does it describe reality in a totally precise way. Most economists tend to consider law a set of restrictions –more or less appropriate– on the “free” interaction between “supply” and “demand” in markets, which are ideally conceived as spontaneous and self-organising orders. Although this perspective assumes a moderate position, accepting the necessity of a certain level of regulation, the intervention of law is contemplated as the intervention of State’s power over an economic order ideally conceived as a reality perfectly separated from legal regulations and the rest of society. This dissociation is brought about to a large extent by academic specialization. In the actual context of workers’ weakness in the balance of power between capital and labor, this cognitive framework often causes “markets” to be seen as idealised and almost personified entities that do not depend on human behaviour, thus making law, *by the very nature of things*, “invasive” regulation.

This view of the legal system as a set of restrictions on the interaction of supply and demand in the “free” market seems to be of some usefulness, but it is incomplete if accepted in absolute terms. Indeed, the “market” is a contingent institution, which does not exist in all known human societies and that only since industrialisation (and through the intensive activity of State’s power) has turned into the essential basis of human subsistence¹. “Supply” and “demand” do not emerge *ex nihilo*, but rather spring up from social life, as a result of the intervention of various social actors with different degrees of power and influence; among these actors, the State plays a leading role. Thus, in real terms, law not only imposes restrictions on markets but also performs a fundamental role in their creation, configuration and maintenance².

Opposing this limited, economic perspective, some academics have stressed the role of labor law in the creation, configuration and maintenance of labour markets. Among them we want to emphasize the approach of Deakin and Wilkinson³. These authors consider that the redistributing and protective roles of labor law have a positive function in the configuration of the labor market, as they correct inherent problems attached to unregulated markets and therefore promote greater social utility. So, for example, protection against dismissal of pregnant workers constitute a substantive freedom that permits effective integration of women into the labour market. This idea is combined with the concept of “*capabilities*,” borrowed from the economist Amartya Sen, so that social rights are interpreted as “institutionalised forms of capabilities which provide individuals with the means to realise the potential of their resource endowments and thereby achieve a higher level of economic functioning”⁴.

In my opinion, this theory has some limitations, principally as a result of its rhetorical function; since it is a question of *convincing* the reader that labor law and labor market are not opponents but rather complements, much emphasis is placed on considering law from an almost exclusively economic perspective. In my opinion, the view of law as an instrument for the configuration of markets and for the maximization of economic efficiency must be complemented with the consideration of other aspects of a legal, sociological or political nature. Thus, on the one hand, it should not be forgotten that labor law and social security law have the purpose of channelling social conflicts (what, of course, will probably benefit economic effectiveness and, where appropriate, productivity). On the other hand, analysis of legal reality should not fail to take political values into account and, in particular, the value of democracy; a legal system will be more democratic in so far as it involves greater controls on power. In this sense, labor law will be more democratic in so far as the channels it promotes to guide the resolution of

¹ POLANYI, K., *The great transformation: the political and economic origins of our time*, 2nd edition, Beacon Paperback ed., Boston, MA: Beacon, 2011.

² I have already defended this argument in the article “La regulación de las migraciones laborales en tiempos de crisis”, *El Cronista del Estado Social y Democrático de Derecho*, nº 2, pp. 34-35.

³ DEAKIN, S. WILKINSON, F., *The law of the labour market: industrialisation, employment and legal evolution*, Oxford University Press, Oxford, 2005.

⁴ *Ibid.*, p.347.

conflicts permit an effective limiting of the power exerted by the employer, and which is inherent in the capitalist mode of production⁵.

In any case, what I find more relevant from the approach of these authors is that they emphasize –although using other language– the *empowerment* of workers more than the *protection of workers* as an absolute value. The notion of “*protection*” could even be seen as paternalistic in nature, insofar as it considers workers as playing a passive role in defending their own interests. The key to channeling social conflict in order to democratize (within the inherent limits of the capitalist system) salaried work relationships and to maximize labor market efficiency is the *re-balancing of power* in the context of industrial relations in order to allow workers to defend personally and collectively their interests and to operate as autonomous and free individuals in the market and in the society. In this context, workers’ “*protection*” may be important, but it is a means to carry out this re-balancing of powers rather than an end in itself.

2. Everyday mobilization of labor rights

Law is a social sub-system functionally specialised in the channelling of conflicts that operates through the generalisation of expectations⁶. The legal system provides solutions or predetermined resolution schemes for conflicts that could hypothetically arise, therefore enabling conflicting parties to adjust their expectations toward these solutions.

In abstract terms, there can be several reasons for conflicting people to comply with the solutions provided by the legal system. The most obvious reason for them to abide by the rules is the eventuality of *coercion*; parties can impose on their opponents the solutions established in the legal system through resort to the State’s power, which seeks to have a monopoly on the legitimate exercise of violence and exerts that monopoly in a relative –if not absolutely– credible way.⁷ If the coercion mechanisms are effective, they do not have to be exerted directly; rather, they operate indirectly, as the recipients of the rule anticipate the possibility of the imposition of solutions, or seek to avoid the performance of the expected sanctions, and thus comply with the rule *spontaneously* in their daily life without the need for formal state intervention. Beyond coercion, in certain contexts legal rules are complied with due to the need to achieve a minimum of security in social and economic relations; people need to know what they should be doing in their dealings with others and legal regulation can provide them with some certainty, although it may also compete in this regard with another normative systems alien to the State’s power. Finally, sometimes norms are obeyed either because they have been internalized, that is, because the social players have assumed them within their own discourses and not as external orders, or because the issuing authority enjoys a certain degree of legitimacy in the community.⁸

In spite of the above observations, it is evident that in certain social contexts the failure to comply with rules is rather widespread and it goes far beyond that the emergence of isolated and occasional deviant behaviour. In effect, legal rules are not the only *reasons for action*, or the only schemes that attribute meaning to human behaviour; rather, they are competitors in the social space with other regulatory systems and with other motivations, desires and interests on the part of individuals or social groups.

⁵ In this vein, linking protection against dismissal with democratic values, BAYLOS GRAU, A., PÉREZ REY, J., *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, pp. 46-50. This entire monograph constitutes an important reference to the theme addressed in the present article.

⁶ This definition is built through Luhman and Teubner’s theories which represent law as an “autopoietic” system. I think these theories are very suggestive and can contribute some interesting ideas, but this doesn’t mean that I have assumed them with all their consequences; particularly, I consider problematic the emphasis that has been placed on the autonomy of systems, which could lead to an excessive idealisation of certain aspects of social reality that only should be viewed apart from the rest for analytical purposes.

⁷ WEBER, M., *Economía y sociedad: esbozo de sociología comprensiva*, Fondo de Cultura Económica España, Madrid, 1993 [1922]

⁸ See my discussion on the efficacy of employment law in “Una aproximación metodológica al problema de la eficacia de las normas laborales”, *Revista de Derecho Social*, nº 59, 2012, pp. 76-83.

Specifically, it must not be assumed that labor rights are brought to bear automatically because they have been formulated in the rules. These rights must be *mobilized* individually by right-holders (individual and collective actors), not only in the most critical moments of open conflict demonstration but also in the daily performance of the employment relationship⁹. The mobilization of rights not only occurs when social actors make recourse to institutional mechanisms of coercion, but also when conflicting parties refer to the law as a tool (among others) to strengthen their position in the course of the bargaining process and everyday contexts of employment relations. Certainly, when employees consider that their interests are protected by rules, they may feel especially legitimated to put pressure on the employer in defence of those interests¹⁰.

In any case, beyond this “moral” motivation, the effective binding of rights depends in the last resort on the context of power relationships within the enterprise¹¹. If power relations are highly biased towards the employer, the formal recognition of social rights lacks importance. At the same time, however, as was pointed out previously, well-designed and well-implemented labor regulations are able to produce a certain re-balancing of powers. Therefore, the efficacy (or ineffectiveness) of labor regulations with respect to the “empowerment” of workers is self-reinforcing. This means that the more balanced the powers are, the easier it will be for the labor precepts that contribute to this balance to be applied while, in so far as labor legislation is not able to achieve this empowerment effect, it will make the performance of other labour precepts more difficult, thereby amplifying the dysfunction.

For this reason, it appears appropriate to identify the essential parameters that determine to a great extent the relations of power between the parties. Insofar as labor legislation manages to impact these parameters, there will be a positive feedback effect, which will influence the efficacy of the entire system. In my opinion, these parameters are principally the following¹²:

- *The capacity of employees to organize* and the relative power of their collective avenues of representation. This parameter depends mostly on social, historical and economic factors, although it may be influenced considerably by the institutional framework designed by norms.
- *The effective functioning of the mechanisms of protection* provided by the legal system. This parameter depends nearly exclusively on institutional and legal factors, as it refers to the accessibility of institutional procedures for the protection of rights, as well as to the efficacy of these procedures and to the sanctions and remedies foreseen by the legal system. In any event, it should be taken into account that protection and coercion procedures usually require that recipients mobilize labor rights for themselves, either individually or collectively, and this is not always going to be easy if power relations are unbalanced.
- *The global cost of the termination and replacement of workers*. This parameter is at the same time made up of two elements: the economic and bureaucratic costs of a possible dismissal and the costs to replace the worker. The first of these elements depends almost exclusively on institutional and statutory factors, while the second is mainly connected to the worker’s qualifications (officially recognised or not), the job requirements and the characteristics of the available labour force.

⁹ In this regard *Vid.* ALBISTON, C.R. “Bargaining in the shadow of social institutions: competing discourses and social change in workplace mobilisation of civil rights”, *Law & Society Review*, Vol.39, nº 1, 2005, which combines theoretical reflection with an empirical examination of family leave.

¹⁰ *Ibid.*, p. 29. This motivation is increasing through informal social interaction with family, friends, colleagues or legal representatives, who encourage the employee to put “his or her rights” into play (p.27); in the case of leave, the legitimation obtained by the recognition of interests is used as well against the possible rejection by one’s colleagues (pp. 37-38).

¹¹ *Ibid.*, pp. 16, 23-25.

¹² Actually, although I refer to three main parameters, I consider that there exists a fourth –the “moral” legitimation of power structures producing labour rules and of the rules’ content. This parameter is constituted more by socio-cultural and political factors than by legal ones and in any case, its incidence in the context of enterprises orientated toward the maximization of benefits is limited. This does not imply that regulation cannot interfere with these parameters, but rather that its capacity to influence is limited.

3. Particular importance of the dismissal regulation in the “empowerment” of workers

In my opinion, dismissal regulation is the most relevant legal institution in the composition of these parameters. This is why *the dismissal regime constitutes the cornerstone of labour law*,¹³ as a statutory system directed toward the channelling of social conflict and to the maximization of the social efficiency of the labor market through the generation of expectations and the re-balancing of power relationships between employers and workers.

Apart from the nuances that might arise in every concrete situation, the inherent power imbalance of employment relations in a free-market capitalist economy derives fundamentally from the fact that salary is the only, or at least, the main livelihood or the principal source of sustenance and welfare for working people, as well as the dominant path for personal and social integration. In this context, workers' fear of losing their jobs generally constitute the employer's most important weapon in everyday employment relations. Obviously, these worries increase in a context of massive structural unemployment, even where sufficiently generous social benefits are able to partially mitigate this effect.

An employee whose employment stability is precarious in nature is reluctant to organise in conjunction with other workers, to put him or herself forward in an election of representatives, to become a member of a labor union or to exercise collective action in the defence of his or her interests or those of others in similar situations. At the same time he or she is an employee who will have difficulty mobilizing individually rights recognised in the legal system through the exercise of legal actions, registering formal complaints to administrative bodies in charge of controlling the enforcement of labour regulations, or simply defending his or her interests through everyday bargaining “in the shadow of the law”, that is, under the legitimation of rights officially stipulated by regulation. For these reasons, *dismissal regulation affects very significantly the three parameters that have been mentioned previously defining the power relationship between the parties*. Other elements affecting these parameters (business size, union traditions, the internalization and legitimation of norms, business culture, workers' qualifications and labor supply shortages) derive to a great degree from factors that less closely linked to the content of legal norms.

It should also be noted that in most cases *the termination of the employment contract is the final cost for a poorly resolved conflict inside the enterprise*. In the daily living of any productive organisation slighter or greater conflicts between employees and employers arise continuously. Pathological cases aside, this conflict is gradually channelled through permanent and daily bargaining (individual or collective) in which the parties give way or gain footing according to their power relations. In this context, the typical scenario is that the possibility of termination (both at the initiative of the employee as well as at the initiative of the employer) is always present, implicitly or explicitly, and determines decisively the equilibrium of power. Both the employers' representatives and employees know that if conflicts are not adequately resolved, they become amplified, with the final result often being that the employee is separated from the business. Therefore, the higher the cost of termination, the greater the employee's power in these everyday situations and, thus, the greater the employer's incentives to find channels for resolving such conflicts peacefully and, critically, within the business.

The importance of dismissal regulation for the equilibrium of power relations increases in the context of small and medium sized enterprises. In small enterprises there are structural reasons hindering both the existence of employees' representatives and, if they do exist, their proper functioning according to the expectations created by traditional labor unions; certainly, some partial solutions against this “representative deficit” could be considered, but the effects of these solutions are always going to be limited. Moreover, the elevated unreliability, individualization and personalization of relationships in the context of smaller enterprises means that formal resort to mechanisms of protection stipulated by the legal system is relatively limited (or completely non-existent) during the life of the employment relationship; in a small organisation, the fact of invoking a third party outside the firm to impose binding solutions often signifies a breakdown of the personal relationships that are so central to production in these types of firms.

¹³ I pursue the same idea, although with somewhat different and more developed arguments in the monograph, *Vicisitudes y extinción de la relación de trabajo en las pequeñas empresas*, CES, Madrid, 2007, pp. 329-335.

Ideological constructions of the “flexicurity” model tend to ignore the importance of dismissal regulations in the empowerment of workers. The replacement of stability by the supposed improvement of active and passive employment policies potentially undermines the re-balancing of power between the employee and the employer. There is thus a very high risk that this paradigm will be utilised to legitimise the deregulation of dismissal without seriously improving employment policies; in any event, even where the improvement is effective, some dysfunctions in power relations do occur. Undoubtedly, the fear of losing one’s job is less significant if good employment benefits are contemplated along with retraining and relocation mechanisms, but for several reasons this effect is limited.

In the first place, the efficacy of active policies depends to a high degree on the real demand for labor, which is very low if unemployment is structural and massive. Secondly, passive policies are limited by several causes, as they cannot replace completely the role of employment even in its dimension of a minimum income guarantee (and far less so for more non-material aspects). In the third place, beyond the worker’s “fear” of losing his or her job, we also have to consider the influence of regulation on the behaviour of the opposing party. If termination is the final cost of an unresolved conflict and this cost is low for the employer (because the cost has been “socialised” through public spending on active and passive measures), then most of the incentives for managing appropriately the conflict disappear and it is likely that employers’ preferred strategy will rest on an elevated involuntary job rotation. Such strategies of course affect productivity negatively and thus end up being counterproductive for overall social welfare and economic efficiency.

Discourses about the so-called Danish “flexicurity” model tend to ignore that in Denmark there are remarkably high rates of union membership and that unions are well organized. Dismissal conflicts are generally channelled through a series of relatively efficacious conflict resolution mechanisms, so that the number of arbitrary dismissals is extremely reduced and the control of managerial power is carried out principally through union intervention¹⁴.

4. Elements for the control of managerial power in the regulation of dismissal: a general critique of Spanish legislation

The control of the employer’s unilateral power through dismissal regulation is based primarily on four factors: just cause for dismissal, dismissal procedures, the consequences associated with the failure to comply with legal norms and the mechanisms for protection against unlawful managerial decisions (along with, if relevant, judicial decisions).

The cause of dismissal is the key element for controlling management’s arbitrary power over industrial relations. Thus, voices associated with employer interests frequently promote –directly or indirectly–, some kind of deregulation of the legal requirement for just cause (for example, through the “single contract of employment” approach). These proposals are justified with the argument that deregulation will increase employment rates. I consider this reasoning quite feeble in general and particularly weak in the Spanish context. In my view, this demand plays an ideological function that masks a fundamentally political matter: in so far as arbitrary dismissals are allowed, there will in practice not be any possibility to control the employer’s power within the organisation. In any case, it should be noted that the requirement of dismissal for justified grounds is derived directly from Article 35 of the Spanish Constitution (according to Constitutional jurisprudence) and Convention 158 ILO.

Logically, the stricter the regulation of just cause, the greater the power bestowed on the employee in everyday interest bargaining. However, “extremely” inflexible regulation that fails to suit business necessities could be counterproductive, as demands for flexibility would be channelled in a dysfunctional way. For dismissals on disciplinary grounds or dismissals on objective grounds stemming from the employees’ circumstances, it is essential that the legal system demand that the grounds involved be significant; small offences or worker dysfunctions should not be used to disguise dismissals pursued in reprisal for the exercise of rights and legitimate interests or that derive from poor management of

¹⁴ I explain this in greater detail “Informe sobre la regulación del despido en Europa”, *Temas Laborales*, nº 99, pp. 282-286.

employment conflict. Regarding dismissal for economic, technical, organisational or production-related grounds, the degree to which the cause may be indicated may vary, but the minimum demanded would have to be set by the effective guarantee that the job has not been subsequently recreated.

The fact that the cause is the “key element” does not deprive any relevancy to the rest of the elements, but simply means that these are largely at the service of the justified ground requirement. In fact, it could be the case that a poor regulation of the remainder of the elements makes illusory the requirement for cause.

In the Spanish legal system, the regulation of cause had been traditionally quite restrictive; this rigidity was maintained or even increased by the interpretation and implementation of juridical bodies (although this last affirmation should be contrasted with systematic, empirical evidence). However, after several labor reforms undertaken in 1994, 1997, 2010 and 2012, the standard demanded for dismissal related to economic, technical and organisational or production-related grounds has been reduced to the minimum allowed by the Spanish Constitution; there is thus no obstacle to using the figure of dismissal for legally admissible objective grounds to adapt staff volume to productive necessities within the organisation, even in contexts where enterprises are profitable. Thus, Spain can be located among those countries that, without permitting “free dismissal” on a general basis, apply a more flexible regulation to these causes. However, this relaxing of standards of cause has not been accompanied by an increase in guarantees that extinguished positions are not replaced by other employees; in my opinion, these guarantees will have to be created through judicial interpretation to avoid the fraudulent use of the institution of economic dismissal in such a way that unlawful decisions reinforcing de facto employer power are not allowed.

Dismissal on objective grounds with concurring circumstances related to the employee (sudden incapacity, justified by frequent absence, etc.) has not been much utilised by Spanish employers. Recently (Labour Reform of 2012) the regulation of some of these grounds has been changed on the employer’s side, although it is still too soon to know if this is going to involve a wider utilisation of this option. Regarding dismissal on disciplinary grounds, Spanish legislation has not experienced significant modifications since the original drafting of the *Estatuto de los Trabajadores* (Workers’ Statute); nevertheless, in this case the content of the law depends significantly on the judicial interpretation of each particular case according to the concurring circumstances, supported by the doctrine –called “Gradualist”– of the Supreme Tribunal. Beyond the polemics on this question, it would be necessary to carry out empirical research to determine if judicial interpretation of dismissal on disciplinary grounds is today inclined more towards managerial flexibility or toward employment security.

Another issue of interest is that the labour reform of 2012 has established a new contractual modality for enterprises with less than 50 employees where the termination of employment is completely free (requiring neither grounds nor procedural requirements) during the first year of the contractual relationship. During this period the prohibition of discriminatory dismissals persists formally but in all other cases management’s discretion is maximal.

The regulation of dismissal procedures can meet diverse goals, but displays clear importance in the control of managerial power. On the one hand, the promotion of adequate procedures enables a certain level of dialogue between the employer and the employee or between the employer and union representatives that can facilitate the resolution of conflicts by peaceful means, avoiding immediate recourse to unexpected or immediate dismissals that may consolidate draconian managerial power. On the other hand, the communication of dismissal to the employee stating the reasons for dismissal in writing results is essential to ensure the possibility of a subsequent judicial control of just cause.

With regard to non-collective dismissals, the procedural demands in Spain have always been very poor compared to most European countries (even in comparison to countries with more flexible regulations). In Spain, the dismissal is effective upon its mere communication to the employee, with no requirement for any previous procedure granting the employee the opportunity to defend himself or to claim arguments against the termination decision. A notice period is not required in any case of dismissal on disciplinary grounds (even in the case of openly arbitrary dismissals), while in other countries it is always obligatory except when the worker misconduct is truly serious. Therefore, there is a historical tendency in the Spanish legal system for dismissal being a managerial decision that cannot be questioned until it become effective.

Notwithstanding the foregoing, Directive 2002/14/CE (transposed literally at this point by the Spanish legislator in Article 64 of the Employees' Statute) requires dialogue with employees in order to reach an agreement before taking decisions that could prompt a fundamental breach of conditions in employment contracts; in my opinion, this previous consultation duty covers dismissals, although it should not necessarily be applied in a formal way. The effective application of this legal mandate nevertheless differs from the cultural standards actually dominant in the Spanish context, thereby making it difficult to implement.

Spanish legislation does make obligatory the communication of the employer's dismissal decision in writing, although there is a dysfunction about the legal consequences foreseen by the failure to comply with this formal requirement. For a variety of reasons, wrongful or unfair dismissal (*despido improcedente*) has been used as the normal legal channel for Spanish employers' decision to terminate the employment contract (after the labor reforms, partly by inertia), even when there is a well-justified ground. At the same time, currently, the only sanction foreseen by failure to comply with formal requirements is the wrongful qualification. Thus, when the employer is ready to acknowledge the unfair dismissal, either because there is not cause or because the small compensation for unfair dismissal is less costly than the judicial review of the cause, he or she hasn't the slightest incentive to obey formal requirements, because the failure to comply does not involve any legal consequence which differs from the qualification of wrongful dismissal. In the same way, verbal and even unspoken dismissals are encouraged. In many cases, this can cause defencelessness for employees since the employee has 20 days to contest the dismissal from the moment that the employee receives management's notice. Thus, an employee could appeal a dismissal too late because he did not adequately interpret a series of employer actions that subsequently could be considered by the judicial courts as indicative of the employer's will to terminate the contract of employment.

With regard to collective redundancy, the Spanish tradition had an established *ex ante* procedure for administrative control that is unusual in comparative terms. After the labour reform of 2012, however, the necessity for administrative authorisation has disappeared. At this time, procedural demands for collective dismissals are situated broadly in the minimum established by EU Directive.

Regulation of the legal consequences for failure to comply with obligations is critical for ensuring just cause in dismissal and, therefore, the effective prohibition of employers' arbitrary actions. The Spanish system has explicitly chosen to free employers who use their power of termination unlawfully from administrative or criminal responsibility. Although in labor law many minor infractions have been considered to be questions of "public order" worthy of administrative sanction, in the case of dismissal, the only effective control is legal action by the affected worker with the objective of obtaining reinstatement or compensation for the damages suffered. Administrative sanctions do exist for failures to comply with obligations regarding temporary employment; however, for one or another reason, these have not shown efficacy in preventing fraud.

Regarding the contractual consequences of unfair or wrongful dismissal, European doctrine distinguishes between *effective protection* (*tutela reale* in Italian), which implies reinstatement, and *mandatory protection* (*tutela obbligatoria*), which signifies the establishment of economic compensation. From a purely abstract perspective, effective protection seems a more appropriate channel for ensuring the requirement of just cause for dismissal. This is why many lawyers, especially those most committed to defending and advancing the interests of employees, advocate this form of protection. In practice, however, on numerous occasions the purity of legal principles contrasts harshly with economic and social reality, which makes reinstatement impossible or undesirable even for employees. For this reason, countries in which reinstatement is officially contemplated, frequently end up in practice converting the compulsory act of reinstatement into an economic compensation¹⁵; thus, the true role of 'reinstatement' is to reinforce the employee's position in negotiations over the level of monetary compensation for dismissal.

In Spain, reinstatement is formally applicable as a general rule of the legal system, although in fact it is never applied, with the exception the Public Administration and perhaps in larger enterprises.

¹⁵ I come to this conclusion in the "Informe sobre la regulación ...", Op. Cit., p. 292 (summarising practice in different countries).

With what is in my view a paternalistic perspective, our legal system conceives reinstatement as the most desirable option for employees (without being relevant the employee's opinion), while at the same time it allows, in practice, what has come to be called "at will compensated dismissal". This illusory and incoherent regulation generates several dysfunctions.

First of all, the employee who contests a dismissal *cannot apply for a remedy other than reinstatement*; he or she is a "passive victim" of unlawful conduct whose interest is protected without bearing his or her preferences in mind¹⁶. If the dismissal is qualified as wrongful and the employee is not a representative, the choice between reinstatement or compensation rests exclusively with the employer. Thus, in most cases where the employer opts for readmission, this is done in order to put pressure on the employee who does not desire to be re-employed (because the relationship has deteriorated in a small enterprise, because he or she fears being the victim of harassment, or because he or she has found another job...) so that the worker ends up resigning without obtaining the corresponding compensation. It goes without saying that this "employer empowerment" scarcely favors the peaceful channelling of conflicts in enterprises. It would be more logical that in cases of wrongful dismissal the contractual relation could only continue to exist if both parties were to agree; otherwise reinstatement should be replaced with a payment sufficient to compensate the damage caused and to discourage future arbitrary dismissals.

In the event that dismissal is qualified as null and void, the employee must be reinstated even if he or she does not want to continue in the position. This situation is not difficult to imagine, given that in many of these cases the employer has infringed the employee's fundamental rights. Article 286.2 of the *Ley de la Jurisdicción Social* (procedural law for Labor Courts) lets the employee opt for compensation when the dismissal is voided due to sexual harassment or harassment related to the victim's gender, but this exception does not apply to the other dismissal cases declared null and void. It is only logical that the employee should be able to decide between reinstatement and compensation for the unlawful job loss. In practice, once again, the employee can use the power that the compulsory reinstatement gives to him to agree on a relatively high compensation, but it does not seem that this is an appropriate way to peacefully channel conflicts in the employment context.

Secondly, the false predominance of the possibility of reinstatement in the law gives rise to procedural problems generated by rules intended to make this mandatory protection effective. The employee has only 20 days to take legal proceedings against dismissals, instead of the deadline of one year that works as a general rule; this makes sense if the employee intends to seek reinstatement, but it lacks justification if what is sought by the employee is solely financial compensation. On the other hand, it is very possible that the consideration of reinstatement influenced the traditional prohibition of an accumulation of dismissal claims with any others, regardless of whether the employment relation's termination coincides with legitimate claims for other rights at the same time. The new *Ley de la Jurisdicción Social* extenuates significantly this prohibition of accumulation. Finally, in cases of wrongful dismissal, when the employer does not acknowledge compensation within a period of 5 days, it is automatically considered that he or she has chosen reinstatement, which hardly coincides with reality and thus imposes an unnecessary procedure for executing the court's decision.

In the third place, this symbolical emphasis on an illusory reinstatement obscures the weakness of compensation regulation. In most countries, the courts have a certain legal margin to determine the compensation amount on a case-by-case basis, although caps are often established. In the Spanish legal system, compensation for wrongful dismissal depends exclusively on wages and seniority and not on other factors like the firm's economic capacity, the degree of arbitrariness of the employer's decision, the behaviour of the parties during the conflict and during the process, etc. Today, after the 2012 Reform, the general right of perceiving 45 days' pay per each year of service up to a maximum of 42 months' salary has been decreased to 33 days' pay per year of service up to a maximum 24 months' salary. At the same time, the so-called "procedural wages" have completely disappeared if the employer opts for the severance payment. At the same time, severance payments are established for dismissals with legally admissible objective grounds that are also linked to wages and seniority (so that "the cost of the unlaw-

¹⁶ Vid., FERNÁNDEZ LÓPEZ, M^aF., "La ejecución forzosa de las sentencias dictadas en los procesos por despido", RL-I-1991, p. 214.

fulness” to employers is constituted by the difference between these two amounts). Finally, the legal sanction that is applicable to the termination of a fraudulent fixed term contract is the presumption that the contract of employment is permanent and the termination as wrongful dismissal; the protection in strictly legal terms is exactly the same.

In this context, the “*despido improcedente*” (wrongful or unfair dismissal) has become the normal channel for the unilateral termination of employment contracts, even when there is a cause. The corresponding compensation, totally predictable, is considered by Spanish employers as the economic cost of a normal management decision and not as the sanction for an illicit one. This explains employer pressures for reductions of wrongful dismissal compensation, leading to progressive reductions in employees’ protection against arbitrary decisions.

As a consequence, in the Spanish system it is the seniority of the employee and not the “just cause of dismissal” that is the relevant element to determine the protection against dismissal and, thus, the effectiveness of the entire content of labor law in the everyday mobilization of labor rights. This causes serious dysfunctions in extent to which labor law achieves its purpose of worker “empowerment”, reproducing labor market segmentation, which is not exclusively determined by the fixed term contracts, but rather by the employee’s seniority in the enterprise. While there are a good number of employees who are unprotected –to different degrees– from managerial arbitrariness, there may well be a core of long-standing “excessively protected” workers; as a result, precarious workers suffer to a large degree employer demands for flexibility. Incessant employer demands aimed at the de-regulation of the cause for dismissal and the reduction of wrongful or unfair dismissal compensation are progressively decreasing veteran workers’ protection, but, at the same time, these changes are making even more precarious the situation of those workers without seniority, who are in a more vulnerable position.

5. Conclusions

Labor and social security law cannot be seen solely as a variety of external disruptions to the functioning of the labour market, but rather must also be seen as having a constitutive role in the configuration of the market, typically with a goal of trying to reconcile market efficacy with the satisfaction of the economic necessities of society. This latter outcome is principally achieved through the *empowerment* of workers.

With some nuances, the principal channel through which labour law can influence the re-balancing of powers between employees and employers is dismissal regulation, which is the most important part of labor legislation.

Spanish legislation establishes a system officially based on a just cause for dismissal requirement where reinstatement is symbolically claimed as the main remedy for unlawful dismissal; nevertheless, in practice, it constitutes a system of “mandatory protection” that rests on employees’ seniority more than on just cause for dismissal. This means that a large number of employees do not enjoy the protections afforded by labour rules in everyday bargaining surrounding their interests. Moreover, this reality has contributed toward the consolidation of employer strategies that are detrimental for productivity.

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