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ARTICLES

Labour market segmentation in Spain: is legislation leading to a reduction in duality?

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Abstract: In the last decades, the Spanish legislature has expressed its concern regarding the negative impact of the existing duality in its national labour market. Many of the employment Acts adopted in the last few years specifically mention this problem in their preambles.

In order to analyse the effectiveness of the measures adopted about this question it is necessary to highlight the two different ways to approach the problem of duality. On the one hand, the existing duality could be reduced by making the access to temporary contracts of employment harder (reducing the number and the possibilities of temporary contracts and increasing the labour cost of these contracts) On the other hand, protection to open-ended contracts could be loosened so that differences of protection in both kind of contracts would be shortened. For some years the focus was on reducing hiring flexibility. Since the economic crisis of 2008, and in accordance with the recommendations of the European Council, initiatives to combat the duality of the Spanish labour market have affected firing flexibility. This paper studies the effectiveness and consequences of those policies.

Keywords: duality and segmentation, hiring flexibility, firing flexibility, labour law reforms.

1. The duality between temporary workers and permanent workers. The causes

For the past thirty years, the Spanish labour market has been highly segmented and there has been considerable duality between temporary and permanent workers. This has become a special feature of Spain's labour market¹, that is, *a structural element of Spanish labour relations*².

According to Eurostat (the European Statistics Agency), for many years now, Spain has been the country with the highest rate of temporary employment, at its highest in 2006 when it reached 34%. Since 2009, Spain has only been substituted by Poland in first place for having the highest temporality rate of all European countries. In 2014, the percentage of temporary workers in Spain reached 24%, the second highest in the European Union in terms of temporality, only following Poland (28.4%).

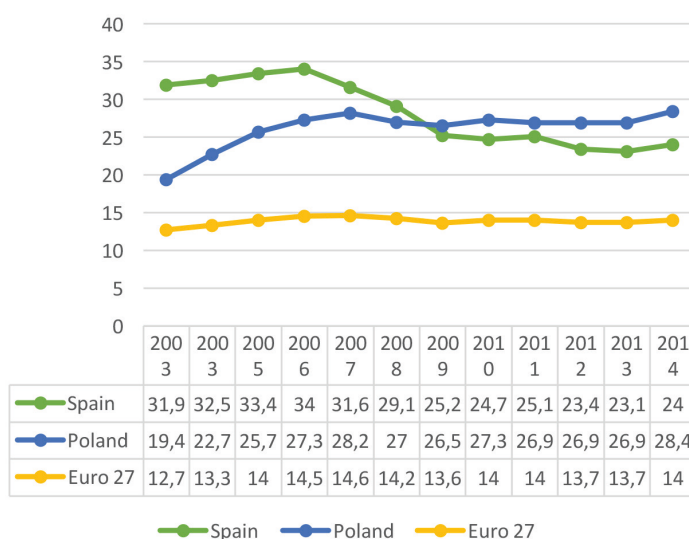
Therefore, it is remarkable that over the past twelve years, the evolution of the temporary employment rate has risen from 2003 (31.9%) until 2006 (34%), with a steady decline occurring from that year onwards, although some rises did take place in 2011 and 2014.

As a result of the high levels of labour market segmentation –permanent vs temporary workers– and the excessive turnover of the temporary appointment, there have been negative effects on

¹ Commission Staff Working Document (2015, 40).

² ESCUDERO RODRÍGUEZ, R. (1997, 208).

Temporary employment rate. Source: Eurostat



productivity³, competitiveness and proper functioning of companies, which have been detrimental to both companies and workers⁴. These negative effects have even affected the social protection systems⁵.

Therefore, Spanish lawmakers have long shown an increasing interest in tackling these excessive temporality rates in the labour market. However, the legal measures adopted by Spanish law have not succeeded in diminishing the segmentation of the Spanish labour market, and therefore, concerns have been raised regarding the strength of lawmakers’ intent to fight temporality⁶.

Indeed, the decrease in the temporality rate since 2007 appears to have been the result of the readjustment of staff as a consequence of the crisis, rather than from the measures proposed by lawmakers to fight this excessive temporality⁷. This is clearly seen in the previously mentioned statistical data which reveals a rise in the temporality rate in 2014, after the impact of the economic crisis in Spain had a seemingly reduced effect.

The pressure of social agents on the need to encourage permanent hiring as well as the appropriate use of temporary hiring does not appear to have been useful in reducing the rate of labour temporality⁸.

It is also important to note that the causes of this excessive temporality in labour hiring are many and varied. On the one hand, there is the productive structure in a country with a strong presence of certain activity sectors –such as tourism– with the burden of seasonality⁹ (a). On the other hand, there is a

³ 11th clause of Recommendation for a Council Recommendation on the 2015 National Reform Programme of Spain and delivering a Council opinion on the 2015 Stability Programme of Spain. Brussels 13.5.2015. COM(2015) 259 final.

⁴ *Acuerdo Interconfederal para la Estabilidad del Empleo* 7.4.1997.

⁵ Preamble of *Real Decreto-ley* 8/1997 (later Ley 63/1997).

⁶ In the past, academics have drawn attention to the contradiction between the theoretical approach of the temporality problem on behalf of lawmakers and the specific measures that have later been put into effect. See BAYLOS GRAU (1993) on this issue, in regards to the process of labour reforms started in 1992. In relation to the legal reforms introduced in 2010: CAMPS RUIZ (2010, 15) In relation to the legal reforms introduced in 2012 (RODRÍGUEZ PIÑERO *et al.*, 2012, 4).

⁷ FUNDACIÓN SAGARDOY (2013, 20 and 21).

⁸ The last official document pointing out the need to reduce the excessive temporality is the *II Acuerdo para el Empleo y la Negociación Colectiva 2012, 2013 y 2014* (BOE 30.1.2012). Agreement related to Emploment and Collective Bargaining signed on 25.1.2012 by social counterparts: Confederación Española de Organizaciones Empresariales (CEOE) and Confederación Española de la Pequeña y Mediana Empresa (CEPYME) representing employer’s associations; and Comisiones Obreras (CCOO) and Unión General de Trabajadores (UGT) representing trade unions. In similar terms, the first Agreement on Collective Bargaining (BOE 6.6.1997) pointed out the negative effects of high levels of temporary contracts in the Spanish labour market.

⁹ Commission Staff Working Document (2015, 40). This report says that if high levels of labour market segmentation in Spain continue to hold the country back, it is due in part to the persistent macroeconomic uncertainty. However, the current high rate of temporary contracts even during periods of economic growth –reaching the highest percentage in 2006– does not support this conclusion.

presence of a great unjustified temporary labour exchange, stemming from the strong temporary culture existing amongst the Spanish employers (b).

- a) The growing importance of the tertiary sector in the Spanish economy. Although it is true that the seasonal nature, as a main feature of the services sector, can affect the percentage of temporality, the fact is, this circumstance alone does not seem to explain the segmentation of the labour market¹⁰.
- b) What may be defined as an “entrepreneurs’ culture of labour temporality” has gradually been established over the last four decades, particularly since 1984, when priority was given to temporal hiring as a tool to promote employment¹¹. This measure was taken in order to fight the high unemployment rates existing in Spain at that time, as a result of the contemporary economic crisis. Temporary contracts for employment promotion became widespread ever since that year. This type of temporary contracts was made without a justified cause and they were soon favoured by employers¹², thus helping to perpetuate the culture of precariousness among Spanish employers. Therefore, when the law has restricted access to this type of contract, Spanish employers have not hesitated to maintain the temporary hiring practice even though it goes against legal norms (so, in *fraus legis*¹³)¹⁴.

Aside from these two aforementioned factors, it is necessary to add the effects that the position adopted by lawmakers, social agents and the Courts themselves have had on temporary hiring on this reality. Lawmakers have revealed a lukewarm temper when addressing the problem of temporality (BAYLOS GRAU, 1993; CAMPS RUIZ, 2010, 19). Social agents, when negotiating collective agreements, have excessively stretched the legal frameworks, and have permitted abusive temporary hiring practices¹⁵ (LÓPEZ GANDÍA, 1997, 84; ESCUDERO RODRÍGUEZ, 1997, 226) Finally, the Court’s decisions have encouraged the increase of temporality, by allowing, for instance, the temporary hiring of workers by suppliers in the case of outsourcing (FITA ORTEGA, 2005, 1352).

2. Measures adopted to overcome the segmentation of the Spanish labour market

Theoretically there are two possibilities for reducing the temporality rates. On the one hand, there is the reduction of hiring flexibility by toughening the limits applied to temporary hiring (2.1). On the

¹⁰ The fact that Spanish enterprises are not competing in quality but rather, in costs, may have an even stronger impact on the temporality rate than the importance of the services sector in the Spanish economic model. PEDRAJAS MORENO *et al.* (2006, 81).

¹¹ The so-called temporary contracts without an objective reason.

¹² The favourable employer’s reception to this type of hiring stems from different causes: It is an instrument of external flexibility that permits the easy adaptation of the staff to the company’s circumstances, therefore avoiding the “rigid” safeguarding that concerns an indefinite employment contract (the extinction of which entails greater procedural obstacles and a higher economic cost). It represents more worker dependence and subordination to the employers’ managerial power, as a result of the increased lack of employee stability caused by the temporary feature of their contracts. Finally, the temporary workers’ group reveals lower rates of Union membership as compared to the group of workers with indefinite employment contracts. To learn about some of these reasons, *vid.* ESCUDERO RODRÍGUEZ (1997, 214 and 215).

¹³ Defined as a maneuver tending to escape the scope of application of a given law in order to integrate the scope of application of another law regarded as more favourable. In this case, escaping from the law applicable to indefinite employment contracts and replacing it by the law applicable to temporary contracts.

¹⁴ ESCUDERO RODRÍGUEZ (1997, 223, 224 and 241) CAMPS RUIZ (2010, 17) Even in the Preamble of Ley 35/2010, it is assumed that there is an increase in unjustified use of temporary contracts.

¹⁵ The inadequate use of the collective bargaining is implicitly considered in the “II Acuerdo para el Empleo y la Negociación Colectiva 2012, 2013 y 2014”. In order to contribute to the reduction of the excessive number of temporary contracts, this document asserts that collective agreements must *encourage the adequate use of the contractual modalities in such a way that the permanent needs of a company be accomplished with indefinite-term employment contracts and the short-term requirements, when these exist, may be attended to with causal temporary contracts, directly or by means of temporary agencies*. It finishes by pointing out that collective agreements must not introduce drafts or agreements that denaturalize the legally foreseen causes of temporary employment contracts (Estatuto de los Trabajadores).

other hand, there is the introduction of flexibility to the indefinite employment contracts in order to make them more appealing from an employers' point of view (which basically means reducing the costs of dismissal –firing flexibility– and cutting social security costs) (2.2). Given that the extinctive conveniences (in terms of procedure and costs) inherent to temporary contracts represent one of the factors that encourages these contractual formulas, the need to reduce the rigidity to dismiss in the indefinite employment contracts has been argued so that employers do not perceive stability as an obstacle.

These options are not mutually exclusive but can, on the contrary, be combined to also achieve the goal of reducing the temporality rate. This would involve the combination of lower hiring flexibility with higher firing flexibility for indefinite employment contracts such that by fighting the pathologic temporality –the one not justified by objective reasons– the required flexibility that allows employers to weaken the bond with the worker is not lost.

2.1 Reducing hiring flexibility. The measures adopted by Spanish lawmakers since the 1990's with the purpose of fighting the duality of the Spanish labour market and slowing down the excessive temporality rate existing in Spain, were initially focused on increasing the limits of temporary hiring by establishing mechanisms to make the temporary contract option –in theory– less interesting for employers.

Hence, and with the goal of promoting objective reasons for temporary hiring:

- 1º) The number of temporary employment contracts available was reduced. This reduction affected the temporary contracts with objective reasons (eliminating the *contrato para el lanzamiento de nueva actividad*¹⁶) as well as the temporary contracts without objective reasons¹⁷ (reducing the possibilities to enter into this contract just by limiting the group of people to whom this contract was address to¹⁸).
- 2º) The costs of temporary employment contracts were increased. This was achieved by two means: increasing social contributions, as a penalization for some temporary contracts¹⁹; and establishing an indemnity when the contract expired –which affected, basically, the two categories of contracts that were most often used by Spanish employers (*contrato de obra o servicio* and *contrato eventual*) often in *fraus legis*–²⁰.
- 3º) The option to reduce Social Security costs in the case of temporary employment contracts was significantly reduced. This option remained almost exclusively devoted to encouraging stable employment.

These restrictive measures of hiring flexibility were largely driven by the need to incorporate Council Directive 1999/70/EC on fixed-term work, whose purpose, according to clause 1, has a dual nature: a) To improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. b) To establish a framework to prevent abuses arising from the use of successive fixed-term employment contracts or relationships.

This Directive declares: “To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no

¹⁶ This contract was intended to help companies begin a new activity, offering them the opportunity of temporary hiring when opening a business or launching a new activity in the existing business.

¹⁷ Those aimed at job creation.

¹⁸ So that for a period of time (from 1997 to 2007) only disabled workers could enter into this contract. With Ley 44/2007 a new group of persons was added (people at risk of social exclusion and only if hired by enterprises searching for social inclusion)

¹⁹ Since Ley 49/1998 the percentage for calculating employers' contributions for unemployment benefits rose from 7.8 (in the case of indefinite contracts) to 8.3 (in the case of temporary contracts). By Ley 12/2001 the percentage for calculating contributions for common (non-professional) accidents or illnesses in the case of temporary contracts having a duration of less than seven days suffered an increase of 36%. Differences in this cost increased later, when social contributions were reduced in the case of indefinite contracts by different laws (like *Real Decreto-ley 5/2006*) in order to promote a stable employment (reaching 7.05 –instead of 7.8– nowadays).

²⁰ *Real Decreto-ley 5/2001* (later Ley 12/2001). The amount of the compensation, originally 8 days per year of service, has been progressively increased since 2012 to 12 days per year of service in 2015.

equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures²¹:

- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) the maximum total duration of successive fixed-term employment contracts or relationships;
- (c) the number of renewals of such contracts or relationships”

Based on the parameters established in that Directive, and aimed at countering the existing abuses in temporary hirings, Spanish lawmakers introduced three new limits to temporary hiring: a limit in the number of renewals for some temporary contracts²²; a maximum total duration for the *contrato de obra o servicio*²³; and a limit to the succession of temporary contracts with the same worker in his/her organization²⁴. However, the limits to the succession of temporary contracts with different workers to occupy the same post in an organization were left in the hands of the collective agreements.

However, as a consequence of the economic crisis, this last mechanism (established in Article 15.5 of the *Estatuto de los Trabajadores*) was put on hold for two years, in order to encourage recruitment²⁵. The *Real Decreto-ley* 10/2011 providing such a withdrawal, in its Preamble, asserted that the limits for the succession of temporary contracts with the same worker in his/her organization established in 2006, in a period of economic expansion adequate to encourage employment stability, would be counterproductive at a time of crisis. It was pointed out that, in a situation of economic crisis, *the rule, far from encouraging permanent hiring, may cause undesired effects for the renewal of temporary contracts, and may negatively affect the maintenance of employment.*

Eventually, in an attempt to reduce temporality rates, the focus has been on establishing some limits to precariousness in companies, demanding either a minimum number of permanent contracts or a maximum number of temporary contracts. Some examples of these measures, which are referred in the mentioned “II Acuerdo para el Empleo y la Negociación Colectiva 2012, 2013 y 2014”²⁶, may be found in:

- Ley 14/1994 which regulates the temporary-work agencies. This norm demands, since 1999²⁷, that temporary-work agencies must have a minimum number of permanent-contract workers in their staff (12 workers per thousand temporary agency workers²⁸ hired in the previous year)
- 32/2006, regulating subcontracting in the building sector, introduced the obligation to count a percentage of stable personnel (with indefinite employment contracts), at no less than 30%, for those companies willing to subcontract works or services in this activity sector (This demand was applied gradually over time: 10 per cent during the first eighteen months as of the law’s entry into enforcement; 20 per cent during the nineteenth to the thirty-sixth month; 30 per cent from the thirty-seventh month included)

²¹ According to article 2, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 July 1999, or shall ensure that, by that date at the latest, management and labour have introduced the necessary measures by agreement, being, the Member States, required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive.

²² The *Real Decreto-ley* 5/2001 established that the *contratos eventuales* signed for a lesser duration with respect to their maximum duration (generally 6 months) could only be renewed once. On the other hand, the *Ley* 3/2012 limited the possible renewals of the apprenticeship contracts to two.

²³ Three years, although expandable to twelve additional months by sectorial collective agreement (measure introduced by the *Real Decreto-ley* 10/2010).

²⁴ 24 months in a 30-month period, regardless of whether they have been working providing services directly to the company or through a temporary agency with the same or a different type of fixed-term contract. In any case, it is important to highlight that this limitation is not applicable to some contracts, like formative contracts or interim contracts (measure introduced in the *Real Decreto-ley* 5/2006).

²⁵ *Real Decreto-ley* 3/2012 shortened the period of suspension of this measure, which became effective again since January 1, 2013.

²⁶ This agreement, as another measure directed to bring down employment temporality, establishes that the possibility or convenience to determine the global volume of temporary contracts is analyzed in the collective agreements.

²⁷ Since *Ley* 29/1999.

²⁸ Workers with an employment contract or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction (article 3.1.c of Directive 2008/104/EC on temporary agency work).

As for the determination of a maximum number of temporary contracts in the company's staff, this kind of measure has been tested in Spain with formative contracts: from the *Real Decreto-ley* 18/1993 a maximum limit for apprenticeship contracts was established²⁹. However, since 2011 with the *Real Decreto-ley* 10/2011, this limit has disappeared.

2.2 Greater firing flexibility. In addition to the measures adopted to restrain hiring flexibility, other measures have been taken in order to reduce temporary rates by intensifying firing flexibility in the Spanish employment legislation³⁰. Those have aimed at bringing down the cost and simplifying the extinctive procedures provided for in the Spanish regulation with the declared intention of fighting the Spanish labour market duality³¹.

It is common to state that *strict employment protection legislation often encourages recourse to a range of temporary contracts with low protection —often held by women and young people— with limited progress into open-ended jobs. The result is segmentation of the labour market*³².

In Spain the “strict” protection against dismissal is identified with the need to pay the worker an indemnity in cases of wrongful dismissal—in some cases, even when declared a fair dismissal—. So it has been argued that the high cost of compensation for firing provides a clearly dissuasive effect to hiring workers with permanent employment contracts³³.

To redress this situation, the cost of dismissals has been reduced since 1997³⁴, the year when the red line on the cost of dismissals that Trade Unions considered insurmountable was crossed for the first time³⁵. In 1997, the so-called *contract for encouraging indefinite hiring* was introduced. This contract was established in the interest of fighting the high temporality rates and promoting stable employment for ever increasing groups of people³⁶. Its distinctive feature consisted of a reduced indemnity in cases of objective dismissal—those dismissals not related to the worker's behaviour and his/her compliance with the basic labour obligations—. In these cases, if the dismissal was declared wrongful, the indemnity was reduced from 45 days' salary per year of service with a maximum of 42 months of salary to 33 days of salary per year of service (with a maximum of 24 months of salary).

The inefficiency of this type of contract to effectively achieve its goal of fostering stable employment was recognized by the Government in 2010. In order to promote an increased use of this type of contracts, the option was to significantly widen the group of individuals to whom it was directed³⁷.

Moreover, in order to increase the number of indefinite employment contracts (not only of the *contrato para el fomento de la contratación indefinida*, but also of the whole set of indefinite contracts) in 2010 new legislation reduced costs of objective dismissals³⁸ in case of open-ended employment con-

²⁹ In the beginning, that limit was established by decree according to the number of workers in a company. Later—after the *Real Decreto-ley* 8/1997—the legal limit was only effective in case of no limitation assigned by a collective agreement.

³⁰ For a more detailed presentation of the evolution of dismissals regulation since 2010, see MANEIRO VÁZQUEZ (2014)

³¹ In that sense, see Preamble of *Real Decreto-ley* 3/2012, point V. In other occasions it was not expressly stated in the Preambles of the regulations that the changes on dismissals and redundancies regulation were directed to the fight against labour precariousness and segmentation. For instance, the *Real Decreto-ley* 8/1997 that introduced the *contrato de fomento de la contratación indefinida* as a tool addressed to fight in a decisive and urgent way against labour precariousness and the high turnover of contracts. Or, for example, *Real Decreto-ley* 10/2010, which includes some reforms on the termination of contracts within the measures adopted to reduce duality and temporality in the labour market.

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, Brussels, 27.6.2007. COM (2007) 359 final, p. 6.

³³ See BLASCO PELLICER (2010, p 57).

³⁴ *Real Decreto-ley* 8/1997.

³⁵ In fact, making dismissals less costly was the real and transcendental aspect of the reform of 1997. RODRÍGUEZ PIÑERO (1997, p. 81).

³⁶ Such groups were expanded—always with the purpose of encouraging the use of this contract of employment—at first with the *Ley* 12/2001, later with the *Real Decreto-ley* 10/2010 and, finally, with the *Ley* 35/2010. After this last norm, only the unemployed males between 16 and 30 years of age, who had not been in a situation of unemployment for more than a month or were unsuitable to enter into this contract, (in case of women in such a circumstances, they could enter into this contract if they were hired to work in professions or activities with a lesser rate of female employment) were affected.

³⁷ *Real Decreto-ley* 10/2010.

³⁸ Not related to worker's behavior, but to other causes such as ineptitude, absenteeism, or economical, technical, organizational or productive causes.

tracts. It is remarkable that in this case the reduction of the indemnity for the employer did not mean lower compensation for the worker, since a public entity –the *Fondo de Garantía Salarial*³⁹– assumed the difference. That way, the maintenance of the workers' rights and the reduction of costs related to dismissal were combined⁴⁰.

The *Real Decreto-ley 3/2012* put an end to the two above-mentioned mechanisms and made a qualitative leap in the use of firing flexibility as an instrument for boosting employment and reducing duality in the labour market. In this sense, it must be taken into account that the suppression of the *contrato de fomento de la contratación indefinida* was not a result of the renouncement of reducing the cost of dismissals as an incentive towards indefinite employment contracts. On the contrary, this contract lost its interest because of the generalization of the reduction of the legal compensation in case of wrongful dismissals⁴¹ that was widened to all types of contracts (temporary or indefinite-term) regardless of the motives of the dismissal (objective or disciplinary reasons)⁴².

Furthermore, this *Real Decreto-ley 3/2012* introduced⁴³ a new contract (the *contrato de trabajo por tiempo indefinido de apoyo a los emprendedores*) which aims to foster stable employment. This contract of employment is addressed to companies with less than 50 workers⁴⁴, and tries to persuade employers to engage under indefinite employment contracts in the same two ways as with the *contrato para el fomento de la contratación indefinida*: using the traditional mechanism of reducing employer's Social Security contributions; and reducing costs of the termination of the contract. However, with this new contract, this second way has become more relevant. Indeed, the particularity of this contract relies on the regulation of the probationary period –during which the contract can be terminated without an objective cause, without previous notice and, more relevantly, without having to pay any compensation to the worker–. In this contract, the probationary period lasts one year regardless of the complexity of the activity to be carried out, whereas in the general legal regulation of the institution, its length is shorter and depends on the workers' skills that are to be evaluated by the employer (six months in case of technical personnel and two months for other personnel⁴⁵).

Hence, consequently, the option of firing flexibility as an instrument to encourage employment and reduce the duality and segmentation of the Spanish labour market has been clearly intensified in 2012.

Nevertheless, the Spanish Courts have objected to the legality of some of these measures, as the one just mentioned regarding the *contrato de trabajo por tiempo indefinido de apoyo a los emprendedores*⁴⁶. In some cases tribunals have considered that this contract is contrary to the European Social Charter of 1961⁴⁷, quoting the Decision on the Merits of the European Committee of Social Rights of 23.5.2012 (complaint 65/2011)⁴⁸. In any case, the Spanish Constitutional Court has understood that this contract respects Spanish constitutional rights without considering whether it respects the rights recognized by the European Social Charter⁴⁹ or not.

³⁹ A public entity financed through employers' contributions.

⁴⁰ This measure disappeared with *Real Decreto-ley 3/2012*.

⁴¹ LÓPEZ TERRADA (2012, 20).

⁴² Among the measures contained in Chapter IV of *Real Decreto-ley 3/2012* (entitled 'Measures to encourage the efficiency of the labour market and reduce labour duality'), along with other measures targeted to facilitate extinctions for objective causes, the indemnity decrease in case of wrongful dismissal could be found.

⁴³ In its Chapter II entitled "Promotion of the Indefinite Hiring and other Measures to Foster Employment.

⁴⁴ According to data provided by *Real Decreto-ley 3/2012* in its Preamble, enterprises of 50 or less employees represent the 99,23% of Spanish enterprises.

⁴⁵ But in the case of enterprises with less than 25 workers the length is three months for non-technical personnel.

⁴⁶ Not only Courts, but academics have also expressed their concerns about the disrespect of international rules introduced by this set of measures. LÓPEZ LÓPEZ (2012, 37) PÉREZ REY (2012, 60) RODRÍGUEZ PIÑERO *et al* (2012, 17 and 18) LÓPEZ TERRADA (2012, 38) SALCEDO BELTRÁN (2013, 93-122).

⁴⁷ Judgment of the Juzgado de lo Social of Barcelona n° 412/2013, 19.11.2013.

⁴⁸ In its decision, the European Committee of Social Rights confirmed that Greek legislation stipulating that employment contracts of indefinite duration, considered in probationary employment period –could be terminated without notice and severance pay unless otherwise agreed by the parties– for the first 12 months as of the date of entry into force, was in violation of Article 4, par. 4 of the European Social Charter (which recognizes the right of all workers to a reasonable period of notice for employment termination).

⁴⁹ Judgments of the *Tribunal Constitucional* n°. 119/2014, 16.7.2014 and n°. 8/2015, 22.1.2015.

3. Some incongruent actions related to the declared policy against segmentation and duality

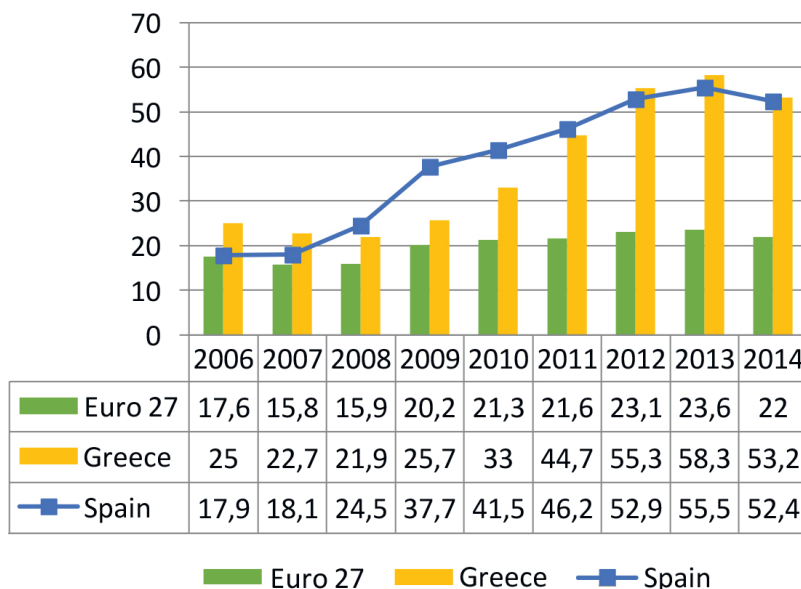
Once the Spanish lawmakers' actions, devoted to fighting the duality and segmentation of the labour market, have been exposed, it is important to analyze other measures which could be considered incongruent with the ultimate purpose of promoting stable employment. Such measures affect both hiring flexibility (3.1) and firing flexibility (3.2).

3.1. In relation to hiring flexibility. A renewed policy regarding temporary employment contracts may be seen as a key tool to foster employment in two ways. One way is the creation of new fixed-term contracts and the other is the consolidation of existing temporary contracts as mechanisms of employment promotion.

a) *New fixed-term contracts.* Since one of the first initiatives adopted in the field of hiring flexibility was to reduce the number of temporary contracts –with or without an objective cause–, the introduction of new forms of temporary contracts, although aimed at encouraging employment, may be inconsistent with this measure.

This argument may lead to more inconsistencies if these new contracts are established based on a legal text whose declared purpose consists of reinforcing the principle of employment stability. This was the case with *Real Decreto-ley 5/2001* which introduced a new temporary contract –allegedly for objective causes⁵⁰–: the so-called *contrato de inserción*⁵¹.

Despite these considerations, new temporary employment contracts have recently been introduced into Spanish labour legislation in order to alleviate the high rates of unemployment, especially among young people. Because of the last economic crisis and its impact on this vulnerable group, several actions have been adopted to overcome the rates of youth employment, even though those actions have not impacted the segmentation of the Spanish labour market.



Unemployment rate of young people (under 25).
Source: Eurostat.

⁵⁰ The aim of this contract was to carry out a service or task of general or social interest as a way to acquire job experience and to improve the employability of the unemployed person entering this contract. It was not required that the service or activity carried out should have autonomy or substantivity, as it happens in the similar contract –this one purely objective as it addresses to attend temporary needs– regulated in article 15.1.a of the *Estatuto de los Trabajadores*.

⁵¹ This contract was disappeared with *Real Decreto-ley 5/2006* as it did not fulfill the expectations and objectives for which it was created.

According to Eurostat data, the unemployment percentage of young people under 25 years of age has almost tripled in Spain since 2008, competing with Greece for the dubious honour of having the highest rate of unemployment (including youth unemployment) in the European Union⁵².

Within this context, a new modality of temporary contract without an objective cause was introduced in the Spanish labour legislation in 2013⁵³: the *primer empleo joven* contract. This contract has a 3-month minimum duration and a 6-month maximum duration (extendable to a maximum of 12 months through a collective agreement) and is intended to encourage the employment of unemployed young people –under 30– having limited (less than three months) or no work experience.

b) *The consolidation of temporary contracts as a mechanism to boost employment.* The actions intended to encourage youth employment have not been limited to the introduction of the abovementioned contract. The legal system of formative contracts⁵⁴ has also been modified, especially the apprenticeship contract, which has been increasingly seen as an instrument to foster employment⁵⁵. Indeed, if the initial purpose of this contract was to give young people without qualifications access to the labour market, providing them with needed training, the successive reforms on the legal regulation of these contracts (training and apprenticeship) have significantly blurred said objectives.

So, in relation to apprenticeships, young people to whom this contract would be addressed to and who could be eligible for this contract, according to the first text of the *Estatuto de los Trabajadores* of 1980, were only individuals between 16 and 18 years of age. Nowadays, with unemployment rate rising to 15%, people under 30 can enter into this contract⁵⁶.

The age limit for this contract has fluctuated over the past years, based on the economy's cycles. The trend to increase the age limit during periods of high unemployment percentages highlights its use as an instrument to reduce unemployment: the age limit was extended to 20 years in 1984⁵⁷, and was not required in the case of handicapped workers –this exception has never disappeared since this time–; it rose to 25 years in 1993 –in an economic crisis period⁵⁸–; in 1997, during a period of economy recovery, it was once again reduced to 21⁵⁹.

In 2001, and paradoxically, in the context of a legal disposition addressed to reduce the excessive temporality rates⁶⁰, the group of individuals that were not subjected to the age limit was extended considerably (so that together with disabled workers –among other groups– those who had been unemployed for more than three years were also included). In 2006, the number of exceptions to the age limit was reduced, although the age limit increased from 21 to 24 for other worker categories⁶¹.

Finally, during this last economic crisis, three modifications have taken place: in 2010⁶², some modifications were made both for the group of people that were not subject to the age limit as well as

⁵² Regarding global unemployment rate in Spain and Greece, the evolution from 2010 to 2014 shows the following data. Greece: 12.7% (2010) 17.9% (2011) 24.5% (2012) 27.5% (2013) y 26.5% (2014). Spain: 19.9% (2010) 21.4% (2011) 24.8% (2012) 26.1% (2013) y 24.5% (2014).

⁵³ *Real Decreto-ley* 4/2013. In any case, and in a bid to provide this contract with an objective cause, this norm points out that the acquisition of a first job experience will be considered as the cause of the contract.

⁵⁴ Which are temporary because of their scope of giving some training to inexperienced workers (maximum of two years in the case of training and three years in the case of apprenticeship).

⁵⁵ LÓPEZ GANDÍA (2012, 88).

⁵⁶ *Ley* 3/2012 (Disposición transitoria 9).

⁵⁷ *Law* 32/1984, targeted to implement *the adaptation of an institutional framework that regulates the labour market to the new circumstances of the Spanish economy, after the economic crisis of the last decade* (Preamble).

⁵⁸ This modification was introduced by *Real Decreto-ley* 18/1993 within the set of measures addressed to optimize employment possibilities for young people lacking specific professional training and work experience, and foster their work placement.

⁵⁹ *Real Decreto-ley* 8/1997. In the Preamble of this text, the need to initiate a debate regarding how the economic recovery could be accompanied by an improvement in the labour market, offering a joint answer to the serious problems of unemployment, precariousness and high employment turnover, was pointed out.

⁶⁰ *Real Decreto-ley* 5/2001.

⁶¹ *Real Decreto-ley* 5/2006. This *Decreto-ley* was intended to encourage stable employment taking into account the continuing segmentation between temporary and permanent contracts and, most importantly, given the high rate of temporality

⁶² *Real Decreto-ley* 10/2010.

for the group with a higher age limit (24); in 2011⁶³, the maximum age was increased to 25; and in 2013, the fact that those under the age of 30 could enter into this contract, as a temporary measure, until the unemployment rate decrease to under 15 %.

On the other hand, the legal regulation of this contract has not been fully coherent with its original aim in regards to the requirement of lack of qualification. In fact, since 1993, the legal regulation of the contract allows for qualified individuals to enter into it, as long as their qualifications are not related to those required for entering into a training contract in the activity performed⁶⁴.

Furthermore, if the apprenticeship contract was created as an opportunity for professional training, intended for unqualified young people in order to offer them a professional career (and just one),⁶⁵ this has not been the case since 2012. Nowadays, one can enter into an apprenticeship contract even if he/she was previously hired by the same or a different company under this contract. The only restriction now relates to the activity carried out: it must be related to a different professional career⁶⁶.

Temporary employment contracts have also been fostered during this crisis period by the progressive enlargement of the objective reasons allowing user undertakings⁶⁷ to enter into *contratos de puesta a disposición* (assignments) with temporary work agencies (ETT, based on its initials in Spanish) This has meant a qualitative leap in the role attributed to temporary works agencies. If initially their role was basically 'logistic' –providing workers to companies in need of a temporary workforce–, after the successive reforms occurring in 2013, that function has been blurred, reinforcing their role as employment fosterers⁶⁸. This is the conclusion that may be drawn from the legislation that has increased the cases in which user undertakings can enter into assignments with temporary work agencies, allowing them to do so in the same cases foreseen in formative contracts (apprenticeship⁶⁹ and training⁷⁰) or the *primer empleo joven* contract⁷¹.

The fostering of these unstable contracts has two immediate consequences. On the one hand, by increasing the options to enter into temporary contracts, the segmentation of the labour market remains steady. On the other hand, it implies precariousness of the working conditions⁷². In this sense, it must be considered that the apprenticeship contract has a legal minimum wage equivalent to the inter-professional minimum wage (648.60 € per month in 2015 –14 payments–) in relation to the time worked. Given that during the first year of the contract no less than 25 % of the working day must be devoted to training (85% in the second and third year), the minimum wage will be 75% of the inter-professional minimum wage (486.45 €) during the first year⁷³.

3.2 Actions related to firing flexibility. As previously mentioned, firing flexibility has also been implemented in order to boost employment. However, certain inconsistencies may also be observed in some of these measures related to firing flexibility⁷⁴.

⁶³ *Real Decreto-ley* 10/2011.

⁶⁴ Article 7 of *Real Decreto* 2317/1993. Nowadays article 6 *Real Decreto* 1529/2012.

⁶⁵ As there was no reason to enter into another apprenticeship contract –either for the same or a different activity– once the skills related to the first professional activity were obtained. This explains that since *Real Decreto-ley* 2317/1993, once the maximum duration of the contract had expired, the worker could not be hired under this contract by the same or different company and for the same or different activity.

⁶⁶ Article 2 *Real Decreto-ley* 3/2012.

⁶⁷ That is, *any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily*. (art. 3.1.d of Directive 2008/104/EC on temporary agency work).

⁶⁸ *Real Decreto-ley* 16/2013 asserts that the modifications affecting training contracts are used to make the incorporation of young workers to the labour market possible. In this legal text it is considered that with this measure stable employment is fostered since the training contract has proved to be an important way to access the labour market and a way of transition towards indefinite-term contracts.

⁶⁹ *Real Decreto-ley* 4/2013 (Third final provision).

⁷⁰ Article 3.1. *Real Decreto-ley* 16/2013.

⁷¹ Ley 11/2013 (Disposición adicional 5).

⁷² Regarding this risk see: RODRIGUEZ PIÑERO *et al* (2012, 14).

⁷³ In the case of training contracts, the minimum wage is established at 60% or 75 % of the wage established in a collective agreement for the corresponding professional category (art. 11.1.e of the *Estatuto de los Trabajadores*).

⁷⁴ Regarding this question, GIMENO DÍAZ DE ARAURI (2015).

The first inconsistency relates to the reduction of severance pay in cases of wrongful dismissals introduced for the first time in 2002⁷⁵, and reintroduced in 2012⁷⁶. Instead of fostering a stable employment, it has considerably decreased the costs of wrongful dismissals of workers with poor stability in the company –workers provided with temporary employment contracts–. As a consequence, with this logic of reducing dismissal costs in order to promote employment, temporary contracts have been boosted instead of indefinite ones.

This is the case of wrongful dismissals, where the employer⁷⁷ can choose between the worker reinstatement or contract termination (in this last case, the employer must pay an indemnity). Regardless of the option selected, before the reform, the employer had to pay the so-called *salarios de tramitación* (procedural salaries)⁷⁸. *Real Decreto-ley* 3/2012 suppressed these procedural salaries when the option becomes the payment of an indemnity –hence, not in cases of readmission– which in turn has significantly reduced the cost of wrongful dismissals of the workers with limited seniority in the company –usually workers with temporary contracts–, and has discouraged their employment stability. Thus, this decision has contributed to perpetuate the segmentation of the labour market.

Indeed, since the cost of indemnities in cases of dismissal in Spain depends on the seniority of the worker within the company, procedural salaries would increase the cost of firing workers having limited seniority⁷⁹.

The second inconsistent action regarding firing flexibility, within the scope of encouraging stable employment, has also been introduced through *Real Decreto-ley* 3/2012. According to this decree, the cost of wrongful dismissals has been reduced from 45 days of salary per year of service to 33 days (and the maximum limit has been reduced from 42 months of salary to 24 months) This measure was introduced in order to *encourage the efficiency of the labour market as an element linked to the reduction of the labour duality*⁸⁰. In the Preamble of *Real Decreto-ley* 3/2012, it is argued that the traditional indemnity of 45 days of salary per year of service, *constitutes an element that “overaccentuates” the existing breach between the costs of termination of a temporary contract of employment and the costs of terminating indefinite-term contracts, in addition to being a distortive element for the competitiveness of companies, especially for the smaller ones due to the current times of limited sources of financing.* However, the reduction of the indemnity to 33 days means reducing all wrongful dismissals, regardless of contract type.

Subsequently, this measure does not contribute to reduce the difference of severance pay between permanent and temporary employment contracts as it does not modify that which generates the difference of treatment in indemnities, that is, that the indemnity mainly depends on the worker’s seniority in the company⁸¹.

It should come as no surprise then that Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Spain (D.O. C 247 29.7.2014) points out that segmentation remains an important challenge for the Spanish labour market, that the number of contract types remains high and that the gap between severance costs for fixed-term and indefinite contracts remains amongst the highest in the Union, even after the reform.

⁷⁵ *Real Decreto-ley* 5/2002. This decree was declared null and void by judgment no. 68/2007 of the Tribunal Constitucional (28-3-2007).

⁷⁶ Article 18 of *Real Decreto-ley* 3/2012.

⁷⁷ Spanish legislation only recognizes this option to employees in the case of workers’ representatives.

⁷⁸ The unpaid wages from the firing date until the notification of the judgment that would have first declared the firing as wrongful.

⁷⁹ For instance: a worker with a salary of 50 € per day and with a seniority of 3 months in the company would receive 412.50 € of indemnity. If the judgment declares the dismissal to be wrongful, after 6 months since the dismissal, it is declared that the worker would receive 9,000 € awarded in procedural wages. Nowadays, given the accumulation of complaints, the Social Courts are taking approximately a year and a half, as of the time of the complaint, to notify of the judgment.

⁸⁰ Preamble of *Real Decreto-ley* 3/2012 (Parts II and V).

⁸¹ Only the reduction of the maximum limit of compensations (from 42 to 24 months of salary) allows for an initial approach to the amount of compensation to be received, for unfair dismissal, of both open-ended and temporary contract workers.

We can conclude that firing flexibility has not had the intended effect in overcoming segmentation –since the preference for temporary contracts is still widespread amongst Spanish employers⁸²– but it has contributed to rendering instability and precariousness as new features of the labour system.

The reduction in labour market duality appears to have been useful as a pretext for cheapening costs of dismissals without a fair cause or those carried out without following the legal procedural requirements –in other words, wrongful dismissals⁸³.

4. Conclusions

The initiatives implemented to fight segmentation in the Spanish labour market still fail to yield the intended results. The European Commission has recognized that despite regulatory reforms, the proportion of the workforce in temporary employment began to increase once again in 2014, reaching over 24 %, and particularly affecting young people and the low-skilled. Moreover, the new types of contracts that have been introduced and the incentives to encourage employers to hire staff on an open-ended basis have yet to be used to their full potential⁸⁴.

In view of the previous considerations, it seems clear that the actions of Spanish lawmakers were not truly intended to end the labour market's current duality and segmentation. On the one hand, they are the result of the current situation of economic crisis. On the other hand, this same crisis may be used as a pretext to introduce measures of flexibility that are an obstacle to reducing segmentation.

It should be pointed out that the option of lawmakers, when similar cases of economic crisis have taken place, has always been to introduce flexibility in the legal system with regards to temporary contracts, without proposing effective measures targeted to putting an end to fraud in temporary contracts. This was the case of 1997, when the so-called *contrato de fomento de la contratación indefinida* (CFCI) was introduced, including a kind of labour amnesty intended to identify and regularize those temporary contracts concluded in fraud (*fraus legis*)⁸⁵ allowing the implementation of incentives (bonuses in employer contributions to the Social Security) for the transformation of temporary contracts signed before a set date, into indefinite-term contracts. This sort of amnesty, applicable from the first legal regulation of the CFCI (*Real Decreto-ley 8/1997*), was prolonged during the entire applicability of this contract until its disappearance. So, all of the following regulations (*Ley 12/2001*, *Real Decreto-ley 5/2006*, *Real Decreto-ley 10/2010*, and *Real Decreto-ley 10/2011*) were given successive amnesties.

The only advances that lawmakers appear to have made from these reform measures are declarations of good intentions, which hide, in some cases, ill-intentioned purposes. This is the conclusion that may be drawn from the actions implemented within the crisis period that started in 2008. During these years of crisis, greater hiring flexibility has been added to increased firing flexibility which does not contribute –suspected of not being the real objective of the reforms implemented– to overcome the duality and segmentation of the labour market⁸⁶.

While the increased firing flexibility is a bid in favour of stable employment, the problem is that pathologic temporality within hiring could be substituted with pathologic actions related to dismissals. There are many examples emphasized by the judgments of Spanish Social Courts: such as *contratos indefinidos de apoyo a emprendedores*, having a one-year probationary period despite involving activities that do not require high qualifications, and that are extinguished a few days before the end of the probationary period.

However, the economic crisis appears to have offered justification for the current state of things at a national level⁸⁷. The laws introducing reforms are not the only ones that have been justified by the

⁸² FERNANDEZ LÓPEZ (2012, 208). According to LÓPEZ TERRADA (2012, 79) new rules may lead to even higher levels of instability.

⁸³ URRUTIKOETXEA BARRUTIA (2012, 28).

⁸⁴ 11th whereas clause of Recommendation for a Council Recommendation on the 2015 National Reform Programme of Spain and delivering a Council opinion on the 2015 Stability Programme of Spain. Brussels, 13.5.2015. COM(2015) 259 final.

⁸⁵ ALBIOL MONTESINOS (1997, 57).

⁸⁶ GOERLICH PESET, J.M. (2012, 24).

⁸⁷ This was the argument of the Greek government in defense of the cuts introduced in social laws in the proceedings

economic crisis. In some cases, judicial decisions that have determined the implemented measures have also justified them. In this way, the Spanish *Tribunal Constitucional* argued in favour of the constitutional legality of certain laws in response to a scenario of severe economic crisis. Nevertheless, it becomes rather doubtful that any of these measures, such as the proposal for the *contrato de apoyo a emprendedores*, conforms to international standards or even to the principles and legal foundations of European Union Law.

Sometimes the objectives established in the Treaty on the Functioning of the European Union (TFEU) have been argued as grounds for limiting the impact of the new regulations. In this sense, the judgment by the Supreme Court from 27.1.2014 (appeal number 100/2013) does not accept that the so-called “social dumping” may be reached by means of the degradation of the working conditions. The Court declares that even though all wage reduction implies increased competitiveness, any means or terms used to carry out this wage reduction cannot be accepted. *Even more when article 151 of the Treaty of the Functioning of the European Union establishes as its objective –and as the objective of all EU Member States– “the improvement of living and working conditions” to which is even subordinated “the need to maintain the competitiveness of the Union economy”; and we should not forget the primacy of European law and the ‘pro comunitate’ interpretation criterion which even affects the Constitution in accordance with art. 10.2 of the Spanish Constitution”.*

On the other hand, in the general introduction to Conclusions XIX-2 (2009) on the repercussions of the economic crisis on social rights, the European Committee of Social Rights said that while the “increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while tax and social security contribution revenues decline”, by agreeing to the 1961 Charter, the Parties “have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised.” Accordingly, it concluded that “the economic crisis should not result in a reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed during a period of time in which beneficiaries require the most protection”⁸⁸.

But once again, at a national level, things appear to work otherwise. In its response to this decision, the Greek delegation before the Committee pointed out that: 1) Its government accepted the conclusions of the ECSR concerning the issues of non-conformity with the European Social Charter. 2) That the measures were of a provisional nature. 3) The Greek government had the firm intention of revoking these measures as soon as the country’s economic situation would allow it. However, in this respect, and with regard to the political and economic constraints, it was not possible to envision a set timeframe, although it was unlikely that tangible results in Greece would be apparent before 2015⁸⁹.

In addition to all of the previous considerations, one additional final comment should be made in regards to the consequences of the policies implemented to promote stable employment: they have introduced a higher risk of in-work poverty. Currently, it is not just the issue of precariousness related to the instability of employment, but also precariousness in working conditions, particularly salary. The impact of certain types of contracts (apprenticeship) on wages has been pointed out in this paper. But Spain is suffering from another key factor of precariousness, also linked to the policies that foster employment, regardless of whether it is stable or not: the promotion of part-time work – which seems in most cases to be not by choice⁹⁰.

We can conclude that Spain is far from overcoming labour market segmentation. Not only due to the poor results of policies promoting stable employment but also due to the appearance of a new

before the European Committee of Social Rights (complaint number 65/2011) and their response to the decision adopted by this organization.

⁸⁸ Decision on the Merits adopted on 23 May 2012, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece. Complaint No. 65/2011.

⁸⁹ Ministers’ Deputies/Rapporteur Groups. GR-SOC. Rapporteur Group on Social and Health Questions. GR-SOC(2012) CB5. 5 November 2012.

⁹⁰ Commission Staff Working Document (2015, 41).

form of polarization: full time employees against part-time ones (wage polarization)⁹¹ which increases gender inequality as part-time contracts tend to be more present amongst women in both indefinite and temporary employment contracts.

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⁹¹ Polarization that new rules related to part-time work is increasing as new employment laws related to part-time work are not fostering employment stability and reducing duality. RODRÍGUEZ PIÑERO (2012, 21).

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Effects of Employment and Social Protection Reforms in Spain: a jurisprudential perspective

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Abstract: This paper analyzes the consequences of the process of labor reforms on the Spanish labor market. Specifically, it is deepened in the interpretation of the social courts of the reforms related to employment and social protection. Therefore, the main legal measures during times of crisis are studied, which have introduced an important space to labour flexicurity. Highlighting the changes related to internal flexibility and external that have been interpreted and sometimes corrected by social jurisprudence.

Keywords: labour reforms, Spanish labor market, social jurisprudence, labour flexicurity, internal flexibility, external flexibility.

1. Objective and purpose of reforming the Spanish job market

Since May 2010, Spanish labour legislation has suffered a profound change derived from economic and social policy promoted by Spanish governments. The government has instigated anti-crisis measures and one of these has been labour reforms, which have affected basic Spanish labour law, the Workers' Statute [Royal Legislative Decree 1/1995, of 24 March¹ (hereinafter ET)]. These are reforms derived from the decisions and directives issued by the European Union and which have been adopted by the Spanish government. They are socio-labour adjustments driven by the Troika as a response to the financial crisis of the Spanish banks, which has had a significant cost in terms of labour relations.

Said European guidelines have been general but each State has subsequently and progressively assimilated them while considering their own situation. In reality, this implies that the responsibility for these measures is shared less between European (and international) institutions and the Spanish government itself. The guidelines (or pressure) of the European Union and international organisations, such as the International Monetary Fund (IMF) have been involved in labour reforms and the Spanish government has finally shared this policy. Despite this, the reality is demonstrating that the effects of these measures are not what was hoped and the unemployment situation of the Spanish market has not changed. Even still, and despite the difficult adjustment, the IMF continues to believe these changes are insufficient and that Spain must continue with labour reforms.

These reforms have resulted in a profound transformation of labour relations, with collective bargaining means losing prominence. This signifies that the organisational and discontinuance power of companies has been strengthened with these reforms. It is a frontal change of direction, given that the

¹ *Estatuto de los Trabajadores* [Real Decreto-Legislativo 1/1995, de 24 de marzo].

Constitution considers trade unions as constitutionally relevant subjects and it recognises their right to union freedom and action (art. 7 and 28.1) (TC² Ruling 281/2005, of 7 November). This guideline has directed changes towards the reduction of salaries, the priority of collective company bargaining against sectorial agreements, the facility to substantially modify work contracts, the introduction of an extraordinary permanent contract with lower compensation costs, and the reduction of severance pay.

The last reform took place in 2012 and was carried out by Royal Decree 3/2012, of 10 February 2012, and it was subsequently legally ratified (Law 3/2012, of 6 July 2012, on Urgent Measures for Labour Reform³). This reform was a step forward in the process of labour reforms. It has attempted to, without managing to do so, stimulate the creation of employment, correct its temporary nature, and contribute to the improvement of the Spanish economy. The purpose of the reform was to generate employment and contain collective dismissals in order to reduce Spain's high rate of unemployment, which is the highest in the European Union, and which has progressively increased despite reforms in the years 2010, 2011 and 2012. Currently, the unemployment rate stands at around 22.85%, with almost 50% of those workers under 25 years old, while temporary work in Spain represents 25% in comparison with the European average of 14%. As such, and in order to combat this situation, drastic labour cuts were carried out, being identified as a factor for improving business productivity and the general economy, in the belief that the removal of labour rigidity could remedy unemployment and create jobs.

Additionally, it must be said that this reform is not external to its precedents. There is a clear, central thread based on international and European Union directives. The reform issues are the same, but the 2012 reform was of greater depth, particularly affecting the reduction of severance pay and the weakening of collective bargaining mechanisms by increasing the unilateral decision power of the employer. This is despite the guideline itself, in its preamble, alluding to its intention to search for balanced reform. On the contrary, the direct effects of the reform have been the increase of the individuation of labour relations and the creation of new conditions of insecurity, which can also affect the principle of dignified employment, inspired by the International Labour Organisation (ILO).

The reforms have included the European Union's notion of flexicurity. This is one of its essential objectives. Despite the generic nature of this concept and the imprecise nature of its content, the reform aims to combine elements of labour flexibility and security in employment, without achieving the desired balance. It provides companies with more flexibility, encouraging the modification of contracts and enabling collective bargaining to adapt to the economic reality of the company. Flexibility is conceived when both entering and exiting the labour market. In other words, it facilitates entry to the market with new contracts and it facilitates the possibility of companies with economic problems dismissing employees for less money via lower severance pay. Furthermore, and on the other hand, it aims to encourage employment by improving labour intermediation and professional training. This is combined with elements of security such as the right to a paid training permit, conditional to a year of service in the company. Certain rights to the conciliation of family and work life are also reformed, bearing in mind the productive and organisational needs of companies.

After two years of application, the balance is the considerable decrease of compensation costs for modifications and dismissals, which is applied equally to small and large companies. It is simpler to modify and reduce working conditions and apply labour flexibility in companies. However, the number of disputes has increased considerably and this has resulted in an increase in claims in social courts, giving rise to a pronouncement of the nullity of business measures, in addition to contradictory legal rulings that generate, in certain cases, legal uncertainty.

These measures were adopted without social dialogue with trade unions and business associations. In recent years, social dialogue has deteriorated. This has undoubtedly been a significant effect derived from the crisis and the Spanish government has intervened without considering social agents. The only exception can be found in the scope of Social Security, where the government increased the retirement age from 65 to 67 years old in agreement with trade unions (agreement signed 2 February 2011). However, this agreement has not been reproduced in the labour sector, given that the 2010 reform

² *Tribunal Constitucional* (Spanish Constitutional Court).

³ Ley 3/2012, de 6 de julio de 2012, de medidas urgentes para la Reforma Laboral.

(Royal Decree 10/2010), the collective bargaining reform of 2011 (Royal Decree 7/2011) and the last reform of 2012 were opposed by trade unions.

Before Royal Decree 3/2012, of 10 February, was approved, an agreement between the government and social agents was reached regarding employment and pensions, and this was signed on 25 January 2012 [Inter-Confederation Agreement for Employment and Collective Bargaining (2012-2014)⁴]. However, this agreement was unobserved with the labour reform of Royal Decree 3/2012. The reforms considered in this law went against the general sense of tripartite agreement between the government and social agents. This was the reason for the second general strike of the crisis, which took place on 29 March 2012, following the general strike of 29 September 2010 against the labour reform of that year. Due to the strike of 2012, CCOO and UGT, majority trade unions, presented claims before the ILO against the Spanish government's reform.

2. An overview of judicial interpretation: constitutional and judicial control

In light of the labour reform of 2012, up to three appeals of unconstitutionality have been presented. This gives rise to three sentences of the Constitutional Court (*Tribunal Constitucional*, hereinafter TC). There are three rulings regarding the labour reform of 2012 that could have been perfectly accumulated to provide a more systematic and clarifying response, without the need to isolate issues and give isolated interpretations.

The first ruling of the TC, of 12 February 2014, referred to the use of the Decree Law formula due to extraordinary reasons of urgent need, without turning to ordinary parliamentary procedure. The TC's Order of 12 February 2014 on the labour reform of 2012 involves the validation of the reform, justifying the actions of the government when legislating due to reasons of urgent need which stem from the country's economic situation. The TC values the existence of extraordinary circumstances and circumstances of urgent need to legislate, enabling the government to legislate by decree instead of commencing ordinary parliamentary process. Despite this, the ruling of the TC of 12 February 2014 involved the particular vote of Judge Fernando Valdés.

Previously, the TC considered the processing of labour reforms via urgent Royal Decree to be unconstitutional. This occurred in 2007, when the method of the decree was not deemed to be justifiable, with the reform of 2002 being annulled, although this had no effect given that said reform was subsequently processed as a draft bill before parliament. TC Ruling 68/2007 ruled the labour reform of the government of Mr José María Aznar (Royal Decree 5/2002) did not respond to a situation of extraordinary urgency and need (a general strike was called due to the reform). Therefore, the fact the omission of the parliamentary process would have caused damage was not accredited. This TC Ruling was definitely a precedent that could have affected the processing of Royal Decree 3/2012, which was later ratified by Law 3/2012. However, the TC did not reach this conclusion in 2014, as it considered this formula to be a legitimate option of legislative policy that does not infringe on fundamental rights or liberties.

Resorting to Decree Law due to urgent reasons was also criticised in the manifesto "Algo estamos haciendo mal" (We are doing something wrong), signed by sixty professors and tutors of public law in February 2014. These professors criticised the approval of more than fifty Decree Laws, ratified by parliament with barely a discussion, in 2012 in addition to the delay of many of them in their processing as laws. Additionally, it must be highlighted that the use of the Decree should be a power of exceptional governance (art. 86 of the Spanish Constitution), especially when the root of its measures may consider significant restrictions to the rights of workers.

The second ruling of the TC happened last July and it is very important as it confirms the constitutionality of the cores of the reform, contesting the appeal of the Parliament of Navarre (TC Ruling of 15 of July 2014). The TC Ruling of 15 July 2014 declares the constitutionality of the labour reform and it deems that the rights of workers, trade-union liberty and the right to collective bargaining are not infringed upon. Despite this, the ruling will involve the individual votes of Judge Fernando Valdés, with whom judges

⁴ Acuerdo Interconfederal para el Empleo y la Negociación Colectiva (2012-2014).

Adela Asua and Luis Ortega, who pertains to the progressive current of the TC, have agreed. In reality, the TC took a stance regarding matters that are also the basis of the appeal put forward by the Socialist Party (Partido Socialista) and the Plural Left (Izquierda Plural). This leaves the basis of this appeal with virtually no substance and it will be resolved under the same interpretative criteria given the current composition of the TC, where the conservative majority carries weight as the political party that sustains the Spanish government. Consequently, the TC has already ruled on two occasions in favour of labour reform, and it must now rule only on the constitutionality of the issues related to flexibility for performing objective and subjective dismissals, or the development of employment regulation records in the public sector, which have been used as cutback methods of the public administration and public companies.

The validation of the TC implies a great polarisation, as it gives priority to the economic and organisational interests of companies and their unilateral will in labour relations, which means reducing the margins of trade-union freedom and collective action. This gives rise to an increase in labour insecurity, moving away from the constitutional consensus that prioritises collective liberties, and altering the impact of action equality at the heart of labour relations. Spain's most representative trade unions, CCOO and UGT, believe labour reform to be an attack on labour rights and collective bargaining (declaration of 20 July 2014). They believe this change of model positions the country in a system that moves away from the democratic model of Employment Law, it takes the country back to Francoism, and that the TC has not come to recognise the influence of fundamental employment rights and trade-union freedom. Trade unions and, without a doubt, socialist and plural-left groups will resort to other international judicial instances. As such, they will try to look for a response to the Spanish legislative measures taken due to crisis. In this regard, the trade unions already reported the reform to the ILO Committee on Freedom of Association on 29 October 2012.

On the other hand, ordinary jurisprudence has had to interpret the most relevant effects of the labour reform. The courts have played an important role, although there are still many questions that have not been clearly resolved. However, as will be discussed later, the essential aspects addressed by the social courts refer to the judicial control of collective dismissals in particular and the assessment of the causes that enable them to be adopted. Social courts continue to interpret regulations from a constitutional perspective, backing collective negotiation and trade-union freedom or the right to work. However, their declarations definitely cannot contradict the sense of legal reforms. Despite this, in some rulings signs of the corrected interpretation of the reform can be discerned, with a more equal working relationship being sought. From a business point of view, fear of legal correction is generated, especially when clear and unequivocal criteria of application do not exist.

Throughout this document, a collection of the most notable Spanish court rulings that interpret the labour reform will be analysed. As a general reflection, it must be stated that the reforms have involved a considerable increase in the workload of the courts, which have inevitably had to rule on its more controversial aspects. The Labour Chambers of the High Court (*Tribunal Supremo*, hereinafter TS) and the National Court (*Audiencia Nacional*, hereinafter AN) have been especially prominent.

3. Promotion of stable employment and labour contracting

The central idea of the reform is not temporary hiring, but the promotion of permanent contracts. It has, unsuccessfully, aimed to stop the high levels of insecurity linked to temporary contracts. In this sense, the novelty has been the introduction of a contract promoting permanent employment, named support for entrepreneurs (art. 4.1 of Royal Decree 3/2012). This involves a permanent, full-time contract to which only companies with less than fifty employees can resort. This new, permanent contract is presented as an extraordinary resource but in reality the Spanish business model is comprised of small- and medium-sized businesses that represent around ninety percent, and this converts this contract into an almost general option. The only limit is the impossibility of using this contract if, in the previous six months, the company undertook economic dismissals that were declared as unfair. Along with the possibility of the termination of the contract in the period of one year, the business owner benefits from important fiscal and Social Security deductions if the employee works for at least three years.

The most conflicting aspect of this contract is the legal provision of an obligatory trial period with a duration of one year. This means introducing an element of a temporary nature to the contract, given the insecurity it generates in the job. Furthermore, it must be noted that termination during the trial period is free and without compensation, which leads to unfair or *ad nutum* dismissal, along with the limitation of legal control, which is not possible, except of course when fundamental workers' rights are violated (TC Ruling 94/1984, TC Ruling 166/1988, TC Ruling of 18 April 2011). All of this could imply a violation of Convention Number 158 of the ILO. Of course, this would be a new contract that equips permanent workers with temporary employment, without containing this duality in the Spanish job market, which is moving towards greater weight for the temporary. In a nutshell, the contract does not facilitate stability in employment and this kind of contract is subject to a large dose of uncertainty.

The TC has endorsed the support for the entrepreneur's contract with a period of one year, without considering compensation for its termination. This has undoubtedly been one of the most critical points, given that both Spanish law and the ILO's conventions declare the right to justifiably dismiss workers, which may imply an infringement on the rights of the worker. Despite this, the TC believes the contract with this trial period of one year encourages employment, given that its trial makes permanent hiring more attractive and considers the legal limitations to its practical application.

Reform also introduces important changes to certain temporary contracts, making the use of temporary contracts appear more attractive to companies. The considerable economic advantages temporary hiring involves for companies have not been eliminated, so there continues to be incentives for its use. On the other hand, it prevents progress in the generation of conditions of labour stability. In spite of all this, the reform tried to compensate for this situation by applying a maximum limit to temporary employment via the linking of temporary contracts equivalent to twenty-four months of work in a period of thirty months (art. 15.5 of the ET).

Use of the temporary contract has been encouraged for training and learning (art. 11.2 of the ET) in order to promote youth employment. The high rate of youth unemployment in Spain should be mentioned once more. Consequently, the maximum duration of work under this contract has been extended to three years, with the minimum duration being six months. Additionally, the apprentice worker can be hired by the same company or by a different company, meaning that apprentices can be employed for up to six or nine years via successive contracts for their training. In reality, they may be apprentices from sixteen to thirty years old, and permanently if the individual is disabled as there is no age limit for this group. An attempt was made to apply the German system for dual professional training to the Spanish model, given that there is a private interest of companies in training and preparing their employees and, on the other hand, public interest in improving employee qualifications via professional training. As such, the system has important incentive measures, including the reduction of Social Security costs for business by 75% or even 100%.

The next wager was the part-time contract to enable the creation of employment. In Spain, this contract has had minimum use and to foster its usage, the prohibition on working overtime has been lifted. Previously, overtime could only be worked by full-time, permanent employees. Now, the part-time working day can be increased via overtime, which means companies can hire employees to work more hours without assuming responsibility for permanent labour costs and workers can see their remuneration increased by working more hours and being paid for every hour of work resulting in a salary increase. The problem is that this measure inevitably leads to a halt in permanent hiring. It will create more employment, but not employment that is full-time and permanent, which generates stability with dignified working conditions (art. 12 and 35.2 of the ET). The only limit is that overtime and ordinary part-time contract working hours may not exceed a full-time working day, as this would transfer the part-time contract into a full-time contract (art. 12.4.c. of the ET).

Another contract driven by reforms has been the work-at-home contract, which is now called the more general distance contract (art. 13.1 and 2 of the ET). The aim is to favour new forms of telework due to the impact of new technology. In other words, new forms of work that are not telework in the strictest sense, or that do not provide work activity in a company, although this kind of work is present in the labour world due to the application of new forms of business organisation.

Professional training measures are also strengthened and the right of workers to training aimed at adaptation regarding the modifications operated at work is guaranteed. If modifications are imposed by the business owner, he must provide the employee with a course that enables him to adapt to said changes. These modifications must be reasonable in any case. A training permit with the right to have the job post held is legally configured when modifications to the job post occur, in addition to an annual twenty-four-hour training permit also linked to the job post, which will be improved via collective bargaining.

This is combined with another measure that promotes the creation of employment: the possibility of temporary employment agencies intervening in labour intermediation. Temporary work agencies can act as private, profit-making job agencies, contributing to the creation of employment. However, this involves a formula that aims to increase the number of posts, but which comes at the cost of securing models that hinder labour stability and facilitate the loaning of manpower outside the scope of public placement services.

4. Internal flexibility measures: adaptation of the collective agreement and modification of work contracts

In terms of collective bargaining, the priority of the company collective agreement against that of the sector is of particular relevance. The reform tries to adapt working conditions to unexpected economic changes. The application of collective agreement, without limits, is a priority and it refers to important conditions such as salary, working hours, holidays, professional qualification, and types of contracts. As such, collective agreement is placed at the service of business interests.

The theory of the priority of company collective agreement has been endorsed by the TC Ruling of July 2014, ratifying the loss of power of collective bargaining. The TC believes this option is valid to the extent that, constitutionally, there is no predetermined collective bargaining model. This is a direct blow to the traditional structure of Spanish collective negotiation, arising from the constitutional model of 1978, which is based on collective labour relations. Social dialogue has configured a sectorial structure of collective bargaining that drives negotiation in the lower area of the sector and which has enabled the expansion of the coverage of workers, which reached 90% of the active population in 2012 but which is now decreasing. There is no doubt that in the work environment, trade unions have less bargaining power and this model understands this is a change in general influence. In Spain, almost 90% of companies have less than ten employees. With this in mind, a sector agreement has been confirmed that cannot contemplate minimum obligatory salaries for companies (AN Ruling 95/2012, of 10 September).

The diminishment of collective bargaining coverage is due to another important change: the limitation of the ultra-activity of collective agreements. Before the reform, when a collective agreement completed its agreed duration period, it continued to be applicable until the following negotiation. Currently, ultra-activity is not unlimited, instead, it is restricted to two years as a means of facilitating the adaptation of working conditions (art. 84.2 of the ET). There is no doubt that the original rule of ultra-activity had the benefit of the broad subjective extension of collective agreements and the stability of a regulatory framework that generated legal security, and which could always adapt to structural negotiation in the sector. Therefore, another effect is evident: the breaking up of collective bargaining, disregarding the Second Agreement for employment and negotiation for the years 2012-2014, signed on 25 January 2012.

The next change affects the need to cut salaries and this has occurred via the possibility of removing collective agreements (art. 82.3 of the ET). It is a measure designed for any kind of working condition, but which has been used especially to reduce salaries. Companies must claim business reasons, so economic, technical, productive and organisational reasons have been made more flexible to enable it. The causal factor is the existence of a “negative economic situation, in cases such as the existence of actual or anticipated losses, or the persistent decrease of income or sales.”

The only limit is the need for agreement with workers’ representatives, meaning the unilateral decision of the business owner is not possible, unlike with modifications and collective dismissals.

The main source of conflict can be found here, given that the reform aims to avoid the obstruction of negotiation by considering the need for collective agreements to anticipate bargaining conflict resolution procedures and, finally, the obligatory intervention of arbitration, which falls upon the National Advisory Commission on Collective Agreements (*Comisión Consultiva Nacional de Convenios Colectivos*, the CCNCC), which depends on the Ministry of Employment, or autonomous institutions, in which representatives of the public administration and social agents are present. In this issue, the TC understands that obligatory arbitration before the CCNCC is an efficient mechanism in the adaptation of labour conditions to adverse company circumstances, given that it enables subsequent obstructions in negotiations regarding salary reductions to be avoided. The TC highlights as a guarantee the need for business reasons, meaning economic, technical, organisational or productive reasons, to effectively coincide.

The TC believes this does not infringe upon the constitutional right to collective autonomy, as business owners and trade unions form a part of this organisation. However, the problem is that the Government is present as a third party actor in this organisation, and it decides in the event of disagreement. This is the sensitive area, which may violate the right to collective autonomy. This means a collective agreement may be disregarded with the vote of the public authorities in an administrative organisation, affecting the principle of voluntary nature. Additionally, the TC has come to understand that the setting of salaries and, in general, the content of the labour relationship corresponds to the free autonomy of workers and the business owner, without the interference of the public authorities (TC Ruling 31/1984, of 7 March, and TC Ruling 17/1986, of 4 February).

The TC ruled on the reduction of civil servant salaries, without considering it unconstitutional, as it was deemed not to violate the right to collective bargaining given it was a legally anticipated measure in accordance with the extraordinary economic circumstances of the country. Thus, the principle of normative hierarchy prevailed (TC Ruling 85/2001, of 7 June). Despite this, Spanish trade unions presented a complaint to the ILO, along with Greek and Portuguese trade unions, stating that this was an unusual solution, giving the problem of social cuts an international dimension. However the ILO's Committee on Freedom of Association ruled that international treaties ratified by Spain were not infringed upon (ILO Agreements 87, 98, 151 and 154). In the scope of public employment, unrest increased considerably, giving rise to a general strike in the public sector, seconded by the most representative trade unions, a conflict that was also linked to the removal of the civil servant bonus in 2012.

Within internal flexibility, new possibilities for the substantial modification of the work contract are noteworthy. These are not considered negotiated measures, but they may be implemented via the unilateral choice of the company in order to adapt labour relations for business reasons. As such, the possibility of the irregular distribution of the working day stands out (art. 34.2 of the ET), which may be organised irregularly by collective agreement, but in the absence of agreement the business owner may apply 5% by means of unilateral decision. Likewise, the possibility of reducing the working day has been enabled (art. 48 of the ET) as a temporary measure to avoid collective dismissals, hence its close link to procedures of suspension and termination of working conditions.

Modifications that enable contracts to adapt to the needs of companies have been channelled by three internal flexibility measures, namely functional mobility, geographical mobility and the substantial modification of working conditions. All of these stem from the need for business reason, generally economic, as a common denominator, the rigor of which has been reduced with reform, making it a much simpler and more effective measure. This enables an intense modification of the conditions agreed in collective agreements, subjecting the business owner to a consultation procedure which, once observed, will apply the measure without the need for agreement with employees (art. 41 of the ET). Likewise, modification is now permitted in reference to the employee remuneration system, now including salary, providing an additional way to reduce wages and salary costs. The AN understands that this modification channel is a response to difficult company situations, which is to say, it is a preventive measure and an alternative to economic dismissals. In these cases, the representatives of workers must observe constructive conduct during the bargaining process, especially when the company sufficiently proves the existence of economic reasons (AN Ruling 61/2012, of 28 May 2012).

5. The external flexibility of the work contract: adjustment by means of collective dismissals

Collective or individual dismissals in small companies due to economic reasons has been a way of reducing fixed labour costs. The adjustment was important as it made the regulation of dismissal noticeably more flexible. This provided companies with the resource of collective dismissals. Therefore, many companies unjustifiably postponed dismissal processes prior to the reform in order to benefit from the new system, although in these cases the AN declared the nullity of the dismissals due to non-compliance with transitory law (AN Ruling of 25 June 2012 and 28 September 2012).

The action of the social courts regarding collective dismissals has been particularly important and, in many cases, it has ruled on controversial aspects of the interpretation of the reform. The AN in particular, more than the social courts, is interpreting the reform. The AN has been leading the way with more coherent and uniform doctrine in its rulings. Despite this, the rulings of the social courts and the AN are setting the interpretative criteria of the more polemical aspects of the reform.

Greater flexibility regarding collective dismissal has been possible thanks to the revision of business reasons, mainly economic, which can be seen with less accuracy. This is because economic reason can be presumed to concur when a persistent decrease in the level of income or sales over the course of three consecutive quarters exists, without the company having to demonstrate this as the results justify the reasonableness of the decision to favour competitiveness (art. 51 of the ET). Despite this, and being more flexible, the causal nature of dismissal is maintained. Special measures have even been taken in the civil service in order to facilitate dismissal. Specifically, considering the existence of a situation of unexpected and persistent (for three consecutive quarters) budgetary insufficiency as a reason for collective dismissals for the financing of public services. It has generated great conflict in this area, as mentioned previously.

The social courts understand that judges may assess the existence of the legality of the reason, as well as its reasonableness, and the judge may evaluate if the dismissal is proportional (Social Court Ruling of 20 December 2013). This implies justifying the dismissal, accrediting its functionality and rationality with regards to tackling the company's needs. The AN has begun to revise the causality and legality in its rulings, which enables legal control (AN Ruling of 21 November 2012). Despite the reform that makes dismissals more dynamic, the courts have continued to maintain the requirement of justified dismissal. The company must prove the dismissal will contribute to an improvement of the economic situation in the future. As such, the mere concurrence of a negative economic situation is not sufficient when a persistent decrease of income over the course of three consecutive quarters exists. Therefore, legal control over the reasons for dismissal is not completely eliminated, given that the dismissal must be justified (*vid.* art. 158 ILO Convention). The courts can continue to understand the rationality of the business measure and dismissal is not an absolute or arbitrary right of the company.

Despite this, there is no doubt that justification has been relaxed, considering it is enough to say how many dismissals are to be carried out and to justify the negative development of the company with the relevant documents. It would not be necessary to confirm that the dismissals will contribute to the survival of the company or the overcoming of the company crisis (Social Court Ruling of 20 December 2013, AN Ruling of 21 November 2012, and TS⁵ of Galicia Ruling of 6 July 2012). These rulings, in reality, came to encompass an interpretation of the social courts prior to the reform itself, which understood that it was enough to accredit the existence of continued and substantial losses (Social Court Ruling of 11 June 2008).

Due to Directive 98/58/CE of 20 July 1998, the consultation or collective bargaining period has been maintained. However, it does not require agreement with representatives and the requirement of administrative authorisation to be able to apply the dismissals has disappeared. The consultation period may finish with agreement and, in its absence, the business owner will adopt the measure he deems appropriate, and the labour authority must be informed of this. The suppression of administrative authorisation is the most important measure, and it is substituted by a simple form of communication with the labour authority. The TC still has not taken a stance with regards to this issue, considering it must still

⁵ Tribunal Superior (Regional High Court).

resolve the third appeal of unconstitutionality. However, authorisation was a requirement for dismissals due to crisis, valid in our legal system since 1944, but this authorisation, in reality, was an act of legal control and the corresponding administrations had not assumed responsibility for ruling in the event of disagreement. Additionally, Spain was one of the last European countries to maintain this kind of authorisation in its legislation.

The courts have interpreted controversial issues regarding business restructuring processes. Without a doubt, another essential theme is that of negotiating on collective dismissals. Spanish legislation and direct European legislation refer to a general bargaining concept, in addition to the observance of the duty of good faith in the consultation phase. The duty of good faith negotiation declares a desire to initiate an authentic bargaining process. Simply informing of dismissals before finalising the consultation period is not enough, given that it would demonstrate in reality that there is no attempt to negotiate. Therefore, good faith is presented as a general validity requirement for the dismissal procedure (AN Ruling of 15 October 2012).

In collective dismissals, it is necessary to prove the reason for dismissal and to comply with the company's obligations of documentation and information to workers. The essential requirement of the negotiation is the delivery of information by the company. Therefore, all the information referring to the economic situation of the company must be provided, which will enable the justification of the poor economic situation (TS of Madrid Ruling of 22 June, 30 May and 11 July 2012). Additionally, the company must supply information about the professional classification of the employees affected by collective dismissal (TS of Catalonia Ruling of 23 May 2012). This would be a basic element in the consultation period (art. 51.2 of the ET). What's more, the company must communicate the criteria for determining the employees affected by dismissal at the start of the consultation period (TS of Madrid Ruling of 25 June 2012). Therefore, the courts can declare the nullity of dismissal by understanding that the company does not sufficiently comply with its duty to inform the representatives of workers.

When bargaining, the company has diverse communication options with workers' representatives. Consultations can be performed with trade union representatives or unions with workers' commissions can be turned to directly, doing without trade unions. The important element is for consultation and negotiation to occur, and the law opts for trade-union representation but this does not mean trade-union representation is always necessary (art. 51 of the ET) [AN Ruling of 28 September 2012]. In spite of this, bargaining without trade unions could pose practical problems. The negotiation commission formed by workers, without the presence of trade unions, may not contest collective dismissals (art. 51.2 and 124 of the Law Regulating the Social Courts). From a procedural point of view, this is not permitted legally, although in some cases this possibility has been favourably interpreted (TS of Catalonia Ruling of 23 May 2012). This understands that these workers would act, in any case, as labour representatives for the purpose of being able to exercise the fundamental right to the effective protection of the court (art. 24 of the Spanish Constitution).

The other issue is what companies or organisations are authorised to negotiate. If the dismissal process is started, it must be processed in the scope of the company, as indicated in Directive 98/59 on collective dismissals and art. 51 of the ET. However, the law does not refer to the possibility of collective dismissals in business groups. The AN Ruling of 28 September 2012 backs the bargaining legitimisation of the group with the view to facilitating a unique procedure which enables a homogeneous result. This is due to the fact the group is the real business owner (in this sense: AN Ruling of 26 July 2012 and TS of Extremadura Ruling of 26 July 2012). Therefore, the fragmentation of dismissal is avoided, under penalty of nullity, if the real business owner, which is the group, avoids formally presenting itself, as occurs in legal fraud (TS of Catalonia Ruling off 23 May 2012). Economic reason must affect every business in the group and not just one individually considered business (AN Ruling of 28 September 2012). On the other hand, consultations must be formalised with the totality of the company and not the work centre (AN Ruling of 25 June 2012). Effectively, negotiations can be carried out per work centre, but always with an overview and by using the general situation of the company as a reference (AN Ruling of 25 July 2012). Royal Decree 1482/2012, of 29 October, enables different bargaining in each work centre, but the courts understand that these negotiations may not lose the general perspective of the company.

Apart from collective economic dismissal, labour reform has been responsible for reducing the costs of common dismissal. It has noticeably reduced the amount of compensation from forty to five days' salary per year of service with a limit of forty-two monthly payments, and it has planned a new compensatory module of thirty-three days with a limit of twenty-four months (art. 56.1 of the ET). In this regard, the TC Order of February 2014 endorsed the constitutionality of the measure, in addition to the limiting of back pay in cases of readmission. This implies limiting the economic amount the worker may yield from the moment he is dismissed until there is a final judicial decision. Currently, resorting to back pay has become a truly residual note.

Labour Law Limited to the Citizen? Considering Labour Migrants in the UK

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Abstract: The use of the term ‘migrant’ supports a particular construction of the legal subject of labour law, whereby the exclusion of some from recognition as ‘citizen nationals’ justifies exclusion from a formal employment relationship. Being outside of a formal employment relationship renders ‘migrants’ useful and necessary as *precarious* labourers in the current globalised economic market. This paper examines UK labour and migration law to raise theoretical questions underpinning a current crisis of labour law.

Keywords: labour migration, precarious labour, labour law in the UK, citizenship.

Introduction to ‘migrant workers’

Labourers who are identified as migrants (foreign, non-nationals) elicit critical responses in media and political discourse. Most often, these are individuals working in low-waged, ‘low-skilled’ labour. Their status is deemed to be ‘migrant’ as a result of their actual nationality, country of citizenship or as a result of racial and ethnic prejudice. Moreover, persons working in ‘bottom-end’ labour, without permanent employment contracts and/or residency are also equated with holding irregular, or precarious, immigration status. Migration regarded as irregular, as opposed to *illegal* or *undocumented*, has raised concern in the UK both with regard to the exploitable and exploited situation of many of these persons when they are working, and the fear that foreign workers in non-specialised (‘skilled’) employment may be willing to work for less than British (nationals) workers and thus adversely affect the employment opportunities of British citizens.¹ It is difficult to define precisely who are the individuals considered to be migrant labourers. Are these persons foreign nationals? Does their legal employment require a work permit or visa? Is their immigration status in the UK precarious, or at risk of becoming precarious? The label, migrant labourer is used to represent the ambiguous demographic that is seen to not hold per-

¹ CHERTI AND BRUHMIE 2013, 1. Researchers have suggested that high irregular migration is due to the lack of regularisation programmes, which have been implemented in other EU countries, as well as a UK policy of returning migrants (deportation, and assisted voluntary return). Regularisation programmes are discussed in Linda Bosniak, 2013. Arguing for Amnesty *Law Culture Humanities* 9(3): 432-442. Commonly, in the UK it is reported that the public are ‘opposed to immigration’. This statement raises a host of problems, which I will not detail here, except to highlight that the problematic demographic called ‘irregular migrant labourers’ may often not be actual migrants or persons with irregular/precarious immigration status, but either foreign-born nationals or citizens with the freedom of movement and work within the European Union. Scott Blinder at the Migration Observatory has looked at public opinion surveys and immigration discourses. Scott Blinder, 2012. Briefing: UK Public Opinion Towards Immigration: Overall Attitudes and Public Concern *Migration Observatory* Oxford: University of Oxford at 2, 6; Scott Blinder, 2012. Imagined Immigration: The Different Meanings of ‘Immigrants’ in Public Opinion and Policy Debates in Britain *Centre on Migration, Policy and Society* Oxford: University of Oxford. A further issue is the fear that migrants are taking advantage of British social services, for instance the NHS. However this is beyond the scope of my current discussion which will focus on the labour of persons considered to be migrant labourers.

manent status and citizenship. The label, *irregular* migrant labour, including the ambiguity of both the terms ‘irregular’ and ‘migrant’, homogenise the diverse and multifaceted experiences of labourers and migrants, but also presumes a precarious legal status, albeit without the term ‘illegal’, thus making even the legality or illegality of their immigration and/or employment status questionable.²

The persons who may indiscriminately be identified as migrant labourers are subjected to inter-sectional discrimination and prejudice as result of their race, gender, and financial situation (poverty), ability, nationality, citizenship (or lack thereof), education, language and so on. Rather than trouble each of these discriminations and their manifestation in employment practices and labour markets, the title of ‘migrant’ lumps these differences as one experience against an ideal ‘regular citizen’. The regular citizen is recognised as a legal subject in existing legal categories and traditional frameworks of labour law. However it is increasingly evident that this regular citizen-subject is, in current labour market practices, difficult to locate. This is in spite of the legal frameworks that demand persons to conform to this specific ‘normal’ legal subject to enable legal recognition and protection. In spite of this salient normative category, the migrant labourer has become a ‘normal’ labour market presence. Consequently, labour law is challenged to adapt to recognise the migrant as a part of an international, and national/domestic, labour market.

A ‘migrant labourer’ is not synonymous with outsider status. Migrants are not necessarily outside the system and the nation-state. Rather, the term ‘migrant’ effectively renders persons as *lesser* citizens, less-deserving and marginalised in a sub form of legal subjectivity while not denied subjectivity absolutely. The reliance on such elusive terms as the ‘migrant’, points to the limited extent that formal legal categories of citizenship and immigration status can identify the participation –residence and work or employment– of persons in the UK labour market who exceed standard categories of recognition.³

Persons may be in situations where they are not tangibly granted full status under the law, and their belonging as citizens in the nation-state is stunted. Notwithstanding the fact that holding legal citizenship status does grant the possibility of legal recognition where a lack of citizenship does not, marginalisation and exclusion from being considered a citizen legal subject may continue in spite of formal citizenship status. This is not as a result of legal barriers, which would be remedied by expanding legal categories and access to titles of citizenship. Rather, the ostensible exclusion is from what Anderson refers to as participation in the nation through a ‘community of value’.⁴ The members of this community of value are the contrast to migrant. The community of value is the community of the non-migrant citizens. But who are these persons? By broadly referring to a migrant (racialised, ethnic) labour force, the domestic citizen labour force is constructed as the norm, but in practice these are only those citizens with qualities un-hampered by race, gender, class, dis/ability and other discriminatory labels. According to Anderson, the community of value is comprised of persons who share values and form the national community, however in an elusive and slippery manner because these values are difficult to pinpoint and hold within a particular time and place. Nevertheless, the community of value is ‘one of the ways the

² The term ‘irregular’ encompasses a spectrum of experiences in migration and labour. It can be used to refer to situations where individuals may slip into different immigration statuses however without being definitively identified as *illegal* and therefore subject to deportation and/or placed into detention. The spectrum of immigration status and ones movement on the spectrum may be a consequence of individuals’ own actions, employers’ actions, or legislative changes. It can be easy to fall in and out of status, for instance through sponsorship breakdown or if employed, as a migrant on a work permit, in very low-waged labour. For instance, for many migrants in bottom-end labour it is necessary to supplement income with a second job in order to meet the cost of basic necessities nevermind send remittances to their home country. Falling in and out of status, the individual may be considered to be in an ‘irregular’ situation. Anderson, Ruhs. However, irregular migrants are not clearly illegal. Irregular statuses are much more difficult to tackle as a strict issue of legal enforcement. There is often ambiguity as to which legal measures apply to an individual’s particular situation. ‘Irregularity’ involves a spectrum of precarious statuses or semi-compliance with law (MARTIN RUHS and BRIDGET ANDERSON. 2010. Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK. *Population, Space and Place* 16 (3): 195-21). Irregular migrants may refer to irregular entrants, foreign-nationals exceeding their permission to stay or who do not abide by conditions of stay, or children of irregular migrants who do not have the leave to remain (GORDON and SCANLON 2009, 4-5). Due to the lack of empirical data and lack of specificity as to who and what is considered to be ‘irregular’ as well as ‘migrant’, irregular migration is heavily under-theorised (BOMMES and SCIORITINO 2011, 13).

³ For instance, legal categories of citizen-national, naturalized immigrant, seasonal worker, or visa holders. Also non-legal categories that are based on racial, ethnic, socio-economic and gender identifications.

⁴ ANDERSON 2013.

state claims legitimacy' through shared (cultural) values; indeed the nation is a community of value at its best when populated by Good Citizens who are law-abiding and hard-working (economically productive) members of stable and respectable (nuclear) families.⁵ The Good Citizen ideal is the product of a liberal, Western, modern-colonial paradigm; moreover reinforced by a neoliberal free-market ideology. Qualities are of an individual, independent, autonomous, participate in the market economy, the political public sphere and are unhampered by the 'disabilities' of race, gender, class and so on.

As a legal status, national citizenship, identified through a passport or other national identity document, can facilitate the right to access social services, employment and legal representation. Symbolically citizenship facilitates belonging, identity and rights. Within the modern nation-state system the recognition of citizenship confers rights and obligations of persons within a sovereign nation of which they are considered to be a national. Through citizenship, sovereign states distinguish their national members from foreigners, and control access to rights accordingly.⁶ Thus, formal citizenship is more than a symbol of membership in a state; it is part of an international system where states bear the responsibility to admit and govern those they have accepted as their citizens.⁷ Citizenship under the law tends to universalise belonging, because it suggests that there is an attainable legal status for all persons within a territory. Meanwhile as above, citizenship is 'characterised by inclusion and exclusion.'⁸ However the inclusion and exclusion is not physical, but from membership which is troubled, or in practice defined, by the community of value. Citizenship closes off membership, meanwhile purporting to represent universalism.⁹ Furthermore, as mentioned above, membership in a nation-state through citizenship is not only a matter of legal techniques and requirements; it is based on conditions of desirability according to the community of value. These conditions make practical membership for some impossible, and they are therefore excluded from recognition in legal categories and, as will be discussed below, labour law frameworks.¹⁰ Bridget Anderson's Good Citizen –'the liberal sovereign self: rational, self-owning, and independent, with a moral compass'¹¹ – overpowers formal citizenship status, such as guaranteeing rights as a consequence of nationality through a passport. In contrast, the Failed Citizen is dependent, transgressive, potentially criminal, and above all, an 'abnormal' outsider. There are many examples of citizenship being contested and/or experienced that complicate formal, legal, state-centric, interpretations of the term. In the UK in 2014, there was much debate about how to limit the citizenship rights of, or ban re-admittance to, British citizens who left the country to join the Syrian army and the army of the Islamic State.¹²

Of interest to the application of labour law is how a domestic labour market suggests that its labour force is predominantly made up of citizen-workers. While the dominant community of value privileges economic participation in the public economic market, the UK labour force has always included the labour of those historically, and currently, not considered full citizens and furthermore excluded from the formal labour force and economic market: women,¹³ colonial subjects, slaves or indentured

⁵ ANDERSON 2013, 3.

⁶ SASKIA SASSEN, "Globalisation or Denationalisation" *Review of International Political Economy* 10: 1 (2003): 1-22.

⁷ BRIDGET ANDERSON, "What does 'The Migrant' tell us about the (Good) Citizen?" *Centre on Migration, Policy and Society Working Paper* University of Oxford, 94 (2012), 1, 4.

⁸ MARGRIET KRAAMWINKEL, "The Imagined European Community: Are Housewives European Citizens?" In *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities*, Joanne Conaghan, Richard M Fischl and Karl Klare, eds., 321-338 (Oxford: Oxford University Press, 2012), 323. Citizenship has been associated with political-economic participation that is based on a liberal, individual, male, property (land)-holding subject being recognised as a citizen of a political community, namely the nation-state. Since the emergence of the nation-state and subsequently the modern welfare state, the distinction made between citizen and non-citizen has become further intertwined with economic entitlements. Citizenship as social entitlement differs from citizenship as a legal status. Moreover, citizenship as social participation is different from citizenship as political/governance participation.

⁹ J. FUDGE, "Precarious Migrant Status and Precarious Employment" 110, in reference to Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos," *International Sociology*, 1999: 245-268. Cohen also discusses changing paradigms of citizenship for both political democratic citizenship and juridical conception of citizenship.

¹⁰ BONNIE HONIG, *Democracy and the Foreigner*, (Princeton: Princeton University Press, 2003), 54.

¹¹ ANDERSON, 2003, 3.

¹² PATRICK WINTOUR, 'David Cameron Shelves Move to Ban British Jihadis Returning to UK' *The Guardian* 1 Sept 2014.

¹³ JOANNE CONAGHAN and KERRY RITTICH, *Labour Law, Work, and Family: Critical and Comparative Perspectives*, (Oxford: Oxford University Press, 2006), 8.

servants,¹⁴ disabled persons,¹⁵ prison inmates¹⁶ and children.¹⁷ The experiences of persons designated within these categories further demonstrate that legally possessing citizenship status does not ensure equal recognition of rights in the nation-state.¹⁸ Citizens throughout history can be ‘migrant’. Social and economic inequalities isolate certain sectors of the citizenry, who subsequently are relegated, through the labour market, into situations where their participation as labourers is neither fully inclusive nor exclusive but distanced from the norm.¹⁹

It is noteworthy as well to identify that the economy is not synonymous with the market, meanwhile both the market (the neoliberal economic market that informs demand in the labour market) and the management of the household (the broader definition of “economy”) form inclusions and exclusions within their definitions. For example, the market formally includes the declared legal market that is identified through wage labour and exchange. The economic household includes traditional Western-liberal ideas of household, usually based on a classic model of a nuclear family and male-breadwinner model of employment and income generation through participating in the formal economic market.²⁰ However the ‘economy’ can include a plethora of markets, where market is defined as supply and demand. Citizens considered less-desirable –foreign-born, as well as those not considered to be fully-citizen, able to work (women, children, disabled, criminally convicted, prison inmates)– together with non-national, migrant workers, can be excluded from the community of value while still being included as necessary actors with limited agency in the proto-political, global market economy. These are persons whose subjectivity is incomplete as the included-excluded.

The condition of ‘migrant’ status is that individuals commonly find work in situations that may be informal, outside recognised employment contracts, with short-term work permits, in seasonal labour, fixed-term contracts or self-employment contracts may fluidly fold into employment practices that are in ‘semi-compliance’²¹ with law. Such ‘irregular’ or exceptional situations serve a particular purpose within the labour market. These workers are characteristically precarious, flexible, non-permanent and often may be hired and fired without any consequences on the employer, where the employment agreement has been arranged outside the operative definitions of employment laws. Particularly if they are non-nationals, persons may be willing to work for cheaper wages, may work in excess of formal working hours, for instance because of temporary stay in the country and a desire to work as much as possible during a limited time. Moreover, if immigration status is precarious, persons may agree to the employers demands to avoid being deported or transgressive of their immigration permit. Those with precarious immigration status are undeniably vulnerable to the worst abuse and exploitation from employers. Nevertheless, citizen workers in low-waged, ‘low-skilled’ labour sectors may likewise have no choice but to consent to substandard labour conditions.

The uncomfortable –both jurisdictionally and theoretically– intersection of employment and immigration concerns can result in individuals being in the gaps of the law, meaning that their status is ambiguous, in other words irregular. Employing a non-national, migrant labour force can be a way for employers to ‘distance themselves [employers] from the moral economy of the labour being done’²²,

¹⁴ ADELLE BLACKETT, “Emancipation in the Idea of Labour Law” In *The Idea of Labour Law*, Guy Davidov and Brian Langille, eds., 420-436 (Oxford: Oxford University Press, 2011), 420-21.

¹⁵ JOHN RIGG, “Labour Market Disadvantage amongst Disabled People: A Longitudinal Perspective,” Centre for Analysis of Social Exclusion, 2005, 2. Also, advocacy groups bring attention to exploitation of persons with disabilities in “sheltered workshops”, hospitals, “therapeutic work activities” in institutions: Jihan Addas, “A Legacy of Exploitation: Intellectual disability, unpaid labour and disability services.” *New Politics* 14:1 (Summer 2012), 53.

¹⁶ NOAH ZATZ, “Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships,” *Vanderbilt Law Review* 61:3 (2008).

¹⁷ GERALDINE VAN BEUREN, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1998), 263.

¹⁸ ANDERSON, 2013, 4.

¹⁹ JANE WILLS, Datta, et al., *Global Cities at Work: New Migrant Divisions of Labour* (London, New York: Pluto Press, 2010), 1.

²⁰ JUDY FUDGE, “Labour as a Fictive Commodity,” in *The Idea of Labour Law* Guy Davidov and Brian Langille eds., 120-136 (Oxford: Oxford University Press, 2011), 131.

²¹ MARTIN RUHS and BRIDGET ANDERSON. 2010. Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK. *Population, Space and Place* 16(3): 195-21.

²² WILLS JANE, DATTA KAVITA, EVANS YARA et al. 2010. *Global Cities at Work: New Migrant Divisions of Labour* London New York: Pluto Press.

especially when the work is dangerous, dirty and denigrated (3D's). Employers may feel justified, or less guilty, employing migrant workers who come from regions with less economic opportunities. However, immigration and the economic opportunities for non-nationals is only one part of a system where low-waged, low-skilled migrant labour is considered problematic. Migrant labour embodies the precaritisation of labour where workers are rendered to the margins of existing labour protections, while serving an increasing demand in the globalised labour market. Restrictions mandated through immigration laws are only one half of the picture in migration and labour, where situations of sub-citizenship are reinforced for those both with and without formal legal citizenship status.

The exclusion of migrant workers from the community of value, and thereby from ready access to legal protections within the nation-state legal system, is not definite. 'Migrant', even where considered irregular, is not 'illegal'.²³ Catherine Dauvergne, in *Making People Illegal*, uses the term illegal because of its pointed, specific implication of the law. Dauvergne discusses the process whereby labels "make people illegal" and exacerbate divisions of "us versus them", to contend that the term illegal is the clearest example of this separation.²⁴ The term migrant, moreover *irregular* migrant, does not implicate the law in the way that the term *illegal* does. Illegal has a direct association with criminality.²⁵ Whereas migrant and irregular are now most commonly used to refer to a subset of labourers who are not plainly contravening immigration or labour laws, but nevertheless are marginalized and in the shadow of regulations. Because the term, migrant labour, refers to a broad assortment of employment and migration circumstances, it blurs the distinction between the legal and illegal while reifying the regular citizen labourer as an ideal. An ideal that is infused with assumptions of what constitutes active participation in the nation-state and deserves to be recognised not within the formal legal nation-state, but within a community of shared values.

The definition of migrant in reference to migrant labourer or worker is also unclear. According to the UN International Convention on the Rights of Migrant Workers and Members of their Family (UNCRMW), article 2 (1) defines a migrant worker as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'²⁶ The International Organisation of Migration (IOM) defines labour migration as 'the movement of people from one country to another for the purpose of employment' but does not define what would constitute employment. The International Labour Organisation (ILO) has defined 'migrant for employment' in Convention No. 97 article 11 (1), as 'a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.'²⁷ The above definitions specifically refer to individuals crossing international borders.

In the UK it is difficult to distil how the popular definition of 'migrant' is applied in data collection and research. The Labour Force Survey (LFS) and Annual Population Survey (APS) are typically used to measure the impacts of migrants on the UK economy and define migrant as 'foreign born'. Based on this definition, calculations of a migrant population would include those who have citizenship and who would not be counted as migrants if 'migrant' were defined as those who are subjected to immigration control or distinguished by self-proclaimed nationality. For data according to National Insurance Numbers (NINo), 'migrant' is defined as a foreign national. However in the Office of National Statistics (ONS), 'migrant' is defined according to the UN definition, where a migrant is someone who is residing in a country other than his or her usual residence for at least a year. ONS data is used in the UK for measuring net migration. Data on net migration have a significant impact on immigration policy and political debates concerning immigration reduction. Yet, the ONS data does not include

²³ In fact, the term, irregular, came into popular usage as an alternative to the reference, widely acknowledged as derogatory, of illegal migrants. Migration activists, for example the international movement No One Is Illegal, brought public attention to the derogatory label, illegal. *No One Is Illegal (NOII)*. <http://www.noii.org.uk/> (accessed February 13, 2012).

²⁴ DAUVERGNE, *Making People Illegal*, 16-19.

²⁵ DAUVERGNE *Making People Illegal*, 4. The legal ambiguity of the term irregular allows it to be applied to a demographic of labourers beyond a specific legal category.

²⁶ United Nations International Convention on the Rights of Migrant Workers and Members of their Family, article 2 (1).

²⁷ The International Labour Organisation (ILO) Convention concerning Migration for Employment (Revised 1949). Entry into force: 22 Jan 1952.

statistics on actual departures from the UK. Length of stay is based on terms stipulated in migrant visas and self-reporting.²⁸

The differences in definitions used in UK government surveys are not insignificant. For instance, according to Anderson and Ruhs, if migrants' share of the labour market is a concern for policy makers, that share appears sixty percent larger if one considers all foreign-born workers rather than foreign nationals. In practice, foreign nationals and foreign-born workers have different relationships with the labour market based on whether the intention to stay is permanent or temporary. Temporal restrictions and status concerns for foreign nationals impact the intensity of working hours and length of contract these individuals will agree to. These differences cannot be fairly summarised in most political debates and legal concerns about a migrant labour force. Complications of definitions can be a reflection of the different ways that nationality laws recognise citizenship: *jus soli* that is citizenship based on birthplace and *jus sanguinis*, based on nationality of parents. However, politically the use of the term 'migrant' can exploit the inconsistent statistical definitions of migrant to further political agendas. Political discourses significantly impact who is popularly considered to be IML, and consequently treated as a foreigner and non-citizen. Political support for tighter immigration controls obscures the structural labour market (economic) reasons for precarious work as well as the reality of who is carrying out that labour. It is difficult to determine who is a migrant if the term is broadly used to discuss 'foreigners' but evokes flexible, temporary, transient labour.

Precarious employment

Studies in the UK reveal practices of exploitation and abuse that persist in spite of existing national and international labour standards.²⁹ The work produced by these authors contributes to discussions by legal academics that concern the legal, political, economic and social reasons for a category of labourers that are considered to be migrants in irregular situations.³⁰ Although there are many connections, the link between being labelled as 'migrant' and precarious work has not been established clearly. Precarious work can refer to a broad range of labour situations, which will be discussed below with regards to sub-contracting and fixed-term contracts, whereas migrant labour is commonly associated with low-waged, low-skilled or 'bottom-end', labour. Notwithstanding the absence of a 'robust legal definition of precarious work'³¹ and therefore the possibility that this category also can be used to identify divergent experiences, the concern about migrant workers in the UK indicates possible connections between precarious employment in low-waged low-skilled sectors and a racialised labour force considered to be outside the boundaries of community (national) belonging. The label 'migrant' may be a way to deflect attention from increasing employment precarity as a labour norm, deflecting and deferring national attention to transnational labour concerns and international labour markets. The difficulty in establishing both what constitutes a migrant labourer and precarious work raises the imperative to probe these labels and their function in the UK labour market.

The availability of workers from within the EU, willing to work for less, and a deregulated labour market in the UK promotes a supply in response to a demand for precarious workers. However,

²⁸ BRIDGET ANDERSON and SCOTT BLINDER, 'Who Counts as a Migrant? Definitions and their Consequences' (Oxford: Migration Observatory, 2013), pg n/a.

²⁹ See MARIA HUDSON, NETTO, et al., *In-work poverty, ethnicity and workplace cultures*, 2013; Working Lives research institute (<http://www.workinglives.org>) SONIA MCKAY, EUGENIA MARKOVA, and ANNA PARASKEVOPOULOU, *Undocumented Workers' Transitions: Legal Status, Migration and Work in Europe* (London: Routledge, 2011). Research in sociology, see BRIDGET ANDERSON and COMPASS: ANDERSON, "What does 'The Migrant' tell us about the (Good) Citizen?" 2012; public policy: Finch and Cherti 2011; ANDERSON and ROGALY, *Forced Labour and Migration to the UK Study 2005*; Geography: WILLS, DATTA, et al. *Global Cities*; politics: McNEVIN *Contested Citizenship*, and economics: RUHS, "Towards a post-2015 development agenda: What role for migrant rights and international labour migration?"; DUSTMAN, FABBRI and PRESTON, "The Impact of Immigration on the British Labour Market".

³⁰ FUDGE, "Precarious Migrant Status and Precarious Employment"; GUILD and MANTU, *Constructing and Imagining; Divergent Making People Illegal*.

³¹ SONIA MCKAY, "Disturbing equilibrium and transferring risk – confronting precarious work." In *Resocialising Europe in a Time of Crisis*, Nicola Countouris and Mark Freedland, eds., (Cambridge: Cambridge University Press, 2013), 194.

importantly, the ideal flexible worker does not include workers whose immigration status depends on their employment. For precarious work, ‘employers must avoid being tied into sponsorship and other obligations, and [thus they] turn to flexible labour already in the UK.’³² Temporary work programmes and the legal employment of third-country nationals are highly regulated. Thus immigration controls ‘rather than a tap regulating the flow of workers to a state, ... might be more usefully conceived of as a mould *constructing* certain types of workers through selection of legal entrants, and the requiring and enforcing of certain types of employment relations.’³³ Citizen workers, especially EU-citizen ‘migrant workers’ who may be willing to work for less, are left with little choice but to conform to sub-standard employment. Thus in spite of the problem of defining who are migrant labourers and what this label attempts to encompass (and consequentially homogenises), much attention is invested into maintaining a ready supply of workers to fill market demand.

Labour Law and Labour Protection for ‘migrant’ workers

The standard employment relationship that developed as a cornerstone of employment law in the UK has been problematised by many labour law scholars to date.³⁴ While this standard employment relationship remains entrenched in employment law –as full-time, continuous work, under one employer, with access to employee benefits and entitlements³⁵– in practice it is the employment contract that arguably determines the basis of the employment relationship, granting more flexibility and broader legal scope to contemporary employment situations.³⁶ While strides are being made to extend this definition, traditionally labour is recognised by legislated definitions of ‘employer’ ‘worker’ ‘employee’.³⁷ Outside of these definitions it remains difficult to determine a precise contractual employment relationship outside judicial interpretation: from *Carmichael* to *Autoclenz* [2011] the definition of employment is being challenged, expanded and interpreted to include the current trends in employment, which include increased prevalence of part-time, fixed-term or casual contracts.

These shifting labour market practices establish precarious work as a new standard for the labour that is demanded across labour sectors and income levels. Leah Vosko defines precarious employment as:

‘work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship between *employment status* (i.e. self- or paid employment), *form of employment* (e.g. temporary or permanent, part-time or full-time), and *dimensions of labour market insecurity*, as well as *social context* (e.g. occupation, industry, and geography) and *social location* (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).’³⁸

Precarious employment is increasingly recognised as a common form of labour, especially in low-waged, low-skilled sectors.³⁹ Furthermore, legislation protecting Agency Workers and Part-time Workers is an example of legislative efforts to catch up with shifting labour market practices. Particularly in low-waged, low-skilled labour sectors, the workers who are in precarious employment situations

³² ANDERSON, *Us & Them*, 81.

³³ ANDERSON, *Us & Them*, 91.

³⁴ MARK FREEDLAND and NICOLA KOUNTOURIS, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011).

³⁵ VOSKO 2010, 1.

³⁶ FREEDLAND and KOUNTOURIS, 2011.

³⁷ Employment Rights Act (ERA) 1996 sec 230 (1): an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. (2) “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. (3) “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

³⁸ VOSKO 2010, 3.

³⁹ FUDGE 2011a; VOSKO 2010; RITTICH 2010.

are predominantly non-British nationals.⁴⁰ Migrant, non-British, labour is commonplace in low skilled labour intensive sectors such as agriculture, hospitality and construction where the influx of workers, primarily from the EU, can respond to fluctuating labour demands and seasonal, temporary, contracts.⁴¹ This has been the case since the development of seasonal worker programmes in the 1950s, and has carried through in times of labour shortages. These sectors are characteristically under-regulated and workers, seasonal workers, are known to be more vulnerable to exploitative practices and abuse from employers.⁴²

Currently, a dominant concern is that these previously seasonal arrangements now characterise long-term work arrangements while maintaining a flexible and, for the worker, insecure contractual basis. Workers can be hired and fired on demand by employers who, by forming fixed-term, casual or self-employment contracts are not subject to the same legal obligations that protect employed workers against actions such as unfair dismissal, discrimination and so on. Self-employed workers do have some employment rights, however they are seen as legally more autonomous from the business and contract for services. Therefore, a self-employed worker is seen as someone who is able to substitute their services with another worker, and to maintain full responsibility for paying taxes, being invoiced for their work and establishing the parameters of their work contract. In *Autoclenz*, the employers argued the labourers were self-employed and therefore, their self-employment status meant that they were ineligible for holiday pay as is granted to employees. The Supreme Court held that the employers were benefiting from sham employment contracts.⁴³ The contracts were found to be ‘sham’ contracts because they identified labourers as self-employed while in practice the labourers were treated as employees of the company.

The decision in *Autoclenz* demonstrates the potential for judicial decisions to be favourable to precarious workers. By considering the practical relationship underway in *Autoclenz*, the Supreme Court interpreted an employment contract where contractually there was no such contract of employment. *Autoclenz* differs from the previous decision in *Carmichael v National Power plc* [2000], where it was decided that there was no obligation clause in the contract between Carmichael and her employers. Carmichael’s work arrangement was ‘casual’, and it was held that casual workers lacked a relationship of ‘mutuality of obligation’ with the business. Consequently, there was no contract of employment and therefore the workers were not entitled to the written terms of a contract of employment.⁴⁴

⁴⁰ WILLS JANE, DATTA KAVITA, EVANS YARA et al. 2010. *Global Cities at Work: New Migrant Divisions of Labour* London New York: Pluto Press.

⁴¹ ANDERSON and RUHS, 2012.

⁴² Since SAWS, seasonal workers programmes are characteristically intensive, demanding and brutal. The discursive identification of a low-waged labour force as foreign workers currently remains in the UK as one that was rooted in seasonal migrant worker programmes, but has since developed into anti-European Union scare-mongering. In the UK, the label ‘migrant’ may refer to persons who are on temporary or short-term work visas, who are actually dealing with immigration law provisions, as well as EU nationals who, due to EU freedom of movement (Directive 2004), do not require work visas.

⁴³ ALAN BOGG and TONIA NOVITZ. 2013. Race discrimination and the doctrine of illegality *Law Quarterly Review*. 129: 12-17.

⁴⁴ In *Consistent Group v Kalwak* [2008] EWCA Civ 430, the question considered in the Court of Appeal after the Employment Tribunal was whether claimants were employees employed by Consistent Group Limited, whether they were also ‘workers’, and whether they were employees, workers or neither of Welsh Country Foods Limited (WCF), and whether the ‘Obligations’ term in their contract of employment was a sham or not. If the ‘obligations’ part of the contract was found to be a sham, then this would mean that ‘both parties intended to paint in that respect a false picture as to the true nature of their respective obligations.’ (at para 28). It was held in the Court of Appeal that there was no obligations clause in the employment relationship with Consistent Group because the relationship lacked ‘mutuality of obligation’ to be a contract of employment (152-153). According to Lord Justice May, “the written contract between each other claimants and Consistent expressly purported to be a self-employed subcontractor’s contract for services. The ‘Obligations’ clause, ... , taken at face value ... would not constitute the claimants as employees for the purpose of section 230 of the Employment Rights Act 1996.” (at para 55). In *Carmichael v National Power plc* [2000] IRLR 43 it was affirmed that in agency work, there can be found to be a lack of mutuality and therefore no general contract of employment, when casual workers have the option to refuse work, as well as a discontinuous contractual relationship (the difference in obligation between when work was offered and when working was seen to demonstrate that the parties were not in a relationship of continuous employment). However in *Autoclenz Limited v Belcher and others* [2011] UKSC 41, it was established that where ‘written documentation may not reflect the reality of the relationship’ (at para 22 Lord Clarke), there is possibility to find the contract a sham employment contract. In *Autoclenz*, even though the terms of the contract explicitly stated that the workers were self-employed, the practice of services demonstrated that the contract was in reality one of employment.

Concerns for precarious employment in the UK, in low-waged or ‘bottom-end’ labour, intersect with concerns for persons working with precarious immigration status. In the UK, the presence of European Union citizen workers has spurred political fervour against UK’s membership in the EU, particularly due to the EU Directive on freedom of movement for labour.⁴⁵ Migrant labourers from within the EU –mainly those who are nationals of financially weaker countries, frequently referred to as persons from the Eastern European bloc– are blamed for driving down wages and limiting employment opportunities for British workers.⁴⁶ Firstly, there is a clear lack of evidence to support these claims.⁴⁷ Secondly, the rhetoric in popular media and political discussions confuse immigration status and immigration policy with shifts in labour market demand. ‘Irregular’ labour situations and a downward pressure on wages and/or employment opportunities are not directly a consequence of immigration law and workers with precarious immigration status. Notwithstanding the increased vulnerability of persons whose precarious immigration status and threat of detention/deportation can be used to exploit their labour mentioned above, the de-regulation of labour standards, the current labour market demand and employment practices that seek out precarious work arrangements are not solely based on their immigration (visa) status. In order to address the current fears of migrant labour in the UK it is necessary to look not only at the exploitation of non-nationals in labour situations that take advantage of their precarious immigration status, but also at how poverty is exploited such that workers consent to increasingly precarious work, thus contributing to a downward pressure on wages that is connected to the demands of a globalised economic market for cheap flexible labour within a deregulated labour market.

A de-regulated, or un-checked, labour market is a concern that extends beyond the immediate situation of migrant labour and precarious employment. Labour law scholars, notably Bob Hepple, have identified a general lack of political will and political culture in the UK to intervene in employment and business practices.⁴⁸ The demand for flexible, precarious workers whose employment situations exceed the scope of legislation meant to enforce minimum protections and rights for workers do not raise alarm when these protections and rights are seen to impede economic priorities of fostering economic growth and maintaining global market competitiveness. As is widely recognised, especially in times of economic crisis or recession governments lessen the protective regulatory function of labour and employment laws. An on-going demand for cheap and flexible labour sustains lower production costs and conceivably, greater economic output. Economic growth is measured against a supposedly global economic market and is privileged at the expense of employment security and labour protection.

Immigration policies prioritise an employer-led, flexible system, ‘responsive to market needs’⁴⁹ above labour protection. This was emphasised since in 2002, the Points-Based System (PBS) was introduced. The PBS obliges all applicants below Tier 1 (highly skilled work permits) to apply via a UK sponsor. The employer-sponsor is responsible for the migrant – for their entry requirements and, more importantly, for their exiting the country according to the conditions of their work permit.⁵⁰ This shift abrogated government oversight over immigration work permits and opened the potential for businesses to benefit from cheaper labour, which government emphasises as beneficial for the national economy. However, sponsorship has also increased the potential that workers will be exploited. Workers are bound to particular employers for their legal right to be in the country and thus without recourse to seek safer, or non-abusive employment.⁵¹ As an example, in 2003 in Morecambre Bay, UK, migrant labourers

⁴⁵ Most notably, UKIP

⁴⁶ UKIP blames immigration for labour market shifts and global economic changes (global supply chains etc).

⁴⁷ DUSTMANN NOV. 2014

⁴⁸ BOB HEPPLE 2013. Also, ‘Present day governments are reluctant to interfere with flexibility [freedom of contracts] for fear that restrictions might damage the competitiveness of business.’ (Hugh Collins 2010, 187). Lack of regulation means more irregular workers.

⁴⁹ UK Border Agency, *Controlling Our Borders: Making Migration Work for Britain* (2005) Cm 6472:15.

⁵⁰ In 2005, unemployment (UE) was at a historic low and there seemed to be a genuine economic need for migrant workers, particularly in the service sector. In spite of this need, as mentioned above in text, it was recommended that low-skilled work permit schemes (Tier 3) be phased-out within three years due to the availability of a labour supply from the EU. Accordingly, Tier 3 was phased-out by 2008, except for A2 migrants, from Romania and Bulgaria.

⁵¹ BRIDGET ANDERSON, “Illegal immigrant”: Victim or Villain? *Centre on Migration, Policy and Society Working Paper*. University of Oxford 64 (2008).

working as cockle pickers were tragically swept into the sea. An investigation into their deaths revealed gangmaster work practices.⁵² Consequently, the government created the Gangmasters Licensing Authority and Act of 2004. The 2004 Asylum and Immigration (Treatment of Claimants etc.) Act and, separately, the Gangmasters (Licensing Authority) 2004 Act (GLA) addressed unregulated employment and situations whereby employers knowingly employ illegal workers by introducing workplace inspections and spot fines for employers using illegal workers.⁵³ The 2004 Act and the GLA were specifically meant to respond to gang labour, which as form of employment facilitates a flexible labour supply that is mostly filled by migrants from EU countries. According to Kendra Strauss, ‘many gang workers are economic migrants from the EU accession countries, recruited in their country of origin by local labour intermediaries, while some ... are undocumented workers who become enmeshed in local networks of non-British labour contractors.’⁵⁴ Many migrant advocates and workers welcomed the intervention made by the GLA in 2004. However, the GLA focuses only on particular labour sectors, excluding labour that is self-employed or agency work. Consequently, much of the on-going exploitation experienced by precarious labourers occurs beyond the scope of this legislation. The GLA also suffers from a severe lack of funds and resources. This has rendered the GLA limited in its success and scope.⁵⁵ In spite of the GLA’s mandate to regulate employers and the Points Based System (PBS) formalising work permits, the demands in employment that maintain irregular and exploitative labour practices exceed existing regulations. Moreover, the lack of political will to allocate funds to the GLA reinforces the political priority to maximise profit and minimised regulation. The Points-Based System has made the process of acquiring legal permission to migrate and sponsor migrants more difficult, and the number of persons coming in from non-EEA countries to work in low-skilled/ low-wages occupations has decreased. Meanwhile the standards, wages and conditions in the labour sectors have not improved.⁵⁶ Neither the PBS nor the GLA eliminated precarious employment, where this type of employment is kept off record. Employers may extend working hours, withhold pay, or require workers to work overtime without pay, all the while appearing to give their workers autonomous choice to consent or refuse. Employers are able to manipulate terms of employment that defer their responsibility, for example when labourers are technically self-employed or sub-contracted through an agency. In these cases, the employer is not necessarily bound to protect the workers through existing company regulations or policies.⁵⁷

Conclusion: migrant labour and the future of labour law

The aforementioned community of value promises to fulfil the ‘spirit’ of a ‘people’ within a shared, cohesive and known shared set of values. In the UK, as Anderson argues, the community of value is ‘populated by ‘good citizens’, law-abiding and hard-working members of stable and respectable families.’⁵⁸ Membership in the community of value is afforded to these Good Citizens who reflect liberal ideas (autonomy, freedom, belonging and property, are British, educated, predominately male, middle (to upper) class. This membership is protected and restricted, even against legal (formal) citizenship categories – which is how the exploitation of precarious workers in low-waged and low-skilled labour (the downward pressure on their wages and tendency towards casual, insecure work contracts) continues

⁵² Gang labour is ‘a form of temporary casual labour in which an agent (‘gangmaster’) contracts and supplies workers for employment in the British labour market, traditionally in the horticultural and agricultural sectors.’ Kendra Strauss, “Unfree again: social reproduction, flexible labour markets and the resurgence of gang labour in the UK,” *Antipode* 11 (2012): 1-18.

⁵³ *Gangmasters Licensing Act* 2004 ch.11; Gangmasters Licensing (Exclusions) Regulations of 2006, S. I. 2006/ 658). The GLA (2004) was established after the deaths of migrant labourers (cockle-pickers) in Morecambe Bay, UK. BBC News, “Tide kills 18 cockle pickers” *BBC News* February 6, 2004.

⁵⁴ STRAUSS, “Unfree again” pg. n/a.

⁵⁵ WILKINSON 2012, 15-17.

⁵⁶ UK Home Office, *Managing Migration: The Points Based System*, Select Committee on Home Affairs report July 2009, Thirteenth Report of Session HC 217-1 (2008-2009).

⁵⁷ Anderson and Ruhs, *Who Needs Migrant Workers?*, 13. A more detailed discussion of employment law will follow in chapter four.

⁵⁸ ANDERSON, *Us & Them*, 3.

even for labourers who are British Citizens.⁵⁹ This while the ‘community of value’ is not written in to legislation per se, the values guide political priorities, labour enforcement or their non-enforcement, as is the case with the GLA 2004.

My conclusion is not a closing but instead leaves with a suggestion for where this discussion of migration labour and labour law may lead. Labour law scholarship is currently concerned with the contemporary relevance of existing legal frameworks and legal fields.⁶⁰ Ostensibly ‘global’ labour markets depend on an increasingly precarious supply of workers across labour sectors and employment. Maintaining a focus on migrant labour that is considered ‘irregular’, I suggest that re-thinking law and the legal citizen-subject might be necessary before possible remedies available for ‘irregular’ migration and their precarious employment situations to be widely successful. Such a deeper questioning suggests looking at how labour market economic concerns converge with ideas of citizenship and who is permitted recognition as a legal subject.

Philosopher Jean-Luc Nancy offers a concept of the *confronted community* to re-consider how what is experienced, included and excluded, within law and labour markets exceed existing categories of labour law through frames of immigration and citizenship. Being identified as a ‘migrant’ suggests that one’s presence is not one of permanent belonging but rather exists (is present) in legal grey areas in the shadow of the domestic law. In his work, Nancy explores the presence of persons interacting and relating in spite of formal inclusions or exclusions.⁶¹ Our very basic being is relational, and from this sociality of interaction, we have what we know of as our economic, legal and political infrastructures. The bare relationality that constructs the matter of society (economic, juridical and political) is not a utopian community, but rather is the bare bones or foundation of what constitutes our world. This ‘originary’ or basic interaction, according to Nancy, comes before categories and labels that ascribe meaning and recognition in relation to the nation-state and its legal system. Nevertheless, in the coming together the only language that we have and know is within the frame of the nation-state and traditional law. Therefore, if unquestioned, the economy and the labour markets that are managed through legal frameworks are produced, reproduced and perpetuated.

Nancy’s work offers a unique approach to the analysis of labour law and migrant labour by suggesting a starting point that strips legal categories bare to expose the actual practices of sociability and labour production and reproduction. Without attention to the constructed categories, labour is predetermined into categories that render some persons ‘irregular’ against a presumed ‘regular’ ideal citizen-subject. When unquestioned, the sociality is understood only from a paradigm of thought that not only is traditional labour law, but more fundamentally remains contingent on a historically specific system of political and juridical governance, constructed through modern philosophy’s understanding of being and from this, legal status. The political-juridical governance structure informs language, categories and knowledge. This, the Western, modern-colonial philosophical tradition, is not only a lasting ideological foundation of current legal categories and subjectivities, but has capitalised on the epistemological and ontological facets of law’s origins and our very social, political, economic constitution. For this reason, the legal grey areas where persons in ‘irregular’ labour situations are not only in the gaps of ‘regular’ legal status, but are the irregular against which the subject is constituted as regular. In spite of the sociality including the labour (production and reproduction) of all actors, in Nancy’s words the ‘originary sociality’ that is the basis of our society and economy, legal categories differentiate regular citizen subjects from those considered to be irregular. This is crucial to analyse because the legal categories do not negotiate a border of legal versus illegal. Rather the difference is more ambiguous, and legal grey areas more elusive. For this reason, my approach deeply questions how we constitute being as a person subjected under the law.

⁵⁹ According to Bonnie Honig, membership in a nation-state through citizenship is not a matter of legal techniques and requirements; it is based on conditions of desirability. These conditions make membership for some impossible (Honig 2001, 54). Precarious labourers are kept beyond the scope of legal regulation and active citizenship participation within a national legal system. Meanwhile, their labour benefits a national (domestic) economy.

⁶⁰ Many scholars are exploring new conceptual and regulatory possibilities in labour law (Freedland and Kountouris 2012; Arthurs 2011, 22; Fudge 2011b, 128-135; Zatz 2011, 234; Blackett 2011, 434-436); Migrants at Work

⁶¹ JEAN-LUC NANCY, *An Inoperative Community* Minnesota: University of Minnesota Press, 1991.

The direct applicability of connecting migration and labour law concerns with fundamental questions of being via the constitution of sociality remains undetermined in my analysis. However, my approach to labour migrants in irregular situations and their troubled access to recognition under labour/employment laws begins from the fundamental question of why formal categories of labour and employment law are insufficient to remedy the situation of ‘irregular migrant labourers’. Digging into this question brings me to consider how persons are constituted and recognised as legal subjects. By using this as a starting point, further work aims to unravel the present inability for existing legal systems and instruments to adequately address persons living and working in the shadows of the law.

Shifting epistemologically our understanding of citizenship and labour market participation and labour to the *confronted* community would open onto the multiple practices and experiences of labour and work and place labourers not as occupying legal grey areas but as confrontation of a globalised labour market demanding cheap labour. This would enable a critical intervention into broader, overarching, labour and economic practices that go un-examined in the immediate concerns of labour regulations and enforcement of existing legislative protections.

The Spanish Labour Foundation: The case of Construction Labour Foundation of Asturias

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Abstract: Work foundations are not well known institutions having a great potential to promote an improved and stronger social dialogue, worker participation and employee social responsibility. Perhaps, the Austrian work foundations are the most well known, serving as an example of success that may become the basis of a new model that is founded on flexicurity. However, there are other experiences in Europe from which knowledge may also be derived for both European and national good practices perspectives.

The purpose of this research is to analyse the main characteristics of Spanish labour foundations. The interest in these foundations is based on two main points. On the one hand, they give us a concrete and specific regulation on labour foundations which comes directly from the law. In this sense, they are based on a completely different legal system as compared to the Austrian experience. On the other hand, they represent the first regulation in Europe on this specific type of foundation. This not only means a longer tradition, but more importantly, that they are based on a completely different socio-economic perspective.

This paper has been divided as follows: first, there is a brief description of the concept of labour foundation; second, the regulatory framework is described, which consists of both the legal regulation and its practical manifestation. As for the latter, one of the most thorough and developed experiences has been chosen: the case of Construction Labour Foundation of Asturias. Finally, some conclusions about the practical development of labour foundations in Spain are offered.

Keywords: labour foundations, work foundations, Labour Law.

1. Introduction: from “foundations” to “labour foundations”

There is no existing common legal definition of the term “foundation”, even in Europe. Countries with civil law systems recognize the foundation as a legal form, but its limits differ from one country to another. They are based on the ancient *universitas rerum*, which explains that the most important thing when defining a foundation is the patrimony or assets, which is destined to a specific purpose. Most common law countries, including the UK, Ireland, Cyprus and Australia, do not have a specific defini-

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tion, but they use the “trust” concept, that is, a relationship between property and trustees, and follow its legal development from case law. The exception is the US, which in 1969 established a precise, albeit negative, definition¹.

This heterogenic situation comes not only from the different legal traditions, but also from the distinct political systems and the role that foundations play in them. Despite its basis in private law, its development is quite close to the role displayed by the State. In economic terms, foundations are tools to “fill gaps” or cover market failures², so they are inevitably destined to converge with the state, which usually carries out the same function. Some research underlies the role of foundations as a complement or substitute of the state (and sometimes, as a rival)³ and, accordingly, it establishes different roles depending on the “type” of the state⁴.

Therefore, it is possible to find different types of models («visions»), depending on the kind of relationship existing between the foundation and the state⁵. In the «social democratic model», foundations exist in a highly developed welfare state, which is not an obstacle to the quite intense activity, as a part of a coordinated relationship that allows them to play a complementary or supplementary role to that of the public authorities. In the so-called «state-controlled model», foundations are looked upon with suspicion, so they must carry out their activities within a quite controlling legal framework in a subservient level to the state. In practical terms, this model is quite closed to the «peripheral model», where foundations have a minor role, what is not necessary linked to the regulation, but with other reasons like social perception of foundations. Both may be seen as a more restrictive version of a «corporatist model», in which foundations have a subsidiary relationship with the state, and therefore, they are considered to be a part of the welfare state and not “strange” elements. In the «liberal model», foundations have quite an important space, but in a parallel system, next to the government, they are often an alternative to the mainstream and safeguards of non-majoritarian preferences. Finally, in the «business model», foundations are corporate instruments for achieving some public interest, thus cooperation relationships emerge not with the state, but with the business sector⁶.

Nevertheless, considering the common elements, some definitions have been provided. Focusing on legal requirements that appear in all legal systems, foundations have been termed «independent, separately-constituted non-profit bodies with their own established and reliable source of income, usually, but not exclusively, from an endowment, and their own governing board»⁷. In a most basic form, which underlines the role or purpose of this legal institution, «the foundation is based on the transfer of property from a donor to an independent institution having the obligation of using this property, and any proceeds derived from it, for a specified purpose or purposes during an often-undetermined period

¹ ANHEIER, H. K. *Nonprofit organizations: theory, management, policy*, Routledge, London; New York, NY, 2005, p. 304.

² WEISBROD, B. A. *The nonprofit economy*, Harvard University Press, Cambridge, Mass., 1988.

³ ANHEIER, H. K.; DALY, S. “Comparing foundation roles”, in *Foundations in Europe: society, management and law*, Routledge, New York, 2007, pp. 27-41. Currently, in this study, other kinds of roles carried out by foundations are explained.

⁴ These studies are inspired by Sping-Andersen’s construction of the Welfare State. G. Esping-Andersen, *The three worlds of welfare capitalism*, Princeton University Press, Princeton, N.J., 1990.

⁵ ANHEIER, H. K.; DALY, S. “Comparing foundations visions”, in *Foundations in Europe: society, management and law*, Routledge, New York, 2007, pp. 45-58.

⁶ Two more models may be added. The Mediterranean model, situated in the countries of Southern Europe and characterized by a huge increase in foundations over recent years; and the post-socialist model, typical in Eastern Europe and supported by external funds and forming part of a political, though highly complex and ambiguous agenda of public sector support. H. K. ANHEIER, “Foundations in Europe: a comparative perspective”, en *Foundations in Europe: society, management and law*, The Directory of Social Change, London, 2001, pp. 68-75.

⁷ European Foundation Centre, *Comparative Highlights of Foundation Laws. The Operating Environment for Foundations in Europe*, EFC, Brussels, 2015, p. 8. This reports analyses the regulation of foundations in 40 European countries from a cross-national perspective, focusing on the following common elements: 1) purpose of a foundation, 2) minimum capital, 3) state approval, 4) registration, 4) economic activities, 6) majority shareholding, 7) governing organs, 8) remuneration of board members, 9) reporting, 10) external audit, 11) supervisory authorities, 12) recognition of foreign foundations, 13) assets and dissolution, 14) administration cost, 15) timely disbursement of income and assets, 16) activities abroad and implications for the tax status, 17) gift and inheritance tax, 18) tax treatment of income from grants and donations, 19) tax treatment of income from asset administration and economic activities, 20) tax treatment of foreign-based foundations, 21) tax treatment of individual donors-domestic and cross-border cases, 22) tax treatment of corporate donors-domestic and cross-border, 23) overview of core elements of the legal requirements for public benefit tax status, 24) overview of purposes for exempt public-benefit status.

of time»⁸ or «a private legal entity that possesses income-generating assets and devotes its resources to public purposes»⁹.

Accordingly, a foundation must have the following characteristics¹⁰: i) it must be an asset-based entity or a non membership-based organization, which means that it is based on an original deed that provides both the intent of purpose and relative permanence as an organization; ii) it must be a private entity, which does not mean that it can belong to the State, but it is structurally separate from public bodies and it cannot exercise governmental authority; iii) it must be a self-governing entity, so it must be provided by its own governing bodies; iv) it must be a non-profit-distributed entity, so it is not to return profits to their owners or members; v) it must serve a public purpose, which is understood to be a purpose of general interest; and vi) self-understanding and identity as “foundation”, distinguishing it to other non-profit organizations. All these items permit distinguish a foundation to other philanthropic entities throughout countries despite of the lack of a single legal definition.

In spite of this huge variety, all foundations may be classified into three different types, according to their activity¹¹: i) grant-making foundations, which provide funds for specific purposes; ii) operating foundations, which primarily operate their own programs; iii) and mixed foundations, which combine these two kind of activities. If we pay attention to founder type, four different kinds may be distinguished: i) individual foundations, in which the founder is a natural person (or persons); ii) corporate foundations, the most common of which are company related or company sponsored ones; iii) community foundations, which quite common in Anglo-Saxon countries and usually belongs to municipalities; and iv) government-sponsored or government-created foundations, if they receive a lot of support from the state¹².

According to this brief description, there is no relationship between foundations and labour issues apparently. Labour foundations do not appear in the list of kinds of foundations; neither employers nor employees are mentioned as possible founders; working conditions and social protection do not seem to be the prototypical types of activities carried out by them. However, Labour Law is an area of confluence between the public and the private issues and, therefore, plenty of general interest must be defended¹³. This is a field in which the State intervenes but also, in which social partners, employers and employees, plays a very significant role. From this perspective, labour foundations can be a tool on hand for those who are closer to the labour market to develop the activities that every legal system attributes to them. This makes Labour and Social Security Law an appropriate field for the development of labour foundations¹⁴.

Work foundations¹⁵ are not well known institutions having a great potential to promote an improved and stronger social dialogue, worker participation and employee social responsibility. Perhaps, the Austrian work foundations are the most well known, serving as an example of success that may become the basis of a new model that is founded on flexicurity¹⁶. They were born out of a truly specific context that determines their subsequent development. Specifically, the first labour foundation, the Steel Foundation was created in the 1980's¹⁷, using as an example, the experiences from other German industrial areas¹⁸. The purpose of this legal tool is to reconvert the most important Austrian steel company,

⁸ ANHEIER, H. K. *Nonprofit organizations*, cit., p. 304.

⁹ ANHEIER, H. K. “Foundations in Europe: a comparative perspective”, cit., p. 2. See this research in order to study the historical background of foundations.

¹⁰ ANHEIER, H. K., DALY, S. “Philanthropic foundations in modern society”, in *Foundations in Europe: society, management and law*, Routledge, New York, 2007, pp. 8-9. H. K. Anheier, “Foundations in Europe: a comparative perspective”, cit., pp. 41-42.

¹¹ ANHEIER, H. K. *Nonprofit organizations*, cit., pp. 305-306.

¹² ANHEIER, H. K. “Foundations in Europe: a comparative perspective”, cit., p. 49.

¹³ LANTARÓN BARQUÍN, DAVID. “La Fundación y sus recientes proyecciones en el Derecho del Trabajo y de la Seguridad Social (Especial atención a las Fundaciones Sanitarias)”, cit., pp. 173-174.

¹⁴ *Ibid.*

¹⁵ The term “work foundation” is also used, as a synonym of “labour foundation”.

¹⁶ Currently, it has been highlighted as a practical example of “flexicurity” along with the Austrian severance payment system. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. «Towards Common Principles of Flexicurity: More and better jobs through flexibility and security»*. COM(2007) 359 final, European Commission, Brussels, 2007, p. 19.

¹⁷ “Arbeitsstiftungen”, as it is called in German, are highlighted as a successful model for the solution of regional structural and labour market problems. This instrument was first used in the framework of the VOEST-Alpine Steel Foundation (1987).

¹⁸ WINTER-EBMER, R. *Long-term consequences of an innovative redundancy-retraining project: The Austrian Steel Foundation*, Working Paper, Department of Economics, Johannes Kepler University of Linz, 2000, p. 6.

achieving a complex balance between the vindicating industrial workers and their trade unions and the rest of society.

Thus, on the one hand, the Austrian steel industry was no longer economically viable in a context of global concurrence, meaning that massive lay-offs may be adopted, as a first step in an overall renewal process. Some major decisions had to be taken in order to steer this complex process, minimizing both the social effects and the union responses. On the other hand, no sort of answer was going to be understood by a society involved in such a great variety of social, economic and political changes¹⁹.

The final result is a legal form in which all of these parties are represented but in which the main solutions come from the one that has been the most affected, employers and employees. The establishment of a labour foundation is based on an agreement between social partners at company or sector level in collaboration with the regional labour market service authority²⁰. Accordingly, despite the fact that public administration support is going to be needed, as it is being explained, the success of Austrian labour foundations probably comes from the offering of solutions that are supported (and financed) by employers, workers and ex-employees. In these ways, pre-retirement, active job seeking and, most of all, education, training and re-qualification programs were implemented in order to provide a new labour opportunity to all workers who viewed themselves as having been dismissed (paying special attention to older and young job-seekers).

However, there are other experiences in Europe from which knowledge may also be derived for both European and national good practices perspectives. Spanish labour foundations are one of them. The interest in these foundations is based on two main points. On the one hand, they give us a concrete and specific regulation on labour foundations which comes directly from the law. In this sense, they are based on a completely different legal system as compared to the Austrian experience. On the other hand, they represent the first regulation in Europe on this specific type of foundation. This not only means a longer tradition, but more importantly, that they are based on a completely different socio-economic perspective.

The following sections will be dedicated to analyse their legal framework through one of the most thorough and developed experiences: the case of Construction Labour Foundation of Asturias.

2. Labour foundations in Spain: the institutional framework

2.1. Legal Framework

Although Spanish labour foundations are not as well known as others, such as the Austrian ones²¹, they are a prototypical example of this type of foundations. Before explaining the legal framework of these institutions in Spain, it may be interesting to present some data describing their situation. This, however, is not an easy task. Despite the fact that Law 50/2002, of 26 December, on Foundations²² (hereinafter Law 50/2002) established the creation of a single register of foundations, this was recently carried out²³. This means that the information still remains distributed between the different public institutions that are in charge of this type of registers, including various national ministries and offices of the Autonomous Communities. Fortunately, some private institutions, like the Spanish Association of Foundations (Asociación Española de Fundaciones –AEF–), attempts to centralize all this information.

According to the AEF's data, there are 14,808 foundations registered in Spain in 2015, of which 13,302 are "active". This data includes all types of foundations, public and private, related to all sorts of activities and purposes, including the environment, culture, entrepreneurship, charity, religion, etc.

Regarding this last one, 232 foundations declare to have "employment and learning"²⁴ as main activity, whereas 289 as a secondary activity, 185 as a third activity and 73 a fourth. Thus, different types of

¹⁹ SUSCHNIGG, P. *From Austrian Labour Foundations to Job Transfer: Training Strategies Under Three Labour Relations Regimes*, York University, North York (Canada), 2001, pp. 4-11.

²⁰ VOSS, E. *Organising Transitions in Response to Restructuring*, European Commission, Hamburg, 2010, p. 41.

²¹ MERCADER UGUINA, JESÚS R. (ed.), *Fundaciones laborales: herramienta para canalizar la responsabilidad social empresarial*, Tirant lo Blanch, Valencia, 2009, p. 192.

²² Spanish Official Gazette (BOE) of 27th December 2002, no. 310.

²³ Order PRE/2537/2015. Spanish Official Gazette (BOE) of 1st December 2015, no. 287.

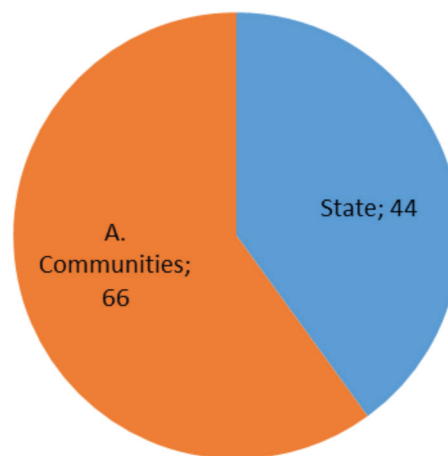
²⁴ This is the keyword under which they are classified.

activities and purposes may be undertaken by a single foundation, which means that, some of these foundations may be not be classified as “labour foundation” according to the regulation as explained below.

In order to focus our analysis on those foundations that are in fact “labour”, and considering that the available data fails to distinguish them, the foundation names have been used. This strategy is not a complete and satisfying response for two main reasons. On the one hand, there is no obligation to use the term “labour foundation” such as, so it is quite possible that the words “labour” or “work” may not appear in the name. On the other hand, there are some foundations that, although they use this term in their name, are not in fact labour foundations, according to the traditional characteristics described in the Spanish regulations. Despite these problems, it may be a useful way to determine the exact number of labour foundations existing in Spain.

The next graph show this data, distinguishing between those whose scope is the state and those whose activities are developed within the limits of an Autonomous Community (or a province or provinces to which it belongs).

Graph 1. Labour foundations in Spain



Source: own elaboration based on AEF's data.

Considering that no specific labour foundation regulation exists in the Autonomous Communities, they have been found to be quite successful. As for the overall data, it may be classified as satisfactory, especially when considering the abandon that this type of foundation has suffered over the past decade, which shall be described later. Unfortunately, the scarcity of the data does not permit the creation of a more thorough description, for example, one revealing how many employees are covered by these foundations.

The Spain's case is probably one of the oldest in Europe. The Spanish labour foundation regulation dates back to 1961, when Decree 446/1961, of 16th of March, on labour foundation was passed²⁵. Then, the Order of the Ministry of Employment of 25th of January of 1962 created its content²⁶. According to its Statement of Reasons, «Over time, there is a greater number of companies which, interpreting their social duties fairly, create charitable organizations within its structure to favour its employees, although they do not usually provide them with any sort of property, legal autonomy or control. The great job that these organizations can offer, not only directly through their activity, but by bringing together the individuals who work in the same place, provides employers and employees formulas that offer stability to this activity, facilitating employee solidarity with the company efforts and contributing to optimal results»²⁷. As a result, this tool has been extended across the country, so the new regulation comes to offer legal support and to promote its diffusion²⁸.

²⁵ Spanish Official Gazette (BOE) of 20th March 1961, no. 67.

²⁶ Spanish Official Gazette (BOE) of 13th February 1962, no. 38.

²⁷ Own translation.

²⁸ Regarding the historical origins of labour relations, see RUIZ OLABUÉNAGA, J. I., “Spain”, in *Foundations in Europe: society, management and law*, Routledge, New York, 2007.

Although this regulation is inspired by an old fashioned concept of labour relations, typical of Franco's dictatorship that conceives them as a harmonious community between labour and capital²⁹, it also reflects the first steps towards true collective bargaining. This trend shall be seen to have accelerated with the democracy thanks to the Constitution of 1978, whose articles 34 and 37 promote foundations and collective bargaining, respectively³⁰. The final result is that labour foundations go from being viewed with suspicion due to their novelty, to be considered an advanced institution of the new period for Foundation Law and collective bargaining³¹.

Consequently, the new Law 30/1994, of 24th November, on Foundations and Tax Incentives for Private Participation in Activities of General Interest³² was going to keep the previous regulation, explicitly include «group of workers from one or two undertakings and their relatives» as beneficiaries of a foundation (art. 2.2) and order the renovation of the regulation through a new decree by the Government (additional provision 18).

However, a new law shall substitute the former one with some important changes for labour foundations. The current Law 50/2002, of 26th December, of Foundations³³ abrogated most of the content of Law 30/1994, including additional provision 18, and the Decree of 1961. This does not mean that Labour Foundations no longer exist in Spanish legal systems. Currently, it is possible to find specific mentions, such as art. 2 r) of Law 36/2011 of Social Procedure³⁴, expressly including disputes related to labour foundations within labour court competences; art. 240.2 General Social Security Law³⁵, which permit undertakings to improve the coverage provided by Social Security through, among other tools, labour foundations; or art. 2.1.d) of Royal Decree 1337/2005, of 11th November, approving the Regulation of state level foundations, which expressly mentioned this kind of foundations and whose first additional provision defines them but only «for the purposes of this regulation»³⁶.

Nevertheless, the Law has opted for regulation of labour foundations through a general prescription instead of a specific one. It admits the existence of labour foundations as a specific type of foundations and, consequently, its art. 3.2, concerning beneficiaries, attempts to save one of their most important legal obstacles: «the founding purpose must benefit a generic group of people. This category includes groups of workers from one or several companies and their families»³⁷. But, except for this quite important exception, labour foundations must be governed by the same rules as any other foundation. This new regulation was criticized by the doctrine³⁸, since it does not deal with the numerous peculiarities of this type of foundation, which would be an obstacle for their future expansion and development.

Consequently, the Spanish legal system maintains the legal form of foundation but with few specific rules. As mentioned previously, along with the legal mention of employees as beneficiaries, Royal Decree 1337/2005 includes the concept of labour foundation:

²⁹ GALA VALLEJO, C. "Las fundaciones laborales: (su base ideológica y planteamiento jurídico)", *Revista de Previsión Social*, vol. 19, 1963, pp. 3-6.

³⁰ MERCADER UGUINA, JESÚS R. (ed.). *Fundaciones laborales*, cit., pp. 17-19.

³¹ LANTARÓN BARQUÍN, DAVID. "La Fundación y sus recientes proyecciones en el Derecho del Trabajo y de la Seguridad Social (Especial atención a las Fundaciones Sanitarias)", *Relaciones laborales: Revista crítica de teoría y práctica*, 1, 2001, p. 17.

³² Spanish Official Gazette (BOE) of 31st October 2015, no. 261.

³³ Spanish Official Gazette (BOE) of 27th December 2002, no. 310.

³⁴ Spanish Official Gazette (BOE) of 11th October 2011, no. 245.

³⁵ Spanish Official Gazette (BOE) of 29th June 1994, no. 154.

³⁶ Spanish Official Gazette (BOE) of 22nd November 2005, no. 279. Accordingly, art. 11 a) of Royal Decree 1611/2007, of 7th December, in which the register of state level foundation is created (Spanish Official Gazette (BOE) of 19th January 2008, no. 17) recognizes labour foundations as the kind of institution that may be registered in it. According to Spanish Constitution, both the State and Autonomous Communities are competent to regulate foundation activities in their respective geographical area.

³⁷ As mentioned previously, the concept sustains that assets must be dedicated to a particular purpose. In some legal systems, only public purposes are admitted, whereas others allow foundations to pursue any lawful purpose, including private ones. However, in these latter situations, public tax benefits are usually excluded. In the case of Spain, only public purposes are admitted, generating a huge debate on the legal nature of labour foundations and whether or not they really are foundations. For more on this debate, see RODULFO, J., *Las fundaciones laborales: problemática actual y régimen jurídico*, Grupo INI, Madrid], 1992, pp. 43-48.

³⁸ MERCADER UGUINA, JESÚS R. *Fundaciones laborales*, cit., pp. 36-37.

«For the purposes of this regulation, labour foundations are considered to be those:

- a) created by agreement between companies and their employees, [or] established by unilateral act of a company or third parties for the benefit of workers of one or several companies and their families.
- b) formed by the most representative employers and trade union organizations in a given sector or some specific sectors for the development of working purposes».³⁹

Furthermore, the general legal concept of foundation is also applicable (art. 2), defined as a «non-profit organization whose patrimony or assets, by their founders' wish, is permanently intended for purposes of general interest». According to this definition, three main characteristics delimit the concept of foundation in Spanish Law, not so different from other civil law systems: a patrimony intended for a purpose, that is managed by a specific legal entity and that pursues a general interest as a non-profit organization⁴⁰.

Comparing these two definitions, what are the keynotes of the definition of a labour foundation? Regarding the intended patrimony, it could emerge in two different ways: a) by agreement between companies and their employees; that is, by collective bargaining agreement; or b) by unilateral act of the company or a third party⁴¹. So, here we have the first genuine characteristic of a labour foundation since, in addition to the unilateral decision or will of one or more individuals, collective bargaining is also a legal method, and in this case, the principal one in order to constitute a foundation⁴². Moreover, it has some major legal consequences since it connects the labour foundation to the right to collective bargaining (art. 37 of the Spanish Constitution –SC–) and, specially, to freedom of association (art. 28 SC), which is more protected as a fundamental right. In other words, labour foundations extend beyond the limits of art. 34 of SC, linking not only to other rights, but to the one having the greatest protection in Spanish legal system, as a part of the activities that may be carried out by trade unions.

This singular *via* is articulated by the direct agreement between the employer and his employees (or employees' representatives) or by agreement between the most representative employers and trade union organizations in a given sector or several specific sectors. It should be highlighted that any type of collective agreement is valid to constitute a labour foundation. Each case refers to two different bargaining levels, company level and sectorial level. As we shall explain below, this latter one is especially important for small and medium sized enterprises (hereinafter, SME) since it permits them to profit from synergies derived from the economies of scale.

Second, regarding the purpose itself, there are two main limits or requirements. On the one hand, it must be a «purpose of general interest» (general requirement) but, on the other hand, «for the benefit of workers of one or several companies and their families» or «the development of working purposes» (specific requirements). This means that all sorts of purposes admitted for any kind of foundation will be valid for a labour foundation if it benefits company employees and their families or working purposes. The definition of a «purpose of general interest» is not limited by Law 50/2002, but rather, it offers an extensive list including, among others, those related to social assistance and social inclusion, education, culture, science, health, employment or promotion of social economy⁴³. The previous Decree from 1961 mentioned assistance «work» or activities as inherent to labour foundations. However, it also included an open list that probably connected those that were more common in that particular time: «kindergar-

³⁹ First Additional Provision of Royal Decree 1337/2005. Own translation. This concept does not contain the Autonomous Communities that have competences on foundations placed in their territories. Andalucía, Canarias, Castilla y León, Cataluña, Galicia, La Rioja, Madrid, the Basque Country and the Valencia Community have passed their own laws on foundations. Source: Spanish Association of Foundations (AEF).

⁴⁰ DROBNIG, U. «Foundations as Institutionalized Charitable Activity», in *Foundations in Europe: society, management and law*, Routledge, New York, 2007, pp. 608-611.

⁴¹ This «bilateral» way of conforming labour foundations comes from the first regulation. In spite of that art. 3 of Royal Decree 446/1961 only mentioned the agreement between the company and workers, the subsequent Order also included unilateral acts of the employer or a third party (art.2).

⁴² GALA VALLEJO, C. «Las fundaciones laborales», cit., p. 8.

⁴³ See art. 3.

tens, schools, holiday and retirement homes, recreational, cultural and vocational training centres, company shops, sports facilities, medical services or other healthcare facilities, fellows, housing and generally any other kind of assistance activities for the benefit and enjoyment of those who serves or served in a company»⁴⁴. It should be noted that both the Law and current Decree refer simply to “employees”, but does not mention former employees, as did the 1961 Decree, raising a question as to whether labour foundations could develop programs for workers who have been dismissed⁴⁵.

Some studies have highlighted the fact that the Spanish definition differentiates between levels of bargaining. At a sectorial level, the purposes have broader names («employment purposes») and there is only one way to create a foundation: the collective agreement. At a company level, the purposes appear to be more reduced («benefit of workers of one or several companies and their families») and the paths are more diverse, not only collective agreements, but also unilateral acts of the employer or a third person. This differentiation is used to highlight the fact that, in the second case, the beneficiaries need only to be considered employees in order for them to be considered “labour foundations”⁴⁶.

Accordingly, Spanish regulation establishes a set of requirements which makes labour foundations different to the rest of them. On the one hand, at company level, the minimum requirement is benefiting workers and their families (and, additionally, it may be created by collective agreement). On the other hand, at sectorial level, the entity must be founded by collective agreement. This is a genuine characteristic element of labour foundations.

From a comparative perspective, a third keynote can be added⁴⁷: employees or, more correctly, their representatives, must take part in the management of the foundation. This is the logical consequence when the foundation is constituted by collective agreement; that, as we previously mentioned, is the most common situation, but the Law does not impose it. The former Decree of 1961 obligated the inclusion of worker representation in the foundation’s compulsory government organs⁴⁸. This characteristic led to some major legal debates since, from a theoretical point of view, the foundation manager is usually the administrator of a tool, the foundation, from which a third party profits. In the case of labour foundations, not only are employee representatives the administrators, but also the founders and beneficiaries, raising the question of whether or not this is contradictory with the legal nature of foundations. In other words, questioning whether or not labour foundations are real foundations.

These debates have been addressed by Law 50/2002 which, as was previously mentioned, expressly says that «groups of workers of one or several companies and their families» may be considered a generic group for the purpose of the foundation, that is, they may be beneficiaries. Furthermore, since there is no rule that forbids their participation in the management of the labour foundation, this means that *ope legis*, there are no obstacles to the participation of employee representative in the foundation’s organs of government. Aside from the law, this has been justified by the fact that neither general interest means the interest of a group of beneficiaries, nor can managers do whatever they choose outside the foundation agreement. Accordingly, a foundation cannot be created to satisfy the private interests of a group of beneficiaries nor may its managers adopt decision that are contrary to foundations agreement⁴⁹. In addition, both creation and administration are shared activities, so not only may the employee representatives participate, but the employer as well. Their presence guarantees the public purpose of the foundation and that founder and manager interest do not coincide with that of the beneficiaries. Regardless, it is quite possible that, as warned, this is a special and specific characteristic of labour foundations⁵⁰.

⁴⁴ Art. 1 Royal Decree 446/1961.

⁴⁵ Nevertheless, it may be admitted as “working purpose” for the sectorial level.

⁴⁶ MERCADER UGUINA, JESÚS R. (ed.). *Fundaciones laborales*, cit., p. 177.

⁴⁷ PÉREZ DEL PRADO, D. “What is a labour foundation? A comparative perspective”, (*en prensa*), 2016.

⁴⁸ Art. 4 and art. 24 Order of 22nd January 1962.

⁴⁹ MERCADER UGUINA, JESÚS R. (ed.). *Fundaciones laborales*, cit., pp. 45-46.

⁵⁰ *Ibid.*, p. 46. This interpretation coincides with those that, in the international panorama, underlie the fact that the foundation’s purposes tend to be more changing and flexible. Prewitt, K., “The Foundation Mission: Purpose, Practice, Public Presures”, in *Foundations in Europe: society, management and law*, Routledge, New York, 2007, pp. 351-357.

2.2. Construction Labour Foundation of Asturias: the reference case

There are some significant examples of labour foundations in Spain which reveals that they are capable of providing quite a wide range of activities within the limits of employment relations. Whereas other comparative experiences developed out of a very specific context for a very specific purpose, subsequently extending their activities in the field of employment policies, Spanish labour foundations were created to develop different types of activities related to social protection, working conditions, employment policies and corporate social responsibility, among other tasks.

This characteristic is one of the most significant in order to classify Spanish work foundations as a different version of this type of institutions in Europe, a second type if they are compared to other experiences. Therefore, it is possible to say that there are, at least two different types of labour foundations, based on the activities that they are currently carrying out. On the one hand, there are the “growing-limits” foundations, referring to those whose purposes fall within the limits of employment policies. On the other hand, there are the “open-limit” or “flexible” foundations, whose limits are more extensive, although though their activities must refer to employment or industrial relations.

In order to justify this classification and, more importantly, to reveal the type of activities that labour foundations may carry out, which may be useful for legal systems and labour markets as good practices, one of the most highlighted cases⁵¹ has been selected. This is the Construction Labour Foundation of Asturias (“Fundación Laboral de la Construcción del Principado de Asturias” –hereinafter, the FLCA–), which is defined as a “non-profit joint organism of a social and labour nature”. It was created in 1988 through a specific clause included in the Collective Agreement for the Construction Sector in Asturias⁵², signed that year by the employers’ regional associations (Confederación Asturiana de la Construcción (CAC) and Asociación de Promotores y Constructores de Edificios Urbanos de Gijón (AS-PROCON)) and the two principle trade unions (CCOO and UGT). This foundation is mainly aimed at employees who are covered by this collective agreement and their families, but it also expands its scope to unemployed individuals from the construction sector and other collectives if the programs related to them produce any kind of benefit for the construction sector.

The FLCA’s activities are financed by employer contributions (4.5% of the gross wage costs). This obligation was created by the collective bargaining agreement and it affects all of the companies under its scope of application. Despite the fact that this is the main source of funds, the FLCA also receives some public grants and other resources from financial and commercial activities.

The contribution system is quite sophisticated⁵³. Contribution depends on the number of hired workers and days during they are working. In order to control these two elements, the FLCA signed a co-operation agreement with the Social Security Fund. Currently, the procedure followed by companies is inspired by the Social Security contribution procedure. Thanks to this agreement, the FLCA can compare the information declared by the companies in its “virtual office” with that which is registered in the Social Security database. Every month, the FLCA provides companies with a proposal of contributions. In the case of disagreement, the company may submit a rectification form which shall be revised in a period of 15 days. The entire procedure is followed electronically by the “virtual office”.

These contributions are used to finance two independent funds: first there is the so-called “general fund”, destined to the FLCA’s assistance and ordinary activities; and second is the “special fund”, which supports the “sector loyalty” benefits as described below.

Therefore, the funds controlled annually by the FLCA depend on the number of workers and companies who are direct beneficiaries of its activities according to the collective bargaining agreement. The following table and graph show both of these as well as the evolution during the crisis. They both distin-

⁵¹ This foundation has been recognised by the EU Council as a Model of Good Practices in the application of EU Guidelines for Employment (Helsinki, 1999). Council of the European Union, *Joint Employment Report 1999. Part I. The European Union*, Council of the European Union, Brussels, 1999.

⁵² The “Principado de Asturias” (Principality of Asturias) or simply “Asturias” is an Autonomous Community situated in the north of Spain. Its total population is around 1,000,000 inhabitants.

⁵³ For more details see FLCA, *Manual de cotización a la Fundación Laboral de la Construcción del Principado de Asturias*, Principality of Asturias, 2009. Principality of Asturias Official Gazette (BOPA) of 12th January 2009, no. 8.

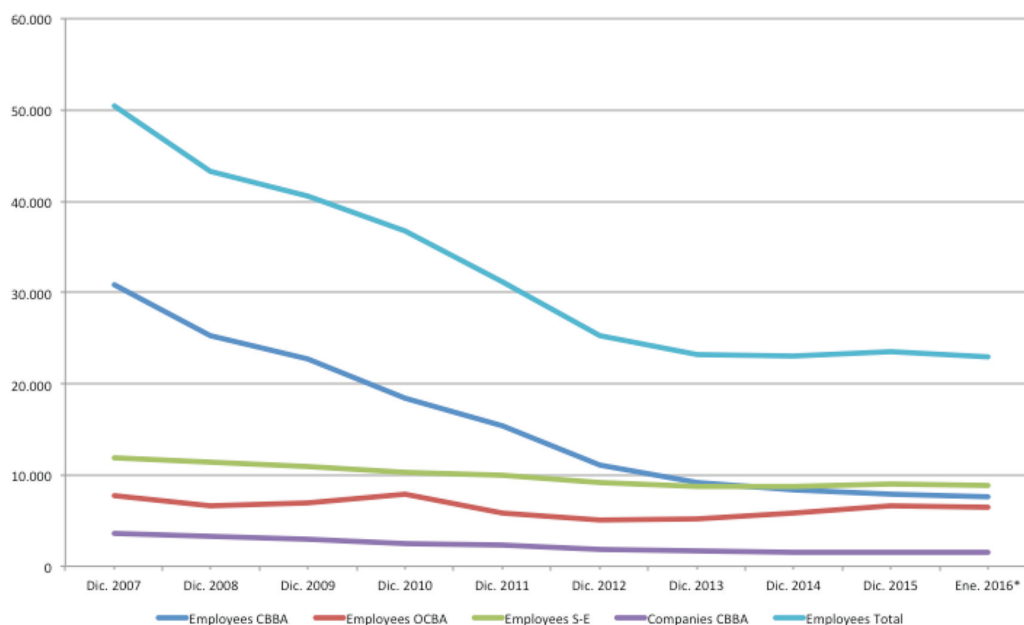
guish between employees who are under the coverage of the collective bargaining agreement of Asturias (CBAA) and the other collective bargaining agreements which are also applied in the construction sector in Asturias (OCBA) and to freelance workers. The table also shows the percentage of each group.

Table 1. Companies and workers beneficiaries of the FLCA and entire construction sector.

	Companies	Employees				Employees %		
	CBAA	CBAA	OCBA	S-E	Total	CBAA	OCBA	S-E
December 2007	3,669	30,896	7,702	11,884	50,482	61.20%	15.26%	23.54%
December 2008	3,334	25,273	6,564	11,405	43,242	58.45%	15.18%	26.37%
December 2009	3,001	22,714	6,977	10,938	40,629	55.91%	17.17%	26.92%
December 2010	2,541	18,428	7,963	10,342	36,733	50.17%	21.68%	28.15%
December 2011	2,362	15,346	5,908	9,984	31,238	49.13%	18.91%	31.96%
December 2012	1,916	11,036	5,070	9,144	25,250	43.71%	20.08%	36.21%
December 2013	1,659	9,218	5,161	8,748	23,127	39.86%	22.32%	37.83%
December 2014	1,559	8,355	5,846	8,779	22,980	36.36%	25.44%	38.20%
December 2015	1,530	7,844	6,698	8,956	23,498	33.39%	28.50%	38.11%
January 2016	1,495	7,617	6,475	8,855	22,947	33.19%	28.22%	38.59%

Source: FLCA Memory 2015. CBAA: Collective Bargaining Agreement for Asturias. OCBA: Other Collective Bargaining Agreement. S-E: Self-Employment.

Graph 2. Evolution of the number of beneficiaries, companies and workers.



Source: FLCA Memory 2015. CBAA: Collective Bargaining Agreement for Asturias. OCBA: Other Collective Bargaining Agreement. S-E: Self-Employment.

First, the data reveals the effects of the crisis on the construction sector, probably the most harshly affected in Spain, reducing both the number of companies and employees. This authentic “earthquake” has reduced the number of companies by 145% and altered the traditional distribution of employees. As job destruction has mainly focused on dependent work, more than on self-employment, and the percentage of workers affected by the collective agreement of Asturias (and beneficiaries of FLCA activities) has change notably. Hence, from covering over 30,000 workers (61% of total employees) prior to the crisis, this number has been reduced to approximately 7,600 workers (33% of total) in 2016.

However, despite the impact of the crisis, the FLCA continues to assist a relatively high number of companies and employees within the construction sector in this Autonomous Community. Approximately 1,500 companies devote their contributions to the support of FLCA activity, which assists more than just the mentioned number of workers, given that it also implements programs for the unemployed. Moreover, the incipient economic recovery leads us to believe that the FLCA shall return to its usual level of coverage in relative terms or based on percentages⁵⁴, since in the past, it was quite stable.

Their purposes have been defined quite broadly, inspired by the Decree of 1961, but all of them may be summarized in the five main areas highlighted as the primary in the practical functioning of Spanish labour foundations⁵⁵.

First, the FLCA offers social benefits to enhance or complement social security benefits. In addition to the complementary temporary disability benefits⁵⁶, quite common in the Spanish collective bargaining, the FLCA also provides family allowances, the so-called “sector loyalty” benefit and subsidies for long-time unemployed workers. This first one is directed to cover distinct circumstances that may directly affect the worker, such as disability, death or education; or that relate to the worker’s family, such as having minors or children who are studying or the death or disability of a spouse or child. From 2012 to 2015, approximately 3,000 benefits were provided on average per year, having a maximum quantity of 3,500 euros. The total costs approximate 1,000,000 euros.

The second recognizes the permanence of the employer in the construction sector. The FLCA is also responsible for paying the seniority bonus by compensating its cost to the companies that recognize it. This is a means of helping to secure employment by providing financial assistance to workers with seniority. Moreover, this mechanism has been highlighted because it enables a redistribution of seniority labour costs within the sector and thereby ensures more balanced competition between companies⁵⁷. In 2014, the total number of beneficiaries was 10,019; the average daily subsidy was 0.78 euros and the total cost reached more than 2,000,000 euros. The second measure benefited 80 undertakings with a cost of 148,581.15 euros⁵⁸.

The third refers to long-time unemployed workers who were dismissed by a company under the coverage of the collective agreement from prior to the 31st of December 2007. The potential beneficiary must not be entitled to receive any type of unemployment benefit from the social security system. This subsidy is related to the attendance to a free vocational training course and its amount depends upon the number of hours of this activity, reaching a maximum of 680 euros. Despite its attractive design, which was inspired by the latest trends in the activation of passive employment policies, the funds dedicated to this program have been affected by the crisis. So, from the 330 beneficiaries and more than 97,000 euros for the period 2011-2012, these figures were reduced to 35 and approximately 18,000 euros in 2013.

Second, learning programs are one of the most often supported by labour foundations in Spain and the FLCA is a significant example of this. It has created two learning centres that specialize in vocational training for the hiring sector. These centres offer courses for employees, unemployed people and young students, adapting them to the company needs and requirements. Special program for long-time unemployed individuals were explained previously. As for the other programs, 34 courses were offered for young people in 2014, benefiting a total of 427 students. However, the effects of the crisis have emerged here as well. The average number of students over the last two decades is 1,099, peaking to 4,316 in 2011; and the average number of courses is 90, peaking at 385 during this same year. Thus, the reduction is quite pronounced. As for vocational training for workers, 79 courses were developed in 2014, assisting 864 employees. The trend is exactly the same as with the previous program, showing a

⁵⁴ However, it is quite unlikely that the construction sector shall employ the number of workers that it did several years ago, either in Asturias or in Spain.

⁵⁵ MERCADER UGUINA, JESÚS R. (ed.). *Fundaciones laborales*, cit., pp. 141-157. To examine the FLCA’s activities in greater detail, see FLCA, *Memoria de actividades 2015*, FLCA, 2016.

⁵⁶ Spanish temporary disability benefits cover this type of risk with the 60% of the insured’s daily average earnings in the last calendar month before the incapacity began, paid from the 3rd to the 20th day; and 75% from the 21st day for up to 12 months (but it may be extended for six months). Collective bargaining agreement used to complement both days and quantities. In this case, the labour foundation is used as a tool to implement it.

⁵⁷ Council of the European Union, *Joint Employment Report 1999. Part I. The European Union*, cit., p. 96.

⁵⁸ Data for 2013.

considerable decrease if compared with the averages from the last two decades: 140 courses and 1,753 beneficiaries. This is particularly disturbing when considering that the evaluation of these programs, mainly focused on the effectiveness of training for labour market integration, has shown the positive effect of trainings adapted to the company needs, having a placement of trainees that approximates 74%⁵⁹.

In addition, the foundation has also created the so-called “professional construction card” and the “professional construction card for self-employed persons” that is, a document that credits, among other data, the training received by the worker in the area of occupational risk prevention and that is required by law in order to work in this sector⁶⁰. This special effort made in education and training has been recognized as a good practice by the most specialized entities⁶¹.

The third large area is known as “social action”, that is, a heterogeneity group of benefits that provide economic aid or services that are not directly connected with labour or guaranteed by law⁶². Here, the FLCA is in charge of providing scholarships and aid-assistance for the disabled; promoting research and development programs or improving the scientific and technical research in the field of construction; conceding allowances for rehabilitation or access to the first home; implementing programs on the use of new technologies, with special attention to computer and telecommunications, etc.

The program dedicated to the rehabilitation or access to the first home should be recognized, given its links to social aid to the general strategy of economic policy for this sector. With this instrument, the construction sector re-invests some of its profits in itself, contributing to its expansion, particularly during the recession period. Moreover, after this, it may help with the reorientation of the sector to other types of activities such as rehabilitation, thanks to the changes introduced in 2011. The allowances have varied from 2,000 to 6,000 per beneficiary and project and they may permit investment of more than 66,000 euros in 2015. This program has led to the inversion of over 9,000,000 euros in the sector during the last 15 years.

Fourth, employment policies and labour intermediation are other activities that are carried out by the FLCA, revealing that its purposes extend beyond only workers of the construction sector, also including the unemployed and young job-seekers. Some of the measures developed in this area have already been explained. Nevertheless, other important initiatives should also be described. Hence, the FLCA has its own employment agency, which collaborates with the regional public employment service and has a relative high placement rate: 62% of the job offers currently filled by the agency were attained by their trainees⁶³.

In this field, some hiring incentive programs have also been developed to provide support to vocational training students. Despite the empirical evidence suggesting the inefficiency of this type of policy in Spain⁶⁴, given its large “deadweight effect”, it would be interesting to evaluate this program, since it focuses on a very specific collective. This and the fact that the program focuses on individuals receiving training may lead to different results⁶⁵.

Another initiative related to this type of policy is the so called “Program for the maintaining of employment 2013-2016”, which incurred costs of 198,000 euros in 2014 and 165,000 in 2015. It was developed within the framework of the social dialogue between the parties of the collective bargaining

⁵⁹ Council of the European Union, *Joint Employment Report 1999. Part I. The European Union*, cit., p. 97.

⁶⁰ Actually, the Spanish “Fundación Tripartita para la formación en el empleo” (Tripartite Foundation for Vocational Training) centralizes the main effort in the area of vocational training and education for both employees and unemployed people in Spain. The presence of the Public Administration in its foundation and management has been used to exclude it from the group of “labour foundations”. Jesús R Mercader Uguina (ed.), *Fundaciones laborales*, cit., pp. 136-137. However, it is officially registered as such and, considering the rules exposed here, there would be any problem in classifying as labour foundation. Its results have been highlighted as a good practice. P. Szovics; European Centre for the Development of Vocational Training (eds.), *Sectoral training funds in Europe*, Office for Official Publ. of the Europ. Communities, Luxembourg, 2008, pp. 51-70.

⁶¹ P. SZOVICS. European Centre for the Development of Vocational Training (eds.), *Sectoral training funds in Europe*, cit., pp. 71-78.

⁶² MARTÍN VALVERDE, A. *Las mejoras voluntarias de seguridad social*, Instituto García Oviedo. Universidad de Sevilla, 1970, p. 17.

⁶³ Council of the European Union, *Joint Employment Report 1999. Part I. The European Union*, cit., p. 97.

⁶⁴ TOHARIA CORTÉS, L. (DIR) y otros, *El efecto de las bonificaciones de las cotizaciones a la Seguridad Social para el empleo en la Seguridad Social: un intento de evaluación macroeconómica, microeconómica e institucional*, Ministerio de Trabajo e Inmigración. Secretaría de Estado de Seguridad Social, 2008. PÉREZ DEL PRADO, D., *Los instrumentos económicos de fomento del empleo*, Tirant lo Blanch, Valencia, 2011.

⁶⁵ MOORE, J. y otros, *Stimulating job demand the design of effective hiring subsidies in Europe. 2014. 2014.*, Publications Office, Luxembourg, 2014, pp. 44-49.

agreement and aims to maintain current employment levels in the construction sector in Asturias. It consists of a subsidy for companies in the sector whose amount depends on the number of workers and days they have worked over a specific period of time. Currently, the main requirements are maintaining the level of employment and the working conditions as agreed upon in the collective agreement, especially those related to salary ⁽⁶⁶⁾.

Finally, of the activities carried out by the labour foundation, those related to occupational risk prevention are quite common. Programs developed by the FLCA range from the area of education and training, as previously mentioned, to inspection activities, in collaboration with the Employment and Social Security Inspectorate. In 2015, 2,942 construction sites were visited and 3,732 inspections were carried out. This means that the working conditions of over 8,000 workers were reviewed. These inspections resulted not only in the correction of detected anomalies, but also the creation of practical reports on the status of the sector, offering suggestions to both companies and public authorities, in order to improve occupational risk prevention and the application of Labour Law rules.

The practical impact of these reports is potentially quite high, given that they consider the issues analysed in them and since these analyses come directly from the parties working together in the sector: employers, employees and public administrations. For example, the “Report on the situation of the construction sector in Asturias 2015” (“Informe sobre la situación del sector de la construcción de Asturias 2015”) ⁽⁶⁷⁾ summarizes a list of requirements and suggestions for the public administration in order to improve working conditions, among other issues, in the Asturias construction sector.

Regarding the former, the Administrations are required to publish the concession of contracts and licences in their websites, in accordance with Law 19/2013, of 9th December, of Transparency ⁽⁶⁸⁾; to obey the limits on subcontracting that were also imposed by the Law ⁽⁶⁹⁾, to sanction companies that do not fulfil the law, especially the obligations related to labour conditions, social security, labour risk prevention and taxes; to develop inspectorate activities focused primarily on outsourcing; to make sure that companies have at least 30% of their employees with an indefinite contract, etc.

The report also offers some suggestions, requesting clauses in public contracts to prevent breaches of working conditions or practices leading to their degradation (or others linked to environment and sustainability); the creation of the party “responsible for the contract”, who shall be in charge of monitoring and controlling outsourcing; the connection of the objectives of the Employment Strategy with the requirements to obtain a public contract or the conditions to develop any kind of construction, etc.

All of these initiatives demonstrate the huge variety of activities currently being carried out by labour foundations in Spain. It is true that the FLCA is probably a prototypical case, but its success must be taken into account in order to improve the results of labour foundations in Spain or in other countries, adapting the activities that they carry out or creating new programs that permit them to explore new fields. The potential of labour foundations in our changing system of employment relations is enormous. We shall refer to it in the next section when drawing conclusions.

3. Conclusions: the potential of labour foundations

This example of FLCA demonstrates that the solution to a large part of the labour problems of modern societies shall come from the social partners directly. The European Union and most States give social dialogue a special role within the framework of labour and social conditions, as the key to obtain the practical balance between competitiveness and welfare that our European social model demands. The solution to combine employers and employees’ requirements and needs shall be found in the parties involved, and labour foundations are its practical materialization.

⁶⁶ FLCA, *Plan de apoyo al mantenimiento del empleo (2013-2016). Reglamento*, FLCA, Principality of Asturias, 2013.

⁶⁷ See Fundación Laboral de la Construcción del Principado de Asturias, *Informe de situación del sector de la construcción del Principado de Asturias 2015*, FLCA, 2015.

⁶⁸ Spanish Official Gazette (BOE) of 10th December 2013, no. 295.

⁶⁹ These two requirements seem to be obvious; especially when considering that it is a public administration. However, practical experience shows that it is absolutely necessary according to the perspective of the social partners.

Nevertheless, they are neither well-known nor receiving sufficient support. The Spanish case is paradoxically an example of success in spite of the fact that the regulation has given up recognizing its peculiarities. Additionally, a specific and particular treatment in the labour, social security and fiscal fields is also missed nowadays.

This different model of work foundation compared to the Austrian, as the best well known, gives us a new reason to remove the obstacles that difficult its development and promote them among companies and sectors all over Europe, as a useful way to improve competitiveness, social dialogue and labour conditions in our continent. The main role of labour foundations in our society can now be divided in three different ones:

First, they are an instrument for the promotion of social dialogue, which in European employment policies, is of great importance⁽⁷⁰⁾. Labour foundations permit a better, closer and stronger relationship between employers and employees, which consequently is not concentrated when the collective bargaining agreement must be negotiated, but it extends itself a long time. It permits, not only analysing and finding practical solutions for the different problems of one economic sector between the two main parties involved, but providing useful information for each one. Employers will know the labour and social condition of their employees and employees will take advantage of companies and sector information.

In this sense, the labour foundation is a legal instrument that perfectly connects to the idea of “flexicurity” since among its activities there are both those related to more flexible labour markets and those that look for increased social protection and security⁽⁷¹⁾. Here we have a tool on hand for those who are closer to the labour market, the social partners, which can serve both the employers’ and employees interest. Moreover, it is considered to strengthen the daily relationship between them with the labour foundation becoming an ideal instrument to find a balance between competitiveness and welfare and social protection.

Second, labour foundations are tools for corporate social responsibility. This is not only because some of them contributes to some social programs that extend beyond the company or one specific economic sector, such as those for the unemployed or the disabled. Contributing to vocational training or research and development, labour foundations may improve the economic situation of the company, its productivity or competitiveness. Investing in education, they are not only developing a useful program for a company or a sector, but also for society as a whole. Implementing social benefits for their employees and families or even, for unrelated individuals, they act as tools that show that company interests may go beyond mere profit earning. They promote a closer relation not only with the personal and social situation of employer, but with all of society.

Some research has suggested that one of the areas where labour foundations may potentially be extended in the future is in its use as an investment fund⁽⁷²⁾. This may be materialized as a joint fund, in which both the employer and the workers finance different types of programs related to the foundation’s objective. The already-mentioned FLCA would be a good example of this. However, this can be also be crystalized in a company’s investment fund in which the undertaking’s surplus is used to promote the same sort of activity, but with the important fact that workers or their representative participates in determining the use of this fund. In this way, corporate social responsibility is connected with the improved and more active participation of social partners.

Last but not least, they are a tool to improve SME conditions. When sectoral collective agreements create a foundation for a specific geographical area and/or activity, they may provide services and programs that the SME would be unable to obtain or finance on their own. This is a clear case in which the SME may profit from the scale economies generated by a supra-level institution such as the labour foundation. This is especially important in the vocational training area. Programs are usually quite expensive for these types of companies, but foundations may offer them at an affordable cost. It is

⁷⁰ European Commission, *Communication from the Commission: «Partnership for change in an enlarged Europe-Enhancing the contribution of European social dialogue»*, European Commission, Brussels, 2004. European Commission, *Communication from the Commission: «The European social dialogue, a force for innovation and change»*, European Commission, Brussels, 2002.

⁷¹ GAZIER, B. “Flexicurity and social dialogue, European ways”, *University Paris*, vol. 1, 2006.

⁷² RODULFO, J. *Las fundaciones laborales*, cit., pp. 32-36.

true that governments usually plan programs for SME, considering this context, but even in these cases, the foundations may serve as a sort of agent of change, concentrating funds and distributions amongst companies within the sector. Furthermore, these companies may participate in the foundation's activities through their representatives, and, thereby, determine the type of program that best suits their needs.

All of these reasons serve to explain why labour foundations may be an efficient tool to achieve a balance between employer and employee interests, labour flexibility and job security or business profitability and social responsibility. An old and not very well-known instrument for the economic and social challenges of our current society.

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Working Time and Family Responsibilities in Spanish Labour Law: an Overview on the Current Situation

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Abstract: The Spanish legal foundation on working time does not create a favourable atmosphere for employees to reconcile their work and family responsibilities. This study outlines the institutional figures that permit Spanish employees to reduce or redistribute their working hours; in addition to illustrating some of the differences with other European workers. In Spain, the lack of social awareness regarding reconciliation of labour and family life is apparent in that its regulation does not emerge from an initiative of the Spanish parliament, but rather, results from the transposition of guidelines established by the international and European communities. Therefore, Spanish employees having family responsibilities find it harder to achieve a balance between work and family as compared to their colleagues in Denmark, the Netherlands, Sweden or Germany. Furthermore, Spanish data from 2005 to 2014 has been analysed in order to determine if a change in trend has occurred with regards to reconciliation or if, on the contrary, we are witnessing the perpetuation of traditional men and women roles.

Keywords: reconciliation, part-time work, reduction of working hours, and data.

1. Introduction

Work and time are an inescapable combination, inherent to all mankind. From a worker's point of view the importance of time management results from its impact on personal, family and leisure time. From a business perspective however, it is a question of maximising productivity. For both parties, worker security and welfare is the common interest with regards to time management in the workplace.

The personal employee circumstances have played an essential role in the regulation of working time, as seen throughout the history of labour law. The worker's movement initiated as a means of advocating a limitation of working hours until laws were eventually passed to limit its maximum duration. In Spain, since 1983 the maximum duration of working hours has been "forty hours a week of effective work as a total yearly average" (art. 34.1 of Royal Legislative Decree 1/1995, of 24 March revising the text of the Workers' Statute Law, hereinafter referred to as WS) in comparison to the 45 hour a week that was established in 1980.

However, over recent years numerous debates have arisen regarding the possibility of making working hours more flexible. This is evident with the various legislative reforms that are reshaping the WS, and which have been increasing the employer's prerogatives by addressing the "when" question in regards to working hours.

The first measure to promote the flexibility of working hours took place in 1994 through the introduction of Act 10/1994, 19 May, regarding urgent measures to promote employment. This act intro-

duced the possibility of distributing working hours unevenly throughout the day by means of a collective negotiation agreement. The reform introduced in 2012¹ has further increased the employer's prerogatives by enabling 10% of the working hours to be unevenly distributed throughout the year. Since then, the schedule of the working hours is no longer an essential element of the employment contract².

Another social demand which has gained strength over recent years, particularly since the female's incorporation within the labour market, is the right to reconcile family and working life.

This fundamental right has been undermined by the fact that it can only be obtained through a collective negotiation. Despite the duty of collective negotiation to adopt a strategy that favours the conciliation of family and working life, current collective negotiation agreements tend to be quite broad in their descriptions of the distribution of working hours. This leads not only to employee insecurity, but it also hinders the development of the right to conciliate work and family life.

The legal limitation of the maximum duration of working hours marked a milestone in the history of labour legislation; however, the incorporation of women into the labour market has created a social and economic transformation that has not currently had a sufficient impact on Spanish labour laws. One cannot currently speak of a truly equal distribution of opportunities between men and women in the labour market.

An effective conciliation between family and working life, in terms of equality, demands a radical change in the organisation of labour, specifically, in terms of working schedules. Changes should be implemented in the productive system and in the corporate organisations in order to achieve a balance between work and family.

The multiple labour reforms that have been implemented over the past decade have focused primarily on labour flexibility in the sense of promoting the power of collective negotiation, to the point of legally supporting the de-regulation of the labour market. But what about the employee's right to reconcile family and working life?

The flexibility of the working hours, which is understood as the mechanism by which corporate necessities are adapted to employee needs, should promote the conciliation of work and family life, not solely for the security and health of the workforce, but also for its repercussions on general interests.

The purpose of this paper is to study Spanish situation regarding employees and family responsibilities and to identify the main differences with that of Dutch, German and Scandinavian workers sharing similar situations. Over the past two years, as a result of the economic crisis, Spain has been forced to make major reforms in various fields, with the labour market being one of the most important. In fact, the latest labour reform of 2012 went hand-in hand with various Acts designed to "improve"/ amend certain aspects of this market.

The balance between work and life has been comprehensively ignored by Spanish legislators recently, and the few reforms that have been adopted are a direct result of European directives. This situation is especially detrimental to female workers, who compared to Scandinavian workers, are not provided with the necessary support by their companies. Employees in Spain have difficulties to access public childcare service as well as to adjust their working hours in order to meet their family necessities. An examination of the different institutional figures that allow workers to adapt their work hours to family needs illustrates the Spanish situation in comparison to that of Scandinavian or Dutch workers. Furthermore, data from the Spanish Statistical Office has been used to determine whether, currently, traditional male-female roles have changed within the labour market.

This study aims to provide a reflection of the Spanish public policies adopted in regards to reconciliation and the situation of European female workers. We proceed as follows: (i) first, we consider the legal basis for work and family reconciliation in Spain; (ii) then we present a review of the different institutional figures that allow employees to reduce or redistribute their working hours, highlighting some differences between Spanish employees and the situation of other European workers; (iii) and finally, we analyse Spanish part-time work data.

¹ Act 3/2012, 6 July, on the urgent measures to reform the labour market.

² BALLESTER PASTOR, M.A. (2013). "La flexibilidad en la gestión del tiempo de trabajo: jornada y distribución del tiempo de trabajo", *Revista de Derecho Social*, no. 62, pp. 53-92.

2. Legal Basis for Work and Family Reconciliation.

In Spain, normative foundations for the regulation of reconciling work and family life appear in the Constitution, however, it was not until 1999 that Royal Legislative Decree 39/1999, of 5 November, on employee reconciliation of work and family life (hereinafter, *Reconciliation Law*) was issued, being the first law having the main objective of reconciliation in terms of equality. It is also the only specific law on reconciliation that has been enacted in recent Spanish history.

Nevertheless, this law was not the result of an initiative of the Spanish parliament, but rather, was the result of a transposition of guidelines established by international and European communities to the Spanish legal framework. Specifically, it results from the European Union Directive 92/85/EC, of 19 October 1992, on the introduction of measures to encourage improvements in the security and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (hereinafter referred to as *maternity leave*) and the Council Directive 96/34/EC of 3 June 1996, on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (hereinafter, the *directive on parental leave*).

Since 1999, new laws have been approved which have half-heartedly introduced political reforms to achieve an equal distribution of opportunities between men and women; Spanish legislation appears to be largely dependent on the European Union. Therefore, European legislation is the main engine of the political reforms that strive to reach a balance between work and life in terms of equality.

A. European Union Legislation

The design of the *Maternity Leave Directive* is exclusively aimed towards women and is coherent with its creation in order to protect women during pregnancy and lactation. In addition, this legislation may be considered a conciliation rule, given that it recognizes the right to be absent from work in order to care for new-borns and because its duration exceeds the maximum time required for the physical recuperation of the woman after childbirth.³ This directive has been recently modified by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007.

The *Parental Leave Directive* has been approved by means of a framework agreement on parental permission, resulting from the commitment of the UNICE, the CEEP and the UTEC to establish dispositions on parental leave and absence from work due to greater causes, with the objective of enabling the reconciliation of work and family life and to promote equal opportunities between men and women.

This Directive on parental leave was repealed by Directive 2010/18/EU of 8 March 2010, implementing the revised Framework Agreement on parental leave. This new directive recognizes the right to a minimum of four months of parental leave which can be enjoyed either on a full time or part time basis. In the Spanish legal system, full-time parental leave is known as leave of absence to care for children or family or permission for the birth of children, while part-time parental leave refers to a reduction in working hours or the permission for lactation.

The novelty of this new directive on parental leave (Directive 2010/18/EU) is its reference to the distribution of family responsibilities, as it establishes parental leave as being non-transferable, for at least one of the four minimum months of its duration⁴. This directive has yet to be transposed to the Spanish framework.

Directive 2002/73/EC, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational train-

³ BALLESTER PASTOR, MARÍA AMPARO (2010). "Conciliación laboral y familiar en la Unión Europea: rémoras, avances y nuevas líneas de tendencia en el ámbito de la corresponsabilidad", *Revista de Derecho Social*, no. 51, pp. 39-42.

⁴ "The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States." (Clause 2.2 of Directive 2010/18/EU).

ing and promotion, and working conditions (hereinafter, Directive 2002/73/EC) aims to encourage the adoption of measures to combat all sorts of gender-based discrimination by employers and those responsible for vocational training.

Finally, *Directive 2004/113/EC*, implementing the principle of equal treatment between men and women in access to and supply of goods and services (Directive 2004/113/EC), aims to safeguard the fundamental principle of equality between men and women, declared in the EU's principal regulatory texts (arts. 21 and 23 of the Charter of Fundamental Rights of the EU and art. 2 of the Founding Treaty of the European Community), in the field of access to and supply of goods and services, as it is a field where gender discrimination is quite common.

B. Domestic legislation

The legal basis for the regulation of work and family conciliation may be found in the Spanish Constitution, specifically in articles 9, 14, 35 and 39 (hereinafter referred to as CE). Article 14 CE recognizes the fundamental right to equality, prohibiting gender discrimination. In both article 9.3 and 35 CE (although mainly in the latter) equality in terms of ability to work is recognized. In other words, the CE establishes the criterion of equality of opportunities between men and women⁵. Finally, the protection of the family by the authorities is guaranteed by constitutional mandate, as seen in articles 39.1 and 92 CE.

Leaving aside the constitutional realm, we shall now discuss some of the innovations introduced not only by the *Reconciliation Law* but also by other regulatory texts, whose aim is different from work-life balance.

Law 39/1999, of 5 November, reconciliation of work and family life (*Reconciliation Law*), has extended the right to reduce working hours and the right to extended leave of absence for employees who must care for family members, who due to age or disease, are unable to provide for themselves and cannot perform remunerated work, although only up to the second degree of consanguinity. Furthermore, the law includes individuals suffering from visual and hearing impairment to the already existing, physically or mentally handicapped, so that employees of these workers may have the right to a reduction of working hours.

The *Reconciliation Law* not only provides men with access to the care of their child as of the moment of his/her birth or incorporation into the family, it also offers women the option of allowing the father to enjoy up to a maximum of ten of the sixteen legally recognized weeks of maternity leave, while also permitting both parents to simultaneously enjoy this leave.⁶

Leave for adoption, permanent fostering and pre-adoptive children under the age of six no longer depend upon the age of the minor in order to determine who may enjoy this right. Furthermore, no dismissal may be motivated by pregnancy, the application or enjoyment of maternity/paternity leave or family care, unless it may be proven to originate from causes other than those mentioned above and that are unrelated to discrimination. Finally, illnesses resulting from pregnancy, childbirth and breastfeeding are included as assumptions which may not be computed as labour absenteeism, and therefore they may not be a cause of contract dismissal.

Act 12/2001 of 9 July, on urgent measures to reform the labour market in order to increase employment and improve its quality (Act 12/2001), following the line established by the *Reconciliation Law*, has extended regulations on maternity/paternity leave in the case of premature children birth or a mothers' hospitalization needs after childbirth. In fact, this Act enables the father/mother to leave work for one hour or even entitles them to reduce their working hours up to a maximum of two hours, with a proportional salary decrease, while the new-born remains hospitalized. On the other hand, the Act exempts employers from receiving the contribution on behalf of employees, replacing them with maternity/paternity leave.

⁵ LORENZO RODRÍGUEZ-ARMAS, MAGDALENA (2004). "La conciliación de la vida familiar y laboral en serio: apuntes constitucionales para una conciliación acorde con la igualdad y el principio de no discriminación por razón de sexo", *Anuario Jurídico y Económico Escurialense*, XXXVII, p. 86.

⁶ Exposición de motivos de la Ley 39/1999, de 5 de noviembre, de conciliación de la vida familiar y laboral.

Act 39/2006, of 14 December, on promotion of personal autonomy and care for individuals in situations of dependency (Act of dependence), recognizes the right of dependents to be served by public services or concerted care facilities or, in the lack of the same, to receive benefits according to their degree of dependence⁷.

Organic Act 3/2007, of 22 March, on the effective equality of women and men (hereinafter, LOI), is the result of the transposition of two European directives on equality: Directive 2002/73/EC, and Directive 2004/113/EC, into Spanish law.

To promote the reconciliation of work and family life, the LOI regulates paternity leave, whose duration is of thirteen days, extendable in the event of multiple births by two additional days for each child, as of the second child. It also introduces improvements in maternity leave, extending its duration to two weeks in cases of children with disabilities.

As for the reduction of working hours due to legal guardianship, the LOI extends the maximum age of the child from six to eight years old. It also reduces the minimum limit for reducing working hours to one-eighth.

In regards to unpaid leave, its minimum duration has been reduced to four months, while the maximum duration of extended leave of absence for family care was increased to two years. In addition, it is expected that in the future, both extended leaves of absence for legal guardians and family care may be enjoyed in instalments⁸.

The labour reforms carried out over recent years have also dedicated part of their articles to the introduction of certain improvements in the field of conciliation, although they occupy a secondary role. The improvements introduced by Act 3/2010, of 6 July, on urgent measures to reform the labour market (law 3/2012) and by the recent Royal Decree-Law 16/2013, of 20 December, on measures to promote stable recruitment and improve the employability of workers (RD-law 16/2013) are analysed below, in regards to the legal figures being studied.

3. Institutional figures permitting employees to reduce or redistribute their work hours. Differences with other European countries

The Spanish legal system has been attempting to respond to worker demands concerning working hours and the work-life balance. Work flexibility may be the answer; however, it does not respond to the goal of increasing worker productivity and reducing working hours, partly because a cultural change amongst employers is necessary in order to achieve this goal.

In fact, the enhancement of collective negotiation as a mechanism to establish appropriate working hours that are compatible with both employer productivity and employee needs, has resulted unproductive and even detrimental to workers.

General legal foundations on working time do not make it possible for employees to satisfactorily balance work and family life. This leads workers to resort to different institutional figures, permitting them to reduce or redistribute their work hours.

A. Reduction of working hours for legal guardianship or for care of family members (Art. 37.5 of the Workers' Statute)

The reduction of working hours for legal guardianship or care of family members differs from the so called "special working days" which are characterized by extending or reducing working hours and their distribution due to the specific nature of the very work. This is the case for full-time employees exposed to environmental risks.

⁷ MARTÍN-LLAGUNO, MARTA AND CRISTINA GUIRAO-MIRÓN (2013). "El marco jurídico de la conciliación. Revisión de las políticas de conciliación en España desde 1999 hasta 2009", *Portularia*, Vol. XIII, no. 1, p. 4.

⁸ The Explanatory Memorandum of the LOI.

The reduction of working hours for legal guardianship constitutes one of the cases in which the right to reconcile the labour and family life is achieved. Therefore, it is necessary to begin by introducing the origins of this legal figure which is currently regulated in article 37.5 of the WS.

Reduced working hours in order to care of family members (minors, the disabled or those who are unable to be self-dependant) was one of the novelties introduced by the *Reconciliation Law* and which gave rise to the modification of article 37.5 WS. Nonetheless, this right to reduced working hours for the guardianship or care of the disabled was initially regulated in article 25.6 of the Employment Relations Act of 1976⁹, (in Spanish “*Ley de Relaciones Laborales de 1976*”).

Article 37.5 ET drafts responses to changes introduced by Act 3/2012¹⁰. The first paragraph has been rewritten, with its most noteworthy modification being the limit of the reduction of working hours, which has decreased from one-third to one-eighth. In addition, the introduction of the word “daily” should be highlighted. Although this last change appears to be insignificant, it means that the reduction of working hours due to guardianship must be directly applied during the daily hours in which the service is made. Thus, the doctrinal and jurisprudential debate regarding the possibility of accumulating working days, by using the weekly or monthly calculation has ended.

The introduction of the word “daily” has led to the limitation of working flexibility, which only benefits employers. The employee may only decide the time of entry and exit¹¹.

According to article 37.5 WS, employees who meet at least one of the following conditions may reduce their daily working hours between one-eighth and one-half, with proportionate salary reduction.

1. Employees who for reasons of guardianship, are responsible for children under the age of 12 (since the last modification introduced by Act 16/2013 (Royal Legislation Decree 16/2013).
2. Employees who for reasons of guardianship are responsible for a disabled individual.
3. Employees obliged to care for family members who are unable to care for themselves, but only up to a second degree of consanguinity or affinity.

Furthermore, the employee parent or adopter would be able to reduce at least half of his working hours, with a proportionate salary reduction, in order to care for the minor under his responsibility if said minor suffers from cancer or other major illness or if he/she requires extended hospitalization or prolonged and continued care until reaching the age of 18. However, the Public Health Service must determine whether or not the minor requires prolonged and continued. The conditions and cases in which a reduction of working hours could be recognized are established in the collective negotiation. For example, a collective negotiation agreement from the *Asegurador Reale* group establishes the possibility of accumulating a reduction in overall working hours, taking into consideration the necessities of the department (*BOE 112 10/05/2013 Ministry of Employment and Social Security*).

Recently, the minor’s age was increased to 12, given response to claims of different groups. Until the age of 12, minors need attention their legal guardians since they cannot manage their daily activities such as going to school alone, staying at home alone or using public transport on their own¹².

This age change brings the Workers’ Statute in line with the Basic Public Workers’ Statute (Act 7/2007, 12 April).

As for the right to reduce working hours for the care of family members, although the Workers’ Statute does not mention it, the right may also be applied between spouses since the Spanish Civil Code

⁹ “*El trabajador que tenga a su cuidado directo algún menor de seis años o a un minusválido físico o psíquico, y siempre que no desempeñe otra actividad retribuida, tendrá derecho a una reducción de la jornada de trabajo, de al menos un tercio de sus duración, con la disminución proporcional del salario correspondiente.*” (art. 25. 6 of *Ley 16/1976, de 8 de abril, de Relaciones Laborales*).

¹⁰ Regardless the recent change introduced by the Royal Legislation Decree 16/2013, that increased the minor maximum age on behalf of whom the employee could reduce his/her working hours, with a proportional salary decrease.

¹¹ HERRAIZ MARTÍN, M^a SOL (2012). “La conciliación de la vida laboral y familiar en la Ley 3/2012: Luces y sombras”, in *La Regulación del Mercado Laboral: Un análisis de la Ley 3/2012 y de los aspectos laborales del Real Decreto-Ley 20/2012*, (Directors: Mercader Uguina, Jesús and Ignacio García-Perrote Escartín), Lex Nova, Valladolid, p. 329.

¹² JOVER RAMÍREZ, CARMEN (2013). “La difícil supervivencia de la conciliación entre la vida laboral y familiar en tiempos de crisis y reforma”, *Revista Doctrinal Aranzadi Social*, no. 4/2013 parte Doctrina, pp. 5-6.

regulates the obligation of mutual assistance and aid (art. 68). This possibility has been considered by collective negotiation¹³.

It is important to stress that collective negotiation agreements do not give fair treatment to all individuals that give employees the right to reduce their working hours. Whereas these agreements tend to enhance legal provisions regarding childcare, usually by increasing the age of the minor, when it comes to disabled family members or members who, due to their age, cannot manage on their own, collective negotiation agreements simply reproduce that which has been declared by the law. For example, the *collective negotiation agreement of Zurich Insurance PLC*, Spanish branch (BOE 129 12/09/2013, Ministry of Employment and Social Security) or the *collective negotiation agreement of Telefónica Soluciones de Informática y Comunicaciones de España S.A.U* (BOE 146 19/06/2012, Ministry of Employment and Social Security).

On the other hand, the expression “*manage by themselves*”, used in the Workers’ Statute to define the individual conditions under which employees have the right to reduce their working hours, is applied by Spanish Courts in a restrictive way, making it difficult for employees to exercise their legal rights¹⁴.

Act 3/2012 has enhanced the role of collective negotiation which has become the mechanism to establish a timetable of organizational requirements in order to reduce working hours. Nonetheless, employees maintain the right to choose the period and schedule in which they wish to work. Regarding this issue, PhD Carmen Jover proposes that, in order to comply with the legislator’s intention to combine both employer and employee needs, an open clause should be included, giving priority to the employee preference for timetable organization if no damage is found to result for the company’s productivity and the organization¹⁵.

Ultimately, Act 3/2012 has placed work and family reconciliation in a secondary position, giving power to collective negotiation and leaving employees unprotected with regards to this matter.

An alternative to reducing working hours is boosting public childcare, as is done in other European countries such as Denmark, Finland, Sweden and France. In fact, “*a legal right to childcare place exists [...]*” in the majority of these countries. “*In Denmark, every child has a right to a childcare place from the age of 26 weeks. This is followed by Finland where children have the right to a childcare place from ten months and Sweden where working and studying parents have the right to a childcare place from their child’s first birthday. Parents in Germany, Great Britain and France have the right to a childcare place for their children from the age of three years.*”¹⁶

In addition to the provision of childcare places, the governments of these countries have adopted childcare financing policies in order to ensure the reconciliation of work and family for workers, especially for employed women. For example, “*in Denmark, at least 75 percent of childcare costs are covered by the municipality. At a maximum of 138 euro per month for the first child and less for additional children, childcare costs in Sweden are also comparatively low. From the age of three, children also have the right to 525 hours of care free of charge per year. In Finland, the maximum contributions per child are 254 euro per month and considerably lower for siblings. French and Swiss preschool is funded entirely by the public purse.*”¹⁷

Although a correlation between poor childcare infrastructure and lack of work-life balance has not been established, there is still a need for public childcare policies in order to offer employed women almost the same opportunities as men.

¹³ MERCADER UGUINA, JESÚS R. (2013). *Lecciones de derecho del Trabajo*, Tirant lo blanch, Valencia, p. 434.

¹⁴ Judgements by regional Higher Courts of Justice (STSJ in Spanish). STSJ of Madrid May 16, rec. 2946/2011, FJ Único; STSJ de la Comunidad Valenciana November, rec. 845/2010, FJ 1º.4; STSJ Andalucía, July 19, rec. 325/2009, FJ 2º.

¹⁵ JOVER RAMÍREZ, CARMEN (2013). “La difícil supervivencia de la conciliación entre la vida laboral y familiar en tiempos de crisis y reforma”, *Revista Doctrinal Aranzadi Social*, no. 4/2013 parte Doctrina.

¹⁶ HENNIG, M., STUTH, S., EBACH, M. & HÄGGLUND, A.E. (2012). “How do employed women perceive the reconciliation of work and family life? A seven-country comparison of the impact of family policies on women’s employment”, *International journal of sociology and social policy*, vol. 32, no. 9-10, pp. 513-529.

¹⁷ HENNIG, M., STUTH, S., EBACH, M. & HÄGGLUND, A.E. (2012), op.cit., page 12.

B. Part-Time Contract (art. 12 of the Workers' Statute)

A part-time contract is defined as an agreement to provide services during a number of hours per day, week or year, inferior to a full-time comparable employee (art. 12 WS). From the definition found in the Workers' Statute, part-time contracts are not merely a reduction of working hours (full-time contract with reduction of working hours) or a reduced utilization of working hours, since they are contracts having a complex legal configuration, formal requirements and the possibility of changing from full-time to part-time and vice versa.

Article 12 WS defines a comparable full-time employee as the one that: i) works in the same enterprise, ii) with the same labour contract; and iii) who works in the same or similar job.

Nevertheless, in order to consider a contractual relationship as part-time, it is not enough to work fewer hours than a full-time employee. Indeed, the reduction of working hours must be voluntarily adopted by the employee and is subject to a part-time contract, as stated in art. 12.4c) WS and jurisprudence of the Spanish Supreme Court (SC)¹⁸. The lack of wilfulness means that neither the suspension of the contract due to economic, technical, organizational or production reasons or force majeure, nor the reduction of working hours due to guardianship or the care of family members are considered to be part-time contracts¹⁹.

Regarding the same, Germany is, perhaps, the most generous country, given that *“employees of companies with a minimum of 15 employees and who have at least six months length of service have the right to part-time employment; however they do not have any right to change back from part-time work to full-time. A company may only refuse a request for part-time work for organisational reasons. In Great Britain, in contrast, the right to part-time work is limited to parents of children up to 16 years. [...] In France, where 23 percent of employed women work part-time, following the birth of a child, employees have the right to reduce their working hours to up to 16 hours up to the child's third birthday. Almost one-fifth of women in Denmark work for fewer than 30 hours per week [...]. However, there is no legal right to part-time work in Denmark. There is no universal right to part-time in Sweden either: 16 percent of employed women there work less than 30 hours per week. However, parents have a right to work part-time until their child is eight year old. They can reduce their working hours up to 75 percent.”*²⁰ In Spain, part-time work is not a right but a contractual option for the employee.

Part-time contracts have suffered the most modifications since the enactment of the Workers' Statute in 1980. All of the reforms agree on the need to enhance this type of contract, since it is considered to be an appropriate mechanism to revitalize the Spanish labour market in terms of the distribution of work time. Therefore, it was surprising that the recovery of extraordinary hours was the only measure introduced in the most recent labour reform, conducted by Act 3/2012.

Nonetheless, the possibility of part-time employees working extraordinary hours was soon removed by Act 16/2013, which once again modified article 12 WS. Reflection is necessary as to why extraordinary hours tend to be an issue of conflict and why legislators have not considered the possibility of exchanging supplementary hours for extraordinary hours. The answer is quite simple: supplementary hours are paid as ordinary hours whereas, economically speaking, extraordinary hours are more expensive.

Since the modification introduced by Act 16/2013, the distribution of work hours would be stated in the collective negotiation agreement, instead of in the actual contract. Although this constitutes an improvement, the risk of the company's distributing employee working hours remains. The lack of a general regimen regarding this issue makes the part-time contract unattractive to workers who aim to balance work and family life.

Part-time workers have the same indivisible working rights as full-time workers, although the rights that can be measured are granted in proportion to number of hours worked (art. 12.4d WS and Supreme Court Judgement (STS) 15th November of 2006, rec. 103/2005).

On the other hand, the distribution of supplementary hours is no longer included in either the

¹⁸ Judgements of the Supreme Court: May 14 of 2007, rec. 85/2006 and October 7 of 2011, rec. 144/2011.

¹⁹ Judgements of the Supreme Court, May 14 of 2007, rec. 85/2006.

²⁰ HENNIG, M., STUTH, S., EBACH, M. & HÄGGLUND, A.E. (2012). “How do employed women perceive the reconciliation of work and family life? A seven-country comparison of the impact of family policies on women's employment”, *International journal of sociology and social policy*, vol. 32, no. 9-10, pp. 523.

collective negotiation or the specific agreement, as occurred prior to the last labour reform. As a result of this lack of regulation, part-time workers perceive this type of contract to be less suitable to balance their working and family life, since it is impossible for a worker to reconcile their labour and family life if they do not know when they will be required by their employer.

According to the goal of making part-time contracts more flexible, supplementary hours can be agreed upon and may be voluntary. Agreed supplementary hours are mandatory when the employee has signed the prescriptive agreement. On the other hand, the employer can only offer voluntary supplementary hours when part-time contracts are permanent in duration [art. 12.5a)-g) WS]. Furthermore, according to article 12.5 WS, the most recent draft, supplementary hours can only be completed by employees whose ordinary working time, as stated in their contract, is at least ten hours per week in annual figures. This last measure is clearly an incentive directed towards employees against the flexible measures introduced by Act 16/2013, which benefit employers.

The measures introduced by Act 16/2013 have made part-time contracts more flexible and attractive to employers as opposed to employees, who still perceive this figure as being unsuitable to the reconciliation of their labour and family life, preferring to reduce their working hours for guardianship or family care.

After exposing the Spanish regulation regarding part-time work, we shall now consider how the Spanish part-time work situation differs from those existing in countries such as the Netherlands, Germany and Sweden. How does part-time work help to accomplish the work-life balance in these countries?

According to the Organization for Economic Cooperation and Development (OECD) data, part-time work is prevalent in The Netherlands. *“Dutch employees are legally protected and can adjust their working hours in their current job”* whereas *“Germany, [...] and Sweden are useful benchmarks because they represent typical conservative, [...] and Nordic regimes and are characterized by varying levels of part-time work prevalence and protection”*.²¹

Before detailing the merits of part-time work regulation in these countries, it is necessary to describe what exactly part-time work is considered to be. The OECD establishes a threshold of approximately 30 hours a week²², while the Dutch statistical institute (SCP and CBS) establishes it between 12 and 34 hours per week. In fact, if the threshold is set between 12 and 19 hours a week, it is informally referred to as a “small part-time job”, whereas a “large part-time job” consists of between 20 and 34 hours per week²³.

Collective negotiation and the right to adopt work hours constitute the key to success in these European countries. In both the Netherlands and Sweden, *“employee representatives are strongly involved in developing employment policies [...] For example, in the Netherlands, protective provisions for part-time employees are included in collective negotiation agreements since the early 1990s. In contrast, German employer organizations continue to resist legislation governing part-time work”*.²⁴

“The ILO considers the employees’ ability to adapt their hours to their needs as a requirement of decent work. [...] the Netherlands has designed what is probably the most comprehensive state effort to increase high quality part-time work. The Wet aanpassing arbeidsduur (Working Hours Adjustment Act), enacted in 2000, allows employees to request variable working hours. Employers may only reject this request if they can prove it would seriously harm the organization. The content and roots of Swedish legislation are similar to those of Dutch legislation. Swedish employees have the right to adjust their working hours, which provide large opportunities for households to adapt their working time to various situations and commitments over the life course without significant income losses. In the early 2000s, Germany introduced legislation that increased access to part-time work and made it possible to adjust one’s working hours. However, the scope and impact in German legislation are more limited, and part-timework has not reached the same normalized status as in the Netherlands”.²⁵

²¹ ROETERS ANNE and LYN CRAIG. 2014, *“Part-time work, women’s work-life conflict, and job satisfaction: A cross-national comparison of Australia, the Netherlands, Germany, Sweden, and the United Kingdom”*, *International journal of sociology and social policy*, vol. 53, no. 9-10, pp. 185-213.

²² <http://stats.oecd.org/>

²³ http://www.cbs.nl/en-GB/menu/_unique/_concept/_default.htm?postingguid={C5053425-F9AF-4CE2-96EC-30FA4D-5BA0A6}&concept=Part-time+jobs9

²⁴ ROETERS ANNE and LYN CRAIG. 2014, op. cit. page 13.

²⁵ ROETERS ANNE and LYN CRAIG. 2014, op. cit. page 13.

As revealed in this study, Spanish workers do not have the right to adjust working hours to their needs. Although Act 16/2013 enables collective negotiation to determine the distribution of working time, an advance on this matter since employee representatives can exert more pressure; Spanish workers are still far from achieving the situation enjoyed by Dutch and Swedish workers. In fact, as we shall expose in the next section, although the adaptation of working hours is a legal right (Art. 34.8 WS), the requirement of a collective or individual negotiation precludes the application of that right.

C. Adaptation of length and distribution of working time as a legal right to reconcile working and family life (art. 34.8 of the Workers' Statute)

After the study of the reduction of working hours for legal guardianship or for care of family members and the part-time contract, the issue of what happens in the other cases that are not specifically contemplated by the law, inevitably arises. For example, a shift worker who requests a permanent shift due to the lack of a legal provision regarding the right to switch shifts under guardianships circumstances. Another example is the employee with family responsibilities, differing from those described in art. 37 WS, requesting a change from his/her full-time contract to a part-time one, but the request is declined due to the lack of vacancy and the organizational necessities.

Issues such as these, which are not contemplated in the WS, tend to generate conflict in the Courts, since most employees under these circumstances appeal to art. 34.8 WS, on behalf of which the employee has the right to adapt the length and distribution of his working time in order to reconcile his/her working and family life. This right extends beyond that stated in art.37.5 and 6 WS since a proportionate salary reduction is not contemplated and it gives the possibility to change the working shift. Nonetheless, art. 34.8 WS makes this right conditional on the existence of a collective or individual agreement on the matter.

Act 3/2012 has modified art. 34.8 WS by introducing a new paragraph, which simply states that it will “promote” the reconciliation between the right to work-life balance and the improvement of productivity in the company environment. This novelty is ineffective since the right to reconcile work and family life still depends on the existence of a collective or individual agreement. Once again, legislation has failed to expressly determine the parties obliged to reach an agreement on this matter and to establish the consequences of failing to reach an agreement.

This legal alternative is not free of criticism at the very heart of the doctrine²⁶, since it is considered to be insufficient in comparison with other measures, such as in the case of gender related violence (art. 37.7 WS), where the legislative solution has further widened in defect of a collective or individual agreement, the very female employee has the right to determine the length and distribution of her working hours with the single limit of respecting the rules established in art. 37.6 WS.

Constitutional jurisprudence makes it clear that interpretation discrepancy exists not only in the ordinary Courts but also at the Supreme Court level, in the interpretation of the legal rights to reconcile work and family life, the right to not be discriminated against (art. 14CE) and the right to protect the family, understood as a jurisdictional asset (rt. 39).Nevertheless, since 2007, the Constitutional Court has agreed on the need for ordinary jurisdiction bodies to consider the constitutional dimension of art. 34.8 WS²⁷.

Other than the constitutional doctrine established in 2007 regarding art. 34.8WS, its effectiveness has been almost non-existent, especially in the shift working regime, claiming the impossibility to apply paragraphs 5 and 6 of art. 37 WS and failing to recognize a switch of shifts as part of the right to reconcile working and family life, in addition, to the necessity of a collective or individual agreement.²⁸

²⁶ SÁNCHEZ URÁN AZAÑA, YOLANDA (2012). “Adaptación de la jornada laboral por circunstancias familiares: la familia como bien jurídico protegido (reflexiones en torno a la STC 24/2011)”, *Civitas Revista española de Derecho del Trabajo*, no. 155/2012, pp. 282-283.

²⁷ Judgement of the Constitutional Court, January 15 of 2007, rtc 2007/3; Judgement of the Constitutional Court, March 14 of 2011, rtc 2011/24 ; and Judgement of the Constitutional Court , March 14 of 2011, rtc 2011/26

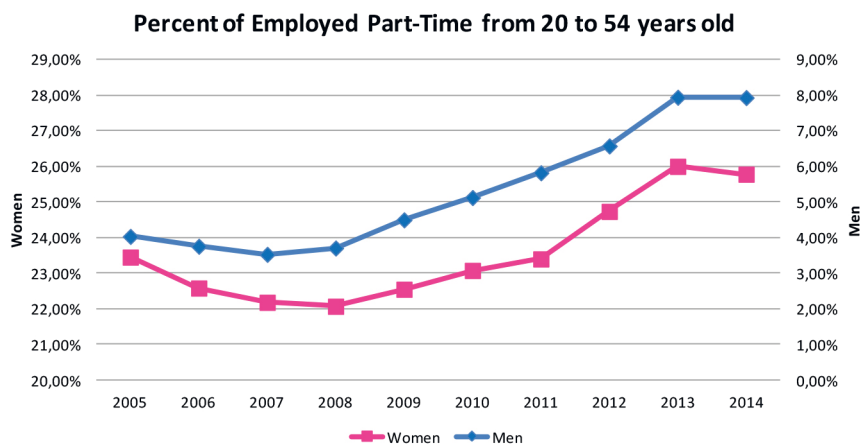
²⁸ CASTELLI, NUNZIA (2012). “Conciliación de la vida familiar y laboral y exigencias organizativas empresariales”, *Revista Doctrinal Aranzadi Social*, no. 2/2012 paragraph 1/2012.

4. Spanish Part-Time Work Data

Female incorporation in the labour market has brought into debate not only the need to enable employees to reconcile their working and family life, but also the necessity to redefine male-female roles in society. Women demand the same labour opportunities as men, and this requires a change of culture in all spheres of society.

In order to determine whether any change has occurred with regards to the issue of gender equality in the sphere of reconciliation, this study uses data from the Economically Active Population Survey (EPA in Spanish) to show the reasons why workers choose part-time work and its distribution over the past 10 years²⁹.

Chart 1

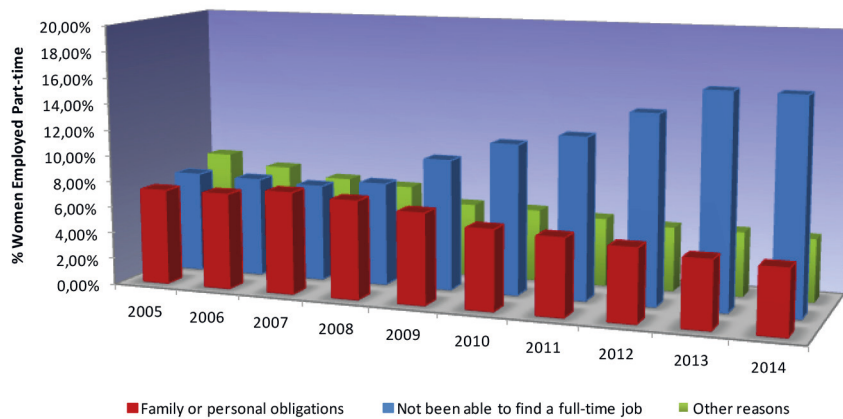


Source: The graph was made using data from The Spanish National Statistical Institute (www.ine.es)

This graph reveals that even though part-time employment has had a proportionately higher increase in male workers, it is still predominantly conducted by female workers.

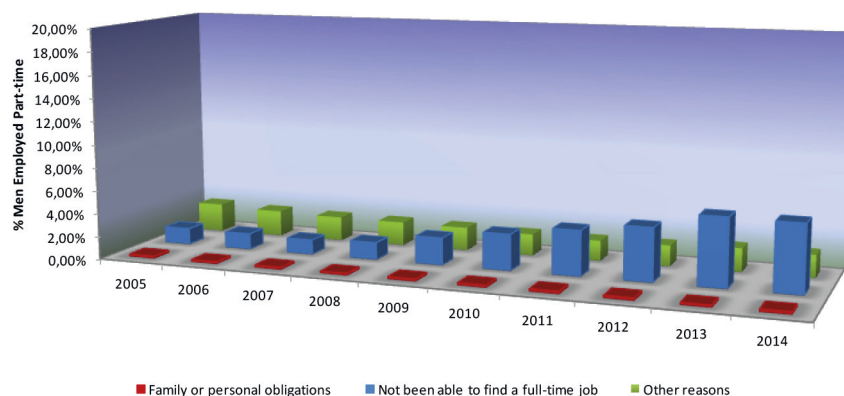
The following two graphs show the reasons why workers choose part-time work.

Chart 2: Women



Source: The graph was made using data from the Spanish National Statistical Institute (www.ine.es)

²⁹ http://www.ine.es/dyngs/INEbase/en/operacion.htm?c=Estadistica_C&cid=1254736176918&menu=ultiDatos&idp=1254735976595

Chart 3: Men

Source: The graph was made using data from the Spanish National Statistical Institute (www.ine.es).

We can see that during the economic crisis, “family responsibilities” as a cause moved into second place for female workers, with “*not been able to find a full-time job*” being the first reason for holding a part-time job. In 2011, 12.3% of women held a part-time job for the reason of “*not been able to find a full-time job*”, while 11% of them had a part-time job for other reasons. In 2013, the difference becomes greater, 16% against 10%.

On the other hand, male workers with a part-time job are a minority, and “*not been able to find a full-time job*” was the main reason for that. The weight of “*Family responsibilities*” in male workers for choosing a part-time job is almost insignificant, as seen in chart 3.

This prevalence of part-time work in females is not only common in Spain, but also across many countries. According to a study by Roeters and Craig: “*part-time work is much more prevalent among women than it is among men. Although attitudes vary across countries, it is widely considered harmful to young children if their mother works full-time, especially when high-quality childcare is unavailable. Women anticipate future family responsibilities by choosing jobs with fewer hours, even before they actually have children. Part-time employment among men is low (in 2006, male part-time rates varied between 9.9% in Germany and 27.2% in the Netherlands, OECD, 2014), and although it is not frequently studied, it appears that men chose to work part-time for different reasons than women. In the Netherlands, for example, the presence of children has only a minor impact on men’s working hours.*”³⁰

5. Conclusions

Spanish employees have to turn to different institutional figures in order to reconcile their working and family life, due to the lack of flexibility that the general law provides in this matter. Furthermore, Spanish employees having family responsibilities are less protected by its government than Dutch, Swedish or German workers, who enjoy public aid that is offered in different manners, from economical subsidies to public assistance and facilities.

A change of culture is needed soon, not only from the Spanish government but also from social partners, who have shown their inability to turn the prominence given to collective negotiation into an opportunity to improve the situation of employees having family responsibilities while responding to the productivity claim of the corporate sphere.

³⁰ ROETERS ANNE and LYN CRAIG 2014, “*Part-time work, women’s work-life conflict, and job satisfaction: A cross-national comparison of Australia, the Netherlands, Germany, Sweden, and the United Kingdom*”, *International journal of sociology and social policy*, vol. 53, no. 9-10, pp. 185-213.

Data suggests a lack of change in terms of equality regarding the reconciliation of working and family life. Firstly, part-time jobs continue to be prevalent among women, despite countercyclical behaviour among men. Secondly, although the economic crisis has led to “family responsibilities” being considered the second-ranked priority among female workers, the difference between women and men have not changed. Finally, the rates of men having a part-time job for family reasons have not varied.

The issue of reconciling working and family life requires additional attention, not only from national institutions but also from international ones, since the western world is experiencing population aging and a change of its pyramid, which is becoming increasingly narrower due to a decrease of the youth. Women continue to postpone maternity; therefore it is urgent to adopt measures that permit them to have the same labour opportunities as men, not forcing them choose between a professional career and a family. This may be accomplished by increasing awareness of the need to share family responsibilities.

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