

Crisis and labor reforms in Spain: a paradigm shift?

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Crisis

- The main origin of the crisis is strictly financial and American:
 - The US banks spread all over the international financial system, as if it were an attractive and profitable investment, thousands of financial products derived from mortgage contracts that t
 - The US raised rates: construction activity slowed down and millions of workers became unemployed and began to stop paying their mortgages or loans
 - Then the financial products that had been distributed lost their value and there is a loss of the banks' real estate portfolio-> generates a real estate "bubble" -> this causes bankruptcy of the banks but also of the investors who had acquired the financial products based on the paying of the mortgages.
 - When banks fail-> they stop giving credit-> the companies can not go on with the production.
 - The fall in production and economic activity increases unemployment.
 - Unemployed workers can not buy at the same level-> companies have less income or bankrupt
 - *The mortgage crisis turns into global financial crisis*
 - States also become impoverished as a result of receiving less tax and having to increase their spending on pensions and social protection.

What the governments do?

- They inject billions into the refinancing of banks thinking that banks will grant credit and revive the economy (fewer redundancies and unemployment)
- BUT they do not change the rules of the game.
- Once the Bank are refinanced: they impose their conditions to flow credit and they tighten the conditions to grant the loans, so the money not flow and the economy doesn't recover.
- The governments need money to finance their activities (payment of salaries of public employees, among other items)-> in Europe they launch public debt (since the creation of money from the monetary union is restricted).
- This public debt are classified junk garbage bonds by the rating agencies (the same private entities contracted by the same banking entities that did not hesitate to qualify as high quality the mortgages they put into circulation to support the business before)
- This forces governments to pay very high interest rates to those who invest in such public debt.
- Because of the indebtedness (endeudamiento) of the states, governments opt to adopt austerity policies in response to the situation.
- This weakens the economy because:
 - It reduces the expense
 - It generates less employment
 - States perceive less taxes and income: they have to do more with less income.
- The drowning of companies promotes **a labor reform** to reduce wages and adapt the workforce to the lowest demand

Spain

- ❑ Spain as a privileged observatory for two reasons:
 - It has been seriously affected by the crisis
 - The crisis has tried to solve through legislative reforms of two different political parties (socialist and conservative) which allows to observe two different approaches to the same problem.
- ❑ The crisis is a historic travel “partner” of Labor Law (Palomeque). But the current crisis has its own characteristics and an unknown impact on the Labor Law.

1. Flexibility at the entrance

- **Basic idea:**

- Instead flexicurity (políticas activas de empleo basadas en la formación)
- Increased flexibility in the entry to fight against unemployment

A) Intermediation:

- State monopoly -> ends 94/95: Temporary Work Agencies (ETT), private *non-profit* Employment Agencies (trade unions, universities etc..)
- Socialist reforms (2010): It is allowed the private *profit-making* Employment Agencies
- Conservative reforms (2013): more freedom and flexibility for TWA (ETT):
 - a) These enterprises (TWA) can now act as a Employment Agencies (placement agencies)
 - b) More modalities of lawful assignment of workers to the user undertaking: admission of training contracts and internship contracts

1. Flexibility at the entrance

B) Recruiting:

- Various measures (facilitating the hiring of part-time, a new temporary contract of "first youth employment", the apprenticeship contract become more a contract for promotion the youth employment than a training contract (-> training is given by the own enterprise, lower time for apprenticeship), promotion of self employment and entrepreneurial activity (fake autonomous, living below the poverty line).
- The **leading measure**: '**Permanent Employment Contract to Support Entrepreneurs**' (art. 4 Law 3/2012):
 - Only can be concluded meanwhile the unemployment rate is more than the 15%
 - Available exclusively for undertakings with less than 50 workers that did not make unfair or collective dismissals in the 6 months preceding hiring
 - Indefinite duration and full-time basis
 - Tax and social security advantages-> if mantein the contract 3 years and it must maintain the level of employment offered by [that contract] for at least one year with effect from the conclusion of the contract. In the event that those obligations are not met, the benefits must be repaid.
- Same labour conditions than the general permanent contract **but the sole exception of the probationary period (trial period), which shall in all circumstances be of one year's duration (no individual or collective agreement can change it)**:
 - Trial period is not linked to the type of activity developed by the worker, nor professional qualification: it converts this "indefinite" contract in a "temporary contract" in practice: at the end of the year the enterprises extinguish it lawfully: it allows to re-contract another worker: rotation of workers
 - Is it contrary to international commitments? Art.4.4. European Social Charter (1961) recognises the right of all workers to a reasonable period of prior notice for termination of employment: this is the position of some initial spanish judgments, the poition of the European Committee of Social Rights, and the position of the most representative trade unions in Spain, who have submitted a complaint to the ILO
 - However: 1. *Spanish Constitutional Court* considers that it is reasonable and proportional in times of crisis because it is limited in its temporal scope, and limited causally and quantitatively. 2. *CJEU* incompetence (but highlightes that the EU does not impose any obligation on trial period (nor art. 151 nor directive of temporary contracts), 3. ILO considers reasonable in general but urges the government to verify with the social partners that there is no abuse or fraud in the real and practical use of this contract

2. Internal Flexibility

- More employer power of business organization as an alternative to dismissal:
 - Socialist model: negotiated internal flexibility
 - Conservative model: one-sided flexibility (unilateral employer decision)
- Reformed aspects:
 - Enlargement of the objet of the employment contract: its delimitation by professional *groups* (tasks, responsibilities, titles) instead of *categories* (excessive pre-assignment of tasks)-> the employer gets more unilateral power of task specification
 - Irregular distribution of the working hours (before the crisis this possibility only could be by previous negotiation; actually, in default of negotiation: the employer may unilaterally distribute the working day irregularly up to 5% (ref. 2010) and now much more: up to 10% (ref. 2012)
 - Temporary labour force adjustment plans (temporary suspension of contracts or reduction of working hours): abolition of the previous mandatory administrative authorization
- The most important reform: extending the unilateral right of the employer to modify substantially the employment conditions: the procedure to do it was an “extraordinary” power for the employer, but now becomes one more instrument of “management” in the employer's labour relations:
 - More working conditions subject to change (all: including wages, individually or collectively established – except “statutory” collective agreement that has a specific regulation for its non-application in an enterprise-)
 - Less “causal” requirements:
 - It suffices that the alleged motive or cause concur.
 - The requirement of a judgment of *reasonableness* between the measure adopted and the alleged cause is removed
 - Reduction of collective bargaining spaces: It is only mandatory to open a consultation period with workers' representatives when a certain worker threshold is exceeded (below this threshold: individual communication). If no agreement is reached after the consultation: the amendment can be made by employer's unilateral decision.

3. External flexibility

- The reforms have acted on two fronts:
 - A. General-> on the cost of any unfair dismissal (without legal cause),
 - B. Specifically-> on collective dismissal (redundancies).
- A+B: an increase of the employer's power and a reduction in the cost of illegal dismissal decisions.

A. General reform in terms of termination of employment: Reduction of the cost of dismissal without cause:

- "Direct" **reduction of the cost of terminations of contract without "cause"** (unjustified dismissal):
 - Before 2012 reform: 45 days/year worked, maximum 42 monthly payments
 - After reform: 33 days/year, maximum 24 monthly payments (57% reduction)
- Indirect" reduction of the cost of dismissal: elimination of "**procedural salaries**" for unfair dismissal (wages that should have been received by the worker during the court procedure when it ends with judgment declaring the extinction unfounded)-> "punishment" of the employer for something (Judicial delay) external to the business decision, and which constitutes an incentive for workers to demand and not reach previous agreements

3. External flexibility

B. Reforms in collective redundancies for business reasons:

- Removal of prior administrative authorization and reduction of the role of the labor administration (it can not supervise the business measures neither suspension/stopping them: it has only a “monitoring function” related to unemployment fraud and in detecting if there are defects of consent in case of agreement with workers representatives)
- **As a counterparty (in return): greater relevance of the consultation period** with workers' representatives. However, some obstacles:
 - Reduction of the duration of the consultation period (max 15 days)
 - Progressive limitation of "judicial control":
 - ✓ Initially: **nullity** for not respecting the period of consultation or for fraud, malice, abuse of right, or coercion. Judges extended the nullity to cases where the employer *didn't negotiate in good faith*.
 - ✓ Legislative Reaction: nullity **"only"** if the consultation period *has not been carried out* or the expected information has not been delivered: it paralyzes extensive interpretations of the judges.
- **More relevant measure: redefinition of business causes that allow collective dismissal:**
 - Socialist reform: business cause: need to prove it and the proportionality and reasonableness of the measure adopted by the employer in regard with the cause: depending on the degree of impact of the cause)
 - Conservative reform: objectivization of the cause (decrease in sales or revenues 3 quarters of the previous year's quarters), its concurrence is sufficient and all the requirements of reasonableness and proportionality are eliminated: business discretion (confirmed TS) -> contrary to the requirement of the Convention ILO n.158 (cause/effective judicial control)?
 - It is understood that *economic* causes arise when a *negative* economic situation emerges from the results of the company, in cases such as the existence of current or anticipated *losses*, or the *persistent decline in its level of incomes or sales*. In any case, it will be understood that the decrease is persistent if during *three consecutive quarters the level of revenue (income) or sales* is lower than that registered in the same period the previous year

Flexibility and decentralization of collective bargaining

- Reform of the collective bargaining system:
 - Collective bargaining as an instrument of business management (ref. 2010- 2012).
 - Ref. 2012: paradigm shift: the political and economic function of the mandatory collective agreement at the *sectorial* (national or regional CCAA) level (to avoid the social dumping between companies) has been undermined by leaving that the “key” labour conditions can be taken at the enterprise level, even if they are against those established at the sectorial level. The practical result: an intense and widespread wage devaluation
- Deep reform of collective bargaining system (statutory collective agreements are regulatory and objective source of law^{3.1.b ET} and of general or *erga omnes* applicability, binding all employers and workers included in their scope during the entire period of their validity^{art. 82.3 ET}):
 - ✓ **Granting to the enterprise *collective agreement* a priority over the sectoral agreement for certain conditions** such as salary or working hours (schedule) (article 84.2 ET). Not needed any special “cause”.
 - Ref. 2011: This possibility (priority of the enterprise collective agreement) could be allowed only by the “sectoral collective agreement”-> it was the higher unit of collective bargaining, by itself, that would allow such a priority to the lower unit.
 - Ref. conserv. 2012: “Legal” mandatory rule that can not be modified by collective bargaining at any level. The negotiation of the collective agreement at the company level can be carried out at any time and once achieved, it will always have preference over the other agreements of higher scope (regional, Autonomous communities, national level)
 - ✓ **Enlarging the possibilities of the employer to modify a sectoral collective agreements** (a rule of law) at the level of the undertaking though a *company “agreement”* (not a source of law, but a source of obligations: contractual agreement-> ad hoc representatives in case of lack of institutional representatives) (“**descuelgue**” opting out^{82.3ET}). Temporary, causal and necessarily bilateral opting out.
 - Ref. 2012: If the parties do not reach an agreement (at company level, at sectoral level), any of them may go to the Advisory Committee (national or regional) and request the derogation. This Committee is a tripartite-> administration has a main role.
 - ✓ **Limiting the temporal validity of collective agreements once they are finished (ultraactividad ultraactivity)** to one year maximum (unless otherwise agreed by the parties). After the deadline without agreement, the collective 10 agreement of the higher level applies.

Something in return?

- The Green Paper on the modernisation of labour law proposes lifelong training as a central element of worker "security" as well as social protection in transitions between jobs
- Some measures of **occupational training** (2012):
 - Some of them have not yet materialized (cuenta de formación/cheque formación-training account and training check)
 - Others have changed their objective: training work leave must be "linked to the activity of the company", removing now the possibility of other training (only in interest for the worker)
- Vulnerability or **reduction of social protection**:
 - Reduction of social spending in times of austerity -freezing pensions, delaying the retirement age, incorporating new sustainability factors, etc.-
 - Measures against unemployment: the majority aims to stimulate the employment of young people through their own company (self-employment)
 - The most effective and necessary measure because of the high level of unemployment has been the PREPARA program of retraining people who has no more unemployment protection (initial duration of 6 months later extended by the Government, paralyzed as a result of a Constitutional Court Judgment STC100/17 which declares some articles null because they are contrary to the constitutional order of distribution of powers in the field of employment)

After 5 years: What else?

- Real effect of the reforms:
 - Less unemployment (from 26% to 18,5%) (2nd after Greece)
 - But now we can talk about the “poor people with precarious job”:
 - Poor (wages devaluation: for the workers with a job and for those that come back to the labour market after been fired because of redundancies)
 - Precarious: part time not voluntary, increase of the new indefinite contract with 1 year of trial period, high rate of temporary contract (*august)
- The current question is whether the reforms made in the western labor legal systems (as a result of the directions of supranational economic institutions) that search the job creation, but not so much the protection of the worker, have genetically transformed the labor law. Since its DNA is not based on countering the rules of the market itself, but on establishing limits to the free will through rules to protect the worker.
- In general, all economic crises have led to a reform and adaptation of Labor Law. But in all of them the essential core of Labor Law has been maintained:
 - ✓ Its *compensatory* nature (rebalancing the inequality of contractors)
 - ✓ Its *integrating* character (through the protection of the weak contractor and the collective subjects that defend it, the State integrates the conflict and maintains the capitalist system against alternative systems).
- Has the Social Welfare State only been maintained by the fear of communism? With the fall of the wall and with globalization, has changed the side of the fear (now is the fear of the workers) and this has allowed the power economic classes to demand social cuts in exchange for not dismantle the entire social system by producing only in non-developed countries where there is not collective autonomy and the contract rules only by individual autonomy? **Is the end of work and the end of the Labor Law in the context of a 4.0 economy?**

After 5 years: What else?

- I don't think so. Also the "steam engine" was thought to be a way to destroy work or, after, the new technologies or internet. The work developed by people, through different technological means, with the collaboration of robots or organized by algorithms, will continue and always need a specific regulation.
 - **The end of work (subordinate employment or self employment)? Not** because it would mean the death of the consumer and, as a consequence, the death of the companies. In this case (end of work), the companies could only survive if universal incomes are created (difficult: complex financing). The end of work would suppose the death of the capitalist system itself. Today we must again remind Marx who, in his time, warned that the army of unemployed workers could only be disarmed if the capitalist system created "new needs" and, with this, generated new jobs. If in the next future the capitalism system is not able to absorb the unemployed people, they can take up arms and look for alternative economic and political models. A new revolution will return even if today its manifestations are different and embryonic (occupy wall street, 15 M, etc.). The economy 4.0 will, undoubtedly, create new works, many of them nonexistent today. The question is if those jobs will be enough to avoid the reaction of the reserve army
 - **The end of the Labor Law as a specific regulation of certain type of work? Also not.** We have to rethink its institutions and certain rules. But its nuclear bases, based on the worker protection to achieve the balance between the unequal parties, have to remain. The capitalist system is not interested in a return to individual autonomy since today many of the purely civil law institutions are more protective and would generate more costs than those of labor standards (dismissal, unilateral modification of the contract, etc.)
- Therefore, I do not believe that we are facing a paradigm shift in the sense of "dismantling" Labor Law, even if it is true that are not good times for the workers and their representatives. But I do believe that **we should seek a new democratic, social and economic paradigm that prevents market domination over the democratic social contract.** We must rethink the labor legislation without forgetting its protective essence and the new challenges that it faces. In this sense, the starting point is the consensus on a strong defense of the fundamental social rights. Only a supranational compromise in the defense of these rights will avoid the rupture of social cohesion, a growing euro-skepticism and the development of nationalist and xenophobic political parties.

After 5 years: What else?

- The importance of:
 - penalizing a purely speculative economy and returning to a productive economy, even if it is a third or fourth generation,
 - the committed to a growth model based not on the intensive use of unskilled, cheap labor easily replaceable by robots or automated processes,
 - take into account the diversity of business and the size of companies, allowing specific rules for small enterprises,
 - bet on a model of union participation in small and micro enterprises,
 - prioritize the guarantee of minimum income to lead a decent life (something that already speaks the agenda 2020 by appealing to a new pact for social investment)
 - a commitment to security for the most vulnerable groups (which are no longer just the traditional ones but many of those who have temporary or precarious contracts and who declare that they can not make ends meet)
 - and other proposals for the protection of the active or passive worker, even if it is underlining his important role as a consumer activator of the economy, but, mainly because his work involves a person an must be a decent work, **are today more than ever necessary proposals.**
- Labor Law, in any case, should not come to an end. The new “ghost that is haunting Europe” and the world, called neoliberalism, shouldn’t loss its historical memory and remember that labor relations are “relations of conflict”, as Dahrendorf pointed out. Only the integration of the conflict and the protection of the workers by the Social State, has allowed the maintenance of the capitalist system. Perhaps movements like those of the Arab spring, Tahir square in Istanbul, the Spanish 15M or the American Occupy Wall Street, were the first blows that shows that the “reserve army of unemployment and poor” has started to organize itself with the sole purpose of changing the established system.
- In the hands of labor law lawyers, like all of us here present, is looking for ways to restore balance in a discipline that has managed to give so much progress to humanity.