

## Collective Bargaining in the Renewed Spanish Labour Law: a New Tool for Economic Policy?

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### Abstract

As in any other advanced democratic State, collective bargaining plays a central role in Spanish labour relations. Latest labour law reforms during the world financial crises have substantially affected this institution, and rules governing collective bargaining have changed profoundly, coherently with the general objective to increase employers' ability to change its contents and to avoid the so-called "rigidification" of working conditions. Its role is formally more important, but an objective analysis of this new regulations and its impact on Spanish labour relations leads to a completely different conclusion. It has been converted into an instrument of economic policy, with weaker collective agreements, allowing a general wage devaluation. This experience shows the vulnerability of collective labour law to external pressures. The temptation of using instruments of social dumping can be strong, producing changes in collective labour law that impose a model of collective bargaining unbalanced towards management's interests.

### Key words

Collective bargaining; collective rights; labour law reforms; social dumping; fundamental rights

### Resumen

La negociación colectiva juega en España un papel central en las relaciones laborales. Las recientes reformas del Derecho del Trabajo han cambiado radicalmente esta institución, y su marco normativo ha cambiado en profundidad, de manera coherente con un objetivo general de favorecer la flexibilidad en las empresas y evitar la "rigidificación" de sus condiciones de trabajo. Formalmente, su papel se ha fortalecido, pero un análisis objetivo lleva a una conclusión completamente distinta. Se ha convertido en un instrumento de política económica, con convenios más débiles, que han conducido a una devaluación salarial. Esta experiencia demuestra la vulnerabilidad del derecho colectivo del trabajo a las presiones externas. Puede haber una fuerte tentación para el uso de instrumentos de *dumping* social,

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produciendo cambios en el Derecho colectivo que impognan un modelo de negociación colectiva desequilibrado en favor de los intereses empresariales.

**Palabras clave**

Negociación colectiva; derechos colectivos; reformas del Derecho del Trabajo; dumping social; derechos fundamentales

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## 1. Introduction. Collective rights and labour law reforms in Spain

The regulation of collective rights has traditionally enjoyed a high level of stability in Spanish labour law. An analysis of a forty years period, starting from the enactment of the first Workers' Statute in 1980, shows that only the two most important reforms of these years, the 1994 socialist government reform and the recent series of legislative changes induced by the financial crisis (Valdés Dal-Ré 2012), have really affected the structural elements of Title III of this piece of legislation. This is somehow surprising, for a number of reasons. First, the rhythm of changes in Spanish labour legislation is very strong, and the number of reforms put into practice during this period is extremely high. Secondly, there is a consensus on the existence of some shortcomings in the real situation of collective bargaining, which leads to continuous criticisms about some of its more relevant aspects (Felgueroso 2012). Thirdly, there are notorious lacunas in this sector of labour law, the lack of a postconstitutional act on the right to strike being the best example.

Notwithstanding all these facts, our collective law has proved a remarkable level of stability. Probably this is a consequence of the difficulties involved in the task of changing it, and it does not express a generalized consensus about its quality. It is therefore noteworthy the fact that in the aftermath of the impact of financial crisis in Spain, major reforms have been implemented in this field (Cruz Villalón 2013). Both the socialist and the conservative governments, in turn in office, introduced relevant adjustments, affecting crucial aspects of it (Navarro Nieto 2012).

Regulatory changes produced by economic difficulties are a classic element in Spanish labour relations; the fact that these changes affects collective labour law is far less common. However, what is new is that this situation has been somehow imposed by external actors, particularly economic agencies and supranational bodies. In any case, this does not mean that the Conservative Government was not willing to reform in depth this institution. It is clear, though, that the pressure to do so, and some of the main ideas of this reform, came from international organizations. Spain is not among the EU member States which has been subject to *rescue* (ours was only financial, and our Memorandum of Understanding did not include reforms affecting labour relations). Nonetheless, outside pressures were strong, due to our dependence from international debt markets during the worst years of this crisis. More than a strict matter of conditionality (as it happened in Portugal or Greece), ours is an experience of *debtocracy*, in which international actors such as the Organisation for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and the Central European Bank imposed a number of measures through indirect means. Recommendations, conclusions of missions, letters to the President of the Government, declarations of high-rank officers and the like were used to this purpose. Many of these pressures pointed towards collective bargaining, assuming the criticisms on it that were already circulating in the country (Rodríguez-Piñero Royo 2014).

Thus, these criticisms, which had little or no effect for decades, suddenly became practical due to the support of these foreign actors, and reforms eventually came into force. The reaction of most internal actors was surprisingly critical with the new regulation, even though many of them were not happy with the previous situation. If there was a demand for a change, surely it was not for this change.

## 2. Towards a new model of collective bargaining

Latest labour law reforms have strengthened employers' powers to impose changes in employment and working conditions in their workforce, following a general trend starting in the 1990s. The Socialist Party's reforms of 2010-2011 made the implementation of most of these measures depend on the agreement between employers and workers' representative bodies, both elective and from unions. The model, which increased considerably the companies' ability to adapt to economic pressures (Falguera i Baro 2011), was inspired in the idea of the so-called "bargained

flexibility", and accordingly the increased employers' prerogatives depended upon their ability to agree these measures. Indeed, in order to make it possible, the law imposed strengthened duties to bargain, combined with time limits for these decisions to take place and with the use of external aid for the bargaining actors, such as compulsory mediation and arbitration. The need for an agreement with the workers' representative bodies was the red line the government was not willing to transgress, and therefore the employer did not have a unilateral right to implement these measures without this support.

This new model did not have the time to be put into practice effectively, as in 2011 the government supporting it lost office, just some months after the main elements of this reform were enacted. We have no ways to know whether it would have been successful. Conservative government changed substantially this model, in the context of major reforms taking place in 2012, and affecting almost every aspect of the regulation of the labour market. The new legislation, which is currently in force, maintained formally the idea of the need of bargained processes in order to adopt relevant managerial decisions, following the model of collective dismissals. With a major change, though, as in many cases, it allows the employer to implement the different measures at his own initiative, if no agreement has been reached. Although bargaining ("consultation", in the terminology of this legislation) is compulsory, and its absence produces the decision to be null and void, agreement is not, and the employer can go ahead with changes even when lacking it, if he proves that he has fulfilled his duty to bargain in good faith. A single red line survived: the employer cannot change economic and employment conditions granted by a collective agreement without the agreement of his employees, obtained in a consultation procedure. But even in this case, he retains some lines of action, as the law envisages a very complex system through which unilateral changes can be attained, in some circumstances. This system ends in a particular form of compulsory arbitration by a tripartite administrative body (the Comisión Consultiva Nacional de Convenios Colectivos at a State level, and its equivalents when the conflict is regional).

Taking into account all these elements, we can hardly talk any more about "bargained flexibility" to define the model currently in force in Spain. Probably we could more correctly talk about "consulted flexibility" as a more precise terminology for the current situation. This definition can only stand, if one accepts that these consultation procedures are an honest attempt to reach a consensus on the different measures to be adopted; for many, it only plays the role of formally legitimizing unilateral management decisions.

Besides, rules governing bargaining in the Workers' Statute have been also profoundly changed, coherently with the general objective of increasing employers' directive powers and to avoid the so-called "rigidification" of working conditions due to this collective regulation. A number of innovations was introduced to allow changes in the content of agreements, affecting nuclear elements of its regulation. Thus, a general mechanism for opting out from the application of generally binding agreements was introduced, with two different procedures depending on the legal nature of the agreement. Moreover, an almost complete preference for company level agreements was also implemented, and the rules governing the duration of collective norms were changed as well, making it possible for an agreement to lose its effects after the end of its term if a new one has not been signed.

The general idea was to change the traditional bargaining dynamics in two ways. On the one hand, the model based on periodical negotiations and the protection of effective application of what have been agreed during its duration, has been substituted by a new one in which bargaining is a permanent relationship between both partners, which can take place in any moment. The duty to bargain in good faith and the role of the agreement as a peace treaty have changed substantially in accordance. On the other hand, the idea that what the workers earned in the bargaining table was a permanent right, to be kept in the future, is no longer true,

as the reforms are clearly aimed towards reducing their economic rights and working conditions at any moment.

This new dynamic is not neutral, and has been designed to favour changes on employers' initiative, something that has been the rule in a context of crisis; we will see what happens when things improve and the unions demand to change economic conditions before time in their benefit. So far, this has not been the case, unfortunately, as the general economic situation has not allowed to do so.

These changes have been accompanied by the already mentioned strengthened managerial prerogatives, and the combination of both have had a profound impact in the practice of labour relations in Spain, weakening workers' position. For instance, it is common to present a demand for changes in economic conditions in the context of a consultation procedure of a collective dismissal, offering them as an alternative for avoiding terminations of employment. The pressure on workers is clear, and so the chances of reaching an agreement increase. In fact, the conservative government defends the success of its reforms by pointing out the number of agreements reached to this purpose from 2012 on; a deeper analysis leads to different conclusions.

The preference in favor of the company-level agreement has been particularly unfortunate. In theory, this was conceived to help big companies to construct a collective regulation of their own. Its implementation has been completely different, being used majorly by small and medium-size firms, as an instrument to avoid industry agreements with good working conditions. The abuse of this preference, through the so-called "ghost agreements", is a major concern for unions, and the judiciary has been forced to react overriding many of them, using old and well known constructions about legitimacy to bargain collectively. In general terms, the impact of these rules on the structure of collective bargaining has been minor; nonetheless the effects on some specific sectors have proved to be relevant.

A process of delegitimation of industrial action also took place, a phenomenon that has reduced unions' ability to confront these practices. The pressure on unions to prevent strikes has taken many forms, except for a new law to regulate this institution: changes in the Penal Code to sanction conducts usually linked to strikes; general criticisms on any strike having some public impact; the abuse of government prerogatives on strikes affecting public services... According to the Government and most of the media, a worker on strike is no longer someone using a constitutional right to defend his interest, but rather a privileged person defending his prerogatives.

Collective bargaining's role has been, at least formally, fortified in the last reforms, but an objective analysis of the new regulations put into practice, combined with an evaluation of their impact on Spanish labour relations, leads to a completely different conclusion (Gutiérrez Pérez 2014). Bargaining processes has become an instrument of employers' managerial powers, and their outcomes, traditional collective agreements, have been weakened.

These tendencies have had noteworthy consequences (Calvo Gallego 2013). The most evident, a reduction in the coverage index of collective agreements, with a growing number of workers without any agreements in force applicable. There have also been lower levels of industrial action, after a marked increase in the early years of the crisis, even in a context of profound economic problems negatively affecting employment and workers' rights. A change in the rhythm of bargaining has been also remarkable, as it takes longer to renew existing agreements.

At a macroeconomic level, the impact of this new model has led to a substantial reduction of wages in large sectors of the labour market, a significant increase in economic inequalities, the boosting of poverty at work, the spread of precarious forms of employment and the weakening of unions. Probably some of these elements qualify as undesired (but not completely unexpected) side effects of this reform. However, when one considers it from the perspective of the general Spanish economic policies, then the new model has been a success.

### 3. New functions for collective bargaining in the global market

It is commonly accepted that collective bargaining plays many roles, and that these have changed substantially over the last decades. Starting from an almost exclusively regulatory function in its early years, nowadays its missions include many others related to the adaptation to changes and the response to economic difficulties in enterprises. This has been a common trend, and many national labour laws have used collective agreements as an instrument to ease the introduction of flexibility. New paradigms have resulted about the relationship between law and the different kinds of agreements, and among these.

In the last wave of reforms, though, this role has changed. The world financial crisis's impact on Spanish economy was tremendous, and the government's main response was to promote a general wage devaluation. This generalized and intense reduction in wage levels was almost the only instrument of economic policy for years; and changes in labour law should be considered under this light (Calvo Gallego and Rodríguez-Piñero Royo 2014).

Lacking the resources to implement any other alternative, due to budget constraints, and subject to the guidance and monitoring of the European institutions (followed by our governments with enthusiasm), there was little space for other possible solutions. Although the public discourse rarely declared explicitly this purpose, it is true that this effect, the general lowering of wages, cannot be qualified as an undesired side effect. It was, on the contrary, present in the very design of this package of reforms. In a country as Spain, which has traditionally enjoyed a high level of coverage of collective agreements (around 80% every year), wages are typically regulated by these bargained norms. Thus, the only way to produce this effect was influencing collective agreements. Therefore it was done, with big success (Pérez Infante 2013).

The link between labour reforms and economic policies does not end in this particular institution. On the contrary, in the last general elections, all economic programs of the different political parties dealt primarily with labour issues, being in truth programs for labour reforms more than real economic agendas. In some of the new political parties, emerged after the turmoil of traditional policies, the official experts in labour issues, responsible of designing their programs in these issues, were economists with purely economic approaches to these questions. This is easy to understand, considering the levels of unemployment the country was facing. It is also very expressive of how this sector of the legal order has been brought under other policies, away from traditional social considerations. It is not any more the labour market what the Government regulates, but rather the prize of labour itself.

An explanation of this can be found on two elements, in my opinion: the first one is a political reason, a decision to stimulate this wage reduction as a direct, fast and feasible instrument to help Spanish companies to recuperate competitiveness in the global market. The second is budgetary, because in a moment in which the country suffered strong pressures from both public debt markets (the so-called "2012 risk premium crisis") and European institutions, this was the only way to react without increasing public expenditure. Social costs involved were not taken into account, or were at least considered acceptable.

Furthermore, the role of employment as the objective of public policies has also changed. Although in public discourse there is still a defense of its priority as a general and mainstreaming objective for all policies, the truth is that this is not the case anymore. Other considerations are progressively being taking into account with more attention: budget constraints, of course, but also the financial crisis of public social security. Consequently, the potential impact on employment is counterbalanced with an analysis of costs in public resources. The experience of the banking system, subject to a profound restructuring involving huge public expenditure, and having produced an enormous loss of employment at the same time, is paradigmatic.

These reforms have affected legislation covering all sectors of the labour market, including public employees at all levels. This has been possible because the central government retains important regulatory powers in public employment, allowing it to impose these changes to all these workers, regardless the type of administration employing them. Its ability to set new rules is in practice comparable to the one it retains in private employment as the sole labour law-maker in the country.

Additionally, it is important to explain that in the public sector the dynamics of change have been different. Although the successive governments shared the same objective as for the private part of the economy, that of reducing wage costs, there has been major differences regarding the public sector. For private firms this is a question of competitiveness, and can be put into practice progressively; for the public sector it had become a matter of control of public expenditure, of debt control, and this effect had to be produced immediately. In fact, wage cuts have been progressive in private employment, and relatively reduced; for public employees they have been immediate and far-reaching. Moreover, a relevant part of the budget cuts has come from these wage reductions, easy to apply and to monitor (De Soto Rioja 2013).

Even before the law on collective bargaining was changed, public employees suffered major wage reductions, which started as soon as in 2010. Public employers benefit from a case-law of the Constitutional Court which empowers the government to impose wage cuts even when salaries are set at collective agreements legally binding; this is not deemed as a breach of the constitutional right to collective bargaining, if its adequately justified. Later on, the government promoted a reform of the 2007 Public Employment Basic Statute through which the binding effect of collective agreements for these employees was conditional to the general guidelines of the economic policy.

The consequence is that collective agreements are binding in the public sector only and insofar as the Government in office considers them acceptable. Public employers' previous compromises on wages and working conditions are no longer a problem. The test set by the Constitutional Court to control the use of this prerogative, based on the existence of financial constraints, is easy to pass, and therefore the authorities retain a major instrument for economic policy by acting directly on its wages.

It is from my point of view noteworthy that wage cuts on public employees have been a central element in the different memorandums of understanding that European authorities imposed to member States in their programs for rescue, making them a condition for getting the financial aid. Notwithstanding that Spain's memorandum did not include this measure, as it affected exclusively the bank system (some cuts for top managers in this sector were foreseen as a matter of fact), the origin of these cutouts came from EU pressures anyway, through different ways.

Public sector benefited from changes in collective bargaining in another, indirect way. New rules allowed firms specialized in providing services to other companies, to have their own firm-level agreements, with low wages and working conditions. Thus, they could offer their services at a reduced price, generating a widespread effect of social dumping in whole areas of the services sector of the economy. This reduction of costs allowed administrations to cut down their expenses when contracting out the delivery of public services, in a context of massive privatization. Economic aspects of the offering has become the main decision factor in public tendering, and this has encouraged these practices. Deterioration of economic and working conditions for workers in contracted services is blatant, thus creating a new niche of precarious work in an already defective labour market.

Altogether, the clear conclusion is that collective bargaining has been used as an instrument to impose a wage devaluation in Spain, rather than acting as the natural mechanism to improve and ensure living incomes. If this was the objective, then it is clear that the reforms have been successful, as a substantial reduction of wages in many sectors of the labour market has occurred. This has produced, among other



consequences, a remarkable growth in economic inequalities and a substantial increase of poverty at work, nowadays a major problem in Spanish labour market, together with unemployment and precarious work. Some effects that governments in office have been willing to assume.

#### **4. How far can you go: are there any limits to labour law reforms?**

The last wave of changes in Spanish labour law can be described as extreme, as it has been far-reaching and has affected central institutions of this branch of the legal order, and also in that it has reached a leveling which one can raise doubts about its legitimacy and legality, considering the framework in which labour law-making operates. These doubts arise from both an internal and external perspective.

From an internal perspective, it is clear that the government, the real law-maker during this period, is confined by the Spanish Constitution. This is particularly true in a country like Spain, where our 1978 Constitution included a number of workers' and unions' rights; a country whose Constitutional Court has traditionally led a strong juridical protection for these rights. It was not strange, then, that many actors resorted through different channels to this Court in order to challenge the most relevant changes introduced in social legislation during this period. This operated in two main directions: the breach of fundamental rights, such as the right to bargain; and the interference on the powers of the regions, according to the distribution of competences set in the Constitution itself and in the Statutes of the different Autonomous Communities (Comunidades Autónomas).

In general terms, the Spanish Constitutional court, chaired by a labour lawyer for many years of this convulsive period, has endorsed the reform package enacted during these years. The case-law has been large, but with little impact on the evolution of the labour legal system, as no real limits have been put to the enactment of a renewed labour law, including the new model in the regulation of collective rights I just presented. This has been a surprise to many, as there were substantial doubts about the compatibility of some of these measures with the Constitution itself and with the jurisprudence of the Constitutional Court. The conservative government itself has some reserves in institutions such as the opting-out of collective agreements, and constrained itself when dealing with them by setting the only red-line in its labour policy.

The external perspective has been different. Being Spain a country subject to a number of international duties deriving from its membership to supranational organizations such as the European Union, and from its assumption of international instruments such as most International Labour Organization (ILO) conventions and the European Social Charter, its management of national labour legislation is no longer a purely internal question. In the first decade of the XXI century, Spanish labour law operates within an international legal order, which determines the way some central institutions must be dealt with. The multi-level protection of labour rights is already real and effective.

In this context, major changes such as the ones produced in the last years affect directly these international commitments, as they affect rights guaranteed at this level. Freedom of association, non-discrimination and the right to work are but some examples of this.

This is not just theory. On the contrary, in the last few years the major tensions in the management of labour legislation has come from decisions from the European Court of Justice applying some EU directives, which have forced Spanish Courts to change long-lasting constructions and may even produce some new legislation. Not to speak about the consequences of some European rulings defending economic freedoms whose effects in the docks sector are enormous (including a general strike). This happened in institutions so central in the Spanish practice as collective dismissals and fixed-term contracts. Therefore it was by no means irrational to expect some

level of conflict between these internal regulations, restricting fundamental collective rights, and the international texts on human rights granting them.

In fact, those advocating for a different model of labour law, opposing to what they considered real attacks on these rights, considered this as a line of defense. Thus, national unions resorted to international bodies such as the ILO Committee on Freedom of Association and the European Council of Social Rights to denounce some of the new rules. These complaints were in most cases successful, and these organs declared a number of infringements by the Spanish state.

Nonetheless, these declarations had little practical effect, as the Spanish government did not take any action to correct these breaches of the duties assumed by the country. In practical terms, no effect has been seen in collective labour laws, even though some of them really crossed the limits of what could be legally done by our law-maker.

At the same time, some judges tried to confront some of the new rules with international treaties on human rights, as the European Social Charter, but they found little support and success.

Maybe a decision of the European Court of Human Rights would have had a real impact. Even a ruling by the European Court of Justice, whose power to upset national labour laws is clear in the XXI century. This prospect was not that strange, as the Charter of Fundamental Rights of the European Union includes the fundamental collective rights in article 28, devoted to the "right of collective bargaining and action". According to this provision, "workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action". This declaration is not different from what we find in other treaties as the ESC or the ILO conventions. Its practical utility has been, at least in the Spanish case, scarce.

This statement leads me to a paradoxical conclusion. I pointed out that one of the primary factors setting in motion the reformist moment in Spanish labour law was the pressure from international actors, including the EU. If one analyzes the list of demands presented to the Spanish government during this period, we can conclude that most of them were satisfied. In the global world, the country has been sensitive to these external constraints. Nevertheless, legal obligations assumed by the country regarding other international organizations, those devoted to the protection of social rights, were almost useless in order to control the new rules affecting them. There has been an unequal impact of both dimensions of Spain's international duties, the protective side being shadowed by the European economic governance, concluding a growing disconnection between what the international community is defending from a social and an economic perspective.

## **5. Some lessons from the Spanish experience**

Spain has been considered an applied student for international economic agencies. Most of their recommendations have been applied to some extent, with a few exemptions. It is interesting to highlight that most directives affecting collective bargaining were actually put into practice. This was the case of the preference for firm-level agreements, the opting-out mechanism and the limitations on the extended duration of collective norms (the so-called "ultraactividad"). Three innovations with major effects, as we just saw. Not bad for a country that kept all its decision-making in the field of labour law, as European conditionality affected only the bank system.

A first lesson is, then, the vulnerability of collective labour law to external pressures, particularly in countries depending on external economic support, or vulnerable to

public debt markets. Memorandums of understanding and other instruments of international governance focus on labour relations, and pretend to change them.

Directly related to this, we can identify another lesson, which is that natural evolution of collective bargaining systems, a natural process depending on many internal factors, has been substituted by an artificial evolution. This is the result of different influences, mostly external, having in mind a precise model of how collective relations should be, according to the orthodoxy of international economic agencies. They have succeeded in forcing changes that did not come from the labour relations system itself.

What happened in Spain can act a signal or an example of what the international economic consensus has in mind when dealing with collective industrial relations; how they want collective bargaining to be dealt with by State legislation; what its role should be in the global market. Little more than a tool for adjustment for firms, or an instrument for improving competitiveness through the reduction of wage costs. Rules on opting-out and on the preference of some bargaining levels express this vision; a vision in which, paradoxically, the level of public intervention in labour relations increases, as the States gets involved in directing its industrial relations system towards new paradigms considered more adequate (and acceptable to debtors and international economic agencies). In this model, the autonomy of the bargaining agents does not deserve protection in all circumstances; and neither is granted the implementation of agreements in all circumstances.

A third lesson would be that there is a standard model of how collective labour relations should be in the international arena, promoted by these actors that are ruling the global world. It is important to be aware of this model, as it can predict future evolution of this part of the social system.

The recent Spanish experience proves that labour law can become a major instrument for economic policies, changing its traditional roles in order to contribute to the implementation of other goals. It is not a question of flexibility anymore; the game is about competitiveness through the direct reduction of labour costs. Employment is welcome of course, as a side effect, and with no consideration about its quality.

Probably this is just an example of the social dumping many of us feared in the debates about the impact of globalization in labour relations; a strategy of social devaluation that combines direct changes in the regulation of work with indirect pressures on social partners at all levels to reduce wages. To this purpose, collective bargaining, the natural place for setting wages according to the European Social model, is a logical target, and so it has been under attack.

A fourth and final lesson from what we have experienced in our country is that, in a context of global markets, the need of supporting domestic firms can easily lead to the temptation of using instruments of social dumping in order to deal with a harsh economic conjuncture. Among them, changes in collective labour law imposing a model of collective bargaining unbalanced towards management's interests, and far away from its original function.

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