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Reformas y contrareformas laborales en la segunda década del siglo XXI en España

Reformas e contrarreformas trabalhistas na segunda década do século XXI na Espanha

Labor reforms and counter reforms in the second decade of the 21st century in Spain

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RESUMEN
La crisis económica que irrumpió en el panorama económico occidental en el año 2007 afectó de manera particularmente intensa en las economías de los países del sur de Europa. El dramático incremento de las tasas de desempleo en España desencadenó un ciclo de reformas del marco normativo laboral que se inició en el año 2010. La lenta recuperación de las magnitudes macroeconómicas no ha ido acompañada por una paralela mejora de los datos sobre empleo y condiciones de trabajo. El cambio de Gobierno en 2018 ha impulsado la introducción de una serie de apresurados cambios normativos con el objetivo de limitar y reconducir los efectos más perniciosos de la reforma y el compromiso de abordar un más amplio programa reformador, mediante la adopción de un nuevo Estatuto de los Trabajadores. En el presente trabajo se estudian los elementos clave de las sucesivas reformas del marco normativo laboral introducidas desde el año 2010 hasta el momento presente, se presentan los efectos más evidentes sobre alguna de las variables básicas del sistema de relaciones laborales español y se plantean algunos elementos de reflexión a tener en cuenta en la elaboración del nuevo Estatuto de los Trabajadores.

PALABRAS-CLAVE: reforma laboral, negociación colectiva, extinción del contrato, flexibilidad

RESUMO
A crise econômica que irrompeu no panorama econômico do Ocidente em 2007 afetou de maneira particularmente intensa as economias dos países do sul da Europa. O aumento dramático das taxas de desemprego na Espanha desencadeou um ciclo de reformas do quadro regulamentar do trabalho iniciado em 2010. A recuperação lenta das magnitudes macroeconômicas não foi acompanhada por uma melhoria paralela dos dados sobre emprego e condições de trabalho. A mudança de governo em 2018 impulsionou a introdução de uma série de mudanças regulatórias precipitadas com o objetivo de limitar e reconduzir os efeitos mais perniciosos da reforma e o compromisso de abordar um programa reformador mais amplo através da adopção de um novo Estatuto dos Trabalhadores. No presente trabalho, estudam-se os elementos-chave das sucessivas reformas do marco regulatório do trabalho, introduzidas desde 2010 até o presente, apresentam-se os efeitos mais óbvios sobre algumas das variáveis básicas do sistema de relações trabalhistas espanhol e são propostos alguns elementos de reflexão a ter em conta na elaboração do novo Estatuto dos Trabalhadores.

PALAVRAS-CHAVE: reforma trabalhista, negociação coletiva, rescisão de contrato, flexibilidade

SUMMARY
The economic crisis that broke out in the western economic panorama in 2007 affected particularly strongly the economies of the countries of southern Europe. The dramatic increase in unemployment rates in Spain triggered a cycle of reforms of the labor regulatory framework that began in 2010. The slow recovery of macroeconomic magnitudes has not been accompanied by a parallel improvement in data on employment and work conditions. work. The change of Government in 2018 has prompted the introduction of a series of hasty

regulatory changes aimed at limiting and redressing the most pernicious effects of the reform and the commitment to address a broader reform agenda by adopting a new Statute of the Workers. In this paper we study the key elements of the successive reforms of the normative labor framework introduced from the year 2010 until the present moment, the most evident effects on some of the basic variables of the Spanish labor relations system are presented and some elements of reflection to take into account in the elaboration of the new Statute of the Workers.

KEY WORDS: labor reform, collective bargaining, contract termination, flexibility

INTRODUCTION

The evolution of the Spanish labor regulatory framework is rich in experiences that link economic crises and reforms[1]. The original version of the Workers' Statute has been modified, more or less intensely, in all recessive cycles that have afflicted the Spanish economy since 1980[2]. From the scientific perspective, it is very difficult to determine to what extent these reforms have contributed to improving economic variables, as the determination of what evolution the same variables would have registered whether the labor standard had not been reformed, or even if the reform had followed another route or addressed different contents, constitutes an effort to be developed in the uncertain terrain of predictions.

Notwithstanding the foregoing, it is quite simple to show that most of these reforms have contributed to limiting the individual and collective rights of workers[3], have caused a long cycle of wage devaluation[4], have facilitated the segmentation of the groups of people who provide service on their own and for others[5], and have contributed to the emergence of a new social group that we call precarious[6]. With this, a new model of society based on

[1] RODRÍGUEZ-PIÑERO y BRAVO-FERRER, M. *Derecho del Trabajo y crisis económica en Rivero Lamas, J., El derecho del trabajo y la seguridad social en la década de los 80*. Zaragoza: U. Zaragoza, 1983 VV.AA. *Las reformas del derecho del trabajo en el contexto de la crisis económica: la reforma laboral de 2012.* Valencia: Tirant lo Blanch, 2013..

[2] Act 8/1980, from March 10, of the Workers Statute (BOE from March 14)

[3] CRUZ VILLALÓN, Jesús et al. *La incidencia de la reforma laboral de 2012 sobre la estructura de la negociación colectiva*. Ministry of Job and Social Security, 2015.

[4] FERNÁNDEZ, Diego Dueñas; RUFIÁN, Luis Gómez. La devaluación salarial en España tras la reforma del 2012: articulación jurídica y efectos económicos. *Revista de Economía Laboral*, 2015, n. 12, v.1, p. 285-334.

[5] LÓPEZ-ROLDÁN, Pedro; FACHELLI, Sandra. Desigualdad y segmentación en los mercados de trabajo de España y Argentina. *Anuario IET de trabajo y relaciones laborales*, 2017, No. 4, p. 15-33.

[6] OVEJERO BERNAL, A. *Los perdedores del nuevo capitalismo. Devastación del mundo del trabajo*. Madrid: Biblioteca Nueva, 2014.

inequality, lack of protection and individualization of labor relations is emerging[7]. The employment contract progressively ceases to constitute a guarantee of access to a decent standard of living while, in parallel, there is a reduction in the financing and quality standards of public services tied to the welfare state.

On the other hand, the Spanish experience also shows that the introduction of legal reforms does not automatically and widely alter the labor relations system, when the latter has mechanisms that make it possible to totally or partially avoid the legislator's will. The existence of a robust system of collective bargaining based on heavily unionized sectors has allowed workers who provide services in these areas, especially large companies in industrial sectors, to resist the onslaught of the crisis and labor reforms. Yet, this resistance work does not affect the whole structure of collective bargaining and the effects of the reform have been projected more intensely on small businesses, on the services sector and on younger people.

As a summary of what has been said, if in terms of annual GDP Spain exceeded the data recorded in 2007 at the end of 2015, the unemployment rate in 2018 stood at 14.3%, five and a half points higher than the one registered at the end of 2007. On the other hand, in terms of occupation, in 2007 the social security system kept high an average of almost 19.4 million workers in December 2007, while in December 2018 the figure barely exceeds 19 million. To a greater extent, the bad data on employment volume have a more negative profile after the analysis of some quantitative variables. While it is true that the temporary employment rate has been reduced by six points compared to 2007, at the end of 2018 it maintains a value of 25.9% at the end of 2018, well above the European average. Together with these high rates of temporary employment, the rate of part-time workers has increased by more than three points in the period studied. Finally, the poverty and social exclusion rates have had a very negative evolution, if in 2008 the AROPE index stood at 23.8, the figure for 2017 stood at 26.6, which in absolute terms means that a total of 12,338,187 people,

[7] ROMÁN, Salvador Manzanera; PEDREÑO, Manuel Hernández. Precariedad laboral y exclusión social en España: Hacia un nuevo modelo social desprotector y de cohesión débil. *Sistema: Revista de ciencias sociales*, 2019, No. 253, p. 35-56.

26.6% of the population residing in Spain, are at risk of poverty and/or social exclusion[8]. In summary, the economic recovery has not brought the recovery of living standards prior to the economic crisis.

1 THE 2012 LABOR REFORM AND ITS PRECEDENTS

Operated by Act 3/2012[9], the reform is presented as a necessary and urgent regulatory activity with the goal of eliminating the weaknesses of the Spanish labor model allegedly highlighted by the economic crisis. The explanatory statement of the standard itself imputes to the rigidity of the labor regulatory framework the intense destruction of employment that occurred in Spain during the first years of the crisis, which placed that country at the head of the euro economies in this section. The legislator expressed his intention to proceed to modify the foundations of the socio-labor model, by introducing a major reform, in line with what was claimed by international economic institutions[10]. Although the orientation of the previous labor reforms, operated by Act 35/2010 was praised[11], RDL 3/2011 and RDL 7/201, its contents were considered insufficient[12]. That is why the 2012 reform proceeded to intensify the changes operated by the previous ones in order to alter the basic structure and balances of the Spanish labor relations system. Although the legislator defends the balanced mood of the changes, by introducing flexibility

[8] LLANO ORTIZ, J. C. El estado de la pobreza: seguimiento del indicador de riesgo de pobreza y exclusión social en españa 2008-201. Madrid: *EAPN-ES*, 2017.
[9] Act 3/2012, from July 6, urgent measures for the labor market reform (BOE from July 7)
[10] The connection between these organizations and the reforms operated, vid. OECD, "The 2012 labor market reform in Spain: A preliminary assessment". Available at: http://www.oecd.org/els/emp/spain-labourmarketreform.htm; FMI, "2012 Consultas del Artículo IV con España--Declaración Final de la Misión del FMI", disponible en: https://www.imf.org/es/News/Articles/2015/09/28/04/52/mcs061512.
[11] Act 35/2010, from September 17, on urgent measures for labor market reform (BOE of September 18); Royal Decree-Law 3/2011, from February 18, on urgent measures for the improvement of employability and the reform of active employment policies (BOE from February 19); Royal Decree Act 7/2011, from June 10, on urgent measures for the reform of collective bargaining (BOE from June 11); Act 27/201, from August 1, on updating, adaptation and modernization of the social security system (BOE from August 2).
[12] Among the numerous studies on reforms, the following stand out: CRUZ VILLALÓN, J. Algunas claves de la reforma laboral de 2010. *Temas Laborales. Revista Andaluza de Trabajo y Bienestar Social,* 2010, n. 107, p. 21-52; GRAU, Antonio Pedro Baylos. El sentido general de la reforma: la ruptura de los equilibrios organizativos y colectivos y la exaltación del poder privado del empresario. *Revista de Derecho Social*, 2012, No. 57, p. 9-18; CRUZ VILLALÓN, Jesús et al. *La incidencia de la reforma laboral de 2012 sobre la estructura de la negociación colectiva*. Ministry of Employment and Social Security, 2015.

in the management of the company's human resources, generating job security and maintaining social protection levels, as will be analyzed in subsequent sections, the changes introduced notably reinforce the employer's powers within the employment contract and in the evolution of the labor relations system.

The broad rejection with which the reform was received by the unions and by the majority of the legal-labor doctrine prompted the presentation of two unconstitutionality appeals against the most controversial aspects of the standard[13]. The SSTC 119/2014, from July 16[14] and 8/2015, from January 22[15], dismiss the resources, and declare the reform rule as fully constitutional. The texts of the judgments offer us a very interesting legal debate, which allows us to oppose the arguments used by the majority of the members of the court and individual votes supported by three magistrates. In simplified terms, the text of the sentence shows the confrontation between two conceptions of the role that labor law must play in the coming years: maintaining its conservative and compensatory character, or focusing efforts on creating conditions that are supposedly more favorable for the job creation and for increasing the competitiveness of companies. The dissenting magistrates, beyond certain substantial aspects, concentrate their criticisms on the constitutionality fee that, as a case resolution methodology, uses the Court. Specifically, the dissenting judges consider that the sentence inaugurates and integrates a new canon that elevates the adverse economic scenario to the constitutional category. In other words, the CC (Constitutional Court) uses the effects of the economic crisis on citizenship as a parameter of constitutional assessment of the measures limiting the constitutional rights of working people.

The jurisprudential thesis is committed to the subordination of social rights to a double constitutionality trial; the first of an ordinary nature, the second of an extraordinary nature, activatable in situations of economic crisis. The generalization of this judicial practice could be devastating for the consolidation of the Social State and for the effectiveness of the rights recognized in the EC and in international treaties. In the wake of the economic cycles,

[13] Resource for unconstitutionality 5603-2012, brought by the Parliament of Navarra and appeal for unconstitutionality 5610-2012, brought by the Socialist Parliamentary Group and the La Izquierda Plural Parliamentary Group.
[14] BOE from August 15.
[15] BOE from February 24.

so changing in the last decades, the ordinary legislator could possibly assume the powers of the constituent legislator, removing the content of rights with a constitutional rank. Notwithstanding the foregoing, it is obvious and technically irrefutable that economic crises allow for justification of rights limitations as long as they do not affect the essential content of constitutional social rights. In other words, the reformist activity of the ordinary legislator must remain outside any affectation of the necessary powers so that the constitutional law continues to be recognosible as belonging to the type described.

The controversy has jumped the borders of the Spanish courts, from the complaints presented by the Spanish unions before the European Committee of Social Rights (CEDS), who consider that the Spanish regulations violate the content of the European Social Charter. In the words of the CEDS "the measures that seek to consolidate public finances, ensure the viability of retirement pension schemes or encourage employment could be considered legitimate in times of economic crisis, but should not be translated by reducing the rights recognized in the Charter"[16]. In this regard, it must be argued that the limits of legislative action on constitutional rights must remain intact regardless of the upward or downward direction of the economic cycle. This is precisely the functionality of the "essential content" concept, a minimum guarantee, unalterable under any circumstance. On the contrary, the accessory content of those same rights can be altered by the action of the ordinary legislator.

1.1 The regulation of hiring modalities at the service of fostering job creation

The first chapter of Act 3/2012 deals with the introduction of various measures with the stated objective of favoring the "employability" of workers. On one hand, the Public Employment Services are accused of inability to properly manage the hiring of workers, and it is decided to favor the private management of job offers and demands by extending the powers of Temporary Labor Companies, for those who are authorized to operate as

[16] CEDS, Conclusions XX-3 (2014), (Espagne), janvier 2015. VV.AA. *Balance between Worker Protection and Employers Powers. Insights from around the World.* Cambridge: Cambridge Scholars, 2018.

placement agencies (art. 16.3 ET)[17]. In parallel, there is a new modification of the regulation of the contract for training and learning with the aim of promoting the insertion of young people in the labor market, expanding the possibilities of using this hiring modality in different ways, to halfway between the provision of services for others and professional training, with little quantitative relevance in the Spanish labor landscape (art. 11.2 ET)[18].

But the most controversial contracting measures are found in Chapter II of the Law, which groups different provisions aimed at promoting the hiring of unemployed youth by small businesses. The standard identifies this social group and smaller companies as the main ones harmed by the economic crisis. In order to alleviate their situation, a special modality of an indefinite contract referred to as "contract for indefinite support for entrepreneurs" is introduced (art. 4 Act 3/2012), the regulation of part-time work is modified and the regulations on home work are adapted to include teleworking.

The contract to support entrepreneurs is a special indefinite contract for companies with a volume of employment of less than fifty workers, always full-time, which has significant bonuses for social security contributions and tax incentives, particularly when hiring people under thirty or over forty-five. The specialty of the contract, in terms of obligations of the parties, is expressed by extending the probationary period that, unlike what is generally established (art. 14 ET), in this type of contracts will have a duration of one year[19]. In practice, this means that during the period of one year the employer is empowered for *ad nutum* unilateral termination of the employment contract, without obligation to pay any amount in compensation. The measure is introduced for a temporary period of an uncertain nature, as these contracts could be made as long as the unemployment rate remained above 15%.

From the constitutional perspective, questions are raised as to whether the extension of the probationary period in this type of contract would violate arts. 35.1 and

[17] PÉREZ, Alexandre Pazos. La colaboración del servicio público de empleo estatal con las agencias de colocación privadas y las empresas de trabajo temporal. *Temas laborales: Revista andaluza de trabajo y bienestar social*, 2018, No. 143, p. 187-224.
[18] I GENÉ, Josep Moreno. El contrato para la formación y el aprendizaje: un nuevo intento de fomento del empleo juvenil mediante la cualificación profesional de los jóvenes en régimen de alternancia. *Temas laborales: Revista andaluza de trabajo y bienestar social*, 2012, No. 116, p. 35-88.
[19] TOSCANI GIMÉNEZ, Daniel. El fomento de la contratación indefinida: el nuevo contrato para emprendedores. *Temas laborales: Revista andaluza de trabajo y bienestar social*, 2012, No. 116, p. 13-34.

37.1 of the Spanish Constitution (SC). Firstly, it is pointed out that both international standards and art. 35.1 Spanish Constitution (SC) enshrine the requirement of cause in the contractual termination by unilateral will of the employer. In this logic, the trial period could be an exception. The extension up to one year of the duration of the probationary period for this type of contract has no connection whatsoever with the purpose for which that institution is conceived, designed exclusively to verify the professional aptitudes and the adaptation to the job position of the new person hired. The new type of contract additionally introduces elements outside the general regulation of the temporary extension of the probationary period, such as the unavailability by collective agreement and disengagement with training levels. These elements have led some authors to question the objectivity and reasonableness of the justification adduced by the legislator, to call into question the lack of proportionality of the new regulation, and to argue that it violates the principle of employment stability and of causality of contractual termination (art. 35.1 Spanish Constitution (SC)). Furthermore, the unavailability of the matter could violate the constitutional right to collective bargaining (art. 37.1 Spanish Constitution (SC)).

The CC (Constitutional Court) rejects that the new regulation damages the right to work (art. 35.1 Spanish Constitution (SC)) and considers that the precept questioned has a legitimate, reasonable and proportionate justification. The fostering of the hiring of people who are part of groups that register high unemployment rates, the temporary or transitory nature of the measure, the scope restricted to smaller companies, the possibility that workers will reconcile benefits for some time social security and employment, and the indefinite nature of the contract are sufficient elements of balance, according to the Court. To a greater extent, the Court validates the extension of the functionality of the institution of the trial period, which in this type of contract would allow small businesses to fully verify the professional skills of the contracted workers and, in parallel, check whether the job that is created indefinitely is economically profitable. The violation of the right to collective bargaining is also rejected (art. 37.1 Spanish Constitution (SC)), since the judgment understands that the imperative of the normative provision, a standard of an absolute necessary right unavailable for collective autonomy, is equally reasonable, necessary and

proportionate, in the extent to which it aims to prevent collective autonomy from frustrating the legitimate objective that the legislator pursues.

The option adopted by the majority of the CC (Constitutional Court), which refuses to deepen the legal nature of the change introduced, is clearly reflected. Beyond the formal aspects, the reform puts into the hands of small companies an extinctive formula with a functional vocation different from the trial period. In some ways, the ruling recognizes that the extension of this period is not related to a hypothetical greater difficulty of these employers to verify the skills and abilities of new workers; therefore, it is expressly stated that during this period, employers may also check the economic feasibility of the job. In my opinion, this approach should be rejected for two reasons. Firstly, the probationary period should not be used for purposes other than those established in the standard, the economic unfeasibility of a job may be a cause of objective termination of the ex art work contract 52.c ET, with the compensatory consequences that the standard establishes; what cannot be considered from the reasonable and proportionate constitutional point of view is regarding the economic cause beforehand, avoiding a subsequent judicial control and eliminating the compensation provided in general. Secondly, the preamble of the standard does not refer to this function; on the contrary, the measure is part of the logic of eliminating obstacles that hinder the indefinite hiring in small businesses.

From this perspective, the reform is clearly disproportionate, imposes the majority of the charges on workers (injury to the right to job stability for a year) while putting in the hands of employers unilateral decision powers that are certainly extravagant (free and free of charge dismissal for a year) and important economic incentives (social security and tax bonuses). Specifically, the compensation referred to in the judgment (continuity of unemployment benefit, indefinite hiring) are rights that were already part of the worker's assets. Lastly, the temporality of the measure resulted at the time of approval of the standard equally debatable as uncertain. As stated above, the elimination of the possibility of making use of these contracts was conditioned to the achievement of a reduction in the unemployment rate of just over ten points. At the time the standard was approved, it could be discussed whether we were facing a *certus* or an *incertus an*, but it is out of question that it was an *incertus quando*. In practice, the desired figure was reached in the third quarter of

2018, so the exceptionality of the measure has been extended for a period of six years to which an additional year corresponding to the test periods of those contracts signed during the last year of validity of this contractual modality. The repeal of the measure makes it possible to make a negative balance of a very controversial measure in terms of legislation[20], as the limitation of the right to stability in employment and the right to collective bargaining has not achieved the ambitious objectives initially set, since, as stated above, the temporary employment rate remains exceptionally high[21].

1.2 The change of working conditions as an instrument of internal flexibility

The maintenance of the legal business constitutes a general principle of law, with broad roots in Spanish labor law. In the same sense, from an employment policy perspective, the termination of the employment contract must be considered the last option in situations of business crisis. Based on these arguments, there is a broad consensus regarding the need to introduce in all labor relations systems rules that allow, in situations of business crisis, the modification of current working conditions, in order to facilitate the overcoming of negative context and, thus, avoid the extinction of contracts and the unfeasibility of business activity. Without prejudice to the foregoing, the levels of agreement decrease rapidly at the time of specifying the design of these mechanisms, in particular as regards the conceptual delimitation of the enabling causes, the determination in qualitative and quantitative terms of the conditions that can be changed, and the procedure to be followed in each case[22].

The 2012 reform is firmly committed to the introduction of different internal flexibility measures. Chapter III of Act 3/2012 introduces a group of measures with the objective of generating adequate incentives for companies to cope with changes in the

[20] MONTES, Óscar Requena. The indefinite contract to support entrepreneurs: results and ways to eradicate them. *Revista de derecho social*, 2018, No. 82, p. 185-209.
[21] The sixth additional provision of the Royal Decree Act 28/2018, from December 28, for the revaluation of public pensions and other urgent measures in social, labor and employment matters (BOE from December 29), repeals the standard that created this contractual modality, although it keeps the contracts signed up to that date in force, under the conditions established in said standard and until its completion.
[22] CASTILLO, María Teresa Alameda; AGUDO, Eva María Blázquez. Modificación sustancial de condiciones de trabajo: un análisis retrospectivo. *Trabajo y derecho: nueva revista de actualidad y relaciones laborales*, 2016, No. 14, p. 25-48.

demand for products or services while preserving the company's human capital, which are specified in the possibility of adapting the agreed working conditions to the different realities of the evolution of the business activity. First, the professional classification system must be articulated exclusively around the concept of a professional group, a modification that broadens the margins of ordinary functional mobility. In practice, workers undertake to perform, at the request of employers, more roles or tasks, without receiving any compensation in return. Second, the reform facilitates the substantial modification of working conditions, altering the distinction between individual and collective modifications, broadens the number of conditions to be modified, and establishes a procedure for the modification of collective agreements during their term. Third, the administrative authorization requirement for temporary suspension of employment contracts is abolished.

Among the measures listed, the modification of the rules on substantial modification of working conditions took on an important role, and has also been subject to revision, via STC 8/2015. Specifically, the appeal considers contrary to the right to collective bargaining (art. 37.1 Spanish Constitution (SC)) and the right to freedom of association (28.1 Spanish Constitution (SC)) the unilateral power that the rule grants employers to modify the working conditions established in collective pacts or deals, other than collective agreements. The sentence flatly rejects the thesis of the appellants supported by arguments that are very similar to those described in the previous section.

As a premise, it should be remembered that this possibility was initially introduced in the 1994 reform[23]. On that occasion, the intervention of the labor authority in the procedure was abolished and, for collective modifications, the obligation to consult with the legal representatives of workers was introduced. In case of disagreement, employers could adopt the decision unilaterally. Well, there is an absolute consensus that the pacts or agreements that can be modified in this way would be the conventions of limited effectiveness, which lack the *erga omnes* efficacy attributed to the negotiated agreements, as per the rules established in Title III ET. Judgment 8/2015 recognizes that both types of agreements are the product of the exercise of the right to collective bargaining (art. 37.1 Spanish Constitution

[23] Act 11/1994, from May 19, which modifies certain articles of the workers' statute, and the articulated text of the Labor Procedure Act and the Act on infractions and sanctions in the social order (BOE from May 23).

(SC)), so that both of them display the "binding force" that the constitutional precept projects. The judgment also acknowledges that the substantial modification of the conditions established in the agreements of limited effectiveness, insofar as it allows the entrepreneur to separate from the previously agreed, negatively affecting the right to negotiation. Nonetheless, the CC (Constitutional Court) considers this interference legitimate because, in its opinion, it has a reasonable and proportionate justification.

Pursuant to the judgment, the proportionality of the measure is fully accredited because the business faculty affects only these types of agreements; because it is proposed as an alternative to the failure of the inquiries; because it allows you to go to other dispute resolution procedures (mediation or arbitration); because it demands the existence of economic, technical, organizational or production reasons; and because the worker is attributed, in certain cases, the possibility of terminating the contract with the right to receive compensation. The CC (Constitutional Court) does not take into account some other equally solvent arguments against the thesis that defends the proportionality of the measure. To begin with, it is forgotten that the recognition of the unilateral decision power of one of the parties constitutes a first-order negative incentive for the development of any inquiry, negotiation, mediation or arbitration process; secondly, the fragile regulation of the justifying causes of the business decision, which have been made more flexible in successive reforms, allow in practice that these decisions are taken almost discretionary, as a measure that was initially conceived to deal with extraordinary or pathological situations today can be adopted in very common situations in the life of companies; third, the possibility of a unilateral termination at the will of a worker entitled to compensation is not applicable in all cases of modification, nor is it consistent with the purpose of the reform (maintenance of the employment relationship), nor does it allow any compensation for the injury of the right to collective bargaining, as a compensation, where appropriate, would compensate for the termination of the contract.

Nor do the views of the majority of the CC (Constitutional Court) and the particular vote coincide on this point. The signatories of the latter consider that they grant special legal relevance to the modification of the criteria that, to date, allowed distinguishing between individual and collective modifications. Since 1994, and until the 2012 reform, the distinction

took as its starting point the nature of the source of fixing the condition to be modified. The standard configured as individual the modifications established in the contract or granted unilaterally by the employer, while considering collective those others contained in collective pacts or agreements or established by a unilateral decision between the employers, with collective effects. Individual modifications only required notification, while collective ones required inquiring the workers' representation. After the reform, this criterion disappears, being replaced by a threshold system, the number of people affected in relation to the volume of employment at the company, which in the previous regulation was used in a restrictive way for modifications of conditions of minor importance (roles and schedule). Well, from the constitutional perspective, the number of people affected must be considered irrelevant, since regardless of the subjective scope of the modification, the injury to the right to collective bargaining occurs due to the non-application of the agreement. Therefore, the discrepant magistrates consider that when the business decision modifies the normative content of a collective agreement or pact, it must be considered unconstitutional, whether it is considered collective in application of the legislation under appeal, as if it falls between individual modifications. In short, as part of the essential content of the right to collective bargaining, art. 37 CC (Constitutional Court) attributes to any instrument risen from a collective autonomy a binding effectiveness, which must be imposed on any agreement or decision of an individual nature. That is why the faculty, attributed by art. 41 ET to employers, if unilaterally modifying the working conditions established in collective pacts or agreements should have been rejected by the judgment.

1.3 The modification of collective bargaining system rules as an instrument of internal flexibility

From what has been said in the previous section, it can easily be deduced that collective agreements, negotiated in accordance with the procedure provided for in Title III ET, become a guarantee of stability of working conditions for workers, because as previously stated, those established through other types of sources can be modified by an unilateral decision by the employer. Knowing this circumstance, the 2012 legislator also proceeds to

make a profound modification of some of the typical rules of collective bargaining in the Spanish labor relations system, with the aim of preventing collective bargaining from facilitating wage devaluation, and of other working conditions. Firstly, the reform extends the limited non-application of the conditions established in the current collective agreement; secondly, it intervenes in the structure of collective bargaining by establishing the priority of what is negotiated in a collective bargaining agreement compared to what was agreed in a collective agreement of a higher scope, even when the regulation of lower scope establishes less favorable conditions; thirdly, the period of validity of the normative clauses of collective agreements during the renegotiation period is limited.

The possibility of altering the working conditions established in the collective agreement had already been extended in the previous reforms, although the effectiveness of the normative claim was often blocked by the lack of agreement with the workers' representations. The 2012 reform eliminates the obligation to reach an amendment agreement, the new art. 82.3 ET imposes on the parties the obligation to submit to the arbitration of the National Consultative Commission of Collective Agreements. This issue was also subject to appeal for violation of the right to collective bargaining and the binding force of the conventions (art. 37.1 Spanish Constitution (SC)) and the right to freedom of association (art. 28.1 Spanish Constitution (SC)), with similar little success. According to the CC (Constitutional Court), the standard concerned is adopted in a context of economic crisis with the objective of favoring the company's internal flexibility, serving, for a legitimate purpose, to guarantee the citizens' right to work (art. 35.1 Spanish Constitution (SC)), through the adoption of a policy aimed at achieving full employment (art. 40.1 Spanish Constitution (SC)), such as the defense of productivity in accordance with the requirements of the general economy (art. 38 Spanish Constitution (SC)). To a greater extent, the standard is reasonable and proportionate, since the National Consultative Commission of Collective Agreements intervenes in a subsidiary manner, once other conflict resolution systems are not feasible, thereby avoiding situations of blockage; the business decision is subject to limitations for causal, material and temporary reasons.

The above reasonings can be opposed by most of those made previously, to which for reasons of brevity we refer. Additionally, the sentence seems to forget that, although the

reform is introduced at a time of serious economic crisis, these rules have not been designed on a temporary basis; indeed, once the economic crisis has been overcome, the non-application of the agreement introduced in 2012 remains in force. If, as the judgment says, the economic crisis functioned as an objective and reasonable justification to support the limitation of the right to collective bargaining, it should have been designed as a rule of transitional law, losing force once the critical situation has been overcome. On the contrary, the absence of a deadline or term indicated, since the adoption of the new legal regime, the will to modify the functioning of the labor relations system. On the other hand, it is debatable that the modification of the conditions agreed in the collective agreement, which is indeed a standard with a temporary character, allows to guarantee the full employment and the citizens' right to work, it is not even demonstrated that the worsening of the conditions of work improves the companies' productivity.

In another order of things, the 2012 reform also breaks with a tradition of the Spanish labor relations system that, from the original version of the ET, entrusted the configuration to collective autonomy the task of defining the structure of collective bargaining, by means of framework agreements for the articulation of collective bargaining (art. 83.2 ET) [24]. It is true that the 2011 reform already gave an application priority to the business-level agreement over sectoral agreements in fundamental matters, but it is no less true that the rule left the option of blocking this possibility to state or regional agreements. The 2012 reform makes this matter unavailable for collective bargaining in order to ensure that the setting of working conditions occurs at lower levels[25]. There is no doubt that, in a business landscape dominated by small businesses and microenterprises, the prominence of sectoral collective agreements is very relevant to guarantee high coverage rates and minimum standards.

In the opinion of the appellants in protection, the application priority of the company agreements violates the arts. 28.1 and 37.1 Spanish Constitution (SC), since it involves relegating the negotiation of the union representatives and favoring the materialized by the

[24] CRUZ VILLALÓN, Jesús et al. *La incidencia de la reforma laboral de 2012 sobre la estructura de la negociación colectiva*. Ministry of Jobs and Social Security, 2015.
[25] GÓMEZ GORDILLO, R. La preferencia del convenio colectivo de empresa: análisis de los límites materiales de aplicación del uno de los pilares de la reforma de 2012. In: *La negociación colectiva como instrumento de gestión del cambio*. Madrid: Ediciones Cinca, 2017. p. 53-75.

non-union representatives, whose representativeness derives from ordinary legality. Additionally, the legislature would lack objectivity and proportionality to the extent that it expels social agents or the space that the constitutional standard assigns them. Also on this point, STC 8/2015 rejects the claims of the appellants, among other reasons, because it considers that the applicative priority of the company agreement, neither prevents negotiation in sectoral areas, nor reduces the regulatory effectiveness of the existing sector regulation, which will continue to be applicable in companies that do not enter into company agreements, nor make it impossible for trade unions to participate in the negotiation, in accordance with the legitimation rules established in arts. 87 and 88 ET.

In this section, the statements made by the court are partial, because although the application priority of the collective agreement does not expel either the unions or the sectoral areas of the collective bargaining system, there is no doubt that the standard makes a configurative effort of the collective bargaining system in which, from the subjective point of view, the activity of non-union representatives is privileged, and from the point of view of the contents, the effectiveness of the system's articulation agreements is limited and, under the arguable argument of proximity, a principle of repeal *in peius* of the working conditions established in the sectoral agreement is introduced. In this sense, the individual/dissident vote of STC 129/2014 is particularly critical of the interpretation of art. 37.1 Spanish Constitution (SC) assumed by the majority of the CC (Constitutional Court). In the opinion of the dissenting parties, the CC (Constitutional Court) considers that said provision is deprived of all regulatory content, which allows unlimited intervention by the ordinary legislator in its configuration, an operation in which the essential content of the law could be blurred. From this premise, the private vote considers that the application priority of the company agreement ex art. 84.e ET violates the freedom of stipulation of the parties (art. 37 Spanish Constitution (SC)), freedom of enterprise (art. 28.1 Spanish Constitution (SC)) and the principle of legal certainty (art. 9.3 Spanish Constitution (SC)) and, finally, recalls the resolution of the ILO Committee on Freedom of Association which, at its 320 meeting, responds to complaints raised by Spanish trade union organizations against the content of art. 84.2 ET. Among other arguments, on one hand, it is urged that the modifications of the agreements that have as their purpose the overcoming of the serious economic difficulties

undergone by the companies is specified in the framework of the social dialogue; on the other hand, that the introduction of decentralizing mechanisms through derogatory provisions less favorable than those in force at higher levels can alter the balances of the collective bargaining system, weakens the freedom of association and collective bargaining, and violates the principles enshrined in Conventions Nos. 87 and 98 ILO.

Lastly, and with the same objectives set out above, the 2012 reform introduces changes with respect to the regime of validity of the collective agreement during the renegotiation process (art. 86 ET)[26]. The legislator, firstly, intends to reduce the terms in which the process of renegotiation of the agreement is articulated; secondly, in the face of bargaining blocks, by temporarily limiting the period of "ultra-activity", the guarantee offered by the working conditions contained in the previous expired agreement is protected from protecting workers' representatives against proposals to the decline in business representation.

1.4 The suspension and termination of the contract as instruments for overcoming the business crisis

The legislative will to favor the "efficiency" of the labor market, through the introduction of more "flexible" rules, also affects the regulation of the rules that order the suspension and termination of the contract. On one hand, the legal regime of the temporary suspension of the employment contract is modified, which can occur both for complete periods, and for hours or days (art. 47 ET). In the matter of dismissal (art. 51 and 52 ET), from the procedural perspective, the need for administrative authorization is eliminated and the obligation to reach an agreement with the representatives of the workers to proceed with the dismissals is eliminated (art. 51 ET); in the aspect of the justifiable causes, which are intended to limit judicial control over the existence of the enabling reasons. On the other hand, compensation for unfair dismissal is reduced (art. 56 ET), in order to bring the economic compensation applicable to the termination without a cause of the indefinite work

[26] DE LA ROSA, Manuel Álvarez. Aplicación temporal del convenio colectivo: finalización del convenio y régimen posterior de condiciones de trabajo (ultractividad). *Revista de Derecho Social*, 2014, No. 65, p. 29-40.

contract and the one established for the termination of the fixed-term contract, by compliance with the agreed term or condition. The legislator starts from the assumption that this difference is at the base of the widespread fraud in temporary hiring in Spain, which dualizes and fragments the labor market in our country. On the other hand, and in the same line of argument, the legal regime of processing wages is modified, to quantitatively limit corporate responsibility for this concept (art. 56.2 and 5 ET). As has already been said for other matters, the collective dismissal was also subject to reform in 2010, so the reform operated in 2012 serves to deepen the flexibility elements already incorporated[27].

The new wording to art. 51 ET has also been subject to appeal for protection, both for violation of the right not to be dismissed without just cause (art. 35.1 Spanish Constitution (SC)), and for violation of the right to effective judicial control over the causation of dismissal (art. 24.1 Spanish Constitution (SC)). In the opinion of the appellants, the new definitions of the causes justify the collective termination of the contracts suffers from lack of specificity which indirectly suppresses the business obligation to prove the concurrence of the extinguishing cause and to justify the reasonableness of the extinction decision. For its part, the CC (Constitutional Court) denies the consecration of an acausal collective dismissal, based on business discretion. The elimination of the references that the previous regulation made to the obligation to prove the concurrence of the cause and to the accreditation of the reasonableness of the extinction decision, is not intended to recognize a greater margin of discretion to the employer. On the contrary, the CC (Constitutional Court) considers that the new regulation technically improves the previous one, provides greater legal certainty to social agents (art. 9.3 Spanish Constitution (SC)), and facilitates subsequent judicial control (art. 24 Spanish Constitution (SC)).

On the contrary, the individual/dissident vote rejects the majority reasoning in this matter. Specifically, the maximum flexibility of the preceding regulation is recognized in the case of justifying causes, and the relevance of the obligation, now repealed, that weighed on the employer to justify the reasonableness of collective dismissal in order to prevent a negative evolution of the company, or to improve the organization of its resources with a

[27] Sáez Lara, C. Restructuraciones empresariales y despedidos colectivos. Valencia: Tirant lo Blanch, 2015; CABEZA PEREIRO, J. La suspensión de la autorización administrativa en los despidos colectivos *Revista de Derecho Social*, No. 57, 2012, p. 183-198.

view to favoring its competitive position in the market. With this, the 2012 reform aims to transform the cause into a mere condition, which operates as a factual assumption that, if materialized, empowers the employer automatically and directly, to extinguish employment contracts. As a result of this construction, judicial control is limited to the verification of the existence of any of the causes described in the assumption of fact, without any possibility of assessing whether the dismissals are justified, necessary, reasonable and proportionate, attending to all circumstances that build the concrete case. “In summary, the reforms introduced by Law 3/2012 automate the extinguishing cause in the face of the mere existence of an economic fact that, as has been reasoned, lacks the least objective significance of sufficient entity, justification and need to consider that the regulation of collective dismissal is constitutionally protected.” In this logic, the individual/dissident vote warns that the new regulation not only violates the constitutional standard, but also collides with the provisions of art. 9.1 of ILO Convention 158, whereby national judicial bodies must be empowered to examine both the grounds invoked to justify the termination of the contract, as well as its justification.

CONCLUSION: THE NORMATIVE CHANGES INTRODUCED IN THE YEARS 2018 AND 2019

The success of the motion of censorship that triggered the change of government last May 2018 paid for the proliferation of omens favorable to the materialization of a profound modification, among other matters, of the legal regime of collective bargaining in force after the reforms from 2012. Contrary to expectations, the call for elections has prevented the development of such an ambitious reform program. Notwithstanding the foregoing, since last December the Government has introduced successive regulatory changes in labor matters, by decree law. Among other matters, the modifications affect the regulation of some contents of the collective bargaining system; specifically, aspects related to the collective negotiation of equality plans, the possibility of negotiating mandatory retirement

in agreement, the conventional setting of the hourly control instruments in the company have been treated.[28]

In chronological order, the first modification lifts the absolute veto which, after the 2012 reform, weighed on the negotiation of agreements on compulsory termination of the contract for compliance with the ordinary retirement age (additional provision tenth ET). The resurrection of this type of clause is articulated with the stated objective of reducing the unemployment rate of people under thirty, ten points higher than the general one. The elimination of the legal prohibition that collective agreements can establish the termination of the employment contract, once the mandatory retirement age has been reached, always linked to the achievement of employment policy objectives, is considered by the new executive, together with others, as an ideal instrument to boost the generational change in the labor market. In this company, the Government has the support of the social partners, who expressly urged it to foster legal changes "that allow collective agreements to enable the termination of the employment contract due to compliance with the ordinary retirement age, provided that, the affected worker is entitled to the full retirement pension, in order to facilitate the generational relief and linked to employment policy objectives"[29].

Second, the broad support that the struggle for the achievement of an effective gender equality has gathered in recent years, clearly visible in the mobilizations convened on the occasion of March 8, has also been reflected in the normative action of the new executive in the workplace. The explanatory statement of RDL 6/2019 recognizes the insignificance of the effects achieved by the promotional or fostering measures contained in the LOIMH[30], after more than a decade of validity. Specifically, the persistence of unequal working conditions for women and men is considered intolerable, a reality that is singled out in the growth recorded by the wage gap in recent years. Although the need to elaborate a new comprehensive and transversal articulated text is affirmed, the RDL limits itself to modifying some precepts of the laws that make up the labor regulations (ET, LGSS, LISOS, EBEP) and LOIMH itself. With regard to collective bargaining, the reform intensifies the duty

[28] GÓMEZ GORDILLO, R. La negociación colectiva en las reformas de 2018 y 2019. *Temas Laborales. Revista Andaluza de Trabajo y Bienestar Social,* 2019, No. 147.
[29] Resolution from July 17, 2018, of the General Directorate of Labor, which registers and publishes the IV Agreement for Employment and Collective Bargaining (BOE from July 18).
[30] Organic Act 3/2007, from March 22, for the effective equality of Women and Men (BOE from March 23)

to negotiate the modalities of exercising the right to conciliation of family and work life, through the concretion of the aspects to be negotiated and the establishment of a subsidized obligation of individualized negotiation, which will be enforceable in the absence of a conventional regulation. In the same deepening logic, the rules regarding equality agreements are reformulated, by extending the scope of the duty to negotiate, to include medium-sized enterprises, the creation of a register of equality agreements and the increase in prominence of the diagnostic studies, which must precede the negotiation of these agreements, be subject to the agreement with the representation of the workers and show a wide range of contents. Lastly, with the objective of reinforcing the effectiveness of the principle of equal pay for men and women, the concept of "work of equal value" is expressly introduced, in particular in terms of collective bargaining on professional classification and remuneration[31].

To sum it up, the evolution of labor relations has also helped to reflect regulatory deficiencies in other material fields. In the Government's opinion, the absence of a legal obligation to register the workday must be corrected in a necessary and urgent manner. In accordance with the terms in which the explanatory statement of RDL 8/2019 is expressed, the obligation to register the workday responds to the need to guarantee, with greater intensity and efficiency, the respect of the established working time limits in the legal standard imperatively (arts. 34 to 38 ET). With this, the mechanisms for controlling the duration of the daily work day acquire a new dimension, in guarantee of respect for the rights of workers and of the limits for such purposes established in the labor legislation. The text recalls that the accomplishment of conferences that violate, in quantitative terms, the limits established in the legal or conventional standard contributes to make the labor market precarious and negatively affects the volume of Social Security contributions. Nevertheless, the accounting of working time, a typical mechanism of business control, becomes an instrument of transparency of the employment relationship, which guarantees the rights of both parties, while protecting the general interest. The normative response originates in the problems of formal accreditation of the actual day carried out by the workers, once the

[31] Commission Recommendation from 7 March 2014 on the refusal of the principle of equal return between men and women through transparency (DOUE from March 8).

thesis held by the Labor Inspectorate did not receive any favorable reception in the judicial doctrine. Specifically, the Supreme Court has recently declared the absence of a legal provision that requires employers to keep a daily record of the days actually performed by the people who serve the company, except for the provision for overtime, which establishes the art. 35.5 ET, and on those hired part-time, which sets the art. 12.4.c ET. In such circumstances, and to the extent that the registration of the ordinary day is a basic budget for the control of excess hours, the accreditation of the number of overtime hours performed, and the possibility of claiming their compensation or offset, also result affected. Once the insufficiency of the legal regulation was verified, and in the absence of a sufficient conventional regulation that could compensate for this gap, the Supreme Court indicated to the legislator the way forward: the introduction of the appropriate regulatory changes that obligate the employer to keep an hourly record of the days carried out by all the people who serve in the company, in order to facilitate, among other issues, the proof of overtime. Last but not least, the measure has obtained indirect support from the Court of Justice of the European Union[32].

As it is easy to notice, the new government has not proceeded to modify the most criticized aspects of the 2012 reform. Notwithstanding the foregoing, the government's willingness to proceed with a thorough reform of the contents of the ET has been reflected through the commitment to constitute an expert commission, within the term that ends on June 30, with a tremendously ambitious assignment: to propose a new Workers Statute[33]. The new parliamentary majority born of the elections held on April 28 would make it possible to assume that the new regulation would eliminate, at least, the most harmful aspects of the current regulation. The fulfillment of this hypothesis will be revealed in the coming months.

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