Pension Rights as Fundamental Rights: A Comparative Analysis of the Old Age Pensions Prospects in Norway and Spain on Grounds of Collective Labour Conditions

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TESI DOCTORAL UPF / ANY 2017

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To my parents
In memoriam

Acknowledgements

A PhD project is always a long process of research and learning that would not be possible without the support and help of the people around the candidate. As it has been my case, I want to express my gratitude to those who have made this project possible.

To my supervisor Professor Julia López who has always been ready to read and critically asses my work. Her support, comments and directions have been crucial for the research's success. Also to my colleagues at the Labour Law and Social Security Area of the Pompeu Fabra University, Professors: Consuelo Chacartegui, Josep Fargas, Eusebi Colas, Sergio Canalda and Alexandre de le Court, for their time and support.

Professor Stein Evju – now Emeritus Professor - deserves also my warm thanks for the long discussions, critical comments and help during and after my stay at the *Institutt for privatrett*, at the University of Oslo. Professor Bernard Johann Mulder, also at the University of Oslo, for his time and unconditional support. And, to my colleagues there: Alexander Næss Skjønberg, Marianne Jenum Hotvedt, Andreas Van Den Heuvel, Anette Grønnerød-Hemmingby, for their availability, support and help: Tusen takk!

Professors Ann Numhauser-Henning, Mia Rönnmar, Andreas Inghammar and Jenny Julén Votinius at the Faculty of Law at Lund University, for their kindness and help during my stay at the faculty and for having made me aware of the Swedish labour system peculiarities.

To Jordi and *little* Jordi, for their love, understanding, patience and unconditional backing. In exchange, they got my absence and isolation: Thanks for being here!

Bente Lindberg Kraabøl and Bodil Silset, at the University of Oslo, for all their help during my stays at the Faculty.

Finally, to all those who I do not want to forget but it would too long to mention, for having shared their knowledge and comments with me along these years. It has been my pleasure.

This project has been possible thanks to the funding grants from: The Spanish MINECO, Project DER2013-45750P, Ref: BES-2014-069145 and, ES07 EEA Grants, Ref: 022-ABEL-IM-2014A.

ABSTRACT

The link between pensions and work is established at human rights level through social security contributions. The extent to which this link is strengthen is set in the national designs of social security systems that on their turn reflect the values to which each society adheres as well as the institutional contexts in which the systems are embedded.

The project compares Norwegian and Spanish collective bargaining models from this institutional perspective and critically analyses their respective ability to secure appropriate working conditions that can ensure the financing of the systems and the return of adequate pension benefits at old age. The study is complemented with the transversal analysis of the EU's law and policies impact in each institutional framework and ultimately on the collective bargaining model.

RESUM

La relació entre pensions i treball, establerta a nivell de drets humans per mitjà de les contribucions a la seguretat social es materialitza en el disseny dels respectius sistemes a nivell nacional. Aquests reflecteixen d'una banda els valors amb els quals la societat s'identifica i de l'altra, el context institucional en el que es troben inserits.

El projecte compara els models de negociació col·lectiva des d'aquesta perspectiva institucional i n'analitza de manera crítica la capacitat respectiva per respondre amb unes condicions de treball aptes per garantir el finançament del sistema i el nivell adequat de beneficis de les pensions. L'estudi es completa amb l'anàlisi transversal dels efectes que les polítiques i el marc legal de la EU, tenen sobre els diferents contexts institucionals i per tant sobre la negociació col·lectiva.

FOREWORD

From the several different approaches that an analysis of pensions can be undertaken, this project has chosen that based on rights. The controversial matter of the interconnectedness is presented here as a triangle the apex wherein the right to freedom of association is placed. The right to a fair wage and the right to old age pensions stand on the basis. The structure and thus the adequacy of pensions depends on the effectiveness of the right on the vertex.

The project compares the Norwegian and the Spanish collective bargaining models focusing on the differences. This permits more abstraction and thus conciseness which is expected the reader will appreciate. The axis of the research revolves around the role of the state and analyses how the institutional framework shapes the interaction of social partners and their making of social and labour agreements. This provides the research with a transversal approach that includes political and constitutional fields, beyond the purely legal analysis.

Within the research focus, the scope is broadened to analyse the effects of the EU policies and law on the role of the state. Here lays an interesting point of the research in that it adopts a reverse approach, departing from the accustomed line. Rather than looking on the direction EU → state, the analysis seeks to explain to what extent the role of the state facilitates the introduction of EU law and policies into the domestic order. This perspective leaves open a field for research that should come to supplement the existing ones.

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TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
AFP	Avtalefestet pensjon
AG	Advocate General
BOE	Boletin Oficial del Estado
CEARC	Committee of Experts on the Application of Recommendations and Conventions
CESCR	Committee on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association
CFREU	Charter of the Fundamental Rights of the European Union (The Charter)
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CME	Coordinated Market Economies
COE	Council of Europe
CPI	Consumer Price Index
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECSS	European Code of Social Security
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFTA	European Free Trade Association
EFSF	European Financial Stability Facility
EMU	European Monetary Union
ESC	European Social Charter
ESM	European Stability Mechanism
EU	European Union
FRA	European Union Agency for Fundamental Rights
IHDI	Inequality-Adjusted Human Development Index
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary Fund
LME	Liberal Market Economies
MME	Mixed Market Economies
MoU	Memorandum of Understanding

NACE	Nomenclature générale des activités économiques dans les Communautés européennes (EU Abbreviation)
NAV	Norwegian Labour and Welfare Administration
NCU	National Currency Unit
NE	Negotiated Economy
NOU	Norges offentlige utredninger
OECD	Organization for Economic Cooperation and Development
OJEU	Official Journal of the European Union
RECSS	Revised European Code of Social Security
SGP	Stability and Growth Pact
TBU	Teknisk beregningsutvalg for inntektsoppgjørene
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
VoC	Varieties of Capitalism
WB	World Bank
WEA	Working Environment Act

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INTRODUCTION: The Thesis in a Nutshell: Scope and Background

The future of pensions has become a matter of concern for governments and citizens alike. Most of the existing studies deal with pensions' sustainability at macro-economic level, largely focusing on ageing population[1]. However, there are several reasons to claim that such an approach is incomplete. First, it tends to limit the causes of the analysis to demographic changes – lifespan increase and birth rate – while sidestepping other relevant variables, i.e. unemployment rates or the deterioration of working conditions. Second, the emphasis on the macro-economic interest falls short of a fullest account of pensions' implications: i.e., the micro-economic effects, the social impact, or legal abidance. Third, the macroeconomic priority dodges the tensions coming up between transnational and national policies that impair states capacity to organize domestic relations.

This project suggests that the study of pensions from a collective labour-rights based approach has the potential to complement above mentioned shortfalls by broadening the scope of analysis to the interface of pensions and labour. Pensions are a complex matter that links work and leisure, economic freedoms and social rights, individual interests with collective interests[2] hence, the most difficult point for any research is to limit the elements under analysis. For the purposes of this project the core analysis revolves around wages and labour conditions as these are the main elements in the work relation, as well as the essential elements for pension rights' adequacy, universality and continuity.

On this basis, the analysis links the adequacy of the right to an old age pension to the effectiveness of the right to a fair wage and to working

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1 See i.e.,: OECD, *Pensions Outlook 2016,*; Clements, B., et al. (eds), *Equitable and Sustainable Pensions Challenges and Experience*, (2014), IMF; SCHWAN, A.; SAIL, E.; *Assessing the Economic and Budgetary Impact of Linking Retirement Ages and Pension Benefits to Increases in Longevity*, (2013), European Economy – Economic Papers from Directorate General Economic and Monetary Affairs, European Commission No. 512; SPRUK, R.; "Ageing Population and Public Pensions; Theory and Macroeconometric Evidence", in *Panoeconomicus*, (2014), Vol. 61; RAMOS, A.J.; "Viabilidad Financiera y Reformas de los Sistemas de Pensiones en la Unión Europea", in *Revista de Estudios Empresariales. Segunda Época*, (2011), Vol. 2; EU Commission, White Paper an Agenda for Adequate, Safe and Sustainable Pensions, Brussels, 16.2.2012, COM (2012) 55 final.

2 ESPING-ANDERSEN, G.; *The Three Worlds of Welfare Capitalism*, (1990), Cambridge: Polity Press.

conditions and therefore, to the right to freedom of association. To put it graphically, the underlying idea is that the right to freedom of association, the right to a fair wage and the right to an old age pension are built as a triangle. In its vertex, the right to freedom of association is a must to uphold the entire structure.

Before going further, a clarification is necessary: sustainability and adequacy are, obviously, terms that belong to the economic field. Their counterpart in the legal field of human rights would be redistribution and non-regression. However, for the purposes of clarity and given that the core protection of the right to an old age pension revolves around the appropriate level of benefits, sustainability and adequacy are used along this project referring to human rights as well. This should not come as a surprise, since the Committee on Economic, Social and Cultural Rights (CESCR) do also refer to these terms in its interpretative comment on the right to social security[3].

Social security contributions[4] are the cornerstone of the structure of most pension systems. Pension reforms undertaken in many developed economies in the last decades, have strengthen this relation by linking benefits to earnings along working lives[5]. Hence, making the level of benefits highly contingent on wages and employment continuity, not only at the individual dimension but also for the sustainability of the system. To be sure, sustainability is not referred to the provision of whichever amount of benefits. These are to be adequate to grant the standard of living of the beneficiaries at any given time.

Put differently, pensions depend on the existence of a welfare state financed through contributions, taxes or a combination of both[6]. Whatever the choice, the economic capacity of the citizens as a whole will act as a limit to the financing of the system[7]. High income contexts enable high contributions or taxes whereby welfare can be fed, whereas low income contexts tend to reduce revenues and increase expenses in the

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3 CESCR, UN General Comment No. 19, E/C.12/GC/19, The Right to Social Security, pars. 11, 55, 65 & 67.

4 See, i.e. CESCR, UN General Comment No. 9, E/C.12/1998/24, The Domestic Application of the Covenant, par. 15; ECSR, Digest of the Case-law, (2008), p. 89.

5 IMF, *The Challenge of Public Pension Reform in Advanced and Emerging Economies*, (2011), Policy Papers, Fiscal Affairs Dept., p. 8.

6 ILO, *Social Security Financing*, (1999), Geneva: ILO, p. 29 and ff.; HEMERIJCK, A.; *Changing Welfare States*, (2013), Oxford: OUP.

7 NICKLESS, J.; *European Code of Social Security. Short Guide,* (2002), Strasbourg: COE, p. 71.

form of social relief. Since work is the main source of income for the vast majority of people, situations of high unemployment or precarious work – part-time, temporary, low paid, informal work, work insecurity –, are conducive to the underfinancing of the system[8], therefore undermining the sustainability of the system to provide adequate levels of benefits.

Individual decisions on labour market participation, i.e. early retirement or health troubles are structural problems having negative effects on the sustainability of welfare systems. Despite that empirical studies on job satisfaction have not been able to find a direct relation between working conditions and the participation in labour market[9], research indicates that promoting job quality which encompasses: earnings, employment security and working environment elements[10] might increase incentives for labour market participation[11]. On this basis, it is reasonable to hold that working conditions when associated to wide coverage of workers are likely to play an important role in pensions' benefits over time.

That said, the design of each pensions' system expresses the power relations of the institutional framework in which it is embedded[12]. Hence,

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8 See: HEMERIJCK, A., EICHHORST, W.; *Whatever Happened to the Bismarckian Welfare State? From Labor Shedding to Employment-Friendly Reforms*, (2009), IZA Discussion Paper Series, DP No. 4085, March 2009, p. 5; TANGIAN, A.; *Not for Bad Weather: Macroanalysis of Flexicurity with Regard to the Crisis*, (2010), ETUI Working Paper 2010/06; ESPING-ANDERSEN, G.; *The Three Worlds of Welfare Capitalism*, pp. 79–80.

9 INGHAMMAR, A. ET AL.; "Prolonged Working Life and Flexible Retirement in Public and Occupational Pension Schemes", in Numhauser-Henning, A. (ed.);
Elder Law: Evolving European Perspectives, (2017), Cheltenham & Northampton: Edward Elgar Publishing.

10 CAZES, S., ET AL.; *Measuring and Assessing Job Quality: The OECD Job Quality Framework*, (2015), *OECD Social, Employment and Migration Working Papers,* No. 174, Paris: OECD Publishing.

11 POLLAK C.; *Employed and Happy despite Weak Health? Labour Market Participation and Job Quality of Older Workers with Disabilities*, (2012), Irdes working paper n° 45. 2012/03; CLARK, A. E.; "What Really Matters in a Job? Hedonic Measurement Using Quit Data", in *Labour Economics*, (2001), Vol. 8 (2); KSENJA, A.A.; "Job Satisfaction of Older Workers as a Factor of Promoting Labour Market Participation in the EU: The Case of Slovenia", in *Revija za socijalnu politiku, Svezak*, (2013), Vol. 20 (2); OSWALD, A. ET AL.; "Happiness and Productivity",in *Journal of Labor Economics*, (2015), Vol.33 (4).

12 See, i.e.: Ebbinghaus, B., Manow, Ph. (eds), *Comparing Welfare Capitalism. Social Policy and Political Economy in Europe, Japan and the USA*, (2001), London: Routledge, for an analysis of the different approaches on respective

the changes in norms, regulations and policies in the labour field not only will inevitably have an impact on the norms, institutions, and regulatory structures of pensions and vice versa[13], they also reflect the ability of the industrial relations system to influence on social outcomes.

It follows that institutional contexts which facilitate collective bargaining for the regulation of working conditions should provide better pension outcomes than those in which working conditions are set by the state as the originating institution of norms and regulations. To this purpose, the project compares Norway and Spain collective bargaining models as framed within their respective institutional contexts, on the assumption that the Norwegian industrial relations system should lead to better pensions' adequacy the Spanish system.

Several reasons justify the comparative choice. First, Norway's labour market, following the Nordic pattern of collective bargaining performs much better than many European countries. Hence, suggesting that this form of labour arrangements provides an advantage in terms of securing fair working conditions. According to the *OECD Employment Outlook 2017*, Norway has the second lowest level of labour market insecurity[14]. In contrast, labour market security has worsened over the past decade in Spain which "ranks at the bottom third of OECD countries in terms of labour market security"[15]. As a consequence of the labour market insecurity, the percentage of working-age people living beyond the poverty threshold[16] in Spain is of 16.5% while in Norway is 9%, as indicated in the same report.

Another way to highlight the differences in working conditions is the level of precarious employment in each country as shown in table 1 that compares the percentage of precarious employment in working-age population between 15 and 64 years:

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set of norms and regulations that operate under a given institutional framework institutionalism.

13 See: STRAUSS, K., "Flexible Work, Flexible Pensions: Labor Market Change and the Evolution of Retirement Savings", in Stone, K. and Arthurs, H. (ed), *Rethinking Workplace Regulation*, (2013), New York: Russell Sage Foundation, p. 273.

14 OECD, How Does Norway Compare? Employment Outlook 2017, available at: https://www.oecd.org/norway/Employment-Outlook-Norway-EN.pdf , p. 2.

15 OECD, How Does Spain Compare? Emloyment Outlook 2017, available at: https://www.oecd.org/spain/Employment-Outlook-Spain-EN.pdf , p.2.

16 Less than 50% of the median income.

Table 1 % Precarious employment

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Spain	4.5	4.2	4.3	4.3	4.2	4.6	4.8	4.7	4.7
Norway	0.8	0.7	0.8	0.8	0.8	0.8	0.7	0.6	0.6

Source: Eurostat (2017)[17]

If we look at the percentage of low-wage earners, also in working-age, as a proportion of all employees, excluding apprentices, in companies of more than 10 employees, the same results are found. The levels of both indicators remain highly stable in both countries, although the differences are relevant. This suggests that the institutional context where the industrial relations develop could be a reason explaining the outcomes.

Table 2 % Low-wage earners

	2006	2010	2014
Spain	13.37	14.66	14.59
Norway	6.48	7.27	8.29

Source: Eurostat (2017)[18]

Second, the Nordic welfare is well known by its comprehensive coverage. Norway is interesting because of its oil resources. Could the welfare state be linked to this wealth? The first steps of the research already highlighted that this was not the case. Norway has not separated from the Nordic tradition of work line. Labour is considered the main resource of the country, 15 times higher than the oil wealth[19]. For that reason, welfare is oriented towards activation policies rather than to protection. On its turn, social actors are involved in the design of welfare policies through tripartite cooperation pointing at the social dimension of unions as groups of influence at national level. Such a function is not rare in the Spanish welfare setting, but the extent to which it is developed in each country could bring some help in the explanation of the pensions systems study.

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[17] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Cross cutting topics/Quality of employment/Security of employment and social protection/ *Precarious employment by sex, age and NACE Rev. 2 activity*, Code: lfsa_qoe_4ax1r2, last accesed: 07/09/2017.

[18] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Database by themes/Labour market/Earnings/Low-wage earners and median earnings/Proportion of low-wage earners/ *Low-wage earners as a proportion of all employees (excluding apprentices) by sex*, Code: earn_ses_pub1s, last accessed: 07/09/2017.

[19] Government of Norway, Official Norwegian Reports (*Norges offentlige utredninger)*, NOU 2004:1 *Modernisert folketrygd— Bærekraftig pensjon for framtida*, p. 9. Author's translation.

Third, in the 1990s the Nordic countries experienced a financial crisis very similar to the one experienced by the EU countries in the earlies 2000s. The former were able to surmount their financial issues and recover economic growth faster than is currently being taken in th EU area. This is explained in terms of Nordic's strong institutions, law enforcement and policy transparency[20] that would not find a correlated level in the EU's liberal economic orientation. Norway has been able to maintain its traditional industrial relations system anchored in collective bargaining as the main source of labour law, whereas in Spain, the continuity of labour law institutions is being challenged on grounds of economic efficiency and employment creation[21].

Furthermore, Norway, as a European Economic Area (EEA) member is bound by the EU rules on four freedoms and except for monetary policies faces most of the constrains and opportunities of Union's membership[22]. Nevertheless, its governments keep sufficient leeway to decide on internal matters while Spain's power is restricted by European Monetary Union (EMU) as well as bailout measures. In sum, the ability of each state in comparison to address their social and labour predicaments is different.

Outline of the Project

First part, grounds on human rights level to draw the conceptual framework for the rights which are relevant for this project: old age pensions and labour conditions. This body of law contains several

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[20] JONUNG, L.; "Lessons from the Nordic Financial Crisis", in Jonung, L. et al. (eds), in *The Great Financial Crisis in Finland and Sweden. The Nordic Experience of Financial Liberalization*, (2009), Cheltenham: Edward Elgar, p.9.

[21] Between the relevant literature on this topic, see: Bogg, A., et al. (eds), *The Autonomy of Labour Law*, (2015), Oxford: Hart; Davidov, G., Langille, B. (eds), *The Idea of Labour Law*, (2011), Oxford: OUP; DUKES, R., *The Labour Constitution: The Enduring Idea of Labour Law*, (2014), Oxford Scholarship Online. This last is especially salient for an account of the different theories fuelling the debate on appropriateness of labour law for the regulation.

[22] DØLVIK, J.E. ET AL; "The Nordic Social Models in Turbulent Times", in Dølvik, J.E.; Martin, A. (eds), *European Social Models from Crisis to Crisis. Employment and Inequality in the Era of Monetary Integration*, (2014), Oxford Scholarship On line, p. 248; MJØSET, L., CAPPELEN, A.; "The Integration of the Norwegian Oil Economy into the World Economy", in Mjøset, L. (ed), *The Nordic Varieties of Capitalism*, (2011), Bingley, U.K.: Emerald Group Publishing Limited, p. 168.

undefined terms that challenge the task of elucidating the definitory elements of each right. However, the transversal analysis of the existing different instruments; international and transnational as well as their case-law, allows building a plausible concept of pensions adequacy as well as a notion of fair wage from which the obligations of the states can be interpreted. Being aware of the huge debate around the consideration of labour rights as social rights, a review is made to suggest that there are enough grounds to claim for such an anchorage. The last section looks at the EU level, its interaction with the upper level and its effects into the Member States legislations.

Second part starts with the comparison of the Norwegian and Spanish institutional background models. Given that the project deals with industrial relations systems and that the "study and analysis of national relations systems must consider the specific historical, political, economic, and societal contexts in which a national industrial system is situated"[23], this part seeks to understand the roots that lay behind each system that can explain the differences. It underpins in the theoretical models of welfare and Varieties of Capitalism (VoC) literatures to set the framework for analysis. Afterwards, it studies the industrial relations differences in Norway and Spain based on: coordination structures, wage setting mechanisms, the regulation of working conditions and the nature of collective agreements. Last section, as in previous part, is devoted to analysing the impact of EU level in each industrial relations system and serves as the link to the following part.

Third part compares the protection of pension rights in each system from a legal perspective. Starting at constitutional level, it continues with the comparison of pension systems. It then goes through a comparative analysis of the challenges to pensions' adequacy derived from the current pension systems. The last section, again, seeks to find whether and how the EU level has an impact in the pension systems but it adopts a quite different perspective. Since the objective of the project is focused in the institutional context, this section compares different pension reforms inside EU countries in order to understand to what extent the institutional context is permeable to EU's interferences.

Fourth part assesses the findings of the analysis in order to confirm or refute the thesis of the project. Pension systems, seen in isolation in each

[23] RÖNNMAR, M.; "Information, Consultation and Worker Participation – An Aspect of EU Industrial Relations from the Swedish Point of View", in Rönnmar, Mia (ed), EU *Industrial Relations v. National Industrial Relations: Comparative and Interdisciplinary Perspective,* (2008), Alphen aan den Rijn Wolters Kluwer, p. 19.

system offer a different outcome but when compared within their respective structure linking labour and pension rights, it is possible to confirm that pension rights in Norway are better protected than in Spain although not in compliance with human rights law in any case. This finding confirms the interconnection between rights and the need to take this perspective into account for the sustainability of pensions. It leads to rethink at which level pensions should be studied. It might well be that pensions could be withdrawn from the macro-economic field to be aligned with labour in the studies for improvement purposes, since it is as this level that elements are shared and can be transversally analysed. This leaves an open field for further and deeper research.

Methodology

"Law research is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social contexts and interpretation"[24]. To this purpose, and in order to facilitate the readers' access to the sources, I have, whenever possible, chosen texts in English. When this has not been possible because of the issue under analysis or because of the quality of the translated materials, original language documents have been used.

The project rests on binding international, transnational and national instruments. Very few mentions – in support of - will be done to soft-law documents. The reason is simply; this project is concerned about rights and these ensue only from law – hard-law – which has the legal capacity to create mandatory obligations. Within this context, i.e., ILO Conventions are of binding nature for ratifying States even though reality reveals that the lack of a supervisory body bears to non-compliance[25]. Soft-law may be a useful tool to raise awareness of a problem, but evidences the political inability or unwillingness to commit to social rights[26]. The idea expressed along these lines is that rights are of a legal

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[24] DOBINSON, I., JOHNS, F.; "Qualitative Legal Research", in McConville, M., Hong Chui, W. (eds), *Research Methods for Law*, (2007), Edinburgh: EUP, p. 22.

[25] O'HIGGINS, P.; "The Interaction of the ILO, the Council of Europe and European Union Labour Standards", in Hepple, B. (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, (2002), Cambridge: CUP.

[26] GARCÍA-MUÑOZ ALHAMBRA, M.A. ET AL.; "Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law" in *International Journal of Comparative Labour Law and Industrial Relations,* (2011), Vol. 4 (27), p. 338.

nature and can only be held on the premise that there are no different concepts and purposes of law[27]. Soft-law is often considered as half way between hard-law and no law. However, "behaviour is either legal or illegal, but never something in-between. And an instrument is in force or it is not in force, but never something in-between"[28].

Neither pensions, nor labour law are clear-cut fields. Many of their elements may overlap in the process of analysis depending on the factor under consideration. In a transversal research as the one undertaken in this project, this point becomes more frequent. When deciding the structure of the project, my criterion has been to make a clear separation of the contents to be dealt with. This notwithstanding the reader will find few recurrences that I tried to minimize through a reference.

In any comparison where one of the parts is an EU member, necessarily EU law and bodies come into play. The interferences between national and EU level can be studied in an integrated manner or separately. Since Norway is not an EU member while Spain is, the option taken in this project has been that of separating the two levels of analysis for clarity purposes. The criterion prevailing when dealing with EU matters has been that of the most relevant field of the ongoing analysis irrespective if the matter does affect one country or both.

In the comparative analysis, focusing on the differences leads to abstraction and allows for conciseness. The research output is based on two-standing points it should be oriented to the real life and it should be short. To these purposes, the necessary theoretical framework to develop the research has been built but the analysis has been done with the aim to avoid as much as possible theoretical digressions that would be helpless to address real issues. Moreover, Norway and Spanish legal structures are set with different rationales making their comparison at a theoretical level long and outside the purposes of this project.

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[27] Against this opinion see, SCIARRA, S.; "Fundamental Labour Rights after the Lisbon Agenda", in de Búrca, G.; de Witte, B. (eds), *Social Rights in Europe*, (2005), Oxford: OUP, p. 201 ff. who claims that legal obligations can be translated from soft-law mechanisms.

[28] KLABBERS, J.; " The Undesirability of Soft Law" in *Nordic Journal of International Law*, (1998), Vol. 67 (4), p. 7. Also: HEPPLE, B.; "Enforcement: The Law and Politics of Cooperation and Compliance", in Hepple, B. (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, (2002), Cambridge: CUP, pp. 245-246 who claims that voluntary measures have proven not to work in practice, mainly because of the lack of sanctions. Hepple argues for a responsive regulation that progressively increases sanctions if failure to cooperate persists.

Even that the focus is on real life, I am aware that the reader will be an expert on pension and labour matters. The vast literature on the topic makes unnecessary to repeat something that is already known. The choice for the analysis has, thus, been made to focus on the differences that can explain the outputs, rather than on concepts and frameworks that have already been developed elsewhere. In these cases, references are made to the literature dealing with the subject at hand.

Objectives

In a general sense, comparison is useful to study whether and to what extent the elements that provide better results can be exported to the other system that underscores. However, the objective here is not to transplant, but to analyse how collective bargaining mechanisms affect the adequacy of pension benefits. In this project, comparison leads to understand the institutional contexts that lay under the models of industrial relations and that may explain their outcomes[29].

The project's second objective is to contribute to the existing research by introducing the micro level focus on the analysis of pensions. Labour and pensions are correlated whatever the design of the schemes might be. This approach cannot be left behind, neither in the literature nor in policy making. Hence, the research aims to provide some findings that might broaden the scope of study to welfare and labour rights on a systematic basis.

Finally, a comparative approach always leads to a better understanding of the own system and allows for the critical assessment of both models under comparison. In this line, the project aims to enrich the knowledge in both systems.

Background: crisis of ideas and policies

The so-called *great recession*[30] has turned into real problems the potential dysfunctions of capitalism identified by Adam Smith's moral political

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[29] KUTTNER, R., "Labor Market Regulation and the Global Economic Crisis", in Stone, K., Arthurs, H. (eds), *Rethinking Workplace Regulation*, (2013), New York: Russell Sage Foundation, p.43.

[30] The term is used by STIGLITZ, J.E.; *The Price of Inequality,* (2012), New York: W.W. Norton and Company. Dates depend on each country's circumstances. According to the US National Bureau of Economic Research,

economy theory expressed in *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), namely: inequality, commodification of labour, loss of political power, unrestrained consumption[31]. Many economic and political scientists believe that modern capitalism policies based on extensive liberalization, i.e. privatization, deregulation, fiscal austerity, unfettered markets and reduction of state intervention[32] are greatly responsible for the ongoing troubles[33] while some support the view that there are less painful capitalism options[34].

Behind the adoption of any given economic measure lies an economic theory that allocates different distribution of resources and thus empowers and disempowers different political and economic constituencies[35]. These constituencies - a new wave of activists organized around international non-governmental organizations, mainly corporations, banking and other economic interests' groups[36] - have become the true holders of power and rights by exercising corporate lobbying that corrupts state institutions. The progressive influence the wealthier use to promote policies to enhance their wealth in somehow of a vicious spiral, annuls the power and the capacity of the state to act[37].

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in US the period started in 2007 and ended in 2009. Available at:.http://www.nber.org/cycles.html. For the IMF, however, recession started in 2009: "In 2009, almost all the advanced economies are expected to be in recession. The degree of synchronicity of the current recession is the highest to date over the past 50 years". IMF, *World Economic Outlook. Crisis and Recovery*, (2009), Box 1-1, p.14.

31 BASSIRY, G., AND JONES, M.; "Adam Smith and the Ethics of Contemporary Capitalism", in *Journal of Business Ethics*, (1993), Vol.12 (8).

32 CAMPBELL JONES, ET AL., *For Business Ethics*, (2005), p. 100.

33 See, i.e.: NUGENT, W.; *Progressivism: A Very Short Introduction*, (2010), Oxford: OUP; STIGLITZ, J.E.; *The Price of Inequality*; BLYTH, M.; *Austerity: The History of a Dangerous Idea,* (2013), Oxford: OUP; KRUGMAN, P. R.; *End this Depression Now!,* (2012), New York: W W Norton.

34 See i.e.: RODRIK, D.; *The Globalization Paradox: Democracy and the Future of the World Economy,* (2012), New York: WW Norton & Co.; Hall, P.A., Soskice, D. (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, (2001), Oxford: OUP; HAY, C., PAYNE, A.; *Civic Capitalism*, (2015), Cambrige: CPP; PIKETTY, TH., (trans. Goldhammer, A.); *Capital in the Twenty-First Century*, (2014), Cambridge: The Belknap Press of Harvard University Press.

35 BLYTH, M.; *Austerity: The History of a Dangerous Idea*, p. 39.

36 STIGLITZ, J.E.; *The Price of Inequality*.

37 CROUCH, C., "The Next Steps", in HAY, C., PAYNE, A.; *Civic Capitalism*, (2015), Cambridge: CPP, pp. 66-67. Similarly, Joan Somavía, ILO Director General in his speech in ACTRAV/From Precarious work to decent work, (2012), pp. 9-11. The issue is also mentioned by

The friction between capitalism and democracy[38] is perhaps more acute in the ordoliberal belief prevailing at EU level[39]. Ordoliberals claim that the economic is an order *per se* – implicitly assuming that it remains beyond constitutional and political control[40] -, that guarantees fair competition, private property and social returns provided it is not disturbed by concepts of other orders. Therefore, state's regulatory intervention should be restricted to grant that competition is undisturbed[41]. As far as states respond to economic/market mandates they cannot be made accountable for political and social failures. In this line, Hayek proposed to abolish democracy, if necessary[42].

The weight of the ordoliberal credo is noticeable in EU political stance. Particularly, the adoption of the Euro Plus Pact has surrendered national economic policies as well as competences on labour law to the EU[43] where Germany retains the ability to choose and determine the course of policy according to its preferences while peripheral countries' discretion has shrunk dramatically[44] evidencing that "theories of trade policy that emphasize special interests are on the right track"[45].

RODRIK, D.; *The Globalization Paradox: Democracy and the Future of the World Economy*.

38 STREECK, W.; "The Crises of Democratic Capitalism", in *New Left Review*, (2011), Vol. (71), p. 3.

39 See: STREIT M.E.; MUSSLER, W.; "The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'", in *European Law Journal*, (1995), Vol. 1.

40 PEACOCK, A., WILLGERODT, H.; "German Liberalism and Economic Revival", in Peacock, A., Willgerodt, H. (eds), *Germany's Social Market Economy,* London, (1989) cited in DUKES, R; *The Labour Constitution*, p. 123

41 DUKES, R; *The Labour Constituion*, p. 123. In this point, there is no difference with the neo-liberal credo. See, ASHIAGBOR, D.; *The European Employment Strategy: Labour Market Regulation and New Governance*, (2005), Oxford Scholarship Online, p. 15.

42 STREECK, W.; "The Crises of Democratic Capitalism".

43 BARNARD, C.; "armingeo Euro Plus Pact: A Labour Lawyer's Perspective", in *Industrial Law Journal*, (2012). Vol. 41 (1), p. 106.

44 ARMINGEON, K., BACCARO, L.; "Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation", in *Industrial Law Journal*, (2012), Vol. 41 (3), p. 264.

45 KRUGMAN, P.R. ET AL. ; *International Economics. Theory & Policy*, (2012), Pearson, p. 261.

The introduction of debt limits into national constitutions is also expressed in terms of democratic deficit by Piketty[46] who considers that it restricts leeway for governments to make budgetary decisions in case of need, since it places on the constitutional judge the final decision on the legality of economic measures. The contrast, in terms of legitimacy, is that it should be on the sovereign parliaments after democratic debates, to make the appropriate decisions on tax increases or debt reductions. Altogether, this generates a sense of failure of democracy and raises questions on the legitimacy of policies, rules and institutions boosting disaffection and unfairness feelings in citizenry as shown in the 6th. European Social Survey (2011-2012)[47].

Within the above context, employment measures adopted at EU level present two directions somehow contradictory. First, a labour flexibilization stance which has not returned expected results on fighting unemployment and foster growth, and is widely regarded as having had counterproductive effects[48]. Second, notwithstanding the above, EU has continued to back deregulation as a way to facilitate businesses' restructuring in the framework of Europe 2020 to strengthen the financial sector's ability to cope with national debts[49], resulting in rampant unemployment rates and precarious conditions of work.

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46 PIKETTY, TH., (trans. Goldhammer, A.); *Capital in the Twenty-First Century*, pp. 566-567.

47 Available at: http://www.europeansocialsurvey.org/data/download.html?r=6 . The increasing distance between European citizens and EU politicians is a fact acknowledged also at EU level from long time, see: MONTI, M., "A New Strategy for the Single Market", *Report to the President of the European Commission J M Barroso*, 9 May (2010) cited in SCIARRA, S.; *Common Places, New Places. The Labour Law Rhetoric of the Crisis*, (2012), Working Paper C.S.D.L.E. Massimo D'Antona. INT – 92/2012, p. 2.

48 PRASSL, J.; "Contingent Crises, Permanent Reforms: Rationalizing Labour Markets Reforms in the European Union", in Laulom, S.; Teissier, Ch. (eds), "Which Securities for Workers in Times of Crisis?, in *European Labour Law Journal*, (2014), Vol.5 (3-4), p. 213; In the same line: DEAKIN, S., "Editorial: The Sovereign Debt Crisis and European Labour Law" , in *Industrial Law Journal*, (2012), Vol. 41, p. 251 or NJOYA, W.; "The Problem of Income Inequality: Lord Wedderburn on Fat Cats, Corporate Governance and Workers", in *Industrial Law Journal*, (2015), Vol. 44 (3), pp. 401 ff. Also: PISSARIDES, P.; *Social Europe in a Climate of Austerity*, Eurofound Conference, Athens 23rd June 2014, available at https://www.socialeurope.eu/2014/06/social-europe-austerity/

49 A recent recommendation can be found in: Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Croatia and delivering a Council opinion on the 2015 Convergence Programme of Croatia (2015/C 272/15).

The vagueness of the term "precarious" has not been an obstacle to reach a general consensus about its scope. In short, it encompasses job uncertainty, low wages, low or none protection against dismissal and access to social protection mechanisms as well as weak health and safety conditions[50]. The diagnoses as for remedies differ according to the affiliation of the institutions or authors; however, there is a common understanding that regulatory tools are appropriate means to redress the situation. It is more controversial what such measures should cover and which rights are to constitute a common minimum floor[51].

Alongside the deterioration of working conditions, the shift from the productive to services economy has generated new employment dynamics, i.e. underemployment[52], long term unemployment, the destandardisation of employment relations. To appropriately respond to these new challenges some authors hold the need to adapt social security systems. Arguably, some labour law rules may not be appropriate for developing and transition social security systems[53]. Esping-Andersen admits that welfare states and labour market regulations originated in an industrial model do no longer obtain. In the post-industrial society, the risk structure is changing and welfare should find new ways to cope with[54] through regulation that covers the emerging risks[55], fosters productivity and improves competitiveness lacks[56]. Piketty proposes that

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50 An extensive definition can be found in STANDING, G.; *The Precariat the New Dangerous Class,* (2011), London: Bloomsbury. The author considers precarity as a new social class formed by those lacking the forms of labour security, p. 17. For an account of the literature defining precarious work, see: QUINLAN, M.; "The 'Pre-Invention' of Precarious Employment: The Changing World of Work in Context", in *The Economic and Labour Relations Review*, (2012), Vol. 23 (4), pp. 4-5.

51 See, WORKING LIFE RESEARCH INSTITUTE, *Precarious Work and Social Rights*, (2011), pp. 12 ff.

52 PUTTIK, K.; *The Challenges Facing Social Security Systems. The Lessons Europe Can Learn from the World's Developing Systems*, (2015), ISLSSL XXI World Congress of Labour Law & Social Security, Capetown, p. 5, available at http://islssl.org/wp-content/uploads/2015/10/UnitedKingdom-KeithPuttick.pdf

53 DEAKIN, S.; "The Contribution of Labour Law to Economic and Human Development", in Davidov, G., Langille, B. (eds), *The Idea of Labour Law,* (2011), Oxford: OUP.

54 ESPING-ANDERSEN, G.; *Social Foundations of Postindustrial Economies,* (1999), Oxford: OUP, p. 5; HEMERIJCK, A., *Changing Welfare States*, p. 15.

55 Laulom, S.; Teissier, Ch. (eds), "Which Securities for Workers in Times of Crisis?, in *European Labour Law Journal*, (2014), Vol. 5 (3-4).

56 Esping-Andersen, G., Regini, M. (eds), *Why Deregulate Labour Markets?,* (2000), Oxford: OUP.

the new form of modern redistribution should consist "in financing public services and replacement incomes that are more or less equal for everyone, especially in the areas of health, education, and pensions. [..] Modern redistribution is built around a logic of rights and a principle of equal access to a certain number of goods deemed to be fundamental"[57]. But the idea is not much new: social security function and goals remain those that Beveridge contended: to fight the "five 'Giant Evils' of Want, Disease, Ignorance, Squalor and Idleness"[58].

[57] PIKETTY, TH., (trans. Goldhammer, A.); *Capital in the Twenty-First Century*, p. 479.

[58] BEVERIDGE, W.H.; *Social Insurance and Allied Services*, (1942).

PART 1 The Normative Protection of Pensions and Labour Rights at Human Rights Level

Despite that the interdependence and indivisibility of all human rights was proclaimed by the United Nations (UN) in 1950[1], the split of the Universal Declaration of Human Rights (UDHR) into two covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in 1952[2] reveals the political difficulties that have accompanied the adoption of human rights legal instruments. Similar concerns are mirrored in the adoption of the European Convention on Human Rights (ECHR). The Preamble of the Convention states that it is the "first step[] for the collective enforcement of certain of the rights stated in the Universal Declaration", implicitly admitting at the same time the interdependence of human rights and the political impossibility to adopt civil freedoms and social rights in a unique document[3]. In the *travaux préparatoires* for the adoption of the European Social Charter (ESC), the interrelation of the Charter with the ECHR is several times emphasized[4] as well as the interdependence of all human rights[5].

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1 UN 5th. Session, Resolution 421 (V) December 4th. 1950, Draft International Covenant on Human Rights and Measures of Implementation: Future Works of the Commission on Human Rights.

2 UN 6th. Session, Resolution 543 (VI) February 5th. 1952, Preparation of two Drafts International Covenants on Human Rights.

3 See: KOCH, E.; *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights*, (2009), Leiden; Boston: Martinus Nijhoff Publishers, p. 2.

4 COE, European Social Charter*, Collected (Provisional) Edition of the "Travaux Préparatoires"*, (1953-1954): Memorandum by the Secretariat-General of the Council of Europe on the Role of the Council of Europe in the Social Field, Strasbourg, 16th April 1953 SG (53) 1, p. 6; Consultative Assembly of the Council of Europe, First Ordinary Session, 18th September 1953, Doc. 18S, p. 13.

5 COE, *European Social Charter, Collected (Provisional) Edition of the "Travaux Préparatoires"*, (1955): Consultative Assembly, Committee on Social Questions, Memorandum by the Secretariat of the Committee on the Preliminary Draft of the Social Charter prepared by the Working Party, Strasbourg, 25th. June – 5th. July 1955, AS/Soc (6) 30 Rev, p. 107; Consultative Assembly of the Council of Europe, Seventh Ordinary Session, Draft Recommendation European Social Charter, October 1955, Doc. 403, p. 175. More recently, see: GOMEZ, A.; *Social Security as a Human Right - The Protection Afforded by the European Convention on Human Rights*, (2007), COE, p.7.

Also, the same difficulties are found in The American Convention on Human Rights, "Pact of San Jose, Costa Rica" (ACHR) adopted in 1969 and the African Charter on Human and People's Rights (ACHPR) adopted in 1981. Both instruments are of a binding nature and expressly mention in their preambles the interdependence of human rights as a way for the full development and freedom of persons. However, neither text contains a catalogue of social and economic rights as they do for civil and political rights. The ACHR provides for a mandate to states to progressive develop economic, social and cultural rights[6] while the ACHPR establishes a collective right to economic, social and cultural development[7]. It was in 1988 that the Additional Protocol to the American Convention to the ACHR in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", recognized specific social and economic rights to individuals.

The theoretical interdependence of human rights has originated a vast literature approached from legal, moral, social, political and economic fields[8]. In legal writing, the *de facto* separation between civil and social rights remains a controversial issue whereby the transversal effects of justiciability are the main concern. The debate revolves around the constitutionalization of social rights with arguments focusing on democracy, policy making, judicial review... The legitimacy and competence of judges to review[9] policy decisions or to interfere in

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6 Art. 26 ACHR. A comprehensive commentary can be found in: UDOMBANA, N.J.; "Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa", in *Cornell International Law Journal*, (2006), Vol. 39.

7 Art. 22 ACHPR.

8 To cite but a few examples: MARSHALL, T.H.; "Citizenship and Social Class", in Marshall, T.H.; *Sociology at the Crossroads and other Essays*, (1963), London: Heinemann; NICKEL, J.W.; "Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights", in *Human Rights Quarterly*, (2008), Vol. 30 (4); SEN, A.; "Freedom and Needs: An Argument for the Primacy of Political Rights", in *The New Republic* (January 10, 1994), pp. 31-38; WHELAN, D.; *Indivisible Human Rights: A History* (2011), University of Pennsylvania Press; HOLMES, S., SUNSTEIN, C.R.; *The Cost of Rights: Why Liberty Depends on Taxes*, (2000), New York: W. W. Norton & Company; MUNDLAK, G.; "The Right to Work: Linking Human Rights and Employment Policy", in *International Labour Review*, (2007), Vol. 146 (3-4).

9 For a summary of arguments on judicial discretion see i.e. ROMAN, D.; "Justiciabilité des Droits Sociaux et Self Restraint Jurisdictionnel", in Roman, D. (dir), *La Justiciabilité des Droits Sociaux : Vecteurs et Résistances*, (2012), Paris: Pedone cop.; KLATT, M.; "Positive Rights: Who Decides? Judicial Review in Balance", in *International Journal of*

governments' budgets might alter the norm of policy-making and potentially influence government's legislative agenda[10]. Democratic challenges are claimed on the basis that a non–elected body might constraint the decisions of democratically elected peoples' representatives[11] thus questioning the separation of powers.

The adjudication of the South African Constitutional Court in *Khosa*[12] and *Mazibuko*[13] also served to highlight other problems linked to the justiciability of social rights. Critics suggest that the Court has avoided determining the content of the right hence losing the chance for government to implement measures whereby the effectiveness could be granted[14]. Against this background another line of criticism more prone to the legitimacy issue, contains that judiciary cannot adjudicate on the precise content of the rights since that would be tantamount to dictate the scope of the obligation on welfare[15]. Although Mantouvalou raises good arguments against the most common objections for constitutionalizing social rights[16], in practice the debate has not clarified the way for the recognition of social rights as human rights thus hindering the interdependence of human rights[17].

Constitutional Law, (2015), Vol.13 (2); TUSHNET, M.; *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (2008), Princeton, NJ: Princeton University Press; YOUNG, K.G.; *Constituting Economic and Social Rights,* (2014), Oxford; OUP; KING, J.; *Judging Social Rights*, (2012), Cambridge: CUP.

10 CAMPBELL, T., ET AL.; "Introduction", in Campbell, T., et al. (eds), *The Legal Protection of Human Rights: Sceptical Essays*, (2011), Oxford: OUP.

11 GRANT, E.; "Human Dignity and Socio-Economic Rights", in *Liverpool Law Review*, (2012), Vol. 33 (3); EUROPEAN PARLIAMENT, *Fundamental Social Rights in Europe*, (2000), Social Affairs Series, SOCI 104 EN - 02/2000.

12 Case *Khosa and Others* v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004).

13 Case *Mazibuko and Others* v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009).

14 DAVIS, D.; "Socioeconomic Rights: Do they Deliver the Goods?", in *International Journal of Constitutional Law*, (2008), Vol. 6 (3-4).

15 Wesson, M.; "Disagreement and the Constitutionalisation of Social Rights", in *Human Rights Law Review,* (2012), Vol. 12 (2).

16 MANTOUVALOU, V.; "In Support of Legislation", in Gearty, C. A.; Mantouvalou, V. (eds), *Debating Social Rights*, (2011), Oxford: Hart Publishing, pp. 113 ff. She refers mainly to labour rights, but the arguments may also apply to other social rights.

17 For an account from the genesis to the current state of the issue, see: BARAK-EREZ, D., GROSS, A.M.; "Introduction: Do we Need Social Rights", in Barak-

It can be argued that the above theoretical framework relies on two premises: 1) The two different covenants ICCPR and ICESCR as well as their European counterparts; the ECHR and the ESC, have different legal effects; 2) The legal basis of the rights depends on their content. To this end it is worth to remember that rights and their correlative obligations do ensue from the binding nature of the instruments that the parties have accepted. The fact that each document contains different provisions and therefore establishes different rights is not a legal condition enough to assume different effects. EU legislation provides some good examples; the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) accommodate different principles, rights and obligations which binding effects on Member States are beyond discussion. Or the different directives i.e. on health and safety at work.

If we accept that rights have the same legal status, it necessarily follows that states' legal obligations arising from the ICCPR and ICESCR or from the ECHR and the ESC[18] are of the same nature. The resource to the positive and negative obligations is now superseded since most of the rights entail both categories[19]. The duty of progressivity often has been cited as being of a different nature[20] than the obligations laid down on civil and political rights. However, progressivity does not exclude the existence of the social rights nor the obligations to protect, fulfil and respect through the adoption of legislative measures and judicial remedies

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Erez, D., Gross, A.M. (eds), *Exploring Social Rights: Between Theory and Practice*, (2007), Oxford: Hart, pp. 1-8 with relevant bibliography.

18 On the regional instruments, see: COE, High Level Conference on the European Social Charter, General Report, (2014).

19 BARAK-EREZ, D., GROSS, A.M.; in *Exploring Social Rights: Between Theory and Practice*, p. 7; MANTOUVALOU, V.; "Are Labour Rights Human Rights?", in *European Labour Law Journal*, (2012), Vol. 2. This was also acknowledged by the ECtHR in Case Airey v. Ireland, 9 October 1979.

20 CHAPMAN, A.R., RUSSELL, S.; 'Introduction', in Chapman, A.R., Russell, S. (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (2002), Transnational Publishers; EIDE, A.; "Economic, Social and Cultural Rights as Human Rights", in Eide, A., et al, (eds), *Economic, Social and Cultural Rights. A Textbook*, (2001), Kluwer Law International; SEPÚLVEDA, M.; *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights*, (2003), Antwerpen: Intersentia. For an early commentary see: ALSTON, PH., QUINN, G.; "The Nature and Scope of State Parties' Obligations under the Covenant on Economic, Social and Cultural Rights", in *Human Rights Quarterly*, (1987), Vol. 9 (2).

topped with practical action[21] that apply to civil and political rights and socioeconomic rights likewise. Arguably, the duty of progressivity also confirms the legal basis of the social rights; otherwise it is difficult to understand how a right which does not have such a consideration can be improved or how it can yield duties. This idea certainly, is inherent and can only be held if one assumes that the purpose of law is simply to create two categories: binding or not binding which does not admit gradation[22]. Recognizing the importance and complexity of the issue revolving around the interdependence and justiciability of social rights, this project rests on a basic assumption that there is legal ground supporting these rights at human rights level. Therefore, states are under the obligation to preserve their effectiveness through legislation enhanced by appropriate action in the relevant fields. What follows analyses the content of the rights to social security and to collective bargaining in order to define the scope of states' duties.

SECTION I. The Fundamental Right to Old Age Pension Embedded in the Right to Social Security

1. Conceptual Framework: Interconnectedness of Rights

For the purposes of this project, two preliminary methodological questions need to be clarified. The first one refers to the concept of social security. Art. 25 UDHR states: "Everyone, as a member of society, has the right to social security ..." hence establishing the universality of the right on the sole grounds of being a person without further conditions. The explanatory text of Art. 9 ICESCR on the right to social security lays down the substantive right to all members of society[23]. The mechanisms used, i.e. through social security, social assistance or universal social protection is a matter to be decided at national level provided that the right is granted. In contrast, the ESC distinguishes between the right to social security (Art. 12) and the right to social assistance (Art. 13). This separation creates a problematic interpretation of the rights admitted by

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[21] Compare: UN General Comment No. 3, E/1991/23, The Nature of States Parties Obligations and UN General Comment No. 31, CPR/C/21/Rev.1/Add. 1326 Nay 2004, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.

[22] KLABBERS, J.; "The Undesirability of Soft Law", p.7; For an opinion against, see: SCIARRA, S.; in *Social Rights in Europe* p. 201 ff. who claims that legal obligations can be translated from soft-law mechanisms.

[23] CESCR, UN General Comment No. 19, pars. 23 & 34. Also, par. 31, 48 & 66.

the European Committee of Social Rights. On the one side, national social security systems may or may not adhere to such distinction and on the other side the ESC does not offer a clear definition of the content and scope of each right[24]. It is outside the scope of this project to deal with the dichotomy social security/social assistance. Suffices to say that along this work, the term social security is used in its broad sense, including systems of social protection. Only references to the right to social assistance provided for in Art. 13 ESC will be done when it is deemed convenient for the clarity of the discourse.

The second methodological question refers to labour rights. It can be argued that the scope and motivations of each human rights instrument have laid down different structures of labour rights. Hence, the ICESCR main concern on providing legal grounds for social rights, does not give rise for substantive labour rights beyond the general right to fair and just working conditions set up in Art. 7 ICESCR. The provision encompasses fair wage, working time and safe working conditions. The Covenant does neither contain any reference to the termination of employment. Although it stems from the Committee on Economic, Social and Cultural Rights General Comment No. 18 that interprets the right to work[25].

The ESC, despite its social orientation, adopts a work focused approach for the protection of the overall rights contained in the Charter. In fact, it feeds from both, the ICESCR as well as from the International Labour Organization (ILO) Conventions the standpoint whereof is the protection of workers' rights. For that reason, the structure of the ESC is more similar to the ILO Conventions than to the ICESCR in that the two former instruments lay down different provisions for each right. The right to a fair remuneration is protected under Art. 4 ESC and ILO Convention C131 (to cite only the most general and recent), while Art. 2 ESC and ILO Convention C047 deal mainly with working time and rest. Health and safety are provided for in Art. 3 ESC and ILO Convention C155 and the right to protection in cases of termination of employment is expressly provided for in Art. 24 ESC and ILO Convention 158 likewise. For convenience, this project follows the structure of separate rights.

The right to social security is a clear expression of the interdependence of human rights. Art. 22 UDHR links human dignity and personal freedom to the enjoyment of socioeconomic rights, among which the right to social security. More recently, the CESCR has interpreted the role of social security laid down in Art. 9 ICESCR as sheltering human dignity

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[24] ECSR, Digest of the Case-Law, (2008), p. 97.

[25] Art. 6 ICESCR; CESCR, UN General Comment No. 18, E/C.12/GC/186, The Right to Work, par.35.

in those circumstances[26] beyond a person's control[27] that deprive individuals to fully enjoy the other rights granted in the ICESCR[28]. Within this framework, the purpose of the right to social security[29] cannot be narrowly conceived as a mere palliative action addressed to alleviate poverty and social exclusion[30] but is aimed at complementing individuals' means so that they are able to fully participate in society and exercise personal freedoms[31].

The above definition of social security encapsulates two different premises which are relevant for this project. At the individual level, the CESCR understands that securing a standard of living amounts to the respect for human dignity[32]. It can be argued that this construction overcomes the theoretical debate on whether human dignity gives raise to substantive rights[33] and places the right to a standard of living[34] as an

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[26] On a clear reference to the nine risks to be covered by a social security system: health care, sickness, old age, unemployment, employment injuries, family support, maternity, invalidity, dependents, that are found in: UN General Comment No. 19, The normative content of the right to social security; ILO Convention 102; RECSS.

[27] CESCR, UN General Comment No. 6, E/1996/22 Annex IV, The economic, social and cultural rights of older persons, par. 26.

[28] CESCR, UN General Comment No. 19, pars. 1 & 41.

[29] An account of the objectives of social security can be found at: GARCÍA, M.; "Derecho a la Seguridad Social", in *Estudios políticos*, (2014), Vol.32.

[30] SERVAIS, J-M, *International Standards on Social Security. Lessons from the Past for a Better Implementation*, (2014), ISLSSL Asian Conference, available at http://islssl.org/wp-content/uploads/2014/12/Servais_2014_Asian_Conf.pdf ; Committee of Economic, Social and Cultural Rights (CESCR), UN General Comment No. 3, par. 10; NICKLESS, J.; *European Code of Social Security*, p. 5.

[31] CESCR, E/C.12/57/D/1/2013, Communication No. 1/2013, *Miguel Ángel López Rodriguez v. Spain,* par. 10.5; ECSR, Conclusions XIII-4, Statement of Interpretation on Article 12; FABRE, C.; *Social Rights Under the Constitution, Government and the Decent Life*, (2000), Oxford: OUP, p. 169; BARAK-EREZ, D.; GROSS, A.M.; in *Exploring Social Rights: Between Theory and Practice*, p. 2; SHAHID, A.; "Ageing with Dignity: Old-Age Pension Schemes from the Perspective of the Right to Social Security Under ICESCR", in *Human Rights Review*, (2014), Vol. 15 (4), p. 457. In the same sense: ILO, International Labour Standards on Social Security, available at: http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm .

[32] CESCR, UN General Comment No. 19, par. 22; CESCR, UN General Comment No. 6, par. 32.

[33] For an account of the different approaches see: SHAHID, A.; "Ageing with Dignity: Old-Age …", pp. 457-458; O'MAHONY, C.; "There is no such Thing as a Right to Dignity", in *International Journal of Constitutional Law,*

objective measure whereby the compliance of social security can be assessed[35]. Since human dignity is inherently equal for all human beings[36], the right to social security is both a universal right[37] and a dynamic instrument the normative content of which must accommodate different individual circumstances on an equal and non-discriminatory footing[38].

Framing the right to social security in terms of complementing the standard of living presupposes the existence of a source that provides for the latter. This can be found in Art. 7.a.ii ICESCR through work remuneration[39] as well as in Art. 4 ESC. To the extent that work remuneration allows individuals to enjoy a decent living, the social security system will be partly relieved from its compensating function[40] creating a positive impact in the collective dimension of the system. Bearing in mind that work is the main source of income for the vast majority of people[41], the right to a fair remuneration plays an instrumental role in the effectiveness of both, the right to a standard of living and to social security by means of a complex circular relation: compliance with the right to a standard of living is measured after deduction of taxes and the contributions paid to the social security[42]. In parallel, contributions to the social security are to be affordable measured to the income level[43] and at the same time the latter have to be sufficient to enable social security

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*(*2012), Vol. 10 (2). For an account of constitutional courts differences see: RAO, N.; "Three Concepts of Dignity in Constitutional Law", in *The Notre Dame Law Review*, (2011), Vol. 86 (1).

34 Art. 11 ICESCR.

35 See, i.e: ECSR, Conclusions 2009 - Portugal - Article 12-1.

36 GRANT, E.; "Human Dignity and Socio-Economic Rights" …, p. 240.

37 See: Art. 22 UDHR; CESCR, UN General Comment no. 19, especially pars. 4,6, 22 & 31.

38 CESCR, UN General Comment No. 19; CESCR UN General Comment No. 20, E/C.12/GC/20, Non-discrimination in Economic, Social and Cultural Rights; ICESCR, Preamble; ILO Convention 118.

39 CESCR, UN General Comment No. 23, E/C.12/GC/23, On the Right to Just and Favourable Conditions of Work (article 7 of the International Covenant on Economic, Social and Cultural Rights), pars. 1 & 18.

40 ILO, *Social Security: A New Consensus*, (2001), Geneva: ILO, p. 93.

41 O'DONNELL, A.; "Safety Nets and Transition Assistance: Continuity and Change in a Liberal Welfare State", in Stone, K.; Arthurs, H. (eds), *Rethinking workplace regulation*, (2013), New York: Russell Sage Foundation, p. 273; FLANAGAN, R.J.; *Globalization and Labor Conditions*, (2006), Oxford: OUP, pp. 9-10.

42 ECSR, Conclusions XIV-2, (1998), - Statement of interpretation - Article 4-1.

43 CESCR, UN General Comment No. 19, par. 25; Art. 76 RECSS.

systems to provide appropriate benefits throughout generations[44]. It is therefore plausible to hold that the effectiveness of the right to a fair remuneration is a necessary precondition for the effectiveness of the right to social security.

The right to just or fair working conditions[45] and the right to safe and healthy working conditions[46] are primarily addressed to grant the well-being of individual workers through the enjoyment of leisure and/or family life[47] which are inherent factors to human dignity. The relevance of working conditions for the standard of living of workers is illustrated by the fact that the annual leave has been framed as a right that workers cannot waive[48].

When appropriate working conditions are accompanied with fair wages, the standard of living is much likely to improve. This correlation is of a necessary nature and creates a triangular link in which each right is highly dependent on the effectiveness of the others. Put it simpler, if just working conditions are respected but the salary is not fair enough, the right to a standard of living will not be realized. The opposite also holds true, a high standard of living, requires high remuneration that need to be accompanied with just working time and healthy working conditions otherwise there are few chances to enjoy such a standard of living. A more extensive list of relations can be made, but these examples only aim to illustrate the existing interconnectedness of rights.

Working conditions do also have redistributive effects over work and welfare. Limiting working time has the potential to allow other individuals into the labour market and therefore enhancing the effectiveness of the right to work laid down in Art. 6 ICESCR and Art. 1 ESC. As an immediate result, lower resources should be required from the social security systems to support those in need while contributions and/or tax revenues should be expected to increase, if and only if in parallel remuneration is granted at the appropriate level. It is therefore plausible to hold that the effectiveness of the right to a fair remuneration is a necessary precondition for the effectiveness of the right to social

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44 Art. 12 ESC; ECSR, Conclusions XX-2, (2013), Czech Republic Art. 12-1, CESCR, UN General Comment No. 19, par. 11 & 65; Arts. 3 & 11 ILO Recommendation 202.

45 Art. 7.c-d ICESCR; Art. 2 ESC.

46 Art. 7.b ICESCR; Art. 3 ESC.

47 CESCR, UN General Comment No. 23, pars. 34 ff.

48 CESCR, UN General Comment No. 23, par. 43; ECSR, Digest of Case-Law, (2008), p. 29.

security provided that just working conditions, broadly understood are secured to all workers.

1.1 Particularities of the Old Age Pension

Old age pensions involve the loss of income from a prescribed age and in this sense pensions sit within the conceptual framework of social security. However, the basic premises differ somewhat. Bearing in mind that the contingency under protection is age and that old age – under a normal cycle of life – is not a potential but a certainty, it is natural that the personal scope comprises all the population, not only a targeted group as the other social security branches do. In this perspective pensions are the most universal protection of any social security system. Linked to the certainty of age, the loss of income can neither be considered a risk, but a reality on a permanent basis for which pensions become a factor of security at a later stage of life. Unlike other social security benefits that have a present or immediate effect, pensions can be defined as a deferred mechanism to cushion the different circumstances outside individuals' control that may negatively impact on his/her old age standard of living. Taking account of these elements, the protection afforded by pensions needs to be broadly conceived in terms that it goes beyond a complement to reach an adequate standard of living but becomes the source that provides for it.

To put old age outside the reach of risk moves the compensating function of the latter to the scope of pensions' solidarity[49] in return for individuals' participation to the collective financing[50] of the social security system. Compared to other benefits, old age pensions are subject to a long process of accrual[51] during which the individual relinquishes his/her participation in favour of the redistributive function of the system[52], known as the

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[49] See; NICKLESS, J.; *European Code of Social Security …*, p. 71.

[50] The collective financing of social security systems is provided for in: CESCR, UN General Comment No. 19, par. 4; ESCR, Digest of the Case-Law, (2008), p. 89.

[51] Compare: Art. 17 ILO Convention 128, Art. 11 ILO Convention 128 or Art. 43 ILO Convention 102. The RECSS provides 40 years for old-age pensions (Art. 29) while qualifying rules for the other benefits are left open to national regulations.

[52] CESCR, UN General Comment No. 19. The ECSR, in the *European Social Charter, Collected (Provisional) Edition of the "Travaux Préparatoires"*, (1956): Consultative Assembly, Committee on Economic Questions, Strasbourg, 28th February 1956 AC/EC (7) 24. PART III: Revised draft Social Charter submitted as bloc amendment to the draft Social Charter

intergenerational solidarity. Solidarity means in general, lower benefits than the total amount of contributions[53] but entails in return that the system safeguards the standard of living of the coming elderly generations.

Elderly's right to a standard of living is highly dependent on the revenues that the system – broadly understood as social security plus social protection – is able to generate through taxes and/or contributions. For this, work has to fulfil three conditions: engage a large share of population, be continuous and procure individuals enough resources[54]. This relationship extends the interconnectedness of the right to social security to freedom of association and more specifically to the right to collective bargaining as essential part of it[55] inasmuch as its essence, the protection of workers' interests, conduces to the collective target of universal, adequate pensions.

2. The Adequacy of Old Age Pensions

If we admit that social security is a universal right and that old age is rather a certainty than a risk, it follows that pension entitlements cannot arise solely from contributions. To this purpose human rights instruments accommodate two different categories of pensions: those originated by the lack of work income and those related to lack of means. This is acknowledged by the CESCR stating that other forms of social protection are to be in place for those who do not reach the qualifying criteria[56]. It also ensues from Art. 13 ESC read in conjunction with Art. 23 ESC. It thus can be argued that, inasmuch as old age is concerned, social assistance is meant to secure elder people who are not entitled to an

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contained in Document 403, p. 66, and Digest of the Case Law of the European Committee of Social Rights, (2008), p.277 refers to the term solidarity to ensure the dig-nity of persons, although the mechanism provided in the ESC has the same redistributive character as expressed by the CESCR.

53 NICKLESS, J.; *European Code of Social Security*, p. 71.

54 Similar arguments can be found in: WAGNER, N.; "Financing Social Security in the EU: Business as Usual?", in *International Labour Review*, (2012), Vol.151 (4); PRASSL, J.; in *Which Securities for Workers in Times of Crisis?,* pp. 216-217; ILO, *Social Security Financing*, (1999), Geneva: ILO, p. 29 and ff.;

55 ECtHR, Case *Demir and Baykara v. Turkey*, Judgment 34503/97 Grand Chamber, 12/11/2008, par. 154.

56 CESCR, UN General Comment No. 19, par. 4.b; CESCR, UN General Comment No. 6, pars. 21 & 30.

adequate social security pension[57] that they can lead a life of autonomy and dignity. It follows that adequacy requisites are shared by any form that the system adopts for the provision of pensions.

Despite being a clear economic element, the concept of adequacy is also a necessary legal factor for assessing the effectiveness of the right to social security. In particular, adequate old age pension benefits are the core substance to secure the elderly with enough resources to lead a decent life while playing an active part in social life[58]. However, the dual nature of pension rises normative questions on whether the levels granted are universal and on equal grounds. What follows, seeks to answer these questions by framing the concept of adequacy through the analysis of the different provisions laid down at human rights level.

The legal concept of pensions' adequacy arises from the normative content of Art. 9 ICESCR as well as from Art. 12 ESC. The main difference can be found from the general interpretation given by the CESCR in contrast with the comprehensive and combined reading made by the ECSR of Arts. 12, 13 and 23. The CESCR shapes adequacy as the "reasonable relationship between earnings, paid contributions and the amount of benefits"[59] in a direct reference to pensions arising from the lack of work income. For pensions arising from the lack of means, i.e. social assistance, individuals are entitled to, at the very least, the essential minimum[60]. This pattern leads to a problematic interpretation of adequacy; if the essential minimum is considered enough to grant elderly's dignity, then the level of benefits related to work contributions that result above would hinder the redistributive function of the system. Conversely, if the level of benefits to be considered adequate is that resulting from the relation with contributions, then the system shows an inner conflict between the substance and the normative content of pensions. Whatever the approach, equality cannot be taken for granted.

The ECSR has developed a more nuanced approach to adequacy in which two elements deserve to be highlighted. First, as a general rule, the Committee has repeatedly stated that social security benefits targeted to cover the lack of work income are to "always stand in a reasonable relation to the wage in question and should in any event exceed the minimum subsistence level. In particular, the income of the elderly

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57 ECSR, *Finnish Society of Social Rights v. Finland*, Complaint 88/2012, Decision on the merits, 9 September 2014, pars. 33-34.

58 CESCR, UN General Comment No. 19; CESCR, UN General Comment No.6; ECSR, Conclusions 2013 - Sweden - Article 23.

59 CESCR, UN General Comment No. 19, par. 22.

60 CECSR, UN General Comment No. 19, par. 59.a.

should not be one of minimum assistance"[61]. Second, the bottom line to assess adequacy is the poverty threshold of the country wherever the benefits arise from work contributions or from lack of means[62]. Taken together, the ECSR's case-law overcomes the issue of equality in human dignity but even more relevant: the linkage between the legal, undefined, concept of adequacy and a measurable data such as the poverty threshold, refines the substantive nature of the right and enhances its effectiveness.

The foregoing approximation to pensions' adequacy is to be understood as the integration of the ILO Conventions 102 and 108 as well as the relevant Revised European Code of Social Security (RECSS) provisions within the ESC. The Committee has established the level of pensions' benefits alone or combined with other benefits at minimum 50% of the median equivalised income as calculated on the basis of the Eurostat at-risk-of-poverty threshold value[63]. When the level of such pensions alone is below 40%, the Committee considers benefits inappropriate regardless whether other complements are in place[64]. For benefits related to social assistance, the monthly income of each household adult can neither fall below these poverty limits[65]. The calculation of individual benefits as provided by the RECSS[66] does not deviate from the above guidelines, fixing the percentage of replacement at 50% of wages either for the individual or for the surviving spouse. In fact, this could not be otherwise since Art. 12 ESC equals the right to social security to the levels of the RECSS[67]. In this sense, the ESC and the RECSS can be understood as a whole instrument, the former of which sets the normative content of the right and the latter the technicalities.

While the minimum levels set by the ECSR fit within ILO Convention 102 on Social Security minimum standards, there is a friction at upper levels between ILO Convention 128 - which sets adequacy at 45%[68] - and the Committee's case-law. This imbalance can be explained by the different scope of each instrument. The ILO Convention 128 is binding upon countries having different economic developments and social traditions whereas the ESC brings together European states' traditions

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61 ECSR, Conclusions XVI-1 - Statement of interpretation - Article 12-1, 12-2, 12-3.

62 See, i.e.; ECSR, Conclusions XX-2 - Statement of interpretation - Article 4 Additional Protocol.

63 ECSR, Digest of the Case-Law, (2008), p. 90.

64 See, i.e.: ECSR, Conclusions 2009 – Italy – Article 23.

65 ECSR, Digest of the Case-Law, (2008), p. 99.

66 Arts. 71 and 72 RECSS in relation to Art. 29 RECSS.

67 See Art. 12.2 ESC.

68 Arts. 27 and 28 in relation to Art. 17 ILO Convention 128.

and developments that despite being different, are closer than those addressed by the ILO Conventions. On this basis, the ECSR's room for interpretation is broader and can be more precise in shaping the legal content of its provisions. The application by analogy of the more favourable principle should be appropriate to conclude that the threshold of pensions' adequacy in the European region is to be in line with the ECSR's findings.

Finally, in order to grant the standard of living along life[69], the adequate level of benefits defined above is to be paid periodically[70] , indexed to wages and to the cost of living[71], making lump-sum payments at retirement, by its inherent nature, inadequate. Therefore, adequacy is coupled with legal certainty, thus requiring of a legal framework that sets the entitling rules as well as the remedies in case of breach. The mere existence of a social security system publicly managed is a necessary but not sufficient condition.

SECTION II. Labour Rights' Protection at Human Rights Level: A Necessary Tool for the Effectiveness of Pensions

1. The Right to Collective Bargaining: Collective Agreements' Normative Framework

At human rights level, freedom of association appears as the corollary of labour rights as provided for in: Art. 22 ICCPR, Art. 11 ECHR, Art. 8 ICESCR, Part I.5 ESC, Art. 5 ESC and ILO Convention 087. This last being the first one to be adopted in 1948, all the other instruments are based on it. For that reason, only the ILO Committee on Freedom of Association provides a systematic interpretation of the right which, moreover, is used as the reasoning basis on the decisions of the respective competent bodies. From the extensive corpus developed by the Committee on Freedom of Association (CFA), for the purposes of this

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69 CESCR, UN General Comment No. 19, pars. 1,6, 11 & 67; Arts. 3.2 & 76.2, 23.a ESC (Revised), Art.31 ECSS; ECSS: Explanatory report, par. 74. It is implicit as well in CESCR, UN General Comment No. 6, par. 32 in order to reach the adequate standard of living provided for in Art. 11 ICESCR.

70 Art. 30 ILO Convention 102; Arts. 17-19 ILO Convention 128; Arts. 26-29 RECSS.

71 Arts. 71 & 72 RECSS; Art. 29 ILO Convention 128; ECSR, *Finnish Society of Social Rights v. Finland*, par. 88; ECSR, Conclusions 2003- France.

project the focus will be on the transversal objectives of the right to freedom of association and the expanded role of labour market actors derived therefrom.

The scope of the right is broadly conceived as a necessary instrument for the economic and social development of any given state[72]. Within it, the fundamental objective of the trade unions "should be to ensure the development of the social and economic well-being of all workers"[73] for what it might be necessary to influence on government's economic and social policies of general interest[74]. In this context, the right to freedom of association sets upon trade unions an obligation of defending not only the occupational interests of their affiliates but also the socio-economic interests of the "workers in general, in particular as regards employment, social protection and standards of living"[75].

The principle of no rights without obligations also applies to human rights in the sense that to enjoy human rights implies duties on other holders[76]. Therefore, deriving an obligation on trade unions to defend economic and social interests entails that the system lays down substantive rights in front of the bearers of the analogue duty: employers and governments as the case might be. However, human rights instruments[77] do not provide for a legal background enabling unions to deploy the tasks they are entrusted with vis-à-vis governments. The CFA has repeatedly stressed the importance of consultation and cooperation between the latter, unions and employers' organizations before the adoption of public policies[78], legislative measures[79], employment flexibility measures[80] as well as on a general framework for the purposes of developing a good climate of social harmony[81] but the lack of binding effects does not grant the effective chances for unions to be involved in political decisions affecting labour's socio-economic interests.

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72 ILO, CFA Digest of Decisions, (1996), pars. 25, 31.

73 ILO, CFA Digest of Decisions, (1996), pars. 27, 165, 450; Similarly: ECSR, Digest of the Case-Law, (2008), par.158; Art. 5 ESC; Art. 8.1.a ICESCR.

74 ILO, CFA Digest of Decisions, (2006), pars. 529, 455, 933.

75 ILO, CFA Digest of Decisions, (1996), par. 480.

76 FREDMAN, S.; *Human Rights Transformed: Positive Rights and Positive Duties,* (2008), Oxford: OUP, p. 204.

77 Except for ILO Recommendation No. 113, that lacks legal effects.

78 ILO, CFA Digest of Decisions, (1996), pars. 924-929.

79 ILO, CFA Digest of Decisions, (1996), pars.930-933; ILO, CFA Digest of Decisions, (2006), p. 1070.

80 ILO, CFA Digest of Decisions, (1996), pars.934 ff; ILO, CFA Digest of Decisions, (2006), p. 1096.

81 ILO, CFA Digest of Decisions, (1996), pars. 26.

Even though there is no an obligation for employers and unions to negotiate nor to cooperate and, even less to reach agreements, the right to collective bargaining laid down in different human rights instruments[82] entitle these organizations with a substantive right for the protection of their mutual interests in relation to each other. Furthermore, it is the basis for the fulfilment of other fundamental rights[83] as the right to just working conditions[84], to protection of termination of employment[85] or to fair remuneration among other rights[86]. To these purposes, collective bargaining has been considered an essential element of the right to freedom of association for improving the "living and working conditions" of workers[87]. Yet, it has not been until the European Court of Human Rights (ECtHR)'s ruling on the *Demir and Baykara* landmark Case Law[88] that collective bargaining acquired its legal status[89]. Departing from its traditional doctrine[90], the Court notes that the developments in international – with special reference to ILO Conventions and ECSR Case Law - and domestic labour law as well as the practices in Contracting States, the time has come to admit that the right to bargain collectively requires protection in order that unions can effectively defend workers' interests.

In essence, the right to bargain collectively laid down in Art. 4 ILO Convention 098 and Art. 6.2 ESC protects the voluntary and freely engagement of the parties into negotiations[91] by creating a normative content posited upon the duties of no interference and support from public authorities[92]. This duty of no interference does not preclude statutory law to regulate matters subject to collective bargaining; mainly

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82 ILO Convention 098; ESC Art. 6.

83 ECSR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, Decision on admissibility and the merits, 03 July 2013, par. 109.

84 Art. 7 ICESCR; Art. 2 ESC.

85 Art. 24 ESC.

86 Art. 4 ESC.

87 ILO, CFA Digest of Decisions, (2006), p. 177.

88 ECtHR, Case *Demir and Baykara*.

89 For an analysis of the judgement and its potential implications, see, for all: EWING, K.D.; JOHN HENDY, Q.C.; "The Dramatic Implications of Demir and Baykara", in *Industrial Law Journal*, (2010), Vol.39(1).

90 A summary of the previous ECtHR decisions can be found in: ECSR: *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, pars. 45-53.

91 See, for all: ILO, CFA Case 2349 (Canada), Report No. 337, June 2005, par. 404.

92 ILO, CFA Digest of Decisions, (2006), pp. 177-178, 185, 186; ESC, Digest of the Case-Law, (2008), p. 54.

the "determin[ation] of wages and other conditions of employment"[93] insofar as these are not excluded from the remit of the latter[94]. Within this context, coming to reinforce the scope of collective bargaining, the ICESCR and the ESC have incorporated provisions on remuneration and working conditions[95] that are to be read as minimum compulsory levels to be respected by collective agreements[96] and of application to workers not covered by the latter.

The effectiveness of the right to collective bargaining is not only weighed against the respect of the autonomy of the parties by national law, but also against their ability to reach agreements. Within this perspective, the right can also be framed as a shared[97] right between workers and employers to establish self-regulation systems through collective agreements. It follows that the normative function is entrenched in the outcomes of collective bargaining but the full effectiveness of the right is to be enhanced by binding collective agreements[98]. Not only as a matter of legal certainty, but also to uphold the "mutual respect for commitments undertaken by the parties as an important element of collective bargaining"[99] for the purposes of industrial relations stability[100].

The binding nature of collective agreements is assumed in the ECSR's case law. The Committee accepts most of labour related issues agreed in those instruments instead of or improving national legislations[101]. This is natural if one recalls that collective agreements are the expression of the parties' will. Hence the recognition of their binding nature represents the maximum respect for the autonomy of the parties and their right to bargain collectively. Accordingly, the effective protection of the right admits a negative form of no interference but does also contain a positive protection of respecting and enforcing the agreements by means of providing appropriate remedies in case of breach.

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93 International Labour Conference 30th. session, "Freedom of Association and Industrial Relations, Report VIII", (1947), p. 52.

94 ILO, CFA, Digest of Decisions, (2006), p. 183.

95 Art. 7 ICESCR, Art. 2 ESC and Art. 4 ESC respectively.

96 CESCR, UN General Comment No. 23, pars. 7-10 and 18-23; ECSR, Digest of Case-Law, (2008), p. 27 ff.

97 "Shared" is deliberately used here as distinct to "collective". It refers to the necessary concurrence of both parties so that collective agreements can deploy their regulatory function.

98 ILO, CFA, Case 2362 (Colombia), Report No. 337, June 2005, par. 760; Case 1919 (Spain), Report No. 308, November 1997, par. 325.

99 ILO, CFA, Case 2947 (Spain), Report No. 371, March 2014, par. 453.

100 ILO, CFA, Case 2171 (Sweden), Report No. 330, March 2003, pars. 1047-1048.

101 See, i.e.; ECSR, Digest of Case-Law, (2008), pp. 27 & 160.

2. The Right to a Fair Wage: How Fair Should It Be?

Art. 7.a ICESCR provides that minimum remuneration has to secure all workers with "i) a fair wage and ii) a decent living for themselves and their families" while Art. 4.1 ESC establishes that fair remuneration should be "such as to give workers and their families a decent standard of living". Remuneration is interpreted as a broad concept including bonuses, gratuities and other allowances in cash or in kind[102] while ILO Convention C099 (Wages, Hours of Work and Manning (Sea)) sets up a definition of wage that excludes "the cost of food, overtime, premiums or any other allowances either in cash or in kind"[103]. In parallel, the CFA contains that wage should protect workers' living standards[104] and the CESCR's has interpreted that minimum wage is to be considered as "a means of ensuring remuneration for a decent living for workers and their families"[105]. This context suggests a first question: what is within the scope of the right to a fair wage: remuneration – broadly understood - or wage interpreted as the basic level? In other words, is remuneration what should grant the standard of living or is wage? And, finally what is the appropriate level that secures a standard of living? These questions are not trivial since the effectiveness of the right depends on how they are answered.

Remuneration subsumes concepts that may not be paid on a stable, objective basis, this is, concepts that can be made contingent upon factors such as individuals' work performance that are assessed by the unilateral criteria of the employer, and/or the undertaking's economic or financial results, or simply allowances that are paid on fulfilment of condition. Furthermore, these concepts may not be agreed in collective agreements but arise from the individual employment contract. In all these cases, remuneration becomes a variable provision that does not necessarily grant a stable standard of living which is the ultimate target of the right. Despite this distinction, the ECSR case-law has avoided to deal with the

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[102] Art. 1 ILO Convention C100; CESCR, General Comment No. 23, par. 7; ECSR, Digest of the Case-Law, (2008), p. 43.

[103] Art. 4.d ILO Convention C099.

[104] For all, see: ILO, CFA, Digest of Decisions, (2006), p. 1024.

[105] CESCR, UN General Comment No. 23, par. 19; In the same line, ILO Recommendation 030, part. III; ILO Recommendation 089, part. I.

issue and interprets the concepts of remuneration and wage alike[106] – including in both cases: bonuses and gratuities[107]

The concept of fairness as read by the CESCR entails two dimensions; the individual one related to the skills and responsibilities of the worker and the collective one linked to the economic provision able to grant a decent standard of living[108]. As far as the latter is concerned, the relevant level is the minimum wage set by national law. To be fair, wage setting mechanisms must take into consideration the following elements: "the general level of wages in the country, the cost of living, social security contributions and benefits, and relative living standards"[109]. In contrast, the ECSR is less concerned with the elements that may account for fairness but directly assesses it with regards to the net average national wage as the threshold: wages falling below 60% or, unable to ensure a decent living in real terms for the worker concerned -and not the family- is considered not fair[110]. It follows that wage increase according to the cost of living of the country is a constituent of fairness.

This last creates an inner controversy between the content of Art. 4.1 ESC "remuneration such as will give the[workers] and their families a decent standard of living" and the effectiveness of the right as assessed by the ECSR. It also conflicts with the right provided in Art. 7.a ICESCR and interpreted by the CESCR since both include the family as a unit the decent living whereof is to be ensured by remuneration. In ESC's signatory countries where women remain outside the labour market, families with only one breadwinner might not reach the standard of living proclaimed by the ESC. But still most important is that the family enjoys the right to social, legal and economic protection under the ESC[111]. If individual wage might not be enough to cover family needs, social protection in the form of appropriate means will have to be transferred into them. It is in this sense that the ECSR's decision on assessing fairness can be critically opposed as it conveys the duty of securing a

[106] See, for all: ECSR, Conclusions XIV-2 - Statement of interpretation - Article 4-1.
[107] ECSR, *General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, Decision on the Merits, 23 May 2012, par. 57.
[108] CESCR, UN General Comment No. 23, pars. 10 and 18 respectively.
[109] CESCR, UN General Comment No. 23, par. 21; Art. 3.a ILO Convention C131.
[110] ESC, Conclusions XIV-2 - Statement of interpretation - Article 4-1.
[111] Art. 16 ESC.

decent living from the subjects of the right to a fair wage into the community.

The fundamental question on the right to a fair wage is how and what does it make possible the realization of the right. Despite that the ILO and the CESCR establish that a minimum wage is to be fixed by law, the ESC relies mainly on collective agreements ability to negotiate appropriate wages. In any case, the elements mentioned above, i.e. the cost of living, social security benefits, and the like are to be considered and respected by whatever wage setting mechanisms. This means that the core content of the right to a fair wage acts as a limit to the right to collective bargaining as far as the autonomy of the parties in this particular point is concerned.

The fairness of remuneration is to be also assessed in connection with the right to just working conditions in terms of overtime compensation that includes night work as well as work beyond time limits[112]. Except for Art. 1 ILO Convention C047 establishing a working time limit of forty hours per week, neither the ICESCR nor the ESC define what a reasonable working time is. As a general rule, the CESCR attach to the ILO Convention just mentioned, allowing certain flexibility provided by law[113] while the ECSR prefers to assess reasonability according to national conditions and thus decides on a case by case basis[114]. Overtime, as interpreted, by the ECSR is to be compensated with a higher rate of remuneration than the average or by time-off on condition that the period of leave is longer than the overtime worked[115] while Art. 8 ILO Convention C171 on night work only stipulates that pay or similar benefits are to be granted on account of night work.

Despite these differences, it can be argued that the working schedule framed by human rights determines the realization of the right to a fair wage in the sense that working time outside the prescribed standards increases the level of what is to be considered fair.

The fairness of remuneration in relation to working condition does have an impact on the right to social security financing and also in the adequacy of pensions for two reasons. First, the right to social security, it has been mentioned in Section I above, requires of collective financing. Hence, working conditions need to be appropriate to secure the standard of living and the financing of the systems. Put it negatively, any form of

[112] Art. 8 ILO Convention 151; CESCR, UN General Comment, No. 23, pars. 35 & 37; ECSR, Digest of Case-Law, (2008), p. 27.
[113] CESCR, UN General Comment No. 23, par. 37.
[114] ECSR, Conclusions XIV-2 - Statement of interpretation - Article 2-1.
[115] ECSR, Conclusions 2016 - Ireland - Article 4-2.

precarious work will result in the underfinancing of the system[116] because of its inherent lower contributions but also because of it may lead to increase the needs of social protection, thus, jeopardizing the ability of the system to provide for adequate benefits.

Second, when old age pensions are linked to contributions and these are correlated to earnings, low wages resulting from precarious working conditions penalize the level of future benefits. The longer the precarious situation the lower the pension benefits will be. In systems in which the beneficiaries' pensions depend mostly on wage earners, women in many cases, there are high chances that pensions of these beneficiaries fall below the poverty threshold. In short, unfair working conditions lead to inadequate level of pensions and impaired not only on the redistributive function of the system but also in the solidarity.

SECTION III. The Effectiveness of Rights: Obligations of States

1. The Role of the States: A Politico-Economic-Social Debate

Social rights yield states' positive obligations mainly linked to economic provisions[117]. It is precisely this economic facet what has raised the most objections to their fulfilment and has created two different mainstream debates; one focuses on the causes that hinder states' room for manoeuvre while the other revolves around the reasons for states to fulfil social rights.

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[116] See: HEMERIJCK, A., EICHHORST, W.; *Whatever Happened to the Bismarckian Welfare State?,* p. 5; TANGIAN, A.; *Not for Bad Weather: Macroanalysis of Flexicurity with Regard to the Crisis*, pp. 79–80.

[117] For an account of states' general obligations under the ICESCR and related literature, see: GRIFFEY, B.; "The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", in *Human Rights Law Review* , (2011), Vol.11 (2), pp. 279 ff; SSENYONJO, M.; "Economic, Social and Cultural Rights: An Examination of State Obligation", in McBeth, A., Joseph, S., (eds), *Research Handbook on International Human Rights Law*, (2010), Cheltenham: Edward Elgar Publishing, p. 45.

With the spread of neo-liberal[118] economic ideas, the size and the role of the state has been a matter for debate. The challenges and consequences of states' withdrawal claimed by neo-liberals have been highlighted from different fields[119]. Among critics, Ashiagbor holds that the debate about the state is an artificial and tendentious one. Deregulation turns into another regulation laying down rules that allow for markets' existence and operating. Neo-liberal economy requires and needs a regulatory state but modelled to fit its interests[120].

In political terms, Stiglitz considers that neo-liberal claims respond to the logics of interest's groups to shape political legislative agendas, as well as social thinking[121]. Similarly, Ife holds that key decisions affecting many millions of people are no longer taken by governments but by individuals or groups "who were not popularly elected and whose identities are unknown to most of the world's population"[122]. In the same line, Fudge argues that neo-liberalism is also about restructuring political power as it involves a shift from parliamentary to judicial and executive power[123].

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[118] BOAS, T.C.; GANS-MORSE, J.; "Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan" in *Studies in Comparative International Development (SCID)*, (2009), Vol. 44 (2), argue that that the concept of neo-liberalism is not yet empirically defined. THORSEN, D.; "The Neoliberal Challenge: What is Neoliberalism", in *Contemporary Readings in Law and Social Justice*, (2010), Vol.2 (2) claims that the term neo-liberalism is being widely used in literature from a pejorative or at least critical perspective. Being aware of such warnings, for the purposes of this work and in light of the pernicious effects that the adoption of neo-liberal market model is having in particular, but not only, in Spanish society I deliberately choose the term neo-liberalism linked to the critical side of the concept, following NUGENT, W.; *Progressivism: A Very Short Introduction*, (2010), p. 2.

[119] See, Hepple, B. (ed), Social *and Labour Rights in a Global Context: International and Comparative Perspectives*, (2002), Cambridge: CUP.

[120] ASHIAGBOR, D.; *The European Employment Strategy: Labour Market Regulation and New Governance*, (2005), p. 31; STREECK, W.: "The Crises of Democratic Capitalism", in *New Left Review*, p. 3. In a similar vein, DEAKIN, S.; "Conceptions of Market in Labour Law", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing, pp. 148-149

[121] STIGLITZ, J.E.; *The Price of Inequality*.

[122] IFE, J.; *Human Rights and Social Work: Towards Rights-Based Practice*, (2012), Cambridge: CUP, pp. 30 ff.

[123] FUDGE, J.; "Constitutionalizing Labour Rights in Europe" in Campbell, T. et al. (eds), *The Legal Protection of Human Rights. Skeptical Essays*, (2011), Oxford: OUP, p. 266.

Other authors suggest that neo-liberal ideology can be a threat to democracy. Radcliff, summarizes: "for the Right, economy should be self-governing, and thus ultimately outside the purview of democracy"[124] while Fredman contains that economic interests are of a kind that damage basic human rights, both in the sense of infringing on the democratic rights of the people and by interfering with their substantive freedom to be[125]. From a diachronic perspective, Prasch holds this same idea of lessening personal freedoms and democratic values coinciding with periods of economic liberalization[126]. Insofar as individuals become disempowered, states are less prone to comply with their social commitments.

Globalization has been used as justification of welfare retrenchment due to states' diminishing fiscal and political sovereignty[127]. Now policies are sold as social investment[128] instead of income support and incentives over guarantees, attempting to enhance individual responsibility rather than reliable social provision, while resources' allocation on markets is preferred[129]. The logic of welfare rights and the principle of equal access to goods deemed to be fundamental for the dignity of the person – pensions, education, health care, income replacement... - in which redistribution is built[130], is being replaced by conditionalities under threat of welfare losing[131].

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[124] RADCLIFF, B.; *The Political Economy of Human Hapiness. How Voter's Choices Determine the Quality of Life*, (2013), Cambridge: CUP, p.1.

[125] FREDMAN, S.*; Human Rights Transformed: Positive Rights and Positive Duties*, p. 43.

[126] PRASCH, R.E.; "Capitalism, Freedom and Democracy Reprised; Or, Why Is the Liberalization of Capital Associated with the Increased Repression of Individuals?", in *Journal of Economic Issues,* (2011), Vol. 45 (2), p. 279; HELD, D.; *Modelos de Democracia*, (2006), Madrid: Alianza Editorial, p.163.

[127] Hepple, B. (ed), *Social and Labour Rights in a Global Context*. In the same line, but directly advocating for the role of labour law: ILO, *Social Security: A New Consensus*, (2001), Geneva: ILO, p. 84.

[128] SEWELL, W.H.; "From State-Centrism to Neoliberalism", in Hall, P.A.; Lamont, M. (eds), *Successful Societies: How Institutions and Culture Affect Health*, (2009), Cambridge: CUP, p. 286.

[129] GUILLEMARD, A.M.; "Social Rights and Welfare: Change and continuity in Europe", in Boje, T. P., Potucek, M. (eds), *Social Rights, Active Citizenship and Governance in the European Union, (*2011), Baden-Baden: Nomos, pp. 38-39 provides an accurate summary of this Third-Way approach.

[130] PIKETTY, TH., (trans. Goldhammer, A.); *Capital in the Twenty-First Century*, p. 479.

[131] FREDMAN, S.*; Human Rights Transformed: Positive Rights and Positive Duties*, p. 231.

Economic liberalism, the effects of globalization, the shift from an industrial to a service economy, more skill-based labour markets, the destandardisation of employment relations, create new emerging social risks that welfare has to cope with[132]. Failure to address them is increasing exclusion rates, poverty and inequalities which on their turn are a potential source of economic regression, conflict, insecurity, and political unrest[133]. Despite that there is a theoretical "emerging consensus that open economies should be characterized by strong social protection systems"[134], reality shows that power shift into economic elites impinges upon the interests and the social rights lawfully vested on citizens are being gradually reduced[135] . The increasing interest on human rights as a befitting field to restore the balance of rights between welfare and economy is to be understood within this framework.

Fredman[136] adopts the 'positive duties' approach based on democratic principles. She distances herself from the protective function of human rights to advocate for their empowering function. Her approach relies on the states as duty bearers for enabling people to participate in society. As far as this functional approach succeeds in avoiding the paternalistic conception of the state, globalization is no longer a threat but a means to enhance welfare. Ife's[137] main assumption can be seen as complementing this approach. In his view, human rights are defined by the interaction of people and thus are dynamic and should be able to adapt to the evolving nature of these interactions. He claims that interaction does not allow for an automatic correlation between rights and freedoms, but when rights are exercised there must be some limits to ensure responsible behaviours. State has the resources and the mandate to guarantee the framework in which interactions occur and where and how rights and freedoms can

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[132] HEMERIJCK, A.; *Changing Welfare States*, p. 15; ESPING-ANDERSEN, G.; *Social Foundations of Postindustrial Economies*, pp. 5-15-32.

[133] See SARKIN, J.; KOENIG, M.; "Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy", in *Human Rights Quarterly*, (2011), Vol. 33 (1), p. 22 with a comprehensive account on note 129 of examples. Also, HEMERIJCK, A.; *Changing Welfare States*, p. 3.

[134] Jansen, M. et al. (eds), *Trade and Employment. From Myths to Facts*, (2011), Geneva: ILO Publications, p. 4.

[135] PUTTICK, K.; *State's Social Security & Support for the Wage-Work Bargain. Reconstructing Europe's Floor of Social Protection*, (2014), ISLSSL XI European Congress of Labour Law & Social Security, Dublin, p. 5; KILPATRICK, C.; *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, (2015), EUI Working Paper LAW 2015/34.

[136] FREDMAN, S.*; Human Rights Transformed: Positive Rights and Positive Duties.*

[137] IFE, J.; *Human Rights and Social Work: Towards Rights-Based Practice*.

develop[138]. A dynamic conception can be also found in Lyon-Caen, who claims that the contents of social rights require continuous updating and thus the analysis of their legal efficacy[139].

Schiek's concept of human rights as an instrument for empowering people encapsulates most of the above factors. The realization of individual autonomy should take into account the societal environments in which individual interact. Since "marked-based societies are structured to allow relations of economic dependency to develop"[140], it follows that states as well as private groups are obliged. Hence horizontal relations do also fall within the scope of human rights[141]. This requires two essential state activities: to endow citizens with basic capabilities to enjoy the rights and to enable citizens to ward off private power. To comply with this last, fundamental rights should take the form of collective rights as the most efficient form for citizens to counterbalance the power of interests' groups and protect themselves from the abuses of economic (or others) power[142]. Social rights as they protect the preconditions for an autonomous life[143] can perfectly fit and fulfil a renewed role of enabling citizens within the framework of human rights.

Framing social rights in the context of human rights from a functional and evolutionary perspective assumes a certain harmonization of core values, that despite their distinctiveness, social groups are able to share. And, as far as globalization advances societal developments should be expected to converge, so should regulations do. However, inherent to the protection of rights, fundamental or not, is the institutional existence of a sovereign body able to set obligations, sanctions and remedies in case of

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[138] IFE, J.; *Human Rights and Social Work: Towards Rights-Based Practice*, p.144.

[139] LYON-CAEN, A.; "The Legal Efficacy and Significance of Fundamental Social Rights: Lessons from the European Experience", in Hepple, B. (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, (2002), Cambridge: CUP.

[140] SCHIEK, D.; "Fundamental Rights Jurisprudence Between Member States' Prerogatives and Citizens' Autonomy", in Micklitz, H-W.; De Witte, B. (eds), *The European Court of Justice and the Autonomy of the Member States,* (2012), Cambridge: Intersentia, p. 221.

[141] The public/private divide of human rights and the bearing of responsibility is questioned in: IFE, J.; *Human Human Rights and Social Work: Towards Rights-Based Practice,* Chapter 3, and p. 147.

[142] SCHIEK, D.; in *The European Court of Justice and the Autonomy of the Member States*, pp. 221-222.

[143] MÖLLER, K.; "Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights", in *Oxford Journal of Legal Studies*, (2009), Vol. 29 (4), p. 758.

breach. This is, the traditional role of state. At the end of the day it is the only legitimate structure for organizing the relations between citizens and redistribute wealth through law. This is its most important role[144]. In the globalization era, the question is which actors, through which means and at what level regulation of social rights can be achieved[145].

2. Constitutionalizing Social Rights: An Effective Measure?

Welfare state and collective bargaining have been the traditional vehicles for social rights. The decline of the former is leading to increasing recourse to legal and constitutional mechanisms to assert claims for the latter[146]. Certainly, the changing structures of industrial relations have rendered some labour institutions inefficient, revealing the need to redesign the sources of social and labour rights to cope with the new scenarios[147]. The question here is whether constitutionalizing labour and social rights can address these challenges. Or, put in another way, whether constitutional mechanisms are appropriate ways to secure states' obligations for individuals can realize their rights.

Constitutional rights entail states sovereignty but in the current global context sovereignty is less and less a matter under states' control. This is not seen as a constraint by Arthurs and Hendrickx who share the idea that social rights need to be harmonized globally. In their opinion, sovereignty "gives repressive states a rationale for insisting that they be allowed access to global markets on their own terms, unconstrained by "universal" labor standards" [148]. Instead, alleged democratic states do not respect such

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[144] KATROUGALOS, G.; "Constitutional Limitations of Social Security Privatisation: Human Rights Approach" in *European Journal of Social Security*, (2010), Vol. 12 (1), p. 25; STIGLITZ, J.E.; *The Price of Inequality,* p. 58; ALESINA, A.; RODRIK, D.; "Distributive Politics and Economic Growth", in *The Quarterly Journal of Economics*, (1994), Vol. 109 (2), put the emphasis on the need of state participation in economic policies.

[145] FUDGE, J.; "The New Discourse of Labour Rights: From Social to Fundamental Rights?", in *Comparative Labor Law and Policy Journal*, (2007), Vol. 29 (1), p. 66.

[146] FUDGE, J.; "The New Discourse of Labour Rights", p. 31

[147] See Davidov, G., Langille, B. (eds), *The Idea of Labour Law*; HENDRICKX, F.H.R.; "The Future of Collective Labour Law in Europe", in *European Labour Law Journal*, (2010), Vol. 1(1), p. 61.

[148] ARTHURS, H.; "Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture", in *Berkeley Journal of Employment and Labor Law*, (2001), Vol.22 (2), p. 284.

standards creating situations of social dumping[149] between states that place groups of workers in different jurisdictions in competition with each other by reducing working conditions and being less assertive of their social claims[150]. Against this way of understanding labour law in a globalized world, Sciarra contains that globalization leads to law-making processes beyond the state in which the latter confers powers to private organizations resulting in private parties dealing with collective interests. To counteract these effects, labour law has to resume its authority of law over policies and be a legal mechanism of empowering people[151].

In line with the functionalist approach to human rights described in previous section that looks for progressive change in law to adapt to evolutionary developments, Lord Wedderburn, probably the loudest voice for workers' rights, always championed that "the ultimate aim [of collective labour law] was to redress the inequality of power of worker and employer and law was to be shaped to this end or shunned if it did the opposite"[152]. A priori, this excludes the chances of constitutionalizing rights since one of the basic principles of constitutions is to have rights "beyond of the reach and revision of ordinary legislation and shifting democratic majorities"[153].

Following Sinzheimer's ideas, Dukes assumes the political nature of labour law and institutions and their economic functions to suggest that the concept of 'labour constitution' implies the ordering economic function of labour law and its power to enabling workers[154]. She places legislative level beyond constitutions to claim that regulatory framework conceived as "a single bounded 'space'—a workplace, company, industry, or nation—within which the respective roles of organized

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[149] HENDRICKX, F.H.R.; "The Future of Collective Labour Law in Europe", pp. 64-65.

[150] ARTHURS, H.; "Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture", p. 282.

[151] SCIARRA, S.; "The 'Autonomy' of Private Governments", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing, p. 74.

[152] FREDMAN, S.; "Comment: The Values and the Vision: A Reply to Alan Bogg and a Personal Tribute to Lord Wedderburn", in *Industrial Law Journal*, (2015), Vol. 44 (3).

[153] ESTLUND, C.; "An American Perspective on Fundamental Labor Rights", in Hepple, B. (ed), Social *and Labour Rights in a Global Context: International and Comparative Perspectives*, (2002), Cambridge: CUP, p. 193.

[154] DUKES, R.; *The Labour Constitution*, p. 5.

labour and management are governed by a single set of norms"[155], continues to be valid despite globalization and loosening of state's power in order to democratize capitalism. Also, the growing of small enterprises, especially in the current EU context that backs and fosters entrepreneurship, where the enforcement of labour rights is difficult[156], collective labour law at workplace level is a must for the sake of workers' equality and social justice.

Collective labour law should be reshaped in enabling terms rather than in terms of protection so that collective rights become vehicles for the realisation of individual rights, freedoms and aspirations[157]. This view comes from Deakin and Wilkinson who see social rights as individual instruments to achieve a higher level of economic functioning[158]. They support a conception of labour law in which social rights play a central role in the formation of labour market relations[159]. Collins has criticized this instrumental approach as a potential source of trade-off against other welfare values and interests[160] whereas Dukes considers that a well-functioning labour market admits different perspectives on rights. I.e., the no inclusion of the right to wage since from the employer's view this right could limit the maximization of benefits[161].

A tendency adopted by some scholars for the protection of labour rights as human rights has been to consider them as intertwined with political rights by means of the right to freedom of association[162]. This conception would make constitutional protection easier while at the same time could

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[155] DUKES, R.; *The Labour Constitution,* p. 190.

[156] HEPPLE, B.; "Enforcement: The Law and Politics of Cooperation and Compliance", p. 256.

[157] HENDRICKX, F.H.R.; "The Future of Collective Labour Law in Europe", p. 68.

[158] DEAKIN, S.; WILKINSON, F.; "The Law of the Labour Market", in *Oxford Monographs on Labour Law*, (2005), Oxford, p. 347 cited in: HENDRICKX, F.H.R.; "The Future of Collective Labour Law in Europe", p. 68.

[159] DUKES, R.; *The Labour Constitution*, p.104.

[160] COLLINS, H.; "The Law of the Labour Market: Industrialization, Employment and Legal Evolution by Simon Deakin and Frank Wilkinson", in *Industrial Law Journal*, (2006), Vol.35 (1).

[161] DUKES, R.; *The Labour Constitution,* p.122.

[162] On the right to freedom of association, see: FUDGE, J. "Labour Rights as Human Rights: Turning Slogans into Legal Claims", in *Dalhousie Law Journal*, (2014), Vol. 37 (2). Also, MANTOUVALOU, V.; "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation", in *Human Rights Law Review*, (2013), Vol. 13 (3), claims that by virtue of the method called 'an integrated approach to interpretation' used by the ECtHR, it is possible to view labour rights as civil and political rights.

"be used to embed labour markets in an institutional framework that requires any derogation from the values of democracy and human dignity to be justified"[163]. Within the complex and changing nature of collective bargaining and labour relations, there are different components that have different links to freedom of association. In Fudge's view, constitutional protection requires the presence of a strong link between a given element – i.e. salary – to freedom of association[164].

Accepting "an autonomy-based understanding of constitutional rights"[165] in which collective labour rights could find their place remains disputed[166]. Formally, constitutional collective labour rights should serve to promote the substantive equality between employer and employee. On the other side, constitutional rights are by definition immune to economic efficiency arguments[167] and, at the same time they cannot be waived[168]. In labour arguments, this reduces the scope of both collective and individual autonomy. One of the principles on which labour law is based, the subordination inherent to the managerial prerogatives, makes it difficult to meet the conditions established by the ECtHR for lawful waivers, i.e.; to be unequivocal, and been obtained freely and without constraint[169]. Although Mantouvalou provides good arguments against the most common objections for constitutionalizing social and labour rights[170], in practice and despite the higher constitutional status effectiveness is not granted as long as judges are not willing to interfere in political and budgetary decisions in which social and labour rights play an important role[171].

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[163] FUDGE, J. "Labour Rights as Human Rights: Turning Slogans into Legal Claims", p. 619.

[164] FUDGE, J.; "Labour Rights as Human Rights: Turning Slogans into Legal Claims", p. 617.

[165] MÖLLER, K.; "Two Conceptions of Positive Liberty", p. 758.

[166] For an account of the various arguments in favour and against, see MANTOUVALOU, V.; "Are Labour Rights Human Rights?".

[167] MANTOUVALOU, V.; "Are Labour Rights Human Rights?", p. 171.

[168] IFE, J.; *Human Rights and Social Work: Towards Rights-Based Practice*,p. 24.

[169] MORRIS, GS.; "Fundamental Rights: Exclusion by Agreement?", in *Industrial Law Journal*, (2001), Vol. 30 (1), pp. 53 and ff, explains the difficulties.

[170] MANTOUVALOU, V.; in *Debating Social Rights*, pp. 113 ff.

[171] For a summary of arguments on judicial discretion see i.e. ROMAN, D.; in *La Justiciabilité des Droits Sociaux : Vecteurs et Résistances*; KLATT, M.; "Positive Rights: Who Decides?", points out at four problems for the constitutionalization of social rights, of which judicial review or " judges' competence" is the focus.

For this reason, Bogg[172] considers that efforts to reconfigure labour rights as human rights is a praiseworthy development that notwithstanding does not provide a real improvement on peoples' day to day life. He questions: "What are the concrete effects of human rights victories in constitutional courts upon the day-to-day lives of working people, and how do we make human rights victories count in the real world? How can we ensure that fundamental rights protections for workers remain effective in an era where organized labour is in a state of precipitous weakness?"[173]

The effectiveness of the ECHR, ILO and ICESCR provisions and the Case Law of ECtHR largely depend on national implementation[174]. The future of social and labour rights thus hinges on the ability of domestic courts for transforming human rights from normative ideas into realities with an impact on real-world lives [175]. In some countries, lower courts have taken the lead in incorporating the ECHR[176] while Canada provides a good example of Constitutional Court involvement in granting collective labour rights[177]. However, reliance in courts' interpretation does not provide legal certainty to people who search in social and labour rights adjudication not only reparation for just cause but an immediate

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[172] Bogg's critiques are addressed to Lord Wedderburn's ideas on the primacy of politics in the sphere of collective labour law. It is understood that the criticism can be extended to those advocating for the same line of thought.

[173] BOGG, A.; "The Hero's Journey: Lord Wedderburn and the 'Political Constitution' of Labour Law", in *Industrial Law Journal*, (2015), Vol. 44 (3), p.347.

[174] ANDENÆS, M.; BJØRGE, E.; "National Implementation of ECHR Rights", in Føllesdal, A. et al. (ed), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, (2013), Cambridge Books Online, p. 181.

[175] JUSTICE A BÅRDSEN; *Fundamental Rights in EEA Law – The Perspective of a National Supreme Court Justice*, EFTA Court spring seminar, Luxembourg 12th of June 2015, par. 5, available at: http://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/fundamental-rights-in-eea-law---bardsen-03062015.pdf ; POLAKIEWICZ, J.; *The Future of Fundamental Rights Protection Without Accession*, (2015), COE, Directorate of Legal Advice and Public International Law, available at: http://www.coe.int/en/web/dlapil/news-dlapil/-/asset_publisher/SjSCFLWj9NEP/content/mr-jorg-polakiewicz-was-at-maastricht-university-26-june-2015

[176] STONE, A.; 'Assessing the Impact of the ECHR on National Legal Systems', in Stone Sweet, A. (ed), A *Europe of Rights: The Impact of the ECHR on National Legal Systems*, (2007), Oxford: OUP, p. 687.

[177] FUDGE, J.; "Labour Rights as Human Rights: Turning Slogans into Legal Claims"; ARTHURS, H.; "Labour and the 'Real Constitution', in *Les Cahiers de Droit*, (2007), Vol. 48 (1-2).

relief to difficult situations. To avoid this gap, Cippitani[178] suggests that social human rights are enforceable via contractual relationships – such as in Arts. 31 & 36 of the Charter of Fundamental Rights of the European Union (CFREU) – thus allowing protection by domestic civil law courts and under Art. 6.1 ECHR as recipients of social services may raise disputes of interest. This has last is also hold by Novitz[179] and Mantouvalou[180] who support their arguments in the ECtHR case-law.

From the perspective that human rights are able to create horizontal relations, constitutional social and labour rights should enable judges to adjudicate in violation of third parties and make legislature accountable for breach of their obligations. In other words, constitutionalizing social and labour rights enhances democracy. Justiciability operates as a guaranty if rights and not policies are at stake[181]. Nevertheless, to grant effectiveness in the real life, constitutional protection must be reinforced – not replaced - by statutory law which direct effect is not a matter of discussion between political and judicial approaches while avoiding the increasing debate on the horizontal effects of human rights into private law[182]. On top of this, social rights are dynamic rights and their effectiveness requires frequent adjustment of laws regulating their exercise. Constitutional framework alone does not grant such adaptability.

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[178] CIPPITANI, R.; "The 'Contractual Enforcement' of Human Rights in Europe" in Diver, A.; Miller, J. (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions*, (2016), SpringerLink Books Law and Criminology, p. 321.

[179] NOVITZ, T.; "Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions", in *Industrial Law Journal*, (2012), Vol. 41 (2).

[180] MANTOUVALOU, V.; in *Debating Social Rights.*

[181] HERRERA, C.H. ; "La Justiciabilité des Droits Sociaux: Concept Juridique et Evolution Jurisprudentielle", in *La Justiciabilité des Droits Sociaux : Vecteurs et Résistances*, (2012), Paris: Pedone cop., p. 117.

[182] For a discussion on the topic, see: COLLINS, H.; "On the (In)compatibility of Human Rights Discourse and Private Law", in Micklitz, H-W. (ed), *Constitutionalization of European Private Law: XXII/2*, (2014), Oxford Scholarship On line.

3. Obligations of States under Human Rights Legal Instruments

3.1 Legislative Obligations

Under human rights law, states do enjoy a wide margin of appreciation on the means used to implement their obligations on the condition that such measures are effective[183]. There are, however, some fields in which enforcement of rights through law is a strong duty. This can be said of provisions related to fair working conditions as regards pay and working hours and, to the right to social security, social welfare and social services that emerge as substantive rights from the ESC[184]. As such, the first obligation is for states to incorporate the rights into their respective legal orders that must contain the "appropriate means of redress, or remedies, [..] and appropriate means of ensuring governmental accountability"[185]. Once statutory national law has been enacted states are obliged to address any circumstance that can jeopardize the effectiveness of the rights. This obligation is broadly conceived, including; 1) the amendment and/or repeal of existing legislation that is not compatible with human rights provisions[186] and, 2) to regulate third party activities liable to interfere in the enjoyment of the rights[187]. Failure to act holds as violation through omission[188].

Where the mechanisms established for the realization of the rights, i.e., the right to social security or the right to a fair wage, are linked to horizontal relations such as labour/employment relations, the legislative

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[183] ESCR, ESC Explanatory Report, par. 139, p. 16; CESCR, UN General Comment No. 3.

[184] ESC, Digest of the Case-Law, (2008), p. 9.

[185] Art. 2 ICESCR; CESCR, UN General Comment No. 9, par. 2; Art I ESC; Also, ESC, Digest of the Case-Law, (2008), pp.15-16.

[186] CESCR, UN General Comment No. 19, par. 67; CESCR, General Comment No. 23, par. 58. In the same sense: ECSR, Digest of Case-Law, (2008), p. 240; ECSR, *Confederation of Swedish Enterprise v. Sweden*, Collective Complaint No. 12/2002, Decision on the merits, 22 May 2003, par. 28.

[187] See i.e.; CESCR, UN General Comment No. 19, par. 45; CESCR, UN General Comment No. 23, par.59; CESCR, UN General Comment No. 15, E/C.12/2002/11, The Right to Water, (b) Obligations to protect.

[188] CESCR, UN General Comment No. 19, pars. 64 & 65; CESCR, UN General Comment No. 23, par. 79. Also, ECtHR Case 73316/01 *Siliadin v France* is relevant. The Court held France was in violation of the ECHR because there was no legislation in place to sanction employer's behavior in breach of human rights.

obligation takes preference over the duty of no-interference in collective bargaining discussed in section II.1 above, due to the redistributive character of social security and the economic effects of wages on it. This does not, however, imply the state's interference in the autonomy of the parties. Conversely, it has to be understood as the protection due by the states to individuals in providing them with a legal framework supporting the development of industrial relations in a context of legal certainty, therefore allowing predictability for workers and courts. Legislative measures are to be adopted in tripartite negotiations[189] and comprise the obligation to legislate on minimum wages[190], minimum working conditions, including overtime[191] as well as the promotion of collective bargaining[192] as a means to regulate working conditions through collective agreements. This legislative context acts as a minimum floor that "clearly circumscribes the discretion left to employers and employees to vary, by means of a collective agreement"[193], the conditions on where the labour relations develop, placing states as grantors of labour rights.

As far as specific legislative obligations regarding the right to social security are concerned, states must put in place a system regulated by law[194]. No provision forecloses states to freely design their social security systems including pensions schemes setting different degrees of benefits according to personal situations. National legislation shall provide for the enabling rules and concomitant mechanisms to access benefits[195]. Finally, in case of privately run schemes, states are obliged to enact a legislative framework to prevent abuses[196].

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[189] CFA, Digest of Decisions, (2006), par. 1070; CESCR, General Comment No. 23, pars. 35 & 40.

[190] CESCR, UN General Comment No. 23, pars. 21 & 59; ILO Conventions 026, 099 and 131.

[191] CESCR, UN General Comment No.23; ECSR, Digest of Case-Law, (2008); ECSR, Conclusions XIV-2 - Statement of interpretation - Article 2-1, 4-2.

[192] CESCR, UN General Comment No.23, par. 60; ECSR, Digest of Case-Law, (2008), p. 54; CFA, Digest of Decisions, (2006), par. 880, 888, 945.

[193] ECSR, *Confédération française de l'Encadrement CFE-CGC v. France*, Collective Complaint No. 16/2003, Decision on the merits, 12 October 2004, par. 35

[194] CESCR, UN General Comment No. 19, par. 48, ECSR, Digest of Case-Law, p. 89.

[195] CESCR, UN General Comment No. 19, par. 15; RECSS, ILO Conventions 102 and 128.

[196] CESCR, UN General Comment No. 19, par. 46.

3.2 The Obligation of Non-Regression

While legislative obligations are aimed at securing the effective realization of the rights, there are other important obligations of states that arise from the binding nature of international instruments. A preliminary point to highlight is that countries' financial situation is not a sufficient condition to adopt regressive or restrictive measures. Neither is it a matter of political options. Obligations under international bind successive governments regardless their ideology. Non-regression is a necessary condition to the full enjoyment of the rights therefore states non-compliance accounts as violations of human rights. In many cases, regressive consequences can arise from the omission of states duties; hence the obligation of non-regression is far-reaching and in social security terms encompasses the obligation to index benefits to the cost of living as a minimum duty, to the overall obligation to preserve the sustainability of the systems[197].

States are obliged to secure that social security benefits are appropriate all over the period of the contingency[198]. For pensions, this means throughout live and it is on that basis that express reference to the sustainability of the pensions is made by the CESCR[199] while from Art. 12 ESC it has to be inferred that the obligation of maintaining a social security system that provides adequate benefits is on a continuous basis. ILO Convention C102 also highlights the importance to guarantee the future of the right setting on states a preventive obligation to make periodic actuarial studies and calculations concerning financial equilibrium prior to the introduction of any change in benefits, contributions or taxes allocated to cover the contingencies[200]. These obligations are mainly addressed to the public provision of social security. Privatization of social security schemes does not exempt states of their responsibilities to grant the enjoyment of the right[201]. To this end, states are in charge for the administration of such schemes through legislative measures and independent and public participation[202]. In any

[197] CESCR, UN General Comment No. 19, par. 11; Art. 12 ESC in terms of maintenance.
[198] CESCR, UN General Comment No. 19, heading 3; ECSR, Conclusions 2002 - Interpretive statement - Art. 12-1, 12-2, 12-3; Art. 26.1 RECSS, Art. 14 ILO Convention 128.
[199] CESCR, General Comment No. 19, pars. 11 and 65.
[200] Art. 71.3 ILO Convention 102.
[201] CESCR, UN General Comment No. 19, pars. 5 & 9.
[202] CESCR, UN General Comment No. 19, pars. 46.

case privatization entails the extinction of neither the right nor of its distributive character[203] .

To secure the realization of the right to social security, states must make available the necessary resources[204] and continuously monitor the effectiveness of the mechanisms in place[205]. But in those systems where contributions are compulsory[206], social security becomes a public or collective good[207] the management whereof is entrusted to the states, reinforcing their obligations of control and monitor while at the same time restricting their ability to make use of resources outside welfare[208]. This perspective places social security outside the reach of financial macro-economic issues unless states are able to prove that a regression is indispensable[209] for the maintenance of social security systems and do not challenge the effective protection of all members of society against social and economic risks and does not reduce the system to one of minimum assistance[210].

The CESCR subordinates regressive measures to be lawful under State Party's legislation and that appropriate remedies are in place[211]. Communication 1/2013 of the CESCR summarizes the regressive actions

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[203] CESCR, UN General Comment No. 19, par. 5.

[204] CESCR, UN General Comment No. 19, pars. 4, 11, 42, 59.a. Also, statement by the Committee on "Social protection floors: an essential element of the right to social security and of the sustainable development goals", pars. 7-8; ESC, Digest of Case-Law, (2008), p. 15.

[205] CESCR, UN General Comment No. 19, pars. 22,59, 67 ff.; ECSR, Digest of Case-Law, (2008), pp. 167-168.

[206] Obliging to collectively bear the costs of social security schemes: Art. 76 ECSS (Revised), Art. 71.1 ILO Convention 102.

[207] CESCR, UN General Comment No. 19, par. 10.

[208] Although not restricted to welfare, HUMBLET, M.; SILVA, R.; *Standards for the XXIst Century Social Security*, (2002), Geneva: ILO Publications, p. 12, notes that states cannot use social security assets to compensate budget deficits. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_088019.pdf . Also, ILO, *Setting Social Security Standards in a Global Society*, p. 22, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_secsoc_5953.pdf

[209] CESCR, UN General Comment No. 19, par. 42; ECSR, Conclusions XVI-1 - Statement of interpretation - Art. 12-1, 12-2, 12-3.

[210] For all, see: ECSR, Conclusions XIV-1, Statement of Interpretation Article 12; ECSR, *Finnish Society of Social Rights v. Finland*, par. 86; Also, ECSR, Decision on the merits: *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) / Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece*, par. 47.

[211] CESCR, UN General Comment No. 19, par. 78.

that states may lawfully adopt. It is related to the case of a prisoner who saw his non-contributory benefits reduced on the grounds that state provided lodging and food while in prison. The Committee holds that this did not account for a violation of the right as the purposes of the reduction were within states obligations, namely: national law in force allowed such restrictions that were a "reasonable means of achieving a purpose that is compatible with the Covenant, namely, the protection of public resources, which are necessary for the realization of individuals' rights" and it was not a disproportionate measure as far as it was not proved it impaired on the prisoner's or his family's basic needs[212].

Systems of compulsory work contributions assume continued employment relationships expanding horizontal effects of labour to welfare state. This feedback involves that the vertical relation state-individuals created by human rights law for the protection of the latter is supplemented by a bottom-top relation derived from the appropriate regulation of labour relations. As far as it may lead to an erosion of the financial base of social security schemes, producing inadequate levels of social security and social assistance benefits, any modification of national labour law resulting in working conditions or wage levels below the minimum standards equals to a regressive measure. To this respect, the ECSR and the ILO already warned that violations of the right to social security have increased linked to wage cuts that have increased the number of people in vulnerable groups outside the labour force, among which the elderly and the sick, who have not been able to make provisions to cover their own risks[213].

To the extent that labour conditions are agreed between employers and employees' representatives, employees accept their share of business risk. In this case, social security systems act as legitimate mechanisms for risk protection. Conversely, if labour conditions are the result of employers' unilateral decisions, there is a displacement of full risk on the individuals that place the burden on the collective financed system, reducing its effectiveness. States are responsible "for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects"[214]. Accordingly, deregulation of labour results in a double breach of states international obligations: 1) as it causes a regressive stance on

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[212] In the same line, see CESCR, *Miguel Ángel López Rodriguez v. Spain*, pars. 13.2, 13.3 & 13.4.

[213] PALMISANO, G.; *The Contribution of the European Social Charter*, in ECSR, Activity report 2015, p.4.

[214] UN Legislative series, "Ch. II: Attribution of Conduct to a State", in *Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts*, (2012), New York: United Nations, par. 2 with explanatory note, pp. 27-28.

the rights of workers[215] and 2), in particular, it challenges states' obligation to secure the sustainability of the social security systems in the long run. In any case, states are obliged to redress the situation[216] including adjudication[217].

Bearing in mind that as a general principle of international law, states cannot invoke national law as justification for failure to perform treaty obligations[218], labour deregulation constitutes a direct violation of the right to collective bargaining and an indirect infringement of states obligations towards the realization of the right to social security. To this purpose, the ILO's CFA recalls that any measure having restrictive effects over the regulatory function of collective agreements, should be imposed on an exceptional basis and for a short period but in any case, it must be accompanied of adequate safeguards to protect workers' living standards[219]. The same applies to the other working conditions for which states do have a legislative obligation, mainly on setting minimum wages and regulating overtime. Flexibilization of labour conditions through regulation is admitted provided these measures are of a temporary nature[220] and they are provided in national law or in collective agreements but in any case, the substance of the rights, i.e. the protection of workers in terms of health (overtime) and standard of living is maintained[221].

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[215] Deliberate regressive measures are expressly forbidden. See CESCR, UN General Comment No. 23, par. 52 invites states to seek for international cooperation and assistance instead of adopting any regressive measure. Also, ECSR, *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece*, pars. 13-14 stating that employment flexibility should be compatible with fundamental labour rights of workers.

[216] UN Legislative series, "Part Two: Content of the International Responsibility of a State", in Book 25: *Materials on the Responsibility of States for Internationally Wrongful Acts*, pp. 199 ff.

[217] CESCR, UN General Comment no. 23, par. 59.

[218] Vienna Convention on the Law of Treaties, Art. 27; CESR, UN General Comment No. 9, par. 3.

[219] ILO, CFA Digest of Decisions (1985), par. 641; ILO, CFA Digest of Decisions, (1996), pars. 886-887.

[220] CESCR, UN General Comment No. 23, par. 22 & 52.

[221] CESCR, UN General Comment No. 23, par. 46; ECSR, Conclusions XIV-2, Netherlands.

SECTION IV. Human Rights, EU Fundamental Rights and National Legislation: Colliding Levels

1. The CFREU as Source of Rights

The incorporation of the CFREU (the Charter) into the existing EU legal order has created a complex net of connections between rights, freedoms and containing instruments thwarting the effectiveness of the former. To analyse the Charter as source of rights entails to take into account different levels of abstraction, i.e. the content and scope of its provisions, inner and outsider connections, and the role of the Court of Justice of the European Union (CJEU) in giving legal force to the Charter. The vast literature dealing with all these issues mostly agree on the weaker protection allowed by the Charter in contrast with the ESC[222]. In *Melloni* Case, although referred to the Common Foreign and Security Policy (CFSP), the CJEU established the general rule that rights guaranteed by the Charter are limited by the unity, primacy and effectiveness of EU law[223]. The right to social security provides a good example.

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[222] See, i.e.: Bercusson, B. (ed), *European Labour Law and the EU Charter of Fundamental Rights*, (2006), Baden-Baden: Nomos; Peers, S. et al. (eds), *The EU Charter of Fundamental Rights. A commentary*, (2014), Oxford: Hart Publishing; DANWITZ, T.; PARASCHAS, K.; "A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights" in *Fordham International Law Journal*, (2012), Vol. 35 (5); DE BÚRCA, G.; "The Evolution of EU Human Rights Law", in Craig, P.; de Búrca, G. (eds), *The Evolution of EU Law*, (2011), Oxford: OUP; EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, (2006), available at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf ; ECSR Working Document, *The Relationship between European Union Law and the European Social Charter*, (2014), available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806544ec ; ALBI, A.; " Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums", in *European Law Journal* , (2009), Vol. 15 (1); GROUSSOT , X.; PECH, L.; *Fundamental Rights Protection in the European Union Post Lisbon Treaty*, (2010), Foundation Robert Schuman – Policy Paper , No. 173; de Vries, S. et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon*, (2013), Oxford: Hart Publishing.

[223] CJEU, C-399/11 *Melloni*, 26 February 2013, par. 60.

Art. 34 CFREU is something in-between a principle and a right[224]. Taken together, the wording of the article and the Explanations to the Charter, it follows that social security is a right of basic provision referred to in paragraph 3, consisting of social and shelter assistance "to ensure a decent existence for all those who lack sufficient resources". The remainder of the article, pars. 1 & 2, should be considered a principle, seemingly offering a low level of protection than its counterparts at the ESC – Arts. 12, 13 and 14 – on which the Charter fed.

If social security is understood as a lively concept able to be adjusted to changing societal needs, the non-obligation to create new services where they do not exist[225] is to be interpreted as foreclosing states competence to legislate new rules. Thereby directly affecting the duty of progressivity laid down by Art. 12 ESC understood in the two senses of the word: improvement on benefits/services and extension of coverage. In practice, this would produce regressive effects on the beneficiaries, current or potential.

Read as a whole, the Charter reveals the significant absence of the right to a fair remuneration – Art. 4 ESC and Art. 7.a.(1) ICESCR. Having in mind that it was included in the Community Charter of the Fundamental Social Rights of Workers (1989), point 5, the exclusion represents an important setback on the Charter's overall scope of protection given the connection that labour income plays on the realization of other rights; i.e. dignity, property, rights of the child, family protection. In contrast to this argument, and following the line of dignity, Bercusson considers that Art. 31 CFREU obliges states to have regulation in place covering all range of working conditions in order to ensure workers' dignity[226].

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[224] PAJU, J.; "Much Ado About Nothing?", in de Vries, S. et al. (eds), *The EU Charter of Fundamental Rights as a Binding Instrument*, (2015), Oxford: Hart Publishing, p. 195, claims that according to CJEU case law, it must be seen as a principle.

[225] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJEU, C 303/17; EU Parliament, "Art. 34, Social Security and Social Assistance", Charter of Fundamental Rights of the European Union, available at: http://www.europarl.europa.eu/comparl/libe/elsj/charter/default_en.htm

[226] BERCUSSON, B.; *European Labour Law and the EU Charter of Fundamental Rights*, pp. 380-381, cited in BOGG, A.; "Art. 31 – Fair and Just Working Conditions", in Peers, S. et al. (eds), *The EU Charter of Fundamental Rights. A commentary*, (2014), Oxford: Hart Publishing, p. 845. Bogg analyses the importance of Art. 31 CFREU as a substantive fundamental right subsuming the entire field of labour law.

Arguably, wage falls outside EU competences as freedom of association and social security do[227]. This has not been an obstacle for the latter to be included in the CFREU. Hence the underlying reason must be found in the internal conflicts that such a right might create with other rights of the Charter, notably with freedom to conduct business – Art. 16 CFREU. Its inclusion under the heading "Freedoms" parallels the right to property - Art. 17 –, or the right to freedom of association – Art. 12 CFREU. Such a freedom is not listed in any other international human rights instrument[228]. Thus, its content and extent has been shaped by the CJEU Case Law[229] not in terms of fundamental rights but of balancing employees' and employers' interests[230].

In so doing, the CJEU introduces foreign elements into the fundamental rights field which distort the values and principles that the Charter was supposed to enshrine. Likewise, if rights proclaimed by the Charter are not absolute, but must be considered in relation to their social function and the restrictions imposed may in any case impair the very substance of the rights[231], then freedom to conduct business limits and should be limited by other rights, i.e. collective bargaining – Art. 28 -, unjustified dismissal – Art. 30 CFREU – or workers' right to information and consultation – Art. 27 CFREU - when some of their respective elements conflict.

CJEU's opinion on balancing rights has been reshaped in view of the *Alemo Herron* judgment, where the Court places no limitations to the substance of freedom to conduct a business[232]. Despite that in more recent cases, i.e. *AGET Iraklis*[233] and *Asklepios* Cases[234] the Court seems more

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[227] Art. 153 TFEU.

[228] Some Member States have included, directly or indirectly, this freedom into their constitutional systems. See, GROUSSOT, X.; *Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights*, (2014), Legal Research Paper Series, Paper No. 01/2014, Lund University, p. 2.

[229] European Union Agency for Fundamental Rights (FRA), *Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right*, Luxembourg: Publications Office of the European Union, (2015), p. 9.

[230] In contrast, see OLIVER, P.; "What Purpose Does Art. 16 of the Charter Serve?" cited in GROUSSOT, X.; *Weak Right, Strong Court …* p. 6. Oliver suggests that the objective of Art. 16 would be to treat freedom of business in an identical basis as social rights.

[231] Among others: CJEU Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood*, 10 July 2003, par. 68.

[232] CJEU, C-426/11 *Alemo-Herron and Others v. Parkwood Leisure Ldt*., 18 July 2013, pars. 36-37.

[233] CJEU, C-201/15 *AGET Iraklis*, 21 December 2016, pars. 77 & 90.

prone to accept a balance between labour rights and economic freedoms, the reasoning delves on the fundamental nature of the freedom at stake which leads to the conclusions that restriction on it are contrary to EU law.

These conflicts are gradually undermining the content of social and labour fundamental rights but also negatively affecting the essence and the reach of the whole Charter. In Groussot's words: "[The] absence of balancing amounts to a hierarchical approach, where social rights are being subsumed or forgotten"[235]. On her side, Barnard claims that despite the low profile of the Charter, rights remain although they have been refocused and reconceptualised[236]. Instead, it is also possible to argue that, as far as social/labour rights refer, the depth of this reconceptualization does not allow recognizing them as rights. They have lost their substance and effectiveness; that is what qualifies rights as such.

With the Charter becoming a Treaty, a potential conflict might arise with Art. 153 TFEU[237]. By virtue of the latter, the rights to freedom of association and to social security would have been reintroduced into the realm of EU law. However, Art. 6.1 TEU and 51.2 CFREU both preclude the Charter to extend EU's competences. In Dorssemont's opinion this exclusion does not preclude nor invalidates legislative intervention "merely indirectly related" in the field of social policy[238]. On his side, Bercusson contents that the prohibition of Art. 51.2 CFREU is tantamount to the submission of the Charter to the Treaties undermining the concept of fundamental rights so far as competences act as a limit to the protection of fundamental rights. In other words, fundamental rights will be ignored by the EU where they come up against the limitations of its competences[239].

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[234] CJEU Joined Cases C-680/15 and C-681/15 *Asklepios Kliniken Langen-Seligenstadt GmbH*, 27 April 2017, pars. 22-23.

[235] GROUSSOT, X.; *Weak Right, Strong Court …*, p. 15.

[236] BARNARD, C.; "EU Social Policy: From Employment to Labour Market Reform", in Craig, P.; de Búrca, G. (eds), *The Evolution of EU Law*, Oxford; OUP, 2011, p. 686.

[237] See, BERCUSSON, B.; "Horizontal Provisions", in Bercusson, B. (ed), *European Labour Law and the EU Charter of Fundamental Rights*, (2006), Baden-Baden: Nomos; DORSSEMONT, F.; "Art. 12 – Freedom of Assembly and of Association", in Peers, S. et al. (eds), *The EU Charter of Fundamental Rights. A Commentary*, (2014), Oxford: Hart Publishing, p. 343.

[238] DORSSEMONT, F.; in *The EU Charter of Fundamental Rights. A Commentary.*

[239] BERCUSSON, B.; "Conclusion", in Berusson, B. (ed), *European Labour Law and the EU Charter of Fundamental Rights*, (2006), Baden-Baden: Nomos, p. 448. In the same vein, FERRARO, F.; CARMONA, J.; *Fundamental Rights in the European Union. The Role of the Charter after the Lisbon Treaty*, (2015), EU

A comparison of the wording of articles is insightful to this end. References to Union Law - broadly conceived in terms of legal order - as the basis for the recognition of rights and principles appear only under the heading "Solidarity". A further argument obtains from the tensions arising between different Treaties' provisions. In particular, Art. 153.4 establishes that Member States are free to set "more stringent protective measures". This can be interpreted as imposing 1) stronger measures to access protection this is, act as ceiling with regards to fundamental rights protection or, 2) measures that reinforce protection which equates to be a floor, depending on whether stringency is placed on measures or on protection. Compared with the wording of Arts. 53 CFREU - "nothing will restrict or adversely affect" [240] - and 54 CFREU - "any activity may destruct or limit" the rights, it shall be presumed that TFEU is limiting the extent of protection. This raises the issue of the CFREU as source of rights and obligations

In contrast with CESCR's General Comments and ECSR's Explanatory Texts, the Explanations relating to the CFREU are scanty as far as states' obligations are concerned. In particular, for labour and social rights no mentions are made, so that it is in CJEU's Case Law where *ad hoc* obligations are found. On the basis of Art. 51.1, the Charter is binding upon Member States "where national legislation falls within the scope of European Union law"[241], the Court refrains itself to adjudicate only in CFREU social matters[242] by diverting the substance of the contended matter to the scope of Treaties or secondary EU law, because any provisions of the Charter themselves cannot form the basis for the Court's jurisdiction[243].

Although this appreciation might not be in total accordance with Art. 267.a TFEU nor with the Court's own statements regarding its exclusive

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Parliament, p. 11, available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf

[240] For a discussion on the effects of this particular wording, see: LENAERTS, K.; "Exploring the Limits of the EU Charter of Fundamental Rights", in *European Constitutional Law Review*, (2012), Vol. 8 (3), pp. 398-399.

[241] CJEU, C-617/10 *Åkerberg Fransson,* 7 May 2013, par. 21; and Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJEU, C 303/17.

[242] I.e. CJEU, C-539/14 *Sánchez Morcillo and Abril García*, 16 July 2015, par. 49; CJEU, C-408/14 *Wojciechowski*, 10 September 2015, par. 53, with regards Art. 34 CFREU; CJEU, C-395/15 *Daouidi*, Opinion of AG Bot delivered on 26 May 2016, with regards several articles of the Charter.

[243] For all, see C-617/10 *Åkerberg Fransson*, 7 May 2013, par. 22.

jurisdiction[244], the point here is that this technique forestalls the Court to provide the rights of the Charter with a meaningful content and its decisions result in different solutions depending on the directive or treaty provisions that the Court interprets to be at issue[245]. In short, fundamental rights are not endowed with the attribute of legal certainty inherent to their condition of fundamental, nor their effectiveness is granted[246].

On this basis, it can be said that the function of the CFREU is not as much about being a source of rights and obligations, but of a legal instrument for transferring them from the international to the EU's scope of law. Because national legislations are grounded on human rights instruments, this transfer has consequences for the effectiveness of rights' protection at Member States level.

2. Human Rights Protection at EU Level: More than a Conflict of Hierarchy

In principle, the relations between international HR legal framework, regional and national legal systems are hierarchical and should not lead to major issues. UN Human Rights treaties – ILO Conventions and ESC relations embody a comprehensive relation between legal systems.

EU law theoretically operates at an intermediate level between international legal order and domestic regulations. Inasmuch as human rights derived legislation is concerned, it should not affect the relations

[244] Compare: CJEU Opinion 1/09, 8 March 2011, par. 78 and Opinion 2/13, 18 December 2014, pars. 206, 234, 246, ascertaining the exclusive jurisdiction of the Court except for the revision of fundamental rights, par. 254.

[245] CJEU, C-157/14 *Neptune Distribution*, 17 December 2015, par. 33: "The Court is free to "interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts". For a partial critique and a partial approval of Courts' stance with regards to fundamental rights see: BARNARD, K.; "The Silence of the Charter: Social Rights and the Court of Justice", in de Vries, S. et al; *The EU Charter of Fundamental Rights as a Binding Instrument*, (2015), Oxford: Hart Publishing.

[246] See CJEU, C-176/12 *Association de médiation sociale*, 15 January 2014, pars. 45-47 on Art. 27 CFREU; C-356/12 *Glatzel*, 22 May 2014, par. 78 on Art. 26 CFREU, where the Court holds that these are not subjective rights. It is for EU and national laws to give them more specific expression to be effective.

between states and their nationals. Treaty on European Union[247] declares EU's respect for the rule of law and human rights and attachment to the ESC, the 1989 Community Charter of the Fundamental Social Rights of Workers and ECHR[248]. EU commits itself to the protection of human rights outside the Union[249], engages to accede to the ECHR, gives legal effects to the CFREU and adopts as principles of EU' law the human rights guarantees as provided by in the ECHR and by the common constitutional traditions of Member States[250] . Finally, Art. 53 CFREU establishes that the adoption of the Charter does not alter Member States' commitments stemming from International Human Rights law and national constitutions. It follows that EU body of law subordinates itself to the higher hierarchy of human rights.

Notwithstanding the above, double standards can be found at EU level. Art. 2 TEU is internally oriented and refers to general values in which EU's bases its policies. Its wording conveys a passive stance – respect, attach to - compared with Art. 3.5 TEU where EU assumes the active role to protect human rights externally. Significantly enough, the external dimension found also in Art. 21.1 and Art. 21.2 TEU explicitly recognizes the UN Charter and international law that are not mentioned on the internal dimension of Art. 2, nor in Art. 3.3 TEU. It may thus follow that from the outset Union's concern for the internal protection of human rights has not been a priority[251]. Alternatively, if the above different provisions are interpreted as having the same value, then EU treaties already admit the existence of international agreements to which it has itself voluntarily submitted and thus they become, for the sake of their introduction into national law, a limit to EU[252].

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[247] Versions used: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01.

[248] Recitals 4 & 5 Preamble TEU; Art. 2 TEU; Preamble CFREU; Art. 151 TFEU.

[249] Art. 3.5 TEU.

[250] Art. 6 TEU.

[251] In different terms, see: PECH, L.; "???A Union Founded on the Rule of Law???: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law", *in European Constitutional Law Review*, (2010), Vol.6 (3), p. 362, who considers that Art. 2 TEU "incidentally confirms or rather assumes for legitimating purposes, that the Union and national constitutional regimes are based on a broadly identical set of foundational principles and values".

[252] CAUNES, K. ; *La Protection des Droits Fondamentaux dans l'Union Européenne*, (2015), ERA Forum, p. 462.

De Búrca suggests that EU human rights field seems to be externally-oriented rather than for internal application[253]. This is related to EU's objectives as specified in Art. 3.3 TEU. For internal purposes there are no objectives related to human rights. Instead, Art. 3.5 TEU identifies the protection of human rights as a goal in the "wider goal". A point that seems to be confirmed by the European Parliament in its Resolution of 7 September 2015, where it urges the Commission to adopt the necessary measures to align international human rights protection internally as it is being done in the EU's external action[254].

To this respect, it is worth to mention that in *Kadi* case CJEU champions fundamental rights at the international scope[255]. By contrast, the real issue for labour and social rights recognition as human rights is the economic factor underlying them: "Labour rights, however, are not as fundamental as liberty, security and subsistence; they are not universal (applicable to every human being for the very fact they are human) or timeless"[256]. This affirmation may be challenged from different grounds but the most important here lays the contrast with the integrative approach discussed above. By sticking to the separation of human rights, EU denotes the bias in which its policies are grounded and their targets.

By proclaiming the Charter, the EU expressed its aim to redefine fundamental rights by distancing itself from the existing international texts and readjust fundamental rights to the logic of the single market[257]. This approach links with the concept of EU as an autonomous legal order established by the CJEU in the *Costa vs Enel Case* as early as in the 60's[258]. Autonomy requires the creation of a system covering all fields of law in which its elements are structured in terms of coherence. Fitting the Charter, endowed with a particular interpretation of its content, into

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[253] DE BÚRCA, G.; in *The Evolution of EU Law*, p. 490.

[254] European Parliament, *Resolution of 7 September 2015 on the situation of fundamental rights in the European Union*, point 10.

[255] CAUNES, K.; *La Protection des Droits Fondamentaux dans l'Union Européenne*, p. 462.

[256] EU Commission, "Labour legislation in support of job creation", in *Employment and Social Developments in Europe 2015*, European Commission Directorate-General for Employment, Social Affairs and Inclusion, p. 80.

[257] HARVER, M.; MAIER, R.; "Rights over Resources" in Clasquin, B. et al. (eds), *Wage and Welfare. New perspectives on Employment and Social Rights in Europe*, (2004), Brussels: P.I.E/ Peter Lang, p. 203.

[258] CZUCZAI, J.; *The Autonomy of the EU Legal Order and the Law-Making Activities of International Organizations. Some Examples Regarding the Council Most Recent Practice*, (2012), Bruges: European Legal Studies, p. 2.

Treaty level with binding nature came to close EU's legal system and indirectly expanded its regulatory competences.

Fontanelli suggests that fundamental rights compliance at EU level is measured in relation to the Charter and not to international instruments, precisely to ensure the uniformity of EU law application across the Union, otherwise the risk of having 27 different levels of protection would compromise the homogeneity of EU law[259]. This argument is not very convincing as it falls short to take account of the scope of EU law harmonization. Human rights refer both to civil and social rights and precisely the latter in terms of labour rights are excluded by virtue of Art. 153 TFEU which refers to coordination but does not seek uniformity.

CJEU's Opinion 2/13 delivered on 18 December 2014, on the EU's accession to the ECHR summarizes EU's legal stance on human rights protection while raising doubts on its lawfulness. A first striking point is the appeal that "the ECHR should be coordinated with the Charter"[260] and not the other way around. This interpretation read in connection with Court's reiterative recourse to its exclusive jurisdiction and, to the specific characteristics and autonomy of EU legal order[261]. In particular the Court statement of the autonomy of EU law in relation to "international law"[262] contradicts the logic of subordination giving leeway for EU law to compete with international human rights law. The autonomy of EU's legal order is difficult to be maintained from this perspective. It places itself at the same level as international legal order although not being an international instrument, nor an international body to which countries outside EU could adhere.

The rationales behind this opinion is to be found on the higher protection afforded by the ECHR[263] which binding effects upon Member States are admitted by the Court[264]. These same binding effects would apply to EU's institutions[265] meaning that ECtHR would be authorized to assess

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[259] FONTANELLI, F.; "National Measures and the Application of the EU Charter of Fundamental Rights – Does EU Know EU?", in *Human Rights Law Review*, (2014), Vol. 14 (2), p. 240.

[260] CJEU Press release No 180/14, Luxembourg, 18 December 2014, on occasion of CJEU's Opinion 2/13. Also CJEU Opinion 2/13, par. 189.

[261] CJEU Opinion 2/13, pars. 179 ff.

[262] CJEU Opinion 2/13, par. 170.

[263] CJEU Opinion 2/13, pars. 187-189.

[264] CJEU Opinion 2/13, pars. 105 & 155.

[265] DE SCHUTTER, O.; "Anchoring the EU on the ESC: The Case for Accession", in de Búrca, G.; de Witte, B. (eds), *Social Rights in Europe*, (2005), Oxford: OUP, p. 141.

the division of competences between EU and Member States and also repeal EU law[266]. Such fearing reveals the vulnerability of the legal coverage of human rights within the EU system and cannot be detached from the 'integrative approach' adopted by the ECtHR by which it takes into account social matters in its adjudication[267].

To this respect, De Schutter, suggests that accession imposes positive action in EU and secondary law dealing with fundamental rights such as Directives 2000/43/EC or 2000/78/EC prohibiting discrimination might not be in accordance with the ESC provisions or with the scope of protection as referred in ECSR case law[268]. With the no-accession EU legal order is left outside the reach of the ECtHR and eludes the sanctioning of EU for human rights violations. Likewise, claims against Member States to the international Courts should be reduced if EU law is isolated as an order above any other.

The narrow interpretation of Art. 53 CFREU has two important repercussions. First, the Court's arguments create an exclusion clause: CFREU and ECHR are not compatible, nor in content nor in jurisdiction. This places Member States who are signatory of the ECHR and ESC in a difficult position and undermines the effective protection of individuals. Second, it may contravene Treaties' provisions related to the observance of Member States' constitutional arrangements. CJEU's opinion can be explained from the ordoliberal background in which EU law sits[269]. To the extent that state – note that in this sense EU is considered as the state that the Court denies being- respond to economic/market mandates they cannot be made accountable for political and social failures. This view underlies in the Court's opinion when it refers that neither itself nor the acts or omissions of EU institutions can be subject to scrutiny beyond these same institutions[270].

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[266] CJEU Opinion 2/13, pars. 186 & 224.

[267] MANTOUVALOU, V.; "Labour Rights in the European Convention on Human Rights", p. 536 ff.

[268] DE SCHUTTER, O.; "Anchoring the EU on the ESC: The Case for Accession" p. 142. For an analysis of different EU secondary legislation and their compliance with ESC provisions, see: ECSR, *The Relationship between European Union Law and the European Social Charter*, (2014).

[269] See: STREIT M.E., MUSSLER, W.; 'The Economic Constitution of the European Community"; MICKLITZ, H-W.; 'The ECJ Between the Individual Citizen and the Member States", in Micklitz, H-W.; De Witte, B. (eds), *The European Court of Justice and the Autonomy of the Member States*, (2012), Cambridge: Intersentia, p. 356.

[270] CJEU Opinion 2/2013, pars. 230 & 254-258.

From a legal approach, several questions arise: Polakiewicz questions if the far-reaching meaning of the CFREU is pertinent[271]. Some more could be added: does the principle of conferral subsume Member States yielding their human rights obligations? Are EU law basic foundations really those of the constitutional orders of its Member States? To the extent that EU institutions – including Member States – relinquish to CJEU's dictates might they be acting *ultra vires*?[272] Against these questions, Justice Safjan claims for the approximation of constitutional provisions as a matter for EU unification[273]. Nevertheless, the aim and purpose of fundamental rights is not related to harmonization or unification, but empowering individuals and protecting their personal liberty primarily against state authorities[274].

Member States' constitutional traditions enjoy a widespread deference at Treaties level[275]. Furthermore, these integrate the principles of EU law, are a source of influence in CJEU's Case Law[276] and it is presumed that Art. 6.3 TEU and Art. 53 CFREU are the instruments to safeguard the vertical relation established by Human Rights international level with national legislations through Member States' constitutions. By contrast, CJEU's opinion neglects such due respect which is not a minor omission given that national constitutions are the instruments through which individuals will be able to set their human rights claims in the event of violations. As the legal system stands, such violations can only arise from the states whether they act within the framework of their binding international obligations or they are implementing EU law in the

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[271] POLAKIEWICZ, J.; *The Future of Fundamental Rights Protection Without Accession*.

[272] CREMONA, M.; "External Relations and External Competence of the European Union", in Craig, P.; De Burca, G. (eds), *The Evolution of EU Law*, (2011), Oxford: OUP, pp. 220-226 discusses the concept of "implied powers" as the CJEU has developed it. The question is to identify "the specific objective for which internal powers have been granted but for which external powers may be necessary".

[273] SAFJAN, M.; *Fields of Application of the Charter of Fundamental Rights and Constitutional Dialogues in the European Union*, (2014), CJC DL 2014/02, Florence: European University Institute, available at: http://cadmus.eui.eu/bitstream/handle/1814/32372/CJC_DL_2014_02.pdf?sequence=3&isAllowed=y .

[274] POLAKIEWICZ, J.; *The Future of Fundamental Rights Protection Without Accession*.

[275] Arts. 4 & 42 TEU on common security and defense, Art. 48 TEU on revision procedures, Art. 49 TEU on the accession of other Parties, Art. 52 TEU on ratification, as well many others on TFEU.

[276] CJEU Opinion 2/2013, par. 37.

framework of Art. 51.1 CFREU[277]. The principle of conferral, which is implicit in the adoption of the CFREU, does not find accommodation within this situation. The Union, lacking the characteristic of being a state[278] cannot be held responsible in front of its citizens especially as remedies for individual's reparation remain with national jurisdictions.

Both ECtHR and ECSR Case Law seemingly support this affirmation. On the one side, Member States' individuals can still access ECtHR with regards to their complaints "irrespective of whether and to what extent their cases raise questions under EU law"[279]. On the other side, in accordance with the settled Case Law of the ECtHR, states' obligations under Art. 1 ECHR apply to Member States regardless they have transferred their powers to and if so done, the supranational entity to which those have been transferred to is bound to secure that ECHR guaranties are respected. Furthermore, states are responsible to keep under careful scrutiny that the supranational entity so does[280].

The same is valid for matters within the remit of the ESC. The ECSR being aware that social rights in the EU do not enjoy the same level of protection than in the ESC[281] holds that when preparing legislation and when transposing it into national law, Member States remain obliged to comply with the provisions of the ESC[282]. And in the same line, the CFA holds that states having ratified ILO instruments, cannot use other agreements or commitments for non-compliance[283]. Given that national regulatory structures were created on the base of international instruments, infringement directly affects vertical relations, this is, the protection of individuals.

In accordance with Art. 151 TFEU, EU's social policy objectives line up with the ESC and the 1989 Community Charter of the Fundamental Social Rights of Workers in order to improve working and living

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[277] MANTOUVALOU, V.; in *Debating Social Rights*, p. 93.

[278] CJEU Opinion 2/13, par. 193.

[279] POLAKIEWICZ, J.; *The Future of Fundamental Rights Protection Without Accession*.

[280] ECtHR, Case 24833/94 *Matthews v. the United Kingdom*, Grand Chamber, 18/02/1999, par. 32. More recently the same is held in Case 30696/09 *M.S.S. v. Belgium and Greece*, Grand Chamber, 21/01 2011, par. 338.

[281] ECSR, *Confédération générale du travail (CGT) v. France*, Collective Complaint No. 55/2009, Decision on the Merits, 23/June 2010, par. 35.

[282] ECSR, *Confédération française de l'Encadrement CFE-CGC v. France*, par. 30; ECSR, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, Collective Complaint No. 78/2012, Decision on the merits, 7 December 2012, par. 46.

[283] ILO, CFA, Digest of Decisions, (2008), par. 21.

conditions and achieve their harmonization throughout the Union. The fields and scope that would facilitate such attainment are found in Arts. 153 and 156 TFEU under the principle of subsidiarity[284]. In particular, the Declaration on Art. 156 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, reinforces the idea that employment, labour and social security matters remain under Member States competences and are not object of harmonization. Nor does Art. 4.2 TFEU provide exclusive competences to the EU in social policy matters.

A link to the exclusion of EU competences of matters referred to in Art. 153 TFEU: wage, collective bargaining, freedom of association and social security can easily be inferred and to their concomitant fundamental rights enshrined in the CFREU: i.e. fair conditions of work, social security, freedom of association, collective bargaining, protection against unfair dismissal, to name but the most self-evident. This suggests two consequences: on the one side, the adoption of the Charter might not be sufficient basis to support the conferral of powers on social and labour rights. On the other side, the principle of subsidiarity acts as a tool of transforming social rights into social policies[285]. In practice, the effectiveness of the rights are eroded.

Subsidiarity implies a great deal of subjectivity of EU's legislature even if the act is reasoned[286]. Also, the action is geared, towards achieving EU's objectives[287] laid down in Art. 151 TFE regardless that places one or more Member State in a worse position than before the act at issue being adopted[288]. In this line, EU Commission and Parliament, do not have a special interest in having the application of this principle under scrutiny. The former's interest is to have its proposals negotiated and approved by Member States, without involvement of national parliaments. These do have the power of controlling subsidiarity[289], meaning that EU Parliament should yield its competence in favour of

[284] The theoretical limits of the principle of subsidiarity are analyzed in SYRPIS, PH.; *EU Intervention in Domestic Labour Law*, (2007), Oxford: OUP, pp. 88 ff.
[285] SCIARRA, S.; in *Social Rights in Europe*, p. 202.
[286] CJEU, C- 491/01 *British American Tobacco (Investments) and Imperial Tobacco*, 10 December 2002, par. 123.
[287] DAVIES, G.; "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time", in *Common Market Law Review*, (2006), Vol.43 (1), p. 68.
[288] CJEU, C-508/13 *Estonia v Parliament and Council*, 18 June 2015, pars. 44 ff.
[289] Protocol 1 TEU.

national parliaments[290]. It might thus occur that the principle of subsidiarity acts as a regressive tool. Furthermore, matters excluded on Art. 153.5 cannot be interpreted narrowly so to affect the scope and substance of the previous fields in Art. 153 TFEU nor to call into question the aims pursued by Art. 151 TFEU[291] and the provisions of social partners' autonomy as laid down in Art. 152 TFEU[292].

As far as pay is concerned, Art. 153.5 TFEU excludes EU law to fix level but no other related questions. This is so, because "the level of pay falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Art. 151 EC et seq"[293].

All together this suggests a contrary logic. It is difficult to understand how the objectives of improving and harmonizing working and living conditions set forth in Art. 151 TFEU will be achieved if pay level, which is most probably the essential working condition to combat exclusion, is left outside harmonization purposes and is not considered as a fundamental right.

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[290] ROSSI, S.; "Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?", in Biondi, A. et al. (eds), *EU Law after Lisbon*, (2012), Oxford Scholarship Online, p. 96.

[291] CJEU, C-307/05 *Del Cerro Alonso*, 13 September 2007, par. 39; CJEU, C-268/06 *Impact*, 15 April 2008, par. 125.

[292] SCIARRA, S.; *Social Law in the Wake of the Crisis*, (2014), WP CSDLE "Massimo D'Antona".INT – 108/2014, p. 5 available at: http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-INT/20140704-100748_Sciarra-n108-2014intpdf.pdf

[293] CJEU, C-307/05 *Del Cerro Alonso*, pars. 40 & 49; CJEU, C-268/06 *Impact*, par. 122.

PART 2 Comparative Case Study: Norway and Spain Institutional Differences

In the smooth and prudent approach to liberalization adopted by Norway[1] the ability to combine elements of liberal and corporatist economies[2] have played an important role. Norwegian capitalism is characterized by a great presence of the state and by a decentralized public and private structure: economy, public services and collective bargaining. In this sense, it follows a logical path in contrast with the neo-liberal economy that tends to centralize the economic power of multinational companies and decentralize collective bargaining. Labour institutions and the political underpinning of the model are the substantial differences that lead to a balanced model of economy, welfare and labour. Hence the institutional framework of tripartite cooperation emerged as the more salient feature of the welfare state together with the fact that "labour law has been a special discipline with collective agreements as a particularly important and special source of law"[3].

In Spain the main banks, large industrial and service companies and financial sector took the lead of economic liberalization in a context of increasing vulnerability of Spanish governments to external economic pressures[4]. This concurs with a strong change in labour regulation towards the liberalization of labour market, in which social partners barely participate[5] resulting in the raise of unemployment and the

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1 MAILAND, M.; "Change and Continuity in Danish and Norwegian Capitalism: Corporatism and Beyond", in Becker, U. (ed), *The Changing Political Economies of Small West European Countries (Changing Welfare States)*, (2012), Amsterdam: Amsterdam University Press, p.79.

2 DØLVIK, J.E.; *Welfare as a Productive Factor. Scandinavian Approaches to Growth and Social Policy Reform,* (2016), Fafo-paper 2016:01, p. 19.

3 NIELSEN, R.; *EU Labour Law*, (2013), Copenhagen: Djøf Publishing, p. 109

4 MOLINA, O., RHODES, M.; "The Political Economy of Adjustment in Mixed Market Economies: A Study of Spain and Italy", in Hancké, B. et al. (eds), *Beyond Varieties of Capitalism. Conflict, Contradictions, and Complementarities in the European Economy*, (2007), Oxford: OUP, p. 240; The same but in a general context is suggested by: CROUCH, C.; in *Civic Capitalism*; PIKETTY, TH., (trans. Goldhammer, A.); *Capital in the Twenty-First Century,* pp. 66-67. Similarly, SOMAVÍA, J.; *From Precarious Work to Decent Work*, (2012), Speech in ACTRAV, pp. 9-11; RODRIK, D., *The Globalization Paradox: Democracy and the Future of the World Economy*; Hall, P.A., Soskice, D. (eds), *Varieties of Capitalism*.

5 GONZALEZ, S., LUQUE, D.; "Crisis Económica y Deterioro de los Pactos Sociales en el Sur de Europa: Los Casos de España y Portugal in *Revista Internacional de Sociologia*, (2015), Vol. 73 (2), pp. 7-8.

declining of the welfare state. In the literature, this problem is linked to EU membership[6] in which the liberal economic orientation prevails over the social interests.

This section seeks to understand the institutional contexts framing the collective bargaining ability to develop and produce different social outcomes with the ultimate aim to explain the pervasiveness of EU's policies.

SECTION I. Theoretical Framework: Models of Political Economies and Welfare

The study of the institutional structure can be undertaken from several perspectives depending on the elements under analysis. Following the human rights approach adopted as the basis of this project, the line of argument revolves around the role of the different actors, with the main focus on the state, in the shaping of welfare. To this purpose, we have chosen within the comparative literature on welfare models Esping-Andersen's[7] approach. On its turn, welfare is closely interrelated with the industrial relations structure that are largely influenced by the politico-economic institutions governing a given nation. Therefore, the appropriate theoretical framework where to underpin the comparison of the Norwegian and Spanish models must take into account the institutional setting of the political economies where actors develop their activities. To these purposes we have chosen Hall & Soskice's[8] approach.

Being aware that any choice leaves behind other attributes equally interesting, and that typologies cannot fully explain the wide range of interactions within the different institutions, we believe that the selected approximation has two benefits of relevance for this project; first, both are based on the differences of the models. This paves the way for the project to study how these differences work in the specific models and to understand their outputs. Second, both works of reference complement each other in that *Varieties of Capitalism* is concerned on how the relations between the market actors influence the economic model and

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6 See, i.e.: MEARDI, G.; "The (Claimed) Growing Irrelevance of Employment Relations", in *Journal of Industrial Relations*, (2014), Vol. 56 (4), p. 60; BARNARD, C., "The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective", p. 106.

7 ESPING-ANDERSEN, G.; *The Three Worlds of Welfare Capitalism*.

8 Hall, P.A., Soskice, D. (eds), *Varieties of Capitalism.*

the *Three Welfare Models* integrates into the study of welfare systems the interactions of these actors from the politico-economic perspective.

1. The Three Models of Welfare Capitalism Approach

Each welfare system is a unique social construct operating at national level through social security systems that translate the core values to which any given society adheres[9]. The redistributive extend, however, largely depends on the ability of the institutional structure to forge inclusive alliances supporting policies that take the losers back into the system[10].

In the *Three Worlds of Welfare Capitalism*, Esping-Andersen assumes the welfare state as a system of stratification and an active force of ordering social relations[11] defined by the interaction between state, economy and the social structure. From this interaction, he draws three welfare regimes: liberal, conservative and social-democratic, according to their respective de-stratification abilities. Stratification in Esping-Andersen's theory is linked to the concept of de-commodification of labour understood as the provision of welfare rights leading to social equality.

The author contends that the historical institutional legacy of nations shape welfare in different ways, according to the structure of political power. In nations dominated by liberalism, with low state's involvement in economy and a concomitant labour power unable to influence national political economy, welfare systems show high degrees of equality. In the conservative regimes, the mobilization of the political left succeeded to obtain a "considerable modicum of rights"[12] from the state and the Church that notwithstanding kept their strong social control. As a result, these regimes show a higher degree of equality than liberal but lower than social-democratic regimes. The reason is that the latter welfare regimes are mainly feed in a tradition of social democracy political dominance with high political and social influence of the labour movement.

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9 MARHOLD, F., "Fundamental Values and Interests in Social Security Law in the Consideration of Changing Employment", in Kiss, G. (ed), *Recent Developments in Labour Law*, (2013), Budapest: Akadémiai Kiadó.

10 IVERSEN, T., SOSKICE, D.; "Redistribution and the Power of the Advanced Nation State", in Dølvik, J.E., Martin, A. (eds), *European Social Models from Crisis to Crisis. Employment and Inequality in the Era of Monetary Integration*, (2014), Oxford Scholarship On line, p. 287.

11 ESPING-ANDERSEN, G.; *The Three Worlds of Welfare Capitalism,* p. 23.

12 ESPING-ANDERSEN, G.; *The Three Worlds of Welfare Capitalism,* p. 51.

If one looks at the provision of benefits, the reasons and outcomes of stratification mirror those of de-commodification: 'Liberal regimes' believe that benefits must reflect market inequalities and are therefore characterized by residualism and dualism of benefits. Using means-tested and stigmatized relief for 'market failures' these regimes rely on private market welfare for more advantaged groups[13] while social policies are supposed to cover states of need. 'Conservative regimes' are not concerned with redistribution, rather than with maintaining the hierarchy and differential status. Social policies are linearly designed to maintain class and status differences. Finally, 'social democratic regimes' seek to extend social rights and are guided by the principle of solidarity. Hence, policies tend to establish universalistic entitlements based on average standards.

In a latter work, *Social Foundations of Postindustrial Economies*[14] Esping-Andersen includes the relation between welfare and industrial relations as a distinctive factor of welfare stratification. Liberal regimes are characterized by low coverage and low centralization of unionism with the result of more segmentation, dualism and hence inequality. Given that welfare in these regimes is residual and highly privatized, social redistribution will not cover market inequalities. In contrast, universal welfare goes hand in hand with centralized trade unionism and high coverage leading to more equality since the co-ordinated bargaining system allows for wage-equalization, full employment and growth[15] thus creating higher efficiency on the distribution of resources and homogeneity between social classes. These are features associated with the social-democratic model, while the conservative model does not present a particular pattern on its own.

Esping-Andersen's classification has been subject to a large scrutiny[16] and the author himself acknowledges that there is no a pure model. In *Social Foundations of Postindustrial Economies* he re-visits the models and

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13 O'CONNELL, P.J.; "The Three Worlds of Welfare Capitalism. Book Review", in *Social Forces*, (1991), Vol. 70 (2), pp. 532-533.

14 ESPING-ANDERSEN, G.; *Social Foundations of Postindustrial Economies*, (1999), Oxford: OUP.

15 ESPING-ANDERSEN, G.; *Social Foundations of Postindustrial Economies,* p. 16.

16 See, i.e: BORSENBERGER, M., ET AL.; "Welfare Regimes and Social Cohesion Regimes: Do They Express the Same Values? ", in *European Societies*, (2016), Vol. 18 (3); LYLE A. ET AL.; "Social Stratification and Welfare Regimes for the Twenty-first Century: Revisiting the Three Worlds of Welfare Capitalism", in *World Politics*, (2008), Vol. 60, (4), p. 643 for a comprehensive account.

suggests an alternative way to classify welfare regimes by pinpointing their dominant approach to: 1) managing social risks within labour markets. This is, according to the regulatory and non-regulatory course ranging from weak, medium and strong regulation. 2) The state's welfare policies in terms of residual, universalistic or social insurance models and, 3) the family, this is, whether families are meant to be the primary locus of welfare. He observes that the case for Southern Europe regimes depends ultimately on the centrality of families, which was "the weak link in the original 'three worlds' model"[17]. Despite of this, he considers that the "three models" still respond to his aim of understanding the big picture of welfare systems.

From a general point of view, Norway belongs to the social democratic regime and Spain features as a conservative regime. However, Spain is better defined by a fourth model: the *Mediterranean Regime*, proposed by Ferrera[18] or Leibfried[19]. Its main characteristics are a late modernization, low civil society mobilization and authoritarian political regimes. The low level of social transfers is partly counterbalanced by the strong supportive role of family networks. Social policies in this Southern model are characterised by particularistic and clientelistic traits[20]. This makes the Mediterranean model the less efficient of the models. In contrast, the Nordic model returns more equity and efficiency by providing incentives to a greater number of working population[21].

If we accept that inequality is one measure for testing welfare systems' efficiency, the precedent affirmation is confirmed in the Inequality-Adjusted Human Development Index (IHDI)[22]: Norway scores first in the UN IHDI while Spain scores twenty-seventh[23]. Obviously, there are

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17 ESPING-ANDERSEN, G.; *Social Foundations of Postindustrial Economies,* p. 92.

18 FERRERA, M.; "The 'Southern Model' of Welfare in Social Europe", in *Journal of European Social Policy*, (1996), Vol.6 (1), pp. 19-20.

19 LEIBFRIED, S.; "Towards a European Welfare State?" in: Pierson, C., Castels, F.G. (eds), *The Welfare State Reader*, (2006), Cambrige: CPP, pp. 190-206.

20 FERRERA, M.; "The 'Southern Model' of Welfare in Social Europe".

21 SAPIR, A.; *Globalisation and the Reform of European Social Models,* (2005), Policy Contribution presented to the ECOFIN informal meeting in Manchester, 8th September 2005, available at: http://bruegel.org/wp-content/uploads/imported/publications/pc_sept2005_socialmod.pdf

22 PIKETTY, TH., (trans. Goldhammer, A.); *Capital in the Twenty-First Century*, p. 243, warns about the misleading approach of some inequality indexes. Accepting Piketty's critiques, for the purposes of this section the index used provides a sufficiently descriptive picture.

23 Source : http://hdr.undp.org/en/composite/IHDI , Inequality-adjusted Human Development Index, last accessed 17/09/2017.

many other economists that oppose the Scandinavian model. For all, Acemoglu[24] is probably the most critical with the general economic model followed by Nordic countries arguing that there is an alleged equilibrium in the world and that if some countries can afford themselves high welfare states and lower inequality is because some others have promoted models of innovation technology that increase inequality and reduce welfare. Probably this is not the most convincing way to advocate for inequality but…

2. Politico-Economic Models: Varieties of Capitalism

The Varieties of Capitalism approach, "distinguishes among capitalist economies by reference to the means firms and other actors use to coordinate their endeavors"[25]. The theory is based on the premise that in order to solve relational problems firms tend to "gravitate toward the mode of coordination for which there is institutional support"[26]. On this background Hall and Soskice suggest that national political economies can be differentiated between: liberal market economies (LME) and coordinated market economies (CME). The former is characterized by firms' reliance in hierarchies and competitive market arrangements for coordination purposes while in the latter, relations are managed through non-market strategic interaction between firms and other actors.

Supportive institutions for coordination in liberal market economies are primarily markets, hierarchies and the accompanying legal system that secures formal contracting. Correlated institutions in coordinated market economies, are on the one side, those enabling for information exchange, monitor and sanctioning the behaviours that are relevant for the development of coordination between firms and actors. And, on the other side, institutions that promote and facilitate negotiations between the actors in order to reach agreements. In each economy, these institutions tend to operate in a complementary way in the different spheres of the economy. This is, the presence or efficiency of one increases the efficiency of the other; what the authors call 'institutional complementarities'.

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[24] ACEMOGLU, D. ET AL.; *Can't We All Be More Like Scandinavians? Asymmetric Growth and Institutions in an Interdependent World*, (2012), NBER Working Paper No. 18441.

[25] HALL, P.A., GINGERICH, D.W.; *Varieties of Capitalism and Institutional Complementarities in the Macroeconomy. An Empirical Analysis*, (2004), MPIfG Discussion Paper 04/5, Max Planck Institute for the Study of Societies: Cologne, p. 9.

[26] HALL, P.A., SOSKICE, D; "Introduction", in *Varieties of Capitalism,* p. 9.

Industrial relations provide a good example: In LMEs market competition leads to employer-employee individual agreements, easy fire and hire and, the concomitant lack of powerful trade unions makes collective wage setting difficult. In these economies, macroeconomic policies and market competition are the usual ways to control wages and inflation. Employment is a matter of risk for the individual worker who is supposed to invest in his/her skills in order to be employable. Conversely, in CMEs the existence of powerful unions and employers' organizations allow for setting wages in a coordinated way that bind all members. This way of bargaining across the economy, limits the inflationary effects of wage settlements[27] and requires lower intervention of national policy. Furthermore, the presence of strong trade unions also secures working conditions and in compensation encourages employees to invest in company-skills, resulting in long-term employment.

Institutional complementarities also influence public policies in each model differently. Hall and Soskice argue that the chances for states to adopt suitable politico-economic policies to each model depend on the information available. In LMEs business are reluctant to share information with governments because of competition issues, mainly due to the fact that business do not have enough political influence to sanction governments. Accordingly, in LMEs states are left with limited policy instruments to support coordination activities, thus the general policy pattern in these economies is governed by tax incentives, government subsidies and deregulation – as synonymous of liberalization - as the most effective way to improve coordination.

In CMEs the existence of strong businesses, unions and other organizations plays a double role. On the one hand, the climate of trust between them and the non-market based mode of coordination do not make necessary to share information with governments. These organizations are independent, able to monitor and sanction their members, and thus can effectively administer a policy framework for coordination. On the other hand, organizations in CMEs tend to have political influence enough to mobilize a serious constituency if they need to sanction the government.

In the VoC approach, welfare states are supposed to mirror political economies. The individual way of managing labour-business relations in LME suggests that liberal welfares are prone to establish means-tested and low benefits level. The rationales behind is that market competition

[27] HALL, P.A., SOSKICE, D; "Introduction", in *Varieties of Capitalism,* p. 25.

does also involve worker competition in order to make him/her adjust his/her abilities in line with the changing businesses' needs. Precisely because of this dynamic nature of business, employment relation is unstable and labour market populated with workers without the skills that firms demand. Firms transfer to the state the provision of welfare benefits and state disciplines individuals' failures through lowering benefits.

Generally speaking businesses' operations in CMEs require workforce to be equipped with high levels of industry-specific skills. It is incumbent on the individual worker to secure these skills, but given the risk that changing employment entails, companies offer generous replacement schemes that "help to assure workers that they can weather an economic downturn without having to shift to a job in which their investment in specific skills does not pay off"[28].

The authors present their VoC theory as a continuous variation in which countries such as US, Australia, among others, lay in one end of the spectrum as LME and, Norway or Belgium lay at the other end as CME with a wide range of variations in between. They do find that both, LME and CME seem capable of providing satisfactory levels of long-run economic performance. The most relevant difference lies on the systematic variation on innovation capacities and distribution of income and employment. While LME create higher levels of income inequality, CME patterns provide shorter working hours and more income equality.

There is vast literature suggesting that the institutional approach does not suffice to explain the success of other varieties that do not follow the patterns of the two models[29]. Other factors such as the organization of production systems[30], the role of the state[31], or the political culture and

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[28] HALL, P.A., SOSKICE, D; "Introduction", in *Varieties of Capitalism,* p. 51.

[29] HAY, C.; "Common Trajectories, Variable Paces, Divergent Outcomes? Models of European Capitalism under Conditions of Complex Economic Interdependence" in *Review of International Political Economy*, (2004), Vol. 11 (2).

[30] BRUFF, I.; "What about the Elephant in the Room? Varieties of Capitalism", in *New Political Economy*, (2011), Vol.16 (4).

[31] MARTIN, C.J.; THELEN, K.; "The State and Coordinated Capitalism: Contributions of the Public Sector to Social Solidarity in Postindustrial Societies", in *World Politics*, (2007), Vol. 60 (1); ROYO, S.; *Varieties of Capitalism in Spain. Remaking the Spanish Economy for the New Century*, (2008), New York: Palgrave MacMillan.; HANCKÉ, B. ET AL; "Introduction: Beyond Varieties of Capitalism", in Hancké, B. et al. (eds), *Beyond Varieties of Capitalism. Conflict, Contradictions, and Complementaritoes in the European Economy*, (2007), Oxford: OUP. The chapter also provides a summary of the main critiques of the VoC theoretical framework.

rules of conduct in which actors interact[32] do also need to be taken into account in the analytical framework.

According to Molina and Rhodes[33] Spain, and Italy qualify as mixed market economies (MME) the main characteristics whereof are: "fragmented production systems by small/large firms, public-private and territorial divides". Under Hancké et al.[34] Spain qualifies as a Mediterranean or mixed economy (MME) characterized by an important role of the state. In a similar vein, Hamann[35] considers that the VoC approach with its focus on employers cannot provide explanations on the variations of the models where other actors play also central roles and also because it cannot explain the existence of sporadic social pacts between union and governments in MMEs as Spain or it can neither explain the role of unions on these economies.

This makes that the logic and forms of coordination in these economies substantially differ from the models proposed by Hall and Soskice because of the "organizational fragmentation and politicization of interest associations and the greater role of the state as a regulator and producer of goods". In these countries, institutional complementarities cannot be found since labour relations are coordinated through liberal institutions that decentralize the bargaining power of workers, while finance is governed by institutions of non-market coordination that tend to centralize the economic power of multinational companies producing a power imbalance that breaks the economic loop.

Following the VoC models Norway would feature as CME: the interaction between business and workers is mainly held by strong organizations in both sides, in a climate of mutual trust and abidance.

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32 HIPPE, J. ET AL; *The Nordic Model Towards 2030. A New Chapter*?, (2014), NordMod2030. Final report, p.22; BERGENE, A.; HANSEN, P.; "A Historical Legacy Untouched by Time and Space?: The Hollowing-out of the Norwegian Model of Industrial Relations", in *Nordic Journal of Working Life Studies*, (2016), Vol.6 (1), p. 12; BIELER, A.; "Small Nordic Countries and Globalization: Analysing Norwegian Exceptionalism", in *Competition and Change*, (2012), Vol. 16 (3), p. 225.

33 MOLINA, O., RHODES, M.; in *Beyond Varieties of Capitalism*.

34 HANCKÉ, B. ET AL; "Introduction: Beyond Varieties of Capitalism", in Hancké, B. et al. (eds), *Beyond Varieties of Capitalism. Conflict, Contradictions, and Complementaritoes in the European Economy*, (2007), Oxford: OUP, p. 28.

35 HAMANN, K.; *The Politics of Industrial Relations: Labor Unions in Spain*, (2012), New York: Routledge, p. 226.

However, Mainland[36] proposes that the decentralised, network-based and learning-oriented version of a coordinated market economy that Norway represents is better defined by the concept of Negotiated Economy (NE). NE does not mean centralized corporatism, it also can adopt a decentralized form whereby facilitating mobilization of consensus around 'the national strategies for international competitiveness'[37]. This requires a great deal of flexibility by the actors involved in accepting changes which have been possible through the consolidation of the main elements of the system, i.e. collective bargaining, tripartite cooperation and universal welfare state[38].

SECTION II. Differences on Welfare Shaping

To a large extent the shaping of the Norwegian welfare system fits within the social-democratic model described by Esping-Andersen while the Spanish foundations remain still today anchored in the conservative model. In the Nordic literature, it is often claimed that the political underpinning of the system has its roots in the power mobilization of people to break with historical determinants to construct a democratic society with balanced core interests[39]. Extremely poor farmers had to struggle to gain support by their own and overcome poverty[40]. From this view, social mobilization is an element quite strange in the Spanish welfare construction for two reasons. First and foremost, because its conservative roots, mainly the social control exerted by the state and the church, made it highly difficult for people to organize and mobilize.

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36 MAILAND, M.; in *The Changing Political Economies of Small West European Countries,* p. 74.

37 CAMPBELL, J.L., PEDERSEN, O.K.; "The Varieties of Capitalism and Hybrid Success: Denmark in the Global Economy", in *Comparative Political Studies,* (2007), Vol. 40 cited in MAILAND, M.; in *The Changing Political Economies of Small West European Countries,* p. 92.

38 MJØSET, L., CAPPELEN, A.; in *The Nordic Varieties of Capitalism*, p. 248.

39 GUSTAVSEN, B.; "The Nordic Model of Work Organization", in *Journal of the Knowledge Economy*, (2011), Vol.2 (4), p. 465; HIPPE, J. ET AL; *The Nordic Model Towards 2030*, p. 23. In a similar vein, BIELER, A.; "Small Nordic Countries and Globalization: Analysing Norwegian Exceptionalism", p.225, contains that class struggle is also a factor to take into account in the analysis of models. TERJESEN, E.A.; "Radicalism or Integration: Socialist and Liberal Parties in Norway, 1890–1914", in Hilson, M., et al. (ed), *Labour, Unions and Politics under the North Star. The Nordic Countries, 1700-2000,* (2017), New York: Berghahn.

40 TERJESEN, E.A.; in *Labour, Unions and Politics under the North Star. The Nordic Countries, 1700-2000*.

Second, because organizations as church, guilds or even family provided the basic support so that people adopted a more passive stance in terms of involving themselves in vindication purposes.

Norway's first agreement between capital and labour, signed in 1935 pressed the state to get responsibility for universalistic welfare[41]. At that time, Spain was under the dictatorship regime characterized by minimum social expenditure and by the political (little social power) and economical (low wages) subordination of labour[42]. Mobilization was politically impossible but the regime also took care to provide basic passive welfare as a way to prevent social claims.

The presence of powerful strategic actors; employers and workers organizations as well as political parties has been a constant in Norway, resulting in a power balanced structure that facilitates class-coalition building and at the same time limits the power and influence of other interest groups[43]. Given that actors represent core societal interests, consensus is a must and negotiations and agreements are frequent, leading to flexible policies the implementation and communication to the society whereof is participated by those who have negotiated them in order to ensure social support[44]. On this basis, welfare policies have been

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41 ØSTERUD, Ø.; "Introduction: The Peculiarities of Norway", in *West European Politics*, (2005), Vol.28 (4), p. 707; LYNGSTAD, R.; "The Welfare State in the Wake of Globalization: The Case of Norway", in *International Social Work*, (2008), Vol. 51 (1), p. 71; A historical account of the development of industrial relations in the political context of Norway can be found in: HEIRET, J.; "Three Norwegian Varieties of a Nordic Model – A Historical Perspective on Working Life Relations", in *Nordic Journal of Working Life Studies*, (2012), Vol. 2 (4).

42 SOLA, J.; "El Legado Histórico Franquista y el Mercado de Trabajo en España", in *Revista Española de Sociología*, (2014), Vol. 21, p. 106.

43 CHRISTENSEN, T.; "Narratives of Norwegian Governance: Elaborating the Strong State Tradition", in *Public Administration*, 2003, Vol.81 (1), p. 166; HEMERIJCK, A.; "Corporatist Governance, the Welfare State and European Integration", in Davids, K., et al. (eds), *Changing Liaisons: The Dynamics of Social Partnership in 20th Century West European Democracies*, (2009), Brussels: Peter Lang, pp. 34-36

44 DØLVIK, J.E; in *European Social Models from Crisis to Crisis,* p. 251; LYNGSTAD, R.; "The Welfare State in the Wake of Globalization: The Case of Norway", p. 77; HIPPE, J. ET AL; *The Nordic Model Towards 2030*, p. 46 contains that emerging populist parties in Norway base their policies on a strong defence of welfare state solutions, particularly those that serve the population's national majority.

in continuous development, seeking broader equality trough non-market mechanisms[45].

None of the above elements can be found in the Spanish system. To start with, political coalition is not in the conservative model's culture. In Spain, this is a salient feature, as group interests – political parties and economic groups – have dominated society and politics since 1808[46]. In practice party interests predominate over national concerns creating a vicious circle: the governing party does have the monopoly of power while social actors are fragmented, do have weak power[47] and no political influence. Class-coalitions are almost impossible to develop and negotiation and consensus has been possible only in few *ad-hoc* situations[48], limiting their steady and stable participation in tripartite pacts[49] and excluded them from making major inputs into social issues (e.g. pensions)[50]. Linked to the political structure is the dominant trait that separates Spanish welfare vis-à-vis the conservative model: the existence of clientelistic relations that encourages the exchange of votes by welfare benefits[51].

Obviously, these institutional frameworks have marked the targets and coverages of each welfare system in quite opposite directions. In Norway welfare state is understood as a collective way of solving problems. In other words: a tool for societal stabilization geared towards equalization. Hence, establishing a universal welfare publicly provided on a redistributive basis has been a target shared by all actors[52]. Universality,

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45 LYLE A. ET AL.; "Social Stratification and Welfare Regimes for the Twenty-first Century", p. 645.

46 ESDAILE, CH. J.; *Spain in the Liberal Age: from Constitution to Civil War, 1808-1939*, (2000), Oxford: Blackwell, p. 385. A complete history of the period between 1808 and 1939 can be found in it.

47 MOLINA, O.; RHODES, M.; "The Reform of Social Protection System in Mixed Market Economies", in *Pôle Sud* (2008), Vol.1 (28), p. 19.

48 HAMANN, K.; *The Politics of Industrial Relations: Labor Unions in Spain*, p. 230.

49 ROCHA, F.; "Crisis and Austerity Policies in Spain: towards an authoritarian model of industrial relations", in Rocha, F. (coord); *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems*, (2014), Madrid: Fundación 1o. de Mayo, p.201.

50 MOLINA, O.; RHODES, M.; in *Beyond Varieties of Capitalism*, p. 245.

51 FERRERA, M.; "The 'Southern Model' of Welfare in Social Europe",pp. 19-20.

52 See: LYNGSTAD, R.; "The Welfare State in the Wake of Globalization: The Case of Norway", for an account of welfare developments in Norway; PONTUSSON, J.; "Once Again a Model: Nordic Social Democracy in a Globalized World", in Cronin, J.E., et al. (eds), *What's Left of the Left:*

notwithstanding, is not free of individual responsibility. Since the system relies in high employment rates and high salaries to secure funding and curb rising expenditures[53] welfare is built as an enabling mechanism to allow individuals back to the labour market as soon as possible. Thus, the protective function does not obtain.

The Norwegian welfare combines liberal individualistic attributes[54] within the collective responsibility wielded by the state on a universal basis. In other words, welfare policies are embedded in the general purpose of helping the economy and the society to cope with risks and to adapt to new requirements[55]. This model of welfare-cum-work sets working obligations on the individuals, making emphasis on benefit sanctions and tightening the eligibility rules. The policies based on training, subsidized employment and other re-employment chances are subject to changes to income prioritization if unemployment or crisis so request[56]. The overall objective is that conditionality serves as an alternative to cuts in benefits. This so called "work line', which was launched by 1960s in Scandinavia, gradually lost momentum, but was reinstated during the economic crisis of 1990s, is currently supported by mainstream parties, employers, and unions[57].

Seen from an historical perspective, welfare in Spain has been used as tool for societal stabilization as well. However, its ultimate target has not been equalization, rather than the social control. Conceptually, the Spanish welfare system is understood as a protection mechanism of passive support, characterized by stratification: public and private employees receive in principle generous benefits while in small enterprises, agricultural, traditional services, the young, long term unemployed and informal economy, benefits are especially lower[58]. The long list of 'special' social security regimes existing within the welfare state embody such stratification and evince the lack of modernization and simplification of the system.

Democrats and Social Democrats in Challenging Times, Durham, N.C: Duke University Press

53 DØLVIK, J.E.; *Welfare as a Productive Factor*, p. 36.

54 See GUILLEMARD, A.M.; in *Social Rights, Active Citizenship and Governance in the European Union*, pp.38-39.

55 ANDERSEN, T.M. ET AL.; *The Nordic Model. Embracing Globalization and Sharing Risks*, (2007), Helsinki: The Research Institute of the Finnish Economy (ETLA).

56 MAILAND, M.; in *The Changing Political Economies of Small West European Countries*, p.86.

57 DØLVIK, J.E.; *Welfare as a Productive Factor*, p. 19.

58 FERRERA, M.; "The 'Southern Model' of Welfare in Social Europe".

Conditions to access and benefits levels are set somehow hierarchically or status based according to the profession and still, within each profession to the job position. Just to outline the main structure: Four main social security schemes exist: 1) the so called general, for paid employees, 2) self-employed, 3) coal industry and 4) sea workers. Artists and bullfighting professionals have each different treatment within the general scheme. Domestic employees or agricultural workers each belong to other different schemes within the first, and so the system goes on[59].

Health insurance is the only truly universal benefit. The main reason is that welfare does not espouses full employment but has a traditional passive character linked to sustained high unemployment levels for which the reliance in the protective function of welfare is crucial, creating the syndrome of "welfare without work"[60]. Attempts to implement activation labour market policies have been done, but their effectiveness has been constrained by two main reasons: First, and foremost by the weak capacity of employers and unions for joint coordination and provide appropriate technical and vocational training enabling workers to adapt their skills. Second, policy initiatives unilaterally adopted by the party in office on the flexibilization of the labour market and the extension of temporary employment for maintaining income levels rather than training and skills enhancement, as well as using subsidized employment as an active labour market measure[61].

Despite that the Spanish social expenditure has always ranked below the EU average, conceptually welfare in Spain is moving from passive and paternalistic to residual liberal welfare for targeted groups[62] in order to

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59 See: The Spanish Social Security in http://www.seg-social.es/Internet_6/Trabajadores/CotizacionRecaudaci10777/Regimenes/index.htm (in English) for an understanding of the system.

60 HEMERIJCK, A.; EICHHORST, W.; *Whatever Happened to the Bismarckian Welfare State?,* p. 16.

61 MOLINA, O., RHODES, M.; in *Beyond Varieties of Capitalism*, pp.238-239.

62 PAVOLINI, E.; "From Austerity to Permanent Strain? The EU and Welfare State Reform in Italy and Spain", in *Comparative European Politics*, (2015), Vol. 13 (1), pp. 60-61. For an explanation of the Spanish welfare evolution see: MUÑOZ DE BUSTILLO, R., ANTÓN, J.I; "Turning back before Arriving? The Weakening of the Spanish Welfare State, in Vaughan-Whitehead, D. (ed), *The European Social Model in Crisis. Is Europe Losing Its Soul?*, (2015), Elgaronline, pp. 452-462. For a critical assessment of Spanish welfare state see: NAVARRO, V.; *El Subdesarrollo Social de España*, (2006), Barcelona: Anagrama.

fulfil EU's Stability and Growth Pact (SGP) mandates[63]. The blossoming premises launched from the political parties are that social rights are to be 'reserved' for the least advantaged and risks related to employment i.e.; pensions, unemployment and the like are to be individually assumed on a private basis, without being seriously contested socially. It is questionable whether these changes are reducing the incidence of social expenses[64] because, as mentioned above, the clientelistic relations that are embedded in the Spanish institutional framework require keeping voters subsidized.

One of the drawbacks of the Norwegian system is its high administration costs. However, a strong and costly public administration, including government, legislation and administration is essential to organize and distribute the welfare state[65], especially in a universal coverage system based on activation policies that requires the participation of individuals to benefit from the collective. This participation is what determines the extent and the allocation of the resources. Hence, administration must be trustful, cooperative, close and transparent to create the necessary sense of community and to legitimately enforce the individual obligations.

That is the reason for the welfare decentralization in Norway. Welfare policies are negotiated at national level, but it is considered that redistribution at regional and local levels enhances their effectiveness. Decentralization is possible because the institutional setting provides for rules of conduct that ensure trust and compliance between actors at all levels. A number of tripartite bodies, in which social partners do also have influence[66], are in charge of welfare matters. From the work line perspective, the negative impact on state's expenses is counterbalanced by the positive impact on employment.

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63 COSTAMAGNA, F.; "The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy", in Adams, M. et al. (eds), *The Constitutionalization of European Budgetary Constraints*, (2014), Hart Publishing on Line, p. 375; MUÑOZ DE BUSTILLO, R., ANTÓN, J.I; in *The European Social Model in Crisis. Is Europe Losing Its Soul?*, p. 457.

64 See: LYLE A. ET AL.; "Social Stratification and Welfare Regimes for the Twenty-first Century", pp. 663-664.

65 EICHENHOER, E.; "Social Security as a Human Right: A European Perspective", in Pennings, F., Vonk, G., (eds), *Research Handbook on European Social Security Law*, (2015), Cheltenham: Edward Elgar Publishing Ltd, pp. 12-13.

66 MAILAND, M.; in *The Changing Political Economies of Small West European Countries*, p. 86; ØSTERUD, Ø.; "Introduction: The Peculiarities of Norway", p. 715.

The continuity of the Norwegian model has its ills and erosion is a threat[67]. Being conscious of this, main Norwegian employers and unions associations recently advocated to renew and strengthen their social partnership. The rationales behind was that both parties had to contribute side by side with the state to appropriately handle the current challenges facing Norway's economy, i.e.; the declining oil revenues or the digital economy among others[68].

SECTION III. Differences in Industrial Relations Contexts

The dichotomy individualization versus collectivization can be translated in terms of labour law to employment relations versus industrial relations[69]. This notwithstanding, the concept of industrial relations conveys a wider set of interconnected institutions and exchanges that cannot be modified in isolation without causing a cascade effect, specially over the welfare state. Furthermore, industrial relations "are conceived as having broader political and social implications, for instance on equality, stability and democracy"[70].

In the last decades, industrial relations have lost a great deal of their political importance as a consequence of the prioritization of economic issues at national level. Social matters have been detached from the negotiations of social partners and brought into the economic sphere[71],

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67 See, i.e.: BERGENE, A.; HANSEN, P.; "A Historical Legacy Untouched by Time and Space?".

68 DØLVIK, J.E.; *Welfare as a Productive Factor*, pp. 36 ff. Critical journalist comments can be found in: *Aftenposten*, 9/01/2016, available at: http://www.aftenposten.no/meninger/leder/Norge-er-mer-enn-NHO-og-LO-15332b.html (in Norwegian); *Revolusjon*, available at : http://www.revolusjon.no/teori-og-analyse/teori/index.php/?option=com_content&view=article&id=1806:baere kraftig-solidaritet-med-nho&catid=77&Itemid=68 (in Norwegian).

69 RÖNNMAR, M.; "Labour law in the Courts. The role of European case law on fundamental trade unions rights in an evolving EU industrial relations system", in Neergaard, U. et al. (eds), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives,* (2010), Copenhaguen: DJØF Publishing.

70 MEARDI, G.; "The (Claimed) Growing Irrelevance of Employment Relations", p. 597.

71 MEARDI, G.; "Les Relations Professionnelles Européennes Sous Pression Internationale: Une Comparaison de Six Pays ", in *La Revue de l'IRES*, (2013), Vo. 74 (3), p. 36.

causing an important destabilization in the systems. Spain has been notably hit by the dismantling of its already weak labour relations. In comparing Norway and Spain institutional framework, this section seeks to explain how the Spanish context facilitated the transformation.

1. Coordination as a Way for Balancing Social and National Economic Interests

Industrial relations models are the result of "the underlying capitalist social relations of production and the way in which they shape the balance of power between capital and labour"[72]. In his *Industrial Relations Systems* theory, John T. Dunlop in the 1950s, shows that an industrial relations system involves three actors: state, employers and employees and/or their representatives. These relations are shaped by a network of rules governing three contexts: technical, market and, power-status[73] in which the state should, ideally, play a facilitating role for the labour market actors to coordinate their activities through regulation and administration agencies. A set of ideas and values shared by the actors make the system work in integration. This means that state traditions, as suggested by Crouch[74] can also explain the differences between industrial relations models. Hamann[75] and Hyman[76], in similar terms, they content that the state is the actor that shapes such balance through regulations and policies that built the structure of unions and hence their ability to participate in industrial relations.

The theoretical explanations of the role of the state in industrial relations can be complemented with the coordination function, not only in the sense of Hall and Soskice's theory, but also to ensure that agreements between labour and capital are implemented and become effective. What follows compares industrial relations in Norway and Spain underpinning on the coordination element as the means to achieve effective collective bargaining.

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72 BIELER, A.; "Small Nordic Countries and Globalization: Analysing Norwegian Exceptionalism", p. 225.

73 RÖNNMAR, M.; in *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives*, p. 171.

74 CROUCH, C.; *Industrial Relations and European State Traditions*, (1993), Oxford: OUP.

75 HAMANN, K.; *The Politics of Industrial Relations: Labor Unions in Spain*, p.11.

76 HYMAN, R.; "The State in Industrial Relations", in Blyton, P. et al. (eds), *The SAGE Handbook of Industrial Relations,* (2008), London: SAGE Publications Ltd, p. 262. Hyman prefers to refer to 'government' instead of state.

Coordination operates in different directions, horizontal and vertical, and at different levels: from central to workplace. Between social partners (bipartite coordination), between these and state (tripartite coordination), between state's bodies, between organizations and their subordinates, between members of the different subordinate organizations and between members of the same organization. Coordination's distinctive feature is that it creates the bottom-top and top-bottom relational dynamics necessary to ensure the effective functioning of the system. Therefore, it requires an organizational structure allowing multilevel coordination, which is the cornerstone element for fully developed negotiation processes and agreements to achieve their targets.

This notwithstanding, coordination primarily depends on the willingness of the labour market actors to cooperate, hence to ensure effectiveness at all levels the involvement of the state is a must. On the one side, unfolding a large public structure that supports the interaction between social partners is essential to cope with the new challenges of a post-industrial economy. When adjustments are required to weather economic difficulties, state involves as a third negotiator in the table with business and labour together[77]. On the other side, coordination inevitably implies a process of integrating employers and unions into national policy-making so that they can "make highly organized, collective demands for public policy and, in turn, to help with the implementation of policy outcomes"[78].

Tripartite coordination allows the state to incentivize social order while in return unions grant a certain degree of "securization" for workers and their families with the consent of employers[79]. Thus, the involvement of market actors under the umbrella of state helps to create a climate of social peace and of better understanding and acceptance of measures adopted. Such a climate also may contribute to boost productivity: as long as workers feel relieved of their day to day subsistence concerns, stress and conflict reduce.

To a large extent coordination in Norway is premised on a shared political culture of norms and mindsets based on the idea that the small open economy of the country, highly dependent on exports and exposed

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77 SCHMIDT, V.A.; "Putting the Political Back into Political Economy by Bringing the State Back in Yet Again", in *World Politics,* (2009), Vol. 61(3) pp. 521-522.

78 MARTIN, C.J.; THELEN, K.; "The State and Coordinated Capitalism", pp. 4-7

79 MARTIN, C.J.; THELEN, K.; "The State and Coordinated Capitalism", for creative and successful examples.

to the fluctuations of the international markets requires coordination of macroeconomic policies, wage setting and social and labour market policies[80] to easily adapt to new challenges. A similar ideology or culture does not obtain in Spain mainly due to its political structure "where party competition exerts a disciplining role in the system"[81].

Party interests in Spain predominate over national concerns creating a vicious circle: the governing party does have the monopoly of power while the state is subservient to the ruling party with whom the most powerful interest groups establish clientelistic relations. Other interest associations, unions and employers' organizations are fragmented and divided with weak force to articulate a plausible structure able to counteract the correlation of forces that play at national level[82]. This context impedes the existence of shared national targets for which coordination would be meaningful while at the same time acts as a break to innovation and socio-economic improvement.

Tripartite coordination in Norway is fundamental to ensure that the interplay between macroeconomic governance, public welfare services and organized working life converge in balanced societal interests. To this end, employers organizations and unions sit on a permanent basis in a number of public committees that handle matters of relevance for working life and social issues, i.e. the government's so-called Contact Committee (*Kontaktutvalget*), established in 1962 for the coordination of wage settlements, the *Arbeidslivsog pensjonspolitisk rod*, established as a forum between the government and the labour market parties for dialogue on labour market and relevant pension issues, the Technical Calculation

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80 BERGENE, A. ; HANSEN, P.; "A Historical Legacy Untouched by Time and Space?", p. 12; BIELER, A.; "Small Nordic Countries and Globalization: Analysing Norwegian Exceptionalism", p. 225; MAILAND, M.; in *The Changing Political Economies of Small West European Countries*, pp.92-93; NERGAARD, K.; "Social Democratic Capitalism", in Wilkinson, A., et al. (eds), *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, (2014), Oxford: OUP; HIPPE, J.ET AL; *The Nordic Model Towards 2030,* p. 23; IHLEN, Ø., WELTZIEN HOIVIK, H.; "Ye Olde CSR: The Historic Roots of Corporate Social Responsibility in Norway", in *Journal of Business Ethics*, 2015, Vol.127 (1), p.111.

81 MOLINA, O.; RHODES, M.; "The Reform of Social Protection System in Mixed Market Economies", p. 19.

82 Interesting studies on the historical development of industrial relations in Spain can be found in: HAMANN, K.; *The Politics of Industrial Relations: Labor Unions in Spain*; ESTIVILL, J., DE LA HOZ, J.M.; "Transition and Crisis: The Complexity of Spanish Industrial Relations", in Baglioni, G., Crouch, C., (eds), *European Industrial Relations: The Challenge of Flexibility*, (1990), London: Sage.

Committee for Income Settlements (*Teknisk beregningsutvalg for inntektsoppgjørene*, - TBU)[83] or the National Wages Board, (*Rikslønnsnemnda)* in charge of settling disputes on interests through arbitration. By placing unions and cross-class coalitions at the core of the national political economy, the Norwegian system facilitates the understanding of shared interests that, on its turn, paves the way for horizontal coordination – across industries and sectors – and also enables unions and employers' organizations to shift and coordinate negotiating strategies vertically, i.e. between the levels of industry/sector and companies[84].

Spanish organizations are only occasionally called to have a say in national matters of labour or social relevance, i.e. the *Pasto de Toledo* for pensions' reform in 1995 that ended a year later with a bipartite agreement between unions' and government (*Pacto de la Moncloa*) for which the latter committed to grant the adequacy of pensions until 2001. Bipartisan agreements come to the fore only in cases of weak governments – regardless of their colour - seeking unions' *ad-hoc* support for reforms[85]. All these situations are examples of cooperation, rather than of coordination. In absence of institutional and organizational structures that could make vertical coordination possible, interests groups adopt decisions tailored to their narrow interests without collective targets in mind frustrating further chances for coordination at the lower levels. The endemic deadlock of tripartite and bipartite social pacts[86] finds explanation within this particular environment of industrial relations in Spain where consensus and coordination are difficult, even unnecessary.

Instead of coordination at bipartite level, employers and unions in Spain have sought to invest in political alliances rather than the protection of the respective class interests'. As a consequence, industrial relations have

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83 See: Eurofound, Norway: Industrial Relations Profile, p. 9.

84 DØLVIK, J.E.; *Welfare as a Productive Factor*, pp. 21-22.

85 HAMANN, K.; *The Politics of Industrial Relations: Labor Unions in Spain*, pp. 216-230.

86 SOLA, J.; "El Legado Histórico Franquista y el Mercado de Trabajo en España", p.104; For an opposing view see; ROCHA, F.; in *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems*, p.201, who argues that tripartite social dialogue has had an important role until 2012, despite continuous ups and downs. See: FERNÁNDEZ, C.J. ET AL.; "The Reform of Collective Bargaining in the Spanish Metal and Chemical Sectors: 2008-2015. The Ironies and Risks of De-Regulating Employment Regulation", in Koukiadaki, A. et al. (eds), *Joint Regulation and Labour Market Policy in Europe During the Crisis*, (2016), Brussels: ETUI, pp. 499-502 for an account of the different opinions on this issue.

traditionally been an arena for dealing with conflicts rather than seeking for social progress, produce collective goods or achieve a better fit between production and protection systems. Similarly, there is no building of positive coordination at company level due to the fact that class coalition lacks the micro-foundations that can support a similar partnership at the sectoral/national level. The pervasive intervention of the state in the past whereby coordination patterns were regulated and controlled, perpetuate the incapacity of autonomous coordination at local and sectoral levels[87]. At its turn, in a somehow vicious circle, the lack of coordination at local or company level "impedes bottom-up dynamics of cross-class negotiation and incorporation"[88].

Coordination at company level consists of several components: wage and working conditions' negotiation, workers' participation in the development of the company and the like. In Norway this is possible thanks to the existence of a 'subinstitutional' organization inside the respective unions and employers' organizations to commit their subordinate levels and ensure compliance[89]. This hierarchical organization is based on mutual trust and good faith values that prevail over autonomy meaning that lower levels will not deviate by unilateral decisions. The strong ties which exist between unions' officials and company representatives allow trade unions to articulate the up-bottom process[90] of coordination without failures.

On its turn the lower level, typically represented by a local union leader elected by the members of the local union, has enough autonomy and unions' support to commit the workers at the undertaking or company to a collective effort on behalf of the other members[91]. Hence, the lower level does not only behave as a receiver of instructions, it also emerges as the source granting the functioning of coordination or as the bottom-up pillar underpinning the overall system. Its main merit is not only to secure the application of agreements negotiated at superior levels, but also that it creates routines for dialogue. In Norway, this is specially valued by employers and workers alike as a way to bring expectations in line with

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87 MOLINA, O., RHODES, M.; in *Beyond Varieties of Capitalism*, p. 247.

88 MOLINA, O., RHODES, M.; "The Reform of Social Protection System in Mixed Market Economies", pp. 16-20.

89 NERGAARD, K.; in *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, p. 303.

90 MARGINSON, P.; "Coordinated Bargaining in Europe: From Incremental Corrosion to Frontal Assault?", in *European Journal of Industrial Relations*, (2015), Vol.21 (2), p. 101.

91 BARTH, E. ET AL; "The Scandinavian Model-An Interpretation", in *Journal of Public Economics*, (2014), Vol. 117, p. 62.

each other[92]. Both are interested in the continuity of business, and company level is the appropriate ground to involve workers in: problem solving, expertise and knowledge transfer as well as to commitment to strategies of future and keep industrial peace.

Multilevel coordination is premised on high degrees of organizations' density[93] to spread the information and facilitate the understanding of broad objectives. In Norway, employers' membership was 75% in 2013 while in Spain it only reached 36% in the same period[94]. As far as unionization rates are concerned, the Spanish system is affected by a systemic hindrance: the low unionization degree has been steady low along years, ranging from 13.5% in 1980 to 16,9% in 2013. It is worth to make an aside here to explain two institutional factors that have exerted a relevant influence on this respect.

The end of the dictatorship brought the legal recognition of unions as relevant actors in the Spanish political and social life[95]. However, they were deprived of own resources to carry on the new responsibilities – consider that they were banned for 40 years and that no unionisation culture existed. A political agreement to provide public economic support to the unions, starting from 1976[96] was subsequently laid down into the legal order by different provisions. A decision to cede to the most representative unions the assets confiscated during the dictatorship, adopted in 1986[97], was aimed at closing the gap but created a conflict about the legal and equitable titles of the assets to which also other organizations, including the employers' organizations claimed.

The problem was two-fold: under the former regime employers were obliged to finance the only existing union created by the state. Upon its dissolution under the new regime, employers sought to recover their share. On the other side, other less representative unions considered

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92 BERGENE, A., HANSEN, P.; "A Historical Legacy Untouched by Time and Space?", pp. 12-13.

93 TRAXLER, F, "The Role of Collective Bargaining in the European Social Model: Summary", in *Transfer: European Review of Labour and Research*, (2006), Vol.12 (4), pp.678-678.

94 Eurofound, Working Life Country Profiles.

95 Art. 7 The Spanish Constitution.

96 MAGAÑA, F.J., RICO, S.; "El Patrimonio Sindical Acumulado", in *Proyecto Social: Revista de Relaciones Laborales*, (1997), Vol. 4-5, p. 197.

97 *Ley 4/1986, de 8 de enero, de cesión de bienes del patrimonio sindical acumulado* (Act on the cession of the accumulated trade unions' assets).

excluded from the deal[98]. Complaints were filled with the ILO Committee on Freedom of Association who suggested that the solution should be based on the principle that assets should be used for the purpose for which they were intended[99]. In 2008, direct subsidies were allowed by law, to both, trade unions and employers' organizations[100] and other forms of subventions continue today to be allocated to them through the yearly the State's budget[101]. As it may result obvious, the public financing of the unions and employers' organizations jeopardizes their independence.

Behind the hectic pace of assets allocation underlies the structural problem of unions' representativeness. The law on freedom of unionisation established the criteria – number of delegates obtained in the election processes - and functions of the most representative unions. The preamble of the law explains that the intention is to open the legislation as much as possible to union pluralism, by "promoting the principle of equality above the aim of reducing unions' atomization, evolution that is left to the free interplay of the union forces with presence in the labour relations"[102]. In practice, this regulation has prevented minority unions to access financial public support and institutional presence, thus perpetuating the low capacity of the major unions to develop in an independent and free context of strength.

It must be added to the above that the extension mechanism of collective agreements[103] *–erga omnes* effect – that applies in Spain has a further

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98 DE LA VILLA, L.E.; "El Patrimonio Sindical", in *El Cronista del Estado Social y Democrático de Derecho*, (2008), Vol. 0; MAGAÑA, F.J., RICO, S.; "El Patrimonio Sindical Acumulado".

99 CFA, Case 900 (Spain), Report No. 202, June 1980, par. 354; See also Case 900 (Spain), Report No. 194, June 1979.

100 *Real Decreto 1971/2008, de 28 de noviembre, por el que se regula la concesión de forma directa de subvenciones a las organizaciones sindicales y asociaciones empresariales por su participación en los órganos consultivos del Ministerio de Trabajo e Inmigración, de sus organismos autónomos y de las entidades gestoras de la Seguridad Social* (Royal Decree on direct subsidies to the trade unions and employers' organizations).

101 See, i.e.: CEOE, Annual Accounts 2016, p. 46; CCOO, Annual Accounts 2014, pp. 86-87; UGT, Nuestras Cuentas 2015.

102 See: *Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical* (Law on freedom of unionisation) Preamble and Arts. 6 & 7 for the representativeness criteria and functions.

103 See, IFO Institute, Center for Economic Studies, "The Determinants of Collective Bargaining Coverage, 2015" available at: https://www.cesifo-group.de/ifoHome/facts/DICE/Labour-Market/Labour-Market/Unions-Wage-

counterproductive effect in unions' power[104]: it makes unnecessary union's membership. And, since only the most representative unions have the legitimacy to bargain at multi-employer level[105], the former are constrained by the narrow interests of their affiliates otherwise they would risk losing their representative prerogatives. In short, it can be argued that the Spanish legislation has failed to create any true incentive for a fair background of industrial relations where unions could increase their negotiating power. Conversely, its stablishes a vicious circle seemingly designed to ensure that unions cannot deploy their labour and social role.

Unionization rate in Norway reached a peak level of 55.1% in 2003 and since then it has progressively receded to 52.1 in 2013, although it tended to increase to 54% in 2014[106]. This average is low compared to other Nordic countries, i.e. Sweden 67.7%, Denmark 66.8, Finland 69%, Iceland 85.5%[107] in which the steady decline of unionization can also be easily traced, but still remains high compared to other European countries. The decline in Norway might be linked to the changes in the individual interests of unions' members regarding income distribution making them less supportive of the national welfare policies[108]. Still, strong workplace organization, the existence of national confederations and the absence of a politically fragmented union movement contributes to membership resilience[109] and allows for high levels of coordination.

Bargaining-Labour-Relations/extension-of-collective-agreements-in-Europe.html .

[104] In the same line: PUMAR, N.; "Captive Audience Speech: Spanish Report", in *Comparative Labour Law and Policy Journal*, (2007), Vol. 29, p. 180.

[105] Art. 83 *Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores* (The Workers' Statute); See: HAMANN, K.; *The Politics of Industrial Relations: Labor Unions in Spain*, p. 227.

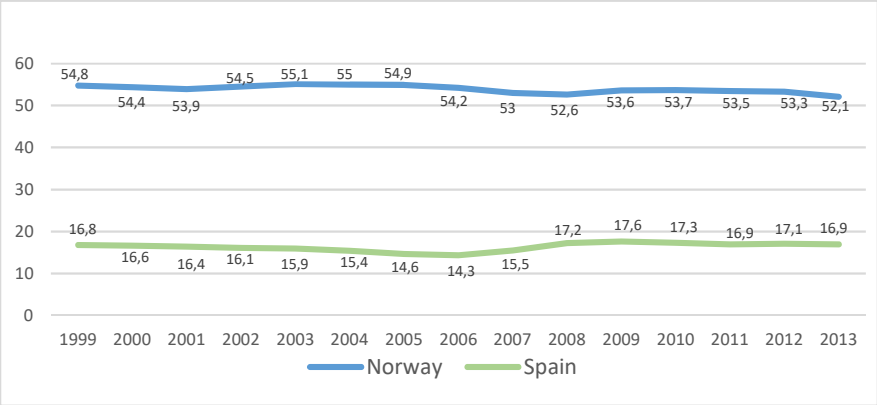
[106] NERGAARD, K.; *Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2014*, (2016), Fafo-notat 2016:07, p. 13 (in Norwegian).

[107] See: Trade Union Density OECD.Stat, available at: https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN

[108] PONTUSSON, J.; "Unionization, Inequality and Redistribution", in *British Journal Journal of Industrial Relations*", (2013), Vol. 51 (4); MOVITZ, F., SANDERG, Å,; "Contested Models: Productive Welfare and Solidaristic Individualism", in Sandberg, Å., (ed), *Nordic Lights. Work, Management and Welfare in Scandinavia*, (2013), Stockholm: SNS FörLag, p. 46.

[109] SANDERG, Å., MOVITZ, F.; "How Bright are the Nordic Lights?", in Sandberg, Å., (ed), *Nordic Lights. Work, Management and Welfare in Scandinavia*, (2013), Stockholm: SNS Förlag, p. 19.

Graph 1 Trade union density



Source: OECD Statistics (2017)[110]

Bipartite cooperation is enhanced through the regulatory function of the state whereby acting as an enabling mechanism when the state uses its institutional power to arbitrate among economic actors and to facilitate their activities[111]. Within this enabling role the state leaves unions and employers' organizations to jointly administer the rules through collective bargaining, while acting as an observer and grantor of the production system's nonmarket coordinating institutions. In this sense, the state lends public authority to the collective agreements reached by social partners through legislative and administrative provisions. In other words, the normative activity of the states is devoted and limited to establish a regulatory framework whereby negotiation processes are governed[112]. In fact, this is the very principle for industrial relations governance stemming from the right to collective bargaining. *A contrario*, regulation plays a hindering role when the state uses its institutional power to interfere in the negotiations between employers and workers, or when it does not adopt active actions to encourage and facilitate the interaction between labour market actors.

Labour regulation serves as a furtherance mechanism for bipartite coordination in Norway. Legislation establishes the minimum floor of working conditions from which labour market actors are free to negotiate

[110] OECD Statistics, http://stats.oecd.org/Index.aspx , Labour/*Trade union density*, last accessed: 12/09/2017.

[111] SCHMIDT, V.A.; "Putting the Political Back into Political Economy by Bringing the State Back in Yet Again", pp. 521-522.

[112] HEMERIJCK, A.; in *Changing Liaisons: The Dynamics of Social Partnership in 20th Century West European Democracies*, pp. 32-36.

and organize their relations[113] and, on the other side the mechanisms for labour disputes settlement[114]. Any of those are at odds with the principle of the autonomy of the parties[115] since the latter retain their self-regulatory capacity through normative binding agreements. Instead, regulation provides two advantages for the system to work as an integrated set by; on the one side granting a framework of legal certainty for the parties to negotiate on equal footing, and on the other side it contributes to industrial peace. Moreover, sharing normative spheres between the state and labour partners limits unilateralism to all parties creating a power-balanced structure where the opposing class interests necessarily will come to converge.

An example may serve to exemplify bipartite coordination and the regulatory function of the state in its enabling role. In 2005, the Norwegian main union -LO- called to negotiate collective agreed occupational pension schemes. But the employers' organization – NHO - opposed on grounds that those might create a potential competitive imbalance between firms with and without collective agreements. Employers also feared that collective agreed pensions might led to their loss of control and autonomy over pension arrangements to unions. Instead, employers proposed company-based schemes as they could be better adjusted to the special needs of the firm and avoid running parallel schemes in a single company[116]. The failure of negotiations made the parties to address government with the request to establish a mandatory occupational pension scheme. Regulation was the way to eliminate employers' fear and satisfy unions' petitions and state the institution to arbitrate among the parties' interests.

The Spanish state's regulatory activity in industrial relations is at the same time both, a need and a consequence of the institutional context. It is a mechanism to compensate the lack of coordination at all levels and it reflects the class-power imbalances: regulatory decisions are taken without the involvement of the social partners increasing the disconnection between interests' associations and the state[117] while

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[113] See: Chapter 1, Section 1-1 *LOV-2005-06-17-62 Lov om arbeidsmiljø, arbeidstid og stillingsvern mv* (The Working Environment Act – WEA).

[114] *LOV-2012-01-27-9 Lov om arbeidstvister* (The Labour Disputes Act).

[115] BERGENE, A., HANSEN, P.; "A Historical Legacy Untouched by Time and Space?", p. 12.

[116] TRAMPUSCH, C.; "Employers and Collectively Negotiated Occupational Pensions in Sweden, Denmark and Norway: Promoters, Vacillators and Adversaries", in *European Journal of Industrial Relations*, (2013), Vol. 19 (1), p. 47.

[117] MOLINA, O.; RHODES, M.; in *Beyond Varieties of Capitalism*, pp. 240-241.

making negotiations between the labour parties impossible, even unnecessary[118]. A recent example is illustrative: In 2012, a national agreement was signed between employers and employees covering the structure of collective bargaining, setting coordination and implementation rules that would govern this labour institution in the future. Two weeks after, government's legislation was enacted by the mechanism of urgency repealing most of the terms negotiated and agreed between the social partners[119]. Even though this unilateral and largely contested decision was the consequence of EU's pressures as it will be discussed below, it needs to be interpreted also within the industrial relations context in Spain, in which the unilateral decision of the state in the form of regulation is frequent.

2. Collective Bargaining: Wage Setting

Building a system of collective bargaining rests on three important pre-conditions: a legal framework, an institutional framework, and an industrial relations practice[120]. Two dimensions can be identified in collective bargaining, the level of centralization and the level of coordination. The first refers to the bargaining level at which collective agreements are formally concluded while the second relates to the synchronization of the distinct bargaining units across the economy for the sake of macro-economic-social goals. From the 1970s decentralization has gradually imposed in most countries, but this does not necessarily imply the lack of coordination. Since "centralization is just a special form of coordination"[121], thus forms of coordinated decentralized collective bargaining are possible.

Sinzheimer[122] defined two elements that should be present in a democratic economy: the hierarchical organization of workers' representatives and, the legal precedence of sectoral agreements over workplace agreements. Both factors are strictly related in Sinzheimer's

[118] RODRIGUEZ, C. J. F. ET AL.; "Austerity and Collective Bargaining in Spain: The Political and Dysfunctional Nature of Neoliberal Deregulation", in *European Journal of Industrial Relations*, (2016), Vol. 22 (3), p. 7.

[119] ROCHA, F.; in *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems*", p. 186.

[120] HENDRICKX, F.H.R., "The Future of Collective Labour Law in Europe", p.76.

[121] TRAXLER, F.; "Trends in Collective Bargaining and Economic Performance in the OECD Countries", in Dølvik, J.E., Engelstad, F. (eds), *National Regimes of Collective Bargaining in Transformation: Nordic Trends in a Comparative Perspective,* (2003), Oslo: Makt- og demokratiutredningen, p. 4.

[122] Cited in DUKES, R., *The Labour Constitution*, p. 159.

thinking. Only coordination of bipartite labour/capital negotiations — and, particularly, centralized wage negotiations — could complete worker's solidarity and the objective of universal improvements in terms and conditions of work. Otherwise, capitalist competitiveness would be installed between workers and their standard of living would come to depend on the particular workplace in which he/she found employment. Thus, he proposed that a comprehensive system of coordination should take place at national level in which unions should negotiate centralized agreements and works councils were to implement them.

Different authors in different periods[123] have also argued that coordinated wage bargaining not only does not impair economic growth; it rather fuels it by increasing employment. Hancké & Herrmann[124] contend that coordinated wage bargaining sets incentives on companies to adjust their internal operations, while decentralized systems presumably have the opposite effect: they reduce pressure for companies to improve in productivity. Obviously, another line of thinking opposes centralized bargaining precisely because of its potential equalizing element[125], arguing that wage differentials are beneficial for economic efficiency, improve labour market performance and increase prosperity. Other consider that coordinated wage bargaining mitigates the decline of employment but also does involve higher labour costs that are shifted to employees while decentralized negotiations tend to shift costs to employers[126].

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[123] See, i.e.: BARTH, E. ET AL; "The Scandinavian Model-An Interpretation"; KOLL, W.; *The New Economic Governance Arrangements and Autonomous Collective Bargaining in the European Union. Dialogue-based Macroeconomic Coordination*, (2013), IMK Study 30.

[124] HANCKÉ, B., HERRMANN, M.; "Wage Bargaining and Comparative Advantage in EMU", in Hancké, B. et al. (eds), *Beyond Varieties of Capitalism. Conflict, Contradictions, and Complementarities in the European Economy*, (2007), OUP, p. 143.

[125] See FREDRIKSSON, P.; TOPEL, R.; "Wage Determination and Employment in Sweden since the Early 1990s: Wage Formation in a New Setting", in Freeman, R.B. et al. (ed), *Reforming the Welfare State: Recovery and Beyond in Sweden,* (2010), The University of Chicago Press, available at: http://www.nber.org/chapters/c5360.pdf .

[126] VESTAD, O.L.; *Who pays for Occupational Pensions?*, (2011), Memorandum No 16/2011, Oslo University, Department of Economics, http://EconPapers.repec.org/RePEc:hhs:osloec:2011_016; AZEMAR, C.; DESBORDES, R., *Who Ultimately Bears the Burden of Greater non-wage Labour Costs?*, (2010), Working Papers, Business School - Economics, University of Glasgow, http://EconPapers.repec.org/RePEc:gla:glaewp:2010_02.

Less disagreement is found when the welfare approach is at issue. Esping-Andersen[127] and Moene[128] focus on the potential of coordinated wage bargaining for social equality while Barth & Moene[129] add that countries with low wage differentials tend to have more generous welfare spending, and vice versa. Following the equality factor but from an industrial relations perspective, Arrowsmith et al.[130] find the advantages of coordinated bargaining in the position of unions as grantors of standardization in opposition to individual pay negotiations that in practice become a hindrance to wage growth and/or a reward for work intensification. Hancké & Herrmann[131] do also consider that one of the reasons for coordinated bargaining returning more equality lies in the definition of employment categories linked to skills and pay. This element that does not exist in decentralized bargaining provides more homogeneity of wage levels for equally skilled workers. Finally, Holden[132] explains that coordinated bargaining at two levels central and local, allows central unions to focus on the employment in central negotiations while knowing that higher wages will be achieved at local level.

Within the foregoing context of high coordination level Norway has developed a particular form of coordinated decentralization[133] of collective bargaining at three levels, represented by a hierarchy of agreements. At the highest level, bargaining takes place between the general branches of employers' confederations (i.e. the Confederation of Norwegian Enterprises (NHO)) and a trade union (such as the Norwegian Confederation of Trade Unions (LO) or the Confederation of Vocational

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[127] ESPING-ANDERSEN, G.; *Social Foundations of Postindustrial Economies*, pp. 16-19.

[128] MOENE, K.; "The Impact of National Collective Bargaining Regimes on Social Equality", in Dølvik, J.E., Engelstad, F. (eds), *National Regimes of Collective Bargaining in Transformation: Nordic Trends in a Comparative Perspective,* (2003), Oslo: Makt- og demokratiutredningen 1998-2003.

[129] BARTH, E., MOENE, K.; *The Equality Multiplier*, (2009), NBER Working Paper No. 15076.

[130] ARROWSMITH, J. ET AL.; "The Management of Variable Pay in European Banking", in *The International Journal of Human Resource Management*, 2010, Vol. 21 (15), p. 2718.

[131] HANCKÉ, B., HERRMANN, M.; in *Beyond Varieties of Capitalism,* p. 137.

[132] HOLDEN, S.; "Local and Central Wage Bargaining", in *The Scandinavian Journal of Economics*, (1988), Vol. 90 (1).

[133] For an opposing opinion see: VARTIAINEN, J.; "Nordic Collective Agreements – A Continuous Institution in a Changing Economic Environment", in Mjøset, L. (ed), *The Nordic Varieties of Capitalism*, (2011), Bingley, UK: Emerald Group Publishing, pp.335 ff., who claims that the system has never been decentralized.

Unions (YS)) with the aim to regulate permanent and general matters between the parties. These general agreements define principal goals and lay down principles and procedures[134].

Second bargaining level supplements the first. It often applies to sectoral industries or special groups. The system is completed at undertaking[135] level where specific rules on pay rates, representation, cooperation and co-determination are concluded[136]. In order to grant that the commitments at the first level are respected, each level of negotiation must always comply with the more general agreements concluded at the superior level[137]. Even that the parties at the lower levels are not legally bound to follow the terms of the agreements concluded at the superior level, the principle that "collective bargaining really is about mutual negotiations, not unilateral commitments"[138], obvious as it may appear, contains the internal logic of the collective negotiation process; none of the parties will substantially separate from what has already been agreed.

Spain misses well-defined mechanisms articulating bargaining across levels. Sectoral and company have been the predominant bargaining levels. The former is further divided by geographical areas: local, provincial, regional or national, with the higher level taking precedence. However, the lack of strong organizations that can articulate coordination patterns through these levels make centralized negotiations very difficult in Spain. Unions have sought to reform the system with three main aims at the forefront: "an extension of the regulatory scope of collective bargaining; a formalization of the rules connecting levels within the system; and the consolidation of the national sector as the predominant

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[134] LØKEN, E., ET AL; *Labour Relations in Norway*, (2013), Fafo Report 2013:09

[135] Note this is not company level, but still a level below. Although same basic agreement applies to all company sites, different collective agreement may be concluded at different sites.

[136] See, § 9-2 *Hovedavtalen LO–NHO 2014–2017* (Basic Agreement 2014-1017 NHO-LO with supplementary agreements), available at: https://www.lo.no/Documents/Lonn_og_tariff/hovedavtalene/basicagreement_14_17.pdf

[137] A clear, summary explanation in English can be found in: EFTA, , Case E-10/14, *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden* , Judgement of The Court, 18 December 2014, available at: http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2014/10_14/10_14_Judgment_EN.pdf

[138] BRUUN, N.; "Finland", in Blanpain, R., Świątkowski, A.M., (eds), *The Laval and Viking Cases: Freedom of Services and Establishment vs industrial Conflict in the European Economic Area and Russia*, (2009), Alphen aan den Rijn: Kluwer Law International, pp. 69 ff.

bargaining level"[139]. Nevertheless, their lack of mobilization power, the non-existence of a united counterpart with whom the claims could be negotiated and the presence of a state unwilling to mediate have prevented major changes.

Instead, any chances to maintain or improve centralized bargaining in Spain have, since 1994, been progressively curtailed through different legal labour reforms that introduced company as the preferred bargaining level[140]. In 2012, the legal inversion of the favourability principle - which holds that lower levels can only improve conditions agreed at higher levels[141] - come into effect. *De facto*, state's regulatory function has operated as an instrument for wage bargaining decentralization by explicitly introducing the precedence of company level[142]. This change, in which neither unions nor employers were involved, shows not only the coordination problems but also how the political structure may pervade the industrial relations systems. In the one hand, bargaining decentralization erodes the role of unions and the substance of the right to unionization. On the other hand, decentralization also goes in detriment of small employers' interests[143] for whom centralized bargaining was a form of protection[144].

Despite the voluntary nature of collective bargaining in Spain, mandatory minimum wage applies and increases are set by law unilaterally by the party in office according to the macroeconomic development of the country. The parties are free to negotiate higher salaries at whatever level, but in the context of company bargaining, increases are difficult to achieve, since employers know that the same conditions will not necessarily be followed by other employers, thus creating a competitive disadvantage.

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[139] MOLINA, O.; RHODES, M.; "The Reform of Social Protection System in Mixed Market Economies", p. 16.

[140] A summary of the main reforms can be found in: GOERLICH, J.M.; *Régimen de la Negociación Colectiva e Inaplicación del Convenio Ccolectivo en la Reforma de 2012*, (2013), València: Tirant lo Blanch.

[141] KEUNE, M.; "The Effects of the EU's Assault on Collective Bargaining: Less Governance Capacity and More Inequality", in *Transfer* (2015), Vol.21 (4), p.479.

[142] Art. 84.2 The Workers' Statute.

[143] The 99.88% of Spanish companies are small or medium companies at the end of 2015. See: Ministerio de Industria, Energia y Turismo, Estadísticas Pyme, Evolución e Indicadores, Nº 14, Febrero 2016, available at: http://www.ipyme.org/publicaciones/estadisticas-pyme-2015.pdf (in Spanish)

[144] MARGINSON, P.; "Coordinated Bargaining in Europe ….", p. 106; Cruz, J.; "Hacia un nuevo modelo laboral en España", in Derecho PUCP, (2012), Vol. 68, p. 148.

Norway does not have a statutory minimum wage nor mechanisms for extension of collective bargaining agreements[145] but due to a well stablished set of norms of equal treatment, there has been a long continuity of wage equality and a certain measure of wage constraint that has played an important role in macroeconomic management[146] and social equality. This has been possible thanks to social partners' commitment to country's socio-political economy and has been facilitated by the permanent flow of information from the state and the ability of the labour market parties to impose the collective agreements on non-organized enterprises[147].

Wage formation guidelines are set through tripartite cooperation at national level in order to maintain national economic competitiveness[148]. To that purpose Norway has established a specific institution Det *tekniske beregningsutvalget for inntektsoppgjørene* (TBU) - The Norwegian Technical Calculation Committee for Wage Settlements - formed by experts, administrators and representatives of the labour market parties whose main function is to provide the actors of wage bargaining with the national, uncontested data where wage setting must anchor. The TBU calculations take into account, among others, monetary policy, labour market prospects, welfare state, exchange market indicators for the Norwegian currency and other indicators. The TBU comes up with a 'wage corridor'[149] which is not mandatory since wage setting does correspond to the parties' decision, however they generally stick.

Wage bargaining takes place at two levels: central/sectoral and local, in the form of pattern bargaining. It starts at the "export industry" which is considered the most affected by international competitiveness. At this level, the parties involved agree that wage negotiations should be carried out on the basis of four established criteria: the profitability, productivity, future prospects and competitiveness of the company. Once negotiations in this sector are concluded, the other sectors, including public sector,

[145] Except for The Act on Collective Agreements enacted in 1994 but has never been applied since.

[146] MJØSET, L., CAPPELEN, A.; in *The Nordic Varieties of Capitalism*; LØKEN, E., ET AL; *Labour Relations in Norway*.

[147] NERGAARD, K.; in *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, p. 307.

[148] The Norwegian Technical Calculation Committe for Wage Settlements, https://www.regjeringen.no/en/topics/labour/lonn-og-inntekt/innsikt/inntektspolitikk-og-lonnsoppgjor/tbu/id439434/

[149] MJØSET, L., CAPPELEN, A.; in *The Nordic Varieties of Capitalism*, p.171.

will initiate their own wage bargaining, mostly at undertaking level, within the boundaries marked by the export industry[150].

The current trend of wage decentralization that affects Norway has made that "the substance of collective agreements concluded at national sectoral level has shifted from detailed regulation to framework agreements, leaving generous leeway for negotiations at company level"[151]. In all, decentralization may not be the concept that best defines wage setting mechanisms in Norway. The system rather refers to a certain degree of wage differentiation negotiated at company level within established limits[152] but in labour terms, it evidences two comparative advantages: on the one side, it balances economic and labour interests with the social horizon in mind. On the other side, closely related to that; it restrains high wage differentials at the general level and within occupations, leading to more equality.

Table 3 Average monthly earnings

	Norway €				Spain €			
	2011	**2012**	**2013**	**2014**	**2011**	**2012**	**2013**	**2014**
Average	4466	4624	4793	4940	1905	1891	1894	1908
1. Managers	6564	6744	7026	7218	4376	4300	4430	4533
2. Professionals	5402	5594	5775	5944	2738	2730	2679	2686
3. Technicians and associate professionals	4669	4861	5030	5166	2353	2375	2363	2348
4. Clerical support workers	3643	3778	3914	4049	1682	1639	1648	1677
5. Service and sales workers	3327	3451	3553	3665	1327	1326	1321	1349
6. Skilled agricultural, forestry and fishery workers					1523	1518	1461	1495
7. Craft and related trades workers	3778	3868	3993	4094	1803	1760	1763	1763
8. Plant and machine operators, and assemblers	3733	3857	4038	4139	1793	1743	1725	1728
9. Elementary occupations	3169	3271	3406	3462	1116	1140	1159	1174

Source: Ilostat (2017)[153], Currency €

[150] NERGAARD, K.; in *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, p. 307.

[151] MALMBERG, J.; "The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions", in *Scandinavian Studies in Law*, (2002), Vol: 43, p.193.

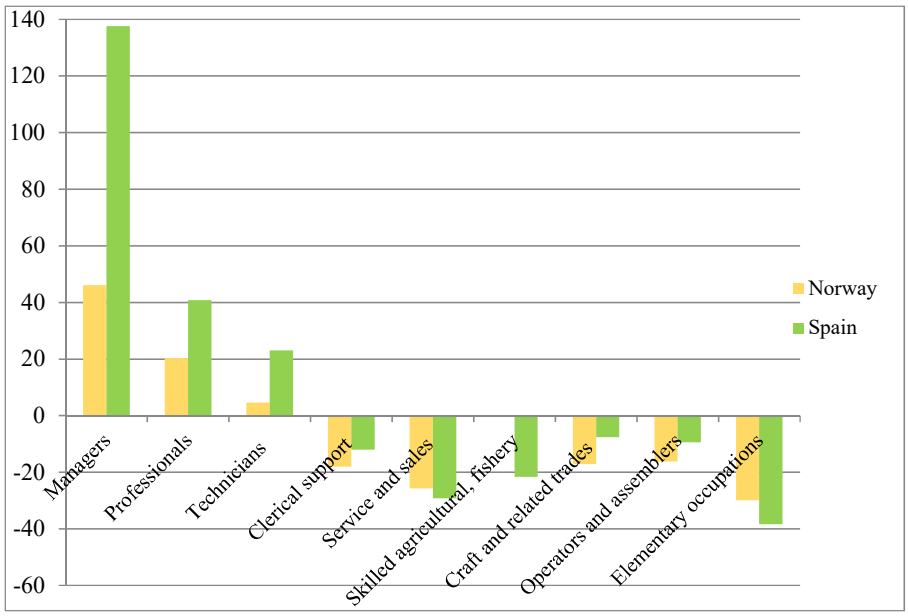
[152] VARTIAINEN, J.; in *The Nordic Varieties of Capitalism*, pp.335 ff.

[153] ILO Statistics, Earnings and Labour Cost/Mean nominal monthly earnings of employees by sex and occupation, available at: http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=EAR&indicator=EAR_XEES_SEX_OCU_NB&datasetCode=A&collectionCode=YI&_afrLoop=32404822002591&_afrWindowMod

Based on the data of table 1, the following graphs compare the monthly earnings on three different bases:

Graph 2 compares the differences in categories with regards to the average monthly earnings, Graph 3 shows wage differences among categories compared to each immediate superior and Graph 4 shows the differences between each category and that of managers, as the higher category.

Graph 2 Wage differences respect to average wage

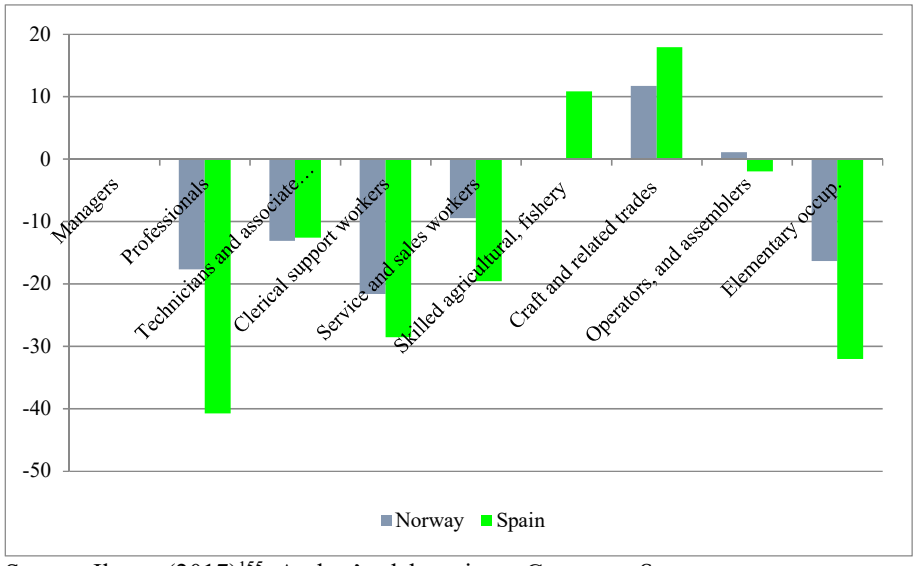


Source: Ilostat (2017)[154], Author's elaboration – Currency: €

e=0&_afrWindowId=flqd3eqew_135#!%40%40%3Findicator%3DEAR_XEES_SEX_OCU_NB%26_afrWindowId%3Dflqd3eqew_135%26subject%3DEAR%26_afrLoop%3D324048220025 91%26datasetCode%3DA%26collectionCode%3DYI%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dflqd3eqew_184 , last accessed 11/9/2017.

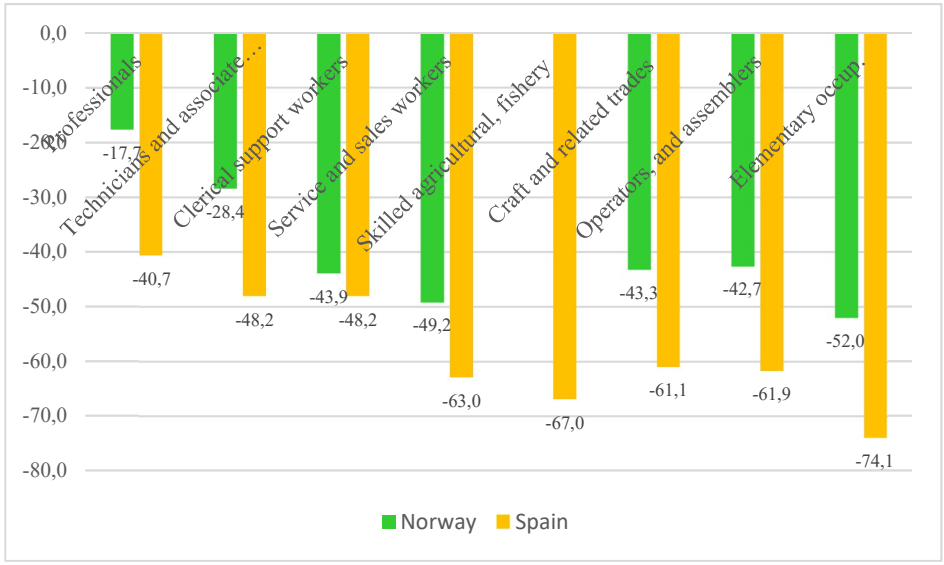
[154] Ilostat Statistics, see note 153.

Graph 3 Wage differences by categories



Source: Ilostat (2017)[155], Author's elaboration – Currency: €

Graph 4 Wage differences to highest category



Source: Ilostat (2017)[156], Author's elaboration – Currency: €

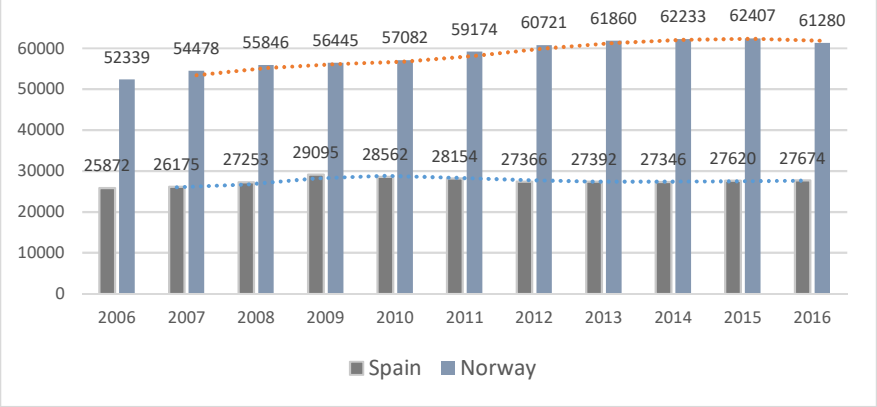
[155] Ilostat Statistics, see note 153.
[156] Ilostat Statistics, see note 153.

Both countries show a similar pattern in wage categories. However, the differences are striking in Spain whatever the basis taken, particularly, when looking at the higher-lower ends. Furthermore, differences in Norway besides being lower they show a higher similar degree of harmonization while in Spain the behaviour of the different categories suggest a high level of decentralization and low coordination.

In Spain decentralization is better defined as the individualization of pay setting with the gradual levelling down of the collective bargaining structure. This context not only undermines one of the reasons for unions' membership, it also reduces the chances for preserving earnings in real terms[157]. The graph below compares wage growth in Norway and Spain. Until 2015 it shows a steady growing line in Norway. Concurring with an increase of wage decentralization, a trend of lowering unionization rates and an increase in employers' organizations and power[158], real wages show a reduction in 2016.

It remains to be seen whether this marks a turning point or it just represents a "bad" year in wage bargaining. On its turn, decentralized wage bargaining in Spain together with low unionization rates have marked an unstable wage pace along years. The start of the crisis in 2009 indicates the ongoing period of real wage decline more accentuated from 2012 onwards in parallel with bargaining decentralization.

Graph 5 Annual average wages



Source: OECD Statistics (2017)[159], at constant prices and national currency

[157] See: OECD Employment Outlook 2014, pp. 47-51 admitting that wages increases have not followed the same pace as inflation.
[158] VARTIAINEN, J.; in *The Nordic Varieties of Capitalism*, p.335.
[159] OECD Statistics, http://stats.oecd.org/Index.aspx , Labour/Earnings/*Average annual wages*, last accessed: 9/9/2017.

From the above comparison, it can be argued that the mechanism of coordination applying to industrial relations provides better results in terms of wage growth and equality than contexts of low coordination. Still, coordination requires of an institutional background in which the state is willingly involved. Formally, this would contravene the principle of non-interference of the state in matters falling within the parties at collective bargaining. However, the analysis of the Norwegian model, highlights that the dichotomy state/non-state is not the only possible. Rather it might be reformulated in different, broader terms, i.e. which kind of state can better serve industrial relations? Certainly, it is outside the scope of this project to engage in such a debate. Its modest purpose is to suggest that the state positive intervention by facilitating coordination is a necessary institution of labour relations. In so doing it incentivizes the unions' task to struggle for social improvements which ultimately is the substance of the fundamental right to association.

3. The Regulation of Working Conditions

The link between social security and labour is not new[160], but pension reforms in Europe have furthered the relation between benefits and work. The European Commission admits that the "the underpinning of pension systems in terms of a good balance between contributory years and retirement age or between contributors and beneficiaries, is not just affected by the employment rate at the end of working life. Entry ages and the stability of employment over the working life are also key factors"[161]. In this scenario, it seems rather convenient to advocate for the regulation of collective labour law, specially taking into account that the current instability of employment causes a disproportional gap in pension rights[162].

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[160] RÖNNMAR, M.; "Protection of Established Position, Social Protection and the Legal Situation of the Elderly in the European Union", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing, p. 95.

[161] European Semester Thematic Fiche, Adequacy and Sustainability of Pensions, p. 2 available at: http://ec.europa.eu/europe2020/pdf/themes/2015/pensions.pdf

[162] HEMERIJCK, A.; "Self-Transformation of European Social Model(s)", in Esping-Andersen, G., Regini, M. (eds), *Why Deregulate Labour Markets?,* (2000), Oxford: OUP, p.204.

Conversely, there is a chance to content that labour regulation is not strictly related to employment creation. Many authors have already argued about that[163] and is apparent, as well, from the EU report[164] where Spain, after the 2012 labour reform ranges on the first place for temporary contracts. Also, the protection for collective dismissals have been reduced considerably together with permanent employment, while rampant unemployment continues being an unresolved, structural problem.

According to Dølvik[165] the increasing globalization and the changes in production models are leading to more precarious work, discontinuities and atypical workers, that see their incomes reduced. In parallel welfare states have been built to provide higher protection to those fortunate enough to be in the labour market on a long-term basis. "Plainly, social security and labour law institutions must work effectively and in tandem. This means social security systems must have effective design features and secure funding. On the labour side of the employment/social security interface there must be fair, balanced responsibilities between the State, employers, and individuals"[166].

There is no doubt that Fordist production model is outpaced and that labour market is changing; new actors, new jobs and consequently new skills are needed. This means that labour law has to be "redesigned" to cover the new needs[167]. But labour law remains a tool for the balance of power between labour and capital. In a similar line, Lord Wedderburn notes that the raise of employment contract ignores the reality of modern power, especially in view of the global capital[168].

Labour law admits two stances. It can be seen as a burden or a break to economic growth, or it can be used as a tool to secure social stability, increase confidence and thus economic growth. Labour law might be developed in a preventive function in a broad sense. It can be held that

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[163] PRASSL, J.; in *Which Securities for Workers in Times of Crisis?*, p. 213; In the same line: DEAKIN, S.; "Editorial: The Sovereign Debt Crisis", p. 401 ff. Also: PISSARIDES, P.; *Social Europe in a Climate of Austerity*, Eurofound Conference, Athens 23rd June 2014, available at https://www.socialeurope.eu/social-europe-austerity ; Esping-Andersen, G., Regini, M. (eds), *Why Deregulate Labour Markets?*, p.100.

[164] EU Commission, "Labour legislation in support of job creation", in *Employment and Social Developments in Europe 2015*, p. 88 ff.

[165] Dølvik, J.E., Martin, A. (eds), *European Social Models from Crisis to Crisis.*

[166] PUTTIK, K.; *The Challenges Facing Social Security Systems*, p. 2,

[167] See; Davidov, G., Langille, B. (eds), *The Idea of Labour Law*.

[168] WEDDERBURN, B.; "Common Law, Labour Law, Global Law", in Hepple, B. (ed), *Social and Labour Rights in a Global Context*, (2002), Cambridge:CUP.

prevent accidents at work, annual leave pay and other conditions do contribute to a better health of the population and thus save expenses for the society as a whole. Employment and inclusion policies do allow that people contribute to the wealth of the country instead of being a burden[169]. In all these spheres, the presence of the state is a must and the involvement of social partners will be crucial to achieve the welfare objectives. Also, labour law can be used as a way to shape or encourage certain attitudes into a desired direction, i.e. to encourage women's participation in working life without reducing birth rates[170].

Sciarra suggests that labour law has not to be understood as an interference of the state. Labour law requires that the state guarantees the rights of individuals, sets guidelines but it is the individual autonomy of the parties that is embodied in collective agreements what harmonizes market and social values[171]. From this perspective, labour law sets on the state a grantor position whereas the true regulatory function rests on the labour parties. Labour law and collective agreements thus become complementary. It should be added, however, that the criteria for assessing the guarantee of the rights, is the existence of a national body of law providing for the binding effects of collective agreements, preventing from unreasonable downwards deviations and setting adequate guarantees for enforcement.

The regulation of working conditions in Norway is better explained from a private law perspective. The idea is that the autonomy of the parties belongs to the private sphere. The collective agreement is a contract between the parties that express a collective will. Hence, the basic employment regulation, The Working Environment Act (WEA), sets minimum conditions on the parties to the contract, such as working hours, termination of employment, holidays, information and consultation or health and safety, among others, that neither the employment contract nor collective agreements can negotiate *in peius*[172]. Rather than the protection of rights, the purpose of the WEA as stated in Chapter 1 is to secure the development of businesses while safeguarding the welfare state. In this sense, individual rights ensue from the employment contract rather than from the law.

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[169] JAKHELLN, H. ET AL.*; Labour Law in Norway*, (2013), Alphen aan den Rijn: Wolters Kluwer, p. 67.

[170] JAKHELLN, H. ET AL.; *Labour Law in Norway*, p. 68.

[171] SCIARRA, S.; "Market Freedom and Fundamental Social Rights", in Hepple, B. (ed), *Social and Labour Rights in a Global Context*, Cambridge University Press, (2002), p. 107.

[172] Section 1.9 The WEA.

Individual protection against dismissal is probably the most developed element in the WEA. It is illustrative to mention that the objective justification of the dismissal by curtailed operations or rationalisation measures, is weighted against the disadvantage caused by the dismissal for the individual employee. In order not to leave the latter unprotected, however, the WEA lays down the statutory role of unions for the protection of individual dismissals[173]. The employee is allowed to remain at his/her work place until proceedings/negotiations ended. This gives a strong bargaining position to employee for negotiating severance pay beyond the threshold provided by law. In the event of declared unfair/invalid dismissal employee will be kept in its place and may be allowed for damages if claimed. Nevertheless, employer has the chance to ask the Courts to declare "clearly unreasonable" that the employment relation continues, although found invalid/or unfair.

No labour statutory rights in abstract can be found in the Norwegian laws. Collective agreements being a particularly important and special source of law[174], collective rights as provided by the different legislative norms revolve around the existence or willingness to enter into collective agreements. The right to collective bargaining and the right to strike[175] are two main examples while the right to freedom of association in the labour strict sense, is recognized to the parties to the collective agreement[176].

What the Norwegian law seeks is to promote the negotiations between the parties and hence spread the collective element in labour relations. To this purpose, collective agreements and the Labour Disputes Act[177] are the main legal sources governing labour relations. The Labour Disputes Act revolves around the effects of collective agreements, by establishing the principle of mutual recognition and peace duty, meaning that strikes can only take place in the periods of renegotiation of collective agreements every second year. All in all, the purpose is to set predictability, determine the employers' prerogatives[178] and to give the

[173] Section 5 The WEA.

[174] GOODERHAM, P., Et al.; "The Labor Market Regimes of Denmark and Norway - One Nordic model?", in *Journal of Industrial Relations*, (2015), Vol.57 (2).

[175] Section 3 and Sections 18 & 25 The Labour Disputes Act.

[176] See, i.e.; Basic Agreement 2014-1017 NHO-LO.

[177] There are two different statutory acts, for private employees and for public employees: The Labour Disputes Act, above n. 121 applies to private employees, while *LOV-1958-07-18-2 Lov om offentlige tjenestetvister* (The Service Disputes Act) applies to public employees.

[178] LØKEN, E. ET AL.; *Labour Relations in Norway,* (2013), Fafo Report 2013:09.

social partners a statutory role in the "supervision and application of the law"[179].

The Spanish system is organized around the Workers' Statute[180]. By its structure and placement in the legal order, this comprehensive piece of legislation fulfils two main functions. First, it is the main source of rights. Art. 4 lays down basic substantive rights i.e.: the right to strike, the right to information and consultation, or the right to freedom of association[181] which are developed into specific laws[182]. It is, as well, the instrument regulating the individual and collective relations that give raise to formal rights. Second, its placement on top of the Spanish legal order builds a hierarchical relation that explicitly prohibits lower norms undermining workers' rights[183].

This is an exhaustive law that encompasses the regulation of the different types and categories of employment contracts, the regulation of the unions' functions of representativeness and the working conditions. Formally, it sets the minimum basis upon which the employment contract or the collective agreement can improve working conditions and establishes the hierarchy of collective agreements. The main feature of the Spanish regulation, however, is its company orientation, both by the prevalence of company bargaining as well as by the prerogatives vested upon the employer for the changing of working conditions or for the causes of employment termination[184]. At this point, the reader is referred to what is being explained in the following section about the general context of labour conditions in Spain.

4. The Nature of Collective Agreements

Collective agreements are the cornerstone of labour relations in Norway. The first act on collective agreements in the Nordic countries, "the Labour Disputes Act (*Arbeidstvistloven*), was adopted in Norway in 1915. The act contained, inter alia, rules concerning the conclusion of collective agreements and mediation. A labour court was established for

[179] MALMBERG, J.; "The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions", p. 190.
[180] *Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores* (The Workers' Statute).
[181] Art. 4 The Workers' Statute.
[182] I.e: The Law on freedom of association.
[183] Art. 3 The Workers' Statute.
[184] See: Arts. 41, 45, 47, 49, 51 & 52 The Workers' Statute.

the handling of disputes regarding breaches of collective agreements and industrial actions"[185]. The basic features of this act remained in force until 2015 when the new act, above mentioned was adopted.

Collective agreements are concluded at national level between the main employers' organizations and unions. Within their areas of application, they become not only binding on the signatory parties, but also on members of their organisations. Derogation power is allowed only" through collective agreements concluded by trade unions at sector level. The main reason why the derogation power is located in the hands of nation-wide sector-based trade unions is to ensure a strong counterpart to employers during negotiations"[186].

The signature of a collective agreement at national level does not automatically bind the enterprises that are members of the employers' organization. Workers must demand to their respective employers' the application of an agreement. To do that the law requires a certain proportion of the workers (commonly 10 percent) of that enterprise to be unionized. In case of the employer refusing to sign a collective agreement, it must be enforced by a strike[187]. In non-members companies, unionized workers may request the employer to sign in the form of adhesion, a collective agreement. In that case, no minimum levels of unionized workers are required by law. If the individual employer (not member of an employers' organization) accepts, it adopts the form of an accession agreement.

Collective agreements contain a normative part and a contractual part. In Kahn-Freund's opinion, the contractual function of collective agreements was for the benefit of management, while its normative function was to benefit labour[188]. The former regulates the relation between the parties and the normative part contains provisions concerning rights and obligations of the employer and the employee vis-a-vis each other. The normative competence of the social partners is rather wide. According to the *travaux préparatoires* to the Norwegian act, a collective agreement can cover any matter about which a trade union and an employers' organisation might agree. Usually, "the law on social security and welfare

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[185] MALMBERG, J.; "The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions", p.191.

[186] MALMBERG, J.; "The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions", p.196.

[187] ALSOS, K., ELDRING, L.; *Extension of Collective Agreements: The Norwegian Case*, (2006), CLR-News no 3/2006.

[188] KAHN-FREUND, O.; *Labour and the Law*", (1977), cited in Nielsen, R.; *EU Labour Law*, (2013), p. 141.

serves as a platform for the agreements and arrangements that are concluded between the parties of labour life"[189]. Furthermore, the normative nature of collective agreements rules out provisions in employment contracts that may conflict with collective agreements to which both parties are bound[190].

These normative and contractual functions produce different effects on wages and employment conditions according to different situations: 1) Both parties are bound by the collective agreement, 2) Employer but not employee is bound, 3) Employee but not employer is bound. In principle only members of the signatory parties are bound and there are no non-discriminatory principles that oblige to apply to non-unionized workers the same conditions as unionized workers, but employer is presumed, to apply at least the minimum conditions to non-unionised workers as well. This does not follow from legislation, it remains an employers' prerogative but is commonly accepted by the employer on grounds of preventing low-wage competition and equality. Furthermore, unless expressly otherwise agreed in the individual employment contract, all general provisions in the collective agreement have normative effects for the non-unionised workers in case that the employment contract lays down less favourable working conditions[191].

The reason of coverage of collective agreements in Norway not made extensive is that the individual autonomy of worker who decides whether to unionize or not and if so, to which trade union. Benefits depend on that choice, since each union will negotiate independently with the same employer and have different outputs. Furthermore, unionized workers have had the right to vote and decide on an agreement and thus on their own interest, while non-unionized workers do not have such voting. Thus, it is not fair to impose on them some conditions that they have not been able to decide upon[192].

Hence, it might be formally possible that two working colleagues with the same job at the same workplace associated to two different unions would have different pay, working conditions, early retirement provisions and pension benefits as come off from different collective agreements. In practice, this is not the case, because the agreements reached with the

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[189] JAKHELLN, H. ET AL.; *Labour Law in Norway*, p. 70.
[190] Section 6 The Labour Disputes Act.
[191] AHLBERG, K., BRUNN, N.; "Sweden: Transition through Collective Bargaining" in Blanpain, R. (ed*), Collective Bargaining and Wages in Comparative Perspective: Germany, France, The Netherlands, Sweden and The United Kingdom*, (2005), The Hague: Kluwer Law International, p. 122.
[192] JAKHELLN, H. ET AL.; *Labour Law in Norway*, p. 136.

leading union will not differ so much from the conditions negotiated with the "second" union. The latter has not enough force to impose better conditions and the employer does not have any need to give such. It is in the interest of the enterprise for peace in the working environment not to break the entire system. Still, non-unionized workers have the freedom to individually negotiate with the employer to remain outside the collective agreement, creating a certain risk for the system specially in a highly developing white-collar, skilled community of workers that demand higher wages and other benefits (variable pay, individualization of employment contract,.).

The binding nature of collective bargaining in Norway is seen as an advantage for both parts. Employers consider it business friendly "as it increases predictability for capitalists who can define the rules of the game and enter into agreements which are not only binding for all union members but also defining for non-members"[193]. Furthermore, being a peace document, it creates certainty and stability in the relations and enables the employer to modify the working conditions of all employees through negotiations with one or a few trade unions, thereby reducing costs. From the perspective of the trade unions, collective agreements have the primary purpose to protect its members against pressure from employers[194].

One of the historic purposes of collective agreement is the regulation of wages and other employment conditions. This normative function has its *raison d'être* on the balancing power between the two sides of a contract and thus provide for just and fair working conditions. Since pay is exclusively a contractual matter in Norway, the concept of "fair" or "just" pay is not defined in legislation. However, the fact that collective agreements are generally accepted as instruments for wage setting can in itself be seen to indicate that there is a concept of "just wages", even if it is not explicit.

The content of that concept depends on the values underlying the collective agreement. This means that it may differ from time to time and from one collective agreement to another. Hence, one could also say that a concept of what is "fair" or "just" indirectly emerges from collective agreements to the extent that they lay down what factors shall be considered when individual wages are set. Another way of putting it is

[193] BERGENE, A.; HANSEN, P.; "A Historical Legacy Untouched by Time and Space?", p. 12.

[194] MALMBERG, J.; "The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions", pp. 191-192.

that pay differences must be justified on objective grounds if they are to be "just"[195].

The Spanish legal order, distinguishes between two different types of collective agreements: multi-employer and single-employer[196].Their main difference is that the former has normative effects to which employment contracts have to adapt[197] while the later has only contractual effects[198]. This difference does also have effects on the extension of coverage. Multi-employer agreements deploy *erga omnes* effects while, obviously, the single-employer agreements only cover the workers at the signatory company.

To fully understand the effectiveness and the nature of the collective agreements in Spain, some elements legally established have to be highlighted. First, the prevalence of company agreements[199]. Second, the rules for unions' representativeness[200] require that company agreements can only be negotiated by workers' representatives elected in the corresponding processes. At sectoral level, the power to negotiate is vested upon the most representative unions at national level. Third, Spanish has a minimum statutory wage[201] which sufficiency should be presumed[202] but is questioned by different scholars[203] all the more if we take into account that minimum wage depends on the governments' budget which is subject to the law on budget stability.

This normative framework is embedded in a context of unionization rates in which the legitimacy of unions at company level is quite weak,

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[195] AHLBERG, K., BRUNN, N.; in *Collective Bargaining and Wages in Comparative Perspective*, p. 121.

[196] In the Spanish literature, these are referred to as: *estatutario* (multi-employer) and *extraestatutario* (single-employer).

[197] ALONSO, M.; *Introducción al Derecho del Trabajo*, (2013), Cizur Menor: Civitas, p. 582 ff.

[198] For detailed explanation of collective agreements in Spain see MONTOYA, D.; Unit. 3: Collective Bargaining, (2015) available at: https://core.ac.uk/download/files/608/32323959.pdf (in English)

[199] Art. 84.2 The Workers' Statute.

[200] Art. 87 The Workers' Statute; VALDÉS DAL-RÉ, F,; "El Derecho a la Negociación Colectiva en la Jurisprudencia Constitutional Española", in *Revista de Derechos Fundamentales*, (2011), Vol. 5, p. 130

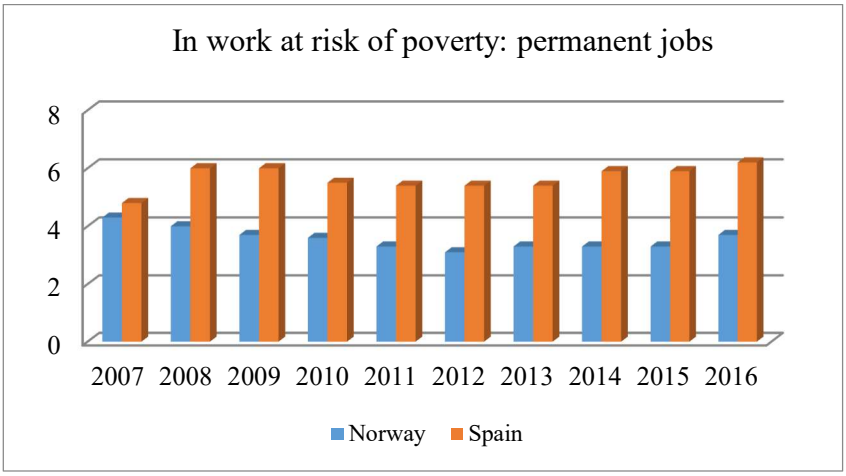
[201] Art. 27 The Workers' Statute.

[202] CASTRO, M.; *El Sistema Normativo del Salario: Ley, Convenio Colectivo, Contrato de Trabajo y Poder del Empresario*, (2008), Madrid: Dykinson, pp. 31 & 111.

[203] I.e; ALARCON, M.R.; *Jurisprudencia Constitucional Social, 1991-1999*, (1999), Sevilla: Mergablum.

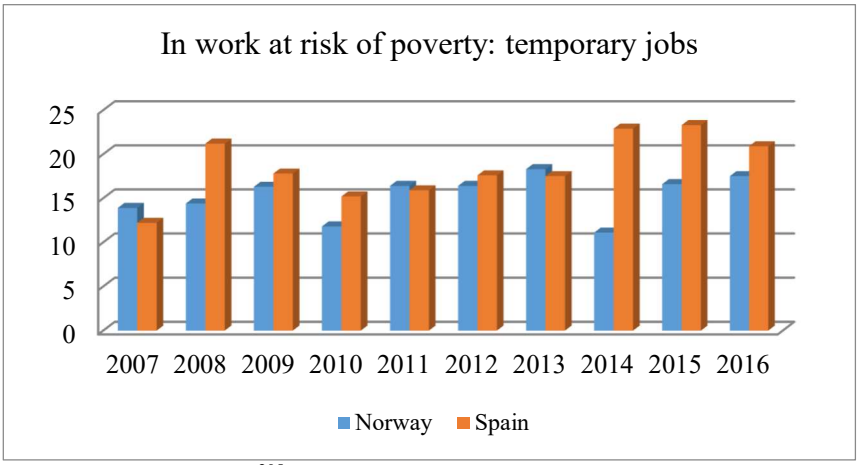
especially in small companies which, by the way, are a high majority in Spain. On top of this, the labour market with high unemployment rates do not create any incentive for employers to enter into negotiations, resulting in a clear retrenchment of wage and working conditions, as shown in the following graphs:

Graph 6 At risk of poverty permanent jobs



Source: Eurostat (2017)[204]

Graph 7 At risk of poverty temporary jobs



Source: Eurostat (2017)[205]

[204] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Database by themes/ Living conditions and welfare/Income and living conditions/In-work poverty/ *In-work at-risk-of-poverty rate by type of contract - EU-SILC survey*, Code: ilc_iw05, last accessed: 09/09/2017.

SECTION IV. EU's Impact on Industrial Relations: National Responses

The EU's impact on Member States' industrial relations systems may be approached at least from two different, even not unrelated, perspectives: i.e.: collective labour law and EMU policies. The latter is better analysed from the institutional point of view while the former requires a legal focus. For that reason, and in order to maintain the coherence with the structure of this project in which the role of the state is the axis, this subsection deals with the EU's impact from the EMU membership approach whereas the effects of collective labour law will be analysed separately in the following subsection. Owing to Norway does not belong to the Eurozone, this choice presents a methodological disadvantage since comparison is not possible. However, dealing with issue separately seems advisable in terms of the appropriate comparative analysis that will follow along the project.

1. The Spanish National Context

After the Lisbon Treaty coming into force it has become a difficult task to hold that there are matters falling outside EU's competences[206]. On the one side the introduction of EMU main lines at EU primary law[207] and, on the other side the EU's acquiring legal personality[208] have broadened the scope for EU to act. To be sure, many of the state competences on monetary issues have been transferred by Member States on occasion of the adhesion to the unitary currency, but industrial relations are not within them[209]. This notwithstanding, Arts. 145 and 146 TFEU make employment policies instrumental to the EMU targets while Art. 150 TFEU authorizes the Council by simple majority "to monitor the employment situation and employment policies in the Member States and

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[205] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Database by themes/ Living conditions and welfare/Income and living conditions/In-work poverty/ *In-work at-risk-of-poverty rate by type of contract - EU-SILC survey*, Code: ilc_iw05, last accessed: 09/09/2017.

[206] See BONDE, J-P.; *From EU Constitution to Lisbon Treaty: The Revised EU Constitution Analysed by a Danish Member of the Two Constitutional Conventions*, (2007), Foundation for EU Democracy.

[207] Art. 3.4 TEU; Protocol No. 4; Art.3 TFEU; Arts. 119 ff. TFEU.

[208] Art. 47 TEU.

[209] Arts. 4 & 5 TEU; Art. 153.5 TFEU.

the Union". On this basis, the Commission considers itself legitimate to propose measures to be adopted by national governments on their industrial relations practices[210], despite that Art. 147 TFEU reiterates that Member States' competences on employment matters should not be affected by EU's action.

The clash between treaties' provisions was aggravated with the onset of the crisis when the vulnerability of the overall EU's monetary system came apparent due to the financial difficulties of some Member States. One of the reasons that better explains this situation is the recurrent problem of multilevel interactions due to the unresolved issue of the allocation of competences. The EMU was developed at EU level accompanied by the SGP[211], a mechanism governing the necessary stability of the EU's financial system for the smooth operation of the Euro in the international exchange markets. To that purposes, exclusive competences to the EU were conferred on monetary policy but economic policies remain with Member States[212] who see their margin of manoeuvre curtailed by the coordination framework[213] .

On top of this, the stability of the currency introduced the international dimension into the EU's policies whereby the EU has to act as a single authority - which it can do by virtue of the legal personality provided for in the treaties - regardless of the effects in national economies. This interplay between different levels of governance has caused the dysfunction of the EMU system and its inability to manage the crisis[214] within the established treaties' provisions.

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[210] See, i.e.: Council Decision (EU) 2015/1848, recitals (1), (4) and specially recitals (5 & 6).

[211] Declaration 30 A, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon: OJEU C115, 9 May 2008.

[212] Arts. 120 and 121 TFEU.

[213] SNYDER, F.; "EMU-Integration and Differentiation: Metaphor for European Union", in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law*, (2011), Oxford: OUP, pp. 694-695.

[214] HINAREJOS, A.; "The Role of Courts in the Wake of the Eurozone Crisis", in Dawson,M. et al. (eds), *Beyond the Crisis: The Governance of Europe's Economic Political, and Legal Transformation*, (2015), Oxford: OUP, p. 117; in a similar line see: DINOPOULOS, A.; "Ihe Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity", in Adams, M. et al. (eds), *The Constitutionalization of European Budgetary Constraints*, (2014), Hart Publishing On Line, pp. 43 ff, albeit he suggests that the use of international instruments falls outside treaties' provisions.

Since each Member State's economy is a different financial reality whose capacity of response to the economic challenges differs[215], the priority was to protect the national economies that performed well enough through the SGP activation mechanism for Member States in difficulties. The EMU was then supplemented by a complex set of instruments – the so called New European Economic Governance – that provides EU's institutions with a wide margin of discretion in the exercise of their powers and serves to justify: 1) the entry on the EU's decision-making process of outsider Union's organizations such as the International Monetary Fund (IMF)[216] and, 2) the application pattern of EU's policies 'one size fits all'. This new framework, however, goes beyond the treaties legislative mandate, to become political in nature[217] raising legality questions[218].

In 2012, within the EMU's framework, Spain requested financial aid to rescue its banking sector. The agreement was set through a MoU[219], in which Spain committed to: "3) implement the labour market reforms, 4) take additional measures to increase the effectiveness of active labour market policies, 5) [..] and eliminate barriers to doing business"[220]. Furthermore, the surveillance body – the Troika –required substantial changes in wage-indexation mechanisms, decentralization of collective bargaining, and wage moderation in the public sector[221]. All these

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[215] HABERMAS, J.; "The Crisis of the European Union in the Light of a Constitutionalization of International Law", in *The European Journal of International Law,* (2012), Vol. 23 (2), p. 340.

[216] COSTAMAGNA, F.; in *The Constitutionalization of European Budgetary Constraints*, p. 368.

[217] FEIGL, G.; "The New EU Economic Governance: A Critical Overview", in Rocha, F. (coord); *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems*, (2014), Madrid: Fundación 1o. de Mayo; ARMINGEON, K., BACCARO, L.; "Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation", p. 264; LINDSETH, P.L.; *Power and Legitimacy: Reconciling Europe and the Nation-State*, (2010), Oxford Scholarship Online; CAPALDO, J., IZURIETA, A.; "The Imprudence of Labour Market Flexibilization in a Fiscally Austere World", in *International Labour Review*, (2013), Vol. 152 (1).

[218] BAYLOS, A.; "La Desconstitucionalización del Trabajo en la Reforma Laboral del 2012", in *Revista de Derecho Social*, (2013), Vol. 61, p.3.

[219] See: Memorandum of Understanding on Financial Sector Policy Conditionality, 20 July 2012, Spain available at: http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf

[220] Par. 31Spain MoU.

[221] KEUNE, M., "The Effects of the EU's Assault on Collective Bargaining", p.478; KOLL, W.; *The New Economic Governance Arrangements and*

conditions were introduced without the involvement of the social partners, through a legislative reform[222] prior to the signature of the MoU, following the Council's Recommendation of 12 July 2011, which contains the measures that were lately enforced:

> "labour market reform in Spain needs to be complemented by an overhaul of the current unwieldy collective bargaining system. The predominance of provincial and industry agreements leaves little room for negotiations at firm level. The automatic extension of collective agreements, the validity of non-renewed contracts and the use of ex post inflation indexation, clauses contribute to wage-inertia, preventing the wage flexibility needed to speed up economic adjustment and restore competitiveness" [223].

resulting in the erosion of the industrial relations system[224] and the transformation of the legal status of the right to collective bargaining, constitutionally protected by Art. 37 of the Spanish Constitution (*Constitución Española*)[225].

This form of 'supranational interventionism' that in Spain is leading towards a more authoritarian model of industrial relations[226], cannot only be framed in terms of EU's legitimacy to impose or intrude into national competences. It needs to be complemented with reference to the country's institutional framework and in particular its ability to protect

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Autonomous Collective Bargaining in the European Union. Dialogue-based Macroeconomic Coordination.

[222] *Real Decreto-ley 3/2012, de 10 de febrero, de medidas urgentes para la reforma del mercado laboral* (Royal Decree of 2012 on the Labour Market Reform).

[223] See: Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated Stability Programme of Spain, 2011-2014, (2011/C 212/01).

[224] See, i.e.: RODRIGUEZ, C. J. F. ET AL.; "Austerity and Collective Bargaining in Spain", p. 271; GARCÍA BLASCO, J.; "Las Medidas Laborales y la Crisis Económica. Valoración, Problemas Aplicativos y soluciones", in García, J.I. (dir), *El Impacto de la Gran Crisis Mundial sobre el Derecho del Trabajo y de la Seguridad Social: Su Incidencia en España, Europa y Brasil, 2008-2014*, (2014), Barcelona: Atelier, p. 97.

[225] Official English version used in this project from the Spanish Constitutional Court, consolidated text in force available at: https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/ConstitucionINGLES.pdf

[226] ROCHA, F.; "Introduction", in Rocha, F. (coord); *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems*, (2014), Madrid: Fundación 1o. de Mayo, p.17.

the constitutional system in front of external threats. This is of special relevance if, as Kilpatrick shows, the EU institutions, in this case the Commission and the European Central Bank (ECB), did not directly impose an obligation to rescued Member States on how to implement conditionalities:

> "Given that the MoU is signed by the national authorities, who are also responsible for its implementation, the ultimate responsibility rests with them […] it is for the Member State to ensure that its obligations regarding fundamental rights are respected.
>
> The final decision on concrete measures to be taken at national level is adopted by the concerned Member States, acting in accordance with their constitutional requirements"[227]

According to the CJEU's decision in *Pringle,* neither the MoUs nor the ESM[228] itself fall within EU law. Instead these mechanisms respond to the voluntary nature of the signatories' Member States to commit to a stronger stability of the common currency through the establishment of a financial source in case of difficulties[229]. This decision suggests two elements for analysis. First, the voluntary nature implies that the Spanish state should be well aware in advance of the conditions for the assistance and thus should have made the decision – political and legal – to access the financial aid after evaluating the consequences of the conditionality for the national system, including the rights of the workers.

Second, the Spanish MoU was signed in the context of the European Financial Stability Facility (EFSF) Framework which - as well as its successor, the European Stability Mechanism (ESM)Treaty – provide that the rules of the financial assistance and the monitoring compliance must be fully consistent with the TFEU and the acts of EU law[230]. Hence, it is a

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[227] KILPATRICK, C.; "Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?", in *European Constitutional Law Review*, (2014), Vol.10 (3), p. 395.

[228] The Spanish MoU was signed in the context of the EFSF Framework Agreement funding programme that now is used within the ESM Framework.

[229] CJEU, Case C-370/12 *Pringle*, 27 November 2012. For an analysis of the case see: TOURI, K., TOURI K.; *The Eurozone Crisis: A Constitutional Analysis*, (2014), Cambridge: CUP; or HINAREJOS, A.; in *Beyond the Crisis: The Governance of Europe's Economic Political, and Legal Transformation*.

[230] Preamble Recital (2), EFSF Framework Agrement Consolidated Version, available at: https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf

matter under the signatory state's responsibility to make sure that the national measures adopted in the MoU pursuant the EFSF agreement comply with the EU law. This obligation entails a double check for the signatory state that goes beyond the respect for the distribution of competences and the application of the principle of subsidiarity; it also must take into account the relation between national and EU law.

The principle of hierarchy that places EU law above national law is not absolute. EU's accession does not equal to the nullification of the Member State; it retains among others, the competences that have not been transferred to the Union, the power to withdraw from the EU as well as the ratification of treaties' amendments. Where these powers emanate from the constitutional system of the Member State, as is the Spanish case, it follows that the instrument remains its fundamental set of governance and control rules that encounter due protection at treaties level[231]. Furthermore, the values enshrined by the constitutional traditions of Member States become principles – thus legal norms[232] - of the Union law[233]. Therefore, it can be argued that constitutional texts become the bridge between EU and national law inasmuch as the former act as the tool for assessing the validity of the norms implemented at any level. Accordingly, the principle of hierarchy has to be interpreted in the sense of preventing that any law, norm or pact can contravene neither EU law nor national constitutions. It is from this perspective that the Spanish state has the responsibility to comply at the same time with its constitutional system and with EU law.

Obviously, the conditions for the accession to the financial aid were settled in advance and accepted by the Spanish government in office at that moment. It is less clear whether the appropriate controls on the legality of governments' acts when making common decisions, were carried out by the Spanish institutions[234]. To start with, a short chronological review of the facts may be helpful to understand the political and labour background that facilitated the shift in industrial relations in Spain. Since the start of the crisis, the political discourse, that took as a basis for its legitimacy the references to the deregulation agenda

[231] I.e.: Arts. 4.2, 42.2, 48.4, 48.6, 49, 50.1, 54 TEU.

[232] VON BOGDANDY, A, "Constitutional Principles", in von Bogdandy, A., Bast, J. (eds), *Principles of European Constitutional Law,* (2006), Oxford: Hart Publishing, p.9.

[233] Art. 2 TEU read in conjunction with Art. 6.3 TFEU.

[234] The idea, in more general terms is developed in: INNERARITY, D.; "The Inter-Democratic Deficit of the European Union", in Dawson, M., et al. (eds), *Beyond the Crisis. The Governance of Europe's Economic, Political, and Legal Transformation*, (2015), Oxford: OUP, p. 175.

emerging from the EU and financial markets, put a growing emphasis in the need to reduce labour costs to foster the rampant unemployment rates and economic growth[235]. To this purpose the reform of collective bargaining structure through its decentralization together with the reduction of dismissals' costs have been at the core of the political and labour debates in Spain since 2008s.

Despite the several attempts to reach bipartite agreements for the reform of collective bargaining, few progresses were made basically because: 1) the deterioration of the Spanish economy involved rapid changes in the government's austerity measures, making that the negotiated elements resulted inefficient for the new contexts and, 2) the continuous distant positions between unions and employers on which aspects should be reformed[236]. With regard to this last point, it is undeniable that employers in big corporations, who exert a great influence in Spanish industrial relations, did not have any stimulus to agree with unions nor with the government. EU pressures on the latter were in line with employers' interests, so they only had to wait for regulation. Besides, government's regulation served them as the pretext in front of other employers' smaller organizations whose preferences went for balanced negotiations with unions. In this context, only unions and small employers' organizations had a real interest to negotiate and agree. However, their fragmentation and few mobilization force impeded any chance for influence in the decision making process.

In 2010 and 2011 the government decided, after failed negotiations with the social partners, to legislate in urgency the easing of the conditions and costs for lay-offs and, the decentralization of collective bargaining by introducing the prevalence of company level bargaining[237]. In 2012, a new urgency legislation was passed, this time without any attempt of social dialogue, which implemented the unilateral decision of the employer to modify collectively agreed working conditions and to lay-offs in cases of economic, technical, organizational or productive

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[235] FERNÁNDEZ, C.J. ET AL.; in *Joint Regulation and Labour Market Policy in Europe During the Crisis*, p. 506.

[236] An extensive explanation of the political and labour context in Spain can be found in: MOLINA, O., MIGUÉLEZ, F.; *From Negotiation to Imposition: Social Dialogue in Austerity Times in Spain*, (2013), Working Paper No. 51, Geneva: ILO.

[237] *Real Decreto-ley 10/2010, de 16 de junio, de medidas urgentes para la reforma del mercado de trabajo* (Royal Decree of 2010 on the Labour Market Reform); *Real Decreto-ley 7/2011, de 10 de junio, de medidas urgentes para la reforma de la negociación colectiva* (Royal Decree of 2011 on the Collective Bargaining Reform).

reasons[238]. It is precisely this point that has given rise to the major objections about the legality of the reform in two main directions.

First, the extension of the causes to justify lay-offs implies the correlative effect of reducing the judicial control for unfair dismissal[239]. The preamble of the act admits that the introduction of these causes was necessary in order to avoid uncertainty in employers' decisions. The judiciary, in the past, adjudicate considering the proportionality, reasonableness or adequacy of the measure adopted by the employer. From now on, so the law goes on, the judges might only take into account whether the causes exist or not[240]. Such a limitation of the judicial decision based on competitiveness or economic performance of the company is outside the constitutionally legitimate purposes and creates a problematic situation with regards to the right to an effective legal remedy protected as a fundamental right by Art. 24 of the Spanish Constitution[241].

It is in relation with the legal remedy that the reform might also contravene the Art. 9.3 in relation to Art. 1 of the ILO Convention 158 on termination of employment, ratified by Spain. Even that Art. 9.3 of the ILO Convention 158 accepts operational requirements of the undertaking as a valid ground for employment termination, the worker shall have the right to appeal to an impartial body empowered to determine whether the termination was indeed for these reasons. On its turn, Art. 1 remits to national practice or law, the extent to which those bodies shall also be empowered to decide whether these reasons are sufficient to justify such termination. Given that national procedural law on labour matters establishes the reasoned judgement on the appraisal of the evidences[242] as the legal safeguards for a fair trial, it could be held that the reform has curtailed the capacity of judges for reasoning their decisions, hence impairing on the effectiveness of the legal protection.

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[238] Art. 12 Royal Decree of 2012 on the Labour Market Reform.

[239] CRUZ, J.; "Hacia un Nuevo Modelo Laboral en España", in *Derecho PUCP*, (2012), Vol. 68, p. 150.

[240] Preamble V, Royal Decree of 2012 on the Labour Market Reform.

[241] PRECIADO, C.H.; *La Reforma Laboral de 2012.Comentarios al Real Decreto Ley 3/2012 de 10 de febrero de medidas urgentes para la reforma del mercado laboral*, pp. 33-34, available at: http://www.cgtcatalunya.cat/IMG/pdf/REFORMA_LABORAL_RD-LEY_3-12_5_.pdf (in Spanish).

[242] See Art. 97 *Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social* (Act on Labour Procedure).

Second, the voluntary nature of the right to collective bargaining as configured by the ILO Convention 98 – also ratified by Spain - has its corollary in the conclusion of binding agreements. The convention was introduced in the Spanish Constitution in order to protect the right to negotiation and reaching agreements[243] as an essential content of the right to unionization[244]. The latter occupies a relevant position in the national constitutional system that has been interpreted and distinguished from the general right to association[245] because:

> "the right to unionization is aimed at the protection of the two main instruments that the workers – the weakest part - do have in the social state to defend their interests against the economically stronger part, that is, the employers. Such instruments are the right to join unions and the right to strike. Moreover, the right to unionization is obviously connected with Art. 7 of the Spanish Constitution which recognizes trade unions as central in labour relations and, in general, in the economic and social life"[246].

Based on the foregoing constitutional framework, the introduction into statutory law of provisions allowing for unilateral decisions of employers, devoid of substance the right to collective bargaining as it makes negotiations and agreements totally irrelevant. Contexts that – either *de iure* or *de facto* – impede negotiations also impair on the institutional representation of interests that the Constitution reserves to the parties in the wide socio-economic context[247]. Whereas these functions steam from the ILO conventions ratified by Spain, there is a high presumption that the labour reform introduced in 2012 might violate such international treaties. To this end the CFA has already requested the Spanish authorities to introduce new regulations based on tripartite dialogue[248] but no changes have taken place up to the moment of writing this project as confirms the direct request made in 2015 by the ILO Committee of

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[243] See VALDÉS DAL-RÉ, F.; "El Derecho a la Negociación Colectiva en la Jurisprudencia Constitutional Española", in *Revista de Derechos Fundamentales*, (2011), Vol. 5,p.131 for case-law references.

[244] Art. 28 The Spanish Constitution; For all see: STC 238/2005, 26 September 2005, third ground for decision.

[245] Art. 22 The Spanish Constitution.

[246] See: Congreso de los Diputados, Synopsis of the Art. 28, available at: http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=28&tipo=2 (in Spanish). Author's translation. For all see STC 8/2015, 22 January 2015, second ground for decision.

[247] STC 58/1985, 30-04-1985, fourth ground for decision.

[248] ILO, CFA Case 2947 (Spain), Report No. 371, March 2014, pp. 436-464.

Experts on the Application of Recommendations and Conventions (CEARC) who follows-up the case[249].

As it has been mentioned above, since 2010 urgency legislation has been the preferred mechanism regardless of the ideology of the government in office, to introduce labour market reforms. Albeit this tool is provided for in Art. 86 of the Spanish Constitution and, as such it is subject to constitutional control, the Constitutional Court has repeatedly limited itself to make the verification on the abusiveness or arbitrariness of the decision, but not to question its convenience neither to refer to the substance of the case. The Court justifies its decisions on two legal bases; first, that the Government is the constitutional holder of the urgency legislative power. It is, furthermore, the responsible for the political direction of the State and therefore urgency responds to a mere political judgment[250]. Second, since urgency legislation is to be upheld, repealed or modified by the parliament[251], it corresponds to the legislature the substantiation of the appropriateness thereof.

The parliamentary control of the government, however, is relatively difficult due to the Spanish political two-parties structure and electoral system that favours comfortable majorities[252]: all labour reforms mentioned here have been passed in the parliamentary processes without major modifications. The 2012 reform was upheld without any amendment thanks to the absolute majority of the ruling party. This being the case, it is of a logical nature to question whether the urgency is justified or if this practice is intended to undermine the parliamentary character of the political form of the State as defined in art. 1.3 of the Spanish Constitution. Such were the grounds for the constitutional challenge raised by a Labour Court in Madrid whereon the lower judge claimed that the reasons for urgency did not encounter justification within the content of the reform[253]. It being the case that the expected resolution would be in line with the Court's previous judgements, this time the upper judges took a different stance. In essence, the Court's did not refrain from deciding on the convenience of the measures, but fully

[249] CEARC Direct Request Spain - adopted 2015, published 105th ILC session (2016).
[250] STC 29/1982, 31 May 1982, third ground for decision; STC 18/2016, 4 February 2016, third ground for decision.
[251] Art. 151 *Reglamento del Congreso de los Diputados de 10 de febrero de 1982* (Ordinances of the Spanish Congress).
[252] COLOMER, J.M.; "Spain and Portugal: Rule by Party Leadership", in Colomer, J.M. (ed), *Comparative European Politics*, (2008), London: Routledge, p. 203.
[253] ATC 43/2014, 12 February 2014.

assumed the government's arguments as deployed in the preamble of the act[254].

This kind of political acquiescence was the interpretative prelude of the resolutions on the reform that would come later and that explain the reasons that have facilitated the introduction of major changes in the Spanish industrial relations system. Two relevant cases for the purposes of this project were raised about the constitutional flaws of the 2012 labour reform. In the first one the Parliament of the autonomous region of Navarra challenged two elements of the reform: the derogation of the working conditions collective agreed and the decentralization of the collective bargaining through the legal prevalence of the company agreement, in that both impaired the right to collective bargaining and the right to unionization.

The findings of the Court to dismiss the appeal were grounded on the economic situation of the nation and the need to allow the necessary flexibility to the companies to redress their organizational and economic concerns "as it is done in several European countries through the attribution to collective agreements of limited personal applicability"[255]. To this purpose the legislature, in the Court's opinion, has the power to restrict the scope for collective autonomy if the aim is to secure business competitiveness or if the legislative aim is "to impede that the collective autonomy might frustrate the legitimate objective of creating stable employment"[256]. With that in mind, so the Court's argument continues, the constitutional protection recognized to labour rights in the past has to yield in the current economic context in favour of the right to freedom of enterprise also constitutionally enshrined in Art. 38 The Spanish Constitution[257].

Similar arguments have been used in the second relevant case the Court had to deal with. In this occasion the appeal was raised by the Socialist and Left Groups in the Spanish *Congreso de los Diputados* (Congress). Likewise in the previous case, the focus of the contested legislation was about the change of the legal status of the rights to collective bargaining and unionization. Claimants held that the decentralization of collective bargaining and the possibility of the employers to unilaterally change the working conditions devoid of substance such rights[258]. Although the

[254] See, ATC 43/2014, 12 February 2014, fourth ground for decision.
[255] STC 119/2014, 16 July 2014, fifth ground for decision. Author's translation.
[256] STC 119/2014, third ground for decision. Author's translation.
[257] STC 119/2014, fourth and sixth ground for decision.
[258] ALONSO, M.; *Introducción al Derecho del Trabajo*, p. 582. See to this respect the dissenting vote of three Judges to the STC 119/2014.

Court's reasoning is based in its previous decision, the most relevant in this case is its emphasis on the will of the legislature and the Court's role to assess whether the measures adopted are reasonable and proportionate to the aim pursued[259]. However, the reasoning used on the assessment is limited to repeating what is expressed by the government in the preamble of the act to justify the reform. As is natural, the Court is satisfied to assert that the measures are fully consistent with the constitutionally legitimate aim of avoiding job destruction.

The constitutional decisions on the 2012 labour reform[260] highlight the political underpinning of the Court as the main concern in the Spanish institutional context for the appropriate safeguarding of the system. On the one side, the incessant appeal to the legislature's discretion badly encompasses with the main function that the constitutional body is entrusted with: the judicial review. Bearing in mind that the measures were adopted by the government unilaterally, such deference places the Court as a body of support for the political decisions rather than the independent institution it is expected to be. In adopting this position, it undermines the role of the Congress as the control body of government's acts[261].

On the other side, the doctrinal interpretation alongside the above decisions has shifted the Spanish constitutional standards whereby industrial relations were governed, by introducing the economic element as the measuring parameter to which the content of the constitutional text should be fitted in. The changing nature of the economic situation implies the installation of legal uncertainty within the core structure of the Spanish legal system since, presumably, the future rulings will be accommodated to the country's economic development and political course. If we understand a constitutional system as the legal foundations of any given legal order it follows that the substance of the constitutional rights must be unique and uniform. Certainly, the accessory or non-essential content of these rights can be accommodated to the economic environment. But this malleability is not predictable of its essential content, which, by its own configuration, must be endowed with a stability protected from the fluctuations of political and economic

[259] STC 8/2015, 22 January 2015, fourth ground for decision.

[260] The most relevant for the purposes of this project are: ATC 43/2014, 12 February 2014, STC 119/2014, 16 July 2014, STC 8/2015, 22 January 2015, ATC 35/2015, 17 February 2015, STC 140/2015, 22 June 2015.

[261] See: DELLEDONNE, G.; "A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences", in Adams, M. et al. (eds), *The Constitutionalization of European Budgetary Constraints*, (2014), Hart Publishing on Line, p. 200.

conjunctures[262]. Furthermore, in terms of legality and ultimately of democracy, it is to be questioned whether a constitutional system might operate two different standards of constitutional review, one for normal times and one in times of crisis[263].

None of these flaws should come as a surprise if due regard is paid to the process of appointment of the judges to the Constitutional Court. The Court is formed by 12 magistrates of which four are chosen by the Congress and four by the Senate by a qualified majority. Two are assigned by the government and two by the General Council of Judiciary. The members are appointed for a period of nine years and shall be renewed by third parties every three years[264]. In the two-parties Spanish political system, the appointment of new members is contingent on the electoral majorities and on the parties' strategies and power to impose their choices. The result is a highly politicized Court[265] of changing ideology that at the time of deciding on the labour reform was formed by a conservative majority (7-5)[266].

All in all, the Spanish Court's rulings have reintroduced into the legal system the managerial prerogatives balanced to economic outcomes, resulting in the transformation of the constitutional protection from persons to economic interests. To a certain degree, these decisions bear a high resemblance to the CJEU's rulings in Viking and Laval cases in that economic freedoms take a relevant role vis-à-vis of fundamental rights. In terms of methodology it can be argued, however, that the interpretation given in Spain goes even further than that of the CJEU's since there is no a proper balance among the rights at stake[267]. Whether the Spanish Court has been influenced by the CJEU might be debatable but it should not be

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[262] STC 8/2015, 22 January 2015, Dissenting vote of Three Judges, 2nd. recital.

[263] KILPATRICK, C.; *Constitutions, Social Rights and Sovereign Debt Sttes in Europe: A Challenging New Area of Constitutional Enquiry*, (2015), EUI Working Paper Law 2015/34, pp. 3-4.

[264] Art. 159 The Spanish Constitution.

[265] MAGONE, J.M.; *Contemporary Spanish Politics*, (2009), London: Routledge, pp. 125-126; GUILLÉN, E.; "Judicial Review in Spain: The Constitutional Court", in *Loyola of Los Angeles Law Review*, (2008), Vol. 42 (2), p. 546; GARUPA, N. ET AL.; "Judging under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court", in *The Journal of Law, Economics, & Organization*, (2013), Vol. 29 (3).

[266] See: El Pais, 11 march 2013, https://politica.elpais.com/politica/2013/03/10/actualidad/1362942099_045708.html; El Periódico, 7 june 2013, http://www.elperiodico.com/es/politica/20130607/tribunal-constitucional-pierde-mayoria-progresista-con-renovacion-cuatro-jueces-2411899;

[267] See the dissenting vote of three judges in STC 119/2014.

overlooked[268] given the EU's economic framework, its impact on the Spanish decision-making process and the politicization of the Spanish High Court.

What has been pointed out so far seeks to explain how the changes operated in the Spanish industrial system primarily hinge on the national institutional framework which is highly influenced by the political system. Although EMU's membership has contributed to boost the political underpinning of the system to the detriment of its democratic control, the Spanish context nuances the affirmation that EU's restricts the capacity of the States to resist to outside intrusion[269]. If one looks on how the development of the labour reform process has been carried out, it is possible to hold that the Spanish state has not opposed any type of resistance to external interference. On the contrary, it has been used as a strategy on the governments' hands for the benefit of its allied class's interests, basically as a result of the endemic clientelistic relations that pervade the Spanish institutional framework.

Governments of any colour have "called for international commitments to escape parliamentary oversight and avoid having to justify themselves internally"[270]. In effect, all three reforms mentioned here justify in the respective preambles, their need on grounds of the crisis and the European labour market context, on the commitments acquired in front of the Council or on the recommendations of the Council. Still, 2010 and 2011 reforms under a social-democratic government have not escaped a certain degree of complicity with the EU's requirements[271] even though the option therein was towards a more balanced reform between employees' and employers' interests.

The greatest emphasis on EU's requirements found in the 2012 reform is not accidental and highlights the convergence of targets between the conservative party and the EU, this is: placing the economic policies

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[268] To this respect see; DE WITTE, B.; "Direct Effect, Primacy and the Nature of the Legal Order", in Craig, P.; De Burca, G. (eds), *The Evolution of EU Law*, (2011), Oxford: OUP, p. 352.

[269] FEIGL, G.; in *The New EU Economic Governance and its Impact on the National Collective Bargaining Systems*, p. 29.

[270] INNERARITY, D.; in *Beyond the Crisis. The Governance of Europe's Economic, Political, and Legal Transformation* p. 175; SCHÖMANN, I., CLAUWAERT, S.; *The Crisis and National Labour Law Reforms: A Mapping Exercise*, (2012), Working Paper 2012.04, Brussels: ETUI.

[271] See: CHARI, R.S.; "The EU 'Dimensions' in Economic Policy Making at the Domestic Level: Evidence from Labour Market Reform in Spain", in *South European Society and Politics*, (2010), Vol. 6 (1), pp. 58 ff.

above and outside the reach of constitutional control. For the Spanish government in office the requirements of the Troika were in line with their electoral programme[272] and became "also the opportunity seized by the PP to transform the organizational and distributional dynamics of the labor market and to pursue a longer-term ambition of reshaping the structure of political contestation"[273].

Within this perspective, the changes in the Spanish industrial relations system cannot be termed as the unavoidable consequence of EMU's membership. The explicit introduction of council's recommendations in the preamble of the act[274] is probably a salient example. The labour reform 2012 was implemented within the MoU context, which is a funding agreement between the Spanish state and a private financing institution and that neither recommendations nor opinions are of a binding nature since the EU has only coordination competences in economic matters[275]. Accordingly, the introduction into the Spanish legal order can be explained within the deficiencies of its institutional context when it comes to using the powers to control government's acts that can alter constitutional basic principles in matters that have not been transferred to the EU[276].

2. EU Labour Law and National Level: Interaction at Different Levels

The interaction between national and EU levels reveals –at least for the purposes of this project - two problems in the industrial relations field. The first relates to the structural political form of the EU. Each industrial relations system has been built within national boundaries and represents a set of interactions between different elements that do not find correspondence at EU level[277] basically because the latter lacks the political form and structures of a state. Furthermore, EU's law and policy-making decisions operate at transnational level without having

[272] See: Programa Electoral PP, Elecciones 2012, available at: http://www.pp.es/sites/default/files/documentos/5751-20111101123811.pdf (in Spanish).

[273] CIOFFI, J.W., DUBIN, K.A.; "Commandeering Crisis.Partisan Labor Repression in Spain under the Guise of Economic Reform", in *Politics & Society*, (2016), Vol.44 (3), p. 442.

[274] Preamble VII Royal Decree of 2012 on the Labour Market Reform.

[275] Art. 121 TFEU, Art. 2 TEU, Protocol No. 14 On the Euro Group.

[276] DE WITTE, B.; in *The Evolution of EU Law*, p. 352.

[277] See: RÖNNMAR, M.; in *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives*, p. 176.

previously taken the necessary steps to bring into alignment the different national industrial relations systems so that their institutional contexts can operate at the same level. The lack of an alternative structure at transnational level replacing the function that the state fulfils in industrial relations leads to the erosion of the industrial relations favouring the spread of individual employment relations.

Without an institutional framework in which the state is present, it follows that its regulatory function on collective bargaining is lost. The particular form of the EU, however, makes that this function coexists at national level together with the economic regulation placed at the transnational level, clashing in different situations[278] and making the relational dynamics between labour actors to change. This duality provides employers with a window to profit from the national character of collective bargaining despite the increasingly transnational character of production and service provisions. In practice hindering EU's economic and social integration in a broad sense[279] by decreasing the chances to improve living and working conditions as set forth in Art. 151 TFEU.

The duality of EU-national law is also affected by the legal priority of EU law over national law, creating a dysfunction between the locus for power enforcement and the originating institutions of law[280]. Member States must implement EU's decisions but usually directives do not provide how the rights and obligations shall take effect in the national context. Hence, remedies for redress are in principle, a matter of domestic procedure. However, Member States are not fully autonomous on deciding the rules to apply, since the principle of subsidiarity does not allow them to legislate on matters that could fall among EU's shared competences[281]. In

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[278] BRUNN, N.; "The Changing Normative Field of Labour Law", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing, p. 86.

[279] SCHIEK, D.; (2008), "Transnational Collective Labour Agreements in Europe and at European Level – Further Readings of Aticle 139 EC, in Rönnmar, M. (ed.); *EU Industrial Relations v. National Industrial Relations: Comparative and Interdisciplinary Perspective, (2008),* Alphen aan den Rijn: Kluwer Law International; HENDRICKX, F.; "Completing Economic and Social Integration: Towards Labour Law for The United States of Europe", in Countouris, N., Freedland, M. (eds), *Resocialising Europe in a Time of Crisis*, (2013), Cambridge: CUP, pp. 67 ff.

[280] HABERMAS, J.; "The Crisis of the European Union in the Light of a Constitutionalization of International Law", p. 340.

[281] MALMBERG, J.; "Effective Enforcement of EC Labour Law: A Comparative Analysis of Community Law Requirements", in *European Journal of Industrial Relations*, (2004), Vol. 10 (2), p. 219.

other words, when Member States implement directives that do not provide for measures of redress, these are to be established by Member States, according to EU law thus creating a potential conflict between sanctioning rules in the same field, at national level depending on whether the matter is implemented through directives or not.

Bercusson shows that the meaning of labour law is very different from the concept it was created after WWI and the ILO norms than the one derived from the European Coal and Steel Community in 1957 and that later gave rise to the European Community (EC). The EC was founded with the purpose of creating a free market in which labour is just another good – a commodity or a tool – to that purpose. Hence, industrial relations do not really operate at a different level; simply they are aimed at different goals. But "ultimately, to defend Member States systems in the face of internationalization of the economy, a framework of European collective labour law is needed"[282]

CJEU case-law such as the Laval quartet[283] illustrates the above discussed general shortcomings on the difficulties to reconcile laws that operate at different levels and with different structures. Harmonization of labour conditions by virtue of Art. 153 TFEU has proven difficult if not impossible given the differences between 27 Member States. But the Court's decisions act as a downward harmonization mechanism by dismantling the established labour rights at domestic level, regardless these are constitutionally protected, as is the case in Spain, or they ensue from other sources.

As it is well-known[284], in Laval and Viking cases the right to collective bargaining and industrial action is subordinated to freedom of movement, placing, not only Treaty provisions but also Directives above national law[285]. This doctrine has been reminded in latter cases. In *Fonnship A/S*[286]

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[282] BERCUSSON, B.; *European Labour Law*, (2009), Cambridge: CUP, p. 317.

[283] CJEU, C-341/05 *Laval un Partneri*, 18 December 2007; C-346/06 *Rüffert*, 3 April 2008; C-319/06 *Commission vs Luxembourg*, 19 June 2008; C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*, 11 December 2007.

[284] On the huge academic literature about the judgments, a compilation of most relevant can be found at: http://www.etui.org/Topics/Social-dialogue-collective-bargaining/Social-legislation/The-interpretation-by-the-European-Court-of-Justice/Reaction-to-the-judgements/Articles-in-academic-literature-on-the-judgements .

[285] BARNARD, C.; "Free movement and labour rights: Squaring the circle", in Evju, S. (ed), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance,* (2014), Oslo: Institutt for privatrett, Universitetet i Oslo, p. 327.

the Court rules that freedom to provide services also applies to EEA member companies, and thus the restrictions on the right to strike as set in *Laval*. The conspicuous effects that the unbalanced judgments have on the domestic systems of Member States are relevant. These rulings came to question the mere continuation of the constitutional orders and force national judges to rule against their own constitutional provisions[287].

In case *Prigge*, *Fromm & Lambach* the Court reiterates that the right to collective bargaining as set forth in Art. 28 CFREU is to be performed in accordance with EU law as per Viking and Laval. On this basis, the Court finds that public security reasons are not sufficient to allow collective agreements to fix termination of employment age below the established in national and international legislation as this does not conform with Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[288]. This case is interesting in two senses. The first, it rules that collective agreements cannot contain clauses more favourable to workers, thus continue on the line of restricting the autonomy of social partners and eroding the normative function of collective agreements. Second, the Court intrudes in national prerogatives on industrial relations beyond the provisions of the Directive.

Arguably, the implications of this jurisprudence transcend the pure normative field to affect directly the industrial relations of Member States as is the case in Norway and the other Nordic countries. The Nordic model of industrial relations - characterized by few state intervention and great party autonomy - is put in a disadvantage, because the ruling entails the state intervention on setting minimum wage at national level[289]. This situation creates an internal contradiction at EU level. Treaties provisions on harmonization entail a loss of state's power in favour of EU. But the Laval ruling evidences a return to the states of the power to regulate in industrial relations. It can only be considered consistent if it is admitted that these powers are to be used to reduce or dismantle industrial relations

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[286] CJEU, C-83/13 *Fonnship and Svenska Transportarbetarförbundet*, 8 July 2014, par. 41.

[287] DORSSEMONT, F.; *A Judicial Pathway to Overcome Laval and Viking*, (2011), OSE Research Paper no. 5, p. 5.

[288] CJEU, C-447/09, *Prigge and Others*, 13 September 2011, par. 75.

[289] Evju, S. (ed), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance,* Oslo: Institutt for privatrett, Universitetet i Oslo; RÖNNMAR, M.; in *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives*, p. 190.

at national level, even this may lead to social dumping between Member States[290].

Beyond the CJEU's case law, EU's aversion to industrial relations is to be interpreted within its foundational economic objectives[291]. In the current TEU this has become more evident in view of the wording of Art. 3 where aims and objectives are expressed. While social aims are to be 'promoted', economic targets, i.e., internal market and economic and monetary currency are to be 'established'. This distinction is not trivial since the latter reveals an active commitment towards the accomplishment of targets while the former refers to take steps to advance without a firm engagement. In this prevalence of economy, actors in industrial relations are seen rather as foes instead of means of support and achieving targets. The reason is that baking unions would oblige EU to relinquish in favour of sharing targets which is outside its tenets.

The directives in four freedoms aim at protecting posted workers with a hard core of labour standards. However, they are not integrated into the industrial relations systems of the host state nor of the establishment state, making it difficult for both supervision mechanisms of control of working conditions to be effective. This can potentially affect domestic labour market and challenges competition between domestic and foreign companies and employees[292]. Furthermore, these directives have restricted the chances for Member States to make and enforce labour law within their frontiers and have lost control to bind foreign firms and workers to their national public policy provisions[293].

The preference for social dialogue as a tool to govern industrial relations at EU level[294] is not only a divesting process of collective bargaining's

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[290] See: NOVITZ, T., SYRPIS, P.; "Giving with One Hand and Taking with the Other: Protection of Workers' Human Rights in the European Union", in Fenwick, C., Novitz, T. (eds), *Human Rights at Work: Perspectives on Law and Regulation*, (2010), Oxford: Hart Publishing, p. 156.

[291] See, i.e Art. 2 Treaty of Paris 1951 and Art. 2 Treaty of Rome 1957.

[292] AHLBERG, K., ET AL.; "Monitoring compliance with Labour Standards. Restriction of Economic Freedoms or Effective Protection of Rights?", in Evju, S. (ed), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance,* (2014), Oslo: Institutt for privatrett, Universitetet i Oslo.

[293] DØLVIK, J., VISSER, J.; "Free Movement, Equal Treatment and Workers' Rights: Can the European Union Solve its Trilemma of Fundamental Principles?", in *Industrial Relations Journal,* (2009), Vol.40 (6), p. 495.

[294] EU Commission, "Social Dialogue", in *Employment and Social Developments in Europe 2015*.

normative and regulatory functions[295] to turn into the form of voluntary agreements lacking enforcement, covered with the veil of the autonomy of the parties[296]. It is also a process of declining unions' strength since EU law neither provides for a way of addressing the breach of collective agreements concluded at EU level neither could do it since the right to strike is left at national level. Hence there are no incentives for unions to look for transnational collective bargaining nor do they have enough institutional representativeness to seek for enforcement measures.

In Norway, problematic situations resulting from the four freedoms have been solved through the involvement of social actors and the state, with legislative intervention as they saw fit. As a result of the EEA agreement, Norway's unions envisaged the potential of social dumping created by labour migration from low-cost countries and the consequent risk of increasing wage differences and reducing equalization in society. They managed that the Parliament passed the Act on Collective Agreements[297] whose main target was to ensure that foreign workers in Norway had the same wage levels and working conditions as the nationals by extending the application of relevant collective agreement to all workers, unionized or not[298].

Social partners did participate in the implementation process of the Services Directive[299] in Norway. This facilitated the easiness of the implementation by the reassurance that the domestic industrial relations system and labour law would not be affected[300]. This is the overriding concern in Norway rather that of the EU principles of free movement and free market, the point that brings together politics, economy and labour is the national labour market and the national interests to be protected[301]. These task is facilitated by the non-euro zone membership that gives the

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[295] In a similar line, see: DUKES, R.; *The Labour Constitution,* p. 157.

[296] For a critical overview see, Bogg, A., Dukes, R.; "The European Social Dialogue: From Autonomy to Here", in Countouris, N., Freedland, M. (eds), *Resocialising Europe in a Time of Crisis*, (2013), Cambridge: CUP.

[297] *LOV-1993-06-04-58 Lov om allmenngjøring av tariffavtaler* (Act on Collective Agreements).

[298] ALSOS, K., "Labour Mobility and Wage Dumping: The Case of Norway", in *European Journal of Industrial Relations,* (2008), Vol. 14 (4).

[299] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[300] EVJU, S., NOVITZ, T.; "The Evolving Regulation: Dynamics and Consequences", in Evju, S. (ed), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance*, (2014), Oslo: Institutt for privatrett, Universitetet i Oslo, p. 75.

[301] EVJU, S.; "Fundamental Social Rights vs. Fundamental Freedoms", in *Europäische Zeitschrift für Arbeitsrecht*, (2013), p. 257.

country chances for overcoming crisis, maintaining the power balance and the welfare model[302].

In short, it seems clear that the responses of each Member State to EU law varies according to the "relative influence of social actors, such as employers and trade unions, and the domestic institutional framework within which they operate"[303].

[302] DØLVIK, J.E.; *Welfare as a Productive Factor,* pp. 6-7.
[303] EVJU, S., NOVITZ, T.; in *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance*, p. 28.

PART 3 THE REGULATION OF PENSIONS IN NORWAY AND SPAIN

The institutional differences analysed in the previous chapter suggest these should mirror in the structure of the respective pension systems through their regulatory framework and ultimately in the protection of pension rights and of their adequacy. Whether the constitutional systems provide for a regulatory mandate of pensions is the starting point of this chapter. To this purpose the Spanish politico-constitutional context dealt with in the last section of the previous chapter acts as the nexus to the comparative analysis carried out here. Because of the link between pensions and work, the peculiarities of the Spanish constitutional system regarding industrial relations, outlines the context that frames the protection of pensions, also at constitutional level.

The analysis continues by comparing the purposes of the pension reforms that took place in each country and shows the different rationales behind each welfare state as well as how the role of the state as defined in the previous chapter plays an important role in the design of pension systems. Ultimately, the institutional framework is looming as a relevant element in the adequacy of pension benefits.

SECTION I. Constitutional Basis for Adequate Pensions

To understand the protection of social rights in the Norwegian and Spanish constitutional systems it can be helpful to first look at the instrumental functions of each text based in its structure. The preamble of the Spanish Constitution states the values and principles that guide the nation, among which democracy, the guarantee of a fair social and economic order and the protection of all citizens in their exercise of human rights. Probably this content would lead a new reader to expect the immediate provisions to be related with citizens' rights in a similar way as the German Basic Law or the Italian Constitution wherefrom the Spanish Constituents took inspiration[1]. However, the Spanish text devotes the first eight articles to consecrate the form and organization of the state, reflecting the issues that worried at that moment[2]. Art. 9.3 establishes the

[1] PEGORARO, L.; "El Derecho Comparado y la Constitución Española de 1978. La Recepción y «Exportación» de Modelos", in *Anuario Iberoamericano de Justicia Constitucional*, (2005), Vol. 9, p. 292.

[2] Actas de la Ponencia Constitucional, Revista de las Cortes Generales, núm. 2 (1984), available at: http://www.congreso.es/constitucion/ficheros/actas/actas.pdf (in Spanish).

normative nature of the instrument[3], and only from Art. 14 onwards the catalogue of rights can be found.

The Norwegian Constitution (*Kongeriket Norges Grunnlov*)[4], in its Art. 2[5], puts the emphasis on the Constitution as the instrument granting democracy, a state based on the rule of law and human rights. It thus emerges itself from the very beginning as the tool whereby democracy and the activities of the state will be assessed[6]. This straightforward provision to the constitutional text as the supreme law is explained in historical revolutionary terms and highlight the concerns of the drafting committee: to establish "the unequivocal principle of sovereignty of the people, the division of power based on that sovereignty, the catalogue of human rights"[7]. The main task of the delegates as they framed the Constitution, was "to put down on paper — in words, sentences, and paragraphs — ideas of the foundations of government and the protection of human rights in Norway"[8]. However, one cannot find an introductory declaration of rights in the Norwegian Constitution because the committee charged on its drafting decided to "leave out the general principles,

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Given that the works of the Committee responsible for drafting the constitutional text were declared secret, there are no other available official versions of the preliminary works. For an account of the historical developments in Spanish constitutionalism see: VARELA, J.; *Política y Constitución en España: 1808-1978*, (2007), Madrid: Centro de Estudios Políticos y Constitucionales.

3 GARCÍA DE ENTERRÍA, E., FERNÁNDEZ, T.R.; *Curso de Derecho Administrativo I*, (2011), Cizur Menor: Thomson Reuters, p. 118.

4 Official English version used in this project from the Norwegian Parliament (*Stortinget*): *The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2016*, available at: https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf

5 It is worth to mention that the current wording of this article was approved in 2008. See Constitutional Proposal (*Grunnlovsforlag*) 10, *Stortinget Dokument* 12:10 (2007-2008), p. 2, approved, available at: https://www.stortinget.no/globalassets/pdf/dokumentserien/2007-2008/dok12-200708-10.pdf (in Norwegian). The original version of 1814, however, already enshrined individual civil rights, see: BRAEKSTAD, H. L.; *Constitution of the Kingdom of Norway: An Historical and Political Survey*, (1905), London: David Nutt.

6 See Arts. 8 & 9 The Norwegian Constituion.

7 MICHALSEN, D.; "The Norwegian Constitution of 1814 between European Restoration and Liberal Nationalism", in Grotke, K., Prutsch, M. (eds), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences*, (2014), Oxford Scholarship Online, p. 214.

8 LOVOLL, O.S.; "Writing Democracy: The Norwegian Constitution 1814–2014", in *Canadian Journal of History*, (2016), Vol.51 (1), pp. 149-151.

statements borrowed from philosophy and international law [..] to proceed at once to the positive resolutions of the constitution"[9].

Rights are explicitly formulated in the last but one chapter – Arts. 92 to 113 - and mostly concern the protection of individuals against the state while setting the duties of the state to ensure compliance rather than rights of individuals, reflecting the formulation of civil and political rights. In the Spanish text, Art. 9.2 imposes a positive action on the state to seek for the equality, freedom and dignity of individuals but does not recognize any substantive right neither is this mandate linked to Art. 10 for the protection of fundamental rights[10].

In fact, the constitutional protection of human rights is the bone of contention in both texts. In the Norwegian system and despite the outward explicitness of the terms used in the provision, the content and the scope are under debate. As a result of the EAA agreement entering into force, The Norwegian Constitution was amended in 1994[11] to incorporate two state obligations: 1) to "respect and ensure human rights" and, 2) to implement human rights treaties binding on Norway into national regulation through statutory enactments[12]. Accordingly, rights enshrined in the, ECHR, ICESC[13], ICCPR, and other treaties were incorporated in the Human Rights Act – in purity: *Act relating to the strengthening of the status of human rights in Norwegian law* - put into effect in 1999[14]. In 2014 a subsequent constitutional amendment[15], abolished the requisite of implementation into statutory law giving rise to the internal debate about the semi constitutional nature of the treaties' rights[16].

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9 TØNNESSON, K.; "The Norwegian Constitution of 17 May 1814 - International Influences and Models", in *Parliaments, Estates and Representation*, (2001), Vol. 21 (1), pp. 183-184.

10 See STC 120/1990, 27 June 1990, fourth ground for decision.

11 Art. 110.c The Norwegian Constitution, before the 2014 amendment.

12 VOLLEBÆK, K., PLESNER, I.T.; "Towards Constitutional Protection of National Minorities Rights in Norway. Does it Matter?", in *Nordic Journal of Human Rights. Special Issue: Fragmentation in International Human Rights Law - Beyond Conflict of Laws*, (2014), Vol. 32 (2), p. 179.

13 Except for the Optional Protocol to the ICSECR recognizing the competence of the Comittee on violations of Economic, Social or Cultural rights.

14 LOV-1999-05-21-30 *Lov om styrking av menneskerettighetenes stilling i norsk rett* (The Human Rights Act).

15 Former Art. 110.c The Norwegian Constitution became current Art. 92 from 2014 onwards.

16 See: VOLLEBÆK K., PLESNER, I.T.; "Towards Constitutional Protection of National Minorities Rights in Norway. Does it Matter?"; SMITH, C.; "The Interaction between the European Convention and the Protection of Human Rights and Fundamental Freedoms within the Norwegian Legal System", in

In essence, the short, albeit comprehensive Human Rights Act transfers the substance and the autonomy of human rights into Norway's legal system[17] but creates a conflict of law on the rules of precedence with EEA Law. Art. 3 of the Human Rights Act sets precedence of the conventions and protocols' provisions. Exactly the same precedence can be found in Art. 2 EEA Law[18] referred, of course, to the four freedoms – movement of persons, capital, goods and services – which are the pillar of the agreement. From the more specific wording of EEA law, it would be possible to infer that it precludes the principle of *lex posterior derogat legi priori* as set forth by the Vienna Convention on the Law of Treaties[19] thus granting EEA agreement precedence over all other domestic regulation. So far, no conflict has come to the fore [20] so it is difficult to predict the outcomes for the human rights protection in the whole Norwegian constitutional system.

The judiciary seems to have a clear opinion in favour of granting the constitutional protection of the involved rights: "the Norwegian Supreme Court is not only prepared to test whether EEA law is in accordance with fundamental rights, as prescribed by the Norwegian Constitution itself and by the incorporated human rights treaties. The Supreme Court is constitutionally obliged to do so. This duty has not been transferred to the EEA institutions"[21]. Certainly, the Norwegian Supreme Court (*Norges Høyesterett*)[22] has always been prone to protect human rights. Whether treaties should be given precedence over national law has been, however,

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Mahoney, P. et al. (eds). *Protecting Human Rights: The European Perspective*, (2000), Köln: Carl Heymanns Verlag, pp. 1307–1308.

17 Arts. 1-3 The Human Rights Act.

18 *LOV-1992-11-27-109 Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde* (Act implementing the EEA agreement into the Norwegian law).

19 Art. 30.3 Vienna Convention.

20 EVJU, S.; "Fundamental Social Rights vs. Fundamental Freedoms", p. 323.

21 JUSTICE A BÅRDSEN, *The Norwegian Supreme Court and the Internationalisation of Law*, Seminar for the EFTA Court and the Norwegian Supreme Court,7-8 October 2014; In the same line: JUSTICE TROND DOLVA, *The Protection of Minority Rights in Norway with Reference to the Sami People*, available at: http://tribunalconstitucional.ad/sites/default/files/documents-ponencies/H-NORWAY.pdf

22 The Supreme Court of Norway is vested with constitutional review (Art. 89 The Norwegian Constitution) as well as a court of last resort (Art. 88 The Norwegian Constitution).

not a steady interpretation[23]. According to the most recent case-law, it is argued that the Court has opted to apply a national law approach when interpreting the international treaties in line with Lord Bingham's opinion on what should the role of national courts be: 'to ascertain the true governing principle and apply it'[24].

When it comes to the effective protection, the matter becomes much more complex. Despite of the above affirmations, the Norwegian Supreme Court, through judicial review, applies different standards:

> "reference is made to three groups of constitutional provisions that are subject to different levels of intensity when being reviewed. The highest review intensity applies to "the individual's personal liberty or security", often referred to as political and civil rights. The lowest intensity applies to the organisation or internal working methods of the other branches of government. The third group, economic rights, is in an intermediate position"[25].

Leaving to the legislature different margins of discretion necessarily results in different levels of protection and suggests that the treaties incorporated to the Human Rights Act do not play an equal role in the Norwegian constitutional system[26].

The Spanish Constitution sets three different State obligations on the protection of human rights. A negative obligation, this is the state must refrain to interfere in the enjoyment of the civil and political rights enshrined in Arts. 14 to 29 and 30.2, which protection under the

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[23] BJORGE, E.; "The Status of the ECHR in Norway: Should Norwegian Courts Interpret the Convention Dynamically?", in *European Public Law*, (2010), Vol.16 (1).

[24] ANDENAS, M., BJORGE, E.; "The Norwegian Court Applies the ECHR by Building upon its Underlying Principles (European Convention on Human Rights), in *European Public Law*, (2013), Vol.19 (2), p.246. See the recent case Supreme Court HR-2017-1127-U, (Case no. 2017/778), 29 June 2017.

[25] JUSTICE B TØNDER ; "The Control of the Legislative and the Executive Power by Norwegian Courts", in *Panstwo i Prawo*, (2014), available at: https://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Articles/articles-and-speeches-2013/The-control-of-the-legislative-and-the-executive-power-by-Norwegian-courts/ (in English).

[26] To this purpose, the speech of JUSTICE A BÅRDSEN, *Interpreting the Norwegian Bill of Rights*, Annual Seminar on Comparative Constitutionalism 21 - 22 November 2016, Faculty of Law, University of Oslo, seems to stress the predominant position of civil and political rights.

Constitution can be directly claimed by the individuals[27]. A group of rights, Arts. 30 to 38, which act as 'bridge' rights in the sense that they enjoy a core minimum content linked to substantive rights, which the State must respect. Beyond this threshold there is no obstacle for statutory law to be enacted; i.e. the right to collective bargaining, the right to work[28] or freedom of business. And finally, mostly social rights (Arts. 39 to 52) for which the Constitution lays down on the State a positive duty to promote. These rights are built as guiding principles, so it is incumbent on the state to determine their content and scope through regulation or other means suitable to reach the targets set by the social and economic policies[29].

Such a segmentation of rights reproduces the traditional distinction between political and social rights, failing to take account of the indivisibility of human rights. But might also contravene Art. 10.2 of the Spanish Constitution in that this provision remits to the human rights treaties validly ratified by Spain[30] for the interpretation of the meaning and scope of fundamental rights without further distinction of treaties. Therefore, it should be presumed that the ICCPR, the ICESC, the ESC or the ILO Conventions display the same effects. However, the Constitutional Court has never projected such a conflict in its decisions but has, from the onset, adopted two different interpretative standards depending on the category of the right to be assessed.

When substantive rights are at stake, this is, what under the constitutional text qualify as fundamental rights, international treaties become the source of rights, having a direct effect on the appeal[31]. In this sense, the interpretative outcome of the Court will be in line with the treaty at issue. As far as the remaining rights are concerned, the Court adopts this conformity technique the other way around; the interpretation of the treaty provisions will be made in accordance with the constitutional content. In other words, the category of the right determines the direction of the interpretation of international treaties: the content of the Constitution is in

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27 Spanish Constitutional Court, Amparo (Appeal for constitutional protection of fundamental rights) available at: https://www.tribunalconstitucional.es/en/tribunal/Composicion-Organizacion/competencias/Paginas/04-Recurso-de-amparo.aspx (in English)

28 For all see, STC 227/1998, 26 November 1996.

29 For all see, STC 65/1987, 21 May 1987.

30 The list of instruments ratified can be found at: http://indicators.ohchr.org/

31 STC 38/1981, 23 November 1981, fourth ground for decision; STC 64/1991, 22 March 1991, fourth ground for decision.

accordance with the treaty in question or, the treaty provisions fit into the constitutional content[32].

The foregoing overview of the Norwegian and Spanish general constitutional frameworks points at the reception into the domestic legal orders of the international human rights instruments as a problematic element. To what extent this might affect the real protection of social rights is the subject of the following analysis. In particular, what interests here is whether the right to an adequate pension enjoys protection under each constitutional system in comparison and if so, what are the tools at play.

The Norwegian Constitution essentially does not provide for regulation on social matters. It only contains a succinct mention to social security in Art. 110: "Those who cannot themselves provide for their own subsistence have the right to support from the state", which may be understood as an obligation for the state to provide basic social assistance in a universal basis. It follows that the right to pension is not a direct constitutional mandate. Nevertheless, the fact that the Constitution vests on the Supreme Court of Norway with a double function: the constitutional review, which is a power of all Courts[33], as well as being the court of last resort leaves it in the position to hear about any matter[34]. It is on this two-hat system that the Supreme Court has been called to decide about pension rights issues on the constitutional grounds prohibiting, in Art. 97, the retroactive effects of law[35].

In cases RT 1996 *Borthen* and RT 1996 *Thunheim*, The Norwegian Supreme Court was prone to assert the strong constitutional position of pension rights but was not ready to repeal any regressive measure if the individuals are secured with an adequate level of benefits allowing them for a reasonable standard of living. The basis of the constitutional protection is the security and predictability of the expectations created through the pension schemes, not the amount of benefits. The long the

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32 For all see STC 145/1991, 1 July 1991, fourth ground for decision.

33 Art. 89 The Norwegian Constitution.

34 The Supreme Court may hear about any matter on direct individual appeals if the case is important or, as a second instance court: *LOV-2005-06-17-90 Lov om mekling og rettergang i sivile tvister* (Act relating to mediation and procedure in civil disputes - The Dispute Act), Chapter 30.

35 ELIASSON, N.; *Protection of Accrued Pension Rights. An Inquiry into Reforms of Statutory and Occupational Pension Schemes in a German, Norwegian and Swedish Context*, (2001), Lund: Akademibokhandeln i Lund, p. 97 ff., with references and commentaries of The Norwegian Supreme Court's cases RT 1996 Borthen and RT 1996 Thunheim.

legislature reduces benefits, the strongest the constitutional protection becomes[36] in order to assess the proportionality of the measures with regards to the economic needs of the state. This has been the line followed by the Norwegian Supreme Court from an early stage to present when Parliamentary Members challenged the adjustments of their pensions[37].

In the latter case, The Norwegian Court did not find that the reduction of pensions was in breach of the human rights legislation, nor did it found that pensions generate a right to property in the sense of ECHR Protocol 1. The argument was that the security and predictability was granted and so Parliamentary Members continue to enjoy good and secure pensions despite the adjustments. The latter were considered to be necessary within the framework of the country's pension system reform in 2009 and because the sustainability of the system concerns everybody in the society Parliamentary Members do also have to bear their share of reduction. Hence equality and solidarity are also values that the Court balances in order to assess the proportionality of the measures. The interesting points of the decision are on the one side, the Court' ad hoc ruling on what is an adequate pension level. In so doing, and this is the other point of relevance, it encompasses a wide margin of political discretion on budgetary matters with social regards making the collective interests – in the form of sustainable pensions – prevail over the individual interests represented by the increase of benefits.

Even the more extensive coverage of social matters under the Spanish Constitution the provisions on social security[38] and old age pensions[39] are inserted into the guiding principles, thus do not create substantive rights. Their value resides in the fact that:

> "The whole set of guiding principles should be recognized, respected and protected in the legislation, judicial practice and by the activities of public authorities, according to art. 53.3 of the Constitution. This constitutional declaration prevents all public authorities from considering such principles as devoid of content and obliges to take them into account in the interpretation of both the constitutional norms and laws"[40].

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36 ELIASSON, N.; *Protection of Accrued Pension Rights*, p. 100.

37 Supreme Court of Norway HR-2016-389-A, (Case no. 2015/1740), 19 February 2016. Summary in English available at : https://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/human-rights/

38 Art. 41 The Spanish Constitution.

39 Art. 50 The Spanish Constitution.

40 STC 19/1982, 5 May 1982, sixth ground for decision. Author's translation.

Two elements mainstream the Spanish Court's interpretation on these guiding principles and shape the constitutional fit of their mandatory nature. First, in accordance with the superior value of political pluralism proclaimed in Art. 1.1 of the Spanish Constitution, the margin that these principles leave to the legislator is very broad. The goals and actions thereof can be realized through different means of varying content and scope[41]. Accordingly, these principles are conceived as mandates of result without concrete legislative content. The constitutional protection will be granted only insofar as a given guiding principle is related to fundamental rights[42].

Art. 41 of the Spanish Constitution reads: "The public authorities shall maintain a public Social Security system for all citizens which will guarantee adequate social assistance and benefits in situations of hardship, especially in cases of unemployment". Within the above determinants, the High Court has elaborated on the essence of the Spanish social security system on the basis of three main factors:

> a) "Art. 41 reaps and consolidates the evolution of social security systems in such a way that the protection of citizens in situations of need is conceived as a 'function of the State'. Thus, much of the nexus benefits-contribution has been overcome by the dynamics of the protective function of state"[43].

It follows that the concepts of social assistance and social security become blurred to the extent that although the Spanish social security system remains contribution based, its constitutional form departs from the notion of risk or contingency – considered obsolete – to include any situation of need[44].

> b) "Art. 41imposes on the public authorities the obligation to establish - or maintain - a protective system that complies with the technical characteristics of coverage mechanisms specific of social security systems. In other words, this provision establishes a public regime in the form of an institutional guarantee, the preservation whereof is considered essential to

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41 STC 14/1992, 10 February 1992, eleventh ground for decision.

42 STC 45/1989, 20 February 1989, fourth ground for decision.

43 STC 84/2015, 30 April 2015, seventh ground for decision; STC 65/1987, 21 May 1987, seventeenth ground for decision; STC 103/1983, 22 November 1983, third ground for decision, among others. Authors translation.

44 STC 239/2002, 11 December 2002, third ground for decision; STC 137/1987, 22 July 1987, fourth ground for decision; STC 103/1983, 22 November 1983, fourth ground for decision.

> ensure the constitutional principles. This essential core is binding upon the legislature in such a way that is must be preserved 'in recognizable terms for the image that the social consciousness has in each time and place"[45].

The social security system consists of "a minimum constitutionally granted"[46].

> c) "Apart from this limitation, the rights of citizens to social security ensue from the ordinary law which grants the legislator a wide margin of discretion to modulate the protective action of the system according to the economic and social circumstances that are imperative for the very effectiveness and viability thereof"[47].

For that reason, the Court constrains its judicial review to situations that might give raise to unjustified or unreasonable differences in treatment. Otherwise it would interfere with "decisions that may alter the economic and financial balance of the system as a whole"[48].

It is worth to note that despite Art. 41 on social security lays down the adequacy of the social protection, the above consolidated case-law has systematically failed to deal with. Instead the High Court has resorted to the necessary balance between economic resources and the needs of the different social groups by declaring that it is upon the legislature to assess and determine the level of protection:

> "considering the general context in which the availability of the moment and the needs of the various social groups occur in connection with economic circumstances. It cannot therefore be ruled out that, in view of the circumstances indicated, the legislature, in assessing the relative importance of the situations of need to be satisfied, regulates the level and conditions of the benefits to be made or modified to adapt them to the needs of the moment"[49].

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45 STC 84/2015, 30 April 2015, seventh ground for decision; STC 76/1988, 26 April 1988, fourth ground for decision; STC 26/1987, 27 February 1987, fourth ground for decision. Author's translation.

46 STC 103/1983, 22 November 1983, sixth ground for decision.

47 STC 84/2015, 30 April 2015, seventh ground for decision; STC 65/1987, 21 May 1987, seventeenth ground for decision, among others. Author's translation.

48 STC 156/2014, 25 September 2016, fourth ground for decision; STC 184/1993, 31 May 1993, sixth ground for decision.

49 STC 156/2014, 25 September 2014, fourth ground for decision; STC 197/2003, 30 October 2003, third ground for decision; STC 77/1995, 22 May

Were it not because the above creates an internal contradiction within its reasoning, the fact that the protection could be accommodated to the changing societal needs[50] might be interpreted as a praiseworthy commitment of the Court. However, regulatory changes on the level of benefits can be hardly reconciled with the social consciousness of what a social security system is. In other words, changes due to macro-economic circumstances might render the protection of the institutional guaranty ineffective. Moreover, the references of the Court to the 'specific mechanisms of social security systems' are to be understood to the international instruments – ILO Convention 102 or the European Code of Social Security, both ratified by Spain – that establish such technical mechanisms and thus make them recognizable. Rather, the Court seems to disown these sources and entrust the social consciousness' recognition of the social security system in national terms only.

A second issue in the constitutional interpretation of what the social security system in Spain should be in relation to its structure. From item a) above, it emerges that different structures coexist. However, social security understood as a core minimum not in a universal basis, but only for those in need, is the ideal towards which the legislature should address its activities[51]. In the meanwhile, the Constitution does not impose but allows different social security structures providing for different legal regimes of protection having regard to the originating causes[52] and the inherent redistributive character of the system[53]. It follows that the concept of adequacy, and its concomitant right ensuing from each legal basis might differ according to the assumptions taken at legislative level to build each structure.

The relevance of adequacy for old age pensions has already been dealt with in chapter one. The Spanish constitutional text, in line with the international human rights instruments, provides in its Art. 50 for a positive duty of the State to "guarantee, through adequate and periodically updated pensions, sufficient financial means for senior citizens". Within

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1995, fourth ground for decision; STC 65/1987, 21 May 1987, seventeenth ground for decision, among others. Author's translation.

50 This is suggested in STC 37/1994, 10 February 1994, fourth ground for decision.

51 Auto 306/2008, 7 October 2008, eighth ground for decision.

52 STC 149/2004, 20 September 2004, fifth ground for decision; STC 38/1995, 13 February 1995, third ground for decision; STC 184/1993, 31 May 1993, sixth ground for decision; STC 114/1987, 6 July 1987, third ground for decision.

53 STC 110/2015, 28 May 2015, fifth ground for decision.

the Constitutional Court's case-law, Art. 50 has been always elaborated as part of Art. 41 on social security[54] thus, most of the discussed above does apply to pensions as well. At this point, what interests to elucidate is the constitutional treatment of pension's adequacy.

From the early case-law the Spanish High Court has ruled that in:

> "art. 50, the concept of "adequate pension" cannot be considered in isolation, depending on each single pension, but must take into account the pension system, considering the prevailing economic and social circumstances at each moment. Furthermore, it should be recalled that it is a matter of managing limited economic means for a large number of social needs. The same holds true for the guarantee of periodic update, which does not necessarily imply the annual increase of all pensions. By setting a limit to the perception of new pensions or by denying the update for higher pensions, the legislature does not exceed its power. On the contrary, it is within its functions the assessment of the socioeconomic circumstances that determine the adequacy and updating of the pension system. Regardless the opinion that each individual case might have on the appropriateness of the measure, it is embedded in the duty of solidarity incumbent to all citizens"[55].

It being the case that pension rights arise only through ordinary law, it follows that the adequacy of pensions does not belong to the core minimum constitutionally granted within the social security system. A different question is whether adequacy may be interpreted in terms of vested rights. Or, whether the principle of retroactivity of laws forbidden in Art. 9.3 of the Spanish Constitution applies to situations in which the law lays down provisions that directly affect acquired rights. To this end, the Court has distinguished between rights and expectations: consolidated rights might not be restricted, however updates belong to expectations and as such a subsequent law may limit or derogate such expectations for the time being[56] if the reasons for the law match within the context of preserving the economic resources of the system.

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[54] STC 49/2015, 5 Mach 2015, fifth ground for decision; STC 100/1990, 30 May 1990, second ground for decision; STC 134/1987, 21 July 1987, fifth ground for decision; STC 114/1987, 6 July 1987, third ground for decision.

[55] STC 134/1987, 21 July 1987, fifth ground for decision. Author's translation.

[56] STC 112/2006, 5 April 2006, seventeenth ground for decision; STC 97/1990, 24 May 1990, third and fourth grounds for decision; STC 99/1987, 11 June 1987, sixth ground for decision.

The 2011 constitutional reform[57] established national budget stability at constitutional level whereby it became an interest constitutionally protected[58]. The reform has been severely criticized in the Spanish academic literature both in form and substance[59]. *De lege data*, it can be argued that new constitutional provisions transform the dimension of the Spanish state established in Art. 1. of the Constitution, from social to economic and preclude the evolution of the welfare state – or initiate its regression. This last has been assumed by the Spanish Constitutional Court (*Tribunal Constitucional*) as a necessary measure for the redistribution of public resources[60].

To be sure, budget stability is not a strange concept at constitutional level. In March 2001, the Court already found to be legitimate for the State to establish budgetary limits on specific matters[61]. The interpretation given resides on that the definition of 'budgetary stability' is configured as an orientation of the general economic policy that the State can dictate ex Art. 149.1.13 of the Spanish Constitution. Some months later, in December 2001, laws introducing budgetary stability into the Spanish legal order were passed[62]. Against these laws several regional autonomous

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57 BOE, Reforma del Artículo 135 de la Constitución Española, available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-15210 (in Spanish). For an English version of the Article see: See*:* Gobierno de España, La Moncloa, *Art. 135 The Spansih Constitution*, http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/titulo_septimo.aspx

58 STC 139/2016, 21 July 2016, sixth ground for decision.

59 I.e.: FLORES, L.; "El Ataque Constitucional al Estado Social: Un Análisis Crítico de la Reforma del Artículo 135 de la Constitución Española", in *Revista Internacional de Pensamiento Político*, (2014), Vol. 9; FALGUERA, M.; "Un Ataque Directo a la Democracia y al Derecho", in *Cuadernos de la Fundación 1º de Mayo*, (2011), Vol. 25; RODRIGUEZ, C. J. F. ET AL.; "Austerity and Collective Bargaining in Spain", p. 5; GARCÍA BLASCO, J.; "Las Medidas Laborales y la Crisis Económica. Valoración, Problemas Aplicativos y soluciones". García, J.I. (dir), *El Impacto de la Gran Crisis Mundial sobre el Derecho del Trabajo y de la Seguridad Social: Su Incidencia en España, Europa y Brasil, 2008-2014*, (2014), Barcelona: Atelier, p. 97.

60 STC 139/2016, 21 July 2016, eighth ground for decision.

61 STC 62/2001, 1 March 2001, fourth ground for decision.

62 *Ley Orgánica 5/2001, de 13 de diciembre, complementaria a la Ley General de Estabilidad Presupuestaria* (Law on Budget Stability) and *Ley 18/2001, de 12 de diciembre, General de Estabilidad Presupuestaria* (Budget Stability General Act). Modified by *Real Decreto Legislativo 2/2007, de 28 de diciembre, por el que se aprueba el texto refundido de la Ley General de Estabilidad Presupuestaria*, subsequently modified by Ley Orgánica 2/2012,

Parliaments filled proceedings of unconstitutionality in March 2002 that were not decided by the Court until 2011. All of them were systematically rejected on the grounds that the legal commitment was not in breach of the constitutional order because, as stated above, the constitutional legitimacy of the state to determine the economic policy allows setting budgetary limits as it sees fit[63]. However, the Court has not ruled which matters nor to what extent these limits can be set by the law.

The 2011 constitutional reform brings to the fore the question of how this new constitutional principle will be balanced vis-à-vis the fundamental rights and the other constitutional principles. Whether to following may be an example is not so clear, but certainly brings a change in the Court's interpretation of the retroactivity principle when applied to pensions' updates. In Spain, the Social Security law provides for the automatic yearly adjustment of pensions. The *quantum* of the increase is set according to the national budget and set forth in the Finance Act which is enacted later in the current year. Therefore, in the event that no law repealing the automatic increase for the following year is enacted before 31st December, conceptually the update becomes an acquired right from the 1st. January every following year.

On 30th. November 2012, the government adopted in the form of urgency legislation, the measure to abrogate pension updates from the 1st. January 2012[64]. In this occasion, reversing its previous decisions, the Court did not find that the measure constituted a regression on individual rights because the update would not become an acquired right until 31st. December[65]. Although the budget stability is not expressly mentioned in the decision as being a constitutional principle, the Court accepts that the need to comply with the public deficit limits stated in the preamble of the law as a sufficient justification to uphold the measure. From this perspective, it may reasonable to think that the reform will have downsizing effects in terms of rights.

It is worth reflecting also the other element that has raised legality doubts about the reform. The Spanish Constitution provides two different procedures for its amendment. The simple one allows for the amendment

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de 27 de abril, de estabilidad presupuestaria y sostenibilidad financiera (Law on Budget Stability and Finacial Sustainability).

63 STC 134/2011, 20 July 2011, eighth ground for decision. Author's translation.

64 Art. 2.1 *Real Decreto-ley 28/2012, de 30 de noviembre, de medidas de consolidación y garantía del sistema de la Seguridad Social* (Royal Decree for the consolidation and guarantee of the Social Security System).

65 STC 49/2015, 5 March 2015, fifth ground for decision and dissenting vote of two judges.

to be approved by the majority of the Congress and of the Senate[66]. The normal procedure is to be undertaken if the reform affects any of the Articles 1 to 65 of the text[67]. Despite that there is a strong presumption that the introduction of budgetary stability will affect the rights of the citizens, at the very least for the provisions of Art. 31:

> "1. Everyone shall contribute to sustain public expenditure in proportion to his or her financial means, through a just and progressive system of taxation based on principles of equality, which shall in no case be confiscatory in nature.
>
> 2. Public expenditure shall be incurred in such a way that an equitable allocation of public resources may be achieved, and its planning and execution shall comply with criteria of efficiency and economy."

the reform was enacted using the simple procedure. The political reason is quite simple to understand: The two majority parties agreed on the form and the terms of the reform before its submission to the *Congreso de los Diputados*. Both having 222 seats of a total of 350 seats in the Congress as well as the majority of the Senate, the requisites for the adoption of the reform via simple amendment were met.

Furthermore Art. 167 of the Spanish Constitution provides that if one tenth of the Member of the Congress so request, a referendum shall be called, after the reform has been passed. Significantly enough the two major parties secured the affirmative vote of other minority parties in a way that the reform was approved by 316 votes, exactly avoiding by one tenth less one that the opposing Members could request such referendum. Procedural singularities occurred during the parliamentary process[68] in order to avoid that the normal procedure could delay the approval. In fact, the text was submitted to the Congress on the 26 of August 2011 and passed on the 2 of September 2011. In short, it seems plausible that the reform was incurred in citizens' rights fraud[69] because of the political

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[66] Art. 167 The Spanish Constitution.

[67] Art. 168 The Spanish Constitution.

[68] Those are detailed in: RIPOLLÉS, M.R.; *La Reforma Constitucional Española de 2011: Antecedentes, Tramitación y el Epígono de la LO 2/2012*, (2012), Seminar in the Italian Parliament, June 2012. A comprehensive explanation of the parliamentary process in English can be found in: PIEDRAFITA, S.; "National Parliaments' Say on the New EU Budgetary Constraints: The Case of Spain and Ireland", in Adams, M. et al. (eds), *The Constitutionalization of European Budgetary Constraints*, (2014), Hart Publishing on Line, p. 332 ff.

[69] FLORES, L.; "El Ataque Constitucional al Estado Social: Un Análisis Crítico de la Reforma del Artículo 135 de la Constitución Española", p. 343.

entrenchment of the institutions[70]. Or in other words, because of the weakness of the institutional background.

As a corollary, extensive leeway to the legislature for balancing economic and social interests is the definitory feature of the Spanish High Court when adjudicating on social security matters. Certainly, the constitutional set of guiding principles require such a balance but do also impose their integration in the legislative acts. However, the Court's reluctance to assess the proportionality of the measures adopted through judicial review leads to a problematic understanding of the scope and effects of the constitutional provisions at issue.

The reading of Art. 41 on social security and Art. 50 on pensions convey into the Spanish Constitution one of the obligations of the states in the social security field set forth at international level, notably that of providing adequate benefits level. To this end, failure to set the boundaries of adequacy devoid of substance the constitutional principles and contravenes the international commitments. Ultimately, the purpose of adequacy and thus the update of pensions and social security benefits is to avoid disproportionate levels of inequality.

The case-law analysis undertaken in this section does not have any exhaustive aim, nor this would be opportune in the framework of this project. Its rather modest purpose has been two-fold. First and foremost, to study the protection of pensions at constitutional level in a comparative perspective. Second, to underscore how the institutional problems in the Spanish context pointed out in the previous section, do materialise in the social field.

SECTION II. Pension Rights vs Welfare Benefits: What are Pensions Aimed at?

Above the long-lasting, unresolved debate about the sustainability of pensions, the question that hovers around is what should pensions be aimed at? Put in other terms, should pensions belong to the collective good of welfare or these are to be designed as property rights? No more but no less, this is the current debate. What is at stake, however, is not just a conceptual change. It is that this change does question the very existence

[70] See: ALVAREZ, E., ET AL; "La Reforma del Artículo 135 CE", in *Revista Española de Derecho Constitucional*, (2011), Vol. 93 for a critical assessment of the reform.

of the rights of individuals to a dignified life, to equality and freedom that the redistributive function of welfare entails.

And even as important as that; since the decisions on what direction pension policies will be rests on the states, regime transitions that potentially increase the vulnerability of individuals might be interpreted as states' abuse. This is not to say that welfare policies or pensions' regulation should be petrified. On the contrary, it must be admitted that social needs are a highly dynamic field, therefore the states must adjust their legislative decisions accordingly and with due proportionality for the different rights at stake. But placing the debate in terms of collectivization versus individualization seems, *a priori*, an oversimplification of the problem.

The welfare state has been a powerful tool to reduce inequality by providing a minimum level of resources for all citizens[71]. Despite the structural differences among each domestic system, it is an uncontested matter that the labour relation plays an important role in their designs. Obviously, this holds true also in terms of pensions, regardless the latter are intended as a welfare right or as an employment contract right. As Fredman[72] puts it, welfare rights are rights to receive public provision. This implies duties of other individuals to "give" to the general welfare state among which mandatory contributions that are applied to redistributive purposes. Because these contributions rely on continued employment relations, i.e. in absence of career disruptions and in fair working conditions, they have been able to avoid 1) the declining coverage and generosity for those in work, 2) the exclusion of an increasing number out of the labour market whose income replacement is borne by social security systems and, 3) to secure the regular financing of the welfare.

Numhauser-Henning[73] holds that pensions have developed in close relation to the traditional employment contract as social security developed as a complement to wage-work. Work relationship becomes the locus where the pension contract arises as earnings-contributions related, whether in the form of publicly provided or occupational schemes, and

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71 ATKINSON, A.B.; *Inequality. What Can Be Done*, (2015), Cambridge: Harward University Press, p. 205.

72 FREDMAN, S.; *Human Rights Transformed: Positive Rights and Positive Duties*, p. 204.

73 NUMHAUSER-HENNING, A.; "Labour Law, Pension Norms and the EU Ban on Age Discrimination", in Numhauser-Henning, A., Rönnmar, M., (eds), *Age Discrimination and Labour Law*, (2015), Alphen aan den Rijn: Kluwer Law International, p. 121.

differ from the public universal right provided on a redistributive basis as a general welfare right. This perspective distinguishes between pension rights as deferred wages[74] and other public rights such as social assistance, allocating contributions into the realm of private law.

The approach to work relationship is also present in Strauss's[75] idea of welfare rights. She adopts, however, a pensions' contract individualized perspective to contain that pensions developed under stable and long-term employment relations able to provide a lifelong guarantee. This guarantee is in decline due to factors such as the globalisation of labour markets, unemployment and the rise of temporary and precarious work. Hence, the employment relation cannot provide for adequate pensions any longer Moreover, she contends that pensions "are designed, on one hand, to be a de jure source of income when people are unable to engage in wage labour; on the other they are the de facto link between different stages of the life-course that amplify and extend labour market inequalities"[76]. This two-fold perspective places the regulation of pensions in a good position to analyse state's distribution priorities and the underlying political and legal underpinning of the country's ideal of equality. Or, to put it simpler, the analysis of pensions' regulation helps to understand the direction towards which the purpose of pensions is being geared.

Before engaging in the aforementioned analysis, a question that seems crucial to be addressed for the context of this project is the assumption that publicly provided pensions could be subsumed into the field of property rights. This seems to create an at odds relation between public and private rights in systems based on solidarity and redistributive purposes. I am aware that the ECtHR ruled in the admissibility decision of case *Stec and Others v. The United Kingdom* that legislation in force "providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its

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74 DEROODE, A.; "Pensions as Wages", in *The American Economic Review*, (1913), Vol. 3 (2).

75 STRAUSS, K.; "Equality, Fair-Mutualisation and the Socialisation of Risk and Reward in European Pensions", in Countouris, N., Freedland, M., (eds), *Resocialising Europe in a Time of Crisis*, (2013), Cambridge: CUP, p. 342 ff.

76 STRAUSS, K.; "Accessing Pension Resources: The Right to Equality Inside and out of the Labour Market", in *International Journal of Law in Context*, (2014), Vol.10 (4), p. 523.

requirements"[77]. In the same line, the Spanish Constitutional Court in its decision 49/2015, already mentioned in the previous section.

Even though this case-law is very helpful for the protection of pensions, the effects of mixing private rights into the field of public law might be debatable. First and foremost, if possession ensues from the idea that a lease contract exists between the state and the individual on grounds of contributions, the provisions of social security law in force from the first contribution onwards would act as the contract. This means that if such law provided for updates on benefits, these are not mere expectations but rights at least until that law is modified. Second, modifications of that law that has served as contract, would require the agreement tacit or explicit between the parties. In this sense the legislature would not be free to pass on a new legislation without the consent of the majority of the contributors for whom that contract is in force? In addition to being unreasonable, this would seriously restrict the capacity of the state to regulate and in practice it would displace the regulatory function on welfare matters on to the individuals.

Third, for example in the Spanish legal system, property rights are inherited, but pensions are non-transferable. The idea of widowhood pension is not that of legacy but that of livelihood. Because the idea of entitlement and beneficiary are different, the widowhood pension is lower. Hence, the regulation of pensions and the private law might generate a tension in terms of benefits' amount. Fourth, property rights may be expropriated in case the state might deem it necessary[78]. Henceforth any state might reduce or cancel the payment of pension benefits in situations of austerity or economic crisis? This eventuality seems at the very least, dangerous. Finally, from possession no right to amount arises and this is precisely, the corollary of pensions. Thus, an individual property right to pension, or any other welfare benefits, does not involve per se any guarantee of adequacy. It should be reinforced with elements of public law to grant the effectiveness of pensions.

Besides the legal concerns that might give rise to conflicts of law, publicly provided welfare rights involve principles such as solidarity and redistribution that find their *raison d'être* only insofar as within the collective dimension. Not only these principles do not obtain in the private sphere, but property leads to individualization and therefore impairs in the redistributive capacity of the system as a whole.

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[77] ECtHR, *STEC and Others v. the United Kingdom*, Grand Chamber Decision as to the Admissibility of Applications nos. 65731/01 and 65900/01, 6 July 2005, par. 54.

[78] Art. 1, Protocol 1 to the ECHR.

1. Recent Pension Reforms: Background and Aims

The debate between pensions as public welfare rights and pensions as private rights reflects the tensions between adequacy and sustainability, between social and economic interests that persist in all places at all times. In many European countries, pension reforms had been envisaged and to some extent initiated in the 1990s[79], but being a highly sensitive matter, postponement of major reforms was the preferred choice of most governments. The financial crisis underwent in the Nordic countries in the early 1990s[80] and in 2008 in the EU, bolstered significant changes around. How these reforms were carried out in Norway and Spain as well as the underlying criteria is being dealt with hereafter.

Although pension concerns in Norway can be traced back to 1990[81], it is after the financial recovery started in 1992 when the need to reform the pension system began to take shape. From 1993 a series of committees, formed by independent experts, were appointed by the government in the successive years to work over the primary focus of analysis: the reduction of early retirement and the increase of working life[82]. Attention was given on the need to maintain a retirement system of approximately the form and extent existing in Norway, while safeguarding the reasonable distribution of benefits and burdens between active and passive population. The idea was to relieve the future generations of encumbrance and to ensure a compulsory social retirement scheme with entry criteria, benefits and duration that meet the Norwegian welfare standards[83].

In parallel, in 1994, the Norwegian Parliament (*Stortinget*) requested the government to establish a public committee to work on the sustainability of the social security system. The mandate was to analyse the advantages, disadvantages and risk factors of various fund structures for all or part of national insurance system on two basic tenets: 1) ensure everyone a basic

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79 GRECH, A.G.; "Comparing State Pension Reforms in EU Countries Before and After 2008", in *Journal of International and Comparative Social Policy*, (2017), p. 1.

80 JONUNG, L.; in *The Great Financial Crisis in Finland and Sweden. The Nordic Experience of Financial Liberalization*.

81 See: Government of Norway, Official Norwegian Reports (*Norges offentlige utredninger*, NOU), avalaible at: https://www.regjeringen.no/no/dokument/nou-ar/id1767/ (in Norwegian).

82 NOU 1994:2 *Fra arbeid til pensjon* (From work to retirement); NOU 1998:19 *Fleksibel pensjonering* (Flexible retirement) (in Norwegian).

83 NOU 1994:2 Part 6: Recommendations, 16.2 Goals and Challenges (in Norwegian). Author's translation.

security regardless of the former income, and a public supplementary pension that depends on previous employment income and, 2) to preserve the distribution profile of the national insurance system[84]. On these grounds, a commission was appointed in 2001 to prepare a comprehensive pension reform.

In its report, the committee adduces two reasons for the reform of the pension systems: the increasing ageing population and the unfairness of the, at that moment, existing system in which work income and benefits level where not correlated. To solve the gap, the committee draw different proposals revolving around the idea that the Norwegian state has the responsibility to eradicate poverty and take care of everyone in society. Hence, the pension system should have the basic purpose of providing economic and social security while the level of benefits should be balanced against sustainability. In this line, the different proposals had all two key objectives in mind: First, the pension system has to secure every individual with a minimum old age pension regardless of previous income. Second, the retirement pension must ensure that there is a reasonable correlation between benefits and working life[85].

The government in office assumed the recommendations of the committee in its White Paper No. 12, which was endorsed by the *Stortinget* in 2005[86]. The goals, as stated in the White Paper reflect the three main objectives that have been at the forefront of the reform since the onset: sustainability, increased working life and, basic universality. This should be achieved through the introduction of the life expectancy ratio, the long-life accrual and individualization of benefits in order that each generation bears its load[87]. Still, and due to the new the election process held in September 2005 changed parliamentary majorities, the *Stortinget* called in 2006 the

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84 NOU 1998:10 *Fondering av folketrygden?* (Funding of National Insurance?), pp. 393-395 (in Norwegian). Author's translation.

85 NOU 2004:1 *Modernisert folketrygd — Bærekraftig pensjon for framtid* (Modernized National Insurance - Sustainable pension for future), pp. 11, 15-16, (in Norwegian). Author's translation.

86 STENSNES, K., STØLEN, N.M.; *Pension Reform in Norway. Microsimulating Effects on Government Expenditures, Labour Supply Incentives and Benefit Distribution*, (2007), Discussion Papers No. 524, Statistics Norway, Research Department, pp. 3-4; See the Norwegian Parliament resolution of 26 Mai 2005 no. 354: *Stortinget vedtak nr.354 om hovedprinsippene for en pensjonsreform, jf. Innst. S. nr. 195 (2004 – 2005)* (in Norwegian).

87 Norwegian Government White Paper, *St. Meld 12, Pensjonsreform – trygghet for pensjonene (2004-2005)* (Pension reform - pension security (2004-2005)), p. 8, available at: https://www.regjeringen.no/contentassets/14a7ff21027e4eeca18426a60f5716e3/no/pdfs/stm200420050012000dddpdfs.pdf . Author's translation.

new government to come back with the assessment and proposals for changes in retirement pensions in a number of areas.

The White Paper No. 5 submitted by the new government to the *Stortinget* does not substantially differ from the former's report. It emphasises the need to make the system more sustainable and fair. In any case it provides a more nuanced approach to the goals of the reform in terms of: 1) being economically and socially sustainable, 2) having good distribution and gender equality profiles and, 3) being simple and understandable. The most relevant point is, however, that it clearly defines the difference between the level of benefits related to the basic universal pension and the work-related benefits in the following terms: acceptable and standard: "The standard guarantee helps the individual not to lose much income after retirement. *Standard* security can be perceived as savings for old age. The basic insurance shall provide an *acceptable* income level for persons without or with little connection to the labour market" [88]. The new white paper was endorsed by the *Stortinget* in 2007 and final legislation with the new rules were adopted in 2009 for entering into force in 2011.

For the reform to achieve its targets, the complicity of labour was crucial. In its report to the government, in 1998, the committee emphasized that any option for funding and thus granting the sustainability of the social security system involves as a prerequisite the increased access and quality of labour and capital whereas the uncertainty associated with the size of future revenues from petroleum extraction is very high[89]. In this line, the 2004 report also emphasizes that "labour is the basis of the Norwegian welfare and represents the bigger resource of the country: it is 15 times higher than the oil wealth, both those raised and placed in the Petroleum Fund and the remaining reserves under the sea bed in the North Sea"[90].

This political challenge was surmounted with the involvement of the main union LO from 2005 onwards, after the first government's proposal had been released by the *Stortinget*. The acceptance of the major changes in the individual benefits level; i.e. the long-life accrual and the longevity

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88 Norwegian Government White Paper, *St. Meld 5, Opptjening og uttak av alderspensjon i folketrygden (2006-2007)* (Earnings and withdrawal of retirement pension in the National Insurance Scheme (2006-2007)), p. 13, available at: https://www.regjeringen.no/contentassets/09364a128e2a4bf6a273ead21ece9480/no/pdfs/stm200620070005000dddpdfs.pdf . Author's translation. Italics are mine.

89 NOU 1998:10, p. 395.

90 NOU 2004:1, p. 9.

adjustment, as well as the need to abolish the strong subsidies for early retirement that had been built along years under collectively negotiate pension schemes would certainly be met with resistance by unions and citizens[91]. All the most, in a country were the petroleum revenues create a certain level of reassurance that the state should be able to tackle future pension issues. Therefore, the acceptance of unions was seen as a prerequisite for the smooth implementation of the reform. And certainly, it gave its fruits. From the moment that unions participate in the reform they could not oppose it and were engaged in its communication. As a result, there was little and short mobilization against[92].

In Spain, the reform of the pension system is considered to begin in 1994 when, upon the request of one political party, a parliamentary commission was established to analyse the structural problems of the social security system and draw recommendations for reforms to be undertaken in order to guarantee the sustainability of the public pension system and avoid public deficit's increase. In 1995 the report of the commission was approved by the vast majority of the political parties under the so called *Pacto de Toledo*. Its aim was to 'maintain' the protective function of the social security system on the basis of solidarity and redistribution[93] through the establishment of two different schemes: 1) a publicly provided benefits based on mandatory contributions and, 2) a basic social assistance provision, outside the social security system, financed through taxes, addressed to alleviate situations of need.

The report was primarily concerned with the modernization, rationalization and simplification of the social security as a whole rather than to specially focused on the reform of pensions. It contained fifteen recommendations many of which in the form of technical measures to be

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91 PEDERSEN, A.W.; *The Norwegian Pension Reform. An Incomplete Miracle*, (2014), Oslo:Institute for Social Research; available at: https://www.forskningsradet.no/servlet/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=+attachment%3B+filename%3D%22AxelWestPederse.pdf%22&blobkey=id&blobtable=MungoBlobs&blobwhere=1274504064174&ssbinary=true

92 ERVIK, R., LINDÉN, T. S.; "The Shark Jaw and the Elevator: Arguing the Case for the Necessity, Harmlessness and Fairness of the Norwegian Pension Reform", in *Scandinavian Political Studies*, (2015), Vol. 38 (4).

93 See: Congreso de los Diputados, Sinopsis Art. 41, Pacto de Toledo, available at: http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=41&tipo=2 Seguridad Social*, Informe de Evaluación y Reforma del Pacto de Toledo*, (2011), p. 12, available at: http://www.seg-social.es/prdi00/groups/public/documents/binario/128563.pdf (in Spanish)

gradually adopted in the medium and long run. Between them: the creation of a social security reserve fund to attenuate the effects of negative economic cycles, the update of pensions according to the cost of living, the gradual increase of retirement age, the reduction of contributions as a measure to increase employment, the fight against underground economy through the improvement of collection mechanisms and the modernization of accrual rules for fairness and equity purposes, among others.

The commission agreed to periodically follow-up the implementation of the measures and provide new recommendations as the case might be. In the first review that took place in 2003, no major changes or recommendations were introduced but to reassert the need to enhance the measures proposed in the initial report[94]. It is in the second review report, submitted to the *Congreso de los Diputados* in 2011 that the commission warns on the need of balancing the sustainability and adequacy of pensions in order to avoid the potential negative impact of the Stability and Growth Pact in terms of public deficit reduction in which pensions would not be left aside. With this objective in mind, the commission recalls that the protection of pensions is a constitutional principle that the law shall respect. Accordingly, the public pension system based on solidarity and redistribution shall be maintained and improved. It calls upon the government to work on the reduction of early retirement incentives and correlate working life and benefits level while maintaining the update of accrued pensions[95].

The implementation of the first measures was preceded by the government and unions agreement in 1996 whereto the employers' organization refused adherence. Later, in 2001, a four years tripartite agreement for the improvement and the development of the social protection, was transformed into law. Although the ongoing implementation process has not been a steady one, as a general rule, it can be affirmed that despite the non-binding nature of the Pact, the main legislation enacted until 2011 was the consequence of the previous consensus reached with the social partners on the Pact's recommendations. This situation was reversed with the 2013 reform which was adopted without consensus and in breach of the Pact's recommendations as it will be discussed below.

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94 See: Ministerio de Trabajo e Inmigración, Informe del Desarrollo del Pacto de Toledo, Vol. 1, (2008), p. 17 ff (in Spanish).

95 Boletin Oficial de las Cortes Generales, Congreso de los Diputados, Serie D, Núm 513, 31-01-2011, pp. 18, 22-28 (in Spanish).

2. Individualization vs Redistribution: Pension Systems Compared

In regulatory terms, the need to balance sustainability and adequacy has moved many European countries to introduce changes in the normative field of social security systems from basic protection and thus distributive effects towards acquired rights, property and the normative pole anchored to market function[96]. In this line, national rules distinguishing between 'contributory' and 'non-contributory' benefits are to be considered two different normative patterns, according to Christensen[97]. The first pattern is linked to insurance derived from work contributions. It is closely related to the principles of private law in that when due, benefits are regarded as property. The second pattern is based on solidarity at national level through tax-finance. The first pattern does also have a redistributive and solidarity function, albeit individualism in the sense of acquired rights prevails.

Both contributory and non-contributory patterns of social security regulation exist in Norway and in Spain, however none of them fully respond to the general characterization. The Norwegian system is financed by contributions and by tax through state budget[98]. Because a unique social security mechanism applies to both contributory or standard pension and non-contributory or basic pension, solidarity and redistribution functions should be presumed to work together. This notwithstanding, the normative patterns contributory and non-contributory distinguish on the one side, different levels of benefits and on the other side individualism versus solidarity[99], thus reducing the distributive ability of the system. On its turn, the Spanish regulation responds to the above patterns, in a clear separation between the financing sources of each:

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96 ERHAG, T.; "Changing Normative Patterns in Statutory Old-Age Pensions", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing, p. 237.

97 CHRISTENSEN, A., MALMSTEDT, M.; "Lex Loci Laboris versus Lex Loci Domicilii - an Inquiry into the Normative Foundations of European Social Security Law", in *European Journal of Social Security*, (2000), Vol. 2 (1), p. 70.

98 Norwegian Ministry of Labour and Social Affairs, The Norwegian Social Insurance Scheme, (2015), available at: https://www.regjeringen.no/globalassets/departementene/asd/dokumenter/2015/a-0008-e_the-norwegian-social-insurance-scheme_web.pdf

99 See, FRAYSSÉ, O.; "Labor and Pensions (Social Security and Private Pensions)", in *Revue Française d'études Américaines*, (2007), Vol. 111, pp. 40-45.

contributions are allocated to the financing of work related benefits, whereas non-contributory benefits are exclusively assigned to the state's budget[100]. Here, solidarity applies to both patterns but redistribution operates only within the contributory pattern. This latter is based on a fully redistributive basis whereby the notion of acquired rights hardly obtains.

That said, the functions of solidarity and redistribution in each system certainly require a broader approach that is outside the purpose of this project. Suffices to say that the normative patterns approximation provides a suitable basis to anchor the comparative analysis of the pension systems in Norway and Spain.

From the explanatory statement of the Norwegian Social Security Act (*LOV-1997-02-28-19 Lov om folketrygd)* it follows that the individualization of the system is designed to "provide financial security by ensuring income and compensate for special expenses during unemployment, maternity, alone childcare, sickness or injury, disability, old age and death. The system is meant to further contribute to the equalization of income and living conditions of the individual's life and between groups of people and empower individuals on self-support and fend for themselves"[101]. Art. 2 of the Spanish Social Security Act (*Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social*) establishes that the main characteristic of the system is its protective aim based on the principles of universality, unity, solidarity and equality. According to the changing societal needs mentioned by The Spanish Constitutional Court case-law above, the Spanish social security act anticipates government's discretion to add new contingencies to those currently covered[102]. In view of these intentions, not only different targets are self-evident, also the systems are oriented in two opposing directions which, of course, should shape their redistributive and solidarity functions and thus would have different outcomes on the adequacy of pensions as well.

A preliminary, but illustrative way to depict the differences between Norwegian and Spanish pensions systems is shown in the graph below that display the respective structures of the pension systems in terms of individual benefits sources.

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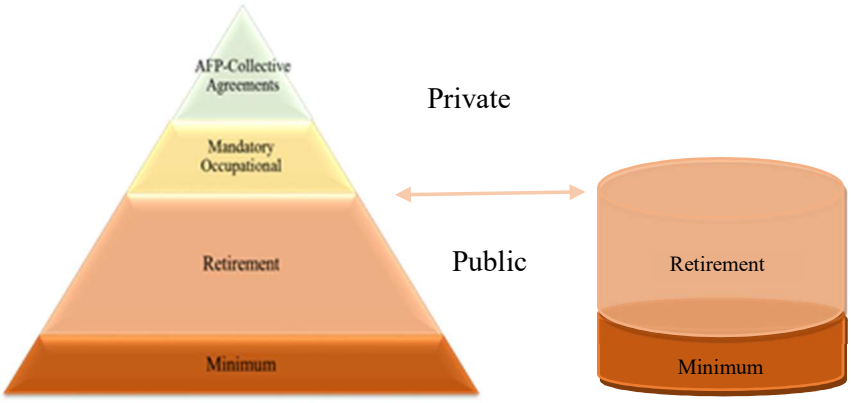
[100] See: Revista de la Seguridad Social, (2013), available at: http://www1.seg-social.es/ActivaInternet/AfiliacionParo/REV_031132?ssNotPrincipal=REV_031117&ssSeccionPrincipal=AfiliacionParo .

[101] Explanatory statement, The Norwegian Social Security Act. Author's translation.

[102] Art. 42 The Spanish Social Security Act. Author's translation.

Graph 8 Pensions' pillars compared



Source: Author's own construction[103]

The Norwegian pension system is in line with The World Bank Pension Conceptual Framework[104]. It contains a non-contributory zero pillar, a mandatory publicly provided first pillar and a mandatory second pillar. In contrast, current pension system in Spain is formed by the zero pillar and a first mandatory publicly provided pillar. In both countries, private savings do account for a residual part only, so they have not been taken into account. Furthermore, in Spain, occupational pensions are voluntary agreed either in the individual employment contract or by collective agreement but coverage is far from extensive[105].

Both systems are based on a minimum pension below which the social assistance scheme applies. In the Norwegian system, the general conditions for accession to the minimum pension benefits are based on 40 years of residence adjusted if less years, covering all residents not entitled to, or entitled to a very low pension[106]. This lifelong universal pension can

[103] The idea was taken from a conversation with A. Inghammar in Lund in Dec. 2016, regarding the Swedish pension system.

[104] World Bank, *The World Bank Pension Conceptual Framework*, (2008), World Bank pension reform primer series. Washington, DC: World Bank, available at: http://siteresources.worldbank.org/INTPENSIONS/Resources/395443-1121194657824/PRPNoteConcept_Sept2008.pdf

[105] According to the OECD, *OECD Private Pensions Outlook 2008,* (2009), Paris: OECD Publishing, p. 274, only 8% of active workforce were covered in 2008.

[106] Chapter 3 The Norwegian Social Security Act. See The Norwegian Labour and Welfare Administration, (NAV): https://www.nav.no/en/Home/Benefits+and+services/Relatert+informasjon/minimum-pension-level-previously-called-a-basic-pension, or The Norwegian

be drawn only at the age of 67 and is means-tested against the spouse/cohabitant. The paradigmatic example would be a single person aged 67, lawfully residing in Norway for 40 years, having never been engaged in a gainful occupation. He/She would receive the minimum pension, regardless of his/her personal wealth. The minimum level is yearly fixed by the government and at the time of drawing the pension will be indexed to wage growth less 0.75% and adjusted to life expectancy ratio. To be entitled to a social assistance pension in Norway requires at least three years of residence. All the other rules of the minimum pension mentioned above apply, except that wage growth indexation is reduced on 0.5% instead.

The general retirement pension in Norway is earnings-based[107]. Along all working life, a yearly amount of 18.1% of the pensionable income up to a ceiling of about 1.5% of average full-time income is credited into an individual fully funded account[108]. At the time of retirement, the capital of the fund is adjusted to life expectancy and split into pension annuities. Yearly indexation to wage growth reduced by 0.75% applies. This pension is supplemented with the minimum pension reduced at the 80% of the earnings-based pension.

In the Spanish social security system, the regulation of retirement pensions and minimum level pensions are clearly separated. The latter[109] requires three years of residence in Spain before reaching the age of 65. The level of benefits is set yearly in the government's budget as a flat rate that can be supplemented with incapacity and housing allowances. The accession conditions are individually tested against the economic unit. The retirement pension[110] is contribution-based with ceilings varying on job categories and wage levels. The minimum level is fixed on 15 years of contribution progressively increasing to 25. Benefits are calculated on the basis of years of contribution, indexed to a level fixed yearly by the

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Government *(Regjering)* https://www.regjeringen.no/contentassets/03b0e088c8f44a8793ed0c0781556b11/a-0008-e_the-norwegian-social-insurance-scheme_web-003.pdf for a basic explanation in English.

[107] Chapter 19 The Norwegian Social Security Act. Pensions in Norway are on a transition period from the old to the new system and different rules apply depending on the date of birth. For the purposes of this project we use the rules for those born in 1963 or after to which the new system fully applies.

[108] See HIPPE, J.H., VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes. The Norwegian Country Study to the OECD Pension Adequacy Project*, (2014), Fafo-report 2014:21

[109] Minimum level pensions are regulated in Arts. 369 ff. The Spanish Social Security Act.

[110] Arts. 204 ff. The Spanish Social Security Act.

government according to the development of the social security system, between the floor of 0.25 % and the ceiling of CPI + 0.50%[111]. The life expectancy ratio will be introduced from 2019 onwards and will apply only once, to the new pensions.

The regime of retirement pensions for civil servants is governed in both countries by different rules to those for private employees. In Spain, the maximum level for each category of workers is determined yearly in the government's budget and then adjusted according to the years of service, where 35 years allows for the maximum level of benefits[112]. The Government Pension Fund Global (former Petroleum fund) grants civil servants' pensions at a 66% of pensionable income for 30 years of service, adjusted to life expectancy ratio and to years of service[113]. This amount is not subject to the fund's variability; it is long life granted, indexed to wage growth less 0.75%.

The Norwegian public pensions system is supplemented by occupational pensions collectively agreed or mandatory. These, schemes are considered private pensions even though the state is partly involved in its financing. All public employees in Norway (about 33% of the workforce) are covered by occupational collectively agreed pensions - in which the state is the employer - governed by law[114]. Basically, this contractual pension scheme allows employees in the public sector to early retirement at the age of 62 with the 66% of pensionable income granted provided they have at the time of retirement reached the minimum contributory pension level in the national social security system and that they have at least 10 years of service when turning 50. If the employee does not take early retirement, the occupational scheme provides up to a 70% of pensionable income at the compulsory retirement age. Indexation rules apply but not life expectancy adjustment.

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[111] Arts. 7 ff. *Ley 23/2013, de 23 de diciembre, reguladora del Factor de Sostenibilidad y del Índice de Revalorización del Sistema de Pensiones de la Seguridad Social* (Act on the regulation of the Sustainability Factor and the Indexation of the Social Security Pension System).

[112] *Real Decreto Legislativo 670/1987, de 30 de abril, por el que se aprueba el texto refundido de Ley de Clases Pasivas del Estado* (Act on Social Security Benefits for Public Employees).

[113] Chapter 3 and Chapter 5 *LOV-1949-07-28-26 Lov om Statens pensjonskasse* (The Norwegian State Pension Fund Act).

[114] *LOV-2010-06-25-28 Lov om avtalefestet pensjon for medlemmer av Statens pensjonskasse* (Act on Contractual Pensions for Members of the Public Service Pension Fund).

In the private sector, two different types of occupational pensions coexist. A mandatory occupational pension that applies to all companies having at least two employees working more than of 75% of statutory working time, between the two[115]. Employers are obliged to deposit a minimum of 2% of employee's annual salary into a defined contribution fund[116], fully managed by the employer, who also benefits from tax deduction for these contributions.

The contractual scheme - *Avtalefestet pensjon (AFP)*- is a collective agreed occupational pension covering about 50% of the workforce[117], co-financed and administered by the state[118]. This scheme is designed to cover voluntary early retirement from the age of 62, but rewards late retirement by increasing benefits. This is not a fully funded scheme, but a defined benefit one. However, it requires membership of at least 7 out of the last 9 years before 62 as well as the last three years prior to pension withdrawal. Yearly granted level of benefits amount to 0.314% of the individual income subject to the indexation and adjustment rules[119]. Norwegian system only allows early claiming of retirement if rights accrued are sufficient. "For an individual to be eligible for early claiming, her accumulated pension wealth must be high enough to ensure that she will receive yearly pension benefits from age 67 that are strictly greater than the minimum pension level for 67-year-olds at the moment of claiming"[120]

Both social security systems are fed with the contributions of employers and employees based on wage levels. In Norway, contribution rates depend on the area, but the average amounts to 14.1% for employers'

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[115] Art. 2.2 LOV-*2013-12-13-106 Lov om tjenestepensjon* (Occupational Pensions's Act).

[116] Art. 4.5 ff. Occupational Pensions's Act.

[117] HIPPE, J.H., VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes,* p. 13.

[118] *LOV-2010-02-19-5 Lov om statstilskott til arbeidstakere som tar ut avtalefestet pensjon i privat sector* (The Norwegian Act on Government Subsidies to Workers Who Take Early Retirement in the Private Sector (AFP Subsidy Act).

[119] HIPPE, J.H., VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes*, p. 13.

[120] BRINCH, CH. N. ET AL. ; *Life Expectancy and Claiming Behavior in a Flexible Pension System,* (2014), European Association of Labour Economists, Conference Papers, Ljubljana, p. 5, available at: http://www.eale.nl/Conference2014/Program/papers/Poster%20IV/P04.3.4.Ola%20Vestad.pdf .

contributions and 8.2% for employees' contributions[121]. In contrast to most European countries a maximum earnings ceiling does not apply, consequently total income is charged. Employees' and employers' contributions in the Spanish system vary according to the professional sector. In general terms, suffices it to say that most common contributions rates are 4.7% for employees and 23.6 % for employers[122] . These earnings-based contributions are topped with ceilings in each different scheme.

SECTION III. Challenges to Pensions' Adequacy

From the above comparison of pensions systems, some preliminary presumptions can be established regarding the adequacy in terms of security for present and future beneficiaries.

The introduction of the life expectancy ratio in both systems is the most obvious instrument to reach such target but it leads-in the field of rights alien elements of risk as opposed to security for individual pension benefits[123]. This balancing of individual and collective interests is not strictly forbidden at human rights level but rather the opposite. It is possible to affirm that such equilibrium is backed by endowing states with a certain margin of flexibility to define the means and elements by which they grant the minimum core for the adequacy, according to the respective resource constraints[124]. From a stricter reading of the individual adequacy, and in view of the ECSR case-law, the measure would not be regressive as long as the final level of benefits falls within the adequacy test of the ECSR.

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[121] Missoc Comparative Table Database /Norway/ Contributions of insured and employers, available at: http://www.missoc.org/MISSOC/INFORMATIONBASE/COMPARATIVETABLES/MISSOCDATABASE/comparativeTableSearch.jsp , last accessed 14/09/2017.

[122] See: *The Spanish Social Security System: 2016 Contribution Bases and Rates* available at: http://www.seg-social.es/Internet_6/Trabajadores/CotizacionRecaudaci10777/Basesytiposdecotiza36537/index.htm (in English)

[123] See; BÖRSCH-SUPAN, A.H.; "Challenges for European Welfare States", in *International Tax Public Finance*, (2015), Vol. 22 (4), pp. 539-540; ANXO, D. ET AL; *Transitions from Work to Retirement: Still a Maximum Diversity in a Minimum of Space*, (2011), ASPA Project, Report for the European Commission, Brussels, p. 19.

[124] CESCR, UN General Comment No. 3, par. 10; SSENYONJO, M.; in *Research Handbook on International Human Rights Law*, p. 47.

As far as the Spanish system is concerned the main challenge for adequacy derives from legal uncertainty. A clear-cut example is the introduction in 2013 of the indexation rules directly linked to the social security development and not the Consumer Price Index (CPI) as required by the Spanish Constitution[125] or the *Pacto de Toledo*. Moreover, it can be argued that these indexation rules are in breach of the principles set in by human rights since they link the level of benefits to a factor that is outside the individuals' reach. Not only macroeconomic developments are not correlated with individuals' responsibility for a longer working life but it is precisely this disconnection that undermines the solidarity of the citizens as well as the redistributive, and ultimately the ability of the system to provide adequate levels; since individual effort may not secure an appropriate level, does it make sense to work longer? Those with higher earnings may decide to retire early thus increasing the expenses of the system.

Another example of legal uncertainty in the Spanish system relates to the terms of application of the life expectancy adjustment. The law on social security establishes that the adjustment for the new pensions will be corrected every five years. But the law on budget stability allows the government to amend the factor whenever there is a risk of long-run deficit on the pension system. This creates a problem for workers near to the retirement age since they might not appropriately calculate their benefits levels.

If we use the replacement ratio as a measure to test the adequacy of pensions, it should be admitted that pensions in Spain are adequate, even after the new indexation rules. Compared to other EU countries, the level of benefits has been high in Spain. The OECD estimates that before the reform replacement rate was 81.2% one of the highest in the OECD countries. After the reforms, the replacement rate decreased to 73.9%[126] but still remains higher than i.e. in Norway. The main concern in terms of adequacy is not only that this factor has a cumulative reduction effect on pensions' adequacy in case of inflationary trends[127], but also that there is a

[125] Art. 50 The Spanish Constitution.

[126] Consorci d'estudis, mediació i concil.liació a l'administració local, http://cemical.diba.cat/es/planpensiones/planpensionesSistemaPublico5_castellano.asp .

[127] See: ALDA, M., MARCO, I.; "El Fin de la Revalorización de las Pensiones Españolas según la Evolución de los Precios", in *Aposta, Revista de Ciencias Sociales*, (2016), Vol. 71; ROSADO, B., DOMÍNGUEZ, I.; "Solvencia Financiera y Equidad en el Sistema de Pensiones Español tras las Reformas de 2011 y 2013", in *Anales del Instituto de Actuarios Españoles,* (2014), Vol. 20.

great deal of governments discretion on the decision of the level for increase since the mathematic calculation is linked to the social security budget yearly established by the state. Usually, this budget does not provide all the necessary information about the expenses and revenues of the social security system; thus, the calculation of the increase is opaque for the citizens. Since its implementation in 2013, only in 2017 this information has been made transparent[128].

Average replacement rates in Norway are 66% for public service and average 56% for private sector[129]. To the best of my knowledge, there are no reliable studies in Spain that analyse different replacement rates according to the different schemes in place. However, the different regulations that apply for private and public pensions suggest that a similar difference to that of Norway might result in Spain as well, pointing at a potential problem of redistribution that could jeopardise the adequate level of benefits for future pensioners in the Spanish system.

Replacement rates ensue from the calculation rules set in by statutory law. It is within states' discretion to set such rules and entitlements but it is also an obligation of the state to 1) ensure the sustainability of pensions and, 2) to secure formal equality. To apply different entitlements to benefits arising from job position displaces the allocation of resources from the equity principle: equal benefits for equal contributions, to class criteria which do not find accommodation within the international law. Most important is that the adequacy of benefits in the other classes might be impaired. Hence, it could be a matter of further research whether those rules need to be reformulated in order that benefits levels are governed by equity principles related to the contributions as a matter to enhance the redistributive capacity and the sustainability of the system.

The different replacement rates in Norway are related to individual adequacy and security rather than to the collective dimension of sustainability, although an indirect link can also be made through formal equality. The pension systems for public employees comply with the provisions of adequacy at human rights level, this is: lifelong provision, indexed to wage growth and paid periodically. This together with the fact that the replacement rate is granted along life secures adequacy. Against

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[128] DEVESA, E., ET AL.; *Presupuestos, Pensiones y Pacto de Toledo*, (2017), BBVA Research On line, available at: https://www.bbvaresearch.com/publicaciones/presupuestos-pensiones-y-pacto-de-toledo/ (in Spanish), last accessed 20/07/2017.

[129] See, HIPPE, J.H., VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes* for more details and differences between pension schemes in Norway.

this background private employees do not have the same grants as it has been discussed above. The issue to be solved, here, is primarily of equality: why should private employees bear the burden of sustainability?

A satisfactory answer cannot be that public employees' pensions are paid from the petroleum fund precisely to ease the load of the public system because the petroleum fund is public and there is no reason it could not be used for private employees' pensions as well. But if the pension system is alleviating because of this then there are grounds to support that adequacy should be secured for all citizens. Within the Norwegian context, the rationale behind this difference is that of a trade-off: Public employees' wages are constrained by the wage pattern negotiation at national level; hence their participation in the sustainability of pensions comes via wage restrain whereby limiting their pension benefits.

A less justifiable measure is the individualization of rights implemented in the Norwegian system. First and foremost, it contravenes the principle of a social security collectively funded whereby adequacy holds. Even though Norway maintains a core level of pension benefits publicly provided on a universal basis, individualization reduces the ability of the system to support those who have been unable to work in a long carrier thus jeopardizing the adequacy of their pensions. Individualization is also a measure to incentivize people to stay at work for a long time. Since pension levels depend on working years, it is the individual's decision what determines the final level of benefits. This has two consequences for adequacy: the individual may deem enough the benefits accrued under his/her personal account and decide to retire earlier but will reduce the contributions to the collective financing. Such a decision will also increase the burden on the public minimum level for the years in advance until the prescribed retirement age[130].

An important flaw for the individual adequacy of pensions in the Norwegian system is related to its fully-funded base. At the retirement age, pensioners will receive the minimum level granted by the state plus their share on the public funded part plus the occupational pension, also fully-funded. *Per se*, the concept of fund encompasses the transfer of risk; capital may be lower or higher at the moment of drawing the pension. This factor of uncertainty is increased by the complexity of investments coupled with the financial illiteracy of many individuals and the added inherent risk of solvency. Part of these risks are counterbalanced with an

[130] NORBERG, P.; "The Use of Market Forces in Social Security", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing, pp.178 ff.

important body of law geared to protect the stability of pension funds in cases of financial turmoil or company bankruptcy and by the "«general good» doctrine, applying to activities of pension funds offering pension schemes in Norway"[131]. In terms of rights, however, this does not improve the security that pensions require nor grant adequate levels. Put in different terms, it is difficult to see how governing pensions with the logic of economics rather than by the norms and rules of rights may produce the same effects as rights.

Linked to the funding system is that at retirement, pensioner will receive a lump-sum amount disconnected of longevity. Bearing in mind that the concept of adequacy entails the provision of periodical payments indexed to cost of living on a lifelong basis to grant a dignified standard of living. The termination payment does not necessarily grant any of those conditions. It may be argued against, that the minimum pension level will continue to be provided on a public basis within the indicated terms. Still, this does not secure an adequate level of benefits along life[132].

It comes in favour of the collective adequacy, the Norwegian mechanism in that no ceilings apply to the contributions, whereas benefits are, partly creating a counterbalance effect to the individualization of benefits. Since ceilings apply in the Spanish system, both in contributions and in benefits accrual, it might be assumed that this should not produce any major effect on the collective adequacy of pensions.

Despite that in the previous section, two pension schemes have been identified in each system: the basic universal provision and the retirement pension linked to working life, in practice three levels of benefits can be identified. The basic pension subject to residence years and means-tested, the minimum retirement pension for those that the labour market has not allowed to accrue sufficient rights and that is thus supplemented to reach such minimum, and the retirement standard pension correlated to working life: this suggest some threats to adequacy. The OCDE[133] estimates that current social assistance level in Spain provides for 19.6% of average wage, while in the general pension system this percentage increases to 33.9% at the minimum level.

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[131] For an explanation in English see: Financial Supervisory Authority of Norway, http://www.finanstilsynet.no/en/Insurance-and-pensions/Insurance--pensions/Topic/Activity-of-EEA-pension-funds-in-Norway/

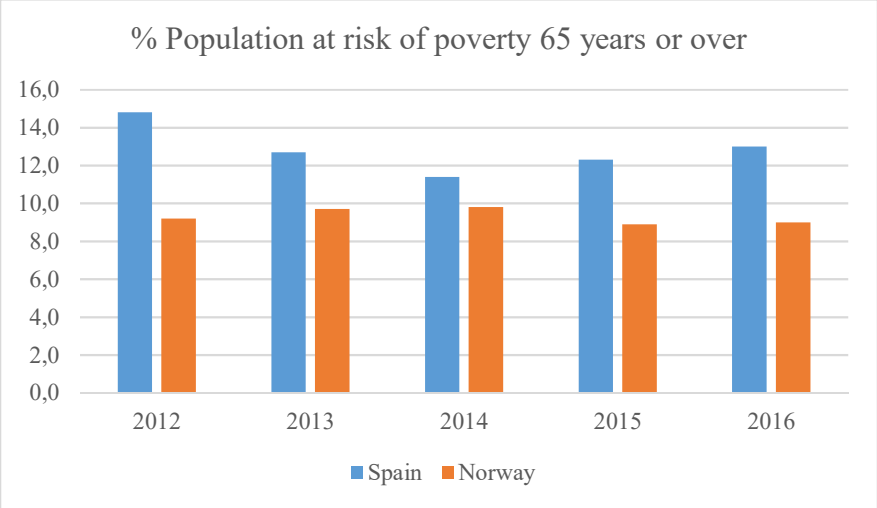
[132] Replacement rate is less than 50% according to HIPPE, J.H., VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes*, p. 38.

[133] OECD, *Pensions at a Glance. OECD and G20 Indicators*, (2015), Paris: OECD Publishing, p. 127.

In Norway, the minimum level is 31% of average wage for all citizens with 40 years of residence or more, hence the basic pension is reduced for less years. These percentages depend on the criteria used and do not provide a complete picture of the differences between pension schemes neither of the reasons behind, i.e. part-time work, unemployment, gender gap, and many others. This warning notwithstanding, the evidence is that the conditionality to years of residence that applies in both countries is completely alien to the adequacy concept and invalidates the aim of the core minimum pension - or social assistance - which is to guarantee a reasonable standard of living for old people with no other means[134], hitting often women in the private sector[135].

If we look at the poverty rates of people above 65, it seems clear that the minimum pensions in Norway or social assistance in Spain do not grant the standard of living that should according to human rights law.

Graph 9 Population older than 65 years at risk of poverty



Source: Eurostat (2017)[136]

[134] CHRISTENSEN, A., MALMSTEDT, M.; "Lex Loci Laboris versus …", p. 104.
[135] HIPPE, J.M., VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes.*, p. 51.
[136] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Database by themes/Living conditions and welfare/Income and living conditions/Income distribution and monetary poverty/*At-risk-of-poverty rate of older people by sex and selected age groups - EU-SILC survey*, Code: ilc_pnp1, last accessed: 12/09/2017.

Both systems rely on employment for pension rights accrual. Concerning Norway, the individualization of benefits will provide adequate benefits only insofar as employment opportunities are available. Obviously, the current Norwegian labour market context of low unemployment rate[137] secures work availability. Even though the socio-economic politics of the country discussed above, facilitate the work line; severe changes in the country's employment framework might jeopardize the ability of the system to provide adequate pensions not only at the individual level also for the collective sustainability. The system might be unable to respond to a high demand precisely because individualization reduces its redistributive possibilities.

Table 4 Unemployment

Year	Unemployment			Long Term Unemployment			Unemployment 55+ years	
	Norway	Spain		Norway	Spain		Norway	Spain
2006	3.4	8.5		0.8	1.8		1.1	5.8
2007	2.5	8.2		0.4	1.7		0.9	6.0
2008	2.5	11.3		0.3	2.0		1.0	7.3
2009	3.2	17.9		0.5	4.3		1.1	12.1
2010	3.6	19.9		0.7	7.3		1.4	14.2
2011	3.3	21.4		0.7	8.9		1.2	15.1
2012	3.2	24.8		0.6	11.0		1.3	18.0
2013	3.5	26.1		0.7	13.0		1.3	20.0
2014	3.5	24.5		0.8	12.9		1.3	20.0
2015	4.4	22.1		1.0	11.4		1.6	18.6
2016	4.7	19.6		1.2	9.5		2.0	17.0
Source: Eurostat[138]				Source: Eurostat[139]			Source: OECD[140]	

[137] SSB Statistics Norway, available at: https://www.ssb.no/en/arbeid-og-lonn/statistikker/akumnd/maaned 4.3% at June 2017, increasing from 3.4% at April 2014, last accessed 17/09/2017.

[138] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Database by themes/ Employment and unemployment (Labour force survey)/ LFS main indicators (lfsi)/ Unemployment - LFS adjusted series (une)/ *Unemployment by sex and age - annual* average, Code: une_rt_a. (in % of total active population), last accessed 09/09/2017.

[139] Eurostat Database, http://ec.europa.eu/eurostat/data/database , Database by themes/ Employment and unemployment (Labour force survey)/ LFS main indicators (lfsi)/ Unemployment - LFS adjusted series (une)/ *Long-term unemployment by sex - annual average*, Code: une_ltu_a. (in % of total active population), last accessed 09/09/2017.

[140] OECD Statistics, http://stats.oecd.org/Index.aspx , Labour/Labour force statistics/LFS by sex and age/LFS by sex and age - indicators/*Unemployment rate,* age 55 to 64 in %, last accessed 09/09/2017.

In the Spanish case, the relation between benefits and working life leads to a structural inconsistency since the labour market is highly unable to provide work in a permanent basis. This is most evident for those aged 55 years or over, for whom the increase of the retirement age together with the indexation rules will most affect their individual pensions' adequacy. On top of this, and as far as the expenses on the social security system increase by the unemployment benefits, the pension indexation rules that are linked to the social security budgets may potentially affect negatively the pension benefits level in the long run.

SECTION IV. The Interference of EU in Pension Systems: A Matter of Institutional National Context?

At present, it is difficult to argue that any field of law might be outside the reach of EU law. Be it through coordination, by the effects of four freedoms directives, through the CJEU rulings or by the EMU mechanisms, EU's impact in national legislations it is a fact even for social matters that treaties have left to Member States competences[141]. As regards to pension reforms, it is common place in the literature to refer to the EU policies as the mainstreaming guidelines for national responses[142]

[141] Among the huge literature dealing with this matter see, i.e. PENNINGS, F.; *European Social Security Law*, (2010), Antwerp: Intersentia; SHAW, J., "Citizenship: Contrasting Dynamics" in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law*, (2011), Oxford: Oxford University Press, pp. 589-590; SCHULER, R.; "Old-Age and Survivors' Pensions", in Cornelissen, R., Fuchs, M. (eds), *EU Social Security Law : A Commentary on EU Regulations 883/2004 and 987/2009*, (2015), Baden-Baden: Nomos, p.336 ff; DØLVIK, J., VISSER, J.; (2009), "Free Movement, Equal Treatment and Workers' Rights", p. 495; NUMHAUSER-HENNING, A.; "Freedom of Movement and Transfer of Social Security Rights Pension Rights and the EC Coordination Rules on Applicable Legislation in the Light of Migration and Labour-Market Developments", in Numhauser-Henning, A., Rönnmar, M., (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, (2013), Oxford: Hart Publishing.

[142] See i.e.; ANGELAKI, M., NATALI, D.; "La Politique des Retraites Depuis la Crise: Évolutions Européennes et Réformes Nationales", in Degryse, Ch., Natali, D. (eds), *Bilan Social de l'Union Européenne 2010*, (2011), Brussels: ETUI et Observatoire Social Européen ; BARCELÓ, J.; "La Crisis Económica y las Reformas en la Pensión de Jubilación", in García, J.I. (dir), *El Impacto de la Gran Crisis Mundial sobre el Derecho del Trabajo y de la Seguridad Social: Su Incidencia en España, Europa y Brasil, 2008-2014*, (2014), Barcelona: Atelier, cop., p.670. In contrast see: WILLERT, M.; "The European Social Dimension in Pension Policy", in *Transfer: European Review of Labour and Research*, (2012), Vol. 18 (3), who claims that higher

as well as to the bailout measures imposed by the Troika[143]. Without denying the impact that the EU exerts in the legal orders and welfare policies of its Member States, this section adopts a focus in line with the target of the project, this is, to compare the measures adopted in the reform of pensions by different states in order to understand the extent of EU's effects.

Social policy is regarded as a productive factor by EU institutions. Hence, they seek efficiency, cost reduction and privatization from which principles of solidarity, inclusion and cohesion have been discounted[144]. These principles have been the basis of most European welfare systems that are now being dismantled through soft-law mechanisms as recommendations that do not conceal hard-law mechanisms as sanctions if budget sustainability is not granted. Here arise two different levels regarding legitimacy. The first relates to the use of soft-law to impose hard-law in areas where EU has not competence. In other words, it is a way to circumvent treaties provisions and the rule of law of EU itself. The second relates to the different yardsticks for effectiveness. The effectiveness of economic matters is measured conscientiously, while the effectiveness of rights is imprecise and depends of values that are not measurable. Certainly not in figures, but yes in people's day-to-day living.

An obvious, but worth to recall, point to highlight is that pension policies belong to the 'soft-law' area of the EU, not having binding effects on Member States and, despite that social security directives might in practice lead to some degree of harmonization[145], EU countries remain responsible for defining the fundamental principles of their social security systems[146]. On this basis, it is a matter of each state to select its pensions structure and set the distributive, adequacy and sustainability goals that best suit its national policies. A second point is that the concerns for the

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coordination between Member States in social security is needed in order to reach a better balance between sustainability and adequacy in pension reforms.

[143] THEODOROPOULOU, S.; *Has the EU Become More Intrusive in Shaping National Welfare State Reforms? Evidence from Greece and Portugal*, (2014), ETUI Working Paper 2014.4; STEPAN, M., ANDERSON, K.M.; "Pension Reform in the European Periphery: The Role of EU Reform Advocay", in *Public Administration and Development*, (2014), Vol. 34.

[144] COSTAMAGNA, F.; in *The Constitutionalization of European Budgetary Constraints*, p. 373.

[145] LANGER, R.; "Arts. 45 and 48 TFEU – Workers", in Cornelissen, R.; Fuchs, M. (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009*, (2015), Baden-Baden: Nomos, p.35.

[146] Eur-Lex, Glossary of Sunmmaries, "Social Security"; http://eur-lex.europa.eu/summary/glossary/social_policy.html

increase of public budget expenses due to ageing population and declining fertility rates do affect to most of the develop countries regardless whether they belong or not to the EU[147].

Table 5 Demographic indexes

	Fertility Rates %						Population age 65 or over %						
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Norway	2.0	1.9	1.9	1.8	1.8	1.8	15.0	15.1	15.4	15.7	16.0	16.3	16.6
Sweden	2.0	1.9	1.9	1.9	1.9	1.9	18.2	18.5	18.9	19.3	19.6	19.9	20.2
Germany	1.4	1.4	1.4	1.4	1.5	1.5	20.6	20.8	20.9	21.0	21.1	21.2	21.4
Portugal	1.4	1.4	1.3	1.2	1.2	1.2	18.8	19.1	19.5	19.9	20.4	20.8	21.2
Greece	1.5	1.4	1.3	1.3	1.3	1.3	19.0	19.4	19.8	20.3	20.9	21.4	21.6
Spain	1.4	1.3	1.3	1.3	1.3	1.3	17.2	17.4	17.7	18.1	18.4	18.8	19.1

Source: World Bank (2017)[148]

In the wake of the Nordic crisis, Norway found on the OECD countries' experiences the source of inspiration for its pension reform whereas looking at the EU developments as the issues to escape from[149]. Although its petroleum wealth, a sound economy and its sovereignty on monetary policy does not make the country a straight forward candidate for pensions reform, the increasing ageing population seems the only reason to push for that reform, even if their fertility rate is among the highest in Europe. In any case, the preventive aim made the government to undertake a serious reform that introduced, as already discussed, two mechanisms for levelling down benefits: life expectancy and the correlation between working life earnings and benefits.

Sweden also experienced the Nordic crisis with stronger force than in Norway and although its recovery was relatively fast and solid[150], the pension reform was one of the most radical undertaken in Europe[151]. As in Norway, the reform took a long process, from 1992 to 2001 of discussion

[147] See, i.e.: RUGGIERO, E., ET AL.; *Aging and Social Expenditure in the Major Industrial Countries, 1980-2025,* (1986), IMF Occasional Paper No. 47.

[148] World Bank, DataBank World Development Indicators, available at: http://databank.worldbank.org/data/reports.aspx?source=World-Development-Indicators , last accessed: 07/09/2017.

[149] See, i.e. NOU 1994:2, p. 17, NOU 1998:10, p. 20 and NOU 2004:1, p. 20 for OECD references. See NOU 1994:2, p. 88 for references to US and Germany and NOU 2004: 1, p. 29 on EU developments.

[150] JONUNG, L.; in *The Great Financial Crisis in Finland and Sweden. The Nordic Experience of Financial Liberalization*, p. 5.

[151] NATALI, D.; *Pensions After the Financial and Economic Crisis: A Comparative Analysis of Recent Reforms in Europe*, (2011), ETUI Working Paper 2011.07, p. 17.

and preparation[152] however, its implementation was progressive and the first steps began in 1995[153]. The main reasons behind the reform were the sustainability and the fairness of the system, thus it was decided that "the economic and demographic risks were to be transferred from the pension system to the individual and thus from the working generation to the whole insurance collective"[154]. On this basis Sweden adopted far reaching measures: the automatic balancing mechanism depending on the economic development of the country[155], the life expectancy adjustment as well as the correlation between working life earnings and benefits.

Germany started its pension reform in 1992 as a response to the challenges of the ageing population and low fertility rates[156]. In 2004 the main reform took place through the introduction of the sustainability factor that links benefits to the system dependency ratio. This factor "considers not only the development of life expectancy but the entire demographic development (including changes in migration and notably in birth rates), as well as the development on the labor market"[157]. The increase of retirement age was introduced in 2011, with reduction indexes for early retirement.

The EU's financial aid to Portugal was accompanied with concrete yearly measures on the reduction of pension benefits, i.e. suspend indexation rules and freeze pensions or reduce pensions above 1500 €[158], but no specific mandates on pension reforms were mentioned. Portugal, notwithstanding initiated pension reforms in 2007 by introducing the life expectancy ratio and later on, in 2013 by increasing mandatory age retirement linked to the life expectancy. Early retirement was suspended, as a consequence of the financial aid, but in 2015 the suspension was

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[152] Swedish Ministry of Health and Social Affairs, *The Swedish Pension Agreement and Pension Reform*, (2009), DS 2009:53, p. 3 (in English).

[153] PALMER, E.; *The Swedish Pension Reform Model–Framework and Issues*, (2001), Swedish National Insurance Board, Working Papers in Social Insurance 2000:1 (in English), p. 4.

[154] Swedish Ministry of Health and Social Affairs, *The Swedish Pension Agreement and Pension Reform*, p.29.

[155] PALMER, E.; *The Swedish Pension Reform Model–Framework and Issues*, p. 26.

[156] BONIN, H.; *15 Years of Pension Reform in Germany: Old Successes and New Threats*, (2009), IZA Policy Paper No. 1, p. 7

[157] BÖRSCH-SUPAN, A.H., WILKE, B.C.; *Reforming the German Public Pension System*, (2005), Paper Prepared for the AEA Meetings, Boston, January 6, 2006, p. 27.

[158] See, Memorandum of Understanding on Specific Economic Policy Conditionality, 17 May 2011, Portugal.

replaced by establishing minimum conditions for accession: 60 years and 40 years of contributions[159].

Under bailout, Greece was obliged to reform its pension system in 2010. It must be said that the Greek governments had not undertaken any previous measure due the sensibility of the matter and the social unrest that changes provoke. Hence the system resulting after the reform still remains generous compared with the reforms undertaken in many other countries. Life expectancy will be introduced in 2011 while statutory retirement age will be linked to it[160].

Spain financial aid came in 2011, with the main pension reform that introduced the life expectancy ratio from 2027 onwards. Although a clear link can be established, there is no mention in the MoU about specific measures on pensions. Nonetheless, the most important changes came in December 2013, in a somehow hasty way that modified the entry into force of the life expectancy adjustment from 2027 to 2019, introduced the automatic indexation mechanism linked to the development of the social security system from January 2014 and made conditional early retirement to minimum 63 years and 33 years of contribution. Given that Spain "successfully exited the financial assistance programme for the recapitalisation of financial institutions in January 2014"[161], it becomes difficult to grasp the link between the pension reforms in Spain and the requirements of the Troika, at least for the last and most radical.

It is not either easy to trace a rationale behind the different measures adopted in the different countries. At a first sight, Greece and Portugal would be best candidates for integral reforms. Their economies are suffering even most than the Spanish one, their demographic indicators are unbalanced – low fertility and high ageing population -, they belong to the Eurozone thus being subject to budgetary stability. Despite all this, they have adopted the less stringent measures, especially Greece. Sweden, with a higher fertility rate and lower ageing population has adopted the same measures as Spain whose demographic and economic indicators are less promising. If the balancing mechanism is an option to secure

[159] See, ETUI, Pension Reform in Portugal, available at: https://www.etui.org/fr/Reforms-Watch/Portugal/Pension-reforms-in-Portugal-background-summary

[160] SYMEONIDIS, G.; *The Greek Pension Reform Strategy 2010–2016*, (2016), World Bank Group, Social Protection & Labour, Discussion Paper No. 1601.

[161] European Commission, Financial assistance to Spain, available at: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-spain_en

budgetary stability, then Germany and Sweden would not necessitate such a measure. In the case it is linked to demographic developments, then all countries, perhaps with the exception of Norway, should implement it.

Table 6 Main mechanisms introduced in pension reforms

	Life Expectancy	Balancing Mechanism	Retirement Age to Life Expectancy
Norway	X		
Sweden	X	X	
Germany		X	
Portugal	X		X
Greece			X
Spain	X	X	

Source: The Ageing Report 2015[162]

Seen from a north-south perspective the comparison offers a rich variety of elements for further discussion. Germany, Sweden and Norway implemented substantial reforms in the earlies 2000s while Spain, Portugal and Greece did not effectively engage until a decade later. This may suggest on the one side, an opposing view of politics. Farsighted decisions are common in the North while southern governments adopt a narrow view by acting ad hoc. On the other side, pensions reflect two different options of welfare. In the Nordic understanding, pension are a relatively sensitive matter and political decisions are easier to adopt. In the South pensions are central to social perception of welfare, thus changes involve difficult decisions. In this perception, Germany's Bismarckian welfare would be nearer to the South than to the North.

In short, this sketch of different pension reforms seems to point out that there is no a clear relation among EU's membership and pension reforms. In this field, each Member State remains so far sovereign to adopt its policies. However, as Esping-Andersen put it, whatever the approach to pensions it will fall short to take into account the full complexity of the matter:

> "If an analysis of pensions appears somewhat narrow and pedestrian, keep in mind two circumstances: first, pensions account for more than 10 percent of GDP in many contemporary nations; second, pensions constitute a central link between work and leisure, between earned income and

[162] EU, *The 2015 Ageing Report Economic and budgetary projections for the 28 EU Member States (2013-2060)*, European Economy, 3|2015, (2015).

redistribution, between individualism and solidarity, between the cash nexus and social rights. Pensions, therefore, help elucidate a set of perennially conflictual principles of capitalism"[163]

[163] ESPING-ANDERSEN, G.; *The Three Worlds of Welfare Capitalism*, pp. 79-80.

PART 4 Convergences and Divergences on the Protection of Pension and Labour Rights

A plausible account of human dignity must include membership in society. Unfortunately, "History teaches that denying people their rights is a recipe for upheaval. Societies which empower citizens, safeguard freedoms and keep proper checks on power are much more likely to enjoy lasting peace"[1].

The redistributive function of social security is linked to the concepts of social justice and fairness that reduce economic and social tensions among individuals and groups. Hence, the objective of a modern social security must be interpreted beyond a palliative remedy but a preventive system that has the target of building an equalitarian society as a means to grant stability and progress. The term social security as defined by the CESCR, "covers all the risks involved in the loss of means of subsistence for reasons beyond a person's control"[2]. Given that personal circumstances may change along life, the right to social security is to be conceived as a dynamic right that has to be able to accommodate to changing social needs with the purpose of empowering people to participate in economic and social life. Within this perspective, social security acts as an economic stabilizer and stimulus tool[3] as well as fostering personal liberty. Pension rights, as part of the social security system play this role for old-age persons. For that reason, adequate benefits are a must.

Building egalitarian societies has been an objective of most European states. From a political point of view, inequality leads to social conflict and destabilization of countries, undermining democratic legitimacy and reducing economic growth[4]. To this respect the function of unions goes beyond the protection of workers' interest but is also to play a political

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1 JAGLAND, T.; S*tate of Democracy, Human Rights and the Rule of Law in Europe. A Shared Responsibility for Democratic Security in Europe*, COE, (2015), p. 6.

2 CESCR, UN General Comment No. 6, par. 26.

3 The role of social security schemes as economic stabilizers has been highlighted by several scholars in different fields. See, i.e., DEAKIN, S.; in *The Idea of Labour Law*, p. 166. Also, BARR, N. *The Economics of the Welfare State*, (2012), p. 10 cited in PUTTICK, K., *The Challenges Facing Social Security Systems.*; STIGLITZ, J.; "The Global Crisis, Social Protection and Jobs", *International Labour Review*, (2009), Vol.148 (1), p. 4; ILO, *Building Economic Rcovery, Inclusive Development and Social Justice*, (2014), World Social Protection Report 2014/15*:* Geneva: ILO.

4 FUKUYAMA, F.; "Dealing with Inequality", in *Journal of Democracy*, 2011, Vol.22 (3), p. 84.

role that encompasses and serves to balance broader social interests with economic interests. In this sense, unions do also contribute to the democratic process[5] exerting a limit to the power of the other actors of the society. Their function is to be understood as top down in the sense that only insofar as unions are able to participate from the decision-making processes, they will be able to secure the societal interests. No more and no less, this is the purpose of the right to freedom of association.

The comparative analysis undertaken in this project, reveals that the role of the state determines the interplay between the social actors and consequently models their ability to participate in the welfare and democratic life of the nation. Both in Norway and Spain, the historical developments have shaped the different models. Democratization has not been a steady nor a stable process in Spain. It could be argued that except for the short period 1931-1936[6], democracy only reached Spanish polity on 1978. A journey through the history of the country reveals short periods of democracy interspersed with frequent and long periods of absolutism and dictatorship[7]. This background has influenced all the areas of the Spanish politico economical system from the onset to the extent that the political system that emerged after dictatorship left untouched state's capacities and never rejected symbolically the authoritarian regime[8].

The roots of the Norwegian model are to be found on the struggles that lead farmers to jointly seeking for state's protection. The word 'jointly' determines the different outputs. To confront the state's power, the farmers needed to create a strong mobilization that could seriously affect the state. The reason: they had to escape poverty. In exchange for the protection they yield their lands to the state. This trade-off marked the political and social development of Norway. Consensus, power balance and the will of the citizens to look for their way out have been enduring features of the Norwegian model. These can still be found in the empowering welfare system, in the process of drawing and enacting the Constitution, in the pension reform or in the working legislation that only sets minimum provisions whereas the autonomy of the parties is the

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5 FICK, B.; "Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society", in *Working USA: The Journal of Labour and Society*, (2009), Vol. 12.

6 VARELA, J.; *Política y Constitución en España: 1808*-1978, p. 587; also for an account of the Spanish constitutional history and political scenarios.

7 A complete history of the period between 1808 and 1939 can be found in ESDAILE, CH. J.; *Spain in the Liberal Age: from Constitution to Civil War, 1808-1939*.

8 FISHMAN, R.; "Rethinking State and Regime: Southern Europe's Transition to Democracy ", in *World Politics*, (1990), Vol. 42 (3), p. 430.

backbone of the labour relations and in the involvement of the social partners in policy making.

In contrast, the Spanish model is characterized by its passive nature. The state's protection has always been given for granted – even if at the minimum level – thus creating weak mobilization power of people and low organization power of the social groups that must be linked to the state's repression as well. The existence of different class power imbalances created and supported by the authoritarian regimes has allowed the continuity of the State as the only powerful institution.

Norwegian distinctive characters of welfare policies rely on the close and balanced interplay between macroeconomic governance, public provision of welfare services and organized working life[9] which is possible thanks to the existing institutional context that allows for the political involvement of strong social partners and, a shared ideology that encompasses the need to adapting to international competitiveness[10] while seeking full employment. The involvement of social partners in the Norwegian welfare shaping is embedded in a set of culture, political norms and mindsets in which the state is willingly sharing its political space[11].

Closely linked to the shared ideology is the long-standing tradition of negotiation, mutual recognition and trust that exists between Norwegian organizations and that make that agreements are considered as law. It has contributed to this the existence of strong organizations able to mobilize wide support. Negotiation and trust are not consistently settled in Spain because there is no a special need to negotiate. Unions should ask for negotiation but their scarce unity does not make them a serious threat.

Nor can the Spanish state share its power with other actors since that would entail the entry of unions into the policy making sphere with the concomitant weakening of employers' and state's leverage. Another way to explain this difference is from the freedom of association principles. The participation of unions in socio-economic policy making, specially referred to workers' well-being moulds the nations' economic and social model. This is clear in both Norway and Spain models although in opposing directions. At this stage, it can be argued that the right is effective in Norway but not in Spain.

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9 HIPPE, J.ET AL; *The Nordic Model Towards 2030*, p. 11.

10 MAILAND, M.; in *The Changing Political Economies of Small West European Countries*, pp.92-93.

11 For the sharing of political space, see: CROUCH, C.; *Industrial Relations and European State Traditions*, (1993), Oxford: Clarendon.

Coordination between employers and unions with the involvement of the state provides a competitive advantage in the Norwegian system because it allows for a good interplay between social and economic policy, on the one hand, and collective bargaining on the other. Thus, it becomes instrumental in achieving national policy objectives concerning income, employment and social security[12]. Conversely, coordination has not been developed in Spain because the institutional background has prevented the establishment of the necessary interaction between levels. Coordination has to be established top down, and involves a certain degree of organization to secure the interaction. Once the dynamics have been created, its preservation requires a bidirectional feeding. However, the Spanish institutional context triggers fragmentation thus making organization almost impossible.

Political and civil rights occupy a predominant role in the Norwegian and the Spanish Constitutions while social rights enjoy a lower protection. A point that is worth mentioning and that can contribute to make a difference in the protection of social rights is the structure of the judicial review. In Spain, the main function of the Constitutional Court is only dedicated to the interpretation of the constitutional text. Individual appeal applies to political and civil rights (Arts. 14 to 29 and 30.2 of the Spanish Constitution). This makes the Court to be anchored in a theoretical level and much embedded in the political decisions. By contrast, the fact that the Norwegian Supreme court is at the same time the final instance court and the body entrusted with reviewing the legality of Government decisions and the constitutionality of legislation adopted by the *Stortinge*t makes that changing social realities are entrenched it is judgements. This is not to say the Supreme Court of Norway has escaped the debate on the democracy and constitutional review, it is simply to suggest that the double function probably allows a broader scope for interpretation.

At least this seems to suggest the analysis of pension rights in constitutional terms. A priory the right to an adequate pension is protected under the Spanish Constitution while only a right to social assistance ensues from the Norwegian Constitution. It is however, the Constitutional Courts interpretation and concomitant case-law what models the difference. The Constitutional Court in Spain has repeatedly ruled on the one side, that the constitutional mandate creates a positive protective obligation on the state to establish a basic, dynamic and universal social security system – in which pensions are included. On the other side, it insists that only a core protection for those in need is the institutional

[12] KEUNE, M., "The Effects of the EU's Assault on Collective Bargaining", pp. 480-481.

guaranty[13], resulting in that the right to social security in Spain would be akin to a basic provision, dissociated from contributions and, means-tested. In this line, pensions are granted only at the minimum level for those in need both in the Spanish and Norwegian Constitutional systems.

Remarkably is that the legal reasoning in both Courts, through widely arguments, they both reach similar conclusions: the evolutionary nature of the social protection needs justifies: 1) granting the collective dimension in front of the individual interest and 2) states are only obliged to grant a minimum level of individual protection subject to economic conditions. As long as the latter are outside constitutional protection, this conditionality is questionable. However, the reasoning of each court is not done on the same footing. While the Norwegian Supreme Court seeks to answer on the substance, the Spanish Constitutional Court leaves free leeway to the legislature, or in other terms, avoids adjudicating on the essence of the constitutional provisions. This can be explained in terms of the institutional problems in the Spanish context.

From the comparative analysis of pensions systems, it is possible to hold that neither system grants or secures that pensions will be adequate on a lifelong basis. Still, the reasons are different: on the Norwegian side, the individualization of benefits threatens the adequacy of the collective financing of the social security and the introduction of funded individual accounts challenges the individual adequacy in that it does not secure an appropriate level of benefits along life. On the Spanish side, the main threat is related to legal uncertainty in that the discretional power of the state to take unilateral regulatory decisions is not limited by an appropriate institutional context. Still, the reduction of benefits has similar effects in both systems: they contribute to increase inequality since it is more difficult for the low incomes groups, often women in private sector or temporary workers, to reach adequate pension levels[14].

Formally pension reforms undertaken in both countries share common targets: to grant an appropriate level of pensions for all citizens in the long run[15] and, to contain the future cost increases of public pensions related to the ageing of the population[16]. Consequently, in both cases the main

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13 See pages 145-147 above.

14 HIPPE, J.M.,VØIEN, H.G.; *An Analysis of Future Benefits from Public and Private Pension Schemes*, p.51.

15 See: MUÑOZ DE BUSTILLO, R., ANTÓN, J.I; in *The European Social Model in Crisis. Is Europe Losing Its Soul?*, pp. 468-469; The Norwegian Government White Paper No.5, (2006-2007) on pensions, Chapter 1.

16 See: ANXO, D. ET AL; *Transitions from Work to Retirement: Still a Maximum Diversity in a Minimum of Space*, p. 18.

elements revolve around the adjustment of benefits via the introduction of lifespan indexes and working life conditionality. Looking at the similarities, it could be argued that states are confronted to the same difficulties in encompassing adequacy and sustainability. Put differently, states share the same problems to comply their obligations on redistribution and non-regression at the same time. If we look at the differences on the mechanisms to reach such targets, it could be argued that Spain has adopted a much more radical measure that will reduce the adequacy target in a long run.

That said, a more nuanced approach is required on the analysis of pension reforms. The study reveals that sustainability and adequacy are understood as a dichotomy: the fight for sustainability unavoidably leads to a reduction in the adequacy, or in other words, if adequacy is maintained sustainability is impossible. Nevertheless, this is a misleading approach. Sustainability is a premise for adequacy, not its opposite. The purpose of the right to an old age pension is to be adequate; hence the focus on sustainability voids of substance the right. The point prevailing behind the dichotomy seems to be whether pension rights are to be treated as welfare rights or as individual rights. This is the case in Norway, through the individualization of benefits, but not the case in Spain, so far, and has to be understood within the different welfare State traditions: passive in Spain and obligational in the case of Norway where there are no rights without obligations.

In this line, the rationales behind the measures adopted in Norway have two aims: first, that each individual undertakes his/her responsibility on when to retire and what level of benefits he/she deems enough and, second, according to the government documents on the pension reform, at maintaining solidarity by making the individuals aware that welfare is a collective good and that all have to share common responsibility for its sustainability by contributing. In the actual context of employment insecurity nobody is granted with a secure income along life, why should pensioners be treated differently? The community expects they stand shoulder to shoulder with the others on the premise that pensions cannot be perceived as "*otium cum dignitate*" any longer [17]. Whether this goes in detriment of adequacy is a minor problem for the Norwegian understanding. This explains that the measures have been accepted as a necessary action to preserve the collective good.

Although the intermediate goal of making people responsible for its retirement might also apply, this concept of the welfare does not obtain in

[17] NUMHAUSER-HENNING, A.; in *Age Discrimination and Labour Law*, p. 122.

Spain. Certainly, the responsibility is understood to be on the state, not on the individuals. The Spanish reform thus, breaks the traditional passive character of the welfare in Spain but goes far beyond by linking the level of benefits to a macroeconomic factor that falls outside the individuals and the collective reach. The same applies to the life expectancy ratio that has been introduced in both systems. To be sure, the right to social security is defined at human rights level as a mechanism therefor the state is obliged to protect the individual in circumstances beyond his/her control. Certainly, the state is free to design the social security structures provided these do grant the appropriate protection. Hence, the introduction of elements that bear no relation to the control that the individual may exert does not accommodate the obligation of the state, or leaves the individual unprotected. None of the systems in comparison fulfils the mandates of the human rights legal framework despite both ratified the ICESCR and the ESC.

In both pension systems, benefits levels are correlated to the increase of working life. In terms of the protection of the right to pension, this option assumes full or nearly full employment, otherwise pensions cannot be adequate. The Norwegian model provides two advantages to this respect: 1) a wide public administration structure and low unemployment rates[18], 2) a welfare state with activation systems in order that everyone can earn a life through work. The welfare state help citizens transform from one job to another, from one life-phase to another, from a low to a higher income situation, so that people can be continuously more economically active than in other types of societies[19]. On this basis, it can be argued that there is no breach of the state's obligation for the protection of the right.

The contrary is to be said for Spain. Together with the endemic high unemployment rate, the welfare state has proved unable to reintroduce into the labour market most of the unemployed. Hence, the relation between pension benefits level and working life will have a penalizing effect on many future pensioners. And, it is in this sense that the lack of effective measures to redress the situation leaves the individual unprotected. If we add to this that the introduction of the indexation rules

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[18] See, NAV, Labour Market Information in English. The Current Market Situation in Norway, (2017), available at: https://www.nav.no/en/Home/Work+and+stay+in+Norway/Relatert+informasjon/labour-market-information-in-english .

[19] SACHS, J.; "Revisiting the Nordic Model: Evidence on Recent Macro Economic Performance", in Phelps, E.S. Sinn, H-W., (eds), *Perspectives on the Performance of the Continental Economies*, (2011), MIT Press Scholarship Online.

are based on the social security budget[20] it could be possible to argue that the state has acted *ultra vires* or in bad faith since the measure is regressive in nature. In the structural unemployment context of Spain; according to the OECD the unemployment at the end of 2018 will be at 15,5%[21] - the link of pensions benefits to contributors to the social security system is a way of placing the burden of all the system only into the pensioners, hence jeopardizing their benefits level on a permanent basis. This measure in particular, is very similar to the one enacted in Germany[22] and has been adopted without the appropriate analysis and explanation that its implications deserve.

One of the challenges resulting from the study of the Norwegian model is that it presumes low mobility of workers, long work tenure and high degree of unionization. In a country with a scarce 3.5% unemployment rate this is not currently an issue. But any downwards economic fluctuation might weaken the system. Also, the declining degree of unionization together with the increasing labour migration and the EU directive on cross-border services - that imposes labour conditions of country of origin to posted workers challenges the ability of collective bargaining as a tool for reducing differences on wage, and thus equalizing society[23].

As "it was established in 1958 by Paul Samuelson"[24], the fairness of pensions depends on wage growth. This affirmation acquires more relevance with the correlation of working life and pension benefits: low wages transform into low pensions at old age, thus creating a poverty line along life. Labour law becomes a cornerstone to secure the alignment of wage with the standard of living and contribute to higher pension benefits. The comparative analysis of Norway and Spain reveals that collective bargaining is a good instrument to reach wage growth and that EU

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20 Art. 7 Act on the regulation of the Sustainability Factor and the Indexation of the Social Security Pension System.

21 OECD, How Does Spain Compare? Emloyment Outlook 2017, available at: https://www.oecd.org/spain/Employment-Outlook-Spain-EN.pdf , p.2

22 Compare: BÖRSCH-SUPAN, A.H., WILKE, B.C.; *Reforming the German Public Pension System*, (2005), Paper Prepared for the AEA Meetings, Boston, January 6, 2006 and ROSADO, B., DOMÍNGUEZ, I.; "Solvencia Financiera y Equidad en el Sistema de Pensiones Español tras las Reformas de 2011 y 2013".

23 NERGAARD, K.; in *The Oxford Handbook of Employment Relations: Comparative Employment Systems*.

24 WB, "Notional accounts. Notional defined contribution plans as a pension reform strategy" in *Pension Reform Primer,* 2005/01, http://siteresources.worldbank.org/INTPENSIONS/Resources/395443-1121194657824/PRPNoteNotionalAccts.pdf, p. 3.

Membership is a hallmark in the differentiation of Norwegian and Spanish current industrial models.

Collective bargaining is obviously a labour institution but reflects the social context where it develops. The Norwegian system provides an example of highly coordinated wage setting mechanism that secures wage growth according to the country's economic development but adapted to the enterprise's "financial position, productivity, competitiveness, and future prospects"[25]. This is reached through collective agreements as the main institution for the regulation of working conditions. It belongs to the autonomy of the parties the content and scope of the agreement while the statutory law is limited to set the minimum grounds for allowing the social partners to develop their relations in a context of legal certainty.

Regulation reflects the distinctive characters of the states under comparison. The Norwegian state regulates labour matters with the consent or upon request of the social partners. It is an unwritten pact but inherent to the system that the state plays a major role of supporting the parties or mediating among them rather than interfering in their autonomy. Instead, the Spanish state evinces a clear pattern to interfere in the labour parties' space by regulating most of the working conditions, sometimes without or in clear opposition to their interests. As a result, wages in Spain are frozen and within some periods, have significantly reduced increasing the level of working poor for whom the adequacy of pensions is precluded. In this context, Spanish EU's Membership seems to have played a supporting role for the state to adopt the legislative measures that have dismantled the industrial relations system in Spain and have introduced the prevalence of company agreements.

The differences highlighted above do not intend to give a complete picture of the industrial culture developed in each country, just to provide an insight of their foundational democratic structure in order to understand which are the root causes explaining the success or failure to similar challenges. Institutions' capacity to adapt to globalization and overcome crisis largely depends on the structure of the state. Crisis and globalization can be regarded as a threat or as a challenge. Usually neo-liberal economies would see them as a challenge for market improvement and rely on laissez-faire while social-democratic states look at the threats as a means to improve social development.

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[25] NERGAARD, K.; in *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, p. 307.

CONCLUSIONS

This research project has drawn the right to an old age pension as a fundamental right for which the state is obliged to grant an adequate level of benefits that ensure elderly people a standard of living commensurate to that of their society. At human rights level, this obligation is framed in protective terms derived from the redistributive function of compulsory contributions. To this purpose, states are grantors and bearers of monitoring duties[1] over the collective resources yielded by the national social security systems.

To make an analogy with private law: states would be fiduciaries of the contributions they have been entrusted with in good faith, with the express mandate to redistribute as needed, also in good faith. The state administers the collective resources and, consequently has a wide margin of appreciation that is limited by the monitoring duty on the sustainability of the system. In this sense, the social security funds cannot be used to other ends[2], meaning that national economic situations cannot prevail over the right and in any case, could not devoid it of substance. Lending situations as the one arising from Spain's signature of the MoU would have been done in breach of the citizens' good faith and of state's duties.

Alongside this general conceptualization, the comparative analysis undertaken in this project suggests that the assessment of pensions' adequacy requires bringing together the institutional framework and the design of the social security at national level. A relevant finding that emerges from the comparative research is clear: the adequacy of pensions rests on the existence of a transversal connection between the institutional context and the design of the schemes.

The internal logic of the Norwegian welfare structure has work as the axis that supports the entire system. Therefore, the main obligation of the state is to make individuals active while the institutional context has vested on collective bargaining the function of granting the adequacy of benefits. Its social security design aims to make individuals responsible for their working life choices from which the ultimate adequacy of pensions benefits hinges. Although the Spanish welfare structure also revolves around work, the system entrusts the state with the obligation to grant the adequacy of pensions while the labour institutions lack of a relevant function. Since the design of the social security schemes make pension benefits contingent on working life, there is a disconnection between the

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1 CESCR, UN General Comment No. 19, pars. 67 ff.

2 DEAKIN, S., in *The Idea of Labour Law*, p. 166.

level where adequacy is granted and the one where adequacy should be effective.

Collective bargaining rooted on tripartite cooperation emerges as the tool that provides a system with the necessary structural coherence for its smooth running. The reason of the argument can be easily understood if due regard is taken at the levels in which each field, welfare and working conditions, develop. Welfare policies are a matter of national level decision but the impact spreads to the labour market and ultimately to the individuals' working choices. Hence labour market policies will have to be designed in harmony with the welfare policies otherwise the system will not return the expected results. Let's take the example of increasing retirement age. If we think that work is a limited good, extending working life will have an effect on labour market exits and entries, on the level of wages, as well as on the pensions' benefits. Moreover, the labour market needs and the workers' skills should be matched to support such measure. Employers' willingness to hire or retain older workers[3] will also be crucial for the success of the measure. On that premise, the involvement of social partners at the same level where the measures are taken is essential to avoid flaws that could jeopardize the sustainability of the system.

Collective bargaining in its self-regulating function is about the negotiation of working conditions and operates at a lower level, between employers and unions, formally without the necessary involvement of the state. It means that national welfare objectives can easily escape from the scope of negotiations. At this level, targets are undoubtedly narrower. Even if negotiations take place at national level, the interest of the parties predominate and might not be correlated with the national design of welfare, to the point of impairing on individuals' benefits to the social security. One of the clearest examples is the wage structure: the parties might be interested in setting certain pay elements without taking into account the effects that this can have on the national social security system, as well as on the future benefits of individuals.

In short, the sustainability of the pensions systems requires that the transversal anchorage established by the national welfare systems between pensions and work is reproduced in the forms of tripartite and bipartite bargaining. This is no more and no less, the expression of the two elements encapsulated in the essence of the right to freedom of association: unions to be partners at national level to help in securing

[3] To this purpose, see: ULANDER-WÄNMAN, C.; "Swedish Collective Agreements and Employers' Willingness to Hire and Retain Older Workers in Employment", in *Nordic Journal of Working Life Studies*, (2016), Vol. 6 (2).

social interests and collective bargaining for the regulation of working conditions, taking place at bipartite level.

The comparative analysis indicates that the dissociation between negotiation levels might originate in the industrial relations pattern. Coordination and regulation have been identified along this project as the main functions of the state in industrial relations. In its regulatory function, the state provides the legal framework – that at the end, equals to the design of the organizational framework – for governance among actors: "[T]he state's legislative capacity in economic, social, and labour market policy-formation has a direct influence on relations among the government, trade unions, and employer organizations"[4]. In its coordination function, the state acts as a promoter and mediator of the negotiations between employers' and unions' organizations by providing the institutional framework; information, rules of conduct, administration and the like for social partners to developed their functions on a stable basis of legal certainty. The comparative analysis shows that coordinated contexts require less regulation whereas in less coordinated contexts, regulation is the usual way.

From the institutional context approach, regulation limits the weight of social partners for influencing national policy formation. From the industrial relations perspective, strong regulation constrains the scope for autonomy of the parties to agree while acting as a disincentive to negotiation. Contexts of highly regulated working conditions, are not tantamount to fair labour conditions, especially if regulation is oriented towards the flexibilization of the labour market, as the Spanish model highlights. Instead, the self-regulatory capacity of collective agreements provides a comparative advantage in terms of pensions' adequacy. Here, the argument holds in terms of a bottom-up relation at the individual level.

The relation between pensions benefits level and working life emanating from social security designs presumes the existence of continued employment relations thus the ability of the labour market to provide for jobs and, that the labour market will be able to secure the necessary level of earnings during all working life. These should grant the adequacy of future pensions. Otherwise, there would a transfer of risk on to individuals which is in contravention of the states' obligations under human rights law. On this basis, it can be hold that any given industrial relations system should accommodate the tools to grant the effectiveness of the relation.

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[4] HEMERIJCK, A.; "The Forgotten Center: The State as Dynamic Actor in Corporatist Political Economies" in Levy, J.D. (ed), *The State after Statism: New State Activities in the Age of Globalization and Liberalization*, (2004), Harward: Harward University Press, p. 9.

Individually agreed working conditions develop at the lowest level of any system, creating a conspicuous disconnection between welfare and work. By their inherent nature, lack the element of solidarity essential for the redistributive purposes of a social security system. Since they are contingent on the development of the labour markets it is hardly difficult to see how they can deliver stable outcomes to the social security in current unsecure labour markets. Collectively agreed working conditions, although they cannot fully grant the adequacy of pensions benefits, are better equipped through their collective force, to influence on the improvement of working conditions and, consequently, in the present standard of living of individual workers. The higher and longer this standard of living, the lower the public expenses – in the form of social security or social assistance - will be, thus increasing the potential for more adequate pensions in the long run.

Indeed, globalization and the changing production systems are leading towards new forms of industrial relations. But one thing is to substantiate the consequences of the changing labour market and social structures and a different thing is to address the root causes thereof. The idea along this project has been that jobs providing a sufficient income save social public expenditure and contribute to the sustainability of the social security systems. This seems especially relevant in view of the impact that EU's law and policies are having on Member States' industrial relations systems.

This research has identified two main problems concerning the interaction between EU and domestic levels. The first is related to the permeability of the institutional framework to EU's interferences. In this sense, the Spanish politico-economic context appears as notably promoter: Governments of any colour have gone further than the requirements of the EU in pensions and collective bargaining reforms. The second problem refers to the different levels wherein EU and domestic law interact in labour and social matters.

EU is a dual process itself and goes at two speeds: the economic and the socio-political. There are many asymmetries and conflicts between market freedoms and, social improvement and living standards that risk the effective way towards convergence. The EU has the ability to promote negative integration by removing obstacles to market integration but this is not balanced with the ability to promote positive integration in terms of social and political harmonization, mainly because it lacks a political structure that can replace the functions of the state. The conferral of monetary competences by Member States to the EU has minimized states'

ability to act in labour and social matters, at the same time the EU can neither formally act in these fields since it lacks the necessary competences thereof. This creates a gap in terms of the locus of effectiveness because labour and social matters need of a transversal institutional framework where to develop and be addressed. From this perspective, it is possible to hold that collective bargaining at domestic level, has the potential to counterbalance this gap. Albeit this claim might appear in contradiction with the current EU policies, the research highlights that there should be room for Member States to manoeuvre if they are willing to do so.

Finally, it should be pointed out that a big state structure is not necessarily in detriment of economy as the Norway model proves. The drawback pointed out by some authors about the inefficiency of public sector[5] may be linked to ideology rather than to real evidence. Assessing the public sector with the logic of the free market disregards the guaranty duties of the former – especially formal and/or procedural - towards the whole society. These duties do not apply to the private agents, hence the yardsticks measuring productivity or efficiency in each sector do necessarily to be different and adjusted to the specific ends pursued. A strong and costly public administration, including government, legislation and administration is essential to organize and distribute the welfare state[6] and, it should not be forgotten, public administration is also a source of employment.

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5 BECKER, U.; VAN KERSBERGEN, K,; "The Small Corporatist …" p. 185.

6 EICHENHOER, E.; "Social Security as a Human Right: A European Perspective", in Pennings, F., Vonk, G., (ed), *Research Handbook on European Social Security Law*, (2015), Cheltenham: Edward Elgar Publishing Ltd., pp. 12-13.

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