Neoliberal and neocorporatist policies in France, Italy and Spain: Can trade unions participate in the governance of economic globalisation without risking their soul?

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Abstract

The balance of power between social partners and the governments of Southern Europe, built on the neocorporatist model of industrial relations over the last decades, has been seriously harmed by the 2008 recession. This has allowed for the development of a neoliberal discourse on solutions to the recession throughout the entire EU institutional frame. A first consequence of this is that the critical questions posed by Labour Law on the excesses of economic capitalism will hardly find any answers at each welfare state level, especially inside European countries in view of the process of Europeanisation of labour relations through flexicurity principles.

In the second place, the recession invites unions to rethink their approach to politics in the immediate future. They must opt between reconstructing the neocorporatist model of industrial relations that went so well for them in the preceding decades or starting to mobilise for an open struggle against neoliberal political parties, governments and corporations, both in Europe and worldwide. Either option will certainly impact on the labour movement's critical discourse, which must also redefine its objectives and transnationalise its goals in order to adapt to the challenge of the globalized and financialized economy.

1. Introduction

The 2008 recession inevitably weighs on any consideration of the relationship between trade unionism and politics, primarily because Labour Law's critical discourse on the excesses of neoliberal capitalism will no longer find a path to solutions in each individual welfare state. Moreover, welfare states themselves will have more and more difficulties to guarantee the defence of social justice and dignified labour. This will result inevitably in Labour Law's confrontation with a globalized and financialized economy[1].

It is not a minor problem to attempt to find epistemological keys to the role played by politics in the economic recession and the future of 21st century trade unionism in the face of the challenge of the governance of globalisation. My capabilities do not suffice to offer a solution to this discussion, be it from a supra-state level framework or from beyond the industrial relations state, as would be the case. What I aim to do is to find out the keys to interpret the future of industrial relations or, rather,

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[1] F. Maupain, *The future of the ILO in the global economy,* Hart Publishing, Oxford, 2013, p.2

the role of trade unions in the search of their social function of representation and defence of the working class –at any level where it might be needed, including worldwide- from an interdisciplinary perspective, both legally-critically and historically-socially, from the teachings brought by three recent experiences. Two are countries which have suffered enormously during the recession: Spain and Italy. The third one is France, which, despite not having suffered so cruelly the effects of the recession thanks to the size of its economy, exemplifies the path to increased flexibility of Labour Law, and also of its model of industrial relations, but at a pace quite different from that of the other two countries (which have not themselves evolved at the same pace either).

The hypothesis that I want to demonstrate in this paper is that the relationship of unionism with politics in a globalised world must be termed in the plural, at trade union level (the firm or undertaking, and the local union), at world level (international branch) and in between these two, at various intermediate levels, including national level. This last point is certainly true in the face of the outcome of the three cases examined, despite the obvious limitations that the membership of these three countries in the core group of the EU poses to the development of the political relationship of the unions with the state institutions given the process of europeanisation of labour relations through flexicurity principles. To this end the instruments of trade union action ought to allow unionism to make use of its function of social representation in a multilateral and multilevel manner, both within the internal national frame as well as within the transnational frame, for which transnational law on trade union action should be developed sooner rather than later. (The failure of the Monti II Regulation on the right to strike at European level is not a good omen. Neither does it help to impose legal limitations (national, international or transnational) on collective autonomy, on union organisation or on the scope of collective bargaining in order to advance the construction of a model of transnational regulation.

Having put forward my hypothesis, I will introduce my thoughts on the key issue of the relationship between unionism and political action in "national" terms, which should not be understood as neglecting the two main conditioning factors of national politics on labour and industrial relations that we have been pointing out since the outset. The first one is that any analysis of social and legal data must be made from the perspective of responding to the challenges of financial and economic globalisation, as the world is under the almost absolute reign of the capitalist production model. The second one is that I intend to reflect on the first one from the europeanisation of my discourse, and most particularly, from the vision of the European frame of regulations analysed from my own vital experience, that of Southern Europe, since it is the only one from which I am capable of offering empirical evidence, closer and more verifiable for me, given my contacts, my travels and my use of three languages.

Thus, my way of thinking is built on the experience of the answers given by politicians and public authorities (the Judiciary included) to the financial and economic crisis, firstly in Spain, then in Italy and finally in France. I will incidentally make reference to the case of Greece, as an important example of the extremes to which a neoliberal policy can go. Indeed, a circumstance common to these countries is that during the recession, in one way or another, the policy of austerity has been applied following the neoliberal dogma promulgated by the so-called Washington consensus,

which has been imposed by European institutions and especially executed by the European Commission and the ECB, nicely supported by the political power represented by Germany in Europe (acquiesced in by France) with the collaboration of the IMF.

Any reflection on European politics during the recession requires attention to the European Stability Mechanism (ESM) established in 2011 through an international treaty for the euro countries. Even though the ESM Treaty does not explicitly adress labour and employment law reforms that are to be realized by members receiving financial aid from the ESM[2], labour market reforms and adaptations of the social security systems of the affected members have a prominent place in the memoranda of understandings concluded by the Troika[3]. (Parenthetically, the European Court of Justice has ruled in plenary session (Thomas Pringle case) that the ESM is in line with EU Law.)

On the other hand if I am to develop my discourse from the perspective of the three countries of Southern Europe, I cannot leave aside the particular "neocorporatist"[4] version of their national model of collective labour relations. This neocorporatist model has been especially used in the majority of countries of continental Europe to justify state intervention in the economy with a view to ensuring acceptable social outcomes within free market economies. In some countries known for their historical precedents, we could also say that neocorporatism has equally responded to their inability to free themselves from a certain state paternalism over labour collective relationships. Precisely in these countries, the debates over the dangers of falling into unionist corporatism have been very heated indeed, with rather negative consequences for the effective practical functioning of the neocorporatist model[5].

The neocorporatist practice par excellence has been to promote concerted action between Government and the social partners at three angles. It was used especially in situations of "*emergenza economica*" or crisis (such as in 1973-74, when it was applied with some degree of political success), since neocorporatism combined with emergency

[2] However Regulation 1176/2011 provides a European legal framework for the detection of macroeconomic imbalances within the Union and an alert mechanism, and a Memoranda of understandings for each country. On the other hand, the monitoring procedure for the Euro Area is set out in Regulation 1174/2011 for the control of the budgetary policy of the Member States and through this procedure programmes are available that may provide reforms in the area of labour and employment law.

[3] A. Seifert, *European Economic Governance and the labor Laws of the EU Member States,* 35 COMP. LAB. L. & POL'Y J. 321 and 322 (2014).

[4] A model of labour collective relations based on the political exchange on social and economic matters between the national government and the privileged representatives of union workers and corporate organisations. It is a model of concertation between Government and social partners (in its *hard* version) or of social dialogue at two or three levels (in its *soft* version). The latter represents a less invasive formula of the freedom of *social partners* and has allowed for its public institutionalisation, both in the countries of Southern Europe as well as in the EU itself, a fundamental fact for the search of a responsible commitment of *social partners* in the economic governance of the countries of the EU.

[5] Theorised by Offe y Lehmbruch, cited by M. Regini, *Stato e sindacati nel sistema económico*, riv. Gior. Dir. Lav. R Rel. Ind., n 1, 1979, p.66 and ff. P. Barcellona, & M. Carrieri, *Goberno dell'economia e controllo operaio nelle strategie della sinistra europea,* Riv.Democrazia e Diritto, n 4, 1982, p.16 and ff.

legislation, apart from justifying the limitation of rights[6], also redirects investment from the public to the private sector (for instance, helping the private banking sector but imposing cuts on social spending, as happened in the last financial recession). This is a model that, on the other hand, has traditionally been welcomed by adherents of different political ideologies, from social democracy to European conservative parties.

The unique feature of the neocorporatist model applied in the South of Europe is that it has had to engage with mainly socialist and/or class unionism, politically configured much closer to the left than typical European social democratic labour movements[7]. However, the fall of the Berlin wall on the one hand, and, on the other, the crisis of social democracy — brought about by the gradual political subordination of the European left to the neoliberal dogma after an uneven confrontation with the economic powers within an economic, social and political context altered by the globalisation of the economy and the europeanisation of politics — has left unionism without a valid political reference. In fact, the configuration of social democracy, moving from the political left towards an ideology closer to a socio-liberal posture, has taken place without the consent of the unions.

Lastly, neocorporatism is also a way of understanding political democracy in which private organisations for the defence of union and corporate interests participate, along with other civil society actors, in decision-making on social and economic policies. This has enriched the quality of democracy, as well as legitimised government action when setting priorities among the emerging interests to be satisfied. This is particularly true in the present situation, where we can barely discern the end of the long financial and economic crisis of 2008, given economic growth that can fairly be called "the new mediocrity"[8].

The South of Europe has long lived with the effects of the policies prescribed by the "troika" during the economic crisis: the policies of tax consolidation and salary devaluation, the reforms imposed on countries with budgetary deficits and high public debt (Spain, Portugal, Ireland, Greece, Italy and finally, France), and that most loved reform of all, the urgent and profound labour reform that followed the example of Germany (Hartz Reforms). However, the Hartz reforms – it is becoming clearer and clearer – played a rather ancillary role in the economic restructuring, and would not have been so successful without the responsible behaviour of German corporations, without co-management, without massive investment of profits into investigation and innovation[9] and albeit, to be fair, without dialogue and agreements with the unions in each branch and each corporation - in summary, without the principles and practices of neocorporatism.

Despite this evidence, the European Commission has not departed from neo-liberal principles to face the recession, with the exception of compensating salary

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[6] N. Poulantzas, *Estado, poder y socialismo*, Ed. Siglo XXI, Madrid, 1979, p.203 and ff.

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[8] Economic growth without job creation or increase in productivity, in the words of Cristine Lagarde, Head of the FMI, to the El Pais newspaper, 11 April 2015.

[9] C.E. Triomphe, *Réformer encore? Pour quoi faire?,* Metis 06/04/2015 (newspaper on line).

devaluation and re-establishing corporate competition[10] with specific actions of social stabilisation so as to mitigate the effects of excess in the application of liberal policies. An example can be found in the EU itself when the EU's Council of Employment, Social Policy, Health and Consumer Affairs adopted the Joint Employment Report (on 9 March 2015). Thus the EU continues to support flexicurity-style reforms on labour law and labour markets, but at the same time announces that its next meeting will consider the proposal of the Commission to set up a Platform against Undeclared Work, or the adhesion of the EU to the ILO Declaration against forced work .

These labour reforms, however, far from putting an end to social inequalities by levelling salary conditions and types of work, have rather worsened them by increasing the number of workers assigned to poorly qualified, precarious or part-time jobs. This type of reforms had already been tested in countries less touched by the recession (zero-hour contracts in the UK and mini-jobs in Germany) and were implemented in the countries of Southern Europe by order of the Commission and the European Council despite the firm but impotent opposition of the unions.

Neocorporatism –and its eventual functioning crisis, in view of what will be set out below – is also at the heart of Europe. The concertation practice at three levels (corporate organisation, union and political representatives of the EU) takes place within the formal frame of the founding Treaties as well as through the informal social dialogue. In March 2015 the first Tripartite Social Summit[11] was held since the new Commission took office in November 2014. It follows the EU High Level Conference on "a new start for social dialogue" which took place in Brussels on the 5th of March 2015, 30 years after the launch of European social dialogue in Val-Duchesse, some indication of the importance of European social dialogue to address today's economic and social challenges. For example, it has been discussing progress with the Investment Plan for Europe, or another major EU policy initiative: the Energy Union.

These have been the characteristics of what is known by authors as the neo-corporatist model of industrial relations that, prior to the recession, functionally favoured economic growth in a context of relative social peace. My paper, however, aims at pinpointing that presently, at least in the countries covered by this research, the combination of social dialogue and legislative intervention in support of the social and economic representatives in their role of regulating labour relations in the shadow of economic crisis, favours another type of intervention. More recent interventions have been more heteronomous or "neoclassical", based on the traditional principles and values of the rule of law and legal certainty. They have operated to the detriment of collective bargaining and, consequently, of union freedom on which collective

[10] The ILO acknowledges that salary reductions and decentralisation of collective bargaining have taken the countries of Southern Europe to shorten their differences in competitiveness with respect to the rest of the Euro zone; at the same time it indicates that the world labour perspectives will worsen in the coming years unless 280 million jobs are created by 2019, especially in emerging and developing countries, or that unemployment among the young is especially exposed to the brewing of a serious social unrest. Vid. ILO "*Perspectivas Laborales y sociales en el mundo, Tendencias en 2015*", p.1. The wild migratory phenomena experienced in Europe are a clear sign that the analysis is not mistaken. The European crisis is solved slowly, but the global crisis is growing little by little.

[11] It meets twice a year ahead of the spring and automne European councils, with the participation of the ETUC, and the corporate European organisations: Bussiness Europe, CEEP and UEAPME.

bargaining has been based in the constitutional models typical of the countries of the South of Europe. This is my second hypothesis.

Before demonstrating this hypothesis or even construing *conceptualizations*, I think it methodologically necessary to start by briefly analysing our recent trade union history and then putting into context the big issues that, in my belief, may condition our results, their present validity and the credibility of my conclusions.

2. Trade unions and politics: brief European history until the present day

The trade union tradition in the South of Europe has been, and in theory, continues to be, that of a trade unionism of class confederacy and socialist ideology (throughout the 20th century the majority of unions were a communist stronghold in France, Italy and Spain). It is a unique feature of Southern Europe as opposed to the majority of official or local unions in Anglo-Saxon unionism that supported Labour but were independent from it, or to the unions of Central and Northern Europe, typically linked to social democratic parties and with a longstanding experience of political concertation with their Governments.

In Southern Europe, attempts by anarchists to control the union movement had been politically defeated by the first quarter of the 20th century. As a result of the fall of the Berlin wall and, in practice, the end of the communism in Europe, the same would happen with communist efforts to control the main trade unions in France, Italy, Spain, Portugal and Greece.

The loss of those ideological vanguards of the revolutionary left has meant that in the 21st century the main body of unionism in Southern Europe has been oriented to support – if not to participate in the politics of European social democracy as the only alternative, remaining politically autonomous and ideologically open to agreements with Governments of either political spectrum, even if, at any rate, unions have continued to profess essentially an ideology of class and struggle against the interests of business and finance. On the other hand in general, at an organic level, unions have not been affected by the new political phenomena brought about by the breakdown and bad image of the traditional political parties of both the right and the left. Somehow, we could say that they have remained loyal to their political tradition, turning a deaf ear to the emerging social movements, mainly led by the young and supported by the new culture of social networks.

Besides, globalisation has already revealed the uselessness of the international confederations of purely ideological composition of the past century, and we have witnessed the birth of new international union organisations more sectorialised and with the capacity to intervene in the transnational collective negotiation or in those international institutions that have allowed for their participation (especially within the EU). However, this international unionism is still governed by highly institutionalised officials, and even confers plenary authority on its mandarins (who have job permanency) who in turn act as a moderating influence at the international level rather than as genuine representatives of the diversity of unions that they are supposed to

represent. To sum up, and in my view, these are very hierarchical union structures with a close-knit professional leadership and little or no transparency, so that they are farther and farther removed from the reality of their union base and the majority of workers. This criticism may even be made of the ETUC and the International Trade Unions Federation.

Also, the "professionalised" unionism of Southern Europe has been comfortably functioning within the neocorporatist model of governance of social and economic policies, even in the successive economic recessions, which have always been resolved by following a strategy based on compromising salaries and jobs in exchange for the public guarantee of income for workers harmed by the recession. The foundations for the strategy of flexicurity were anticipated in the long experience of the industrial restructuring of Europe from the 1970s onwards.

Thus, in Europe there has been an "institutionalised" unionism that has, through neocorporatist practices, not only identified itself with the actions of various political parties but, at times, with government action itself. (Sociological studies carried out in Spain put political parties and unions at the same low levels of social disrepute). If the traditional political parties of Southern Europe are on the brink of losing their institutional position in power, the same may happen to the majority of traditional unions. However, employed workers repeatedly give their support and mandate to these unions, albeit their membership has always been, and will continue to be, very low, both in France and Spain, and slightly less low in Italy.

In fact, it is a frequently heard criticism that the unions defend the interests of employed workers, but do not defend the interests of the rest (unemployed workers, at risk or those in undeclared work). The latter have been more efficiently represented by social movements or recently-formed social organisations that, in cases like Spain, have their own political representation separate from the unions (*Podemos political party*).

3. Some cases

3.1. The Spanish case

Concertation between government and the social partners in Spain [12] has been, and continues to be, a defining element in the system of work relations developed during the transition to democracy. It has stood up rather well through the different political changes of left and right Governments, and has adapted to their various anti-cyclical policies as well as real economic recessions.

The Spanish concertation at three levels, typical of the 80's, was flexibilised in 1990's, both in its periodical timeline and in its development (combining the concertation at three levels with the inter-confederal collective bargaining at two levels)[13]. Social

[12] F.J. Calvo Gallego, & M.C. Rodriguez –Piñero Royo, *Las reformas laborales como instrumento de política económica y su impacto sobre el diálogo social en España,* Rev. Internacional y Comparada de relaciones laborales y derecho del empleo, vol. 2, n 4. 2014, p.11 and ff.

[13] C. Palomeque & M. Alvarez de la Rosa, *Derecho del Trabajo* , Ed. Ramón Areces, 2014, p.492.

dialogue was likewise marked by milestones of strain and conflict. Indeed, social dialogue has not prevented various general strikes against the government, especially during the 1993-1995 recession, or when the Convergence Programme with the European Community was approved, despite opposition by unions that were ideologically opposed to the conception of a "Europe of capitals". The important labour reforms of 1994 were also opposed by a union-led general strike. By contrast, the ensuing reforms of 1998 were not as they were agreed by the unions and the then-right wing Government. However, this episode revealed a split within union ranks, as the CCOO signed off the Toledo Agreements on Pension Reform, but the UGT did not.

From 1997 onwards the concertation between Government and social partners in Spain has followed general European practice (which is embedded in the ECT and the EUFT) that favours negotiated legislation. Corporations and unions enter into Inter-confederal Agreements, which urge the government to adopt mutually agreed legislative action. This is a departure from the previous Spanish approach to social dialogue. In a further development, as relations between the important union federations improved after the general strike of 2002, the socialist Government of President Zapatero relaunched concertation between Government and social partners and the practice of negotiated legislation particularly. The Agreement of 29 July 2008 was signed before the financial recession; in the changed circumstances, at the peak of the recession the Goverment was forced to legislate by fast-track (*RDLey 27/2009*), in a climate of strong opposition by unions and corporations, and a general strike, in September of 2010, the seventh one in Spanish democracy. However, before the second phase of the recession arrived — now of an economic nature — the socialist Government opened dialogue at two and three levels during 2010, responding to the social representatives with the Interconfederal -Bilateral- Agreements signed in 2010, 2011 and 2012.

Upon its arrival in power in November 2011, the Popular Party— representatives of the Spanish right wing and with a comfortable absolute majority — kept on the same fast-track legislative action, with social dialogue more formal than real. Despite the social representatives having proposed a new Inter-confederal Agreement on collective bargaining with suggestions for negotiated legislation in January 2012, the Government approved *RDLey 3/2012* a month later, with blatant disregard to the proposal. This caused the ILO's criticism for breaching the principles enshrined in the ILO Conventions 87 and 98[14].

Indeed, the 2nd Inter-confederal Agreement on Employment and Collective Bargaining (approved on 30 January 2012) contemplated a structure of collective negotiation from branch to company level that was not taken into account by the legislative reform of articles 83,2 and, particularly, 84,2nd of the Workers' Statute as amended by the Law 3/2012 of 6 July (transposition of the *RDLey 3/2012*). The reform establishes a norm of public order or mandatory requirements governing the structure of collective bargaining, which is directly opposed to the collective autonomy of unions and management.

[14] 371st Report of the Committee of Union Freedom, meeting of the board, Geneve 13-27 March 2014, response to the complaint posed by the two unions signatory to the Agreement (CCOO and UGT).

The 2012 reform was the new government's main response to labour issues. It can be considered as an accelerating element in the "macroeconomic unbalance" and has aggravated the economic recession. Indeed, in face of the financial burden of public debt and the impossibility of using anti-cyclical budget and tax policies – due to, among other reasons, the requirements of the ECB and the European Commission to reduce the public deficit – the labour reform was employed as an instrument to devalue wages — in effect as an substitute for currency devaluation – designed to achieve competitiveness (an aim which has really been met) and of maintaining employment levels by avoiding redundancies through reducing salary costs (an aim whose effects are now being felt, as employment levels begin to go up, but of poor quality)[15].

With the economic recovery of 2014, social dialogue has been reconvened. The Prime Minister held his first meeting with social representatives on 18 March 2014, almost two years after his taking office. In July 2014 an agenda of programmatic goals was signed by all three levels, with steps towards economic growth, creation of employment and social cohesion reinforcement. However, in reality, since the coming to power of the right in November 2011 there have only been two agreements. One did not have the Government's participation (salary moderation agreement of January 2012) and the other (December 2014) was a three-level agreement on a special training programme which made social grants available to the long term unemployed. The law for the reform of the professional training system for employment (*RDLey 4/2015*) was resulted from social dialogue between corporate and union organisations and the Government. And finally, with the Agreement of 29 June 2014 which re-affirmed the necessity of preserving concertation between Government and the social partners in order to design policies oriented to strengthen the economic and employment recovery, a small step has been taken towards reinitiating the practice of negotiated legislation, but with limited practical effect due to the existing weakness of unions.

Aside from some responding to principles of flexicurity, reasons of economic policy (salary devaluation) aimed at instrumentalising Labour Law and its traditional techniques of public intervention for corporate profit distribution, in the Spanish case, labour reforms have been oriented towards a restructuring effort to enhance business competitiveness in the face of economic globalisation. With regards to this last objective, the attempt to re-regulate the framework of collective bargaining has been a key issue.

The model of collective bargaining applied in Spain is a model of legislative intervention on collective autonomy, the former being justified by the promotion of trade unionism (Constitutional Tribunal decision, STC n.98/1985) under which the law endows union and business representatives with authority to negotiate (through the so-called technique of higher representation). Equally, the law regulates the procedure of negotiation, and part of the contents of negotiation, as well as ensuring its binding force "erga omnes" by giving the collective agreements normative efficacy. It also establishes a negotiating structure, which in the original model recognised the existence of intermediate agreements between corporate and sectorial national levels (so-called "provincial" agreements) where established by past practice, which permitted the adjustment of wages not only at sectorial level, but also in accordance with the levels of

[15] F.J. Calvo Gallego, y M.C. Rodriguez-Piñero Royo, *Las reformas laborales como*…cit, p.20 and 21.

union strength and the quality of life in each region or territory. While this arguably had an anti-competitive effect in many types of companies, it did provided a measure of security for the whole bargaining system. This will be a very important question, at least during the hoped-for fat years of economic growth.

The 2012 reform introduces two significant changes in the structure of collective bargaining in Spain. One (jointly shared with the Socialist reform of 2011) is sectorial centralisation of collective bargaining, which is still dependent on the principle of collective autonomy (art.83,2 LET). The other, exclusively introduced by the 2012 reforms, is the independence of negotiations at the corporate and corporate group levels, which were imposed by art.84,2 LET. In the words of the Spanish authors[16], there has been a true dualisation of the structure of collective agreements, with two separate forums for negotiation —the first still subject to the collective autonomy of the social partners, the second at the mercy of union dynamics in each company.

The legislative tendency towards the preponderance of corporate level collective negotiations as a means of assuring greater business competitiveness, with derogatory effects on sectorial (branch) collective agreements, has been achieved through legislative intervention and approved by the Constitutional Court in its decision STC n.119/2014 of 16 July, as I will explain in the following section. The ILO Report on Spain[17] favours sectorial agreements and three level concertation, and recommends that the reform introduced in the wake of the economic recession be revoked once the recession is over; however, it seems that the Government has no such intention. For its part, the left opposition promises, prior to winning the elections, to abolish the recent changes.

3.2. The French case

Concertation between the government and the social partners in France has a longstanding tradition (the *Accords de Matignon* of 1936 or the *Accords de Grenelle* of 1968), and both right and left governments have tried to sustain the famous "*Trente Glorieuses*" since the years of great prosperity, as we will see next, even in the complicated times of the recession that have little or nothing to do with that golden era of continuing economic growth of the three decades following the II World War.

Legally speaking, social dialogue as a procedure antecedent to legislation is enshrined in art. 1 of the *Code du Travail*, which establishes that it will be subject to a prior consultation process following negotiations on the matter between national and inter-branch trade unions representatives and employers organizations[18].

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[16] S. Del Rey Guanter, *Estructura de la negociación colectiva y prioridad del nivel de empresa tras la reforma laboral de 2012*, Rev.Ministerio de Empleo y Seguridad Social, n. extraordinario 2012, p.211.

[17] ILO Report on Spain, *Growth with Employment*, Genève 2014.

[18] In fact the delegation of this legislative function was not contemplated in the Constitution of the 5th Republic, so that it had to be approved by a constitutional reform of art.51-3 by the French Parliament on 14 March 2013, as told by Y. Pagnerre, *Social reforms to cope with the financial crisis in France* , Comp. Labor Law & Pol'Y J., vol.35: 301, 2014.

The French case, which I intend to present as empirical evidence of the conceptual approach to be exposed at the end of this paper, is still a work in progress whose final shape is not yet clear. Like Spain, the dual economic and financial crisis of 2008 and following witnessed a change in government in France. However, unlike Spain, President Sarkozy, a conservative, was replaced by President Hollande, from the left, in May 2012.

In one case and the other, reforms initiated by the European Commission were implemented at a slow pace, because, in both Governments, the importance of social dialogue with corporate and union organisations has become a big burden on the legislative procedure. As a result, in 2015 we may witness the first reform without consensus.

Some reforms have been introduced however. Both the "*'Accord sur la competitivité et l'emploi*", signed by unions and corporations under the tutelage of President Sarkozy on 9 April 2008 (which gave way to Law of 20/08/2008, in line with the previous reform of *Law on the modernisation of the labour market*), and the *Accord National Interconfederale* of 11 January 2013 ("ANI 2013"), signed by the French corporate association (MEDEF) and three trade unions (CFDT, CFE-CGC, CFTC), under President Hollande, were translated into Law of 14/06/2013, the *Loi Hollande de Sécurisation de l'emploi* of 14 June 2013; another Agreement (14 December 2013) will probably be enshrined in a new law to reform of vocational training.

In reality, the first accord did not really succeed, because it conditioned the flexibility of working hours on the existence of collective corporation agreements under the threat of a possible legislative reform that would impose it – as has happened in Spain. It was refused assent by President Hollande (who had been elected in 2012) in the first place; however, the arrival of a new Prime Minister (M.Valls) and the need to maintain employment levels (*sécurisation de l'emploi*) have given urgency to the negotiation at corporate level of flexibilisation measures of working time, mobility and salary within certain time limits (minimum duration of two years for repealing agreements, albeit respecting minimum legal wage and maximum working time) and recognising the individual rights of workers to contract out, although in that case there may be redundancies (*pour cause réelle et serieuse*). On the other hand this *Accord National Interconfederal* also contemplates a personal training allowance of 20 hours per year for each worker (*compte personnel de formation*), a minimum working time for part-time contracts (24 hours per week), with some exceptions (students…), and also new collective rights for work councils (consultation) and the election of two representatives of workers as members of the corporate board in companies with more than 5,000 employees[19].

However, with respect to the exercise of union action, former Prime Minister Fillon under the Presidency of Sarkozy had introduced an important reform of collective bargaining well before the recession. Law 4/5/2004 introduced the principle of majority rule for employees covered by a collective agreement. This principle will also

[19] This law has been discussed in an ample doctrinal commentary in the special issue of Review *Droit social*, n. 10 of 2013.

operate at the level of inter-confederal negotiation (Interbranch agreements*).* In the second place it also recognises the autonomy of each bargaining level, although the branch level will remain pre-eminent with regard to negotiations over minor issues such as minimum wages or professional classification within branches. For the rest, the corporate collective agreement will prevail over the sectorial agreement, unless the latter expressly provides otherwise. Collective agreements at corporate group level are also recognised.

This reform has come to establish a new model of articulation between the corporate collective agreements and the sectorial –branch- collective agreements, in a less radical way than in Spain, in the sense that the sectorial collective agreement may also establish other consequences. The truth is that also in France "*le centre de gravité de la negotiation est nettement déplacé vers l'entreprise, voir l'etablisement*[20], which, in fact, changes the system of French collective bargaining, favouring the decentralisation at company level of the collective derogatory agreements and reducing the capacity of action of confederate unions by bringing into play the corporation itself, where that power will have to be expressed case by case, depending on the level of representation of each union in each corporation. This reform was intended to create majority rule, in the words of J.E. Ray[21], so as to restructure French unionism and put pressure on unions to be more accountable to employees for their decisions.

However, the sustainability of social dialogue in France remains to be seen. On 9 April 2015 there was a mobilisation against the reforms of the Valls Government by the opposing unions: CGT and FO, together with other transport and teachers unions. It coincides with the negotiations that the Government has initiated with corporations and unions to create a new framework of social dialogue whilst at the same time it attempts to present both parties with a labour reform package. The Government has intervened in the negotiation after the failure of the social partners to reach an agreement, by putting forward a law proposal in April 2015 regarding social dialogue and support to employees (*relatif au dialogue social et au soutien à l'activité des salariés*).

3.3. The Italian case

The mistrust towards the corporatist or neocorporatist practices deeply marked union-management relations in postwar Italy, as it sometimes did in post-Franco Spain. At the cradle of union corporatism, the theory of "*ordinamento intersindacale",* meant, in the first place, that art. 39 of the Italian Constitution would be left unchanged until the present day. In the second place, that there has been no public legislative initiative to regulate labour collective relations, which continue to be governed by the principle of collective autonomy, particularly in the case of collective agreements; for the most part, the same can be said of the right to strike and the right of workers to collective representation.

[20] M.A.Souriac, *L'articulation des niveaux de négociation,* Droit Social , n. 6, juin 2014, p.582.

[21] J.E. Ray, *Les curieux accords dits majoritaires de la loi 4/5/2004*, Droit Social, n. 6, 2014, p. 591.

This contractualist and private law perspective, and the absence of statutory regulation, has resulted in a strong judicialisation of the bargaining process and its outcomes, and considerable uncertainty about its effectiveness[22]. This model of Italian industrial relations has been indirectly threatened by recent Community intervention in response to Italy's financial difficulties following the 2008 recession. A communication from the European Central Bank to the Italian Government in August 2011 led the so-called technocratic Government of Mario Monti to approve the Legge Fornero n.92/2012 of 28 of June, followed upon by the Legge Leta n.99/2013, of 9 of August, both of which introduced important measures of external flexibility for fixed term hiring.

In union matters, albeit less strongly, given the lack of direct statutory regulation of the structure of collective bargaining, article 8 of the Law n.148 of 14 September 2011 is paradigmatic: it imposes the decentralisation of collective bargaining at a territorial level, but also at a company level, despite the ensuing inter-confederal agreements between the main union and management organisations (*Accordo Interconfederale of 28 June 2011*, *Protocolo de Intesa* of 31 May 2013, *Testo Unico* of 10 January 2014)[23]. This first legislative text is directed at arranging the structure of collective bargaining in Italy, and mandates its decentralisation (*decentramento sulla regione, provincia, di distretto*) with a view to promoting its establishment in regions with mainly small businesses. To accomplish this, the law permits the parties to contract out of national sectorial collective agreements. This approach promotes the notion that enterprises themselves are the place where contracting-out may be most useful and is most needed.

The threat of a legislative action to establish a new approach to bargaining structures has forced the social partners to respond defensively, to develop an intense negotiating procedure at a high level translated into *Accordi y protocoli d'intesa*, thus moving from weak regulatory model (simple action recommendations directed at their respective affiliated organisations) to a rather different one. The new model, while still maintaining the flexibility intrinsic to an agreement negotiated at a top level, assumes a strong position on the selection of the negotiating agents, by declaring some sort of winning and losing organisations at each decentralised negotiating level, depending on whether they have passed the representativity test adopted in the Agreement (*Testo unico sulla rappresentanza nell'industria, of 10 January 2014*). The social partners, in response, have become the defenders of a labour culture based on a "classical" view of collective autonomy (from Otto Kahn-Freund to Gino Giugni), arguing that from a legal point of view any legislation that regulates the representativity of bargaining agents would seriously threaten the fundamentals of the Italian system[24].

3.4. The extreme example of Greece

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[22] R. del Punta, *Note sparse sul Testo Unico sulle rappresentanze*, Riv. Diritto delle Rilazioni Industriali, XXIV/n 3, 2014, p.674.

[23] M. Biasi, *The effect of the global crisis on the labour market: report on Italy,* Comp. Labor law & Pol'y J., vol.35:395, 2014. A. Cataudella, *Nota sul protocollo d'intesa del 31/5/2013*, Gior. Dir. Lav e Rel. Ind. N 141, 2014, p.137 and ff

[24] B. Caruso, *Costituzionalizzare il sindicato. I sindacati italiani alle ricerche di regole…,* Riv. Diritti, Lavori, Mercati, n 2, 2014, p.595 and ff.

The special issue of the Comparative Labor Law & Policy Journal has a *Report* on the Greek crisis[25] that is very englightening about the limits of reasonableness that have been surpassed by the Troika as a condition to keep lending money to the country that has accumulated the largest public debt in Europe in relative terms. As regards labour law, a 2012 statutory law derogates from the principle of collective autonomy, and abolishes the social partners' regulatory power in setting general minimum wages at the national level, thereby clearly violating the constitutional right to collective bargaining (art.22,2 Greek Constitution), but which has nonetheless been approved by the *Council of State* on the basis that legislative intervention is exceptional, proportional and provisional. Ironically, whilst the reform was not proportional, it was indeed provisional, as the newly-elected left wing government repealed it.

4. The context to our consideration

The democratic postwar model of industrial relations in Southern Europe was developed in an era of sustained economic growth and had an essential neocorporatist component, albeit one that took a different form in each of the countries examined. However, for several reasons, the challenges posed by the 2008 recession have not left that model intact in any of them. First, it has been impossible – through concertation and social dialogue – to respond to the neoliberal strategies that have been identified as necessary to exit the recession. And second, the unions have been pushed, in general, to resort to last-ditch defensive strategies — to win or to die — which has both damaged their reputation and proved unavailing when the intensity of the neoliberal force has been unleashed against them.

The three cases examined provide data that support a criticism of the performance of the neo-corporatist model of Southern Europe. On the one hand, collective autonomy has not always been respected. Social dialogue has taken place under the pressure of neoliberal policies diminishing the room for bi- or multi-lateral agreements. Union power has been weakened, firstly, by imposing– by operation of law – big inter-confederal agreements and branch negotiation that promote the decentralisation of negotiations and give priority to company-level agreements which in some cases include agreements reached by management with non-union representatives. Secondly, the political system has proved largely impervious to general strikes, making them a mere incident of popular discontent. In the end, unionism has been weakened: even if it maintains its defensive posture, as a counterbalance to the power of capital, and thereby retains its soul, it has lost its arms and armour.

Let us examine next in a more systematic manner the context in which this provisional diagnosis is produced before the actual political post-recession climate.

4.1 The democratic – and neocorporatist – model of labour relations does not effectively respond to the recession, and it also gravely harms the reputation and strength of unionism.

[25] M.Yannakourou, & Ch.Tsimpoukis, *Flexibility without security and deconstruction of collective bargaining. The new paradigm of labour law in Greece*, Comp. Labor Law Pol'Y J., vol35:361 and ff, 2014.

The practices of concertation between government and the social partners[26] were fundamental conditions for the economic rebirth of postwar Europe (II World War) and continue to influence decisively the labour relations system of Northern and Central Europe (*sozialpartnershaft*) to the point of constituting a key reference for the European social model and the social dialogue institutionalised in Europe. However, the translation of the concertation between Government and the social partners took on a weak institutionalised shape in the countries of Southern Europe, probably due to the neocorporatist precedents in some of these countries, a model deemed to be politically inappropriate especially for the unions based on class ideology and the inevitable conflict of interests — the tradition of most unions of Southern Europe.

An important outcome of social or political concertation between the state, employers and unions is negotiated legislation, an outcome quite different from the traditional results of collective bargaining. The EU strongly favours this approach, as is evident from its embrace of the European social dialogue, which has been defined by the Commission as "the discussions, consultations, negotiations and joint actions undertaken by the social partner organisations representing the two sides of industry (management and labour)…", at European level, of course[27], and may consist of tripartite concertation (since 2000 Informal Tripartite Summits are held once a year), and bipartite social dialogue.

This dialogue has been institutionalised through organisms with parity of representation such as the Committee of Employment, for ensuring a continuous dialogue, joint action and consultation between the Council, the Member States, the Commission and both sides of industry. There is also the Social Dialogue Committee, established in 1992 as the main body for bipartite social dialogue at European level, which holds three to four meetings per year and consists of 32 employers and 32 workers representatives. And finally, there are the sectorial social dialogue committees established since 1998 (the Commission recognizes 37 EU-level sectorial dialogue committees).

The EU is obliged to evaluate the post-recession political effects of the results of this governance model of industrial relations that is spread among EU member states. In particular, it must determine whether its reputation and credibility have been damaged along with the legitimacy of the social partners - particularly the union representatives. This evaluation must be clear and transparent, as the very survival of the neocorporatist model may be at stake.

4.2 Has the instrument used — legislative changes to the structure of collective bargaining — contributed to the final destruction of the neo corporatist model?

[26] We mean by "concertation between Government and social partners" the negotiating process of political exchange between the state powers and the social agents (unions and management) justified by a correction of the constitutional classical liberal scheme of the tripartite system. For instance, art. 7 of the Spanish Constitution is – and this is the relevant thing – systematically framed within the part that defines the organic model of the State, and says that "workers unions and management associations contribute to the defence and promotion of the economic and social interests that are inherent to them".

[27] European Commission (2009), *Industrial Relations in Europe 2008*, Brussels, European Commission, p.103.

In the majority of countries of Southern Europe, the right to collective bargaining is protected by the Constitution, and, in many cases, supported by national legislation on trade unions. From a legal point of view, the right to collective autonomy or to the contractual power of workers' representatives and corporations to establish the framework of labour relations has been accompanied, very often, by a process of tripartite social compromise in which Governments have taken an active part in establishing these atypical negotiations on labour legislation and economic policies.

However, we know from the examination of the above three cases that recent episodes of legislative intervention have not responded to this pattern. Moreover, in this recession the role or function of regulatory labour legislation has been altered. Let us say that our model of industrial relations, since the initial theorizing by the Webbs (1894), has acknowledged the function of collective bargaining in restoring the imbalance of power between the contracting parties that exists in the individual employment relationship. Thus, ILO Convention 98 also links the exercise of the right to union association with the right to collective bargaining, and emphasizes the duty of states – where necessary – to adopt stimulus and development measures for the use of voluntary negotiating procedures between labour and management associations[28].

The fact that the recently implemented labour law "reforms" have especially impacted on the structure of collective bargaining is not a minor problem. I define this as the normative regulation of the different levels of collective negotiation and of the type of relations between them, a subject traditionally reserved for the exercise of collective autonomy. The recession has been used opportunistically, for political purposes, to invert the existing model of collective bargaining from a high level down to a territorial and sectorial level, ending up at each particular workplace, being replaced through the political and legislative intervention by a "non-model", this time much more decentralised, where the decision-making power on basic employment conditions is being moved downwards, to each specific workplace.

For instance, art. 37.1 of the Spanish Constitution specifically mandates Parliament to regulate a system of collective agreements as well as their legal efficacy, so that the legislature has to take an active role in the setting and development of the right to collective negotiation (STC n. 58/1985 and ruling STC n. 208/1993). This and other similar mandates – albeit not as explicit as art. 37.1 of the Constitution – have brought a relative proliferation of norms on union rights, a model certainly different from the Italian one – and from the French one to a lesser extent - where the theory of *ordinamento inter-sindacale* has meant the lack of legislative development of the Italian constitution provisions and utmost deference to the principles of collective autonomy and union freedom.

Again speaking to the Spanish example, the union legislation of 1985 was based on the principle of promotional intervention, minimum and sufficient, again within the utmost deference to the autonomy of organisation and of union action, albeit justified by its promotional function of the union fact (Ruling of STC n. 98/85, of 29 July). Thus, a

[28] M.E. Casas, *Reforma de la negociación colectiva en España y sistema de relaciones laborales*, Cuadernos de Relaciones laborales, vol.32, n.2 (2014), p.288.

statutory development assigned powers to a higher union structure, as determined by public legislative criteria, for instance, to regulate collective agreements of *erga omnes* efficacy among the unions and management associations which had been legally declared as the most representative ones. On the other hand, this constitutional recognition of the "binding force" of collective agreements has led the constitutional court to hold that collective agreements made in compliance with the new legal requirements have a quasi-public relevance or quasi-legal value (Ruling of STC n. 177/1988 or Ruling of STC n. 119/2002). This is a clear illustration of the corporatist motifs that still permeate our democratic labour legislation.

The new reforming legislation just examined partially breaks with the neocorporatist model of labour relations by not assigning juridical value to the collective agreement as an instrument of quasi-normative regulation and replaces it (without expressly saying so) with the factual recognition of a management function for labour relations, as a flexible instrument that pays attention to the actual-existing situation of the employer. The same applies to corporate bargaining to a different extent in each of the three countries examined. However, we can also reach the same conclusion from the previous coordinating function represented by the Interconfederal Agreements (sometimes with negotiated proposals for legislative projects), which have disappeared with the advent of the recession. This has clearly happened in the Spanish case, with the II AINC of January 2012 (not attended by Government) and may also be taking place in France and perhaps Italy.

However, this is a tentative diagnosis. Given historical precedents and signs of the recovery of social dialogue in Spain – as it emerges from the economic recession – the same will probably happen in the two other countries sooner rather than later. The breakup in concertation between government and social partners will not leave its mark, but we will once more conclude that the neocorporatist model works when the economy works too, and becomes difficult to manage when profit margins narrow and panic ensues. Is neocorporatism a cynical model? Moral behaviour is not valued by the public in general these days, and people are more practical and simply prefer that things work, badly or, preferably, well. We are, after all, talking about political dialogue, in a world of cynics.

The crisis of the model of collective bargaining through the intervention of the legislature is also going to have an impact on the life of unions. The nature of the collective agreement – and even of the strike – is closely linked to the form of union structure[29], so that any manipulation by law of that structure will also have a direct or indirect effect on the organisation and functioning of the unions, and on their survival and place in public consciousness.

4.3 The role of the judiciary, the control of the legislative power or the incorporation of the legislative function into the judiciary in the defence of the traditional values of the juridical and democratic system

[29] De Veali, M. "Proyecciones económicas, psicológicas y sociológicas de los convenios colectivos de trabajo", en Libro in memoriam de Ludovico Barassi, *Contratti collettivi e controversia collettive di lavoro*", CEDAM, Padova, 1956, p.158.

As claimed by Harry Arthurs, *if labour wants to protect its gains and recoup its losses, it will have to struggle harder, not litigate more frequently*. In Spain, the unions have always maintained a sustained strategy of litigation, backed up by workers' mobilisations. Litigation is usually the Spanish unions' first recourse in the event of a work conflict. This strategy has proved to be successful in the first instances of litigation, and, in some cases, on appeal before the higher courts as well, including before the Constitutional Court.

In times of recession, however, the Spanish case shows a different trend that supports Prof. Arthur's assertion. While the corrective function exercised by the courts on some of the most radical reforms by Law 3/2012 has been praised by the unions, there has been no such success when the question has come before the Constitutional Court as to the constitutionality of some of the reforms. In both cases we confront different ways of considering the interpretative role of the courts, teleologically corrective, or complementary but with respect to the letter of the law. In light of recent Spanish experience, we can say that the judiciary has assumed a legislative and corrective function in the first case, while accepting legislative authority in the second case, to deflect the unions' litigation strategies.

An example of the corrective function on the legislative effects has been the ruling of the High Court of 22 December 2014 (*Tribunal Supremo*) which annuls the reform that left without effect a collective agreement that has expired without being renewed or renegotiated. The immediate consequence of this has been to return labour relations to the level of individual negotiation upon expiry of the collective agreement, by considering that the contract of employment incorporates all the clauses of the expired collective agreement pending a new collective agreement.

In the opposite sense, an example of great regulatory importance for the democratic model of industrial relations in Spain has been the above mentioned ruling STC n.119/2014 of the Constitutional Court. The ruling discussed the constitutionality of the priority given by law to the collective agreement of a corporation or corporation group rather than to the sectorial collective agreement, so that the former may regulate, *in peius*, essential work conditions such as wages and working hours. The Constitutional Court has upheld the constitutionality of the legislative reform arguing, *inter alia*, that the reform is consistent not only with articles 28 and 37.1 of the Constitution (which recognise the rights to union freedom and collective bargaining) but also with article 38 of the Constitution, which protects free enterprise and mandates the public powers to monitor and promote productivity. But, what is more important, the Constitutional Court omits reference to the principle of minimum intervention and promotion that it had previously upheld.

The Constitutional Court has thus changed its doctrine and established that the constitutional model of collective bargaining is open to revision, since it has not kept a regulatory reserve in favour of collective autonomy on the subject and, consequently, by virtue of the principle of the primacy of the law (which cannot be altered by social partners through collective agreements) the Spanish legislator has an ample leeway to regulate the development of the right to collective bargaining, especially as to the rules of concurrence and articulation between different collective agreements. The STC

n.119/2014 ruling brings an important correction to the traditional understanding of Labour Law, based on the legislative intervention in support of the unions, as well as the unwritten principle of maintaining the "union achievements" justified by reasons of general interest such as situations of exceptional crisis[30].

In contrast, the Constitutional Court in Italy has accepted a more modest role for the legislature, a more intermediating role. As a result of another conflict arising from the Italian reform on collective bargaining, the ruling of the *Corte Costituzionale* n. 231 of 23 July, has revised the reform of article 19 Law n.300/1970 (introduced by article 8 of the Law n.138/2011 above mentioned), with the aim, on the one hand, of defending the validity of the *ordinamento interdindacale* whilst, at the same time, underlining the political value of union pluralism as conditions to be previously considered prior to a legislative reform on union freedom or negotiation, which, besides, should always be respectful of an agreement politically agreed between the social partners[31]. In a country which has not formally embraced a neocorporatist strategy, its Constitutional Court has declared its intention to support what amounts to "neocorporatism".

This brief analysis of the validity of the idea of the balancing function that has traditionally been used to justify the support that unions give to the judiciary confirms its advantages in those legal systems where social rights have been constitutionalised, but also its limitations and, in any event, its insufficiency to consolidate union gains where these exist.

4.4 The europeanisation of the economic and social policy. The European Union exits the recession clearly oriented towards the neoliberal principles from which the European social model is a mere subordinate variable.

Many in the political left have trusted the solution to the imbalance of powers at national domestic level to an equitable and socially just intervention of the EU instruments, European Court of Justice included. This is not so in reality: what may be politically and juridically arguable is not however acceptable from a moral point of view. As in the case of someone who is truly a liberal "*morality and political economy are inextricably linked "(as David Hume said), this suggests that ethics, through the study of morality and political economy, and the study of economic behaviour and institutions are*

[30] Another example of the validity of the law is the validation of the unilateral change by management to the conditions agreed on the collective agreement without erga omnes efficacy (*pactos extraestatutarios*). The ruling of the Constitutional Court of 23 January 2015 (Rec.5610/2012) declares that it does not violate the union right to freedom of unions (art.28,1 of the Constitution), nor the constitutional right of workers to collective bargaining (art.37,1 of the Constitution). It reasons that the unions have other negotiating tools that can be freely used if they want to (the collective agreements of erga omnes efficacy). In any event, the workers representatives will be consulted on before any repeal, and such a repeal will only take place when there has not been an agreement. Besides, said unilateral decision will be legally conditioned and will always be checked by the judiciary. This does not prevent us from considering that the unilateral change of the collective agreement by management may carry some compensation and liability.

[31] L. Tria, *Il quadro della rappresentativitá sindacale dopo la sentenza della Corte Costituzionale 231/2013*, Riv. Giur. Lav.., n. 1, 2014, p.23. C. Pinelli, *Dal protocolo d'intesa del 31/5/2013 alla rilettura dell'art.39 Cost.*, Gior.Dir.Lav.Rel.Ind., n.141, 2014, p.143 and ff.

inseparable subjects,[32] and we also know the importance that this author had on Adam Smith, the father of the economic theory of free markets and another great moralist.

The European political construction would be better off paying attention to the legacy of the European cultural traditions, particularly the great philosophers of the Enlightenment, and trying not to stop thinking in moral and philosophical ways. The motto of the recession should have been "pragmatic with principles". No matter how old the moral values of the European society are, it is better that they exist than having none of them in any of the action plans put forward by the European political powers.

We have a positive example of doing so in the promotion of Common Principles on Flexicurity[33] arisen as a social labour relations model for Europe. They have been negotiated with all the stakeholders such as Member States, social partners, but also social NGOs, the EESC, EP and CoR. The procedure has shown that ETUC was very sceptical about the principles' view on social protection measures,[34] for instance the emphasis on avoiding the benefit systems acting as disincentive to work, whereas according to ETUC, in the EU's most successful Member States generous benefits are key to managing change and creating adaptable workforce[35].

In my opinion, the best definition of the concept of flexicurity is not in the conclusions of the Council (EPSCO) of 2007, but in the Communication on flexicurity presented by the European Commission, which I fully subscribe to: it stated that *"Flexicurity should not be misconceived as giving employers freedom to dissolve their responsibilities towards the employee and to give them little security. Flexicurity does not mean "hire and fire"; nor does it imply that open-ended work contracts are a thing of the past. Flexicurity is about bringing people into good jobs and developing their talents. Employers have to improve their work organisation to offer jobs with future. They need to invest in their workers' skills. This is a part of internal flexicurity. However, keeping the same job is not always possible. Sometimes it is better to focus on finding a new job rather than preserving the job one has at the moment. External flexicurity attempts to offer safe moves for workers from one job into another, and good benefits to cover the time span, if needed"[36].*

Probably this European strategy on labour relations, compatible with the defence and advance of competitiveness of European corporations, has always haven two problems of credibility. On the one hand, management – I am thinking of the countries of Southern Europe, with the exception, maybe, of France - has probably failed to assume the responsibility it has on the professional advance of its employees, leaving all of it to the public powers. On the other hand, the problem comes from the small role given to the law as the real safeguard for putting into practice the theoretical principles of flexicurity. Their development has been left, in principle, to soft law mechanisms and

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[32] S.A. Kayatekin, *The relation of morality to political economy in Hume,* Cambridge Journal of Economics, n.38, 2014, p.605.

[33] Council conclusions 16201/07 on december 2007 *Towards Common Principles of Flexicurity.*

[34] ETUC (2008), *Wages and good Jobs must be a priority in sfeguarding European economic stability,* Press release 31 January 2008.

[35] S.Bekker, *Flexicurity : the emergence of a european concept*, Ed. Intersentia, Cambridge, 2012, p.289.

[36] European Commission(2007), *Towards common principls of flexicurity: More and better Jobs through flexibility and security,* p.7.

a bottom-up development of good practices. A good law would be necessary to avoid the trap of uncertainty that some practices of flexicurity will certainly lead to (there is the numerical flexicurity, but let us not forget the functional flexicurity either, for instance, a part-time job, a flexible working time without control or a descending or turning mobility).

In these cases, T.Treu[37] thinks that to oppose union resistance (through struggle and collective agreements) to the pressure exerted on job quality by flexicurity will not be enough guarantee of protection of the dignity of workers, especially where there are atypical workers at the service of corporations. Thus, the author equally defends its regulation, with minimum supranational and national rules adapted to the social and economic conditions of the different countries, such as minimum wage and the use of incentives (or rather dissuasive mechanisms, *bonus-malus*, depending on each country's characteristics). Similarly, flexicurity would be favoured by the introduction of some forms of public and private collaboration where they may prove to be efficient, as would be the case of active employment policies (unions would be included in this collaboration). Public powers would also take part more actively, for example, by favouring a more democratic governance in corporations, promoting the participation of workers in the organisation of labour and in the work life of the corporation. Unions would also have to have their place there, on condition that they obtain democratic legitimisation from the employees.

2008 has also surfaced the weaknesses of flexicurity as a strategy of development and competitiveness, before, during and after the recession. Thought up for an economy of knowledge, still an economy of the future, it would represent some sort of compromise between the old flexibilities of labour conditions and the new guarantees in and out of the employment contract, whilst, in reality, the only security guarantees that really exist have been developed around the unemployment safety net to which different technical varieties have been added. Little has been made around the responsibility of the employer derived from the employment contract, beyond that collective transition to a second work life through accompanying or relocation plans for dismissed workers. In reality, this new work and employment regime is yet to be built, like those transitional work markets where the new status of active citizenship would be built, an hypothesis still more theoretical than real. Unions have, in the implementation of the strategy of flexicurity, an important challenge that they can no longer ignore.

4.5 The alternative to "neoliberal globalization" is rather "Trade Union mobilization" at a general level but also at the local level (from which the real representative strength of trade unions comes).

Neither the return to neocorporatism or the European dream by itself, nor the union action coupled with an agressive judicial strategy, or the traditional political allies, have sufficed to stop the economic globalisation and the neoliberal strategies implemented to combat the recession. The new political situation generated by the recession in the

[37] T.Treu, *Derecho del Trabajo y protección social: antiguas y nuevas preguntas*, International Society for labour and Social Security law (ISLSS), Informe de posición, 8 June 2013

countries of Southern Europe is imposing –through policies and legislation – a move since the traditional vision in continental Europe of the role of legislation in support of trade unions and collective autonomy of the social agents to another less respectful -and allegedly modelling of the collective relations- through limiting collective autonomy and even the use of union rights, especially of strike. This is made at the same time that it's trying to extend via statute the old rights of information and consultation, as well as participation of workers in management. The goal is to achive a new unionism more cooperative with corporate objectives and interests in the search of competitiveness, more similar to the predominant style of union action in central Europe principally.

The question is, will the unions be capable of responding with success to the public powers' imposition of a change of model? Will it be a necessary condition to overcome the emergency of the recession and the return to growth and economic buoyancy? How? By introducing conflict in the routine of labour relations, leading them if possible, as some minority unions have tried to do in Spain, with huge following among workers of the service sector above all, and causing uneasiness among the economic and political class that unsuccessfully keep inviting them to take part in an institutionalised social dialogue?

5. What kind of unions, for what kind of politics?

A lot of the things we have said invite us to look back at the times of mass trade unions admired and respected socially and triumphantly in politics, but we will not find there the answer to the new era. We will only find nostalgia, the worst possible situation to think about what is new in the real world. The truth is that unionism in the South of Europe has responded to the challenge of globalisations and europeanisation of market politics, in the midst of the recession, through an eminently defensive strategy, claiming quality employment for everyone but acting, above all, on behalf of those who have jobs as the main objective of the diminishing union action. It has not been capable of suggesting exciting ideas or alternatives to the neoliberal policies, especially for those who had nothing to lose because they had nothing before the recession, those whom have not been represented (the unemployed young and long-term unemployed, or new workers that are employed outside traditional corporations).

The employment is slowly changing with the arrival of new technologies, the economic globalisation and Europeanisation of the intervention processes in the economy -as showed by the recent crisis but also with the bifurcation of the labour market and the birth of new forms of industrial relations- that point at the predominance of collective bargaining decentralised at each corporation in the face of sectorial bargaining at other levels of collective agreements. The unions know this, but they move slowly, whilst the recent financial crisis has brought a crucial challenge to the intervention power and the credibility of unions in change management and governance in these new times.

In one way or another we know that this is a new work and employment regime with European vocation – and, why not, universal – that needs to be rethought and rebuilt. We have to think about that conforms to a changed work relation, that needs

more autonomy in the performance of work, of a more personalised management of working time, of permanent training, of continuing progress of professional advancement, ensured by public institutions and also by the employer, which poses the need to rethink the traditional schemes of social security as well. What is needed is a public system of guarantee of professional transition through sufficient economic help to attend the essential needs of the individual and his family, certificates of proved professional experience from a accreditation system recognised by businesses world and internationally validated. And, as the employer's responsibility translated to guaranteed economic compensation add to more work insurance or stock options or shares as compensation for contract termination.

This is a huge task for trade unions and quite difficult to juggle, because we face a dualised work market, where a segment of workers with the right qualifications, open to the world, connected and competitive, who may be suited for the new work regime, are joined by another vast group of workers from the service sector, domestic, with few qualifications, that are, perhaps, protected from international competition but not from poverty. In reality, this second group complements the first, because it allows it to gain competitiveness and profitability through wage moderation and low costs of intermediation. Whether this work market will be sustained in the long term is another matter altogether.

The question is, who should the trade unions represent? Or, better still, could the same union represent both groups of workers? Could the trade unions of the traditional working class do it or should it be up to a new type of trade union, more autonomous from the political class? The answer may possibly come by adapting the types of trade unions to the professional profile of workers, leaving behind the sectorial or industrial structure that has guided the confederate unionism so far. I must admit that this sounds like importing into Europe the Anglo-Saxon unionism or, worse still, the old craft unionism, but it is not such a bad idea if we consider that they do not live at the edges of politics, but act politically too.

I say this because despite the image of professional lobby of the international unions, it would be suicidal to pretend to govern globalisation and Europe and give up the institutional structures and the international negotiating tables (EWC, etc.). This poses the difficult problem of having international unions or political lobbies dealing with traditional unions. Perhaps we can respond quite simply, I believe that the union management of multinational companies should be more connected and approachable with the low level unions: the local or branch trade unions which they represent when sitting at international meetings.

There is then the union action at company level. Modern unionism should admit that it is in the interests of workers to defend a model of participation[38], where management governance opens up to social responsibility, with the only aim of defending the quality of employment. This way, it would allow to leave the union conflict only to authoritarian corporations closed to the participation of workers in the management of business,

[38] Participation, training and quality of employment are of value by themselves. The ILO underlines that a common factor to those countries that have achieved a better income per capita and sustainable development is the existence of a quality of employment. ILO(IIEL) *World of work report 2014. Developping with Jobs*, p.23 .

concentrating all efforts and selecting the businesses to be targeted. The objective is to change the internal functioning of corporations, following the example of successful union models from Toyota (*lean production*) to German co-decision management, through liberated corporations (Gore)[39]… The unions cohabit with innovation and collective bargaining at the service of competitiveness and the betterments of their company, and cannot act as gamblers in the face of industrial and production changes. Evidently, there will have to be good professional unionists to supervise the participation processes and inform their workers of the pros and cons of this transformation, without ideological bias.

Finally, the unions have to stop living at the edges of social movements and cooperative economies (from "hacker spaces" in San Francisco to "maker spaces" or "micro-factories"…inspired in the idea of "open source", of social and caring economy, developed around the world and financed through crowdfunding*)*, places open to all those who daily invent ways of organising and cooperating with the aim of developing militant albeit productive activities[40]. In this new economy, the unions must be aware that the relation ought to be of mutual respect and association to undertake joint strategies where mutual interest so advises. At the end of the day, what other purpose is served by "unionising" the collaborative economy?

In short, the biggest challenge for unions in the 21st century – I always speak from the perspective which I know best, the unions of Southern Europe – cannot be restrained to defending the workplace in a corporation anchored in the Fordist model of work (workers with long term contracts and a taylorist organisation of production) in the welfare society where there has been production and mass consumption in an international framework governed by unequal trade relations that favour the industrialised countries. This model is irreversibly disappearing for the countries of Europe as a result of globalisation. The unions have to contribute to invent and propose a new labour regime, that would bear in mind the international division of labour, the conditions of global competition among companies and the expectations and ways of working of new workers, capable of demanding and creating work conditions and new guarantees in an economy of transition towards a new model, or old and new models simultaneously.

6. A few keys to the theoretical conceptualisation of relations between unions and politics.

Once the class problem or kinds of existing relations between union action and politics has been contextualised, we have to confirm or deny the initial hypothesis of this paper. In the first place, the experience of recession in the examined cases questions the validity of the institutionalised practices of concertation between Government and social partners, as well as social dialogue practices, which have given way, in a more or less accentuated manner, to a classical intervention, heteronomous, from the state in the regulation of labour relations. As recently written by Marc Rigaux, *Social adjustment of the labour market was made possible because three primary*

[39] I.Getz, BM. Carney, *Liberté & Cie.* Flammarion, 2013 (Crown Bussiness 2009), Paris, p.53 and ff.

[40] J.M. Bergère, *Tous co-workers*, http://metiseurope.eu/tous-co-workers_fr_70_art_29885.html

conditions had been met. There was a political structure, in this case a State, capable of imposing restrictions upon the economic actors as regards the functioning on the labour market. There was a social counterforce which urged the political institutions to take protective measures…And there was a kind of citizenship that made possible to translate these social acquirements into individual rights (and collective). *At present these preliminary conditions are far from being fulfilled at the transnational level, which explains the absence of adequate public interventions of the long standing Europeanised and globalised labour market and social competition (absence of an adequate counterforce at the transnational level…after communism systems collapsed)*[41].

However, this does not lead to the disappearance of social dialogue, but to the defeat of unionism or, rather, of the defensive strategies of the unions. On the contrary, governance of globalisation needs this social dialogue whether multilevel, national, international and transnational – and the unions know it. This crisis forces European unions to rethink its ways of action and participation in social dialogues. There has been a weakening of the political power of social partners, an inefficient bureaucracy in the mechanisms of social dialogue and a lack of correspondence between the union mobilisations, the international political union action and other social mobilisations. Perhaps, to curbe the weakening of its political influence, modern unionism has to move from the idea of being only the workers'interest representatives to defend huge social interests, and to become a social unionism for the XXI century.

Consequently, its upkeep would imply to articulate global governance with multilateral renewed mechanisms (joined by Governments and representatives of the EU and the social partners) of plural configuration, depending on the levels of dialogue allocated to the partners by virtue of their collective autonomy. These would operate together with the institutionalised mechanisms existing in Europe[42], jointly articulated, but independent in their composition and functioning.

Without doubt, European unionism will continue to face its challenges by interacting with politics at different levels. A multilateral articulation along the lines of neocorporatism even if assuming its risks, combined, maybe, with a bilateral negotiation at transnational level in the industrial sectors of economic activity where there exists real representation of unions. This would be called a renewed model of multilateral and multilevel governance of plural and variable configuration, where unions should be incorporated. It would rather be an aim to be achieved: a complex and partially institutionalised articulation of the social partners to govern globalisation (eventually, progress in building Europe is the model and the path for the European unions, and also a mirror for other world regions).

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[41] M.Rigaux, Labour law or social competition law. The right to dignity of working people questioned (once again), in M.Rigaux, J.Buelens, A.Lattine, eds. *From labour law to social competition law?,* Intersentia, Cambridge, 2014, p.3.

[42] 267 Transnational Corporate Agreements that cover 10 million workers is already a start. At EU level the institutionalised model of participation in union and corporate organisations though cross-industry social dialogue committee and 43 sectorial social dialogue committees that cover 75% of Europe's workforce is a good token of the involvement of social partners in EU Governance.

To the extent that we are proposing a model of transnational political governance with social and business counterparts at international level that is in progress, and that would bring together the representatives of unions and businesses of different European countries, we ought to ask ourselves about certain national idiosyncrasies such as the independence of unions from the political parties, the peculiarities in the structure of collective negotiation or ideological differences that could act as "constraints", particularities that come from a tradition that does not historically have any reason to continue to exist.

With respect to the constraints of an ideological kind, there persists in Southern Europe the perception of a class trade unionism potentially revolutionary as a defining element of the union and political action, a reaction typically from the South where inequalities are more significant and have been made more obvious by the recession, thereby contributing to the radicalisation of people. This is rather unusual in Northern Europe as it has more social equality and social-democratic policies have worked better. However, ideology has not prevented all the main European unions from joining the ETUC.

With respect to the legal constraints, the Europeanisation of social and economic policies, in my opinion, is allowing to go towards the abolition of regulatory peculiarities and the confirmation of a Community *acquis* more and more coherent at regulating labour relations.

There are practical constraints, too, that affect the representativity and organisation of workers through the unions. Nearly twenty years ago I wrote that the unions should give voice to their members and non-members as well, and get over the monolithic and abstract conception of the labour world, more typical of the class unionism, to make the low level organisations more prominent, without having to go back to the primitive unionism or direct democracy, but, rather, restoring that ancient spirit without having to renounce the confederate unionism[43]. Developing the local unions and company union organisation and provide them with the necessary means will always be a half-made task in the union life, of strategic importance for their betterment and perfection. The unity of trade unions should be the instrument for the strengthening of local and companies structures, but this will be just an idea if the historical and ideological identities of class trade unionism remain.

The question of the relation of the unions with politics is probably not that urgent for the unions that have to fight for their survival first, before even considering the role of politics in their union action. Notwithstanding this, the relation with politics can also be a vehicle for its survival, whilst opening up to relationships with other social organisations would give it power and influence in politics. Should a trade unionist end up being the candidate of a political party for the presidency, even winning them, as has been the case in Sweden? In my opinion, this only means that the best political teams have arisen from the trade unions, which can only be good news for the unions. As so many things that have changed throughout the history of unions, the old marxist idea of function sharing between political party (achieving power) and trade union (mobilising the masses) does not have, in my view, any role to play today. Besides, the implication of

[43] JP. Landa, *Democracia sindical interna,* Ed. Civitas, Madrid 1996, p. 156.

political parties in the union strategies is a relevant complement that indicates the influence of the unions in the governance of globalisation.

Lastly, there is also the political relationship of the unions with the public powers: Government, Parliament and the Judiciary. We can say, following on the steps of Gino Giugni, that legislation and collective bargaining are the same thing, and that therefore, the so-called *ordinamento intersindacale* or autonomy of unions to regulate the labour conditions with full freedom and effects is the objective to be pursued?. Or, rather, is negotiated legislation as the result of social and political concertation, also the result of the assumption by Parliament of the proposals put forward by Interconfederal Agreements reached at national level, the recognition given to unions by the political power and their realisation as the true protagonists of the political play, a practica inspired in the neocorporatist model of industrial relations?

The 2008 recession has shown that a politically organised society does not make decisions – the market does. And the market makes its choices on the basis of cost-effectiveness and not on the basis of the needs of the population and society. To correct this damaging trend has been precisely the commitment acquired by Parliament in the Constitutions of the three countries above examined. The relationship with public powers is crucial for the unions of Southern Europe (coupled with reasons of union weakness, economic financing and promotional legislation). However, economic globalisation, free competition... are notably changing the legal categories that based the regulation of the national labour markets. This trend favourable to the ideology of free market need an adequate counterforce to be stopped… the unions of Southern Europe need the public powers to intervene so as to rebalance the market, for instance, by imposing social clauses in the negotiations of free trade agreements worldwide.

Perhaps neoliberalism without unions may facilitate the dynamism of the economy at the expense of huge social disadvantages. It is a direct path towards exploitation and social exclusion, which will certainly end up damaging the very economic dynamism itself. Politics, once more, shows the path towards market regulation. Collective bargaining would be incapable of achieving this by itself. But this union weakness should not tempt Governments to try and distort the existence and the function allocated to unions. As I have stated in the title of my paper, to preserve the soul of unionism means to guarantee at all times their social function: to defend the wage earners's dignity, rather without the support of law, or, better still, with the law that protects and promotes unionism.

LIST OF ABBREVIATIONS

BE: Bussiness Europe

CA: Collective Agreement

CC: (Spanish) Constitutional Court

CCOO: Confederación Sindical de Comisiones Obreras

CFDT: Conféderation Française Democratique de Travailleurs

CFE-CGC: Conféderation Française des Employés Cadres

CFTC: Conféderation Française des Travailleurs Chrétiens

CGT: Conféderation Generale des Travailleurs

CJEU: Court of Justice of the European Union

ECB: European Central Bank

ECT: European Community Treaty

ETUC: European Trade Union Confederation

FO: Force Ouvrière Sindicato de de France

LET: Ley Estatuto Trabajadores (Law on the Workers Statute)

MEDEF: Conféderaration des Employeurs Françaises

TFEU: Treaty on the Functioning of the European Unions

UEAPME: European Association of Craft, Small and Medium-Sized Enterprises

UGT: Unión General de Trabajadores de España