

## **Policy-Making in Hard Times: The Case of Southern European Labour Reforms**

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### **Introduction**

For many orthodox economists, the never-ending Euro crisis that began in late 2007 confirmed the wisdom of their long-standing crusade to transform the rules governing Southern European labor markets. These arguments were embraced by the Troika formed by the European Commission, the IMF and the European Central Bank, which declared poorly designed labor market institutions to be among the most serious ailments afflicting Greece, Italy, Portugal and Spain. The reluctance of political elites in these countries to challenge claims that the crisis was a product of domestic institutional shortcomings and their unwillingness to consider Euro exit thus pushed institutional reform to the top of the domestic political agenda.

Whether domestic institutions were really to blame for the crisis or not, the Troika's recipe for reform was presented by international and domestic elites alike as the only way to avoid sovereign default. The crisis had delivered—or so it appeared—an exogenous shock of sufficient magnitude to force a radical reform of domestic institutions long impervious to external pleas for change. Eight years into the crisis, major labor market reforms have indeed been pursued in Greece, Portugal and Spain, and Italy finally looks ready to apply the prescribed treatment.

In this paper, we will consider the extent to which reforms in Spain and Italy have followed the patterns predicted by political economists studying institutional change.<sup>1</sup> One of these predicted patterns is evolutionary. In these cases, slow shifts in underlying interests give rise to new coalitions favoring significant reforms, the adaptation of existing institutions to new functions or their simple abandonment. An alternative path to change emerges when exogenous shocks force a rapid—and often radical—revision of prior institutional settlements. The Euro crisis would seem to be a classic case of the latter.

Most readers will be familiar with at least the broad contours of recent labor market reforms in Southern Europe. On the conventional reading, privileged insiders in Spain long resistant to the imposition of more market-conforming labor market rules were finally vanquished by the technocrats advising the Troika. In other words, the exogenous shocks of the crisis undermined the power of the coalitions defending existing institutions and paved the way for a logic of economic efficiency to supplant the logic of politics that underpinned previous settlements. The same conventional wisdom would hold that a similar logic applies in Italy, where the same pressures have been rather less successful in forcing change, largely because of the well-known roadblocks to reform in Italy's fragmented and veto-ridden political system.

In this paper, we will challenge the conventional view that these reforms reflect the straightforward application of a neoliberal, deregulatory recipe in the interests of greater labor

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<sup>1</sup> For an overview of these debates, see Mahoney, J. and Thelen, K. (eds.) (2010a). *Explaining Institutional Change: Ambiguity, Agency, and Power*. New York: Cambridge University Press.

market efficiency. We will argue that this interpretation is doubly flawed. In the first instance, the logic of the labor market reforms pursued in Spain and Italy has been far more political than economic. Second, even as massive changes have been taken place in the regulation of the Spanish labor market, the reforms left intact critical features of the prior institutions in ways that have not been sufficiently appreciated—in other words, change has been far more incremental than revolutionary, even in the face of extraordinary exogenous shocks. In Italy, recent reforms have also left much of the existing regime in place.

Our interpretation of recent reforms in Southern Europe suggests the limits of recent work in the historical institutionalist tradition. Kathleen Thelen has described three patterns of responses to changing organization of interests in capitalism, which she describes as deregulation, dualization and embedded flexibilization.<sup>2</sup> Embedded flexibilization (the archetypical Scandinavian outcome in which liberalization of labor markets is compensated by a social investment strategy to minimize exclusion) results where previous policy trajectories generate well-organized interests outside of manufacturing. Supported and guided by powerful states with strong programmatic preferences, organized workers and employers outside of manufacturing provide support for a recasting of labor market rules and supply side institutions. Some scholars have argued that the institutional outcomes of this process should provide a model for Spain.<sup>3</sup> However, the historical trajectory of interests and institutions in Southern Europe looks nothing like anywhere in Scandinavia, making this outcome exceedingly implausible.

The other two patterns described by Thelen, however, may more credibly serve as potential models for making sense of recent labor market reforms in Spain. Deregulation is said to emerge where exogenous shocks—e.g., the decline of industrial manufacturing—undermine unions' market power and employers from declining and rising sectors join together to demand the individualization of risks (ever-fewer collective and individual job protections and steady reduction in levels of social service protection). Dualization, on the other hand results where evolutionary changes in economic organization gradually reduce the power of organized interests in manufacturing, thus providing the space for emergent service sectors and smaller industrial firms to press for liberalization on the margins of the labor market and the welfare state. In the dualization model, institutional veto points and the political strength of labour market insiders determine the choice to force adjustment onto labour market outsiders.

Southern European labor markets have long been described as highly dualized;<sup>4</sup> indeed, the Troika, the European Commission and the European Central Bank, as well as most orthodox economists, have stressed that reducing the division between labor market insiders and outsiders is one of the central challenges countries like Spain and Italy must address. If embedded flexibilization rests on a series of organizational and institutional prerequisites that are sorely lacking in Southern Europe, then the exogenous shock of the crisis should generate shifts toward

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<sup>2</sup> Thelen, Kathleen. 2014. *Varieties of Liberalization and the New Politics of Social Solidarity* (Cambridge: Cambridge University Press).

<sup>3</sup> Such solutions have been proposed by both Vicenç Navarro and Victor Lapuente. We are of course aware of the considerable differences in their respective understandings of the political and economic problems facing Spain and the plausibility of the solutions proposed.

<sup>4</sup> *Inter alia*, see Rueda, David. 2007. *Social Democracy Inside Out: Government Partisanship, Insiders and Outsiders in Industrialized Democracies* (Oxford: Oxford University Press).

one or another of these two outcomes. This claim generates two alternative hypotheses. If the exogenous shock sufficiently weakens the domestic coalition that has long supported dualization, then we would labor market reforms to move Spain in a decisively deregulationist direction. Alternatively, if, despite the stresses posed by the demands of powerful external actors, the long-standing domestic, cross-class coalition defending insider labor market privileges holds together, dualization would be expected to increase.

Our analysis will show that neither of these hypotheses is adequate to the task of understanding the direction of labor market reform in Southern Europe since the onset of the crisis. The central problem with historical institutionalist approaches with respect to the Southern European cases is not their concern with specifying collective interests and defining the mechanisms through which coalitions emerge around specific programs of action; this is, obviously the substance of politics. However, the conception of interests in the historical institutionalist literature is largely limited to material interests in the political economy.<sup>5</sup> As we shall see, the interests that have informed labor market reforms in Spain, particularly since the PP's electoral victory in November 2001, have been narrowly partisan and political. Obviously, certain segments of society, and particularly certain groups of actors within the labor market, have been particularly advantaged or disadvantaged by these reforms. However, these consequences are largely secondary to the more naked partisan interests being pursued.

In Italy, the labour market reform passed by the Monti government reflected the less obviously partisan backing for deregulation. The lack of a cohesive parliamentary majority around the Monti executive, and Monti's own technocratic background which undermined his political authority, the more limited scope of the Italian reform can also be interpreted in the light of the different political opportunities facing party politicians. Both the major Italian electoral coalitions have mixed incentives in the politics of labour reform, since they both represent sectors of Italy's industrial and financial business communities, and the trade union movement's partisan alignment is less clear than in Spain. The relatively slower pace of labour reform in Italy is also, we contend, a function of the rather different preferences of industrial employers, deriving from the presence of a much larger sector of competitive manufacturing than in Spain and a much stronger presence of these firms in the peak employer association, Confindustria. Employers in this sector are far less enthusiastic about labour market deregulation, given the greater importance of skills and access to patient capital for their profitability.

The following analysis suggests that studies of institutional change need to move beyond narrow adscription of insider and outsider status to employee interests, and take more seriously the competitive strategies of employers, and the relations between employers' interests and political parties. We suggest that the aggressive employer offensive in Spain was made possible by the close political connections between the employers' associations (notably CEOE) and the PP, which facilitated a partisan strategy of deregulation that served both political and economic ends. In Italy employers have a much more varied set of economic interests and political connections which undermined joint action to push the deregulation agenda. These political relationships,

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<sup>5</sup> We are not accusing scholars in this tradition of being crude materialists. Indeed, one of their most important contributions to political economy has been to clarify the ways in which material interests are constructed through socialization processes mediated by institutions. Our point, rather, is that in the end, the interests that are privileged in this literature are largely economic rather than political.

much more than the different nature of labour representation or formal political institutions, account for the different outcomes in the two cases.

But there is a further area where the Southern European cases suggest a modification of the prevailing theoretical approaches in the political economy of structural reforms. The labour reform agenda in the South has focused on the formal legal framework of employment law, especially relating to dismissals, contracting types and collective bargaining. The reasons for this are clear enough: both Spain and Italy have long traditions of highly regulated labour relations, and some of the institutions that economists and international institutions have objected to most strenuously are entrenched in codified law. But the ways in which these laws are implemented appear to confound many of the objectives of reformers. Most notably, a higher legalistic approach to employment relations has created a set of stakeholders that fall outside most political economists' focus of attention: the various legal advisors and intermediaries that help workers, unions and employers manage employment relations, and the legal practitioners who apply the law, for example in labour tribunals. These actors also play an important role in the process which has rarely been considered by scholarly observers, and indeed to some extent by policy makers themselves.

The following pages represent a first cut at developing these ideas in the framework of a comparison between Spain and Italy. The Spanish case is presented in rather more depth at this stage, the Italy case is briefly sketched out at the end of the paper.

## **Spanish Labor Market Reforms**

The process of labor market reform in Spain has been dictated by the concerns of domestic elites eager to ensure that the internal devaluation demanded by the Troika would be largely borne by the popular classes rather than capital. Unwilling or unable to leave the Euro or impose losses on the largest banks and their investors, Spanish governments of both the Left (under José Luis Rodríguez Zapatero) and the Right (under Mariano Rajoy) have slashed public spending and pursued labor market reforms. As unemployment skyrocketed to more than 25% and both demand and credit dried up, many employers suffered along with their employees. For those employers who survive the crisis, the long-term costs of the crisis are likely to be few. For vast swathes of the working population and the unions and parties that seek to mobilize their support, however, the crisis may well linger for many years to come.

Many welfare state experts warn that indiscriminate cutbacks in health and education are likely to leave deep, permanent scars on institutions that were built with enormous public investments in the years since the transition to democracy.<sup>6</sup> Similarly, experts in pensions argue that changes recently put in place to ensure the “sustainability” of the system imply such significant cuts in

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<sup>6</sup> Bosch, Xavier, Pedro Moreno, and Alfonso López-Soto. 2014. The Painful Effects of the Financial Crisis on Spanish Health Care, *International Journal of Health Services*, 44:1; Del Pozo Sen, Alberto and José Moisés Martín Carretero. 2013 (December). “Social Cohesion and the State in Times of Austerity. Country Case: Spain,” Friedrich-Ebert-Stiftung. <http://library.fes.de/pdf-files/id/10453.pdf>; Legido-Quigley, Helena, et al. 2013 (June 13). Will Austerity Cuts Dismantle the Spanish Health System? *BMJ*, 346.

many Spaniards' eventual retirement benefits that the entire system has in fact been transformed.<sup>7</sup> Nevertheless, although they reflect long-standing debates about the appropriate public-private mix in welfare state provision, these reforms do not appear to be guided by a clear impetus to transform the underlying logic of welfare state institutions. The same cannot be said for labor market reforms.

Labor market reforms in Spain—particularly since Rajoy's conservative Popular Party won an absolute majority in the November 2011 elections—have been informed by the desire to transform radically the balance of power between capital and labor. In January 2012, the *Financial Times* asked Luis de Guindos, the Economy and Competitiveness Minister for the new government, where growth and employment would come from. He responded, “[l]abour reform and the financial sector, the banking industry. So the central point of the labour reform has to be modification of the system of collective bargaining in Spain.”<sup>8</sup> De Guindos claimed that the new government would be careful to avoid “[contaminating] the sovereign risk with the banking risk.” Of course, the treasury was to become highly contaminated. With respect to labor market reforms, however, de Guindos was true to his word. In February 2012, the government approved Law 3/2012, the most significant labor market reform since the Transition to democracy.

The legal and regulatory changes pursued by the PP have entailed a shift in the *locus of authority*, that is, the right to exercise discretion. Where discretionary authority in the labor market was previously exercised both by employers and by labor market intermediaries (unions, employer associations, judges and the Labor Authority), the reforms put in place by the PP have decisively shifted discretion over labor market outcomes towards employers. These changes reflect a move away from a socialized conception of the firm and the economy towards one in which the owners of capital are understood to be, effectively, the only legitimate voices determining whether and how labor is deployed.

This drive to shift the locus of authority in the Spanish labor market is fundamentally a political project, in two senses. First, the political space in which these reforms were pursued was created by extraordinary conjunctural circumstances. Demands for internal devaluations by European financial elites generated the political leverage needed to drive through aggressive labor market reforms long resisted by unions and their political allies, the labor bureaucracy (labor courts, the Labor Inspectorate, and the Labor Authority), and even certain employers largely satisfied with the previous status quo.<sup>9</sup> Second, the character of labor market reform has been determined by primarily political rather than economic considerations: to *undermine* and *recast* the existing status quo in order to impose the (neo-liberal) authority of the marketplace.

The remainder of this section details the process through which these changes were put in place in the service of Spanish economic, and political, elites.<sup>10</sup>

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<sup>7</sup> Suárez Corujo, Borja. 2013. ¿El factor de sostenibilidad: caballo de Troya del sistema pública de pensiones? *Tema Laborales* 121: 13-35.

<sup>8</sup> Mallet, Victor. “FT Interview Transcript: Luis de Guindos.” 5 January 2012, *FT.com*.

<sup>9</sup> This complex alliance is described in Dubin, Kenneth A. “Adjusting to the Law: The Role of Beliefs in Firms’ Responses to Regulation,” 2012, *Politics & Society* 40:3; 386-421.

<sup>10</sup> While the regulatory changes put in place by the PP have been justified by governing elites in economic efficiency terms, their economic benefits have been murky, at best; by contrast, their political

## A. Not the Same Old Story

On 10 February 2012, the newly arrived government of Mariano Rajoy took advantage of the Popular Party's (PP) absolute majority to pass the Royal Decree Law 3/2012, provoking a general strike and effectively neutralizing much of the agreement to reform collective bargaining reached just two weeks earlier by the social partners. On 29 July 2014, some two and a half years later, the main social partners and the Minister of Employment and Social Security, Fátima Bañez, reached an "Agreement of Proposals for Tripartite Negotiations to Strengthen Economic Growth and Employment."<sup>11</sup> Was this simply another case of the long-standing Spanish pattern of pacts followed by conflicts followed by more pacts, with little more than a few legislative changes in between promoting greater precariousness for those on the margins of the labor market?<sup>12</sup>

The accord, unsigned and announced days before the August recess, making it unlikely to garner much parliamentary attention in the fall, declares that tripartite negotiations (in some cases involving the regional governments) will be opened to address dualism in the labor market, to update the vocational and on-going professional training system, and to consider possible measures to address situations where no one in a household holds a job. It also declares that unions and employers will redouble their efforts to map the structure of collective bargaining and identify the number of firms and workers affected by non-application clauses in situations of hardship and to strengthen mechanisms that favor internal flexibility over layoffs and the extrajudicial solution of conflicts.

Why did the government and social partners return to the bargaining table? From the government's perspective, recent economic and political developments provided incentives to demonstrate a consensual approach to economic and social policymaking. The agreement took place against the backdrop of increasingly confident expressions of incipient economic recovery by the government and the conclusion of the IMF Mission to Spain.<sup>13</sup> However, with unemployment still near 25% and recriminations echoing after the PP's poor performance in the May 2014 European Parliament elections,<sup>14</sup> it was certainly politically expedient to reach an agreement claiming to assist those most hurt in the crisis, especially with municipal and thirteen regional elections upcoming in May 2015 and general elections being required by the end of 2015.

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advantages—disorganizing and repressing workers and their allied supporters—are quite clear. One may be forgiven for suspecting that the Troika's labor market prescriptions have been embraced so enthusiastically for just this reason.

<sup>11</sup> "Acuerdo de propuestas para la negociación tripartita para fortalecer el crecimiento económico y el empleo" Accessed at <http://prensa.empleo.gob.es/WebPrensa/noticias/ministro/detalle/2277> on 8 August 2014.

<sup>12</sup> See for example, Hamann, Kerstin. 2012. *The Politics of Industrial Relations: Labor Unions in Spain* (New York: Routledge)

<sup>13</sup> IMF. 27 May 2014. "Spain: 2014 Article IV Consultation Concluding Statement of the Mission," <http://www.imf.org/external/np/ms/2014/052714.htm>.

<sup>14</sup> The PP won the 2009 EP elections with 6.67 million votes and 24 seats. In 2014, with abstention virtually unchanged from 2009, they received just 4.07 million votes and 16 seats, two more than the Socialists. Far Left parties increased their total number of seats from 3 to 15.

For the unions, participation in an unsigned accord filled with promises to negotiate and devoid of any real content regarding the collective regulation of employment relations was largely a sign of defeat. The government's offensive against labor—through legislation, through the courts and through executive action—is largely complete. Encouraged by the Troika and enabled through its absolute majority in Parliament, the PP has not only pursued internal devaluation through salary restraint but also transformed labor relations through legal centralization and juridification. These reforms have generated a massive reallocation of power towards managers and a profound restructuring of the labor relations system. The unions' return to the negotiating table with the government is largely a sign of their near-total powerlessness to defend workers' interests in any other realm; anything but the same old story.

### **B. Transforming Labor Relations Through Legal Centralization: The PP's 2012 Reform**

Law 3/2012 significantly reduced the costs and legal uncertainties surrounding layoffs and expanded employer authority in three fundamental ways: by lengthening the trial period for new hires to an entire year, by expanding the scope of employer discretion in the workplace, and by permitting the unilateral rejection of existing collective bargaining agreements. These changes have favored salary reductions and weakened unions' representative capacity.

Employers can now introduce *permanent* downward changes in salaries previously agreed through collective bargaining or individual negotiations for demonstrable reasons related to the firm's economic, technical, organizational or production needs.<sup>15</sup> If the changes affect multiple workers and are accepted by the workers' representatives (works council, firm-level union section or ad hoc worker committee), the agreement can only be overturned by the courts in cases of fraud, bribery, or a civil rights violation. If no agreement is reached after a 15-day consultation period, the employer may proceed with the changes unilaterally following one week's notice, although in such cases the employer's justification and willingness to bargain in good faith can be reviewed by the Courts.

A comparison with the Socialists' 2011 reform of the same statute is instructive. The Zapatero government sought to encourage firms to adjust through internal flexibility measures rather than layoffs by adding new language stipulating that the "economic" needs justifying the proposed changes could include not only the short-term financial survival of the firm (as the Courts had previously interpreted this passage) but also the firm's competitive position. The Socialists' stipulated that disagreements between employers and worker representatives be referred to sectoral bipartisan committees and, if necessary, to arbitration procedures defined by the social partners. Under the new language, the sectoral bargaining unit can only be consulted when the changes are collective and, if the sectoral unit cannot agree on a solution, the employer or the workers may solicit binding arbitration. Thus, only an arbitrator or a judge can stop an employer

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<sup>15</sup> Previously, firms could only reduce salaries established in sectoral agreements when they could demonstrate a persistent decline in revenues. The reductions could only be *temporary* and the agreement with the workers' local representatives would have to include a plan for reestablishing the sectoral rates. Where no local agreement could be reached, the committee representing the sectoral bargaining representatives could approve or reject the proposed reduction, with subsequent appeals to arbitration possible. Article 82 Workers Statute (ET) (2011 text).

from unilaterally and irrevocably revising salaries (or any other aspect of internal flexibility covered by Article 41).<sup>16</sup>

The revision of Article 41 has transformed the relationship between sectoral bargaining agents and workplace actors by dramatically increasing employers' capacity to deviate from sectoral agreements. The 2012 reform also revolutionized the dynamics of collective bargaining at the sectoral level by reducing unions' bargaining power and by opening the door to a substantial reduction in traditionally high rates of collective bargaining coverage. Prior to 2012, collective bargaining dynamics were shaped by two critical legal norms, *ultraactividad* and *extension*. *Ultraactividad* meant that any clause in an agreement would remain in force unless both sides agreed to its renegotiation. If the application period of an agreement were to conclude without a new contract, the old contract would remain in force. *Extension* meant that sectoral agreements were automatically applied to all firms within the sectoral and geographical range of the bargaining unit.<sup>17</sup> Employer representatives at the sectoral level seeking to engage in concession bargaining regarding wages (or virtually any other contract clause) thus faced a Herculean task: unions had little to fear from simply refusing to make concessions.<sup>18</sup>

The 2012 reform upended this equilibrium. Extension rules were revised so that firms are now permitted to negotiate their own collective bargaining agreements with clauses deviating down, as well as up, from those established at the sectoral level with respect to salaries, hours, job categories, contracting and work/life balance.<sup>19</sup> The 2012 reform also places important limits on *ultraactividad* (Article 86 ET). If either party denounces a collective bargaining agreement, it loses validity one year after its specified termination date. From that moment on, the most proximate, collective bargaining agreement at a level above that of the denounced agreement (provincial, Autonomous Community or statewide) enters into force. Should there be no superior agreement, employment relations would then be regulated by the Workers' Statute. The minimum salary in this latter case would now be the state-set minimum of €645.30 per month.<sup>20</sup>

Limiting *ultraactividad* has revolutionized collective bargaining in Spain. Employers with firm-level agreements more generous than sectoral agreements can now engage in concession bargaining by threatening to denounce the agreement. Sectoral bargaining agents can now raise the prospect of collective bargaining coverage disappearing entirely for entire sectors.

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<sup>16</sup> Article 41.4 ET and article 82 ET.

<sup>17</sup> This explains why traditional coverage rates in Spain have averaged around 80% even though union density has long been less than 20%. Critically, prior to the 2011 reform, firm-level agreements could only improve on the conditions set out in the relevant sectoral agreement. Hence with rare exceptions, firm-level agreements were only negotiated at the insistence of worker representatives.

<sup>18</sup> In reality, these bargaining rules are probably at least as important as the differential in dismissal costs between permanent and temporary contracts in explaining Spain's historically high rates of precarious unemployment. Unions negotiated on behalf of insiders and employers in turn sought flexibility on the margins.

<sup>19</sup> The 2011 reform (Article 84 ET) opened the door for firm-level agreements that set different standards for these questions. However, it allowed sectoral bargaining units to restrict these opt-outs, something now prohibited with the 2012 reform.

<sup>20</sup> With 14 monthly payments. Notice that this is far below the lowest salary typically set in a collective bargaining agreement, even in sectors with many low-skill positions.



### C. A Cheaper Labor Market or a Better One? The Goals of the 2012 Reform

The Troika, the OECD and the Bank of Spain continue to press the Spanish government for further labor market reforms. Their recommendations center around a small number of proposals intended to address long-standing problems related to duality in the Spanish labor market and significant obstacles to intermediation and labor mobility. Specifically, the critics suggest: (1) further reductions of severance pay for permanent contracts to reduce the still slight gap that exists in this regard with respect to temporary contracts (at least for firms with 50 or more employees); (2) lengthening the trial period (with no severance pay during the trial period) for new employees in larger firms to match the full year accorded to firms with fewer than 50 employees; (3) eliminating temporary contracts all together by creating a single contract category with gradually ascending severance; (4) increasing investments in active labor market policies.<sup>21</sup>

These recommendations dovetail with those long advocated by orthodox labor economists in Spain.<sup>22</sup> However, the Spanish government does not seem inclined to follow this advice. Mariano Rajoy and the Minister of Employment and Social Security (MEySS), Fátima Bañez, have repeatedly stressed that the government is largely satisfied with the 2012 reform and that it does not plan any further major changes.<sup>23</sup> The government's position, we contend, reflects the fact that it does not share the objectives of those advocating more thoroughgoing neo-liberal reforms.

In introducing its recommendations, the OECD states that “Whether or not the 2012 labour reform is sufficient to transform the Spanish labour market into one that combines flexibility with fairness and worker security remains to be seen.”<sup>24</sup> Similarly, Christine Lagarde, Managing Director of the IMF, said in recent comments on the Spanish adjustment program that labor market reforms must continue: “Both firms and their workers need to be assured that they can reach appropriate agreements on working conditions and wages.”<sup>25</sup> Whether or not the reader—or the Troika—believes that the steps these actors have proposed will lead to economic recovery or restore social solidarity, these are nevertheless the values orienting the policy prescriptions of “serious” people in positions of authority. They are not, however, the values orienting the Spanish government's reform agenda.

Luis de Guindos recently made clear that wage reductions were the cornerstone of his government's strategy for economic recovery. After ridiculing the Zapatero government's efforts to pursue countercyclical, “Keynesian” fiscal solutions, he laid out the current government's approach:

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<sup>21</sup> For all, see OECD. 2013 (December). The 2012 Labour Market Reform in Spain: A Preliminary Assessment (Paris: OECD). [www.oecd.org](http://www.oecd.org).

<sup>22</sup> Various Authors. 2009 (April). “A proposal to restart the Spanish labor market,” <http://www.crisis09.es/PDF/restart-the-labor-market.pdf>.

<sup>23</sup> As the Minister stated, “The reform is done; the government is only considering minor adjustments.” El gobierno sólo se plantea ajustes menores a la reforma laboral,” 2 August 2013, *Elpais.com*

<sup>24</sup> OECD, op. cit., 46.

<sup>25</sup> Comments delivered at the conference, Europe—The Path to Sustainable Economic Growth, Bilbao, Spain, 3 March 2014. Available at <http://www.imf.org/external/np/speeches/2014/030314.htm>.

In the case of Spain we gained competitiveness in the past through the devaluation of the peseta... Now we have gained competitiveness through internal devaluation, through outperforming our peers in terms of the evolution of labor unit costs. *And without any sort of second round or side effects*... This is going to be different because it is more sustainable... To flexibilize labor markets is something we have to do... It's how we're going to grow in the medium term. [our emphasis]<sup>26</sup>

While outside observers stress—at least rhetorically—the importance of balancing labor market competitiveness with equity concerns, the main architect of Spain's economic strategy has made it clear that for his government, cheaper *is* better. Yet, when one considers the full range of measures pursued by the PP with respect to the labor market, it appears that this is not the complete story. Internal devaluation is not merely a requirement imposed by the Troika; it is also an opportunity to transform the distributional dynamics of the labor market and, perhaps, the structure of political contestation. For the Popular party, the primary flaw with the prior framework of labor market regulations appears to have been the possibilities it provided for collective action, not the inequalities occasioned by its contracting rules. The path the government has chosen to drive down wages is a direct challenge to the regulating—and the mobilizing—capacities of Spanish unions.

A similar argument can be made regarding the government's apparent reluctance to eliminate the labor market's dual structure. Spanish unions have often been accused of defending insiders, i.e., workers with permanent contracts and considerable tenure at the expense of new hires and those with temporary contracts.<sup>27</sup> Spanish governments' historic reluctance to address this duality has long been attributed to union resistance; however, given the ferocity of their offensive against collective rights, it's hard to believe that the PP feared antagonizing the unions on this particular issue. Rather, we are forced to conclude that the PP chose to maintain the dualistic character of the Spanish labor market because it was convenient for capital (providing a docile and low cost army in a context of labor abundance) and politically expedient to encourage divisions within the working classes.

#### **D. The Evidence: Winner Take All Dynamics in the Spanish Labor Market**

##### *The evolution of collective bargaining*

A November 2013 survey of more than 200 larger firms (81.3% > 50 employees) offers important details regarding the impact of the February 2012 labor market reform on firms' employment and labor relations practices.<sup>28</sup> Employers reported that they were taking advantage

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<sup>26</sup> Comments of Luis de Guindos at the OECD seminar: The Euro Area at a crossroads. Brussels, 17 February 2014. <http://video.consilium.europa.eu/webcast.aspx?ticket=775-982-14001>. The minister's comments begin at precisely the 1 hour point.

<sup>27</sup> Dolado, Juan José et al. 2010. ¿Quiénes son los insiders en España? in Dolado and Florentino Felgueroso, eds., *Propuesta para la reactivación laboral en España* (FEDEA) [http://www.crisis09.es/PDF/Propuesta\\_reactivacion\\_laboral.pdf](http://www.crisis09.es/PDF/Propuesta_reactivacion_laboral.pdf).

<sup>28</sup> The sample is far from representative of Spanish employers, which are overwhelmingly very small firms. However, the questions are far more detailed than those in any statistically significant survey. Fundación Sagardoy and Fundación Adecco. 2013. *3er observatorio de seguimiento de la reforma laboral*

of the reform to reduce staff with lower severance, reduce wages and hours and withdraw from sectoral collective bargaining agreements. Approximately 43% of the firms had laid workers off over the last year and more than 20% had taken advantage of new procedures to promote internal flexibility and escape clauses from in-force agreements to reduce wages. The average salary reduction was approximately 10%.

Approximately 11% of the firms had opted out of collective bargaining clauses regulating salaries (86%) and working hours (43%). Of those firms whose collective relations were regulated by a sectoral-level agreement, 27% of large firms and all of the firms with less than 50 employees had begun or were planning to open negotiations for a firm-level contract.<sup>29</sup>

To what extent are these trends borne out by the government's data? Unfortunately, data regarding collective bargaining is still provisional for the entire period since the 2012, as the government has reduced reporting of collective bargaining agreements to those registered electronically (claiming that it would be saving some €400,000) and eliminated the Labor Market Survey (Encuesta de Coyuntura Laboral), which provided the most extensive data available on the evolution of internal flexibility.<sup>30</sup>

The results of this opacity can be seen in the following data on year to year salary increases in collective bargaining agreements.<sup>31</sup> Columns 2, 6 and 10 report the definitive salary increases for each year for, respectively, all agreements, firm-level agreements and sectoral agreements. Columns 3, 7, and 11 report the number of agreements in each category and columns 4, 8 and 12 the number of workers affected by those agreements. The effects of the crisis can be seen clearly in the declining number of workers affected after 2008. However, we do not know how much of the sharp decline in coverage rates between 2012 and 2013 is a reflection of reporting problems and how much is a reflection of employers taking advantage of the 2012 reform to withdraw from agreements. What is clear is that the nominal salary changes reported reflect a real decline in wages—internal devaluation is indeed underway.

**Table 1: Collective Bargaining Coverage and Annual Salary Change by Level**

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*de 2012*. Club de Excelencia en Sostenibilidad. [http://www.adecco.es/\\_data/NotasPrensa/pdf/540.pdf](http://www.adecco.es/_data/NotasPrensa/pdf/540.pdf). Last accessed 20 August 2014.

<sup>29</sup> In the first edition of the survey shortly after the reform, 40% of large firms but none of the smaller ones were planning to negotiate their own agreements. In the second survey in early 2013, already 60% of small firms were considering this possibility. The results suggest a rapid learning curve for larger firms and a slower one regarding the opportunities created by the reform.

<sup>30</sup> Bentolila, Samuel. 9 April 2013. Apagón estadístico. <http://www.fedeablogs.net/economia/?p=29745>.

<sup>31</sup> Ministry of Employment and Social Security. July 2014. Resumen de resultados. Estadística de convenios colectivos de trabajo. Monthly advance through June 2014. Available at <http://www.empleo.gob.es/estadisticas/cct/welcome.htm>.

T.2 VARIACIÓN SALARIAL MEDIA EN CONVENIOS COLECTIVOS CON EFECTOS ECONÓMICOS CONOCIDOS Y REGISTRADOS (1)

AÑO DE EFECTOS ECONÓMICOS	VARIACIÓN SALARIAL EN TOTAL DE CONVENIOS				VARIACIÓN SALARIAL EN TOTAL DE CONVENIOS DE EMPRESA				VARIACIÓN SALARIAL EN TOTAL DE CONVENIOS DE ÁMBITO SUPERIOR A LA EMPRESA			
	Pactada (en %)	Revisada (en %)	Basada en información de:		Pactada (en %)	Revisada (en %)	Basada en información de:		Pactada (en %)	Revisada (en %)	Basada en información de:	
			Convenios	Trabajadores (miles)			Convenios	Trabajadores (miles)			Convenios	Trabajadores (miles)
2000	3,09	3,72	5.252	9.230,4	2,64	3,49	3.849	1.083,3	3,15	3,76	1.403	8.147,1
2001	3,50	3,68	5.421	9.496,0	2,84	3,12	4.021	1.039,5	3,59	3,75	1.400	8.456,5
2002	3,14	3,85	5.462	9.696,5	2,69	3,62	4.086	1.025,9	3,19	3,88	1.376	8.670,6
2003	3,48	3,68	5.522	9.995,0	2,70	2,94	4.147	1.074,2	3,58	3,77	1.375	8.920,9
2004	3,01	3,60	5.474	10.193,5	2,61	3,14	4.093	1.014,7	3,06	3,65	1.381	9.178,9
2005	3,17	4,04	5.776	10.755,7	2,94	3,61	4.353	1.159,7	3,19	4,09	1.423	9.596,0
2006	3,29	3,59	5.887	11.119,3	2,92	3,15	4.459	1.224,4	3,34	3,65	1.428	9.894,9
2007	3,14	4,21	6.016	11.606,5	2,70	3,57	4.598	1.261,1	3,20	4,28	1.418	10.345,4
2008	3,60	3,60	5.987	11.968,1	3,09	3,09	4.539	1.215,3	3,65	3,65	1.448	10.752,9
2009	2,25	2,24	5.689	11.557,8	2,17	2,17	4.323	1.114,6	2,26	2,25	1.366	10.443,2
2010	1,48	2,16	5.067	10.794,3	1,26	1,99	3.802	923,2	1,50	2,18	1.265	9.871,1
2011	1,98	2,29	4.585	10.662,8	1,63	1,97	3.422	929,0	2,02	2,32	1.163	9.733,8
2012(*)	1,01	1,17	3.998	9.889,9	1,19	1,50	2.888	857,0	0,99	1,14	1.110	9.032,9
2013(*)	0,53	0,53	2.371	6.937,1	0,04	0,05	1.674	455,0	0,57	0,57	697	6.482,1
2014 Ene-Jul. (*)	0,55	-	1.046	3.768,1	0,48	-	707	232,2	0,56	-	339	3.535,9

Union publications confirm the widespread downward trend in wages. As the CC.OO. union reports in its July 2014 collective bargaining update, "...the unions and workers have prioritized the preservation of their collective bargaining agreements, accepting multi-year renovations, but at a high cost in salary devaluation and a reduction of other benefits and conditions, sometimes in exchange for employment guarantees, but without sufficient compensation in most cases."<sup>32</sup>

The ministry also reports 748 cases of opt-outs from collective agreements from March – Dec 2012, 2,512 during 2013 and 1,532 through June 2014, affecting respectively 29,352, 159,550 and 50,232 workers.<sup>33</sup> 98% of the opt-outs reported were agreed during the consultation period: in a context of high unemployment and reduced severance pay, workers and their representatives are rarely willing to contest employers' demands. Where workplace representation is weak, such agreements are more likely to go unreported, and may even be informal. The non-representative data reported at the beginning of this section suggests that opt-outs are far more frequent than those recorded in the government's incomplete data.

This claim is supported by the unions' efforts to collect data from their members and through their visits to firms without union representatives.<sup>34</sup> CC.OO. notes that in the 29 months since the reform was approved, almost 1200 new company-level collective bargaining agreements were created, whereas prior to the reform there were typically some 200-250 per year. The union's survey suggests that much of this increase comes in small, service-sector firms: contracts initiated by employers and signed by worker representatives unconnected to unions with salaries and conditions far below those in the once-binding relevant sectoral agreements. Not only is

<sup>32</sup> Secretaría de Acción Sindical de CC.OO. 2014 (July). La negociación colectiva tras dos de reforma laboral. Confederación Sindical de CC.OO., p. 7; Secretaría de Acción Sindical - UGT. 2014 (February). *Dos años de reforma laboral*. UGT. 2014 (April – June). *Boletín de negociación colectiva* 18. <http://www.ugt.es/actualidad/2014/julio/boletin18> UGT [negociacioncoletiva.pdf](http://www.ugt.es/actualidad/2014/julio/boletin18).

<sup>33</sup> Ministry of Employment and Social Security. July 2014, op. cit.

<sup>34</sup> Secretaría de Acción Sindical de CC.OO. 2014 (July), op. cit.

collective bargaining coverage declining, but we must also increasingly question the value for workers of bargaining coverage itself.

It is thus hardly surprising that the government might prefer to obscure from view the extent to which the 2012 reform has disorganized employment relations.

### **E. The Path to Internal Devaluation: Recasting, or *Un-casting*, the Spanish Labor Relations System**

With an absolute majority ensuring passage of any legislation it desired in the Parliament, the PP's efforts to reconstruct the Spanish labor market faced three major obstacles: constitutional and procedural objections from recalcitrant judges and labor inspectors, collective action in the firm, and broader unrest in the streets. Over the two years since Law 3/2012 was passed, the government has taken significant actions to safeguard its reforms on all three fronts.

#### *Taking on the Judiciary*

On multiple occasions since the law's passage, judges have rejected collective layoffs, workplace reorganizations and salary reductions for lack of cause or for failure to follow precedent,<sup>35</sup> leading to frequent complaints by employers and their representatives.<sup>36</sup> Various elements of the reform were also challenged in the Constitutional Court, precisely on the grounds that they called into question the established model of labor and social relations balancing the constitutionally protected freedoms of employers to manage with those of workers to effective representation and a decent standard of living.

On 16 July 2014, the Constitutional Court upheld three critical aspects of the 2012 reform, rejecting claims of unconstitutionality put forward by the parliament of the region of Navarre. The decision was met with an energetic dissent from Fernando Valdés Del-Ré, one of Spain's foremost progressive labor law scholars, joined by two other members of the court.<sup>37</sup> Despite the dissent, the government had reason to confide in the Constitutional Court's support. In June 2013, the government took advantage of a partial renovation of the Court to create a conservative majority (7-5) for the first time in a decade. The new President of the Court, Francisco Pérez-Cobos, had been a member of the PP since 2007. He was also the author, along with his then senior clerk, Javier Thibault Aranda, of a 2010 article in one of Spain's most prestigious labor

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<sup>35</sup> Pascual, Raquel. 21 May 2014. "Así han interpretado los jueces la reforma laboral," [http://cincodias.com/cincodias/2014/05/20/economia/1400594782\\_780723.html](http://cincodias.com/cincodias/2014/05/20/economia/1400594782_780723.html). According to the President of CEOE, Joan Rosell, "Many more labor reforms are needed to adapt the reality of the law to the reality of the firm in order to not be waiting to see what the judges say."

<sup>36</sup> Iñigo Sagardoy, Managing Partner, Sagardoy Abogados. "Algunos tribunales están desvirtuando la reforma laboral," n/a. 12 May 2014. Or <http://www.expansion.com/2014/05/12/juridico/1399916581.html>. See also, Valverde, M. and M.Serraller. 6 April 2014. "El desafío de los tribunales a la reforma laboral," <http://www.expansion.com/2014/04/06/economia/1396814060.html>.

<sup>37</sup> As individual votes are not reported, we do not know whether the two "progressive" judges whose names do not appear in the dissenting opinion voted with the majority or simply chose not to subscribe the arguments of the dissent.



law journals proposing major changes in the regulation of collective bargaining.<sup>38</sup> When the PP took power, Thibault Aranda was named Director General of Employment in the MEySS and was a central figure in the drafting the new law, which adopted virtually whole cloth the changes he and Pérez-Cobos had proposed in their article.<sup>39</sup>

The ruling confirmed the reform's inversion of the prevalence of sectoral collective bargaining agreements over firm-level agreements and the right of either party to request arbitration in a collective dispute regarding opt-outs from an in-force contract. It also declared constitutional the one-year trial period permitted under the highly subsidized "support for entrepreneurs" (*apoyo a los emprendedores*) contract category, which allows firms with less than 50 employees to dismiss new workers without severance (or cause) during their first year. Together with its important reductions in severance pay and the elimination of ultraactividad—an issue recently settled by the Supreme Court—, these issues represent the most significant changes introduced by the 2012 reform.

As in the case of the Constitutional Court, the government had good reason to expect that the Supreme Court would consolidate doctrine regarding the reform in ways consistent with the legislator's intentions. The Justice Ministry's 2013 reform of the General Council for Judicial Power (*Consejo General del Poder Judicial*), the formally self-governing body overseeing the Courts, imposed simple majority voting for Council decisions instead of the previously required qualified majorities. As a consequence, the conservative majority of the Council was able to impose a conservative majority on the Supreme Court.<sup>40</sup>

According to the reform's critics in the judiciary, these changes undermine fundamental constitutional guarantees and shift the balance of power between employers and workers. In a country where the vast majority of firms have less than 25 workers, the ability of employers to negotiate firm-level agreements effectively marginalizes large numbers of workers from union protections as employers pressure local, non-union representatives to sign agreements that offer conditions inferior to those offered at the sectoral level. As the dissenting opinion argues: "the objective is not an articulated decentralization of collective bargaining but rather, more crudely, a disaggregated and atomized decentralization."<sup>41</sup>

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<sup>38</sup> Pérez de los Cobos y Orihuel and Francisco Javier Thibault Aranda. 2010. "La reforma de la negociación colectiva," *Relaciones laborales: Revista crítica de teoría y práctica*, 2; 1189-1200.

<sup>39</sup> Díez, Luis. 19 July 2013. "El presidente del TC y militante del PP inspiró con un letrado amigo la reforma laboral de Rajoy," <http://www.cuartopoder.es/laespumadeldia/2013/07/19/el-presidente-del-tc-y-militante-del-pp-inspiro-con-un-letrado-amigo-la-reforma-laboral-de-rajoy/>; 12 June 2013. "Los 12 magistrados del Tribunal Constitucional," <http://www.rtve.es/noticias/20130612/12-magistrados-del-tribunal-constitucional/684980.shtml>.

<sup>40</sup> Over the five years of its current mandate, the Council's majority will name half the judges on the Supreme Court and the presidents of all the regional appeals courts (Tribunales Superiores de Justicia) without having to compromise with other factions. Íñiguez, Diego. 11 December 2013. "Regreso al siglo XIX," [http://elpais.com/elpais/2013/12/05/opinion/1386257293\\_269314.html](http://elpais.com/elpais/2013/12/05/opinion/1386257293_269314.html).

<sup>41</sup> "...la finalidad no es lograr una articulada descentralización contractual sino, más rudamente, una descentralización disgregada y atomizada." "Voto particular que formula el Magistrado don Fernando Valdés Dal-Ré a la Sentencia dictada en el recurso de inconstitucionalidad núm. 5603-2012," §II.C.4(c). [http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP\\_2014\\_059/2012-05603VPS.pdf](http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_059/2012-05603VPS.pdf)

Progressive jurists criticize the right to request binding arbitration to enforce opt-outs from collective bargaining agreements as a similarly unconstitutional intervention in the rights of unions and employer associations to regulate their affairs. The central point of contention is the State's participation in the National and Regional Collective Bargaining Commissions that choose the arbitrators. For the majority, the government's constitutional obligation to "defend productivity" (CE 38) justifies both the radical decentralization of collective bargaining and the State's involvement in the obligatory arbitration of collective disputes.<sup>42</sup> For the dissenters, the economic exigencies of the moment cannot justify the effective annulment of workers' constitutional rights to collective bargaining (CE 37) or the right of unions and employer associations to manage their own affairs (CE 8).<sup>43</sup>

Using a similar logic, the dissenters argue that a trial period of a year for all types of jobs, no matter how short the learning curve fails to meet the test of proportionality between the business needs of employers and the citizen's right to a decent job and protection against unfair dismissal. Ultimately, unions and progressive students of the Spanish labor market fear that the one-year trial period is little more than a government strategy to reclassify what are in many cases temporary jobs as permanent ones. Given the generous subsidies offered to employers who hire under this contract modality, there is surely more than a grain of truth to this argument.

In sum, the Constitutional Court's decision goes a long way toward reducing lingering uncertainties about the new model of labor relations contained in the 2012 reform. To the extent that the divide between insiders and outsiders in the labor market has been reduced, such reductions have come via big cuts in severance costs for permanent workers. Nevertheless, precarious contracting, whether recognized as temporary or disguised through subsidized, permanent contracts of various kinds, will continue to plague the Spanish labor market going forward. The central point for our argument, however, is that the reform has reduced the costs of redeploying or dismissing labor market insiders to such an extent that the prime beneficiaries of dualism at this point are not a particular class of workers but rather employers and their political allies.

The Court's decision also provides judicial support for a government committed to minimizing the impact of collective regulation on employer decisions. The reforms introduced in the structure and content of collective bargaining Law 3/2012 were clearly intended to neutralize unions' abilities to resist employer initiatives and to promote internal devaluation through a reduction in salaries and layoff costs. The labor market reform was only one plank in a broader offensive to reduce the power of any and all labor market intermediaries (unions, employer associations, labor inspectors, judges and, as we shall see, ordinary citizens) to condition employer discretion. Labor market reforms, at least in Spain, have *increased* the marketization of policymaking (more discretion for employers) while at the same time *reducing* the de jure or de facto discretionary authority and political power of labor market intermediaries.

The Constitutional Court's decision is most appropriately read in this light: it accepts the central tenets of a reform that decisively reduces the capacity of the courts to second-guess employer

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<sup>42</sup> STC 5603-2012, de 16 de julio de 2014.

[http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP\\_2014\\_059/2012-05603STC.pdf](http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_059/2012-05603STC.pdf).

<sup>43</sup> Voto Particular, *passim*.

decisions. Confident that the Constitutional Court would accept a more limited role in labor market governance, the government simultaneously pursued other actions intended to neutralize potential sources of resistance to a winner-take-all labor market. In the following sections, we will detail two of the most important of these initiatives: severe restrictions on the capacity of the labor inspection service and legal and administrative changes that represent a direct threat to the right to strike and, indeed, the capacity to mobilize political protest in general.

### *Taming the Labor Inspection Service*

The Labor Inspection Corps traditionally played a central role in the negotiation of collective dismissals. Inspectors would review documentation shared by the negotiating parties, require employers to produce further documentation, and emit reports evaluating the adequacy of the documentation provided and the degree to which the parties had bargained in good faith. In many cases, inspectors served as mediators to facilitate agreements and worked with the parties to identify alternatives to dismissals.<sup>44</sup>

After the 2012 reform, the Director General of the Inspection Service (a civil servant appointed by the Minister of Employment and Social Security) sent out new instructions to Inspectors regarding their role in collective dismissals.<sup>45</sup> Operational Criteria (OC) 92 (28 November 2012) limits the role of the inspectors in collective dismissals to procedural oversight and reminds inspectors that their recommendations are no longer obligatory. Inspectors are to refrain from requesting complementary documentation once the period of consultation (15 days) is concluded, and in no case should they evaluate whether the causes motivating the dismissal are sufficient.

Going forward, only the judiciary would be able to evaluate the substance of employers' claims regarding the causes motivating dismissal or work reorganization. This transformation of the Inspection Service's role introduces a potentially radical shift in the balance of power between employers and worker representatives. Given the relatively small size of most Spanish firms and the limited resources of worker representatives, the Inspector's traditional role substantively increased guarantees for the protection of workers' rights.

Labor market observers differ over the wisdom of Law 3/2012's rebalancing of the interests of employers and workers for firms in difficulty and, particularly, the amplification and clarification of the range of justifications for changes in conditions or dismissals. Nevertheless, the law clearly upholds the formal (and for most employment law scholars, constitutionally mandated) requirement that changes be justified. It is here that we can appreciate the real significance of OC

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<sup>44</sup> For more on the role of the Spanish Inspection Service, see Dubin, Kenneth A. et al. 2012, "La Inspección del Trabajo: Un activo infrautilizado en la lucha contra el desempleo, [Labor Inspection: An Underutilized Asset in the Battle Against Unemployment]," in Toni Ferrer and Santos Ruesga, eds., *Objetivo el Trabajo. Anuario de Relaciones Laborales 2012* [Objective Work. Annual Review of Labour Relations 2012] (Madrid: UGT, Marcial Pons), 175-178.

<sup>45</sup> The following discussion is based on a summary of "Criterio operativo núm. 92 sobre la actuación de la Inspección de Trabajo y Seguridad Social en los procedimientos de despido colectivo y de suspensión de contrato y reducción de jornada," 28 November 2012, offered by Eduardo Rojo Torrecilla. The authenticity of his discussion as been confirmed with two currently Inspectors.

<http://www.eduardorojotorrecilla.es/2012/12/sobre-las-causas-alegadas-en-un.html>.



92: it makes it far less likely that workers will dispute employers' causal claims, even when they would be unlikely to stand up to judicial scrutiny.<sup>46</sup>

### *Undermining collective resistance*

Proponents of labor market deregulation have long criticized Spanish unions for opposing the development of legislation regulating the right to strike, as called for in Art. 28 of the Constitution.<sup>47</sup> Indeed, with the sole exception of the last absolute majority Socialist government in 1993, no Spanish government of the democratic era has managed to put forward legislation regulating the right to strike as called for in the Constitution.<sup>48</sup> Nevertheless, strikes can be limited by the declaration of minimum service levels for “essential” services offered by the public sector (or private firms contracted by the State), particularly those related to health, security, transport, education or sanitation, as well as those related to private sector minimal maintenance requirements.

The definition of minimum service standards has been the object of intensive jurisprudence for years. After a bitter 2013 strike provoked by layoffs and other changes in the sanitation services provided by private contractors in Madrid, Rajoy announced that he had asked the MEySS to study a possible regulation of minimal services to ensure that minimums would in practice be upheld.<sup>49</sup> This call for a minimum services law was embraced by employers' associations but rejected by the unions. The union's resistance to such a law is understandable: in practice, courts have repeatedly found governments at all levels guilty of setting “abusive” minimal standards, although these decisions generally come after the fact and bring no further sanction. Given the current government's proximity to employers, the unions fear that a strike law will legalize minimum service levels that have previously been labeled abusive by the courts, which are currently left to make sense of vague statutory language.<sup>50</sup>

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<sup>46</sup> For example, in a decision reached on 21 April 2014, the Supreme Court rejected a minority union's challenge of a lower court decision to approve a collective dismissal negotiated between the employer and a majority of workers' representatives. In its ruling, the lower court noted that alternative measures such as salary reductions or working time reductions may well have made the dismissals unnecessary, but with Law 3/2012 and an agreement in hand, the judiciary had no reason to intervene. The historic role of the Labor Inspection Corps might well have obviated this outcome. “La importancia del acuerdo durante el periodo de consultas,” 3 July 2014. <http://www.eduardorojotorrecilla.es/2014/07/la-importancia-del-acuerdo-durante-el.html>. Accessed 14 August 2014.

<sup>47</sup> Durán López, Federico. 19 May 2014. “Los conflictos sociales y el imperio de la ley,” [http://cincodias.com/cincodias/2014/05/16/economia/1400256935\\_565444.html](http://cincodias.com/cincodias/2014/05/16/economia/1400256935_565444.html).

<sup>48</sup> That initiative, pacted with the two majority unions, died when the government called early elections. The subsequent minority Socialist government did not revive the proposal. <http://www.rtve.es/noticias/20131123/servicios-minimos/799501.shtml>.

<sup>49</sup> 21 November 2013. “Rajoy encarga a Empleo que estudie ‘una ley de servicios mínimos, para que se cumplan,’” <http://www.rtve.es/noticias/20131121/rajoy-encarga-empleo-estudie-ley-servicios-minimos-para-se-cumplan/798122.shtml>.

<sup>50</sup> In fact, Title II, art. 17.1 b (the section on transportation, no employment law!) of the 4 July 2014 omnibus bill authorizes the Ministry of Fomento to set minimum service standards for airports. Rojo Torrecilla, Eduardo. 8 July 2014. Estudio del contenido laboral del Real Decreto-Ley 8/2014, de 4 de julio, ¿una ley de acompañamiento encubierta? (II). [www.eduardorojotorrecilla.es](http://www.eduardorojotorrecilla.es). Accessed 14 August 2014.

The possible regulation of higher minimum standards is not the only threat to the effectiveness of the strike as a weapon of collective conflict. Since the PP came to power, an unprecedented number of strikers have been pursued for both administrative and criminal violations. The unions CC.OO. and UGT recently issues a joint report documenting some 81 cases being pursued against strikers affecting at least 261 workers. At least 40 workers face the very real prospect of going to jail, although none of the cases involve serious acts of violence.<sup>51</sup> As the unions and several jurists point out, the criminal penalties sought for unionists contrast sharply with the prosecutorial forbearance revealed by the total absence of criminal penalties for even the most brazen anti-union practices pursued by employers, even though both kinds of violations are classified under the same statute.<sup>52</sup> Similarly, Spanish prosecutors' recent criminal cases against bankers have, unlike those against strikers, included requests for less than two years of jail time, which means probation for those with no criminal record.<sup>53</sup> The unions have denounced the sudden aggressiveness of national and regional prosecutors before the International Labor Association, the European Committee for Social Rights, as well as the parliament.<sup>54</sup> They have also received letters of support for their campaign from the progressive associations of judges and labor inspectors.<sup>55</sup>

The government has also taken steps to restrict any and all forms of public protest that might serve to raise broader awareness of perceived instances of political and economic injustice and serve as building blocks for opposition both within and beyond the Parliament. In November, 2013, the Ministry of the Interior distributed a draft proposal of its new Law for Citizen Security. As part of the legislative review process, the document was evaluated by the General Council for Judicial Power and the analogous body overseeing the prosecutor's office, the Prosecutorial Council (*Consejo Fiscal*); both were extremely critical with the draft for granting the police excessive discretionary authority in the face of public protests and for threatening constitutional protections of citizens charge with violating the law.<sup>56</sup>

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<sup>51</sup> CC.OO. and UGT. 2014. "Ofensiva penal contra el derecho de huelga,"

<http://www.ugt.es/actualidad/2014/junio/CCOO%20UGT%20OFENSIVA%20PENAL%20CONTRA%20EL%20DERECHO%20DE%20HUELGA.pdf>

<sup>52</sup> Penal Code Article 315. Requena Aguilar, Ana. 6 July 2014. Doble rasero judicial: penas de cárcel a piquetes, sanciones al patrón que no deja hacer huelga [http://www.eldiario.es/economia/Penas-protostar-sanciones-administrativas-empresas\\_0\\_267374097.html](http://www.eldiario.es/economia/Penas-protostar-sanciones-administrativas-empresas_0_267374097.html).

<sup>53</sup> Urruti, Mikel. 31 May 2014. "De los trabajos y las penas," <http://lanzuzenbidea.blogspot.com.es/2014/05/160de-los-trabajos-y-las-penas.html>.

<sup>54</sup> For more details, see <http://huelganoesdelito.es/huelganoesdelito/>.

<sup>55</sup> Comunicado de Jueces para la Democracia sobre condenas de prisión para sindicalistas, 23 July 2014: <http://www.juecesdemocracia.es/txtComunicados/2014/23julio14.htm>. For the Inspectors, 9 July 2014. <http://www.ccoo-servicios.es/huelga/html/31388.html>.

<sup>56</sup> CGPJ:

[http://www.poderjudicial.es/cgpj/es/Poder\\_Judicial/Consejo\\_General\\_del\\_Poder\\_Judicial/Actividad\\_del\\_CGPJ/Informes/Informe\\_al\\_Anteproyecto\\_de\\_Ley\\_Organica\\_de\\_Proteccion\\_de\\_la\\_Seguridad\\_Ciudadana; Consejo\\_Fiscal: http://www.fiscal.es/Documentos/Documentos-del-Consejo-Fiscal.html?pagename=PFiscal%2FPage%2FFGE\\_pintarDocumentos&cid=1242052647004& charset = utf-8&buscador=1&ckConsultas=1&txtFechaDesde=&txtFechaHasta=&txtPalClave=&btnBuscar2=Buscar;](http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Consejo_General_del_Poder_Judicial/Actividad_del_CGPJ/Informes/Informe_al_Anteproyecto_de_Ley_Organica_de_Proteccion_de_la_Seguridad_Ciudadana; Consejo_Fiscal: http://www.fiscal.es/Documentos/Documentos-del-Consejo-Fiscal.html?pagename=PFiscal%2FPage%2FFGE_pintarDocumentos&cid=1242052647004& charset = utf-8&buscador=1&ckConsultas=1&txtFechaDesde=&txtFechaHasta=&txtPalClave=&btnBuscar2=Buscar;)

On 11 July 2014, the Council of Ministers approved a revised version of its proposed Law for Citizen Security.<sup>57</sup> The new law doubles minimum fines and raises substantially the maximum financial penalties for violating norms governing public protest, with fines for minor violations ranging from €100-600 and for serious and very serious violations from €600 – 600,000. The range of sanctionable behaviors increases from 10-17 for minor violations and from 16-26 for serious ones. This increase is largely attributable to a reclassification of actions previously sanctioned in the criminal code as administrative violations. However, the new sanctions proposed are in most cases significantly higher than those in the criminal code. To compound the matter, the Ministry of Justice has introduced fees for access to the Administrative Courts, whereas access to the Criminal Courts is free.<sup>58</sup> Moreover, in administrative matters, unlike criminal ones, police reports alone are sufficient evidence for a judge to confirm the sanction.

These new restrictions follow on the heels of a considerably more belligerent attitude toward public protest, as the government's own data for the last three years clearly demonstrates. The number of public meetings that failed to comply with the law increased slightly from 3,173 in 2011 to 3,461 in 2012, the first year the PP was in office. However, the number of sanctions levied increased from 366 to 1,722. In 2012, the government was notified of 44,233 public protests and prohibited 294. In 2013, with virtually the same number of protest notifications (43,170), the number of protests prohibited increased to 1,682. Regarding protests specifically related to labor concerns, in 2012, there were 15,182, of which only 95 were prohibited; in 2013, with a similar number of protests (16,587), 815 were prohibited—almost 10 times as many. If we consider protests organized by unions, there were 88 prohibited in 2011, 77 in 2012 and 644 in 2013, although in 2013 there were 95 fewer protests (18,600) than in 2012.<sup>59</sup>

In sum, the PP's 2012 labor market reform was only one element in a broader offensive against workers, organized labor and their allies that was made possible by the Troika's insistence on recycling capital back to the core of the Eurozone through internal devaluation on the periphery. While some degree of wage devaluation was likely unavoidable without an exit from the Euro, the PP's aggressive disorganization and repression of organized interests in the workplace through legislative reform, the muzzling of the State's powers to restrict employer discretion, and prosecutorial aggressiveness towards dissenters (and forbearance for employers) went far beyond the demands of the Troika. At the same time, the PP has resisted demands for reforms not supportive of its broader project. Nevertheless, EU elites should be proud of the Spanish

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the legislative proposal: <http://www.juecesdemocracia.es/legislacion/Anteproyecto-de-Ley-de-Seguridad-Ciudadana.pdf>. All accessed 15 August 2014.

Presno, Miguel Ángel. 19 July 2014. "El Proyecto de Ley Orgánica de Seguridad Ciudadana," [http://www.eldiario.es/agendapublica/nueva-politica/Proyecto-Ley-Organica-Seguridad-Ciudadana\\_0\\_282771984.html](http://www.eldiario.es/agendapublica/nueva-politica/Proyecto-Ley-Organica-Seguridad-Ciudadana_0_282771984.html). What follows is largely based on this summary, along with consultations with experts in criminal and administrative law. The increased policing powers in the new bill are less extensive than in the original version.

<sup>58</sup> Ley 10/2012, de 12 de noviembre. Fees for contesting the administrative sanctions set out in the new law will be as much as €2000 (excluding attorney fees).

<sup>59</sup> All data obtained from Ministry of the Interior, *Anuario Estadístico*, 2011, 2012, 2013. Available at <http://www.interior.gob.es/es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas>.

government for having understood that demands for internal devaluation were the ideal pretext for crafting a winner-take-all, neoliberal economy within the Periphery at the service of elites both at the Core and at home.

### **Labour Market Reform in Italy: If At First You Don't Succeed?**

The Italian case at first blush appears to confirm much of the existing literature on structural reform, comparative political institutions, and labour market dualism. The implicit vetoes on structural reforms which have disappointed reformers and their supranational backers can be easily accommodated by a theoretical perspective that stresses the difficulties of overcoming conservative insider groups when dispersed and politically isolated outsiders fail to mobilize, particularly in a constitutional framework replete with veto points such as Italy. The limited scope of Monti's 2012 reform<sup>60</sup>, and the so far hesitant moves made by current Prime Minister Renzi<sup>61</sup>, have been mostly interpreted as additional evidence of Italy's reluctance to embrace fundamental change of any kind.

This interpretation, popular in the media and political and policy debates, is heavily reliant on cliché and selective observation of the facts<sup>62</sup>. Italy has in fact undergone far-reaching reforms in vast areas of the economy, transforming the 'sheltered economy' of the pre-Maastricht era into a more open and liberally regulated market economy. Employment protection has converged with the European mainstream after a series of reforms liberalizing temporary and part-time employment, notably the Treu Package of 1997 and the Biagi Law of 2003. The much cited Article 18 (of the Labour Statute), which imposes reinstatement for wrongful dismissal, has yet to be abolished despite constant discussion ever since the early 2000s, but this rule applies to relatively few workers (companies under 15 employees, the vast majority of Italian firms, are exempt). In fact dismissals are not notably more difficult in Italy than in most other European countries<sup>63</sup>. Recent reforms have also significantly affected collective bargaining, with the move towards plant-level agreements in 2011.

The crisis has not brought, however, the kind of full-scale assault on existing equilibria seen in Spain. One obvious explanation for this could lie in the absence of a sufficient parliamentary majority for such changes: whilst in Spain the crisis brought the collapse of Socialist support and hastened the election of a conservative government with a record majority, in Italy the fragmentation of the party system has prevented any government not led by Silvio Berlusconi from building a stable governing majority. Post-crisis attempts at reform have therefore been initiated by weak, largely technocratic administrations lacking a strong popular mandate. An electoral law that offers winning coalitions an automatic majority has not been sufficient to bring

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<sup>60</sup> Tito Boeri, "Desperately Seeking a Middleman", *Contemporary Italian Politics* 5(2) (2013): 222-28.

<sup>61</sup> Gavin Jones, "Italy's modest labor reform shows Renzi's momentum faltering", *Reuters* Thu May 15, 2014. <http://www.reuters.com/article/2014/05/15/us-italy-reform-renzi-idUSBREA4E0G020140515>

<sup>62</sup> See Jonathan Hopkin "The Troubled South", in Mark Blyth and Matthias Matthijs (eds.), *Beyond the Euro* (Oxford: Oxford University Press, forthcoming).

<sup>63</sup> Stefano Sacchi "Italy's labour policy and policymaking in the crisis: from distributive coalitions to the shadow of hierarchy", Labor Working Paper no. 132, 2013, p.14.

stability, since Italian bicameralism acts to counterbalance these artificial majorities. Not surprisingly one of the first reforms initiated by the Renzi government was the abolition of the Senate.

But this approach fails to account for the accumulation of structural reforms implemented since the early 1990s, and in particular the major fiscal sacrifices made to join the euro. Italy actually showed abundant capacity to reform and its fiscal stance ever since the financial crisis of 1992 has been extremely conservative by the standards of similar nations (Italy has run a primary budget surplus since 1994, even during the current recession). Moreover the structural reforms achieved by centre-left governments, particularly the first Prodi administration have had a counterpart in the changes imposed by the Berlusconi governments of the 2000s, such as several reforms of the justice system, regulation of media and communications, and education reforms. Although the economic efficiency gains resulting from these reforms is rightly questioned, what they reveal is that the roadblocks to policy change in Italy have been much exaggerated, and that when a cohesive coalition is constructed, major policy and institutional changes can be made.

In this light we propose that Italy's relatively slower pace of labour liberalization is best understood in terms of the nature of the reform coalition, and particularly the divisions within the employers' sector and its complex relationships with the main political parties. Whereas in Spain the employers' representation is in the hands of a Castile-centred elite closely associated with the currently ruling PP, with a strong influence from sheltered business sectors involved in close dealings with the state machinery, in Italy employers' representation is less cohesive and reflects important divisions over policy. These divisions are in function of the stronger manufacturing sector in Italy, which is competitive in international markets and has a set of interests and preferences at loggerheads with the sheltered sector of domestically focused companies, very often SMEs (although Berlusconi's Mediaset corporation is a good example of a domestically-focused large company with little interest in global markets and heavy dependency on state regulation). The exposed sector functions according to the logics of Coordinated Market Economies, with requirements in skill formation and raising capital that favour a certain degree of state intervention to secure a skilled and stable workforce and provide a cushion against downturns. The sheltered sector has more of an interest in removing regulations that restrict downward pressure on wages and dismissals, along the lines of the Spanish model, and has little investment in CME-style institutions.

These divisions are reflected in the relations between employers and the political parties. The centre-right parties, notably Berlusconi's Pdl and the Northern League, have to a significant degree built their political support on the small business sector and on domestically-oriented large companies. During Berlusconi's second government, the employers' association Confindustria elected a leadership from the SME sector based in the South of the country, in a departure from the traditional pattern of large Northern firms (particularly FIAT) dominating the organization. However this new leadership, which favoured Berlusconi's strategy of dividing labour by driving a wedge between the centrist CISL/UIIL and the leftist CGIL over labour reform, did not survive long, and by 2006 the Northern industrialists around FIAT took control again, with Luca de Montezemolo of Ferrari becoming Confindustria president. At the same time Montezemolo made a rapprochement with the centre-left coalition led by Prodi, with some suggestions that he himself would enter politics. With the SME and sheltered sectors aligned

with the centre-right and the large exposed companies aligned with the centre-left, the employers' front lacked any cohesive political representation, stymieing any attempt at radical labour reform.

These divisions have persisted through the years of crisis. Confindustria has remained in the hands of Northern industrialists, whilst Berlusconi's political coalition around the small business and sheltered sectors has maintained difficult relations with large companies. At the same time however, the centre-left PD has not proved a stable interlocutor for business, with its links with the CGIL proving a bone of contention. As a result, a new technocratic governing elite under Mario Monti, and subsequently the grand coalition administrations led by Letta and Renzi, has emerged to deal with the crisis, enjoying support from the European institutions and exposed sectors of Italian business. However lacking any cohesive parliamentary majority nor a clear mandate from employers, consensus around labour reform has proved elusive. The current scenario has involved a series of announcements of major changes – Renzi's much hyped 'Jobs Act' – but little in the way of clear implemented change. At the time of writing, the outcome remains uncertain but the lack of a strong employers' mandate and the weakness of the government makes a reform along the Spanish lines unlikely.

### **Conclusion: Beyond Dualism**

Labor law reform has been used in Spain for political as much as economic policy ends. The conservatives of the PP focused and seized upon the legal reform of labor relations as a way of weakening, if not destroying, their most institutionally and economically potent political opponents. In the process, Spanish labor relations and employment law reform also reallocated power and discretionary authority within the national political economy. The Spanish labor reforms devolved discretionary authority, away from the Labor Authority perceived as pro-labor and even the courts, to the level of the firm and its managers. The reformed Spanish labor law granted managers—those with authority in the hierarchy of private firms—vastly broader discretion over employment decisions and participation in organized labor relations. The effect of labor law reform was to forcibly shift the collective, social, and solidaristic conception of the employment relationship to a neo-liberal individualistic and atomistic one through the imposition of a contractual and market-conforming legal framework.

Italy has yet to follow this road. Although the pattern of liberalization at the margin and dualistic dynamics has been similar through the 1990s and early 2000s, the Eurozone crisis has played out rather differently. The lack of cohesive employer preferences over labour reform, and the political divisions between distinct industrial interests (ideological and territorial, as well as economic) has hindered the creation of a coalition for radical deregulatory reform, despite strong external pressures. That this has been the case is even more striking in the light of the major changes made in the Italian economy in the 1990s, under European external pressure, in order to participate in European Monetary Union. It suggests that politics, rather than a simple equation of external financial pressure applied to weak labour movements and clear employer preferences, lies behind labour market policy choices.

We tentatively conclude that this suggests that a more political, even partisan, conception of institutional change under crisis is required. Material interests may appear rather stable and crisis can indeed change the relative bargaining power of different interests and usher in major reforms. Financial crisis and the institutional constraints on national politics can also bring about major changes. But we argue that the institutional change literature has underplayed the role of partisan politics of the most traditional kind: political parties exploiting opportunities created by crisis to strengthen their electoral and organizational position by delivering policy favours to key constituent. The configuration of a strong party with a clear vision of policy which could benefit its main business stakeholders was present in Spain, but up to now has been absent in Italy. This partisan story, we argue, is an important addition and correction to the dominant accounts in the literature.