De-commodifying social rights: Welfare State policies in a multilevel perspective

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Abstract

De-commodifying social rights: Welfare State policies in a multilevel perspective

Over the last 30 years, European Welfare States have been subjected to a process of transformation within the context of globalization, political and societal changes. This work centers on the legal evolution of the systems of protection against unemployment in Spain, The Netherlands and Germany, three Welfare States which the litterature has classified as originally pertaining to the Conservative model, and analyses those changes from the point of view of de-commodification, within the context of the Europeanization of social policy and the idea of *flexicurity*. It is argued that those evolutions involve the re-commodification of social rights related to protection against unemployment. The multilevel perspective is reinforced by a study of regional and international social rights instruments as possible basis for the development of legal de-commodification strategies rooted in the understanding of human rights as indivisible rights, which involve the obligation of the States to guarantee sufficient protection of their citizens against the risk of unemployment, along the lines of the idea of "decent unemployment".

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List of Abbreviations

ALMP	Active Labour Market Policies
ALG I	*Arbeitslosengeld* I (Contributory Unemployment Benefits System - Germany)
ALG II	*Arbeitslosengeld* II (Tax-financed, means-tested Unemployment Benefits System - Germany)
CFRUE	Charter of Fundamental Rights of the European Union
CJUE	Court of Justice of the European Union
CWI	*Centrum voor Werk en Inkomen* (Center for Work and Income – The Netherlands)
ECB	European Central Bank
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EES	European Employment Strategy
EFSF	European Financial Stability Facility
EMU	European Monetary Union
ESC	European Social Charter
ESF	European Social Fund
ESM	European Stability Mechanism
ETT	*Empresa de Trabajo Temporal* (Temporary Employment Agency – Spain)

EU	European Union
ILO	International Labour Organization
IMF	International Monetary Fund
INEM	*Instituto Nacional de Empleo* (National Employment Institution – Spanish PES)
LGSS	*Ley General de la Seguridad Social* (General Act on Social Security – Spain)
LISOS	*Ley de Infracciones y Sanciones en el Orden Social* (Act on Offences and Sanctions within the Social Sphere – Spain)
LMP	Labour Market Policies
OECD	Organization for Economic Cooperation and Development
OMC	Open Method of Coordination
PES	Public Employment Service(s)
R&D	Research and Development
RWW	*Rijksgroepsregeling Werkloze Werknemers* (
SEPE	*Servicio Público de Empleo Estatal* (Public State Employment Service – Spanish PES)
SGB	*Sozialgesetzbuch* (Social Code – Germany)
STC	*Sentencia del Tribunal Constitucional* (Judgment of the Spanish Constitutional Court)
STSJ	*Sentencia del Tribunal Superior de Justicia* (Judgment of a Spanish Autonomous Community level Appelate Court)
TFUE	Treaty on the Functioning of the European Union
TUE	Treaty on the European Union

UN	United Nations
UWV	*Uitvoeringsorgaan Werkverzekeringen* (Executive Organ for Employment Insurances – The Netherlands)
WW	*Werkloosheidswet* (Act on Unemployment - The Netherlands)
WWB	*Wet Werk en Bijstand* (Act on Work and Assistance - The Netherlands)
WWV	Wet Werkloosheidsvoorziening (Act on Unemployment Benefits – The Netherlands)

Part I. Crisis and Evolution of Welfare State Policies in Europe

Chapter I. Crisis, Austerity and reform of social rights in Europe: an overview

I.1. An overview of the current European economic crisis and its outcomes

Although there is not a lot of controversy about the origins of the 2008 financial crisis that resulted in a global economic slump, the contrary has to be said about the options to get out of the latter. But more than controversy, one could also speak about confusion, or even schizophrenia, when trying to grasp the use in political discourse of concepts like "growth enhancing austerity" or "expansionary contraction", this with the presupposition that those

concepts have more depth than their mere use as disguising the blindness of economic and politic decision-makers caused by their political allegiance to neoliberal thinking and interests.

The deconstruction since the 80's of all the regulations put in place after the 1929 *crash* to prevent banking crises permitted the emergence of extremely complex financial instruments as well as the increased possibility for financial institutions to sell loans instead of keeping them on their own books. The consequent opacity of the risks behind financial engineering and the massive selling of collateralized loan obligations, insured (at least on paper) by credit default swaps, provoked the inability of financial institutions and insurers to make good on their promises once thing went wrong. [1]

The ever growing risks taken by those institutions as well as the total opacity about those risks resulted in the 2008 financial crisis, which passed into a lasting economic crisis (with periods of recession) as follows.[2] Firstly, economic stability lead to rising leverage (i.e. rising debt of economic players in comparison to their income and assets), due to complacency about lending risks (for example, rising house prices makes that, in general, an owner that stops being able to pay his mortgage can reimburse it by simply selling the house). But rising leverage makes an economy more instable, more prone to be affected by bad events, like the bursting

[1] Lavapitsas, C., Kaltenbrunner, A., Labrindis, G., Lindo, D., Meadway, J., Michell, J., Painceira, J.P., Pires, E., Powell, J., Stenfors, A., Teles, N., Vatikiotis, L., *Crisis in the Eurozone*, Verso, London, 2012

[2] Krugman, P., *End This Depression Now*, Norton, New York, 2012, 41-53

of a house bubble or a financial crisis. At such a "Minsky-moment" or "Wile E. Coyote-moment" lenders rediscover risks of debt, and debtors are forced to start deleveraging. But in an economy with many players with high leverage, when lots of those players find themselves in debt trouble at the same time, their collective efforts to deleverage are self-defeating, as overall demand plunges. The credit contraction due to the financial crisis resulted in the collapse of aggregate demand, lowering consumption as well as exports. The State intervention to rescue on the one hand the financial systems, and trying to mitigate, on the other hand, the effects of the crisis by increasing spending led then, as a collateral damage to the crisis, to soaring deficits and increased national debt.

In Europe, and, more particularly, in the Eurozone, the general picture is completed by an even more severe economic and public deficit crisis in the Eurozone periphery countries, mainly Spain, Portugal, Greece, Ireland and Italy, that seemed to hamper recuperation in the other EU countries, and even drag them into deeper recession.[3] This specific Eurozone problem has much to do with the design itself of the Economic and Monetary Union on one hand, and of the Euro on the other and the integration of economically non-homogenous countries without providing for fiscal transfer mechanisms to correct asymmetric shocks, creating imbalances which were made worse by pressure put by Germany on

[3] Eurostat, News release of 14 February 2013, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-14022013-AP/EN/2-14022013-AP-EN.PDF (last visit: 21/2/2013)

its workers since the nineties and throughout the first decade of this century.[4]

Already in 1995, a study by the European Social Observatory warned that the asymmetry between a monetary union (centralised) and an economic union which governance could be resumed to the "Broad Economic Guidelines" and the "Stability and Growth Pact" was problematic.[5]

However, this only created the financial and private credit crisis in the periphery. The recession(s) which followed, and the current situation of very low growth are related with the measures taken with the (failed) objective to curb down the public deficits created by the first stage of the crisis.

The reaction of European states, the European Union and International Economic Organizations like the IMF to the economic crisis focused on one sole aspect of it: increased public deficit and public debt (due mainly to the bank bailouts), without regards to other aspects like soaring unemployment, growing inequality, inadequate productive models or lack of economic integration within the Eurozone. The "refoundation of capitalism" announced in the immediate aftermath of the 2008 financial crisis is already a long forgotten rhetorical void-filling announcement. Moreover, not

[4] Lavapitsas, C., Kaltenbrunner, A., Labrindis, G., Lindo, D., Meadway, J., Michell, J., Painceira, J.P., Pires, E., Powell, J., Stenfors, A., Teles, N., Vatikiotis, L., *Crisis in the Eurozone*, Verso, London, 2012; Armingeon, K. and Bacarro, L., "Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation", *Industrial Law Journal*, vol. 41, nº 3, 2012, 275

[5] Degryse, C., *The new European economic Governance*, ETUI Working Paper 2012.14, 8-9

satisfied with focusing on one sole aspect of the crisis, and despite of its complexity, those states and institutions only prescribed one medicine or, at least gave it priority above all other possible solutions: fiscal consolidation, or, better said, austerity.

Such an attitude did not only ignore the complex character of the economic and social problems at hand, but snubbed the abundant historical literature and eminent economist's warning about the self-defeating economic and fiscal consequences of budget cuts imposed by austerity. With the utmost subjective and intangible notion of "confidence" as paramount conditioner of policy decisions, and guided by "the markets", which, on the one hand, speculated with the fiscal woes of countries of the Eurozone periphery, and on the other hand were considered as a "rational" player commanding the need to bring down budget deficits due to soaring interests, the European states, the European Union and the IMF imposed, acting together or independently, harsh austerity programs which have had the adverse effects than those sought for, not bringing the deficits into line, and, therefore, not solving the problem of exposure of European banks towards public default, extending the economic instability in the Eurozone, the European Union, and, by extension, in the world economy.[6] But the measures imposed were not only of a budgetary nature. In most of the bailed-out countries, as well as in Spain, the lack of comparative competitiveness would be remedied by reforms of the labour markets, supposedly in line with the

[6] Lavapitsas, C., Kaltenbrunner, A., Labrindis, G., Lindo, D., Meadway, J., Michell, J., Painceira, J.P., Pires, E., Powell, J., Stenfors, A., Teles, N., Vatikiotis, L., *Crisis in the Eurozone*, Verso, London, 2012

European Employment Strategy and the *flexicurity* concept, but aimed only at flexibilization, which passed through the deconstruction of mechanisms of protection of workers and lowering salaries to provoke internal devaluation, which would supposedly enhance competitiveness as well as help solving unemployment.

In 2011 and 2012, almost all member states implemented austerity programs affecting social rights related to social security and social protection, whether directly through imposing restrictions on entitlements or lowering benefits, and indirectly through general cuts in public services, in funds as well as in staff, as shown in the following table.[7]

[7] Own elaboration from data figured in Pietras, J. , "Austerity measures in the EU – A country by country table", The European Institute, *Special G-20 Issue on Financial Reform*, http://www.europeaninstitute.org/Table/Special-G-20-Issue-on-Financial-Reform/ (last visit, 10/3/2013) and Laven, Z. And Santi, F., "EU Austerity and reform: a country by country table". Blog of the European Institute, 2012, http://www.europeaninstitute.org/April-2012/eu-austerity-and-reform-a-country-by-country-table-updated-may-3.html (last visit 10/3/2013)

Table 1: mapping of austerity measures in the EU 2010-2012

legend	Pensions	Civil Service	Health Care	Child benefits	Minimum Wage	Unemployment	Education	other welfare
1	*increase age*	*hiring/salary freeze*	*cuts*	*cuts*	*reduction*	*cuts in benefits*	*general cuts*	*cuts in benefits*
2	*stricter entitleme*	*salary reduction*		*stricter entitlement*	*freeze*	*stricter entitlement*	*university cuts*	*general cuts*
3	*benefit cuts*	*jobs reduction*		*freeze*		*shorter period*		*structural reforms*
Austria	1, 2	1	1					
Belgium	1							
Bulgaria	1	1, 2 (10%)						
Cyprus		1						
Czech Republic		2	1					1
Denmark		3		1		3 (50%)	2	
Estonia		1						
Finland								
France	1, 2	1		3				
Germany		3						2 (8 billion/year)
Greece	1, 3	2, 3 (40%)	1 (1 billion)		1 (22%)			
Hungary	1, 2, 3	3 (40%)		3		1		
Ireland		2 (15%)		1	1 (1€)		1, 2, 3 (welfare to work)	
Italy	1 (women), 2	1						
Latvia		2						
Lithuania		1						
Luxembourg							1	2
Malta								
Netherlandsin	1		1					
Poland	2							
Portugal	3	2						2
Romania	3 (15%)	2 (25%)						
Slovakia								
Slovenia		2 (15%)	1			1		
Spain	3 (freeze)	1, 2, 3	1		2	1	1, 2	2
Sweden								
UK	1	3		2		1	1	1 (cap)

The table consists in a roughly made mapping exercise of austerity measures related to public services or social protection taken in various countries of the EU up to 2012. The numbers 1, 2 and 3 stand for the type of changes in each welfare state program and are explained in the first three lines of each column. Freezes, cuts and volume reduction in civil service/public administration have been generalized through almost the whole European Union, with the

exception of Belgium, The Netherlands, Poland, Sweden, Finland and a few more small countries, showing a general move of reduction of the weight of the state. Pension reform has been adopted also in a majority of countries, with almost all countries increasing the retirement age. Cuts in general welfare provision (social assistance, housing benefits, etc.) have been adopted in 7 countries, cuts in education and child benefits in 5 countries, and cuts in unemployment policy have been adopted mainly through reductions in benefits. The table also shows that not only Eurozone members are concerned. The UK, for example, increased pension age, imposed cuts on unemployment benefits, on higher education spending as well as caps on general welfare benefits. Generally, privatization and welfare state retrenchment involved the shrinking of the public sector and the loss of thousands of public sector jobs.[8]

Finally, it is important to note that "austerity" has also brought with it reform of social rights not directly related to fiscal balance, mainly those connected to the labour market and labour relations.

[8] Hermann, C., "Crisis, Structural Reform and the Dismantling of the European Social Model(s)", *Working Paper* nº 26/2013, *Institute for International Political Economy Berlin*, 2013, 6-7, http://www.ipe-berlin.org/fileadmin/downloads/working_paper/ipe_working_paper_26.pdf

Table 2: Changes announces and/or adopted to industrial relations/collective bargaining systems and certian aspects of labour law[9]

	Reform of industrial relations and collective bargaining systems (including decentralisation of collective bargaining)	Changes to individual/collective dismissal rules	Changes to organisation of working time legislation	Changes to rules on atypical contracts (including creation of new types of contract (+*) in particular for young people (+**)
Belgium		+	+	+**
Bulgaria	+			+**
Cyprus		+		
Czech Republic		+	+	+*
Estonia	+	+		+
Finland	+			
France	+			+**
Germany			+	+
Greece – MoU	+	+	+	+**
Hungary	+	+	+	+**
Italy	+	+		+**
Ireland – MoU	+			
Latvia		+		+
Lithuania		+	+	+
Luxembourg			+	+**
Netherlands	+			+
Poland	+		+	+*
Portugal – MoU	+	+	+	+
Romania	+	+	+	+/+**
Slovak Republic	+	+	+	+*
Slovenia			+	+*
Spain	+	+	+	+/+**
Sweden			+	+**
United Kingdom		+	+	+

Note: MoU: countries with a Memorandum of Understanding with the EU, the IMF and the ECB.
Source: ETUI research.

The preceding table shows that most countries have adopted labour law reforms following the crisis. Concerning working time, most of those reforms implied widening or allowing more overtime options and hours. They entailed also flexibilization of fixed-term and other

[9] Table taken from Clauwaert, S. and Schömann, I., "The crisis and national labour law reforms: a mapping exercise", *ETUI Working paper* 2012.04, 9, http://www.etui.org/Publications2/Working-Papers/The-crisis-and-national-labour-law-reforms-a-mapping-exercise

atypical contracts by augmenting possible duration and renewal options, and/or creating new types of contract (some protective measures are adopted, mainly linked with the implementation of Directive 2008/104 on temporary agency work). Protection against redundancy has also been reduced, by extending definitions of redundancy as well as simplifying procedures and reducing its costs for the employers. Flexibilization thus took mainly the form of promoting non-standard forms of employment and weakening job security, leaving other aspects behind,[10] except for Spain, with its far-reaching reforms towards unilateralization of modifications to contractual conditions.[11] Concerning industrial relation and collective bargaining, reforms tend towards the decentralization of collective bargaining, mainly favoring the company level and allowing deviations unfavorable to workers. Some weakening of trade union representation and action through revision of representativeness and conflict solution mechanisms is also to be noted.[12]

It seems therefore that, the concept of "austerity" in Europe goes far beyond fiscal consolidation and the aim of balanced national budgets. In the "bailout" countries, the Memorials of Understanding and the specific European instruments passed for their

[10] Hermann, C., "Crisis, Structural Reform and the Dismantling of the European Social Model(s)", *Working Paper* nº 26/2013, *Institute for International Political Economy Berlin*, 2013, 9;
[11] López, J., de le Court, A., Canalda, S., "Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", in *European Labour Law Journal*, vol. 5, nº 1, 2014, 19-43
[12] Hermann, C., "Crisis, Structural Reform and the Dismantling of the European Social Model(s)", *Working Paper* nº 26/2013, *Institute for International Political Economy Berlin*, 2013, 11-12;

implementations were not only concerned by cuts in expenses and increases in taxes so as to lower the borrowing needs of the rescued countries, but imposed social rights reform without relation to fiscal consolidation, except through a tenuous link they might have on the enhancement of competitiveness. But the same reasoning can be applied to countries not formally bound by "international austerity instruments" other than general obligations of deficit reduction under the EMU. In Spain, for example, the 2010 and 2012 labour market reform seem to have been passed not only as a means to enhance competitiveness through lowering wages, but also as a means to "please the markets" and, as such, help avert a bailout due to soaring interest rates on state bonds.

There is also a general trend towards passing those different measures following procedures lacking respect for democratic and participatory foundations (by-passing social partners, use of emergency legislation, Memorials of Understanding,…),[13] adding to the problems of loss of democratic legitimacy of the countries (mainly in Southern Europe) having implemented the most important packages of austerity measures.[14]

As already stated here above, the measures of fiscal consolidation and internal devaluation, most of them implying restrictions on social rights and their effectiveness, have had counterproductive

[13] For a more detailed overview, see Clauwaert, S. and Schömann, I., "The crisis and national labour law reforms: a mapping exercise", *ETUI Working paper* 2012.04, 8-15

[14] Armingeon, K. and Bacarro, L., "Political Economy of he Sovereign Debt Crisis: The Limits of Internal Devaluation", *Industrial Law Journal*, vol. 41, nº 3, 2012, 268

effects, by worsening the liquidity problems of those countries rather than alleviating them.[15] Even the IMF recognized in 2012 that the implemented policy of fiscal consolidation has had unintended consequences on growth and employment,[16] joining other institutions and analysts in their critics of fiscal consolidation, labour market deregulation and the combination of both.[17]

According to the European Commission's EU Employment and Social Situation (Quarterly Review) of March 2014, unemployment has reached unprecedented levels in the EU (10,9% in september 2013 and 10,8% in january 2014, and 12% in the Euro-area), affecting above all youth (24%) and low-skilled workers (19%). Long-term unemployment (more than one year) has reached 5% of the active population and 47% of total unemployment and its share of total unemployment is increasing, while unemployment stabilizes between 2013 and 2014 (but does not decrease), which points

[15] Armingeon, K. and Bacarro, L., "Political Economy of he Sovereign Debt Crisis: The Limits of Internal Devaluation", *Industrial Law Journal*, vol. 41, nº 3, 2012, 254-275

[16] IMF, *Fiscal Monitor. Balancing Fiscal Policy Risks*, https://www.imf.org/external/pubs/ft/fm/2012/01/fmindex.htm

[17] ILO, *World of Work Report 2012*, stating that austerity has adversely affected government budgets, and that, in the face of a recession and that "labour market deregulation does not boost growth and employment in the short term – the key time horizon in a crisis situation" but may lead to more redundancies without supporting job creation; Hunko, A., *Austerity measures – a danger for democracy and social rights – Report of 7 June 2012 to the Parliamentary Assembly of the Council of Europe*, http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18745&Language=EN; Armingeon, K. and Bacarro, L., "Political Economy of he Sovereign Debt Crisis: The Limits of Internal Devaluation", *Industrial Law Journal*, vol. 41, nº 3, 2012, 254-275; Capaldo, J., and Izurieta, A., "The imprudence of labour market flexibilization in an austere world", *International Labour Review*, vol. 152, nº 1, 1-26; Wood, R., "Eurozone Macroeconomic Framework: Reducing Internal and External Imbalances.", *MPRA paper* 53569, 2014, http://mpra.ub.uni-muenchen.de/53569/

towards growing labour market detachment of unemployment persons. Moreover, very long term unemployment (more than 2 years) has reached around 3% of the total labour force, more than half the share of long-term unemployment. A closer look at the countries worst affected by the crisis (and austerity policies) reveal enormous disproportions. Spain has an unemployment rate of around 26% with 54,6% youth unemployment and 13% long-term unemployment, the latter having increased. Greece reaches rates of 27%, 59% and 18,5% (increasing) respectively; Portugal 17%, 34,7% and 9% (increasing); Italy 13,5%, 42,4% and 6,5% (increasing). Underemployment (persons unvoluntarily working part-time), as well as potential additional labour force (those seeking work but are not available and those who are available but not seeking work) has also increased, again in the countries worst affected by the crisis, labour market deregulation and austerity measures. Moreover, where there was improvement in employment rates, it was mainly due to recourse to fixed-term and part-time work, with permanent, full-time work in decline.

According to the same study, the household's income and financial situation at EU wide level has also decreased during the crisis, and while up to 2009, the increase in social benefits partly compensated the market income losses, up to 2013, the stabilization impact of tax-benefit systems weakened, reflecting their decrease due to austerity measures. While household incomes stabilized between 2013 and 2014, it continued to decline in southern countries like Spain and Greece. On the other hand, financial distress (i.e. the need to draw on savings or run into debt) is still increasing, and has

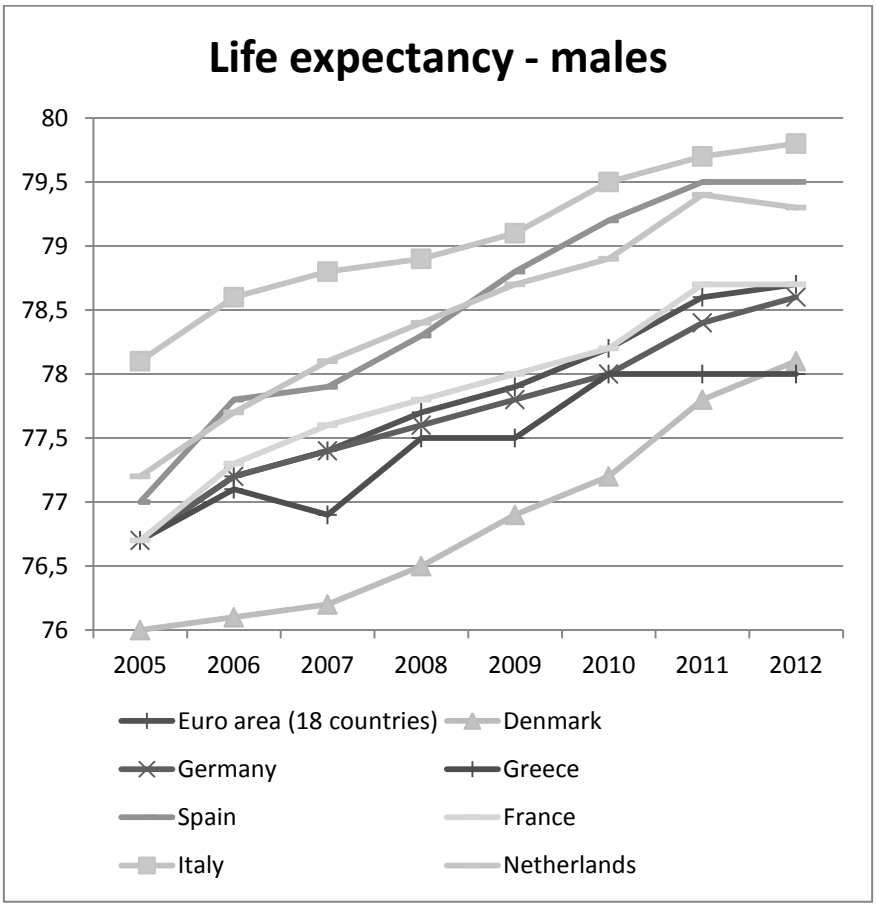
soared except for in the upper quartile households, even in countries whose labour markets have shown better resilience to the crisis. Risk of poverty has risen in a great number of countries, while some even show a drop in the at-risk-of-poverty threshold, which reflects a general deterioration of living conditions, due to the combination of rising unemployment and decreasing stabilizing effect of social protection. Again, bailed-out countries, as well as Italy and Spain, all show this combined trend of increasing risk of poverty and lowering (or stagnating) poverty threshold. Moreover, from 2010, several material deprivation increased significantly across Europe, with the most important rises in, amongst others, Greece, Ireland, Italy, Hungary, Spain and the UK, with the biggest changes affecting the elderly.

Finally, another aspect which generally does not receive much attention, are the effects of the crisis and austerity in matters of health. While several years will be needed to allow us to observe them with more precision, some disturbing developments are already present, mostly in southern European countries, but also in core European countries like Germany. As such, suicide rates have soared everywhere, which was anticipated by specialists, but other consequences were not. The incidence of mental disorders, as well as HIV-cases have been observed to be increasing in Spain and Greece.[18]

[18] Karanikolos, M., Mloadovsky, P., Cylus, J., Thomson, S., Basu, S., Stuckler, D., Mackenbach, J., McKee, M. "Financial crisis, austerity, and heatlh in Europe*", The Lancet*, Vol. 381, nº 9874, 13–19 April 2013, 1323–1133

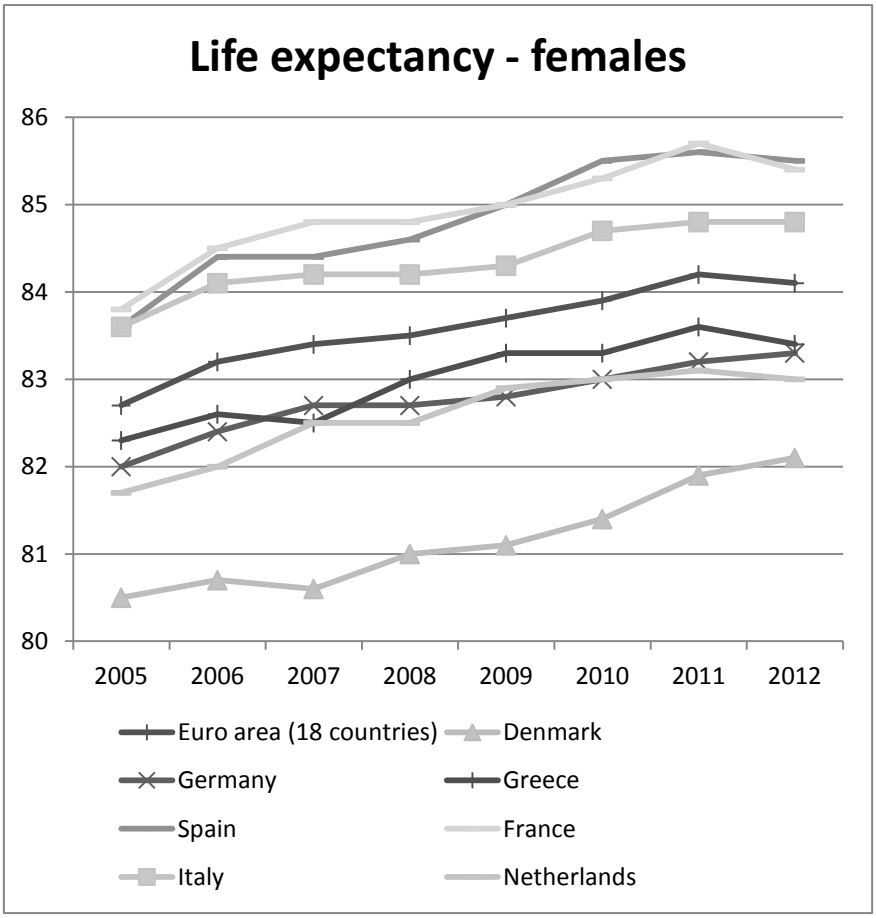
A brief look at life expectancy in Euro countries confirms the effects of the crisis (and austerity) on health of individuals, with growth in life expectancy starting to stagnate, and even decrease in some countries, from 2010. Again, women seem to be worse affected, with a general decrease of life expectancy in the Euro area.

Graph 1: Evolution of life expectancy in the EU - males



Source: own elaboration from Eurostat online database, 2013

Graph 2: Evolution of life expectancy in the EU - females



Source: own elaboration form Eurostat online databes 2014

At the light of all what has been described, it is thus clear that a financial crisis provoked by a lack of risk controlling mechanism and the economic crisis that followed from it, created an even more profound crisis in Europe, due on the one hand to the lack of economic integration within the Eurozone, and on the other hand to the counterproductive effects of austerity as a response. But displacing the focus from the economy towards society as a whole,

it can be said that the crisis and the design of economic governance (or the lack of it) in the EU, as well as the neoliberal orientation of its institutions (more structurally in the case of the ECB and politically in the case of other institutions or most member states) involved a clear and generalized erosion of social rights, whether they impose positive contribution obligations on states (social security and social welfare rights) or not (labour law).

But those policies have not been efficient, or even effective.

As now even the IMF recognizes its gross underestimation of the negative effects of austerity programs, joining an ever growing number of critics of those measures, it seems that the institutions of the European Union and the European Monetary Union, as well as Member States, as showed by the recent turn towards cuts in social spending taken in France, are still blinded by their faith in their narrow, monetary, market-driven and neoliberal approach of the crisis and its solutions.

I.2. The current crisis as crisis of democratic capitalism

Analysing the evolution of Democratic Capitalism, of which the Welfare State could be seen to be a product,[19] Wolfgang Streeck describes the evolution of the developed democratic states of the Western world towards their conversion after the financial crisis of 2008 into "debt-collecting agencies on behalf of a global oligarchy of investors", the international financial industry, in whose hands global political power has ended.[20]

This happened through a sequence of democratic-capitalist crises since the 1970s, which all ended into a new settlement between the economic forces of capitalism and the democracies trying to accommodate the social demands of their citizens. Inflation, due to an accommodating monetary policy, meant to meet redistributive wage settlements and full employment, while growth rates were declining, and which ultimately provoked increase in unemployment due to the reactions of increasingly suspicious capital owners, started being controlled in the 1980s, in the wake of the newborn neoliberal agenda. However, because inflation was no longer available to close the gap between conflicting demands of

[19] Democratic capitalism being "a political economy ruled by two conflicting principles, or regimes, of resource allocation: one operating according to marginal productivity, or what is revealed as merit by a `free play of market forces', and the other based on social need or entitlement, as certified by the collective choices of democratic politics". This definition integrated what Carl Offe has identified as the condradiction of Welfare State Capitalism. See Chapter 2.

[20] Streeck, W., "The Crises of Democratic Capitalism", *New Left Review*, nº 71, 2011, 5-29

workers and capital (or, "the markets"), governments started to run public debt to introduce resources within the system.

Globalization, or rather the advance of a more competitive, integrated economy has brought also the need (or the perception) that the redistribution functions which larger firms were asked to perform by unions and governments in the Fordist era (mainly, employing less productive workers in overpaid marginal and secure employment) be externalized to society (or rather, social protection systems) for them to survive in a more competitive environment, ending redistribution at the stage of production and turning responsibility for economic equality and social cohesion to public policy.[21]

For the public deficit spending not to crowd out private investment, and thus keeping interest rates low, financial markets were deregulated. To limit demands from workers, labour markets underwent the same treatment, and trade unions were controlled. Increasing public debt would however ultimately end in pressures from creditors, worried about getting lended money back, and resulted in the financial markets asking for consolidation of public budgets, fiscal discipline and economic revitalization through more deregulation. The consequences of those new policies starting to be adopted in the 1990s were cuts in spending in social policy and the

[21] Streeck, W., "Competitive Solidarity: Rethinking the European social Model", in Hinrichs, K., Kitschelt, H. and Wiesenthal, H. (eds.) *Kontingenz und Krise. Institutionenpolitik in kapitalistischen und postsozialistischen Gesellschaften,* Campus, Frankfurt, 2000, 246

end of wage increases, at least at the lower end of the *flexibilized* labour market.

This coincides with the period of Welfare State changes Pierson has described as the era of permanent austerity, with increasing income inequality and poverty rates.

But further financial liberalization, and the appearance of cheap mortgages and other forms of consumer debt it permitted (coinciding, within the European context, with the compensation of the competitive imbalances within the Eurozone by credit from the more "advanced" core to the periphery), started "compensating" the need to address the demands of lower and middle classes, not anymore through the State, but through the markets. As such, this can be described as a move of re-commodification, in that welfare starts to be provided by and subject to the market instead of by other institutions.

Individual debt replaced public debt, mitigating workers´ decreasing income and rising inequality, with the consequences we already know once the financial crisis started with the collapse "of the international credit pyramid on which the prosperity of the late 1990s and early 2000s had rested". The democratic states undid the results of their financial consolidation over those years to assume the huge private debt and avoid the collapse of the financial markets. This led to a quick restoring of the prosperity of those financial markets. But the latter then started again to ask for fiscal consolidation, which turned, above all in Europe, to the adoption of austerity and new deregulation of labour markets.

The 2008 crisis has thus shown the danger of forgetting the importance of old risks and the class nature of inequalities which constitute the central issue behind them, and that the move towards labour flexibility, pressure on wages and less generous Social Security systems has been inadequate to address effectively the deeper issue of economic uncertainty hidden behind the concept of insecurity.[22] In absence of adequate coverage of the old risks (retirement, sickness, unemployment,...) and reduced capacity to earn a living out of the labour market, citizens have had to face those risks using their accumulated wealth and/or their knowledge. The deregulation of finance entailed by neoliberal policies created a period of debt-fuelled consumption which created the belief that people who formerly had no assets other than those needed for daily life or assets of which they could not mobilize without major negative consequence for their standard of living (mainly the working class) would be able to face those risks more easily. But rising inequality caused by dwindling solidarity over the last 30 years lies at the root of the 2008 crisis.[23] This shows that class, expressed in terms of level of wealth holding, remains important in determining if people are able to face old risks. Passing the responsibility of employment (or risks) over from the State and the employer to the individual downplays the importance of class issues in the possibility to face those risks. Moreover, with the 2008 crisis

[22] Crouch, C., "Tackling workers' insecurity in Europe: how adequate is flexicurity?", *paper presented at the 2012 Conference on Resocializing Europe*, 18-19 May 2012, UCL, London

[23] Herman, C. "Crisis, Structural Reform and the Dismantling of the European Social Model(s)", *Institute for International Political Economy Berlin Working Paper* 26/2013; Stockhammer, E, "The Euro Crisis, European neoliberalism and the need for a European Welfare State*", Soundings*, nº 50, 2012, 121-130

it seems that the focus on flexibilization of the labour market and the need for states to reduce their social budgets (and thus taxation or debt) pushed to the background the vital question of income security.[24]

Within the framework of that context, the next Chapter takes a closer look at the paradigmatical changes in the principles commanding the regulation of European Welfare States and introduces the research questions of this work, which are related to those changes.

[24] Laulom, S., Mazuyer, E., Teissier, C, Triomphe, C.E., Vielle, P., "How has the crisis affected social legislation in Europe", *ETUI Policy Brief,* (2)2012, 5. http://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/How-has-the-crisis-affected-social-legislation-in-Europe

Chapter II. Welfare State Change in Europe: towards activation and *flexicurity* as paradigms of social policies

II.1. The context: Globalization, new risks, inequality and poverty

The timid appearance of a substantive social policy in the European Community after the Treaty of Amsterdam happened against a backdrop of general academic and political discussion about the crisis of the post-war welfare state and the need to reform it. Starting in earnest with the first oil shock, changing economic conditions, fiscal strain, demographic pressure, political challenges, enhanced mobility of capital, weakened labour markets and weakened memories of hardship of part of the labour class produced shifts in the political balance, reflected in the resurgence of conservative parties and a rightward drift of centre-left parties.[25] After a period of budgetary, programmatic and personnel growth in the 60s and the 70s, the expansion of the Welfare State was put to a

[25] Pierson, P., *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment*, Cambridge, 1994, 179-180

halt in the 80s, accompanied by cuts in programs and rising unemployment.[26]

The eighties and nineties saw thus a change in discourse, against the backdrop of factual pressures on the post-war European welfare states, generally regrouped under the terms of transition towards Post-Industrialism.[27]

One of the most important changes, of an economical level, the rise of the share of the service sector, with limited capacity to productivity improvement, lead to slower growth, apart from facing Welfare States with the "trilemma of the service economy", consisting in solving or balancing the contradictions between wage equality, employment growth and budgetary constraint.[28] This happened also in a general context of change of the nature of employment and decline of the standard contract as the base of industrial relations, social, fiscal and labour market policy and pillar of the post-war economic system and western Welfare State.[29] Globalization, technology and new management strategies created

[26] Shwartz, H., "Round up the Usual Suspects!: Globalization, Domestic Politics, and Welfare State Change", in Pierson, P. (ed.), *The New Politics of the Welfare State*, Oxford, 2001, 17.

[27] Pierson, P., "Post-Industrial Pressures on the Mature Welfare States", in Pierson, P. (ed.), *The New Politics of the Welfare State*, Oxford, 2001, 80-104; Esping-Andersen, G., *Social Foundations of Postindustrial Economies*, Oxford, 1999

[28] Pierson, P., "Post-Industrial Pressures on the Mature Welfare States", in Pierson, P. (ed.), *The New Politics of the Welfare State*, Oxford, 2001, 83-87; Iversen, T. and Wren., A., "Equality, Employment and Budgetary Restraint: The Trilemma of the Service Economy", 50 (4), *World Politics*, 1998, 507-546

[29] Stone, K.V.W. and Arthurs, H., "Chapter 1: The Transformation of Employment Regimes: A Worldwide Challenge", in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation. Beyond the standard contract of employment.* Russel Sage Foundation. New York, 2013, 2

pressure for more flexible work arrangements as well as demand for more skilled workers.

Another, cultural or societal change is the transformation of household structures materializing in the inflow of women in the labour market, lower fertility rates, and the rise of single-parent households, in the context of welfare states mainly constructed on a "male-breadwinner" structure. This lead to the need to face social needs (mainly care) traditionally taken over by women out of existing formal categories (like employment contracts), but which increasingly needed mobilization of resources on part of the state, new risks appearing within employment (maternity leave, etc.), and increasing risks of poverty or social exclusion due to the shift from numerous multi-generational households (with a greater potential to share risks) to smaller households.[30]

Population ageing is also commonly presented as a new risk which the Welfare state faces, triggering discussions about the future of retirement pensions as well as a growing need for health care expenditure, despite its slow-moving and undramatic character.[31]

All those changes provoked, apart from fiscal pressures on the traditional welfare states, the appearance of what the literature calls "new social risks", which makes that more vulnerable groups are likely to experience new needs. Amongst them could be listed: balancing paid work and care responsibilities, lacking necessary or

[30] Pierson, P., "Post-Industrial Pressures on the Mature Welfare States", in Pierson, P. (ed.), *The New Politics of the Welfare State*, Oxford, 2001, 94-99
[31] Pierson, P., "Post-Industrial Pressures on the Mature Welfare States", in Pierson, P. (ed.), *The New Politics of the Welfare State*, Oxford, 2001, 93-94

up-to-date skills for adequate and secure jobs, access to private provision supplying insecure or unsatisfactory pensions and social services.[32]

From a political point of view, after primarily revolving around macro-economic management and wage bargaining to counter inflation and rising unemployment in the 1970s, the attention moved towards issues of economic competitiveness, with attention on supply-side measures in employment through labour market deregulation and starting mainly in the 1990s measures of cost-containment in social spending and institutional re-design, in line with the idea of "social protection as a productive factor".[33] Within such a framework, it is contended that reform of protection against unemployment takes a central place. Such adjustment took place in a context where increasing capital mobility and high-volume currency speculation on exchange rates (and, since 2008, on government bonds) have reduced the action margin of governments concerning taxes and subsidies. This problem is even more acute within the EU context, due to its "open market" policies and the constraints on borrowing with the 1997 growth and stability pact, reinforced since 2008. This has weakened the capacity of government to manage key aspects of their economy, reducing possibilities to demand-side approaches to unemployment and inaugurating an era of "permanent austerity".[34] Continuing that line

[32] Taylor-Gooby, P. , "New Risks and Social Change", in Taylor-Gooby, P. (ed.) *New Risks, New Welfare*, OUP, Oxford, 2004, 5
[33] *ibidem*, 6
[34] Pierson, P., *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment*, Cambridge, 1994

of thought, could it be that, with the enshrinement of the "golden rule" (zero deficit being the permanent goal of public budgets) in Treaties and Constitutions, we are assisting to the *coup de grace* to Keynesian approaches towards the economy, ironically enough at a moment where more and more economists are rediscovering the analytical and normative virtues of Keynesian thought?

For example, recent research shows that no robust correlation can be found between level of social expenditure, seen as a whole, and change in debt between 1995 and 2011. A closer, disaggregated look shows that pensions have a higher correlation with debt, while unemployment protection expenditures are significantly less correlated, while impacting positively on primary balance, which puts them on the forefront as an optimal stabilization system in case of economic downturn.[35]

This era of permanent austerity found its political roots and incipient implementation in the UK and US context in the 80s, where the Thatcher and Reagan governments are generally presented as materializing the conservative critic of the Welfare State with a politic of retrenchment. According to Pearson, in both cases the Welfare State proved more resilient than it seemed.[36] However, further reform in the 1990s and the 2000s shows that a permanent erosion started to appear in a second stage, all over Europe.

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[35] Vyprachticka, T. and Garnero, A. "Chapter 3. Social protection systems confronting the crisis" in European Commission, *Employment and Social Developments in Europe 2012*, 2013, 208-210;

[36] Pierson, P., *Dismantling the Welfare State? Reagan, Thatcher and the Politics of Retrenchment*, Cambridge, 1994

Taken from a global European perspective, the result of those fiscal pressures, combined with the changed discourse on welfare state consisted in governments constraining spending by narrowing eligibility conditions, and introducing market-based systems, above all in health services. Concerning social insurance systems (pensions, contributory unemployment benefits,...), benefit generosity has been curtailed and increasingly targeted at lower income groups,[37] a move that is well illustrated by the shortening of maximum period of unemployment insurance benefits and their replacement after that period by general or specific means-tested social assistance regimes.[38]

As a result, the 1990s saw the reduction of average benefits per person of pensionable age by 2 percent between 1994 and 1999 in the EU-15, and unemployment compensation per capita falling by one per cent per year between 1990 and 1994 and 2,5 per cent per year between 1994 and 1999.[39] Between 2001 and 2008, total expenditure (on constant prices) on social protection benefits increased by 3,3% for the EU-15, 4,7% for housing and social exclusion, 3,9% for family/child care, 2,4% for disability, 3,9% in

[37] Van Gerven, M., "Converging Trends of Social Policy in Europe: Social Security Benefit Reform in the UK, the Netherlands and Finland", *European Journal of Social Security*, vol. 10, nº 3, 2008, 207-226

[38] Palier, B. And Martin, C., „From a `Frozen Landscape´to Structural Reforms: The Sequential Transofrmation of Bismarckian Welfare State Systems" in *Social Policy & Administration*, vol. 41, nº 6, 2007,535-554; Hemerijck, A. And Eichhorst, W., „Whatever happened to the Bismarckian welfare state? From labor shedding to employment-friendly reforms", IZA discussion paper nº 4085, 2009

[39] Taylor-Gooby, P. , "New Risks and Social Change", in Taylor-Gooby, P. (ed.) *New Risks, New Welfare*, Oxford, 2004, 7; Myles, J. and Pierson, P., "The Comparative Political Economy of Pension Reform", in Pierson, P. (ed.), *The New Politics of the Welfare State*, Oxford, 2001, 312

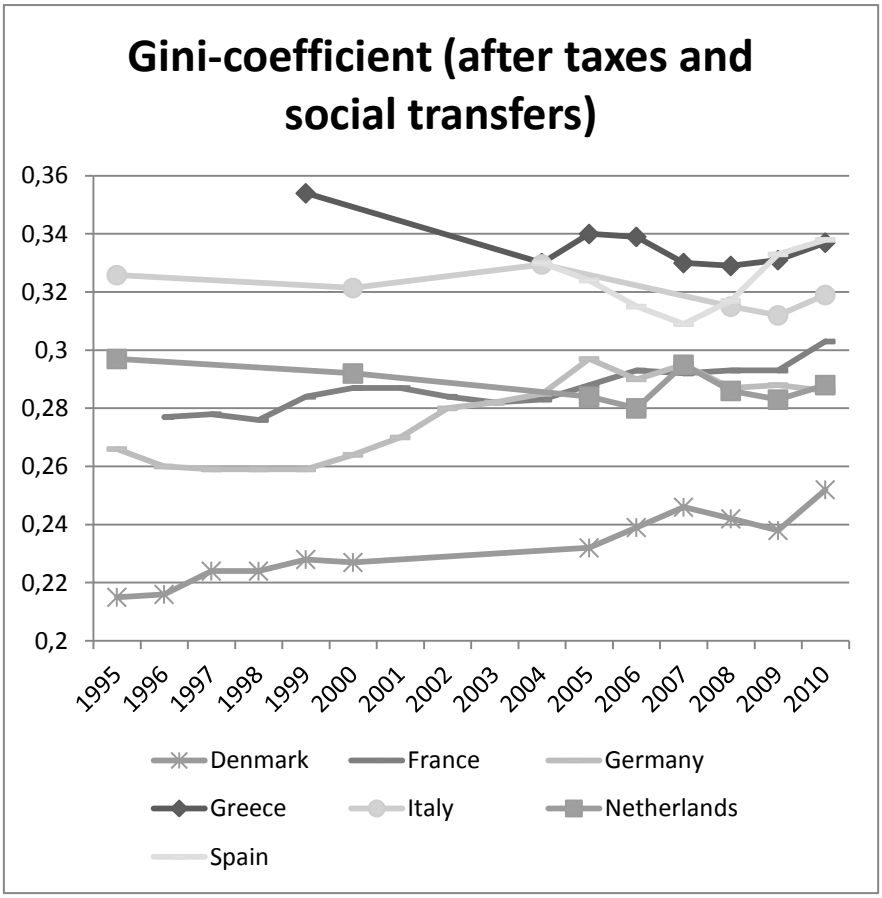
health care, 3,2% in old age pensions and 1,24% on unemployment (-0.4 for the EU27).[40] However, this has to be contrasted with changes in GNP in real prices of 15,3 % for the period 2000-2008 for the EU-15[41]. Social protection as percentage of GNP rose from 25,4% to 26,4% for EU-15 in the same period (mainly due to rise in costs of old age and health care).

Even if research points towards the several difficulties to measure the impact of different forms of Welfare States and Welfare State institutions, it seems that the changes both in social protection systems as in labour market regulation in Europe, and above all in the Eurozone, are generally related to higher unemployment, growing inequality, poverty and social exclusion, above all in the first decade of the XXIst century and certainly if the years of crisis are taken into account.

[40] Data taken from Puglia, A. "Population and social conditions" *Statistics in Focus*, 17/2011, EUROSTAT, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-017/EN/KS-SF-11-017-EN.PDF (last visit 11/3/2013

[41] Source: EURSOTAT online databases 2013

Graph 3: Evolution of inequality in EU countries

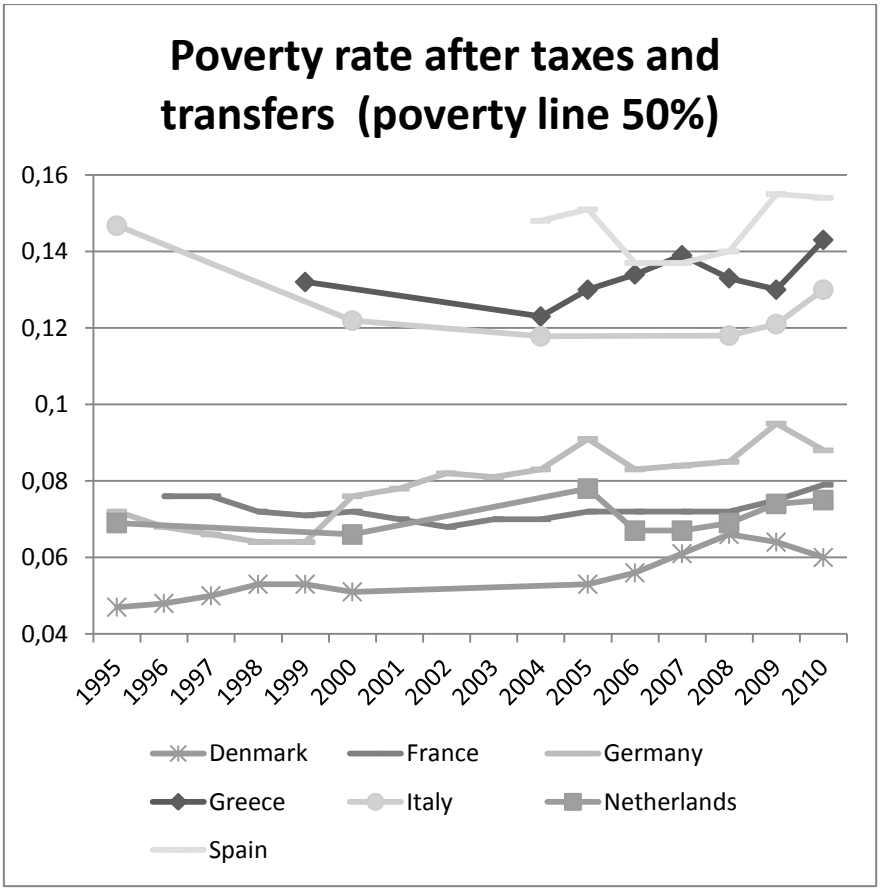


Source: own elaboration from OCDE online database 2014

In terms of inequality, the previous graph shows that it has raised more or less constantly in Germany, Denmark and France, considered as "robust" Welfare States, and shows an important increase with the crisis in countries were inequality had been reduced, or presented a more irregular pattern, like in the Netherlands.

According to the OCDE, even if the major part of the growing inequality was due to the inequality in distribution of market incomes (wages, income from self-employment, capital income and returns from savings), cash transfers (i.e. welfare state benefits), have become less effective in reducing the levels of market income inequality, in a great part of the European countries, above all during the late 1990s and early 2000s.

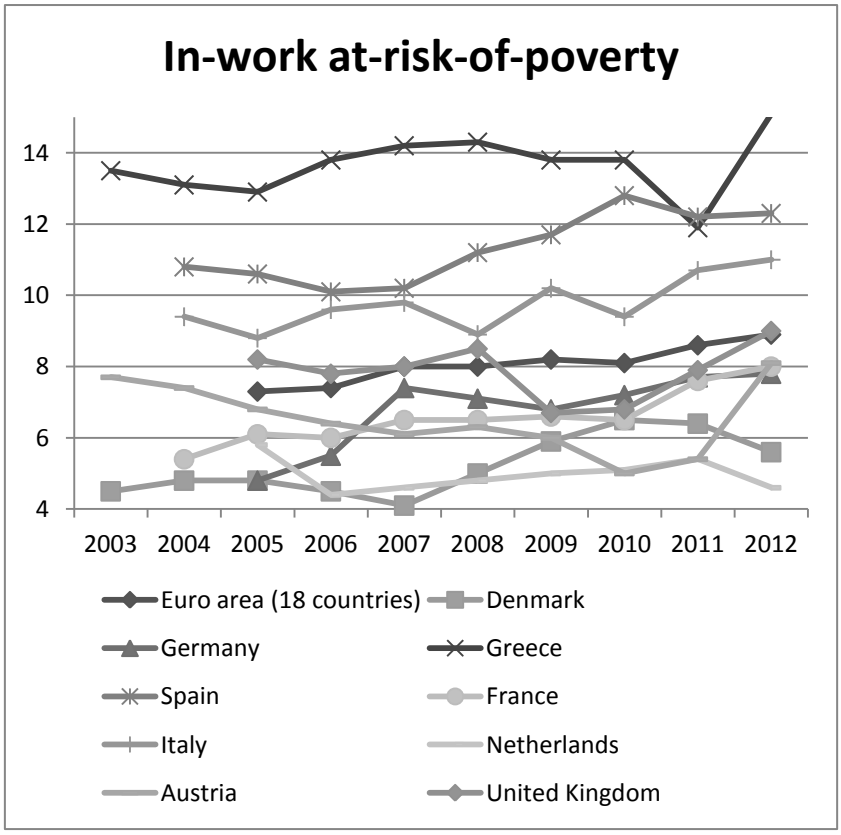
Graph 4: Evolution of the poverty rate in EU countries



Source: own elaboration from OECD online database 2014 (percentage of total population under poverty line)

The previous graph (which does not take into account the austerity years) shows that it seems also that poverty has not really decreased in all those years of Welfare State change, in most of the countries analysed. Morevoer, if one takes a look at the at-risk-of-poverty level provided by EUROSTAT, the perspective is not better.

Graph 4: Evolution of the in-work-at-poverty rate in the Eurozone



Source: own elaboration from EUROSTAT online database (SILC) 2014[42]

[42] It is important to note that, at-risk-of-poverty indicator being relative to overall wages, a depression in the latter, as happening in countries like Greece and Spain, decreases its capacity to measure poverty.

In-work poverty is also another phenomenon which has grown over those years of welfare state change, however not in all European countries. On the other hand, with the crisis the number of working poor increased in almost all European countries.

In-work poverty does not seem to be only related to the general increase in income inequality,[43] but also with institutional features related to the labour market (mainly atypical work and collective bargaining decentralization) as well as welfare characteristics, like lower unemployment replacement rates and family cash benefits, the latter because of the important of household structure on working poverty.[44]

[43] Gutiérrez Palacios, R., Guillén Rodríguez, A.M. and Peña-Casas R., "Earnings inequality and in-work-poverty", REC WP 07/2009, *Working Papers on the Reconciliation of Work and Welfare in Europe*, 2009, http://www.socialpolicy.ed.ac.uk/__data/assets/pdf_file/0007/30112/REC-WP_0709_Gutierrez_Guillen_Pena-Casas.pdf (last visit: 21/04/2014)

[44] Lohmann,H., "Welfare States, Labour Market Institutions and the Working Poor: A comparative analysis of 20 European Countries", *European Sociological Review*, vol. 25, nº 4, 2009, 489-504;

II.2. *Flexicurity* as paradigm for European regulation of the labour market and protection against unemployment

When analysing welfare state policies, one has to look further than private or state-driven social protection and transfer programs, but also have a wider view from the point of view of social rights in general, including labour law taken in a stricter sense. The "service sector trilemma" theory is a good illustration of that necessity, and in this context, the decline of the standard employment contract should be viewed not only as a consequence of changes in the nature of work, but also as a consequence of regulatory intervention, and in itself a cause of welfare state change, given the centrality of the standard contract.[45] From that perspective, social rights proved not so resilient.

In Europe, the nineties presented a general trend of reduction of social rights related to labour market and employment contracts, by easing employment protection legislation, but especially by liberalizing atypical contracts and decentralizing collective bargaining (flexibilizing thus working time and wages). Radical change operated mostly in the UK (and started in the 80s), while the other European countries introduced mainly flexibility at the

[45] Stone, K.V.W. and Arthurs, H., "Chapter 1: The Transformation of Employment Regimes: A Worldwide Challenge", in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation. Beyond the standard contract of employment.* Russel Sage Foundation. New York, 2013, 1-19;

margins.[46] The following table[47] shows an overview of reforms reducing social rights which have been adopted during the 1990s (including some aspects of unemployment protection).

Table 3: reforms of labour law and protection against unemployment in the 1990s

	dismissals	atypical contracts	working time/part-time	change in bargaining level; 3: statal, 2: industry level, 1: company level	minimum wage	unemployment benefits (lower duration/replacement rate)	unemployment (stronger availability)
Denmark			x	3 to 2		x	x
Finland		x	x	3 to 2		x	x
Sweden	x	x		3 to 2		x	x
Austria			x				
Belgium		x			x		
France		x	x		increase	x	x
Germany	x	x	x				x
Netherlands	x	x	x		x	x	x
Greece							
Italy	x	x	x	2 to 1/3			
Portugal			x	2 to 1/3	x		
Spain	x	x	x	2/3 to 2			
Ireland							x
UK			x	2 to 1			x

[46] Samek Lodovici, M., "The Dynamics of Labour Market Reform in European Countries!, in Esping-Andersen, G., *Why Deregulate Labour Markets*, Oxford, 2000, 45

[47] Inspired from Samek Lodovici, M., "The Dynamics of Labour Market Reform in European Countries", in Esping-Andersen, G., *Why Deregulate Labour Markets*, Oxford, 2000

By the end of the 90s, following the introduction of the fundaments of European social policy in the Amsterdam Treaty, the liberalization trend started being supported by the European Employment Strategy, launched in 1997.

In the first decade of the 21st century, this strategy received a new impulse in the context of the Lisbon agenda, whose reform proposal for the labour market and unemployment protection started revolving around the now well-known concept of *flexicurity,* [48] at the centre of the Employment Strategy, while the greatest part of the remainder of social protection was brought under the umbrella of social inclusion.

From the perspective of the European institutions it was stated that "providing the right balance between flexibility and security will help support the competitiveness of firms, increase quality and productivity at work and facilitate the adaptation of firms and workers to economic change".[49]

Flexicurity as a policy tool and in the sense the Commission has put forward in its 2007 Communication,[50] has only gradually evolved to the central position it occupies in the European Employment Policy. But flexibilization of the labour market, as well as "*flexicure*" policies in Denmark and The Netherlands took form in the 1990s

[48] Saskia Klosse, "Flexibility and Security: A Feasible Combination?", *European Journal for Social Security*, Vol. 5, 2003, 191-213, stating that it has become a key target of the European Employment Strategy and argues that it constitutes a major challenge to the European Social Model

[49] Council Decision of 22 July 2003 (2003/578/EC) on guidelines for the employment policies of the Member States

[50] Communication of 27.6.2007, COM(2007) 359 final

and at the beginning of the XXIst century. In this sense *flexicurity* is a concept that appeared after European Member States started to deregulate labour contracts, and at the most could be said to potentially accompany deregulation moves well advanced into the first decade of the XXIst century.

The first guidelines related to protection of workers in and out of work do not refer to *flexicurity* as a concept. Under the heading "Encouraging adaptability of businesses and their employees" they aim to promote modernization of work organization (measures of internal flexibility, like retraining and new working time management) and forms of work (incorporating in the law more adaptable types of contracts). Under the heading "Improving Employability" they aim at tackling youth and long-term unemployment on the one hand, mainly through offering the subjects a new start through employability measures like a new job, work practice or training, and on the other, by reviewing, adapt and refocus benefit and tax systems "to provide incentives to seek and take up work and measures to enhance employability".

On the one hand, it cannot be said that employment protection reduction is not advocated further than flexibilizing working time arrangements and permitting new flexible contractual forms (by which is meant above all temporary contracts), however balanced with adequate security and higher occupational status.[51] Other forms of employment protection are not really aimed at.

[51] which theoretically runs against the fact that mostly low-skilled, low-paid workers work under those types of contracts.

On the other hand, it is difficult to deny that behind the euphemisms represented by the need to "refocus" social security benefit systems (mainly unemployment protection), the idea of seeing them as an obstacle to labour market entry, and thus their reform under the idea of *flexicurity*, is already at the centre of the EU vision. At the same time, the guidelines present clear goals concerning the number of persons that should benefit from active labour market policies, above all training, and appeal is made to the adaptation of public employment services towards effective prevention of unemployment and activation of unemployed and other non-active potential members of the workforce.

The next guidelines, published in 2001,[52] provide no great change concerning this pattern. They specify however more measures under the "Employability" title directed towards improving education and training systems, and developing job matching and measures to combat emerging employment bottlenecks, measures which could be viewed as "neutral" on the flexibility-security nexus.

In 2003, the guidelines were restructured.[53] Employability disappears as title, or even as a reference. A first guideline on "active and preventative measures for the unemployed and inactive" repeats in substance the guidelines of the preceding years with regards to unemployment protection systems, with references towards refocusing benefits systems disappearing, only to be

[52] Council Decision of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001.
[53] Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States.

reintegrated in a "Making work pay" guideline which links them to the suppression of unemployment, poverty and inactivity traps, in conjunction with tax systems, which also have to take into account the reduction of the working poor. In terms of employment protection, the promotion of flexible contracts stays on the agenda, but the reference towards adequate security and high occupational status is replaced by a mere "better balance between flexibility and security" and favouring career progression. One can also note a greater emphasis on training, lifelong learning and development of human capital.

The guidelines for 2005, 2006, 2007[54], integrated in a greater package of Employment Guidelines and Broad Economic Policy Guidelines, are grouped in three chapters. The chapter about "attracting and retaining more people in employment, increase labour supply and modernise social protection" systems seems to put a greater emphasis on active and preventive labour market measures (identification of needs, job search assistance, guidance and training), but keeps asking for the continual revision of incentives and disincentives resulting from the tax and benefit systems, including the management and conditionality of benefits (a specific reference which is new in the guidelines), whilst ensuring adequate level of social protection. It should also be noted that the modernization of social protection systems has to ensure their financial sustainability and be oriented towards the support of participation and better retention in employment. Specific reference

[54] Council Decision 2005/600/EC of 12 July 2005 on guidelines for the employment policies of the Member States

is also made to the economic guideline "to safeguard economic and fiscal sustainability as a basis for increased employment". In the second chapter, about improving adaptability of workers and enterprises, guideline 21 invites to promote "flexibility combined with employment security" and review "where necessary the different contractual and working time arrangements".

In conclusion, one can distinguish an evolution towards clearer insistence on conditional benefits, the conditions of which should be aimed at "avoiding" the inactivity trap, the only limit on the lowering of which is expressed through a reference to them having to be "adequate". However, the latter is a relative term, and no reference is made to the parameters to which adequacy has to be measured. In this sense some could argue that this does not amount to the need for the benefits to be "sufficient". Concerning flexibility in the labour market, above all centred on working-time arrangement and flexible contracts, this was in the beginning still linked with security, and it is striking that the reference to high occupational status, and thus quality of employment, has disappeared. Moreover, it is only with the appearance of the 2007 Communication on *flexicurity* that a clearer paradigm of security "at the service" of flexibility appeared.

It is only with the Guidelines of 2010, that explicit reference is made to the integration of the *flexicurity* principles endorsed by the European council into labour market policies, "with the view on increasing labour market participation (which, with a global EU unemployment rate of around 10% at the time, is difficult to see as a

priority), combat segmentation, inactivity, and gender inequality, whilst reducing structural unemployment". For flexibility and security to be both balanced and mutually reinforcing, what is to be implemented is: flexible and reliable contractual arrangements, active labour market policies, effective lifelong learning, policies to promote labour mobility, and adequate social security systems to secure labour market transitions, accompanied by clear rights and responsibilities for the unemployed to actively seek work.

Concerning flexibility within the labour market, the specific references constraining flexibility, like high occupational status for temporary contracts, or adequate employment security, formulated so as to be able to be considered as a "direct" form of compensation of the respective flexibility measure, disappear gradually, to be replaced by references to more general goals like tackling labour market segmentation, addressing the quality of jobs and employment conditions and combat in-work poverty. The only exception to that pattern may be that adequate social security should be ensured for those on fixed-term contracts and the self employed.

One can also note the constant weakening of reference to demand-side measures, which in the 2010 Guidelines are reduced to some well-targeted measures for vulnerable categories, or the "revision of tax-systems […] to stimulate labour demand", which reflects the departing from any Keynesian measure to attain full employment.

Finally it should be underlined that important conditions for a successful production of *flexicurity* trade-offs are labour market decentralization and a tradition of coordination, consultation and

negotiation, as well as broadened scope for collective bargaining,[55] circumstances which do not present themselves within all the Member States, or at least with a high degree of variety in intensity and institutional mix.

This all has made that the concept of *flexicurity* itself is the object of great controversy.

The concept is supposed to be best represented by the Dutch, and, above all, the Danish labour market and social protection organization, from which it finds its direct inspiration. However, its promotion would imply the presence of the special socio-legal conditions of those labour markets, which European *flexicurity* does not address. Moreover, the Danish system as an inspiration of *flexicurity* has recently started to be put into question. The link between *flexicurity* policies and good performance of the Danish and Dutch labour markets is not conclusively ascertained, next to the fact that those policies have been developed *post hoc* or unknowingly rather than in a proactive way.[56] Some authors even argue that the Danish labour market is not as fluid and "mobile" as originally presented, amongst others because of a high level of "false" job rotation.[57] Other research has shown that the good labour market performance of Nordic countries are not only due to

[55] Wilthagen, T. and Tros, F. "The Concept of "Flexicurity": A new approach to regulating employment and labour markets", *Transfer, European Review of Labour and Research*, Vol. 10, No. 2, 2004, 166-186

[56] Viebroeck, E. and Clasen, J. "Flexicurity and Welfare reform: a review", *Socio-economic Review*, nº 7, 2009, 305-331;

[57]Barbier, J.C. "Apprendre vraiment du Danemark",*Connaissance de l'Emploi*, nº 18, 2005, 1-4

flexicure policies, which moreover go much further than mere contractual flexibilization and out-of-work securization, but also importantly to high investment in human capital (education and long-life training) and research and development.[58] And finally, the recent OECD 2013 Job Outlook, containing updated and more accurate job protection indicators (one of the most influential scientific base of theories around labour market flexibility), shows clearly that the Danish indicators do not place that country in the most flexible categories, even to the contrary, leading to the conclusion that "the whole policy of *flexicurity*, as it has been promoted all these years by the European Commission, has been based on a statistical illusion".[59]

Research also points towards the exorbitant costs of implementing the Danish model in countries with higher rates of unemployment, as well as the impossibility to implement consistently a shift from job security (i.e. guarantees to remain in a concrete job position with a company) towards employment security (guarantee to have employment, generally with another employer, if the former contract is ended), given that it would be difficult to attain high employability under flexible employment and that Europe is not

[58] Lefebvre, A. and Meda, D., "Performances nordiques et flexicurité: quelles relations?", *Travail et Emploi*, nº 113, 2008, 129-138; Jochem, S., "Nordic Employment Policies – Change and Continuity Before and During the Financial Crisis", *Social Policy & Administration*, vol. 45, nº 2, 2011, 143

[59] Janssen, R., "Flexicurity: the model that never was", *Social Europe Journal*, 2013, http://www.social-europe.eu/2013/12/flexicurity-model-never/ (last visit: 6/12/2013)

well-prepared for the life-long learning which should back up employment security under a flexibilized system.[60]

Moreover, despite its generalized use and central character, it does not have a real European definition with general recognized standards.[61] The concept is ambiguous and lacks any substantial definition, let alone any legal substance. This gives way to a variety of models and interpretations,[62] making it perhaps a good analytical paradigm which could give indications for more balanced processes of labour market regulation,[63] but hardly useful as a policy tool.[64] It has been described as a simple linguistic combination of opposites which can be applied to virtually every policy mix,[65] or a mere "buzzword".[66]

Also, the disagreement of social partners on almost all key elements of the *flexicurity* debate shows that the concept did not serve to

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[60] Andranik, T., "Is Europe ready for flexicurity? Empirical evidence, critical remarks and a reform proposal", *Intereconomics*, vol. 43, nº 2, 99-111;

[61] Jaspers, T., "Flexiseguridad: ¿Es la respuesta acertada a la modernización del derecho del trabajo?" in Juan Pablo Landa Zapirain (coord..), *Estudios sobre la estrategia europea de flexiseguridad: una aproximación crítica*, Editorial Bomarzo, 2009, 73-102

[62] Keune, M. and Jepsen, M., "Not balanced and hardly new: the European Commission´s quest for flexicurity", *ETUI Working Paper* 2007.01, http://www.etui.org/Publications2/Working-Papers/Not-balanced-and-hardly-new-the-European-Commission-s-quest-for-flexicurity

[63] Jaspers, T., „Flexicurity: A contribution to the solution of the insiders-outsiders´dilemma?", in Ales, E., Jaspers, T., Lorber, P., Sachs-Durand, C., Wendeling-Schröder, U. (eds.), *Fundamental Social Rights in Europe: Challenges and Opportunities*, Intersentia, Antwerp-Oyford-Portland, 2009, 86-87

[64] Burroni, L. and Keune, M., „Flexicurity: a conceptual critique", *European Journal of Industrial Relations*, n° 17, 2011, 87

[65] Hyman, R., „Trade unions and the politics of European integration", *Economic and Industrial Democracy*, , n° 1, 2005, 9-40;

[66] Viebroeck, E. and Clasen, J. "Flexicurity and Welfare reform: a review", *Socio-economic Review*, nº 7, 2009, 325;

overcome the labour-capital divide on employment policies.[67] This might also be explained by the fact that the debate on *flexicurity* is the product of a return to pre-keynesian discourse on unemployment, where the latter is seen as a micro-economic problem, connected with individual responsibility, to be solved by the elimination of obstacles, inherited from the fordist period, to a good functioning of the labour market, rather than the more social-democratic vision of unemployment as a macro-economic problem, resulting in a collective responsibility, and thus the mobilization of macro-economic elements for its solution.[68] Despite its empty character, the concept is still laden with neoliberal ideological thought.

Taking into account what precedes, it has also to be said that it is almost impossible to find a good equilibrium between the reduction of protection of workers that entails flexibility and a sufficient level of protection of the same workers so as to ensure a decent modernization of labour markets and social protection, and there are signs that the model is not apt to protect workers in a situation of economic crisis like the one European countries are living for the moment.[69]

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[67] Burroni, L. and Keune, M., „Flexicurity: a conceptual critique“, *European Journal of Industrial Relations*, n° 17, 2011, 78-79

[68] Lavialle, C., “Les projets de " flexi-sécurité ": capitalisme " idéal " vs " capitalisme raisonnable " ?”, *Economies et Sociétés*, n°34, 2012, 1241 – 1268, http://halshs.archives-ouvertes.fr/halshs-00822201.

[69] See Jaspers, T., “Flexiseguridad: ¿Es la respuesta acertada a la modernización del derecho del trabajo?” in Juan Pablo Landa Zapirain (coord..), *Estudios sobre la estrategia europea de flexiseguridad: una aproximación crítica*, Editorial Bomarzo, 2009, 73-102

Finally, one should also take into account the possible political use of the concept, where the security part is used to sell the message of enhanced flexibilization in the interest of certain socio-political interest groups.[70]

Within this context, the interpretation of *flexicurity* pushed forward by the European Commission does not help towards optimism in this sense. It is also important to observe that this interpretation has only gradually taken the centre of the European Employment Strategy.

The vision of the Commission does not entail a compensatory move between more flexibility (less employment protection) and better protection, but the change within the security leg is more to be seen as a change in types of security rather than an improvement of security. Old types of security, in the sense of classic protection against risks, like the right to unemployment benefits, give way to a new type of security based on employability, adaptability and activation, and this provokes several elements of imbalance, the most fundamental of which being the conceptualization of security as being at the service of flexibility, or being an element itself of flexibility, instead of mitigating its negative effects.[71]

Secondly, the new security type is also a more intangible type of protection. Not only are employability, activation, active labour

[70] Tom Wilthagen and Frank Tros, "The Concept of "Flexicurity": A new approach to regulating employment and labour markets", *Transfer, European Review of Labour and Research*, Vol. 10, nº. 2, 2004, 166-186

[71] Keune, M. and Jepsen, M., "Not balanced and hardly new: the European Commission´s quest for flexicurity", *ETUI Working Paper* 2007.01;

market policies and long-life learning concepts which are intrinsically vaguer than legal institutions of employment protection and the concept of benefits. This has consequences on their implementation as an element of security, augmented by the *soft law* character of the instruments used for their implementation.[72]

But the intangibility of this new type of protection has also another important effect on the idea of protection and its model of implementation. This intangibility affects the guarantee of the security they are supposed to give, as well as the control the subjects of the protection have on that guarantee. Employment protection and unemployment benefits, to name only these, lean themselves intrinsically to be claimed by the persons to whom they are destined, and procedures to effectively claim protection are guaranteed. An amount in cash or in kind can easily be claimed from the authorities, as well as abstention for the employer to commit certain acts, or even positive action, under threat of administrative or criminal sanctions and financial compensation. But receiving an adequate and effective training, acquiring the capacities to adapt oneself, or achieving employable status are one step further than effective, claimable rights.

And the latter difficulty is amplified by the fact that it is impossible to detach the subject of this new type protection from its performance, making it difficult to ascertain the respective responsibility of the different actors of the protection. The responsibility for the other types of protection is clearly

[72] ibidem

concentrated in subjects (the state, the employer) which are different than those which are object of the protection (the worker or the unemployed).

So, the reforms of labour markets between the 1990s up to the 2008 crisis, whether under the *flexicurity* paradigm or not, involved in most of the EU countries an increase in atypical employment, as well as the share of workers in atypical employment, affecting above all women, young people (15-29) and older workers (55-65), while trends and prevalence of one form of non-standard employment above the others varies from country to country.[73]

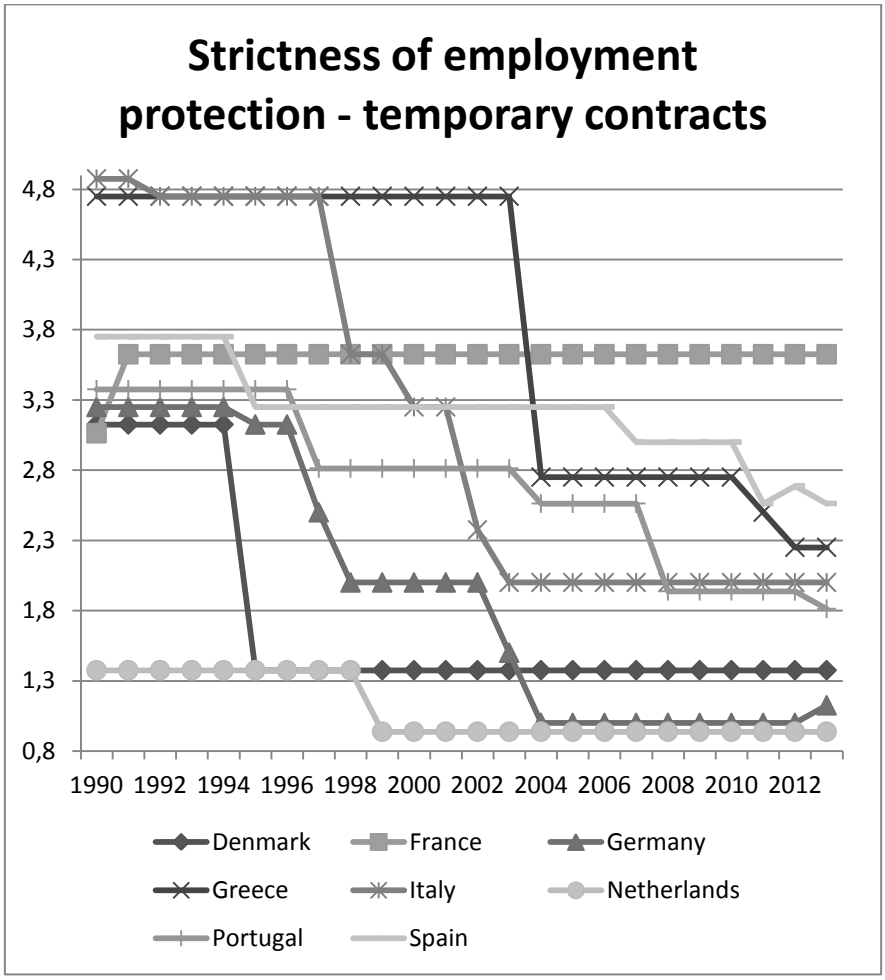
Moreover, if one takes into account the OECD Employement Protection index (far from being perfect given that labour institutions like protection against dismissal have to be seen within the wider context social and labour market regulation, and are therefore individually difficult to compare), protection of standard contracts decreased only slightly or remained untouched until the crisis. On the other hand recourse to non standard contracts was made more easy from the 90's and especially during the first decade of the 21st century (era of the Lisbon strategy). Moreover, the OECD figures show that the crisis was the occasion of the decrease in protection above all in standard contracts, reflecting the link between the measures taken during the crisis and deregulation of labour markets, above all in Southern European countries, even if their "employment protection index" was not as high as other

[73] Schulze Buschoff, K. and Protsch, P., "(A-)typical and (in-)secure? Social protection and "non-standard" forms of employment in Europe", *International Social Security Review*, vol. 61, nº 4, 2008, 54-56.

continental European countries. This is also problematic within a context of other welfare state cuts following the crisis, as one of the functions of "stricter" employment protection seems to be the provision of protection in countries with weak social transfer systems.[74] Moreover, the latter numbers, even if they have to be taken with caution, also reflect that even if there is a move towards the same direction, mainly decreasing protection, this does not involve any convergence between European countries.

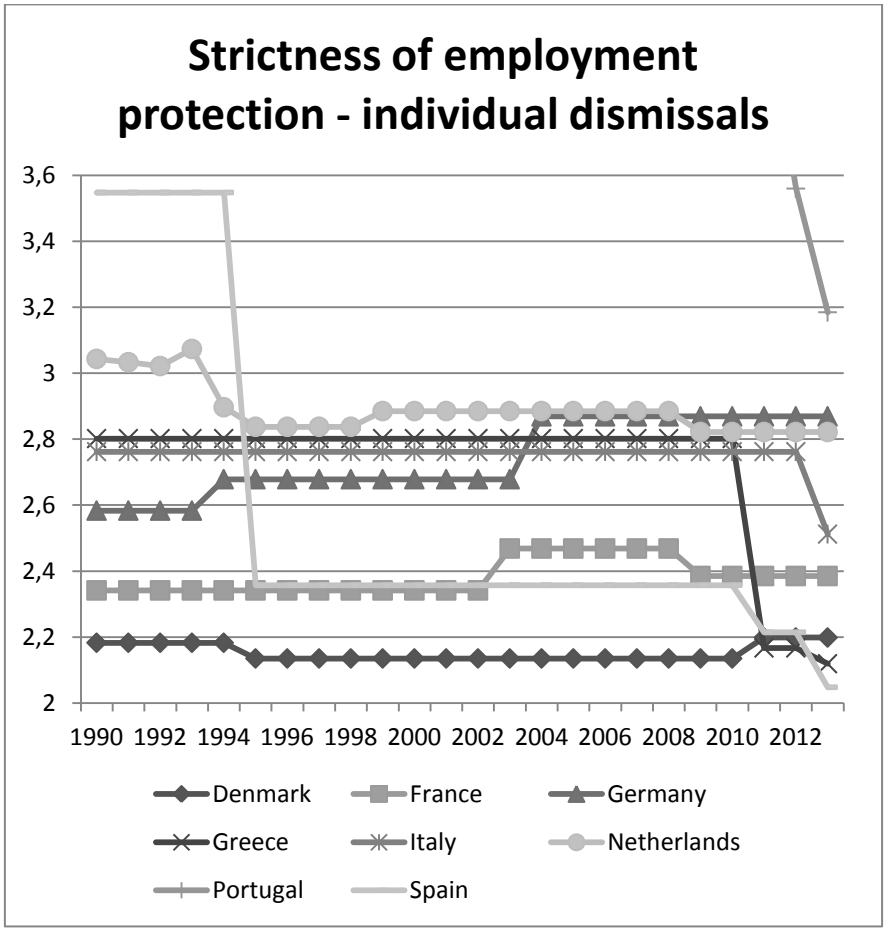
[74] Esping-Andersen, G., Social Foundations of Post-industrial Economies, OUP, Oxford, 1999; Lohmann,H., "Welfare States, Labour Market Institutions and the Working Poor: A comparative analysis of 20 European Countries", European Sociological Review, vol. 25, nº 4, 2009, 502

Graph 5: Evolution of the strictness of employment protection for temporary contracts



source: own elaboration from OECD online database, 2014

Graph 6: Evolution of strictness of protection against individual dismissals in standard contracts



source: own elaboration form OECD online database 2014

Moreover, persons in atypical forms of employment suffer specific disadvantages concerning social protection, which are also increased by the fact that they often form part of a more fragile and

irregular career pattern, with also greater risks of being unemployed.[75]

The focus put on the new social risks could be seen as one of the factors influencing the decrease of labour rights through flexibility. Even if one could not affirm without doubt its determinant character, it appears nevertheless that it was used as legitimation of the *flexicurity* agenda or the political implementation of Third Way theories.[76]

The *flexicurity* agenda is also inscribed within another aspect of the evolution of Welfare States in Europe, which is its Europeanization. *Flexicurity* and European social policy are just one aspect of the European elements influencing social rights. The Lisbon and 2020 strategies develop themselves in a broader framework which also influences the different elements of the post-war Welfare State. There is still an important debate around the imbalance between social and economic goals of the EU, despite consolidation of some social rights through legislation like the Directives on Temporary Work, Agency Work, or the recognition to social rights under the Freedom of Movement principles and legislation. The discussion around the *Viking* and *Laval* cases is a good example, and shows,

[75] Schulze Buschoff, K. and Protsch, P., "(A-)typical and (in-)secure? Social protection and "non-standard" forms of employment in Europe", *International Social Security Review*, vol. 61, nº 4, 2008, 56-58

[76] Gautié, J., "Quelle troisième voie? Repenser l'articulation entre marché du travail et protection sociale", *Document de Travail nº 30 – septembre 2003*, Centre d'études de l'emploi, 2003, http://www.cee-recherche.fr/publications/document-de-travail/quelle-troisieme-voie-repenser-larticulation-entre-marche-du-travail-et-protection-sociale

that the fundamental economic character of the Union has weakened social rights even before the 2008 crisis.

At the start of the European integration project, it was assumed that the development of the internal market would result, through the free circulation of production means, in an equalisation of social rights. Equalisation of social and labour standards was not a prerequisite for the realisation of the integration project. The Union would not need more than to adopt some measures of basic coordination or support, and the same view seems to have been adopted by the insertion of a social policy Title in the Amsterdam treaty[77]. The view was that national Welfare States could absorb the trade-offs of market integration. But it seems that, next to the pressures on their budgets exercised within the context of the EMU and the influence of European Employment and Social Policy, the European Welfare States have to endure also an attack on their national social rights forming the core of their Welfare States, mainly through negative legal integration based on enhancing competition.[78] Negative integration influenced their national labour relation systems due to the prevalence of transnational market freedoms on national fundamental social rights, but also their social protection systems, through their obligations to open-up their

[77] Ashiagbor, D., "Embedding trade liberalization in social policy: Lessons from the European Union", *Comparative Labor Law & Policy Journal, (*32) 1, 2011, 373-404

[78] Sharpf, F., „The asymmetry of European integration, or why the EU cannot be a social market economy", Socio-Economi review, nº 8, 2010, 211-250; Offe, C., „The European Model of „Social" Capitalism: Can it Survive European Integration?", *The Journal of Political Philosophy*, Vol. 11, nº 4, 2003, 437-469;

solidarity systems to freedom of movement without a real pan-European solidarity system being constructed as a compensation.[79]

II.3. Re-commodification of protection against unemployment as element of Welfare State change: research questions.

The idea of *flexicurity* finds a parallel in the contextualization of Welfare State changes within new models like the activating welfare state, the enabling welfare state or the social investment welfare state. Without entering into the details about those proposed models,[80] they all include the concept of activation, which has increasingly informed not only labour market policies but also reforms of social protection systems, and particularly protection against unemployment.[81] Institutional reform centred thus on the activation of actual or potential benefit recipients through their (re)integration in the labour market. Within that context, active labour market policies (consisting in training, placement, work incentives and other policies favouring employment, mainly focused on the supply-side of labour) are given an important place

[79] Ashiagbor, D. "Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration", *European Law Journal,* Vol. 19, nº 3, 2013, 303-324

[80] Morel, N., Palier, B., Palme, J. (eds.) *Towards a social investment Welfare State?: ideas, policies and challenges*, The Policy Press, Bristol, 2009; Dingeldey, I., "Between Workfare and Enablement – The different paths to transformation of the welfare state: A comparative analysis of activating labour market policies", *European Journal of Political Research*, Vol. 46, nº 6, 823-851;

[81] Barbier, J-C., "activating social protection and employment insurance", *TLM.net Working Paper*, 2005, 5,
http://www.siswo.uva.nl/tlm/root_files/workp05-26barbier.pdf

in labour market governance,[82] to the point of invading the concept of security which social policies, and mainly protection against unemployment, have to provide to their beneficiaries. To that extent *flexicurity* policies could be said to be an instrument of those changes. Within the implementation of those new models, return-to-work strategies, or work-first, their form more closely connected with the labour market, have taken the lead over out-of-market social protection of workers or persons in risk of exclusion as objectives[83], as well as shifted on the worker the responsibility for his or her own employability.[84]

However, research shows that in most European countries, those policies moved the more vulnerable group of their beneficiaries into low-paid and temporary jobs, leading to a reduction in job quality,[85] and fostered the exclusion of unemployed individuals for reasons unrelated to personal circumstances and responsibility, such as persistent unemployment and low levels of job creation.[86] There

[82] Bonoli, G., "Chapter 16. Active labour market policy in a changing economic context", in Clasen, J. and Clegg, D., *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011, 319-333;

[83] Clasen, J., „Motives, means and opportunities: reforming unemployment compensation in the 1990s", *West European Politics*, vol. 23, n° 2, 38;

[84] Arcanjo, M., "Unemployment Insurance Reform – 1996-2006: A New Balance between Rights and Obligation in France, Germany, Portugal and Spain", *Social Policy & Administration*, Vol. 46, n° 1, 2012

[85] Eichorst, W., Konle-Seidl, R., Koslowski, A. and Marx, P., "Chapter 14. Quantity over quality? A European comparison of the changing nature of transition between non-employment and employment", in Clasen, J. and Clegg, D. (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011, 296;

[86] Arcanjo, M., "Unemployment Insurance Reform – 1991 – 2006: A New Balance between Rights and Obligations in France, Germany, Portugal and Spain", *Social Policy & Administration*, vol. 46, n° 1, 16

seems thus to be a link between reforms in unemployment protection and social outcomes of the Welfare State.

The first research question of this work parts from the hypothesis that the reform of the national systems of protection against unemployment in Europe, above all in countries, like Germany, Spain, or the Netherlands where those systems were strongly based on status protection of workers by providing them wage replacement benefits for the time they are searching new employment, can be analyzed in terms of re-commodification of welfare state policies initially intended to de-commodify workers. The latter concepts will be treated in depth in Part II, before situating protection against unemployment within its multilevel regulative framework (Part III) and proceeding to a case-study to assess why one could speak about re-commodification of protection against unemployment.

As a first, rough definition of re-commodification, it would mean that social protection, which was intended to provide workers with the means to conduct a life without dependency on the market in case of social risks, like unemployment (i.e. the de-commodifying function of the welfare state), has been increasingly subjected to the particular necessities and logic of the market, instead of the necessities, or aspirations of the persons those systems are supposed to protect, involving the treatment of those persons as commodities rather than humans, or citizens of a democratic society (i.e. a process of re-commodification).

Within that context, the evolution of the elements of *flexicurity* contained in the guidelines analyzed in the preceding section, reflect in themselves a move towards higher re-commodification of the European idea of *flexicurity*, which already in itself entails re-commodification of protection against unemployment (in its conceptualization as a contribution towards more efficient labour markets) and protection in employment. It is contended that this process of re-commodification of social rights presents connections with the Europeanization of Welfare State policies where those rights have been driven to the background by a regulation model conceptualized in terms of economic policy and governance by numbers. It is contended however that the same multilevel regulatory system contains legal elements which could be used as correctors of the process of re-commodification of protection against unemployment and as basis of legal strategies of de-commodification.

The process of re-commodification of protection against unemployment inscribes itself within a broader process of re-commodification of the European welfare states, which goes further than mere cost-containment and readjustment under the idea of "permanent austerity" put forward by Paul Pierson. This process is inscribed within the greater question of the tensions between capitalism, based on free market economies, and the democratic social demands of the citizens, mainly workers, of the post-industrial Welfare States. Those tensions, as is contended in Part II, are also at the heart of the ideas of de-commodification and re-commodification. Embedding welfare state changes within the latter

view permits to connect those changes in terms of activation, abandonment of full employment policies, labour market flexibility and austerity, and the shift of the production of welfare from the state to the market with the functions of the Welfare State within European democratic societies.

Part II. De-commodification and Re-commodification under the perspective of social rights

Chapter I. De-commodification as perspective on social rights

I.1. The "classic" notion of de-commodification in the Welfare State litterature

De-commodification, a concept that appeared in the social science literature in the 1980s, mainly in the context of welfare state studies, comes from the idea that in a market economy, individual persons are commodified, mainly through their labour. Given that labour is the individual's primary commodity in the market, de-commodification refers to dynamics that reduce the reliance on the market, mainly through labour, for one to ensure its well-being. This is of course only a first rough approach of what de-commodification would mean. The extent of its signification and its

implications varies from one approach to the other, above all due to the specific function it fulfils in the writings in which it appears.

It is mostly known as the key classification factor of European Welfare State models in Gøsta Esping-Andersen's seminal work *The Three Worlds of Welfare Capitalism*. The concept was also used capture the contradiction between welfare and capitalism.[87]

The concept is generally embedded in the fictitious character of the conceptualization of labour as a commodity and its difference with true commodities, found in the works of Marx, Marshall and Polanyi.[88] In *The Great Transformation*, Polanyi takes a position that acknowledges the "essential dynamism of capitalism" but takes also into account the negative impacts of free markets.[89] Based on an analysis of the history of economy, the work criticizes the conceptualization of the liberal, self-regulating market as a "logical" evolution of history, and argues that the refusal for liberal market political theory to acknowledge the fictitious character of commodification of labour, land and money, its destructive consequences on human society, and the thereto related reactions led ultimately to the collapse of 19th century civilization through the disruptions of the two 20th century world wars and the events that led thereto. According to Polanyi, the liberal market economy created a process of commodification of labour and human

[87] Offe, C., *Contradictions of the Welfare State*, Hutchinson, London, 1984
[88] Peck, J., *Work-place: The Social Regulation of Markets,* Guilford Press, New York, 1996, 24
[89] Taylor-Gooby, P., "Introduction: Open Market vs. Welfare Citizenship: Conflicting Approaches to Policy Convergence in Europe", *Social Policy & Administration*, 37 (2003), nº 6, 543.

necessities. However, while involving the elimination of solidarity structures on which pre-capitalistic society was based, liberal market economy does not guarantee that it can in itself provide for the survival of human society. The reason for that can be found in the construction of liberal market economy as a rational system based on economic self interest. But this construction presents two flaws. Firstly, "no specifically human motive is economic" and therefore neither its economic motives. Second, the rationalistic constructs of liberal market theories are contradicted by both modern anthropology and the history of trade and markets. Also, the market has been the outcome of "a conscious and often violent intervention on the part of government which imposed the market organization on society, for noneconomic ends". Based on his theory of "embeddedness of markets in society", Polanyi states that the victory of fascism was made unavoidable by the liberal market political economy's theories and their obstruction of any social or economic reform involving planning, regulation or control, according to its illusionary idea that freedom demands the absence of power and compulsion from a human community. But power and compulsion are part of reality and any ideal that would ban them from society must be invalid. Therefore, the question that sums up the condition of man is whether, in the light of the previous fact, man can reassert his freedom and "strive for its fulfilment in society without lapsing into moral illusionism". For Polanyi, the answer, and the meaning of freedom in a complex society, is to be true to the task of creating more "abundant freedom for all" (in contrast to the privileged freedom of liberal market political economy),

because in that case there is no fear that either power or planning will destroy the freedom built by their instrumentality. Polanyi believes thus that the success of market capitalism in the long term depends on structures provided by an interventionist welfare state.[90]

Esping-Andersen's use of de-commodification springs from the need for a correct way of defining the Welfare State. Before the inaccurateness of definitions based on spending levels, an approach which in the meantime has been confirmed as such,[91] he concludes that the basis of the definition has to be a concept of State structure, and embraces the theory of T.H. Marshall, also based on the fictitious character of labour as a commodity, that it is social citizenship that forms the central idea of the Welfare State. However, he argues that entitlement to social rights is not enough, and a genuine Welfare State theory must encompass how state activity relates to market activity and the role of family. That is where the concept of de-commodification enters the stage. Recognizing its character as a central axiom of Marxism, underpinning the concept of emancipation and the theory of alienation, he states that there is de-commodification when "a service is rendered as a matter of right" and when a person can maintain an acceptable standard of living without reliance on the

[90] Taylor-Gooby, P., "Introduction: Open Market vs. Welfare Citizenship: Conflicting Approaches to Policy Convergence in Europe", *Social Policy & Administration*, 37 (2003), nº 6, 544

[91] Levy, J.D., "Chapter 38.Welfare Retrenchment", in Castles, F.G., Leibfried, S., Lewis, J., Obinger, H. and Pierson, C. (eds.), *The Oxford Handbook of the Welfare State*, OUP, Oxford, 2010, 552-565

market. As such, he equates de-commodification with the distribution of welfare according to need.[92]

As a commodity, individuals are prisoners of forces beyond their control, like sickness or vicissitudes of the economic cycle. Therefore, de-commodification is a precondition to attain an acceptable level of welfare and individual security. Moreover, working class power mobilization requires the establishment of alternatives to market compulsion and the commanding of resources that do not depend on the human capital of wage earners, which permits the lessening of competition and strengthening the unity necessary for collective action.[93] In this sense, within a democratic system, a de-commodifying Welfare State can also be construed as a resource of power to counterbalance the power of capital.

Claus Offe, which whom Esping-Andersen shares the paternity of the concept, used the idea of de-commodification to capture more precisely the contradictions at the heart of the relation between welfare (state) and capitalism. He builds on a conception of a capitalist society as comprising three subsystems (society, economy and – welfare – state) governed by their respective logic (socialization, capital accumulation, management of crisis between the two first subsystems).[94] Within this context, the contradiction of

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[92] Esping-Andersen, G., "Citizenship and Socialism: De-commodification and Solidarity in the Welfare State" in Rein, M., Esping-Andersen, G., Rainwater, L., (eds.) *Stagnation and Renewal in Social Policy: the Rise and Fall of Policy Regimes*, New York, M.E. Sharpe, 1987, 86

[93] *ibidem*

[94] Papadopoulos, T., "The Recommodification of European Labour: Theoretical and Empirical Explorations", *University of Bath European Research Institute*

welfare state capitalism lies in the fact that a network of non-commodified institutions is necessary for the functioning of an economic system that uses labour as if it were a commodity, while the powers related to the Capital component of capitalism, pressure towards the elimination of those components. As such, those powers are pushing for an extension of the logic of the economic subsystem within the other subsystems. Within this context, he defines de-commodification as "the withdrawal and uncoupling of an increasing number of social areas and social groups from market relations"[95].

Focusing more narrowly on labour markets, the fictive character of labour as a commodity and its social nature gives thus rise to contradictions produced by the problematic relationship between labour and the labour market, contradictions which neoclassical economics tends to interpret as market failures, "a temporary departure from business as usual where supply and demand are in harmony", while they should be viewed as systemic, and only to be contained by temporary institutional arrangements. Those problematic relations express themselves in the sphere of incorporation, allocation, control and reproduction of labour in or by the labour market and show that the labour market is embedded

Working Paper Series, WP-05-03, 2005, http://www.bath.ac.uk/eri/ERI-working-papers/ERI-working-paper-05-03-final.pdf , 5

[95] Claus Offe, *Contradictions of the Welfare State*, London, 1984, 64

in a wider social environment with which it interacts, which it has to take into account and which shapes and permits its functioning.[96]

The concept of de-commodification is mostly known within the context of the literature on comparative social policy and, more specifically, in relation with Esping-Andersen's classification of Welfare States into Welfare State clusters or models in his work *The Three Worlds of Welfare Capitalism*.

Its originality resides in the fact that it goes further than the analysis of spending data, taking also into account program characteristics reinforced by systematic empirical evidence.[97] Looking after what a

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[96] Peck, J., *Work-place: The Social Regulation of Markets,* Guilford Press, New York, 1996, 23-43
Firstly, labour is not produced for the market. Therefore, its supply is relatively autonomous from the level and composition of labour demand in the market, and shaped by social forces such as state policies, ideological norm and family structures.
Secondly, the social nature of labour involves that markets cannot be accounted for adequate validation of human capital, and therefore effective allocation of labour, given that institutions and forces outside or at the limits of markets like family systems, schools, social class not only define the social limits of wage-labour, but also stratify the labour supply and structure the labour market. Therefore, the risk of poverty and unemployment are related more strongly to social characteristics than to human capital. which hampers its "efficient allocation".
Thirdly, labour control and necessary consent of the worker cannot be secured simply through despotic management strategies and assessment of potential workers has to take into account unpredictable personal factors, achieving balance between consent and control in the workplace is a political process and has to take into account individual and collective social relationships, which are influenced by factors and institutions out of the labour market.
Finally, reproducing labour (people, and thus social reproduction) is a complex process that mainly develops out of the labour market, through institutions with their own logic or additional purposes than mere reproduction of labour, even if they are shaped by the labour market.
[97] Scruggs, L., and Allan, J., "Welfare-state decommodification in 18 OECD countries: a replication and revision", *Journal of European Social Policy*, 16 (2006), nº 1, 55;

welfare state does, rather than how much it spends his classification is grounded on two key welfare characteristics: level of programme de-commodification and social stratification.[98] His de-commodification index is composed of various measures of qualifying conditions, benefit duration and income replacement, for standard production workers as well as workers qualifying only for the minimum benefits, for three social security contingencies: pensions, sick pay and unemployment benefits.[99] Applying, this model, he identified three typologies of Welfare States. Focussing on European countries, and in ascending de-commodifying order, the Liberal cluster included the UK and Ireland, the Conservative, or Bismarckian cluster, was composed of Germany, France, Austria, Belgium, Italy and Switzerland, and the Social-Democratic, or Nordic cluster was integrated by Denmark, Sweden, Finland and Norway. While the Netherlands was found to contain features of both the Social-Democratic and the Conservative cluster, it was finally included in the latter.

The principal analytical axis underpinning the classification is the private-public mix, the labels derive from classical European political economy and reflects an economy dominated by industrial mass-production with a household prototype based on the male one-earner type.[100]

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[98] *Ibidem,* 56

[99] Esping-Andersen, G., *The Three Worlds of Welfare Capitalism*, Polity Press, Cambridge, 1990, 49; Huber, E., and Stevens, J.D., "Welfare State in the Era of Retrenchment", in Paul Pierson (ed.), *The New Politics of the Welfare State*

[100] Esping-Andersen, G., *Social Foundations of Postindustrial Economies*, OUP, 1999, 74

The *Three Worlds of Welfare Capitalism* has prompted a vast number of theoretical and empirical studies critical with Esping-Andersen's work,[101] looking for which classification principles should be used, the number of models the classification of countries itself, and also the influence of more gender-centred approaches.[102]

One of the most important critics to his classification comes from the question of the presence of a fourth, "Mediterranean" Welfare State that should spring out of the "Conservative" or Bismarckian model.[103]

Moreover, one important observation that has to be made about all the literature is that it is mainly centred on the income maintenance dimension of the studied Welfare State institutions.[104] It is important to observe that research suggests that his attempt, as well as other attempts to get beyond aggregate expenditure comparison between welfare states have failed until now and should still be on the agenda of comparative research.[105]

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[101] Arcanjo, M., "Regimes and reform of welfare state: the classification of ten European countries in 1990 and 2006", *working paper* 34/2009/DE/SOCIUS, *School of Economics and Managemet – Technical University of Lisbon*, 1, http://pascal.iseg.utl.pt/~depeco/wp/wp342009.pdf ; Bambra, C., ""Sifting the wheat from the chaff: a two-dimensional discriminant analysis of welfare state regime theory", *Social Policy and Administration*, 41,1, 2007;

[102] Bambra, C., "Sifting the wheat form the chaff: a two-dimensional discriminant analysis of welfare state regime theory", *Social Policy and Administration*, 41,1, 2007, 2

[103] Arcanjo, M., "Unemployment Insurance Reform – 1991 – 2006: A New Balance between Rights and Obligations in France, Germany, Portugal and Spain", *Social Policy & Administration*, vol. 46, n° 1,

[104] Bambra, C., "Sifting the wheat from the chaff: a two-dimensional discriminant analysis of welfare state regime theory", *Social Policy and Administration*, 41,1, 2007, 24

[105] *Ibidem*, 23.

There is therefore a double difficulty in integrating what the present research identifies as important factors, like in-work-de-commodification, or the "how spent" aspect of welfare state provision, in the different typologies, and further research about that matter is to be suggested.

However, all this does not mean that Esping-Andersen's classification, or the use of the de-commodification concept itself proves to be useless in developing ideal Welfare State regimes for analytical purposes.

Firstly, when looking at the different welfare state typologies (based on theoretically informed factors, in contrast to taxonomies, based on pure empirical research),[106] if on the one hand some countries vary from clusters and the research suggests more than three clusters, most countries tend to "stick together" and the new clusters tend to spring out of the original "Espingian" ones. Anglo-Saxon countries tend to appear in the least generous regimes, while Scandinavian countries tend to figure in the most generous ones. Also, Germany systematically appears in middle-positioned conservative regimes, while Italy, Spain and Greece tend to cluster together.

Another aspect is that most of those studies try to classify those welfare States according to different aspects of what Welfare States do, which suggests that the different typologies (as well as taxonomies) measure only slightly different aspects of the underlying dimensions of the welfare states.

[106] *Ibidem,* Table 1;

Other authors, while stating that de-commodification indices are not strong elements of regime classification, that the de-commodification index misclassified half of the cases, and that there is no clear national regime coherence across the three studied programs (unemployment, sickness, pensions), they recognize that the Scandinavian countries, as well as the Netherlands, all classified in the Social-Democratic regime, tend to score high on the three programs, whether applying Andersen's de-commodification index or their own "benefit generosity index".[107]

Secondly, there are also elements that can be used to strengthen the usefulness of the idea of de-commodification in measuring, not only welfare state generosity, but also welfare state achievements of an egalitarian agenda.

For example, coming back to Esping-Andersen's de-commodification index, it seems that one of the principal reasons for the difference between the social-democratic and conservative regimes come from the fact that the income replacement rates among those with minimum qualifying conditions were better in the former.[108] But those regimes did not differ most in the structure of the transfers, but above all from the public character of the social democratic regime, not only at level of funding, but also at the level of delivery of the social services. It is also very important to observe that this social service intensiveness promoted the

[107] Scruggs, L., and Allan, J., "Welfare-state decommodification in 18 OECD countries: a replication and revision", *Journal of European Social Policy*, 16 (2006), nº 1, 55-72.
[108] Huber, E., and Stevens, J.D., "Welfare State in the Era of Retrenchment", in Paul Pierson (ed.), *The New Politics of the Welfare State*, 112

expansion of women's labour force participation as well as invested above all in non-aged population, involving investment in human capital, one of the features that would downplay somewhat the role of *flexicurity* in the adequate functioning of their labour market.[109]

The function and success of the Welfare States up to the 1980s could thus be said to have been their de-commodifying effect. Since then however, an abundant literature has studied the different aspects of the crisis in which those Welfare States find themselves, causing their restructuring, due mainly to the changing nature of work, de-familialization, appearance of new social risks, the economic context and increased fiscal pressure, as shown in the previous Part.

The restructuration of the Welfare State in the 1990s and in the first decade of the present century has been qualified by a whole range of researchers as a clear movement of re-commodification. Even if some authors handle other concepts to grasp the transformation of Welfare States over the period, like entrenchment[110] or the move to a social investment state,[111] the re-commodification aspect of that evolution keeps occupying an important place in their research.

Moreover, the acute crisis in which occidental capitalism finds itself after the financial collapse of 2008 and, above all in Europe, the

[109] Lefebvre, A. and Meda, D., "Performances nordiques et flexicurité: quelles relations?", *Travail et Emploi*, nº 113, 2008, 129-138

[110] Pierson, P., "Coping with Permanent Austerity. Welfare State Restructuring in Affluent Democracies", in Paul Pierson (ed.), *The New Politics of the Welfare State*, OUP, Oxford, 2001

[111] Morel, N., Palier, B., Palme, J. (eds.) *Towards a social investment Welfare State?: ideas, policies and challenges*, The Policy Press, Bristol, 2009

appearance of legal instruments and reforms to guarantee the adoption of austerity measures (constitutional modifications, "memorials of understanding" and new treaties in the context of the EU) have shown that from a general point of view those Welfare States, which were de-commodifying in the 1980s, find themselves in a situation where the social rights on which they are constructed depend ever more on markets (like financial markets or the labour market) or are impregnated by their logic.

This evolution goes hand in hand with structural shifts seen from the point of view of the varieties of capitalism theory. Economic and social reforms have made some countries pertaining to the corporatist (mainly Spain) or the social-democratic varieties to shift towards the liberal variety. This is an evolution which is not to be welcomed, as there is evidence that the two former models, not only perform better from an economic and social point of view, but are also better equipped to face future economic and environmental crisis.[112]

This context of increasing commodification, not only in the sphere of social rights, reminds the processes which Karl Polanyi analyses in *The Great Transformation*, and which by negating the fictitious character of labour, land and money, the consequent disruption of society caused by the ever expanding market logic and the reactions of society against disruption, caused the end of the XIXth century civilization through the rise of fascism and two world wars.

[112] Panic, M., "Does Europe need neoliberal reforms", 31 (1) *Cambridge Journal of Economics*, 2007, 145-169

Of course, the level of de-commodification of the different Welfare States is different, and their evolution and restructuring is path-dependent. The actual level of commodification of social rights across the Welfare States also strongly varies. Therefore, within the broader context of re-commodification, it should therefore possible to identify surviving or new de-commodification policies and strategies, as well as the legal and political elements structuring those strategies.

But this would require also a reassessment of the concept of de-commodification. The changing economic and social context and the appearance of new risks could have rendered the initial interpretations of de-commodification obsolete.

I.2. Reassessing the notion of de-commodification in the light of Welfare State change

The first interpretations of de-commodification by Offe and Esping-Andersen in Welfare State analysis have been criticized from different point of views for being incomplete and being inoperative if one wants to take into account the complexity of our western societies and a fully emancipatory dimension to the welfare State.

First, it could be said that their interpretation of de-commodification presents some contradictions with Polanyi's theory of embededness of markets in society. Both authors do not seem to radically depart from the artificial conceptual separation of economy from society, keeping therefore analytically separate the conditions for Labour out of the labour market from the ones in the labour market. It would thus be more fruitful to see the concept of de-commodification as an analytical descriptor of "degrees of intensity of commodification in and out of paid employment".[113]

This artificiality of the distinction between labour market policies and social policies was also criticized by feminist authors, arguing that Esping-Andersen's concept of de-commodification is inoperative for women, who in most cases remain out of the market despite, or due to, the design of the Welfare State.[114] In *Social*

[113] Papadopoulos, T., "The Recommodification of European Labour: Theoretical and Empirical Explorations", *University of Bath European Research Institute Working Paper Series*, WP-05-03, 2005, http://www.bath.ac.uk/eri/ERI-working-papers/ERI-working-paper-05-03-final.pdf;

[114] Orloff, A.S., "Gender and the social rights of citizenship: the comparative analysis of gender relations and welfare states", *American Sociological Review*, 58, 1993, 303-328; Knijn and Ostner 2002

Foundations of Postindustrial Economies, Esping Andersen takes into account some of those feminist critics. He acknowledges that the Welfare State has to contribute to the commodification of women first, to reduce their dependency on men, to be able to de-commodificate them afterwards.

However the current process of re-commodification might pose a challenge to that idea. Re-commodification in and out of work entails the gradual subjugation of Labour to Capital, or pro-Market elites, the other social agent of the power dynamic of re-commodification, resulting in increasing asymmetries of power for both men and women, unevenly distributed between and amongst them.[115] The commodification under conditions of intense in-work commodification makes that "dependency on a male bread-winner might be replaced with dependency on a labour market that can no more be used as a means to access/consolidate social rights", or, to come closer to Esping-Andersen's definition of de-commodification "maintain an acceptable standard of living".[116]

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[115] Papadopoulos, T., "The Recommodification of European Labour: Theoretical and Empirical Explorations", *University of Bath European Research Institute Working Paper Series*, WP-05-03, 2005, http://www.bath.ac.uk/eri/ERI-working-papers/ERI-working-paper-05-03-final.pdf;

[116] A good example of the need to take into account the combination fo both would be the Spanish sickness benefit policy, which provides for wage replacement in case of sickness, protecting workers as such against the risk of sickness, but the generosity of which cannot be read without taking into account the enhanced possibility to put an end to the employment contract in case of sickness that was introduced by the latest labour law reform, and for which data shows that it is preventing workers making use of it. This has no consequences on the "material" subsistence of the worker (as he still receives a wage) but inevitably put the worker's health at risk, with clear negative consequences on his non-directly-material welfare.

This latter thought brings us to an important aspect of the present research, which is related to the enrichment of the concept of de-commodification, given the evolution, not only of the risks that social policies should cover, but to the changed character of our economies and labour markets. The concept of de-commodification appeared within the context of studies having as object Welfare States that had developed mainly in the frame of policies aimed at full employment and in a context of abundant employment, moreover of a Fordian character, where participation in the labour market was generally tantamount to "maintaining an acceptable standard of living", and the impossibility to participate fully and sufficiently to the labour market was generally due to individual gender-neutral factors (sickness, age, ...) instead of (macro)economic, societal-contextual and technological reasons.

But there is a second aspect to that. Esping-Andersen's classification of Welfare States according to their level of de-commodification was based on an index integrating pensions, unemployment and sickness benefits. Those benefits are related to contingencies that depend highly on pre-existing employment and vary highly in function of the contractual characteristics of the latter. In a context of abundant employment of a relative uniform, Fordian character, the linkage of Welfare State institutions to employment, directly in the case of "Bismarckian" insurance schemes, and indirectly in the universalistic "Beveridgean" institutions, did not have great influence on their individual and aggregate de-commodificating effect. However, the diversity in forms of employment and the new economic context that developed

through the last thirty years, where abundant employment does not seem to be guaranteed any more, nor employment security, should make us reconsider if a concept concentrating exclusively on *out-of-work* de-commodification is sufficient to meet its goals.

This might also explain the relative abandonment of the notion of de-commodification at the centre of the Welfare Studies during the 1990s and, above all, the first decade of this century, even by scholars like Esping-Andersen, and explain the advancement of "third way" theories or "social investment Welfare State" models, giving more importance to putting people into employment so as to de-commodify them through the "classic" Welfare State institutions and schemes than reassessing the meaning and the content of the concept of de-commodification.

Paul Pierson is one of the leading scholars who studied the evolution of Welfare State over that period. He did not abandon the concept of de-commodification to analyse that evolution. He recognizes that de-commodification, or rather, re-commodification stands central in studying current Welfare State restructuring. It represents an important dimension of the changes in social provision, mainly aimed at dismantling the aspect of the welfare state that shelter workers from market pressures and forcing them to accept jobs on employers' terms, mainly through active labour market policies. However, he prefers to speak about that evolution

in terms of Welfare State entrenchment,[117] and argues that re-commodification cannot be the only dimension under which those changes can be studied. He makes his point, based on Esping-Andersen's classification of Welfare States (Liberal, social-democratic and Conservative), by showing that in liberal systems reform focuses on cost containment and re-commodification, while in the social-democratic and conservative systems, the focus would be placed more on cost containment and recalibration.

Research centred on broader concepts of de-commodification, however, comes to different conclusions.

The shift in the UK from a welfare state towards a workfare state, through the attachment of responsibilities to social rights, has been analyzed as involving re-commodification.[118] This analysis keeps confirming the close link there is between de-commodification and social citizenship, with the emphasis it puts on a rights approach.

But it could be said that analysing Welfare State change by focusing mainly on people out of employment, misses one important point, which is the intensification of (re)commodification in work (and not only *out* of work). The process of re-commodification can also be experienced while already in paid employment, or during commodification, and that process is also promoted by state policies (internal and external flexibilization, and

[117] Pierson, P., "Coping with Permanent Austerity. Welfare State Restructuring in Affluent Democracies", in Paul Pierson (ed.), *The New Politics of the Welfare State*, OUP, Oxford, 2001, 422
[118] Holden, C., "Decommodification and the Workfare State", 1, *Political Studies Review*, 2003, 303-316

other types of de-regulation) for which one could conclude to a clear trend of re-commodification in the EU15 countries between 1993 and 2003.[119]

Following that line of thought, de-commodification should be analysed as involving a "strong" social policy going further than a participation-enabling policy, or that goes further than 'activation' policies.[120]

Within the context of the European Union, the notion of re-commodification is apt objectively to capture the underlying rationale of the European social policy and the European Employment Strategy in particular, as well as the current work-

[119] Papadopoulos, T., "The Recommodification of European Labour: Theoretical and Empirical Explorations", *University of Bath European Research Institute Working Paper Series*, WP-05-03, 2005, http://www.bath.ac.uk/eri/ERI-working-papers/ERI-working-paper-05-03-final.pdf;). Based on an empirical analysis based on the discursive, the institutional and the relation aspects of re-commodification, he states that, at the discursive level, the objectification of Labour is part of the "hegemonic script" in both the OECD and the EU (with the equivalence drawn between work and security, with the meaning of security being recalibrated from protection on basis of rights to support on basis of rights and responsibilities, substitution of the responsibility of the state to provide full employment with responsibility to provide full employability, shifting responsibilities to the individual – the same happens with the distinction between 'active' and 'passive' benefits, implying that in the former, the policy is already active, putting full responsibility on the individual - patterns evident both in the UK-case and the European Employment Strategy) at the institutional and relational level, he makes an empirical study, first of the level of unemployment expenditure in EU15-countries between 1993 and 2003, showing that, as a general trend protection for the unemployed has been reduced substantially, and most countries have shifted their effort towards 'activation' policies, and second of the strictness of labour market regulation for the same period, showing a reduction in the level of protection (with a slight increase in some countries like the UK and Ireland, but which keep having the lowest scores). Finally, combining both findings, he shows that all countries end concentrating towards a combination of low protection in and low protection out of paid employment.

[120] Somek, A., *"De-commodification Revisited : On the Absence of Emancipation in Europe", University of Iowa Legal Studies research Paper, 06-04, 2006,* 9

welfare policies in general. The type of welfare-to-work policies promoted by the European Employment Strategy and adopted by the European countries, through their 'work-first' instead of 'life-first' approach, harnesses people's behaviour, whether as workers or entrepreneurs, to imperatives linked with the market, as economic growth, and which are contrary to dignified work (or to use the language of ILO, decent work), which would imply the capacity for ordinary people to say no, and being therefore genuinely 'empowered' by the labour market.[121] Also, European social policy has to be understood "as the pursuit of social policy with the aim of making it weaker. European social policy is not about sheltering from commodification, but has as objective to "create equal opportunities for commodification" through the emphasis on access to employment, regulation of privatised services and reallocating part of the responsibility for insurance for life-risk from the collective to the individual, and is manifest above all in the field of employment and social insurance.[122]

Research also shows that the trend of "dualization" identified in Bismarckian welfare systems (insiders being continued to be insured, however worse than before, while a growing number of outsiders begin to depend on systems of universal or targeted benefits financed by taxation and controlled by the state), leads to "neither fully activating nor fully compensatory welfare states". This has a probable two-way causal link with the dualism of labour

[121] Dean, H., Bonvin, J.M., Vielle, P. and Farvaque, N., "Developing capabilities and rights in welfare-to-work policies", 7(1) *European societies*, 2005, 3-26
[122] Somek, A., *"De-commodification Revisited : On the Absence of Emancipation in Europe", University of Iowa Legal Studies research Paper, 06-04, 2006,*

market regulation in those states, given the growing introduction of atypical contracts.[123] This evolution is another element pointing clearly towards the trend of re-commodification of welfare states. The growing number of atypical contracts and their lack of protection (in-work commodification) not only renders more difficult the access to out-of-work de-commodification programs and institutions, but provokes also re-commodification of those out-of work de-commodification measures themselves, mainly for budgetary reasons. Those reforms consist in targeting benefit cuts and activation initiatives, due to the growing number of outsiders and their pressure on financial equilibrium of Welfare State programs.

Relating to this idea, but on a more general level, Alexander Somek argues that "the distinction between commodification and de-commodification, taken by itself, does not suffice to formulate a tenable conception of public policy"[124]. To be able to formulate that conception, he bases himself on Edward Heiman, according to which the capitalist economy empties the legal freedom of individuals by leaving a large majority in a position in which they are materially incapable of enjoying their formal rights, mainly by forcing people into relinquishing control over their lives through

[123] Palier, B. and Martin, C., "From a 'frozen landscape to Structural Reforms: The Sequential Transformation of Bismarckian Welfare Systems", *Social Policy & Administration*, 41 (2007) nº 6, 551

[124] Interestingly, he argues that liberal market theory, with its stressing of individualism, erases the ambivalence of the concepts of commodification and de-commodification, commodification being deemed good simply because "it creates the incentive to exact from oneself the greatest possible energy and to realise unrecognised potential".

their subordination (in a broad sense) in labour. Therefore, social policy (i.e. the Welfare State) has the task of restoring the freedom that capitalism cannot guarantee. A clear parallel can be made with the ideas of Polanyi and his idea of freedom in a complex society, and justifies the need "for a strong, *freedom-restoring*, social policy", that goes further than the mere participation-enabling social policy, exclusively concerned with keeping people in the position of market-participants. It can be said that the participation-enabling policy is a de-commodifying policy, as people are not left completely at the mercy of the market. However, the grade of de-commodification is not enough as to break the circle of commodification where reification is concerned, because, as Georg Lukács puts it[125], in the context of reified social relations people perceive themselves only as observers of their own choices, unable to lead an autonomous (and, therefore, free) life. The "weaker", participation-enabling, social policy does nothing to end the neo-liberal dissociation between the life of the worker and the life of the consumer, while a strong de-commodifying social policy decommodifies in work and out of work, guaranteeing the autonomy of individuals, and therefore invest them with real choices in front of the opportunities given by a market society, in place of those choices being mere adaptations to shifting circumstances, given that, under competitive conditions life is not lived according to an individual plan, but is governed by necessity and subjected to incessant recurrence of smart choices between non-

[125] Lucáks, G. *Geschichte und Klassebwusstsein. Studien über marxistische Dialektik*, Darmstadt, 1988, 179

chosen options, the existence of which is created by the most competitive members of the system.[126]

Finally, when talking about out-of-work de-commodification one should not limit itself to the means that permits to live an autonomous and acceptable life without reliance to the market, but should not forget the question of how those means are provided.

Some authors insist on the fact that de-commodification, even seen from the point of view of the worker, has not only to be seen as augmenting the choice of the worker about income, but also how individuals want to organize their time, how they relate, how they care, etc. The importance of the concept is that it has implication beyond the mere question of commodification of labour-power, but the commodification of other areas of social life. For example, because state provision of welfare services also constitutes a form of de-commodification, de-commodification of services is also an important area to be investigated[127]. Moreover, our market societies have changed rapidly, and "the market juggernaut has expanded far beyond the familiar trinity of land, labor and money commodification emphasized by Karl Polanyi", uprooting communities, making individual livelihoods more insecure and weakening non-market values and practices, acting "as a powerful

[126] Somek, A., "Europe: From emancipation to empowerment", *LSE "Europe in Question" Discussion Paper Series*, nº 60/2013, 22-27, http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper60.pdf

[127] Holden, C., "Decommodification and the Workfare State", *Political Studies Review*, vol. 1, nº 3, 2003, 305

levelling force of social amnesia".[128] This stresses the need to better establish the notion of de-commodification, by incorporating processes "that challenge and limit the scope of commodification by fencing of non-market spheres from market encroachments", by including initiatives that, besides enhancing social protection, shield certain areas of social, cultural and political life from the market (like some aspects of housing or health care services), increase the provision of public goods, creating economic circuits grounded on a logic of social needs rather than profit, increasing market transparency to reveal its true social costs. More than reduce individual and collective dependency on the market, de-commodification should lessen societal subjection to market discipline, and "by ensuring basic needs, enhancing individual capacities and capabilities, and promoting social cooperation and collaboration, de-commodification constitutes a central feature of an egalitarian agenda".

As said before, the focus has been shifted from de-commodification towards activation and, in its more positive version, social investment, by emphasising individual responsibility, investing in human capital and equality of opportunity, and ´new´, activating, social spending, with return to work strategies at the centre of welfare state policies. But this movement downplayed important elements addressed by the de-commodification model.

[128] Vail, J., "Decommodification and Egalitarian Political Economy", 38(3), *Politics & Society*, 2010, 310 -346; Graeber, D., *Towards an Anthropological Theory of Value: the False Coin of Our Own Dreams*, Palgrave, Basingstoke, 2002, 79;

Social risks are still heavily influenced by social class or social stratification,[129] with the consequence that "successful" participation in the labour market is still dependent on social background, and thus focusing on individual responsibility generates (new forms of) marginalization. Return to work strategies have been shown to move beneficiaries, above all the most vulnerable, to low paid and temporary jobs, and restricting alternatives to labour market participation has fostered the exclusion of individuals from protection systems for reasons unrelated to their personal circumstances and efforts, like persistent unemployment and low levels of job creation.[130] Moreover, "classic" coverage against old social risks seems to be more redistributive than social provision designed to stimulate labour market participation.[131]

This view can be strengthened with the argument of the persistence of old social risks developed in the last section of the previous Part, their importance being blurred by the re-comodification of the welfare state as well as by neoliberal (re-commodifying) economic theories that led to private debt generation replacing Keynesian economics.

[129] Vandecasteele, L., *Dynamic inequalities : the impact of social stratification determinants on poverty dynamics in Europe.* PhD. Thesis, 2007, https://lirias.kuleuven.be/handle/1979/960 (last visit: 22/04/2014)
[130] Arcanjo, M., "Unemployment Insurance reform – 1991 – 2006: A New Balance between Rights and Obligations in France, Germany, Portugal and Spain", Social Policy & Administration, vol. 46, nº 1, 2012, 16
[131] Pintelon, O., Cantillon, B., Van den Bosch, K. and Whelan, C.T., "The social stratification of social risks: The relevance of class for social investment strategies", *Journal of European Social Policy*, Vol. 23, nº 1, 52-67;

De-commodification, in the sense in which Esping-Andersen constructs it, does not have to be mistaken as the need of total eradication of work as a commodity, being more related to the degree at which individuals or families are able to maintain a standard of life socially acceptable independently from their participation in the market. When that degree of de-commodification allows work to be a matter of choice, de-commodification can bring to de-proletarization.

Would this thus imply that an operative normative concept of de-commodification has necessarily to integrate a certain balancing character to attenuate the contradiction inherent in capitalist welfare state systems? This would bring us to the imperative of finding where the balance has to be struck.

Fortunately, when confronted with this utmost difficult question, solace can be found in avoiding it, even with legitimate reasons.

Firstly, one has to take into account that there is a wide consensus about the fact that Welfare States close to Esping-Andersen's social-democratic model (mainly Scandinavian states), which present higher de-commodification levels, present also better results when taking into account different factors measuring welfare under its different aspects (including more "capability" or "opportunity"-centered approaches towards autonomy).[132] Using a de-commodification index close to the one used by Esping-Andersen,

[132] Scruggs, L. and Allan, J. "Welfare State decommodification and Poverty in Advanced Industrial Democracies", Paper presented at the 14th International Conference of Europeanist, March 11-13, 2004, Chicago.

Lyle Scruggs and James Allan[133] showed that the structure of social protection policy matters more for reducing poverty than government spending as such, and that more de-commodifying programs were correlated with better reduction of poverty levels. They also compared country according to economic performance and poverty reduction and showed that between 1986 and 2000, absolute poverty rates declined in de-commodifying systems with low economic growth even more than in less de-commodifying regimes with good economic performances, so that it cannot be pretended that de-commodifying policies limit reductions in absolute poverty by limiting growth. They also suggests that strong performance in poverty reduction in liberal systems, due to better economic growth is not sustainable (US) due to economic catch-up cycles and other factors (Ireland)[134]. Those conclusions are important not only in the context of the short-term (or even long-term) low growth prospects for European economies, but if one takes into account the more profound debate about environmental and other consequences of an intensive growth-based economy.

More recently also, Benjamin Radcliff has convincingly showed that not only higher degrees of out-of-work de-commodification, but also more stringent employment protection legislation and

[133] Lyle Scruggs and James P. Allan, "Welfare State Decommodification and Poverty in Advanced Industrial Democracies" Paper presentad at the 14th International Conference of Europeanist, March 11-13, 2004, Chicago.
[134] Scruggs, L. and Allan, J.P., "Welfare State Decommodification and Poverty in Advanced Industrial Democracies", *Paper presented at the 14th International Conference of Europeanist*, March 11-13, 2004, Chicago, 8-10, www.sp.uconn.edu/~scruggs/ces04paper.doc

higher levels of union density are associated with higher individual levels of happiness, in terms of subjective measure of well-being.[135]

Secondly, once the former has been acknowledged, it has to be recognised, as will be argued hereafter, that most European Welfare States have undergone a process of re-commodification, with clear imbalances as a consequence and grave disruptive effects, whether those being social or economic, as already pointed towards in the first Part.

Thirdly, evolution of Welfare States is slow and path-dependent, and would attenuate any advocacy of radical de-commodification.

For those reasons, answering the question is not needed in the light of the objective of the present research, which does not aim to depict what the ideal welfare state in terms of de-commodification would be, but limits itself to advance the idea of the harmfulness of the present trend of re-commodification, the correspondent need of de-commodification, and the identification of legal de-commodification strategies. This work does not pretend to construct an ideal type of Welfare State where would be defined what should be the respective level of involvement and importance of its institution and intervenants.

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[135] Radcliff, B., *The Political Economy of Human Happiness. How Voters' Choices Determine the Quality of Life*, CUP, Cambridge, 2013. Out-of-work de-commodification is the independent variable which has the highest level of influence on well-being, and its positive effect (as well as that of employment protection and union density) increases well-being not only in the lower-level income groups, but also for the wealthier groups, so that society as a whole benefits from generous social protection programs, labour market regulation and stronger unions.

But rather than escaping the question by stressing its (relative) lack of relevance in the context of this work, one could also challenge it more directly by relying on the idea of the contradiction at the heart of Welfare State Capitalism,[136] or the capitalist labour market.[137]

Liberal-conservative critiques on the Welfare State concentrate on the idea that the Welfare States cannot coexist with capitalism, but tend to be silent on the idea that capitalism cannot exist without Welfare State. While the impact of the Welfare State on capitalist accumulation can become destructive, "its abolition would be plainly disruptive". This opposition has to be characterized as a contradiction and not a mere dilemma for which a systemic solution balancing the two components of the opposition would exist. The latter would require, first, that there is an objective optimum point between both, where Welfare State's disruptive effects are avoided and its control-maintaining functions preserved, and second, that policy and administrative procedures are sufficiently rational to attain that hypothetical optimum, both points which are at least highly uncertain[138]. This can be illustrated by the analysis by Wolfgang Streeck of the crises of democratic capitalism, discussed in the previous Chapter, where the political and economic arrangement between opposing demands of capitalism and democracy were always temporary, and resulted inevitably in other

[136] Offe, C., *Contradictions of the Welfare State*, Hutchinson, London, 1984
[137] Peck, J., *Work-place: The Social Regulation of Markets,* Guilford Press, New York, 1996, 24
[138] Offe, C., "Chapter 6: Some Contradictions of the modern welfare state", *Contradictions of the Welfare State*, Hutchinson, London, 1984.

types of arrangements through crises, the 2008 crisis being the last one of maybe others to come.

Moreover, focusing more closely on the labour market, it has been showed that, because labour "is only another name for human activity", the former is rigged with contradictions and conflicts and cannot be self-regulating, for which it produce various dilemmas of regulation (e.g. who is to be defined as groups exempted from its entering, how to balance between the waged and unwaged segments of the population, how to ensure the consent of workers, how to ensure reproduction, given that market wage-setting would undermine it, etc.). Those regulatory dilemmas have to be managed by the state. This can only be done by experimentation and learning, because of its complex institutional dialectic. However, the intervention of the state will never permit the labour market to work without problems,[139] reflecting as such the wider contradiction of the capitalist Welfare State.

Therefore, the idea of an optimal functioning of Welfare States and capitalist labour markets should be interred, which greatly reduces the legitimacy of functionalist approach to their impossible efficient regulation. The social embededness of markets in general and the labour market in particular, opens thus a space for the embededness of their study and regulation in principles which transcends them as well as their logic.

[139] Peck, J., *Work-place: The Social Regulation of Markets,* Guilford Press, New York, 1996, 40

One is thus in search of elements which would guide strategies of de-commodification and permit to answer the conceptual dilemma of trying, on the one hand to acknowledge the structural imperatives of the market, distinguishing market logic from the logic of non-market domains, and on the other hand accepting at the same time that the clash of both domains need not automatically to produce harmful effects.[140]

But the solutions to the regulatory dilemmas posed by those contradictions do not develop within a context where they are only the outcome of power relations between different interest groups, however at the moment biased in favour of capital, market elites, or organizations embodying those two concepts. Within democratic capitalism, the satisfaction of the various demands the State has to answer are embedded within a broader positive multilevel legal structure, expressed in constitutions, international agreements, human and fundamental rights instruments, soft law instruments and the jurisprudence interpreting them. This framework establishes and gives live to rights, most of them embedded in the notion of citizenship, and imposing obligations on the states. Some of those obligations cannot be modified, to a certain extent, by the national or supranational legal outcomes of the processes of majority decision-making regulating the Welfare state (mainly legislation), interact with those outcomes, inspiring them or helping their

[140] Vail, J., "Decommodification and Egalitarian Political Economy", 38(3), *Politics & Society*, 2010, 310 -346;

interpretation, or even supersedes them, when they acquire the category of fundamental rights.

Within this context, Marshall's concept of citizenship (the legal concept which, within democratic capitalism configures the relationships between individuals and society, or individuals and the state, but also at the basis of Welfare States[141]) as including civil rights, political rights and welfare rights[142], is still a valid conceptualization within said legal framework, the instruments of which contain rights pertaining to those three categories, and are positively recognized as such. This framework is also applicable to the capitalist welfare states, as it recognizes the civil rights (mainly the right to property and freedom of contract) on which the capitalist economy is based in regulatory terms.

One possible critic to such an approach could be that within the national and multilevel legal context, social rights have traditionally been marginalized in comparison to civil and political rights, and could therefore not suffice to embed de-commodification strategies. However, as argued in the next section, such marginalization should not be taken for granted nor considered as justified.

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[141] Even if the notion of citizenship as basis of the Welfare States is questioned, for its inevitably exclusionary basis, problematic in a world, and a European Union where immigration and mobility has become an important social, political and legal issue, complicated by the appearance of a concept of European citizenship with a different content as national citizenship; see Ferrera, M., *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection*, OUP, Oxford, 2005. However this question is more related to the boundaries of citizenship than the reading of the notion of citizenship in terms of rights and their relation to de-commodification.

[142] The latter notion should include both welfare rights in the narrow sense and labour rights, which from an in-and-out-of-work de-commodificationperspective should not be analytically separated.

However, the catalogue of rights contained within said multilevel legal framework cannot be approached only through a positivistic perspective, given the abstract character of those rights, the diversity between the different legal instruments, also linked with the historical and political processes which gave birth to them, and the inevitable problems of interpretation they would give rise to.[143]

[143] Mantouvalou, V., "Are Labour Rights Human Rights", *European Labour Law Journal*, nº 2, 2012, also accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007535 (last visit: 25/04/2014); Dean, H., "Social Policy and Human Rights: Re-thinking the Engagement", *Social Policy and Society*, vol. 7, nº 1, 2008, 2

Chapter II. De-commodifying social rights and protection against unemployment under a multilevel human rights perspective

II.1. De-commodification, multilevel framework and social rights

It would be difficult to deny that at the centre of any normative approach to regulation stands the idea of social justice.

One of the most recent theories trying to grasp how to realize social justice is Amartiya Sen's capability approach, which could be viewed as showing connections with the notion of de-commodification.

The capability approach can be helpful in providing a way of thinking about social rights with respect to market processes. The absence of a universally applicable list of capabilities (at least in Sen's approach) makes that attention has to be focused on "social choice procedures by which the content of capabilities can be collectively determined in particular contexts", which means that social rights should be analysed in terms of claims to resources (social security payments for example) or as right to participate in forms of procedural or institutionalized interactions (collective

bargaining).[144] As such there is a link between capabilities and the notion of solidarity, and the latter is a justification to read the concept of equality, a "typical" civil right, as going beyond mere formal equality[145].

One has also to differentiate between the notion of capability and the notion of human capital, quite central even in the less re-commodifying versions of new concepts of welfare state, like the social investment state. The human capital approach only concentrates on the human as a means of production, while the human is also the goal of that production. For example, concerning the capability for care (one of the capabilities of Nussbaum's list) the re-commodification process that entails the welfare state reform policies does not take into account the fact that "our freedom to find and to accept care and our ability ourselves to provide it are as much part of our capabilities as our freedom and ability to work".[146] For example, concerning the capability for voice re-commodification policies seek to empower welfare subjects primarily as consumers of welfare goods and services, where the welfare subject is conceived primarily as an economic actor instead of as a citizen, and his or her capability for voice does not extend to being able to deliberate about how his or her choices might be

[144] Deakin, S., "The 'capability' concept and the evolution of European social Policy", in Dougan M & Spaventa E. (eds), *Social Welfare and EU Law*, Hart Publishing, Oxford, 2005

[145] Barnard, C., "The future of equality law: equality and beyond", in C. Barnard, S. Deakin and G. Morris (eds.), *The future of labour law. Liber Amicorum for Bob Hepple*, Hart publishing, Oxford, 2004.

[146] Dean, H., Bonvin, J.M., Vielle, P., and Farvaque, N., "Developing capabilities and rights in welfare-to-work policies", 7(1) *European societies*, 2005, 3-26

accommodated to the common good, because it is subordinated to economic imperatives.

A caveat has however to be formulated. One should not forget to refer to recent critics made about the practical usefulness of Sen's approach for justice theories. The use of the capability approach by the United Nations Development Program and the UK government, for example, shows that Sen's analysis does not constrain changes between opposed definitions of justice, with the consequent use of the capability approach by champions of the neoliberal vision of justice to reinforce their theories, however mainly interpreting human capabilities as human capital.[147]

But this idea does not exclude the complementary character of the de-commodification and the capabilities approach. To the contrary, Sen's approach needs constraints to attain its primary objective: measure justice not only in economic terms. In this line of thought, given the close link between economy and markets in European welfare states, de-commodification could be a step in this direction. Moreover, as a concept implying the containment of market logic, contrary to the neoliberal approaches, de-commodification might prevent Sen's framework to see capabilities exclusively as attributes to human capital.

[147] Walby, S., "Sen and the Measurement of Justice and Capabilities", Theory, Culture & Society, 29 (2012), nr. 1, 99-118; Dean, H., "Human rights and welfare rights"in Dean, H., (ed.) *The Ethics of Welfare*, The Policy Press, Bristol, 2004, 11

As we have seen hereabove, an important aspect of the notion of de-commodification, whatever its interpretation, is its close connection with the idea of social citizenship. This, again, implies the centrality of the idea of rights as the source of de-commodifying policies, and connects de-commodification with the existing legal instruments developing social rights.

From that point of view the policies entailing re-commodification of Welfare State policies are not acceptable, as will be seen in the present work, as most of them find their justification in giving opportunities instead of rights. In matters of unemployment, not only through training and orientation, but also through what the discourse frames as "incentives", but which in practice are traduced into sanctions and reduced material protection. However, elements of realization of social justice, like material equality, social mobility or even realization of capabilities are not guaranteed by a system based on opportunities, for the simple fact that the element of choice by the individual that it entails is, partially or totally, a fallacy. Such a system does not guarantee that the supposed choice the individual has is not conditioned by his actual social position or material condition. Opportunities may, or may not achieve the realization of substantive capabilities, and, therefore, do not give the guarantee to allow people to determine their own lives (or realize their capabilities).[148] This shows that a right-based approach is even a pre-condition to the capability approach.

[148] Dean, H., Bonvin, J.M., Vielle, P. and Farvaque, N., "Developing capabilities and rights in welfare-to-work policies", 7(1) *European societies*, 2005, 3-26

This problem concerning opportunities is even accentuated by the fact that in most countries the labour market, by its higher flexibilization in the sense of re-commodification, does not automatically guarantee the possibility of meeting ones need or realizing its capabilities. Therefore, Welfare State policies should be framed with a view to not forgetting meeting needs instead of focusing on enforcing responsibilities.

This again connects to our starting point, which was Esping-Andersen's definition of de-commodification, linking it to the social citizenship approach of T.H. Marshall, stating that there can only be de-commodification when a service is rendered as a matter of right. Rights will be at the heart of de-commodification policies when they have the status of property, of claims to elements of social justice,[149] and are granted on the basis of citizenship rather than performance.[150] Performance as conditioner of social rights is a clear expression of the extension of the individualistic market logic based on self-interest and inequality, grounded in the empirically contradicted fiction that all individuals enjoy the same power, while citizenship, "is a status bestowed on those who are full members of a community" entailing that all those members are equal with respect to the rights and duties with which the status is endowed, which implies the claim to a (material and immaterial) situation in society "which is not proportionate to the market value of the

[149] Marshall, T.H., *Citizenship and Social Class,* CUP, Cambridge, 1950
[150] Esping-Andersen, G., *The Three worlds of Welfare Capitalism*, Polity Press, Cambridge, 1990, 21;

claimant".[151] Citizenship should be the status that gives to every member of the community the same claim to "the components of a civilised and cultured life".

A rights-based approach does not necessarily means that there cannot be any conditionality related to social rights. Two arguments generally justify conditionality: the paternalistic argument (it is in the best interest of the benefit recipient) and the reciprocity argument (if the benefit recipient receives a share of the wealth produced by his fellow citizens, he or she has a duty to productively contribute to society).[152] The paternalistic argument is not as strong as it might be once looking at the empirical data,[153] and, to be ethically acceptable, should be considered as self-paternalism (the restrictions on the liberty of the individual concerned has to happen with her consent and serve to strengthen her ability to act on her own judgment), which involves the need for fair political and participation processes giving effective voice to the benefit recipients. The reciprocity argument would only be valid if the structure of opportunities and rewards of the economic and social system is fair and just, the benefit receivers are fully responsible for their situation, and resources are not distributed in function of factors external to the duty of cooperation of all. Given that most resources are actually an inheritance from nature, past generations

[151] Marshall, T.H., *Citizenship and Social Class*
[152] White, S., "Ethics", in Castles, F., Leibfried S., Lewis, J., Obinger, H. and Pierson, C. (eds.), *The Oxford Handbook of the Welfare State*, OUP, Oxford, 2010, 21
[153] Saraceno, C., "Deconstructing the myth of welfare dependence", in Saraceno, C., (ed.) *Social assistance dynamics in Europe: National and Local Poverty Regimes*, Policy Press, Bristol, 235-257

and influenced by social background or class, and not the product of the equal contribution of all to society,[154] the reciprocity argument, and thus the conditionality of benefits, has to be viewed in relation with factors like class inequality, and, within a knowledge-based society, sufficient training and education. This reflects the more general argument about the inability of market fundamentalists to consider that "the seemingly free choices made by seemingly free and equal market participants are strongly affected by the conditions that *precede* market participation".[155]

From that point of view, only through a status as citizen can an individual be effectively empowered to change his class position based on labour market position.[156] This is even more important since in the context of the new economy and the increased commodification of the labour market (*in-work* commodification), inclusion in the latter is not any more a guarantee for social mobility, change in class position, self-realization if one takes the capabilities point of view, or let alone material self-sufficiency, as shown by increasing in-work poverty rates.

This vision of social rights is not only arguable from the point of view of social justice seen as guarantee of personal autonomy, individual development, dignity of human beings or class equality,

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[154] White, S., "Ethics", in Castles, F., Leibfried S., Lewis, J., Obinger, H. and Pierson, C. (eds.), *The Oxford Handbook of the Welfare State*, OUP, Oxford, 2010, 22

[155] Radcliff, B., *The Political Economy of Human Happiness. How Voters' Choices Determine the Quality of Life*, CUP, Cambridge, 2013, 66

[156] Twine, F., *Citizenship and social rights. The Interdependence of Self and Society.* SAGE, London, 1994, 103

but also from a democratic perspective. Social rights, viewed as property rights, whether de-commodifying in or out-of-work, should be viewed as permitting the effective exercise of political and civil rights. It is also important to note that it is the political and civil rights which underpin the development of "strong" social rights,[157] reinforcing the mutual dependency of the three legs of citizenship.

The inclusion of social rights at the same level as civil and political rights should be viewed as inherent to the democratic principle according to Habermas' conceptualisation, insofar they correct social and economic inequalities as well as asymmetric power relations which severely condition the exercise of democracy.[158] From that point of view, as seen in this Part, the commodifying effect of the dependency of individuals on the market involves, on the one hand, the loss of control over their lives, and on the other hand, their individualization and the consequent loss of power desolidarization entails. Therefore, both effects empty civil and political rights of their content, and their function, which is to guarantee the autonomy and freedom of the individual. Thus, even if from an historical perspective, social rights (within the western capitalist democracies) came after the first generation of rights, they still should be considered as part of those rights considered as "co-

[157] Twine, F., *Citizenship and social rights. The Interdependence of Self and Society.* SAGE, London, 1994, 106; Esping-Andersen, G., *The Three Worlds of Welfare Capitalism*, Polity Press, Cambridge, 1990

[158] Rivera Ramos, E., "Rights and democracy: conflict or complementarity?", *Paper presented at SELA 2001: Fundamental Rights*, June 7-10, Iquique, 6, http://www.law.yale.edu/documents/pdf/Ramos_Rights_and_Democracy.pdf

original" to democracy, the reason why they should be viewed as basic, or fundamental rights.

Within that perspective, those basic rights, co-original to democracy, should be framed as human rights.

Firstly, this is because human rights provide for a reinforced normative approach to the articulation, application and interpretation of the multilevel legal system. This is because human rights, as a "universally definable set of rights that are inherent to human beings by virtue of their humanity", are the expression of systemically derived ethical principles or social values.[159] They are endowed with a regulatory unity, founded on the equal dignity of each human being as a moral, juridical, political and social subject, and imply that the construction of any juridical, political or social arrangement has to be grounded "on the guaranteed conditions for human beings to play the leading role, which is not transferable".[160]

Within that perspective, human rights provide thus for the primary principle of reference for evaluating the legitimacy of legal-political systems of regulation. By contending that within all democratic political processes of self-determination, "freedom for self-determination of each individual must be preserved, strengthened and protected, in such a way that the autonomy of one person does

[159] Dean, H. "Human rights and welfare rights: contextualizing dependency and responsibility", in Dean, H., *The Ethics of Welfare. Human rights, dependency and responsibility*, The Policy Press, Bristol, 2004, 7

[160] Carbonari, P.C., "Human dignity as a basic concept of ethic and human rights", in Klein Goldewijk, B., Contreras Baspineiro, A. and Carbonari, P.C., *Dignity and Human Rights. The implementation of economic, social and cultural rights*, Intersentia, Antwerp – Oxford - New York, 2002, 40

not depend on questioning the operational autonomy of another", they oppose the moral core of economic liberalism, the protection of the exchange of benefits contracted between the parties, and superpose a sense of fairness between equal citizens above market regulation through the notion of efficiency.[161] Moreover, the labour market is predicated upon the idea of using others (workers) as means to an end, in an exploitative way (the extraction of surplus by paying them less than the actual value of their work), which institutionalizes a principle which would generally be recognized as immoral.[162] Human rights then, as the normative expression of moral (reference) and ethical values, could thus be seen as useful tools to confront in a regulatory way the problems posed by the "transparent immorality" of the market economy.

According to Rawls, one of the fundamental elements of an ideal society and one of the most important primary goods as a requisite to realize whichever life plan is self-respect. However, given that our human condition involves that we are interdependent beings, the latter can only be achieved through social relations, for which it acquires a collective dimension which can only be realized through social justice, based on the exercise of solidarity, revealing thus the

[161] Mantouvalou, V., "Are Labour Rights Human Rights", *European Labour Law Journal*, nº 2, 2012, also accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007535, at 25 (last visit: 25/04/2014); Garcia schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for them and their guarantees", *Derecho y Cambio Social*, nº 31, 2013, 14

[162] Radcliff, B., *The Political Economy of Human Happiness*, CUP, Cambridge, 2013,

dignity and self-respect of societies.[163] In other terms, human rights do not aim to preserve dignity of man as an abstract individual or abstract human being, but involves that priority must be given to the rights and need of those considered the weakest, and for whom special protection must be granted, so as to protect human vulnerability wherever it manifests itself,[164] and this includes within or at the occasion of the operations of markets.

Human dignity requires personal autonomy, but the latter notion amounts to more than self-sufficiency, and can only be realized through social inclusion. Therefore human rights, if they are to protect human dignity, should thus "entail the right to be included with dignity in social relations of interdependency".[165]

Because there is no freedom which may be exercised without a social area of solidarity, ensuring that human rights are complied requires the recognition of all human rights, including social rights, which means that, even if the historical process for acknowledgement of different categories of human rights has progressed differently, "all human rights claim to be acknowledged as universal".[166]

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[163] Chacartegui Jávega, C., *Dignidad de los trabajadores y derechos humanos del trabajo según la jurisprudencia del Tribunal Europeo de Derechos Humanos*, Bomarzo, Albacete, 2013, 12

[164] Garcia schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for them and their guarantees", Derecho y Cambio Social, nº 31, 2013, 19

[165] Dean, H., "Social Policy and Human Rights: Re-thinking the Engagement", *Social Policy and Society*, vol. 7, nº 1, 2008, 8

[166] Carbonari, P.C., "Human dignity as a basic concept of ethic and human rights", in Klein Goldewijk, B., Contreras Baspineiro, A. and Carbonari, P.C.,

This idea involves that human rights are indivisible, interdependent and interrelated, as expressed in the 1993 Vienna Declaration and Programme for Action, which adds that "the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis".

However, this claim of equality of treatment of social rights, and thus their consideration as human rights has traditionally been questioned.

One of the main objections to give social rights the same normative character as civil and political human rights is based on difficulties regarding their implementation. While civil and political rights are framed as individual rights and would only impose concrete and negative obligations on the State, social rights are generally vaguely defined and involve positive obligations which have to be met by the dedication of resources, the latter being moreover in limited availability, which require complex processes of adjudication. Therefore, they cannot serve as legal basis for individual claims.

Those objections, however, are part of a devaluated perception of social rights which is raised as an ideological option. This perception is based on myths forged by ideological prejudices and results from asymmetrical relations of power and the solutions to the positional problems within the social context which they have

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Dignity and Human Rights. The implementation of economic, social and cultural rights, Intersentia, Antwerp – Oxford - New York, 2002, 40

produced since the end of the golden era of the welfare state.[167] Nevertheless, they are rebuttable, or, at least subject to a more nuanced reading.

The opposition between civil rights as negative and "cheap" rights and social rights as positive, "expensive" rights which require intervention is not consistent, and cannot be generalized.[168]

Civil rights like property rights, for example, require on part of the state the creation and organization of an administrative structure consisting of registries, courts and law enforcement bodies, and political rights involve the dedication of resources to the organization of elections, functioning of representative bodies, financing of parties, etc. Those rights involve thus also the allocation of resources by the state.

Also, some social rights, mainly labour rights, like the right to union freedom of association, the right to strike, the right to protection against unfair dismissal, etc., do not involve positive and costly obligations on behalf of the State. They constitute limits on the rights of employers which might involve costs on behalf of the latter, but this does not involve complex decisions about the prioritization of common resources to be taken through the democratic process.

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[167] Dean, H., "Social Policy and Human Rights: Re-thinking the Engagement", *Social Policy and Society*, vol. 7, nº 1, 2008, 5-7; Garcia schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for them and their guarantees", *Derecho y Cambio Social*, nº 31, 2013 29

[168] Garcia schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for them and their guarantees", *Derecho y Cambio Social*, nº 31, 2013, 51-59

Moreover, social rights which involve the allocation of resources contain, within the human rights legal framework, a negative aspect, embodied in the obligation of non-regression, according to which state implementing those rights are limited in their capacities to lower assignation of resources to the satisfaction of complex rights like the right to social security, the right to social assistance or the right to health.

It is also true that some of those social rights are vaguely defined or have a programmatic character. Nevertheless, this does not mean that they do not impose obligations on the state which could be identified and adjudicated. The right to a minimum of subsistence can easily be identified by the recourse to calculation of poverty or other, more generous thresholds. Moreover, when those rights have a programmatic character, they can involve an obligation of means on part of the State, an obligation which for example does not have any problems to be adjudicated within the civil law sphere. Certainly within a constitutionalist structure, such obligations can form the basis for judicial review by Courts of public decisions which would have violated those obligation of means. Such processes are already put in practice by Courts having a constitutional character, within the context of proportionality and reasonability tests, and have been identified by recent research as an emerging technique of adjudication of social rights.[169]

[169] King, J., *Judging Social Rights*, CUP, Cambridge, 2012; Koch, I., *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention of Human Rights*. Martinus Nijhoff, Leiden – Boston, 2009 *;* Contiades, X. and Fotiadou, A., "Social rights in the age of

Therefore, the difficulties associated with their implementation should not influence the inherent normative character of social human rights. The varieties in ways through which they are shaped and can be concretely activated should not question their character as universal entitlements with ethical implications. To the contrary, their consideration as human rights "predates" the way in which they should be implemented through different legal instruments and adjudicating processes, and should therefore inform their particular ways of implementation so as to maximize their realization.

Their view as indivisible, interdependent and interrelated rights thus also informs the normative value of social human rights.

Moreover, from a positivistic point of view, one of the concrete legal implications of the indivisible character of human rights, is that it reinforces their "treaty-crossing" character through the interconnectedness of different human rights instruments, whether they belong to the category of civil and political rights or socio-economic rights, and support courts in taking into account, at a legal level, the complexity of "real life".[170]

Finally, it is also important to underline that the idea of human rights, set against the backdrop of human dignity, also informs the

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proportionality: Global economic crisis and constitutional litigation", *International Journal of Constitutional Law*, vol. 10, nr 3, 2012, 660-686; Besirevic, V., "Is reducing poverty a task of Constitutional Courts?", *Strani pravni ivot*, nº 1, 2010, 31-57, available at http://www.comparativelaw.info/spz20101.pdf (last visit; 27/04/2014)

[170] Koch, I., *Human Rights as Indivisible Rights*. *The Protection of Socio-Economic Demands under the European Convention of Human Rights*. Martinus Nijhoff, Leiden – Boston, 2009

notion of citizenship, which can be seen as a concrete spatial and historical process of implementation of human rights in social and political areas.[171]

It is true that the concept of human rights is more global than the concept of citizenship, as it encompasses notions of entitlement which go further than considerations of nationality or pertainance to a given community.[172]

But this is a question which affects the boundaries of citizenship, rather than its' content. Within the Western Welfare States, concentrating on citizenship would leave out of the analysis the question of the entitlement of non-nationals to social rights. However, given the appearance of the notion of European citizenship, which gives access to nationals of other Member States the right to equal treatment in terms of entitlement to social rights (still with some limitations, though), diminishes the exclusionary effect of citizenship.[173] Moreover, as has been shown in the Spanish case, a fundamental human rights approach to citizenship rights has permitted, through the action of the courts, to extend social rights

[171] Carbonari, P.C., "Human dignity as a basic concept of ethic and human rights", in Klein Goldewijk, B., Contreras Baspineiro, A. and Carbonari, P.C., *Dignity and Human Rights. The implementation of economic, social and cultural rights*, Intersentia, Antwerp – Oxford - New York, 2002, 42

[172] Dean, H. "Human rights and welfare rights: contextualizing dependency and responsibility", in Dean, H., *The Ethics of Welfare. Human rights, dependency and responsibility*, The Policy Press, Bristol, 2004, 7

[173] Guibboni, S., "A certain degree of solidarity? Free movement of persons and access to social protection in the case law of the European court of justice", in Ross, M. and Borgmann-Prebil, Y (eds.), *Promoting Solidarity in the European Union*, OUP, Oxford, 2010; Hailbronner K., "Union citizenship and Access to Social Benefits", *Common Market Law Review*, nº 42, 2005, 1245-1267

like the right to social security and union freedom of association to non nationals.[174]

The framing of social rights as human rights also confers an enhanced responsibility to develop, implement and giving them life, not only on political and administrative institutions, but also on courts adjudicating them. Moreover, at the discursive level, they enhance the legitimacy of the struggles aimed at realizing them.

Also within the perspective of citizenship, democracy and constitutionalism, the framing of social rights as human rights involves also their categorization as fundamental rights, in the sense of fundamental principle of organization and articulation of a democratic society, superior to the common democratic legislative process. This also reinforces their legal ascendency.

In conclusion, commodification (and therefore, processes of re-commodification), through its individualization, atomization and submission of the human to principles like efficiency and his conceptualization as a factor of production, reducing his value to his economic utility, which are opposed to the ethical principles founding democratic societies contained in the idea of human rights, deconstructs the idea of dignity and human inter-dependency at their core. Moreover, the process of re-commodification of the last 30 years is also embedded in a discourse promoting a particular understanding of human rights, actually based, not on a normative

[174] López López, J., Caruso, B., Freedland, M. and Stone, K. (eds.), *La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada*, Bomarzo, Albacete, 2011;

discourse, but on a technical approach to how they are currently implemented (as opposed to how they *ought* to be implemented), with the submission of social rights to political and civil rights as a consequence. But the very idea of human rights involves their indivisibility and interdependence, a principle which is expressed in legal instruments, for which a de-commodifying approach deconstructing the re-commodifying discourse about social human rights is not only a necessity, but also a normative, and legal obligation.

As pointed out in this Chapter, de-commodification is necessary to the Capitalist Welfare State, and de-commodification is only possible if the de-commodificatory institutions are based on rights. Free market capitalism itself does not predate the notions of citizenship and human rights, but has been instituted through the recognition of civil and political rights, while welfare rights could be seen as the basis of the necessary de-commodification for capitalism needs not to provoke "Polanyian" counter-reactions to the growing hegemony of a self-regulating market.

Therefore, the multilevel legal system, independently from its interpretation, is an existing tool and framework through which analysis of de-commodification can be made. On the other hand, given the application of that framework on capitalist welfare states, de-commodification should also be at the basis of the interpretation of the social rights contained in that framework. There is thus interdependence between both concepts.

There is thus a close relationship and mutual interdependence between (human or citizenship) rights, power and de-commodification. But it can also be said that those concepts also connect closely to the idea of social justice. Even if there is no widely accepted operational or ontological definition of what could be social justice, within a capitalist system, the element of redistribution of market distribution is an essential aspect of it. This legitimates de-commodification as an important element of social justice, and, therefore, also the need for rights and power redistribution. This would also entail meeting needs as a claim of justice, which would imply the existence of institutions or a structure to which principles of justice can apply, which could be modified in line with the ideals and values of the society, which in its turn asks for an agency that is capable to impose those institutional changes, i.e. the state.[175] Again this legitimates the idea and necessity of a rights approach with public institutions to make those rights respected (even if they entail "positive" obligations of those public institutions), and thus de-commodification, for social justice to have a meaningful sense.

And even if one starts from Hayek's thesis that social justice is not a moral principle, but a virtue that applies to society,[176] de-commodification could not be ruled out, because even as a virtue, social justice would enter in contradiction with market logic and would involve shielding society from market activities.

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[175] Jackson, B., « The Conceptual History of Social Justice », *Political Studies Review*, vol.3, 2005, 356-373

[176] *ibidem*

II.2. An approximation to analysing protection against unemployment from a de-commodifying perspective

The hypothesis of this work is that European Welfare States find themselves confronted since the 1980s with a process of commodification or re-commodification of social rights, where the market evolves to being the maximum reference for the entitlement of rights. This general context is felt intensively in the field of labour law and social security, where the entitlement to social rights is ever more linked to the position of the individual in or his or her relation to the markets in general, and the labour market in particular.

As seen in the previous Chapter, while there is no overall consensus about describing European Welfare State changes as outward re-commodification, also due to the relative abandonment of the concept of de-commodification for Welfare State analysis, there is research which already points towards such an evolution.

Re-commodification is revealed amongst other aspects through the appearance of the notion of activation as a central principle of European social policies, aimed at reintegration of welfare recipients within the labour market. Those are further developed within a context where, following the appearance of "third ways" of social-democratic thought and political action, those policies insist on the responsibilities of their destinees, rather than framing claims to solidarity as rights. This has involved a shift of the burden of the risks which those policies are supposed to address towards the

individual, and a reinforcement of the protection against those risks to be realized through labour market participation, as well as shifted the moral and social patterns of the understanding of unemployment and social inclusion.[177]

But this is only part of the picture. It is contended that the paradigm of activation developed within a context of political and legal pressure for "fiscal consolidation", provided a double "incentive" for the decrease of protection in general, and benefit generosity and duration in particular, which lowers the capacity of recipients to rest on alternatives to the labour market when facing social risks.

Moreover, as argued in the previous sections, re-commodification has also to be viewed within the perspective of a process of higher in-labour commodification, not only due to the changing productive and managerial structures and processes, but also through labour market flexibilization, expressed in the increase and promotion of the use of atypical contracts, but also through the weakening of collective labour rights.

A conceptualization of in-and-out-of-work de-commodification reveals that there are arguments to conceptualize changes in terms of re-commodification.

[177] Serrano Pascual, A., "Del desempleo como riesgo al desempleo como trampa:¿Qué distribución de las responsabilidades plantea el paradigma de la activación propuesto por las instituciones eruopeas?", *Cuadernos de Relaciones Laborales*, 2005, vol. 23, nº 3, 219-246;

The further Parts of this work thus analyse if and, to a certain extent, how, those processes of re-commodification take place and are articulated.

The second part of the hypothesis is that it is possible to identify or promote legal de-commodification strategies of the social rights involved.

Those two questions will be approached from a multilevel legal perspective, and the reasons therefore have been already explored in the previous chapter and sections. On the one hand, there is an influence of the European Union on the identified re-commodification processes, and this question asks for a closer study. On the other hand the multilevel legal system provides not only an existing framework providing for guidance towards giving answers to the regulatory problems at the heart of the changing Welfare State, but it is contended that a de-commodifying approach to its articulation and interpretation can provide for elements supporting actual de-commodification of social rights.

The research will however not be extended to all welfare state policies. The analysis of those two hypothesis just exposed has therefore to be limited to welfare state policies which would find themselves at the crossing of what should be considered as the most important elements to verify their solidity.

Within that context, it is contended that policies related to protection against the risk of unemployment would present an adequate choice.

Firstly, those policies are important at a political level, given that reducing unemployment finds itself officially at the heart of social and economic policy. Moreover, despite generally being the third most important welfare state program after retirement pensions and healthcare, legal research on unemployment protection reform seems not to have received proportional attention.[178] The rising levels of European unemployment, above all following the 2008 financial crisis, have even increased the centrality of the question.

Secondly, unemployment and employment are two faces of the same coin, for which policies related to unemployment is an ideal subject to frame within a perspective of in-and-out-of-work re-commodification processes and de-commodification strategies. Labour market flexibilization has increased the risk of unemployment for whole segments of the workforce, while unemployment protection, within the paradigm of activation, has been the central focus of labour market integration policies, and the rise of the importance of active labour market policies.[179]

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[178] Arcanjo, M., "Unemployment Insurance Reform – 1996-2006: A New Balance between Rights and Obligation in France, Germany, Portugal and Spain", *Social Policy & Administration*, Vol. 46, n° 1, 2012, 2;

[179] Eichhorst, W., Kaufmann, O. and Konle-Seidl, R. (eds.), *Bringing the Jobless into Work? Experiences with Activation Schemes in Europe and the US,* Springer, Berlin, 2008; Barbier, J.C.. "Activating social protection and employment insurance", *TLM-net working paper* , 2005; Serrano Pascual, A., "Del desempleo como riesgo al desempleo como trampa:¿Qué distribución de las responsabilidades plantea el paradigma de la activación propuesto por las instituciones eruopeas?", *Cuadernos de Relaciones Laborales*, 2005, vol. 23, nº 3, 219-246; van Vliet, O. and Koster, F., "Europeanization and the political economy of active labour market policies", *European Union Politics*, vol. 12, nº 2, 2011, 217-238;

Moreover, as already put forward in Part I, research points towards the fact that the new shift in unemployment policy moved the more vulnerable groups of their beneficiaries into low-paid and temporary jobs, and fostered the exclusion of unemployed individuals for reasons unrelated to personal circumstances and responsibility, such as persistent unemployment and low levels of job creation.[180] There seems thus to be a link between reforms in unemployment protection and the social outcomes of welfare state change.

Finally, it provides also an ideal base to the analysis of European social and employment policies and the concept of *flexicurity*, as well as its implications.

As already said, the legal analysis of the evolution of protection against unemployment has to be embedded within the (European) multilevel legal framework. Therefore, social rights related to the different aspects of unemployment protection which would be comprised within a de-commodification perspective are analysed from the perspective of human or fundamental rights instrument at international (UN Declaration of Rights and Covenant on Social, Economic and Cultural Rights, ILO Conventions), regional (European Social Charter and European Convention on Human Rights), EU (Charter of Fundamental Rights of the European Union) and national level. Within the EU framework, the primary competence for the regulation of Welfare State programs still rests with the Member States.

[180] Arcanjo, M., "Unemployment Insurance Reform – 1991 – 2006: A New Balance between Rights and Obligations in France, Germany, Portugal and Spain", *Social Policy & Administration*, vol. 46, n° 1, 2012 16

Concerning that Member State level, as a matter of contingency, again a choice has to be made about which national legal systems to analyze. Therefore, an important part of the multilevel legal analysis is centred on a case-study of a few European countries. The selection of those countries has taken into account several criteria, amongst which a linguistic criteria, for a question of access to and understanding of materials, the welfare-state model in terms of de-commodification, following the classification of Esping-Andersen, the relation with the implementation of the concept of *flexicurity* as a central principle of European Employment Policies, as well as the probable intensity of Welfare State reforms, also taking the current economic crisis into account.

Applying those criteria, Spain has been chosen as central case-study.

Firstly, it is a relatively "new" welfare state, as, because of the dictatorship, the construction of the latter according to the same democratic-capitalist principles as other European Welfare State really began at the moment where other Welfare State entered the twilight of their "golden age".

Secondly, Spain has a structural problem of unemployment, which the housing boom of the 2000s seems only to have temporarily hidden, which, following the crisis and austerity, has risen to 26%, making it as such one of the central national economic and political problems. Moreover, while having suffered direly the consequences of the financial crisis of 2008, the country has not been formally bailed-out by the EU, the BCE and the IMF (except for a limited

bailing-out of its banks). If it had been the case, this would have somewhat distorted the analysis of the European multilevel re-commodification dynamic, given the formal implications of other institutions than the EU within the reform process. This would tone down the possible generalizations of the findings, at least to the extent that the path-dependent character of Welfare State change makes generalization possible, and render comparison more difficult.

The Spanish case is contrasted with two other cases, which have been chosen amongst the same welfare state cluster according to Esping-Andersen's classification, again in favour of comparability. Despite its classification by other authors within a specific "Mediterranean" model, Spain has been deemed to present commune institutional characteristics and weaknesses with continental or Bismarckian welfare states, which allows to compare the effects of European policy on their transformation.[181] Moreover, while up to the XXIst century, research was mainly focused on reform processes in the liberal and Nordic models and those Bismarckian Welfare States where deemed to be incapable of

[181] Pochet, P., "De invloed van de Europese integratie op de national hervorming van het sociall beleid van de Bismarckiaanse landen", *Belgisch Tijdschrift voor Social Zekerheid,* nº 3, 2010, 509-539; according to Palier, B. and Martin, C., "Editorial Introduction. From `a Frozen Landscape´ to Structural Reforms: The Sequential Transformation of Bismarckian Welfare Systems", Social Policy & Administration, vol. 41, nº 6, 2007, 536, the broad normative/ideational common elements of the Bismarckian systems are the emphasis on providing job and security to male workers, with schemes less concerned about poverty or inequality than ensuring the proportionality of benefits to previous wages (which indirectly guarantees a certain independence from the market to those benefit holders), with levels of social protection dependent on employment situation, market performance and merit, where universality of coverage is dependent on the capacity of society to ensure full employment.

implementing important reforms, they seem to have recently restructured their Welfare systems in line with the European social policy principles.[182]

Within said "world of welfare", the German case imposes itself, firstly for the reason that the pressure put on its workers in the last two decades (a fact that could potentially framed as a re-commodification process) is one of the reason behind the structural imbalances within the EMU, as argued in Part I. While having profoundly reformed unemployment protection policies in the 2000s, it seems that its labour market has been resilient during the crisis.[183] Moreover, as political and economical power within Europe, it also functions as a role model, at least in the political and cultural discourse and dominates actual European policy orientations. Also, it shares with Spain a constitutional model conceptually built on a notion of "social and democratic" state, an element which, from the point of view of adjudication of social rights, might have a certain importance, and again, presents itself to comparative study.

The third country chosen to centre the case-study is the Netherlands. Contrary to Spain, it is presented as having low unemployment rates and a "well-functioning" labour market. Moreover, even if it originally was not taken as inspiration of the

[182] Arcanjo, M., "Unemployment Insurance Reform – 1996-2006: A New Balance between Rights and Obligation in France, Germany, Portugal and Spain", *Social Policy & Administration*, Vol. 46, n° 1, 2012; Palier, B., "From a `Frozen Landscape´to Structural Reforms: The Sequential Transformation of Bismarckian Welfare Systems", *Social Policy & Administration*, vol. 41, nº 6, 2007, 535-554;
[183] Eichhorst, W., "The Unexpected Appearance of a New German Model", *IZA Discussion Paper*, nº 6625, 2012, http://ftp.iza.org/dp6625.pdf;

flexicurity model, it is claimed that it evolved to an example of conservative welfare state which implemented *flexicurity*, while also moving towards the Nordic or Social-Democratic model.

It is obvious that in the search for proposals of legal strategies de-commodifying unemployment protection, this work has to take into account the realities of the actual Welfare State changes in the European context. Even if it has been defended that genuine de-commodification policies have to go further than a (labour) market participation enabling policy, it is not the purpose of this research to propose a total reversal of current policies towards an ideal system of unemployment protection which would be turned back into the state it was before processes of re-commodification took place. Firstly, the economic, social and legal realities, as well as the political context have changed, and have to be taken into account. Secondly, the present research is a legal research, which means that it has to be constructed on the existing legal instruments, and its purpose is not to propose radically new political, social or economic systems.

Taking into account those premises, it is contented that the following criteria and elements have to be taken into consideration for a legal analysis of unemployment protection from a de-commodifying perspective within the context of regulatory changes based on *flexicurity* and activation. They are to be considered as general considerations which are further refined and verified through the analysis of the multilevel system and the case studies.

Unemployment protection schemes, at least within the Bismarckian Welfare States, were mostly based on a system of social insurance, through public contributory systems. It could be argued that non-contributory systems based directly on financing through taxes have a more de-commodifying character, as the conditions to perceive benefits might not be linked directly to previous contributory periods. However, the mode of financing of the scheme does not involve that the period and level of benefits are not linked to previous periods of employment. Therefore, it is not the way in which the scheme is financed that will influence its de-commodifying character, but the previous conditions of employment influencing benefits which has to be taken into account.

This point has some importance, to the extent that, as is argued here, one of the elements of the evolution of unemployment protection observed in Bismarckian Welfare State is the growing proportion of unemployed which depend on tax-financed schemes, revealing a move away from insurance systems. Moreover, those tax-financed schemes tend to adopt the characteristics of social assistance systems, where benefits are not calculated in function of previous wages, but are means-tested. Within that perspective, the dependence of unemployed persons on means-tested systems has a re-commodifying effect, despite their (supposedly) universal character, because they provide less for a replacement of previous income involving status protection (and thus securing to a certain extent the material situation out of the market in comparison with his or her situation in the market) than for the basic minimum of

existence, which is generally sensibly lower, involving thus a lesser level protection against unemployment, and (and this is generally the purpose of those changes) putting higher pressure on persons to reintegrate the labour market, lowering their choice of commodification.

This aspect also involves that the legal analysis has to approach unemployment protection not only from the perspective of the right to social security, but also from the right to social assistance, given that social assistance will not cover only risks related to social exclusion, but more generally the risk of unemployment.

Within that context, elements like benefit coverage rates (in the sense of number of unemployed which have access to benefits), benefit duration and benefit generosity (income replacement level, and in the case of minimal benefits, their sufficient character) have to be taken into account.

The submission of unemployment protection to the general principle of activation (the previous evolution can also be linked to activation, in the sense that it involves increased pressure to reintegrate the labour market) has also the following methodological consequences.

Active labour market policies (sometimes framed as "activating labour market policies"[184]) have to be taken into account, and their

[184] Schmid, G., *Wege in eine Neue Vollbeschäftigung. Übergangsarbeitmarkte und aktivierende Arbeitsmarktpolitik*, Campus Verlag, Frankfurt, 2002; Betzelt, S., "`Activating´ labour market policies and their impact on the welfare triangle and social inequality", *Paper ESPAnet Conference, Vienna*, September 20-22, 2007, http://www2.wu-wien.ac.at/espanet2007/13_Betzelt_Sigrid.pdf

relation with the legal principles of unemployment protection ascertained. As they promote reintegration within the labour market, they could be viewed as ontologically re-commodifying, reflecting the commodifying character of the idea of *flexicurity* itself. However, it is contended that they can be characterized as more re-commodifying or more de-commodifying in function of their legal connection with the obligation of the perceiver of unemployement benefits to reintegrate the labour market, the intensity of that obligation, and the effectiveness of those measure in enabling workers to choose the form of their commodification.

Those policies express themselves through various forms, which ought thus to be analyzed as having a different degree of de-commodification. Employment subsidies, for example, have to be categorized *prima facie* as heavily commodifying, as they are not addressed to the unemployed, but directly to employers, and have a varying effect on reduction of overall unemployment in function of the employment creation conditions which are attached to them.

Job orientation and placement services, to the extent they are analysed as support to increase the choices of unemployed as to their labour market reintegration have some de-commodifying effect. They can be offered by Public Employment Services (PES), in which case the ressources, efficacy and policy orientations of those administrative bodies can increase or decrease the previously described de-commodifying effect. When they are offered through private, profit-driven agencies, the introduction of market logic within the system can also decrease the de-commodifying effect.

Also, when analysing activation policies, the question of "how" they are implemented is also a crucial question in understanding their full effects, for which questions of governance are also important.[185]

Direct (public) employment creation schemes have also de-commodifying effects as they offer employment at the margin of the labour market, but they were a feature of labour market policies of the 1980s (together with "labour shedding"), policies which in the context of cost reductions tend to have disappeared.[186]

Another form of active labour market policy is training for unemployed. Even if they are focused on increasing human capital, a notion which is closely connected to commodification, they can be considered as the most de-commodifying active policy, as they increase the options of unemployed as to how to reintegrate the labour market, as well as better their career prospects (or even potentially improve their life plans). However, again, their de-commodifying character also depends on the resources dedicated to training programs, as well as their efficacy and the selection procedures.

Also, within the activation paradigm, active labour market policies are also increasingly difficult to separate from "passive" market policies, given that reduction in benefit duration and generosity, as

[185] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003", *IAB discussion paper*, No. 2008, 10, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf

[186] Bonoli, G., "Active labour market policy in a changing economic context", in Clasen, J. and Cregg, D. (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011

well as the use of sanctions,[187] are also framed as incentives to market reintegration.[188]

Therefore, generally, and taking into account the current economic and social circumstances, policies related to activation could be seen as having (limited) de-commodifying character, when they are aimed at strengthening the long-term position of the worker in the labour market (which reveals the importance of training), instead of pursuing only his reintegration.[189]

Finally, considering that the aspect of in-work intensity of commodification has also to be taken into account, attention has to be given to elements of labour law.

Employment protection, in the sense of protection against dismissal, is important for two reasons. First, as it is a disincentive for decisions on behalf of the employer which provokes the loss of employment of the concerned worker(s), it has to be considered as the transfer of part of the costs and responsibilities for the risk of unemployment from the worker and the state to the employer. Second, from a power perspective, it is also directly related to commodification in the sense that lower protection against dismissal augments the pressure which the employer can put on the worker

[187] On the effect of sanctions, see Bieback, K.-J., "Kooperation im Zwangsverhäaltnis. Teilhaberechte und Vertragsstrukturen in der Arbeitsmarktverwaltung", *Zeitschrift für Rechtssoziologie*, n° 30, 2009, 194-195

[188] Bonoli, G., "Active labour market policy in a changing economic context", in Clasen, J. and Cregg, D. (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011

[189] See also Clasen, J., „Les nouvelles politiques de l´emploi au royaume-Uni et en Allemagne", *Critique internationale*, n° 43, 2009, 47-48, who labels labour market policies of this type as „the social-democratic way forward"

faced with a higher unemployment risk, which should be viewed as having also consequences on the effectiveness of other labour rights in the framework of the contract of employment. It can be reasonably defended that workers will have less propension to claim their rights or pressure the employer if this could result more easily (due to minor costs and greater possibilities) in their dismissal. Within that perspective, the rate of unemployment and the qualifications of the worker also play a role.

The regulation of atypical contracts is also factor of possible higher intensity of in-work commodification, next to generally augmenting the risk of unemployment, above all in case of fixed-term contracts.

Finally, the level at which one can count on its commodification to provide for its means of subsistences should also be considered as an important element. The increasing level of working poor described in Part I shows that even within the labour market, it is difficult for some workers to have the sufficient means to develop and adequate and acceptable life from the point of view of dignity. Moreover, within the context of contributory systems, low wages have also a direct influence on the level of de-commodification of social security schemes. Therefore, the level of wages, and above all minimum wage, and their sufficient character, should also be included within the analysis.

Part III: European Supranational Regulatory Framework of Social Rights and Protection against Unemployment

It would be difficult to deny that the evolution of European integration did not have an impact on the re-commodification of social rights in the last 30 years. It is much more difficult however to assess precisely which are the mechanisms through which this influence has been made to happen. Amongst the factors rendering this influence indiscernible, are the fact that the main legislative competences in that field remain with the Member States, and that there are only few *hard law* instruments regulating social rights, and those which exist do not regulate comprehensively the matters within their scope. For example, the Directives related to the freedom of movement of workers need the presence of cross-border elements to apply, the Equal Treatment Directives do not apply to all aspects of social policy and the different Directives on Atypical work only answer some of the "social" problems created by flexible forms of employment, like fixed-term work or part-time work.

This makes also that a strict legal approach would be insufficient to explain the influence, and recourse has to be made to observations by political scientist. In that perspective, it is clear that the process of re-commodification of social rights within the Member States is influenced not only by international or national legal obligations, or even external political pressure, but also by cognitive mechanisms, heavily influenced by local power equilibrium within the institutions having access to governance mechanisms. Therefore, influence of other international institutions, like the OECD are not to be negated. Insisting since the late 70´s on tackling problems of structural unemployment, but through stimulating self-governing capacities of the citizens instead of demand-side policies, it seems that it contributed to the fact that current policies are too focused on the supply-side of labour.[190] Moreover, despite the fact that a great part of the literature of the end of the 80´s pointed towards the difficulties to link benefit generosity with labour market transformations, the OECD insisted on a negative influence of those on unemployment and its duration[191].

The lack of strong legal links between the EU and Member States within the social field, certainly when taking into account the cognitive aspect of the multilevel interaction, also makes that one has to accept to "reduce" part of its observations to global aspects

[190] Triantafilou, P., „The OECD´s thinking on the governing of unemployment", *Policy & Politics*, n° 4, 2011, 567-582, the author however, contends that OECD´s thinking, if well read, has nothing to do with neoliberal *laissez-faire* approach, involving intervention of the State in a wide array as educational programs, taxation regimes, advisory institutions, support of potential entrepreneurs, active ageing schemes, activation programs, etc…

[191] González Temprano, A., *La Política de Gasto Social (1984-1996)*, CES, Madrid, 1998, 116

and paradigmatic elements of the EU social policy regulation, like the concept of *flexicurity* or the general imbalance between social and economic objectives.

It is also important to take into account that social rights in Europe are not only affected by EU law. They inscribe themselves within a complex regulatory framework made of several levels, amongst which the European Regional level (Council of Europe) and the international level (mainly ILO) can be found. Even if the EU has to be considered as the most important level in terms of influence on Member State legal systems, for its political, economical or legal weight, one cannot discard the functions which fulfill those other organizations and instruments in terms of regulation of social rights.

Therefore, this Part addresses the "upper" or supranational level of the multivevel regulation of social rights, leaving the national level and their interaction with the multilevel framework for the case studies. That multilevel regulation is studied from the point of view of the subject of research, unemployment protection, as well as the perspective of the research, de-commodification. Therefore, concrete instruments potentially influencing unemployment protection and the developed in-out-of-work de-commodification framework are assessed within the broader context of regulation of social rights as elements of the Welfare State.

A first look is given to the regulatory framework of the European Union within a general perspective of the influence of its design on the re-commodification of Welfare States and the particular perspective of its influence on unemployment protection and its in-

and-out-of-work-decommodification elements. The second chapter centers on the definition of social rights at the basis of protection against unemployment contained within the different social and fundamental rights instruments of the multilevel legal framework, as an expression of the indivisibility of human (social) rights. International standards contained in ILO Conventions, the European Social Charter, the European Convention on Human Rights and interpreted by the several supervisory or adjudicatory organs related to them are analyzed, before closing with some observations about the position and the potential of the EU Charter of Fundamental Rights within the described multilevel framework.

Chapter I. The European Union as re-commodifying regulatory framework

I.1. Social Europe as Framework for Re-commodification

It is unknown to almost no one that the integration project of the European Community was based mainly on economic goals, the recognition of social rights in the Treaties, like the right to equal pay for women, having mainly a market integration rationale.[192] However, over time, the European Union has integrated social elements in its treatises, legislation and policies, forming today what most authors call the European Social Policy[193]. Nevertheless, this framework cannot be described as coherent, let alone complete, with welfare institutions and all-encompassing protection, but rather a patchwork of regulations of some aspects of social protection and employment policy[194]. However, all those elements have been and are being slowly (re-)organized around central concepts and paradigms, like the concept of *flexicurity*, reflecting the re-commodification trend that European Welfare State have endured.

[192] Barnard, C., *EC Employment Law*, OUP, Oxford, 2006, 6-7;
[193] For an overview of the evolution of European Social Policy since the foundation of the EC, see "Chapter 1 – The Evolution of EC 'Social Policy'" in Catherine Barnard, *EC Employment Law*, OUP, 2006, and referenced authors.
[194] Barnard, C., "EC 'Social Policy'", in Craig and de Búrca (eds.), *The evolution of EU Law*, OUP, 1999

This material reorganization is linked to a formal reorganization of the instruments applying and coordinating the European Social Policy within an increased commodifying framework through which the economic goals of the EU, or, more precisely, of the EMU acquire more importance and hierarchical superiority, as will be argued in the next sections.

The fundamental bases for the European social policy are found in Titles IX (Employment) and X (Social Policy) of the Treaty on the Functioning of the European Union (TFEU), whose aims are respectively to develop (art. 145 TFEU) "a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union" (mainly "balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of environment […] combat social exclusion and discrimination and shall promote social justice and protection […]), and to promote (art. 151 TFEU) "employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion" […] taking into account "the diverse forms of national practice […] and the need to maintain the competitiveness of the Union's economy". Just from the wording, particularly of article 151 TFEU, one can

conclude that European social policy is primarily focused on employment.

It is also important to note that the Chapter on employment Policy refers only to a "high level of employment" as an objective, relegating full employment to the background of the almost abstract goals of article 3 TUE, even if full employment is still indicated in the documents related to the EES.

Apart from its incomplete (or, to some authors, incoherent) nature[195], the main character of European social policy is the fact that, contrary to other, more economic-related policies, its use of *hard law* instruments is scarce, even more since the end of the 20th century. The Treaties themselves limited the power of the EU in that field to "support and complement the activities of the Member States" (art. 153.1 TFEU), adopting "measures designed to encourage cooperation through initiatives aimed at improving knowledge, developing exchanges of information and best practices" (art. 153.2 (a) TFEU). Concerning employment policy, which has to be consistent with the broad guidelines in matters of economic policy, the Treaties consecrate the much discussed Open Method of Coordination.

This form of what is sometimes called "reflexive law"[196] is the core method of implementation of employment policy in the EU since

[195] From the point of view of material competence, according to art. 153.5 TFEU, freedom of association, rights to bargain and strike, pay regulation, are expressly excluded from social Policy

[196] See, amongst others, Barnard, C., and Deakin, S., "In Search of Coherence: social policy, the single market and fundamental rights", 31:4, *Industrial*

the Treaty of Amsterdam, and inaugurated to attain objectives of a European policy in the Lisbon Strategy, consisting in coordinating policy by fixing guidelines and timetables for achieving goals at the EU level, peer review and sharing best practices, while policies and specific targets are spelled out on the national level.

There is also the possibility to adopt Directives (except for combating social exclusion or modernize social protection systems), but only for fixing minimum requirements for gradual implementation and avoiding the imposition of administrative, financial or legal constraints "in a way which would hold back the creation and development of small and medium-sized undertakings", and not forgetting that in the majority of the field (including social security and social protection of workers and protection of workers when their employment contract is terminated), unanimity is required.

There are thus, apart from OMC-related instruments, few direct interventions from the EU in the material regulation of unemployment or even social protection.[197] The only notable intervention has been in the field of coordination of the systems of social security for migrant workers (and assimilated and their families) and their right to equality of treatment as regards, amongst

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Relations Journal and Olivier De Schutter and Simon Deakin (eds.) *Social Rights and Market Forces*: *Is the open coordination of employment and social policies the future of social Europe*, Bruylant, 2005.

[197] Considering the Equal Treatment directives, insofar they apply to social protection, as indirect interventions, which do not affect directly the content of the social rights concerned;

others, social advantages, through Regulations 1408/71[198] and 1612/68[199], which are not instruments adopted within the framework of Social Policy in a strict sense, but rather from the point of view of market integration policy (freedom of movement for workers). Also important for this research are the "atypical work" Directives, two of them (Directive on Part-time Work[200] and Directive on Fixed-Term Work[201]) being fruit of the social dialogue at European level, while the third, on Agency Work, was the first Directive to be adopted within the *flexicurity* agenda. Despite the two first instruments being criticized for not being adequate for their goals to be achieved, they have been successful in advancing social rights of atypicial workers in some Member States, above all those, like Spain, having massively recurred to labour market flexibilization "at the entrance" as a means to create employment. The temporary agency work Directive has even been accused of legitimizing recourse to temporary agency work, while rendering its protective features ineffective due to the introduction of numerous exemptions and exceptions, or potentially worsening protection of temporary agency workers[202], confirming (once more) the imbalanced character of the *flexicurity* agenda.

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[198] Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community

[199] Council Regulation (EC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community

[200] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

[201] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

[202] Countouris, N. and Horton, R.,"The Temporary Agency Work directive: Another Broken Promise?", *Industrial Law Journal,* vol. 38, n^3, 2009, 329-338

In any case, their main rationale however is not one of de-commodification or protection through guaranteeing fundamental social rights, a social minimum floor, raising social standards or limit atypical work (given the absence of provisions towards those goals or their ineffectiveness due to the introduction of numerous exemptions and exceptions) but mainly the implementation of the non-discrimination principle between "standard" workers and atypical workers as principal and only really effective mechanism of protection, and this within a *flexicurity* perspective.[203] Given the single market integration connotations of the non-discrimination principle, those directives cannot be considered totally independently from their economic function. However, the interpretation given by the CJUE of the equal treatment principle at the heart of those Directives, and given the particular use as a fundamental right of that principle by the Court, helped shifting that rationale away from (labour) market regulation towards fundamental social right protection.[204] Those timid advances however should not occult the general ineffectiveness of those Directives in tackling the problems related to atypical work, without forgetting that through their categorization of atypical work they cover only a part of those workers needing protection.[205]

The little amount of *hard law* instruments and the corresponding disproportionate subjection of social and employment policy to *soft*

[203] Bell, M., „Between flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work", *European Law Review*, n° 1, 2012, 31-47
[204] Bell, M., „Between flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work", *European Law Review*, n° 1, 2012, 47-48
[205] Countouris, N., *The Changing Law of the Employment Relationship. Comparative Analyses in the European Context*, Ashgate, 2007

law instruments could be seen as one of the main factors of the lack of effectiveness of the EU in this field. The "coordination" or influence of Member States hard law by soft law instruments inscribes itself in a model of a hierarchical multilevel subordination of laws to instruments which have not the same guarantees in terms of rights, accountability and legitimacy than *hard law*. This could be seen as reinforcing what Alain Supiot refers to the vision of (national) law as a product "whose value is assessed in terms of its competitiveness on the international market of legal norms".[206]

Moreover, the lack of effectiveness of *soft law* instruments in promoting social rights is also linked to and worsened by a broader imbalance within the EU legal system, resulting from the prominence of the economic (fundamental) liberties with regards to (fundamental) social rights, sometimes worsened by the action of the Court of Justice of the European Union, a theme that has received his latest expression through a series of judgments on collective rights (*Laval*, *Viking*, *Rüffert*, *Commission v. Luxemburg*),[207] which have been criticized for considering that fundamental (social) rights have to pass the proportionality test in order not to be considering contrary to economic liberties, in

[206] Supiot, A., "Conclusion: Europe´s awakening" in Moreau, M.A. (Ed.), *Before and After the Economic Crisis. What Implications for the `European Social Model´?*, Edward Elgar, Cheltenham, 2011, 307

[207] *Laval:* Decision of 18 December 2007, case C-341-05; *Viking:* Decision of 11 December 2007, case C-438/05; *Ruffert:* Decision of 3 April 2008, case C-346/06; *Commission v. Luxemburg:* Decision of 19 June of 2009, case C-319/06

opposition to the majority of constitutional traditions of the Member States.[208]

This lack of balance between the social and the economic is quite important, to the extent that, despite the intention to leave the exercise of competence on social security, employment and other social-related matters to the Member States, there is a clear influence of the European Union structural relation between social rights and market-related rights on constitutional arrangements of this relation in Member States.[209] On a more specific level, research points toward the fact that the three EU social policy processes of secondary legislation, CJUE jurisprudence, the Lisbon or 2020 strategy and austerity within the EMU framework shape national social policy by creating pressure for reform at the level of Member States.[210]

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[208] See, amongst others, Maria Teresa Alameda Castillo, "Derechos sociales fundamentales y libertades económicas: ¿dónde está la Europea social?", *Relaciones Laborales*, 2009, 105-122; Bruno Caruso, "La integración de los derechos sociales en el espacio social supranacional y nacional: primeras reflexiones sobre los casos Viking y Laval", *Relaciones Laborales*, 159-186; Supiot, A., "Conclusion: Europe´s awakening" in Moreau, M.A. (Ed.), *Before and After the Economic Crisis. What Implications for the `European Social Model´?*, Edward Elgar, Cheltenham, 2011, points out that in *Viking*, the CJUE even contends that the respect for human dignity has to be `reconciled´ with the requirements related to the economic rights protected by the Treaty (!)., asking himself if the judges of the Court still know what they are talking about when speaking about the concept of dignity, forgetting that the origin of its present meaning is rooted in the totalitarian madness into which Nazism had plunged.

[209] See on this subject Bruno Caruso, "Constituciones y derechos sociales" in Julia López López, Mark Freedland, Bruno Caruso and Katherine Stone (coord.), *op. cit.*, 27-40, who adds that the process provokes new demands for constitutional patriotism.

[210] Mabbett D. and Schelkle, W. "Opportunities, threats and unintended consequences: The impact on national welfare states of three EU policy processes", *paper presented at the EUSA 2007 conference*, http://www.unc.edu/euce/eusa2007/papers/mabbett-d-01g.pdf; Ashiagbor, D.,

To use the language of re-commodification, one can say that, next to the fact that the European Employment Strategy is based on the vision of the employee as "an entrepreneur of his or her own endowments and skills", which as a result of judicial exposition of fundamental market freedoms and the corresponding treatment of welfare service providers and institution (like compulsory insurance plans, amongst others) as potential monopolies subjected to justificatory constraints which are increasingly narrowly defined, the resulting welfare reforms are not inspired by principles of social policy but by fundamental rules of market creation (with the corresponding commodification of recipients as consumers).[211]

On the other hand access of European citizens to social rights and solidarity systems has been enlarged, mainly through the action of the Court of Justice of the European Union.[212] The Court of Justice recognized social rights (mainly social assistance, but also unemployment benefits, student grants and other welfare state rights) to European citizens who were not covered by the free movement of workers regulations, building on the notion of

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"Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration", *European Law Journal,* Vol. 19, nº 3, 2013, 303-324

[211] Somek, A., "De-commodification Revisited : On the Absence of Emancipation in Europe*", University of Iowa Legal Studies research Paper,* 06-04*,* 2006 11-12, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927967

[212] See, amongst others, Herwig Verschueren, "European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems", 9 *European Journal of Migration and Law,* 2007, who argues that even the original exclusion of social assistance schemes has been diluted through the action of the CJUE and the consecutive reforms of the system, like the Regulation 883/2004 of 29 April 2004 on the coordination of social security systems.

European citizenship introduced in EU Primary legislation by the Maastricht Treaty.[213]

This jurisprudence can be said as having de-commodified European citizenship to a certain level, recognizing social rights to citizens as citizens and not as production factors (workers). It led to the adoption of Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and, despite the market-related constraints, highlights the potential of the concept of European citizenship, used in combination with the important European legal institution of equal treatment,[214] on conferring entitlement to social welfare benefits to people excluded from it because of lack of relation to markets.[215]

However, three aspects of this evolution should temper optimism somewhat.

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[213] For an overview, see Guibboni, S., "A certain degree of Solidarity? Free Movement of Persons and Access to Social Protection in the Case Law of the Court of Justice" in Malcolm Ross and Yuri Borgmann-Prebil (eds.), *Promoting solidarity in the European Union*, OUP, 2010

[214] In this context it is interesting to refere to Alexander Somek, "Antidiscrimination and De-commodification", *University of Iowa Legal Studies research Paper 05-03*, 2005, where the author argues in substance that anti-discrimination law, even in the case of a skewed design of EU social law, should not be attributed the central role in social policy, as it has to be complementary to strong social rights and balanced industrial relations.

[215] For a discussion about social rights, freedom of movement of non economically active European citizens and the potential of the CJUE jurisprudence in a multilevel context, see de le Court, A., "Libertad de circulación y ciudadanía europea: un análisis desde el ordenamiento multinivel" in Julia López López, Mark Freedland, Bruno Caruso and Katherine Stone (coord.), *La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada*, Bomarzo, Albacete, 2011, 41 - 78

Firstly, European citizenship as a de-commodifying element is still limited to the exercise of the right to free movement. Even if the recent jurisprudence of the Court of Justice, of which the *Ruiz Zambrano* case is a good example,[216] departs ever more from the actual movement of a European citizen from a Member State to another, some cross-border element is still needed for the rights attached to European citizenship to apply.

Secondly, access to social rights (mainly social assistance) is still graduated in function of time of residence, under the pretext of not burdening too much the solidarity systems of the Member States, and the (ungrounded) fear for welfare tourism.[217] This period of residence is presented as satisfying the need to have certain links with the Member State of residence to have access to its solidarity system, but actually amounts to a re-commodification of those

[216] Case C-34/09, Gerardo Ruiz Zambrano v. ONEM, where the Court ruled that "Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen" The idea behind the reasoning oft he Court ist hat the children, UE citizens, could not enjoy there rights to freedom of movement if their father was not allowed to live with them in a EU country, as they would most probably have to live in their father´s country of origin.

[217] de le Court, A., "Libertad de circulación y ciudadanía europea: un análisis desde el ordenamiento multinivel", in López López, J., Freedland, M., Caruso, B and Stone, K., *La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada*, Bomarzo, Albacete, 2011, 41-78

social rights, given their conditioning to a previous period of economic activity in the Member State of residence.[218]

The third point, of which the second can even seen to be a consequence, is that these incursions of the CJUE within Member States welfare systems can be seen as having a unbalancing effect taking into account the fact that solidarity has not only a "demand"-side, guaranteeing social citizenship, but also a "supply"-side, still confined within the limits of the Member States and where the EU has not taken much responsibility. Putting it otherwise, European citizenship gives new rights to individuals in name of freedom of movement (an economic freedom, or a freedom whose main rational is of a free market nature), breaking Member States solidarity systems open and forcing them to "supply" solidarity, even if it is only to a certain extent, but leaves the Member States on their own to cope with the consequences of that enhanced solidarity, without global European solidarity.

This is an illustration of the problem posed by the liberalizing and deregulatory impact on the socio-economic regimes of the Member States of the current dynamic of negative "integration through law" which tends to undermine the institutions of Continental and Scandinavian social market economies (whose welfare systems present higher rates of de-commodification), while being generally compatible with the status quo in liberal market economies (with

[218] Fargas, J., *Las pensiones no contributivas como proyección social y normative del artículo 41 de la Constitución*, PhD. Thesis, Universitat Pompeu Fabra, 2009, 108, http://ww.tdx.cat/TESIS_UPF/AVAILABLE/TDX-0213109-133354/tjff.pdf (last consulted, 15/04/2014)

lower rates of de-commodification), without there being compensating institutions at EU level, given the high consensus requirements (generally, unanimity) to adopt them.[219]

[219] Sharpf, F., „The asymmetry of European integration, or why the EU cannot be a social market economy", Socio-Economi review, nº 8, 2010, 211-250; Offe, C., „The European Model of „Social" Capitalism: Can it Survive European Integration?", *The Journal of Political Philosophy*, Vol. 11, nº 4, 2003, 437-469;

I.2. Protection against unemployment and the European Employment Strategy

Concerning the evaluation of the implementation of European Policies within the employment and social field, while some authors attribute success to the method (OMC) in terms of coordination,[220] the main tendency, at least in the political science literature, about its capacity to address the problems of collective action, in general and within the EU, is guarded, if not skeptical.[221]

It is true that it would be difficult to deny that the method constrains the policy choices of Member States through the political pressure to comply with the guidelines,[222] creating thus pressure for convergence. But on the other hand, most analysis of the "efficiency" of the OMC do not take into account the broader European cognitive context in which Employment Strategy inscribes itself, and the influence of other policy-determining elements of the same context. Amongst them the role of the OECD in determining policies which are also subject to coordination through the OMC should not be forgotten. As the paradigms and indicators used by the OECD in its reports and recommendations show some similarities with those behind and in application of the

[220] See, amongst others, Jonathan Zeitlin, "Towards a Stronger OMC in a More Social Europe 2020: A New governance Architecture for EU Policy Coordination", in Eric Marlier and David Natali (eds.) *Europe 2020: Towards a More Social Eu?*,

[221] For an overview, see Lenoble, J., "Open Method of Coordination and Theory of Reflexive Governance", in De Schutter and Simon Deakin (eds.) *Social Rights and Market Forces*, 21

[222] Ashiagbor, F., *The European Employment Strategy*, OUP, Oxford, 2005, 191-198

Guidelines implemented through the OMC, it can be therefore difficult to determine the real part of the OMC in "constraining" Member State policies. [223]

Moreover, the efficiency of the OMC in terms of an equilibrated development of the European Employment Strategy is also put into question. The fact that it promotes the tendency to use economic indicators, induced by the need to quantify results for their posterior monitoring and comparison, involve a loss of weight of objectives related to redistribution.[224] The priorities and objectives set by the Commission for the Europe 2020 Agenda confirms the "headlong rush towards the mirage governance by numbers, which is completely disconnected from democracy as well as social and economic realities", without integrating in the debate fundamental questions like "market regulation, frontiers of commerce, social, tax[225] or environmental policies" or "formulating principles which would even remotely reflect truly human concerns, those related to

[223] de la Porte, C., Pocher, J.P., "Why and how (still) study the Open Method of Coordination (OMC)?", *Journal of European Social Policy*, n° 22, 2012, 344;
[224] Landa, J.P., and Terradillos Ormaetxea, E.,"Looking at the EES in Search of Effectiveness and efficiency", in Blanpain, R. (ed.) *Employment policies and Multivel Governance*, Kluwer, 2009, 48-50
[225] A good example of this lack of debate in tax matters is the EU's insistance on increasing indirect taxation to lower direct taxation, while it is shown that the latter has a regressive effect on households with lower income, see Snowdon, C., "Aggressively regressive. The "sin" taxes that make the poor poorer", IEA Current Controversies Paper nº 47, 2013, http://www.iea.org.uk/sites/default/files/in-the-media/files/Aggressively%20Regressive.pdf (last visit: 18/04/2014)

justice, solidarity, democracy or quality of life", despite the failures of the Lisbon strategy.[226]

However, some legal approximation is possible when an OMC objective is mirrored in another legal instruments,[227] and global EU studies have observed that there was a connection between Council Recommendations and cuts in unemployment benefits through reduced budgets and reform of entitlement conditions, however not generalized over the whole EU and over time,[228] while evidence for the influence of those Recommendations on domestic active labour market policies, at least until 2005, seems not to be conclusive.[229] Moreover, the deeply politically negotiated nature of the formation of country-specific recommendations renders an analysis, let alone a legal analysis, even more complex.[230]

Nevertheless, reform of passive policies within the Employment Strategy is focused mainly on reducing work disincentives, resulting in lowering protection through benefits. The fact that the Employment Strategy seems to have more impact in that field than

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[226] Supiot, A., "Conclusion: Europe's awakening", in Moreau, M.A. (ed.), *Before and After the Economic Crisis*
What Implications for the 'European Social Model'?, Edward elgar, Cheltenham, 2011, 308

[227] de la Porte, C., Pocher, J.P., "Why and how (still) study the Open Method of Coordination (OMC)?", *Journal of European Social Policy*, n° 22, 2012, 344;

[228] Paetzold, J. and van Vliet, O., „Convergence without hard criteria: Does EU soft law affect domestic unemployment protection schemes?", *Working Papers in Economics and Finance*, University of Salzburg, n° 2012-09, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179888

[229] Van Vliet, O. and Koster, F., „Europeanization and the political economy of active labour market policies", *European Union Politics*, n° 12, 2011, 217-239

[230] Copeland, P. and ter Haar, B., „The (in)effectiveness of the European Employment Strategy", *Paper presented a the Twelfth Biennial EUSA conference in Boston*, 3-5 March 2011,
http://www.euce.org/eusa/2011/papers/7b_copeland.pdf

in the field of ALMPs,[231] which within the new paradigms are supposed to provide the protection, involves an effect of re-commodification based on lowering passive and active protection against unemployment.

Finally, amongst the EU instruments that influence Member State policy, one cannot forget the funds, like the European Social Fund, which, by requiring that certain conditions be met for the payment under the different programs, provides for incentives to adapt practices and regulation to the models promoted at the EU level.[232]

But, as already pointed out before, a significant part of social policy of the EU is also directed, recommended and implemented within the framework of the Economic and Monetary Union. In the framework of the 2020 Strategy, Employment Guidelines have been integrated within the Broad Economic Guidelines, but coordination and influence from several EU institutions goes further than that, above all after the soaring of public deficits in the aftermath of the 2008 financial crisis.

One of the first important joint measures taken by the euro Member State was the decision taken at the Ecofin Council of 9 May 2010 to establish the European Financial Stability Facility (EFSF). This independent entity, with a lending capacity of 440 billion € based

[231] Paetzold, J. and van Vliet, O., „Convergence without hard criteria: Does EU soft law affect domestic unemployment protection schemes?“, *Working Papers in Economics and Finance*, University of Salzburg, n° 2012-09

[232] Van Gerven, M., Gürocak, S. and Vanhercke, B., “Innovation through the European social Fund: Investing in reintegration policies in the Nethelrands and Spain“, *paper presented at the 2012 ESPANET conference*, http://www.espanet2012.info/__data/assets/word_doc/0005/89249/Van_Gerven_-_Stream_1.doc

on bonds guaranteed by Eurozone member states in proportion with their capital contribution to the ECB, has as mandate: "*to safeguard financial stability in Europe by providing financial assistance to euro area Member States within the framework of a macro-economic adjustment programme*"[233]. The EFSF had been designed as a temporal mechanism, which was substituted by the European Stability Mechanism (ESM) on 12 October 2012, except for the continuing involvement of the EFSF in the ongoing adjustment programmes of Greece, Portugal and Ireland.

Parallel to the constitution of those instruments, whose action is meant to be coupled with austerity programs, the European member states and European institutions members adopted a series of measures, programs and instruments intended to respond to the crisis of the Eurozone, aiming at strengthening the Stability and Growth pack and deepening European economic governance. 2010 saw the launch of the "Six Pack" (formally adopted in November 2011), a proposed set of five regulations and one directive, implementing the "European Semester", reinforcing measures preventing the emergence of and correcting excessive deficits, reinforcing sanctions and sanction proceedings, designing the budgetary frameworks of the member states, and, finally, establishing procedures for the detection, prevention and correction of macroeconomic imbalances (through a system of recommendation and sanctions), measured in terms of public/private indebtedness, development of financial markets, credit flow, unemployment, current account, real effective exchange

[233] Emphasis put by the author

rates, non-price competitiveness and productivity.[234] 2011 saw the adoption of the "Euro + Pact", a list of commitments from the signatory parties (23 EU member states) to enhance competitiveness (mainly through pressure on wages, opening sectors to competition and encouraging R&D and education), promoting employment (mainly through "supply"-side reforms favoring *flexicurity* and reducing taxes on labour), ensuring viability of public finance (mainly through controlling social protection benefits, going from pension to health care), and reinforcing (private) financial stability. Those commitments are then transposed through the National Action Plans adopted through the system of the "European Semester". The same year saw the launching of the "Two Pack", two proposed Regulations reinforcing budgetary surveillance, in proportion to the seriousness of the financial difficulties of the member states or the financial assistance given to them[235]. Finally,

[234] For an overview, Degryse, C., *The new European economic Governance*, *ETUI Working Paper* 2012.14, 28-32. Within this context it is of interest to observe that the Commission in its Communication of 5 March 2014 on the results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (COM(2014) 150 final), 14-15, that Spain did not find itself any more in a situation of "excessive economic imbalance" but only in a state of "economic imbalance which require specific monitoring and decisive political action", because of the "restructuration and recapitalization of weaker banks which have dispelled systemic concerns about the financial sector", a current account which has turned into surplus, positive growth, a stabilization of the housing market, employment destruction which appears (*sic*) to have come to an end, and the completion from the legislative point of view of the agenda of structural reforms contained in the 2013 National Reform Plan. The fact that a level of unemployment around 26%, with soaring long-term unemployment and a high rate of youth unemployment seems not to be sufficient to consider the economic situation as excessively imbalanced, confirms once again the lack of attention given within the EMU to unacceptable social problems with important economic consequences.

[235] Degryse, C., *The new European economic Governance*, ETUI Working Paper 2012.14, 54-55

2012 saw, next to the development of the different initiatives, programs and instruments proposed during the two previous years, the signature on the 2nd of March of the Treaty on Stability, coordination and governance in the Economic and monetary Union. This new Treaty imposes the obligation to incorporate into the national legal order, *"preferably"* through constitutional provisions, the balanced budget rule, also known as golden rule, prohibiting deficits except in exceptional circumstances. It also opens the possibility, in case of budgetary deviation by a Member State, for the imposition of "structural reforms" to restore budgetary equilibrium, with a clear potential to affect social rights, and not only those needing State financing like social security rights.

This new complete architecture has not had yet a lot of direct formal effects in imposing austerity measures affecting social rights on member states, except in the context of the bailouts of Greece, Ireland and Portugal where there was a certain direct, formal influence of EU law. However, the European semester as an instrument, but above all general political pressure (mostly from the Commission and the German government), as well as pressure from the European Central Bank most probably had an influence.

On the one hand, it can be objected that the decisions taken by those member states to implement the agreements concluded with institutions which are not all part of the European Union (like the IMF) could be seen as outside the scope of EU law. However, they can be considered as EU law to the extent those bailouts are covered in part by Council Regulation (EU) No 407/2010 of 11 May 2010

establishing a European financial stabilisation mechanism (a "Six Pack" measure). This Regulation is taken in application of art. 122(2) of the Treaty, which provides the possibility of granting Union financial assistance to a Member State in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control. If we take the Council Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal as an example, we can say that, apart from referring to the Memorandum of Understanding agreed between the country, the EU, the IMF and the ECB, it obliges the latter country, amongst other things, to limit severance payments and make working time arrangements more flexible, to cut (*sic*) in education and health, to cap unemployment benefits to 2,5 times the social support index, to reduce benefits over the unemployment spell, to reduce the minimum contributory period, and to extend unemployment protection to certain categories of self-employed. Even if those two last obligations can be seen as positive, most of them do not, and show that EU law has new ways to extend its reach on social rights within the national legal systems. It shows also the priority of creation of supposedly favorable conditions for the repayment of (EU) loans through budgetary equilibrium above the preservation of the societal (and even economic) equilibrium which is supported amongst other by those institutions as health care, education, job stability protection for example.

Moreover, even without taking into account the instrument just described and especially aimed at "bailed-out" countries, the EU

coordination of employment policy, as well as of social inclusion policy, has been integrated within the context of economic policy coordination, within the broader context of the end of the Lisbon strategy and the new 2020 Strategy. The adoption of the Integrated Guidelines (Broad economic guidelines, employment guidelines and social inclusion guidelines) and a better integration of the several aspect in the context of the 2020 Strategy have been the first steps, of an integration of social policy (in a broad sense) within the European Monetary Union. A second, important step has been taken through the integration of coordination of those policies into the enhanced control mechanism following the adoption of the "Euro-crisis Pacts and Packs", mainly through the "European Semester". Control and coordination of the National Reform Plans (implementing the Recommendations made in the context of the 2020 Strategy) is made at the same time and through the same Legal instruments (evaluation by the Commission, Recommendations by the Council) as the presentation of the Stability Programs (for Eurozone countries), subjected to the new macroeconomic surveillance framework put in place to guarantee a better respect of the amended Stability and Growth Pact. Above all the integration of country-specific recommendations for employment, social inclusion and economic policies within the same Council Recommendation, taken in application of articles 121(2) and 148(4) (Employment Title) of the TFUE, together with Regulations 1466/97 (strengthening of surveillance of budgetary positions and the surveillance and coordination of economic policies) and 1176/2011

(on the prevention and correction of macroeconomic imbalances)[236] points towards a further submission of welfare state policies to the priorities of the EMU and its new, more coercive procedures. This is even more the case for the Euro Member States, as non-compliance with the recommendations under the 1176/2011 Regulation can give way to monetary sanctions under Regulation 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

Concerning unemployment protection, in its Communication on the Annual Growth Survey 2013,[237] a document initiating the European Semester, the Commission makes a series of recommendations concerning unemployment in *Chapter 4. Tackling Unemployment and the social consequences of the crisis***.** Despite recognizing that "the weak growth prospects and the time lag between economic recovery and recovery in the labour markets means that there is no prospect of immediate or automatic improvement in the employment situation" the Commission keeps recommending that "the impact of unemployment benefits should be monitored to ensure appropriate eligibility and effective jobseeking requirements" and "to modernize labour market […] by developing flexible working arrangements", which shows that the main policy directions still push towards re-commodifying and flexibilizing competitiveness enhancing measures, despite the adding evidences that those "austerity strategies" do not work.

[236] Regulation (EU) 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances
[237] COM(2012) 750 final

On the other hand, under the section "improving employability levels, in particular of young people", the Commissions recommends specifically "to boost public employment services and step up active labour market measures" criticizing the fact that "the support provided hardly matches the surge in the number of registered jobseeker experienced in several countries", a specific recommendation that disappeared from the Employment Guidelines, but that could be considered as a step towards enhancing protection, however still within a heavy re-commodifying flexicurity paradigm, and insufficient to cover adequately the risks related to unemployment.

The document recommends other measures, related to the removal of tax burden on employment, targeted public support towards ICT, care and green jobs, the development of "youth guarantee" schemes, well-targeted social security contribution reductions, minimum wage systems striking the right balance between job creation and adequate income, up-skilling, etc., recommendation which reflects those made in the framework of the EES, but which could be considered as more specific, and therefore, potentially more effective.

The closer analysis of some country-specific recommendations and the response of Member States proposed further in this work should help assessing the potential of the Guidelines applied within a context closer to objectives and practices of the EMU, and the effects of this new environment on labour market and unemployment reform. However, it is already clear that those

changes can be seen as a new step towards the submission of European policy related to and affecting welfare state institutions to the goals of the Economic and Monetary Union.

And this is true from a material point of view as well as from the point of view of the instruments, which, seen within the multilevel legal context, are closely interwoven. The more rigorous and constraining coordination (or rather, surveillance) system put in place within the context of the EMU during the crisis will help shape the priorities within the European Employment Strategy, and so influence its material content as well as the content of the Member states policies related towards labour market and unemployment protection.

In the month of October 2013, the Commission released a Communication on the New Social Dimension of the EU, which can be seen as a response to the disaffection provoked by the consequences of the submission of social goals to economic principles within the EU and the devastating effects of "austerity". This answered the call of the June 2013 European Council to strengthen the social dimension of the EMU, by taking account of the social and labour market situation and the need to improve coordination of employment and social policies as well as the role of the social partners and social dialogue,[238] as well as a Resolution of the European Parliament recommending, amongst others, a social pact for Europe as one of the priorities for achieving a genuine

[238] Conclusions of the European Council of 28 June 2013, EUCO 104/2/13 REV 2, point 14

EMU.[239] The Commission proposes to act on four main axes: better the monitoring of employment and social developments so as to better coordinate adequate and timely employment and social policy responses, stepping up solidarity through reinforced financial instruments (mainly through the ESF and the European Structural and Investment Funds), improving labour mobility within the EU and strengthening social dialogue.

However, the actions proposed fall short of genuinely reinforcing the social dimension of the EMU and changing the current orientation, described in this Chapter. First, the indicators proposed for a better monitoring of the employment and social situation (unemployment rate, share of NEETs – young people not in education, employment nor training, household disposable income, at risk of poverty rate and inequalities) confirm long-term trends and do not permit preventive actions. Moreover, there is no guarantee of implementation of the corrective actions that negative indicators could trigger, as there are no new developments in matters of coordination, further than the use of new indicators to promote the exchange of information and best practices. Therefore, the initiative does not bring anything new further than a potential better analysis of the social situation.[240] However, there is no mention of any reorientation towards the integration of a social

[239] European Parliament resolution of 20 November 2012 with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup 'Towards a genuine Economic and Monetary Union' (2012/2151(INI))

[240] ETUC, „Position on the European Commission communication on Strengthening the social dimension of Economic and Monetary Union", 3-4 december 2013, recommending the development of a „decent work index".

rights perspective, confirming the tenacity of EU institutions in their beliefs in exclusive governance by numbers.

In terms of enhancing EU wide solidarity, a perspective which is paramount to the problems created by the lack of integration of solidarity as part of social citizenship at EU level, leaving responsibility for it by Member States which, contradictorily, see their solidarity systems unraveled by negative integration[241] and pressure on their budgets, the Communication does not go further than proposing a better use and targeting of existing funds. And where it proposes to create a "common instrument for macroeconomic stabilization" not only does it not go far in a concrete description of what it could be (however a possible form could be a fund permitting counter-cyclical policies like the US unemployment benefit system, where a federal fund reimburses 50% of unemployment benefits exceeding a standard duration), the proposed measures would require substantial Treaty change, because of a lack of current competence of the EU in those matters. On the other hand such a system would add a genuine solidarity dimension at the EU level, provided that it would be automatic and without adopting the "contractual" character of the existing instruments or the "Memorandums of Understanding" adopted between bailed-out countries and the Troika, and could be considered as a positive step towards re-embedding the market at the EU-level. To that extent, the Communication of the Commission builds on an existing trend of reflection about such

[241] Scharpf, F., „The assymmetry of European integration, or why the EU cannot be a social market economy", *Socio-economic Review*, nº 8, 2010, 211-250

automatic macroeconomic stabilizing mechanisms, which go from the proposal of macroeconomic shocks insurance mechanisms to a genuine European system of unemployment insurance.[242]

[242] For an overview of recent proposals, see de Crombrugghe, A., „European unemployment benefit expenditure solidarity", Paper presented at the Progressive Economy Annual Conference, Brussels, 5 March 2014, http://www.progressiveeconomy.eu/content/european-unemployment-benefit-expenditure-0

Chapter II. Social rights and protection against unemployment within the European Supranational Legal Framework

II.1. International Law, Regional Law and Social Rights

International law has not been concerned a lot about structure and content of welfare states in particular. One can find however some instruments about components of the welfare State like social security or social assistance. Amongst them we can cite ILO Conventions (mostly ILO convention 102) as well as the UN Covenant on Economic, Social and Cultural Rights. The same cannot be said about international standards about rights and policies related more closely to work. Concerning the latter point (but through work-related rights, concerning social law in general) there is currently a wide debate about the meaning and the (un)usefulness of theoretically enforceable international standards in labour law.

Some maintain that strong international labour standards, construed as fundamental or human rights, can be useful in reframing legal

thought about individual and collective labour rights[243]. Moreover, the interaction between the different levels of regulation has become more complex at a territorial (national) level, presenting multiple connections from the point of view of regulation as well from the point of view of jurisprudence, and that within that context "classical" international standards do not have lost their use. For example, ILO conventions have helped creating new and enhancing existing individual and collective social rights in the Spanish democratic context, through those complex and interactive connections between legal levels[244].

Other authors, like Brian Langille[245], criticize the fact that the traditional vision of national labour law (which he summarizes as ensuring social justice against the market by imposing standards and enforcing rights, for example through ILO conventions and social clauses in trade agreements) is being used as a narrative for international labour law. The former, when applied to the international context, envisions a social race to the bottom between rational competing states, because of the failure of international institutions in general or ILO in particular to enforce the standards effectively. Therefore, international labour law should be more

[243] Gross, J., *A Shameful Business. The case for human rights in the American workplace*, Cornell University Press, 2010

[244] López López, J., "La construcción de derechos sociales: judicialización y aplicación de los convenios de la OIT", in Julia López López, Mark Freedland, Bruno Caruso and Katherine Stone (coord..), *La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada*, Editorial Bomarzo, 2011, 13-26; Josep Fargas Fernández, "Uso jurisprudencial de los Convenios de la OIT en materia de Seguridad Social*", ibídem*, 215 – 235;

[245] See, for example, Langille, B., "What is International Labour Law For?", *Law and Ethics of Human Rights*, Vol. 3, 2009, 46-82

concerned about promoting itself so as to lead the states to pursue their self-interest when consistent with the collective goals of humanity, by replacing enforcement with "technical assistance, money, expertise, benchmarking, good practices, coordination, etc". One might say that this debate about international labour law reflects the European Union debate about hard law and soft law, particularly lively in the context of enforcing social rights. As a reconciling note, one could say that the two approaches are not exclusive one from the other. The former approach is even more important within the context of entrenchment and re-commodification happening in the more developed Welfare States, while its usefulness in building up Welfare States has also be shown. Minimal standards that can be used by actors within the state or even regional sphere to advance or fight against regression in the sphere of social rights, mainly but not exclusively, through judicial intervention have not lost their importance.

Finally, in the wider international context, instruments related to Welfare State rights can be divided in two main approaches. The first, the human rights approach, in which we can obviously classify human rights instruments like the UN Covenant, focuses on establishing individual rights that must be guaranteed by the State, while the second, to which most ILO instruments would belong, focus directly on the obligation of the states to secure benefits to those having the right to them. To that respect, the European Social Charter is interesting, as it recognizes the complementary character of both approaches, whose need is well established, and which motivates the fact that the UN Committee on Economic, Social and

Cultural rights is moving towards the state social responsibility approach and the ILO is moving towards the human rights approach[246].

[246] ILO, *Social Security and the Rule of Law. General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*, nº 154 , http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_152602.pdf

II.2 Protection against unemployment and the International Labour Organization

The first reference that comes to mind when talking about social protection, or, more specifically, social security in international context, are the ILO Conventions on social security, amongst which the most relevant for the present study are the 1952 Convention n° 102 concerning minimum standards on social security, and the 1988 Convention n° 168 on Employment Promotion and Protection against Unemployment[247].

In a multilevel perspective, it is important to observe that they connect with a whole series of other international law instruments, at general and regional level. One can cite their fundamental role for the interpretation of the right to social security as figured in the International Covenant on Economic, Social and Cultural, above all through the 2007 General Comment on the right to social security drawn up by the UN Economic and Social Council[248]. But they also influence interpretation of instruments in the context of the Council of Europe, like the European Social Charter, the Revised Social Charter and the European Social Security Code, and have been ratified, at least in part, by most Member States of the European Union.

[247] Convention 44 is considered to be outdated and not open to ratification any more, however still subject to review procedure. It also serves to help interpreting concepts not further defined in Part IV (unemployment) of Convention 102. In the EU, Convention 168 has thus far only been ratified by Belgium, Finland, Sweden and Romania, but is already in force.

[248] Dijkhof, T., *International Social Security Standards in the European Union. The Cases of the Czech republic and Estonia*, Intersentia, 2011, 3-4

The most important of those conventions is the 1952 ILO Convention n° 102 concerning minimum standards on social security. On the one hand, it has been designed with the purpose to promote and guide the incipient construction of the post-war social security systems, by extending coverage and contingencies, promoting adequate benefits, loosening the tie between contributions and benefits and unifying the systems. On the other, it would serve as a framework for new and more specialized Conventions. Both objectives have to be seen within the broader goal of preventing competition on basis of labour costs[249].

Part IV of Convention 102 concerns unemployment, and has been ratified by a great number of EU Countries[250]. It defines the unemployment contingency as "suspensions of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work".

This definition has several consequences on the scope of the ILO protection. The reference to the notion of suspensions of earnings excludes newcomers to the labour market and partial unemployment is not included. The redaction of article 21, on the (minimal) personal scope of protection, providing protection to classes of employees constituting at least 50% of all the employees or residents with means under a limit prescribed in accordance to art.

[249] Dijkhof, T., *International Social Security Standards in the European Union. The Cases oft he Czech republic and Estonia*, Intersentia, 2011, 4

[250] Austria, Denmark, France, Germany, Greece, Ireland, Luxemburg, The Netherlands, Portugal, Slovenia, Spain, Sweden and the UK.

67, involves that insurance schemes for employees should not provide means-tested benefits.[251]

The minimum benefits amount to 45% of the previous wage for contributory systems, with a possible cap of minimum 45% of the average wage of a skilled adult manual male employee. The latter reference, but with an unskilled adult manual male worker, serves also as minimum for flat-rate benefits or in case of means-tested benefits.

Despite the principle being the protection during the whole duration of the contingency, a minimum period of 13 weeks within a period of 12 months is allowed for contributory schemes, and 26 weeks in the same period for means-tested schemes, with exception for seasonal workers, and a maximum waiting period of 7 days. A qualification period can be imposed, which consists in a previous duration of residence or contribution period insofar the duration is necessary to preclude abuse.

Finally, an important element of the protection is the idea of absence of suitable work. To help interpreting this concept, recourse has to be made to ILO Convention 44, which defines more concretely the notion, also in the context of allowing suspension of benefits for an adequate period in case of refusal of a suitable employment, and also ILO Recommendation 67 on Income Security.

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[251] Dijkhof, T., *International Social Security Standards in the European Union. The Cases oft he Czech republic and Estonia*, Intersentia, 2011, 64-66

In this context work shall be considered as not suitable, when its acceptance involves new residence without adequate accommodation, the work involves lower wages or work conditions, or lower than those fixed by collective agreements were applicable, or the refusal to accept it is not unreasonable, giving all considerations involved, including the personal circumstance of the unemployed. Have to be taken into account the length in the previous occupation, the chances of obtaining work in the same occupation, vocation training and suitability for work of the unemployed. Finally, after a period considered reasonable giving the circumstance of the case, the suitability can be interpreted more broadly, and can, under certain conditions, involve change of residence or less favourable working conditions[252]. However, the freedom of choice of occupation (enshrined in article 6 of the International Covenant on Economic, Social and Cultural Rights, but also article 1-2 of the European Social Charter, or article 15.1 of the Charter of Fundamental Rights of the European Union) should function as a limit to this degradation of suitability, which implies that someone would not be free if he or she had to enter into an occupation he or she reasonably does not want, under the pressure of need. Moreover, the principle of dignity would also constitute a limit to that degradation, in the sense that a job which would prevent or seriously impede the personal development of someone,

[252] Dijkhof, T., *International Social Security Standards in the European Union. The Cases of the Czech republic and Estonia*, Intersentia, 2011, 65-66.

taking into account his qualifications and capabilities, would not be considered as suitable.[253]

It is important to observe that during the drafting of the Convention, the ILO Office made clear (already in 1951) that the main requirement of an effective unemployment system are efficient employment services, facilities for retraining and a general programme of full employment, three elements without which unemployment cannot be controlled and its duration shortened.[254]

In this respect, it is also important to mention Convention 168, which, however still not having been ratified by a lot of countries, ties full employment policies more tightly to unemployment protection. One the one hand it obliges the signatories to consider a priority a policy designed to promote, full, productive, and freely chosen employment by all appropriate means, and cite explicitly amongst those means employment services, vocational training, and vocational guidance above all amongst categories of persons liable to have difficulties in finding lasting employment (art. 7 and 8).

The Convention uses a lot of the same categories and concepts as Convention 102, but fixes higher standards (85% of employees to be covered, 50% of previous salary or, in case of non-salary related benefits, the highest amongst three minimum thresholds: 50% of minimum wage, 50% of the wage of an ordinary labourer, or the

[253] Smit, F.J., „Suitable Employment as a Human Right", in De Waart, P., Denters, E., Schrijver, N., *Reflections on International Law from the Low Countries: In Honour of Paul De Waart*, Martinus Nijhoff Publishers, 1998, 195-196

[254] Dijkhof, T., *International Social Security Standards in the European Union. The Cases oft he Czech republic and Estonia*, Intersentia, 2011, 69

minimum essential for basic living expenses, minimum period of 26 weeks per spell of unemployment or 39 weeks over a period of 24 months). It includes also temporary unemployment in case of suspension of contracts within the contingencies. Benefits can be refused, suspended, reduced or ended in case of voluntary unemployment, refusal of suitable employment or, which is new, "when the person concerned has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work".

The circumstances to be specifically taken into account to assess the suitability of employment are „under prescribed conditions and to an appropriate extent, of the age of unemployed persons, their length of service in their former occupation, their acquired experience, the length of their period of unemployment, the labour market situation, the impact of the employment in question on their personal and family situation and whether the employment is vacant as a direct result of a stoppage of work due to an on-going labour dispute".

Finally articles 23 and 24 prescribes the signatories to endeavour to guarantee that periods during which benefits are paid are taken into consideration for the acquisition of social security rights, like disability or old-age benefits, directly or indirectly conditional upon periods of activity, and to adapt those social security schemes to the occupational circumstances of part-time workers.

Even more interestingly, the Convention obliges signatories to provide for unemployment benefits to at least three amongst several categories of persons who have never been, or have ceased to be, covered by schemes for the protection of the unemployed, like younger person after having

completed their education, self-employed, or persons wanting to reintegrate the labour market after having periods of care of children or dependents.

ILO Convention 168 should be thus considered as a real improvement with respect to ILO Convention 102, not only on the level of guaranteeing better benefits, but also in equalizing the several circumstances to be taken into account to assess the suitability of employment (without the period of unemployment having prominence in changing the character of suitability), and taking into account, albeit only partly, new social risks and the integration of labour market (re-)entrants within the scope of the protection. Above all, its insistence on the promotion of full, productive and freely chosen employment could reveal itself a useful interpretation tool of questions raised by unemployment protection systems.

Generally speaking, the centre of the approach of ILO Convention 102 is income security, based on the notion of entitlement, rather than need, with means-testing benefits designed to complement benefits with the nature of product of social insurance of a public character, without the fact that the lesser "availability" of standard employment which was taken as an assumption of that system should undermine the legitimacy of that approach, as the underlying model is more than ever necessary.[255]

[255] Deakin, S. and Freedland, M., "Updating international labor standards in the area of social security: a framework for analysis", *Comparative Labour Law & Policy Journal*, vol. 27, nr. 2, 2006, 151-166;

Finally, it remains important to inscribe the ILO *hard law* instruments, amongst which those described here, within the ILO's Decent Work Agenda, the *soft law* strategy which has become one of the centrepieces of the policy of the ILO. With the concept of decent work at its core and as a goal, the Agenda is implemented through five objectives: creating jobs, guaranteeing rights at work, extending social protection, promoting social dialogue and promoting gender equality as a transversal objective.[256] Within that context, the Resolution and Conclusions Concerning Social Security adopted by the ILO in 2001 affirms that social security is a "basic human right", which confirms that the list of fundamental rights which need priority action does not need to be limited to the four rights of the Declaration of Fundamental Principles and Rights at Work of 1998, and links "the new consensus on social security" to the concept of Decent Work, which helps broaden the conception of the scope of application of social security, as well as anchor it in the principles of dignity and solidarity.[257] In 2011, the ILO adopted a "Resolution and conclusions concerning the recurrent discussion on social protection (social security)" stating that social security is not only a human right, but also a social necessity as well as an economic necessity, and that, next to the establishment of a Social Protection Floor (horizontal dimension), Member States have to provide higher levels of income security (vertical dimension), to as

[256] Sengenberger, W., "Decent Work: The International Labour Organization Agenda", *Dialogue and Cooperation Paper 2/2001,* Friedrich-Ebert-Stiftung, http://library.fes.de/pdf-files/iez/global/02077.pdf

[257] Supiot, A., "The Position of Social Security in the System of International Labor Standards", *Comparative Labour Law & Policy Journal*, vol. 27, nr. 2, 2006, 113-121;

many people as possible and as soon as possible, in first instance towards the coverage and benefits provided for in Convention 102, but also towards other ILO social security conventions (like Convention nº 168) and Recommendations setting out more advanced standards. This gave rise to Recommendation nº 202 concerning national floors of social protection (Social Protection Floors Recommendation), which contains a set of criteria to be followed by the Member States in establishing those "minimal" protection floors, as well as extend social security, by designing strategies, in accordance with effective social dialogue, in which gaps in protection are identified and closed as soon as possible, through appropriate and effectively coordinated schemes and complements social security with active labour market policies, including vocational training, as appropriate.

As a conclusion, if on the one hand, the ILO Conventions on Social Security have been criticized for their lack of effectiveness, above all within the EU context (out of date conceptions and language, lack of legal power, low minimum standards in matters of benefits), on the other hand they still contain provisions which are potentially contrary to certain developments within the evolution of protection against unemployment and by still being applicable in a context of further privatization of insurance and provision of services related to the protection.[258] Moreover, their inscription within the Decent Work Agenda permits their interpenetration with the principles at

[258] For a review of those critics, see Dijkhoff, T., *International Social Security Standards in the European Union. The Cases oft he Czech republic and Estonia*, Intersentia, 2011, 325-345.

its heart, including the necessity to attain more advanced standards than those of Convention 102, all elements which could ensure interpretations permitting to bridge the latter difficulties.

II.3 Protection against unemployment and the Council of Europe

II.3.1. The European Social Charter and its interpretation by the Committee of Social Rights: de-commodification in times of economic crisis.

II.3.1.1. The European Social Charter and its relation with other social rights instruments as an expression of their interconnectedness

On a more regional level, but from a clear human rights perspective, and also of importance for the protection of (fundamental) social rights, there is the existence of the two main Conventions of the Council of Europe. Next to the well-known European Convention on Human Rights (ECHR), which, despite its "first generation rights" character, has consequences on the protection of social rights, another instrument can be more and more concerned as paramount for protecting and promoting social rights, is the European Social Charter. The Charter recognizes the right to Social Security (referring in the relevant article to ILO convention nº 102), to social assistance, to benefit from social welfare services, amongst other "Welfare State rights" and labour rights. It has not the same level of enforcement as the ECHR, and authors are divided about its effectiveness, due to the peculiar, quasi-jurisdictional nature of its supervisory committee[259]. Next to a collective complaints system,

[259] For example, Brillat, R., in his chapter "The Supervisory mechanism of ESC: Recent Developments and their impact" and Gorri, G., "Domestic Enforcement of the ESC: The Way Forward", both in de Búrca, G., and de Witte, B. (eds.), *Social Rights in Europe*, OUP, 2005, view favourably the reforms of the procedure

the Charter has put in place a system of reporting by Member States and Conclusions on compliance with the Charter and information requests by the European Committee on Social Rights, accompanied by Recommendations made by the Committee of Ministers.

But this document is also important in the sense that it gets interwoven not only with the ECHR[260] but also with EU law. On the one hand, the EU treaties do not provide for the accession to the European Social Charter, as opposed to the regulation of the accession of the EU to the ECHR. As such, therefore, the supervisory mechanism of the Social Charter cannot be extended to acts of the EU. However, acts of Member States implementing EU law are included within its scope of application.[261] Moreover,

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before the supervisory Committee and denying its *soft law* character, concluding that the main challenge is to raise awareness of the developments under the Charter. On the other hand, Philip Alston, in his chapter "Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System" in the same book, argues that significant reforms have to be adopted to change a relatively ineffectual system into one that could have a far greater impact. However, all authors seem to be positive concerning the potential of the document, and Akandji-Kombé, J.-F., arguing in "The material Impact of the Jurisprudence of the ECSR", *ibidem*, that the Charter contributes to construing social rights on the one hand, and civil and political rights on the other, as being interdependent and working towards the same goal: the protection of the human being.

[260] Larralde, J.-M., „Charte Sociale Européenne et Convention Européenne des Droits de l´Homme", in Akandji-Kombé, J.-F. and Leclerc, S. (eds.), *La Charte Sociale Européenne*, Bruylant, Brussels, 2001

[261] See European Comittee of Social Rights, Decisions on the Merits in Collective Complaints nr. 55/2009 §§ 32-33: „the Committee reiterates that the fact that the provisions at stake are based on a European Union irective does not remove them from the ambit of the Charter (CFE-CGC v. France, complaint No. 16/2003, decision on the merits of 12 October 2004, §30; see also, mutatis mutandis, Cantoni v. France, judgment of the European Court of Human Rights of 15 November 1996, §30). In this regard, the Committee has already stated that it is neither competent to assess the conformity of national situations with a directive

according to article 151 TFUE, the objectives of European Social Policy are defined "having in mind fundamental social rights such as those set out in the European Social Charter", and the Preamble to the TUE confirms the adhesion of the Member States to fundamental social rights as defined by the European Social Charter. Those declarations, while not conferring enforceable rights, still give the European Social Charter a potentially important function of inspiration of European policy.[262] Also, the European Court of Justice is referring to the European Social Charter in its jurisprudence. Not only has it used the Charter to reinforce the fact the EU is bound by fundamental social rights[263], even if, more recently, it was in the *Viking and Laval* jurisprudence, heavily criticized for subjecting fundamental social rights to economic freedoms which did not augur a favourable apparition of the Charter in the Court's jurisprudence. But the Court has also invoked the Charter as a parameter of interpretation, however always in

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of the European Union nor to assess compliance of a directive with the European Social Charter. However, when member states of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should – both when preparing the text in question and when transposing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter. It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter".

[262] Jiménez García, C. F., "La Carta Social Europea (Revisada): entre el desconocimiento y su revitalización como instrumento de coordinación de las políticas sociales europeas", *Revista electrónica de Estudios Internacionales*, nr. 17, 2009, consulted version: http://dialnet.unirioja.es/servlet/articulo?codigo=3259380 (last visit: 11/2/2014).

[263] European Court of Justice, judgment of 15 June 1978, *Defrenne v. Sabena*, Case 149/77

conjunction with other instruments. In *Impact*[264], the Court referred, amongst other instruments, to point 4 of Part I of the Charter ("right of all workers to a fair remuneration sufficient for a decent standard of living for themselves and their families" as an objective the contracting parties have undertaken to achieve) to defend a broad interpretation of the notion of "employment conditions" contained in clause 4 of the Framework Agreement on fixed-term work.[265] This stance, with express reference to the Charter as a parameter of interpretation, was repeated in a judgement related to the interpretation of the notion of "employment conditions" in Council Directive 97/81/EC on the Framework Agreement on part-time work,[266] and the Court also used the coincidence between the 14 weeks of maternity leave recognized by Council Directive 92/85/EEC on pregnant workers[267] and article 8 of the (Revised) Charter, which also established the minimum leave at 14 weeks, as an interpretative reinforcement[268].

Another important element of influence of the Charter at EU level (also important for its judicialization by EU Courts) is its "incorporation" in the EU legal system through the Charter of

[264] Court of Justice of the European Union, judgment of 15 April 2008, *Impact v Minister for Agriculture and Food and Others*, Case C-268/06

[265] Council Directive 1999/70/CE of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

[266]Court of Justice of the European Union, judgmnt of 10 June 2010, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini*, (C-395/08) *and Daniela Lotti and Clara Matteucci* (C-396/08).

[267] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

[268] Court of Justice of the European Union, judgment of 20 september 2007, *Sari Kiiski v Tampereen kaupunki*, Case C-116/06

Fundamental Rights of the European Union. As provided in article 6.1 TUE, the rights, freedoms and principles included in the Charter shall be interpreted "with due regard to the explanations[269] referred to in the Charter, that set out the sources of those provisions. Said Explanations, to the extent they relate to social rights contained in the EU Charter, refer almost all to the European Social Charter[270] or the (Revised) European Social Charter[271], amongst other instruments. Therefore, the European Social Charter does not only serves as a parameter of interpretation of the social rights contained in the EU Charter of Fundamental Rights[272], but also sees itself attributed, at least indirectly, the character of source of social fundamental rights by article 6.1 TUE.

Moreover, the rights of the European Social Charter can be considered as rights resulting "from the constitutional traditions common to the Member States" in the sense of article 6.3 TUE,[273] which should confer them the status of fundamental principles of EU law.

For all those reasons, it should not be questioned that EU law has to respect the European Social Charter. It is only excluded from its

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[269] Explanations related to the Charter of Fundamental Rights, 2007/C 303/02
[270] Artts 14.1, 15, 26, 28, 29, 31, 32, 33, 34 and 35 EU Charter
[271] Artts. 25, 27 and 30 EU Charter
[272] Concerning the subject matter of present work, see Jennifer Tooze, "Social Security and Social Assistance", in Tamara Hervey and Jeff Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart, Oxford-Portland, 2003
[273] Opinion of 8 september 2011 of AG Trstenjak in case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique y Préfet de la Région Centre*; Frenz, W., *Handbuch Europarecht*, vol. 4 (Europäische Grundrechte), 2011, 1059, par. 3359

supervision mechanism. And even the latter should be nuanced, as Member States' regulations implementing EU law are not excluded.

The Charter has also been found to be too general and programmatic, containing too broadly framed right, not enough precise to be directly enforceable. However, this argument clearly omits to take into account the result of the work of interpretation of the Charter the Committee on Social Rights has developed over more than forty years, not only through the cyclical supervision procedure, but also, since 1998, through its decisions in the collective complaints procedure. Through what can be called without error its jurisprudence, the Committee, has defined and specified the content of the different rights contained in the Charter, giving sometimes extremely concrete standards of verification of conformity with the Charter, including criteria of calculation of the minimum content of some of the rights, including positive rights. Amongst others, one can refer to the right to paid holiday (at least 4 weeks, two of which have to be enjoyed without interruption), right to remuneration guaranteeing decent standard of living (net minimum salary has to be superior to 60% of the medium salary, and at least 50% of the poverty threshold, calculated at 50% of national medium salary; in case minimum salary is situated between 50 and 60% the state shall have to prove that the salary is sufficient to guarantee a decent standard of living) and the right to social security and social assistance, as explained further.[274] This permits

[274] X., „Digest of the Case Law of the European Committee of Social Rights", http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf (last visit: 02/04/2014)

one to argue that a great part of the provision of the Charter have acquired sufficient precision and unconditionality so as to satisfy the requisites in matters of direct applicability and consider those rights as self-executing.

II.3.1.2. The European Social Charter and protection against unemployment

The European Social Charter does not refer directly to a right to unemployment protection. However its article 12 recognizes the right to social security, which contains for the Member States the obligation:

- to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security[275] (art. 12-1 and 2);
- to endeavour to raise progressively the system of social security to a higher level (art. 12-3);

The European social Charter is thus closely connected with ILO Convention 102, and implies its "incorporation", within the limits of the effectiveness of the ESC, amongst the signatory states. The concept of social security as such has not been defined. According to the Committee article 12 applies to all "socially advanced

[275] The (Revised) Charter contains a reference the the European Code of Social Security, almost identical to ILO Convention 102, Mikkola, M., *Social Human Rights of Europe*, Karelactio Legisactio, Helsinki, 2010, 311

techniques of social protection", centering more on the reasons for which social benefits are allocated and the conditions required for those benefits to be received than their legal nature or source of financing of those benefits, for which social assistance is also taken into account to a certain extent,[276] despite the fact that ILO definition of social security does not include social assistance.[277] Such a system therefore, has to comprehend protection against risks including illness, disability, pregnancy, old age, death, unemployment and work related accidents or illnesses, not only to the extent commanded by ILO Convention 102, but also with the obligation to raise progressively the system of social security, which involves an obligation of non-regression, on the one hand, and to provide adequate benefits on the other. This reflects the objective of the Charter to lay down "common minimum and development standards", rather than to impose a common model or harmonize social security legislation.[278]

Concerning the adequacy of benefits, the Committee generally considers that social security benefits, when below the at-risk-of-poverty threshold, calculated as 50% of the median equivalised

[276] Swiatkowski, A. M., *Charter of Social Rights of the Council of Europe*, Kluwer Law International, The Hague, 2007, 268, according to which "article 12 has a broad definition of social security. It encompasses general, obligatory, voluntary and complementary systems of security based on the payment of voluntary premiums of those insured, financed either fully or partially from state funds, the ensured parties' financial benefits or social assistance for those insured, affected by circumstances limiting or affecting their means of earning a living".
[277] Tooze, J., "Social Security and Social Assistance", in Hervey, T. and Kenner, J. (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart, Oxford, 2003, 169
[278] Mikkola, M., *Social Human Rights of Europe*, Karelactio Legisactio, Helsinki, 2010, 312

income, as calculated by EUROSTAT, are not to be considered adequate in view of the Charter.[279] When those benefits are below 40% of the median equivalised income, it even deems that the aggregation with means-tested kinds of benefits, including social assistance, does not bring the situation into conformity with art. 12-1.[280] Following that logic, in accordance with article 13 of the Charter, social assistance benefits cannot be below 50% of the median equivalised income.[281] This approach by the Committee has to be contrasted by the generally timid approach of (Constitutional) Courts towards the principle of sufficiency of social security benefits, and their reluctance to define the minimum content of social rights or tendency to define very low thresholds, for fear of extending their democratic mandate. The Charter however contains a clear and concrete definition of the idea of sufficiency. Moreover, the use of a relative reference like the median equivalised income instead of more absolute formulas shows a tendency towards emphasizing equality. On the other hand, it can have the unintended consequence of not guaranteeing a minimum level of subsistence in case of generally low incomes amongst the population. This problem has been pointed out by the Committee of Experts of the ILO in its 2013 Report on the Application of Conventions and Recommendations, which states, in the case of Greece, that the existing poverty indicators linked to the median income do not

[279] ECSR, Conclusions XIX-2 Hungary, Art. 12-1, 2009
[280] ECSR, Conclusion XI-2, Spain, Art. 12-1, 2009
[281] In the case of households, the total income of the members of the household is divided by the number of "equivalent adults" using the modified scal of equivalencies of the OCDE and the result is compared with the limit of 50%.

reflect the real state of deprivation, given the fall in wages.[282] Therefore it recommends that the relative approach should be supplied by an absolute threshold based on "indicators of the subsistence of the population determined in terms of the basic needs and the minimum consumer basket".

Concerning another element related with unemployment protection, the Committee has also generally accepted the evolution towards negative activation measures, considering however that the conditions to which the payment of unemployment benefits is subjected, including any obligations to take up offered employment, should be assessed under Article 12-1 of the Charter (or Article 12-3 in the case of new developments) or, in certain cases, in case of loss of unemployment benefits due to refusal of employment, under article 1-2, considering the possible violation of freedom the right to freedom of work. A Statement of Interpretation concerning this subject has been reiterated in the General Introduction to the 2012 Conclusions.[283] More generally, the Committee has also analysed

[282] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 102nd Session, 2013, Part 1ª, 765,
http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282013-102-1A%29.pdf
(last visit 07/04/2014) "Where benefits are calculated as percentage of substandard wages, social security system resembles an iceberg where only a small part of benefits is paid above the subsistence level, while the bulk of the system operates below this level, where the application of most provisions of the Convention [102] becomes meaningless"

[283] Article 1-2: requirement to accept the offer of a job or training or otherwise lose unemployment benefit
The requirement for persons claiming unemployment benefit to accept the offer of a job or training or otherwise no longer be entitled to unemployment benefit should be dealt with under Article 12-1. However, the Committee takes due account of the Guide to the concept of suitable employment in the context of unemployment benefit drawn up by the Committee of Experts on Social Security

negative activation measures under articles 12 and 13 of the Charter taking into account the following elements: the measure has to be reasonable and consistent with the objective of providing a long-lasting solution to the problem of deprivation experienced by the individual (this was developed in the framework of article 13 –

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of the Council of Europe at its 4th meeting, held in Strasbourg from 24 to 26 March 2009, and holds that the loss of benefit or assistance when an unemployed person rejects a job offer may constitute a restriction on freedom to work where the person concerned is compelled, on pain of losing benefit, to accept any job, notably a job:

•which only requires qualifications or skills far below those of the individual concerned;

•which pays well below the individual's previous salary;

•which requires a particular level of physical or mental health or ability, which the person does not possess at the relevant time;

•which is not compatible with occupational health and safety legislation or, where these exist, with local agreements or collective employment agreements covering the sector or occupation concerned and therefore may affect the physical and mental integrity of the worker concerned;

•for which the pay offered is lower than the national or regional minimum wage or, where one exists, the norm or wage scale agreed on for the sector or occupation concerned, or where it is lower, to an unreasonable extent, than all of the unemployment benefits paid to the person concerned at the relevant time and therefore

fails to ensure a decent standard of living for the worker and his/her family;

•which is proposed as the result of a current labour dispute;

•which is located at a distance from the home of the person concerned which can be deemed unreasonable in view of the necessary travelling time, the transport facilities available, the total time spent away from home,

the customary working arrangements in the person's chosen occupation or the person's family obligations (and in the latter case, provided that these obligations did not pose any problem in the person's previous employment);

•which requires persons with family responsibilities to change their place of residence, unless it can be proved that these responsibilities can be properly assumed in the new place of residence, that suitable housing is available and that, if the situation of the person so requires, a contribution to the costs of removal is available, either from the employment services or from the new employer, so respecting the worker's right to family life and housing.

In all cases in which the relevant authorities decide on the permanent withdrawal or temporary suspension of unemployment benefit because the recipient has rejected a job offer, this decision must be open to review by the courts in accordance with the rules and procedures established under the legislation of the State which took the decision

social assistance, but could be applied within the broader framework of unemployment protection, insisting on the long-lasting character of the return to work), account has to be taken of the number of persons adversely affected by the measures, the existence of reasons to refuse work, the extent of the reductions of benefits, the purpose of the conditionality, and the means which are given to the services to monitor case-studies.[284]

Finally, given the importance which training should ideally be given in providing protection to unemployed, not only under the idea of *flexicurity* but also as a de-commodifying feature, mention has to be made of article 10 of the Charter on the right to vocational training, and more particularly article 10-3 on the right to vocational training for adult workers. Within the duty of Member States to guarantee or provide adequate trainings and facilities for training for adult workers, which moreover is relative to the rate of unemployment, special attention has to be given to social groups vulnerable to changes in the labour market, like women, migrant workers, and unemployed, above all long-term unemployed.[285] The Revised Social Charter even contains an article 10-4 containing a standard which compels the state to provide for special measure of training and reintegration for long-term unemployed. An analysis of the Conclusions of the European Committee of Social Rights on the conformity of Spain with article 10-3 related to unemployed reveals that in case of lowering unemployment and long-term

[284] Tooze, J., "Social Security and Social Assistance", in Kenner, J. and Hervey, T., (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart Publishing, Oxford, 2003, 190
[285] Swiatowski, A.M., *Charter of Social rights of the Council of Europe*, 153-156

unemployment, it seems only to take into account a sufficient level of expenditure on training policies (even without information about the concrete repartition of the budgets between the different administrative bodies responsible for training) to declare the conformity, without analysis the rate of participation of unemployed in training programs.[286] Concerning the latter indicator the Committee considered that the Irish rate of 11% of participation was low, but did not declare the state to be in situation of non-conformity for that reason.[287] In its last conclusion, given the rise of unemployment and long-term unemployment, the Committee asked for more information on the measures to train and retrain unemployed in those particular circumstances.[288] Therefore, pending the stance of the Committee on that question in future conclusions, it could be said that it manages a quite low threshold for scrutiny of the right of unemployed to vocational training, as it seems to find the mere presence of training programs with minimal participation sufficient for the states to comply with their duty,

[286] European Committee of Social Rights, Conclusions XVI-2 (2003) (Spain), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXVI2_en.pdf; European Committee of Social Rights, Conclusions XVIII-2 (2007) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXVIII2_en.pdf; European Committee of Social Rights, Conclusions XIX – 1 (2008) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXIX1_en.pdf

[287] European Committee of Social Rights, Conclusions XVI-2 (2004) addendum (Ireland and Luxembourg)

[288] European Committee of Social Rights, Conclusions XX-1 (2012) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXX1_en.pdf

II.3.1.3. The European Social Charter and the non regression principle

Finally, it is also of utmost importance to point out that art 12-3, as a particular application of the principle of the more general principle of progressive realization of social rights, expresses also the principle of non regression which, in application of the International Covenant on Economic, Social and Cultural rights, is necessarily linked to the former.[289] Under the jurisprudence of the UN Committee on Economic, Social and Cultural Rights, it entails that any deliberately regressive measure constitute a *prima facie* violation, unless the state can prove, under heightened scrutiny, that they are justified.[290] Article 12-3 of the European Social Charter contains a similar clause obliging states to progressively strengthen protection and extend social security (and social assistance) to the whole population. This obligation of non-regression applies to the whole content of the Charter, which is in accordance with the position of the UN Committee, the framing of Part I of the Charter,[291] and the jurisprudence of the European Committee of Social Rights.[292] Within this context, the Committee accepts

[289] For the Covenant on Economic, Social and Cultural Rights, see Guideline 14(e) of the Maastricht Guidelines, or more specifically, Committee of Economic, Social and Cultural Rights, General Comment nº 18: the Right to Work, UN Doc. E/C.12/GC/18 (2006), par. 21 or General Comment nº 19: the Right to Social Security, UN Doc. E/C.12/GC/19 (2008), par. 42

[290] Courtis, C., "Standards to Make ESC Rights Justiciable: A Summary Exploration", *Erasmus Law Review*, vol. 2, nº 4, 2009, 393

[291] According to which the Member States accept as aim of their policy the attainment of conditions in which the rights and principles of the Charter may be effectively realised.

[292] Applying the non-regression principle in the context of the right of article 4-4 of the Charter to a reasonable period of notice for termination of employment in

however regressive measures to the extent that these are necessary in order to ensure the maintenance of the social security system in question and on the condition that restrictions do not interfere with the effective protection of all members of society and do not tend to gradually reduce the social security system to a system of minimum assistance.[293]

Concerning measures taken in the wake of the current economic crisis the Committee declared in its General Introduction to the XIX-2 Conclusions that the crisis cannot result in the lowering of the protection of the rights recognized by the Charter and that governments have to take all necessary measures so that those right be effectively guaranteed at the moment where the need of protection are most pressing. Moreover, it stated that even if soaring unemployment endangers the systems of social security and social assistance, because the number of benefit claimants increases while resources from taxes and social contribution decrease, the member states have accepted to promote by all useful means the realization of the conditions necessary for the effective exercise of a certain number of rights, like the right to health, the right to social security and social assistance, as well as the right to social services.[294]

Collective Complaint nº 65/2011, *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Decision of 23 May 2012, par. 18

[293] Tooze, J., "Social Security and Social Assistance", in Kenner, J. and Hervey, T., (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart Publishing, Oxford, 2003, 172

[294] Committee of Social Rights, General Introduction to Conlcusions XIX-2

More specifically, the Committee has indicated that with a view to pronouncing upon the compatibility with the Charter of any restrictions on the rights relating to social security as a result of economic and demographic factors, account must be taken of the following criteria:

"a. the nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths, etc.);

b. the reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);

c. the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);

d. the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made; and

e. the results obtained by such changes".[295]

Moreover, the Committee considers that, even when reasons pertaining to the economic situation of a Member State make it impossible to maintain its social security system at the level that it had previously attained, it is necessary by virtue of the requirements of Article 12-3 for that state to maintain the social security system on a satisfactory level that takes into account the legitimate

[295] European Committee of Social Rights, General Introduction to Conclusions XIV-1, p. 11

expectations of beneficiaries of the system as well as the right of all persons to effective enjoyment of the right to social security.

The Committee has recently readopted this analysis and specified in a case where it deemed contrary to art. 4-4 of the ESC the 1 year *de facto* probationary period in open-ended contracts introduced by Greek legislation in application of the Memorandum of Understanding signed with the "Troika", that "doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection".[296]

This decision is important to the extent that it provides a legal argument against the logic of an ideological nature which presides to the policies adopted in the majority of the European countries in crisis, so far without any tangible proof of their efficiency, resulting in budget cuts and intended increase in competitiveness through the intensification of work precariousness. The decision also confirms the interpretation by the Committee of the Charter in terms of no regression. The economic crisis cannot justify whatever form of regression and the content of the social rights has to be maintained as close as possible to their pre-crisis level. This confirms the application of what the French doctrine calls the *effet cliquet*

[296] General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011, decision on the merits of 23 May 2012, § 18

(ratchet effect) of social rights, an interpretation which goes further than their *effet plancher* (or minimal floor approach).[297] However, it is important to state that it would be artificial to separate both approaches to the minimal content of social rights. In both cases, the concept serves to define that minimal content, establishing a limit below which protection cannot decrease, and the violation of which can give rise to claims of an objective (constitutional challenge) or subjective claim. Therefore, both approaches should be considered as complementary, one defining a minimal content of a static character, and the other a minimal content of a dynamic character.

In aforementioned case, however, the Committee, despite its introduction related to the prohibition of non-regression, limited itself to judge the measure in question contrary to article 4-4, given that the concept of trial period "should not be so broadly interpreted and the period it lasts should not be so long that guarantees concerning notice and severance pay are rendered ineffective", without any reference to the non-regression principle.

On the other hand, it has also been held that the Committee, while upholding in appearance the non-regression principle against cuts in social rights in times of crisis, substitutes it in practice with a minimum floor approach.[298] In its decision on the merits in

[297] Marguénaud, J.P., Mouly, J., "Le Comité européen des droits sociaux face au principe de non-régression en temps de crise économique", *Droit Social*, nº 4, 2013, 339-344

[298] Marguénaud, J.P., Mouly, J., "Le Comité européen des droits sociaux face au principe de non-régression en temps de crise économique", *Droit Social*, nº 4, 2013, 339-344

complaint 66/2010, presented by the same Greek unions against the exclusion of minor workers under a special apprenticeship contracts from part of the social security contingencies (amongst other discussed labour law aspects of those contracts), the Committee ruled the measure contrary to article 12-3, given that "measures introduced to consolidate public finances in times of economic crisis and changing the social security system must maintain in place a sufficiently extensive system of compulsory social security and refrain from excluding entire categories of workers from the social protection offered by the system" while the Greek regulation had the "practical effect of establishing a distinct category of workers who are effectively excluded from the general range of protection offered by the social security system at large". The Committee adopts however both approaches. There is an overlap between the static and the dynamic approach, the former applying if one takes the point of view of the workers who are effectively excluded from the protection, and the latter when taking into account the changes to the system of social security as a whole. This confirms thus the complementary character of both approaches.

A few months later, the Committee pronounced itself on Greek measures (again in application of the Memorandum of Understanding) drastically reducing pensions rights.[299] It stated that "even when reasons pertaining to the economic situation of a state

[299] Committee of Social Rights, Decision on the merits: Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece, Collective Complaint No. 79/2012

party make it impossible for a state to maintain their social security system at the level that it had previously attained, it is necessary by virtue of the requirements of Article 12-3 for that state party to maintain the social security system on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security". As elements of definition of that minimal content (mixing static and dynamic definitions of that minimal content), the Committee stated that article 12-3 involves maintaining the system at a "higher" level than that prescribed by article 12-2, the need for the measures not "to prevent members of society from continuing to enjoy effective protection against social and economic risks", the need for the benefits "not be lower than the poverty threshold, defined as 50 per cent of median equivalised income as calculated on the basis of the Eurostat at-risk-of-poverty threshold value" taking into account the existence of subsidiary systems of income replacement (mainly social assistance), and as seen in the decision on the merits in complaint 66/2010, "the absence of exclusion of entire categories of workers from the social protection offered by the system".

On the other hand, the Committee repeats its statements made in its decision in complaint 65/2010 concerning placing the burden of the crisis disproportionately on workers and applying pro-cyclical policies. However, this time, it translates those statements in concrete applications. It bases its decision of non-conformity to article 12-3 of the Greek pension cuts, on the grounds that "the cumulative effect of the restrictions, [i.e. exclusion of 20.000 to

50.000 persons from pension benefits and significant degrading of the situation of others who belong to the most vulnerable groups...] is bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned", moreover, without referring to any static element of definition of a minimum content.

Moreover, and this might be the most important element of the decision, "even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Committee furthermore considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue". This is another clear example of a dynamic approach to the definition of the minimal content of the right to social security. It also adds to the growing European constitutional jurisprudence approaching the adjudication of social rights mainly through procedural arguments and facilitating a form of dialogue between judicial and legislative powers in the definition of social rights, as a particular application of the principle of proportionality.[300] From that point of view, the decision of the

[300] Contiades, X. and Fotiadou, A., "Social rights in the age of proportionality: Global economic crisis and constitutional litigation", *International Journal of Constitutional Law*, vol. 10, nr 3, 2012, 660-686;

Committee runs clearly parallel to a judgment of the Latvian Constitutional Court,[301] also concerning pension cuts. The Court estimated that the legislator did not "carried out objective and well-weighed analysis, neither regarding the consequences of the adoption of the impugned provisions, nor regarding other, less restrictive means for the attainment of the legitimate end", breaking its duty to consider the matter "in a due and coordinated manner for a reasonably long period of time".[302] Another famous expression of this type of jurisprudence is the *Hartz IV* judgment of the German Constitutional Court,[303] which declared unconstitutional the social assistance benefits for minors provided in the *Hartz IV* reform, in application of the right to dignity of article 1.1 of the Fundamental Law, for the absence of justification by the legislator of the criteria used to establish the level of the benefits, which has to be at least as high as the minimum of subsistence.

This procedural approach is also reinforced from a democratic point of view (and also from the point of view of de-commodification) as it points out that the Greek government did not discuss the measures with the organizations that represent the interests of the groups affected, being mainly unions. Without considerations for the Greek constitutional and legal prescriptions relative to the legislative and governmental decision process, the non-regression principle (or

[301] Constitutional Court of the Republic of Latvia, 21 december 2009, Case 2009-43-01

[302] Contiades, X. and Fotiadou, A., "Social rights in the age of proportionality: Global economic crisis and constitutional litigation", *International Journal of Constitutional Law*, vol. 10, nr 3, 2012, 660-686

[303] Bundesverfassungsgericht, Ersten Senat, Judgment of 9 February 2010 (1 BvL 1/09 - 1 BvL 3/09 - 1 BvL 4/09), summary in English at http://www.bverfg.de/en/press/bvg10-005en.html (last visit 15/2/2014)

defined more broadly, the obligation of the state to realize to their best capacities the content of social rights) imposes thus a duty of consultation with unions and other interest groups in the regulation of social rights. Even if the Committee does not mention it, such an approach can clearly be linked with the ILO Decent Work Agenda as well as the Social Protection Floors Recommendation of 2012, which stresses the importance of social dialogue and consultation of social partners in designing the policies of reform of social security.

Another important statement of the Committee in this decision is the reference to the fact that in previous Conclusions, the Committee had accepted pension reforms in Finland, on the grounds that "although the overall standard of living of the population was affected by the reforms, care had been taken to ensure that the burden of these reforms did not weigh too heavily on the economically most vulnerable households".[304] The Committee thus clearly states that the crisis cannot justify cuts in social rights when it has not been assured that that those will affect less the most vulnerable persons. This is also important when one takes into account the debate about the content of social rights and the (fallacious) claim they cannot be "subjectivized" like political or civil rights, because within the context of a reading of social rights in terms of citizenship rights, the argument of the "reserve of the possible" (the argument of impossible full and immediate realization of social rights due to scarcity of resources, which legitimizes the principles of progressive realization, and can thus be found at the heart of non-regression) can only be legitimized if

[304] European Committee of Social Rights, Conclusions XIV-1, Finland

authorities demonstrate that they have done everything possible (reinforcing adjudication of social rights based on procedural approaches), and that priority is given to the most vulnerable[305]. This principle is expressly recognized by the UN Committee on Economic, Social and Cultural Rights, according to which the prohibition of regression involves that legislation cannot benefit already advantaged groups at the expense of vulnerable groups.[306] Following that line of thought, adopted by the Committee, the scarcity of resources can in no case stand as an argument when measures are targeted mainly at the most vulnerable, without regards to the fact if this violates the minimum content of the right or not.

Moreover, going beyond a static approach is also important from the perspective of de-commodification, given the dynamic rather than static character of the re-commodification trend, an aspect that a static approach to the minimum content can fail to grasp. A static approach to the minimal content of social rights is of course

[305] García Shwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for them and their Guarantees", *Derecho y Cambio Social*, nr. 31, 2013, 51 http://www.derechoycambiosocial.com/revista031/social_rights.pdf (last visit: 18/11/2013): "In summary, if the idea of the reserve of the possible can be used as an argument for citizenship by governments in a context of positional struggles, in the sense of justifying the lack of materialization of given social rights, if all rights – whether civil, political or social – are, to a greater or lesser degree, burdensome, and if what is at stake, in reality, is how to decide and with what priority to assign the resources which civil, political or social rights require in order to be satisfied, the political powers, by invoking the reserve of the possible, should always be able to demonstrate that they are making the maximum effort possible (in all fields: financial, personal, technological, etc.) and that they are giving priority to the most vulnerable groups."

[306] Courtis, C., "La prohibición de regresividad en materia de derechos sociales: apuntes introductorios", in Courtis, C. (ed.) *Ni un paso atrás. La prohibición de regresividad en materia de derechos sociales*, Centro de Estudios Legales y Sociales de Argentina, Buenos Aires, 2006 19

necessary to draw a line beyond which regression cannot go, but as Esping-Andersen's classification has shown, welfare states with a low de-commodification index are not necessarily in breach of those minima.

Finally, this jurisprudence of the Committee is also important in that it impregnates the interpretation of the Charter of a dynamic perspective to the definition of the content of social rights, so that those do not only impose the obligation on the state to perform, but also to perform in a certain manner by attaching those procedural obligations to the states' actions. And the latter also forces the organs who adjudicate the social rights in question to also analyze the circumstances and the context in which measures which affect or regulate social rights have been adopted.

II.3.2. The European Convention on Human Rights: a hard-law instrument integrating social rights.

The better known and more "efficient" European Convention of Human Rights has acquired gradually more importance in the field of social rights,[307] even in aspects of social security.[308] The

[307] Marzo, C.,"Doctrinal visions as to the Protection of Social Rights by the European Court of Human Rights" in *Diversity of Social Rights in Europe, Rights of the Poor, Poor Rights*, European University Institute Working Paper 2010/7, 123-134; de Schutter, O., "The Protection of Social Rights by the European Court of Human Rights", in Van der Auweraert, P., De Pelsmaeker, T., Sarkin, J., and Van De Lanotte, J., (eds.), *Social, economic and Cultural Rights: An Appraisal of Current European and International Developments,* Maklu, Antwerp, 2002, 207-242;

[308] Kapuy, K., Pieters, D. and Zalgmayer, B., *Social Security Cases in Europe: The European Court of Human Rights*, Intersentia, Antwerp-Oxford, 2007;

jurisprudence of the ECtHR will acquire even more influence once the EU will have acceded to the Convention, as provided for by the Treaty of Lisbon. Research already points towards the importance of this accession to secure collective social fundamental rights as freedom of association and the right to strike, as the approach set forth by the CJUE in the *Viking* and *Laval* jurisprudence seems to give less guarantees for the exercise of those rights than the approach of the European Court of Human Rights. But the accession could also involve a more general realignment of the "ultra-liberal exuberance" of the CJUE, which devoid fundamental social rights of their meaning, through the integration by the ECtHR of all international and European labour norms in its interpretation of the ECHR.[309]

Concerning social security benefits, the Commission of the Council of Europe has recognized contributory benefits to be considered as "possession" in the sense of Article 1 of Protocol 1 to the ECHR, while the Court itself has played down the need for a link between entitlement to benefits and their contributory character, considering the various systems of financing of social security schemes and the fact that in case of non-contributory benefits, possible claimants also contribute to their financing through general taxation.[310]

[309] Supiot, A., "Conclusion: Europe´s awakening", 304 and Dorssemont, F., "How the european Court of Human Rights gave us *Enerji* to cope with *Laval* and *Viking*", both in Moreau, M.A., *Before and after the Economic Crisis. What Implications for the `European Social Model´?*, Edward Elgar, Cheltenham, 2011

[310] Koc, I.E., *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights,* Martinus Nijhoff, Leiden, 2009, Chapter 8 (The Right to Social Cash Benefits Under the ECHR)

Indirectly, these considerations are important in terms of de-commodification, as social security schemes financed by general taxes and not linked to previous period of employment (measured in terms of contribution period and level of contribution) are to be considered having a better de-commodifying character (however depending further on the level of benefits, which are generally lower than in contributory systems). Therefore, entitlement to social protection benefits is considered as a right protected under the ECHR independently of the involvement of the claimant in the (economic) constitution of the right.

Generally speaking, the ECHR "constitution" is a human rights constitution, while the European Union constitutional order is still very much an "economic" constitution, where economic progress, mainly through market integration and thus fundamental market freedoms, stands next to (or even prior to) the protection and promotion of human and fundamental rights. This inevitably influences the development of fundamental rights by its institutions, on the one hand, given the political priorities, and application and interpretation of those rights by its courts on the other. Both the ECHR and the CJUE have been paramount in constructing the constitutional character of their respective legal system. However, the economic character of the EU constitution has contributed to the fact that EU Courts see themselves as constrained by the need to balance those rights with fundamental economic freedoms, which are more, and more explicitly developed than the limits to the rights contained in the ECHR. Moreover, those courts have also to take into account the principle of subsidiarity and the limits to the

competences of the EU to assess Member State laws, competences which are even more limited in the field of social rights. The ECHR Court has also submitted itself to some principle of subsidiarity, recognizing a wide margin to the Member States when it comes to measures of economic or social strategy, recognizing that "the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social and economic grounds"[311]. However, it is not limited by a system of attribution of competence, and even if the ECHR as instrument lists only a determined catalogue of rights, their interpretation by the ECtHR has shown that their reach is potentially unlimited.

[311] ECtHR, *Stec and Others v. United Kingdom*; Koc, I.E., *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights,* Martinus Nijhoff, Leiden, 2009, 202-203

II.4. The Charter of Fundamental Rights of the European Union as potential de-commodifying legal element

Finally, this debate cannot be assessed without making reference to an important new factor in the social and constitutional analysis of the European Union and its interaction with other legal systems, the Charter of Fundamental Rights of the European Union, which, with the entry into force of the Treaty of Lisbon, has recently acquired enforceable status.

Already when the Charter of Fundamental Rights of the European Union (CFRUE) was not a fully enforceable legal instruments, part of the literature pointed towards the positive impact it could have on the balance between the economic and the social EU, while the more skeptical scholars highlighted the flaws and incoherent framing of solidarity rights and the many limits built in the Charter through the intergovernmental negotiation, like the transversal clauses of article 52, which have furthermore an unclear or ambiguous character.[312] Now that the Charter has entered into force as EU-level, enforceable, constitutional instrument, it is important to assess clearly the significance of this instrument.

The first decisions of the Court of Justice concerning the Charter in the field of labour law seem not to show any change in the Courts'

[312] See, for example, Knook, A., "The Court, the Charter, and the vertical division of power in the European Union", 42 *Common Market Law Review*, 2005, 371;

balancing of fundamental labour rights (mainly the right to collective bargaining and industrial action) and economic freedoms according to the *Viking* and *Laval* jurisprudence, partly due to the "in accordance with EU law" clause that accompanies the definition of most social fundamental rights.[313]

However, its added value has to be analyzed mainly taking into account its place in the increasing interconnection with instruments of other legal systems: the national constitutional traditions of the Member States' legal system, the ECHR, the European Social Charter and the increasing potential and new forms of judicial adjudication the interconnection of the different legal systems entails.[314] At the least, the opening of Union law to those other social rights instruments will require openness on the part of the Court of Justice to change its understanding of what these rights require[315] and protect social rights as an integral element of Union citizenship if the latter concept is to be genuine.[316] But the Charter has also to be viewed within the complex normative framework constituted by the interconnection between *soft law* and *hard law*, as well as taking into account its political significance.

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[313] Voogsgeerd, H., "The EU Charter of Fundamental Rights and its Impact on Labor Law: a Plea for a Proportionality-Test "Light"", *Goettingen Journal of International Law*, Vol. 4, nº 1, 2012, 313-337

[314] Caruso, B. ""Constituciones y derechos sociales", in López López, J., Caruso, B., Freedland, M. and Stone, K. (eds.), *La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada*, Bomarzo, Albacete, 2011, 35-39

[315] Ashiagbor, D., "Economic and Social Rights in the European Charter of Fundamental Rights", *European Human Rights Law Review*, 2004, 64

[316] O'Gorman, R., "The ECHR, the EU and the Weakness of Social Rights Protection at the European Level", *German Law Journal*, vol. 12, nº 10, 1861

Concerning our perspective, namely unemployment protection as de-commodifying instrument, two aspects of the Charter have to be assessed: its material aspect and the content of the rights it proclaims, on the one hand, and the question of the applicability of the Charter, on the other. The Charter contains a series of fundamental rights which relate to unemployment protection as a de-commodifying right, in the perspective of in-work and out-of work de-commodification: the right to social security and social assistance of article 34 is the most obvious, although the right of access to placement services (article 29), the right to protection in the event of unjustified dismissal (article 30) and the freedom to choose an occupation and the right to engage in work (article 15) are also relevant to analyze the elements underpinning protection against unemployment under a de-commodifying perspective.

The question of the application of the Charter is analyzed in the first place, as it permits to assess the extent of its potential with more precision.

II.4.1. Problems of applicability of the Charter as a limit to its de-commodifying potential of national policies

The question of the applicability of the charter or of the enforcement of the rights it contains is a complex one, taking into account what is generally presented as the lack of competences of the European Union within the social field, as well as the limits provided for in the Charter itself. Also of relevance is the

qualification of some rights of the Charter as principles, supposedly involving a lesser degree of applicability.

According to its article 51 the Charter cannot extend the field of application of Union law beyond the powers conferred to the Union, and is addressed to Union institutions within the limits of the principle of subsidiarity, and to Member States only when they are implementing Union law.

There is little controversy on how the Charter applies to EU Institutions. In that context, the EU Charter, according to the "promotional" function of fundamental social rights, should serve as a programmatic instrument for further EU initiatives in the field of social law or informing current soft law driven processes, or being implemented through an own OMC,[317] which could be a little more efficient than the monitoring procedure of the European Social Charter. This use, in line with new governance theories and techniques[318] should be seen as complementary to the judicial use of the Charter to challenge EU legal instruments. This promotional function, however, in the field of social rights, has not been given any serious consideration by the European institutions. As, such, very few mentions of social fundamental rights, if any, have been made within the framework of the Lisbon and 2020 strategies, and

[317] De Schutter, O., "The implementation of fundamental rights through the open method of coordination", in De Schutter, O. and Deakin, S. (eds.), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruylant, Brussels, 2005, 279-343

[318] Bernard, N., "New Governance Approach to Economic, Social and Cultural Rights", in Hervey, T.K. and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart Publishing, Oxford, 2003

promotion of social fundamental rights is far from constituting any important reference.[319] On the other hand, the mainstreaming effect of fundamental rights should not be overlooked, and, within the different European *soft law* and hybrid mechanisms, the Charter could be seen as requiring a consideration of the impact on social rights of all policy making and implementation, thus decreasing (slightly) dominance of economic goals.[320] But again, this depends greatly on political will.

The possibility to invoke the Charter against Member State laws and regulations is even more important within the field of social policy, given that they constitute the main instruments through which EU law is materialized in individual rights and obligations. This brings us to the need to assess what is meant by "implementation" of EU law by Member States. Secondly, while application of the Charter seems entirely possible in the context of implementation of EU legislation in matters of social rights, like the

[319] For example, in its Communication of 20 February 2013 „Towards Social Investment for Growth and Cohesion" (COM(2013) 83 final), the Commission only mentions the Charter in relation to the constatation that „inequalities in disposable income have widened in some countries, while at the same time absolute living standards for many already in vulnerable positions have fallen disproportionally", which it finds at odds with the social rights of citizens to live a life in dignity. However, the Commission does not refer to the right to social security or social assistance, but to the rights in the Chapter on Equality (rights of the child, of elderly persons, equality between men and women and integration of persons with disabilities), moreover within the context of the section of the Communication dedicated to the need to complement the public efforts by private and third sector ressources. Moreover, in its reports since 2010 on the application of the Charter, the Commission does not mention social rights, and the Commission Staff Working documents related to the report, in its chapter about Solidarity, only mentions EU initiatives within the field of social policy coinciding with the rights of articles 27-38, but without any reference to the Charter as a source of inspiration or driving force behind the developments.

[320] Fredman, S., „Transformation or Dilution: Fundamental Rights in the EU Social Space", *European Law Journal*, Vol. 12, nº 1, 2006, 58-59;

atypical work Directives or EU legislation related to coordination of Social Security Systems, there remains the question whether it could be applicable in relation to EU instruments within the context of the OMC.

The fact that the EU Charter speaks about implementation, while the Explanations to the Charter[321] refer to Member States acting within the "scope" of EU Law, has given rise to several interpretations as to its applicability.

Prior to its adoption, the CJUE had already ruled that Member States measures were liable to revision in the light of EU fundamental rights when they were implementing EU law (*Wachauf* jurisprudence)[322] or derogating EU law (*ERT* jurisprudence),[323] which points towards a broad interpretation of the notion of "implementation of EU law" in line with the reference to "acting within the scope of EU law" found in the Explanations to the Charter.

A broad interpretation of the applicability of the Charter should also be commanded by the fact that it would make more sense with the inclusion of fundamental rights whose main scope of application regards more the Member States than the sphere of competence of the EU, leading to an application of the Charter to actions falling

[321] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)
[322] CJUE, 13 July 1989, Case C-5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*
[323] CJUE, 18 June 1991, Case C-260/89, *ERT v EDP*

within the scope of application of EU law, "either by acting under authority or control of EU law or derogating from them".[324]

The CJUE, in Orders stating its lack of competence under article 51 of the Charter also refers, a bit obscurely, to the need for the legal situation to be "connected with EU Law".[325] In that sense, the Court deemed that discrimination between fixed-term workers fell outside of the scope of EU law, as the Fixed-Term Work Directive only addressed the problem of discrimination between fixed-term and permanent workers. While the prohibition of discrimination is a general principle of EU law, the Court decided that the lack of secondary instruments relating to the concrete case (relations between temporary workers) brought it outside of the scope of EU law.

Also to be noted is the Court´s refusal to assume competence to examine Portuguese pay cuts in the public sector in application of the Memorial of Understanding of that country with the "Troika".[326] While the case raised some hopes towards bringing judicial checks to implementation of so-called austerity measures, the Court only stated laconically that "the referring decision did not contain any concrete element that would allow to consider that the 2011 finance law aims to implement Union law". In that case, however, the Portuguese Constitutional Court declared the cuts contrary to the

[324] Poiares Maduro, M., "The Double Constitutional Life of the Charter of Fundamental Rights of the European Union", in Hervey, T.K. and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart Publishing, Oxford, 2003, 291
[325] Order of 1 March 2011, Case C-457/09, *Charty v État belge*
[326] Order of 7 March 2013, case C-128/12

equality principle enshrined in the Constitution.[327] The CJUE adopted a similar position in the case of salary cuts for Romanian civil servants.[328]

As further indications of the applicability of the Charter to Member State law, the Court has also ruled that "it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it".[329] It is thus clear from the jurisprudence that application of the Charter can go further than implementation of EU law, and that the notion of scope of EU law used by the Explanation was an affirmation of the jurisprudence of the CJUE which already had gone further than a strict approach of implementation.

This is also the view adopted by Advocate General Cruz Villalón in its Opinion in the *Åklagaren* case, where he stated that the different formulations used by the Court, and the Charter and its Explanations ("implementation of EU law", "scope of EU law"), are not qualitatively different, and have in common the requirement

[327] Barnard, C.,"The Charter in time of crisis: a case study of dismissal", in Countouris, N. And Freedland, M. (eds.) *Resocializing Europe in a Time of Crisis*, Cambridge University Press, 2013, who points also to the question of applicability of the Charter on Portuguese reform of protection against dismissal, where there are strong links with EU law, given that Council Implementing Decision 2011/344/EU (referring expressly to the Memorial of Understanding) makes express reference to the reform of dismissal and severance costs.
[328] Order of 14 December 2011, Case C-484/11 *Corpul Naţional al Poliţiştilor*
[329] Case C 309/96 *Annibaldi*, paragraphs 21 to 23, and *Iida*, paragraph 79.

of a "presence" of EU law at the origin of the exercise of public authority by the Member States.[330] In its judgement in the same case, the Court ruled that regulation of VAT penalties and criminal proceedings against the claimant constituted implementation of EU law for the purpose of article 51(1) CFUE, namely Directive 2006/112/CE on the common system of VAT and art. 4(3) TEU, according to which the Member States are under an obligation to take all legislative and administrative measures appropriate for ensuring collection of VAT and preventing evasion, as well as article 325 TFEU. The latter obliges Member States to take measures to counter fraud affecting the financial interests of the European Union (the EU budget is financed by part of the VAT Member States collect). It is important to underline that the Court did not follow the criterion of the Advocate General in that case. Centering on the interest of the Union for adjudicating the fundamental rights in question rather than the Member State as a canon of interpretation of the notions of "implementation of EU law" and "scope of EU law", the Advocate General argued that "for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned with the case", a certain degree of connection between EU law and the exercise of the public authority of the State is needed.[331] Due to the fact that the link between EU law and the Swedish measures in question was not of a causal character, whether or not immediate, but only

[330] AG Cruz Villalón, Opinion of 12 June 2012 in Case C617/10, *Åklagaren v. Hans Åkerberg Fransson*, par. 25-33
[331] AG Cruz Villalón, Opinion of 12 June 2012 in Case C617/10, *Åklagaren v. Hans Åkerberg Fransson*, par. 57

coincidental (penalties and criminal proceedings were generally foreseen for ensuring the collection of taxes, but not especially taxes especifically related to the financing of the EU), the Advocate General estimated that the connection was extremely weak.[332] The Court thus implicitly rejected the latter approach, accepting that what could be seen as a coincidental link can be sufficient to consider that the Member State is implementing EU law or that the national measure comes within the scope of EU law.

A parrallel could be made between article 325 TFEU and article 146 TFEU. The latter commands Member States to contribute to the achievement of the objectives referred to in article 145 TFEU (promoting a skilled, trained and adaptable workforce and labour market responsive to economic change with the view to achieving the objectives of article 3 TEU – amongst which a highly competitive social market economy, aiming at full employment and social progress) in a way consistent with the broad guidelines of the economic policies adopted pursuant to Article 121(2) TFEU. Therefore, if the Court found article 325 TFEU to be a ground to find a coincidental link with EU law sufficient to admit that the Member State is "implementing EU law" and therefore the Charter to be applicable, it should not be totally unreasonable to argue that article 145 of the TFUE could be used in the same way to find a connection between Member State measures being part of their employment policy and EU law, triggering the Court's competence to review the measure under the EU Charter in case it is not

[332] AG Cruz Villalón, Opinion of 12 June 2012 in Case C617/10, *Åklagaren v. Hans Åkerberg Fransson*, par. 60-65

consistent with the broad guidelines of the economic (and employment) policy.

Another question is the reviewability by the Court of soft-law instruments. Those are currently immune to judicial revision through a "direct" challenge under art. 230 TFUE, given their lack of binding effect,[333] which is to be lamented for several reasons. Not only do they have a material content that drives the direction of national reforms, but possible revision could guarantee some coherence in a system that is diverse and where conflicts between instruments, given their diversity, have been showed to occur, without forgetting the use of the OMC as method to advance fundamental rights protection within the EU.[334]

Those acts could however be interpreted by the CJUE through the preliminary ruling procedure of article 267 TFUE, which gives it even competence to assess their validity, despite article 263 TFUE.[335] This is not unimportant given the way it opens for judicial revision of soft law. However, the need for the instrument to be relevant to the resolution of the case to grant competence to the Court to assess it brings us inevitably to the question of the link between the national law under scrutiny and the instrument the

[333] Bernard, N., "New Governance Approach to Economic, Social and Cultural Rights", in Hervey, T.K. and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart Publishing, Oxford, 2003, 256;

[334] Strazzari, D., "Tra soft e hard law: prime riflessioni in favore della giustizabilità degli atti emanati nell´ambito del metodo aperto di coordinamento", in Barbera, M., *Nuove forme di regolazione: il metodo aperto de coordinamento dell politiche sociali*, Giuffré, Milan, 2006;

[335] CJUE, Case C-11/05, *Friesland Coberco Dairy Foods v Inspecteur van de Belastingdienst/Douane Noord /kantoor* Groningen, at 36

revision of which would be asked. This would raise questions mirroring those concerning art. 51.1 of the Charter, which treats the necessary link that has to exist between national law and EU law for the Charter to be applicable.

Anyway, the *soft law* character of the EU instruments used within the OMC should not be *a priori* a reason to exclude them from the scope of application of the Charter. There is no compelling reason, nor case-law, that points towards the need to interpret the reference to the "implementation" or "the scope" of EU law as excluding non-binding instruments.

Having a specific look at Recommendations, the *Grimaldi* case[336] shows that their lack of binding effect has not to be construed as relieving them from any legal effect, as "the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".

Therefore, their lack of binding effects makes that they cannot create rights upon which individuals may rely before a national court. But one has to be careful to distinguish between the binding effects of a measure, which is an important criteria in order to ascertain the direct effect of an EU instrument, with the notion of implementation of EU law, which is of another category.

[336] CJUE, Case C-322/88, *Grimaldi v Fonds des Maladies Professionnelles*

This can be clearly seen from the reading of article 288 TFUE, which considers also non-binding acts like Recommendations and Opinions) as "legal acts of the Union".

This can be also deduced from the wording of the Court in the *Grimaldi* case, which clearly refers to the lack of "implementation" of a Recommendation by the Member State in the case in question, or the function of such a Recommendation as an aid to the interpretation of national measure "implementing" them.

Moreover, the Treaty also used the word "implementation" of Guidelines by the Member States in the context of the Employment Policy, and art. 197 TFUE (effective administrative cooperation in implementing EU law) suggests that Member State can implement EU law also when they have no legal obligation to do it.

Even if in most of the court cases related to article 51 of the Charter referred to implementation of Directives or Regulations, the wording used by the Court still leaves the path open to reviewing measures implementing soft law instruments, confirming the view that the scope of EU law does not necessarily correspond with the need for EU institutions to have legislative power to act.[337] Moreover, a systematic lecture of paragraph 1[338] and 2[339] of article

[337] De Búrca, G., "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor", *Journal of Common Market Studies, n° 36,* 1999, 221; Groussot, X., Pech, L., Petursson, G.T., "The Scope of Application of EU Fundamental Rights on Member States´Action: In Search of Certainty in EU Adjudication", Eric Stein Working Paper, 1/2011, Czech Society for European and Comparative Law, Prague, 2011, 17

[338] "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall

51 supports the idea that "implementation by Member States" does not necessarily correspond to the competences or "powers" of the EU, which the Charter cannot expand. Otherwise, the second paragraph could be seen as superfluous, given that the first already makes clear that the EU institutions and Member States have to respect the Charter "in accordance with their respective powers".

For all those reasons, it could be argued that Member State measures implementing country-specific Recommendations from the Council should be reviewable under the Charter. The National Reform Programmes and reports presented within the framework of the EES (and currently within the "European Semester") can provide sufficient information in that respect, as they generally present how Member States are implementing policy guidelines and recommendation. This even truer when taking into account that some of these Recommendations in matters of social law or employment law might be made under the new, more stringent procedures put in place within the framework of the Fiscal Compact, like the new "six pack" supervision and correction procedures, which brings the pressure to implement the recommendations to the point of being obligations sanctioned, not only by "public shame" and close monitoring by EU institutions, but ultimately, in case of the Euro-zone, by sanctions imposed on the Member States. Moreover, the grade of specificity of the

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therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties"

[339] "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any power or task for the Union, or modify powers and tasks as defined in the Treaties"

formulation of the Recommendations could also be taken into account to measure their binding character, if this criterion would be deemed relevant, or in any case reinforce the character of EU law implementation of the national measure. In this case however, some skepticism might be advanced, given their general lack of precision, at least if read separately from the National Reform Programmes or the working documents of the Commission.

The idea of reviewing Member State action in the context of policy coordination should also be justified to the extent that an implementing measure would refer to EU Recommendations (directly or through their categorization as such within the national reports in the context of the European Semester), which from the point of view of the present research is even more important given the general trend to refer to European instruments to justify rights-decreasing reforms.

As a concluding (rhetorical) question, one could ask why national law should not respect EU fundamental rights when it has been modified or created at the more or less pressing "invitation" of the EU (formulated through "legal acts of the Union in the sense of article 288 TFUE), or, formulated otherwise, when its modification finds its roots, inspiration and obligation in EU coordination law.

Finally, article 52(5) of the Charter provides for a distinction between rights and principles, where the latter cannot give rise to direct claims for positive action by the Union's institutions or Member State's authorities. However, the Charter or the Explanations do not provide always for clear indications as to when

a provision contains a right or a principle. Another question is the content of the concept of principle and its consequences on their applicability. A broad interpretation of the concept should be adopted, in line with the decision of the European General Court in the *Pfizer* case[340], according to which article 52(5) of the Charter,[341] by stating (only) that principles cannot give rise to claims for positive actions, provides for a limited justiciability of the principles, consisting in opposing the adoption of EU or national measures implementing EU law which through their regressionary effect, would call into question the effectiveness of a principle of the Charter. They have thus "an exclusionary effect".[342] Another important, even if obvious, element to be underlined is that an *a contrario* reading of article 52(5) of the Charter involves that the provisions of the Charter containing rights, as opposed to principles, can give rise to justiciable claims for positive actions from the Union and Member States implementing EU law. The limited competences of the EU in the social field, the high consensus requirement to adopt instruments under those competences, and the

[340] Court of First Instance, Judgment of 11 September 2002, Case T-13/99, *Pfizer Animal Health v Council*, where the Court admitted the possibility to review EU legislation in light of the precautionary principle of article 191(2) of the Treaty

[341] "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality"

[342] Lenaerts, K., "Exploring the Limits of the EU Charter of Fundamental Rights", European Constitutional Law Review, Vol. 8, 2012, 400-401; De Schutter, O., "Les droits et principes sociaux dans la Charter des droits fondamentaux de l'Union européenne », in Carlier, J.Y. and De Schutter, O. (eds.), La Charte des droits fondamentaux de l'Union européenne, Bruylant, Brussels, 2002, 117.

complex character of the instruments implementing social policy makes such an approach practically difficult. However, the fact that positive actions could be claimed reinforces the arguments in favor of judicial review of some instruments taken within the 2020 strategy, like country-specific recommendations, exposed here above, above all under the perspective of a "procedural" approach to the adjudication of social rights, along the lines of the decisions of the European Committee of Social Rights and other European constitutional courts commented in subsection II.3.1.3. of this Part.

The conferring of the character of principle to a provision of the Charter has also been ruled as having a consequence that it cannot supply the lack of horizontal effect of a Directive implementing that right (which would not be the case in proceedings against the state, which would be the overwhelming majority of proceedings within the field of protection against unemployment, or in application of an instrument with horizontal direct effect, like a Regulation). In a recent decision[343], the Court judged that article 27 of the Charter ("workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time *in the cases and under the conditions provided for by Union law and national laws and practices*") cannot be read in a manner that it "lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to

[343] CJUE, judgment of 15 January 2014, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*

be taken into account in that calculation", a finding that can be drawn from article 3(1) of Directive 2002/14 establishing a general framework for informing and consulting employees in the European Community, but which can only be invoked against the State, and not between particulars. The Court did not follow the opinion of Advocate General Cruz Villalón, who argued that the effectiveness of the Charter could not be undermined by the choice of instrument made by the EU to implement the concerned provision, and proposed therefore horizontal effect to Directives insofar they implement a provision of the Charter, giving thus effect and meaning to article 52(5) of the Charter on the justiciability of principles.[344] The Court differentiated that case from the *Kücükdeveci* case, where it ruled that article 21(1) of the Charter (prohibition of discrimination on grounds of age) was sufficient in itself to confer on individuals an individual right which they may invoke as such, circumverting thus the lack of horizontal effect of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[345]

II.4.2. EU Charter rights related to protection against unemployment

Once having assessed the extent of the possible application of the EU Charter in relation with social rights, the question of which rights and their contents remains to be addressed.

[344] Opinion of AG Cruz Villalón of 18 July 2013 in case C-176/12
[345] CJUE, judgment of 19 January 2010, Case C-555/07

Article 34 of the Charter concerns social security and social assistance. In relation with the former the Charter provides that "the Union recognizes and respects the entitlement to social security benefits and social services providing protection [amongst other contingencies] in the case of loss of employment, in accordance with the rules laid down by Union law and national law and practices". The formula used (recognizes and respects the entitlement) suggests that it is framed as a principle, and not a right, a fact that seems confirmed by the Explanations to article 34(1). The Explanations also indicate that the article shall be applicable when the Union exerts its powers under article 153 (support and complement activities of the Member States in the social sphere, by means of measures encouraging cooperation or directives with minimum requirements for gradual implementation in some of the subjects listed in said article) and 156 TFEU (by making studies, delivering opinions and arranging consultations).

An important element is that article 34(1) is based on article 12 of the European Social Charter. This should have as implication that the principle of social security that the Union (and, even if there is no reference, Member States implementing union law)[346] has to respect has to be interpreted in accordance with articles 12-1, 12-2, 12-3 and 12-4 of the Social Charter as well as the jurisprudence of the European Committee of Social Rights on the matter. One of the practical implications thereof is that the Union has to respect,

[346] Tooze, J., „Social Security and Social Assistance", in Hervey, T. and Kenner, J. (eds.) *Economic and Social rights under the EU Charter of Fundamental Rights. A legal perspective,* Hart, Oxford, 2002, 166.

amongst others, a system of social security which is not gradually being reduced to a system of minimum assistance, with sufficient or adequate benefits, as well as all the consequences of the principle of non-regression in matters of social security, which have been analyzed here above. This is worth mentioning, given the absence of general non-regression clause in the Charter, at least in respect of national laws.[347]

Another implication would be that the indicators and criteria used by the European Committee of Social Rights, and, given the connection between article 12 of the European Social Charter and ILO Convention 102, those used by the Committee of Experts of the ILO, should also be used for benchmarking within the framework of the OMC.[348] Moreover, the employment guidelines, as well as the idea of *flexicurity*, to the extent they affect entitlement to social security benefits should also be interpreted within the light of the European Social charter's principles. The advocacy by the guidelines of the review of the conditionality of benefits, as well as the vague notion of "adequacy" as the only limit to the regressive measures the guidelines entail (and also country-specific recommendations thereto related), or other measures entailing a move from the unemployment protection system towards workfare, should also be read in light of the limits to regressive measures laid down by the Committee of Social Rights.

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[347] Barnard, C., "The Charter in time of crisis: a case study of dismissal", in Countouris, N. and Freedland, M., *Resocialising Europe in a time of crisis*, CUP, Cambridge, 2013, 269

[348] Tooze, J., „Social Security and Social Assistance", in Hervey, T. and Kenner, J. (eds.) *Economic and Social rights under the EU Charter of Fundamental Rights. A legal perspective,* Hart, Oxford, 2002, 191-192.

Article 34(3) on social assistance to the contrary of article 34(1) does not contain a mere principle, but a genuine "right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resource", only limited to the finality of combating social exclusion and poverty, insofar the latter can be seen as a real limitation. The sources of article 34(3) of the Charter are articles 13(1) of the European social Charter as well as 30 and 31 of the (Revised) Charter. Again, this entails that the EU right to social assistance has to be read in light of the criteria developed by the European Committee of Social Rights (cost of living, inflation, relation with minimum wage, increase and decrease in expenditure), which can have a particular application within the framework of the Social Investment Package, but their relevance to Employment policy cannot be totally ruled out, given the complementary character social assistance has in unemployment protection schemes.

Another important provision in relation with unemployment protection, above all under the idea of *flexicurity* and the place it has given to training as providing security to workers, is article 14 on the right to education, more particularly the right to vocational access and training, which however has received very limited attention by the doctrine. According to the Explanations, the source of that right is article 10 of the European Social Charter. The latter connection is important, in that, as already observed, the European Committee on Social Rights insists on the participation of unemployed, and above all long-term unemployed, to training programs to assess the respect by the states of their duty. The

realization of that right by the EU institution should thus involve an assessment of the latter criterion in the implementation by the Member States of the EES, something which does not seem to be integrated within the OMC.

The EU Charter also provides in its Article 30 for the "right to protection against unjustified dismissal, in accordance with Union law and national laws and practices". According to the Explanations, this right (as opposed to principle) draws on article 24 of the (Revised) Social Charter. In its turn, article 24 of the Revised Charter is modeled, amongst others, on ILO Convention 158 concerning work agreement termination by the employer and recommendation 166 related to it.[349] This is of certain importance, given that very few EU Countries have ratified said Convention.[350]Article 24 of the Revised Charter involves, mainly:

- the obligation to provide the worker with a valid reason for termination

- the right to adequate compensation o other appropriate relief in case of termination of employment without valid reason

- right to appeal to an impartial body, which has to determine the reasons for the termination

[349] Swiatkowski, A.M.. *Charter of Social Rights of the Council of Europe,* Kluwer Law International, The Hague, 2007, 167

[350] Hunt, J. "Fair and Just Working Conditions", in Hervey, T. and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart, Oxford-Portland, 2003, 53

The Appendix to the Revised Charter permits member states to exclude some categories of workers from protection: workers engaged under a contract of employment for a specified period of time or a specified task, workers undergoing a period of probation or a qualifying period of employment, provided that this is determined in advance and is of a reasonable duration (there is also a connection with article 4-4 of the European Social Charter), and workers engaged on a casual basis for a short period.

It is worth mentioning that, to the contrary of some national constitutions, where the protection against termination of employment is generally inscribed within a broader, more complex notion of right to work, generally framed more as a principle or abstract obligation of the state, the EU Charter right to protection acquires an autonomous, and individual character, conceived as a negative limitation of the (economic) freedom of the employer to desist from the contract.[351]

An illustration of the difference of approaches can be found in comparing the jurisprudence of the Committee of Social Rights and of the European Court of Justice. The former ruled non conform to article 24 of the (Revised) Charter the possibility to dismiss an employee "on the ground that the employee has reached the normal pensionable age (age when an individual becomes entitled to a pension), unless the termination is properly justified with reference to one of the valid grounds expressly established by this provision

[351] Baylos, A. and Pérez Rey, J., *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 80

of the Charter", those grounds being mainly, "on the one hand, those connected with the capacity or conduct of the employee and on the other hand those based on the operational requirements of the enterprise (economic reasons)".[352] This could be seen as contrary to the jurisprudence of the European Court of Justice, as the latter has ruled in the *Hörnfeldt* case[353] that the right for an employer to automatically terminate an employment contract when the worker reaches the age of 67 was not contrary to Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. According to the Court, the measure has a legitimate aim (encouragement of recruitment of young people), and is proportionate and necessary. In assessing the latter character of the measure, the Court balanced the right to work of article 15 of the Charter ("participation of older workers in the labour force, and thus in economic, cultural and social life"), with the aim of the measure (augmenting possibility of bringing youth in employment)[354] and stated that the latter did not unduly prejudices older worker as they were not prohibited to remain in the labour market or conclude a fixed-term contract with their current employer, in case their pension would be considered insufficient, as in the facts of the case. If the Court had analysed the case from the

[352] European Committee of Social Rights, Conclusions 2012 – Netherlands – article 24, 2012/def/NLD/

[353] CJUE, Judgment of 5 July 2012 (Case C-141/11), *Torsten Hörnfeldt v Posten Meddelande AB*

[354] This illustrates also another problem to be found in the jurisprudence of the Court of Justice, which is the lack of concrete analysis of the alleged aims of the measures within the so-called proportionality test the Court effectuates. The fact is that research predominantly points towards the lack of „substitutive" effect the dismissal of older workers has.

perspective of article 30 of the Charter, and the individual right not to be dismissed without valid reason, maybe it would not have given so much "margin of appreciation" to the Member State in its justification of a discriminatory measure.

The limitation to the freedom to terminate an employment contract article 30 of the Charter entails should also impregnate the reading of the concept of *flexicurity*, and its application through the Employment Policies. Moreover, even if the Charter does not contain any general non-regression clause, the inscription of article 30 within the more general system of the European Social Charter permits us to interpret any regression in the protection against termination of the contract of employment, which the national labour law reforms undertaken within the framework of the EES and the implementation of the (or rather, "a") concept of *flexicurity*. As a complement to the reading of the European Social Charter from a non-regression perspective, one can also find authority, as suggested by Catherine Barnard,[355] in article 151 TFUE and its programmatic reference to the improvement of living and working conditions as objective of the Employment Policy, which, according to the Court of Justice, "are not deprived of any legal effect", and constitute an "important aid, in particular for the interpretation of other provisions of the Treaty and of secondary […] legislation in the social field" when the attainment of those objectives is the result of a "social policy which must be defined by the competent

[355] Barnard, C., "The Charter in time of crisis: a case study of dismissal" in Countouris, N. And Freedland, M. (eds.) *Resocializing Europe in a Time of Crisis*, Cambridge University Press, 2013, 270-271;

authorities".[356] On the other hand, the narrow interpretation by the Court of Justice of the non-regression clauses built in the atypical work Directives, having allowed reduction of the protection of certain categories of fixed-term workers, for example workers of the public service,[357] for the reason the regression did not affect the general protection of fixed-term workers, does not forebode well for interpretation of the non-regression principle in general.[358]

Finally, one should also mention the right of access to a free placement service of article 29, based on Article 1-3 of the European Social Charter and the right to fair and just working conditions of article 31, which seems to be articulated on the right to dignity in employment and should encompass all working conditions, including pay (and thus the right to a fair remuneration),[359] but which the Explanations only connects with some rights related to working conditions, like dignity (article 26 of the Revised European Social Charter) or health and safety (article 3 European Social Charter), which might weaken the direct link with the European Social Charter in the case of other rights, thus

[356] CJUE, judgment of 29 September 1987, case 126/86, *Fernando Roberto Giménez Zaera v. Instituto Nacional de la Seguridad Social*, and judgment of 14 June 2012, case C-618/10 *Banco Español de Crédito v. Calderón Camino*

[357] CJUE, Judgment of 23 April 2009, Joined Cases C-378-380/07, *Angelidaki and others v Organismos Nomarchiakis Autodioikisis Rethymnis and others*

[358] Peers, S., „Non-regression Clauses: The Fig Leaf Has Fallen", Industrial Law Journal Vol. 39, nº 4, 2010, 436-443; Mazuyer, E., „Les questions de l'emploi et du travail dans une Union européenne en crise", ASTREES, Final report of the project „What labour law and social protection in Europe in crisis" for the European Commission, VS/2010/0704, 2010

[359] Bercusson, B., *European Labour Law and the EU Charter of Fundamental Rights*

reflecting the reluctance to explicitly introduce the right to a fair remuneration in the Charter.[360]

[360] Hunt, J. „Fair and Just Working Conditions“, in Hervey, T. and Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights*, Hart, Oxford-Portland, 2003, 54

Chapter III. Multilevel definition of Fundamental Social Rights against re-commodifying multilevel policies

If analyzed from the perspective of its description in the Treaties, the content of and instruments used by the different strategies and policies implementing it, as well as jurisprudence of the CJUE, European Social Policy is characterized by its intent to accommodate social and economic goals, leading to the inevitable subordination of social rights to the latter. EU policy-making accepts the *Schumpeterian* (as opposed to *Polanyian*) argument that market freedom is essential to economic success, the reason for which a social agenda is accepted only if its ends do not conflict with the market.[361] A proof of this intent to accommodation can be found in the fact that the last 20 years, the concentration of EU social rights has been in the field of flexibility and gender, the former being "touted as the key to efficiency, productivity and competitiveness, while at the same time delivering the social

[361] Taylor-Gooby, P. "Introduction: Open Markets versus Welfare Citizenship: Conflicting Approaches to Policy Convergences in Europe", *Social Policy & Administration*, Vol. 37, n° 6, 2003, 553;

objective of family-friendly working conditions".[362] This is also one of the factors explaining the prominence, and current content of the idea of *flexicurity* in the development of the European Employment Strategy within the context of the Lisbon and 2020 Strategies.

Moreover, the recourse to the idea of *flexicurity* also shows the disjunction between two discourses related to labour law in particular, or the regulation of the labour market in general. The first one is a discourse based on rights, whose maximum expression are the rights enshrined in the EU Charter and its connection with social rights instruments like ILO Conventions and the European Social Charter, which are "purely" social, in the sense that they are not institutionally embedded, like the EU objectives, values and fundamental rights, in a legal system with a dominant economic, or Free Trade Agreement character. The second discourse, which from a material point of view has the former character as a source, is constituted by the commodifying policies promoted in the framework of the EU employment and social policies through instruments like the Open Method of Coordination[363] and more recently, through the supervisory mechanisms of the Economic and Monetary Union. A parallel disjunction between legal and policy discourse is to be found in the field of social inclusion and social protection,[364] as well as generally in the Europe 2020 strategy, with

[362] Fredman, S., "Transformation or dilution: Fundamental Rights in the EU Social space", 12 *European Law Journal*, 2006, 46

[363] Baylos, A. and Pérez Rey, J., *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 86-87

[364] Cantillon, B., Verschueren, H and Ploscar, P. „Social protection and social inclusion in the EU: any interaction between law and policy?", in Cantillon, B.,

its sole focus on governance by numbers, instead of by principles reflecting truly human concerns.[365]

Moreover, the new architecture of the EMU, developed as a response to the Eurozone crisis, increased institutional pressure to implement the 2020 agenda. However, seen from a broad perspective, to effectively promote growth (presupposing its objective to promote "smart, sustainable and inclusive growth" is effectively realizable) the strategy is highly dependent on government expenditure, an instrument which that same architecture and its insistence on deficit reduction, coupled to the substantial debts of a significant amount of Member States, is currently impossible to activate. In the absence of traditional tools to deliver speedy growth, like devaluation of the currency, this puts all the burden of adjustment on the labour market and augments pressure on governments to act where they still have competences, like the (de-)regulation of labour law.[366] As such, flexibilization, in the re-commodfying sense of eliminating "rigidities" within the labour market becomes the corollary of the EMU.[367] Within this context, the obligations under the EMU (mainly fiscal consolidation) could be seen as incentives for Member States to

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Verschueren, H and Ploscar, P. (eds.*) Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, Intersentia, 2012,

[365] Supiot, A., "Conclusion: Europe´s awakening" in Moreau, M.A. (Ed.), *Before and After the Economic Crisis. What Implications for the `European Social Model´?*, Edward Elgar, Cheltenham, 2011, 307

[366] Barnard, C., „The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective", *Industrial Law Journal*, vol. 41, nº1, 2012, 103

[367] Deakin, S. And Reed, H., "The contested meaning of labour market flexibility: economic theory and the discourse of European integration", *Working Paper nº 162, ESRC Centre for Business Research, University of Cambridge*, 2000, 36, http://www.cbr.cam.ac.uk/pdf/WP162.pdf

implement those parts of the 2020 strategy which do not involve spending, like labour market flexibilization as well as social benefits retrenchment.

From a de-commodification perspective, all the evolutions referred to in this Part (break-up of solidarity systems, CJUE jurisprudence, EMU, policy processes, legislation) should be interpreted as a movement of the European single market out of or away from the original (national) institutions in which it was supposed to be embedded, without the creation of new de-commodifying institutions[368], a movement of imbalance that could be compared with the disembedding of markets described by Polanyi.[369]

Confronted with that movement, two obvious alternatives can be distinguished. The first would a "Polanyian counterreaction",[370] trying to return to the original bargain, giving back control to Member States to aspects which have been Europeanized. This approach seems to inspire some moves towards curbing competences of the EU, as well as the timidity or lack of political will of the EU in using hard law within the social field. Another example would be the limitation of the application of the EU Charter of Fundamental rights. This attitude however, which also

[368] Ashiagbor, D. "Unravelling the embedded liberal bargain: Labour and social welfare law in the context of EU market integration", *European Law Journal,* Vol. 19, nº 3, 2013, 303-324

[369] Polanyi, K., *The Great Transformation*, Beacon Press, Boston, 1944.

[370] Höpner, M. and Schäfer, A., "Polanyi in Brussels? Embededness adn the Three Dimensions of European Economic Integration", *Max-Planck-Institut für Gesellschaftsforschung Discussion Paper* 10/8, 2010, 27-28, http://www.mpifg.de/pu/mpifg_dp/dp10-8.pdf

partly explains the "underdevelopment of social Europe",[371] given the economic constitution of the EU and the already existing material and functional imbalance described here, this all within the Welfare State context of permanent austerity, seems only to be going to worsen the problem of disembeddedness and associated re-commodification.

The other approach would be the construction of de-commodifying institutions at EU-level, so as to re-embed the single market not only within the Member State legal systems. This passes through the construction of more solidarity mechanisms at EU-level. However, from the point of view of de-commodification, the present research does not help to share the optimism of some towards the potential of the current *soft law* mechanisms and bland approach towards social policy. Not only because as is already hinted towards in this chapter, they do not guarantee a balanced development of social policy in general, and unemployment protection and labour market regulation in particular. But also because of the several economic, institutional and political adverse conditions standing in the way of the development *tout court* of EU social policy.[372] The remaining possibility, therefore, is to vest some hope and energy towards recomposing a balanced socio-economic European Constitution through less "political" ways, which leaves us with fundamental rights as the most powerful tool available,

[371] Bailey, D., „Explaining the underdevelopment of Social Europe: a critical realization", Journal of European Social Policy, nº 18, 2008, 232-245

[372] Scharpf , F.W., "The asymmetry of European integration, or why the EU cannot be a 'social market economy', *Socio-economic Review*, n° 8, 2011, 211-250; Bailey, D., "Explaining the underdevelopment of `Social europe´: a critical realization", *Journal of European Social Policy*, n° 18, 2008, 232-245;

given its double capacity of changing legal realities, one at the discursive level so as to legitimize or promote political initiatives and social movements, the other at legal level, mainly through the actions of the courts. Within this context, it has been sustained in the present Part that there are legal arguments in favor of a closer monitoring by the Court of Justice of EU instruments implementing employment and social policy, like country-specific recommendations, under the perspective of the social rights contained in the Charter.

A fundamental social rights approach within the EU-multilevel context has the advantage to contain powerful elements in favor of the protection of social rights in general and the development of de-commodification strategies in particular. The high interconnection of EU fundamental rights with less commodifying social rights instruments which the present Part has revealed provides tools to promote a more integrated approach which would give more prominence to social rights in comparison with economic objectives.

Even if fundamental social rights are discussed for their lack of direct claimability, a critique that in the multilevel context analyzed in this work finds some evidence in the *soft-law* character of the European Charter of Social Rights and its jurisprudence, and the restrictions on the applicability of the EU Charter of Fundamental Rights, they still have two very concrete consequences: on the one hand, they impose a political obligation on state authorities to develop those rights and to ensure and respect, at least, their

essential content, whatever the political or the economic circumstances,[373] and on the other hand, they inform the interpretation of "more directly" claimable constitutional and legal rights, helping defining their content.

Moreover, the argument of the lack of direct claimable character of social rights is slowly eroded in our multilevel constitutional context. The jurisprudence of the Committee of Social Rights has developed clear, concrete, and unconditional criteria to assess conformity with the Charter, giving rise to possible individual claims, even for positive actions on behalf of the state. The extension of direct claimable fundamental civil rights into the social sphere, as illustrated by the jurisprudence of the European Court of Human Rights in matters of social benefits or freedom of association is another important development. It also echoes the lecture of fundamental social rights in terms of human rights to promote de-commodification, which has been advocated in the previous Part.

Finally, the interpenetration with those fundamental social rights instruments, as well as with *soft law* instruments related thereto, on the one hand, advocates for their being better taken into account in the different instruments of coordination of socio-economic policies within the EU sphere, and on the other hand, provide also for additional criteria and indicators for benchmarking and monitoring

[373] García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", *Derecho y Cambio Social*, nº 31, 2013, 63

of Member State policies which would promote the autonomy of social goals from economic interests.

However, before assessing the potential of fundamental rights as a legal de-commodification strategy, taking into account those observations, the next Part analyses the development of unemployment protection within the context of labour market regulation in three EU Member-State-level cases, so as to analyze the process of re-commodification and its relation with the EU, as well as detect elements of de-commodification at national level, and the relation of the latter with the multilevel legal framework.

Part IV. Re-commodification of unemployment protection in European Member States: Spain, The Netherlands and Germany as case-study

As already explained in Part III, in the context of the European Union, the competence for the legal regulation of Welfare State programs, amongst which protection against unemployment, as well as the labour market, rests basically with the Member States. The analysis of the transformation of the rights and institutions related to protection against unemployment, from the perspectives of de-commodification and re-commodification, has thus to be centered on the national reforms.

As already advanced in the fifth Chapter of Part II, the choice has been made to analyze the evolution within the Bismarckian, Continental, or Conservative model of Welfare State, about which research initially found them to present a "frozen landscape" within the evolution of European Welfare States, before observing

significant changes within the first decade of this century.[374] The research analyzing those subsequent changes, however were not framed from the point of view of re-commodification, or when it did, it seemed to conclude that the changes could not convincingly be characterized as processes of re-commodification.[375]

However, the research referred to above has been mainly done within the sphere of political science. As the idea of de-commodification also involves the characterization of protection against unemployment in terms of citizenship rights, a legal approach would be useful to complete previous research. While the political science approaches generally focus on spending and broad structures of regimes of protection against unemployment, a legal perspective allows the assessment of the legal configuration of those regimes, of the rights and obligation of the unemployed and their interpretation by courts. It also contributes to a legal understanding of the concept of activation and how active labour market measures insert themselves within the nexus between rights and obligations of the unemployed.

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[374] Palier, B. And Martin, C., „From a `Frozen Landscape´to Structural Reforms: The Sequential Transofrmation of Bismarckian Welfare State Systems" in *Social Policy & Administration*, vol. 41, nº 6, 2007,535-554; Hemerijck, A. And Eichhorst, W., „Whatever happened to the Bismarckian welfare state? From labor shedding to employment-friendly reforms", *IZA discussion paper* nº 4085, 2009, http://www.iza.org/en/webcontent/publications/papers/viewAbstract?dp_id=4085

[375] Pintelon, O., "Welfare State Decommodification: Concepts, Operationalizations and Long-term Trends*", CSB Working Paper*, nº 12/10, 2012, http://www.centrumvoorsociaalbeleid.be/sites/default/files/CSB%20Working%20Paper%2012%2010_November%202012.pdf

Also, what is generally taken into account is unemployment insurance, its duration and its rate of substitution of previous salary while the degree of and rights to protection of unemployed running out of benefits and the intensification of (negative) activation are also important in assessing degree of de-commodification and re-commodification. Also, not only from a descriptive, but also from a normative point of view, the idea of *flexicurity* puts the focus of the role of active labour market policies in providing "protection" against unemployment by supposedly enabling workers to find security through reintegration within the labour market. The approaches of Member States towards those ALMPs and their connection with the rights of unemployed to benefits need thus also to be assessed from a legal point of view.

The purpose of the case analysis is not to provide a detailed and systematic account and comparison of the legislative and administrative regulation of all those aspects of unemployment protection. Firstly, it is rather a broad assessment of the evolution of those different elements within selected Member States, seen from a legal perspective, so as to provide for arguments in favor of the hypothesis that classic insurance based unemployment protection schemes have been re-commodified, not only through reduction in spending, generosity or coverage, but also through changed legal definitions of the rights and obligations of unemployed and a different conceptualization of how protection is provided. Secondly, within the idea of Europeanization of Welfare State policy and of *flexicurity*, trends of convergence or divergence between Bismarckian Welfare State should be identified. Thirdly, one of the

purposes would also be the identification in the cases of possible correcting elements which could inspire legal de-commodification strategies. Finally, given the contextualization of the research in a multilevel perspective on social rights as fundamental or human rights, some attention is also given to the place those rights, characterized as such, occupy within the cases' legal system, and how those systems insert themselves within the multilevel legal definition of those rights.

As already advanced in Part II, Spain has been selected as part of the case study for being a country where the current crisis has resulted in an extremely high unemployment rate, putting it at the centre of attention, and where profound reforms have been undertaken under the idea of austerity. The evolution of protection against unemployment is contrasted with Germany and the Netherlands. Those are two other Bismarckian Welfare States where, where, like Spain, unemployment policy systems in the 1980s were based mainly on compensatory insurance financed by social contributions and with benefits calculated mainly in function of previous earnings.[376] The former has been selected for being the most important Bismarckian Welfare State in Europe, the potential role model its reforms can play through its influential position, and the comprehensive reforms that were undertaken in the beginning of this century, better known as "Hartz-reforms". The Netherland have been selected for being represented as a country

[376] Clegg, D., „Continental Drift: On Unemployment Policy Change in Bismarckian Welfare States", *Social Policy & Administration*, vol. 41, nº 6, 2007, 604

originally belonging to the Bismarckian model which has implemented *flexicurity* policies as well as having a "well functioning" labour market with low rates of unemployment. The hypothesis is that in those three cases reforms of unemployment protection can be analysed in terms of re-commodification, independently of their differences.

In each case, treated in separate chapters, thus, after some introducing considerations, if applicable, a first section treats the evolution of the right to unemployment benefits, taking into account the nature of the systems of benefits (insurance system, means-tested system). This involves considerations about the conditions of access to the schemes, the duration of benefits and their generosity, but also, the characteristics and intensity of the obligations attached to their perception, like the obligations to accept suitable employment or to participate in reintegration measures.

A second section analyses the active labour market measures proposed, or forced upon, the unemployed. This is made from two perspectives. Firstly, an assessment of the characteristics of the administrative structure which provides or imposes those measures is made. Secondly, a look is given to the different measures which exists, as well as to their characteristics, financing, effectiveness and relative importance within total ALMPs, so as to assess their potential de-commodifying effect of their contribution to the re-commodification of protection against unemployment.

Throughout those sections, some consideration is given to the insertion of those evolution within the wider processes of re-

commodification of the labour market (in-work re-commodification.

A third section then contains an approximation of social rights related to unemployment protection, or welfare state policies in general, within the constitutional structure, as well as the relation of the national legal systems with the international legal level.

Finally, a concluding chapter treats the different findings in terms of how re-commodification has manifested itself, how the conceptualization of unemployment protection has changed, how active labour market policies relate to the classic "passive" means of protection, and how trends of convergence and divergence appear within the case-study.

Chapter I. Spain: re-commodification through fragmentation and insufficiency

The different reforms of unemployment protection follow the broad lines of the social security reforms. Reforms are sometimes contradictory, but on the other hand follow the broad pattern of rationalization, cost reduction, and evolution from a contributory, social insurance-driven system towards a model were assistance-based schemes gain every time more protagonism. Another common feature, partly related to the precedent, is the rise of private prevision schemes[377].

In its Chapter 3 (Principles governing Economic and Social Policy), Article 41, the Spanish Constitution commands the Spanish public authorities "to maintain a public Social Security system for all citizens guaranteeing adequate social assistance and benefits in situations of hardship, especially in case of unemployment". Social security is a competence of the central state, while general social assistance, as a residual safety net, is a competence of Autonomous Communities. However, the state remains competent to design social security schemes with characteristics of social assistance, like minimum pensions for those who could not reach certain thresholds

[377] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 401

of contribution periods or computing bases, or, as in the case of unemployment protection, means-tested unemployment benefits. The Autonomous Communities social assistance schemes will not be analyzed in this work, mainly for two reasons. Firstly, their regulation, structure and conditions differ strongly between Autonomous Communities, and they are generally underdeveloped, with very limited coverage, low benefits (contrary to the principle of sufficiency[378]) and limited budgets. Secondly, they are not conceptualised as general safety net for unemployed who would have exhausted their rights to benefits, or more generally as basic income schemes for that matter, but more strictly as interventions in terms of remedying social exclusion, with, however, a very limited impact on levels of poverty and exclusion, circumscribed to the political recognition of the existence of a problem of social exclusion.[379]

The General Social Security Act (*Ley General de Seguridad Social*, henceforth: LGSS)[380] configures unemployment protection in a Title III (Protection against Unemployement), technically separated from the protection against other contingencies, like retirement, accidents at work or family benefits, all brought under Title II (Protectory Activity), echoing the specific mention of unemployment protection in article 41 of the Constitution.

[378] Sanzo, L., "La introducción de la renta bàsica en España", *Cuadernos de Relaciones Laborales* vol. 23, nr. 2, 2005, 123-149

[379] Arriba, A., Parilla, J.M., Pérez Eransus, B., "Transformaciones de las políticas autonómicas de inclusión social. ¿Reforma o cambio de imágen", in Moreno Fernández, L. (coord.) *Reformas de las políticas del bienestar en España*, Siglo XXI de España Editores, Madrid, 239-280

[380] Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social.

Unemployment protection is further divided into a contributory level and an assistance level. The latter system, however, is far from having a universal character. It is currently limited to certain categories of unemployed with an income inferior to 75% of the minimum salary (excluding a 13th and 14th month). Under the latter we can count liberated prisoners, unemployed older than 55 having contributed at least 6 years in their life and which would qualify for retirement pension if not for their age, unemployed having received contributory benefits before or not qualifying for benefits despite having contributed during a minimum amount of time, provided they have a family to their charge, or are more than 45 years old (the family-at-charge condition not being applicable if they contributed at least 6 month before their unemployment situation).[381]

Another social assistance scheme is the so-called Active Insertion Benefit (*Renta Activa de Inserción)*, created in 2000 as a temporary program, renovated yearly before being made permanent in 2006. It is inspired from pre-existing, more general social assistance schemes from the Autonomous Comunities[382]. It has been destined to long-term unemployed and provides for a battery of different measures for the reinsertion into work of its beneficiaries. Having a more pronounced objective of social inclusion, it provides for a broader range of measures, going from a compromise to actively search for employment and participate in training activities entered

[381] Art. 215 Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social.
[382] Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 2005, 17

on behalf of the recipient of the benefits to a (timid) partial compatibility of the benefits with employment, the right to a more personalized attention or even a certain priority in the access to job offers or training programs[383]. However, again, the scheme is far from being universal, as it is reserved to unemployed older than 45, and has been criticized for the lack of practical effectiveness of its combination of active and passive policies, reflecting the distance between its legal configuration and its concrete application[384].

I.1 Re-commodification of the Right to Unemployment Benefits: from insurance benefits to assistencialisation without universalisation

I.1.1 The situation in the 80´s: bases of the system and development of the Welfare State

The first fundaments for unemployment protection as a system of social security (before that existed however already a system of unemployment insurance), were laid by the Law 193/1966 on the Basis of Social Security and the 1966 Law on Social Security, replaced by the 1974 General Act on Social Security (LGSS). After the promulgation of the 1978 Constitution, however, unemployment protection was again technically separated from the Law on Social Security to be integrated in 1980 in a "Basic" Law on

[383] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 390
[384] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 390-393

Employment[385] containing also general provisions on employment policy ("promotion of employment"), inserting symbolically unemployment protection as a tool within policies related to employment promotion.

The Law defined the legal situation of unemployment as one where an employee, who would and could work, loses his occupation, sees his contract suspended in the context of collective temporary suspension, or sees his working hours reduced with more than one third, for grounds not attributable to himself. Are also included the periods in which seasonal workers hired under an open-ended contract have no occupation.

A minimum contributory period of 6 months in a reference period of the 4 previous years was required, and the period of protection ranged from 3 to 18 months, with the possibility to be extended to 24 months for workers approaching the retirement age. However, contribution periods taken into account for the granting of benefits due to other contingencies, like temporary disability, were excluded. Jurisprudence has further ruled that the reference period should be extended with the days during which workers were on strike, as well as when their contract is suspended, due to a leave period to exercise union function, possibility provided for by law and including the right to retake the job at the end of the leave.[386]

The benefits amounted to 80% of the average salary taken as basis for the contributions of the last 6 months, reduced to 70% after 180

[385] Ley 51/1980, de 8 de octubre, Básica de Empleo
[386] Spanish Constitutional Court, STC 48/1991, of 28 February

days, and to 60% after 12 months, with a cap of 220% of the minimum salary, the latter being also taken as a minimum floor, but only for unemployed with persons at charge.

The unemployed had to be registered in the corresponding Employment Office.

The right to benefits was to be suspended in case the unemployed refused a suitable (literally translated "adequate") job offer or to participate, without grounds, in training programs, but only if the refusal took place within a first period of suspension of the right due to the beneficiary not appearing before the unemployment administration (INEM) when required. Said refusal involved in principle the suspension of the perception of the benefits during 6 months. However, the Law 8/1988, of 7 April on Offences and Sanctions in the Social Order (LISOS) introduced the possibility to extinguish the right to benefits already by the first refusal of an adequate job offer[387].

The right expired when the maximum period had passed, or when having been employed more than 6 months in a position entitling incorporation in the general Social Security system (in general equivalent to contributing to it). This implied the right to report the not-enjoyed benefit period. Before those 6 months the benefits were merely suspended.

The 1980 Law, defined an adequate job offer as that, which corresponds to the physic capacities of the unemployed and which

[387] Luján Alcaraz, J., "La noción de "colocación adecuada" ante la reforma de la protección por desempleo", *Aranzadi Social*, nº 5, 2002, 83-100

he can professionally fulfil, without supposing a change of residence, unless the new employers offers adequate accommodation. The notion corresponds to the concept of "suitable employment" found in ILO convention n°44 on Unemployment Provision, ratified by Spain on 8 April 1978, which helped interpretation of it.

The Law also instituted the non-contributory level, destined to those workers with a family at charge, whose right to benefits had expired, and to whom no adequate job offer had been offered within 30 days of the expiration. Benefits amounted to 75% of the minimum salary, for a maximum period of 6 months, extendable with 3 months.

In 1984, however, access conditions were relaxed, so as to allow a broader coverage. The Law 31/1984 derogated the Second title of the 1980 Law and bettered slightly unemployment protection, but retained the same structure and principles as in 1980.

The reform was presented as part of a general policy tabling on creating employment, mainly by "economic reactivation" and flexibilizing temporary contracts and introducing new types of contracts targeting weaker collectives[388]. The same year saw the creation of the *contrato conyuntural*, a temporary contract without cause, the abuse of which was to be supposedly protected, but which opened a long period of extreme dualization of the Spanish labour market, due to fraudulent use, broad contract "chaining" possibilities and lack of nexus between the type of contract and

[388] Preamble of the Law 31/1984

temporary necessities of the employer, problems enhanced by broad judicial interpretation[389].

It is also striking to observe in the Preamble of the law that the better coverage was presented as a form of compensatory measure for the greater labour mobility that the new contractual regulations would entail, prefiguring the *flexicurity* agenda that would emerge a decade later in Europe. However, as the Preamble indicated, the better coverage was mainly due to augmenting the period of benefits from 18 to 24 months (and taking more broadly into account past contributions), which furthers us a bit from the link to labour mobility. The minimum floor (minimum salary) was also extended to those having no family at charge

Interesting is the delegation given by the law to the government to adapt the scale of duration of benefits in function of budgetary considerations,[390] corresponding with the conditioning of the bettering of coverage to financial possibilities announced in the Preamble. Also, despite announcing the extension of coverage to new collectives, like seekers of a first job or persons who, having voluntary left their employment, find themselves in a longer period of unemployment than foreseen, the Law itself did not extend coverage, but delegated that power to the government, which has never made use of that power.

[389]López, J., de le Court, A., Canalda, S., „Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* vol. 5, nº 1, 2014, 19-43
[390] Art. 8 Law 31/1984

The sanction system was also lightened, as only a third refusal of suitable employment or unjustified absence of participation in training programs, could lead to extinction of the right to benefits (as already exposed, Law 8/1988 made one refusal sufficient for extinction). The notion of suitable employment was also refined and would remain stable for the following 15 years.

Suitable employment is the one that corresponds 1) with the habitual profession of the worker, or 2) is adjusted to his professional, physical or training aptitudes, or 3) corresponds to the choice of employment manifested by the unemployed, and does not suppose a change of habitual residence (except in case of appropriate housing possibilities offered by the employer). Jobs coinciding with the last professional activity will be considered as adequate. The Real Decreto 625/1985, of 2 April, developing the Law 31/1984, added that the offered job could not involve a salary inferior to the one established by the industry-level regulation (generally, collective agreement) for the corresponding activity. The latter criteria, in addition to being slightly redundant, given that such a salary would normally be illegal,[391] is contradicted by ILO Convention 44, which takes as reference the salary which he would have expected to obtain, "having regard to those which he habitually obtained in his usual occupation" if in the same district, "or would have obtained if he had continued to be so employed", or,

[391] On illegality of working conditions, see STSJ Galicia, 30 October 2000, or the STSJ Castilla-La Mancha 1981/2003 of 28 October, which ruled that the refusal of an offer to work without extra hours pay or paid holidays for an employer with which the unemployed already experienced absence of payment of extra hours and severance package, had been made for on a valid ground.

in any other case, "than the standard generally observed at the time in the occupation and district in which the employment is offered".[392] Doctrine and jurisprudence have further divided the concept in 3 alternative functional criteria (habitual profession, last employment, correspondence with training and physical capacity), which have to be cumulated with the geographical and the economic criterion.[393]

The alternative character of the functional criteria makes that "obligatory degradation" in employment could be possible. An unemployed worker could have to accept a job that is materially, socially, or taking capacities into account, "inferior" to the former occupation.[394] However, this could infringe the right to dignity and professional training and infringe article 10 of ILO Convention 44, which states that an employment is not considered as adequate when "the other conditions of employment are less favourable [...]than those which he might reasonably have expected to obtain, having regard to those which he habitually obtained in his usual occupation"[395]. This could be put in contrast with the limits imposed by Spanish labour law on forced changes of functions

[392] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 269-270

[393] Luján Alcaraz, J., "La noción de "colocación adecuada" ante la reforma de la protección por desempleo", *Aranzadi Social*, nº 5, 2002, 83-100; de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 115-124;

[394] See in that sense, STSJ Islas Canarias, Santa Cruz de Tenerife, of 24 May 2002 and STSJ Cataluña of 20 October 1992, considering the job of construction worker as one that should be considered adequate to any unemployed with the necessary physical capacities, whatever his or her education or training.

[395] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 121-122; González Temprano, A., *La Política de Gasto Social (1984-1996)*, CES, Madrid, 1998

when in employment. Expressed in broad terms, in the latter case, the decision of the employer has to respect worker´s dignity and rights to promotion, as well as salary.

Even if the LGSS does not explicitly gives the right to refuse an adequate offer for grounded reasons, the LISOS (Act on Sanctions within the Social Order) conditions the application of a sanction (three months suspension, 6 months suspension in case of second refusal and extinction of the right to benefits in case of third refusal) to the absence of a valid justification for the refusal of an adequate job offer. The ground generally appearing in the jurisprudence is the need to care for children, mostly infants and in cases of illness, which indirectly gives litigation in that matter a clear gender-related character (most judicial claimants appearing in the published jurisprudence are women). Generally considered, following the interpretation of the Tribunal Supremo of the legal definition of the unemployed, jurisprudence does not accept the child care justification, considering that "normal" personal circumstances are excluded.[396] The two main arguments adduced are, first, the fact that (current) article 203.1 LGSS defines the subjects of the

[396] STSJ Andalucía 743/2001 of 6 March 2001; STSJ Castilla-La Mancha 1704/2002 of 17 October 2002; STSJ Extremadura 22/2002 of 22 January 2002; STSJ Cataluña 1290/1997 of 14 February, all citing STS of 8 February 1995, Rec. 1015/1994; The STSJ Valencia 3450/1999 of 9 November, however refused to qualify a refusal as having no justification, in a case where it was the potential employer who refused the unemployed, the latter having communicated that she could not comply with the working schedule due to having to care for her child; the STSJ Murcia 872/2001 of 18 June, accepted as justification the impossibility to present oneself at work – amounting to a refusal – because of the need to punctually (i.e. 48 hours) care for an ill child without having the possibility to find someone to substitute in the care; STSJ Andalucía, 2015/1999 of 16 September accepted also the need of a wife to care for her terminally and gravely ill spouse.

situation of unemployment as "those who, although they *can* and want to work...", the first verb involving the need to be objectively available for work, and second, that the precedent argument involves the need of absence of discrimination with those who are in employment (in which case the law provides for work-life balance institutions[397]).

It is also important to observe that engaging in activities directed towards enhancing employability is also refused by the courts as a valid ground, the immediate acceptance of a job taking precedence towards the possibility to enhance employability, and, as such, future job quality.[398]

Coming back to the protective 1984 reform, the extension of coverage was mainly felt in the non-contributory scheme. Unemployment subsidy was extended to unemployed (with family at charge) who have had no access to contributory benefits (with a minimum contributory period of 3 months) and to liberated prisoners, with a maximum benefit period of 6 month (extendable by 6 month-periods to 18 months for those who have had access to contributory benefits) and to unemployed older than 55 years, until pension age. In the latter case, the benefits included contribution to the retirement pension system. The government was given power to raise the benefits (fixed in the law at 75% of the minimum salary), which, again, was not followed by any favourable measure.

[397] STSJ Cataluña 6819/2001 of 5 September, which mentions the right to ask for working-time reduction to care for children of less than 6 years, once in employment, as an impediment to refuse employment on those grounds.
[398] Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 2005, 155

After a new fall in coverage between 1986 and 1988, the Royal Decree-Law 3/1989, of 3 March, extended means-tested benefits to long term unemployed of more than 45 years having exhausted a contributory benefit period of at least 12 months.

Those measures resulted in an extension of coverage. But the latter was also due in a great measure to the liberalization of the use of temporary contracts, leading to the use by employers of unemployment protection as a means of workforce management, planning the latter on the basis of temporary contracts adjusted to the minimum contribution periods followed by short periods of unemployment.[399]

Employment protection in Spain has been constructed on the right not to be dismissed without a just cause. It finds its base in the individual aspect of the right to work of article 35 of the Spanish Constitution,[400] and according to the Spanish Constitutional Court, it involves, on the one hand, the need of formal guarantees related to the knowledge by the worker of the cause, and on the other hand, the possibility of an adequate reaction against the decision of the employer, which involves that the judge has to be able to review the act of dismissal.[401]

However the legal construction of the Constitutional understanding of the right to work has been circumverted by the historical trend of

[399] González Temprano, A., *La Política de Gasto Social (1984-1996)*, CES, Madrid, 1998, 114
[400] Judgment of the Constitutional Court, STC 22/1981, of 2 July
[401] Baylos, A., Pérez Rey, J. *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 53

liberalization of fixed-term contracts, consisting above all in the disconnection between the temporary character of fixed-term contract and the temporary nature of the work to be performed, permitting fixed-term contracts to perform permanent jobs, which combined with absence of effective control and broad interpretation by judges of the legal causes of those contracts, have normalized their use for permanent necessities of employers, creating one of the most important anomalies of the Spanish labour market. [402]

Concerning part-time work, article 3.4 of the RD 625/85 provides that the contribution period is counted in contribution days, without taking into account the number of hours worked. If part-time working time is distributed in less than 5 days, the effective contribution days are multiplied by 1,4. This regulation assuring a relative equality between part-time and full-time workers, has to be contrasted with the system put in place since 1998 to calculate contribution periods in matters of retirement pensions, recently declared contrary to European law by the Court of Justice of the European Union[403] and unconstitutional by the Spanish Constitutional Court.[404] The latter system was based on theoretical contribution days, where the total number of worked hours were divided by 5 (5-hours working day taken as theoretical reference), with a correcting coefficient. The system was deemed by both

[402] Dubin, K., Hopkin, J, "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climates and Tough Times*, Palgrave, Basingstoke, to be published, consulted version: personal.lse.ac.uk/hopkin/DubinHopkinFinal2013.pdf (last visit: 11/12/2013), 8-9
[403] CJUE**,** 22 November 2012 (C-385/2011), *Elbal Moreno v. INSS*
[404] Spanish Constitutional Court, Judgment of 14 march 2013, STC 61/2013

courts to be an unlawful application of the proportionality principle, because it entailed an indirect discrimination, being mostly women who had more difficulties to access contributory pensions, having to work far longer than their full-time counterparts.

I.1.2 Reform in the 1990s: re-commodification justified by the need to reduce the costs created by labour market flexibility

The increase in wages (leading to an increase in benefits per unemployed), the abuse of fixed-term contracts, and the following surge in costs, despite a decreasing registered unemployment rate[405], led to a reform in the years 1992-1993[406] centred mainly on cost reduction through stricter access conditions and reduction of benefits and benefit period. In 1991, for example, 2 out of 3 unemployed entered in the contributory protection system due to the expiration of their fixed-term contract, while only 1 out of 4 because of dismissal. This increase, connected with lower economic growth, led to financial imbalance in the contributory system and

[405] González Temprano, A., *La Política de Gasto Social (1984-1996)*, CES, Madrid, 1998, 117-118

[406] Ley 22/1992, de 30 de julio, de medidas urgentes sobre fomento del empleo y protección por desempleo (Law 22/1992, of 30 July, on urgent measures about promotion of employment and protection in case of unemployment) and Ley 22/1993, de 29 de diciembre, de medidas fiscales, de reforma del régimen jurídico de la función pública y de la protección por desempleo (Law 22/1993, of 29 December, about fiscal measures, reform of the legal regime of the civil service and protection in case of unemployment).

the need to supply it from the "general" budget, in a context of increasing deficit and public debt.[407]

There was also a European factor of influence for the reform. In his Convergence Program 1992-1996 towards the Maastricht Criteria, the Spanish government had compromised itself to two main objective: inflation and deficit reduction on one hand, and liberalization of markets on the other hand, both objective which were intended to help attain the real convergence criteria: economic growth and creation of employment. Focused on "reinforcing the conditions that could favour a new increase of growth-influence on employment intensity, which requires to act upon those factors that reduce employment demand or offer", the government openly wanted to flexibilise the labour market, referring to the fact that the liberalization measures introduced in the 1980s saw "five times more employment creation in the 5 following years than in the 20 years before". Those flexibilisation measures should be accompanied by reforms in passive unemployment measures "destined to restore the necessary balance between attention towards unemployment and the creation of sufficient incentives for looking for employment" which could, at the same time restore "financial equilibrium". The 1992-1993 reform inscribes itself thus clearly within a context of reduction of financial costs and the belief that "it is not desirable that a system of unemployment should exist,

[407] González Temprano, A., *La Política de Gasto Social (1984-1996)*, CES, Madrid, 1998, 114-115

which could substitute for a long-lasting period the income coming from employment"[408].

As such, the minimal contributory period was extended from 6 to 12 months, but the reference period was extended from 4 to 6 years. It should also be said that a few years later, art. 4 of the Law 4/1995 on parental and maternity leave gave the possibility to extend the reference period with the amount of time during which leave was taken for child care, adding to the cases of union activity developed by jurisprudence, as seen above. The extension of the reference period was officially explained by the fact that lots of fixed-term contracts adjusted themselves to the minimum periods of contribution. There wasis also an explicit connection with the "temporary contract for the promotion of employment", a subsidized contractual form without cause intended to facilitate transition to open-ended contracts, of a duration of one year. It could thus be said that legislation conceptually intended for the protection of workers was used (and protection decreased) to control behaviour of employers, namely concerning their use of certain types of contract.

The wage substitution rate was lowered, passing from 80% to 70% of the salary the first 6 month and from 70% to 60% afterwards.

Law 22/1993 reduced the minimum floor for persons without family at charge to 75% of the minimum wage.

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[408] Citations from the „Programa de Convergencia (1992-1996)", see Palomeque López, M.-C., "Las modificaciones estructurales del Mercado de trabajo en el debate sobre la convergencia europea", *Revista de Economía y Sociología del Trabajo*, n° 17, 1992, 74-80

The non-contributory program knew cost reduction measures as well, through stricter access conditions (amongst which a stricter definition of family charges). However, access to the non-contributory system is given to unemployed without family at charge not having access to contributory benefits, for not meeting the minimum contribution period, but provided that they contributed at least during 6 month. Scrapping the family-at-charge requisite and introducing a 6 month contribution period can be clearly seen as reflecting the extension of the minimum period for contributory benefits from 6 to 12 months, provoking a transfer of beneficiaries from the contributory system to the non-contributory system.

Law 22/1993 lowered the maximal monthly revenues to qualify for assistance benefits from 100% to 75% of the minimum wage, excluding 13th and 14th month.

Duration of non-contributory benefits was also adapted, and connected with the previous contribution period. With family at charge and contribution period of 3 to 6 months, the benefits period was equal to the contributed months. From 6 to 12 months contribution, duration would be 6 months, extendable by periods of 6 months until 21 months. Duration for unemployed without family at charge would be of 6 months.

Also, some new minor obligations were imposed on unemployed, like the need to periodically renew the work demand (registration as

job seeker)[409] or to communicate grounds that could give rise to suspension or extinction of the right to benefits.

Concerning the legal form of the changes, it has to be observed that both laws were confirming legislative decrees that the Spanish government is allowed to take in cases of urgency.

Finally, a few years later, unemployment protection was reintegrated in a general social security act, albeit in a title separated from the other social security contingencies.

The 92-93 reform effectively provoked a decrease in numbers of unemployed with a right to contributory benefits (most of all for people whose last job lasted less than 6 months, increasing vulnerability of temporary workers) with an increase of those unemployed depending on non-contributory benefits, leading to surpluses in the contributory scheme.[410] This should moreover be seen as particularly problematic given the growing temporality rate and continuous liberalization of fixed-term contracts.

However, despite having been adopted as urgent measures to alleviate a problem of balance in the budgets of unemployment protection, following economic recuperation in 1995 and the appearance of a surplus in the budget of the contributory scheme, there was no return to more "generosity".

[409] An obligation which is still in force, the unemployed having now to renew their demand every two months

[410] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 402

Even more, in 2002, new restrictions were introduced, despite economic growth, lowering unemployment and growing unemployment protection budget surpluses.

I.1.3. Reform after 2000: re-commodification through activation

The end of the 1990s and beginning of the 2000s saw the appearance of the Active Insertion Benefit scheme (*Renta Activa de Inserción*) intended to take into account the special necessities of the most socially excluded collectives of unemployed, and involving the sistematization of the participation of beneficiaries in reintegration measures.

In 2006, in a time of lowering unemployment and increased economic growth (but two years later it would be shown how fragile the growth was) coverage of the assistance scheme was extended, however, again only very selectively, to a few well-limited collectives, like unemployed older than 45 years (for which the requisite of having received contributory benefits during at least a year was suppressed, and who can get access to a special, supplementary 6 month period of benefits - of a higher value than the ordinary assistance benefits in case of family charges, after a period of 2 years of contributory benefits), workers that have

contracts similar to seasonal workers, or partners of labour cooperatives[411].

But the beginning of the millennium saw the most important change in the paradigm of unemployment protection. What is more, this change is directly connected to the (unfaithful) implementation of the European Employment Strategy. The reform was again introduced through an "urgent" legislative process, which in face of massive social protest, saw the reform initially enshrined in an urgency government decree played down in the final legislative act of confirmation.

The Preamble of the Law 45/2002, of 12 December, conceptually changing the conditions of unemployment benefits, refers to the Guidelines of the European Employment Strategy as inspiration for the reforms introduced, more particularly the principle according to which public authorities have to offer formation and employment opportunities, next to the "passive" unemployment subsidies.[412]

There is thus a concrete connection between the reform and the EES. The implementation of an "activity commitment" and the broadening of the notion of adequate job offer can be found

[411] Law 43/2006, of 29 December, for the promotion of growth and employment; De la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 353 and 403

[412] "*From their part, the European Employment Strategy to which Title VIII of the treaty on the European Comunity refers, as well as the Guidelines on Employment which are annually approved by the Summit of Heads of State and Governments, insist since the Process of Luxemburg that the countries of the European Union have to organize unemployment protection in such a way that, joint with the economic benefits necessary to face situations of unemployment, public authorities give formation and employment opportunities which make possible that unemployed could find a job in the shortest possible time*".

implicitly linked with the 2002 Council Recommendation, asking Spain to "complete the modernisation of the public employment services so as to improve its efficiency, and step up implementation of the preventive approach, particularly with regard to the adult unemployed, so as to cover all potential beneficiaries". The official justification, however, was made with the very cryptic and feebly relevant direct reference to the Employment Guidelines, according to which "unemployment protection [had to be organized] in such a way that, joint with the economic benefits necessary to face situations of unemployment, public authorities give formation and employment opportunities which make possible that unemployed could find a job in the shortest possible time".

However, behind the "positive", rights-enhancing rhetoric, of the Preamble of the law skulked a policy mainly based on imposing more obligations on benefit claimants.

As hypocritical as it may seem, the most important mechanisms to give effectiveness to the principle according to which public authorities have to help unemployed to a job, is the introduction in article 231 LGSS of the obligation for the unemployed claiming or receiving contributory benefits to undersign a jobseeker´s "activity commitment" (*compromiso de actividad*). Art. 207 LGSS lists the agreement among the other conditions for the creation of a right to unemployment benefits, seen here above. Moreover, this agreement is presented as an accreditation of the fulfilment of the obligation of the unemployed to actively look for a job on the one hand, and, on the other, to accept a suitable job offer. As such, the new

configuration reverses the burden of proof of the search for employment that now passes to rest on the shoulders of the unemployed.[413]

Also, the law altered the notion of suitable job offer, giving the administration more discretion in defining the concept in each particular case.

This calls for further reflexions on those two important institutions, so as to explain why they can be seen as marking a turning point in the configuration of unemployment protection.

I.1.3.1. The activity comittment: the appearance of a unilateral and automatic administrative „contract".

By this agreement, the unemployed commits itself mainly to 1) actively search for a job, 2) participate in actions for the improvement of his employability, and 3) accept adequate job offers.

The agreement enshrines the obligation of the unemployed, not only to be willing to actively participate in the search of a new job, but also to give proof of that "state of mind". This aspect is important, because it entails in general terms a reversal of the burden of proof of his compliance with his obligations.

[413] TSJ País Vasco (Sala de lo Social, Sección 1ª), sentencia núm. 2480/2011 de 11 octubre.

Authors have remained puzzled about the scope of the contractual character of this new legal instrument. On one hand, the wording used and the fact that is signed and executed by two parties, that it contains, or rather is susceptible to contain specific rights and obligations for both (active job search and employability improvement on one hand, and active employment policies on the other), and the public character of one of the parties, as well as the "social insertion relation", could point towards the subjection of the activity commitment to the rules regulating administrative contracts.[414] On the other hand, however, the obligation to sign the contract to be legally considered as unemployed and the absence of freedom to negotiate its content (mostly concerning its essential obligations and their core content, as expressed by the its obligatory and generic character) gives the unemployed only the option to adhere or not to it.

Its contractual character falls thus more under the discursive than under the normative, certainly when analysing its function in the Preamble of the Law 45/2002, where it is presented as expressing the obligations towards the unemployed which the public employment services assumes (and which, as will be seen further, depends on the discretion of the latter and, more heavily on the will of the state to dedicate the adequate funds to it). However, this does not play down its character as a supplementary legal expression of the evolution of unemployment protection towards the realm of subsidiary benefits.

[414] Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 63

Its specific content, the details of which the unemployed, as well as the unemployment service, has some theoretical freedom to negotiate, evolves mostly around the concept of "insertion itinerary", without any guarantee for the unemployed of being proposed an effective plan of transition towards employment, which ideally should contain a mix and succession of information, orientation, support, training and placement.

Also, the fact that active search and acceptation of an adequate job offer become constitutive of the legal definition of the situation of unemployment has consequences, on the legal and political definition of benefits, of the unemployed and the protected risk.

First, benefits can be seen as being reconfigured as a "reward" or a "salary" for the person actively looking for a job[415]. This vision can also be confirmed by the "contractualization" of the benefit receiver´s obligations. The worker passes from the supervision and direction powers of an employer, enforced by the possibility to lose his means of subsistence, towards (theoretical) supervision and direction powers of the public employment service, enforced again by the possibility to lose its means of subsistence.

Secondly, the unemployed passes from being the claimant of a right to benefits (for which, in some cases he has contributed during its previous work life) and as a citizen who is to be protected for

[415] García Ninet, J.I., Vicente Palacio, A., "Algunas cuestiones sobre las modificaciones operadas en los requisitos de acceso a la protección por desempleo en el nivel contributivo de prestaciones, *Tribuna social*, n° 150, 2003, 15; Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 61;

having involuntarily lost his employment, towards being an active job seeker[416]. This configuration links the unemployed also more directly with its need to become more employable and of the help he can get form the public employment services towards this goal, giving also more weight to that aspect of unemployment protection.

Thirdly, the nature of the protected risks changes, becoming composed of two situation of a different character: the objective involuntary loss of employment on the one hand, and the mixed objective-subjective situation of not finding a new one, despite the will to find one, on the other[417].

This combination reveals a more profound consequence of the change: the individualization (and correspondent de-socialization) of the responsibility to reinsert oneself into the labour market.

Moreover, however being presented officially as a commitment of the administration to help the unemployment to find a job through the design of an insertion program according to its needs and capacities, the "activity commitment" is used as an instrument of control of the will of the unemployed.[418]

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[416] Molina Navarrete, C., "El concepto de "colocación adecuada": "profesionalidad" versus "empleabilidad" del trabajador", *Tribuna social: Revista de seguridad social y laboral*, nr 143, 2002, 11

[417] Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 62

[418] Valdés Dal-Ré, F., "Las tendencias de contractualización en el sistema español de protección social", *Revista de Derecho Social*, 20 (2002), 37; de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 403; Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 2005, 14;

Also, it should be considered as an incentive to the acceptance of a job, reducing the margin of free choice of the unemployed in proportion to the control powers of the administration[419]. This ill-called contract between the administration and the unemployed is an institution taken from the non-contributory scheme of Active Insertion Benefit (*Renta Activa de Inserción*), developed since 2000 and follows the same logic. The only significant difference, however, is that the RAI is fruit of "pure" solidarity, while unemployment benefits are supposed to be the consequence of the unemployed own contribution efforts. This is why the introduction of that "activity committment" should be seen as doubly undermining the character of social citizenship right of the right to unemployment benefits.

Firstly, by tying commodifying conditions to it (reducing freedom for the worker to choose his conditions of commodification by augmenting the pressure and the discretion of the administration on which type of job he is to accept).

Secondly, by conditioning further the enjoyment by the unemployed of its own contributions.

And thirdly, it is a mechanism which increases individual responsibility of the unemployed for his employability (and thus,

[419]de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 108; some authors define the "activity comittment" as an administrative clause, excluding any contractual character or encounter of free will, due to its subscription conditining the recognition of the right to benefits and the absence of respect of it opening possibility of administrative sanctions. The author however refuses to conclude that this implies that the unemployed looses any decision margin in front of the administration's discretion.

more generally, for protection against unemployment), a notion that has, in its actual configuration, a high commodifying character.

This has also to be seen in the light of the characteristics of the sanctions imposed for non-compliance by beneficiaries of their obligations. There are almost no official numbers or databases concerning the patterns of those sanctions, other than press releases from the government. According to one of those, in 2010, 90% of the sanctions (concerning 235.164 benefit holders) were imposed for the non-renewal of the registration with the Public Employment Services. Around 15.000 benefit holders were sanctioned for one of the following reasons (suspension of one month of benefits): absence of presentation to the PES when required, absence of delivery of the proof of presentation at adequate job interview and non-compliance with the activity committment. 7.443 benefit holders were sanctioned for one of the following serious offences (three months suspension, six months suspension or extinction of the right to benefits in case of reoccurrence): refusal to participate in adequate training or accept adequate job offer or social work. In 2010, Spain counted around 3 million benefit holders. The proportion of sanctioned benefit holders would thus be 8,7% in total, and 0,2% for serious offence. When looking at the published jurisprudence (generally appeal-level decisions), the greatest part deals with problems surrounding sanctions or extinctions related to movement of unemployed out of the country, with questions concerning the computing of income to access assistance benefits coming second, and the rest of the most important groups of judgements concerns recognition of unemployment benefits in case

of partial unemployment, and sanctions concerning the refusal of job offers.[420]

In conclusion, despite the imposition of obligations on the unemployed being presented as enhancing his or her possibilities to find employment, the real objective of the reform should be considered, again, of having mainly a financial nature, seeking to reduce the economic cost that periods of unemployment represent for the State. A clear example of this real objective can be found in the fact that the obligation (or to use the words of the authors of the law, the "right") to enter into this "activity commitment" is only required for those unemployed who claim or receive unemployment benefits, instead of all (unemployed) job seekers, even if the latter are not forbidden to enter into such an agreement.[421] But while the goal is cost-containment, the means used amount to the introduction of the workfare model in the regulation, without any real will to activation of all unemployed, whether they receive benefits or not.

I.1.3.2. The notion of suitable employment: stability of suitability within a trend of re-commodification of employment

The law integrates a new criteria which had already been found by the Courts to be implicit in the former text, which is the job requested (explicitly or implicitly) by the unemployed, a criteria

[420] Analysis based on keyword searches („sanction" and „unemployment") in the online database „Aranzadi bibliotecas".
[421] Torrents Margalef, J., "El compromiso de actividad" in VV.AA. ., *El nuevo régimen jurídico del despido y del desempleo (análisis de la Ley 45/2002)*, Laborum, Murcia, 2002, 63;

that adds to the responsibilities of the job seeker to carefully formulate and think about the jobs he would be prepared to accept.

The last occupation criterion is being refined, in the sense that, to be considered adequate, it had to be exercised at least three months. This period has however to be considered as too short, given the fact that, certainly in a situation of scarcity of employment, it is not uncommon to accept emergency occupations, due to pressing needs, but which finish to last more than three months, in which case the job seeker could see himself trapped in a professional itinerary which does not correspond to his capabilities or difficult his promotion through employment.[422] The former notion of habitual employment should therefore be seen as taking the unemployed worker´s right into account in a more balanced way.

Moreover after one year, will also be considered as an adequate job offer the one that the public unemployment service will consider "that the worker could exercise". The slightly circular meaning of this new professional criterion, whose application only depends on the lapse of time, brings serious difficulties regarding its interpretation. While logic commands to consider the physical and professional aptitudes of the unemployed as a limit to the employment service´s discretion, the excessive indetermination of the concept could have consequences on the sanctionability of the refusal of such an offer. This is due to the fact that administrative sanctions in the social order, of which the suspension or extinction

[422] Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 99

of benefits is part of, are subjected to the principle that they have to be sufficiently determinable according to legal criteria, so as to guarantee legal certainty.[423]

Concerning the geographical criteria (that has a cumulative character), the new drafting specifies the sub-criteria to be taken into account, providing, next to the possibility for adequate accommodation, for a limit of 30 km from the residence of the worker for the adequacy of the job offer, or when commuting would take more than 25% of the working time or commuting costs would present more than 20% of the monthly salary. These limitations should be welcomed above all concerning the possibility to consider as inadequate part-time jobs, far from the workers residence.

The new legal drafting also adds that the suitability of the job offer will "take into account the duration of the contract, temporary or open-ended, or the working time, full-time or part-time". *Although the aggressive wording of the initial Legislative government Decree was played down (it mentioned that the adequacy had to be considered without regards to duration of the contract or working-time), we are again confronted to a great legal uncertainty, not knowing towards which objective (worker´s protection or job acceptation) those elements have to be taken into account, and, again, potentially augmenting the employment service discretion. This could be viewed as decreasing the unemployed legal certainty,*

[423] ; de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 126; Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 109-110;

which could in its turn be considered contrary to the idea of "clear rights and responsibilities" of the unemployed, contained in the European Employment Guidelines.[424]

Some authors consider that this new wording consecrates the fact that the duration of the contract or the fact that it would be part-time cannot be used as a valid justification to refuse a job offer, as already pointed towards by jurisprudence.[425] *Others deem that the new wording compels the employment service to take into account the quality of employment and the characteristics of the contract in relation with personal circumstances in considering which job is adequate*[426]*. The obligation to accept part-time work should also be considered as contrary to its voluntary character, as consecrated in the Directive 97/81/CE on Part-Time Work*[427].

This also important given that in the Spanish context part-time work can be clearly seen as a precarious form of work. Part-time work has a problematic definition, according to which any employment contract with a number of hours inferior to a full-time contract of comparable worker is a part-time contract, and the fact that proportionality of access to social security rights automatically

[424] Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States, Guideline 7

[425] Mella Menéndez, L., *El Compromiso de Actividad del Desempleado*, Centro de Estudios Financieros, Madrid-Barcelona-Valencia, 117-118

[426] Molina Navarrete, C., "El concepto de "colocación adecuada": "profesionalidad" versus "empleabilidad" del trabajador", *Tribuna social: Revista de seguridad social y laboral*, nr 143, 2002, 19; Cristóbal Roncero, R., "El programa de renta active de inserción en la Ley 45/2002", in Sempere Navarro, A. V. (coord.), *Empleo, despido y desempleo tras las reformas de 2002 (Análisis de la Ley 45/2002, de 12 de Diciembre)*, Aranzadi, 2003, 285

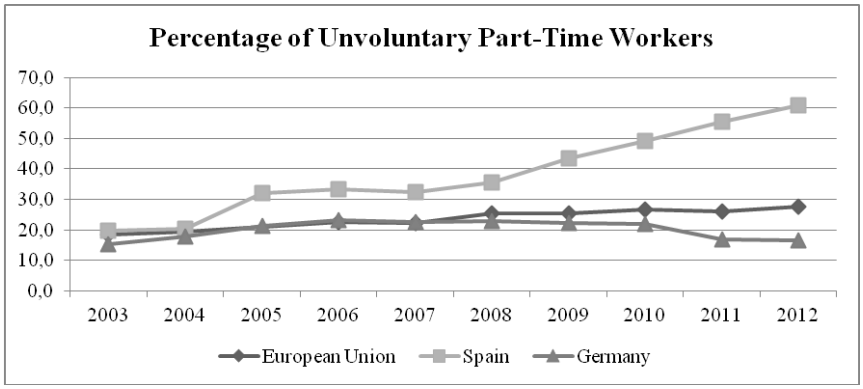
[427] de la Casa Quesada, S., *La protección por desempleo en España*, Comares, Granada, 2008, 127.

applies, and makes their access more difficult.[428] In relation with the latter point, the proportionality principle imposed by the European Directive on Part-time work has not been correctly implemented, as shown by the recent judgment of the European Court of Justice in the *Moreno* case.[429] Part-time work also involves the application of strict proportionality criteria, even to minimum assistance benefits, as shown above.

Also, while the Spanish law guarantees in principle the voluntary character of part-time work, also in application of the EU Directive on Part-time work, the proportion of involuntary part-timers has started to increase since 2004, before soaring with the crisis. This new phenomenon of the Spanish labour market has, again, to be read as a new trend of re-commodification, both in-work as out-of-work, because of its consequences on access and level of unemployment benefits. Moreover, involuntary part-time work, also to be described as "underemployement", is a form of "disguised" unemployment. It is also an important factor of in-work poverty, especially for the young.[430]

[428] López López, J., Chacartegui Jávega, C. and González Cantón, C.: "Social Rights in Changing Labor Markets: Caring for Caregivers in the European Union", in Stone, K. W. and Arthurs, H. (ed.) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation, 2013, 333–349.
[429] European Court of Justice, Judgment of 22 november 2012, *Case C-385/11*
[430] European Commission, "Is Working enough to avoid Poverty? In-work Poverty Mechanisms and Policies in the EU" in *Employment and Social Developments in Europe 2011,* 145

Graph 7: Evolution of Involuntary Part-Time work in Spain, Germany and the EU



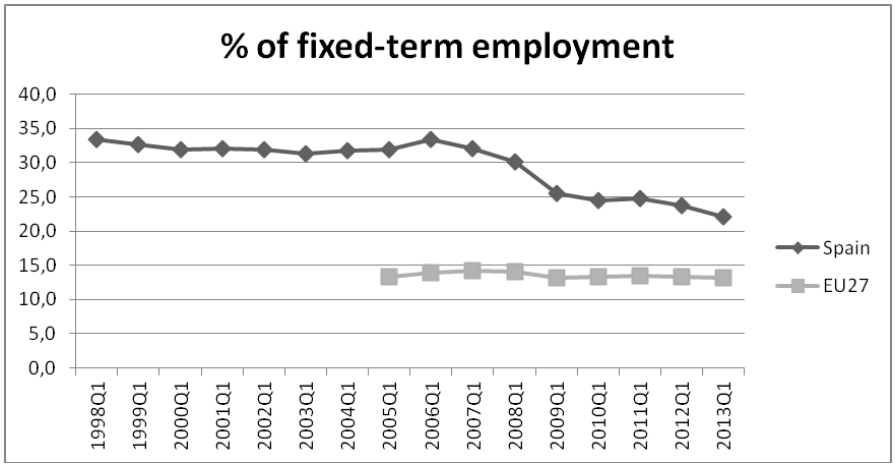
Source: LÓPEZ, J., DE LE COURT, A., CANALDA, S., „Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", European Labour Law Journal, vol. 5, nº1, 2014, 19-43

Also, despite being characterized as problematic by European authorities in the context of the Employment Strategies,[431] the Spanish trend of recourse to fixed-term work initiated in the precedent decade has never been reversed. Only the 2008 crisis decreased the temporality rate, given that fixed-term worker bore the burden of job destruction. Some timid measures had been introduced before the crisis, above all in terms of subsidies for the promotion of conversion into open-ended contracts and the promotion of exceptional, open-ended contracts with lower compensation in case of dismissal, but not in terms of changes in the legal configuration of fixed-term contracts, except the

[431] Recommendation for a COUNCIL RECOMMENDATION on Spain's 2014 national reform programme and delivering a Council opinion on Spain's 2014 stability programme, SWD(2014) 410 final

introduction of limits to their "chaining" and an "absolute" limit of three years. However, in the wake of the crisis, the introduced limits were suspended, and the 2012 labour law reform did nothing else than rely on lowering protection of open-ended contracts, to try to revert the trend, without results.[432]

Graph 8: Evolution of fixed-term employment in Spain and the EU



Source: Eurostat online database 2013

Again, this has negative consequences in terms of entitlement to the right to unemployment protection, due to the contributory character of the latter and the greater difficulties to fulfil the requisites of sufficient contributory periods for persons working in fixed-term contracts. The high temporality rate has also a negative effect on the

[432] López, J., de le Court, A., Canalda, S., „Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* 2014, vol. 5, nº 1, 19-43. Moreover, according to Chapter 2 of the OECD Employment Outlook 2013, p. 97, regulation of temporary has been lowered, mainly by lenghtening their maximmum duration.

precarization of workers and their employability[433], and, at least in the Spanish context, specifically on their employment chances[434], which are also a consequences of higher in-work commodification fixed-term work involves.

Within this context of important precarization of workers in temporary and part-time contract, and the high in-work commodifying level of the latter, the possibility to consider those types of contracts as suitable employment can be seen as quite problematic.

Another important feature of the Spanish labour market which is problematic from the point of view of forcing workers back in the labour market through the broadening of the notion of suitable employment is the low level of wages, and above all of the minimum wage.

Here again, an important element of precariousness arises, as pointed out by the European Committee on Social Rights:

> "In its previous conclusion (Conclusions XVIII-2) the Committee held that the minimum wage was manifestly inadequate as it fell far below the threshold of 60% of the average wage. It also requested detailed information on net values of both minimum and average wages.
>
> The Committee notes from the report that on the basis of the Royal Decree 1632/2006 of 29 December the minimum

[433] López, J., de le Court, A., Canalda, S., „Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* 2014, forthcoming

[434] Polavieja, J., "Partial deregulation in Spain: more cons than pros", Working Paper 2003/195, Centro de Estudios Avanzados en Ciencias Sociales, Madrid, 2003

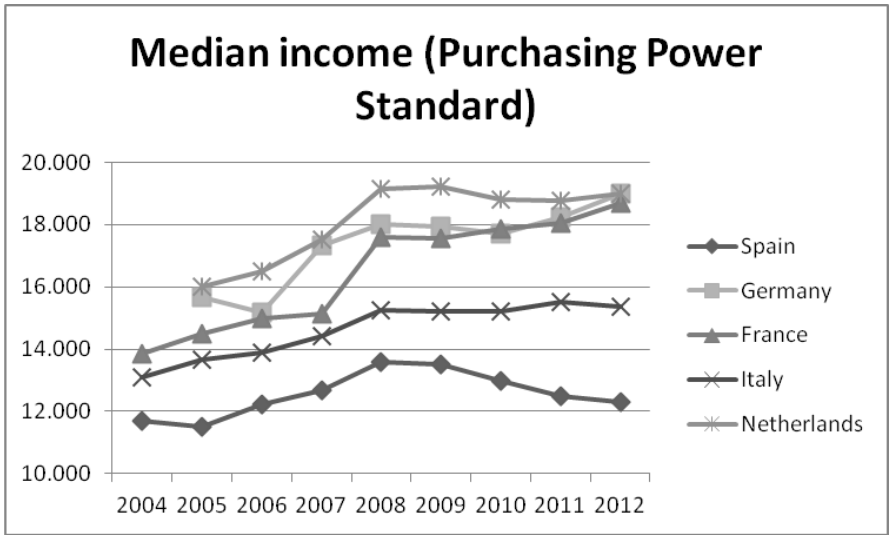
> interprofessional wage was fixed at € 570,60 per month. It rose to € 624 in 2009 by virtue of the Royal Decree 2128/2008 of 26 December. The Committee however observes that the report, again, fails to provide information as requested on the net values of minimum and average wages. It notes from Eurostat that the average annual gross earnings in 2007 amounted to € 21,890 in 2007 (€ 1,824 per month). Therefore, even in the absence of information on the net values, the Committee considers that despite the growth of minimum wage, the situation remains unchanged - the level of the minimum wage remains very low and thus not fair. The Committee also notes from OECD that minimum relative to average wages of full-time workers in 2007 amounted to 45%.
>
> Conclusion
>
> The Committee concludes that the situation in Spain is not in conformity with Article 4§1 of the Charter on the ground that the minimum wage is manifestly unfair."[435]

Given that minimum wage has been frozen during the last years, it could not be said that the situation has evolved favourably.

Moreover, a quick look at the median income in Spain, expressed in Purchasing Power Standard, not only shows that wages in Spain involve lower purchasing power than other EU countries (Portugal and Greece would be the exception), but that the crisis has sharply decreased purchasing power in Spain, to the contrary of the other analyzed countries.

[435] Conclusions XIX-3 – Spain – Article 4-1, 2011

Graph 9: Evolution of the Median Income (expressed in PPS) in EU countries



Source: own elaboration from Eurostat online databases 2013

This has also an importance as to the sufficient character of unemployment benefits, given their close connection to previous earnings, and poses into question, not only the sufficient character of a great part of the wages, but also of social protection benefits.

On a little more positive note, an important element is that the 2002 reform habilitates the public employment services to apply all the aforementioned criteria in terms of suitability of employment, "taking into account the personal and professional circumstances of the unemployed, his insertion itinerary, his work-life balance, the characteristics of the job offer, existence of transport as well as the characteristics of the local job markets". This broadening of criteria, on the one hand, gives a lot of discretion to the employment

services in determining if a job has to be considered adequate. On the other hand, it provides for legal elements which should permit the courts to review the decision of the employment services, by allowing them to take into account the circumstances of the case (and, admittedly, decide in favor of the freedom to choose one's occupation that the right to work should entail).

This new redaction was used in an interesting judgment from 2005 which refused to follow the doctrine established by the *Tribunal Supremo* at the basis of the refusal of care as a justification to refuse work (see subsection I.1.1 here above). The *Tribunal Superior de Justicia de Galicia*[436], court of appeal in social matters, decided 1) that the refusal to participate in training had to be assessed under the same circumstances as the refusal of an adequate job offer, as the PES have to take *into "account the personal and professional circumstances of the unemployed, his insertion itinerary, his work-life balance, the characteristics of the job offer, existence of transport as well as the characteristics of the local job markets" for all the obligation of the unemployed*; and 2) that a worker having refused to participate in training because the participation would make it impossible to care for his child, because his wife was also following training, could not be sanctioned. More interesting even, the Court reinforced its interpretation by referring to ILO Convention 44 and, above all, ILO Recommendation 165, according to which family responsibilities of the unemployed have to be taken into account in the assessment of the suitable character of employment. To justify the reversal of jurisprudence in

[436] STSJ Galicia, 4 April 2005, AS 2005, 1460

comparison to the criteria established by the *Tribunal Supremo*, followed by the jurisprudence commented in section I.1, the Court argued that the principle of the promotion of work-life balance, since the Law 39/1999 of 5 November of promotion of work-life balance of workers,[437] modifying disposition of labour law and social security law, is to be seen as a general criterion of interpretation in labour and social law.

However, this position does not seem to be shared by other Spanish courts, which continue to interpret restrictively the obligation of unemployed along the lines of the 1990s jurisprudence of the *Tribunal Supremo*, creating problems of legal certainty, which have not been solved, given the absence of a new pronunciation of the latter on the matter.[438]

It is thus clear that the new definition of adequate job offer does not provide adequate protection concerning the several elements, as salary, type of contract, working-time and higher skills, that could involve a deterioration of working conditions. Neither does it provide real protection against the worker entering or remaining in the "precariousness trap" (series of temporary and/or part-time contracts with periods of unemployment in between) always more present in the labour market in general, and ever more appearing

[437] Ley 39/1999, de 5 de noviembre, para promover la conciliación de la vida familiar y laboral de las personas trabajadoras

[438] Herrero fernández, M.A., „Formación y percepciones por desempleo tras la Ley 35/2010, de 17 de septiembre, de medidas urgentes para la reforma del mercado de trabajo", *Revista Doctrinal Aranzadi Social*, vol. 3, nº 15, 2010, 105-118

amongst some collectives, like younger people and women, in particular[439].

I.1.4 The 2010-2013 reforms: re-commodification through "flexiprecarisation"[440]

In 2007, out of 1.700.000 unemployed, around 23% were in that situation for more than one year, and around 12% for more than two years. In 2012, out of 5.778.100 unemployed, more the figures were respectively more than 50% and 30%.[441] So, not only the volume of unemployment has literally exploded, but also its duration.

In the first year of the crisis, before the growing number of unemployed seeing their benefit periods expire and the already structurally low unemployment protection coverage drop even more, the government adopted, again by urgent legislative decree[442], a temporary program, consisting in a 6 months period assistance benefits for those who saw their contributory or assistance benefit period expire, and (theoretically) linked to a

[439]Ghignoni, E., Pappadà, G., "Flexicurity analysis of youngsters in Europe: the role of capabilities and human capital", *Sapienza University of Rome, Department of Public Economics, Working Papers* 01/2009, http://www.dipecodir.it/upload/wp/pdf/wp125.pdf ;

[440] The concept of „flexiprecarity" is to be attributed to Julia López, see López, J., de le Court, A. and Canalda, S., „„Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* vol. 7, nº 1, 2014, 19-43

[441] Moreno-Manzanaro Reyes de Blas, N., "La reforma de los subsidies por desempleo en un context de paro de larga duración. El problema de la empleabilidad", *Gaceta syndical*, n°19, 2012, 115.

[442] Real Decreto-ley 10/2009, de 13 de agosto, por el que se regula el programa temporal de protección por desempleo e inserción.

better follow-up by employment services, through the design of a personalized "insertion itinerary", inspired from the *Renta Activa de Inserción* scheme.

The plan has been extended from year to year, before being substituted by the similar, PREPARA plan.

However, in 2012, in a context of the continuation of the rising of unemployment, partly due to a new labour law reform supposedly focused on promoting internal flexibility (mainly through "unilateralization" and "de-contractualization" of the employment relation)[443], but reducing in fact drastically the conditions and costs of dismissal of workers under open-ended contracts, 2012 saw also some points of unemployment protection changed.

So as to "recuperate the rationality of the system and make it more compatible with active life", the government reformed, again through urgency legislation, the unemployment benefit system, through the Royal-Decree Law 20/2012[444]. The mode of implementation of this reform of unemployment protection is no exception to the trend of reforming the latter through supposedly urgent legislative decrees. This particular character of almost all reforms of unemployment protection in the XXIst century (and, since the crisis, also of labour law) is another testimony of an imbalanced implementation of *flexicurity*, in the sense that

[443] López, J., de le Court, A., Canalda, S., „Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* 2014 19-43

[444] Real Decreto-ley 20/2011, de 30 de diciembre, de medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público.

flexicurity policies in Spain are not implemented in a global, articulated way, but rather partially and precipitately, attending to different aspects of those policies without taking into account all the necessary aspects of the transformation of unemployment policies towards the model proposed by the EES. [445]

The reform restricts the conditions of the *Renta Activa de Inserción*, as it is now closed to those who have had no access to one of the other two schemes, affecting above all young people without a first job. This configures this system of protection oriented towards the most vulnerable unemployed as a follow-up system of the means-tested scheme, closing it also towards persons who did not have access to the latter for lack of sufficient contribution period, family charge or necessary age requirements.

The access to PREPARA plan is also restricted (while the plan is being extended) to those who have a family at charge, and enlarge the concept of family income to be taken into account, including those of the parents with which the benefit claimants lives. Those exclusions are even more difficult to explain otherwise than for causes of blind cost reductions, as the advantages of access to that plan had above all been presented as giving access to its requalification programs.[446]

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[445] López López, J., „Flexiseguridad y protección por desempleo: las reformas (2009) desde los derechos laborales", in Agustí Julià, J. and Fargas Fernández, J. (coords.), *La Seguridad Social en continuo cambio: un análisis jurisprudencial*, Bomarzo, Albacete, 2010, 383

[446] Moreno-Manzanaro Reyes de Blas, N., "La reforma de los subsidies por desempleo en un contexto de paro de larga duración. El problema de la empleabilidad", *Gaceta sindical*, n°19, 2012, 115

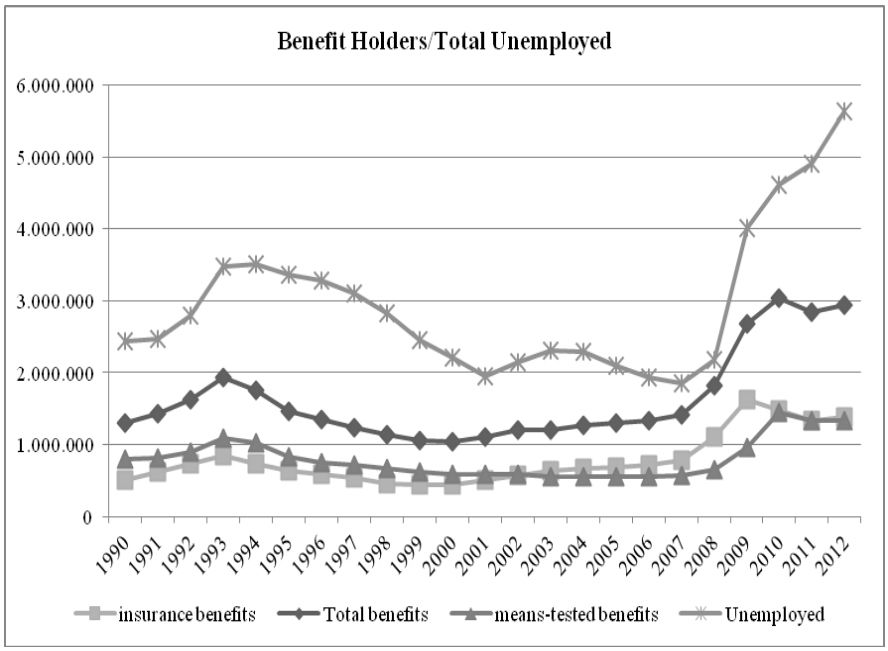
Despite new, empty references to bettering "activation", the RDL 20/2012 does not contain any activation measure, except fine-tuning of definitions of the obligations of the unemployed to prove its active job search, accept an adequate job offer or participating in training and the measures for control of those obligations by the PES (and collaborating profit oriented job placement agencies), reinforcing the repressive character of activation. This has to be confronted with the sharp reductions in financing of activation measures introduced by the same legislation.

But the most important change is the reduction of the wage replacement rate of the contributory scheme to 50% of the salary from the seventh month onwards, supposedly (and fallaciously) to "give an impulse to the activation of unemployed by giving incentives for their return to employment".

It also lowers coverage of the non-contributory, assistance scheme, without adding any new legal mechanism to promote "activity", confirming, once more, the mere cost containing objective of the reform. The special subsidy for unemployed older than 45 having seen ended their contributory benefits period of 2 years is suppressed, and the age limit to enter into the "elderly" scheme is brought from 52 to 55 years. In the latter case, the subsidy does not only ends once the legal pension age is attained, but when the benefit holder meets all the conditions to request a retirement pension from any modality, including anticipated retirement.

This is particularly problematic, given that in 2013, almost half of unemployed had no access to unemployment benefits, a proportion that continues to increase even in 2014.

Graph 10: Evolution of unemployed not perceiving benefits in Spain



Source: Own elaboration from Ministry of Employment and Social Security, Estadísiticas Sociolaborales and Encuesta de Población Activa online databases 2013.[447]

[447] The graph does not include benefit holders of the PREPARA plan, which according to the government, included around 211.000 persons in June 2012. According to a 2014 report of the Fundación 1º de Mayo (Negueruela, E., "Encuesta de población activa (1er trim 2014). Tasa de protección por paro según Communidad Autónoma, sexo y edad", available at www.1mayo.coo.es), at the beginning of 2014, almost 4.000.000 unemployed did not perceive any unemployment benefits. Coverage rates go from 41,7% for unemployed for less than 1 year to 20,2% for those unemployed for more than 4 years, with an overall coverage rate of 37,4% for men, of 27,2% for women, and of 13% for youth (16-29), coming from 16% in 2013. This does not necessarily mean that those without

This also illustrates the high level of commodification of the system, induced on the one hand by the fact that contributory unemployment benefits, as well as the greatest part of means-tested benefits are linked to previous period of contributions (which weakens the "universalist-asistencialist" character of the means-tested scheme) a problem which is intensified through the fragmentation of the means-tested scheme. Access to the latter, after a period of expansion, has been finally restricted to a limited category of unemployed, like persons older than 45 years, or with family charges. The latter should also be considered as having an effect on emancipation of younger people, reinforcing the familialist character of Spanish welfare, as well as hampering emancipation of women (rendered even more difficult with soaring unemployment and the unravelling in the name of austerity of the measures of terciarization of care put in place with great difficulty in the last decade, above all by the 39/2006 Act on Care of Dependents[448]).

It is also worth to note that the lack of Spanish unemployment protection coverage, while involving severe problems in terms of social protection, de-familialization and fight against poverty, has never been an issue in the context of the EES or EU policies towards social inclusion. The only exception could be found in the

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benefits do not have any resources, which they however have to draw from family solidarity. However, the fact that for persons under 45 or without family at charge, there is no means-test at all involves that at least those are not guaranteed any benefits in case of insufficient family resources. The great differences in terms of gender also involve great problems in terms of emancipation of women.

[448] Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia.

2013 Country-specific recommendations, which after recognising that long-term unemployed has reached a rate of 44%, ask to "adopt and implement the necessary measures to reduce the number of people at risk of poverty and/or social exclusion by reinforcing active labour market policies to improve employability of people further away from the labour market and by improving the targeting and increasing efficiency and effectiveness of support measures including quality family support services". This confirms the view within European social policy that protection should be provided in great part through ALMPs rather than raising passive protection levels (at least in terms of coverage), further than increasing their "effectiveness and efficiency", vague terms which do not necessarily imply the former.

Moreover, while the only reference in European guidelines towards unemployment benefits is that they need to be "adequate", coverage does not seem to be an indicator, nor appears in any country-specific recommendation, not even with an unemployment rate of 27% and a coverage rate lowered to only approximately 57% in 2012. Nothing has been said either about the "adequacy" of benefits, which, when in some cases are lower than the at-risk-of-poverty threshold, even in case of insurance benefits, should raise concerns in terms of respect of fundamental rights.

The Royal Decree-Law 20/2012 also made access to contributory benefits harder for part-time workers, especially those with multiple jobs. Only the lost employment will be taken into account for the calculation of the contribution period. Moreover the value of the

assistance benefits is also lowered for this collective, following a strict proportionality rule. Thus, a half-working day part-time worker with no family at charge that has the luck to ending in the assistance scheme will perceive 80/2 % of the IPREM, which amounts in 2013 to around 213 € per month. This, again, points towards the contributory character of the assistance scheme, forbidding us to qualify means-tested unemployment benefits as part of a trend of universalization of unemployment protection.

The former has also to be viewed within the framework of the new prioritization of part-time employment as a means to reduce unemployment rates. After having promoted temporary employment as precarious form, it seems now that, while not trying to remedy the consequences in terms of dualization, the Spanish government has shifted towards promoting another form of precarization of the labour force. However, the promotion of part-time work by the 2012 labour market reform[449] has not been done by increasing its attractiveness for workers, but rather in favour of the interests of employers, mainly by augmenting their power to influence the working-time within those contracts according to their needs. Next to generally flexibilize working time for all contracts, by giving the employer the right to unilaterally dispose of 10% of the annual working-time, the prohibition to perform extra-hours under a part-time contract has been abolished in a first phase. Therefore, next to the existing possibility of performing "complementary hours" (to a maximum of 15% of total working-time), extra hours could be performed, with a maximum

[449] Ley 3/2012, de medidas urgentes para la reforma del mercado laboral

proportional to the legal maximum (80 hours per year). This provision was however abolished a year later, by (again, another "urgent") Royal Decree-Law of 20 December 2013.[450] But the latter adjustment increased the possibility to realize complementary work to a minimum of 30% of the agreed regular working time (instead of a maximum of 15%), a percentage which can be augmented to 60% through collective bargaining (which can however not reduce the minimum of 30%).

In those contracts, working-time can also be organized as "parted working-time", which involves a daily working-time divided in two shifts with an indeterminate number of hours between the shifts. All those new features reinforce the process of in-work re-commodification linked to the recourse to part-time work, a problem which has been argued above to be expressed within the important level of involuntary part-time work. Moreover, the realization of complementary hours has to be notified at least three days in advance, a period which can cause great problems in terms of work-life balance.

But the promotion of part-time work as a means of reduction of unemployment rates is not the only move of in-work re-commodification implemented within the context of crisis austerity and the enhancement of competitiveness through internal devaluation. The 2012 labour market reform has quite brutally enhanced the continuous trend of flexibilisation of the Spanish

[450] Real Decreto-ley 16/2013, de 20 de diciembre, de medidas para favorecer la contratación estable y mejorar la empleabilidad de los trabajadores

labour market as a means to react in front of high levels of structural or temporary unemployment. It was preceded with a more limited reform in 2010, which attempted to promote collectively agreed internal flexibility measures and the use of a new type of open-ended contract with lower dismissal costs for certain collectives (mainly unemployed reintegrating the labour market),[451] followed by a reform, mainly of collective bargaining in 2011, which introduced possibilities for companies to opt out of industry-level agreements in some cases as well as prioritizing company-level agreements in some matters, however under control of higher-level agreements.[452] But the 2012 reform could be considered as a real "disruption" of the balance between workers and employers, as it allowed employers to unilaterally impose internal flexibility on workers, decentralized collective bargaining by giving priority to company-level agreements over industry-level agreement, without possibility for collective bargaining itself to make adjustments to that priority, reinforced the hand of the employer in collective negotiations, suppressed administrative authorization for collective dismissals, and substantially decreased procedural and material protection against individual dismissal, even openly trying to thwart review by the judges of the proportionality or reasonability of the dismissal in light of the ground invoked by the employer.[453]

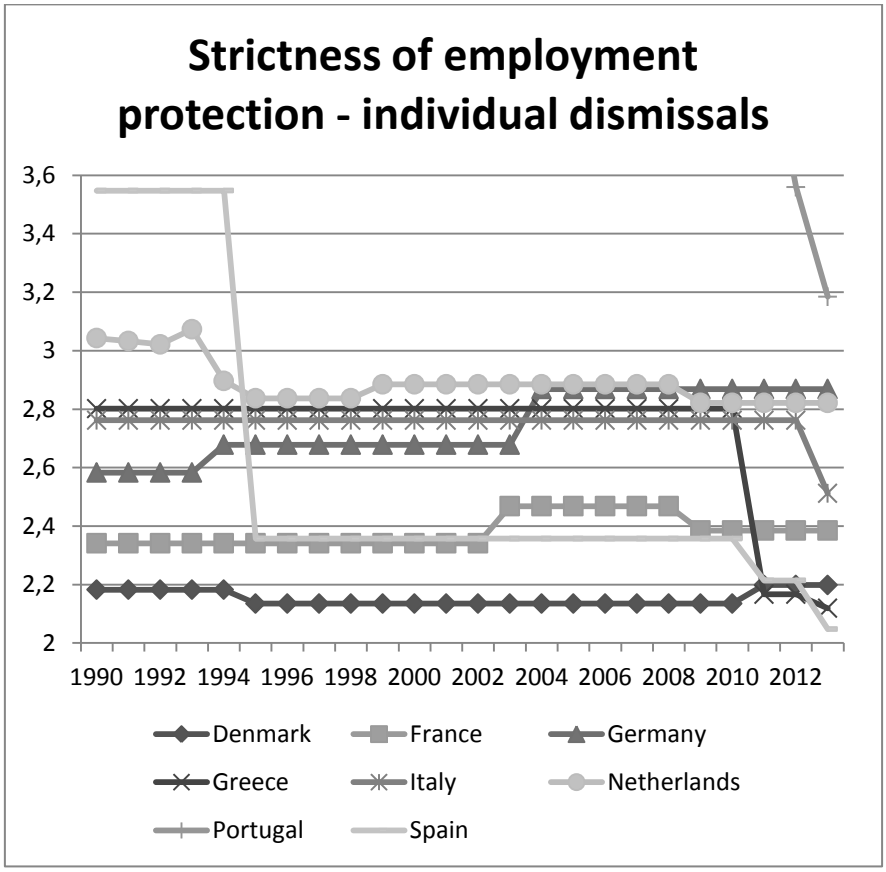
[451] Real Decreto-ley 10/2010, de 16 de junio, de medidas urgentes para la reforma del mercado de trabajo.
[452] Real decreto-ley 7/2011, de 10 de junio, sobre medidas urgentes para la reforma de la negociación colectiva
[453] Suárez Corujo, B., „Crisis and Labour Market in Spain", *European Labour Law Journal*, vol. 7, nº 1, 2014, forthcoming; López, J., de le Court, A. and Canalda, S., „Breaking the Equilibrium between Flexibility and Security:

Protection against dismissal in open-ended contracts has been submitted since 1984 to a continuous trend of re-commodification, in that the legal guarantees against unfair dismissal have been continuously decreased, whether by an ever broader legal definition of the grounds for dismissal, by lowering compensation in case of dismissal with economic or organization grounds, or, which is worse, by limiting the consequences, in terms of worker compensation, in case of wrongful (i.e. illegal) dismissal.[454] In the following table, the OECD employment protection indicators show that, with the 2010 and 2012 labour law reforms, protection against dismissal in open-ended contracts has plummeted, Spain occupying one of the lowest ranks if compared with other European countries (even those with more resilient labour markets).

Flexiprecarity as the Spanish Version of the Model", *European Labour Law Journal*, vol. 7, nº 1, 2014, forthcoming

[454] Dubin, K., Hopkin, J, "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climes and Tough Times*, Palgrave, Basingstoke, to be published, consulted version: personal.lse.ac.uk/hopkin/DubinHopkinFinal2013.pdf (last visit: 11/12/2013). The 2002 labour law reform, from the point of view of practice, even put an end to the causality of dismissal, turning it into a mere question of (high) costs, by giving the possibility of the employer to recognize the wrongful character of the dismissal and paying the compensation, so as not to have to pay the salary due for the period between dismissal and the judgment declaring the latter wrongful. The latter possibility was supressed by the 2012 reform, which could be interpreted as restoring, in practice, causality of dismissal, but which, however, was accompanied by the supression, in practice, of the obligation for the employer to pay the salary for the period between dismissal and judgment. This means that, in theory, a worker has to wait for a judgment, without ressources if she has no access to unemployment benefits, to be able to receive compensation (even if in practice this can also be attained through formal administrative or judicial conciliation procedures).

Graph 11: Evolution of strictness of employment protection in standard contracts in EU countries (1990-2013)



source: own elaboration form OECD online database 2014

This is also troubling given that the level of protection against dismissal in standard contracts in Spain have brought some to nuance the idea of underdevelopment of Spanish unemployment protection, due to the compensating character of higher employment protection.[455] While their findings should in their turn be nuanced,

[455] Riza Ozkan, U., "Comparing Formal Unemployment Compensation Systems in 15 OECD Countries", *Social Policy & Administration*, vol. 48, nº 1, 2014, 44-66

as they do not seem to take into account the high levels of temporality (in which case the identified, supposedly "generous" redundancy schemes do not apply)[456] and the still high rate of non-coverage of benefits, it helps confirming the scope and intensity of the re-commodification trend of Spanish unemployment protection, taking into account the important decrease in protection against redundancy introduced by the 2010 and 2012 labour law reforms.

This adds to the lack of other elements of the security-side of *flexicurity*, in the Spanish labour law reforms, and the 2012 reform in particular, like in-work and out-of work training and other measures to enhance employability, in normal or training contracts, for workers or unemployed (as more closely analyzed in the following section).[457] Given the insufficient character of all those security elements, there is no doubt that the Spanish model, besides showing contradictions with ILO Conventions (in terms of protection against dismissal, freedom of association and collective bargaining) and EU-law (mainly the Directives on Part-Time Work and Fixed-Term Work), without solving Spain's problem of structural unemployment and segmented labour market, has created more precariousness, inequality and judicialisation, evolving towards a model of "flexiprecarity".[458]

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[456] With a rate of almost 34% before the 2008 crisis, and of 25% in 2012, temporary contracts havesupported the bulk of the dismissals at the start of the crisis.

[457] López, J., de le Court, A., Canalda, S., „Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* vol. 5, nº 1, 2014, forthcoming

[458] López, J., de le Court, A. and Canalda, S., „Breaking the Equilibrium between Flexibility and Security: Flexiprecarity as the Spanish Version of the Model",

It is also important to observe that one of the stated objectives of the 2012 labour law reform was to bring protection against dismissal more in line with the European average.[459] This objective has thus proved to be not only fallacious, given the difficulties to compare systems of protection against dismissal for their inherent complexity and wider embededness in other labour market and welfare institutions and the actual situation of Spain not so far from a supposed European average,[460] but also to be a pretext for pure flexibilization without any criteria of some form of European convergence.

However, further than general references to convergence with Europe in terms of protection against dismissal, the legal instruments of the 2012 reform do not show concrete connections with the EES. However, the Spanish National Reform Programme in the context of the European Semester for 2012 presents the reform as embedded within the EES and oriented towards its objectives, as well as meeting the requirements in matters of

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European Labour Law Journal, vol. 5, nº 1, 2014, forthcoming; other authors have defined the model as one of „flexinsecurity" or „flexi-insecurity", see Suárez Corujo, B., „Crisis and Labour Market in Spain", *European Labour Law Journal*, vol. 5, nº 1, 2014, forthcoming and Dubin, K., Hopkin, J, "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climes and Tough Times*, Palgrave, Basingstoke, to be published, consulted version: personal.lse.ac.uk/hopkin/DubinHopkinFinal2013.pdf, 41, defines it in terms of "flexi-insecurity"

[459] Preamble to the *Ley 3/2012 ,de 6 de julio,de medidas urgentes para la reforma del mercado laboral*

[460] de le Court, A., "La reforma del despido (2012) i la 'excusa´europea: un análisis comparado desde la perspectiva de la flexiguridad", in Mirón Hernández, Mª del Mar e Beltrán de Heredia Ruiz, I. (Coords.), *Últimas reformas en materia laboral, seguridad social y en el proceso laboral*, Barcelona: Huyghens 2013.

economic policies and compromises of Spain adopted under the framework of the EURO + pact.[461] However, besides those official documents, to ascertain the influence of the EU institutions, one should not forget to refer to the famous "secret" letter the President of the ECB wrote to the Spanish prime minister on the 5th of August 2011, five months before the 2012 reform, which states that Spain has to take further measures of reforms, inter alia, of the labour market, so as to "urgently confirm its commitment with fiscal sustainability and structural reform, through credible proof" so as to restore its credibility towards the financial markets.[462] The measures "suggested" by the President of the ECB, the adoption of which is considered as "essential" by the latter institution, are 1) additional measures to improve the functioning of the labour market, 2) the suppression of the possibility for industry-level agreement to limit decentralization of negotiations to the company-level, 3) suppress any clauses which allow the actualization of salaries according to inflation, 4) lowering the costs of dismissal of open-ended contracts through the introduction of a contract with very low dismissal compensation, 5) suppress any limitation to the extension of temporary contracts. Despite some of those recommendations showing contradictions with the EES (mainly, the suppression of limits to the extension and renewal of fixed-term contracts), the

[461] Spanish Government, "Programma Nacional de Reformas España", 2012, http://ec.europa.eu/europe2020/pdf/nd/nrp2012_spain_es.pdf, pages 13, 154 and 262

[462] A copy of the letter can be found at http://ep00.epimg.net/descargables/2013/11/27/2b10649fe77a0775a23fb7eb465ab974.pdf (last visisted: 9/6/2014)

2012 Spanish reform followed all those recommendations almost literally, as shown here above.

This shows, if it is still needed to be proved, that the most important reason behind those measures is cost-containment and internal devaluation, without any regards to bettering unemployment protection, neither in a de-commodifying, protection-oriented way, given the social needs of the population, but nor with an efficiency enhancing vision (except permitting to alleviating slightly the consequences of budget reduction for some collectives, like older than 45 years old with family charges). It is pure expression of austerity without any intention to even slightly "reform" the system, in the sense of identifying problems and finding solutions, whether in a genuine de-commodifying way or progressing towards a balanced model of *flexicurity*.

This conclusion is reinforced by the fact that the RD-L 20/2012, inscribes itself explicitly within the European Semester and the Recommendation made within its context, without making any reference to the European Employment Strategy, insofar unemployment measures are concerned.

It is also striking that there is again a consequential link between the need (or, more accurately said, the political choice) to curb the costs of unemployment protection and the increased flexibilization of the labour market, mainly the high temporality rate, like in the reforms of 1992-1993, even if the deteriorating economic conditions (due, in their turn, greatly to the implementation of austerity) play also an important role in the increase in unemployment.

I.2 Active Employment Measures: Re-commodification through ineffectiveness and their conceptualization as policy instead of right

The Constitutional mandate for labour market policies in Spain is article 40.1 of the Constitution, which orders public authorities to realize policies oriented at full employment. In application of that mandate, as already observed here above, what amounted to labour market policies was mainly centred on the promotion of fixed-term work. It is only in 1997, through a national social partners agreement[463], that labour market policies were reoriented towards promotion of stable employment for unemployed and conversion of fixed-term contracts, through allowing the legislator to establish measures of reserve, duration and preference in employment for certain collective, as well as measures promoting the hiring of unemployment and collective with special difficulties[464]. This reorientation can however not be qualified as successful, given the persistence of high temporality rate[465] and high structural unemployment, with high rates of long-term unemployment in comparison with other EU countries.

[463] Acuerdo Interconfederal de Estabilidad en el Empleo of 7 April 1997, which gave birth to the Ley 63/1997 de 26 de diciembre, de medidas urgentes para la mejora del mercado de trabajo y el fomento de la contractación indefinida.
[464] VV.AA., "Desequilibrios ocupacionales y políticas activas de empleo", Informe 1/2005, Consejo Económico y Social, 2005, 62;
[465] Dubin, K., Hopkin, J., "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. (eds.), *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climes and Tough Times*, Basingstoke, Palgrave, 2013, 9

This went accompanied by the decentralization of job intermediation and other active policies (as well as management of labour relations) to the Autonomous Communities, based on the possibility to create non-lucrative job placement agencies, or via article 148.1.13 of the Spanish Constitution concerning decentralization of competences related to economic development, within the framework of the objectives of national economic policy[466]. Therefore, decentralization of ALMPs to Autonomous Communities was going together with their qualification as mainly economic policy instrument, as opposed to social protection, so giving the active perspective of unemployment protection a markedly economic orientation.

The Autonomous Communities assume today the competence in matters of active employment policies, including training, the central State assuming passive policies[467], normative framework, coordination of employment policy, programs for the development of employability through collaboration with State Administration and state-wide organisms, and more concrete policies for the (few) Autonomous Communities not having assumed own competences[468].

[466] García Gil, M.B., *Los instrumentos jurídicos de la política de empleo*, Aranyadi, Cizur Menor, 2006, 68

[467] It is important to note, however, the concurrent competence in matters of Social Assistance; in general the Autonomous Community program are not directly unemployed related and more focused towards social inclusion, but given the strong workfare character of those programs, they generally serve as a second, or third, program of assistance benefits for unemployed.

[468] García Gil, M.B., *Los instrumentos jurídicos de la política de empleo*, Aranyadi, Cizur Menor, 2006, 63-67

This process of decentralization was confirmed and codified in the 2003 "Employment Act"[469] most important Law concerning active labour market policies since the Basic employment Act 51/1980, which inserts itself in the implementation of the European Employment Strategy and the development of ALMPs it promotes. However, as the analysis of the development of Spanish ALMPs shows here under, the calibration of Spanish employment policy in line of EU standards in the 2003 Employment Act has only been a formal operation.

According to classifications generally found in the literature and used in the monitoring of ALMPs both by the EU and the OECD, the main categories of Spanish active labour market policies are analyzed. A first look is given at the structure and operation of public employment services, as providers of job intermediation and orientation services and central institution to the activation paradigm[470] before analyzing the other categories (training schemes, employment incentives[471] and start-up incentives) and studying the general evolution of ALMPs in Spain.

[469] Ley 53/2003, de 16 de diciembre, de Empleo

[470] the Spanish 2003 Employment Act seems to conceptually separate intermediation and job placement, functions divided between the PES, and placement agencies, from other ALMP

[471] Ballester, R., "European Employment Strategy and Spanish Labour Market Policies", *Working Papers. Department of Economics, University of Girona*, n° 14, 2005, 19

I.2.1. Public Employment Services as Administrative Structure for providing security: their ineffectiveness as cause of and excuse for re-commodification

Culminating a period of rationalization and centralization of services related to unemployment, the year 1978 saw the creation of the National Employment Institute (INEM)[472], consolidated in the Basic employment Act 51/1980.[473] It was created as an autonomous organism, competent for the whole Spanish territory and with as principal functions 1) recognition, management and control of unemployment benefits, 2) job placement, 3) professional information and orientation, and 4) professional training. It detained the monopoly in terms of job placement, private and lucrative activities of job intermediation and placement being administratively and criminally punishable. There were even restrictions on direct hiring by employers, however nuanced by a series of exceptions and proceedings, and some activities, like selection of workers, were free.[474]

This situation persisted until 1993, where, again within the framework of the abovementioned Convergence Program (1992-1996), and, again, through "urgent" legislative decree in a context of economic crisis and rising unemployment, the government allowed direct hiring by employers and private, non-lucrative job placement, and authorized operations by temporary employment

[472] RD 36/1978, de 16 de noviembre
[473] Ley 51/1980 Básica de Empleo
[474] García Gil, M.B., *Los instrumentos jurídicos de la política de empleo*, Aranzadi, Cizur Menor, 2006, 52-55

agencies (ETT). The main motives for the reform were the inability for the public employment service to efficiently handle the growing complexity of job offers. Adaptation to EU-Law, and in particular the *Macrotron* jurisprudence, was also presented as a necessity[475].

During the same period, the job placement activity of the INEM was greatly decentralized to the Integrated Employment Services (*Servicios Integrados para el Empleo, SIPE*), private or public bodies (participated by employers, unions or other actors) with collaboration agreement with the INEM, however those were mainly designed to accompany unemployed in the context of active employment policies (orientation, training, etc.). Due to lack of coordination between them as well as with local administration, they lacked effectiveness, and so affecting the already low rate of job placement by the INEM[476].

This went accompanied by the decentralization of job intermediation and other active policies (as well as management of labour relations) to the Autonomous Communities, based on the possibility to create non-lucrative job placement agencies, or via article 148.1.13 of the Spanish Constitution concerning decentralization of competences related to economic development, within the framework of the objectives of national economic policy.

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[475] *Ibidem*, 56-59; Case C-41/90, *Höfner and Elser v Macrotron gmbh*, where the ECJ rule that a public employment service, however being a public body, had to be considered as an undertaking, falling within the scope of competition law, and whose public monopoly could be considered as an abuse of dominant position in certain circumstances, such as when it is manifestly not in conditions to satisfy the demand for its services.

[476] García Gil, M.B., *Los instrumentos jurídicos de la política de empleo*, Aranyadi, Cizur Menor, 2006, 61

Therefore, decentralization of ALMPs to Autonomous Communities was going together with their qualification as mainly economic policy instrument, as opposed to social protection, so giving the active perspective of unemployment protection a markedly economic orientation. The decentralization was also confirmed in the 56/2003 Employment Act,[477] which pretended a re-organization of the PES in Spain as to enhance their effectiveness. On the other hand, while figuring in employment guidelines, as well in the Commission's understanding of the model of *flexicurity*, it is not before 2013 that the country-specific Recommendations mention explicitly the lack of and thus the need to enhance their effectiveness.

The structure of the "National Employment System" was thus transformed, with the *Servicio Publico de Empleo Estatal* (ex INEM) keeping competence on payment of benefits and ensuring coordination role between the decentralized PES of the different Autonomous Communities responsible for control and support of job seekers, in partnership with other (non-lucrative) entities, as well as for the application of part of ALMPs.

A next important step in the organization of the Employment Services structure is the 35/2010 Act on urgent measures reforming the labour market,[478] again confirming and slightly amending an urgent governmental legislative decree, which authorized for the first time profit-oriented labour intermediation and job placement,

[477] Ley de Empleo 56/2003, de 16 de diciembre
[478] Ley 35/2010, de 17 de septiembre, de medidas urgentes para la reforma del mercado de trabajo.

"the collaboration between public and private sector being necessary", according to the Preamble, viewing to "complement the activity of the PES", the centrality of the latter being secured by "the need of an administrative operation licence, the configuration of those lucrative job placement agencies as collaborators of the public service when they subscribe contracts of collaboration, and in any case, by their subjection to inspection and control by PES". But another important aspect was the introduction of the possibility for those profit-driven companies to assume control of unemployed in collaboration with the PES with the view on the application of sanctions, opening thus the exercise of administrative sanction power, traditionally reserved to public authorities, to influence from profit-driven entities.

But this was only a stepping stone for the 2012 reform, which resulted in deepening the market-orientated approach of the employment service providers. Law 3/2012 introduced a new goal to the "National Employment System", which is "strengthen the PES and favour public-private partnership in job intermediation and development of ALMPs". The first measure introduced by the same law to "favour public-private partnership" was to weaken the control measures put in place in 2010, by allowing the absence of answer by the administration to the licence request to be considered as an authorization. The culmination of the new system has been the recent "Framework Agreement for the selection of job placement agencies with the view of collaboration with the PES in the insertion in the labour market of unemployed persons", which, according to the new competence given to the national SEPE and

the regional PES to develop private-public partnership,[479] has taken the form of a tender which contains basic rules of the collaboration contracts with private agencies, and which is accompanied by state financing of the services to be provided, according to a system of incentives of several actions of intermediation and control. Originally, only agencies with a minimum critical mass could be selected (which favours multinational job service companies to the detriment of smaller, non-profit based associations centred on insertion of difficult collectives), but that condition in the tender has been challenged by the administrative tribunal which accepted the claims presented by smaller entities which were excluded,[480] retarding for another indeterminate period the application of the Framework Agreement. This is one of the reasons for which some Autonomous Communities (Catalonia, Andalusia and the Basque Country) did not adhere to the Framework Agreement, excluding thus the operation of the selected private agencies in those communities under that specific tender (however the PES of those Autonomous Communities can conclude their own collaboration agreement under the general administrative contracting rules for partnership with job placement agencies). The tender defines the "insertion" services to be provided as having an integral character and including any activity of orientation, training, intermediation, support in job seeking, attraction of job offers, which is necessary to reach the objective of an effective insertion.

[479] Ley 11/2013 de 25 de julio de medidas de apoyo al emprendedor y de estímulo al crecimiento y de la creación de empleo, 32nd additional disposition

[480] Tribunal Administrativo Central de Recursos Contractuales, Resolution nº 559/2013

The latter concept is defined as involving the conclusion of an employment contract and the continuation of employment in the same or better conditions as the previous employment of the unemployed (expressed in terms of the ratio salary/total working time), for a period equivalent to 6 months full-time. This is an important step towards concreting the definition of labour market integration, which could also influence the interpretation of the notion of suitable employment. However, its applicability remains in principle within the realm of the definition of the conditions for remuneration of services provided by private profit-driven agencies, and. Given the high temporality of the Spanish labour market, this could reinforce the tendency of unemployed falling in precariousness traps.

Remuneration of the services consists in a lump sum ranging from 300 to 3000 € in function of the profile of the worker (age and previous unemployment period) in case of effective insertion, as well as a lump sum of 50% of the previous for each unemployed sent by the PES, whether there is insertion or not. There are additional incentives in case of insertion that goes beyond the normal effective insertion (more than 6 months) and in case of insertion of persons with additional difficulties (social exclusion, disabled,...).

Finally, a payment of 15% of the insertion value will be made when the agency provides information to the PES that ends in the imposition of whatever sanction on the unemployed for the non-respect of its obligation (not presenting herself before the agency

when convoked, refusal of job offer, absence of participation in a program, etc...). There is thus a real possibility that part of the activities of the collaborating private agencies will be oriented towards the possibility to sanction unemployed, mainly by convoking unemployed regularly for unimportant activities, or for their informing about the existence of effective job search, the proof of which is totally uncertain given the vague definition of the concept. The latter payment is also an incentive to attend above all unemployed persons receiving benefits, to the detriment of others, given the absence of application of sanctions for the latter collective, reinforcing the risk of segmentation of unemployed in function of the existence of a right to benefits. Information about some practices put in place by regional, non-profit driven PES which have been denounced by unions, like convocation by email to regular ineffective and empty collective orientation sessions or prioritizing unemployed with benefits in placement activities,[481] show that there is a genuine risk that those type of practices will increase, because of the profit-driven character of those agencies.

Finally, the 2012 labour law reform gave the monopoly of outsourcing in case of collective dismissals to private placement agencies, excluding any intervention of the PES further than the task of registering the outsourcing plans.[482]

[481] See Communiqué of the UGT union of 21st of May 2013, http://www.ugt.es/actualidad/2013/mayo/a21052013.html (last visit: 17/12/2013)
[482] Canalda Criado, S., de le Court, A., "Empleabilidad, Plan Social y Plan de Recolocación: una Perspectiva Comparada", *Justicia Laboral*, nº 51, 2012, 35-62

There is thus a clear move of re-commodification of the core functions related to ALMPs and negative activation by allowing access to the latter of private organisms, submitted to profit-making logic, to assume functions of control of unemployed, and thus of their rights to benefits.

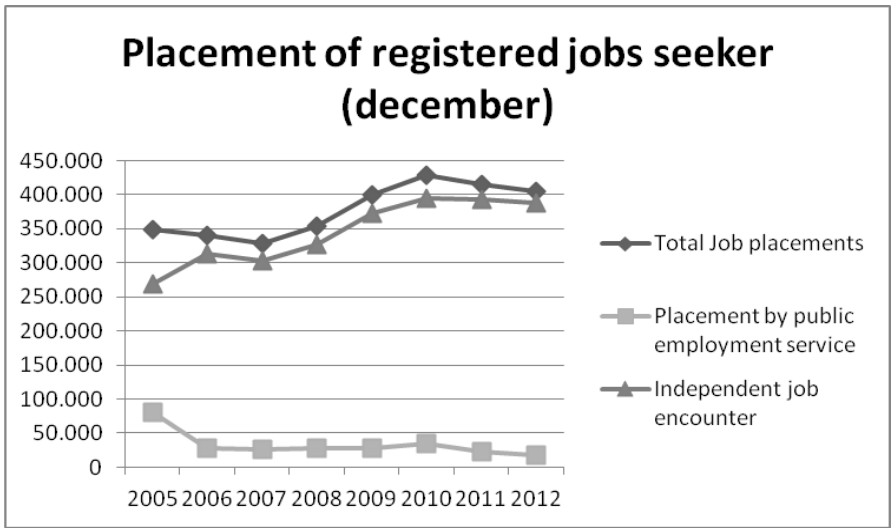
Moreover, a very recent urgent legislative decree of july 2014, modifying more than 25 laws, and officially implementing a youth guarantee, while actually only creating a database where young persons can register, for future (but however not regulatively concreted) offering of reintegration measures, opened the way to profit-driven temporary work agencies to offer training as part of the system (and the budget) of ALMPs.[483] This could be argued as closing the circle of the potential "externalization" of all reintegration measures to be given as part of protection against unemployment (orientation and placement, gathering of information for sanctioning, training and employment subsidies) to the market, involving the intense re-commodification of the latter, with PES potentially acting only as gateway to ALMPs, provider of benefits, formally imposing sanctions, and, most probably, only accompanying, with dwindling budgets, the unemployed most difficult to reintegrate.

But this evolution happened in (and can be partially explained by) a context of clear ineffectiveness of the PES throughout the whole

[483] Real Decreto-ley 8/2014, de 4 de julio, de aprobación de medidas urgentes para el crecimiento, la competitividad y la eficiencia.

analysed period, due mainly to lack of workforce and investment.[484] This underdevelopment of PES is made even clearer when compared with other European countries.

Graph 12: Evolution of placement by PES of registered job seekers (2005-2012)



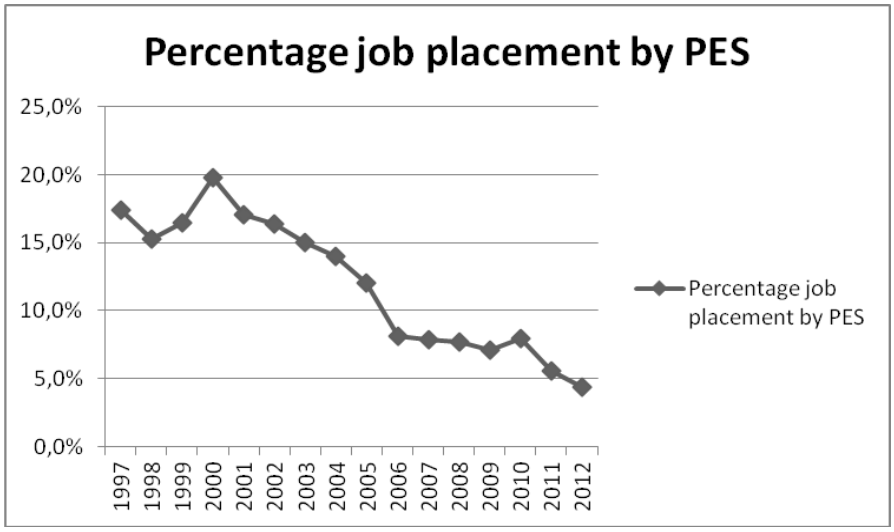
Source: own elaboration from the online database *Estadísticas Laborales* (Spanish Ministry of Employment) 2012

The preceding graph gives us some idea on the efficacy of Public Employment Service in their job placement function. The overwhelming majority of unemployed find a job by their own efforts or through other placement systems, and efficacy of the public employment service seems even to dwindle further from the year 2010 onwards.

[484] Ballester, R.,"European Employment Strategy and Spanish Labour Market Policies", *Working Papers. Department of Economics, University of Girona*, n° 14, 2005, 27, http://dugi-doc.udg.edu/bitstream/handle/10256/287/n14.pdf?sequence=1

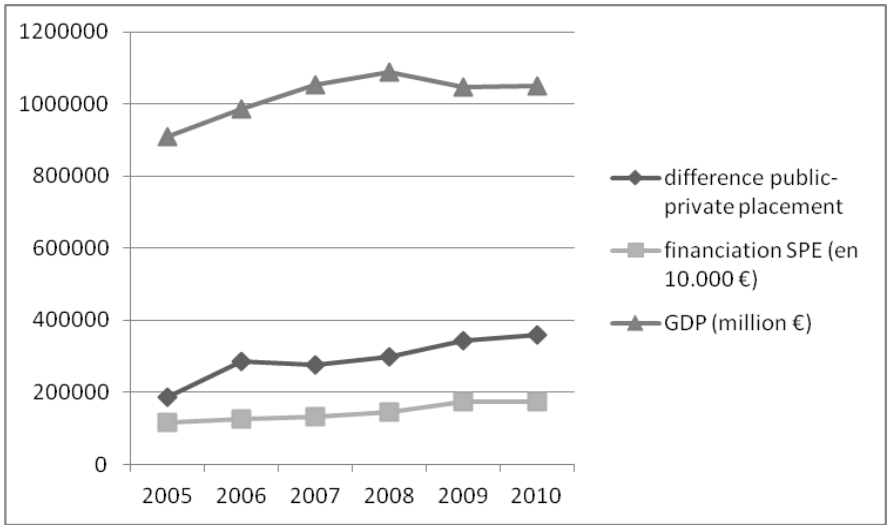
This table can be completed with the following (Percentage of job placement by PES), which gives the "market-share" of PES (or the percentage of job placements compared to the number of unemployed) over the years. The table has been elaborated out of two different sources using slightly different methodology, but shows a clear constant decreasing trend.

Graph 13: Evolution of the percentage of job placement done by Spanish PES (1997-2012)



Source: own elaboration from the online database *Estadísticas Sociolaborales* (Spanish Ministry of Employment) 2012

Graph 14: Evolution of placement by Spanish PES compared to the evolution in their financing (2005-2010)



Source: own elaboration from Eurostat online databases 2013 and Estadísticas Sociolaborales online database 2013

The graph here above shows that the difference between public and private (or individual) job placement keeps increasing, despite the increase of the financing of the Public Employment Service (administrative structure, staff,…). The growth of the difference seems to be slightly accentuated with the crisis, but was also present in times of economic growth.

Finally, while in 1992, taking into account the whole labour force of the unemployment administration, the ratio of unemployed per PES workers was 191, one of the lowest of the OECD,[485] in 2010 it

[485] Gómez Sánchez, V., "La intermediación laboral pública en España. Una perspectiva comparada", *Circunstancia*, *Ensayos,* vol.2, nº 4, 2004

amounted to 208, moreover in a year which had seen increased the numbers of PES workers to face soaring unemployment, but which subsequent cuts certainly have not bettered, to the contrary[486]. If we extrapolate the increase between 2007 and 2010 of the workers of the national PES to the workforce of all Spanish PES (22,6%), we arrive to a ratio in 2007 of 107 unemployed per PES worker. It seems thus, within the approximate character of the data and method used, that the situation might have improved slightly at the best, but certainly not to join the 1992 ratios of Germany (39), France (79), the Netherlands (32) or even a country whose Welfare State model is closer to the Spanish one, like Portugal (51). Moreover, we could assume that those foreign 1992 ratios have bettered under influence of ALMP extension.

This is the more important given that orientation and information of workers, an important aspect of ALMPs, is closely related to the concept of activation of unemployed and highly influenced by the effectiveness and financing of PES as main "provider" of those services.

The following graph, taken from the 2011 Report on the Labour Market made by the National PES (SEPE),[487] shows the distribution of all the services related to ALMPs provided by the different PES (national and autonomous communities).

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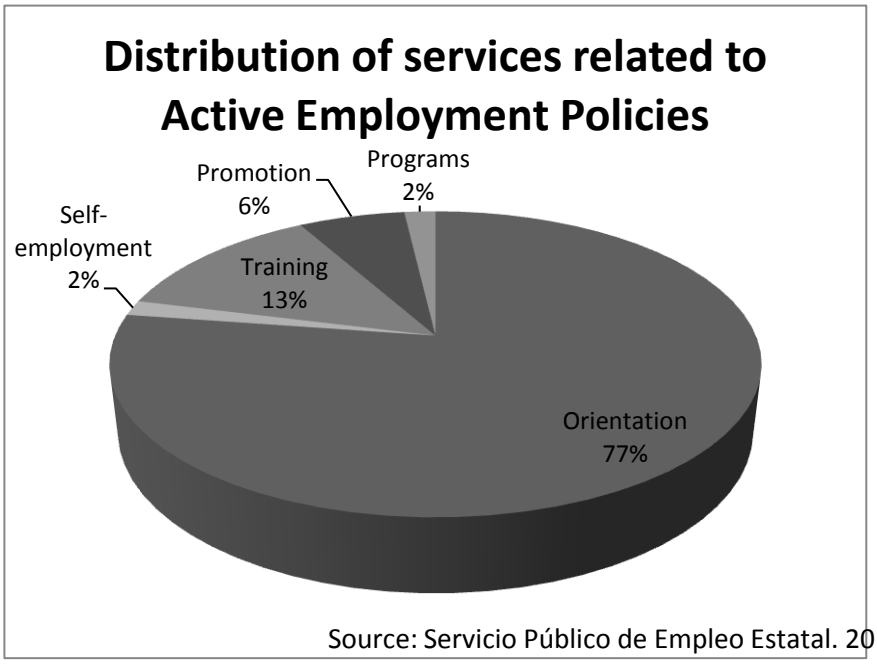
[486] Own elaboration from the SEPE website (http://www.sepe.es/contenido/estadisticas/datos_recursos/index.html), and INE (EPA); see also http://www.fsc.ccoo.es/comunes/recursos/99922/361352-Cuadro_resumen_con_evolucion_en_los_cinco_ultimos_anos..pdf;

[487] http://www.sepe.es/contenido/observatorio/mercado_trabajo/1600-3.pdf

Graph 15: Distribution of services provided by Spanish PES in 2010



Source: Servicio Público de Empleo Estatal. 2010

According to the same source, around 3.330.000 persons were subjects to ALMP measures. The report, however, does not contain any explanation as to the content of the different categories, other than that "it has to be taken into account that services of orientation and information are greatly related to the update of the CV´s of workers registering with the PES at the end of their employment contract", which allows to conclude that orientation and information is standardized and limited to the brief contact those workers have at their registration. It could therefore not be said that those services involve a real support towards a better reintegration of the labour market, or that the number of "participants" in those type of policies reflected in statistics do guarantee that their "participation" has been meaningful.

This clear underdevelopment and its effects have different consequences in terms of equilibrium within the unemployment system, as well as in terms of unemployment rights.

Firstly, it influences directly the efficiency of preventive action and orientation.

Secondly, it influences also the coordination between different aspects of ALMP, amongst other the link between preventive measures and training, weakening even more the role of the State in the improvement of the employability of the worker, isolating the latter in terms of responsibility for his security, as well as access to his unemployment rights.

Thirdly, while principally caused by a lack of financing, it has been used as an excuse for the privatization of services related not only to the employability of the worker and her reintegration in the labour market, but also to her entitlement of her citizenship right to benefits to cover the material losses caused by the loss of her job. This opens the dynamic of the right to benefits to profit-driven logics of operation.

Finally, applied within the flexicurity framework, and given the ever higher flexible character of the Spanish labour market, it is clear that this consists in a further element of weakness of the security-side and a distancing from the model promoted by the EES. A brief look at the Employment Guidelines, which insist since the beginning on "the modernization and strengthening of employment services" shows that there was no effective implementation of that

Guideline. This also partly due to the implementation of the Employment Strategy, which specifies for the first time only in 2013 that Spain should "reinforce and modernize public employment services to ensure effective individualized assistance to the unemployed" while stating that "actions to modernize and reinforce the Public Employment Services itself are still needed",[488] even if the previous years, the Council recommended more vaguely to "take additional measures to increase the effectiveness of active labour market policies by improving their targeting, by increasing the use of training, advisory and job matching services […] and by strengthening coordination between the national and regional public employment services". On the other hand, one could say that this evolution could be considered as a potential improvement of the effectiveness of the EU employment strategies, since their instruments seem to start pointing out more clearly the institutions which have to be improved. Another interesting conclusion which appears from the comparison is that the European Guidelines and recommendations do not contain any indication concerning the privatization of the control of unemployed, limiting themselves to recommend "public-private cooperation in placement services".

[488] Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Spain and delivering a Council opinion on the Stability Programme of Spain, 2012-206 (2013/C 217/20)

I.2.2. ALMP programs: priority to ineffective policies, marginalizing employability

The most important ALMP program has been and still is centred on hiring subsidies, despite the critics towards its efficiency and legitimacy. It is mostly represented by the so-called "bonifications", hiring subsidies consisting in reduction of social contributions at charge of the employers.

Already present in the 1970s, they were presented in the development of the 1992-1996 Spanish Maastricht Convergence Program, as the reinforcement of active labour market policies, next to the improvement of training the unemployed.[489]

The end of the nineties saw a clear increase in hiring subsidies, whose budgetary weight triplicated from 1998 to 1999, when they even outgrew the funds destined to training[490]. They were generally assigned with relatively light obligations on behalf of the employers. Despite being originally designed with a view towards net job creation[491], from 1998 onwards they start to be centred on stabilization of employment by converting temporary into open-ended contracts.

[489] Ley 22/1992, de 30 de julio, de medidas urgentes sobre fomento del empleo y protección por desempleo.
[490] Ley 64/1997, de 26 de diciembre, por la que se regulan incentivos en materia de Seguridad Social y de carácter fiscal para el fomento de la contratación indefinida y la estabilidad en el empleo
[491] Ley 22/1992, de 30 de julio, de medidas urgentes sobre fomento del empleo y protección por desempleo

The legitimacy of those contribution reductions has been criticized, as well as their effectiveness and their adequacy with the configuration of ALMP.

Firstly, almost all studies point towards very poor macro- and micro-economic effectiveness of those hiring subsidies in terms of employment creation, generally pointing towards deadweight effects, (the hiring would have occurred also without the subsidy) with some very particular and limited exceptions in case of small, well-targeted groups, or substitution effects (a worker is replaced by a subsidized worker)[492]. Their generalization to ever growing and generalized categories goes against the general findings about the effectiveness of active labour market policies, which is generally much higher in case of programs of a small dimension, with intensive actions and destined to well-defined and relatively small groups[493]. Moreover, when successful, it seems that those subsidies

[492] Martin, J.P., Grubb, D., "What works and for whom: a review of OECD countries' experiences with active labour market policies", *IFAU Working Paper*, 2001:14, http://www.ifau.se/upload/pdf/se/2001/wp01-14.pdf; Boone, J., van Ours, J.C., "Effective Active Labour Market Policies", *IZA Discussion Papers*, 2004 Marx., I., „Job subsidies and cut in employers´social security contributions: the verdict of empirical evaluations studies", *International Labor Review*, n°1, 2001, 69 ; Ammermüller, A., Zwick, T., Boockmann, B. and Maier, M., "Do hiring subsidies reduce unemployment among the elderly? Evidence from two natural experiments", *ZEW Discussion Papers*, No. 07-001, 2007, ftp://ftp.zew.de/pub/zew-docs/dp/dp07001.pdf; ILO, *The youth employment crisis: Time for action*, Report V in the context of the 101st session of the International Labour Conference, Geneva, 2012, 58-59; for the Spanish case, see Pérez del Prado, D., *Los instrumentos económicos de fomento del empleo*, Tirant lo Blanc, Valencia, 2011, 101-104; Saez, F. "Políticas de empleo y su evolución en España", and García Serrano, C., "Los resultados de las políticas activas de Mercado de trabajo en España. Evidencia empírica disponible", both in VV.AA., *La evaluación de las políticas de ocupación*, Ministerio de Trabajo y asunstos Sociales, Madrid, 2000;

[493] VV.AA., "Desequilibrios ocupacionales y políticas activas de empleo", Informe 1/2005, Consejo Económico y Social, 2005, 62;

sustain above all the creation of low profitability jobs, whose duration is generally linked towards the period of subsidy[494].

Secondly, the Spanish system has also been criticized for its lack of effectiveness, due to the low quantities of the subsidies, the complexity of its regulation and the lack of information about the actual presence of elements leading to those subsidies when hiring in some programs[495].

Thirdly, they are central in Spanish ALMPs, while EU Employment Strategies insist more on orientation and intermediation, training and work insertion programs. On the other hand, the instruments of those strategies have never stated explicitly that Spain should reduce reliance on those types of policies

In that context it is striking to note that until 2001 the Spanish programs have included ever more collectives (younger and older workers, women, long-term unemployed, unemployment benefits recipients and workers having reached age of retirement) as well as the generalized conversion of fixed-term contracts towards open-ended contracts. After 2002, however, younger worker were excluded from those programs. Also from that period, the system of subsidies continues its consolidation towards being linked with open-ended contracts, to the contrary of the chaotic praxis of the

[494] Dubin, K., Hopkin, J., "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. (eds.), *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climes and Tough Times*, Basingstoke, Palgrave, 2013, 23-24; Pumar Beltrán, N., *Política Activa de Empleo y Seguridad Social*, Tirant lo blanch, Valencia, 2003, 234

[495] Pérez del Prado, D., *Los instrumentos económicos de fomento del empleo*, Tirant lo Blanc, Valencia, 2011, 101-104

previous 20 years, where open-ended and temporary contracts saw their respective subsidization and prioritization change from year to year[496]. The latter situation can be partly explained by the focus on job creation, and the initial political choices towards temporary contracts to fulfil that objective.

Moreover, in spite of the apparition of ever more critical studies, those programs were not abandoned nor reduced, as shown by their inclusion in the catalogue of ALMPs in the 2003 Law on Employment (art. 25), their update by Law 43/2006 on promotion of growth and employment[497], mainly to induce a greater use of open-ended contracts, and which was reformed by Law 35/2010 Act on urgent measures for the reform of the labour market[498], to favour more younger workers and training contracts, and their reorganisation by the 3/2012 Act on urgent measures for the reform of the labour market, before being again reformed (for budgetary reasons) by the 4/2013 Urgent royal Legislative Decree on measures to support entrepreneurs, and stimulate growth and employment creation. Minor tweaks and changes are not included in this enumeration.

The unsteady character of their regulation has not changed either, as showed by the reforms of 2012 and 2013, where categories were added, before being suppressed. From that point of view, at least the current state of the regulation has simplified them somewhat,

[496] Pumar Beltrán, N., *Política Activa de Empleo y Seguridad Social*, Tirant lo blanch, Valencia, 2003, 237-243-265.
[497] Ley 43/2006, de 29 de diciembre, para la mejora del crecimiento y del empleo
[498] Ley 35/2010, de 17 de septiembre, de medidas urgentes para la reforma del mercado de trabajo.

leaving them mainly for the hiring of workers of less than 30 years in different contract forms (open-ended, training contracts,…)[499], disabled workers, unemployed workers of more than 45 years hired through the "contract for entrepreneurs" (*contrato de apoyo a los emprendedores* - open-ended contract with SME with 1 year probationary period[500]) and older workers (52 years) depending on assistance unemployment benefits. However, it could be said that the different sub-categories and different amounts of the subsidies still difficult greatly a clear lecture of the schemes and their impact. On the other hand, it is clear that the bulk of the subsidies go towards the hiring of youth in different contract forms, a generalization that goes clearly against existing recommendations and studies in matters of hiring subsidies[501], the ineffectiveness of which is even more enhanced given the fact that youth are the most difficult to assist through ALMPs[502]. Moreover, the actual program, while being able to be analyzed as a generalization, insofar it is mainly orientated towards youth, at the same time is divided in a series of "sub-programs" or modalities all with different conditions, which renders its detailed understanding difficult, and thus

[499] Real Decreto-ley 4/2013, de 22 de febrero, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo.

[500] The Constitutionality of which is discussed, while such a long probationary period has been deemed contrary to the European social Charter by the Committee on Social Rights (decision on the merits in Complaint 65/2011)

[501] It is interesting to point out that according to the ILO, "generalized subsidies that target young people mainly on the basis on their age" instead of addressing "specific labour market disadvantages faced by young people, are unlikely to have a long-term impact on their employment and earnings", contributing to labour market distortions in terms of deadweight and substitution effects", see ILO, *The youth employment crisis: Time for action*, Report V in the context of the 101st session of the International Labour Conference, Geneva, 2012, 58-59

[502] Kluve, J., Schmidt, C.M., "Can training and employment subsidies combat European unemployment?", *Economic Policy*, 2002, 411-448

decreases its effectiveness. Amongst the main categories, one can find (non-exhaustive list): contracting youth under part-time contracts while the worker is following (or has followed) training or education (12 month "bonification"); for youth employed by micro-companies (12 months) or cooperatives (800 €/year during 3 years); transforming fixed-term contract with youth into open-ended contract in SME (500/700 € per year during 3 years); traineeship contracts (50% "bonification"); apprenticeship contracts (50% "bonification") and "contracts for entrepreneurs" (1.300 € during 3 years). A brief look at those main categories also shows that the program is oriented towards promotion of precarized employment[503]. Moreover, when job level sustaining obligations are attached, they are very narrowly conceived and do not include dismissal on economic or organization ground, dismissal for misconduct, non replacement in case of retirement, resignation or permanent incapacity, or non renewal of fixed-term contracts[504], which reduces the obligation to virtually nothing.

Also, very recently, the Spanish government introduced, again by urgent legislative decree, a system of flat-rate employers' contribution to social security (100 € per month) for every worker employed under a new standard contract (including by conversion of fixed-term contract). The measure is not financed out of the

[503] About the precarizing character of training and aprenticeship contracts and their lack of guarantee in therms of increasing employability, see López J., de le Court, A., Canalda, S., "Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal*, 2014 forthcoming

[504] Ley 11/2013, de 26 de julio, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo

ALMP budget, to the contrary of the other employment subsidies, but will involve a direct decrease on income for the Social Security budget, which already presents an important deficit. The measure might thus also have the perverse effect of impeding indexation of pension benefits, as the latter is now dependent on the budgetary balance of the social security accounts. Despite claims from the government that the measure will have neutral effects, because it will be compensated by a higher level of contributory employment, several studies, as well as the European Commission, have contested those claims.[505]

Given all the former, it should be considered reasonable to categorize those subsidies within the Spanish context as amounting to gratuitous transfers from the public budget towards employers, with potential pernicious effect from the point of view of fairness caused by the effect of substitution, not only by pushing existing workers out of work, but also through the promotion of more precarized contracts and having almost nothing to do with a labour market policy. This character of gratuitous transfer to employers also explains the survival of those subsidies through the years, as they help securing the support of employer's associations to measure through which governments present themselves as tackling labour market problems without incurring the political conflicts

[505] European Commission, „Spain - Post Programme Surveillance Spring 2014 Report", occasional Paper 194, may 2013, at 17; Comisiones Obreras, „Valoración del "peso muerto" de la tarifa plana del Gobierno para el fomento de la contratación indefinida", http://www.fsc.ccoo.es/comunes/recursos/99922/1822086-Informe_CCOO_tarifa_plana_de_cotizacion..pdf (last visit: 03/05/2014);

(with unions and/or even between employers' associations) substantive legislative reforms would create.[506]

Finally, besides their ineffectiveness, or at least their inefficiency in guaranteeing indirect employability through employment creation, those subsidies have to be considered as having a high re-commodifying character, given their focus on the necessities of employers, through the conditions of their concession and their generalized character, rather than those of the unemployed considered individually.

The importance given to hiring subsidies as a labour market policy stands in high contrast with the low relative weight of training policies for unemployed. Moreover, not only has there been a mismatch between investment in continuing training education, financed by social security contributions and EU funds and training for the unemployed, one of the lowest in Europe, but the structure of the spending, financing above all unions and employers associations ultimately responsible for the courses, has been criticized for subordinating the goal of human capital development to internal organizational financing of those organisations.[507]

Training for unemployed is included within the wider structure of professional or life-long training since the 1985 National Plan for Professional Insertion and Training, giving birth to a tripartite

[506] Dubin, K., Hopkin, J., "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. (eds.), *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climes and Tough Times*, Basingstoke, Palgrave, 2013, 27-28
[507] *Ibidem*, 24

organization (social partners, with more later presence of the PES), and subsequent national agreements on professional training, and which consecrated the following priorities of professional training: provide training and professional reconversion programs, prioritize attention towards collective with greater difficulties to find employment and improve the training content of the offered courses. Its financing comes above all from social contributions and the European social funds, adaptation to the conditions of the latter, as well as decentralization being the main factors driving the updates of the plan.

2002 saw the creation of a „National System of Qualification and Professional Training“[508] confirming the integration of long-life training of workers with „actions of labour market (re)insertion“ of workers as well as training of „collectives with special difficulties of labour market integration“, and integration which, however, was only definitevly legally formalized in 2007. Despite the integration, diferentation between employed and unemployed is still used, in accordance with the structure of national and european financiation, divided in function of the adressees (social contribution for training of occupied workers and other funds for unemployed) This does not excludes other training structures, organized by regional PES, through work-training programs or other specialized or experimental programs.

[508] Ley Orgánica 5/2002, de 19 de junio, de las Cualificaciones y de la Formación Profesional

Despite the importance of training within the *flexicurity* context, linked to the bettering of employability it entails and the positive influence training of unemployed persons on their durable market reintegration Spanish studies have identified,[509] their financing is low in proportion to other ALMPs, showing the lack of priority given to the most de-commodifying ALMP. Training as an ALMP includes both long-life learning and training of already employed workers (mainly financed by social contributions but integrated in ALMP budgets) as training for unemployed. In 2011, the latter represented only 33% of the total national training budget (including financing from the European Social Fund, but excluding financing from additional regional sources).[510] As a result, a low proportion of registered unemployed take part in training (13,8% in 2010), with an even lower proportion of older unemployed (5,6% in 2010), while the proportion amongst unemployed aged under 25 is much higher (34% in 2010), which also suggests that training for unemployed is supplying for the deficiencies of the education system and the high rates of school-leavers.[511] According to the 2014 OECD online database "Participants stocks on LMP by main categories (% labour force)"[512], in 2011, 307.777 persons participated in training as an ALMP. With around 4.996.900

[509] Blázquez, M., Herrarte, A., Sáez, F., „Políticas de empleo y sus efectos: el caso de la formación dirigida a desempleados", *Cuadernos de Economía*, vol. 35, nr. 99, 2012, 139-157

[510] López Cossío, J. (coord.), "La formación de los desempleados en España", Report of the *Fundación Elogos*, 2011, 8-9

[511] Gómez Sánchez, V. (coord.) "Mejor Formación para crear más empleo", Report of the *Fundación Elogos*, 2010, 7.

[512] http://stats.oecd.org/Index.aspx?DataSetCode=LMPEXP

unemployed in that same year,[513] this would amount to 6,1% of unemployed. Considering that the persons participating in training as understood by the OECD are not all unemployed, this should be considered as a very low proportion, even if there seems to be some discrepancy between the numbers in function of the different sources. As seen in Part III, the European Committee of Social Rights considered a rate of around 10% to be low under the right to vocational training.

This marginalization of training is also due to the fact that it is not conceptualized as a right, but only as an obligation to perceive benefits, when inserted in the activity compromise, which, moreover, is only guaranteed within the marginal unemployment protection systems of the *Renta Activa de Inserción* or PREPARA plan. This unbalanced implementation of *flexicurity* is also linked with the absence of integrated reform of unemployment protection due to almost exclusive recourse to urgent legislative decrees in the matter.[514]

The system is also criticized for the fact that the management of the offer of courses, by adjudication to training entities, involves a lack of adaptation to the real needs of the unemployed (and of the market, for that matter) and lacks incentives for innovation and specialization. Moreover, there is a lack of connection between courses and official training certificates and insufficient articulation

[513] OECD online database, „Annual labour force statistics", 2014

[514] López López, J., „Flexiseguridad y protección por desempleo: las reformas (2009) desde los derechos laborales", in Agustí Julià, J. and Fargas Fernández, J. (coords.), *La Seguridad Social en continuo cambio: un análisis jurisprudencial*, Bomarzo, Albacete, 2010, 383

between training and other integration services (intermediation, orientation) provided by the PES[515]. The latter problem is, again, also connected to their lack of means and development of PES, as shown here above. Finally, the activity of PES is also more focused on budget control and administrative follow-up of the courses, as well as control of unemployed than monitoring training objectives and employability goals with the view to a successful reintegration. One of the consequences of this all is the existence of outdated contents and methods which are not adapted to the productive changes and knowledge economy, as underlined, amongst others, by the continuous absence of training at-distance, only remedied in the last years[516]. This also partly due to the fact that PES are not assigned any objectives in terms of quality, quantity or reintegration rate.[517]

Within that context, the greater decrease in training funds in the 2012, 2013 and 2014 ALMPs budgets is not going to reverse the tendency. The matter is also quite serious when taking into account the general failure of the Spanish labour market regulation in terms of enhancing employability of its workers, employed or unemployed.

Finally, a word must be said about the increase in start-up subsidies, another labour market policy that should be considered as adding up

[515] López Cossío, J. (coord.), "La formación de los desempleados en España", Report of the *Fundación Elogos*, 2011, 16-18
[516] Gómez Sánchez, V. (coord.) "Mejor Formación para crear más empleo", Report of *Fundación Elogos*, 2010, 6
[517] López Cossío, J. (coord.), "La formación de los desempleados en España", Report of the *Fundación Elogos*, 2011, 27

to the commodifying character of "active" unemployment protection within the flexicurity paradigm, as they are meant as an incentive to enter in the labour market as an autonomous worker, a working status which is even more commodified as a dependent worker. Even if they are not submitted to any employer's authority, on the one hand they bare an even greater share of market risks than dependent workers, and on the other the lack of employer's authority is for an ever greater part of autonomous workers a theoretical abstraction given the real links of submission they have with some (and generally their unique) client(s).

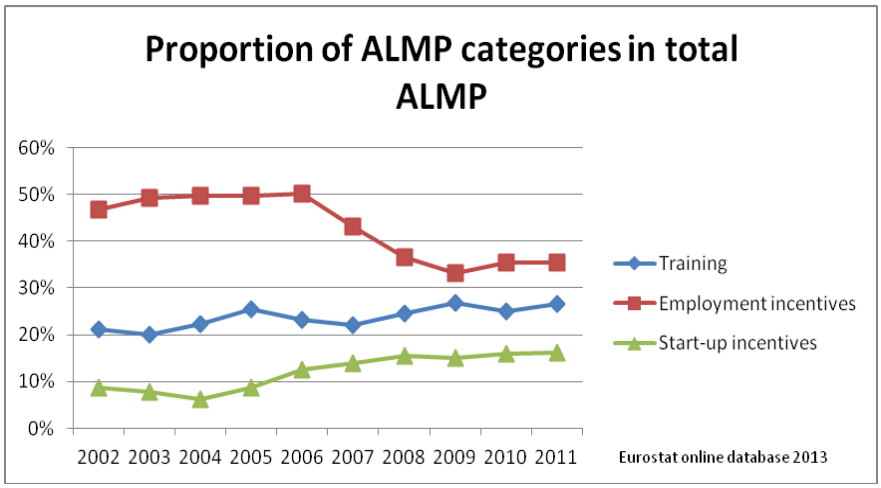
Start-up subsidies consisted in the beginning mainly in the possibility to receive contributory employment benefits of the duration to which an unemployed has the right at the same time, as form of capital to invest in auto-employment (which from a budget point of view, involves a transfer of financing of unemployment from funds destined to passive protection towards funds destined to active labour market policy). Until 2003, the number of beneficiaries of that measure remained relatively low, and the studies do not show any relation between the measure and the number of autonomous workers "surviving" in their activities[518].

One can observe a clear increase of start-up incentives since 2004, in the wake of the 2003 Employment Promotion Act, a trend that culminated with the Law 14/2013, including, again, a system of reduction of social contribution of starting autonomous workers.

[518] VV.AA., "Desequilibrios ocupacionales y políticas activas de empleo", Informe 1/2005, Consejo Económico y Social, 2005, 91

Finally, to conclude the analysis of those three important categories of ALMPs, it is important to have a closer look towards their relative evolution, as shown in the next graph.

Graph 16: Evolution of the proportion between different ALMPs in Spain 2002-2011



Employment incentives have traditionally represented the biggest part of Spain's ALMP's budget. They include mainly hiring subsidies, as well as subsidies officially classified as "for the maintenance of jobs". However, the latter category is referring mainly to subsidies for substitution or job adaptation in matters of maternity risks and leave, and, since the crisis, to short-term work schemes of temporary contract suspensions[519] (scheme that is due to

[519] It is important to observe that those systems, inspired from the German *Kurzarbeit* but not as developed as the latter, involves a transfer of business risks from the company towards the state, or more precisely, towards passive unemployment protection (payments of benefits) on the one hand, but also towards the workers, as during the suspension, they "consume" the rights to insurance benefits that they have generated. The exceptions to that "consumption" in a form of a replacement of a maximum 6 months of benefits, will only apply in case of suspension plans approved before the end of 2013, and only in case of unemployment following dimissal on economic, organization or

finish at the end of 2013). It is also important to state that the category "training" does not only include training for unemployed but also training for workers in employment. Moreover, even if the importance of those "incentives" declined over the years, it seems that the measures taken following the crisis have broken that trend, mainly through an increase in relative terms of the recourse to hiring subsidies (as argued here above) combined, from 2012, with a decrease in the proportion of the budget dedicated to training, the relative position of which stabilized in 2013 but decreases again in the 2014 budget proposal.[520]

In the overall, the tendency goes towards an increase in hiring subsidies, which as explained above should be categorized as a feature of re-commodification of the protection (letting aside the question of its efficacy) with a decrease in the more de-commodifying elements of ALMPs, not only training, but also orientation and placement, the latter with the justification of the intervention of market-logic driven actors like temporary work agencies, which amount thus to a double movement of re-commodification.

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production grounds before the end of 2014, excluding termination of temporary contracts or dimissals on other grounds (Article 16, *Ley 3/2012, de 6 de julio, de medidas urgentes para la reforma del mercado laboral*)

[520] Eurostat nor the OECD databases show the evolution after 2011, but the findings are taken from the Spanish budget proposals, Proyecto de presupuesto 2014 por programa y memoria de objetivos. Tomo IX, Sección 19, http://www.sepg.pap.minhap.gob.es/Presup/PGE2014Proyecto/MaestroTomos/PGE-ROM/doc/L_14_A_G9.PDF (last visit: 23 October 2013)

I.2.3. ALMPs as protection against unemployment: re-commodification through the ineffectiveness of policies centred on employers

The 2003 Employment Act consolidated the structure of Spanish ALMPs and of the PES, as well as gave a legal definition of the concept[521] and categories of ALMP.

Its preamble seems to connect with the EES, however in very diffuse way, by referring broadly to the Luxemburg process which is to be traduced in the need of a "personalized and preventive attention by PES, with special attention to disfavoured collectives, between which disabled people occupy a prominent place" and the fact that "employment policies have to function as instruments giving incentives for an effective incorporation of unemployed into the labour market by stimulating active job search and functional and geographical mobility".

A more direct connection to Employment Guidelines is made, however only concerning the need to quantify the effects of the policy so as to meet conditions related to the distribution of the European Social Funds.

[521] "Active employment policies refers to the programs and measures of orientation, employment and training with the objective of increasing the possibilities of unemployment to access employment in the labour market, in an employment contract or a autonomous worker, and the adaptation of training and requalification of workers towards employment, as well as other measures aiming at developing entrepreneurship and social economy"

Another of the main goals of the act was to define intermediation as a basic instrument of employment policy, opening it to "civil society" (more specifically, opening intermediation to non-lucrative agencies) as a mean to make it more effective.

The soaring unemployment and the crisis brought the Spanish government to retouch slightly in 2010 the organisation and structure of ALMP policies, by modifying the 2003 Employment Act, again through urgent government decisions of legislative rank[522].

The reform declared itself to be sustained on two main "legs". First, by bettering the intermediation system insisting on public employment services anticipating employment necessities of companies, instead of just matching offer and demand. Secondly, by developing more personalized attention (diagnostic of necessities or others). This was done through creating a catalogue of "rights" for the unemployed that would be gradually developed, according to a prioritization of collectives, to reach even to autonomous workers.

It gave however the objectives of ALMP a more market-orientated character. By stating that they should meet the needs of employers in terms of human capital, employment and training and promoting "auto-employment" and entrepreneurship, the Law does not give much space to the needs and aspirations of workers, further than guaranteeing equal treatment.

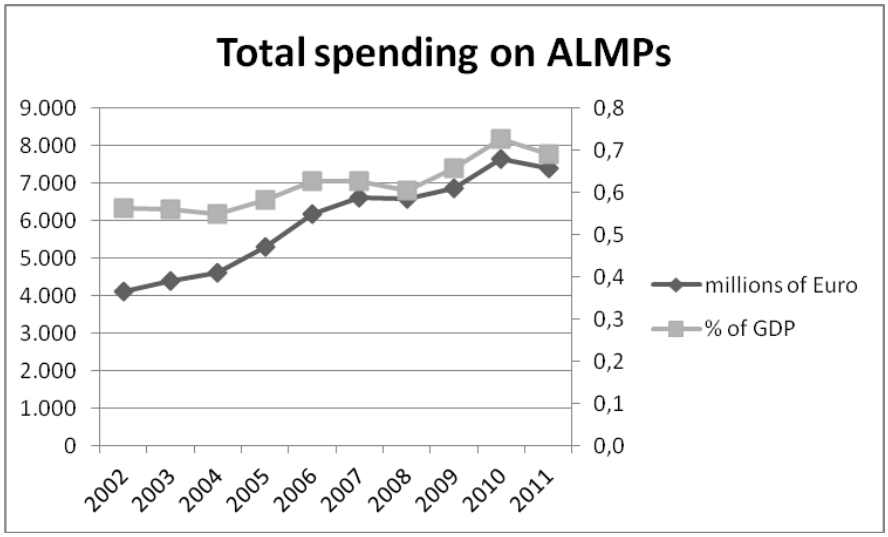
[522] Real Decreto-ley 3/2011, de 18 de febrero, de medidas urgentes para la mejora de la empleabilidad y la reforma de las políticas activas de empleo

Moreover, the development of the new "catalogue of rights" needs financing. The financing of ALMPs was progressively increased and amounted to 7.400 million in 2011, and was foreseen to amount to 8,333 million in 2012 to 8,000 million in 2014 (counting on a reduction of unemployment). In 2012 however, the new government reduced the budget of ALMPs to 5.800.000 million (a decrease of 21%), with cuts mainly in transfers to Autonomous Communities and training (a cut of 34%)[523], justified by the opening of job placement and orientation in the context of unemployment protection to Temporary Work Agencies and the reform in the professional training model. The ALMP budget of 2013 decreased an additional 34%[524] and that of 2014 is announced to equal that of 2013, however with reinforcement of certain programmes in detriment of training, as argued further.

[523]As criticized by the two most important Spanish unions, UGT and CC.OO, http://www.ccoo.es/csccoo/menu.do?Areas:Empleo:Actualidad:361670 (last visit, 12 november 2013)

[524] Ley 17/2012, de 27 de diciembre, de Presupuestos Generales del Estado para el año 2013

Graph 17: Evolution of total spending on Spanish ALMPs (2002-2011)



Source: own elaboration from OECD online database 2013

The analysis of PES and ALMPs in this section shows that the goals of the Employment Act, as far as conceptualized as "rights" of unemployed to participate in measures (intermediation, orientation, training,...) to reintegrate the labour market, are far from being met. From a formal and citizenship point of view, there is no other right than the right to being treated equally in the access to those measure, a right, the importance of which, given the trend of priorization of benefit holders for reasons of budget control, is not to be underestimated. Moreover, its importance will probably grow with the priorization of "easiest-to–place" collectives produced by the entry of market-driven logic in most services (placement, orientation, even training).

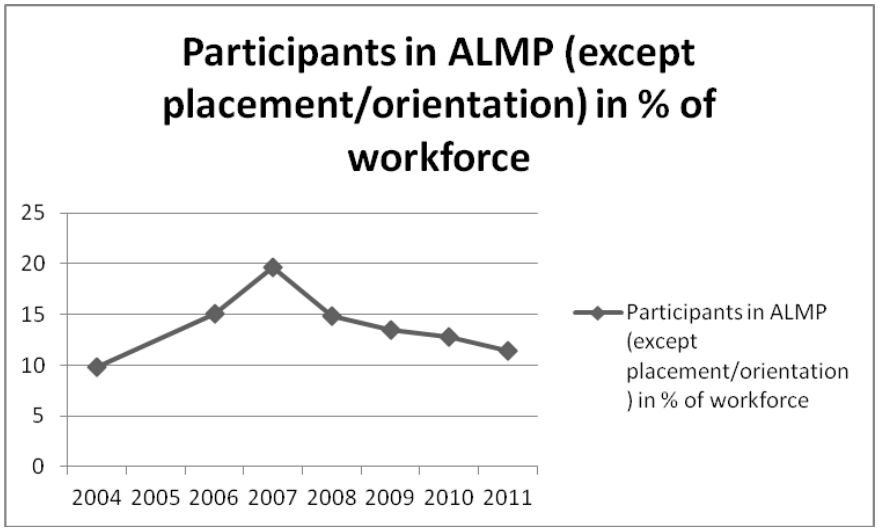
But even taken in a more diffuse and politic sense, the right to ALMPs seems not to be guaranteed by the actual legislation.

Spanish Active Labour Market Policies can be considered as traditionally underdeveloped, and, while spending was gradually increased, until the beginning of the XXIst century it remained comparatively low. Moreover, while spending finally increased to comparatively more acceptable terms, limits in coordination across policy domains and accountability remained high[525]. Adding up to the previous, the lack of effectiveness of PES (which has been used as an excuse for privatization), the lack of effective training structure, the bias towards hiring subsidies, and the dwindling financing in the context of austerity show, on the one hand, there inadequacy from the point of view of flexicurity, and on the other hand, more than their lack of de-commodifying effect, their contribution towards re-commodification.

A good illustration of the erroneous character of categorizing participation in ALMPs as a right is the fact that, as shown in the following graph, global participation in ALMPs has decreased at the same moment that the number of unemployed soared, and therefore the need to participate in ALMPs, from the point of view of individual citizens, has increased.

[525] Dubin, K., Hopkin, J., "A Crucial Case for Flexicurity: The Politics of Welfare and Employment in Spain", in Clegg, D., Graziano, P. (eds.), *The Politics of Flexicurity in Europe: Labour Market Reform in Hostile Climes and Tough Times*, Basingstoke, Palgrave, forthcoming, 2013, 19-20 and 23

Graph 18: Evolution of participants to Spanish ALMP in percentage of the workforce (2004-2011)



Source: own elaboration from OECD online database 2013

The ineffectiveness of the administrative structure within which ALMPs are supposed to enhance employability and thus security of unemployed, as well as the structure and bias of those policies towards re-commodification, generally confirm the evolution of the Spanish implementation of *flexicurity* towards a model of "flexiprecarity" which presents clear contradictions with the orientation of the EES.

Moreover, the subject of the continuous lack of effectiveness of Spanish PES and ALMPs, when contrasted with the more specific instruments of the European Employment Strategy OMC, strengthen the findings about its inadaptation to the development of security policies in the Member States. An overview of the country-

specific recommendations for Spain related to ALMPs and PES (which are actually the only subjects of unemployment protection included, confirming the lack of attention given to passive policies which are argued here to be insufficient) serves to point out this problem.

In 2000, the Council recommended "increasing the number and the efficiency of the individualised activation measures".[526] In 2001, the recommendations exhorted to "continue with modernisation of the Public Employment Services to improve its efficiency, and step up implementation of the preventive approach so as to cover all potential beneficiaries. Such efforts should include the completion of the statistical monitoring".[527] In 2002, reference is made to the need to "complete the modernisation of the public employment services so as to improve its efficiency[528], and step up implementation of the preventive approach, particularly with regard to the adult unemployed, so as to cover all potential beneficiaries. These efforts should include the completion of the statistical monitoring system".[529] In 2003, it is recommended to "complete the modernisation of the public employment services so as to improve its efficiency and to increase its capability to mediate in the labour market. These efforts should include the completion of the

[526] Council Recommendation 2000/164/EC of 14 February 2000 on the implementation of Member States' employment policies
[527] Council Recommendation of 19 January 2001 on the implementation of Member States' employment policies
[528] It is not clear if "its" referes to the modernization, or the PES…
[529] Council Recommendation of 18 February 2002 on the implementation of Member States' employment policies

statistical monitoring system".[530] There is no reference to unemployment protection in 2004,[531] nor in 2007[532], 2008,[533] or 2009[534] (those years coincide with the constant decrease in unemployment, partly due to the housing boom), nor in 2011[535], while in 2012, Spain should "take additional measures to increase the effectiveness of active labour market policies by improving their targeting, by increasing the use of training, advisory and job matching services, by strengthening their links with passive policies, and by strengthening coordination between the national and regional public employment services, including sharing information about job vacancies",[536] and in 2013, "Reinforce and modernise public employment services to ensure effective individualised assistance to the unemployed according to their profiles and training needs. Reinforce the effectiveness of re-skilling training programmes for older and low-skilled workers.

[530] Council Recommendation of 22 July 2003 on the implementation of Member States' employment policies
[531] Council Recommendation (2004/741/EC) of 14 October 2004 on the implementation of Member States' employment policies
[532] Council Recommendation 2007/209/EC of 27 March 2007 on the 2007 update of the broad guidelines for the economic policies of the Member States and the Community and on the implementation of Member States' employment policies
[533] Council Recommendation (2008/399/EC) of 14 May 2008 on the 2008 update of the broad guidelines for the economic policies of the Member States and the Community and on the implementation of Member States' employment policies
[534] Council Recommendation of 25 June 2009 on the 2009 update of the broad guidelines for the economic policies of the Member States and the Community and on the implementation of Member States' employment policies
[535] Council Recommendation (2011/C 212/01) of 12 July 2011 on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated
Stability Programme of Spain, 2011-2014
[536] Council Recommendation on the National Reform Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015

Fully operationalise the Single Job Portal and speed up the implementation of public-private cooperation in placement services to ensure its effective application already in 2013".[537] While the ineffectiveness and problematic orientation of ALMPs over the whole period has been argued in this work, it is thus clear that the Recommendations did not seem to have any influence in their bettering, and the current (lack of) development in the matter (absence of reinforcement of PES further than giving the possibility to private agencies to take over part of their tasks and dwindling financing) points towards the fact that the situation is not about to change. This confirms the findings of previous research on the lack of influence of the OMC in terms of ALMPs (see Part III, subsection II.2), a fact which moreover acquire its importance within the shift of the idea of protection against unemployment towards support to reintegration in the labour market.

[537] Council Recommendation (2013/C 217/20) of 9 July 2013 on the National Reform Programme 2013 of Spain and delivering a Council opinion on the Stability Programme of Spain, 2012-2016

I.3. Constitutional rights as limit to re-commodification: the obligation to maintain a recognisable system of social security

The Spanish constitution contains strong elements for a favourable interpretation of social rights, in line with a de-commodification perspective. There are general values contained in the constitution, which, while not embodying claimable rights, influence the interpretation of individual rights or constitutional mandate, compelling the view of the Spanish constitution as a holistic norm, where rights cannot be interpreted in detachment from those values.[538]

Article 1 of the Constitution proclaims Spain as a *social* and democratic state. The Spanish constitutional concept of social state, which find *inter alia* an expression in article 9.2 of the constitution, which commands all public authorities to promote real and effective, as opposed to formal, equality, involves that the state also recognizes and has, through its intervention as opposed to mere neutrality, realize economic and social rights, like the right to housing and the right to social security, through redistribution of wealth.[539]

Within this context, article 41 commands public authorities to maintain a system of social security with *sufficient* benefits, above

[538] García de Enterría, *La Constitución como norma y el Tribunal Constitucional*, Madrid, Civitas, 1991, 3d. ed.
[539] Alarcón Caracuel, M.R., *La Seguridad Social en España*, Aranzadi, Pamplona, 1999, 15-17

all in case of unemployment. The latter article, which is framed as a mandate rather than an individual right, contains four principles defining the characteristics of the Spanish system of social security which the legislature has to configure.[540] It has to have a public character (even if this seems not to exclude some private collaboration in the management of some aspects of the system), it has to be accessible to all (the idea of subjective universality, which involves that the system has to go further than an insurance system, by including assistance benefits for those who could not access the former)[541], it should cover in principle situations of necessity, even if some of them are conceptualized as the occurrence of a risk (objective generality), and benefits have to be sufficient (principle of sufficiency). Being article 41 configured as a mandate to the legislature, within the guiding principles of socio-economic policy, according to the jurisprudence of the Constitutional Court, the legislature is "free to modulate protection given by the social security system in function of social and economic circumstances which are imperative for its viability and effectiveness", as long as the social security system remains "recognisable",[542] limiting claimability of individual social security rights to their legal configuration.

Following that criteria of recognisability, it could be said that a social security system of protection against unemployment, which is

[540] Alarcón Caracuel, M.R., *La Seguridad Social en España*, Aranzadi, Pamplona, 1999, 61-95

[541] Quesada Segura, R., *Los Principios Constitucionales y el Modelo Legal de Protección por Desempleo*, CARL, Sevilla, 2004, 17

[542] Spanish Constitutional Court, judgment of 21 May 1987,STC 65/1987; Spanish Constitutional Court, judgment of 14 July 1994, STC 215/1994

evolving towards a contractual institution through the assumption of the activity compromise as defining the situation of unemployment, and thus losing its character as citizenship right to state protection, with ever more burdens on the shoulders of benefit holders, without sufficient compensation on part of the authorities (in terms of effective and individualized labour market policies centred on the needs of the unemployed and with a sufficient level of possibility of participation), ever less coverage (above all in times of crisis) and ever lower benefits (which in themselves should be seen as not satisfying the constitutional mandate). It is true that the criterion of recognisability does imply that institutions cannot change over time, as the references that citizens and practitioners have, on which the assessment of the recognisability is based (the Constitutional Court speaks of "social conscience" about the institution), also evolves over time. Within that context, the pervasion of the principle of *flexicurity* (if one accepts its normative character) could be argued as constituting an important element in the assessment of recognisability. But even then it would not be unreasonable to contend that the current institution of protection against unemployment is difficult to recognise in terms of article 41 of the Constitution, because of its important unbalanced character, fruit of the pathologic implementation and absorption of the principles promoted, amongst other international institutions, by those of the European Union.

However, it does not seem that the current state of the case-law related to constitutional social rights has permitted to revert the trend of re-commodification of Spanish unemployment protection

in its different aspects. The recent judgment of the Constitutional Court on the problematic access of part-time workers to social security rights[543] is merely an echo of the corresponding judgment of the European Court of Justice. Given that 10 years lapsed between the referral of a question of constitutionality by a lower court and the decision of the Constitutional Court, there is a strong possibility that it was the decision of the CJUE which finally brought the Spanish Constitutional Court to pronounce itself on the matter. Political influence of the government having implemented the latest reforms of the labour market and unemployment protection on the Spanish Constitutional Court does not bode well for a strong interpretation of Constitutional rights which would deeply question the reforms.

The freedom of the legislature in the configuration of the system of protection against unemployment as social security system has also been interpreted quite broadly by the Constitutional Court.

For example, the Court decided that it remained within the freedom of the legislature to configure the social security system to decide that obtaining a certain temporary income causes the extinction of the right to means-tested benefits for workers of more than 52 years old (configured to last until pension age), instead of its suspension. The extinction involves the impossibility to qualify again for that scheme. The Court did not proceed to a substantial analysis of the proportionality of such a decision of the legislature.[544] It is

[543] Spanish Constitutional Court, judgment of 14 March 2013, STC 61/2013
[544] Spanish Constitutional Court, judgment of 1 June 2009, STC 128/2009

important to observe that in that case, the legislature had amended the law and replaced the extinction of the right to benefits by a suspension of the right, even before the Court pronounced itself. The Court would thus most probably not have caused accusations of illegitimate judicial activism if it had decided otherwise. Therefore, it seems that the Court handles a quite high deference threshold as to its intervention to guarantee the constitutional definition of the right to social security.

Considering the stance of the Constitutional Court, it could be thus difficult to see, in the current state, how legal elements could de-commodify in practice, and thus oppose as correcting elements the re-commodifying policies put in place by the Spanish legislative, governmental and administrative bodies.

This could be viewed in contrast with the idea that the programmatic character of article 41 of the Constitution does not impede that the concepts of public character of the system of social security, subjective universality, objective generality and sufficiency of benefits have to be considered as binding upon the legislature in its configuration of the system of unemployment protection.[545]

However, there is another aspect of the Spanish constitutional context which should not be forgotten in the search for legal de-commodifying strategies.

[545] Quesada Segura, R., *Los Principios Constitucionales y el Modelo Legal de Protección por Desempleo*, CARL, Sevilla, 2004, 18-19

Article 10.2 of the Constitution commands to interpret fundamental rights and liberties in accordance with international treaties on the same matters. This implies that social rights, even when not formally recognized as fundamental right by the Spanish constitution, are also to be interpreted in conformity with those instruments.[546]

Moreover, article 96.1 of the Constitution, which proclaims the non-derogability of international treaties ratified by Spain otherwise than following general international norms, has been generally interpreted as involving the principle of their "supralegality", implying their material hierarchical superiority to ordinary laws.[547] Therefore, an ordinary judge would be empowered not to apply a national law which it would deem contrary to an international treaty. This actually provides for the material constitutionalization of international treaties, with a power to limited judicial review (their decision would only affect the applicability of the national law in the case at hand) in the hands of ordinary courts. This is of an utmost importance from the point of view of adjudicating, and promoting fundamental social rights, and thus oppose re-commodfying policies.

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[546] *Ibídem*, 21

[547] González Campos, J.D., Sánchez Rodríguez, L.I., Sáenz de Santa María, P.A. *Curso de Derecho Internacional Público*, 4ª edición, Thomson Civitas, Cizur Menor, 2008, 340; Menéndez Sebastián, P. y Ceinos Suárez, A., "Capítulo II: Norma Internacional" en García Murcia, J., *El sistema de fuentes de la relación laboral. Estudios ofrecidos al Profesor Martín Valverde por el Área de Derecho del Trabajo de la Universidad de Oviedo*, Ediciones de la Universidad de Oviedo, Oviedo, 2007, 94

There are numerous examples of use by the Spanish Constitutional Court or the Spanish Supreme Court of international instruments to interpret legislation (or the Constitution in the case of the former) in matters of social rights in general,[548] and in Social Security in particular.[549] A decision of a *Tribunal Superior de Justícia* (the jurisdiction level under the Supreme Court) commented here above also had recourse to ILO Convention 44 to interpret the obligation of unemployed with children to care for to participate in labour market reintegration measures. The Supreme Court, in a decision of 6 April 2004,[550] refused to apply in its literal sense the norm which provides that the in case of working time reduction the salary to be taken into account to calculate unemployment benefits is the salary corresponding to that reduced working time. The Court found that in case of reduction of working time for reasons of maternity, the literal application of the provision in question did not take into account the national, EU and international (ILO Convention 156 on Workers with Family Responsibilities) legal framework, for which an exception not provided in the law had to be made in case of maternity. Those are two decisions which involved de-commodification of unemployment protection, moreover with a gender-related aspect, with the second implicitly refusing to apply the national law.

[548] López López, J., Caruso, B., Freedland, M. and Stone, K. (coords.) La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada, Bomarzo, Albacete, 2011

[549] Fargas Fernández, J., „Uso jurisprudencial de los Convenios de la OIT en materia de Seguridad Social", in López López, J., Caruso, B., Freedland, M. and Stone, K. (coords.) La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada, Bomarzo, Albacete, 2011, 215-235

[550] Recurso 4310/2002

More recently, in a case not related to social security but with high relevance as to judicial review of national law by ordinary courts, a first instance labour judge refused to apply a provision of the 2012 labour law reform consisting in giving the right to the employer to conclude an open-ended contract with an automatic probation period of one year. The judge considered the law to be contrary to article 4-4 of the European Social Charter (right not to be dismissed without adequate notice), as interpreted by the European Committee of Social Rights, and therefore applied the general legislation on probation periods and declared the termination of the contract after more than six months (the maximum probation period provided by the *Estatuto de los Trabajadores*) as being without cause and thus against the legal provisions of protection against dismissal.[551]

Therefore international instruments like ILO Conventions 102 and 44 or the European Social Charter could theoretically be invoked to review legislation on unemployment protection, both by ordinary courts as by the Constitutional Court.

The fact that those instruments have to be interpreted given due account to the decisions of the supervisory organs of those instruments would thus mean that Spanish national courts are to use the important materials which constitute all the decisions of the ECtHR, the European Social Committee, the Committee of Experts of the ILO, etc. Inevitably, due account could thus also be given to

[551] Juzgado de lo social nº 2 de Barcelona, judgment 412/13 of 13 November 2013, not officially published, but copy to be found on http://www.ugt.es/actualidad/2013/diciembre/188951481-Sentencia_emprendedores.pdf (last visit: 18/2/2014)

the soft law instruments existing within those different spheres (something which has already be done by the Spanish Constitutional Court, by taking into account ILO Recommendations to recognize social rights, like the right to freedom of association or strike down laws limiting those rights).[552] This would also mean that recourse could be made to principles, arguments and developments within the European Employment Policies, to the extent they do not contradict hard legal instruments, to give substance to legal argumentation, a point which could reveal itself important, given the pathologic implementation by Spain of *flexicurity* policies, for example in failing to curb the problem of segmentation of its labour market, in promoting precarized versions of part-time work, in failing to provide for measure enhancing employability of workers and unemployed through training and effective employment services, to name just a few aspects.

[552] López López, J. "La construcción de derechos sociales: judicialización y aplicación de los Convenios de la OIT", in López López, J., Caruso, B., Freedland, M. and Stone, K. (coords.) La aplicación de los convenios de la OIT por los jueces nacionales: el caso español desde una perspectiva comparada, Bomarzo, Albacete, 2011, 13-26

Chapter II. The Netherlands: re-commodification through integrated work-first approaches

The Netherlands could be seen as one of the forerunners of a combination of activating welfare and labour market flexibilization with the intention to take into account the consequences of the latter on worker´s security.[553] The triggers of the reforms were rising unemployment due to several economic crisis in the 80´s and the 90s, as well as what has been called the "other" Dutch disease: disguised unemployment under the form of a high number of inactive persons depending on a system of work invalidity benefits independent from their grade of invalidity. Reform of unemployment protection in the 1990s was undertaken within the context of the apparition of the "Dutch miracle" a steep rise in job growth in a context not only of "activating" reforms, but also wage-moderation policies driven by an evolution of the corporatist relations between social partners and government from bargaining over mutual concessions ("immobile corporatism") towards the

[553] van Oorschot, W., "Balancing work and welfare: activation and flexicurity policies in The Netherlands 1980-2000", *International Journal of Social Welfare*, n° 13, 2004, 15;

development of common policy orientations aimed towards enhancement of competitiveness ("competitive corporatism").[554]

However, one of the main explanations of higher employment in The Netherlands is the development of part-time work during the last 20 years of the previous century.[555] Half of the increase in jobs in the 1990s came from part-time work, while 17% came from temporary work.[556] This happened in a context where the greatest part of job creation did happen in the second decade of the nineties, when real wages grew more rapidly than before, productivity growth lagged, capital income grew, and house prices soared, increasing domestic demand. This questions the allegation that it was wage restrain which provoked the increase of employment.[557]

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[554] Visser, J., Hemelrijck, A., *A Dutch Miracle*, Amsterdam University Press, Amsterdam, 1997; Salverda, W., "The Dutch Model: Magic in a Flat Landscape", in Becker, U., Schwartz, H., (eds.) *Employment `Miracles´*, Amsterdam University Press, Amsterdam, 2005; Bovenberg, A.L., „Reforming Social Insurance in the Netherlands", *Internation Tax and Public Finance,* n° 7, 2000, 345

[555] Clegg, D., „De Hervormingen van de werkloosheidsuitkeringen in Continentaal Europa", *Belgisch Tijdschrift voor Social Zekerheid*, 2011, 488, note 3, who points out that in 2003, the Dutch occupation rate was higher than in Germany, being however the same in terms of full-time equivalents; Salverda, W., "The Dutch Model: Magic in a Flat Landscape", in Becker, U., Schwartz, H., (eds.) *Employment `Miracles´*, Amsterdam University Press, Amsterdam, 2005, 45, who states that Dutch labour market performance is not as good as presented when taking into account the hours worked per capita, which shows that the advance in service-jobs did not compensate the loss in good-production, and that growth of GDP per hour worked between 1979 and 2000 did not put the country before other countries as Belgium and Germany, but behind them.

[556] van Oorschot, W., "Balancing work and welfare: activation and flexicurity policies in The Netherlands 1980-2000", *International Journal of Social Welfare*, n° 13, 2004, 16;

[557] Salverda, W., "The Dutch Model: Magic in a Flat Landscape", in Becker, U., Schwartz, H., (eds.) *Employment `Miracles´*, Amsterdam University Press, Amsterdam, 2005, 48; Becker, U., Hendriks, C., "As the Central Planning Bureau says. The Dutch wage restraint paradigm, its sustaining epistemic community and

This growing trend in flexible employment was accompanied by legislative measure reinforcing security of those workers, while only slightly reducing protection of standard contracts. The same period saw continuous adaptations of social protection of persons out of employment, the move of an unemployment protection scheme from a three-tier (contributory system, follow-up system, assistance scheme) to a two-tier system, with increasing activation, also of disabled persons, due to the fact that those protection programs contained an important share of "hidden" unemployment. Those gradual changes were accompanied by an important involvement of quasi-markets for the provision of employment and labour market reintegration services, a system which has never proven to perform sufficiently better than the public provision of those services, such as shown by the abolition of the obligation to have recourse to private providers within the context of the assistance scheme.

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its relevance for comparative research", *Review of International Political Economy*, Vol 15, n° 5, 2008, 826-850;

II.1 Unemployment benefits: from generous social insurance to segmented protection

II.1.1 1980-2000: The path to negative activation and the weight of culpability

The system put in place in the beginning of the 1980s was a triple folded system. A first contributory scheme (WW) could be accessed through a qualifying period of 130 days of work within the last year, had a relatively short benefit period (26 weeks) with 80% of the former wage and a high maximum threshold. Once benefits ran out, access was given to a second, tax-financed scheme (WWV) with a maximum period of 2 years and a wage replacement rate of 75%. Finally the RWW, a tax-financed means-tested scheme, managed by the municipalities but financed by the state, served as last safety net.

After a reduction of the replacement rate to 70% for both schemes, and budgetary reductions through limiting indexation and freezing benefits, WW and WWV were merged in 1987.[558] The new system was regulated by an Unemployment Act (*Werkloosheidswet*) and financed through social contributions. To qualify for a first period of 6 months (called *kortdurende uitkering* or short-period benefit), the claimant had to have worked 26 of the last 52 weeks (*wekeneis*). If he had worked 3 years in the last 5 years, duration was extended

[558] Wet van 6 november 1986, tot verzekering van werknemers tegen geldelijke gevolgen van werkloosheid

to a maximum of 5 years, depending on age and previous contribution period, followed by a period of 1 year benefit at 70% of the minimum wage.

Duration, benefit calculation and qualifying period were reformed in 1995.[559] The "normal" scheme, with benefits still at 70% of previous salary, had a double qualifying period condition: 26 weeks of work in the last 39 weeks (*wekeneis*), and at least 52 days of salary in at least each 4 of the 5 preceding years. Duration lasted from 6 months to 5 years, depending on previous worked (total) years, at 70% of the previous wage, followed by a 2 years period of benefits at 70% of the minimum wage.

When not qualifying for the second condition (the 4-out-of-5 years), but only for the first, the unemployed would receive benefits at 70% of the minimum salary, or of his previous daily salary, whichever is the lowest, for a maximum of 6 month. It is interesting to note that the fact that more than 15% of the workers would actually fall under the latter "wekeneis" without meeting the "four-out-of-five" rule had as a consequence that ILO Convention 168, signed by The Netherlands, but which provides that at least 85% of the workers should be covered by an unemployment scheme guaranteeing at least 50% of the previous wage, had as a consequence that the said Convention has finally not been ratified, because The Netherlands would be in breach of the Convention, while that "problem" had not

[559] Damsteegt, A.C., *De Werkloosheidswet anno 2007*, Kluwer, The Hague, 2006

been discussed during the adoption of the law reforming the benefit system.[560]

The concept of unemployement itself is since 1986 objectively defined as the loss of at least five hours of work per week (with corresponding loss of salary) taking into account the average of hours of the last 26 weeks. Benefits are paid in function of the reduction and the recuperation of a certain number of hours per week by finding a new employment this holds in that benefits will be reduced in function of the recuperation of hours (with some additional possibilities for irregular losses[561]).

However, despite this objective approach, the definition of the obligations of the unemployed to be able to claim his rights to benefits have introduced a great degree of subjectivity to the notion of unemployment, much to the disadvantage of the worker and creating even perverse effects.

Literally defined, the worker had the obligation to prevent becoming "culpably" unemployed or being responsible for becoming unemployed.[562] The law further indicated two grounds for breaching that obligation: (1) having conducted himself in such a way that he reasonably should have understood that his conduct could have as a consequence the termination of his employment

[560] Pennings, F., „The Impact of Social Security Conventions: The Netherlands", in Pennings, F. (ed.), *Between Soft Law and Hard Law. The Impact of International Social Security Standards on National Security Law*, Kluwer Law International, The Hague, 2006, 109

[561] Pennings, F.J.L., *Flexibilisering van het sociaal recht*, Kluwer, Deventer, 1996, 144

[562] Art. 24 Werkloosheidswet (1995)

contract, and (2) when the employment contract ends or is terminated without there being such objections to the continuation which would make that the continuation could not reasonably be asked from him. This broadly defined obligation to prevent being unemployed should be seen as a highly commodification feature with also in-work repercussion.

A consequence of this system has been the problematic trend of automatic judicial contestation of dismissal as a preventive measure, as default of contestation of dismissal when contestation could give ground to the annulment of the dismissal, was being seen as "not having prevented the situation of unemployment". This gave rise to a high degree of judicialisation of dismissals. This led to the introduction in 1997 in dismissal protection legislation (*Besluit verweer tegen ontslag*, art. 229) of the conditions in which contestation of dismissal had to be made in order not to loose entitlement to unemployment protection, without real positive effect, for which in 1999 economical dismissals approved by the administrative authority would always be considered as exculpating the worker.[563]

But the culpability in the situation of unemployment does not stop with the recognition of the status of unemployed, but extends its effect during the whole period of entitlement to benefits. However, in this case, the culpability does not necessarily lead to the end of the right of benefits, but rather to possible sanctions.

[563] Damsteegt, A.C., *De Werkloosheidswet anno 2007*, Kluwer, Deventer, 2006, 42-43

The content of that continuous obligation, next to accept integration measures and referral by the PES to job interviews is the following

1. Sufficiently trying to find suitable employment ("*passende arbeid*") which has been considered to be fulfilled by consulting regularly job offer databases and engaging in at least four concrete solicitation activities per month.[564]

2. accepting suitable employment (or abstain from behaving in a way so as to not obtain it)

By suitable employment is meant "all work which matches the force and qualifications of the worker, except if acceptance cannot be requested for reasons of physical, psychical or social order"[565]. In 1996 Guidelines on the notion were published, without legal binding nature, but which served as orientation for the employment services and mainly codified past jurisprudence on the notion.[566]

According to the guidelines, the interpretation of the notion has to be based on three factors: the characteristics of the work (which are primarily assessed in function of the previous job and

[564] The Centrale Raad van Beroep (Court of Appeal), in its judgment of 15 April 2009 (ECLI:NL:CRVB:2009:BI3134), estimated that the obligation to search for work starts even before unemployment benefits are conceded, confirming previous jurisprudence. The Court confirmed a sanction consisting in a decrease of 20% in the benefits during the first 16 weeks for having waited for the effective date of termination of the employment contract, while the termination had been pronounced three months before by a judge. The 2007 Government Regulation on the obligation to solicit (*Besluit sollicitatieplicht werknemers WW 2007*) states that the worker has to develop job searching activities "from the moment it can be reasonably assumed that the employment contract ends".
[565] Art. 24 (3) Werkloosheidswet
[566] Vonk, G. and Zondag, W., "Passende arbeid: nog steeds een levend begrip?", *Serie Onderneming en Recht*, 50 (2009), http://irs.ub.rug.nl/ppn/353590924

qualifications), the level of salary and duration of travel. The strictness of the interpretation of those three factors depends on the duration of unemployment. As such, for example, every six months a worker has to accept a job from a lower educational category, which means that after a year and a half, persons with a higher education degree are to accept also jobs not requiring any qualifications. After 6 months, lower salaries should be accepted, corresponding jobs of the lower educational category which have to be accepted, with minimum salary and applicable collective agreement salaries considered as minima.[567] The suitability will also depend on the availability of jobs in the sector of the previous work, so that in case of high general, sectorial or local unemployment, suitability will be more broadly interpreted. The latter is an important expression of the re-commodifying character of how return-to-work is framed, as it is a feature that depends heavily on the necessities of the employers and the situation of the labour market, rather than on characteristics on which the unemployed has (had) at least some control (qualifications,…).

Also, all the circumstances of the case have to be taken into account. For example, a job with the same employer, involving more hours and higher work pressure, when work pressure already led to the end of the previous work relation, was deemed not suitable.[568]

3. having a behavior as to keeping adequate employment

[567] Richtlijn Passende Arbeid 1996 (replaced in 2008) http://www.st-ab.nl/abwor57.htm
[568] Pennings, F.J.L., *De Werkloosheidswet*, Kluwer, Deventer, 2003, 221

The right to benefits is also linked with the necessity to remain in suitable employment (the job offered or any other employment exercised). This provision, which reflects the general obligation of absence of culpability in the unemployment situation, has even led to find a worker culpable when the absence of renewal of a fixed-term contract could be attributable to him, even in absence of formal offer for renewal from the employer[569].

4. not state conditions relating to an offered employment which difficult the acceptance or offer of that employment

There is also an obligation of communication of any elements that could reasonably influence the right to benefits as well as a series of formal obligations[570].

All those obligations can be sanctioned by total refusal of benefits, or refusal for a period, or decrease of benefits or reduction of benefit period[571].

In 1987, sanctions were left to the competence and discretion of the *Bedrijfsvereninginge*n, institutions responsible for the management of the different social security branches composed by unions and employers' representatives. The 1996 reform, however, transformed that competence in an obligation, before later reforms gave the competence for the management of social security benefits to state-controlled institutions. It expressly forbade the application of a

[569] Damsteegt, A.C., *De Werkloosheidswet anno 2007*, Kluwer, Deventer, 2006, 53-54
[570] Art. 25 and 26 Werkloosheidswet
[571] Art. 27 Werkloosheidswet

proportionality test taking into account the serious character of the default and other personal circumstances in case the worker has been culpably unemployed, and only provided for the possibility of applying a lighter sanction (reducing benefits to 35% of the previous salary instead of total loss) if the unemployed was deemed not to be "majoritarily" culpable of the loss.

The successive reforms of the unemployment schemes in the eighties and the nineties took into account flexible work patterns to a certain extent, by defining job loss in terms of hours (part-time) and providing for a qualifying period taking into account irregular employment.

Concerning a-typical work, it is widely known that The Netherlands, implemented throughout the 1990s labour market policies which approached the concept of *flexicurity*.

Growth of part-time work is one of the reasons behind successful increase in the active population and relative low unemployment figures. While representing 20% of jobs in the 1980s, part-time work grew to 33% in the 1990s before attaining almost 49% in 2009[572]. However, it has been shown, on one hand that this move involved sharing of employment rather than employment creation and on the other hand wage control through decentralization of collective bargaining had also a part in the Dutch employment

[572] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 138

"miracle".[573] Moreover, it is important to distinguish between long and short part-time work (25% of total part-time work is for less than 12 hours per week, and 50% for less than 20 hours), as it has been shown that workers in low part-time contracts have a much higher risk to fall back into inactivity or unemployment or to be locked in low-paid jobs or even temporary contracts.[574] Agency work and fixed-term contracts are also important features of the labour market.

It is generally accepted that during the 1990s the flexibilization of the labour market has been accompanied to a certain extent with implementation of policies to combat precarization which is associated with those types of contracts.

This has been done mainly through a systematic implementation of the principle of equal treatment between part-time and full-time workers, as regards wages, contracts, working conditions, taxes and social protection entitlements (as shown by the introduction of unemployment requirements based on the loss of hours of work), going further than what was required from EU legislation and ILO

[573] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135; the latter position is however contested by Salverda, W., "The Dutch Model: Magic in a Flat Landscape", in Becker, U., Schwartz, H., (eds.) *Employment `Miracles´*, Amsterdam University Press, Amsterdam, 2005, 48, who points towards part-time employment as dominant reason behind the growth in employment contracts

[574] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 139

conventions.[575] The lower comparative level of precarization of Dutch part-time is however also due to social structures, as it is an important form of work of women having a partner with a standard contract.[576] The risk of poverty amongst part-timers in The Netherlands is of 2% for men and 3% for women, one of the lowest levels in the EU.[577]

Prohibition of discrimination in absence of objective justification has been introduced by the 1996 Act on non-discrimination on basis of working-time,[578] even if it did not totally eradicated the discriminating practices, above all those enshrined in collective agreements.[579]

The same period saw also the introduction of some measure of negative activation, through the reduction of the discretion for sanctions (but also by handing competence from social partners to the state). But the measures, together with the broad defined obligations for the worker to prevent his situation of unemployment,

[575] van Oorschoot, W., "Balancing work and welfare: activation and flexicurity policies in The Netherlands, 1980-2000", International Journal of Social Welfare, nº 13, 20, 24

[576] Salverda, W., "The Dutch Model: Magic in a Flat Landscape", in Becker, U., Schwartz, H., (eds.) *Employment `Miracles´*, Amsterdam University Press, Amsterdam, 2005

[577] Horemans, J., and Marx, I., In-work poverty in times of crisis: do part-timers far worse?", *Improve discussion Paper*, 13/14, 2014, 22 http://webhost.ua.ac.be/csb/ImPRovE/Working%20Papers/ImPRovE%20WP%201314_1.pdf

[578] Wet op verbod op onderscheid naar arbeidsduur

[579] Blázquez Cuesta, M., Ramos Martín, N.E., "Part-time employment: a comparative analysis of Spain and the Netherlands", *European Journal of Law and Economics*, n° 28, 233

were actually above all targeted at cost reduction in the contributory scheme, which amounted to around 30% between 1982 and 1998.[580]

That period also saw the complete overhaul of the Social Assistance system with the entry into force in 1996 of a new *Algemene bijstandswet* (*Abw* or General assistance Act)[581], which replaced RWW and had amongst its main features the shifting of responsibilities from the national level to the municipalities, the imposition of more responsibilities on the beneficiaries, above all concerning the search for work, and the development of the individualization principle, according to which assistance could be adapted not only in function of categories, but also circumstances of the family taken as reference for the reception of the benefits.[582]

The protected social risk is defined as "penury" (*behoeftigheid*), which happens when one "does not dispose of the necessary means to provide in the costs of living".[583] General indications as to what has to be understood by that definition were included in the law, but they are concretely defined between national level, which fixes thresholds in function of (family) categories and the municipalities, which has to increase the threshold of certain categories in function of the (local) costs of living, or can decrease the threshold of some categories in function of the same circumstances. The benefit amounts to the difference between income and, to a certain rate,

[580] Pedersen, C., *The Politics of Justifications. Party Competition and Welfare State Retrenchment in Denmark and The Netherlands from 1982 to 1998,* Amsterdam University Press, 2002, 75
[581] Wet van 12 april 1995, houdende herinrichting van de Algemene Bijstandswet
[582] Noordam, F.M., *De Algemene Bijstandswet in Hoofdlijnen*, Koninklijke Vermande, Lelystad, 1996, 4-5
[583] Art. 7.1 Abw

property, and the threshold. Special assistance can also be given in case of special or exceptional needs.[584]

The persons able to take up work, even after necessary training or retraining, fell under the principle of "autonomous provision of means" (*zelfstandige bestaansvoorziening*) as a goal of the activation measures the municipalities could develop through general and individualized plans containing training and work incentives. The obligation to follow those individualized plans (to which exceptions can be made by the government, or, in some, cases, by the municipalities), corresponds to the obligations as unemployed falling under the employment insurance scheme. Sanctions, which had to be proportional to the gravity, circumstances and grade of culpability of the default, could be imposed, and benefits could be reduced in proportion to "the lack of conscience of one´s obligations". A different regime, aimed at social inclusion, was applicable to those deemed unable to take up work in the circumstances in which they find themselves.[585]

The changes introduced in unemployment protection and the labour market, despite moving towards flexicurity, did not seem to have an important impact on the appearance of the Ducth "miracle". The Dutch performance in terms of Welfare State outcomes was not as miraculous as it seems, once one goes beyond raw employment growth and official unemployment numbers. At the beginning of this century, actual unemployment was higher than registered

[584] Noordam, F.M., *De Algemene Bijstandswet in Hoofdlijnen*, Koninklijke Vermande, Lelystad, 1996, 49-56
[585] *ibidem*, 69-75;

employment, employment had grown mainly through redistribution of (decreased) total worked hours, without having improved the situation of the most vulnerable collectives doubly affected by dwindling social security rights and absence of integration in the labour market.[586]

II.1.2 The XXIst century: From activation to work-first within a context of implementation of *flexicurity*

II.1.2.1. Reform of the contributory system: re-commodification through restriction of access, duration and the obligation to accept suitable employment

In 2006, the *Wet Wijziging WW-stelsel* (law for the modification of the system of the law on unemployment) en de *Wet Aanscherping Wekeneis* (law restricting the week-condition) further restricted qualifying conditions, while adapting the notion of culpable unemployment, with a view towards a more objective right to access and higher activation (through preventive action and reducing possibility to waive obligations).[587]

Maximum duration was brought from 5 years to 38 months, and stands in proportion to the contribution period at a rate of 1 month per worked year (if the "four-out-of five" rule is met), with a

[586]Salverda, W., "The Dutch Model: Magic in a Flat Landscape", in Becker, U., Schwartz, H., (eds.) *Employment `Miracles´*, Amsterdam University Press, Amsterdam, 2005, 57-58

[587] Damsteegt, A.C., De Werkloosheidswet anno 2007, Kluwer, The Hague, 2006, 12

minimum of 3 months benefits from the moment one has worked 26 out of the last 36 weeks before becoming unemployed.[588]

During the 2 first months benefits have been increased to 75% of the last daily wage, and kept at 70% for the rest of the benefit period. Both amounts are completed by supplementary benefits if below the minimum wage.[589] In case of loss of part-time employment a strictly proportional rate is applied to the daily wage by dividing lost hours by hours worked.

That year saw also suppressed the follow-up system, which permitted to receive benefits for a maximum of 2 years after expiration of contributory benefits (3 ½ years for persons older than 57 ½).

Given the absence of success in decreasing *pro forma* dismissal procedures, the grounds for "culpable unemployement" were also modified. The individualistic-subjective responsibility requirement attached to a blameworthy behavior disappeared to make way to a more objective definition linked with the grounds of the termination of employment, the only "blamable" criteria left being the case of dismissal on urgent grounds ("*dringende redenen*") generally equivalent to grave misconduct, and "dismissal on initiative from the worker, in the absence of reasonable objections to the continuation of the employment relationship[590]". Moreover, the

[588] Art. 42.2 *Werkloosheidswet*.
[589] Art. 2.8 *Toeslagenwet*
[590] Where in the latter case a balance has to be done between the interests of the worker to the ending of the relationship and the financial interest of unemployment administration

absence of need to contest the dismissal has been expressly introduced in the law. Finally, the European Committee of Social Rights had asked in its 2009 conclusions on the conformity with article 12-1 ESC for more information in the face of the high level of appeals by unemployed against decisions sanctioning them for being culpably unemployed (two thirds of challenges of administrative decisions in matters of unemployment).[591] In its following report, the Dutch government indicated that the Employee Insurance Agency (*Uitvoeringsorgaan Werknemersverzekeringen*, or UWV) has been ordered to apply sanctions only where neglect or recklessness amounted to willful misconduct. The tightening of the grounds for culpable unemployment led to a reduction of sanctions grounded on the culpability for the loss of employment,[592] a trend which is confirmed by our analysis of published jurisprudence on the matter between 2008 and 2014.

The obligation to look for work has been further detailed in a Governmental regulation in 2007,[593] which puts forward the principle of "the shortest way to work". It discerns between unemployed "close" to the labour market, which have an obligation of sufficiently look for work and accept invitations to job interviews, and those "further" from the labour market, for which

[591] European Committee of Social Rights, Conclusions 2009, 2009/def/NLD/
[592] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 182
[593] Besluit sollicitatieplicht werknemers WW 2007

reintegration activities like training, workshops and voluntary work are to be combined with job interviews, under the supervision of a "reintegration coach".[594] The PES distributes unemployed between the two groups and takes into account their potential and limitations, the situation of the job market, the number of job vacancies and the notion of suitable employment in deciding the reintegration measures. From 2007, agreements on the concrete execution of those obligations are compulsory. The regulation was replaced in 2009 in 2012, where the separation between unemployed "closer to" and "further from" the labour market has been abolished, all unemployed having the same obligation to look for work. Some violations, mostly those related to the obligation of information, are sanctioned by a fine in function of the gravity and the circumstance of the case.

On 1st of July 2008, new (non-legally binding but widely applied) Guidelines on the notion of suitable job were published, allowing wider interpretation, in detriment to the benefit-receiver. As such, any job has to be considered suitable (even if it does not match the level of the precedent job) after 52 weeks of unemployment, instead of the former year-and-a-half. Moreover, after those 52 weeks, it is also considered that a job has to be considered suitable, even if the salary is lower than the level of benefits, due to the fact that, in case of long-term unemployment, the new system permits to top the new salary with partial benefits so as to match the former benefit

[594] Damsteegt, A.C., *De Werkloosheidswet anno 2007*, Kluwer, Deventer, 2006, 56-57

level.[595] Before this period, the salary limit to a suitable job is fixed at the level of the type of work which has to be accepted in function of the qualifications (every 6 months, this lowers by a category – there are 4 categories, from higher education to no qualifications - [596] with the level of benefits as a limit, and work of a temporary character has to be accepted.[597] It is worth to note that the European Committee of Social Rights has concluded to a situation of non-conformity with art. 12-1 of the European Social Charter, given the lack of information the Dutch government has given concerning the question "whether there is a reasonable initial period during which an unemployed person may refuse a job or a training offer not matching his/her previous skills without losing his/her unemployment benefits",[598] which would lead us to think that the actual period could be deemed unreasonable.

Sanctions were also slightly adapted. The culpable loss of employment is still sanctioned with the loss of benefits, with the possibility to reduction to 35% for a maximum period of 26 weeks, if the responsibility of the loss is not to be attributed to a major extent to the worker. In case of refusal of a suitable job or behavior

[595] Vonk, G. and Zondag, W., "Passende arbeid: nog steeds een levend begrip?", *Serie Onderneming en Recht*, 50 (2009), http://irs.ub.rug.nl/ppn/353590924 (last visit, 29/04/2013)

[596] Richtlijn passende arbeid 2008, available at http://www.st-ab.nl/wetwwor1rpa08.htm

[597] Inspectie Werk en Inkomen. Ministerie van Sociale Zaken en Werkgelegenheid, "Flexibele arbeid en uitstroom", Report, November 2011, https://www.inspectieszw.nl/Images/Flexibele%20arbeid%20en%20uitstroom_tcm335-327742.pdf (last visit: 29/04/2014

[598] European Committee of Social Rights, Conclusions 2013, The Netherlands, http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Netherlands2013_en.pdf (last visit: 29/04/2014)

leading to the lack of obtention of suitable employment, the sanction consists in the reduction of the benefits in function of the hours of employment which would have been gained. No mitigation of the sanction is possible. The remaining violations (insufficiently trying to leave unemployment – read in conformity with the obligations contained in art. 26 WW – collaboration with the PES and other obligations – putting forward conditions which are obstacles to the obtention of a job, …) are sanctioned by permanent or temporary, total or partial loss of benefits, in function of the serious character of the offence and the degree of culpability of the unemployed. Those sanctions are further detailed in a government Regulation, the *Maatregelenbesluit UWV*.

An analysis of the published jurisprudence on the obligations of the unemployed not to be or remain culpably unemployed (under which the obligation to accept a suitable job falls) reveals that in the great majority of cases, the Courts confirm the sanctions imposed by the UWV (mainly, loss of unemployment benefits in case of not accepting a suitable job, and reduction of 25% - 20% before 2010 - during four months in case of breach of the obligation to look for a suitable job).

A judgment which is not directly related to the obligation to accept suitable work, but nevertheless interesting to ascertain the character of Dutch unemployment protection policies through the notion of suitable job, concerns the refusal by the UWV to pay for part of the costs of training (*in concreto*, training necessary to obtain a license of driving teacher). The Court confirms the decision of the UWV,

which has taken the 2008 Guidelines into account and was based on the fact that, since the claimant was unemployed since more than a year, he was deemed to accept any job which did not go beyond his capacities, even of a lower salary or competence level, for which there were sufficient vacancies available. The Court also accepts that the UWV did not follow the report of the competent career advice agency, because the latter was based on the question of which activities the claimant could exercise the most durably, instead of the question of "the shortest way back to the labour market",[599] confirming the work-first approach of Dutch unemployment protection.

The work first approach that was developed has also to be analysed taking into account the level of in-work commodification of the Dutch labour market. The period of the 2000s build on the first, limited attempts of re-regulation of atypical contracts initiated in the 1990s, with the idea to limit precarization induced by part-time, fixed-term and temporary agency work so as to combat segmentation, in line with the implementation of ideas of *flexicurity*.

Protection of standard contracts operates through a system of causal dismissal, with notice periods of one to four months coupled to a system of previous control of the causes and authorization by the UWV, without compensation for dismissal, or, at the option of the employer or in case of contestation by the worker of the decision of

[599] *Centrale Raad van Beroep*, Judgment of 9 January 2013, (ECLI:NL:CRVB:2013:BY8388)

the UWV, by the Courts, applying a less stricter test of causality but granting compensation if function of a jurisprudential formula (*kantonrechtersformule*).[600] This system of control of the decisions of the employer before it can be executed is quite unique in Europe, and, despite demands from employers' organizations, has never been replaced by the more generally applicable self-executing character of the dismissal with posterior control by Courts or administrative organs.

Part-time work was further addressed by a Part-time Employment Act in 2000[601], a legislation which was weighed in favor of the employee, as proved by jurisprudence relative to it.[602] Protection is organized in line with the Part-time Work Directive,[603] with one important addition, which is that it institutes a subjective right to "switch" back and forth between part-time and full-time, without need to present reasons, only limited in case of proven serious reasons of business interest of the employer.[604] The choice conferred by this legislation has also been effectively enforced by Courts,[605] and it is also important to note that, women and man have

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[600] Jacobs, A.T.M. *Labour Law in The Netherlands*, Kluwer Law International, The Hague, 2004

[601] Wet Aanpassing Arbeidsduur, of 19/2/2000

[602] Blázquez Cuesta, M., Ramos Martín, N.E., "Part-time employment: a comparative analysis of Spain and the Netherlands", *European Journal of Law and Economics*, n° 28, 223-256, at 226;

[603] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

[604] Burri, S.D., Ophitz, H.C., Veldman, A.G., "Work-familiy policies on working-time put into practice. A comparison on the Dutch and German case law on working-time adjustment", *International Journal of Comparative Labour Law and Industrial Relations*, vol. 19, n° 3, 2003, 321;

[605] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace*

generally the same probabilities to increase the numbers of hours they work.[606]

The Flexibility and Security Act of 1999 re-regulated the quite liberalized system of recourse to fixed-term contracts, except for the automatic conversions to an open-ended contract when work continued after its term, prompting employers to wait one month between reengaging.[607] The 3-3-3 rule was created (maximum three contracts, or maximum three years, and minimum three months between fixed-term contract, sanctioned by conversions into open-ended contract) legitimizing quite extended use of fixed-term contracts. On the other hand it consolidated protection for workers with several dispositions: system of fictitious minimum hours for on-call workers, probation period limited to 1 month for contract of less than two years, and finally, a system of presumption of formal (open-ended) contract, in case of a work relation of minimal 20 hours per months during three months. The latter seems not to have been really effective, because the initiative of its enforcement lay in hands of the worker. Collective agreements can alter some of the protection rules, above all the 3-3-3 rule, some enhancing protection, and other reducing it further. However, it is above all the latter which happened, as collective bargaining seems to have

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Regulation. Beyond the Standard Contract of Employment, Russel Sage Foundation, New York, 2013, 135, 147

[606] Blázquez Cuesta, M., Ramos Martín, N.E., "Part-time employment: a comparative analysis of Spain and the Netherlands", *European Journal of Law and Economics*, n° 28, 2009, 255

[607] Keizer, A.B., "Non-regular Employment in the Netherlands", in VV.AA. "Non-regular Employment – Issues and Challenges Common to the Major Developed Countries", *Japan Institute for Labour Policy and Training Report*, No. 10, 2011, 162

progressively altered the 3-3-3 rule towards more flexibility, partly because of decreasing bargaining powers and possibly also as consequence on the concentration of protection for standard workers within negotiations.[608] This has been an unfortunate move from the point of view of de-commodification, given that "Flexworkers" (fixed-term workers and workers through temporary agencies), in 2011, had around four times more chances to end perceiving unemployment benefits than standard workers.[609]

Agency work was also re-regulated in the same period (while agencies themselves were totally liberalized), imposing non-discrimination rules and information obligations, as well as an important protection feature, which is that a contract with a temporary work agency is deemed to be a formal labour contract, except for the first 26 weeks. This rule has been changed through collective agreements with a system of phases. The rights of the worker grow in function of his advancement in the phases, with an open-ended contract in the last phase, or after a maximum of 3,5 years of temporary work (conditions applicable since 2004, around 7% of agency workers are in the second and third phase).[610]

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[608] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 148

[609] Inspectie Werk en Inkomen. Ministerie van Sociale Zaken en Werkgelegenheid, "Flexibele arbeid en uitstroom", Report, November 2011, https://www.inspectieszw.nl/Images/Flexibele%20arbeid%20en%20uitstroom_tcm335-327742.pdf (last visit: 29/04/2014), 20. Moreover, agency work gives even worse results than fixed-term work, not only in terms of unemployment, but also in terms of risk of disability.

[610] Keizer, A.B., "Non-regular Employment in the Netherlands", in VV.AA., "Non-regular Employment – Issues and Challenges Common to the Major

Above all, as already said, an important element, if not the most important, of the "success" of Dutch labour market performance (at least in terms of unemployment) has been the effect of "sharing" the jobs induced by high temporality and part-time work. On the other hand, this high labour market flexibilization has been gradually, even if slightly, reduced over the last decade. This is reflected by the fact that part-time work in the Netherlands seems to be overwhelmingly of a voluntary nature, which is largely a result of collectively negotiated and legal measures designed to make part-time work attractive.[611] Another measure to compensate for flexibility in general has also been the constant indexing of minimum wage to general wage and price developments.[612]

However, less favorable developments are also observed.

It seems that employers in some sectors have restructured their work organization in great part on the most precarious forms of atypical work, a development which finds its expression in the fact that transition rates between fixed-term and standard employment has decreased from 35% to 18% in less than ten years. Moreover, important wage-gaps between standard employment and fixed-term

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Developed Countries", *Japan Institute for Labour Policy and Training Report*, No. 10, 2011, 166 and 169

[611] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 146; van Oorschoot, W., "Balancing work and welfare: activation and flexicurity policies in The Netherlands, 1980-2000", *International Journal of Social Welfare*, nº 13, 24

[612] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 150

and agency work shows that from the point of view of the worker, greater flexibility is not compensated by more wage security.[613] On the other hand if compared to other European countries, those wage gaps are amongst the lowest,[614] which would confirm, from the wage point of view, the Netherlands as a model of *flexicurity* given the comparatively milder consequences for workers of labour market segmentation.

II.1.2.2. Reform of social assistance : re-commodification through intensification of activation

The absence of sufficient results in terms of reduction of social assistance beneficiaries,[615] led to a new overhaul of the social assistance system, with the entry into force in 2004 of the *Wet Werk en Bijstand* (*WWB* – Work and Assistance Act).[616]

The approach consisting in distinguishing between general assistance and particular (and thus individualized) assistance is kept. General assistance is defined at national level (minimum level), means-tested and subject to income and property (with an

[613] Visser, J, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", in Stone, K. and Arthurs, H., *Rethinking Workplace Regulation. Beyond the Standard Contract of Employment*, Russel Sage Foundation, New York, 2013, 135, 152.
[614] European Commission, *Employment and Social Developments in Europe 2011*, 2012
[615] Blommenstijn, M., Kruis, G. and van Geuns, R., "Dutch municipalities and the implementation of social assistance: Making social assistance work", *Local Economy*, n° 27, 2012, 621;
[616] Wet van 9 oktober 2003, houdende vaststelling van een wet inzake ondersteuning bij arbeidsinschakeling en verlening van bijstand door gemeenten

integration premium consisting in a reduction in the calculation of revenues of up to 2,250 € per year as incentive for integration efforts, as well as 25% of 6 month income of a job within the framework of reintegration). It is also important to observe an exemption of property of 5,245 € or 10,490 € for couples and single parents.

The general benefits consist in 100% of the minimum wage for couples (or pension benefits if more than 65), including vacation pay, 70% for single parents, and 50% for the rest. In 2008, this amounted respectively to 1246, 872 and 623 € (younger under 21 receive significantly less)

Municipalities have to add an amount of minimum 115 and maximum 250 per month, in function of the necessities of the receiving person or household.

But the most important conceptual changes are in the duties and the sanctions which hollow the initial definition of reintegration as a right.

Next to procedural obligations, WWB benefit holders have the general material obligation to "show sufficient conscience of the responsibility to provide for one's own means of existence", which was already stated in the previous law. This is the legal development of what is seen to be implied in article 20(3) of the Dutch Constitution which provides that "Dutch nationals resident in the Netherlands, who cannot provide for the means of existence, have a right to assistance by the authorities, to be regulated by law".

Therefore, the authority can first call upon the claimants to exercise self-responsibility on a basis of a pre-legal state of personal responsibility.[617] Within that context, the WWB is based on the idea that citizens are responsible for providing for their own means of subsistence, and where the help of society has to be seen as complementary, and dependent on the exercise of that responsibility.[618]

Other obligations of WWB benefit holders, all defined in article 9 WWB, like the obligation towards insertion into work, find their source in that general principle.

Insertion into work is further subdivided in three, more concrete obligations, namely, to find and accept "generally accepted work corresponding to the capacities" (which implied registration as job seeker with the UWV), use the services offered by the municipalities aimed at insertion into work (which entails that other obligations than generally acceptable work can be imposed by the municipalities), and to collaborate to the assessment of the capacities towards insertion.

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[617] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 174

[618] Noordam, F.M., *Wet Werk en Bijstand in Hoofdlijnen*, SDU uitgevers, 2006, 106, who points towards the fact that the principles has had concrete implications, like the obligation to insure oneself against normal risks, to claim benefits or income to which one has right within the applicable period, not to sell one's house under the market price or not to use compensation for dismissal to reimburse non-urgent debt.

Instead of a "suitable" job, reflecting the obligations of unemployed under the WW, those (or, generally, any person claiming social assistance, in contrast with the anterior legislation) have now the obligation to try to obtain "generally accepted work", a notion which in contrary to Dutch legal practice, has not even received a beginning of legal definition. In application of the individualization principle it shall be applied, interpreted and substantiated (as well as temporary exceptions given) at the level of municipalities.[619]

Parliamentary discussion of the notion did not offer more light on the concept than that it would imply the severance of the link between the job and qualifications, as well as the consideration as not generally accepted work of prostitution, work in illegal conditions and below the minimum wage, or work that goes against the worker´s legitimate moral objections, without totally ruling out personal circumstances. However, studies show that the concept is overwhelmingly used as means of pressure to accept any job that is offered to the benefit claimant, independently of individual circumstances, underlining the "work-first" character of this social assistance scheme.[620]

It is also worth to note that municipalities can temporary suspend the obligations related to the insertion into work, based on serious grounds which could not be remedied by integration measures, for

[619] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 184

[620] Vonk, G. and Zondag, W., "Passende arbeid: nog steeds een levend begrip?", *Serie Onderneming en Recht*, nº, 50, 2009

example if day care facilities for single mothers cannot be offered by the municipality or, generally, when the imposition of a reintegration measure would not help solving a temporary difficult situation, like in case of illness. However, the added value of that provision is not clear, as article 18 WWB already provides for the discretion of the municipalities to adapt the obligations to the circumstances, possibilities and means of the benefit holder.[621]

Finally, even if aggressive behavior towards reintegration managers or integration service providers, which can arise given the intensity of the obligation, is criminally reprehensible, the WWB also provides for a general obligation of good behavior, to be sanctioned with the same measures imposed in case of non-compliance with the other obligations.[622]

Conceptually, the new law created thus a clear nexus between the right to benefits and obligations, putting in *vis-à-vis* the obligation to work with the right to integration, even if the WWB itself specifies in its article 48.1 that assistance is to be given, except otherwise provided, without counterpart.[623]

An important Court decision with regards to the intensity of the nexus between obligation to reintegrate and right to benefits is the

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[621] Noordam, F.M., *Wet Werk en Bijstand in Hoofdlijnen*, SDU uitgevers, 2006, 110

[622] Noordam, F.M., *Wet Werk en Bijstand in Hoofdlijnen*, SDU uitgevers, 2006, 108

[623] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 185

judgment of the District Court of Arnhem of 8 October 2008. The Court did annul the sanction imposed for not accepting a reintegration measure, considering that the municipality imposing the sanction on an unemployed with an academic background for his refusal to collaborate in the activities of public gardening and box packing imposed by his assigned training center had failed to make clear how those activities could have a positive impact on the reintegration of the unemployed in the labour market. Moreover in an *obiter dicta* the Court considered that the sanction may have violated article 4 of the ECHR, given that the activities at the base of the sanction were clearly not conducing towards regular reintegration in the labour market. At the basis of the acceptance, in principle, of work first practices by the Court lies the idea that social assistance presupposes a person to return to paid employment as soon as possible, like in the contributory unemployment system.[624]

This approach was confirmed by the Central Court of Appeal (*Centrale Raad van Beroep*) in a judgment of 8 February 2010, in a quite similar case.[625] The Court confirmed that in applying a sanction, a proportionality test had to be held to assess possible violation of article 4 of the ECHR, in which four factors had to be

[624] Vonk, G., "Hunger as a policy instrument? Some reflections on workfare policies and the prohibition of forced labour", (Revised) Paper presented at the FIAN conference *The Netherlands and the Right to Food in National and International Perspective,* held in Utrecht 15 October 2007; Vonk, G. and Zondag, W., "Passende arbeid: nog steeds een levend begrip?", *Serie Onderneming en Recht*, nº 50, 2009

[625] Eleveld, A., "Arbeidsplicht, rechtvaardigheid en de grondslagen van het socialzekerheidsrecht", in *Netherlands Journal of Legal Philosophy*, n° 41, 2012, 28

taken into account: 1) the characteristics of the activity (job/training/…) in relation with the possibilities, qualifications, experience and family situation of the unemployed; 2) the duration of the period of unemployment; 3) the contribution of the activity towards integration into the labour market, 4) the severity of the sanction. Work-first activities should thus not unreasonably burden their target, be adapted to the individual situation and give perspectives on reintegration in the labour market.[626]

The main conclusions to be drawn from that jurisprudence are thus that article 4 ECHR can be seen to be applicable to sanctions consisting in lowering benefits, that proportionality between the sanction and the violation of the obligation to reintegration has therefore to be observed, and that it has to be proven that reintegration measure can have a positive impact, taking into account personal circumstances of the unemployed.

On the other hand, this jurisprudence is applicable to the participation in measures promoting chances of reintegration, but not on the condition of reintegration itself, and it is doubtful that it could justify the application of a reasonable proportionality test to the acceptance of a suitable job under the WWB, given the extremely wide definition of the latter.

Sanctions were also modified, suppressing fines, and changing a system of benefit withdrawal for one of benefit adjustment to the circumstances of the case. It is the municipal authority which has to define the cases of non-compliance with the obligations under the

[626] *Ibidem*, 33

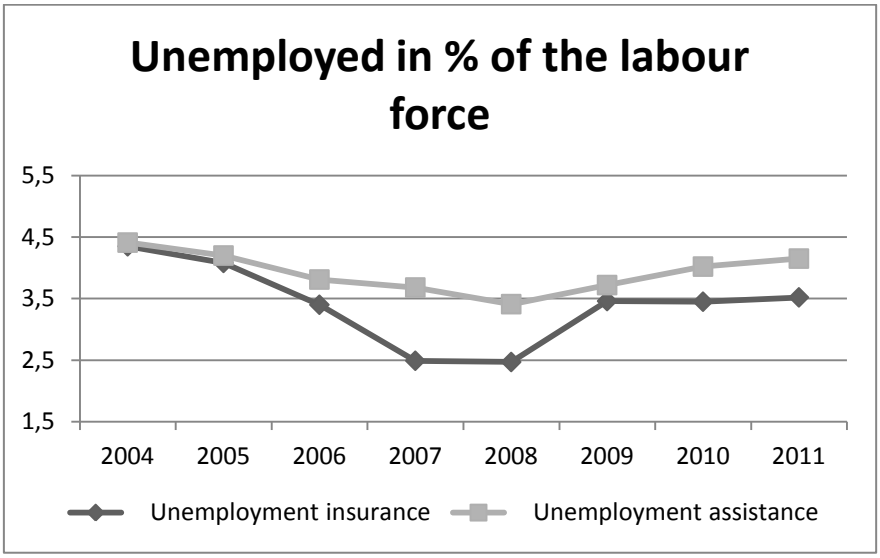
law, under which grave misconduct, but also the forms of behavior which express a lack of conscience towards the recipients´ responsibility for securing his livelihood.[627]

It has been shown that all those changes did not really have effects on the number of payments of benefits, which continued to vary more in function of overall economic performance. This confirms that the scheme has served to absorb unemployed who have run out of insurance benefits. Financial incentives for municipalities for lowering the numbers of benefit holders had some influence on limiting entries to the scheme, but other schemes, like benefits for young disabled persons, saw an increase in beneficiaries, which suggests another movement of absorption. Also, the work-first approach, reinforced by those same financial incentives, made that a relatively high percentage of persons returned to the scheme after employment, with no real increase in durable work participation.[628]

Moreover, the following graph shows that the proportion between unemployed within the contributory scheme and the assistance scheme, while being quite similar in the beginning, evolved into an ever higher part of unemployed in the assistance scheme. The gap closed with the beginning of the crisis, suggesting that the contributory scheme absorbed a great part of job losses in a first phase, but after that, it started widening again.

[627] Art. 18.2 WWB
[628] Blommenstijn, M., Kruis, G., van Geuns, R., "Dutch municipalities and the implementation of social assistance: Making social assistance work", *Local Economy*, n° 27, 2012, 623-625

Graph 19: Evolution of Unemployed in contributory and non-contributory unemployment scheme in the Netherlands (2004-2011)



Source: own elaboration from the OECD online database 2014

This might have been produced by the ever stricter limitation of maximum duration of the contributory system, as well as a generally higher qualifying periods for which the average maximum duration of benefits has decreased.[629] In 2007, 25% of new unemployed had right to a maximum duration of benefits of 6 months, 15% between 6 and 12, 14% between 12-18, 15% between 18 and 24, and 30 % between 24 and 38. This decrease of average benefit duration can be seen in the increase of recipients of assistance benefits since the beginning of the century. Therefore,

[629] UWV, "Invloed van verkorting van de maximale WW-duur", kennismemo 10/09 http://www.uwv.nl/overuwv/Images/Invloed_verkorting_maximale_WW-duur.pdf (last visit: 06/05/2014)

more unemployed, generally younger and women,[630] flow faster into the assistance scheme (if they do not find an acceptable job), with lower benefits as a consequence, as well as an obligation to accept almost any (legal) job, whatever its characteristics. Therefore, the system itself provides for a gradually higher pressure on the unemployed to reintegrate the labour market due to the status change passing into unemployment assistance involves in terms of balance between rights and obligations.

II.1.2.3. Reforms proposed after the crisis: re-commodification through further hollowing of the notion of suitable employment

Finally, the crisis brought pressure for a new reform of the system. Legislation (Wet Werk naar Vermogen) integrating the WWB with other assistance schemes for partial disabled, involving substantial cutback on the budgets for reintegration, was presented, but the fall of the government in 2012 led to its abandonment and the presentation of a toned-down version, de *Participatiewet*, which will hand to the municipalities the responsibility for integration of persons with disabilities.

[630] UWV, "Invloed van verkorting van de maximale WW-duur", kennismemo 10/09 http://www.uwv.nl/overuwv/Images/Invloed_verkorting_maximale_WW-duur.pdf (last visit: 06/05/2014)

On the other hand, a new law project (*Wet Werk en Zekerheid*) has been introduced before the Parliament in November 2013, implementing the following changes in the *Werkloosheidswet*:[631]

- After 6 months of having received unemployment benefits, the notion of "suitable job" will imply "any job which suits the capacities and qualifications of the worker", which would mean that jobs according to lower qualifications as well as salary will have to be accepted. Moreover, the notion of "suitable job" during the first 6 months will not be interpreted any more according to non-binding guidelines (which established that suitable job meant a job of the same level as the previous job), but will be defined by a government regulation.[632] It is important to remind that, concerning the matter of an initial period during which an unemployed can refuse a job not matching his previous skills, the Netherlands have been viewed by the Committee on Social Rights to be in a situation of non-conformity with article 12-1 of the European Social Charter.
- As a "compensation" for the latter measure, the system which provided for the payment of benefits for the difference of working hours between the previous and the new job to be accepted, or "hours compensation system", is

[631] Voorstel van wet tot wijziging van verschillende wetten in verband met de hervorming van het ontslagrecht, wijziging van de rechtspositie van flexwerkers en wijziging van verschillende wetten in verband met het aanpassen van de Werkloosheidswet, het verruimen van de openstelling van de Wet inkomensvoorziening oudere werklozen en de beperking van de toegang tot de Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers (Hereinafter referred to as Project Wet werk en zekerheid)
[632] Project Wet Werk en Zekerheid, 93-94

replaced by one of "compensation of remuneration", similar to the system already in place for long-term unemployed. This means that, upon accepting a job with a lower salary, 70% of the difference between the new and the previous salary will still be paid out as unemployment benefits, on top of the new salary, for the rest of the duration of benefits.[633]

- the maximal duration of benefits will be gradually reduced from 38 to 24 months, which will affect above all workers with long employment tenure; also each worked year up to 10 years will give right to a month of benefits, as before, while the years worked over 10 years will only "generate" half a month of benefits, involving an overall decrease in actual duration of benefits.[634]

The contributory scheme will thus be reduced again, which will lead to a more important flow of unemployed towards the assistance scheme.

The end of the 2000s saw also attempts to reform dismissal protection of standard contracts, and some aborted proposals for

[633] Project Wet Werk en Zekerheid, 94

[634] It should be noted that the government (Project Wet Werk en Zekerheid, 91) refers to a document of the European Commission (European Commission, "Benchmarking unemployment benefit systems", economic papers 454, may 2012) which states that the unemployment protection system is "relatively generous", to motivate the reduction, estimating that such reduction would bring the duration of benefits towards what is "internationally accepted". However, in the document of the Commission, the "relative generosity" of the Dutch benefits is treated with regards to their level. The chapter about duration of benefits does not mention the Netherlands at all. This shows, again, that benchmarking within the OMC is prone to biased political use by governments to justify limiting social rights.

reform have been made. Currently, the same legislative project which intends to reform the contributory unemployment system, the *Wet Werk en Zekerheid*, also proposes a simplification of the dismissal procedure. With the new system, the employer would lose the option between the more rigid, but cheap UWV procedure and the more flexible, but expensive procedure before the courts. Dismissals based on grounds related to the company (economic problems, reorganization,…) shall need previous authorization from the UWV, while the courts will intervene in dismissals based on the person of the worker (mainly disciplinary dismissals). The compensation which the worker could receive through the judicial procedure is suppressed, and replaced by a "transition compensation" if there is a seniority of at least two years in the company, amounting to 1/3 of monthly salary for every 6 months worked in the company, and will also be due in case of non renewal of a temporary contract.

Concerning the proposed reform of protection against dismissal it is worth to note that, while it has remained basically untouched over the last decade, suddenly in 2013 the European Union discovered that the country should address "labour market rigidities by accelerating the reform of employment protection legislation and the unemployment benefit system".[635] While this recommendation did not really appear out of the blue, as the 2012 Recommendation already asked to address "rigidities" without being more specific,

[635] Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of the Netherlands and delivering a Council opinion on the Stability Programme of the Netherlands, 2012-2017 (2013/C 217/22)

the fact that it appeared now when the so-called "rigidities" are the same since a long time can give rise to several observations. Firstly, it could be that the inclusion by the Dutch government of its plans to reform protection against dismissal and unemployment benefits was included in its National Programme (actually, the precedent government, ousted in 2012, already had planned such a reform, and the new coalition agreement contained a watered down project, as it the former was quite controversial in a relatively well functioning labour market), which brought the Commission to "legitimize" those purported changes. Secondly it shows the lack of genuine substance of the implementation of the Employment Guidelines and the extreme volatility of their application through recommendations, depending extremely on political and cognitive circumstances, or even pure coincidence. Thirdly, it is again a confirmation of the blind re-commodification orientation of the process as well as its substance.

Also, the November 2013 *Wet Werk en Zekerheid* project of law proposes to alter the 3-3-3 rule, limiting fixed-term contracts to a maximum of two years. This is to be welcomed, given the tendency of collective bargaining to adapt the 3-3-3 rule in favor of the necessities of employers observed here above.

So, even in times of crisis, the Netherlands seem not to have forgotten re-regulation measures, even if marginal, like the proposition in the current projected law, where lower protection of standard contracts is accompanied by corresponding measures to increase protection in atypical work (correcting the deficiencies of

the 3-3-3 rule and introducing equal termination compensation for standard and fixed-term contracts). This shows that the Netherlands have not abandoned a more integrated approach towards labour market regulation. It is not sure whether The Netherlands are a *flexicure* country, given that flexible workers are not totally protected from adverse consequences of flexibility. But it is clear that labour law reform processes express some concern towards attaining *flexicurity*, which is shown by the several interventions of re-regulation occurred since the 1990s.

II.2 Evolution of Active Labour Market Measures: the evolution towards an integrated system with commodifying conditions

II.2.1 Re-commodification of the structure of provision of ALMPs through obligatory "quasi-markets"

In the 1980s, contributory unemployment benefits were administered by the *Bedrijfsverenigingen*, industrial insurance agencies managed by the social partners. However, there was growing political opposition to their alleged failure to reintegrate workers, as well as their focus on easy recognition of benefits and funneling of unemployed to the most generous social security schemes (above all the disability scheme) as a way to defend workers interests and preventing conflict within companies through creative solution to workforce management problems.[636] By the 1990s, more than 11% of the working age population was receiving disability benefits, with a substantial share thought not to fulfill the criteria, and the costs of the scheme outgrew the decrease in costs of the unemployment schemes resulting from the first reforms of the end of the 1980s. Moreover, despite pressure put by the state on the municipalities and *Bedrijfsverenigingen* to intensify reintegration efforts of unemployed by defining more tightly obligation to search

[636] Goudswaard, K.P., "Gedonder in de Polder: een beknopte geschiedenis van de veranderingen in de uitvoeringsstructuur sociale zekerheid", in Albregtse, D.A., Bovenberg, A.L., Stevens, L.G.M. (eds.) *Er zal geheven worden! : Opstellen, op 19 oktober 2001 aangeboden aan prof. dr. S. Cnossen ter gelegenheid van zijn afscheid als hogleraar aan de Erasmus Universiteit Rotterdam*, Kluwer, Deventer, 2001;

for a job, accept suitable employment and participating in employability assessment and training measures, the resulting changes did not result in a decrease of unemployed, despite steady growth.[637]

Therefore, between 1995 and 2002, the *Bedrijfsverenigingen* were forced on the one hand to merge into fewer structures, and on the other hand to cooperate with commercial insurers, before being abolished altogether. Their role in the public local job placement services was terminated and the latter were centralized and nationalized. Finally the 2001 SUWI law (Structure Implementation Work and Income) created the UWV (*Uitvoeringsorgaan Werknemersverzekeringen*) as a governmental agency charged with the administration of the contributory scheme. The CWI (*Centrum Werk en Inkomen*) were also created as one-stop-shops for the several benefit systems (both contributory as assistance and other disability related benefits), while also taking over the tasks of the public employment services. They were given a gateway role, including job brokerage, assessment of needs and disadvantages of unemployed, some assistance to short-term unemployed, and referral of those who need more attention to UWV or municipalities. For further reintegration measures, both UWV and municipalities were forced to tender all employment and integration

[637] Hoogenboom, M., "The Netherlands: two tiers for all", in Clasen, J. and Clegg, D. (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011, 82-83; van Oorschoot, W., "Balancing work and welfare: activation and flexicurity policies in The Netherlands, 1980-2000", International Journal of Social Welfare, nº 13, 15-27, who shows that activation policies have at best further facilitated labour-market participation of those who would have had a job anyway;

service to profit-driven private contractors, to which unemployed were referred in function of their categorization. Before 2001, the referral of unemployed to private reintegration contractors already existed, but criteria for tenders and reintegration measures were dictated by the government and the emphasis on the determination of the forms of help rather than the needs of the unemployed was deemed to lead to the simple referral of unemployed to fixed programs rather than genuine case management centered on individual needs.[638] Therefore setting criteria for tenders and the elaboration of reintegration programs was decentralized to the UWV and the municipalities, with which performance targets were negotiated. This however created further incentives for the latter to center their attention on fast reintegration, to the detriment of employability enhancing measures for unemployed with greater reintegration difficulties.

Tenders for reintegration generally involve payment on basis of reintegration into employment subjected to social security contribution for at least six months, and is generally structured on employment success fees on the one hand (20 to 50% of the total payment) and direct payment for services on the other. Following critics on the one-size-fits-all character of the services, the government introduced in 2004 a system of Individual Reintegration Agreements, negotiated between the individual

[638] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 190

unemployed and the UWV (with the unemployed having however no contractual rights, as the final decision pertains to the UWV), containing reinsertion obligations, but which involves a secondary reintegration market where individual unemployed can purchase directly reintegration services from providers at slightly higher fee rate than the tender system.[639] Generally however, the expectations at the heart of the introduction of private reintegration markets seem not to have been met. Next to difficulties of quasi-markets for employment services to living up to the pre-conditions for a well-functioning market (absence of real competition due to a lack of sufficient competitors, necessity of regulation and administrative steering, high transaction costs), they did not involve the development of innovative practices, did not provoked significant cost reductions nor important effects of reintegration, inevitably led to neglecting the needs of unemployed needing complex, and thus costly initiatives, and finally involved less visibility due to complexity and a certain level of confidentiality of business contracts, leading to blurred political accountability.[640]

In 2004, also, the WWB further altered the system concerning the municipalities, decentralizing management of benefits and reintegration measures by the assignment of fixed budgets calculated in function of objective criteria. In 2006, the obligation to

[639] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 193

[640] Bredgaard, T. and Larsen, F., "Quasi-markets in Employment Policy: Do They Deliver on Promises?", *Social Policy and Society*, vol. 7, nº 3, 2008, 341-352;

tender out reintegration services for municipalities was suppressed, leading a great part of the latter to offer the services themselves, which might be seen as confirming the lack of efficacy or efficiency of reintegration through market actors.

Finally, in 2010, the CWI were integrated within the UWV and called *UWV WERKbedrijven*.

Public Employment Services have thus been subject to a process of integration, which reinforced the coupling of active and passive support. The UWV WERKbedrijven are now the only attention points towards which any unemployed has to present itself, and which assess the eligibility for benefits, refers the unemployed to the relevant benefit agency (UWV, municipality,…), assesses his or her chances of reintegration before referring him or her to a reintegration agency (private contractor or services of the municipality) for activation.[641]

II.2.2 Active Labour Market Policies: limited rights with commodifying conditions

ALMP measures are referred to in legal text as "reintegration measures", and within the context of the Werkloosheidswet, are to be decided by the UWV, under its legally defined "task to promote the insertion within the labour process" of persons receiving

[641] Hoogenboom, M., "The Netherlands: two tiers for all", in Clasen, J. and Clegg, D. (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011, 90

unemployment benefits as well as workers which have the knowledge that their employment contract ends within four months.[642] Within the contributory system, the reintegration measures however can only be provided through contracted private Reintegration companies (*Reintegratiebedrijven*).

To the task of the UWV to promote reintegration corresponds a (too) broadly framed right to "support to work reintegration".

A great part of the reintegration measures now included in the law is the result of experiments led by the PES under the 1999 Law on experiments under the Law on Unemployment (*Wet experimenten WW*), which provided the PES the possibility to make exceptions to the general rules on reintegration measures to help persons with additional labour market integration difficulties. Chapter XA of the WW still gives the possibility to the UWV to organize experimental measures, to which job seekers are obliged to participate.

Generally, registration with the UWV as well as the first orientation measures is effectuated online, with a possible online interaction with a counsel. Real-life assistance is however also provided if needed. After three months, an interview is organized with the job seeker, to discuss further necessary interventions as well as verify if its job searching obligations have been respected.

According to article 76 WW, training can be provided, for a period of maximum two years with exemption to look for and accept suitable employment and maintenance of benefits, if it is deemed

[642] Art. 30 a Wet structuur uitvoeringsorganisatie werk en inkomen

necessary. The governmental regulation *Scholingsreglement WW* provides two main conditions to assess the necessity: 1) the worker cannot find a suitable job without training or education and the proposed training is adequate for that purpose, and 2) the training has to be considered relevant for the labour market. The first condition could be seen as positive from the point of view of de-commodification, but the second, as it takes the necessities of the labour market even more into account, introduces a commodifying logic within the definition which is totally disconnected from the interests of the unemployed. One can consider that the training provided will be decided in function of the necessities of the employers at that moment. On the other hand, the existence of criteria for providing training in a governmental regulation, even if biased towards a work-first approach, allows a conceptualization of training of unemployed as a right of the latter, which can be claimed before courts, as expressed by the judgment of the *Centrale Raad van Beroep* of 9 January 2013 commented here above in subsection II.1.2.1. "Reform of the contribution system".

Another reintegration measure, which could be seen as enhancing the possibilities of a durable integration of jobseekers within the labour market, and within that perspective, could be seen as enabling, and thus less commodifying, is the "proof job". This is one of the measures which have been introduced in the law after being organized on an experimental basis. It consists in an unpaid job with any employer, with maintenance of benefits, adapted to the capacities of the worker, for a maximal period of 6 months, in case

a real possibility exists that this job would end in an employment contract of more than 6 months.

Another experiment which was finally integrated within the law were start-up subsidies. An unemployed can receive permission to start a business or work as an autonomous worker, with maintenance of benefits during a maximum period of 26 weeks (while still being considered as employed worker for social security purposes, and not autonomous worker). The conditions are that this activity is not executed in favor of his previous employers and that the activity can reasonably be thought to structurally provide for his subsistence in the future. Given those characteristics, the measure can also been seen as enabling, providing some security within the re-commodifying aspect of transforming oneself in an autonomous worker.

Also, unemployed who are deemed not to be capable to be placed in an employment can be forced to provide unpaid work, for a maximum period of two years. That work is defined as work which is complementary to regular work and which cannot lead to substitution of regular jobs. It is work generally provided under the social assistance scheme, the conditions of which are applicable, under supervision of the municipalities.

Given the wide competences of the municipalities, measures offered within the context of the WWB are very diverse and difficult to list. The WWB changed the financing of reintegration measures from a system of reimbursement by the state of the costs of the measures to a system of double budget. A first budget is dedicated to the

payment of benefits, calculated in function of objective criteria and the possible surpluses of which stays with the municipalities and the possible deficits of which have to be financed out of their general budget. The second, limited, budget is dedicated to reintegration measures, the surpluses of which have to be returned to the state. This gives the municipalities incentives to push a maximum of benefit holders in the labour market, while managing the reintegration budget according to cost-effectiveness principles. The effectiveness is gained on the one hand by prioritizing the cheaper measures, like job counseling and job search support, to the detriment of more expensive measures like training, and on the other hand by concentrating on the unemployed who are easier to reintegrate. This led to centrality of the Work First approach within the WWB, with the reintegration services (generally contracted out to different providers in function of the category in which the unemployed is classified) shifting from help to overcome barriers to work towards help to search (and accept any) work more effectively.[643] This does not mean however that persons with more reintegration difficulties are left alone. To the extent that Work First helps limiting the entry into benefits and budgets start giving surpluses, some municipalities start dedicating more attention to "longer-term" unemployed, through intensive programs, combining job search activities and training (only determined by market

[643] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 196; van Berkel, R., "Social Assistance Dynamics in the Netherlands: Exploring the Sustainability of Independence from Social Assistance via Labour Market Inclusion", *Social Policy and Society*, Vol. 6, nº 2, 2007, 127-139

demand) and/or subsidized employment.[644] However, despite those developments, it seems that long-term unemployed in work first projects still tend to get trapped between low-paid, precarious jobs and periods on benefits.[645]

Finally, it is important to point out that the 2006 *Wet Werk en Inkomen naar Vermogen* intensified reintegration of workers with disabilities, through a combination of reintegration obligations on part of the latter with obligations for the employers to participate by offering employment services and, to a certain extent, to offer adapted jobs.

In conclusion, the system of reintegration measures is extremely complex, because of the decentralization within the WWB and the contracting out of most reintegration services within a competitive market. The diversity of practices, goals and procedures followed by the different actors makes evaluation difficult. The occurrence of creaming (selecting unemployed which are easier to reintegrate) and parking (leaving more problematic unemployed out of the programs) following considerations of cost-effectiveness does not help to solve the picture. Therefore, research seems to be quite negative about the results of the Dutch system of reintegration and concludes to its high costs and the very limited effects the changes

[644] Bosselaar, H., Bannink, D., van Deursen, C., Trommel, W., "Werkt de WWB", Report to the Ministry of Social Affairs, 2007, 47-51

[645] Eleveld, A., "Arbeidsplicht, rechtvaardigheid en de grondslagen van het socialzekerheidsrecht", in *Netherlands Journal of Legal Philosophy*, n° 41, 2012, 47; Bruttel, O. and Sol, E., „Work first as a European Model? Evidence from Germany and the Netherlands", *Policy and Politics*, n° 34, 2006, 69-89; Kok, L. and Houkes, A., *Gemeentelijk reintegratiebeleid vergeleken*, Den Haag: Raad voor Werk en Inkomen, 2011;

of the beginning of the century (contracting out and changes in WWB reintegration) have had.[646]

On the other hand, the Dutch system of unemployment protection presents important characteristics which should be seen as important for the present research. As already explored by Sol *et alii*,[647] while it does not go as far as being governed by "a legal doctrine of activation" given that socio-economic steering approaches (or policy), as opposed to legal approaches (or law) are still important in the conceptualization of activation, solid legal standards influence and shape activation policy. A conceptualization of activation in legal terms is important from the point of view of a rights approach, as it permits an approximation which is impossible if activation is only understood in terms of policy. The framing of ALMP as individual reintegration support measures approaches them towards the person of the unemployed as well as their integration within the nexus between rights and obligations. Other instruments like the individual reintegration contract also reinforce such integration. The presence of a certain number of criteria in the legal definitions of the obligations of the

[646] van Dijk, J. *et alii* "Werk is overal, maar niet voor iedereen. Aan de slag met een doelmatig arbeidsmarktbeleid", Report of the Nicis College voor Stedelijke Innovatie, Den Haag, 2008, which states that integration is extremely expensive (around half a million euro for successful reintegration), while the new system seems only to have bettered overall integration chances of benefit recipients by 3 %; Hoogenboom, M., "The Netherlands: two tiers for all", in Clasen, J. and Clegg, D. (eds.), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe*, OUP, Oxford, 2011, 75-99;

[647] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008,

unemployed also allows Courts to assess more easily decisions of the intervening agencies and applying proportionality tests. Regulations on particular measures, for example about the necessary character of training enhance also legal approaches in controlling the agencies' discretion. Finally, sistematic approaches on part of the UWV WERKbedrijven, like the offering of reintegration measures after three months of unemployment also imply the concrete character of activation, making it easier to grasp under a legal perspective.

However, as already argued here above, most of the legal concepts underpinning the Dutch system of labour market reintegration are themselves still quite imbalanced in terms of rights, and the socio-economic policy elements (profit-driven parties, principle of cost-effectiveness), next to their commodifying character, hold a genuine de-commodifying conceptualization of rights to protection against unemployment at a distance. But still, it is undeniable that the legal standards present in the Dutch system are at least a base on which de-commodification strategies could have stronger foundations.

II.3 Constitutional elements: the importance of international law

Article 20 of the Constitution, under the title *Bestaanszekerheid* (which could be translated as minimum of subsistence, but which litterally would mean „security of existence"), contains the social rights related to the obligation of the state related to social security and assistance. Article 19 contains the obligation to promote sufficient employment (not full employment).

Article 20 is further subdivided in three paragraphs, as follows:

1. It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.

2. Rules concerning entitlement to social security shall be laid down by Act of Parliament.

3. Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to public assistance.

While the first paragraph could be compared with „social state clauses" of Germany or Spain as to its content, it does not seem to have been given the same legal function.

Paragraph 1 and 2 are moreover considered as general instruction norms where the state has an important scope of formative power. As such, for example, it was not considered problematic under

article 20 of the Constitution to reform and privatize totally the system of sickness benefits scheme in the 1990s. Against doubts voiced from consultory organs, the government considered that such entirely private social security system could not be considered contrary to article 20, under the condition that the legislative framework would correct the negative forces of the market (which was done by forbidding selection of employees on the basis of medical tests and a residual public system was kept in place as a safety net). While in 1998, the Committee of Independent Experts of the ESC considered the privatization to be contrary to article 12-3 of the Charter, because it would undermine the principle of solidarity by not allowing for the spreading of risk, after the different justification brought forward by The Netherlands, the Committee of Social Rights seems to have accepted the reform. However it still deems that the situation has to be monitored closely given the possible negative side effects.[648]

Finally, paragraph 3 of article 20 (the right to public assistance) is considered to give much less leeway to the legislator, and has been implemented through the WWB.[649]

However, the practical impact, from a binding legal perspective, of those constitutional rights, is limited, as article 120 of the Ducth constitution provides that the constitutionality of acts of parliament,

[648] Vonk, G. And Marseille B., „Country Report on The Netherlands", in Becker, U, Pieters, D., Ross, F., Schoukens, P., (eds.) *Security: A General Principle of Social Security Law in Europe*, Europa Law Publishing, Groningen, 2010

[649] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008,

as well as of treaties shall not be reviewed by the courts. The parliament is thus the sole institution competent to assess the conformity of laws to the Constitution.

On the other hand, article 93 provides that the provisions of treaties, as well as of resolutions of international institutions which may be binding on all persons by virtue of their content are binding after their publication, and article 94 provides that national legal provision in conflict with treaties which are binding on all persons, or with resolutions by international institutions shall not be applicable. This puts international law in a central position for the judicial review of laws.

Therefore, the criteria of self-executiveness (as expression of the notion of „binding on all persons") of treaties is important, as it would permit judicial review. The criteria for assessing the latter are left to be determined by the courts, and direct effect of those treaties does not depend on the intentions of the drafter of the treaties.[650] The *Hoge Raad der Nederlanden* (the Dutch Supreme Court), in a judgment of 30 May 1986, considered that art. 6-4 of the European Social Charter (right to industrial action) had direct effect, given that it could not be inferred from the Charter and the „travaux préparatoires" that such effect had been excluded, and thus only the content of the article was decisive to ascertain that effect, in that it obliged the legislator to make rules of a certain content or was of such a nature that it could be applied immediately as objective law,

[650] Alkema, E.a., „International Law in domestic Systems", Electronic Journal of comparative Law, vol. 14, nº 3, 2010,7

and would therefore give competence to the court to review a lower decision applying the treaty.[651] This view was confirmed in a more recent decision of the same Court of 23 April 2013, where the same article of the ESC was used to interprete the notion of „illegal occupation“ of the premises of the employer in a manner favorable to the workers.[652] The *Centrale Raad van Beroep*, the highest court in terms of social security cases, in a judgment of 26 May 1996, found that articles 10 of ILO Convention 102 (providing for the possibility of participation of women who give birth in the medical costs, provided that they involve no excessive burden) and article 4 of ILO Convention 103, which provides that the medical benefits to which women have right in case of pregnancy have to be provided by social insurance systems or by means of public funds, as a matter of right, given their imperative form and their minimum standards character could be invoked by claimants to review the rights conferred by national law. The Court accepted and applied the interpretation made of those articles by the ILO Committee of experts, which involved that in case of maternity, no participation in the cost of postnatal care could be demanded.[653]

Generally speaking, provisions which provide a right to „all“ or involving an absolute prohibition (or, like in the previous case, the interpretation of which involves an absolute prohibition) would be

[651] Hoge Raad der Nederlanden, Judgment of 30 May 1986, NJ 1986, 688
[652] Hoge Raad der Nederlanden, Judgment of 23 April 2013, S 11/04612, LJN BY5352
[653]

considered as self-executing in the meaning of the Constitution.[654] While the self-executing character of article 12 of the European Social is not clear, it could however be defended that article 13 of the European Social Charter, on social assistance, could be invoked, as it refers to the obligation of the state to ensure adequate assistance to „any person" who is unable to secure adequate ressources.

On the other hand, non-self executing provisions can still form the basis for review of administrative regulations, or finding application through their function as aid to the interpretation of laws. Moreover, it seems that tort-action against the state can be undertaken for the non-compliance with non self-executing provisions.[655]

This brings us also to the role of the decisions of judicial or quasi-judicial bodies interpreting international treaties. Those could be binding under article 93 of the Constitutions by their being construed as decisions of international organisations. However, the doctrine, as well as the courts, in the case of the ECtHR, the General Comments of the Committees supervising the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights,[656] seem to incorporate them rather through their consideration as authoritative

[654] Akkermans, P.W.C., Bax, C.J., Verhey, L.F.M., *Grondrechten. Grondrechten en grondrechtsbescherming in Nederland*, Kluwer, The Hague, 2005, 46

[655] Alkema, E.a., „International Law in domestic Systems", Electronic Journal of comparative Law, vol. 14, nº 3, 2010

[656] *Centrale Raad van Beroep,* Judgment of 11 October 2007, who referred to General Comment nº 3 of the Committee onf Economic Social and Cultural Rights, on the nature of the States' obligation under the Covenant, however to refuse direct application of articles 9, 11 and 13 of the Covenant

interpretation of those treaties.[657] It is thus not impossible to consider that decisions of the European Committee of Social Rights could receive the same treatment.

This pervasiveness of international law and the monopoly of the legislator to review the constitutionality of laws might be seen as one of the factors for which provisions of international law, like article 4 of the ECHR have been used to limit the most extreme forms of activation in the Dutch context. Concerning the latter, it is also contended that sanctions under the WW and the WWB systems could also be reviewed under article 6 of the ECHR (right to a fair trial).[658]

[657] *ibidem*, 11-12

[658] Sol, E., Sichert, M., van Lieshout, H. and Koning, T., "Activation as a Socio-Economic and Legal Concept: Laboratorium the Netherlands" in Eichorst, W., Kaufmann, O., Konle-Seidl, R., *Bringing the Jobless into Work. Experiences with Activation Schemes in Europe and the US*, Springer, Berlin-Heidelberg, 2008, 175

Chapter III. Germany: re-commodification through assistancialisation

III.1. Evolution of unemployment benefits: from status protection to integration of social assistance

III.1.1. 80-90s: A period of cost containment

III.1.1.1. Initial system as basis of further developments

The end of the 70s and the 80s saw the abandonment of full employment as a prior macroeconomic goal, substituted by price stability, modest retrenchment in labour market policy and ambivalent unemployment protection reform, reinforcing protection for some groups, above all older workers, while restricting protection and access to job starters and persons with shorter contribution periods, for reasons of cost reductions. Open unemployment was reduced through reduction of labour supply, such as early retirement schemes or parental leave regulations which institutionalized career breaks for mothers lasting often longer than three years and reinforcing the male breadwinner

model.[659] This all relieved pressure on the unemployment protection system (in the narrow sense) and thus relieved pressure for its further reform.

Unemployment protection was organized according to a three-tier system. A classic contributory scheme of employment insurance, with a maximum duration of 12 months (prolonged in 1987 to 18 months and 32 months for persons older than respectively 42 and 53 years), was complemented with a tax-financed means-tested assistance scheme for those exhausting the insurance scheme or having insufficient contribution record to accede to the latter (with although a minimum contribution period of 150 days). Those having no access to the latter scheme could be covered by the general social assistance scheme financed and managed by the municipalities.

Both contributory and assistance benefits were determined in function of a percentage of previous salary, even if the latter was means tested, reinforcing the status-protecting character of German unemployment protection, and its commodifying links with previous presence in the labour market.

To access the contributory scheme, a minimum contributory period of 12 months in a reference period of 3 years was required. Those perceiving benefits had the obligation to look for a job as well as accept suitable employment. The replacement rate was (and still is)

[659] Dingeldey, I., „Germany: moving towards integration whilst maintaining segmentation", in Clasen, J., Clegg, D., *Regulating the risk of unemployment*, OUP, Oxford, 2011, 56-57

60% of the (fictitiously calculated in function of several factors) net previous salary (67% if children), with a maximum corresponding to the maximum salary taken into account for calculating contributions, and a minimum corresponding to the minimum retirement pension (*Ausgleichzulagenrichtsatz*).

The law considered as unemployed any worker temporarily without an employment relation or having an employment relationship of less than 18 hours per week.[660] Moreover, rights to benefits were linked to the obligation to be "available for job placement", which involved 1) accept reasonable (*zumutbar*) employment, 2) participate in reasonable training activities, and 3) be able to visit the employment services daily as well as to be contactable by those.

The notion of reasonable employment involved striking a balance between the interest of the unemployed and the "payers of contributions", taking into account all the circumstances of the case. As such, previous occupation and qualifications, family or special relational circumstances, duration of unemployment, worse salary and working time conditions and location of the new employment had all to be taken into account.[661]

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[660] § 101 *Arbeitsforderungsgestez*

[661] Therefore, within the contributory system, as established by case-law, the foundation of the sanctions is grounded on the insurance character of the system, and thus on "the need for the community of insured to defend itself against risks for which the insured is himself responsible or in the remedy of which he does not participates". Therefore a suspension of benefits has to be imposed "when the insured, taking into account all the circumstance of the individual case and striking the balance between his interests and the interests of the community of insured, if another behavior of the insured can be expected". Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 243;

III.1.1.2. First reforms: introducing activation as an option for the unemployed

The reform of 1997 (applied from 1998 onwards) refounded the *Arbeitsforderungsgesetz* into a third book of the Social Code (*Sozialgesetzbuch III*). It introduced the "Integration contract" (*Eingliederungscontract*) as a tool the Public employment services proposes to registered job seekers (but conceptualized as a faculty of the PES without obligation for the unemployed to accept), containing their obligations as well as detailing the different activation measures tailored to their characteristics.[662] There is however no right on part of the unemployed to the introduction of particular measures within the contract.[663]

The reform also inaugurated a new catalogue of active labour market measures (see section II) which presented a departure from the job creation schemes of the beginning of the decade.[664] Budgets affected to active labour market policies have been above the EU 15 average throughout the 80s and have augmented in the 90s due to the consequences of reunification, with a high proportion dedicated to job creation and training,[665] aimed at stabilization of individual

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Niesel, K. (ed.), *Arbeitsforderungsgesetz – Kommentar*, C.H. Beck, München, 1997, 648-649;

[662] Bieback, K.-J., "Kooperation im Zwangsverhäaltnis. Teilhaberechte und Vertragsstrukturen in der Arbeitsmarktverwaltung", *Zeitschrift für Rechtssoziologie*, n° 30, 2009, 186

[663] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 149

[664] Dingledey, I., "Between workfare and enablement – The different paths to transformation of the welfare state: a comparative analyisis of activating labour market policies", *European Journal of Political Research*, n° 46, 2007, 829;

[665] Clasen, J., "Les nouvelles politiques de l'emploi au Royaume-Uni et en Allemagne", *Critique internationale*, nº 43, 2009, 43-44.

benefit claims and hiding open unemployment.[666] The new measures, however, did not involve a radical departure from the previous model as they were aimed at stabilizing human capital more than part of programs to force people back into work.[667]

The reform also lowered the maximum employment hours per week which can be combined with benefits to 15,[668] and adapted the availability criteria. It made more explicit the obligation to actively look for employment[669] (introducing it in the definition of unemployment[670]), as well as redefined slightly the state of availability and reconstructing it as an element of the active search for employment. Availability now involves 1) the possibility (or employability - *Arbeitsfähigkeit*) as well as 2) the will to take on suitable employment, in the absence of serious grounds. The *Arbeitsfähigkeit* involves the obligation to accept and hold a suitable "employment under the standard conditions of the labour market for which the unemployed comes into account" as well as to participate in working life reintegration measures and "spatially and temporally be able to follow" those reintegration measures.[671] The

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[666] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 43

[667] Konle-Seidl, R., „Changes in the governance of employment services in Germany since 2003", IAB-discussion paper 10/2008, 8;

[668] This low threshold disadvantages part-timers, as it become more difficult to combine a part-time job with unemployment benefits, and foments marginal part-time work.

[669] Defining it further as "willing to and actually using all the possibilities to end the state of unemployment – § 119 (1) 1. *Sozialgesetzbuch* III

[670] The unemployed being the worker being temporarily out of employment and looking for employment for more than 15 hours per week. § 118 *Sozialgestezbuch* III

[671] § 119 (3) *Sozialgestezbuch* III

concept of suitable employment is broadened, to encompass "all employment corresponding to the abilities" of the worker, in absence of personal or general grounds for refusal.

The law itself defined some of those grounds (conditions below the law or collective agreement; lower salary, with a threshold lowering in function of the duration of unemployment; disproportionate travel time), and stated explicitly that the fixed-term character of employment or the fact that it does not coincide with the qualification of the worker does not involve in principle that the job is unreasonable or unsuitable, severing thus the link with the previous occupation, and transforming occupational protection into a mere decreasing salary threshold system.[672] On the other hand, the definition remains open, and are generally considered as unsuitable jobs those which run against the objectives of unemployment protection as defined by the law or constitutional rights of unemployed[673], or when given the personal circumstances (illness, family, care obligations), the acceptance of the job would disproportionally burden the worker.[674] It is also interesting that §

[672] Sell, S., „Entwicklung und Reform des Arbeitsförderungsgesetzes als Anpassung des Sozialrechts an flexible Erwerbsformen? Zur Zumutbarkeit von Arbeit und Eigenverantwortung von Arbeitnehmern", *Mitteilungen aus der Arbeitsmarkt– und Berufsforschung*, vol 31, n° 3, 1998, 539; Dingledey, I, „Germany: moving towards integration whilst maintaining segmentation" in Clasen, J., Clegg, D. (eds.) *Regulating the risk of unemployment*, OUP, Oxford, 2011, 59;

[673] For example, the Constitutional Court, in its judgment of 18 November 1986 (1 BvL 29/83), declared the exclusion of students from benefits contrary to the equality principle, given the insurance character of unemployment benefits, and, thus, the fulfillment of the same obligations in terms of contribution of unemployed students;

[674] Niesel, K. (ed.), *SGB III Sozialgesetzbuch Arbeitsforderung – Kommentar*, C.H. Beck, München, 2002, 336-340;

119 *Sozialgesetzbuch* III provided for an adapted notion of suitable employment for persons being previously in part-time employment for reasons of care of children or dependents, or during the contributory period corresponding to the unemployment benefits (in which case they cannot be obliged to take on full-time employment), or for homeworkers, when they have worked at home during the corresponding contributory period.

Concerning the conditions in which employment has been lost, the unemployment situation that can be attributed to the worker, for example for termination on his initiative of the employment contract (except if there is a justified cause, for which the same rules as the refusal of a job offer apply), or in case of termination by the employer for grave misconduct, does not exclude the worker from unemployment benefits, but causes an exclusion period of maximum 12 weeks,[675] after which the unemployed can start perceiving benefits for the remaining period corresponding to his contribution history, with a maximum of 75% of the total duration in case of termination of employment on his own initiative.[676] This exclusion period (*Sperrzeit*) was also the general sanction in case of refusal of a suitable job offer or the refusal to participate in active labour market measures (training etc…). Lesser infractions, like those related to the need to answers calls from the public employment services, are sanctioned with suspensions of up to 7 days.

[675] § 144 Sozialgestezbuch III (2002)
[676] § 128 Sozialgestezbuch III (2002) Niesel, K. (ed.), *Sozialgestezbuch Arbeitsforderung – SGB III – Kommentar*, C.H. Beck, München, 2002, 490-492

The non-contributory system (*Arbeitslosenhilfe*), although being means-tested, provided also for benefits calculated in terms of a percentage of the previous salary (53% of 57% if with children), with a reduction of 0,03 % per year after the first year, with a minimum of 50% of the so-called *Bezuggröße*, the latter corresponding to the average retirement pension.[677] Generally speaking, the conditions and characteristics of the scheme were the same as the contributory system, except for its means-tested aspect.

Finally, while the residual general social assistance scheme also contained activation measures, the "Help to Work" program, operated by municipalities with important discretion, benefit recipients had no access to the general integration measures, managed by the PES, contrary to the recipients of contributory and assistance unemployment benefits. Moreover, the law did not define the characters of the jobs to be accepted (although Courts tended to consider that any job would be considered acceptable), and implementation of the Help to Work program differed strongly according to municipalities.[678]

In short,[679] protection against unfair dismissal in standard contracts was (and is still) based on the idea of dismissal as *ultima ratio*, involving the assessment of proportionality between the causes of

[677] § 18 Sozialgestezbuch IV

[678] Eichhorst, W., Grienberger-Zingerle, M., Konle-Seidl, R., „Activation Policies in Germany: From Status Protection to Basic Income Support", *German Policy Studies*, vol. 6, n° 1, 2010, 69

[679] For a more detailed study, see de le Court, A., ""La reforma del despido (2012) i la 'excusa´europea: un análisis comparado desde la perspectiva de la flexiguridad", en Mirón Hernández, Mª del Mar e Beltrán de Heredia Ruiz, I. (Coords.), *Últimas reformas en materia laboral, seguridad social y en el proceso laboral,* Barcelona: Huyghens, 2013.

the dismissal, and when based on economical grounds, the interests of the worker and social criteria of selection of the workers to be dismissed, with readmission in case of unjustified dismissal, under scrutiny of the judge, leading to an important proportion of agreements between worker and employers.[680] Works councils are also involved in dismissal procedure, as an unfavorable position of the latter towards the dismissal results in higher procedural guarantees for the worker.[681] However, this system of protection does not apply to companies employing less than 10 workers, where according to the German Constitutional Court, the employer has however to respect periods of notice and a minimal level of social protection, taking into account the principle of good faith, which translates into the necessity of minimally reasonably justifying the dismissal and respect social criteria of selection of the workers to be dismissed.[682]

This system of protection, which according to the OECD's employment protection index, can be classified within the average of European countries (see Chapter I, section III) and has remained stable over the years, has however to be contrasted with the progressive liberalization of atypical forms of employment.

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[680] Seifert, A., and Fünken-Hötzel, E., "Wrongful Dismissals in the Federal Republic of Germany", *Comparative Labor Law & Policy Journal*, vol. 25, nº 4, 2005, 487-518.

[681] Höland, A., "Kündigungspraxis und Kündigungsschutz im Arbeitsverhältnis aus der Sicht des arbeitsgerichtlichen Verfahrens", Ergebnisse aus dem Vortrag auf dem 5. Hans-Böckler-Forum zum Arbeits- und Sozialrecht am 15. April 2005 in Berlin, http://www.boeckler.de/pdf/impuls_2005_09_hoeland.pdf (last visit: 26/07/2013)

[682] López Terrada E. and Nores Torres, L., "La causalidad de los despidos económicos en el derecho comparado", in Desdentado Bonete, A., (dir.), *Despido y crisis económica*, Lex Nova, Valladolid, 2011, 326-327;

For example, fixed-term contracts have been gradually liberalized in the 1980s and the 1990s, with the possibility for employers to contract workers under those types of contracts, without any justification for some categories of workers,[683] and broad possibilities for other categories, with a maximum of two years.[684] On the other hand, the transition towards a permanent contract has been deemed to be quite frequent (except in the public sector).[685] The famous minijobs already existed within that time-frame, being part-time contract of a reduced number of hours, with exemption of income taxes and social insurance benefits up to a certain level. However, they were designed, and used, mainly for persons, like housewives and students, who did not depend on their work to have access to social security, mainly because of the importance of the breadwinner model.[686]

[683] Eichhorst, W., Tobsch, V., "Has atypical work become typical in Germany? Country case studies on labour market segmentation", SOEPpaper on Multidisciplinary Panel Data Research, nº 596, 2013, http://ideas.repec.org/p/diw/diwsop/diw_sp596.html

[684] Palier, B., and Thelen, K., "Institutionalizing Dualism: Complementarities and Change in France and Germany", Politics & Society, vol. 38, nº 1, 127;

[685] Bellmann, L., Fischer, G., Hohendanner, C., "Dynamik und Flexibilität auf dem deutschen Arbeitsmarkt", in Möller, J. and Walwei, U. (eds.) Handbuch Arbeitsmarkt 2009 * Analysen, Daten, Fakten. (IAB-Bibliothek, 314), Bielefeld: Bertelsmann, 2009

[686] Eichhorst, W., "The unexpected appearance of a New German Model", IZA discussion paper, nº 6625, 2012, 17

III.1.2. The 2000s : the re-commodifying "Hartz" reforms: activation through precarisation

The political momentum used to start designing and implementing what would be known under the name of Hartz reforms[687] was a scandal about manipulation of figures by the PES. This gave way to the constitution of a commission which a few months later made several recommendations, all translated into law by the Schröder's coalition of greens and social-democrats. It is also worth observing that the Hartz report explicitly embedded its recommendation in the European Employment Strategy. However, further governmental and legislative documents barely mentioned any European inspiration for the implemented measures.[688]

The Hartz report was inspired by examples from the UK, the Netherlands and Denmark,[689] and meant the effective turn of the classic status-protecting unemployment towards a universal activating and means-tested system. It did not really alter the contributory scheme, except by shortening its duration to one year (two years for workers older than 50 when they claim for benefits). But it merged the means-tested unemployment protection and the

[687] The "Hartz I" law reformed unemployment insurance, the "Hartz II" law introduced labour market reforms, the Hartz III law reformed the PES and Hartz IV, reformed the assistance scheme and merged it with the general social assistance scheme.

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[689] Eichhorst, W., Grienberger-Zingerle, M., and Konle.Seindl, R., "Activation Policies in Germany: From Status Protection to Basic Income Support". In Eichhorst, W., Kaufmann, O., Konle-Seidl, R. (eds.), *Bringing the Jobless into Work? Experiences with Activation Schemes in Europe and the US*, Springer, Berlin, 2008, 24

general social assistance scheme into one sole activation-driven, work-first, means-tested scheme supposed to guarantee minimum means of subsistence and centered on the "community of living" (*Bedarfgemeinschaft*), an extended concept of household not necessarily linked to the family. This transformed German unemployment protection from a status-protecting system into a universal, activating, basic income support scheme. The expression of this move of integration of systems can be found in the names generally given to its two components. The contributory system is referred to as *Arbeitslosengeld I or ALGI* (unemployment benefits I), while social assistance has passed to be called *Arbeitslosengeld II or ALGII* (unemployment benefits II). The system of ALMP measures accessible to unemployed was not fundamentally altered, except for the fact that some of them were made accessible to *ALGII* holders. The reform saw also a renaissance of public interest job creation schemes (the 1 euro jobs), for those holders.[690]

Indirectly, the Hartz IV reform had consequences at a constitutional level. In its famous Hartz IV-decision of 2010, the German Constitutional Court used the occasion of the constitutional challenge against various aspects of the reform to state, for the first time, that the German Fundamental Law recognized a fundamental right to the guarantee of a *menschenwürdige Existenzmininum*, a

[690] Eichhorst, W., Grienberger-Zingerle, M., and Konle.Seindl, R., "Activation Policies in Germany: From Status Protection to Basic Income Support", in Eichhorst, W., Kaufmann, O., Konle-Seidl, R. (eds.), *Bringing the Jobless into Work? Experiences with Activation Schemes in Europe and the US*, Springer, Berlin, 2008, 27

concept which is translated by the services of the Court[691] as a "subsistence minimum that is in line with human dignity". To the obligation of the state to guarantee that minimum of subsistence corresponds an immediate, subjective right of individuals to material help in case of need, so as not to be affected in their dignity, when they cannot provide for their subsistence with their employment, their own assets or the contributions of third parties. This involves not only the guarantee of "physical" existence, but also the guarantee of participation in social and cultural life in conditions of equality with other persons (*Soziokulturelle Existenzminimum*).[692] The Court however, further indicates that the subjective right only extends to the principle of the guarantee, but not to its level, the determination of which (as well as the modalities of its intervention) remains within the margin of appreciation of the legislator. That margin of appreciation, which also involves the possible graduation of the intervention and thus the application of sanctions, is however limited by the constitutional principle of prohibition of insufficient action (*Untermaßverbot*), which involves the obligation to provide for a minimal level of protection, whatever the circumstances.[693] Moreover, the Court did not define concretely that minimal level, but attached formal requirements to its determination, including a transparent and factual-based process, supported by reliable figures and convincing methods of calculation

[691] Bundesverfassungsgericht, Ersten Senat, Judgment of 9 February 2010 (1 BvL 1/09 - 1 BvL 3/09 - 1 BvL 4/09), summary in English at http://www.bverfg.de/en/press/bvg10-005en.html (last visit 01/05/2014)
[692] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 49
[693] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 50

so as to guarantee judicial review, and permitting an adaptation in function of changing societal circumstances.

Another aspect of the *Hartz* reforms is their inscription within the European Employment Policy.

Generally, legislative documents, as well as political discourse does not refer explicitly to the European Employment Strategy as inspiration, let alone as source of obligations behind the *Hartz* reforms, which are at the center of the reform of unemployment protection. On the other hand, the *Hartz* report, which inspired the reform, is explicitly embedded within the objectives and recommendations of European policy instruments, and is based on an approach of integrating good practices from Denmark, The Netherlands and the UK.[694] The Hartz commission was chaired by Volkswagen group CEO Peter Hartz, and was only composed of three members coming from the social partners, while the others were 2 social scientist, 2 SPD politicians and 7 members were representatives from management consultancies and large companies.[695] This strengthens the view according to which

[694] Vogler-Ludwig, K., "Two Years of the Renewed Lisbon Process: Did the European Employment Strategy Gain or not?" European Employment Observatory Germany Discussion paper, 2007; Stiller, S. and van Gerven, M., "The European Employment Strategy and National Core Executives: Impacts on activation reforms in the Netherlands and Germany", *Journal of European Social Policy*, vol. 22, nº 2, 2012, 118-132

[695] Siefken, S., *Expertenkommissionen im politischen Prozess. Eine Bilanz der rotgrünen Bundesregierung 1998-2005*, Verlag für Sozialwissenschaften, Wiesbaden, 2007, 190

national core executives are an important nexus between the EES and domestic policy-making on activation.[696]

It should also be noted that Germany's 2004 National Action Plan for Employment Policy, submitted within the context of the Lisbon strategy, clearly links the different aspects of the Hartz reforms with the Employment Guidelines.[697] For example, the German government justifies the reforms under Guideline 8, "Make work pay through incentives to enhance work attractiveness", by pointing towards the promotion of minijobs, the reduction in duration of contributory unemployment benefits, the creation of the *ALG II* system, the obligation for those under the *ALG II* system to accept any job, their sanctioning in case of refusal of any job or participation in integration measures, and the opening of active labour market measures to those unemployed. The government further points towards reduction of tax burdens on low income workers and purported reduction in social contributions as measures to make work more attractive. There are however no references to enhancing job quality as a measure to "make work more attractive" so that is seems that such strategy is to be implemented manly through benefit reduction and negative activation, except for tax reductions.

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[696] Stiller, S. and van Gerven, M., "The European Employment Strategy and National Core Executives: Impacts on activation reforms in the Netherlands and Germany", *Journal of European Social Policy*, vol. 22, nº 2, 2012, 118-132

[697] Federal Republic of Germany, National Action Plan for Employment Policy 2004 (submitted pursuant to Article 128 of the EC Treaty), available at http://ec.europa.eu/social/ajax/countries.jsp?langId=de&intPageId=1189 (last visit, 02/04/2014)

The 2004 country-specific recommendations for Germany subsequently, and consequently, explicitly supported the projected Hartz reforms, referring within this context to employment services, and reform of the tax system, while asking for review of the financing of the social protection systems to reduce non-wage labour costs, which also shows the conceptualization of those reforms as austerity measures, and might explain the focus on cost-effectiveness within ALMPs resulting in lowering social contributions, instead of extending measures to unemployed with more reintegration difficulties.

There is however, again, no clear move towards *flexicurity*, given the flexibilisation at the margins of the labour market, and the lack of measures in subsequent National Reform Programs to increase security for those workers in atypical contracts.[698]

III.1.2.1. Few changes in the contributory scheme: reduced duration and higher flexibility in sanctions

As already said, the maximum duration of benefits is reduced to one year, and the minimum qualifying period is 12 months of employment submitted to social security contribution, within a reference period reduced from 3 to 2 years. The duration goes from 6 months to 12 months in function of the duration of employment within a qualifying period of 5 years (§ 147 SGB III). A special

[698] Vogler-Ludwig, K., "Two Years of the Renewed Lisbon Process: Did the European Employment Strategy Gain or not?" *European Employment Observatory Germany Discussion paper*, 2007

clause was introduced (§ 142 (2) SGB III), which allowed workers which during the reference period of two years worked predominantly under short temporary contracts (less than 10 weeks), with a total salary under a certain level, to reduce the minimum qualifying period to 6 months. The measure was intended to last until 2012, but was subsequently extended to the end of 2014.

The reform did no alter the system of integration contract in place. On the other hand, sice 2009, the *Bundesagentür* has the right, in case of refusal to conclude an integration contract, to substitute it by a unilateral act, in which case only the obligation of the unemployed related to his reintegration efforts (*Eigenbemühung*) will be determined, excluding any claimable reintegration measure proposed by the PES.[699]

Although the suitability criteria were not substantially altered (except for younger unemployed)[700], the Hartz I law ("*Erste Gesetz für moderne Dienstleitungen am Arbeitsmarkt*"), which applied from the 1st of January 2003, reformed and fine-tuned the sanction system.[701]

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[699] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 149

[700] Within this context, it is interesting to observe that the worker will comply with the availability criteria, also when he does not want to accept full-time employment, when part-time employment is considered a usual form of employment in the labour market corresponding to the unemployed. This enlarges the previous adaptation to persons having worked part-time for reasons of care.

[701] Within the contributory system, as established by case-law, the foundation of the sanctions is grounded on the insurance character of the system, and thus on "the need for the community of insured to defend itself against risks for which the insured is himself responsible or in the remedy of which he does not participates".

Refusal of a suitable job offer or to participate in a labour market integration measure is since then sanctioned with a suspension of three weeks the first time, 6 weeks the second and 12 weeks the third. A total of 18 weeks suspensions, without regards to the different reasons involve the loss of right to (contributory) unemployment benefits.[702] Another important change has been the reversal of the burden of proof for the existence of grounds to refuse a job offer or participate in integration measures, which is now to be borne by the unemployed, when those grounds are linked to their sphere of responsibility.[703] The inspiration for this change was found in the jurisprudence, which had assumed that the unemployed carried the burden of proof for grounds linked to personal circumstances, circumstances it is easier for him to prove than the public employment services.[704]

Putting an end to the disproportionate character of the 12 weeks sanction and the absence of alternatives would promote the use of sanctions by the *Bundesagentür für Arbeit*, and the reversal of the burden of proof, even if linked to seemingly practical considerations, would further the evolution towards the individual responsibility of the worker in putting an end to his (insured)

Therefore a suspension of benefits has to be imposed "when the insured, taking into account all the circumstance of the individual case and striking the balance between his interests and the interests of the community of insured, if another behavior of the insured can be expected". Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 243

[702] § 159 *Sozialgestezbuch* III

[703] § 159 (1) 2nd paragraph *Sozialgestezbuch* III

[704] Müller, K.-U., Oschmiansky, F., „Die Sanktionspolitik der Arbeitsagenturen nach den „Hart"-Reformen. Analyse der Wirkungen des „Ersten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt", WZB discussion paper, August 2006, 6

situation of unemployment. However, research has shown that not only those legal changes contributed to an increase in the application of sanctions. The *Bundesagentür* accompanied the reform with new directives[705] which also influenced the increase in sanctions. It has also been showed that the latter also depended highly on the resources of the different regional branches of the public employment services, as well as the local level of unemployment (the less unemployment, the more the sanctions).[706]

In 2012, 734.557 sanctions were imposed, with only 7.632 leading to the total loss of benefits. 24,6% were related to the fact that the loss of employment was attributable to the worker (which, as already said, does not lead to the loss of the right of benefits, but only to a sanction), 3,8% for refusal of a suitable job, 1,6% for insufficient efforts in the job search, 1,7 % for the refusal or the interruption of an integration measure (orientation, training,…), 33,3% for failure of showing up at an appointment with the PES, and 35% for late inscription as jobseeker.[707]

[705] Rundbrief 55/03 zur Bewerbaktivierung

[706] Müller, K.-U., Oschmiansky, F., „Die Sanktionspolitik der Arbeitsagenturen nach den „Hartz"-Reformen. Analyse der Wirkungen des „Ersten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt", WZB discussion paper, August 2006

[707] Bundesagentur für Arbeit, *Arbeitsmarkt 2012*, 111, http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2012.pdf (last visit 02/05/2014)

III.1. 2.2. Re-commodification of the non-contributory scheme: activation through minimum assistance

The *Hartz* reform which had the most impact was the merging of social assistance and the non-contributory unemployment benefits into one system, called *Arbeitslosengeld II* (ALG II)

The benefits, which are expressed in a fixed sum of money plus (variable) housing and heating costs, are supposed to cover the basic needs of the unemployed as well as the persons living in the same *Bedarfgemeinschaft* (with, following the Hatz IV-judgment of the Constitutional Court, who declared the initial lump sum for children without regards to their age as contrary to the Constitution, different thresholds, or benefits, for children according to their age). The revenues of members of the same *Bedarfgemeinschaft* which exceeds those needs thresholds are deduced from the total amount of benefits paid to the members of the *Bedarfgemeinschaft* whose revenues do not attain the threshold. So, to give an simple example, in the case of an unemployed with no revenue living with her son of 4 years and her retired mother, the latter perceiving a retirement pensions of 800 €, and supposing that housing costs amount to 100 € per person, she would have perceived in 2012: 374 € (her needs threshold) + 200 € + 213 € (needs threshold of the child) – (800 – 474) (part of the retirement pensions which exceeds the needs of her mother) = 474 +313 – 326 = 561 € (with the idea that a proportional part of that amount is actually destined to the child, and that his or her grandmother has to share the costs of living with her daughter and grandchild). The total income of the household

would thus be of 1361 € (supposing that total housing costs attain 300€).

Even if the Constitutional Court did not declare the benefits to be in violation of the Constitution (except for the initial calculation of the needs thresholds of the children), part of the doctrine and the jurisprudence have considered the amount of the benefits not to be based on adequate calculations.[708] On the other hand, the European Committee of Social Rights considered in its 2009 report the social assistance benefits to be in conformity. On the ground of a benefit level of 345 €, average housing and heating costs (and thus intervention) of 338 € for a single person, and the payment of medical insurance, it concluded that benefits attained the poverty threshold (50% of the median equivalised income) of 737 € per month for a single person.[709] However, in its 2013 conclusion, it had to defer its decision, given the absence of information provided by Germany in its national report.[710]

The activating character of *ALG II* expresses itself with the same institutions as *ALG I* (integration contract, obligation to work towards reintegration and look for employment, participation in reintegration measures, obligation to accept a suitable job) but with a much higher intensity.

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[708] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 55-65

[709] European Committee of Social Rights, Conclusions 2009, Germany, 24-25, http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GermanyXIX2_en.pdf

[710] European Committee of Social Rights, Conclusions XX-2 2013, Germany, 27, http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GermanyXX2_en.pdf

The integration contract, for example, is obligatory, and its nature does not differ compared to the reintegration contract of *ALG I,* for which it gives thus rise to a claimable right to the ALMP measures included therein. Also, the *Jobcenter* (interlocutor of the benefit holders, organizationally separate from the *Arbeitsagentür*) can substitute it with a unilateral administrative act in case of non-conclusion, as well as impose a sanction. To the contrary of the unilateral act in case of refusal of conclusion of a contract by *ALG I* holders, the *ALG II* unilateral act contains not only obligation for the unemployed, but includes also the (claimable) measures of integration proposed by the *Jobcenter* or the *Bundesagentür*. It seems that, within the context of *ALG II*, the unilateral act is increasingly replacing the integration contract.[711]

As explained in more details here after, *ALG II* benefit holders have access to part of the integration measures provided under SGB III, as well as special social integration measures for those benefit holders with particular problems related to social exclusion.

The configuration of *ALG II* as a general scheme for unemployed also involves the obligation to accept a suitable job. However, the content of the notion is different as in the case of *ALG I*, and has a separate definition in the SGB II.

§ 10 of the new SGB II is built on the principle that all jobs are suitable to persons which are able to work, before containing the following exceptions: if the worker is not physically, intellectually

[711] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 149

or mentally in position to perform the work, if the new job would difficult the finding of a job corresponding to the previous job, given the special physical requirements of the previous job, if the job would jeopardize the education of the children of the household, in the absence of available day care facilities, if it would be incompatible with the exercise of care of one or a family member which cannot be ensured by other means, or any other special serious ground.

§ 10 (2) SGB II then gives a list of jobs which cannot be considered as unsuitable *in se*, and which will thus require one of the previous conditions for the unemployed to have the right to refuse: employment which does not correspond to qualifications for which the unemployed has been trained or for which she has previously been employed; a job which, taking into account the education/training of the unemployed, has to be considered as inferior; when the workplace is further than the previous workplace or place of training/education; a job with working conditions inferior to the previous work; if it involves the termination of current employment, except if the need for benefits might be ended by the new job.

In 2012, out of a total of 1.024.621 sanctions (continuous increasing since 2007), 14,2% were imposed for non-compliance with the integration contract , 13,4% for refusal of employment or an integration measure (in both cases involving a decrease of 30% of

the basic income)[712] and 67% for absence of comparison upon convocation (sanctioned with a decrease of 10% of the basic income).[713]

The relation between the *ALG II* holder and the administration is strongly asymmetrical and characterized by an important dependency of the former from the latter.[714] Obligations are vaguely described (the law does not define the obligations nor the modalities of the "activation") and are thus unilaterally defined by the administration. It is also important to note that appeals against decisions are not suspensive. Moreover in case of discretion of the administration, the courts can only annul a decision in case of error, and the decision of the Court has no substitutive effect, in the sense that it only compels the administration to take a new decision[715].

Also, if no integration contract is signed, it can be replaced by an administrative act (and accompanied with a sanction of decrease of 30% of benefits). Asymmetry manifests itself also in remedies of non-compliance: while non-compliance by the unemployed is (automatically) sanctioned by the administration (consisting in a "retention" of the obligation of the administration, which is

[712] i.e. not including housing costs. A repeat offence (within one year of the former) involves a sanction of 60%, and a second repetition involves total loss of all benefits, which, however, can be replaced by help in kind.

[713] Bundesagentur für Arbeit, *Arbeitsmarkt 2012*, 111, http://statistik.arbeitsagentur.de/Statischer-Content/Arbeitsmarktberichte/Jahresbericht-Arbeitsmarkt-Deutschland/Generische-Publikationen/Arbeitsmarkt-2012.pdf, 46-47 and 112

[714] Bieback, K.-J., "Kooperation im Zwangsverhäaltnis. Teilhaberechte und Vertragsstrukturen in der Arbeitsmarktverwaltung", *Zeitschrift für Rechtssoziologie*, n° 30, 2009, 190

[715] Gagel, A., *Kommentar SGB III – Arbeitsforderung: mit SGB II: Grundsicherung für Arbeitsuchende.* C.H. Beck, München, 2008, 191

payment of benefits) the contrary can only be remedied through court action.

Sanctions have to be applied automatically when there is no justified ground for the behavior of the unemployed contrary to his integration contract or the law,[716] which, above all for unemployed less than 24 years old, for which the only sanction is the scrapping of benefits, is generally seen as disproportionate.[717]

Finally it should also be noted that the *Hartz IV* reform, while increasing activation of social assistance benefit recipients, also meant an extension of coverage of the scheme (activation measures and benefits), not only to persons within the formerly less activating social assistance system, but also to persons formerly considered as incapable to work, persons in training or education, or persons which did not enter into account for the scheme, mostly members of the household of benefit holders. This resulted in an important shift of the social insurance state based on status protection towards a more universalist (better coverage) social protection system, with the integration in a more active system with more visible needy persons, but with lower benefits for those who previously entered in the two wage-related unemployment protection systems.[718]

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[716] Bieback, K.-J., "Kooperation im Zwangsverhäaltnis. Teilhaberechte und Vertragsstrukturen in der Arbeitsmarktverwaltung", *Zeitschrift für Rechtssoziologie*, n° 30, 2009, 197

[717] Eicher/Spellbrink-Rixen 2008 § 31 Rz. 53 Kommentar SGB II

[718] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/2008, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf

III.1.2.3. Hartz as in-work re-commodification

The reforms also involved a slight lowering of protection against dismissal as well as other labour market flexibilisation measures, of which the "minijobs" are the most well-known (and from a social rights perspective) most problematic aspect (see section III).

An important feature of the Hartz reform has been the removing of most restraints to agency work, mostly the time-caps which gradually increased in the 1990s,[719] also with the view to facilitate labour market integration of low-skilled and long-term unemployed. Their use can be observed above all in the manufacturing sector, and they seem to have borne the bulk of employment destruction in the beginning of the crisis.[720] Despite the establishment of the principle of equal pay for agency workers, the exceptions provided in case of unemployed reintegrating the labour market, and the apparition of collective agreements applicable only to agency workers produced segmentation in wages between standard workers and agency workers, however without decreasing labour costs for the user companies, due to fees and mark-ups of the temporary work agencies.[721]

[719] Palier, B., and Thelen, K., "Institutionalizing Dualism: Complementarities and Change in France and Germany", Politics & Society, vol. 38, nº 1, 127;
[720] Eichhorst, W., Tobsch, V., "Has atypical work become typical in Germany? Country case studies on labour market segmentation", SOEPpaper on Multidisciplinary Panel Data Research, nº 596, 2013; Palier, B., and Thelen, K., "Institutionalizing Dualism: Complementarities and Change in France and Germany", *Politics & Society*, vol. 38, nº 1, 127;
[721] Eichhorst, W., "The unexpected appearance of a New German Mordel", IZA Discussion Paper, nº 6625, 2012, 11;

Also, in 2009, in-work poverty for workers under a temporary contract was almost three times higher than for workers under a standard contract (14,5% and 5,5% respectively), which might be explained by the wage penalty (i.e. average difference in wages compared to standard contracts), which seems to be one of the highest in Europe.[722] Given the strict level of proportionality applied in terms of wage replacement rate of the contributory system, this adds to the problems caused by the strict qualifying period applied for the access and duration of benefits.

Another important evolution has been marginal part-time work (the so-called "minijobs"), which had always been present, but sensibly grew within certain parts of the service sector, mainly due to their exemption from income taxes and social insurance contributions to a certain level (400€ per month) and the possibility to combine them with *ALG II* benefits, without necessity to be further available for activation measures. Therefore, in 2012, around 1.300.000 persons combined income from work (which however does not give rise to social security rights) and benefits.[723] While those contracts were originally designed for persons, like housewives and students, who did not depend on their work to have access to social security, mainly because of the importance of the breadwinner model, during the 2000s they started to be an important source of precarious employment, to be considered as not only with higher in-work commodifying value, due to the flexibility of their arrangements

[722] European Commission, *Employment and Social Developments in Europe 2011*, 2012, 144

[723] Eichhorst, W., "The unexpected appearance of a New German Model", *IZA Discussion Paper*, nº 6625, 2012, 17

and the consequent power of the employer over the life organization of the worker, but also with a spill-over effect on entitlement to social security benefits. Generally seen, in 2012, 12,6% of part-time work is involuntary (the worker actually wants to work more hours), which is the same level as 2004, a level which slightly grew with the beginning of the crisis.[724] Concerning the relation between part-time work and unemployment, research has shown that over a period of 5 years, around 20% of part-timers end up in (total) unemployment, a percentage that rose to 29% in the case of marginal employment.[725] Those workers also generally end within the assistance scheme, as they have no access to contributory unemployment protection for lack of social contributions.

In 2011, around 45% of the working-age population had a standard contract, 11% part-time workers, 6% on fixed-term contracts, 2% in agency work, 4% in marginal jobs (mostly minijobs) 7% were self-employed, 1,5% unemployed with a job, 6% unemployed and 21% inactive. 61,7% of the active, employed workforce has thus a standard contract. While in 1992, the proportion of standard contracts was roughly the same (45% of total working-age population, but 66,1% of employed population), it declined over the years but recuperated between 2007 and 2011) and the percentage of inactive population was 26%, the bulk of employment increase in

[724] OECD, online statistics database, Incidence of Involuntary Part Time Workers, 2014

[725] Schulze Buschoff, K., Protsch, P., "(A-)typical and (in-) secure? Social protection and "non-standard" forms of employment in Europe, *International Social Security Review,* vol. 61, nº 4, 2008, 57

the last 20 years has been in atypical contracts.[726] However, if the labour market is increasingly segmented, the change over the last 30 years has not been radical.

Segmentation of the labour market traduced mainly into wage inequality and growing low pay sector (20% overall, and 30% for women), due amongst other to the wage gap atypical employment involved.[727] This might be one of the reasons why the current debate about re-regulation of the labour market has been centered on the wage component, and mainly the introduction of statutory minimum wage.

Finally, the shortening of the reference period to assess the right to contributory unemployment benefits introduced by the *Hartz* reforms from 3 to 2 years penalizes temporary employment. This is also the reason why a transitory measure has been introduced (and extended to the end of 2014), and will involve that higher numbers of unemployed formerly in temporary contracts will pass directly, or rapidly into ALG II, with higher negative activation and less access to genuine measures reinforcing their employability.

The liberalization of atypical employment, at the margins of the labour market, combined with an increase of the service sector, the adaptation of market actors to the flexibilisation of some contracts (hostelry and care institution incorporated greatly the minijobs

[726] Eichhorst, W., Tobsch, V., "Has atypical work become typical in Germany? Country case studies on labour market segmentation", *SOEPpaper on Multidisciplinary Panel Data Research*, nº 596, 2013

[727] Eichhorst, W., Tobsch, V., "Has atypical work become typical in Germany? Country case studies on labour market segmentation", *SOEPpaper on Multidisciplinary Panel Data Research*, nº 596, 2013

within their employment structure, for example) the relative shrinkage of the scope of collective bargaining and company-level practices have permitted the appearance of a constellation of more, but more unequal employment forms, perjudicating above all low-skilled workers.[728]

III.1.2.4. Hartz at the heart of re-commodification of unemployment protection

The Hartz reforms involved a comprehensive shift of the definition of protection against unemployment. This expressed itself mainly through the definition of recipients of social assistance benefits as employable persons out of employment, with the consequent extension to those recipients of the obligations of jobseekers, and the increased intensity of those obligations.

It is true that, within the context of *ALG I*, unemployed are relatively "left alone" in choosing how to re-enter the labour market and that their obligations to participate in their reintegration does not involve the automatic submission to an unbalanced reintegration contract, nor a more burdensome obligation to accept jobs which would imply a degradation compared to their former employment. Moreover, this category of unemployed is privileged in its access to positive measures supporting their reintegration. Also, the system of

[728] Eichhorst, W., Tobsch, V., "Has atypical work become typical in Germany? Country case studies on labour market segmentation", *SOEPpaper on Multidisciplinary Panel Data Research*, nº 596, 2013; Palier, B., and Thelen, K., "Institutionalizing Dualism: Complementarities and Change in France and Germany", Politics & Society, vol. 38, nº 1

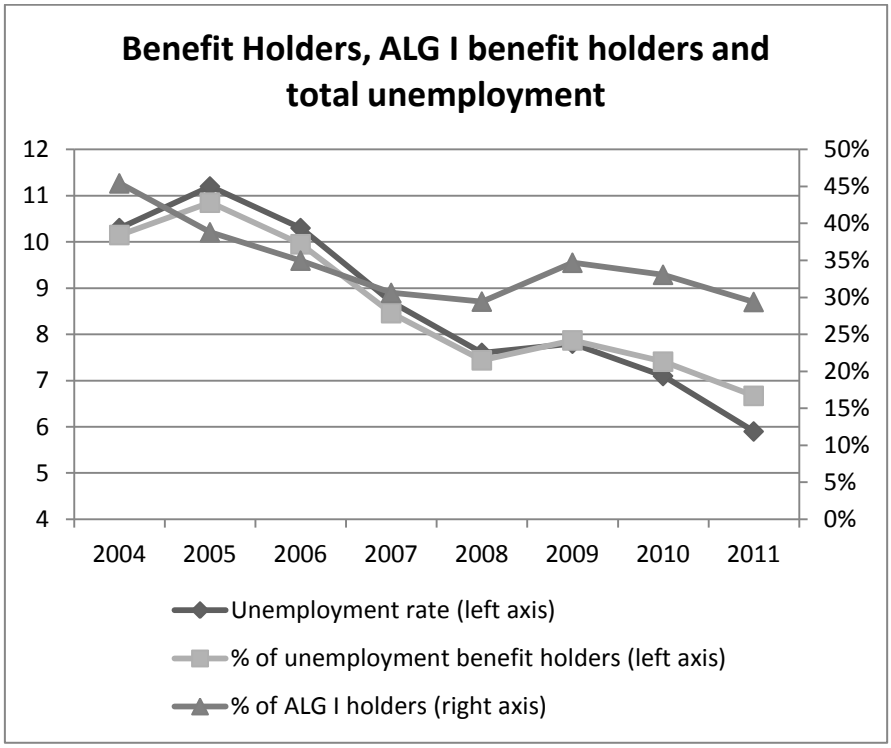
reintegration vouchers can be seen as the timid appearance of an element of the conceptualization of active measures in terms of claimable right is an interesting development, even if extremely limited. However, that "period of grace" only lasts for a maximum of one year (18 months for older workers).

The *ALG II* system provides a guarantee to a constitutionally sanctioned minimal level of subsistence, and in case of the application of sanctions, at least provisional assistance, even if below that minimal level. But for unemployed under the *ALG II* system, the reform has been intensely re-commodifying, permeated by a clear work-first approach, given the obligation to accept any job offered, the intense submission to the benefit administration, and the application of ALMP measures of which a great part, even if designed for reintegration, are in effect tailored to the necessities of employers.

Therefore, it is undeniable that the move towards activation has been translated into greater obligations to look for work on behalf of unemployed in general, as well as an unequal relationship with the PES, which have extended activating "powers", and a great margin of discretion in proposing positive activation measures. Moreover, the submission of the participation to ALMP measures to principles of efficiency and cost-containment, detached from the needs of the unemployed can also be seen as having re-commodifying effect, given the inevitable pervasion of market logic within the protection it involves.

But a systemic view of the change in unemployment protection regimes also reveals changes towards re-commodification.

Graph 20: Evolution of unemployment in contributory and non-contributory unemployment protection schemes in Germany (2004-2011)



Source: own elaboration from OCED online database 2014

The preceding graph shows two different sets of information. First, the percentage of the total holders of unemployment benefits has become higher than the unemployment rate, which shows that ever more workers are actually combining salary and (mainly *ALG II*) benefits, which points towards a trend of subsidy of the salary

which employers pay. The cifers can also be contrasted with the Spanish rate of non-coverage of unemployed. Second, the percentage of contributory benefit holders has constantly declined (with the exception of 2009, with the impact of measures like *Kurzarbeit* to absorb the first effects of the crisis), showing that an ever greater part of unemployed depend on *ALG II* benefits. An explanation for that trend can be found in the increase of long-term unemployment, which in its turn can seemingly be caused by the priority given by ALMPs to unemployed with stronger reintegration chances. However, according to EUROSTAT,[729] both long-term unemployment and very long-term unemployment have decreased throughout the whole period, following similar trends. Therefore, another reason might also have had some influence, which is the increased in-work recommodification through labour market flexibilization, and greater precarization of part of the workforce, which finds increased difficulties to have access to contributory unemployment benefits.

Moreover, more persons on ALG II benefits means that more unemployed, while receiving lower benefits, not any more calculated in function of their previous earnings, are submitted to a system promoting intensive activation based on work-first principles.

[729] EUROSTAT Database "Long-term unemployment by sex - annual average", 2014

III.2 Active Employment Measures: their conceptualization as discretional benefits submitted to the principle of cost-effectiveness

III.2.1 Re-commodification of the PES as providers of ALMPs: from Federal Administration to Federal "New Management"Agency

The Hartz reforms involved a total reorganization of the Public Employment Services. The *Bundesanstalt für Arbeit* (federal employment administration) was transformed into the *Bundesagentür für Arbeit* (federal employment agency), financed exclusively by social contributions and operationally independent from the government, which only supervise compliance with the law and, more particularly, with the SGB III (active labour market policies). The reform was supposed to reflect the principles of New Public Management (management and personnel policy promoting efficiency and flexibility, based on the determination of objectives and compliance therewith) and replaced management by directives by a system of management by objectives.[730]

Supervision and broad policy orientation (for example, the shift towards cost-benefit analysis and efficiency) are determined in a tripartite supervisory committee, composed of representative of the

[730] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014), 12

social partners as well as the government, which have rights of information but without any operational competences[731].

The management of active labour market policies and benefits for the contributory systems falls thus under the responsibility of the *Bundesagentür*, without significant regional or lower level specificities further than those controlled within its own administrative structure (except for the possibility of the *Länder* to complement benefits and services coordinated at federal level or to act within their special sphere of competence, like youth or old age policies). Services are rendered through 178 local PES agencies.[732]

On the other hand, within the context of *Arbeitslosengeld II*, the *Bundesagentür* is responsible for administering basic benefits and activation policies, together with the municipalities, which are competent for housing and heating as well as complementary social services, with decisions related to operational objectives and resource allocation being steered by contracts between the ministry of Labour and Social Affairs and the *Bundesagentür*.[733] In practice, management of all aspects of the assistance scheme is centralized in joint bodies, the *Arbeitsgemeinschaften* (now literally called

[731] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 37; Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014), 13

[732] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, 17 https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014),

[733] *Ibidem*, 13

"Jobcentres"), with some municipalities taking over the role of those joint bodies (*Optionskommunen*).[734] The integration of both agencies provides however for complex institutional, service and personnel management problems, given the different competent political levels (federation, Länder, municipalities), as well as the existence in some districts of both municipality and PES agencies competent for *Arbeitslosengeld II*.[735]

Concerning the provision of reintegration services in a broad sense (training, orientation, job search support,…), some form of outsourcing was introduced, mainly through the creation of Personnel Service Agencies (publicly funded temporary work agencies to which local PES refer jobseekers), and, at a smaller scale, through contracting out by outcome-oriented, time-limited, bonus driven public tender, for unemployed for which regular measures have failed. The contracting out of training services was strengthened and made more transparent with the system of training vouchers. However, all those instruments have been introduced more through a pragmatic trial-and-error approach than through a centrally designed contract management approach.[736]

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[734] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 38

[735] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, 14, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014), 18

[736] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, 15, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014),

III.2.2 ALMP programs: Re-commodification under the principle of cost-effectiveness

Active Labour Market Policies for unemployed on contributory benefits are legally defined, in detail, in the SGB III, which contain also criteria as to the prioritization between the different activation measures they involve. They are financed out of unemployment contributions, with tax-financed supplements for deficits due to the access of *ALG II* holders to those measures.[737] The *Hartz* reforms did not involve an important evolution, nor introduced significant change in the structure and list of available ALMP, further than the reorganization of the PES and the influence this had on the selection of the several integration measures the law offers, due to the importance of the implementation of principle of cost-effectiveness it involved. In 2012, some minor adaptations were introduced.[738]

However, there is no individual right to particular ALMP (§ 3 (3) SGB III explicitly defines them as discretionary "benefits")[739], with

[737] Ebbinghaus, B, Eichhosrt, W., ""Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany*", Amsterdam Institute for Advanced Labour Market Studies Working Paper*, 07/52, 2007, 46, http://www.uva-aias.net/uploaded_files/publications/WP52.pdf (last visit: 04/05/2014)

[738] *Gesetz v. 20.11.2012 zur Verbesserung der Eingliederungschancen am Arbeitsmarkt*

[739] § 5 SGB III states that "The "benefits" of active labour market policies are determined in accordance with their respective objectives and the results of the orientation and placement interviews, in order to avoid otherwise required benefits for the replacement of paid employment, not only temporarily but to prevent the emergence of long-term unemployment". This article, however, does not seem to have been used specifically by jurisprudence to adjudicate legal disputes concerning active labour market policies. Moreover, according to § 7 SGB III commands the *Arbeitsagentür* to choose the appropriate measures in accordance with the result of the orientation interview, the capacities of the

a few exceptions. On the other hand, the measures stipulated within the *Eingliederungsvereinbarung* (integration contract), which, however, is not obligatory for recipients of *ALG I*, do give rise to a claimable right on part of the unemployed.[740] Moreover, after receiving three months of unemployment benefits (lowered to 6 weeks after the 2012 reform), there is an individual right to intermediation vouchers, with which jobseekers can "buy" services to bolster their capacities to search offers and pass job interviews, even if it is not stipulated within the integration contract.

ALMP services for unemployed receiving ALG II benefits are regulated within the SGB II, which confer them access to great part of the ALMP defined in SGB III, next to specific reintegration services, with a stronger emphasis of measures based on in-work benefits[741] (1 Euro-jobs, low income topping – wage subsidies). For them, the conclusion of an integration contract is obligatory. The segmentation between the measures accessible to contributory and non-contributory unemployed has been seen as one of the problems of the German systems, for which a 2012 reform opened new SGB III measures to unemployed on *ALG II*, including the measures for "activation and professional insertion".

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jobseeker, the capacities of the labour market, taking into account the principles of efficiency and economy.

[740] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 149

[741] Ebbinghaus, B, Eichhosrt, W., ""Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany*", Amsterdam Institute for Advanced Labour Market Studies Working Paper*, 07/52, 2007, 43, http://www.uva-aias.net/uploaded_files/publications/WP52.pdf

Here follows an outlook of the most significant ALMP measures proposed by the SGB III.

The most common measures are measures for activation and professional insertion: orientation towards the job market or "training-market", job intermediation services, and services consisting in the analysis, decrease or elimination of "application handicaps"

As already said, unemployed on ALG I have a right to obtain intermediation vouchers after 6 weeks, which with they can pay the services of private intermediation and placement agencies. However, research shows that, at least up to 2007, their use was of a relative significance (around 10% of the vouchers are used), with no special positive results (they do not compensate for the duration of unemployment which is still the most important factor in terms of reintegration chances), also due to the fact that they were generally given to persons with more possibilities to find a job.[742] The 2012 reform also introduced an enhanced control system of the private providers (need for general license as well as approval of the services they provide and quality control measures), as well as cost criteria, in function of average costs for the services provided, for the granting of tenders.

In terms of training, measures can be divided between short qualification-enhancing trainings, and training or education

[742] Heyer, G., Koch, S., Stephan, G., Wolff, J., "Evaluation der aktiven Arbeitsmarktpolitik. Ein Schstandbericht für die Instrumentenreform 2011", *Zeitschrift für Arbeitsforschung*, vol. 45, nº 1, 2012, 41-62

conducing to new qualifications. The latter can be proposed to unemployed when it is necessary for their reintegration or when it appears from the failure to conclude an employment contract that they lack particular qualifications (the measure includes the costs of the training, transport costs, and, if applicable, day care for children). This also includes on-the-job trainings with a possible employment contract at the end.

The provision of training services has always functioned within the framework of a system of preferred suppliers, based on a market structure of above all private non-profit training institutions, the largest of them owned by unions or employer's associations.[743] One of the main instruments embodying this measure open to private services are the training vouchers (*Bildungsgutschein*), which, contrary to integration vouchers, are not framed as a rights, but are only an instrument through which the discretionary training measures are executed. Moreover, the heavily coordinated German system, in fact, does not allow for much choice on part of the unemployed, and, therefore, does not seem to avoid creaming effects (i.e. offer to and acceptance in training of unemployed with better reintegration chances).[744] Research points towards a positive effect of between 10 and 20% of those measures (which means that

[743] Hipp, L., and Warner, M.E. "Market Forces for the Unemployed? Training Vouchers in Germany and the USA", *Social Policy & Administration*, vol. 42, nº 1, 2008, 83; Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, 14, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014)

[744] Hipp, L., and Warner, M.E. "Market Forces for the Unemployed? Training Vouchers in Germany and the USA", *Social Policy & Administration*, vol. 42, nº 1, 2008, 95

between 10 and 20% of the participants effectively reintegrate the labour market thanks to the training, and is stated to be of 10% in the case of *ALG II* recipients), which after the Hartz reforms seems to increase lightly. However, adverse selection is also widely observed, above all in the context of the concession and acceptance by training institution of training vouchers.[745]

Germany knows also an interesting system of employment subsidies, the goal of which is to compensate employers who accept to promote reintegration of unemployed for the productivity loss this would entail, up to 50% of the salary and for maximum 12 months.

Those subsidies are granted on a case-to-case basis, under supervision of caseworkers, which increases their effectiveness. Research puts forwards that in 2007 and 2008, around 250.000 unemployed benefitted from the measure. Deadweight effects of around 40 to 60 % were observed (the unemployed would have been hired also without the subsidy), but lower for long-term unemployed, which points towards the fact that in an important number of cases the productivity loss was revised, showing that the initial assessment of productivity loss was related to prejudices of employers against long-term unemployed.[746]

[745] Heyer, G., Koch, S., Stephan, G., Wolff, J., "Evaluation der aktiven Arbeitsmarktpolitik. Ein Schstandbericht für die Instrumentenreform 2011", *Zeitschrift für Arbeitsforschung*, vol. 45, nº 1, 2012, 55-57

[746] Gesine, S., "Employer wage subsidies and wages in Germany: empirical evidence from individual data", *Zeitschrift für ArbeitsmarktForschung*, vol. 43, nº 1, 53-71.

Employment subsidies are also provided for *ALG II* unemployed, but not to be paid to the employer, but topped up to the salary for a maximum duration of two years, in function of the needs of the household, when the employment contract in question is deemed to better the chances of reintegration of the person in question.

Start-up subsidy can also be offered. They have a duration of six month in case the *Arbeitsagentür* estimates that the unemployed has sufficient capacities to start a business the sustainability of which is accredited by the applicable chamber of commerce or business association. They consist in unemployment benefits increased by 300 € (extendable with an extra 9 months at 300 €).

They were initially framed as an individual right, but the 2012 reform gave them a discretionary character (with the objective of decreasing costs by 1 billion €).[747]

Another important integration measure are the public interest jobs (also known as "1 euro jobs").

The latter are employment opportunities that provide 1 to 2 euro per hour worked on the basis of 30 hours per week for six to nine months in addition to full benefits, reserved to *ALG II* holders, and have replaced the direct job creation schemes providing for regular jobs at collective agreement level wages qualifying for social

[747] Hoffman, T., Wichtige Neuregelungen des Gesetzes zur Verbesserung der Eingliederungschancen am Arbeitsmarkt, http://www.gib.nrw.de/service/downloaddatenbank/uebersicht-neuregelungen-20111125 (last visit: 01/05/2014);

security.[748] While they have been found to have positive effects in terms of employability and reintegration chances, above all for women and long-term unemployed, research points towards the substitution effects of those measures for the following reasons. The public interest character of the jobs is in most cases quite relative, or not sufficiently controlled, which led to an important number of unemployed within those jobs (316.000 in August 2010). Moreover, the competitive advantages which they involved for the employers participating in the scheme, did not lead to job creation, quite to the contrary: important substitution effects were observed, for which it can be concluded that those jobs displaced normal employment submitted to social contributions.[749]

There are also a series of other more specific measures, like those for the integration of persons with disabilities, and the famous system of *Kurzarbeit* by which workers affected by collective temporary working time reductions or contract suspensions can see their salary loss compensated by unemployment benefits. The latter system has been seen as an important factor of the resilience of the German labour market to the crisis.[750]

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[748] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 46

[749] Davilla, S., *Die Eigenverantwortung im SGB III und SGB II*, Peter Lang, Frankfurt, 2011, 198-199;

[750] Hijzen, A., and Venn, D., "The Role of Short-Time Work Schemes during the 2008-2009 Recessions", *OECD Social, Employment and Migration Working Papers,* nº 115, 2011, http://dx.doi.org/10.1787/5kgkd0bbwvxp-en; however, in the manufacturing sector, said resilience is also importantly due to by organizational decisions, like reducing overtime work and eating up surpluses on working-time account, for which employers' behavior is to be considered as an important factor, see Eichhorst, W., "The unexpected appearance of a New

Even if expenses in unemployment protection have augmented in the first five years of the new century, budgets dedicated to active labour market policies have continuously decreased over the years, in absolute and relative terms.[751] This is due to the fact that ALMPs are financed out of the income of unemployment contributions, only marginally toppled by tax-financing, as well as the application of principles related to the cost-effectiveness of the measures, leading to the concentration of short-term unemployed with higher possibilities of market integration to the detriment of other jobseekers.[752] A rise in payment of benefits not met by correspondent increases in contributions means thus a declining share of the budget that can be dedicated to labour market measures. On the other hand, the introduction of New Management Techniques within the *Arbeitsagentür* from 2003 onwards, and higher cost-effectiveness, were dedicated to lowering unemployment contributions.[753] The latter strategy is clearly connected to the EES, as showed by the German National Reform Programme 2005-2008, which under the heading "Reducing nonwage labour costs (Guideline 22)", states that the 2007 reduction of unemployment contributions from 6.5% to 4.5% is

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German Mordel", IZA Discussion Paper, nº 6625, 2012, 12-13; Möller, J., "The German labor market response in the world recession – de-mystifying a miracle", Zeitschrift für Arbeitsforschung, vol. 42, 2010, 325-336

[751] Clasen, J., "Les nouvelles politiques de l'emploi au Royaume-Uni et en Allemagne", *Critique internationale*, nº 34, 2009, 44

[752] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 39

[753] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, 14, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014), 20

financed by revenue due to the improved efficiency in the Federal Employment Agency as well as by the income generated from one percentage point increase of VAT.[754] The National Reform Programme 2008-2010 further states, under the heading "Making Social Security systems sustainable", that the unemployment contribution rate was further decreased to 3,3%, with the view to lower it further while guaranteeing a sound and sustainably financed budget of the Federal Employment Agency".[755] It is also worth to note that this reduction in contribution is the only measure stated by the Government to meet the 2007 country-specific recommendation, "combating structural unemployment by further reforming the tax and social security systems". Another country-specific recommendation, "combating structural unemployment by enhancing the efficiency of placement services for longterm unemployed recipients of Unemployment Benefit Type II", is said to be projected to be met by the reorientation of placement tools, the specification of which is revealed to be general and not specifically oriented towards *ALG II* holders.[756] This might reveal a certain disconnection between country-specific recommendation and measures destined to implement them, and a certain tendency of

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[754] German government, *German National Reform Programme "Driving innovation – Promoting security in times of change – Completing German unity"*, 31, available at http://ec.europa.eu/social/ajax/countries.jsp?langId=de&intPageId=1189 (last visit, 02/04/2014)

[755] German government, *Germany's National Reform Programme 2008 – 2010 "Building on Success – Continuing with the Reforms for More Growth and Jobs"*, 23, available at http://ec.europa.eu/social/ajax/countries.jsp?langId=de&intPageId=1189 (last visit, 02/04/2014)

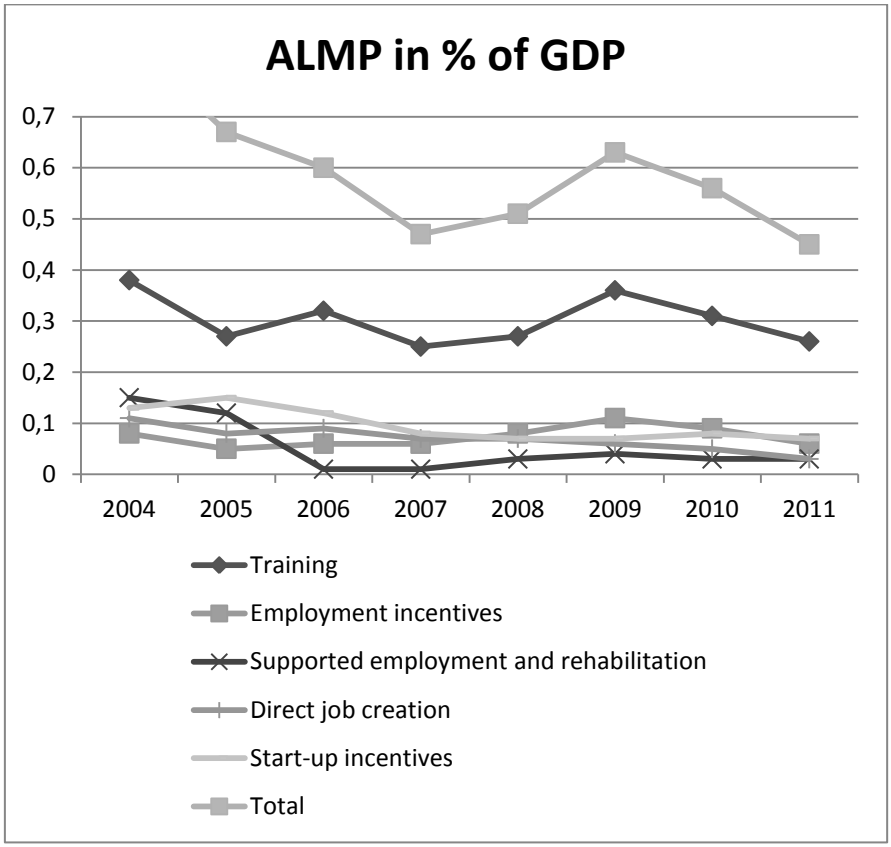
[756] *Ibidem,* comparing p. 23 with 71-72

National Reform Programmes to artificially link reforms to those country-specific recommendations. This could be seen to be confirmed by the fact that, while in 2012 more placement and insertion measures were opened to *ALG II* holders,[757] this fact was not mentioned in any national reform programme nor country-specific recommendation. The latter however generically referred to "maintain appropriate activation and integration measures, in particular for the long-term unemployed"[758]

[757] *Gesetz v. 20.11.2012 zur Verbesserung der Eingliederungschancen am Arbeitsmarkt*

[758] Council Recommendation of on the National Reform Programme 2012 of Germany
and delivering a Council opinion on the Stability Programme of Germany, 2012-2016

Graph 21: Evolution of the proportion between different German ALMPs (2004-2011)



Source: own elaboration from OECD onlin database 2014

As already said, the principles of efficiency and economy in choosing between ALMP measures for jobseekers are enshrined in the SGB III itself.[759] Cost-effectiveness came above all through profiling and segmentation of unemployed within different categories, classified in function of the intensity of active labour

[759] Even if § 4 and 5 SGB III state as global aims of ALMP, the durable reintegration of the unemployed and tackling long-term unemployment, those objectives are not repeated in § 7 , which applies more specifically to the choice by the *Arbeitsagentür* between the different measures to be proposed.

market services needed to enhance reintegration chances, with a concentration of measures on jobseekers needing less intervention, to the detriment of those further from the labour market, needing more costly interventions like training. This resulted in faster reintegration for unemployed falling under SGB III overall, but at the detriment of "weaker" jobseekers, which have thus more chances to end in the *Arbeitslosengeld II*-system.[760]

Moreover, concerning the relative importance of different ALMP measures, public funded training (above all in contributory system), wage subsidies and traditional direct job creation (for long-term unemployed) have receded in favor of aids to business creation (creating an outflow from the labour market in the strict sense to more commodified forms of work like autonomous employment) and "1-euro jobs".[761] This is also part of a general decline in active labour market policies expenditure and participation amongst the recipient of contributory benefits, due to the application by the *Bundesagentür* of more cost analysis procedures in managing ALMPs, applying stricter effectiveness and efficiency,[762] and the fact, referred to above, that the greatest part of the budget of ALMPs is financed by unemployment contributions.

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[760] Konle-Seidl, R., "Changes in the governance of employment services in Germany since 2003*", IAB discussion paper*, nº 10/ 2008, 14, https://www.econstor.eu/dspace/bitstream/10419/32752/1/608382280.pdf (last visit: 30/04/2014), 21

[761] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 46

[762] Ebbinghaus, B., Eichorst, W. "Distribution of Responsibility for Social Security and Labour Market Policy. Country Report: Germany", *Amsterdam Institute for Advanced Labour Market Studies Working Paper*, nº 97/52, 2007, 48

III.3. Constitutional rights as elements of de-commodification: the right to a dignified participation to society as a limit

The German Fundamental Law does not provide for a catalogue of social rights in general, or social security in particular, nor under the form of specific claimable rights or specific policy mandates. [763] Nor is there for example an institutional guarantee for the public provision of social security,[764] like in the Spanish case. However, the guarantee by the state of social rights is mainly constitutionalised through the "social state clause", or principle of social state, of article 20 (1) of the Fundamental Law. The latter principle, to be read in opposition to the principle of *Rechtsstaat,* which protects individuals from the state, mainly through "negative" fundamental rights and separation of state and society as protection against a totalitarian state, involves that, nevertheless, the state has the duty to intervene in society to promote social redistribution and restore social justice. As such, the most important objectives of the *Sozialstaatsprinzip* are securing a minimum of subsistence according to human dignity, promoting equality by decreasing dependence, providing security against social risks and increasing and extending welfare.[765]

[763] With the exception of article 6 on the protection of the family and article 3 (2) containing a duty of the state to promote gender equality

[764] Sachs, M., "artikel 87", in Sachs, M. (ed.), *Grundgesetz. Kommentar*, C.H. Beck, Múnchen, 2009, 1696, nº 57

[765] Eichenhofer, E., *Sozialrecht*, J.B.C. Mohr, Tübinge, 1995, 64

While the social state clause is generally not invoked independently, it has been used by the Court in conjunction with other articles of the Fundamental Law to impose duties on the state. The "Hartz IV" judgment, already commented in this Chapter is one of the most recent examples and provides even for a change in the jurisprudence of the Court, which before did not recognize a direct individual claim to the right to minimum subsistence.[766]

However, as already seen in the analysis of the previous judgment, the legislature benefits from a great freedom in defining, restructuring or even weaken social programs and social security schemes,[767] with the right to property of article 14 of the Fundamental Law protecting social insurance systems from dramatic curtailments.[768]

Another "negative" right which read in conjunction with the social state clause is relevant to unemployment protection due to its specific conceptualization within the German context is the right to work of article 12 of the Fundamental Law, more concretely defined as the right to choose the occupation (and education) which one considers to be proper and to be the basis of one's choice of life.[769] The doctrine considers that one of the goals of unemployment protection is to permit the realization of that right to

[766] Pascal, E., "Welfare Rights in State Constitutions", *Rutgers Law Journal*, vol. 39, nº 4, 2008, 880-881
[767] Koutnazis, S., "Social Rights as a Constitutional Compromise: Lessons from Comparative Experience", *Columbia Journal of Transnational Law*, vol. 44, nº 74, 2005, 123
[768] Quint, P., "The Constitutional Guarantees of Social Welfare in the Process of German Unification", *American Journal of Comparative Law*, vol. 47, 1999, 307
[769] Davilla, S., Die Eigenverantwortung im SGB III und SGB II, Peter Lang, Frankfurt, 2011, 67

work read in conjunction with the social state principle, in that without protection, one would be compelled to accept any work to secure its means of existence.[770]

Legal restrictions to the right to choose one's occupation are permitted by article 12 (1) 2 of the Fundamental Law, but restriction have to be legitimate (for example, if they have as objective the proper functioning of unemployment protection schemes, a higher rate of occupation or combat high unemployment) and proportional.[771] It does not seem however that challenges of the actual system of unemployment protection on those grounds have been made or have been successful. On the other hand, within a constitutional framework which sees the purpose of social rights as the realization of fundamental freedoms, the latter might be relied upon to draw limits to obligations related to activation.[772]

The relation with the German national legal system with the multilevel legal system is not straightforward. International treaties, once incorporated by an act of parliament, acquire the same hierarchical value as laws. They have thus to be treated as ordinary laws and cannot involve some form of judicial review of "national"

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[770] Gagel, A., *Kommentar SGB III – Arbeitsforderung: mit SGB II: Grundsicherung für Arbeitsuchende.* C.H. Beck, München, 2008, § 121 SGB III, nº 33

[771] Peters-Lange, S., *Zumutbarkeit von Arbeit: ein Plädoyer zur Rechtsfortentwicklung*, Bund Verlag, Köln, 1992, 182; Davilla, S., Die Eigenverantwortung im SGB III und SGB II, Peter Lang, Frankfurt, 2011, 67

[772] Eigenhoffer, E., *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht*, Mohr Siebeck, Tübingen, 2012, 70-73

laws.[773] In principle thus, a posterior law contradicting an international treaty would thus prevail.

This principle of equal hierarchical value seems however to have been circumvented in the case of the ECHR, given that the Constitutional Court has considered that the Convention together with the jurisprudence of the ECtHR is relevant to the interpretation of fundamental rights contained in the Basic Law.[774] Because the European Human Rights system coincides with article 1(2) of the Basic Law and the ECHR, as interpreted by the ECtHR, is relevant for their interpretation, constitutional complaints based on the ECHR could be made, and could thus entail the "primacy" of the ECHR over ordinary law. But the same judgment stated more generally that the Court had the responsibility to ensure that the state does not violate its international obligations, and could thus, contrary to the common standard, if necessary, review application and interpretation of international law by ordinary courts.[775] The latter argument could in principle apply to any international treaty and thus serve for action of the Court concerning the respect of treaties other than the ECHR.[776] As the European Social charter is also a human rights instrument, it could thus play the same role in helping interpreting constitutional fundamental social rights (mainly

[773] Streinz, R., „artikel 59" in , M. (ed.), *Grundgesetz. Kommentar*, C.H. Beck, Múnchen, 2009, 1337, nº 65

[774] Hoffmeister, F., Germany: Status of European Convention on Human Rights in domestic law"International Journal of Constitutional Law, vol. 4, n 4, 2006,722-731

[775] Paulus, A., „Germany" in Sloss, D., The role of domestic courts in treaty enforcement. A comparative study, CUP, Cambridge, 2009, 223

[776] Hoffmeister, F., Germany: Status of European Convention on Human Rights in domestic law"International Journal of Constitutional Law, vol. 4, n 4, 2006, 724

the right to dignity, the right to work and the social clause). Within this context, however, it seems that no direct claims could be based on the ESC, as it seems to be generally considered as a *Prinzipiënerklärung*, or declarations of principles, as opposed to *Gesetzgebungsaufträge*, or duties for the development of particular social right institutions or legal requirements, like ILO Conventions.[777] However, under the recent jurisprudence of the constitutional court, the resolution of a conflict between German law and the ESC contrary to the meaning of the latter could potentially be reviewed by the Constitutional Court, under the fundamental rights connected with the principle of social state, so as to avoid that Germany would be in breach of its obligation.

The German constitutional rights related to protection against unemployment can thus potentially underpin legal de-commodification strategies. However, taking into account the actual jurisprudence, they seem to be more oriented towards the right to a minimum subsistence as limit to re-commodification through precarisation.

[777] Eichenhofer, E., *Sozialrecht*, J.B.C. Mohr, Tübinge, 1995, 40

Chapter IV. Re-commodification of protection against unemployment in Spain, The Netherlands and Germany

As already argued in Part I, European Welfare States, and, more particularly, Continental Welfare States have moved towards being composed of passive, de-commodifying schemes towards programs where the activation of benefit holders (i.e. policies and mechanisms oriented towards their reintegration within the labour market) has taken a more central place. Unemployment protection, given its direct links with the labour market, finds itself at the heart of those changes. Given path dependency and other social, political and economic elements, the transformation of social welfare schemes varies across different countries.

Amongst important concepts to grasp and analyze those changes which can be found in the literature revolve around the notions of workfare and enablement.[778] Workfare would be a form of activation founded on a negative approach, based on the pressure or the compulsion of welfare recipients to re-enter the labour market. Sanctions, low benefits or the threat of their termination (through

[778] Dingeldey, I., "Between workfare and enablement – The different paths to transformation of the welfare state: A comparative analysis of activating labour market policies", *European Journal of Political Research*, vol. 46, 2007, 823-851,

sanctions or the nearing end of the benefit period) could be seen as workfare elements. They can be easily conceptualized as elements of re-commodification of unemployment protection.

On the other hand, enablement would constitute also increased emphasis on employment-related measures, expressing itself in a new balance of rights and responsibilities, but accompanied with programs aimed at enhancing human capital and helping unemployed to adjust to the modern labour market.[779]

This would correspond to what was analyzed in this work as active labour market policies.

However, it is contended that this workfare-enablement mix is not enough to analyze activation within the perspective of re-commodification. The nexus between rights and obligations of the unemployed is important, which involves also the form in which "enablement" is inserted within that nexus. From that point of view, it is important to take into account the individual claimability of "enablement" and the corresponding discretion of PES in their offering and insertion within the rights-obligation nexus. It is also contended that another element, partly linked to the former, has also to be taken into account, which is the "juridification" of enablement. As de-commodification involves the adoption of a rights perspective (see Chapter II), not only the relation between rights and obligations of unemployed is important, but also the

[779] Dingeldey, I., "Between workfare and enablement – The different paths to transformation of the welfare state: A comparative analysis of activating labour market policies", *European Journal of Political Research*, vol. 46, 2007, 825

extent to which those measures inserted in that nexus have legal connections with their rights and obligations.

However, one element should not be forgotten. Even enablement involves re-commodification, to the extent that it generally intends to increase opportunities of commodification. But as argued in Part II, the language of opportunities is different from the language of rights, and cannot constitute a narrative at the basis of social citizenship. Therefore it would be very difficult to talk about a right to enablement as a de-commodifying feature of an unemployment protection scheme.

IV.1: Re-commodification of unemployment benefits: assistancialisation as precarization

Analyzing unemployment protection in terms of securing the means to maintain an acceptable way of life from the de-commodification perspective involves that two substantial aspects of the protection are important: coverage and level of benefits.

The first is the proportion of unemployed covered by benefits, which is influenced by the conditions of access to benefits. Spain has shown to be particularly problematic, if not dramatic from that point of view. The historically underdeveloped system of coverage, with categories of workers formally excluded and the lack of development of protection systems for those which run out of contributory benefits has been hidden by the economic boom of the years before the crisis. The latter has proven that the system was utterly fragile. This could be said to be due to its intrinsically commodified character given the high dependence of protection on contributory periods, even in the means-tested scheme. Moreover, means-tested assistance is fragmented, and subsidiary systems of social assistance are virtually inexistent from the point of view of securing sufficient means of existence and participation in society, due to huge disparities between different Autonomous Communities and the lack of comprehensive schemes in most of them.

On the other hand, the German and Dutch systems show a certain convergent development within their transformation into two-tier systems with virtual full coverage, without however excluding

segmentation. Moreover, the "culpability" in the situation of unemployment, where access to contributory benefits is denied (or their period shortened, like in the German case) when the end of the employment contract can be attributed to the behaviour of the worker, cannot be forgotten as re-commodifying element, in the sense that it lowers the power of the worker within the employment contract and its options towards temporary alternatives to earning his or her living in the labour market. From that point of view, the Spanish conditions of access to the contributory system could be seen as the most de-commodfiying.

However, a second aspect, the level of benefits, shows that the latter convergence is only systemic, and a more in-depth analysis shows divergent levels of de-commodification of those two-tier systems. While in both countries, the contributory systems and the social assistance systems show similarities in terms of replacement levels of the contributory system (around 70%), and the structure of benefits in the assistance scheme (flat-rate benefit fixed by the state and additional benefits to be given by municipalities in function of necessities), the duration of contributory benefits, limited to 12 months in Germany while still lasting 38 months in The Netherlands (with however decreasing average durations and projected lowering of maximum periods), shows a more important intensity of re-commodification-through-precarization (i.e. going from status protecting scheme towards minimal assistance scheme). This could find its expression in the fact that in the Netherlands, between 2001 and 2011, the proportion of unemployed on contributory benefits in total unemployment has oscillated between

40 and 49%, the rest perceiving assistance benefits, while in Germany the proportion has decreased from 40% to 30%, revealing thus a greater proportion of unemployed on more precarized benefits.

Again, from that point of view, Spain appears even further on the re-commodification scale, with replacement rate in the contributory scheme going from 70% to 50% after the sixth month, and assistance benefits (when available) flirting with the poverty threshold. This, together with a low maximum level of benefits, involves that it could be difficult to characterize Spanish unemployment benefits as status protecting at all, and qualifying rather as a scheme of fragmented and insufficient minimal protection.

It could therefore be concluded that in the three cases, unemployment benefits have evolved from their de-commodifying function towards a system of minimal assistance. Segmentation between unemployed also reproduces to a certain level labour market segmentation introduced by flexibilization, with the "outsiders" having more propension to end within the social assistance systems, difficulting thus upward mobility and, as a process of creation of a new "inferior" social status, undermining the concept of social citizenship.[780]

[780] Betzelt, S. and Bothfeld, S., "Activation Policies: Potential Enhancement and Factual Restrains of Citizens' Autonomy", in Betzelt, S. and Bothfeld, S. (eds.), *Activation and Labour Market Reforms in Europe*, Palgrave Macmillan, 2011, 243-258

The move towards a system of minimal assistance also involves that unemployed are put under greater pressure to reintegrate the labour market, and has therefore an activating function in itself.

However there are clear differences in the intensity of the evolution towards precarization. The Netherlands are still leaning towards status protection while Spain, with its low benefits and dramatic level of unemployed not covered by benefits and lack of adequate general social assistance systems, does not even guarantee minimal protection to all those who have to face unemployment.

IV.2. The nexus between rights and obligations: the lack of integration of active labour market policies

IV.2.1. Obligations of the unemployed: look for and accept suitable employment

From a technical legal level, all three cases have seen the introduction of a new conceptualization of the right to benefits, which has been attached to a series of obligations aimed at the reintegration of the benefit holder within employment before the end of the period to which it has a right to benefits. This is motivated by consideration of cost-containment of the system, but has also a paternalistic approach, based on the fact that long-term unemployment is generally associated with higher difficulties to successfully and durably reintegrating the labour market. From an economic perspective however, this can be associated with the intention to counteract the effect of reservation wage on the supply of labour in the labour market, and to lower salary threshold at which workers accept jobs. However, recent research shows that the assumption that generous unemployment protection systems (both in terms of level and duration of benefits) promote long-term unemployment is not met by conclusive empirical data, which evens points towards the contrary.[781]

The obligation to look for employment and to accept suitable employment has however always been present in legislation. The

[781] European Commission, *Employment and Social Developments in Europe 2012*, 2013, 91

legal evolution has consisted in making that obligation more precise on the one hand, by adding new specific obligations, and more intense on the other, through enhanced administrative enforcement. The latter aspect has been traduced mainly in the development and adaptation of (new) sanctions, as well as the appearance of a new legal instrument: the integration contract.

The integration contract itself presents disparities in the three cases. It has an obligatory and automatic character upon claiming unemployment benefits in Spain and is framed more as an "activity engagement" on part of the unemployed, while in Germany, its proposal remains at the discretion of the PES, and is only obligatory under the social assistance scheme. Even if its pure contractual character is contested, given that the negotiation of its content is only theoretical, for which it closely leans towards an administrative decision, it is generally accepted (and in Germany, legally defined) that it has an enforceable character. In Germany, and, theoretically in Spain, it serves to embody a succession of actions and interventions which could be framed as an integration trajectory. In The Netherlands, however, the instrument does not exist in its function of enforcement by contractualization of rights and obligations of the PES and the unemployed, which are rather defined legally and through administrative regulations (for example, the Regulation on the obligation to solicit). Dutch integration trajectories are generally imposed through administrative decisions (generally following contacts with the concerned individual). The comparative study reveals however that the absence of individual contract in the latter case should however not be seen as a

substantial difference in the conceptualization of the nexus between rights and obligations, given the discretion the PES has in concreting its own obligations, both in Spain and Germany, and the predominant symbolical character of the contract in Spain.

In effect, the integration contract does not alter the core legal obligations which rest on the unemployed, which are looking for and accepting suitable employment.

In the three cases, the obligation to accept suitable employment has a varying intensity. Not only are sanctions different, but the notion itself of suitable employment diverges in its interpretation and dynamic. In all three cases, it is inspired, and seems to remain within the boundaries of ILO Convention 44. In application of the Convention, the main elements to be taken into account are qualifications and/or past employment, previous level of earnings and distance between employment and domicile. In all three cases, the duration of unemployment has also to be taken into account, in the sense that the longer the period of unemployment, the broader the notion has to be interpreted. While in Germany, the approach towards suitable employment is that of a general proportionality test, the Netherlands have provided for precise Guidelines, which are projected to be transformed into a Regulation (which would provide that after one year, any job would be considered as suitable), introducing a phased system of degradation, where every six month, the unemployed has to accept a job of a lower qualification category and/or salary. In Spain, on the one hand the law specifies that after one year, it is to the PES to determine the

suitable character, suggesting that any job could be considered suitable, but on the other hand a series of criteria are given, including work-life balance, which should involve that, there also, a proportionality test should be applied, however taking into account more elements than in the classic ILO driven definition.

It is also important to observe that both in Germany and in The Netherlands, unemployed under the social assistance schemes are required to accept any legal job, whatever their previous labour history, qualifications or salary. As in the assessment of coverage, the reduced maximum and average durations of contribution reveals another element of higher commodification of unemployment protection, with broad notions of acceptable employment pushing workers into employment not in function of their personal circumstances but in the interest of the labour market.

Related to the acceptance of a suitable employment, one finds also the obligation to look for employment. It is an obligation which is defined with different intensity within the three cases. While in Germany it is more loosely based on directives to be given by the PES, in The Netherlands, again, the obligation is more precisely defined in a governmental regulation, imposing at least 4 acts of job solicitation every 4 weeks. In Spain, the notion does not find any concrete definition, but it is planned that the obligation might be enforced through the referral of jobseekers to profit-driven private job agencies, which, moreover, receive financial incentives to report facts that conduce to sanctions.

The refusal of a suitable job has also to be seen within the light of sanctions which may be applied. Here a clear evolution towards workfare is observed. While 20 years ago, some graduation was still possible or defined in legislation, making it possible to apply considerations about proportionality, new sanctions are not discretional any more. However, the regime of sanctions presents different levels of intensity in the three studied cases. In The Netherlands, refusal of a suitable job is sanctioned with the permanent loss of benefits (up to the hours of the refused job), while insufficient job search is sanction with a reduction of 25% in benefits for a period of four months. In Spain, refusing a suitable job offer would be considered as a light offense, and would be sanctioned by the loss of three weeks of benefits (6 weeks if it is the second light offence, whatever the characteristics of the first, and loss of benefits in case of the commission of refusal as a third light offence). The German system is similar to the Spanish.

This reveals also an important difference in the intensity of the obligation to accept suitable job, with The Netherlands appearing to apply a strong workfare system, revealed both in the quick degradation of the quality of the job (from the workers' perspective) to be accepted over time and the consequences of the refusal.

Finally, the nexus between rights and obligation within the social assistance regimes, both in Germany and in The Netherlands are more unbalanced on the one hand, but embedded within a framework with stronger constitutional limits on the other. Rights and obligations seem not be of a reciprocal character, because the

obligation to self-help seems to pre-exist the right to assistance. However, the constitutional right to a minimum level of subsistence (which seems stronger within The German context, given its constitutional design – The Netherlands do not provide for a system of judicial review of laws, which also makes that International instruments grow in constitutional importance) guarantees that sanctions could never leave the recalcitrant unemployed without resources, and involves a strong assessment of the different circumstances of the case.

IV.2.2. Active Labour Market Measures: neither right nor enablement

As already stated here above, the European paradigm of unemployment protection includes measures intended to enhance opportunities of the unemployed within the labour market, mainly through the reinforcement of their employability. Within the *flexicurity* model, they are even presented as counterpart to the obligations of the unemployed. Therefore, to assess the content and extent of the right to protection against unemployment, the integration of those measures within the nexus between rights and obligations has to be assessed. This has to be done through a combination of approaches. On the one hand, the effectiveness of those measures in augmenting employability is an important element to take into account. But also, or even more, the extent to

which they are conceptualized as claimable rights, rather than as policy measures reinforceming the obligations of the unemployed.

From the latter point of view, Spain diverges clearly from the two other studied cases and presents a system which could be described as re-commodifying, in that ALMPs are far from being conceptualized as rights, above having a high intrinsic re-commodifying nature. Enabling active labour market measures are legally (as well as constitutionally) designed as employment policy, regulated in a separate law without direct connection with the LGSS which defines the rights and obligation of unemployed. They are partly inserted within a catalogue of services the PES offers to employed, unemployed and employers alike. Concerning the unemployed, the "catalogue" of services mentions orientation, the offer of training, job placement, the design of reintegration trajectories but also the recognition and payment of unemployment benefits, all at the same level. It contains however no guarantees for obtaining those services, further than the observance of principles like equal treatment. The only exception would be the fact that the development of an individual and personal reintegration itinerary is explicitly recognized as a right of the unemployed and an obligation of the PES, but there is no indication as to the content or the extent of that right.

On the other hand, the German *SGB III* defines those measures as unemployment "benefits", in the same line as wage-replacement benefits, and within the structure of the Code regulating unemployment protection. Their financing through unemployment

contributions also inserts them strongly within the insurance logic of the contributory system. They are however defined as *Ermessungsleistungen* or "discretionary" benefits, for which the administration is free to decide if a measure will be accorded or not, providing the decision respects the law. On the other hand according to the general principle of the Social Code (§ 39 *SGB I*) the qualification of a benefit as discretionary, is framed as an authorization to deviate from the principle of automaticity, which has to be exercised taking into account the purpose of the benefit as well as legal limitations to the discretion. The refusal to grant a reintegration measure can thus be subject to (marginal) judicial review. Another important element is the recognition of a claimable right to reinsertion vouchers after two months of unemployment.

The Dutch *Werkloosheidswet* contains in its article 73 the right of the unemployed (or worker for which it can be reasonably accepted that his employment contract will be terminated) to support for reintegration. To this right corresponds the legally defined task of the UWV to promote the labour market integration of workers. This does not provide for a strong rights approach towards support. However, some concrete measures, like training are more precisely defined. This provides for element towards their framing as claimable right. In the case of training, the concept of necessity of the training, further defined in a governmental regulation, allows judicial review of the refusal of the UWV to recognize requested training as an integration measure (which involves the suspension of the obligation to look for and accept suitable employment, as well as coverage of the costs of the training). On the other hand the

criteria to assess the necessity of the training are still oriented towards a work first approach, in the sense that training will be granted only if there are no suitable jobs in the market (taking into account the fast "degradation" of the Dutch concept of suitable employment in function of the duration of unemployment), and only those trainings which correspond to the necessities of employers will be considered as necessary. The refusal to grant an individual reintegration contract (an instrument by which an unemployed can "buy" reintegration services on the reintegration market) can also be reviewed, given the existence of administrative instruments providing for criteria for their recognition.

There are thus in the Dutch and German models a certain, even if low, degree of insertion of active labour measures within the nexus between rights and obligations of the unemployed. However, the claimable character of certain particular measures is made possible through the existence of private, sometimes profit-driven third parties (reintegration agencies, training institutions,…) the inclusion of which in the reintegration process can be activated by the unemployed (The Netherlands) or through a system of vouchers (Germany). The insertion of a third party within the nexus thus complicates the relations between rights and obligations, and the characteristics of quasi-markets do not always guarantee an adequate treatment, above all of the unemployed which are further from the labour market.

This rights approach has however to be complemented by another, more global approach, analyzing the overall effectiveness and

orientation of those measures, as well as their inscription within the structure of employment services.

A first observation to be made is the characterization in the literature of some measures as enabling, a qualification which should be nuanced. Measures consisting in the orientation of workers, proposing them job offers and increasing their capacities to adequately search for work or participating in interviews are in fact, and within the context of broad notions of suitable employment and heavy sanctions in case of refusal, more oriented towards fast reintegration in the labour market, rather than increasing human capital, or even the employability of the worker. Therefore, they should be viewed more as the extension of "negative" activation, as they increase the effectiveness (from the point of view of the labour market) and thus the burden of the obligations of the unemployed, whose choice of reintegration can be actually reduced through those measures in that it narrows not only the time frame in which the unemployed can have recourse to an alternative to commodification, but possibly enhances the possibility of employment degradation. The prominence of those measures within the analyzed activation systems should therefore ask for extreme caution in classifying them as "enabling" in a de-commodifying sense.

Taking the previous into account, the study of the Dutch and German case has proven that this type of reintegration measures form the greatest part of active employment measures, to the detriment of more enabling measures like training. Moreover, their

provision is generally concentrated on those unemployed who are easier to activate, whether through the operation of reintegration markets or the application of cost-effectiveness principles within the margin of discretion of the PES, conducing to a certain measure of segmentation in the already high level of individualization of the risk of unemployment.

The Spanish case reveals a totally distinct picture, with the concentration of ALMP budgets (and, recently, social security funds as well) towards employment subsidies the effectiveness and efficiency of which is doubtful, and which pertains more to general labour market policy than instruments to enhance employability of the unemployed. Their conditions are centrally and rigidly defined by law, as opposed to the individualized approach of German employment subsidies. They cover very broad categories of workers, or even all the workers when taking into account the recent flat-rate contributions attached to the hiring under standard contracts. Even from the point of their purpose (employment creation), they should be considered as ineffective, and certainly inefficient, given the deadweight effect and the fact that they easily lead to substitution of employment, a problem which is aggravated by the low requirements in terms of net employment creation. This has also to be viewed taking into account the underfunding and ineffectiveness of Spanish PES, which is pretended to be remedied by the transfer of part of their tasks to private, profit-driven agencies. This allows the classification of the Spanish system of active employment measures as being almost totally severed from the nexus between rights and obligations of the unemployed,

aggravating the individualization of the unemployment risks within a context of low benefits and insufficient coverage.

The three cases present thus differences within the level of integration of active labour market policies within the nexus between rights and obligations, with different degree of individualization of active labour market policies. However, from a legal point of view, it should be concluded that the levels of individualization are insufficient to conceptualize those policies as being part of a legal concept of protection against unemployment defined in terms of rights. The bias towards fast labour market reintegration is an extension of the work first principles which inspire protection against unemployment, and only reinforces a legal concept of the latter as defined in terms of obligations with benefits as counterpart of an activity itself oriented towards termination of perception of benefits. Moreover, by the intensification of the pressure to reintegrate the labour market their financing, design and internal prioritization involve, they debilitate and commodify further the right to protection against the risk of unemployment which an already dwindling access to material protection is supposed to provide.

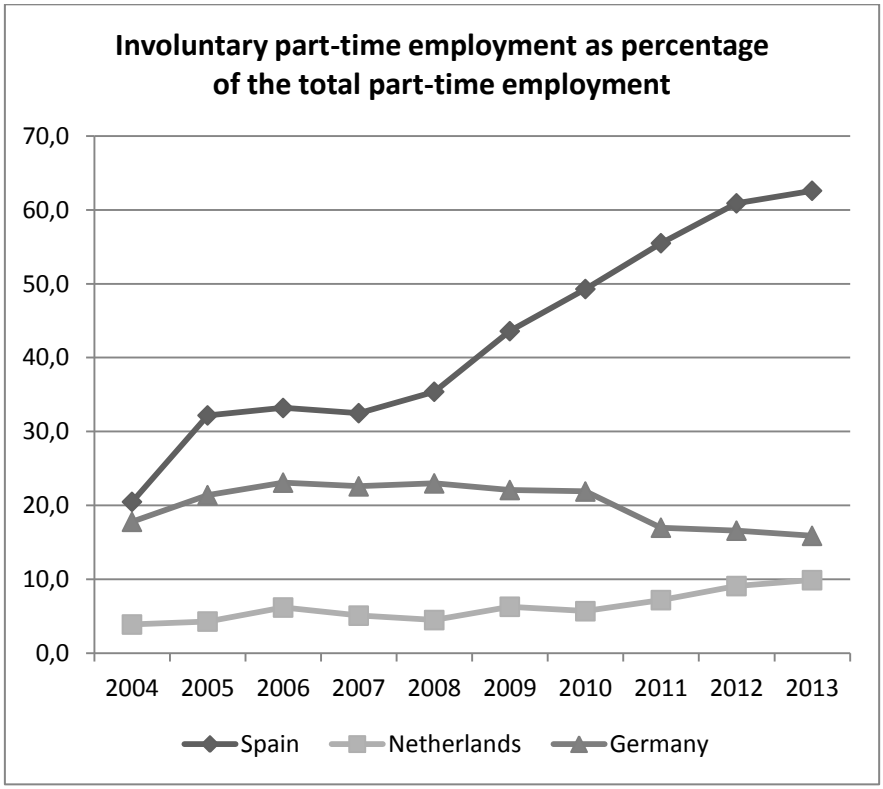
IV.3. In-work re-commodification: between *flexiprecarity* and *flexicurity*

In all three cases, non standard employment has risen, reflecting the general observations about the segmentation of the workforce within the Continental Welfare states, with core workers in relatively protected standard contracts, and employment creation mainly based on flexible part-time and temporary or fixed-term employment. Part-time employment is more important in Germany (27,3% in 2013) and The Netherlands (50,8%) than in Spain (16%), where, however the rate of part-time employment has doubled since 2002, while it has only slightly increased in the tow other countries.[782] On the other hand involuntary part-time employment has dramatically increased in Spain (which is partly due to the lack of child-care facilities) while remaining stable in the two other countries. This is mostly worrying, given that while financial poverty is more highly associated with part-time work, involuntary part-time work has been showed to be especially associated with problematic living standards, above all in Southern European countries where it tends to be more low-paid and insecure.[783] It is also striking to see that, while in Germany, there is an important difference between the poverty risk of male (30%) and female (10%) part-timers, in Spain the difference is much less (20% and 17% respectively).

[782] EUROSTAT online database, "Person employed Part-time", 2014

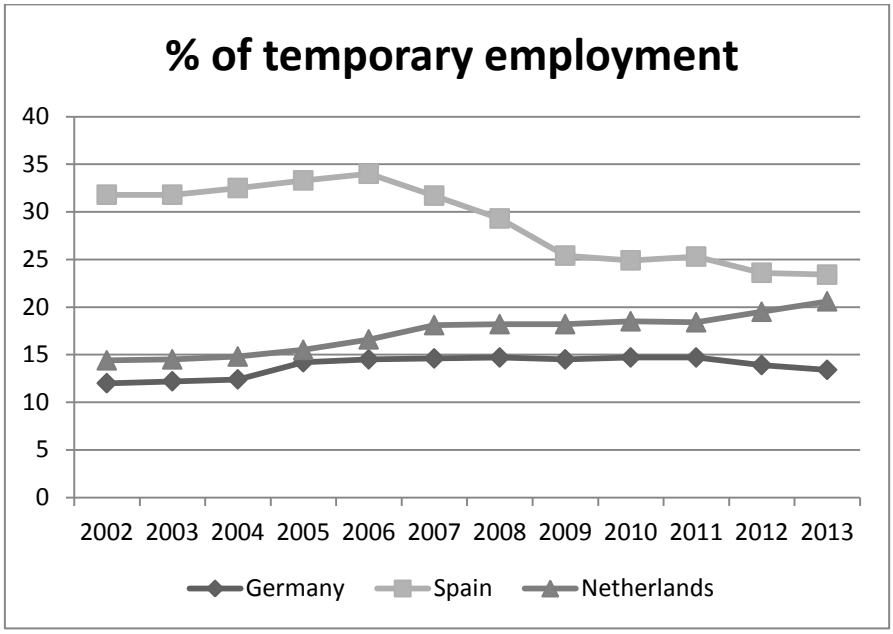
[783] Horemans, J., and Marx, I., In-work poverty in times of crisis: do part-timers far worse?", Improve discussion Paper, 13/14, 2014, 14, "http://webhost.ua.ac.be/csb/ImPRovE/Working%20Papers/ImPRovE%20WP%201314_1.pdf

Graph 21: Evolution of involuntary Part-Time workers in Spain, the Netherlands and Germany (2004-2013)



Source: own elaboration from EUROSTAT database 2014

Graph 22: Evolution of the temporality rate in Germany, Spain and The Netherlands (2002-2013)



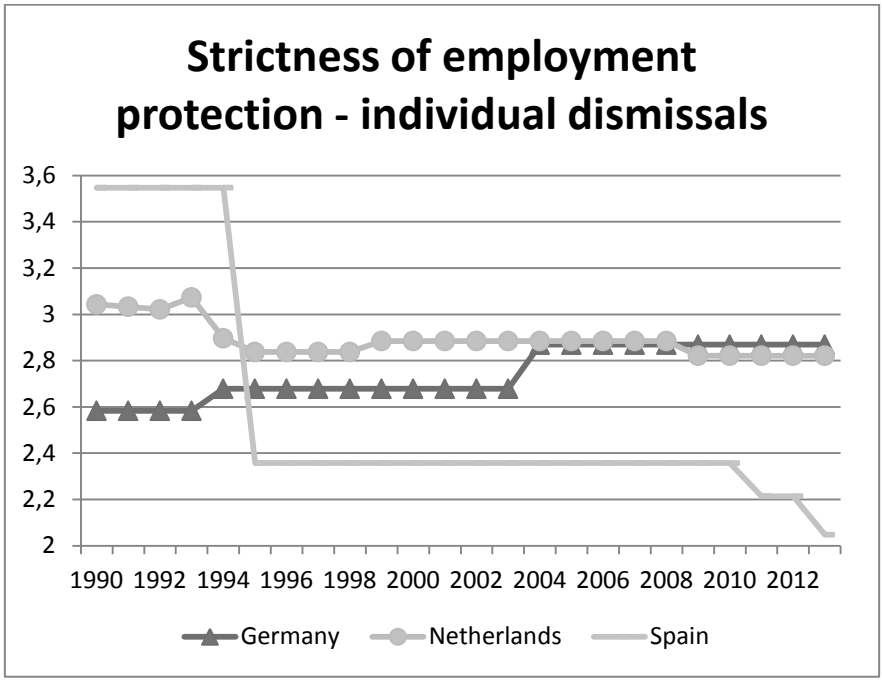
Soure: own elaboration form EUROSTAT online database 2014

Concerning temporary or fixed-term employment, some convergence can be observed between the three countries. However, this is to be explained by the fact that in Spain, temporary employment bore the most important share of employment destruction. The Netherlands also show an increasing trend towards temporary employment, but it seems that the government, by enacting newly, more stricter rules on fixed-term employment is reacting to that trend.

Again, Spain shows thus a divergent path, with higher levels of temporability, and, more recently, the upcoming of more precarious part-time work, in a combination with fixed-term work, while

protection of standard work is lower than the Netherlands and Germany. The decline of the standard contract is due to an extreme flexible regulation of atypical work, low level of enforcement and the adaptation (sometimes described as addiction) of employers to the use of atypical contracts (fixed-term contract in a first phase, and, apparently, in a combination with part-time employment since the crisis and the 2012 reform). The protection of standard workers however, has been dramatically decreased. Not only employers have been given higher unilateral powers in terms of in-work flexibility, but protection against dismissal has been lowered, as shown by the recent employment protection index of the OECD. This has however not led to an increase in standard contracts, as the overwhelming majority of new contracts in 2013 are still temporary and part-time.

Graph 23: Evolution of strictness of employment protection against individual dismissal in standard contracts in Germany, Spain and the Netherlands (1990-2013)



Source: own elaboration from OECD online database 2014

While it has been argued that the changes in unemployment protection systems can be analyzed in all three cases as re-commodification, with however different levels of intensity, in-work commodification has also increased, which reinforces the first process of re-commodification. There again, one can find differences in intensity, with The Netherlands seeming to react to new trends by steps of re-regulation of atypical contracts, Germany not seeing important evolutions, except in marginal part-time employment (minijobs), which should be considered as extremely precarious jobs in the sense that they do not give access to social

security rights (except very limited pension rights). This seems however not to have a negative impact on involuntary part-time employment.

However, atypical workers have a higher possibility of ending in the assistance schemes in the three cases (but with less probability in Spain, given its fragmented and insufficient character), due to problems of access or very short benefit periods within the contributory systems. On the one hand, the existence of the assistance systems increase security of atypical workers who in a purer contributory system (like the Spanish), would have more difficulties to see their loss of earnings compensated. On the other hand, the maintenance of the benefits at a low level (minimal level of subsistence) and the orientation towards workfare introduce another form of segmentation between atypical and standard workers.

Spain again, next to an important re-commodifying intensity of its system of unemployment protection (however, also due in great part to extreme rates of unemployment) has recently turned towards an important trend of in-work re-commodification with lack of re-regulation and further flexibilization of atypical contracts, while further lowering protection within and at the margin of the standard employment contract. This higher level of in-work re-commodification is also to be viewed in the light of the low unemployment benefits, shown by the fact that Spain seems to have

one of the lowest effects of poverty reduction of social transfers in the EU, particularly in the case of part-timers.[784]

[784] Horemans, J., and Marx, I., "In-work poverty in times of crisis: do part-timers far worse?", Improve discussion Paper, 13/14, 2014, 20, http://webhost.ua.ac.be/csb/ImPRovE/Working%20Papers/ImPRovE%20WP%201314_1.pdf(last visit: 08/05/2014)

IV.4. Modification of unemployment protection systems and Welfare State change: convergence and divergence in re-commodification

The previous analysis draws doubts about the possibility to conceptualize the reorientation of social policies related to unemployment protection as a move towards a Welfare State based on enablement[785], or social investment.[786] Some authors also contest the trend of re-commodification of unemployment protection within Conservative Welfare States, because contributory unemployment protection schemes have only gradually and limitedly been altered.[787] However, the perspective developed in the present work, including assistance schemes, labour market policies and in-work commodification points towards a different conclusion. While in The Netherlands, the contributory scheme can be considered as relatively generous, it is increasingly difficult for temporary workers to access it for more than a few months, and the elements of workfare, given a broad notion of suitable job and harsh sanctions are important. Germany has a contributory system which

[785] Dingeldey, I., "Between workfare and enablement – The different paths to transformation of the welfare state: A comparative analysis of activating labour market policies", *European Journal of Political Research*, vol. 46, 2007

[786] Bonoli, G., "Active Labour Market Policy and Social Investment: A Changing Relationship", in Palier, B., Morel and Palme, J, "Towards a social investment welfare state?", The Policy Press, Bristol, 2012, 181-204. According to Palier, B. "The re-orientation of European social policies towards social investment", *Internationale Politik und Gesellschaft*, nº 1, 2006, 105-116, social investment should imply, next to developing early-childhood education and care, increasing social assistance benefits in those countries where it is still a residual benefit leaving recipients in poverty.

[787] Pintelon, O., "Welfare State Decommodification: Concepts, Operationalizations and Long-term Trends", CSB Working Paper, nº 12/10, 2012

is shorter and still quite generous, but is more difficult to access and less generous for atypical workers. Unemployed end thus more easily within the assistance scheme, which is based on very limited benefits and a strong work-first approach, which makes that the system as a whole has moved towards re-commodification. It seems however to take into account to a certain extent the need for care as a ground of refusal of a suitable job, even within the work first oriented assistance scheme.

Also, the changes operated in Spain should confirm its drifting apart from the Continental model in terms of de-commodification, because of its low rate of benefits within the contributory scheme, the insufficient character of the fragmented means-tested follow-up scheme, the virtual absence of an adequate system of social assistance, the inadequacy of PES and ALMP focused on general employment policy rather than on activation, let alone enablement. This enhances the role of non-state and non-market institutions in providing welfare, and thus the familialistic structure of its Welfare State. However, given the lowering household incomes, the high level of household debt, the rolling back of care supporting measures, the cuts in pension benefits and education, and the gradual disappearance of strong family structures, decreases the capacity of those alternative institutions in providing welfare, and thus increasing commodification. Because Spain has one of the highest levels of unemployment of the EU, this should have dramatic consequences not only in hollowing out the content of (social) citizenship, but also at an economic level, with depressing internal demand levels and depletion of human capital.

Moreover, it is incontestable that paradigmatic shifts at the level of the EU and cognitive and policy interaction between the European Employment Strategy and the national level have contributed to the shifts in unemployment protection. The German evolution from a three-tier towards a two-tier system has been inspired by the Dutch model, which involved the same evolution. The evolution of ALMP between both countries, however, does not show convergence in design, even if effects (lowering investment in training, cost-effectiveness) move along a same line. Spain, except for the introduction of more negative activation within the structure of unemployment protection, has not followed the same path, despite a high level of structural unemployment.

Nevertheless, it would be difficult to speak about legal integration, for two reasons. First, legal or explicit connections between regulatory instruments at national level and European level are almost inexistent, or purely incidental. Second, and Spain is a good example, the systematic neglect of recommendations in terms of labour market segmentation, active labour market policies and reorganization and reinforcement of PES has had no political nor legal consequences. The EES has only led to re-commodifying reforms, without any substantial de-commodifying compensation. Benchmarking at EU level has been politically used to lower protection, never to the contrary, showing that the OMC, through its appropriation by national actors, has been been used as an ally within the re-commodification process, and foments convergence

through lowering social rights.[788] Moreover, *flexicurity* has not been implemented as a balanced policy concept, only leading to more labour market flexibility (The Netherlands might be slightly different to that respect) and lowering security which should be provided by unemployment protection, only limitedly compensated by better activation of more employable workers to the detriment of the others. In this sense, Europeanization of protection against unemployment has involved its subjection to a regulation based on policies submitted to all sorts of political and economic contingencies rather than regulation submitted to conceptions approaching the rule of law. Above all the pressure of the European framework on national budgets, whether generally in the case of Spain and its obligation to reduce its budgetary deficit, or through the pressure of the EES to reduce the social contributions of employers in the case of Germany, where ALMPs are financed through the latter, has lead to that trend, which is above all problematic given the decrease of the financing of training, which has to be seen as the most important component of security within the context of ideal *flexicurity* policies or the move towards an ideal social investment state.

Moreover, even in Germany and the Netherlands, where a stronger legal concept of activation can be found (through integration of active labour market measures within the nexus between rights and obligations of the unemployed) protection against unemployment

[788] We have, moreover, found two examples of fallacious use of comparison with other countries of the EU: the Dutch government projected lowering of benefit period in 2013 and the reference to a "european average" by the Spanish government to lower protection against dismissal.

itself is gradually moving towards being a policy rather than a right. Passive protection, still more strongly conceptualized in terms of rights, is moving towards a system of minimal assistance with an important work-first approach, certainly for the growing population of workers in atypical contracts. Active labour market measures, which grow relatively in importance within the concept of protection against unemployment, are however still dominantly a policy concept, where discretion of the administration and the application of market logic and cost-effectiveness principles provokes the prioritization of re-commodifying measures (orientation and labour matching) over enabling measures, above training, as well as segmentation between "strong" and "weak" unemployed, or rather unemployed which are valuable for the labour market and those who are too costly to provide them with better options to lead a life which they have reasons to value. Within this context, protection against unemployment is moving from a right which can be activated by the unemployed as a subject towards a policy where the unemployment is only a potential object.

There are however correcting elements to be found in some judicial decisions or legal provisions. A Spanish judicial decision helped put forward the importance of care against the work-first approaches embedded in the obligations of the unemployed, in absence of specific provision, and the German legislation seems to incorporate that approach to a certain extent. Dutch courts have put the emphasis on the contradictions which work-first approaches can have in terms of the freedom to choose an occupation, by advocating the assessment of the proportionality of those measures

taking into account the purpose of meaningful reintegration within the labour market. Those decisions have a point in common in the sense that they all rely on the international obligations of the state in terms of fundamental rights, by basing their interpretation on the ECHR or ILO conventions, which shows that the multilevel approach to social fundamental rights has consequences for the relative consolidation of some rights of unemployed. The German Constitutional Court has emphasized the principle of *Existenzminimum*, or minimum of subsistence as a limit to the precarization of benefit holders, a principle which has been reflected in legislation and administrative practice in the sense that sanctions within the context of activation cannot deprive benefit holders of the necessary means of subsistence.

However, those and other correcting elements, de-commodifying social rights to a certain extent, can be considered as marginal from the perspective of genuine de-commodification of unemployment protection. Therefore, the next part aims to reconstruct the different elements of protection against unemployment as social rights under a multilevel perspective.

Part V. Legal Strategies of de-commodification of unemployment protection

The categorization of social rights as claimable rights along the line of civil and political rights as well as the indivisibility of human or fundamental rights have been defended in the last decades, so that the debate seems to have moved more towards the question of how those are been given content (or ought to be given content) and what are or should be the best strategies to develop and adjudicate them.[789]

Moreover, in Part III it has been tried to argue that, from a dogmatic point of view, fundamental social rights are an empirical reality, at least within the multilevel European perspective, with the presence of applicable international and regional instruments at the side of national constitutions materially connected to social rights in general, and rights related to unemployment protection in particular (ILO conventions, European Social Charter, EU Charter of Fundamental Rights).

[789] Mantouvalou, V., "In Support of Legalisation", in Geart, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Portland, 2011; Tushnet, M., *Weak Courts, Strong Rights. Judicial Review and social Welfare Rights in Comparative Constitutional Law*, Princeton, Woodstock, 2008; King, J., *Judging Social Rights,* CUP, Cambridge, 2012; Koch, I.E., *Human Rights as Indivisible Rights*, Martinus Nijhoff Publishers, Leiden, 2009; García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", *Derecho y Cambio Social*, nº 31, 2013

The present Part takes a closer look at how unemployment protection can be reconstructed towards being a de-commodifying welfare state policy, around the notion of "decent unemployment", with particular attention to the most important aspects, which are coverage, level of benefits, and the complex issue of activation.

With this objective in mind, emphasis is put on four important elements of the multilevel fundamental social rights framework: the right to social security, the right to dignity, the right to equal treatment and the right to work. The analysis could have been done from other perspectives, like a more systematic analysis of the different fundamental social rights or the instruments within which they are contained. However, the selected human social rights provide different perspectives corresponding in our view closely, even if not exclusively, to the three main problematic aspects of the re-commodification of unemployment protection (coverage, sufficiency of benefits, activation).

The second Chapter then assesses the role of courts within the process of implementation of decent unemployment.

Chapter I. Fundamental social rights and the reconstruction of the right to protection against unemployment

I.1. The right to social security

Rooting a de-commodifying approach within the right to social security as a human right has several implications. It permits to ground the assessment of unemployment protection within the multiplicity and interconnectedness of several international agreements, some of them directly applicable within the national legal system. It allows also the development and enrichment of an understanding of the right to social security thanks to the different perspectives developed under those different instruments. It also provides for elements facilitating a concrete application and/or assessment of the development by the State of its duties related to the right in question.

While the European Social Charter contains a whole range of tools to assess the level and extent of social security system as well as their dynamics, under the obligation of the state to guarantee an adequate system as well as improve it, social security has also been defined through an individual perspective by the ECtHR through

the understanding of claims to social benefits as "possession", applicable to contributory and non-contributory benefits alike, moving them towards the individual right to property.

But framing the right to social security as a human right permits also to go further than the instrumental or systemic approach, as expressed for example in ILO Convention 102, which describes the different possible components of a system of social security without defining the right to social security itself. It permits to develop a normative view going further than conceptualizing it as a mere conglomerate of mechanism warranting social benefits, but, as defined in the ILO Report "Into the 21st Century: The Development of Social Security", as "the response to the craving of security in its widest sense".[790]

The right to social security, in its multilevel, human right dimension, is predominantly framed, not as individual right, but rather as an obligation on the state to provide for a system of social security. On the other hand, its conceptualization as fundamental human rights, through the interpretation of the UN Committee of Social, Economic and Cultural rights, involves the existence of some core elements as the minimal content of the obligation of the state:[791]

[790] Pieters, D., Social Security: An Introduction to the Basic Principles, Kluwer Law International, Alphen, 2006, 2

[791] Langford, W, "Social Security and Implications for Law, Policy and Practice", in Riedel, E., (ed.) *Social Security as a Human Right: Drafting a General comment on Article 9 ICESCR. Some challenges*, Springer, Berlin, 2007, 29-53

- Adequate benefits ensuring the right to family protection, an adequate (or dignified) standard of living and the right to health
- Coverage of all risks and contingencies associated with the inability to realise social, economic and cultural rights (to which one could add the realization of individual fundamental rights)
- Affordable contributions in case of social insurance
- Non-discrimination in the guaranteeing of social rights

The focus on those elements of a minimal content has several implications.

The emphasis on the coverage of risks has implications as to its scope of application.

Firstly, the right to social security is to be defined in terms of an obligation to provide protection against social risks. It is the existence of a risk in which the right is rooted, which means that it is the occurrence of a risk which actions the right to protection. This implies an important connection between the reality faced by individuals and the legal framework which has to take into account that reality. It is contended that this should involve the necessity to depart from formalistic legal approaches and take into account social and economic realities surrounding unemployment. This would oblige actors not to assume widespread ideas related to the necessity of negative activation or the supposed negative impact on the duration of unemployment of generous or extended periods of benefits. As argued repeatedly in the previous chapters, the

scientific foundations of those assumptions are generally contested or inconclusive. Moreover, given the wider re-commodifying cognitive and political mechanisms in which they are inscribed, they should not serve to undermine rights approaches which put the necessity of protection, the principle of human dignity and the right to pursue a life which individuals are able to value at their centre.

This also involves that the necessary means of existence have to be established in function of calculation rooted in reality.[792] An application of this principle can be seen in the Report of the 2013 ILO Committee of Experts on the Application of Conventions and Recommendations,[793] where it confirms the initial approach of calculating those means in function of a percentage of the median salary of the reference country, but with the need to complement such an approach within countries experiencing fall of wages, which is typically the situation of countries like Spain and Greece, in which "austerity" is also conceptualized in terms of internal devaluation to enhance competitiveness (see Part I). Finally, this would also involve the obligation to periodically review benefits to keep them in line with the cost of life.[794]

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[792] In the same line, see the 2010 *Hartz IV* judgment of the German Constitutional Court commented in Part IV, which roots that principle in the right to dignity and the duty of the state to redistribute wealth and promote the effective realization of fundamental rights

[793] *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 102nd Session, 2013, Part 1ª, 765, http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282013-102-1A%29.pdf (last visit 07/04/2014)

[794] Again reference can be made, within the German context of the judgment of 18 July 2012 (1 BvL 10/10) of the German Constitutional Court, obliging the legislator to review the benefits for asylum seekers because they had not been adapted to the increased costs of living. No reference was made to the right to

Secondly, the concentration on the notion of risks involves that the definition of the scope of social security does not depend on the characteristics of the programs and policies, but the risks which those programs cover. It is one of the reasons for which, for example, the private character of some insurance programs does not automatically exclude them from the scope of social security.[795] Therefore, qualifying unemployment protection schemes as insurance based, tax-based, with means-tested benefits or wage-replacement benefits does not exclude them from the scope of the right, or the obligation to provide social security. Any system of protection against the risk of unemployment, whatever its design, should be considered as social security. This is also the stance of ILO Conventions on unemployment protection, like Convention 102, which provides for both systems, contributory or tax-based, as systems of protection against unemployment. This view is strengthened by the fact that, as seen in Chapter III, entitlement to social protection benefits is considered by the ECtHR as a right protected (as "possession") independently of the involvement of the claimant in the (economic) constitution of the right. The right to social security under the ECHR (even if limited as a right to possession of benefits) shares also an integrated view of social security, centred on the risk to be protected, however limited to the right of access to existing systems.

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social security but the argumentation if founded on the right to dignity and the "social state clause"

[795] Pieters, D., Social Security: An Introduction to the Basic Principles, Kluwer Law International, Alphen aan de Rijn, 2006, 3-4; Becker, U., "Privatization and Activation: Analysis", in Becker, U. and Pennings, F., (eds.) *International Standard-Setting and Innovations in Social Security*, Kluwer Law International, Alphen aan de Rijn, 2013, 386

In that line, the European Committee of Social Rights seems to take into account the German system of *ALG II* (assistance benefits) as part of social security for unemployed.[796] However, the Dutch WWB assistance system does not seem to be taken into account under that category.[797] This should be considered as inconsistent. On the other hand, both systems are assessed under the right to social assistance (art. 13 of the Charter). Nevertheless, in the case of Spain, the means-tested unemployment benefit system is assessed neither under article 12 (social security), nor under article 13 (social assistance), while its sole purpose is covering the risk of unemployment, not only for those who have run out of contributory benefits, but also for those who did not access the contributory system for reason of insufficient contributory period (a situation that presents itself more given the high temporability of the labour market) and have more than 45 years or with members of the family at charge without sufficient income. Given that 50% of the Spanish unemployed perceiving benefits are covered by that means-tested scheme (taking moreover into account that almost 45% of unemployed do not perceive benefits at all), the invisibility of that scheme cannot be justified under the minimal content of the right to social security. This is also extremely important, given that the same European Committee of Social Rights has found Spain to be

[796] European Committee of Social Rights, Conclusions XX-2 (2013) (Germany), 18, http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GermanyXX2_en.pdf

[797] European Committee of Social Rights, Conclusions 2013 (The Netherlands), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Netherlands2013_en.pdf

in flagrant situation of lack of conformity with the Charter in terms of its obligation to provide for social assistance.[798]

From a de-commodifying vision, the idea of coverage of risks should thus also take into account the characteristics of the risk itself, and its actual circumstances. In a well functioning economy with high levels of employment, the risk of unemployment is not the same as in a dysfunctional economy like the Spanish. There is also an economic argument to that, which is that unemployment protection schemes are one of the most important and effective stabilizing instruments against an economic downturn, while having a comparatively low correlation with higher public debt.[799]

Also, the Committee of Independent Experts of the Council of Europe, referring to Recommendation 1196 (1992) "on severe poverty and social exclusion: towards guaranteed minimum levels of resources, adopted by the Parliamentary assembly of the Council of Europe", has held that in a social context of severe poverty and/or massive and rising unemployment, article 13 (social assistance) also gives expression to the acceptance of the states of the commitment to guarantee a decent minimum level of resources of those in need.[800] This suggests that all unemployed do not have to be covered by systems of social security within the scope of

[798] European Committee of Social Rights, Conclusions XX-2 (2013) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXX2_en.pdf

[799] Vyprachticka, T. and Garnero, A. "Chapter 3. Social protection systems confronting the crisis" in European Commission, Employment and Social Developments in Europe 2012, 2013, 209-210;

[800] Committee of Independent Experts of the Council of Europe, *Conclusions XII-2 1989-90. Social Charter*, Council of Europe, Strasbourg, 1993, 31

article 12 of the Charter, but that article 13 can serve as "secondary" protection system for unemployed in function of the circumstances. However, again, given the situation of non-conformity of Spain with said article 13, it is clear that the risk of unemployment, under a broad notion of social security, is not adequately protected.

Therefore, a genuine right to social security should entail the obligation of the State to guarantee a system of coverage in line with the actual characteristics of the risk covered. The Dutch and German two-tier systems, in line with the complementary between article 12 and 13 of the social charter towards unemployment, could be seen as moving towards adequacy in that respect (with however an effect of segmentation between workers or unemployed). The Spanish system however does clearly not. Protection against unemployment is triply fragmented. Firstly, it consists of a contributory system, a means-tested system not sufficiently integrated in the former, even if also highly dependent on previous contributory period, and then social assistance at the level of the Autonomous Communities. Secondly, the means-tested system is in itself extremely fragmented and complex, with its requirement in terms of age and family responsibilities.[801] Thirdly, systems of social assistance, as a complementing system of protection of unemployed in exceptional circumstances, like high unemployment and high levels of long-term unemployment, suffer from the fragmentation of competences between the central State and the Autonomous communities and the extreme complex character of

[801] De la Casa Quesada S., *La protección por desempleo en España. Configuración y régimen jurídico*. 412

their delimitation, rendering very difficult any attempt at coordination and integration within a sufficient system of protection against unemployment.[802] On the other hand, the fragmentation of competences should not be an obstacle to the fact that the right to social security would involve a right to protection under a system of social security going further than the coverage under contributory schemes, as they would not be considered as "complementary" systems, competence of the Autonomous Communities, but as the basis of protection against the contingency of unemployment, independently of previous periods of contribution.[803]

Moreover, the right to social security should also entail that it should take into account the current structures of the labour market, given the higher level of in-work commodification at a contractual level, and the lowered possibilities of access to unemployment protection schemes for atypical workers. It should also provide for adequate protection in case of long-term unemployment spells (which is also a specific risk against which a social security system should protect the citizens of a state).

Under article 12-3 of the Social Charter (development of a system of social security), the European Committee seems to adopt such an approach, when recognising the introduction of a measure which would give easier access of short-term workers to contributory unemployment benefit recognizing that the arrangement "improves the social security of employees who cannot satisfy the regular

[802] *Ibidem*, 57-61
[803] Alarcón Caracuel, M. R., *La Seguridad Social en España*, Aranzadi, Pamplona, 1999, 52-53

qualification period for a right to unemployment benefit of at least twelve months for reasons related to the particularities of the economic sector in which they are employed."[804]

Therefore, from that point of view, if Spain theoretically provides for a system covering almost all categories of employees, in fact, it should be considered contrary to the right to social security (not necessarily under its strict definition coinciding with the scope of article 12 ESC linked with ILO Convention 102, but under a human right to social security finding its roots in the ICESCR), as it does not cover almost half the workers actually experiencing unemployment, without being supplied by social assistance as a subsidiary means of protection, given its fragmentation and extremely insufficient character in terms of coverage and benefits, as assessed by the European Committee of Social Rights.[805]

When faced by the risk of unemployment, the social security systems provided for a replacement wage, through benefits, or at least some form of guarantee of a minimum of subsistence. As already made clear throughout this work activation started to play an important role within the context of unemployment protection and is an important element of the re-commodification of the right to protection.

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[804] European Committee of Social Rights, Conclusions XX-2 (2013) (Germany), 20, http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GermanyXX2_en.pdf

[805] European Committee of Social Rights, Conclusions XX-2 (2013) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXX2_en.pdf

From the perspective of a political analysis, the principal (or original) goal of activation for the states implementing it is cost containment. This objective is possibly reinforced by moral considerations about the role of the state in the enforcement of the participation of individuals in society through generating wealth (the new paternalistic approach)[806] and false assumptions about welfare dependence.[807] Those ideas have been translated into a discourse where protection against unemployment passes through the reintegration of the unemployed in the labour market.

At a first sight, the assumption is quite evident. When a person finds a job, the risk against which she was insured or against which the state protects her disappears. Therefore, protection against the risk of unemployment involves helping a person to find a new job.

However, there are some contradictions between these assumptions and the way in which activation manifests itself.

Within the perspective of a right to social security and its international human right definition, protection is provided through the granting of "security" against the risk. Moreover, the risk of unemployment is not only of a material character, given the particular character of work as (possible) experience of self-respect, even if material security is still at the centre of the paradigm of security. But in the current situation of flexible and volatile labour

[806] Mead, L. (ed.), *The New Paternalism: Supervisory Approaches to Poverty*, The Brookings Institution, Washington, 1997

[807] Saraceno, C., "Deconstructing the myth of welfare dependence", in Saraceno, C., (ed.) *Social assistance dynamics in Europe: National and Local Poverty Regimes*, Policy Press, Bristol, 235-257

markets, the risk of being unemployed also involves the risk to status degradation (worse labour conditions, precarious contract,...) once reintegrating the former. These consequences should thus also be taken into account when assessing protection. There is also another argument to that, which is the idea of social rights as necessary condition for the realization of other fundamental rights, or exercising real freedom to participate as a citizen to society. Social security can thus be as a necessity for the persons it covers to realize other fundamental rights. Within this context, when activation amounts to the imposition of obligations constraining one's choices to the point of curtailing the exercise of one's freedom to participate to society, it would thus stop to fulfil its function as a human right or citizenship right.

For example, the obligations of jobseekers, and above all the obligation to accept suitable employment, have also to be viewed from that security perspective. The refusal of a job which does not give a reasonable perspective of security should thus be considered as legitimate. This does not means that individual responsibility, framed as duties of citizens towards society, would disappear. The obligation to look for or accept suitable employment as such remains legitimate within a perspective of the right to social security, and is also recognized in all ILO and other human rights instruments related to unemployment protection.

Moreover, within this light, individual responsibility for an extended period of unemployment has to be given its adequate place amongst the factors of unemployment. Also, if one could accept that

the security to be guaranteed by the State could imply the responsibility of the individual in avoiding the risk of unemployment (a principle, which, as seen in the case studies, can finds its legal foundations in the insurance principle or the subsidiary character of the intervention of the state) it is important to remind that the obligations related to that responsibility are designed from the point of view of a labour market working under standard conditions,[808] and also that the individual is in state to assume his or her responsibilities as a citizen in conditions of substantive equality. Therefore, in case of work shortage or personal difficulties related to the social or economic background of the individual, the principle of security would involve a reassertion of the intensity of the obligations related to activation.

Activation seen as a component of the right to social security also links the latter with the obligation of the state to provide unemployed with measures permitting to view their reintegration in the labour market under an idea of security. This connects thus the right to social security with the right to genuinely enabling measures, under which the right to (vocational) training should occupy a central position. This is important given the erosion of training within ALMP measures observed in the case study (through decreasing budgets, the relative absence of a right of unemployed to access to training and segmentation between unemployed), which moreover present contradiction with the implementation of *flexicurity* policies. The implementation of a reinforced right to

[808] Quintero Lima, M., "La protección por desempleo: ¿la ocupabilidad como contrapartida?", *Aranzadi Social*, Vol. 5, nº 7, 2012, 123 -151

training would imply *inter alia* that a reinforcement of the assessment by the European Committee of Social Rights of the right to vocational training has to be advocated, going further than the quite low thresholds it actually handles.

Finally, the guarantee by the state of security, from a legal point of view, implies that the guarantee has to be based on rights. If it were based on discretion or opportunities, there would be no right to security, even if it was conceptualized as a mere obligation on part of the state.

As argued in Part III, active labour market policies, within the European *flexicurity* perspective, are moving towards being framed under the concept of security. However, receiving an adequate and effective training, acquiring the capacities to adapt oneself, or achieving employable status are one step further than effective security, for which including them under the right to social security could distort that right. On the other hand, from a positivistic perspective, such legal conceptualization is already present. As we have seen the German *Sozialgesetzbuch* defines active labour market measures for unemployment as social (security) benefits. The Netherlands include some measures (like training) in the Law on Unemployment, in the articles following the "right of unemployed to support".

Moreover, within a human rights definition of social security, the benefits provided have to be "adequate" to provide security against the risk of unemployment. Under article 12 ESC, the European Committee of Social Rights speaks also about "effective"

benefits.[809] This would have several implications. Of course, this means that material benefits perceived by the unemployed have to give them the necessary resources to live a life in dignity. From that point of view, the fact that minimum benefits are generally quite close to the poverty threshold (which is a relative measure and should thus be complemented by other approaches to measuring material necessities) should involve stricter scrutiny of the latter under the principle of adequacy or sufficiency.

But it is also contended that this could mean that the activation measures should be tailored to the needs of the unemployed, which would also imply individual treatment and dialogue between the provider of the measure and the unemployed. Moreover, measures which would not guarantee a durable integration within the labour market would not be deemed to be adequate in terms of providing security against the risk. Therefore, work-first strategies could not be acceptable form the notion of social security, and thus, losing benefits for not accepting work or measures which do not guarantee durable integration could be deemed contrary to the obligation of the state to provide for a system of social security guaranteeing adequate, or effective benefits. This could at least limit the re-comodifying character of systems of reintegration measures, which through the design of the obligation of unemployed and the segmentation in the targeting of unemployed, caused by cost-effectiveness principles, are configured more in terms of work-first

[809] Tooze, J., "Social Security and Social Assistance", in Hervey, T. and Kenner, J., (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights. A legal perspective*. Hart, Oxford, 2002, 168

approaches rather than truly enabling measures. This would thus imply a right to durable activation, genuinely securing labour market transitions which do not involve degradation.

Within that perspective also, legislative measures conceptualizing the lowering of benefits as a measure of activation would be more difficult to justify within the context of the application of the principle of non-regression. The Spanish Royal-Decree Law 20/2012[810] reduced contributory unemployment benefits to 50% of the previous wage after the sixth month of unemployment and presented it literally as a measure of activation. With the average median wage of 2012 being around 19.017 € (and the "most perceived salary" being of 16.490) this would give benefits (before retention of taxes and social security contribution) of 792,37 € per month (or 687 € for the "most perceived salary"). After retention of social contributions, those benefits are lower even. With an at-risk-of poverty threshold at 598 € per month, which does not take into account state-wide variations in costs of life, benefits are as thus dangerously low. Therefore, it is contented that, under the right to social security conceptualizing activation as providing security, it would be extremely difficult to justify such a reduction, above all given the lack of social dialogue and the urgent character of the legislation implementing those cuts, under the principle of non-regression of *inter alia* article 12-3 of the European Social Charter. Such activation through general benefit reduction also breaches the principle of the obligation of the state to provide for security, to the

[810] Real Decreto-ley 20/2012, de 13 de julio, de medidas para garantizar la estabilidad presupuestaria y de fomento de la competitividad

extent that it imposes a general lowering of benefits, involving higher individual responsibility to face the risk of unemployment, in a context of extreme unemployment, with clearly insufficient and ineffective positive activation measures, and negating the real factors behind extended periods of unemployment, which are not of an individual nature.

However, the human right to social security, seen from the perspective of de-commodification, should go further than imposing on the states a duty to guarantee minimal levels of (material) assistance in case of the occurrence of social risks, above all in our Western affluent economies. It has been argued in Part II that a genuine de-commodifying social policy has to go further than poverty alleviation. The Dutch and German systems, even if they comply *prima facie* with a basic (or restrictive) understanding of the right to dignity as they guarantee some minimum of existence to all, have been said to move from a system of status protection (guaranteeing a level of life out of the market not too far from previous wage levels) towards a segmented system where ever more unemployed are only guaranteed the strict minimum, which could signify an important degradation of possible life choices while in unemployment (moreover increasing the pressure to re-enter the labour market "at any cost").

Within this context, it could be said that article 12-3 of the European Social Charter cannot be reduced to a mere non-regression principle, as, in principle, it contains an obligation to raise the levels of social security. This has not to be interpreted only

in terms of coverage of the population, but also in terms of sufficiency of benefits. The decreasing reservation wages caused by the move from status protecting unemployment schemes based on a reasonable proportion of previous wage towards means-tested benefits calculated to amount to poverty threshold (or, in the wording of the European Commission's framing of the EES, "to alleviate poverty"), and thus, re-commodification, involves a decrease of the security they should provide. Firstly, the decreased possibility for individuals to reorient and strengthen their life plans (combined with the segmentation of "enabling" support to the detriment of those who most need it) negatively impacts both their objective opportunities to find employment which would guarantee them durable economic security as their subjective experience of security. Secondly, benefits at the level of the risk of poverty, as the wording of the concept itself suggests, imply that their recipients are still facing the risk of poverty, and are generally not sheltered against events involving unexpected expenses which could push them into actual poverty.

This idea of insufficient security has moreover to be considered in relation with in-work re-commodification provoked by lower wages, irregular forms of employment, decreasing guarantees of stability and a higher possibility of abuse of employer power, with the consequence that reintegration in the labour market transfers the unemployed from one situation of threatened security to another.

I.2. The right to dignity and the notion of "decent unemployment"

As already stated in Part II, dignity stays at the heart of any conceptualization of social rights as human rights, but also as a citizenship right. It is also central to newer international approaches towards the implementation of social rights, the most important of which is the ILO decent work agenda.[811] It is also clearly linked to the right to social security in its component of securing at least the right to a minimum subsistence, a link which has been developed, however without reference to the right to social security, by the German constitutional jurisprudence.

In line with the notion of decent work which has moved to the front of the ILO agenda, a notion of "decent unemployment" has appeared in the literature. Based on the notion of (institutional) disrespect as violation of human dignity, Gottfried Schweiger sees unemployment as a social pathology, given that it is connected with the individual experience of various forms of disrespect (reduced overall well-being, experience of poverty, negative effects on mental health, all reducing the experience of a good life). In looking for solutions of a normative character, he discards to view them under a right to work, because of the difficulties associated to it: this could only be realized through the abolishment of the idea of

[811] Chacartegui Jávega, C., *Dignidad de los Trabajadores y Derechos Humanos del Trabajo según la Jurisprudencia del Tribunal Europeo de Derechos Humanos*, Bomarzo, Albacete, 2013, 17-22

the labour market as we know it, or through the provision of public employment, two solutions which are too radical in the current social and political circumstances. On the other hand, he finds more feasible an approach to unemployment in the line of the ILO decent work agenda, with a notion of "decent unemployment" involving clear objectives and the possibility to develop indicators to monitor the fulfilment of those objectives.[812]

In the same line, according to Clemens Sedmak, the institutionalised constitution of unemployment shapes the notion of job (by defining what is employment and what is not) and bureaucratizes unemployment as a job-dependent situation, characterized by transfer of state benefits, by a system administering persons as "cases" and obliging them to take the administration's view on the management of their life, asking them to justify their existence as a subscriber to unemployment benefit (for example, by proving adequate job search or by being forced to accept employment not corresponding to their aspirations, qualification or previous job), paralleling dynamics of dehumanisation which occur within a job.[813] This view clearly parallels the observations made in Part II about the effects of commodification in terms of self-respect and the capacity to live a

[812] Schweiger, G., "Recognition and Work", in Bagusat, C., Keenan, W.J.F. and Sedmak, C. (eds.), *Decent Work and Unemployment*, Lit Verlag, Vienna-Berlin, 2010, 41-54; Schweiger, G., "The social pathology of unemployment", paper (early version), https://www.academia.edu/5773375/The_social_pathology_of_unemployment (last visit: 03/05/2014)

[813] Sedmak, C., "Dignified unemployment, "decency" and the job market", in in Bagusat, C., Keenan, W.J.F. and Sedmak, C. (eds.), *Decent Work and Unemployment*, Lit Verlag, Vienna-Berlin, 2010, 297-319

life which one can value. He also refers to the ILO concept of decent or dignified work, which is established around a framework of conditions that seek to hinder structural degradation in jobs, by strengthening persons to resist against the gradual elimination of decency in work. He proposes thus to translate the notions of dignified employment to the understanding of unemployment, so as to identify unacceptable conditions of unemployment which would exhaust the resources of identity of human beings, and found a positive status of "unemployee", where people would be able to pose the question of their expectations and be prepared to be "cooperatively unemployed".[814]

It is contended that such an approach would fit analytically and normatively in the context and elements of unemployment protection observed in the case-study. On the one hand, the shift towards activation is discursively based on the obligation of cooperation of the unemployed in providing security against the risk of unemployment, in the sense of making it disappear. On the other hand, as a normative guide, it would permit to reassess the imbalance between rights and obligations within this paradigm of cooperation of the unemployed.

In application of the concept of decent unemployment Sedmak identifies five basic conditions for "unemployees" to experience their situation as dignified: a condition of freedom in choosing productive and appropriately remunerated work, a condition of dialogue, which interpret the search for job as a discussion, a

[814] Ibidem, 21-22

condition of security, guaranteeing social protection, a condition of quality of life so as to perceive social responsibility and, finally, a condition of growth, enabling "unemployees" to be able to develop themselves.

Schweiger also indentifies five basic conditions, which partially overlap the precedent, for a notion of decent unemployment: a condition of freedom; rights and security, the former being the guarantee of the latter; dialogue and participation, being also conditions of viewing decent unemployment as a right, and not a charity; quality of life and growth

Translating into the analysis of this work those conditions would have the following implication.

Firstly, within the context of contractualization of protection against unemployment through "integration contracts", a proper, synallagmatic contractual character of the "integration contract" could be advocated. The integration contract should be based on genuine freedom on part of the unemployed to negotiate its content. This would correspond to the "decent unemployment" conditions of freedom and dialogue.

This would also imply, like in Germany within the contributory system to a certain extent, that its conclusion would not be an obligation, but a faculty. It is contended that such change would not be radical, to the extent that the law in itself already contains the obligation to look for and accept suitable employment. In this sense, the general obligation of the unemployed could be made more

precise (and thus more burdensome) in this contract only to the extent that the PES would assume obligations towards supporting the unemployed, in line with his or her expectations. The Dutch "individual integration contracts" could be considered as a first step towards that direction, even if the position of the unemployed as a contractual party is eventually watered down by the fact that the contract is in fact concluded between the PES and private reintegration providers.

Another extension of this idea would be the necessity to involve collective representation structures of unemployed within the design and control of unemployment policies. The Dutch system provides for some advisory role of benefit holders within the structure of the Dutch UWV, but stronger instruments of policy negotiation should be introduced.

Secondly, the concept of suitable employment should be centred on the qualifications and the expectation of the unemployed. This would correspond to the "decent unemployment" conditions of freedom, security and growth.

As already pointed towards in Part III, the principle of dignity should constitute a limit to the degradation involved by the enlargement of the criteria of suitability of a job in function of the duration of unemployment, taking into account the conditions of the labour market. A job which would prevent or seriously impede the personal development of someone, given his qualifications and capabilities, should never be considered as suitable. It should also not be forgotten that the extension of the notion of suitable

employment in function of the duration of unemployment has to be seen in parallel with the negative activation function of the limited duration or the degradation in benefits, constituting thus a double degradation (and thus affection of the dignity) which the unemployed has to suffer. Therefore, the notion of suitable employment has to be interpreted within the context of proportionality. Within that framework, the widening of the notion of suitability in function of time constitutes a restriction of the fundamental right to dignity. Therefore, the "degradation", compared to the qualifications, previous employment and expressed choices of the unemployed should answer a legitimate goal, no other measures should be available (like retraining or the existence of other jobseekers for whom the job would not signify such a degradation) and a proper balance has to be stroke between the interests of the unemployed and those of the state, or community of insured.

Moreover, the criteria of suitable employment should be made clearer and involve more legal certainty, given the fact that sanctions are imposed after the refusal of a job offer by the unemployed. From that perspective, even if the conformity of the Dutch criteria with the right to dignity or the right to work, as interpreted by the European Committee of Social Rights, can be put into doubt, the fact that they are contained in a governmental regulation enhances legal certainty. The German SGB III contains also numerous criteria as to the suitability of employment, above all with regards to childcare. Again, however, the Spanish legal definition does not meet the requirement of legal certainty, and the

contradictory jurisprudence in terms of family obligations of the unemployed, due itself to the lack of legal clarity of the definition of the grounds of refusal of suitable employment, does not improve the situation. Even the flexicurity principles, as defined by the Commission, could be invoked in that respect, as they involve the existence of "clear rights and obligations" for the unemployed.

Another element to be taken into account, above all in the Dutch and German two-tier systems, is the greater proportion of workers under atypical contracts who end more rapidly within means-tested schemes which involve the obligation to accept any (legal) job. Those workers do not have the same rights in terms of refusing unsuitable employment as workers with the right to longer periods under the systems of contributory unemployment benefits. Degradation operates thus more rapidly, but not in function of the time in which those workers have been unemployed, but merely under their falling within a different protection scheme.

Thirdly, systems of protection against unemployment have to be designed to give access and coverage to all categories of workers and unemployed. This would correspond to the "decent unemployment" condition of security, and overlaps with the right to social security.

It has been shown that a great part of the workforce is living under contracts which, generally due to the design of contributory unemployment protection in function of ever stricter qualifying periods, do not gives them access to benefits. Within that respect the existence of universal unemployment protection regimes is an

important development, however based on means-tested benefits the sufficiency of which is generally assessed according to lower thresholds, and with more intense negative activation due to the application of extended notions of employment suitability (or rather the suppression).

The principle of dignity should however permit to limit those extended notions, or the absence of such notion of suitable employment. The legal or administrative definitions of suitable employment, as seen in the Dutch and German case, are still general definitions allowing the application of proportionality, and thus mitigate work first approaches.

Also, systems of protection should also have an indefinite character (provide benefits as long as the risk is present), so as to cover long-term unemployment, and absorb the consequences of the situation of the labour market, as shown by the Spanish problematic. The existence of the obligations of unemployed in terms of cooperation towards ending their situation of unemployment already functions as a limit to the perception of benefits. Research shows that a great part of the factors behind long-term unemployment are education, skill level, the previous sector of activity, the circumstance within which the job was lost, as well as overall levels of unemployment,[815] all factors unrelated with individual responsibility. Therefore, the duration of unemployment, translated into lower benefits or the disappearance thereof, should not add to

[815] European Commission, *Employment and Social Developments in Europe 2012*, Chapter 1

the existing limits of the protection embodied in the obligations of the unemployed.

Fourthly, the access of unemployed to support should be framed as claimable rights. This would correspond to the "decent unemployment" conditions of security and growth.

This would involve a design of support measures supporting the obligation to look for employment from an individualized point of view (which would thus exclude general activating labour market measures, like the Spanish employment subsidies, which are not conceded from the point of view of the individual unemployed but from the perspective of general labour market policy, or in the case in question, meeting demands from employers in terms of lowering social contributions). But individualization is not enough: it is a first step to integrate support within the nexus between rights and obligations of the unemployed. The second step would be the reduction of the discretion of the PES (or providers of integration services) in offering the measures. A first mode of lowering discretion has already been proposed in terms of a genuine right to negotiation of integration contracts. A second mode could be inspired by the German model, with the definition of reintegration measures as individual benefits, which can be claimed by unemployed, and accorded by the PES in function of an assessment of established criteria. The criteria which would form the framework of a proportionality assessment by the PES (and, in their supervisory role, by courts) are however of importance, as shown

by the pernicious effects of the integration of the principle of cost-effectiveness.

From that perspective, it would also not be unreasonable to argue that those reintegration measures could not be imposed. The imposition, while affecting the freedom of the unemployed within the fulfilment of his or her obligation, would also lead to what has been shown in the preceding Part as the danger of those reintegration measures and effective PES intensifying the already heavy obligation in terms of acceptance of suitable employment.

Fifth, unemployed should have access to measures genuinely promoting their "enablement". This would correspond to the "decent unemployment" condition of growth.

The relative decrease of training and long-term measures aimed at investing in human capital observed in the case studies can also be placed within this context. The mechanism leading to this decrease, like the importance of cost-effectiveness principle, the marketization of services to the unemployed, or, like in Spain, the predominance of ineffective policies, should be reassessed.

Applying all those shifts do not require significant and radical changes within the observed unemployment protection systems, with, maybe the exception of the Spanish system. But even in the latter a notion of decent unemployment, rooted in the principle of dignity, could reorient reforms. Within that sense, decent unemployment should serve as humanizing process within the administrative sphere of unemployment protection, as well as de-

commodify it in the sphere of its connections with the labour market.

I.3. The right to equal treatment and non-discrimination

While the right to equal treatment generally stands alone, as seen in the previous sub-sections, it is also included within the right to dignity and the right to social security.

Anti-discrimination law has been found suspect of realizing genuine de-commodification as a centrepiece of social policy, centred on the considerations that it has failed to deliver on the promise of making European society more just and served to legitimate existing inequalities and the neo-liberal orientation of the EU by suggesting that the negative outcomes of competition could be cured of unfairness by reinstating equal opportunities. [816] However, the sceptical analysis is above all oriented at the application of anti-discrimination law in the context of the EU. The flaws of EU anti-discrimination law have already been briefly commented in Chapter III. However, it is contended that it still can be seen as a valuable ally of a system encompassing strong social rights. The fact that it is playing only a supplemental role in correcting for the distortions of the market[817] need not be an obstacle to its usefulness in advancing Welfare State rights in other legal systems, or within a multilevel legal perspective, above all taking into account the indivisibility and

[816] Somek, A., "Antisdiscrimination and Decommodification", *University of Iowa Legal Studies Research Paper*, n° 05/03, 2005, http://ssrn.com/abstract=651441 (last visit: 9/5/2013); O'Cinneide, C., "Completing the picture: the complex relationship between EU anti-discrimination law and `Social Europe´", in Countouris, N., and Freedland, M., (eds.) *Resocialising Europe in a Time of Crisis*, CUP, Cambridge, 2013, 118-119

[817] O'Cinneide, C., "Completing the picture: the complex relationship between EU anti-discrimination law and `Social Europe´", in Countouris, N., and Freedland, M., (eds.) *Resocialising Europe in a Time of Crisis*, CUP, Cambridge, 2013, 119

interconnectedness of human rights. Moreover, the recent decision of the CJUE concerning pension rights for Spanish part-time workers[818] which is commented in this sub-section shows that, for all its flaws, the EU non-discrimination principle can bring forward significant change.

Therefore, when analysing several aspects of the aspects of unemployment protection, like benefit coverage, its use to promote de-commodification should not be ignored.

Firstly, as a fundamental right, which can be activated as a negative individual right, it is an important conveyor of rights with a less individualized character, like the right to social security, which is more generally defined in terms of obligation on part of the state. As such, it has been a powerful expression of the interdependent character of human rights and their indivisibility. It permitted courts to adjudicate social rights which from a legalistic *prima facie* lecture did not enter within their sphere of competence, through the exercise of an "indirect guardianship" of the concerned social rights.[819]

Secondly, its other function as a cross-cutting right is also that it permits to circumvent the deference given by Courts to the legislature in developing programmatic rights. Even if it is part of its reserved domain, it can be generally considered that the

[818] CJUE, Judgment of 22 November 2012, Case C-385/11, *Elbal Moreno v INSS and TGSS*

[819] García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", *Derecho y Cambio Social*, nº 31, 2013, 85

legislature, in developing those principles, cannot affect other rights, amongst them the right to discrimination. Even if some leeway can be given in the assessment of the proportionality or reasonability of the difference of treatment, it permits Courts to put one step behind the door, and at least proceed to verify if the justification for the unequal treatment is reasonable or passes the proportionality test.

Thirdly, enforcing anti-discrimination law has the advantage to always better the conditions of the less advantaged, without lowering the conditions of the majority. While it has been observed that the general tendency of policies to solve problems related to segmentation by worsening the conditions of the better protected (Spain and its last labour law reforms is a good example), involving re-commodification, the dynamic of non-discrimination, by according existing rights to those who are excluded from them is able to contribute to a de-commodifying logic in solving those problems.

However it is not excluded that giving access or bettering access of some categories to social protection schemes through Court intervention could trigger a countermovement from legislative bodies pushed by the perceived necessity to guarantee the viability of the concerned scheme. In matters of employment, this is the reason why non-regression clauses were inserted in the EU Atypical Work Directives. However, their effectiveness (for reasons linked to the necessary margin of appreciation left to the implementing Member States) is heavily questioned, due to their drafting and their

narrow interpretation by CJUE.[820] However, it is contended as argued in Chapter III, that the general principle of non-regression, above all within its interpretation by the European Committee of Social Rights, is still an instrument which cannot be ruled out, above all in periods of economic stability, or growth.

Nevertheless, the possibility of countermovement is not an argument strong enough to detain application of anti-discrimination principles through judicial control. Relation between one act applying fundamental rights and a countermovement that, however potentially diminishing other people´s rights, is in any case itself limited by fundamental rights is too indirect to constrain the margin of courts. In any case, their intervention cannot be considered without democratic legitimacy, as proven by the possibility itself of a countermovement to absorb the consequences of the judicial decision.

Moreover, anti-discrimination is another operational tool that can be used to supplement the minimal floor approach (above all in terms of coverage) developed in international instruments like ILO Convention 102 or the European Social Security code. It is contended that it would complement and reinforce the approach advocated in ILO Recommendation nº 202 concerning national floors of social protection (Social Protection Floors Recommendation), which contains a set of criteria to be followed by the Member States in extending social security, as a tool which

[820] Peers, S., "Non-regression Clauses: The Fig Leaf Has Fallen", *Industrial Law Journal*, Vol. 39, 436-443;

can be activated from an individual, claims-based approach. While "static" instruments like ILO Convention nº 102 generally only require a numerical part of the working population to be covered, for the standard to be met, anti-discrimination claims would serve as dynamic pressure to extend protection. Even if it is not necessarily so, one can consider that it would be generally more vulnerable groups which are not covered, certainly in systems where previous period of contribution are still important. Anti-discrimination can then be a tool to promote an increase of coverage.

But the usefulness of anti-discrimination goes further than coverage. As its primary application does not necessarily require any state intervention further than legal definition and judicial application, it is a law that is tailored to be applied within the market. Therefore, it should play an important role in preventing the consequences of privatization of a lot of services related to unemployment protection, as in both Dutch and Spanish case, as well as practice that can arise from budgetary pressure or the application of cost-effectiveness principles within PES, as shown in the Spanish and German case. It has been shown that in the three studied cases, the existence of reintegration markets or the enshrinement of cost-effectiveness principles as criteria for the actuation of PES tend to advantage orientation and outplacement of higher skilled workers instead of persons requiring more resources to activate, train and outplace. However, given the structure of reintegration measures and the discretion of PES in proposing them to unemployed, such equal treatment is difficult to reinforce from

an individual point of view and a systemic approach should be adopted.

Also, anti-discrimination is one of the main features of the design of the EU constitutional sphere, and at the spearhead of developing social rights within European Union law. A great part of the EU Directives in the social sphere have also been motivated by equal treatment on the one hand, and/or articulated around it on the other. But, above all, it has been a powerful tool in the hands of the CJUE to advance social rights within the EU sphere. As seen in Chapter III, the use by the Court of the equal treatment principle linked to the development of the concept of European citizenship has de-commodified to a certain extent the same concept of European citizenship[821]. But equal treatment has not only been applied within the free movement sphere by the CJUE, and the Court´s jurisprudence has developed an important framework, in general and in the social sphere in particular. The summary of this framework, given by Claire Kilpatrick[822], shows several systems of application which could potentially influence each other, or even collide. Equal treatment as a *general principle* of EU law seems to have been used in *Mangold* and *Kücükdevici* to side-step the rules limiting the application of EU legislation (expiry date for transposition of a Directive in the former, and no horizontal direct effect of Directives in the former). Equal treatment as right of the

[821] Even if this lead to disembedding further the single market by breaking up national solidarity systems without EU level compensatory solidarity mechanisms.

[822] Kilpatrick, C., "The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture", *Industrial Law Journal,* vol. 40, n° 3, 280-301.

EU Charter seems to have been used for grounds of discrimination not implemented through EU legislation. Equal treatment has also been applied as mere content of the different EU legislative instruments, with all the limitation contained therein. And finally, it seems, at least in the field of discrimination based on age, that the public policy exception to justify discrimination is interpreted along the lines of the ECtHR, which give a relatively broad margin of appreciation to the Member States.

Finally, as the Judgment of the Constitutional Court of Portugal on the discriminatory character of reduction of social rights of civil servants has shown, the anti-discrimination logic applied within the broader proportionality approach towards recessionary measures can help countering a certain logic behind power mechanisms (which can be enhanced within the operation of the markets) which tend towards diverting the burden of adjustments in a disproportional manner on certain categories of citizens. Furthering that logic, applying it through the idea that one of the main justifications to reduce social rights in difficult economic circumstances is to be found in concentrating resources on the weaker part of the population[823], the social rights of the most vulnerable part of the population (amongst which should be counted the unemployed, or at least those unemployed which have the most difficulties to find a job, like long-term unemployed) should only be affected in the most extreme circumstances.

[823] Garcia schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for them and their guarantees", *Derecho y Cambio Social*, nº 31, 2013

A good example of the principle of non-discrimination concerning coverage of Welfare State scheme has been its use by the CJUE and the Spanish Constitutional Court to strike down the rules for calculating the necessary period of contribution for part-time workers to have access to the contributory pension benefits, which can clearly be analysed as a de-commodificating move. Despite not being about unemployment protection, those recent cases concern the need for social protection scheme to take into account the new flexibilized forms of employment, in this case Part-Time work. Given the high level of involuntary part-time employment, and its flexible regulation, increased through the Spanish 2012 labour law reform, part-time employment has a high in-work commodifying character. It is also interesting from the point of view of the analysis of the dynamics of the multilevel systems as two Courts which could be both categorized as constitutional pronounced themselves about the same national law in only a few months of interval.

In its judgment of 22 November 2012[824] the CJUE declared that the Spanish calculation system of the period of previous contribution needed to have access to contributory old age pension for part-timers was contrary to article 4 of Directive 79/7/CEE on the progressive implementation of the principle of equal treatment for men and women in matters of social security. It required a proportionally greater contribution period from part-time workers than from full-time workers, as contribution days were calculated on basis of the total hours worked, with a theoretical day counting 5

[824] CJUE, Judgment of 22 November 2012, Case C-385/11, *Elbal Moreno v INSS and TGSS*

hours, with a correcting coefficient of 1,5 to the number of days, which was deemed insufficient by the Court. As the amount of the pensions was already reduced in proportion to the part-time nature of the employment, this amounted to a discrimination between part-time and full-time workers, the former being a majority of women (80% of part-time workers). The Court also noted that the defendants (Spanish government and National Social Security Institute) did not put forward elements which would suggest that the measure was "genuinely necessary to achieve the objective of protecting the contributory social security system, and that no other measure less onerous for those workers is capable of achieving the same objective".

On a lesser note concerning social security, though, the Court reminded his *Bruno and others*[825] jurisprudence, according to which social security benefits (*in concreto*, pensions) "deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy" do not fall under the scope of article 157 TFUE on equal pay between men and women, article 4 of Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, or Clause 4 of the Directive on Part-time work. This reduces the utility of those EU instruments, and

[825] CJUE, Judgment of 10 June 2010, Case C-395/08, *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and others*

thus of the anti-discrimination principle in terms of social security (and social assistance) benefits.

Less than four months later, namely on 14 March 2013, the Spanish Constitutional Court[826] declared the regulation to be in violation of article 14 of the Constitution (non discrimination principle), referring in its argumentation also explicitly to the *Elbal Moreno* judgment of the CJUE, in the context of the obligation imposed by article 10.2 of the Constitution to interpret constitutional fundamental rights in conformity with Spain´s international obligations, including their interpretation by the institutions designed to guarantee those rights. While acknowledging the indirect discrimination of women in the case, the Court deemed it sufficient to assess the direct discrimination between part-timers and full-timers. In accordance with its powers, the Court extended the nullity of the applicable provision to other social security schemes, like permanent and temporary invalidity, survival, maternity and paternity. The Court also refused the arguments put forward by the government (referring again explicitly to their refusal by the CJUE), namely that benefits had to correspond to the contribution made so as to safeguard the economic balance and financial viability of the Social Security system , considering they did not constitute "reasonable justification for the difference of treatment, safeguarding the necessary proportion between the measure, its results and its pretended objective" and observing that

[826] Judgment 61/2013 on a question of constitutionality asked by a lower tribunal in 2003. It took the Court ten years to answer a question, which put also into question the effectiveness of protection of fundamental (social) rights by the Spanish Constitutional Court.

the liberty recognized by the Constitution to the legislator to adapt the protection of the Social Security system in function of economic and social circumstances affecting its efficacy and viability is limited by the necessary respect of constitutional principles. While proportionality of benefits in function of contributions expressed in lower pensions for part-time workers could be justified, the proportionality in terms of contribution period is arbitrary and affects part-time workers disproportionally.

Could one imagine possible applications of the anti-discrimination arsenal to problematical aspects of unemployment protection observed in this work?

The biggest obstacle is the limited scope of application of the equal treatment principle for social security. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, cover social security schemes, as well as social assistance schemes insofar it is intended to supplement or replace the former, and in the case of the Racial Equality Directive, social protection in general. However, all the other Directives are generally limited to occupational schemes (as opposed to statutory schemes). The gender related character of a lot of highly commodified forms of employment can however promote the application of the 79/7 Directive, and provide thus the necessary

connection for EU law, its fundamental rights and general principles, to apply.

However, another much appearing exclusion ground of the Spanish means-tested unemployment benefit system is age, which, again, limits applicability of EU equal treatment principles for reasons of competence.

As seen in Chapter three, the European Court of Human Rights has recognized social security benefits to be considered as "possession" in the sense of Article 1 of the 1st Protocol to the ECHR, opening the way to application of the equal treatment principle of article 14 ECHR. However, it is important to note that the ECtHR stated that "the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic ground, and the Court will generally respect the legislature´s policy choice unless it is "manifestly without reasonable foundation""[827], which is inevitably a lower threshold than the thresholds applied by the CJUE. In a case of gender discrimination due to different retirement ages between men and women, the ECtHR recognized as justification the gradual implementation of a same retirement age (*Stec and Others*).[828] On the other hand, the Court refused to recognize justification in a case were equal treatment was originally scheduled to be attained in 1995, but where a last moment amendment reintroduced discrimination between widowers as to access to a full pension

[827] ECtHR, *Stec and Others v. the United Kingdom*, Judgment of 12 April 2006, paragraph 52.
[828] ECtHR, *Stec and Others v. the United Kingdom*, Judgment of 12 April 2006,

(*Zeman case*). [829] In a more recent Judgment (*Stummer v. Austria*), [830] the Court found no manifest absence of reasonable justification to the fact that the periods of employment as a prisoner of the claimant were not taken into account for the right to retirement pension, recognizing the absence of European consensus in that matter, even if an absolute majority of the Member States provided prisoners with some kind of social security. It is worth noting that an important aspect of the case was that the applicant actually received benefits and housing under an emergency unemployment scheme, a circumstance which seems to have been taken into account by the Court.

Even if exclusion of some categories of persons from unemployment benefits coverage is liable to be challenged under the ECHR, the exclusion has to be of a magnitude which would render difficult its justification under arguments relating to financial equilibrium or social function of those schemes.

However, as contended in the previous subsection, the right to social security, framed as an international human rights, and taking into account the jurisprudence of the European Committee of Social Rights, should imply that unemployment protection has to be assessed taking into account the complementarity between basic (generally contributory) social security schemes and subsidiary systems of protection like social assistance. The approach of the ECtHR in the *Stummer* case, where the coverage of the claimant by

[829] ECtHR, *Zeman v. Austria*, Judgment of 30 June 2005
[830] ECtHR, *Stummer v. Austria*, Judgment of 7 July 2011

means-tested social assistance benefits seems to have been one of the arguments for which the ECtHR found the exclusion from the right to contributory benefits as justified, should also be viewed from that perspective. Therefore, the absence of subsidiary systems of protection should render the recognition of justification of unequal treatment more difficult. This is relevant when analyzing the exclusion of categories of unemployed in function of family charges and age, seen within the light of the jurisprudence of the European Committee of Social Rights, and its decision of non-conformity of Spanish social protection with article 13 of the European Social Charter.[831]

Another potential case could be the exclusion of Spanish household workers from contributory unemployment benefits. They have been recently incorporated within the general social security system, contributing and benefiting from all its benefits schemes, except unemployment. This involves that they are not only excluded from contributory unemployment benefits, but also from perceiving non-contributory benefits, through the link between the two systems.

Again, this type of work is highly gender-related (in 2010, more than 90% were women, of which a majority were immigrants[832]), and represents a great number of workers (around 747.000 in 2010). As Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social

[831] European Committee of Social Rights, Conclusions XX-2 (2013) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXX2_en.pdf (last visit: 10/05/2014)
[832] ILO, *Domestic Workers across the World: Global and regional statistics and the extent of legal protection,* International Labour Office, Geneva, 2013, 35;

security, also prohibits indirect discrimination as to "the scope of the schemes" (article 4.1), and that unemployment protection scheme of a contributory character as well as of a character of social assistance are included, there is a *prima facie* possibility to extend non-discrimination to the absence of unemployment protection to domestic workers. The legislature did not give any reason for their exclusion from the unemployment scheme, when they were integrated within the general social security system[833], being possibly for mere budgetary reasons. Their original exclusion from the general regime was justified by the doubts about their characteristics as employees, due to their closeness to autonomous workers, but today it is clear that the Spanish legal system considers them fully as subordinated employees[834]. Given their recent integration within the general regime, giving them access to better social protection against several risks, it could be argued that there is no objective justification to not having eliminated discrimination on that point as well. As the Spanish Constitutional Court seems to consider that the constitutional definition of the right to social security, which is not seen as a directly applicable individual fundamental right, but has rather a programmatic character, and leaves the legislature free to configure its scope, as long as the system of social security remains "recognizable"[835], it has not

[833] Ley 27/ 2011, de 1 de agosto, sobre actualización, adecuación y modernización del sistema de seguridad social

[834] García González, G., "La integración del régimen especial de empleados de hogar en el regimen especial: logros y retos de future", *Aranzadi Social*, n° 8, 2011, note 33

[835] This means that the Spanish system of social security has to be public and involve concrete protection of situations of necessity, within the liberty of the

generally recognized exclusions of some collectives of the scope of the unemployment protection scheme through legal definition to be contrary to the "principle" of social security[836]. The Constitutional Court has ruled that the fact that art. 41 defined social security as a system of protection against situation of necessity does not mean that all situations of necessity have to be included, and that those situations of necessity have to be evaluated and determined taking into account the general context in which they appear, as well as in connection with economic circumstances, availability of the moment and the necessities of the different social groups, for which the legislature can regulate selectively the level and conditions of the benefits[837].

Also, the principle of equal treatment permits us to shed some light on one of the problems of the system of positive activation, or reintegration measures, identified in this work. The case-study has shown that those reintegration measures are concentrated on unemployed which are easier to reintegrate, to the detriment of the others, for which it can be analyzed as insufficiently oriented towards unemployed with higher risk of turning into long-term unemployed. As already seen, the factors of long-term unemployment are predominantly external to the responsibilities of the unemployed. Also, one of the contributing factors is the prejudices of employers towards long-term unemployed, involving

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legislature to modulate the protection in function of social and economic circumstances which are necessary for the viability and efficiency of the system.

[836] Quesada Segura, R., *Los Principios Constitucionales y el Modelo Legal de la Protección por Desempleo*, Consejo Andaluz de Relaciones Laborales, Seville, 2004

[837] Quesada Segura, R., *ibidem*, 114

thus discrimination at the moment of hiring. Within that context, the German system of employment subsidies should be viewed as a measure contributing towards the decrease of discrimination on those grounds. The system is based on a mechanism to compensate the loss of productivity an employer would suffer by hiring an unemployed, from an individual perspective. The fact that a great part of those subsidies were subsequently lowered after reassessment shows that the initial assessment of loss of productivity was based on those employers' prejudices. Therefore, the individual character of the measure and continuous assessment by case-workers permitted thus to confront those prejudices, reconciling moreover the integration of the unemployed with cost-effectiveness principles.

I.4 The Right to Work

The right to work is one of the economic and social rights which present the most difficulties not only as to its content but also as to its realization.

Firstly, it has a vague character which gives rise to diversity of meanings and interpretations. Not only from a theoretical point of view, which make it sometimes viewed as having an inferior status among the already (erroneously) criticized vague character of social rights. In this sense, it poses the difficult questions of its situation between the right to being idle and exploitation within the labour market (also important form our de-commodification perspective), inclusion or exclusion of non-paid form of works or care, generally heavily gender-related, or its implication for and its interchangeability with the right to a basic income.[838]

The right to work is often implying an obligation for the states to implement policies aimed at attaining full employment. According to the Committee of Social Rights, "if a state at any time abandoned the objective of full employment in favour of an economic system providing for a permanent pool of unemployed, it would be infringing the social charter"[839]. Seen in this light, one could sustain that the obligation to aim at full employment seems to have been forsaken by many a country, even if not overtly, by abandoning any

[838] Mundlak, G., "The Right to Work – The Value of Work" in Barak-Erez, D., Gross, A. (eds), *Exploring social rights: Between theory and practice*, Hart Publishing, Oxford, 2007, 342.
[839] European Committee of Social rights, *Conclusions I*, 1969-70, 14

link between protection against unemployment and demand-side policies, and focusing mainly on activation and other supply-side policies to "create" employment. This stance should be seen as implicitly accepting the neoliberal and human-debasing theories about the "natural rate of unemployment" or the necessity to maintain a "reserve army" as numerous as possible for markets to function optimally, without regards for moral implication or consequences on society.

Moreover, the European Committee of Social Rights has furthered itself from the idea of full employment, by deciding in 1984 not to review the compliance of states with the goal of full employment, but only the measures taken to achieve that goal.

From the perspective of legal instruments, those practical difficulties are enhanced by the different positions and content of the right in the constitutional and international rights instruments incorporating it. The right to work within the EU charter, let alone within the general EU legal framework, with its highly marked individual and commodified character, does not correspond at all with the right to work as framed within the International Covenant on Social, Economic Rights, or the European Social Charter.

The European Social Charter for example encompasses a broad spectrum of rights and obligations within the concept of the right to work, from the obligation or rather responsibility of the state to provide work to the right to non-discrimination in the access to work, the prohibition of forced labour, the freedom to choose one's

occupation and the right to vocational training and job placement (articles 1, 9, 10 and 15 of the ESC).

On the other hand, article 15 of the CFUE seems to define the right to work mainly in terms of the freedom to pursue one´s business or engage into work, moreover within the context of the right to free movement, as confirmed by the jurisprudence referred to in the Explanations.[840] The latter do not connect article 15 CFRUE with article 1-1 ESC, but rather with article 1-2, apparently excluding interpretation of the CFRUE´s right to work in terms of obligation for the states to ensure employment for all. This inscribes itself within a legal framework which, even in terms of creation of employment, put the market as the main, and almost sole responsible for the fulfilment of the main possibility to effectively exercises that freedom.[841] This approach seems to be confirmed by the interpretation the CJUE makes of the right to work in two cases related to age discrimination.

In the *Rosenbladt*-case, the CJUE found that the possibility for the employer to automatically put an end to an employment contract once the worker had reached pension age did not violate her right to work, because this termination did not involve a prohibition to still look for work. Moreover, the CJUE used anti-discrimination law as a means of justification of the absence of violation, as it guaranteed that her age could not be used as an excuse not to engage her. The

[840] Ashiagbor, D., "The Right to Work", in de Búrca, G., de Witte, B., (eds.), *Social Rights in Europe*, Oxford, 2005, 243-244

[841] Lasa López, A., *Constitución económica y derecho al trabajo en la Unión Europea*, Comares, Granada, 2011, 217-221

Court transformed thus the right to work in a mere right to look for work, the older worker not having any guarantee to find work other than a formal guarantee not to be discriminated against, a guarantee whose lack of substance is clearly demonstrate by the high levels of unemployment amongst older workers.

This approach seems to be confirmed in *Hörnfeldt*[842], where the Court ruled that the right for an employer to automatically terminated an employment contract when the worker reaches the age of 67 was justified, the measure having a legitimate aim (encouragement of recruitment of young people), and being proportionate and necessary. In assessing the latter character of the measure, the Court balanced the right to work of article 15 of the Charter ("participation of older workers in the labour force, and thus in economic, cultural and social life"), with the aim of the measure (augmenting possibility of bringing youth in employment) and stated that the latter did not unduly prejudices older worker as they were not prohibited to remain in the labour market or conclude a fixed-term contract with their current employer, in case their pension would be considered insufficient, as in the facts of the case. In the case in question, however, a decisive factor might have been the fact that the claimant had access to a minimum means-tested pension as well as housing benefit. This illustrates the link existing between the right to work and the right to the necessary means of existence.

[842] CJUE, Judgment of 5 July 2012 (Case C-141/11), *Torsten Hörnfeldt v Posten Meddelande AB*

Another problematic aspect of this right is that it could even be said to be "dangerous". At a theoretical level, it has been criticized for inducing people into exploitation through the employment relation, amongst other "techniques" through interpreting it as implying a duty to work in disguise,[843] certainly when coupled with the activation aspects of new welfare state models. Combined with the interpretation of the right to work as paid work, or commodified work, this has also effects on the capacity to care and its gender-related consequences. There is here, however, a problem of logical interpretation of the content of fundamental rights. Fundamental rights should not imply enforceable correlated duties to the owner of the right, other than within the context of the balance with other fundamental rights in case of conflict. Or it could be said that duties associated with some fundamental rights, find their origin more in the idea of solidarity than the core content of the right itself.

But even if the duty to work could be connected to the idea of solidarity, this would be in a negative way, in the sense that there is a duty to not depend on solidarity when one does not have to, lowering as such the possibilities or extent of access to solidarity to those who really need it. But this leaves the question open to who needs solidarity and who does not. And as solidarity is not in itself a right or a fundamental right, but more a value, a social norm, or a broader category of rights (see for example the "solidarity rights" of the EUCFR), from a legal perspective this question has to be

[843] Mundlak, G., "The Right to Work – The Value of Work" in Barak-Erez, D., Gross, A. (eds), *Exploring social rights: Between theory and practice*, Hart Publishing, Oxford, 2007, 342.

resolved taking fundamental rights into account, amongst which the right to work, which cannot be done when that right is also read as a duty.

Nevertheless, the analyzed jurisprudence and the position of the European Committee of Social Rights on the right to work as obligation to promote work reveals that its positive character is too weak to form the basis of a de-commodifying approach to the rights of unemployed.

On the other hand, this does not mean that it is totally devoid of elements which could be used as such or reinforcing the previous approaches proposed in this Chapter.

As shown in the German context, the right to work contained in article 12 of the Basic Law, framed as the right to freely choose an occupation which one can value and which can secure one's means of existence, not only can be framed as legitimating protection against unemployment as a means to guarantee that right, but can also theoretically serve as a limit to work-first measures. Dutch jurisprudence has also indirectly interpreted article 4 of the ECHR (prohibition of slavery and forced labour) along the same lines in the case of obligatory participation in work-first projects, so as to strike down the imposition of work-first measures which were not proved to contribute to the meaningful reintegration of the concerned unemployed.

Moreover, despite the abandonment of full employment policies under the right to work, The European Committee of Social Rights

still gives some meaningful positive content to that right, which are important within the context of activation. In 1999, the monitoring procedure of the European Social Charter in respect of article 1-1 was "restarted", based on an assessment of the balance between several indicators like economic performance, employment rate, unemployment, labour policy, also with attention to measures destined to the categories most affected by unemployment, as well as long-term unemployment[844]. Concerning labour market policy, the Committee seems to have narrowed its approach to only taking ALMPs into account, as most cases of non-compliance (in the 2012 "round") are now related to insufficient or ineffective ALMPs.[845] On the one hand the Committee assesses the employment situation, generally in terms of unemployment and employment rates compared with economic growth. On the other hand, it assesses broadly the adequacy of employment policy, generally interpreted in terms of measures of active labour market policies compared to rate of unemployment and economic growth, with sometimes special attention to long-term unemployed as well as youth.

An interesting feature of the interpretation by the Committee is that for EU countries, the rate of access of unemployed to ALMPs as well as spending on ALMP´s are compared with the EU average, taking EURSOTAT as a source, and the country is found to be in non-compliance when it is below that average.[846] This should also be read taking into account General Comment 18 of the UN

[844] Mikkola, M., *Social Human Rights of* Europe, Karelactio, Porvoo, 2010, 138-146
[845] *Conclusions 2012 – Slovak Republic, Turkey, Bulgaria Georgia*
[846] *Conclusions 2012 – Italy – Article 1-1*

Committee on Economic, Social and Cultural Rights, which considers as a violation of the right to work of article 6 of the Covenant on Economic, Social and Cultural Rights, amongst others, "the failure to adopt or implement a national employment policy designed to ensure the right to work for everyone; insufficient expenditure or misallocation of public funds which results in the non-enjoyment of the right to work by individuals or groups".[847]

It centres also on sufficient training for long-term unemployed, or access of unemployed to ALMPs in a context of rise of unemployment despite economic growth.[848] There is thus a clear connection between the right to work and the right to vocational training. It is also important to note that, for Spain, the Committee reserved its 2012 conclusions, observing that more than 55% of unemployed had access to ALMPs, but wanted more information of the type of ALMPs unemployed had access to. Well now, a brief look at the online EUROSTAT database could have shown the Committee that almost 70% of unemployed having access to ALMPs in reality have access to what EURSOTAT calls "employment incentives" i.e., as our Spanish case study has shown, mainly decreased social security contributions in favour of the employer without sufficient conditions related to employment creation. Only 13% had access to training in 2010, and less than 3,4% had access to "labour market services" i.e. orientation and placement. Within this respect, it could be concluded that, at least in

[847] Committee on Economic, Social and Cultural Rights, General Comment Nº 18 The Right to Work, 24 November 2005, E/C12/GC/18, point 36.
[848] European Committee of Social Rights, *Conclusions 2012 - Slovak Republic - Article 1-1*

2010, Spain violated the right to work of article 1-1 of the ESC, as interpreted by the Committee of Social Rights.

This approach has thus some importance as an argument for recalibration of ALMP towards more enabling measures like training, on the one hand, and guaranteeing genuine access to those measures. Individualization of the latter, like in the Dutch and the German case, should also be asserted under this approach.

Another important aspect is the framing of the right to work in the Spanish Constitutional context, as a right to protection against termination of employment. According to the Spanish Constitutional Court, the individual perspective of the right to work of article 35 of the Constitution involves a right to stability in employment, which has to be guaranteed by a right not to be dismissed without a legally established cause, implying also formal guarantees as to the visibility of the dismissal, as well as the right to an "adequate reaction" against the dismissal, which established the possibility of revision by the Courts of the cause and procedure under the right to fair and effective trial of article 24 of the Constitution.[849]

The German Constitutional Court also recognized from a reading of the right to freedom of occupation within the light of the Social State clause, and the right to stability in employment derived thereof, the constitutional obligation of the state to establish a minimum level of protection against dismissals as well as guarantee

[849] Baylos, A., and Pérez Rey, J., *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 51-52

its (minimal) revision by the Courts.[850] However, the Court has not gone as far as stating that dismissal has to be grounded in a cause, but that the employer has to respect at least a minimum a level of social protection by taking into account to a certain extent the social interests of the worker within the framework of the contractual obligation to good faith.[851] Protection against dismissal is framed within the context of balancing the right to freedom of enterprise and the right to freedom of occupation.

It is however, quite strange that this right to stability in employment has not received much constitutional attention from the perspective of temporary contracts. If the former involves some protection as to the termination of the contract, it would be logic to think that some protection would be implied, of course not at the termination, given the particular nature of temporary employment, but at the moment where that termination is decided, i.e., at the start. A correct understanding of the right to stability in employment under this framework would be that temporary contracts should also be grounded in a (legal, real and reviewable) cause, and not only left to contractual autonomy.[852] The lack of constitutional attention to the question might have been one of the reasons for a wide interpretation of the causes within the Spanish system and important problems of enforcement, leading to a *de facto* liberalization of temporary contracts and the highest rate of temporality in the

[850] Seifert, A. and Funken-Hötzel, E., "Wrongful Dismissals in the Federal Republic of Germany", *Comparative Labor Law & Policy Journal*, vol. 25, nº 4, 2005, 495;
[851] *ibidem*
[852] Baylos, A., and Pérez Rey, J., *El despido o la violencia del poder privado*, Trotta, Madrid, 2009, 52

European Union.[853] In Germany for example, there is no causality required for temporary contracts of a duration of less than two years.

Also, it is important to observe that the right to adequate protection against unjustified dismissal is also recognized as a stand-alone right in article 30 of the EU Charter of Fundamental Rights, as well as in article 24 of the Revised European Charter.

[853] López, J., de le Court, A., Canalda, S., "Breaking the equilibrium between flexibility and security: flexiprecarity as the Spanish version of the model", *European Labour Law Journal,* 2014, vol. 5, nº 1, 2014

Chapter II. Implementing "decent unemployment" as a legal de-commodification strategy

II.1. Implementing decent unemployment by the EU: a question of political will

The multilevel legal system of fundamental social rights puts the State at the centre of the realization of social rights. Even if some rights contained in international instruments can be individualized and concreted to the point of giving birth to claimable rights, bringing therefore the individual perspective in the realization of social rights, the definition and overall construction of rights like the right to social security or the right to social assistance are framed as abstract duties of the state to provide for systems of protection.

However, a first look should be given at the EU level, given its driving role in terms of Welfare State change.

Within the EU multilevel legal system, in terms of social rights related to unemployment, the Member States are still the main subjects of those international obligations. However, this does not mean that the EU cannot play a role in implementing a decent

unemployment policy. The EES is still an adequate environment for the proposal of indicators related to decent unemployment and the review of compliance and progress of Member States. The European Commission itself starts recognizing the importance of unemployment protection as an automatic stabilizer in times of crises and seems to move towards thinking about the implementation of EU-wide unemployment insurance. However such a scheme would still be difficult to implement given the limited competences of the EU in social and employment field.[854]

At the moment, within the Europe 2020 strategy, unemployment protection systems are not mentioned within the part dedicated to social inclusion, further than the general reference to "achieving a new momentum for *flexicurity* and finding new methods to overcome the labour market segmentation with ensuring modern and inclusive benefits and social security systems".[855] The flagship initiative "An Agenda for new skills and jobs: A European contribution towards full employment" which encompasses the European Employment Strategy within the Europe 2020 framework, further "defines" the concept of "modern and inclusive benefits and social security systems", one of the four components of *flexicurity*, as relating to unemployment protection in the following way[856]:

[854] European Commission, *Employment and Social Developments in Europe 2012*
[855] European Commission Communication COM/2010/0758 final: The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion
[856] European Commission Communication 2010/0682 final: An Agenda for new skills and jobs: A European contribution towards full employment

- "Reforming unemployment benefit systems to make their level and coverage easier to adjust over the business cycle (i.e. offer more resources in bad times and fewer in good times). This would enhance the role of benefits as automatic stabilisers, by promoting income insurance and stabilisation needs over job search incentives during downturns, and the reverse in upturns. As labour markets recover, Member States should consider rolling back the temporary extensions of benefits and duration of unemployment insurance introduced during the recession, to avoid negative effects on re-employment incentives. The review of out-of-work and in-work benefits to improve financial incentives to take up work, should be combined with measures to promote the uptake of training and other activation schemes, while making sure that benefits still provide poverty alleviation for those who remain out of work.
- Improving benefits coverage for those most at risk of unemployment, such as fixed-term workers, young people in their first jobs and the self-employed. This can be achieved, where necessary, through extending unemployment benefit systems coverage, and reinforcing other social security entitlements (parental leave and other reconciliation entitlements, sickness leave, disability benefits, etc.); the level of unemployment benefits should be commensurate to the individual work history".

As regards to the concept of decent unemployment, very few elements are included, like the improvement of coverage for

atypical workers. On the other hand, it contains other elements furthering us from the idea of decent unemployment, like review of out-of-work benefits and the measures to promote the uptake of activation scheme (which generally would refer to "negative" measures, like sanctions), as well as characterizing benefits as "poverty alleviation", a very weak term which should be deemed contrary to the principle of security in its sense of preventing poverty rather than alleviating it.

Also, the pressure put on states within the framework of the EES to lower insurance contributions (above all those paid by employers) can be seen to enter in contradiction with the states' obligations to extend social security further than "poverty alleviation systems". For example, this pressure can be analysed as having had an effect on the reduction of more costly ALMPs within the German system under the principle of cost-effectiveness, with the results of the application of those principles extending outside the budget of the insurance system itself (instead of a better allocation of that budget) towards reduction of the financing of the latter.

Moreover, in terms of active labour market policies, the same document contains nothing close to an idea of a "dignified" form of activation. Even worse, the Commission insists on the fact that further attention should be given to the cost-effectiveness of ALMPs and the conditionality of benefits with participation, two elements which have been proven at the centre of an even more intense re-commodifying effect of activation. While being an important part of *flexicurity* policies, the document does not really

highlight the importance of training of unemployed, only naming it between other activation measures PES should comprehensively provide in a more targeted way to more vulnerable workers (low-skilled, younger workers, older workers, unemployed). Mention is made of the necessity of re-skilling of older workers, blue-collar workers and workers returning from parental leave, but training seems not to be viewed as a right, nor given special place within ALMPs, and not even mentioned within the section related to those measures, which seems to be only seen in connection with the necessities of the labour market, rather than increasing the life choices of the unemployed. The document further treats training within *flexicurity* policies as continuous training of the labour force in general, or within the framework of short-term working arrangements like the German system of *Kurzarbeit* (involving working time reduction coupled with partial unemployment benefits).

As seen in Part III, a recalibration of those orientations towards decent unemployment, mainly through a rights-based approach within the arsenal of EU *soft law*, would highly depend on political mechanisms, given the lack of possibility of alternative forms of influencing regulation like direct judicial review by the CJUE of those instruments giving orientation to the Employment Policy. On the other hand, it has been contended that those instruments, and above all Recommendations implementing those orientation could be reviewed by the Court of Justice within the framework of the preliminary ruling (art. 267 TFUE).

However, it should be recognized that what is here theoretically contended in terms of judicial review is still a shaky piece of legal science-fiction, but the probability of which should not be ruled out if one has at heart a recalibration of EU policy in terms of unemployment protection (and the general weakness of social rights within the EU sphere exposed in Part III). A more pragmatic approach should lead us thus to conclude that one has to look at the Member State level in terms of implementation, other than through political action, of a notion of decent unemployment.

II.2. The role of judicialisation of social rights in the national legal system

II.2.1. Judicial implementation of `decent unemployment´: between control of administrative decisions and legal review

It is generally held that the primary and most effective way of realizing social rights is through legislation and administrative action.[857] An indirect legal expression thereof could be found in the Dutch constitutional system, where the parliament is the main enforcer of the Constitution and judge of the conformity of its Acts therewith, given that the conformity of those Acts cannot be reviewed by Courts.

However, the de-commodification perspective developed in the precedent Parts has shown that the power and institutional relations within the EU multilevel context have involved the constant, if sometimes gradual, re-commodification of Welfare State institutions. Therefore, it is mainly contended that from a legal perspective, one has to centre on alternative actors to drive legal de-commodification strategies.

It is true that a concept of decent unemployment, rooted in human rights, could still be in itself a powerful narrative behind cognitive and political change. Moreover, the existence of international human rights instruments as well as in some states a possible

[857] King, J., *Judging Social Rights*, CUP, Cambridge, 2012, 41-57

anchoring of the concept within constitutions are still powerful symbolical and discursive elements which could be used by power actors in the cognitive and political arena to advance reform towards more de-commodification. An example thereof could be taken from the current Popular Legislative Initiative (i.e. the presentation of a law project by ways of petition) before the Catalan Parliament for the implementation of a "guaranteed citizenship income", a system of minimum income for all those who do not attain a minimum threshold. Within the context of the preliminary parliamentary debates, the 2013 Report of the Committee of Social Rights stating the non-conformity of Spain with article 13 of the European Social Charter, as well as article 24.3 of the Basic Statute of the Catalan Autonomous Community[858], declaring the right to said citizenship income, have been advanced as arguments to replace the actual fragmented system of different compartimented punctual material helps depending on budgetary availability by a rights-based system of social assistance close to the Dutch and German system (without however the work first approaches integrated in the latter).[859]

However, it is contended that such move should have more solid legal bases.

[858] Said article declares the (subjective) right of persons in situation of poverty to a guaranteed citizenship income which would secure the minimum conditions to live a life in dignity

[859] Parlament de Catalunya, *Diari de Sessions*, X legislatura, serie P – nº 24, 26 March 2014, 57-58

In the light of the alternatives, research generally points towards (constitutional) adjudication of social rights as the way forward.[860] Moreover, judicial adjudication of fundamental social rights is already widespread within the European context, as the EctHR, the CJUE, Constitutional and ordinary courts effectively recognize individual rights based on fundamental social rights. Within the European context, the debate has also evolved from the principle of their adjudication to focus more on the ways in which they have to be adjudicated.[861]

An important part of protection against unemployment is realized through administrative regulations and finds its expression in individual decisions of an administrative nature imposed by the PES implementing the regulative framework. Those decisions are generally submitted to supervision by ordinary courts. In Spain for example, social courts have the competence to review those decisions.[862] Therefore, within the limits of the law, those courts, through the revision of sanctions applied in case of refusal of suitable employment or the non-compliance with obligations like the participation in reintegration measures or looking for suitable employment in conformity with the principles of decent employment, can apply, within the limits of the law, the principles of decent unemployment within the necessary review of the exercise by the PES of their discretional power, in conformity with the principle of proportionality. The notion of suitable employment,

[860] Gearty, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Oxford, 2011; King, J., *Judging Social Rights*, CUP, Cambridge, 2012
[861] Kings, J., *Judging Social Rights*, CUP, Cambridge, 2012
[862] Art. 2 o) Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social.

given the obligation of taking into account its diverse and numerous criteria, is a favourable terrain to apply de-commodifying elements like the right, implied within the dignity principle, not to accept employment which would hamper personal development. It should also help strike the balance between this right to personal development through work, implying the respect of personal circumstances like the right to care, and the general duty of being available for the labour market. The obligation to participate in reintegration measures is another terrain where to strike a fair balance between the personal needs of the unemployed and the discretion of the PES to impose those measures in a way which could refrain the application of principles like cost-effectiveness or the orientation towards work first strategies.

But the implementation of a principle of decent unemployment would also command for the necessity of those courts to go further than formalistic approaches towards the revision of administrative discretion. As already said in the preceding section, they should also supplement legal analysis in the positivistic sense with considerations about the lack of foundation of an important part of the assumptions at the basis of negative activation and the realities of extended unemployment.

Within the exercise of those competences, courts have between their hands the whole foray of international hard law instruments, the international soft law instruments and the body of jurisprudence, doctrine, reports, opinions and recommendation elaborated by the different accompanying or supervisory organs within the

international organizations in which those instruments are inscribed, and from which a normative theory of unemployment can be construed, to guide their decisions.

But this would only be a first step. Re-commodification of unemployment protection by administrative practices is only a minor part of the observed trend. The main mechanisms of re-commodification have operated at the level of legislative design of the unemployment protection regimes, or, above all in the case of Spain, the lack of creation, by law, of a sufficient and integrated scheme of protection.

It has been argued in Part I and II that the crises of democratic capitalism of the last 30 years have involved the concentration of power within the hand of pro-market forces, inevitably pushing for more re-commodification, and thus influencing democratic decision processes to the detriment of workers, and, above all the most vulnerable, as shown by the general increase in poverty, inequality and in-work poverty, influencing thus the exercise by the latter of their civil and political rights. There is thus a need for independent bodies which force political actors to give reasons and justify their decisions in terms of legislative or administrative action[863] and more particularly with regards to the different obligations to which the states are bound by their constitutions as well as the international engagements they have taken by ratifying international human rights instruments.

[863] Gearty, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Oxford, 2011, 117

This reclamation of accountability can happen through strong judicial review, i.e. by striking down legislation which would go against those states' obligation or not applying it to the case at hand, but even "weaker" forms of judicial review which only have a declarative value are important in that it still creates a forum for people to be heard and raise awareness about important social problems.[864]

Therefore, it is contended that a legal de-commodification strategy can be helped by the judicialisation of the instruments implementing re-commodifying policies, and thus judicial review of the legislative framework of unemployment protection. However, the de-commodifying jurisprudence analysed in this work could be generally be seen as limiting re-commodification rather than actively promoting de-commodification. The analysed interventions generally covered cases at the limits of the systems of protection against unemployment rather than putting into question regimes of protection themselves. Nevertheless, even within that perspective, courts exercising judicial reviews of laws are important actors of legal de-commodification strategies, as their intervention or potential intervention can be analysed as an incentive for other state organs to more thoroughly justify their policies.

Generally, when thinking about judicial review, one turns towards Constitutional courts. However, it is contended that the European multilevel legal framework, depending on each national

[864] Gearty, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Oxford, 2011, 143

constitutional context, also empowers ordinary courts to practice such judicial review. As we have seen in the case study, in Spain, not only international treaties on human rights are to guide the interpretation of fundamental and social rights contained in the Constitution, but international treaties, interpreted in the light of the jurisprudence or doctrine elaborated within the ambit of the international organizations in which those treaties inscribe themselves, enjoy a material hierarchical superiority to ordinary laws, empowering judges in case of contradictions between national law and those treaties, not to apply the former in the legal conflict at hand. While in The Netherlands international treaties even take precedence over the Constitution, Germany however, does not seem to accord such a character to ratified international instruments.[865] Nevertheless, within the EU context, ordinary courts are empowered not to apply national law when it is contrary to EU law, which would provide for the possibility of domestic application of the EU Charter of Fundamental Rights within the sphere of competence of the EU.

This would also reinforce the powers of ordinary courts within their review of administrative decisions concerning unemployment protection, within which they should not be bound by the limits of the law if the latter is contrary to those international treaties. Even if they have no competence to strike down laws in those cases, this modality of a weaker form of judicial review still has its importance in raising awareness on the matter.

[865] European Commission for Democracy through law, *The Relation between international and domestic law,* Council of Europe, Strasbourg, 1993, 102

Another element of that puzzle is the interconnectedness of those international treaties. For example, in reviewing sanctions against unemployed for not accepting workfare measures, an ordinary court could, as shown in the Dutch case, apply article 4 of the ECHR (prohibition of forced labour). This implies that there has to be proportionality between the sanction and the violation by the unemployed of its obligation, which involves taking into account: 1) the characteristics of the obligation (accept suitable employment, participate in an integration measure, look for a job) in relation with the possibilities, qualifications, experience and family situation of the unemployed; 2) the duration of the period of unemployment; 3) any other element taking into account the purpose of protection against unemployment applied to the obligation in question, 4) the severity of the sanction. But the purpose of the obligation in question has also to be viewed within the light of other international instruments, like the European Social Charter, which through the jurisprudence of the Committee of Social Rights, contains indications as to the obligations of unemployed like the acceptance of a suitable job. In the latter case, a sanction consisting in losing benefits for not accepting employment which, amongst others, only requires qualifications or skills far below those of the individual concerned, or which pays well below the individual's previous salary would be contrary to article 1-2 and 12-1 of the European Social Charter. In the Dutch case, therefore, it is contended that the system of rapid degradation in suitability of the job, which is proposed to be regulated by law (and, in any case, the obligation to accept any job, under the assistance schemes in The Netherlands

and Germany) would be contrary to the European Social Charter. The court would thus be empowered to refuse the sanction of total loss of benefits on those grounds. Also, taking into account the right to social security as developed here above, due account should also be given to the effect of degradation in employment towards a durable integration in the labour market (a principle which is legally defined as an objective of activation within the German *SGB III*), for which judicial review should be stricter in function of the type of contract which is offered.

Within the Spanish context, also, the decision of non-conformity with article 1 ESC of the European Committee of social rights because of the ineffectiveness of the PES,[866] or the country-specific recommendation of the Council within the context of the European Semester implicitly recognizing the overall lack of effectiveness and conformity to *flexicurity* of the Spanish regime of ALMPs and the several preparatory documents thereof,[867] should also be taken into account within the review of sanctions of PES for breaches of the obligation to look for work, or to accept employment proposed by those PES, given the evident lack of support unemployed receive in that matter.

Also, it would not be unimaginable for a Spanish court to annul an administrative decision of refusal of non-contributory

[866]European Committee of Social Rights, Conclusions XX-1 (2012) (SPAIN), http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/SpainXX1_en.pdf (last visit: 12/05/2014)

[867] Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Spain and delivering a Council opinion on the Stability Programme of Spain, 2012-2016

unemployment benefits to an unemployed of less than 45 years or without family charges, under the anti-discrimination frame developed in the precedent section, invoking directly international anti-discrimination principles. However, here, the parallel with the Spanish constitutional prohibition of non-discrimination is a strong incentive for the ordinary judge to refer this type of questions to the Constitutional Court, given the relevance of the matter and theoretical consequences of its decision and the fact that it would involve an overt calling into question of the legislature by an ordinary judge.

However, of course, strong, or "classical", objective review by Constitutional courts remains the most important tool to fight legislative re-commodification. As the case study has shown that re-commodification of unemployment protection is also taking effect through the general (im)balance of policies, implemented through legislation, the need for overall assessments of those imbalances and effects cannot be realized through individualized assessment by courts of administrative decisions.

As already shown throughout this work, there is growing literature analysing the role of constitutional courts, or constitutional judicial review of social rights. Austerity measures following the crisis has also given rise to interventions of Constitutional Courts striking legal provisions implementing those measures. The Portuguese constitutional court, in two judgments, stroke down provisions of the Portuguese budget laws of 2012 and 2013, as they included measures (mainly cuts in unemployment benefits, pensions and

salary of public servants) which were going against the constitutional principles of equality and fair distribution of fiscal burdens, particularly involving discrimination of workers of the public sector, and the Italian Constitutional Court, in a decision that might be described as corporatist, stroke down a law decreasing salaries of judges, on the basis of the same principles.[868] In Chapter III are also commented the decision of the Latvian constitutional court on a reform of the system of pensions, as well as the now famous decisions of the European Committee of Social Rights on collective complaints declaring the non-conformity to the European Social Charter of Greek cuts in pensions and other regimes of social security.

Studies on constitutional adjudication of social rights generally point towards the disadvantages of such type of adjudication and address the critics of constitutional judicial review to advance social rights. Generally a delicate point is the question of the wide discretion Courts might have in such adjudication, given the relative indeterminacy of social rights, the complexity of their realization and the questions of redistribution they pose. It would be a truism to say that a Constitutional Court declaring how a concept of decent unemployment has to be legally defined and applied by the social security administration and/or other actors, determining the conditions of suitable employment, the level of benefits and the

[868] Akrivopoulou, C.M., "Striking down austerity measures: the crisis jurisprudence of the Tribunal Constitucional de Portugal and the Italian Corte Costituzionale", *International Journal of Human Rights and Constitutional Studies*, vol. 2, nr 1, 2014, 86-88

qualifying conditions in line with the structure of the current labour market would be overtly activist.

However, questions like the exclusion of some unemployed from the Spanish means-tested unemployment benefits, the sufficient character of the level of benefits, or how the right to care has to fit within the obligation to look for and accept suitable employment are all questions which if resolved by the Spanish Constitutional Court, would not involve revolutionary social change, while still recalibrate some elements of the unemployment protection regime towards de-commodification. Lifting the age and family charge restrictions for access to means-tested unemployment benefits would surely involve important costs. However, again, those costs have to be weighed against the international obligations of Spain to provide for a minimum level of benefits to all unemployed, as well as the right to a minimum of existence, which according to the European Committee of Social Rights is far from being realized in Spain. Within this context, it is also worth mentioning that, while the unemployment rate has not moved from 26 % over the last years, the costs of unemployment protection (excluding reductions in ALMPs) have been reduced by 17% between 2013 and 2014[869], with an ever growing gap in coverage. This means that the cost-reduction measures undertaken went further than the "guarantee of the viability of the system", which is the aim against which the

[869] Comisiones Obreras, "Una reducción del paro registrado gracias a actividades de temporada, pero a costa de más precariedad y desprotección a los desempleados", Communication of 6 May 2014 http://www.ccoo.es/comunes/recursos/1/1834968-Valoracion_paro_registrado_abril_2014.pdf

European Committee of Social Rights assesses the proportionality of regressive measures.

Those examples serve us to introduce the different arguments for which implementation of a decent unemployment agenda through constitutional adjudication taking into account international social rights instruments should be considered as legitimate and feasible.

II.2.2. Judicial control of the legislature: the case for less deference

The multilevel social rights framework can be implemented through judicial review through a technique called normative justiciability. The latter notion means that the provision of international instrument can be invoked before the Court for the latter to ensure, first, that national implementation has occurred, and, second, that implementation has been done in accordance with the provisions of the instrument and the interpretation given to it by the competent organs, realizing their objectives and not contravening them.[870] It is contended that this approach flows from the normative character of human rights, which finds its formal and positivistic expression in their enshrinement in the different human rights instruments, the contextualization of which is to be achieved through the recognition of the interdependent character of the instruments and of the completing character of the jurisprudence or *soft law* instruments

[870] Gori, G., "Domestic Enforcement of the European Social Charter. The Way Forward", in
de Búrca, G., de Witte, B., and Ogertschnig, L., (eds.), *Social Rights in Europe*, OUP, Oxford, 2005, 85

elaborated by the organisations which gave birth to those instruments.

However, this approach should be analytically refined. As showed by Jeff King,[871] when adjudicating constitutional rights, Constitutional Courts are generally required to adopt the following steps.

The Court first has to establish the scope of the interest or the right (for example, right to a minimum level of subsistence in case of unemployment). It has been argued here that the multilevel legal context contains sufficient elements for Courts to be able to adopt an *integrated approach* to interpretation,[872] consisting in the recourse to the different legal instruments of the multilevel context, as well as materials of expert bodies related to those instruments. Those elements will generally allow Courts to define the right in question with the necessary precision for it to be adjudicated, at least taking into account the "static" minimum thresholds (for example 50% of median equivalised income for contributory unemployment benefit, with the necessity that they be supplemented with social assistance benefits if not reaching the threshold of 50%). The interpretation of the international instruments in light with other dispositions, related doctrine, jurisprudence, or soft law instruments can also bring Courts to go further than said minimal thresholds. For example, the obligation to maintain or progressively raise the level of social security would

[871] King, J., *Judging Social Rights*, CUP, Cambridge, 2012
[872] Gearty, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Oxford, 2011, 146

imply that the scope of the interest in case of a regressive measure involving the lowering of benefits, would be the previous benefit. Or, as contended by the Committee of Experts of the ILO, relative measures to establish benefits should be complemented in some cases with absolute calculations. Or the focusing on real needs of the individual could imply that flat rate benefits should be complemented with some individualized additional assistance (this when adjudicating the social right from the perspective of an individual, substantive claim). An important element to take into account is that the determination of those human needs has to take into account the complex social and economic realities in the light of the notions grounding those needs, like dignity, self-respect, autonomy, agency, etc... It is there that the Court's assessment should be based on opinions, studies, reports of professional experts, and where social sciences are to be taken into account,[873] a principle which has been argued here to be contained in the human right to social security itself. Within this scope, considerations rooted in the need for de-commodification (in terms of ensuring sufficient benefits, sufficient duration of the scheme, sufficient access taking into account the existence of an important number of atypical contract, the types of measures unemployed need to ensure a durable integration in the labour market without this influencing them living a life that they can value,....) should also orient the definition of the scope of the interest.

The second step would consist in assessing the nature of the obligation of the state with respect to the interest in question. This

[873] King, J., *Judging Social Rights,* CUP, Cambridge, 2012, 100;

can be, depending of the framing of the right in question, an absolute obligation, which allows no margin of appreciation, and obliges to grant the right once it is established that it is not satisfied. But generally, fundamental social rights are framed in terms of a qualified obligation of the State, which means the right may be limited in some way or left partially unfulfilled provided that the state has met the specified obligation. Such qualified obligation can be explicit (for example the limitations generally contained in part of the provisions of the ECHR) or result from the use of vaguer terms in the provision.[874]

However, this is not a binary divide, and the degree of qualification of the obligation is variable. For example, article 12-1 of the European Social Charter ("With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: [...] to establish or maintain a system of social security"), even if interpreted taking into account ILO Convention 102, and the indicators to calculate the adequate character of benefits, still gives a certain margin of appreciation to the state in how that system of social security is to be designed. On the other hand, it is contended that article 13 of the European Social Charter ("With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake: [...] to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care

[874] King, J., *Judging Social Rights,* CUP, Cambridge, 2012, 103-105;

necessitated by his condition") is an almost absolute obligation (the words "any person" and "be granted" do not leave a margin of appreciation to the state to satisfy the need once it is identified). In the latter case, the interpretation would rather apply to the scope of the right instead of concerning the extent of obligation of the state ("inability to provide for its own resources", "adequate assistance",...), even if again, the multilevel framework, and particularly, the jurisprudence of the European Committee of Social Rights provides for sufficient instruments to precisely define those terms.[875]

Within this context, it is also important to point out that the interdependent character of fundamental or human social rights and their instruments is relevant to the assessment of the degree of qualification of the obligation of the state. As an example, one can cite the fact that the Spanish Constitution does not seem to contain a non-regression clause.[876] However, given the ratification and thus application in the Spanish legal system of the ICESCR and the ESC, which both contain non-regression clauses, the extent of the obligation of the state in relation with particular social rights has to be assessed taking into account the non-regression principle. Moreover, it is contended that the fact that the mandate to provide for a system of social security of article 41 of the Spanish Constitution, construed as implying that the right to social security

[875] Again, a clear parallel can be found with the 2010 Hartz IV judgment of the German Constitutional Court discussed in the analysis of the German case.
[876] Giménez Sánchez, I., "Los límites económicos de los derechos sociales" in VV.AA., *Derechos Sociales y Principios Rectores*, Tirant lo Blanch, Valencia, 2012, 301-313

is a right of strict legal configuration, should not prevent the competence of the Court to intervene in that configuration by granting direct claims to social security benefits in application of international treaties (for example in matters of social assistance, given the framing of article 13 of the ESC).

It is within the assessment of the qualified obligations that the question of resource scarcity will become a relevant consideration.[877] Regarding this point, it is important to observe that it would be a fallacy to view the economic argument in terms of scarcity of resources, while in fact the question at its centre is actually the choice of priorities in the distribution of the existing (or potential) resources, where the fulfilment of social rights is hampered by virtue of economic issues such as the payment of interest rates or choices made based on the interests of market elites.[878] Moreover, while the idea of scarcity is an important point of discussion about the adjudication of social rights within States with limited financial capacities, it should have less relevance in our affluent Western Welfare States, which before the crisis, still have shown at least minimal GDP growth over the last 30 years.

[877] King, J., *Judging Social Rights,* CUP, Cambridge, 2012, 105

[878] García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", Derecho y Cambio Social, nº 31, 2013, 73; as a quick example, taken from the OECD online statistic database 2014, in 2007, before the crisis, The Netherlands were spending a total of 2,5% of their GDP on unemployment protection (with 1,4%, or 0,437% per percentage of unemployment, on passive policies, with active policies having a clear individualized character), while Spain, with a much higher percentage of unemployment, was spending 2,25% (1,46% or 0,176% per percentage of unemployment on passive measures, with underfunded PES and active policies lacking an individual character). For 2007, the percentage of GDP dedicated to social spending was roughly the same in both countries.

It is important to underline that the effective realization of social rights involves that constitutional adjudication of the latter be not limited to appreciations concerning the financing of the social programs under scrutiny, but should take into account the reasonableness or proportionality of budgetary choices in general.[879]

The legislature has generally the exclusive competence of elaborating state budgets. But it also has to do it taking into account constitutional principles. Some of them are closely related to the way in which budgetary choices are made. It is true for example that the Spanish Constitution has been recently (and urgently) modified under pressure of the EU (and the "financial markets") to include the principle of limited budget deficits in accordance with the rules of the EU and the "absolute priority" of the payment of the interests and capital of debts.[880] However, the Constitution also contains the principle of equitable distribution of the expenses of the State,[881] principle which involves legal elements of control of the budgetary activity which go further than their mere need of legitimacy.[882] It is the latter principle, also enshrined in the Portuguese Constitution that was used as one of the arguments to strike down the budgetary laws of 2012 and 2013.[883]

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[879] Lehman, K., "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myths of the Minimum Core", *American University International Law Review*, Vol. 22, 2006, 163-197

[880] Article 135 of the Spanish Constitution

[881] Article 31.2 of the Spanish Constitution

[882] Giménez Sánchez, I., "Los límites económicos de los derechos sociales" in VV.AA., *Derechos Sociales y Principios Rectores*, Tirant lo Blanch, Valencia, 2012, 306-307

[883] Akrivopoulou, C.M., "Striking down austerity measures: the crisis jurisprudence of the Tribunal Constitucional de Portugal and the Italian Corte

But to implement some elements of a decent unemployment agenda, the choices of the legislature need not always be reviewed within the context of the whole range of budgetary options. One of the main problems of the Spanish unemployment protection system seen as a whole is the ineffectiveness of PES, recognized both by the EU within the framework of the EES, as (mildly) expressed by the country-specific recommendation, as taking into account the criteria developed by the European Committee of Social Rights. From a comparative perspective, Spain dedicated in 2011 only 0,15% of its GDP to PES and administration of unemployment benefits (not including the benefit themselves) and 0,25% to employment incentives (mainly not individualized employment subsidies), while the Netherlands dedicated 0,41% and 0,01%, and Germany 0,34% and 0,06% respectively.[884] Those huge disparities, combined with the general character of Spanish subsidies with the employer as beneficiaries versus their individualized character, and the case management system in which they inscribe themselves in the latter countries, show that there is leeway, within the ALMP budget, to reorient the priorities more in accordance with the idea of decent unemployment, without involving any budgetary increase. The latter question can also be put in a non-comparative perspective, and is important in that the structure of ALMPs budgets, or rather, of the criteria under which they have to be distributed, both in the Netherlands and Germany, involve a

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Costituzionale", *International Journal of Human Rights and Constitutional Studies*, vol. 2, nr 1, 2014, 86-88

[884] OECD statistics database, Public Expenditure and Participant Stocks in LMP, 2014

reinforcement of the segmentation between workers (partly overlapping with the labour market segmentation between standard workers and atypical workers) which the two-tier passive protection system instored.

It is also important to underline that the opposition to judicial enforcement of social rights generally departs from the wrong assumption that judicial review has a "strong" character, in the meaning that it substitutes the actual decision of the legislature about the prioritization of resources.[885] However, the assessment by the judges of questions related to the distribution of state resource do not necessarily involve that the Court actually decides about the allocation, but leaves the legislature to devise a program or a scheme in line with the fundamental social rights in question, and sometimes even suspend the effects of the judgment, giving the legislative power the time to bring itself in conformity.[886] The *Hartz IV* judgment of the German Constitutional Court, annulled the provision of the *Hartz IV* law related to social assistance benefits

[885] Tushnet, M., *Weak Courts, Strong Rights. Judicial Review and social Welfare Rights in Comparative Constitutional Law*, Princeton, Woodstock, 2008, 233-237. [885] Scheppele, K.L., "A Realpolitik Defense of Social Rights", *Texas Law Review*, vol. 82, nº 7, 2004, 1921-1961. They discuss a series of decisions the Hungarian Constitutional Court took in 1995 on austerity reforms within the context of the countries' transition towards a market economy under the pressure of international lenders. The Court invalidated the austerity program, consisting in transforming insurance schemes in means-tested benefits scheme and scrapping family allowances, because it ran against legally protected expectations of the citizens, and considered that an adequate transition period was needed. The disasters which were predicted following the judgment in terms of Hungary's commitments towards foreign lenders did not happen, but allowed a gradual transition of the concerned components of the Hungarian Welfare State.

[886] García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", Derecho y Cambio Social, nº 31, 2013, 74;

for children because it did not take sufficiently into account the different needs children might have in function of their age. The Court based its decision on the lack of proof that the calculations leading to the fixation of a certain level of benefits were grounded on figures reflecting the reality, but left the government to decide the level of the benefits. In 2013, the CJUE and the Spanish Constitutional Court decided that the right of Spanish part-time workers to retirement pensions was affected because of the lack of proportionality in the calculation of the requisites of minimal qualifying periods, involving an unjustified discrimination, but did not give any indication as how a regime conform to the EU legislation or the Spanish Constitution had to be designed.[887] The Portuguese Constitution suspended the effect of its annulment of provisions of the 2012 budget law found contrary to the Constitution, giving it effect only from 2013 onwards, thus giving time to the government to take into account the decision of the court in its budgets law for the next year.[888]

Those decisions are the expression of a new conceptualization of the role of (constitutional) courts as "policy partners" when their decisions involve strong demands of the state budget. As such, the courts are setting the political agenda, rather than determine the

[887] The government subsequently calculated the impact of the new regime in 4,56 million € in 2014, increasing to 255 million € in 2020, with 2,5 million (or roughly 6%) percent of the population going to benefit from the measure; see Real Decreto-ley 11/2013, de 2 de agosto, para la protección de los trabajadores a tiempo parcial y otras medidas urgentes en el orden económico y social

[888] Akrivopoulou, C.M., "Striking down austerity measures: the crisis jurisprudence of the Tribunal Constitucional de Portugal and the Italian Corte Costituzionale", *International Journal of Human Rights and Constitutional Studies*, vol. 2, nr 1, 2014, 86-88

concrete allocation of funds without giving the possibility for the legislature to take into consideration other interests outside the area of social rights.[889]

Nevertheless, budgetary allocation is generally the non-written ground behind the deference of Courts towards the legislature and could be said to be enshrined in various considerations about the limits of the role or the power of Courts, grounded overall in reasons of democratic legitimacy, but also in a conception of Courts as lacking expertise or flexibility to efficiently allocate resources. Those different arguments, however, have been nuanced or contested by an abundant literature.[890]

Those complex questions have led to various applications of how judicial enforcement of social rights has to navigate through those issues, with authors advocating different approaches towards meeting the right balance between judicial restraint and judicial

[889] Scheppele, K.L., "A Realpolitik Defense of Social Rights", *Texas Law Review*, vol. 82, nº 7, 2004, 1935; Contiades, X., Fotiadou, A., "Social Rights in the Age of Proportionality. Global economic crisis and constitutional litigation", *International Journal of Constitutional Law*, vol. 10, nº 3, 2012, 660-686; Tushnet, M., *Weak Courts, Strong Rights. Judicial Review and social Welfare Rights in Comparative Constitutional Law*, Princeton, Woodstock, 2008, 237; Scheppele shows that the 1995 decisions of the Hungarian Constitutional court on austerity reform were subsequently used by the Hungarian government to negotiate more favorable conditions with the international financial institutions financing the restructuring of its economy.

[890] Mantouvalou, V., "In Support of Legalisation", in Geart, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Portland, 2011; Tushnet, M., *Weak Courts, Strong Rights. Judicial Review and social Welfare Rights in Comparative Constitutional Law*, Princeton, Woodstock, 2008; King, J., *Judging Social Rights,* CUP, Cambridge, 2012; Koch, I.E., *Human Rights as Indivisible Rights*, Martinus Nijhoff Publishers, Leiden, 2009; García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", *Derecho y Cambio Social*, nº 31, 2013;

activism, like proportionality,[891] reasonableness[892] or incrementalism.[893] What they however all have in common is that they recognize that the margin of appreciation which has to be left to non-judicial state bodies in the realization of social rights varies in function of different considerations.

From a de-commodifying perspective, with the view of implementing decent unemployment it is contended that one should argue for lesser deference of the courts towards the legislature.

As argued in this work, the reform of unemployment protection systems has developed within a European and national cognitive and political framework of, at least, indifference towards the human rights dimension of protection against unemployment. Under pressure of both the EU within the EES and EMU, as well as the OECD, the governance of unemployment has been inspired more by (sometimes contestable or inconclusive) economic theories and moral assumptions on the matter, within a politically and ideologically imposed context of permanent austerity, rather than from the perspective of the basic meta-legal foundations of welfare states as democracies.

However, human rights treaties involve obligations on part of the states, which, through their constitutionalisation or their incorporation within the national legal systems are binding on all

[891] Contiades, X., Fotiadou, A., "Social Rights in the Age of Proportionality. Global economic crisis and constitutional litigation", *International Journal of Constitutional Law*, vol. 10, nº 3, 2012, 660-686
[892] Koch, I.E., *Human Rights as Indivisible Rights*, Martinus Nijhoff Publishers, Leiden, 2009
[893] King, J., *Judging Social Rights,* CUP, Cambridge, 2012

the organs of the state, including the judiciary. Courts have thus a shared responsibility in the realization of social human rights, and thus in advancing rights-based approaches.

Also, as argued in several parts of this work, systems of unemployment protection are recognized as one of the most effective economic stabilizing measures in times of crisis, and less correlated to debt generation than other social protection systems. Therefore, Court decisions enhancing rights of unemployed, even within a context where debt control has become a political imperative, would influence a welfare state policy which has a certain positive economic relevance, as recognized by the EU.

It is also important to stress the negative relation which exists between re-commodification and the idea of democracy, an illustration of which has been found in Streeck's work discussed in Part I. This point is not immediately related with protection against unemployment, but inscribes itself within the general changes within the Welfare State, and above all those implemented in the European countries most affected by the current economic crisis.

The democratic deficit which characterizes re-commodification manifests itself mainly in relation with the structure and policies of the European Union, but, also at state level there is some measure of degradation of democratic procedures, at least in their material aspects, in the adoption of austerity measures. The Spanish case is a good example. It has been shown that, crisis or not, most of the measures involving re-commodification of unemployment have been adopted through urgent legislative procedures and without

thorough dialogue with social agents and civil society in general. As shown in the jurisprudence of the European Committee of Social Rights assessing social security or labour law reforms within the context of the non-regression principle, the urgency within which Greek measures have been taken as well as the lack of consultation with social agents have been important elements of the declaration of non-conformity. This particular context weakens a step more the already relative character of the democratic argument for deference of the courts towards the legislature.

Moreover, as shown in the case studies, re-commodification of some aspects of unemployment protection systems happened in a "decremental" way. By this, it is referred to the fact that some changes, like the degradation of the notion of suitable employment in The Netherlands, were introduced through various limited reforms gradually reducing the rights of unemployed to benefits. Therefore, the assessment of legal changes, above all under the non-regression principle, should also be viewed from a larger historical perspective, taking into account previous legal reforms of the right the protection of which is claimed.

Another important element which has to be taken into account in assessing the level of deference to be given to the legislature is the degree of vulnerability of the persons affected by the lack of realization of the social right in question.

The vulnerability has not only to be assessed within the context of the needs of the concerned persons, but also taking into account their possibilities and extent of participation within the democratic

process, even if generally, the latter is also a consequence of the former. Within a context where political participation in Western democracies has been found to be unequal,[894] studies show that participation of unemployed and persons at risk of poverty in Europe is far lower than other categories, decreasing already generally lower rates due to factors related to the background of those persons.[895]

An expression of the adaptation of the legal reasoning of Courts in function of the vulnerability of claimants can be found in the jurisprudence of the ECtHR. The categorisation of asylum seekers, Roma and disabled persons as particularly vulnerable groups has brought the Court, not only to recognize the special needs of those persons, but also to apply higher standards of substantial equality, higher procedural requirements within the assessment of proportionality and the need of a stricter scrutiny, narrowing the margin of appreciation generally given to the states as to the justification of measures restricting Convention rights.[896]

Without wanting to force any analogy between the particular vulnerable groups recognized by the jurisprudence of the ECtHR and unemployed, it is contended that the logic of such considerations could be applied within the unemployment protection framework, above all when considering the problems

[894] Lijphart, A., "Unequal Participation: Democracy's Unresolved Dilemma," *American Political Science Review*, nº 91 1997, 1-14.
[895] Kroh, M., and Könnecke, C., "Poor, Unemployed, and Politically Inactive?", *DIW Economic Bulletin*, vol. 4, nº 1, 2014, 3-14
[896] Peroni, L. and Timmer, A., "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", International Journal of Constitutional Law, vol. 11, nº 4, 2013, 1056-1085

generally faced by long-term unemployed, not only in terms of access to the labour market, but also in relation with the different experiences of systemic degradation they experience: wider obligations in accepting employment under threat of sanctions, lower (if any) benefits under social assistance programs, higher submission to administrative scrutiny and less access to positive and enabling activation measures.

This idea should also have particular relevance in terms of revision of criteria of repartition of ALMPs between unemployed, which, as shown, have been mainly concentrated on those easier to reintegrate, with as consequences the aggravated possibility of the other unemployed to end, in the best cases, within the systems of social assistance, with a higher commodification aspect, due to lower benefits and more intense negative activation.

Moreover, Courts should also provide better attention towards workers with higher vulnerability due to higher levels of in-work commodification, taking more into accounts the problems faced by those employed under atypical contracts.

Another important element to take into account, above all when reviewing matters like the access to and the level of benefits, is the extent of the existence of alternatives to satisfy the scope of interest at the basis of the claim.

As already said, this seems to have been the approach of the ECtHR in the *Stummer* case,[897] and the European Committee of Social

[897] ECtHR, *Stummer v. Austria*, Judgment of 7 July 2011

Rights also assesses the adequacy of social security schemes under the availability of complementary, social assistance benefits.

Finally, all those arguments have to be seen within the light of the already mentioned integrated approach towards social rights. The interconnectedness of the international human rights instruments related to social rights and the availability of a whole range of accompanying jurisprudence, *soft law* documents and opinions and assessments of bodies of experts are tools which can reinforce courts when faced with the objections of democratic legitimacy and lack of expertise. Moreover, the integrated approach allows the courts to depart from legalistic interpretations towards reinforced normative interpretations of the legal instruments in which they have to base their decisions. In other words, this permits to depart from "legalism", in the sense of positivistic approaches towards law, towards "normativism", a holistic conception of fundamental rights and constitutions as a normative structure the provisions of which are based, explicitly or explicitly, on deeper principles, "and ultimately on abstract norms of political morality that are the deepest source of the authority" of those instruments.[898]

[898] Goldsworthy, J., "Conclusions" in Goldsworthy, J., (ed.) *Interpreting Constitutions. A comparative study*. OUP, Oxford, 2006, 322. See also Mantouvalou, V., "In Support of Legalisation", in Geart, C. and Mantouvalou, V., *Debating Social Rights*, Hart Publishing, Portland, 2011; ; García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", *Derecho y Cambio Social*, nº 31, 2013; A good example can be found in the jurisprudence of the Spanish Constitutional Court constructing collective labour rights where the Court took into account, not only ILO Conventions, but also the related Recommendations. See López López, J. "La construcción de derechos sociales: judicialización y aplicación de los Convenios de la OIT", in López López, J., Caruso, B., Freedland, M. and Stone, K. (coords.) *La aplicación de los convenios de la OIT por los jueces nacionales:*

el caso español desde una perspectiva comparada, Bomarzo, Albacete, 2011, 13-26

Tentative conclusions: De-commodifying protection against unemployment under a multilevel perspective

The research developed in this work has tried to contribute, from a multilevel legal perspective, to the debates around the shifts in protection against unemployment within the broader context of European welfare state change. It has also attempted to maintain that the notion of de-commodification is still useful not only to assess those changes but also to ground normative responses to the social outcomes of those changes.

It has been argued that the changes within protection against unemployment within the studied Welfare States, taken as a whole can clearly be analysed in terms of re-commodification, and even more if one takes into account the concept of re-commodification as including commodification in- and out-of-work. Not only the (existing) social rights related thereto have undergone this process of re-commodification (rights to benefits have become ever more conditional and duration and level of benefits have decreased), but the notion of protection against unemployment itself has undergone the same process, through the shift towards providing protection through services framed in terms of policies (as opposed to rights), actually aimed at a fast reintegration within the labour market,

without regards to the quality of that reintegration, the effectiveness of which in terms of providing protection is questioned, or at least minimal, and creating segmentation by their unbalanced character. This has undermined the idea of security which systems of social protection ought to provide, under the perspective of social citizenship as well as of (social) human rights. Within Bismarckian Welfare States, those shifts have reproduced and reinforced out-of-work the segmentation existing between workers within the labour market, through work first policies, regression of status protection and the lack of taking into account of the quality of labour market reintegration.

As just said, part of the process of re-commodification has happened through the paradigmatical shift of protection against unemployment away from a rights perspective (without however leaving rights out of the picture, but submitting them to ever higher conditionality) towards the idea of protection to be provided through policies administred or coordinated by PES (involving the selection of unemployed participating to those policies).[899] The case-study revealed a common tendency towards important discretionality on part of PES to offer the measures under those policies, above all the most "enabling" ones. Moreover, it has been argued that those measures tend to reinforce the obligation of the unemployed to reintegrate the labour market, rather than enhancing

[899] With the exception of Spain to the extent that a great part of ALMPs, at least in terms of budget, including the social security budget consisting in social contributions, consist in almost indiscriminate hiring subsidies the conditions of which are centrally defined by "urgency" laws, with low effectiveness in terms of employment creation and in terms of providing individual support to the concerned unemployed.

the right to protection, above all in terms of reduction of the reliance on the market de-commodification should involve. Also, and this is one of the causes of the former, market logic has infiltrated those policies through participation of profit-driven actors, new management techniques, cost-effectiveness principles, and the submission of budgets to general constraints aimed at tax and public deficit reduction.

This shift towards policy as means of protection mirrors the shifts involved by the Europeanization of social policy, the regulation of which is done mainly through a model based on policy-instruments through the OMC, rather than legal instruments in the strict sense which would confer rights and obligations to workers faced with the risk of unemployment, as well as precise and enforceable obligations on the states in terms of regulation of said risks. While some convergence in terms of protection against unemployment induced by the EES cannot be denied (involving however processes of re-commodification, partly due to the inherent re-commodifying character of the ideas at its heart), it appears not only that there is no balanced implementation of those ideas, but also that their implementation cannot avoid the appearance of contradictions with the *flexicurity* model, above all in terms of training and the implementation of "clear rights and obligations". Spain and its move towards a "flexiprecarity" model is a clear example of that phenomenon. This could be partly explained by the inherent contradictions within European policy expressed by the opposition between the costly implementation of *flexicurity*, as inspired from the Danish model, and the budgetary constraints enforced through

political pressure put on Member States within the reinforced structure of the EMU, moreover in a context of economic crisis. Another partial explanation could also be found in the lack of concretion and substance, as well as enforceable character of the country-specific recommendations as instruments implementing the EES which have a more direct connection with the policies put in place by the Member States. There is thus a lack of regulatory elements which could oppose and correct the outcomes of power processes having their origin in the functioning of the market which influence national regulation of protection against unemployment, and which find expression, through cognitive and political processes, in the formulation of re-commodifying paradigms and national reforms.

But this does not mean that the multilevel regulatory framework related to protection against unemployment is a model based exclusively on policies. The regulation of protection against unemployment does not only inscribe itself through the implementation of flexicurity through the OMC, with all the flaws the EU regulatory structure and paradigms entails. It has also be argued that there are legal elements contained in human and fundamental rights instruments which vary on the line between *hard law* and *soft law* with the potential to influence the formulation of policies on the one hand and their revision under legal standards on the other. Amongst them, the European Social Charter, an instrument which seems to have lacked publicity amongst the legal community, should be given more attention. Not only could some of its provision, under their interpretation by the European Committee

of Social Rights, be construed as approaching a self-executive character, but it generally provides, through the work of supervision effectuated by the Committee, a broad range of criteria and concreting elements which can be used by national and European institutions and judicial organs to develop rights-based approaches to correct the re-commodifying trends developing under the policy-based regulatory framework.

Taking into account the former, it has been proposed to build legal strategies of de-commodification of unemployment protection on a notion of "decent unemployment". As the notion is enshrined in the right to dignity, it provides for a useful concept to connect an integrated approach towards de-commodifying unemployment protection through the interpretation and application of the different interconnected legal instruments of the multilevel legal context, including jurisprudence, *soft law*, and instruments expressing deliberation and conclusions of social rights expert bodies, mirroring the decent work agenda of the ILO.

Centring unemployment protection on the person of the unemployed as a citizen and a human being serves to highlight the necessity of a rights-based approach to the protection, grounded on the need for the "unemployee" of sufficient material protection, but also of genuine rights of participation within the administrative processes of control of his or her obligations, with a view towards self-realization. The latter involves the recalibration of the notion of suitable employment, the inacceptable character of work-first approaches and the genuinely enabling function of reintegration

measures, involving effective PES and equilibrated contractual relations between the latter and the unemployed, in which the offer of reintegration measures is positively articulated with the obligations of the unemployed.

Such a framework involves de-commodification of unemployment protection as it shifts the view away from the conceptualization of the unemployed as a factor of production. The latter, re-commodifying view, involves that unemployment protection cannot alter the efficient use of those factors of production. Therefore it commands fast reintegration through negative activation and active policies centred on enhancing the efficiency of the labour market by their focus on job matching and reintegration of the easiest to employ.

But the implementation of decent unemployment as a de-commodifying strategy through the application of human rights it is related to and the normative understanding of which it commands is not straightforward. Rooting protection against unemployment within a human rights perspective has the potential to enhance political awareness about the legitimacy of viewing protection against unemployment from a rights perspective centred on the inspirations and necessities of unemployed as humans and citizens, instead as from the point of view of its economic function and neo-classical economic ideas like the necessity of a low reservation wage for the effective functioning of the labour market.[900]

[900] The fallacy of the notion of effective functioning of an unregulated labour market, involving i.a. the necessity of low reservation wages, has been argued in Part II. Even more, the idea of the necessity of low reservation wages is even

However, such transformation is still contingent on power relations and national and European policy frameworks which have been showed not to take into account those rights perspective.

Within that context, application of social rights by judges can be a way forward to promote the adoption of the rights perspective contained in the multilevel human and fundamental social rights framework when neglected by policy makers. The latter legal framework even provides elements for advancing more effective judicialisation. Firstly, it contains legal instruments and can be the source of arguments in favour of a normative approach (as opposed to stricter legalistic approaches) to the assessment of national instruments implementing unemployment policies. Secondly, through the labour of the different bodies supervising those international instruments, that framework provides also for elements defining more precisely those rights and containes elements of concretion which can narrow broad obligations of states expressed in terms of policy directives, approaching the conditions for the self-executing character of those international provisions in the best case, or at least restrict the freedom of the states for their implementation. Thirdly, those same supervising bodies provide expert materials and opinions which can help courts taking reality more into account and ground their decisions in factual assessments. It has been showed that this does not involve that courts would necessarily supplant the role of other democratic organs of the state

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challenged by the positive overall economic function of systems of protection against unemployment, above all in times of crisis, which has been alluded to in this work.

in promoting social rights, but rather enter into a dialogue with those organs so as to remind the latter of their legal duties, and reforce requirements of justification.

Courts can thus stand for the effective enforcement of social rights in the light of the reluctance of European states to bring their systems of social protection in conformity with their constitutional or international obligations. But also, given the current cognitive and political context within which national and EU policies are orientated towards fundamentalist market economic approaches based on governance by numbers, they can also promote an alternative, rights based approach, as the latter is the basis of the language courts use as well as of their legitimacy. It has been shown that within developing countries, court decision enforcing social rights have permitted to introduce the language of rights into the policy debate without supplanting the role of policy-making organs.[901] To cite the conclusions of a study of decisions of eastern European courts within the context of welfare restructuring imposed by international financial institutions in the 1990s, in the new European order, "courts - and the constitutional vision they bring to tough problems of poverty and economic restructuring – may be the only institutions that can balance market fundamentalism with a concern for democracy, constitutionalism and human rights."[902]

[901] Gauri, V. and Brinks, D., "A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World", in Gauri, V. and Brinks. D., (eds.), *Courting Social Justice*, CUP, Cambridge, 2008, 343

[902] Scheppele, K.L., "A Realpolitik Defense of Social Rights", *Texas Law Review*, vol. 82, 2004, 1941

As such, courts can work as catalysts for new developments within existing forms of new governance or soft obligations on state agents to advance human rights through the implementation of substantive equality, by reinforcing procedural obligations of the different actors involved in political decision processes.[903] Without substituting themselves to the legislature, they can orient the decisions of the latter and reinforce the standards of justification of its decisions.[904] But they can also generally raise awareness about the need to take social rights seriously, forcing the other organs of the state to justify their decision under higher standards of scrutiny.

This does not mean that de-commodifying unemployment protection, or Welfare State policies in general, can be effectively realized through the judicialisation of social rights. It is important to remind in this context that the jurisprudence observed throughout this work, apart from few exceptions, like the CJUE and Spanish Constitutional Court decision on access to social security rights for part-time workers, did not involve important changes within the systems of protection. Most of those decisions fixed limits at the margins of the protection systems. Even the *Hartz IV* judgment of the German Constitutional Court, even if it involved an important

[903] Scott, J. and Sturm, S., "Courts as catalysts: re-thinking the judicial role in new governance", *Columbia Journal of European Law*, vol. 13, 2007, 565-594; Fredman, S., "Breaking the mould: equality as proactive duty" in Countouris, N. and Freedland, M., (eds.) *Resocialising Europe in a Time of Crisis*, CUP, Cambridge, 2013, 138-161

[904] García Schwarz, R., "Social Rights as Fundamental Human Rights: the Absolute Necessity for Them and Their Guarantee", *Derecho y Cambio Social*, nº 31, 2013; a concrete application in terms of unemployment protection of that idea can be found in the application by Dutch courts of article 4 ECHR for the municipalities to better justify their decisions in matters of obligation of social assistance benefit holders to participate in reintegration measures.

jurisprudential change by recognizing a direct claimable right to the *Existenzminimum*, only involved a better calculation of already minimal benefits for children, without posing into question the overhaul which the *Hartz* reforms meant. The application by Dutch jurisprudence of article 4 of the ECHR to "meaningless" integration measures concerned obligatory participation of workers with an university degree in gardening or packaging activities, involving also the intervention of extreme disproportion in applying activation.

Moreover, the "anti-austerity" decisions of the European Committee of Social Rights, or the Portuguese Constitutional Court did not reverse the contested measures as a whole, and only questioned some aspects of the legislation submitted to review.

However, this does not involve that human and fundamental social rights have functioned more as limits to the action of the state, reflecting to some extent the "classic" vision of those rights. The Hartz IV judgment and the CJUE and Spanish Constitutional Courts judgment obliged the state to raise to some extent the level of protection. This shows that the positive obligations entailed by most human social rights can be a tangible legal reality. And, as already said, realization of those positive obligation do not only depend on judicial processes but also on political and social mobilization which they also legitimate.

Moreover, apart from their symbolic impact, all those decisions reminded the authorities of their duty to approach the subjects of those measures in general and of protection against unemployment

in particular, as human beings and citizens, with their own particular necessities and aspirations, contributing as such to a decent treatment of those affected and their families. Above all, they reminded the administrative and legislative authorities of those states that they all had duties under constitutional and international law, for example to progressively raise their systems of social security to a higher level, to grant adequate assistance to any person without adequate resources, to protect effectively the right of the worker to earn his living in an occupation freely entered upon, and to ensure the effective right of unemployed to vocational training.

Under the multilevel perspective and the idea of indivisibility of human rights, those duties are described and specified through sufficient instruments, jurisprudence and expert opinions for the legislative and administrative authorities to know on which bases they have to justify their decisions, and courts and other actors to bring them to account.

The current EU regulatory framework, implementing the idea of *flexicurity* through the Open Method of Coordination does not seem to bring Member States to account in relation with the obligations related to human, fundamental and constitutional rights they have, even when promoting policies, like training, which, if effective, could be considered in line with those rights. It is thus difficult to see how European social policy, in its actual state, could promote Welfare State policies which would de-commodify social rights.

Maybe the inspiration and legal constraints found in the multilevel framework of human social rights will not lead to strong processes

of de-commodification, but at least they can remind political and legal actors about the need that democratic societies have of strong, de-commodifying social policies for their citizens to be able to lead lives they have reasons to value.

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