CRITICAL LABOR LAW *versus* LABOR LAW

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CONTENT: I. THE OCCASION TO WRITE A «*DERECHO CRÍTICO DEL TRABAJO*», BEING AT THE SAME TIME A «CRITICAL LABOR LAW».- II. CRITICAL INTRODUCTORY LABOR LAW.- III. CRITICAL INDIVIDUAL LABOR LAW.- IV. CRITICAL COLLECTIVE LABOR LAW.- V. CRITICAL ADMINISTRATIVE AND PROCEDURE LABOR LAW.

RESUMEN: Los autores explican su opción por dejar de explicar Derecho del Trabajo en la Facultad de Derecho, para pasar a explicar un Derecho «crítico» del Trabajo, en español y en inglés. De un lado, ello se debe a las limitaciones y nuevas exigencias derivadas de la implantación del «Plan Bolonia». De otro lado, también se debe al impacto destructivo de la crisis económico-financiera sobre el Derecho tradicional del Trabajo.

ABSTRACT: The authors argue their option to put aside the explanation of Labor Law at Law School, to go on to explain a «critical» Labor Law, in Spanish and English. On one side, it is due to the limitations and new requirements deriving from the implementation of «Bologna Plan». On the other side, it is also due to the destroying impact of the current economic-financial crisis on the traditional Labor Law.

PALABRAS CLAVE: Enseñanza del Derecho, Derecho del Trabajo, Plan Bolonia, Crisis.

KEYWORDS: Legal Teaching, Labor Law, Bologna Plan, Crisis.

I. THE OCCASION TO WRITE A «*DERECHO CRÍTICO DEL TRABAJO*», BEING AT THE SAME TIME A «CRITICAL LABOR LAW»

I. In Universidad de la Coruña Law School, where both of us work, the implementation of «Bologna Plan» was particularly harsh. Firstly because the old 1953 five-year academic plan for Law Grade had to be shorten to a four-year one. Secondly, because everyone at Law School was obliged to lose academic burden because Labor Law had to become a four-month mandatory course, in which we could only use, in fact, a trimester (instead of the traditional semester) to develop the course for our students. Thirdly, because «Bologna Plan» imposed —within the quarter— the distinction between masterclasses and interactive lessons, the former being reduced to only 21 hours of class. In our particular case, this curricular change had an additional problem to be tackled. For theory lessons we relied on a reference book —featured as a classical handbook. It was structured in 43 lessons and became impractical to smoothly address such change. That is the reason why in 2010-2011 academic year we came to the painful decision to put our old handbook to an end, which was already in its second edition[1*]. It had to be replaced by an entirely new one, suitable for «Bologna Plan». We had a full academic year to write it. We began to do it while a research stay in the University of Hamburg, Germany —where our German colleagues showed us that «Bologna Plan» would never be implemented in German Law Schools. Obviously, the first job was to write a new program of Labor Law suitable for the new masterclasses, and being structured in accordance with the number of hours assigned to such kind of explanations, in only 21 lessons.

II. The program we end up writing was a full new program, as compared with the traditional one we used to teach articulated in —as said before— 43 lessons. It is true that our first idea was to do a compendium or summary of our old program. But

[1*] See J. MARTÍNEZ GIRÓN, A. ARUFE VARELA and X.M. CARRIL VÁZQUEZ, *Derecho del Trabajo*, 2nd ed., Netbiblo, A Coruña, 2006, 620 pp.

we dismissed such an idea after considering what should be the essence of each new lesson. In our particular case, everything was conditioned upon the financial-economic crisis, which had broken out three years before, and which led us to think that the old Labor Law, we used to teach in the old Grade, was obsolete. We came to the conclusion that the new program should meet our Grade students expectations since they are much better prepared than ever, particularly in English and computer usage. Thus, teaching a dogmatic legal actuality was not conform to the new reality. In fact, it is a more tragic than merely dramatic reality marked by millions and millions of unemployed young people, by abusive contracts and salaries —assuming there were not scholarships—, and by being bounded to remain in the family home for a lot of years. Even worse, these years of crisis have been featured by unions being transformed in huge training centers and issuing knowledge certificates —not obvious in all cases—, and by public powers gone weaker by the markets, and by what our powerful partners of the European Union —which were seduced by the «international markets»— should say. Hence our conviction that we ought to write not only a new Labor Law embodied in a true workable handbook during only a trimester, but above all a true «critical» Labor Law, completely far away from the old topics, as well as the technocratic distinctions and illusionism[2**]. We even wanted that our critical proposal was manifest and evident. Thus our choice to give to each of the 21 lessons of the new handbook a markedly critical heading, not concealing that our purpose before our students was exactly to criticise what was around them.

III. Obviously, we did not mean to write a negative critique for the sake of argument. It is true that the university —in its own nature— is a critical conscience for society. Students do not want to hear the same old song from professors. Nevertheless university ought to be both positive criticism and solution to problems. Although these solutions state that seemingly a university professor —who is always theoretical in the best sense of the word— 'lives in the clouds'. In other words, we discarded the anti-university motto '*Arrêtez le monde, je veux descendre!*.' Truth must be said, however, we do not like the world we currently live in. In our particular case, those metaphorical 'clouds' were indentified with Comparative Labor Law, to which we were intensively devoted since the publication of our book '*Leyes laborales alemanas. Estudio comparado y traducción castellana*' in 2007. We decisively banked on it, and, of course, we firmly still believe in it. We had no doubts that little or nothing could be done about such situation, but breathe the polluted atmosphere (inconsistent

[2**] See J. MARTÍNEZ GIRÓN and A. ARUFE VARELA, *Derecho Crítico del Trabajo. Critical Labor Law*, 3rd ed., Atelier, Barcelona, 2014, 287 pp.

with a university man of law, and a universal one) which we had called it in another place the «national positivist endogamy». We certainly wanted to reflect the problem in each of the twenty-one lessons composing our new program and our new handbook. From a formal viewpoint, we underlined it to make the qualitative leap of translating into English, literally, the major sentences (the ones that the students were due to learn) in those twenty-one lessons (as the *lingua franca* to move in an efficient way through the world of Comparative Law, exchanging teaching and researching experiences with European colleagues, likewise devoted like us to Comparative Labor Law, and whose mother tongue was not the English, as it happened in our case). And from a material viewpoint, the change also made us integrate the positive criticism in each of those twenty-one lessons, by including in the contents of each one of them —as a general rule— a «**§3**», with which we pretended to give Comparative Law solutions to the problems stated in the «**§2**» of each lesson (as a truly «critical» portion of the particular lesson at issue), after introducing in the «**§1**», likewise in each lesson, the normative structures (obviously, the Spanish ones) that we were bound to make known, in a neutral scientific way, and always in a nutshell, to our students.

II. CRITICAL INTRODUCTORY LABOR LAW

IV. The «Introduction» to the study of our critical Labor Law ended up comprising only three lessons. The first one was devoted to introduce the sources which our students should learn to handle. We headed it «The sources of Labor Law and their search (improvable in Spain) through the Internet». Its critical core was focused on the fact that the normative sources of Spanish Labor Law are characterized by a flagrant violation of the State, going back to 1980. What the State has violated was the letter of the current additional schedule number eight of the Workers' Statute, which imposed to central Government the duty (let us repeat, since nothing more and nothing less than thirty-five years) to enact a «Labor Code», compiling in a unique text the whole labor legislation («all general labor provisions», statutory and regulatory, including the «organic Acts», the latter being of impossible formal combination), and maintaining such a unique text permanently updated. For us, the counterpoint of this violation is exemplified by the French official site of diffusion of Law through the Internet (then took into account by the European Union to build up its own «EURlex» database). Of course, we invite our students —who are much keener than us in using new technologies— to handle it, so they can test at first hand the limitations of the Spanish websites to freely disseminate the sources embodying our Labor Law (statutory and regulatory, case-law, and conventional ones) and, at the same time, the uselessness of enacting —in times of crazy normative changes—

combined text of norms, incapable to compete with French so-called «electronic Codes» of constant Law (in Spain, this situation already exists, though unofficially).

V. On the basis that the principles of Labor Law are helping mechanisms to comfortably walk around the complicated net of sources of Labor Law, we devote the second lesson of our handbook to its study. It is headed «The traditional principles of Labor Law and their neutralization by new economic principles». Its critical core refers to the fact that the principle of the most favorable treatment of the worker, which in some way embraces the rest of traditional principles of Labor Law, wants to be replaced by new economic principles (euphemistically called 'principles of adaptability, flexibility, competitiveness'…), pretending the implementation of a revolution in the traditional system of sources of Labor Law. In our opinion, the use of ultraliberal techniques for a practical prevalence of those new principles external to social justice, such as the technique of labor deregulation (which eliminates statutory minimum labor standards) as well as the technique of making precarious the normative content of the collective bargaining agreements (which can even lead to the lack of conventional minimum labor standards) are clear. In contrast with this liberal revolution, we explain that the traditional principle of the most favorable treatment of the worker becomes positive Law in a number of comparatively significant countries surrounding us (what logically cheers up to deal with it), and that it is even a European common principle, ruled in the Directive concerning the posting of workers in the framework of the provision of services, which prevents —despite the economic tensions it suffers— its elimination as an arranging criterion for the interpretation and application of the sources of Labor Law.

VI. The critical «Introduction» concludes with a lesson about «The smudge of the personal scope borders of Labor Law». In it, we emphasize the current trouble of distinguishing between 'dependent work' and 'self-employment' (and therefore, between those who are and those who are not covered by the personal scope of Labor Law). This distinction has been hindered and even made impossible, due to the intrusion and legalization of the figure of the «economic dependent self-employed». And we show our opposition to it by explaining that, with the statute at hand, it is certainly possible —as in the case of the typical salaried worker— that the «economically dependent self-employed» works in the premises of his employer (of course, not «in an undifferentiated way with the workers rendering services under any modality of employment hiring»), without having the appropriate infrastructure and equipment (supposing that in such activity they are not «economically relevant»), under «the technical instructions to be given by his client», and without assuming the responsibility for the result of his activity, even bearing in mind that when «it is not

fixed the term or the determined service in the contract, it will be presumed, unless contrary proof, that the contract has been signed for an indefinite duration». The new accidents at work '*mutuas'* statute confirms our idea that this «economically dependent self-employed» is, in fact, the legalization of a fraud (the one of the traditionally called «false self-employed»), which nowadays allows the Spanish employer (as opposed to what happens in the case of the German employer or even the Italian employer) to have manpower available at cheaper rates than the traditional one (such accidents at work *mutuas* statute, although not surprisingly for us, legalizes the figure of the «extra-statutory» economically dependent self-employed, that is, the one who acts in the fringes of the regulation contained in the Statute of Self-employment, because he does not even appear as «registrated»).

III. CRITICAL INDIVIDUAL LABOR LAW

VII. After the «Introduction», we place ten lessons about «critical» individual Labor Law. The first of these ten lessons is conceived to get a maximum interest from our young students. It is headed «The Spanish neither unitarian nor integral model of public services of employment». And in it, we take a starting point at the model of public services of employment existing in Germany and Great Britain, which is a unitarian model (not agreed into neither *nations* nor *Länder*, because it acts in the whole territory of both States) and, at the same time, an integral one (that is, only one body manages at the same time active/passive employment policies, supposing that the employment policy is, in fact, a non-splitting unity). And, in contrast with these models, we point out that the Spanish model of public services of employment (ruled in the Act 56/2003, restless and uselessly modified), on the contrary, is neither unitarian nor integral. The former is due to the transfer of active employment policies to the regions. The latter is due to the dissociation existing in Spain between the passive employment policy (being only responsibility of the State) and the active employment policies (transferred, as we have just said, to our seventeen regions). On the basis that if our young students were determined to seek a job, they would naturally do it through the Internet. Therefore, we encourage them to handle EURes database, administered by the European Commission, and fed —without pretending to affect each particular national reality— by the information provided for the different public employment services of the twenty-eight member States. They would be able to check with their personal computers how easy it is to do this for a German graduate of for a British graduate, and how difficult it is, however, for our young Spanish university graduates.

VIII. Supposing those who seeks for a job end up getting it, we next explain (in a lesson headed «The ordinary or common contract of employment and its more undesirable modalities») the Spanish reality of the most easily available jobs. Logically, we take for granted the employment contract that any common worker would wish to have (that is, a contract with pure consideration, that is, that a person would wish to do some work in exchange for a salary, for an indefinite duration and full-time). And then we explain how these three crucial elements can be disrupted (either polluting the consideration —as it occurs in the case of training contracts, or frankly speaking in the one of pre-employment scholarships, or during the probationary period—, or working under a precarious contract, or part-time working). But the lesson is focused on the fraud of law existing in the Spanish fixed-term hiring, and on the lack of will by Spanish legislator to fight against such huge bag of fraud. Hence the suspension of article 15, paragraph 5, of the Workers' Statute, during the period from 31 August 2011 through 30 June 2015. This suspension implies leaving free hands to the employer to manage the precarious employment hiring at his will. And supposing that the French Labor Code exemplifies better than any other European labor norm the formalization of the stability in employment principle, we explain how the French legislator —as opposed to Spanish suspension— should be surprised and scandalized. Among other things, he would not understand how it is possible to «suspend» in Spain the application of the Law of the European Union. And he would remind to us that the Directive concerning the fixed-term work, the implementation term of which ended long time ago, compels to each member State to have norms to fight against fraud in fixed-term contracts, without being possible to suspend the fulfillment of the European duty at issue by apparent labor austerity reasons.

IX. Obviously, what a salaried worker must do is working. And the content of what he or she does (called nowadays, with a technocratic terminology, his/her «functions») is dealt with in the lesson headed «The rendering of work and the attempts of not giving a professional status to the worker». Naturally, we confess our certainty that professional specialization is of benefit. But we also explain how currently both the Spanish and the European Union labor legislator firmly bet against the specialization of workers. In order to promote the so-called «employability», they want a worker ready to do any kind of work, inasmuch as his qualification, his professional career, and, of course, his professional desires or vocation. Hence, the new key economic concept of «functional polyvalence» to be implemented at two different levels. On the one side, there is the external enterprise level: the European Union has adopted as a guide of its employment policy —since 2006— the Danish model of «flexicurity», based on three ideas (a continuous rotation of a worker in different jobs,

the reinforcement of unemployment protection while the worker is jobless, and the reinforcement of the professional training to ease the transitions between unemployment periods and periods of getting a new job). And on the other side, we have to consider the internal enterprise level, in which the key is the so-called «functional flexibility» (or «internal flexicurity»), respecting to which the obsession of the Spanish legislator (2012's too) is the implementation of «professional groups», each one with its corresponding group salary. In this lesson we offer an authentic model of what is pretended, pointing out that in Spain this subject comes from long time ago. In fact, perhaps the most naked, but real, image of the new «polyvalent» worker's generation, called to replace our traditional specialist workers, was already shown by the first state-wide collective bargaining agreement for temporary agencies of employment of 1995, with its thought description —before which our students would be amazed— of its «professional levels».

X. In the subject-matter of working time —which was traditionally the core of imperative labor legislation (and therefore, of Labor Law)—, the European Union Law has ended up being devastating in whole Europe. We study it in a lesson headed «The early maximum at the employer's will work time». Due to the generalization of averages, compensations, and irregular distributions, it is clear that daily and weekly working times are not labor minimum standards yet. They have become mere «illustrative» labor standards, whose fulfillment on the employer's part cannot be monitored with efficacy by the Labor Inspectorate. In fact, the only true maximum working time is the yearly working time, the duration of which is not set by the Workers' Statute, but by the General Act of Social Security. About the Directive ruling some aspects of the working time —without which it is impossible to understand anything at all—, we explain that it was enacted by-passing the primary Law of the European Union, because, formally speaking, it is not a Directive affecting the rights and interests of the workers —despite it impacts frontally on them—, but a Directive on occupational safety and health. Furthermore, we explain that some of its excesses (for example, the individual opt-out clause, allowing the individual employer to agree on work hours with the individual worker in the fringe of normative regulation, and therefore, ultra-flexible ones) has finally become positive Law in a number of member States, such as Great Britain and Germany.

XI. It is nonetheless impossible to find any relevant Law of the European Union relating the amount of salaries (doubtless, the most basic labor standard), because it is expressly forbidden by the Treaty on the Functioning of the European Union. We explain it in the lesson headed «The inter-professional minimum wage and its manifestly inadequate amount». In this chapter, as a counterpoint of this Community lack, we also explain that Spain has ratified the European Social Charter (only its

original version, but not its revised version). This international Treaty forces our country to «recognize the right of workers to receive remuneration that will give them, and their families, a decent standard of living». And we also explain that the European Committee of Social Rights, which is the body charged with monitoring the fulfillment of the Charter, has stated long time ago that Spain is a flagrantly violator State of such specific section of it (the same as Germany or Italy, or otherwise than France). They are documents scarcely known in Spain, maybe because they are only published in the two official languages of the Council of Europe (that is, English and French). But their conclusions are clear, because —according to them— «the level of the [Spanish] minimum wage remains very low», and as a consequence, «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».

XII. The Spanish Law about occupational safety and health —according to which the employer is a security debtor before the worker— cannot be understood as taking apart the Law of the European Union. This is due to the fact that our Law on the subject is a mere implementation of the secondary Law of the European Union about occupational safety and health. We explain it in the only lesson devoted to this subject, headed «The misconduct of the Spanish State in the subject-matter of occupational safety and health». Its critical core is focused on the study of the Luxembourg Court's case-law, which is relatively abundant, about the violation of their duties relating to the implementation of the Directives of the European Union relating to occupational safety and health by a number of member States. For us, it is devastating to verify that Spain is one of the most violator member States in this particular subject, in which the exemplarity of the State (in front of employers, workers, and the specific representatives of the latter on occupational safety and health) seems to be crucial. On the basis of such case-Law, Spain is the second ranked violator State, according to the number of the cumulative condemnations (it also has the 'doubtful privilege' of having been the first member State sentenced by non implementation in time, or by wrongful implementation, of the Community Law on occupational safety and health). Furthermore, Spain is also the second ranked State which violates the Law, according to the number of non fulfilled Directives.

XIII. We focused the modification of the contract of employment on the explanation of how the traditional employer's *ius variandi* has evolved with the passing of the years, until it ended up becoming a true *potestas mutandi*. We explain it in a lesson headed «"Take it or leave it" for the worker in front of the modification of his contract of employment». If this subject is focused from the point of view of the individual worker, it is clear that the key norms are not articles 30, 40, and 41 of the

Workers' Statute (lastly, continuously amended to make easier the collective modifications of labor standards), but article 138, paragraph 8, of the Act Ruling the Social Jurisdiction. It is a dramatically unfair norm, because it forces the worker to litigate up to twice against the employer. And after having prevailed in both pleas, the worker is faced with the choice «take it or leave it», that is, you either accept the arbitrary modification of your contract of employment, or you must leave the enterprise away. And then we raise the following question: is it worth prevailing in two pleas (the former for the recognition of the right, and the latter for the execution of the corresponding judicial decision), paying fees to a lawyer or to a labor advisor, to be placed in such a dilemma? In Comparative Labor Law, there is nothing comparable to this sad situation, either because the general (common Law) rule that the employer cannot unilaterally modify the individual contract of employment is alive (that happens in France), or (supposing that the employer prevails the plea for the recognition of the right) because the employer is forced to reinstate the worker in exactly the same conditions of employment as he enjoyed before the unjust modification of the contract has occurred (as it happens in Germany).

XIV. Acute economic crises always end up leaving their marks on Labor Law, and this is still noticeable long after being surpassed. Regarding the 1992 economic crisis, we point out this idea in the lesson headed «The suspension of the contract of employment and its more surprising, distorting consequences». In that year, due to the financial troubles suffered by the State, a partial privatization of the temporary disability allowance deriving from common risks was implemented, so the employer ought to pay such allowance until the fifteenth day of suspension of the contract of employment. As a consequence, the Spanish figures of accidents at work (if referred to non serious accidents at work with absence) began to swell in an exponential way, by means of registering the employer (supposing that, with the consent of the worker) fraudulent forms of non serious accidents at work. The distortion provoked by such massive fraud in the Spanish figures of accidents at work has been internationally noticed. The body for monitoring the fulfillment of the European Social Charter is stating this (for example, in 2010), in concluding that «the situation in Spain is not in conformity with article 3§2, on the grounds of the manifestly high number of occupational accidents». In our opinion, the reversal of this trend would require to adopt some measures encouraging the fulfillment of legislation dealing with temporary disability, aimed above all at small enterprises, like the ones existing for more than a decade in Germany.

XV. Regarding the termination of the contract of employment, 2008 economic-financial crisis has placed the collective dismissal and the objective dismissal by redundancy on the top of breaking news. We study both kinds of dismissal in the

lesson headed «The starring terminator twins of the contract of employment, by reasons independent of the employee's will». What we rashly criticize in it is the fact that legislation promotes the employer the collective or objective dismissal of permanent workers. It happens by means of leaving him hands free to choose what workers are going to be collectively or objectively dismissed, because the only statutory limitation existing to this respect is the one relating to workers' representatives. This fact provokes, above all in the case of collective dismissal, the selective elimination of aged workers (euphemistically and improperly called «pre-retirees»). In contrast to what occurs in Spain —where our society looks to be morally ill—, labor legal orders of a number of member States of the European Union statutorily prevent the selective elimination of aged workers throughout collective dismissals, as in the paramount cases of the French and German legal orders, where there is a set of priorities protecting ordinary workers to remain in the enterprise, which takes into account —in this order— family duties, the seniority in service, and the situation of the workers having social characters which make particularly difficult their professional reintegration (namely, the handicapped and aged people).

XVI. The classical subject of disciplinary dismissal, which has also been impacted by the current economic-financial crisis, is dealt with in the lesson headed «The starring terminator of the contract of employment, by reasons dependent of the employee's will». Under that heading, we highlight the multiplying efficacy of the cost of disciplinary dismissal, since the non-disciplinary, but unjust, termination of the contract of employment, is tantamount to a wrongful disciplinary dismissal, from a procedure point of view. On this basis, we critically study the last measures for making cheaper the cost of wrongful disciplinary dismissal, focused on the possibility of not having to pay the so-called «back pay», and on diminishing the severance pay for wrongful dismissal, to the worker wrongfully dismissed. It is surprising the fact that these measures are nowadays equally and in an indiscriminate way applied to any kind of enterprises, regardless if they are —from a labor viewpoint— large, medium-size, or small enterprises. This situation does not exist in Germany, where the general rule of mandatory reinstatement is not applied in enterprises having «ten or less workers». Likewise, it does not exist in France —where the general rule when facing wrongful dismissal is, on the contrary, the indemnified termination of the contract of employment—, since the payment to permanent workers of statutorily capped severance pays (but only generic and random severance ones), among other cases, when «the employers usually employ less than eleven workers» is not ruled there.

IV. CRITICAL COLLECTIVE LABOR LAW

XVII. The first of the five lessons we devote to critically analyze the Collective Labor Law is headed «The statutory or Unitarian worker representatives in the enterprise and the "political" efficacy of their elections». We focus our criticism in the double propose of having the elections to personnel delegates and members of works councils in Spain. On the one hand, their logical, natural, or primary purpose is the one that the workers freely and in a democratic way provide themselves with ordinary representatives before their employer. On the other hand, its exotic, artificial, or secondary objective is to measure the rank of «representation» unions have. The latter provokes not only the unionization of elections, but also its bureaucratization and openness to the public, which makes them be similar to political elections to senators with opened lists, in the case of delegates of personnel, and to elections to congressmen with blocked and closed lists, in the case of works councils). According to case-Law, all these complications end up provoking that the workers do without, sometimes, filing the results of the freely and in a democratic way elections carried out in their corresponding enterprises, what does not prevent that the representatives elected by them have (to all internal effects, in the enterprise) the condition of true statutory or Unitarian representatives of their elector workers. But they are —and this is just another evidence of the lack of respect to the Law— «extra-statutory» statutory or Unitarian representatives, because they have been elected failing to fulfill the oppressive statutory requirements imposed by Title II of the Workers' Statute, and by its rules and regulations.

XVIII. In connection with this subject —although stated in a separated lesson—, we deal with «The unions, their members and the polemic about their financing». We take as a starting point the figures of union membership in Spain, which are very low, as well as it happens in France. And on the basis that the contributions paid by the members are the natural and the most primary source of financing for the own unions, we explain that the Spanish unions do not recover income enough in this way, which explains the need to recover additional funds, which up to a large extent come from grants of several public Administrations. A unionism supported by public funds raises transparency requirements. In this regard, our Organic Act of Union Freedom has become a totally obsolete norm. For this reason, as a comparative counterpoint, in this lesson we also explain the modification implemented in 2009 in the French Code of Labor. We underline its mechanisms aimed at securing the publicity of their accounts, not only by the unions, but also employers' associations. Likewise, we explain that these statutory duties do not exist in Germany, because the huge DGB (having more than 6 million members) is exclusively financed with private funds. Despite this fact,

Germany embodies an exemplary model of union transparency, which is a truly pending issue in Spain.

XIX. In our opinion, the interventionism of the State in the subject-matter of collective bargaining is a heritage of our pre-constitutional past. We criticize it in the lesson headed «The general and generalized normative efficacy of the Spanish sectorial collective bargaining agreements, a rarity in democratic systems of labor relations». We point out that the current legal regime of our sectorial collective bargaining agreements is only an adaptation of the legal regime of the François sectorial collective bargaining agreements, maintained in a number of legal requirements and consequences. It is the case, for example, of the imposition of a minimum content to collective bargaining agreements (by the way, with a clear trend to morbidly put on weight), of the maintenance of the administrative control on the collective bargaining agreements entered into, of the publication of the controlled collective bargaining agreements in official journals, and above all, of the assignment to sectorial collective bargaining agreements, in principle, of general or *erga omnes* normative efficacy (as it was the same case during the term of the Francois's union statutes). There is nothing similar in the world surrounding us. We underline it in the lesson, pointing out that the general rule in continental Europe is the limited normative efficacy of the sectorial collective bargaining agreement, either on the basis of the principle of the unique membership (as it happens in France), or on the basis of the so-called principle of the twofold membership (as it happens in Germany).

XX. The rigidity of the Spanish legal regulation of the collective bargaining agreements provokes that the bargaining parties voluntarily agree without respecting the Law. It is a typical Spanish phenomenon. It already existed before the enactment of Title III of the Workers' Statute (that is, the so-called «private», «informal», or «improper» collective bargaining agreements, the doctrinal foundation of which goes even back to Francesco CARNELUTTI's far time). It still exists after the enactment of Title III of the Workers' Statute, which explains its current name of «extra-statutory» collective bargaining agreements. We critically explain it in the lesson headed «The safety valve represented by the "extra-statutory" collective bargaining agreements, especially those with an enterprise scope». In it, we focus everything on the existence of a constant case-Law of our labor courts about the interpretation and application of oral «extra-statutory» collective bargaining agreements. It is also a subject affected by the recent labor reforms. But not in relationship with particular amendments of Title III of the Workers' Statute, but above all relating to the continuous amendments operated on the letter of article 41 of the Workers' Statute (where the «agreements or collective deals», on the one side, and as something completely different and more

untouchable, the «collective bargaining agreements ruled in Title III of the current Statute», on the other side, appear in opposition). In our opinion, to contextualize the existence of oral collective bargaining agreements requires highlighting its inadmissibility in continental European legal orders, in contrast with its franc admissibility in Anglo-Saxon (British and American) legal orders.

XXI. The lack of exemplarity on the side of the State to fulfill the Laws, which we have already dealt with in a lesson of the Part on «critical» individual Labor Law, is treated again in the last lesson of the Part on «critical» collective Labor Law. We have headed this lesson «The violation by the State of its constitutional duty to legislate about strikes, its reasons, and some of its consequences». Among these causes, we point out the union's thesis about «self-regulation» of the strike. And among its consequences, we focus our analysis on striking phenomena getting fully away from the control of class unions, and namely three (the strikes by justices and judges, the so-called «convincitive» picketing, and of course, the strikes called by craft unions in strategic sectors, which in some cases has lead to activate the provisions of the Organic Act 4/1981, ruling the martial law). The contextualization of our model of strike is explained pointing out that such a model is on line with the current models in force in France, Italy, and Portugal, although it has nothing to do with the contractual German model. These contradictory national models explain that the constitutional Law of the European Union excludes from the scope of the European social policy everything related to strikes and lockouts. Similarly, we explain that it encourages some decisions of the Luxembourg Court, in which this Court states that the right to strike is subordinated to the exercise of other structural Community liberties, such as the establishment freedom (case *Viking*) or the rendering of services freedom (case *Laval*).

V. CRITICAL ADMINISTRATIVE AND PROCEDURE LABOR LAW

XXII. As it is logical, the most important administrative procedures in Labor Law are those in which the Labor and Social Security Inspectorate acts. We have already told the troubles imposed by the so-called relaxation of Labor Law on an efficient legal enforcement task (for example, in the subject-matter of the fulfillment by the employer of the norms ruling the working time). In our opinion, the most important problem which nowadays burdens the Spanish Labor and Social Security Inspectorate is that of having been segmented into pieces, from a geographic and functional point of view. The former is due to the creation of a Catalonian Labor Inspectorate in 2010, shortly before the corresponding regional elections in such territory. The latter is due to the fact that this regional Labor Inspectorate is only entitled to develop tasks of

enforcement of labor legislation, but not of social security legislation. It is a consequence damaging the hard core of the task of inspection, as the minutes relating to very serious administrative violations by the employer and the minutes on social security contributions liquidation very often derive from the same facts. Therefore, these facts promote the separate action of two different Inspectorates, which are the Central State Inspectorate (the only competent in social security matters) and the Catalonian Inspectorate (competent, via transfer of competences, in labor administrative matters). They are many more inconsistencies deriving from this artificial segregation of the Spanish Labor and Social Security Inspectorate. For our critical point of view, we explain them in a lesson headed «The Spanish system, partially dispersed, of labor inspection», with its corresponding comparative Law contextualization, in which we focus on the Labor Inspectorates acting in countries with a federal structure (the United States and Germany).

XXIII. Due to our available calendar, we only devote two lessons to critically study procedure Labor Law. The first one is focused on more specifically organic topics, whereas the second one is concentrated on more specifically procedure topics. From an organic point of view, we study the labor jurisdiction in the lesson headed «Labor Courts and the suspicions of the Public Administration before them, as a possible defendant». Apart from the description of labor jurisdictional bodies and the distribution of competences among them, we think the division nowadays existing in the subject matter of social security litigation is specially worthy of criticism. One part of the same is under the jurisdiction of administrative courts (instrumental management of social security, statutory staff in the service of the bodies of the National Health System), whereas the other one (benefits management of social security) is under the jurisdiction of labor courts. In our opinion, this is due to the traditional reluctance of Public Administrations to litigate before labor courts. The lawyers of such Administrations are more comfortable before administrative courts, if they litigate against quasi-employees staff or against beneficiaries. We also contextualize this particular feature in Spain at the level of Comparative Law, always from an organic point of view. We put the counterpoint on the social security jurisdiction (as far as it is different and separated from labor jurisdiction) existing in Germany, and on the *Tribunaux des Affaires de Sécurité Sociale* (as far as they are different of the *Conseils de Prud'hommes*) existing in France.

XXIV. Always thinking of the need to be focused on what is truly important, the procedure key aspects of labor jurisdiction are dealt with highlighting the first instance labor proceedings carried out before our Social Courts (the corresponding lesson is headed «The deceleration of the traditional speed of the labor proceedings»). That is

because we are firmly convinced that labor pleas are won or lost precisely at the first instance. In Spain, first instance fast labor proceedings have always been the rule, with the hearing as the crucial moment. We critically explain that such speed is nowadays severely damaged, due to the restless creation of new special labor proceedings. This provokes, on the one side, that the ordinary labor proceeding is put away in the judicial calendars; and on the other side, that the courts ought to give priority to them and to arrange them in order of hierarchy, giving a preferential treatment to the processing of some special labor proceedings, although in a non-fully systematic way, and therefore, plagued with inconsistencies. Evidently, the contemporary speed should be linked to the existence of an electronic Administration of Justice. In this lesson, we tell that such future has already become real in the labor jurisdictions of a number of countries we consider the most comparatively significant, a fact indicating that we should deal with the mechanisms to fight against the proceeding deceleration in Great Britain (with their exemplary and ultra-fast *Employment Tribunals*) as well as in the United States (its federal Supreme Court decides labor and social security pleas, from a material point of view, as a common law Court it is, but in an ultra-fast way).

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