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E - J O U R N A L

A 21st Century Social Europe. The European Debate and a Review from Spain*

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Abstract

This article addresses current developments, challenges and discussions concerning the social dimension of the European Union (EU). Since the EU Social Action Programme was adopted in 1974, EU social legislation has grown significantly, with a focus on employment, working conditions and worker engagement. However, additional efforts are still needed to tackle standing challenges such as labour migration. In addition to legislative activity, the case law of the Court of Justice has pushed the boundaries of EU law while significantly impactful 'para-constitutional' acts have also emerged. The EU social acquis landscape may be described as complex and constantly evolving, often with tools that gain relevance at specific moments in time. On freedom of movement, at the European level, Brexit and the 'fair movement' proposal have sparked debates on equal treatment and migration management, alongside concerns about concepts such as brain drain and the lessons learned from the COVID-19 pandemic. Spain nevertheless remains steadfast in these matters. This work recognises the influence of the harmonisation of national legislation on labour and social security law in Spain. However, debates are ongoing with regard to posted workers and the effectiveness of the Charter of Fundamental Rights when it comes to safeguarding social rights. Notwithstanding this progress, concerns remain as to whether the EU will succeed in becoming a European Social Union and move

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beyond being perceived as an exclusively economic entity. Academic and political views may differ, but political will and leadership will be key to defining the future of a social Europe.

Keywords: European Union, social action programme, freedom of movement, harmonisation, posted workers, Charter of Fundamental Rights, ecological transition, international trade, collective bargaining.

1. Revisiting the Social Action Programme. From Politics to Law or vice-versa?

Hindsight can safely date the birth of social Europe to 21 January 1974, with the adoption of the Council Resolution on a Social Action Programme. From humble beginnings, the initial provisions of the EEC Treaty (and that very remote Article 69 of the ECSC Treaty) were little more than anecdotal in the framework of a Common Market. Although there was always a laudable doctrinal and political intention to highlight the social side of the European Economic Community, everything that existed until then were tools serving the economy. The cited document is now five decades old, yet it already held a comprehensive roadmap worth examining, serving to not only ascertain how much of what had been imagined then has been achieved, but also how much is still pending today. Nine priorities were then set, divided under three headings.

The first concerned achieving full and better employment in the Community, which by its very wording was already quite utopian. The objectives included securing suitable coordination of Member State employment policies and promoting better cooperation between national employment services; establishing an action programme for migrant workers, whether nationals of Member States or third countries; implementing a common vocational training policy and setting up a European vocational training centre; and taking action to ensure gender equality as regards access to employment, vocational training, promotion, working conditions and pay.

The second part, in turn, focused on improving living and working conditions that would allow them to harmonise with progress. The threefold priorities of this part entailed establishing appropriate coordination of Member State social protection policies; drawing up an initial action programme, particularly on hygiene, occupational safety, workers' health and the organisation of work, starting with the sectors of activity where working conditions are most arduous; and adopting, in cooperation with the Member States, a number of specific measures to combat poverty by preparing pilot projects.

Finally, the third line of action was the increased involvement of the social partners in the Community's economic and social decisions and the participation of employees in the life of companies. In this regard, the aim was to progressively promote the participation of employees or their representatives

in the life of undertakings in the Community while fostering involvement of social partners in the economic and social decisions of the Community.

Some of these priorities were embodied as well-known measures, including the 1975 and 1976 directives on gender equality; measures addressing collective redundancies and transfer of undertakings; and the creation of joint bodies such as Eurofound. Others took longer to see the light of day, such as the legislation on temporary job agencies, which took over three decades, the recognition of four weeks of paid holidays, which also took time, or the timid advances in the Single European Act to give the social partners a stake in the EU game board. A third group, finally, never materialised into anything solid, such as the reduction of the 'normal' working day to 40 hours, or the common vocational training policy, so significant in the European Year of Skills.

Most significantly, however, was the "reform of the organisation of work that give workers wider opportunities, especially those of having their own responsibilities and duties and of obtaining higher qualifications". Well into the 21st century, we cannot easily imagine exactly what the ministers had in mind back in 1974 and through which act of Union law they intended to achieve it.

Many of the issues that emerged from the 1973 oil crisis are still very relevant in the context of the Ukraine war, climate and post-sanitary crises. In short, the challenges of fifty years ago are still present on the European social agenda, along with others that, due to their modernity, were unforeseeable, such as digitalisation or work on digital platforms. Many of the issues raised were certainly addressed, but there is still a sentiment that much remains to be done.

The first assessment that could be made on this quick review is that EU Social Policy may have given up its place, if it ever had one, to EU Social Law. This is a debate as old as the very existence of European social activity and the literature on its extent and limits occupies entire bookshelves. Even a mere discussion on its terminology would entail an extensive review of the state of the art.

What I would like to point out here, admittedly somewhat facetiously, is that the European Union's regulatory arsenal has grown to an extent that would have been inconceivable fifty years ago. If Law is the continuation of Policy by other means, then my proposal would serve no purpose. But if Policy is a form of concerted action within a common normative structure, then it becomes conspicuous by its absence.

I think the perfect example is the situation regarding third-country workers. The 1974 text contemplated "an action programme for migrant workers", as noted above. Today, several directives regulate how people can enter the EU for work in different scenarios. The Law is indeed there. Yet, according to the dictates of Lord Palmerston, anyone can enter any country according to his or her personal interests and the self-interest of each Member State. There is no such common action, but rather everyone involved seeks to serve their own interests, namely the best conditions and the best skilled workers possible.

When the discussion turns to 'EU migration policy', most people actually think this means how refugees are treated and distributed, and how much states must pay if they do not take them in, highly reminiscent of the military service exemption quotas of the 19th century... In short, to something extra-labour and, politically, very delicate and unsuccessful.

The consolidation of Law vis-à-vis Policy is evident in the importance of case law from the Court of Justice. The simple arbiter of the ECSC Treaty's legality was unexpectedly transformed into something much more relevant in its first decade of existence. In social and many other areas, the Court has pushed the boundaries of EU law beyond the legislator's initial vision[1]. A supranational Court wielding such power reinforces the conception of the Union as a Community of law, which the judiciary itself proclaimed as early as 1986 in the landmark case *Parti écologiste 'Les Verts' v. European Parliament*[2].

Perhaps the much-maligned Open Method of Coordination (OMC) could be seen as an attempt to embody this policy-development perspective. A radiant tool appeared in the wake of the Amsterdam Treaty, though Jean-Claude Juncker keenly pointed out that it only created jobs for those who drafted the corresponding clauses in the primary law. The Treaty of Lisbon, however, gave it full legal status by enshrining the new coordination competences under Article 5 TFEU. And, oddly enough, out of them sprang, the European Semester, and with it the rebirth of the Policy.

This has given rise to a new series of multilateral mechanisms and procedures that are hardly qualified as genuine sources of law, yet their economic and political clout is undeniable[3]. The Stability and Growth Pact and Protocol on the Excessive Deficit Procedure are just some examples of these new mechanisms and procedures.

In addition to these employment acts, a plethora of atypical acts have also emerged recently that can be called 'paraconstitutional', since they were created entirely independent of any Treaty support, but are nonetheless backed by the political will of Member States and Institutions. Some of these include the different Troika Memoranda (concerning Greece and Portugal), establishing far-reaching labour-related obligations within an economic restructuring scheme; the secret letters from the European Central Bank, such as the one Spain received during the economic and financial crisis of the second decade of the 21st century, which pushed for far-reaching reforms; or the various documents drawn up within the framework of Horizon 2020. None of them is a norm by any technical definition, yet their political traction extends far beyond any EU directive.

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1 For an in-depth study on its effect on Spain, refer to AA.VV. (Javier Gárate Castro – Yolanda Maneiro Vázquez, directors): *Las respuestas del Tribunal de Justicia a las cuestiones prejudiciales sobre política social planteadas por órganos jurisdiccionales españoles. Estudios ofrecidos a Mª Emilia Casas Baamonde.* Santiago de Compostela, Universidad de Santiago de Compostela, 2021. 200.

2 Case 294/83 Parti écologiste 'Les Verts' v. European Parliament [ECLI:EU:C:1986:166].

3 The most comprehensive study was conducted by Daniel Pérez del Prado: *El impacto social de la gobernanza económica europea.* Valencia, Tirant lo Blanch, 2021.

The landscape of the EU social acquis, in short, is multifaceted and constantly evolving. The centrality of the tools rotates, based on the circumstances, with most leaving a certain stratum. That is also why they can re-emerge unexpectedly and prove their usefulness. A prominent example is Article 225 TFEU. After an initially unsuccessful implementation with the Cercas Initiative, it resurfaced vigorously over the reform of the European Works Councils, prompted by the Von der Leyen Commission's political commitment to listen to the Parliament. We will see for ourselves whether it has been successful or not in 2024.

In this context, some of the current debates in this area will be presented. Some affect Spain while others entail a dimension outside our reality. In any case, these are merely the author's opinions.

2. Freedom of Movement in the Time of Cholera

By and large, Spain's concerns regarding freedom of movement arrangements have been largely *ad extra*. The transitional period of its full entry into force after accession, which lasted until 1992, is the glaring example of how Spanish citizens were regarded as the prototypical mobile subject entering the European labour markets. The prospect of EU nationals coming to Spain to seek and find work lacked a truly relevant dimension.

According to the Spanish National Statistics Institute (INE)[4], only 1,605,384 EU Member State nationals were residing in Spain on 1 January 2022, corresponding to 3.4% of the total population. Of these, not even half were included in the Labour Force Survey (EPA), and Romania, Portugal, Italy and Bulgaria were the main countries of origin. In terms of labour[5], the official figures show that the number of EU citizens working in Spain in 2021 was nearly 750,000 (with Romania, Italy, Portugal and Bulgaria once again the top four countries of origin). These figures can be broken down as follows (in thousands): Agriculture, 43.2; Industry, 92.9; Construction, 83.8; Services, 538.0. The pandemic snapped a clearly upward trend since the beginning of the recovery.

The European legal set-up governing this scenario is well known. The split regulatory regime of freedom of movement means that the regulation with the main labour content, Regulation (EU) No. 492/2011, is directly applicable in Spain, with no further nuances. The ban on discrimination applies consistently across all Member States and seems to have been perfectly assimilated by companies in Spain. Indeed, barring error or omission, only one judgment has been handed down by Spanish courts since its entry into force, which concerned the transitional period following Romania's accession[6].

4 https://ine.es/prensa/pad_2022_p.pdf

5 https://ine.es/jaxiT3/Datos.htm?t=4882

6 Judgment of the High Court of Justice of La Rioja (Contentious-Administrative Chamber, 1st Section) of 19 December 2012 (No. 389/2012).

Equality of treatment is generally observed and no general discrimination is perceived when examining the activity of the courts. Most case law regarding EU law in this area relates to social security regulations, not freedom of movement, and mainly concerns Spanish migrant workers who return to Spain and have problems with the Spanish administration regarding retirement pensions. These questions were, in fact, the first preliminary rulings arising in Spain in the early 1990s.

In turn, Royal Decree 7/2015, which approves the Common Portfolio of Services of the National Employment System, establishes the objective of "identifying and managing job offers, including offers from European Economic Area countries or elsewhere". There have been no complaints about its operation related to discrimination on grounds of nationality[7].

The second policy sheet of the diptych deals with administrative aspects, mainly linked to residency. In this regard, Royal Decree 240/2007 transposes Directive 2004/38/EC, a remarkably stable piece of legislation that has not been amended since 2015. Judiciary activity in this area has increased, though usually linked to administrative residency requirements. Where social issues are concerned, the few rulings that do exist relate to medical care but do not address strictly labour issues.

In turn, the number of preliminary rulings arising in the Spanish courts in matters of freedom of movement (not social security) is negligible, amounting to only one case in recent years (*Gerencia Regional de Salud de la Junta de Castilla y León*[8], on seniority in the public administration). The landmark discrimination case was *Colegio de Oficiales* (Spanish Merchant Navy Officers' Association)[9], which dealt with such a narrow field as the nationality of masters and chief mates on ships. No other major case in this area has arisen in Spain, apart from some early rulings on the recognition of qualifications in the medical professions.

Within this framework, Royal Decree 543/2001 deals with the access of EU nationals to public employment by defining, in accordance with the case law of the Court of Justice, the posts in the Administration that can be reserved for Spaniards, in accordance with Article 45.4 TFEU. Barring error or omission, this norm stands uncontested and has never been challenged before the Spanish Courts or before the Court of Justice. But outside this restricted scope, the Spanish administration is open to EU citizens.

Contrasting with this tenuous situation within our borders, over the past few years three points of interest and debate have emerged in the European sphere[10]. The first concerns the principle of equal treatment, and the negotiations leading up to the referendum that led to Brexit can be singled out as its most significant milestone, albeit not without perilous repercussions. The second brings the so-called

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7 In this regard, refer to the study by Cristina Aguilar Gonzálvez: Despliegue de deerechos en el ejercicio de la libre circulación de trabajadores en la Unión Europea. *Revista de Derecho Migratorio y Extranjería,* No. 59. (2022) 117–152.

8 C-86/21 Gerencia Regional de Salud de Castilla y León v. Delia [ECLI:EU:C:2022:310].

9 C-405/01 Colegio de Oficiales de la Marina Mercante Española v. Administración del Estado [ECLI:EU:C:2003:515].

10 Developed extensively in Sophie Robin-Olivier: General Report. In: AA.VV.: *The XXX FIDE Congress in Sofia, 2023. Congress Publications, vol. 3.* Sofia, Norma, 2023.

'brain drain' into focus. The third addresses the lessons learned from the COVID-19 pandemic and what could be done.

While four prime ministers have since succeeded him at Downing Street, David Cameron's colossal role in the origins of Brexit, now infamously etched in his memory, bears recalling. As UK's Prime Minister, Cameron penned an important letter to Donald Tusk on 10 November 2015 that laid out the UK's demands to remain in the Union, under terms that would deliver victory in the ill-fated referendum. They included a number of issues relating to freedom of movement.

The letter pointed out the 'worrying' increase in the foreign population and, somewhat cynically, noted that several Member States were losing their most highly qualified citizens to the UK. Three central issues summed up British concerns: restrictions on freedom of movement for new countries admitted to the EU; bans to curb sham marriages and stronger deportation powers; four-year residency requirement for workers from Member States before they are eligible for certain social benefits; and ending the practice of sending child benefit overseas. There is no need to recall now how the Union crossed the Caudine Forks in a last-ditch effort to preserve British membership[11].

However, this *infamous* agreement was not bold enough to implement one of the most provocative political-doctrinal proposals, namely establishing a new freedom of movement, which would have returned regulation to the ECSC era. This is the idea of 'fair movement' or 'managed migration'[12], another example of the reality of George Orwell's idea of Newspeak. Lurking under a banner of justice and fairness was a possibility for states to control the profiles of those exercising freedom of movement and to select those most suitable for their productive needs[13].

The perversion of fundamental freedom in the name of national chauvinism would have meant that citizens could no longer truly hold the right to freedom of movement. Instead, Member States – or worse, their labour markets – would control who gets to move according to a *labour raison d'état* that would certainly have made Cardinal Richelieu proud. Quota mechanics or similar systems in other Member States would have replaced freedom of movement.

This is an issue that had already been rejected in the 1956 Spaak Report: "a general integration approach should not distinguish between skilled and unskilled labour; the difficult problem of defining qualifications, which arose in a common market limited to two industries, becomes irrelevant here". Would anyone dare to argue for the translation of this proposal to the free movement of goods?

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11 *Ex-post* analysis by Catherine Barnard: *The Substantive Law of the EU. The Four Freedoms.* Oxford, Oxford University Press, [6]2019. 204.: "The EU did agree to some restrictions on free movement, specifically in respect of access to benefits, but crucially not to any emergency brake on the volume of migration. The new settlement decision was too little too late and the UK voted to leave the EU".

12 Catherine Barnard – Sarah Fraser Butlin: Free Movement vs. Fair Movement: Brexit and Managed Migration. *Common Market Law Review,* Vol. 55, No. 2–3. (2018) 203–226.

13 Summary by Sophie Robin-Olivier: Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility. *Europeanpapers.eu,* 2020. https://tinyurl.com/3hxr84b4 : "The proposal to shift from free movement to 'fair movement' does not intend to foster European solidarity, on the contrary. It aims at giving States the possibility to control migration of EU citizens to avoid sudden influx of immigrants. It relies on the recognition of the limits of solidarity, on the 'political reality' of people's resistance to it, illustrated namely by the British vote on Brexit. Pragmatism, it contends, dictates a more narrow conception of free movement, in line with current aspirations of some European governments".

Where would a ban on discrimination based on nationality stand if the Luxembourg and Liechtenstein exceptions suddenly became the norm for the movement of persons?

This theoretical-political proposal to redefine the foundations of freedom of movement seems to have been forgotten after Brexit. It is now worth noting that some British grievances are still alive and well, as demonstrated by *Commission v. Austria*[14]. Following this agreement, Austrian legislation adopted a similar mechanism: family benefits would be adjusted to the price level of the State of residence of the children for whom the benefit was generated.

The European Commission found the reform inconsistent with EU law and lodged an infringement action backed by the Czech Republic, Croatia, Poland, Romania, Slovenia and Slovakia, territories which had coincidentally once been part of the erstwhile Habsburg Austrian Empire just over a century ago. Austria drew support from Denmark and Norway, in a clear division between a Europe exporting services and a Europe importing them.

In this extensive judgment, the Court stated that Regulation (EC) No. 883/2004 must be interpreted as "requiring strict equivalence between the amounts of family benefits provided by a Member State to workers whose family members reside in that Member State and the amounts provided to workers whose family members reside in another Member State". In support of this assertion, the Court was allowed to point out that, if the Commission had proposed to bring the Regulation into line with the Cameron pact, it would have been contrary to the Treaties and declared invalid.

Regarding the legal dimension of freedom of movement, the response was along the same lines. The intended adjustments are discriminatory, as they massively affect migrant workers whose families reside outside Austria. No objective justification could be found and the Court firmly ruled that it was inconsistent with EU law.

The Austrian case is not an isolated one. Whether this indicates a growing opposition to the principle that the parent(s)' country of work is financially liable for child allowance, even if the parent(s) resides elsewhere, needs to be assessed along with the reasons for this emerging resistance to equal treatment. The mistrust of foreigners is not likely to have abandoned the hearts of European citizens.

Secondly, as noted above, Cameron's letter pointed out that the UK was attracting a great deal of talent from some Member States. Such a spontaneous migration of qualified workers is colloquially known as a brain drain. Was the Spaak Report sincere or cynical when it pointed out that the real interest of Member States was to encourage the movement of unskilled labour[15], given that they are the ones who are usually unemployed? Is it possible that the profiles of individuals exercising freedom of movement have changed radically over time?

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14 C-328/20 European Commission v. Republic of Austria [ECLI:EU:C:2022:468].

15 "On pourrait même soutenir qu'il y a un intérêt commun à faciliter les mouvements de la main-d'œuvre à proportion quelle est moins qualifiée: c'est celle-, en effet, qui trouve le plus difficilement à s'employer dans le pays ou le chômage est étendu; dans les pays d'immigration, elle vient relayer la main-d'œuvre nationale, qui peut ainsi rechercher les métiers mieux rémunères ou moins pénibles".

Clearly, answering this question requires a statistical study of colossal dimensions that cannot be covered comprehensively here. Concluding our country's perspective before turning to the theoretical overview, the brain drain has been a topic of discussion in Spanish public opinion over the last few decades and its very existence is widely debated. Unlike the low-skilled emigration of the 20th century, statistics show that thousands of graduates have moved to other EU countries. Between 2007 and 2017, 87,000 graduates left Spain[16]. However, another source indicates that the issue is more nuanced and that the case is not as dire as in other countries[17]. Regardless of the figures, the perception is that a brain drain really does exist.

Movement can reach seismic proportions in other Member States. Some sources point out that between 2009 and 2015, Romania lost half of its doctors through emigration to other Member States after accession. Similar data are available for other Member States, and here the political dimension arises, which has led some to justify Hungary's and Poland's radical positions in certain respects.

The picture, in this approach, becomes broader and touches directly on economic and social cohesion between Member States. Wealth and wage disparities, the wealth gap, would be the real driving force of the brain drain. The perception, especially in Central and Eastern European countries, is that their education systems are subject to the needs of richer countries. They would be nothing more than training itineraries that make up for the shortcomings of the States with the most powerful economies. The drain would also imply the undermining of home states' capacity to develop both highly productive economies and a sufficient welfare state. Just how much the role of politics and statistics play in these claims, which are more widespread than they seem, is difficult to determine.

This scenario has led some Member States to consider the possibility of establishing measures to ensure that highly educated people remain, at least for a certain period of time, in the territory where they have completed their studies. However, not all of them seem to be compatible with the principle of non-discrimination on grounds of nationality. In this regard, the conditionality of scholarships for higher education studies to a period of employment in the State where the education is provided may be questioned. In Hungary, for example, students receiving government scholarships must successfully complete their studies within a maximum of one and a half times the normal duration of the programme, and enter the Hungarian labour market within 20 years from the date of graduation, for a period at least equal to the duration of their government scholarship. Students failing to accept these conditions can still pursue higher education, but they have to bear the costs of their studies. A programme proposed by the Polish government in 2014 afforded payment of tuition fees for students at prestigious universities on the condition that they accept a job in Poland after graduation[18].

16 http://tinyurl.com/ytm5rkps

17 José Blanco Álvarez: Cuantificando la fuga de cerebros en España. *ICEDE Working Paper Series,* 2019/5.

18 Additional examples in Robin-Olivier (2023) op. cit.

In Spain, there are no similar mandatory measures aimed at retaining workers. However, there is growing political concern, as the brain drain is seen as a serious obstacle to scientific proficiency in Spain. Spain's most recent measure in this regard is a plan for promoting, retaining and attracting scientific and innovative talent in Spain *(Plan de atracción y retención de talento científico e innovador a España).* Endowed with a budget of three billion euros (June 2022 – December 2023), the plan primarily seeks to preclude the outflow of human capital. It nevertheless contains no compulsory measures. An earlier 2019 plan proved rather unsuccessful, in part due to COVID-19.

It may be pertinent, in this regard, to recall the court ruling in *Olympique Lyonnais*[19]. The ruling addressed the French regulation that forced so-called "promising players" (players signed as trainees by a football club) to sign their first professional contract with the club which provided their training. The governments involved in the case were almost unanimous in considering that the restrictive obligation indeed infringed on freedom of movement. They focused their arguments on the next step, the proportionality of the measure and its admissibility as a legitimate objective. The Court was in line with the same approach, admitting the restrictive nature of the measure. In the light of the risk that teams incur in promoting new careers with an uncertain future, the judgment deemed that appropriate shielding measures should be in place, provided that they are proportionate. In the present case, the Court considered that the system did not fulfil this requirement, as the training costs were not linked to the compensation required from the player when changing clubs.

It seems unlikely that the European Union will legislate on this issue. Talent retention measures will therefore be nationally driven and closely monitored by the European Commission. Whenever they are perceived as real obstacles to freedom of movement, the Court of Justice will have to rule. But if it is ordered to be removed for the sake of fundamental freedom, an additional element would be added to the quarrels between some Member States and the Union, engendering already notorious situations.

The third relevant element regarding this field concerns the most noxious of origins. COVID-19, yet another earthquake to rock the European Union, ushered in a new perspective on freedom of movement.

Of all the measures taken by the European Union in the wake of the pandemic[20], legislative or otherwise, the most promising for the future is the idea of critical occupations. It seems appropriate to develop the necessary measures to ensure the continuation of cross-border cooperation in case of a resurgence of this or future pandemics. The Commission, the Council and the European Parliament have issued non-binding statements to this effect. It is time for legislative and administrative action.

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19 C-325/08 Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC [ECLI:EU:C:2010:143].

20 I refer for further developments to my own work: José María Miranda Boto: La libre circulacion tras (¿?) la Covid-19. Retos en materia de restricciones, nuevos modelos familiares y digitalización. *Labos: Revista de Derecho del Trabajo y Protección Social,* Vol. 3., No. 1. (2022).

It would no longer be a matter of restricting movements. Instead it would focus on fostering and guaranteeing cross-border movement for individuals in these occupations. Any value in its justification, however, would be much loftier than the labour market. The welfare of society as a whole would be safeguarded, as this is the common thread running through the definition of 'critical occupations'.

The legislative aspect is the easiest part. The aim is to transform what has already been agreed as soft law into a regulation legally anchored in Articles 21 and 45 TFEU. If a political arrangement arose at a time of need, then it is only fitting to transform that reaction into a preventive tool. The lessons of the pandemic should be harnessed for future benefit, particularly should another similar misfortune ever break out again. There's no excuse for it.

Such a regulation would clarify which occupations are critical and secure their privileges for cross-border activity during a pandemic. More ambitiously, this enhanced freedom of movement could take effect at any time. This is where the administrative part of the European intervention comes into play. Tags, sensors or apps should be created to ensure passage through the 'greenways' that the Commission had proposed at the time. EU law is equipped with the necessary tools to take significant material action. It is the only one, in fact, capable of creating transnational measures of this nature. The COVID-19 Passport, mentioned above, is the clearest example of how the Union can act in this regard.

Implementing this requires a significant investment in political capital. However, the Von der Leyen Commission has not yet indicated any intention to embark on this path. Nor do Member States seem to be enthusiastic about such measures.

3. Harmonising National Legislation within the Framework of the European Pillar of Social Rights

Another core area of traditional EU engagement in the social field relates to the harmonisation effort, namely the 'improvement of living and working conditions', which was emphasised in the Social Action Programme. There is no doubt that the EU social acquis has been an important driving force in developments in labour and social security law in Spain since 1986. While transposition is not always accomplished timely[21], all the necessary reforms are eventually implemented.

In keeping with all the aforementioned points, the preliminary rulings relating to the social acquis originating in Spain have been no less important than normative actions. A concrete rather than abstract comparison of legal systems has revealed real or apparent mutual incompatibilities that had

[21] I have analysed all the social transpositions of the 21st century in José María Miranda Boto: *Condiciones de trabajo transparentes y previsibles: desafíos para el Derecho español en la transposición de la Directiva (UE) 2019/1152.* Valencia, Tirant lo Blanch, 2023.

often been overlooked or deliberately ignored by transpositions. Reforms were carried out in many cases, but they were sometimes insufficient.

In fact, the Spanish courts have, in recent years, been extremely active in the social field, and a notable number of decisions concerning Directives 1999/70/EC[22] and 2003/88/EC[23] have stemmed from this. Directive 79/7/EEC[24] is currently being explored extensively, raising new issues that had never been considered before. This is, in any case, an issue that has been explored in great depth and will not be addressed here.

The current European debate has drawn attention to two issues: equality and working time[25]. It is clear at first glance that the first is a cross-cutting issue that concerns *citizens* as much as labour. The grounds for discrimination currently set out in Article 19 TFEU were developed in the directives of 2000. The TEU's references to equality could, however, provide scope for exploring new grounds, perhaps even by resorting to the mechanism of Article 352 TFEU. Is now the right time to do so?

A review of the recent case law of the Court of Justice justifies affirming that discrimination on the basis of religion is now one of the key issues in multicultural Europe. There is certainly a substantial body of case law concerning the treatment of disability. But the implications of weighing up the rights of certain minorities in the current political climate, at a time when political ideologies that reject them are on the rise, cannot be overlooked.

Turning to Spain, EU law has played a major role in developing anti-discrimination laws in the country. The Spanish Equal Treatment and Non-discrimination Act (Law 15/2022) mentions EU law (Charter of Fundamental Rights, Directives 2000/43/EC[26] and 2000/78/EC[27], etc.). The Spanish Gender Equality Act (Law 3/2007), for instance, transposes Directives 2002/73/EC[28] and 2004/113/EC[29], though it also addresses issues not covered in the harmonised directives.

Religious discrimination, on the other hand, is not a very frequent matter in Spanish courts. The main issue concerns employment in Catholic schools. In recent years, the only decisions concerning the Islamic headscarf in the workplace, for example, were related to health and safety considerations

22 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. OJ L 175, 10.7.1999, p. 43/48.

23 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certains aspects of the organisation of working time. OJ L 299, 18.11.2003, p. 9–19.

24 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. OJ L 6, 10.1.1979, p. 24–25.

25 Robin-Olivier (2023) op. cit.

26 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7.2000, p. 22–26.

27 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, p. 16–22.

28 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. OJ L 269, 5.10.2002, p. 15–20.

29 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373, 21.12.2004, p. 37–43.

in mushroom cultivation. However, the only mention of the highly relevant *G4S Secure Solutions*[30] judgment in the official case law database pertains to criminal law and is hardly relevant. The *WABE*[31] case is not even mentioned in the database.

With regard to disability, the obligation to provide reasonable accommodation, which has been a prominent feature of the case law of the Court of Justice, has been adapted to EU law. The transposition of Article 5 of Directive 2000/78/EC into Article 40.2 of Royal Legislative Decree 1/2013, the General Law on the Rights of Persons with Disabilities, was done by copying the content of the directive verbatim. There is therefore no point of conflict between Spanish and EU law.

However, it is interesting to note that the Spanish legal system has gone beyond the provisions of the Directive. Article 63.1 of the aforementioned Royal Legislative Decree 1/2013 establishes that the violation of reasonable accommodation constitutes a violation of the right to equal opportunities. This precept has been interpreted by the Constitutional Court (STC 51/2021), on the understanding that failure to fulfil this obligation constitutes a violation of anti-discrimination protection, and therefore implies the nullity of the conduct and the possibility of requesting compensation for damages[32].

Spain's anti-discrimination laws as a whole are arguably more forward-thinking than the corresponding EU legislation. Article 2 of the aforementioned Law 15/2022 states that "everyone has the right to equal treatment and non-discrimination, regardless of nationality, age and residence status. No one may be discriminated against on the grounds of birth, racial or ethnic origin, gender, religion, creed, conviction or opinion, age, disability, sexual orientation or identity, gender expression, illness or health condition, serological status and/or genetic predisposition to pathologies and disorders, language, socioeconomic status, or any other personal or social condition or circumstance". This list is much broader than EU law, and would, in any case, retain its value in the interpretations of the Court of Justice.

With regard to the second major issue raised, working time, there can be no doubt that Directive 93/104/EC[33] was and remains of paramount importance. It was, to some extent, one of the more recent developments of the social action programme. There is a wealth of case law concerning it. However, the regulated working time refers to office and factory hours, the mode of production of the second industrial revolution. Digitalisation has not yet permeated European regulation and the doctrine does not fail to point out this gap with the 21st century world of work.

As regards its internal relevance, most of the content of Directive 93/104/EC was already formally present in Spanish legislation. However, Court of Justice case law has yielded very significant

30 C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV [ECLI:EU:C:2017:203].

31 C-804/18 IX v WABE eV and MH Müller Handels GmbH v. MJ [ECLI:EU:C:2021:594].

32 Further information, David Gutiérrez Colominas: *La obligación de realizar ajustes razonables en el puesto de trabajo para personas con discapacidad: una perspectiva desde el Derecho comparado y el Derecho español.* Albacete, Bomarzo, 2019.

33 Council Direcitve 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time. OJ L 307, 13.12.1993, p. 18–24.

improvements, including the rulings on *SIMAP*,[34] a case concerning limits on working time in the medical sector; *Merino Gómez*[35], which established the right to paid annual leave when it overlapped with maternity leave; *Vicente Pereda*[36] and *ANGED*[37], which established the right to paid annual leave when it overlapped with sick leave; and, most recently, *CCOO*[38], which introduced a mandatory system for recording daily working hours. All these decisions involved legal reforms, almost immediately, in contrast to the legislator's absolute inactivity on collective dismissals, for example.

Returning to the European debate, the European Pillar of Social Rights is certainly an essential milestone on the most recent path of social Europe. It is less so in terms of its legal effectiveness, which remains a matter of some debate. It is so because of its role as a political driving force, which led to the adoption of some major directives during the tail end of the Juncker Commission. That momentum carried over into the early years of the Von der Leyen Commission, dispelling the doubts that some commentators had about it.

Apart from other sector-relevant legislation, there are three particularly salient directives in the previous European Commission's portfolio: Directive (EU) 2019/1152[39] of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[40]; Directive (EU) 2019/1158[41] of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU[42]; and, to a lesser extent albeit with considerable potential for development, Directive (EU) 2019/1937[43] of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblowing Directive)[44].

They all refer to the pillar in their preliminary recitals, thus becoming rules for the implementation of what was outlined in the framework of the programme. The importance of the first of these is highlighted in the Recovery, Transformation and Resilience Plan (*Plan de Recuperación, Transformación y Resiliencia*) approved by the Spanish Government. Indeed, beyond its 'ordinary'

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34 C-303/98 Sindicato de Médicos de Asistencia Pública (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana [ECLI:EU:C:2000:528].

35 C-342/01 María Paz Merino Gómez v. Continental Industrias del Caucho SA [ECLI:EU:C:2004:160].

36 C-277/08 Francisco Vicente Pereda v. Madrid Movilidad SA [ECLI:EU:C:2009:542].

37 C-78/11 Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and Others [ECLI:EU:C:2012:372].

38 C-55/18 Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE [ECLI:EU:C:2019:402].

39 OJ L 186, 11.7.2019, p. 105–121.

40 Refer to Miranda Boto (2023) op. cit.

41 OJ L 188, 12.7.2019, p. 79–93.

42 Refer to María José López Álvarez: La adaptación de la directiva de conciliación de la vida familiar y profesional al ordenamiento español. *Femeris: Revista Multidisciplinar de Estudios de Género,* vol. 7., no. 2. (2022); and Yolanda Maneiro Vázquez: *Cuidadores, igualdad y no discriminación y corresponsabilidad: la (r)evolución de los derechos de conciliación de la mano de la Directiva (UE) 2019/1158.* Albacete, Bomarzo, 2023.

43 OJ L 305, 26.11.2019, p. 17–56.

44 Refer to Carmen Sáez Lara: *La protección de denunciantes: propuesta de regulación para España tras la Directiva Whistleblowing.* Valencia, Tirant lo Blanch, 2020.

transposition, Component 23 mentions it twice, with regard to platform work and the simplification of existing employment contract models. With regard to the second directive, the document Spain 2050 – Foundations and proposals for a long-term national strategy *(España 2050 – Fundamentos y propuestas para una Estrategia Nacional de Largo Plazo)* specifically states the necessity "to continue advancing towards effective policies implementing co-responsibility and which, in line with Directive 2019/1158, guarantee a family, personal and professional balance".

As of the date this paper is now set for publication, the first of these is still awaiting transposition. With regard to the other two, transposition has concluded on the Spanish Whistleblowing Act (Law 2/2023 of 20 February), regulating the protection of persons who report regulatory breaches and combat corruption, and, partially, the very recent Royal Decree-Law 5/2023 of 28 June adopting and extending certain measures in response to the economic and social consequences of the war in Ukraine, to support the reconstruction of the island of La Palma and other cases of vulnerability; the transposition of EU Directives on structural changes in commercial companies and the reconciliation of family and professional life for parents and carers; and the implementation and enforcement of EU law.

For its part, the Von der Leyen Commission's record at the moment, biased as it is by the pandemic, can only be considered remarkable. A simple excerpt of its activity will be given here, which broadly follows what was proposed in the Communication on "A Strong Social Europe for Just Transitions"[45]. While the actions foreseen for 2023 in the Commission's work plan were low-profile, some of the initiatives underway are already taking shape, and others may conclude their legislative iteration during the Spanish Presidency.

The first is Directive (EU) 2022/2041[46] of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union[47]. Even without any further analysis of its contents, it is worth noting that an action for annulment is targeting a relevant social regulation for the first time since the United Kingdom challenged Directive 93/104/EC. In case C-19/23, *Kingdom of Denmark v. European Parliament and Council of the European Union*, Denmark seeks to safeguard the powers of its social partners in this task. The Court may deliver its ruling before the end of the year, in a judgement of enormous interest in terms of jurisdiction[48].

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45 COM (2020) 14 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 January 2020 "A strong Social Europe for just transitions".

46 OJ L 275, 25.10.2022, p. 33–47.

47 Analysed further in Milena Bogoni: La regulación europea del salario mínimo en la Directiva (UE) 2022/2041, de 19 de octubre. *Temas Laborales: Revista Andaluza de Trabajo y Bienestar Social,* No. 166. (2023) 171–210.

48 It contains the following pleas in law and main arguments: "In support of the principal claim, the Government claims in the first place that, in adopting the contested directive, the defendants infringed the principle of the conferral of powers and acted in breach of Article 153(5) TFEU. The contested directive interferes directly with the determination of the level of pay in the Member States and concerns the right of association, which is excluded from the competence of the EU legislature pursuant to Article 153(5) TFEU. In support of its principal claim, the Government submits, in the second place, that the contested directive could not validly be adopted on the basis of Article 153(1)(b) TFEU. That is because the Directive pursues both the objective set out in Article 153(1)(b) TFEU and the objective set out in Article 153(1)(f) TFEU. The latter objective is not ancillary to the first and presupposes the use of a decision-making procedure different from that followed when the contested directive was adopted (see Article 153(2) TFEU).

Secondly, albeit further removed from the world of salaried work, there is Directive (EU) 2022/2381[49] of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures After nearly a decade of discussions in the Council and with the European Parliament, it has finally come to fruition. It should be recalled that its transposition in Spain had been set in motion in a much more agile manner than usual, only to be truncated by the call for elections.

Thirdly, there is the very recent Directive (EU) 2023/970[50] of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. Its transposition into Spanish law will not involve any major new developments, though it does create the opportunity for the generation of case law by the Court of Justice in other countries, which constitutes a collateral means of developing the provisions already covered in Royal Decree 902/2020.

Furthermore, the proposal for a Directive of the European Parliament and of the Council on improving working conditions in digital platform work[51] is still in the pipeline. One of the latest episodes of this was the European Parliament's position taken in a plenary vote on 2 February 2023, where by a large but far from unanimous majority, the basis for continuing the dialogue with the Council was established. Within the latter, the discussions reflected in Eur-Lex are numerous and it is not easy to predict the horizon for the adoption of this text.

Six years after its solemn proclamation in 2017 in Gothenburg by the Council, the European Parliament and the European Commission, the pillar of social rights still casts a nebulous shadow. It could easily be characterised as a 2.0 version of the 1989 Strasbourg Charter, endowed with the trappings of post-modernity. Regardless of the actual effectiveness of the pillar, its existence coincided with a pandemic of unimaginable dimensions, but also with a slow but progressive development of the European Union's social legislation, thus fulfilling the prophecy indicated above. In the years prior to its proclamation, the term 'desert' had been used to characterise this legislative landscape. The closing balance of this heading is instead 'progressing'. Whether we should also qualify it with the adverb 'adequately' is left to the reader's discretion.

The two decision-making procedures are incompatible since the adoption of acts under Article 153(1)(f) TFEU – in contrast to those adopted under Article 153(1)(b) TFEU – requires unanimity (see Article 153(2) TFEU). In support of its claim put forward in the alternative, the Government submits that, in adopting Article 4(1)(d) and Article 4(2) of the contested directive, the defendants infringed the principle of the conferral of powers and acted in breach of Article 153(5) TFEU. Those provisions interfere directly with the determination of the level of pay in the Member States and concern the right of association, which is excluded from the competence of the EU legislature pursuant to Article 153(5) TFEU".

49 OJ L 315, 7.12.2022, p. 44–59.

50 OJ L 132, 17.5.2023, p. 21–44.

51 Further analysed in Lidia Gil Otero: Un paso (necesario) más allá de la laboralidad. Análisis y valoración de la propuesta de directiva relativa a la mejora de las condiciones laborales en el trabajo en plataformas. *Lex Social: Revista de los Derechos Sociales,* Vol. 12, No. 1. (2022) 89–121.

4. Unconventional Debates? From Posting Workers to the Effectiveness of the Charter of Fundamental Rights

Since its entry into force, Directive 96/71/EC[52] has been an ongoing source of discouragement and frustration for labour lawyers across Europe. It has led to case law inextricably linked to the expansive interpretation of the current Article 56 TFEU, which, in most cases, deserves no epithet other than 'ominous' for workers' rights. The complexity of regulatory matters has in fact led to the adoption in 2014 of a complementary Directive in an attempt to improve this aspect of the internal market, and another one in 2018 to amend the first one and make it somewhat less liberalising.

Within this regulatory framework, from a posting perspective[53], Spain is one of the Member States with the highest number of posted workers. Only Germany and Poland ranked ahead of Spain in 2019. Postings decreased (-31%) in 2020 because of the COVID-19 pandemic. As far as labour intake is concerned, the legal framework is rather stable and responds to the dynamics of transposition. It began when Directive 96/71/EC was transposed by Law 45/1999. Successive European standards have been transposed in due course, albeit not always in a timely manner. In any case, over the past 20 years, the Spanish Judicial Documentation Centre (CENDOJ) lists fewer than 25 court decisions on the subject, and none of them originated from the Supreme Court. It can be safely asserted that transnational posting of workers is not a contentious issue in Spain[54].

The perceived debate across Europe is political rather than technical in nature, and not everyone shares the dismal assessment. One need only attend meetings between experts from 'core' and 'peripheral' countries to realise this. This is a very latent issue in the perspective of the countries of Central and Eastern Europe, in whose doctrinal opinions it is possible to detect a certain idea of 'economic colonialism' perpetrated by more powerful economies. This is illustrated, for example, by ironic involvement of Swedish banks in anti-union behaviour in Latvia. Companies from a state that prides itself on its social model and respect for collective rights would be no better than Leopold II's Belgian colonisers in their approach to other territories.

It has even been pointed out that the social dumping frequently criticised regarding posted labour is, in reality, the price to be paid by the receiving states for the brain drain they have caused. The boldest claims even suggest that some of the Polish and Hungarian disgruntlement is fuelled by the restrictions sought to be clamped on this form of business. These countries would see it as a matter of

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52 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. OJ L 18, 21.1.1997, p. 1–6.

53 María Dolores Carrascosa Bermejo – Óscar Contreras Hernández: *Posted workers from and to Spain. Facts and figures.* Leuven, POSTING.STAT project VS/2020/0499, 2022.

54 The most comprehensive analysis of the Spanish context is by Javier Gárate Castro: La protección de los trabajadores en los desplazamientos temporales transnacionales. In: AA.VV.: *Derecho Social de la Unión Europea: Aplicación.* Madrid, BOE, 2023. 803–884.

justice to be allowed to use their competitive advantage, in the form of lower wages, in other Member States.

Academically, the most daring proposal is to revise the idea that posted workers do not enjoy any rights under freedom of movement[55]. According to this theory, when the Court of Justice in the *Rush Portuguesa*[56] case held that the freedom to provide services was applicable to posted workers, it did so 'simply' to devise a way around the transitional period in which, after Portugal's accession, worker freedom of movement was not applicable to Portuguese nationals. This would not have been intended to exclude such persons from the definition and thus from the rights of migrant workers, whether or not they reside in the host state. Advocate General Van Gerven argued that this issue was self-evident. Has the time come to reconsider this doctrine?

The weight of the Charter of Fundamental Rights proves to be another potentially surprising battleground for Spanish labour lawyers. Some have even ventured to call it a Trojan Horse for social Europe. Article 16 therein guarantees the freedom to conduct a business, though is perceived as a serious rival to social rights.

The Charter has no prominent role in the case law related to social rights from the Spanish perspective. It is often used as a mainly rhetorical and 'ornamental'[57] reinforcement of existing rights. The Constitutional Court, for example, has only mentioned it once in relation to social matters, though without any relevance. In terms of Supreme Court practice, for example, the Charter was mentioned in ten decisions in the first six months of 2022, according to the CENDOJ database. Not even one of these mentions went beyond reference on the literature. The Charter is not being leveraged as a tool to provide socially relevant solutions. It also brings no real or doctrinal problems.

There is not a single Spanish court ruling in which the (Spanish) right to strike and (EU) fundamental freedoms have collided. In the academic dimension, all authors in the field of labour law defend the right to strike over and above economic freedoms. Its constitutional model of recognition is an autonomous means of collective action conceived as an instrument serving the interests of workers as such, and in this meaning, it is detached from the contractual framework referred to in the Charter[58].

While it does not abridge, it is also not an essential source for the construction of the rule of law in Spain. Democracy and the rule of law are values that date back to the Spanish Constitution of 1978. The years between Franco's death and accession to Europe were widely perceived as a test of Spain's self-determination in putting this core of principles into practice, inspired, of course, by international treaties and comparative constitutional law. The EEC in 1986 was regarded as a reinforcement of these

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55 Sacha Garber: Institutional Report. In: AA.VV.: *The XXX FIDE Congress in Sofia, 2023. Congress Publications, vol. 3.* Sofia, Norma, 2023.

56 C-113/89 Rush Portuguesa Ldª v. Office national d'immigration [ECLI:EU:C:1990:142].

57 Santiago Ripol Carulla: La Carta de Derechos Fundamentales de la Unión Europea en la jurisprudencia del Tribunal Constitucional Español en procesos de amparo. *Freedom, Security & Justice: European Legal Studies,* No. 1. (2021) 219–237.

58 As argued in Antonio Baylos Grau: Derecho de huelga y medidas de conflicto. In: AA.VV.: *Derecho Social de la Unión Europea: Aplicación por el Tribunal de Justicia.* Madrid, Francis Lefebvre, 2019.

principles, but not as a direct source. These matters have thus been seen primarily as an 'internal' matter, a development of the 'social state' of the Constitution, but not a 'European' issue.

In any case, the European Commission's latest Rule of Law Report (2022) did not highlight any fundamental social rights issues in our country. Problems were mainly identified in the areas of justice and the fight against corruption. The renewal of the General Council of the Judiciary is undoubtedly a more important issue for the EU executive.

5. Emerging Paths for a Social Europe?

The European Union's social dimension has often been seen as ancillary to other EU policies: firstly, the Internal Market; more recently, the Economic and Monetary Union; and finally, the Green Deal (or Green Transition). This is an ambivalent situation. For one thing, these 'other' policies (other than social policy) can justify the recognition of social rights at the EU level, opening up new avenues for development. However, they can also constitute serious obstacles to such developments.

As for the Green Transition, there is perhaps less ambiguity about the social justice dimension of this programme. The Commission's 2019 Communication argues that this programme should include measures to ensure an equitable and fair transition. The concept of 'equitable transition' aims to ensure that the reforms brought about by climate change take into account the most vulnerable, who will be particularly affected, with a view to rendering a socially acceptable transition. Yet the actual scope of this aim remains unclear, and its impact on social rights is uncertain[59].

On 11 December 2019, the Commission published a Communication on 'the European Green Deal'. It is described as a roadmap for making the EU economy sustainable by "turning climate and environmental challenges into opportunities, making the transition just and inclusive for all". According to the Communication, "attention will have to be paid to the potential trade-offs between economic, environmental, and social objectives" and "the European Pillar of Social Rights will guide action to ensure that no one is left behind". The goal of a 'fair and inclusive' transition has been clearly stated, but its impact on social rights is yet to be defined.

Many climate policy-driven subsidy programmes and tax exemptions, especially in Germany and other countries of similar latitudes, have been reported, for example, not to benefit the most precarious workers, but rather the most privileged ones, while all contribute with taxes and levies. This suggests, therefore, that there is still potential to develop and establish specific measures to alleviate the burden on the socially disadvantaged. In Finland, trade unions have stressed the importance of a fair transition, especially from the perspective of workers. SAMAK, the Co-operation Committee of the Nordic Social Democratic parties and trade unions, insisted that the fight against climate change cannot be

[59] Robin-Olivier (2023) op. cit.

achieved effectively without social justice, and that social justice means that the weakest social groups should not be the ones to bear the burden[60].

What steps should the European Union take in this area from a social point of view? A first option involves financial muscle. A new EU financial tool could be created with similar objectives to the Adaptation Fund under the Kyoto Protocol. Alternatively, the environmental dimension could be introduced into the European Social Fund. It would be a logical step in its evolution since the Treaty of Rome. The legislative option would seem to be more difficult. In the absence of political consensus on climate change, legislating stands to be more difficult than financing.

International trade constitutes another aspect open to *socialisation*. Already for some time now, it can affect the protection of social rights in different ways. The introduction of 'social clauses' in international treaties has been widely used as one way to prevent a race to the bottom based on dumping. The new generation of EU trade agreements does indeed include a reference to social rights, and an obligation on the parties to adhere to the basic rights safeguarded by ILO conventions.

The European Union strives to not only promote fundamental and social rights through external action, but also influence its trading partners in terms of regulations on human and labour rights. Promoting the European social model may also constitute another aspect of Europe's soft power and geopolitical attractiveness[61]. In its 2021 "Trade Policy Review"[62], the European Commission committed to providing guidance to help EU companies take appropriate measures to address the risk of forced labour in operations and supply chains, in line with international due diligence guidelines and principles[63].

While these innovations may be possible, the finishing touch to the possible development of the EU in the social field is something as classic as social dialogue. The sheer volume of documentation that the European Commission and European Parliament has generated over the last few years reveals a commitment to social dialogue and collective bargaining. In commemorating the 60th anniversary of the signing of the Treaty establishing the European Economic Community, the 2017 Rome Declaration mentioned "a Union taking into account the diversity of national systems and the key role of social partners".

The European Pillar of Social Rights has moved in the same direction, and its provisions cover such relevant statements such as this one under principle 8:

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60 A summary of the outlook from the Spanish point of view in Henar Álvarez Cuesta: La lucha contra el cambio climático y en aras de una transición justa: doble objetivo para unas competencias representativas multinivel. *Revista de Trabajo y Seguridad Social, CEF,* No. 469. (2022) 89–120.

61 Examined further in Robin-Olivier (2023) op. cit.

62 COM (2021) 66 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 February 2021 "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy".

63 An analysis of the matter in Wilfredo Sanguineti Raymond: La construcción de un nuevo derecho transnacional del trabajo para las cadenas globales de valor. *Revista General de Derecho del Trabajo y de la Seguridad Social,* No. 61. (2022).

> "The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States […]. Support for increased capacity of social partners to promote social dialogue shall be encouraged".

Along these lines, the directives adopted in recent years have insisted on the fundamental role of social dialogue and collective bargaining in their implementation. The Minimum Wage Directive, noted above, is based precisely on the incentive of collective bargaining. The guidelines on this issue for the self-employed underline, in short, that the political timing is right.

What can these innovations deliver? Can the EU be perceived as a Social Union, especially in academic, judicial and political discourse? Will shared European values such as equality and solidarity, enshrined in Article 2 TEU, be upheld as the constitutional basis for a European Social Union?

Unfortunately, public opinion in most Member States regards it primarily as an economic union. The austerity measures of the previous economic crisis ruined the EU's image for many. Initially a dynamic catalyst of change, it became an actor full of restrictions working to benefit other countries.

While support in official surveys remained solid in Spain, 35% considered EU membership to be bad for Spanish wages, and over 50% considered membership to be bad for the prices of goods and services. However, a large majority support the development of a common social policy (76.8%) and consider that the main priority of the EU should be the advancement of social and political rights (30.5%), the establishment of a European minimum wage (25.7%) and the adoption of a binding Charter of Social Rights (10%).

From an academic point of view, the common view is that the EU is today endowed with all the powers it needs to implement a Social Union. What is lacking, however, is the political will to implement such a union. Finally, from a political point of view, it is difficult to identify strong views on the issue.