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Commentary

Portuguese Labor Austerity Measures and the Principle of Freedom of Association

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Introduction and Background

The European Union (EU) has since 2010 suffered a significant economic crisis, one that has had a particularly harsh effect on Ireland, Italy, Greece, Portugal, and Spain. Greece, Portugal, and Spain were beset with not only direct economic and financial problems, but also structural labor issues that included huge unemployment rates and an alleged lack of competitiveness of the market.[1]

In these circumstances, the Greek, Portuguese, and Spanish governments implemented important changes in their labor regulations that have led to three complaints to ILO's Committee on Freedom of Association (CFA). These complaints were lodged in response to declining labor standards in countries facing exceptional crisis situations as being in breach of the following ILO conventions: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); and the Labour Relations (Public Service) Convention, 1978 (No. 151).[2]

1 According to Eurostat statistics, in 2010 unemployment rates reached 12.7 percent in Greece, 12 percent in Portugal and 21.4 percent in Spain.

2 Ireland lodged a complaint after the intervention of the IMF (Case No. 2780, Report No. 363, para. 723–815). However, this complaint was not directly against any austerity measure of the Irish government regarding their MOU. Commenting on this case, Michael Doherty observes

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Even though this commentary focuses on Portugal, it also identifies relevant similarities and differences between the Portuguese, Spanish, and Greek cases.

The Facts

Portugal was object of an intervention of the so-called Troika,[3] which aimed to provide financial support under a financial assistance program. The rules of this program were established in a memorandum of understanding (MOU) that included several measures of austerity.[4]

The complaint against Portugal to the ILO's CFA, presented by the General Confederation of Portuguese Workers (CGTP-IN), came in response to the new rules provided in the MOU, in particular, Section 7 of Act No. 23/2012 and relevant cut of wages in the public services and public corporate sector. The complaint also pertained to two changes introduced by the 2009 Labor Code reform. However, certain aspects of the complaint had already been dealt with by the Portuguese Constitutional Court (PCC). The Court had ruled, in separate judgments, that the labor changes were only partly unconstitutional.[5]

Therefore, considering only the facts of the complaint deemed constitutional, six issues are relevant:

1) removal of provisions in collective agreements that were in force prior to Act No. 23/2012 and of amounts exceeding those in the Labor Code for compensation in case of contract termination;

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that "the Memorandum of Understanding outlining the terms of the financial support package for Ireland, contained little in the way of suggested labour law reforms" ("Emergency Exit? Collective Bargaining, the ILO and Irish Law," *European Labour Law Journal* 4, No. 3 [2013]: 192).

3 The members of the Troika are the European Commission (EC), International Monetary Fund (IMF), and European Central Bank (ECB).

4 As David Carvalho Martins points out, the MOU "set the tone of a new Social Dialogue" ("Labour Law in Portugal between 2011 and 2014," http://islssl.org/wp-content/uploads/2014/08/Portuguese-National-Report.pdf).

5 The most important PCC decision is Case No. 602/2013 regarding Act No. 23/2012. For more information, see Ana Teresa Ribeiro, "O art. 7. da Lei no. 23/2012 e o Acórdão do Tribunal Constitucional No. 602/2013 – Análise dos efeitos da Lei nova sobre as convenções coletivas em aplicação à data da sua entrada em vigor," in *Questões Laborais* No. 43 (Coimbra, PT: Coimbra Editora, 2013), pp. 209–32. The other relevant case (Case No. 338/2010) relates to the reform of 2009.

2) introduction of a two-year suspension of overtime pay exceeding the amounts established in the Labor Code and of the pay or compensatory leave established in collective agreement for normal work on public holidays in enterprises not required to close on those days[6];
3) cuts in public corporate sector wages;
4) cuts in public service wages;
5) new provisions pertaining to the expiration of collective agreements; and
6) possibility for workers not affiliated with any union to choose from one of the collective agreements applicable to their sector of activity.[7]

Regarding the first issue, the PCC accepted the legality of the removal of amounts exceeding those in the Labor Code because this code is compulsory. The PCC found no breach to the right of association and collective bargaining because this right is provided by law rather than collective agreement.

On the second issue, the PCC decided that the two-year period was justified by the context of economic crisis. The violation of the right of collective bargaining was therefore only temporary.

On the third and fourth issues, wages reductions in the public and the private sector were also deemed in conformity with the Portuguese Constitution. As the Portuguese government points out, the PCC decided that "those who are paid with public funds are not in the same position as other citizens, and thus the additional sacrifice required of such persons does not constitute unjustifiable treatment." The same idea supported the PCC's decision on the wages cuts in the private sector.

The expiration of collective agreements, the fifth relevant issue, was also an object of discussion in the PCC. The Court decided that the expiration was in accordance with the Constitution and did not breach the right to collective bargaining. However, the rule was not a consequence of labor changes in the context of the referred economic crisis. It had been introduced, in 2009, before economic crisis reached Europe and the MOU.[8]

6 The Act also determined that, after this period of two years, the collective agreements not subject to any changes would have their amounts halved. This provision in particular was ruled unconstitutional by the Portuguese Court.

7 It is important to explain that in Portugal, workers who are not affiliated with any union may choose between two or more collective agreements applicable to a determined sector of activity if the Portuguese government has issued an *administrative extension of collective agreements* of those agreements.

8 The 2009 reform was the result of several preparatory studies made in 2006 and 2007 by the Commission of White Book for Labor Relations. The economical context was quite different from the one existing when the changes imposed by the MOU were published.

Last, the allowance of workers who are not affiliated with a union to opt for a collective agreement applicable to their sector of activity was deemed constitutional. The Court stated that membership in a trade union is always more beneficial than lack of it, because affiliated workers do not depend on *administrative extensions of collective agreements* (AECA) to see their rights ruled by collective agreements.[9]

Analysis

As explained, in Portugal most collective agreements are effective for workers only when the government publishes an AECA. According to the ILO, only 67 percent of Portuguese workers are covered by collective bargaining.[10] However, the density of trade unions is less than 20 percent.[11] This reveals the lack of causal link between collective agreements and an effective representative collective bargaining.

On the other hand, the Portuguese labor norms are predominantly provided for by a comprehensive labor code that includes important legal standards on both labor and employment. In Portugal, therefore, collective agreements do not have the same impact that they do in Spain, where labor relations are strongly supported by regional collective bargaining.

In fact, employers' and workers' lack of interest in each representative class associations is the result not of labor changes, but of an absence of an effective filiation advantage. AECA are indeed a major part of the problem regarding the right of association in Portugal. Even though AECA had recently been limited,[12] the limitation did not produce relevant results. In fact, the change was designed to boost collective bargaining but had the opposite effect. Notwithstanding, Portugal was not the only country that decided to intervene in this area. In

9 About this subject, Júlio Gomes considered it a potential promotion of the worker's disaffiliation from trade unions. Júlio Gomes, "O Código do Trabalho de 2009 e a promoção da desfiliação sindical," in *Novos Estudos de Direito do Trabalho* (Coimbra, PT: Coimbra Editora, 2010), pp. 161–195.

10 Jelle Visser, Susan Hayter, and Rosina Gammarano, "Trends in Collective Bargaining coverage stability, erosion or decline?," *Labour Relations and Collective Bargaining* Issues Brief No. 1, September 2015.

11 The highest density of the filiation in trade unions is in the public sector where the coverage of collective agreements is less relevant.

12 The right of the parties to ask for an AECA for their collective agreement depends on a relevant representation in the sector or region (Ministry Council Resolution No. 90/2012 of 10 October 2012). This resolution was not object of any complaint.

Greece, according to Costas Papadimitriou, AECA were "repealed."[13] Rethinking the role of AECA is vital for the future of collective bargaining.[14]

As to the impact of these austerity measures on the freedom of association, none of them seem to minimize the right of workers or employers to form and join representative organizations. In the public sector, all measures were temporary and the breach of the right of association was not severe. In the private sector, the labor changes that did in fact threaten this right were ruled unconstitutional. The PCC decisions thus protect the right of freedom of association and collective bargaining in Portugal. Most other rules pointed in the complaint were supported exclusively in the context of economic crisis in that they are or were temporary. For example, the duration of the suspension of overtime payment exceeding the amounts established in the Labor Code and the payment of compensatory leave established in collective agreement for normal work on public holidays in enterprises not required to close on those days ended 1 January 2015. On the other hand, cuts of wages will be gradually extinguished in the terms provided by Act No. 159-A/2015 of 30 December 2015.

Contrary to what happened in Greece and Spain,[15] Portuguese labor changes resulted from a previous agreement between employers and workers. The complainant CGTP-IN was the only one to not sign the agreement, which the CFA recognized in its decision.

Finally, in Spain and Greece changes to labor and employment rules were more demanding than in Portugal. In Greece, for example, the cuts of wages were permanent, and in Spain enterprise collective bargaining agreements acquired primacy of application. The CFA therefore recommended a permanent social dialogue.

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13 This author criticizes the Greek solution because it diminishes the importance of collective agreements (Costas Papadimitriou, "The Greek labour law face to the crisis: A dangerous passage towards a new juridical nature," ELLN working paper No. 3/2013, pp. 15–16).

14 Palma Ramalho states that the dynamic of collective bargaining remains poor despite all the developments in this area. See Palma Ramalho, "Portuguese Labour Law and Industrial Relations during the crisis," in *The governance of policy reforms in Southern Europe and Ireland*, edited by Konstantinos Papadakis and Youcef Ghellab (Geneva: International Labour Office, 2014), p. 157.

15 The Spanish government pressured by the fiscal adjustment decided to regulate unilaterally the 2010 labor changes. For more developments about social dialogue in Spain, see Oscar Molina and Fausto Miguélez, "From negotiation to imposition: social dialogue in times of austerity in Spain," in *The governance of policy reforms*, pp. 87–106.

Conclusion

The global economy today is more vulnerable to epidemic crisis than ever before. It is therefore important to ensure that crisis periods do not endanger relevant social standards. In recent years, some countries have tried to use labor law to respond to economic problems. Greece, Spain, and Portugal introduced similar reforms in the same crisis. Nevertheless, the CFA recognized in each case the role of social dialogue in protecting social standards. The Portuguese case testifies to the need for all labor reforms to respect social dialogue. Only then will it be possible to protect all labor actors in a period of austerity.

The PCC has a demonstrable major role in ensuring the freedom of association set by the Portuguese Constitution. The CFA, in its turn, considers that states should avoid amending rules collectively agreed to, unless the amendment is for a temporary period. In this case, Portugal acted within this recommendation, and the current government is returning, in large part, to its previous legal framework.