LABOUR REFORMS AND SOCIAL INEQUALITIES IN SPAIN: THE IMPLICATIONS OF A GLOBAL ECONOMY

Inmaculada Baviera. Lecturer in Labour Law. University of Navarra (Spain)

1. INTRODUCTION TO THE SOCIAL AND ECONOMIC CONTEXT IN SPAIN

The international financial crisis has had a particularly severe effect on the Spanish labour market. Since it commenced, the number of people without work has increased by over 4 million, a sizeable percentage of which (50.4 % in the third quarter of 2013) are long term unemployed, or people who have not worked for 12 months or more1. Within this context, characterised by the highest level of unemployment in the European Union after Greece2, a number of social changes are taking place that hold serious consequences for the future.

Inequality and impoverishment have become a widespread phenomenon in Spanish society, with the corresponding risk of social division. This is reflected in “counter-cyclical” behaviours of income inequalities, which increase in times of recession but which do not reduce differences in periods of economic expansion; leading to a configuration of a dual labour market, where there is a clear division of jobs according to working conditions; and progressive cutbacks to rights that were geared towards equality amongst citizens. The increase in inequalities has in turn led to a parallel concentration of wealth3. In this regard, Spain is one of the EU countries that has undergone one of the sharpest increases in levels of inequality during the crisis4.

In fact, the OECD has warned of the increase of inequality in Spain, where the fall of incomes in Spanish households has been one of the severest in the Eurozone, caused by a deterioration in working condition for a large segment of the population5. According to data from the Survey on Living Conditions, drawn up by the Spanish National Institute of Statistics, the average income of households in 2012 dropped by 3.5% with regard to the previous year. The AROPE index (at risk of poverty or social exclusion), which is one of the indicators of the Europe 2020 strategy of the European Union (it combines three factors: risk of poverty, material deprivation and low work intensity), has risen in line with trends in recent years, reaching levels of 27.3% amongst the population residing in Spain (compared to 27.2% in the previous year)6.

One interesting point is that the AROPE index decreased amongst people over 65 years of age from 2009 to 2013. A sizeable proportion of this segment of the population own their own homes7. This sector in reality has done a great deal to mitigate the effects of

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3 CARITAS, VII Informe del Observatorio de la Realidad Social, 2013, p. 5.
7 Ibidem, pp. 3, 6.
the crisis in families despite the loss in purchasing powers of their pensions. But, in spite of the increased support from those nearby, the chronic nature of the crisis is leading towards an overloading of the family in its effort to cope with needs.

An important factor at the commencement of the crisis in Spain was the excessively close link to an economic model based on construction and housing, as well as the losses incurred by the banks, the recapitalising of which fell on the shoulders of government and citizens. The measures required by international institutions (IMF, EU, ECB) in exchange for aid have exacerbated underlying problems. Fiscal consolidation policies, privatisation in the public sector and labour and financial reforms are cancelling out growth and welfare in order to pay sovereign debt. The progressive increase in regional government debt is an added factor. In this context, the current deterioration in institutional appraisal (from which the trade unions are not exempt) and the political apathy amongst citizens become understandable, even more so in a climate aggravated by recent cases of corruption.

2. ARE THE CONSTANT LABOUR REFORMS A SOLUTION TO SOCIAL INEQUALITIES?

Recent labour reform have been unable to prevent unprecedented levels of job shedding, especially amongst low qualified workers and young people (this sector showed major increases in employment and salaries in the years leading up to the crisis, thanks to the effects of the construction industry). In particular, youth unemployment exceeded 50% in 2012 and continued to grow in 2013 (55.5%). The rate of young people that neither work, study or take on vocational training is the fifth highest in the OECD, and a growing number of young people have emigrated. These circumstances are the result of the grave economic situation, but they are also due to a number of problems that have dragged on for years. This study shall focus on the 2012 reform, with a brief description of the preceding state of affairs.

2. A. BACKGROUND TO THE 2012 REFORM

The devastating impact of the financial crisis on employment, which has been greater than in other countries, is due to a great extent to the large number of workers with temporary contracts, who have played a major role in the adjustment measures of companies. This situation responds to a deeply-rooted system of temporary contracting of workers that commenced in the eighties (as a measure geared towards job creation) to

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8 CARITAS, VII Informe..., op. cit., pp. 8, 16-17; FUNDACIÓN FOESSA, Precariedad y cohesión social, Madrid, 2014, pp. 24-25.
deal with a rigid labour market and high costs of dismissal. This gave rise to the progressive consolidation of a dual labour market, in which a growing number of temporary workers (15.6% in 1985; 34% in 2006, prior to the crisis) enjoyed considerably less protection in comparison to workers with open-ended contracts. Although temporary contracting facilitated access to the labour market, the fact is that remaining constantly subject to this contractual arrangement, as is the case in Spain, is linked to high risks of poverty and impedes inclusive growth. Measures taken later to restrict excessive temporary contracting were unable to put a halt to this phenomenon.

In the context of the current financial crisis, Spain brought about reforms to the labour market by means of the Royal Decree-Law 10/2010, as a matter of urgency, which was subsequently ratified by Law 35/2010, of 17 September, adopting urgent labour market reform measures. This legislative initiative was geared towards reducing duality in the labour market (by restricting the unjustified use of temporary employment), increasing internal company flexibility (by reducing working hours, which enables jobs to be maintained in situations of economic crisis and avoids resorting to termination of contracts), and improving job opportunities for the unemployed, especially young people.

This reform by the Socialist government, along with subsequent reforms, falls within the framework of the Europe 2020 strategy, which, since its establishment at the European Council in June 2010 in order to deal with the international financial crisis, constitutes the new framework of coordination for economic and employment policies of the member state of the European Union. The new European political priorities should be applied via national reform programs. An initiative to boost inclusive growth, or rather, an economy with high employment levels that promotes social cohesion, is “An agenda for new skills and jobs”. The aim is to modernise labour markets by a new boost to what is referred to as flexicurity. This concept was already promoted by the Green Paper “Modernising labour law to meet the challenges of the 21st century”, and the document by the Commission “Towards common principles of flexicurity: more and better jobs through flexibility and security”.


16 BAVIERA PUIG, I., Employment stability in spanish labor law…, op. cit., p. 688.

17 Royal Decree-Law adopting urgent labor market reform measures (R.C.L. 2010, 1587) (Spain).

18 R.C.L. 2010, 2502.

19 Preamble of Royal Decree-Law adopting urgent labor market reform measures (R.C.L. 2010, 1587) (Spain); Preamble of Law adopting urgent labor market reform measures (R.C.L. 2010, 2502). The reduction of working hours draws inspiration from the German kurzarbeit, although temporary suspension was already a common practice in Spain (vid. GONZÁLEZ ORTEGA, S., La fascinación de los modelos o el kurzarbeit a la española, in GARCÍA-PERROTE, I., MERCADER, J.R., LA REFORMA LABORAL 2010. ASPECTOS PRÁCTICOS, Lex Nova, Valladolid, 2010, pp. 181 ss).


23 COM (2007) 359 final, 27.6.2007. The concept of “flexicurity” unites two terms that the Commission has attempted to introduce as joint concepts in the labour market. One the one hand, flexibility is understood as referring to the “advances (or transitions) made throughout life”, such as changing from...
The Commission pointed out that flexicurity policies could be applied via four axes of activity: flexible and reliable work contracts, lifelong learning strategies, effective active labour market policies and the modernisation of social security systems to encourage employment. Denmark and the Low Countries were taken as examples, to demonstrate the aims of the policies. Some of the measures designed to encourage flexible and reliable work contracts established by the Agenda for new skills and jobs of 2010 include: the need to reduce segmentation of labour markets, either by decentralising collective bargaining or by revising of contractual provisions that are currently in force, and boosting the internal flexibility of companies in periods of crisis in order to preserve jobs. The Agenda emphasises that these reforms of the labour market should not endanger the margin of consensus between social partners.

As part of the development of the Europe 2020 Strategy, Spain drafted the National Reform Program (2011). This agenda included, amongst other measures, developments in labour reform, as well as reforms to the system of pensions and collective bargaining, to which social partners demonstrated their commitment in the Social and Economic Agreement reached on 2 February 2011. The corresponding assessment of the Council of the European Union recommended reforms to the collective bargaining system, where the predominance of provincial and sector agreements gave little margin to negotiations at company level. It also highlighted that the automatic extension of collective bargaining and the use of ex-post inflation indexation clauses contributed to wage inertia and impeded the creation of sufficient flexibility for economic adjustment.

After a period of fruitless negotiations between social partners, on 10 June 2011 the Socialist government adopted the Royal Decree-Law 7/2011 to enable greater flexibility in negotiating agreements and to increase the internal flexibility of companies (such as extending conditions for the non-application of wage systems adopted in collective bargaining above company level). The difficulties involved in adjusting labour conditions to economic circumstances led to the “adoption of more traumatic external flexibility measures, such as dismissals, which had a major impact on the volume of employment and on the labour market in Spain, which is highly sensitive to the economic cycle”. However, the Royal Decree-Law on collective bargaining reform was not presented and processed as a bill due to the change of government in the elections of November 2011.

24 Ibid, pp. 5-6, 22-23.
26 National Reform Programme Spain 2011, p. 3.
28 Preamble and art. 6 of Royal Decree-Law adopting urgent collective bargaining reform measures (R.C.L. 2011, 1105) (Spain). [Translated by the author].
2. B. THE 2012 REFORM: SOME CONFLICTIVE ISSUES

The new Conservative government that took power after the elections rapidly added a new twist to the constant labour reforms in Spain. As on other occasions, it was legislated in two stages, in accordance with the provisions of article 86 of the Constitution. Thus, the Royal Decree-Law adopting urgent labour market reform measures, of 10 February 2012, was later processed as a bill. This event demonstrates once again the abuses made of emergency legislation, which soon lead to regulatory inflation that goes against legal security and clarity, and acts in detriment to social dialogue.

The objective of the reform was flexicurity, in a context where the market problems were structural and not of a short term nature. To this end, the law adopted a series of measures to boost internal employability of workers, encourage open ended contracts and promote internal company flexibility so as to put an end to job shedding. It also took on measures that affected the termination of contracts to “encourage the efficiency of the labour market as an element linked to the reduction of labour duality”. The need for this reform, despite the regulatory changes of recent years, also resided in pressures exerted by international and European financial institutions. The reform, which is partly a continuation of previous ones, has led to social controversy over some of its aspects.

1) The abuse of emergency legislation and compensation for dismissal

The Social Court no. 34 of Madrid raised an exception of unconstitutionality with regard to some issues regulated by the Royal Decree-Law adopting urgent labour market reform measures, of 10 February 2012. The Constitutional Court passed a ruling rejecting the exception, although some judges disagreed. The ruling declared that the doubts of unconstitutionality concerning the assessment of the Government of what are extraordinary situations of necessity and emergency were unfounded, and therefore the use of the Royal Decree-Law to introduce the reform was not abusive. The Court also approved the reduction in costs of dismissal (which would encourage job creation and a decrease in duality in the labour market). This consisted of a new method for calculating wrongful dismissal for work contracts signed before the reform, which combined the previous compensation of 45 days salary per year of service (applicable up to the date of the reform) with 33 days (new compensation) for the period worked after it entered into force. The reform also abolished procedural salaries (the money the worker receives from when he is dismissed until a judge decides in his favour) when the company opts

29 Art. 86: “1. In case of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-laws and which may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Part 1, the system of Self-governing Communities, or the general electoral law. 2. Decree-laws must be immediately submitted for debate and voting by the entire Congress (…). 3. During the period referred to in the foregoing subsection, the Cortes may process them as Government bills by means of the urgency procedure”.
30 R.C.L. 2012, 147 (Spain).
31 Law adopting urgent labor market reform measures (R.C.L. 2012, 945) (Spain).
32 BAVIERA PUIG, I., Employment stability in spanish labor law..., op. cit., p. 696; MOLINA, O., MIGUÉLEZ, F., From negotiation to imposition..., op. cit.
33 Preamble of Law adopting urgent labor market reform measures (R.C.L. 2012, 945) (Spain). [Translated by the author].
34 Order of February 12, 2014, Tribunal Constitucional [Constitutional Court] (RTC 2014, 43) (Spain).
for compensation in a case of wrongful dismissal (and not for readmission of the worker).

2) Complaints presented by the trade unions to the ILO for violation of the right to freedom of association and the right to bargain collectively

The grounds for the complaint were based on the fact that in the days leading up to publication of the Royal Decree-Law adopting urgent labour market reform measures, of 10 February 2012, the leading trade unions and employers' associations had signed the Second Agreement on Employment and Collective Bargaining 2012, 2013 and 2014 (II AENC). This agreement was valid for three years, during which the signatories undertook to adjust their behaviour to the criteria agreed for collective bargaining. In particular, the parties maintained a commitment to national collective bargaining, or failing this, at least at regional level, to give structure to the negotiations and the need to preserve provincial agreements, given that they covered a large number of workers and companies. They also agreed on a commitment to decentralisation, or the idea that sector agreements should encourage bargaining within the company on particular issues (working hours, duties and salaries).

The immediate labour reforms, urgently legislated without the participation of the trade unions, left most of the agreement ineffective. The modifications brought about by the Royal Decree-Law were kept in the legislative procedure as a bill. In particular, the unions protested that it imposed the primacy of negotiation in the workplace, when many of the agreements are not negotiated by them, as well as the likelihood that companies may not apply the agreement in collective bargaining for financial reasons, without the agreement of the negotiators or the workers' representatives (by requiring binding arbitration, with the decisive participation of the Administration). In this regard, the Spanish Government alleged that the lack of agreement amongst social partners, remedied by the urgent legislation in 2011, which also increased the possibilities for collective bargaining in the company, had not been a cause for complaint. It also alleged that the trade unions had already subscribed to this notion in the II AENC, and that the courts had confirmed the reform.

The Committee on Freedom of Association highlighted the principle of mutual respect for the commitment undertaken in collective agreements. It underlined that “the elaboration of procedures systemically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to an overall destabilization of the collective bargaining machinery and of workers’ and employers’ organizations and constitutes in this regards a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98”. What is more, in light of the new rules and structure for collective bargaining, the Committee declares that “the determination of the bargaining level is essentially a matter to be left to the discretion of the parties”.

35 R.C.L. 2012, 147 (Spain).
36 It was published in the Official Gazette of 6 February 2012.
40 Ibidem, no. 453.
41 Ibidem, no. 454.
All this has led the Committee on Freedom of Association to call upon the Government to consult with workers' and employers' organisations with sufficient notice on certain regulations prior to approving them, and has also commented on the need to promote social dialogue so that said regulations might be shared as widely as possible.  

3. The problems of the end of “ultra-activity” principle of collective agreements

One of the specific aims of the reform has been to modernise collective bargaining so as to bring it closer to the particular needs of companies and encourage ongoing dialogue in each one. With this objective in mind, the reform has established a new regime for the non-application of the conditions laid out in the collective agreement, as well as favouring the collective agreement of the company. At the same time it has also introduced limitations to “ultra-activity”, or subsisting consequences, which means that when an agreement has reached its end date, and new negotiations are initiated, if an agreement is not reached, the expired agreement shall only be applicable for one year unless agreed otherwise, and not for an indefinite period as was the case before the reform.

The Government stated in its “Report evaluating the impact of the labour reform”, that the blockage of negotiations did not permit adaptation of working conditions to the needs of the company, which gave rise to a wage inertia during the crisis despite the marked increase in unemployment. The reform has led to an increase in the signing of agreements, especially at company level, and has enabled a large number of previously stalled negotiations to be completed.

The application of the new law has generated intense debate in the law courts. A notable milestone in this respect was the judgement of July 23, 2013, Audiencia Nacional (National Court) that legitimised the automatic extension of agreements that included a clause agreeing to this between the company and the trade union representatives (in this particular case by the Spanish Trade Union of Airline Pilots). In other words, the working conditions outlined in collective agreements prior to the reform should continue to be valid if the parties had agreed as such, until it was replaced by a new one, after complying with the obligatory period of one year. This criterion has been followed in subsequent judgements. However, the Judgment of January 23, 2014, Tribunal Superior de Justicia de Andalucía [Supreme Court of Justice of Andalucia] understood that an interpretation of this nature would leave the reform powerless and would “petrify” working conditions (likewise: Judgment of April 3, 2014, Tribunal Superior de Justicia de Castilla y León [Supreme Court of Justice of Castilla y León]). Therefore, one can only await the definitive decision from the Supreme Court. The problem that arises with regard to the rights of workers is that the reform of 2012 establishes that, after the legal period of one year, if there is no new collective

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42 Ibidem, no. 465.
43 MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, Informe de evaluación del impacto de la reforma laboral, 2013, pp. 19-20, 37, 138-139.
44 A.S. 2013, 1140 (Spain).
46 A.S. 2014, 526 (Spain).
47 JUR 2014, 120288 (Spain).
agreement, arbitral award or covenant to the contrary, the agreement loses its effective powers and the agreement reached at a higher level must be applied\textsuperscript{48}. What it does not determine is what regulation is applicable if said agreement does not exist.

4. The “permanent” entrepreneur support contract

The reform, whose objective was to boost the creation of stable, high quality employment in order to reduce labour duality, introduced a new contract designed for small and medium enterprises and the self employed. It is called the “permanent” entrepreneur support contract, and has Social Security and tax incentives, for which the general labour system is applied but which has the peculiar feature of being for a trial period of one year\textsuperscript{49}.

This “peculiarity”, which reduces workers' rights, has created intense debate. One judgement in this regard is particularly noteworthy, that of Judgment of November 19, 2013, Juzgado de lo Social núm. 2 de Barcelona [Social Court no. 2 of Barcelona]\textsuperscript{50}, which declares that the dismissal of a worker after one year's work in a company for not passing the trial period was wrongful. The sentence affirms that the reform infringes a superior rule of law, that of article 4.4 of the European Social Charter of 1961, for not establishing any period of notice or compensation for termination of the contract during the trial period, and that the period of one year is excessive. The relevant collective agreement in this case applies a trial period of two weeks, with the option of being extended to six months. Consequently, termination of the contract outside the trial period set by the agreement constitutes dismissal without cause and is therefore wrongful.

It should be remembered that article 14 of the Statute of Workers’ Rights sets out that a trial period can be agreed in writing, subject to the time limits established by collective agreements. If the agreement contains no arrangement in this area, said period cannot exceed six months for qualified technicians or two months for other workers. The courts have already commented that a trial period (the aim of which is to facilitate mutual knowledge between both parties of the contract so that the employer can assess the worker's aptitude) that is excessively long, even when established by collective agreement, may constitute an abuse of law. In particular, Judgment of November 12, 2007, Tribunal Supremo [Supreme Court]\textsuperscript{51}, declared that a trial period of two years established by collective agreement was abusive and null and void, and the dismissal based on the fact that said trial period was not passed was declare to be wrongful dismissal.

5. The complexities of collective dismissals and the social role of Judges

With the aim of reducing segmentation in the labour market, the reforms have set out to “improve” external flexibility, or rather, the causes for collective and objective dismissals (arts. 51.1 and 52 c) of the Statute of Workers’ Rights)\textsuperscript{52} have been

\textsuperscript{48} Art. 86. 3 of the Statute of Workers’ Rights.

\textsuperscript{49} MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, Informe de evaluación..., op. cit., p. 27.

\textsuperscript{50} AS 2013, 2802 (Spain).

\textsuperscript{51} R.J. 2008, 701 (Spain).

\textsuperscript{52} See, National Reform Programme Spain 2011, p. 18; on the legal and jurisprudential background, vid. BAVIERA PUIG, J., Employment stability in spanish labor law..., op. cit., pp. 690-695.
successively clarified. Another important new feature of the 2012 reform is the removal of the administrative authorisation hitherto required to conduct a collective dismissal. This state of affairs has granted greater importance to *a posteriori* revisions in court of companies' decisions to terminate contracts. The regulatory development of collective dismissals has also been reformed (Royal Decree 1483, 2012)\(^5\). As regards the latter, it is worth highlighting the reform of August 2013\(^5\) (once again urgent legislation), which included amongst other measures the granting of certain prerogatives to groups of multinational companies operating in Spain with regard to the documents they have to submit to justify dismissals (art. 4.5 Royal Decree 1483/2012). This measure has been harshly criticised by trade unions\(^5\). An analysis of some of the most recent and significant sentences on collective dismissals leads one to the conclusion that the complexities surrounding this type of contract termination still persist.

Amongst the many rulings made since the application of the reform, Judgment of June 12, 2014, Audiencia Nacional [National Court]\(^5\), is especially noteworthy. The court upheld the claim from the trade unions UGT, CCOO and CSIF against the decision of Coca-Cola Iberian Partners, based on causes of organisation and production. It declared the collective dismissal affecting 1,190 workers (implemented for 821), and which would mean the closure of the factories of Madrid, Mallorca, Alicante and Asturias, to be null and void. In the judgement of the court, the cause of the invalidity centred on the negotiations of the dismissal, and in particular, on the lack of information to workers' representatives from the company regarding its constitution as a group of companies, which meant a change of company (arising from the merger of the eight bottling plants that the Coca-Cola company had authorised to prepare and bottle the drinks, the result of which was the company's decision to make adjustments to staff numbers). Coca-Cola Iberian Partners also neglected to submit the necessary information to the negotiating commission to assess the alleged organisational causes and negotiate the dismissals. The company therefore did not act in accordance with the principle of good faith in negotiations. Another reason for the invalidity was the deactivation of the effects of the right to strike at the Madrid factory, during the negotiations of the collective dismissal, since the company modified the distribution routes of the product from other factories to supply products to Madrid. The Labour Inspectorate also considered this practice to be an infraction. As a result, the court obliged the company to reinstate the dismissed workers with compensation for the wages they had not been paid.

Another important sentence is the collective dismissal in the regional television chain “Telemadrid”, in which the Supreme Court upheld the judgement of the High Court of Justice of Madrid. This court had based its decision on the lack of proportionality of the measure, due to the large number of contracts that were affected, and declared that the dismissals were not in accordance with law. By doing so, the company was not required to reinstate the workers, but the sentence of the Supreme Court did however oblige it to pay higher compensation. During the sentence passed by the Supreme Court, some

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\(^5\) R.C.L. 2012, 1474.
\(^5\) Royal Decree-law for the protection of part time workers and other emergency measures in the economic and social order (R.C.L. 2013, 1211), which was made law in February 2014 (R.C.L. 2014, 311).
\(^5\) JUR 2014, 164538 (Spain).
judges gave their own particular opinion in favour of declaring the dismissal to be null and void and uphold the claims of the trade unions\textsuperscript{57}.

The above mentioned scenario shows once again the highly complex definitions given to collective dismissal by the courts. The Report of the OECD on the impact of the reform pointed out that the elimination of the administrative authorisation had generated procedural uncertainty, which had been swiftly corrected by the government with the above mentioned reform of August 2013. In this particular context, the report advised that the role of the courts in invalidating collective dismissals should be more closely restricted, “yet, albeit significantly reduced, the discretionary role of courts to invalidate a collective dismissal procedure and order reinstatement remains substantial”\textsuperscript{58}. However, when considering this criterion, it is essential to remember the important social function of workers rights that judges set out to uphold, and the role they have played in this regard in Spanish legal tradition.

3. CONCLUSION

From the scenario described above, which has considered just some of the most relevant points, what should be highlighted is the abuse of emergency legislation to bring about constant labour reforms, and the resulting loss of social partnership, a key factor in making these reforms effective. This has led to greater social conflict and even claims before the Constitutional Court. The judges responsible for applying the 2012 reform have set forward serious objections to it. All this has created grave procedural insecurity regarding this latter reform.

Another objection is that the new measures, despite the reduction in rights, have not led to a drop in unemployment, which in the long term is increasing, and which is the main cause of inequality. This problem must be considered as a priority by the public powers. This is the process that Spanish courts are engaged in when they put a halt to certain collective dismissals and try to maintain decent working conditions. The weight of the public debt on the shoulders of Spanish society cannot mean cutting back on basic necessities. For this and other reasons, it is vital to maintain jobs, as well as create and encourage new sources of employment in order to put an end to a society that generates ever more excluded members.

\textsuperscript{57} Judgment of March 26, 2014, Tribunal Supremo [Supreme Court] (RJ 2014, 2778) (Spain).
\textsuperscript{58} OECD, \textit{The 2012 labour market reform in Spain…}, ob. cit., pp. 23, 45-46.