Stabilising Collective Agreements in Continental Europe: Contract Law Principles at the Rescue of the Right to Collective Bargaining (provisional version)

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**Abstract**

Most of the legal orders of continental europe which confer normative value to collective bargaining agreements also include a system of survival of the content of the latter when they expire, generally called “after-effects”. In some cases, it is regulated by specific legislative provisions. In other, the absence of the latter have been supplied by jurisprudential constructions, based on the application of general principles of Contract Law. In some cases, like Spain, this response has been developed as an answer to the disruption of collective bargaining under supranational pressure in the context of crisis measures. The comparative study of the different cases shows important convergence between the models, both in the adopted legal techniques as well as the pursued objectives, revealing common concerns in the maintenance of a certain balance between negotiating partners, whether through the consolidation of the respective models of collective bargaining or as through the correction of the disfunctions introduced by emergency measures. Those solutions are also embedded in the international definition of the right to collective bargaining, revealing the importance of a holistic vision of the regulation underpinning the european collective bargaining model.

La mayor parte de los ordenamientos jurídicos de la Europa continental que confieren valor normativo a los convenios colectivos también incluyen un sistema de supervivencia del contenido de estos últimos cuando expiran, generalmente denominados "ultra-actividad”. En algunos casos, está regulado por disposiciones legislativas específicas. En otros, la ausencia de estos ha sido suplida por construcciones jurisprudenciales, basadas en la aplicación de los principios generales del Derecho contractual. En algunos casos, como en España, esta jurisprudencia se ha desarrollado como una respuesta a la desarticulación de la negociación colectiva provocada por las reformas hechas bajo presión supranacional, en el contexto de las medidas de crisis. El estudio comparativo de los diferentes casos muestra una convergencia importante entre los modelos, tanto en las técnicas jurídicas adoptadas como en los objetivos perseguidos, revelando preocupaciones comunes en el mantenimiento de un cierto equilibrio entre los interlocutores del proceso de negociación colectiva, ya sea mediante la consolidación de los respectivos modelos existentes o mediante la corrección de las disfunciones introducidas por las medidas de emergencia. Estas soluciones también se integran en la definición internacional del derecho a la negociación colectiva, lo que revela la importancia de una visión holística de la regulación que sustenta el modelo de negociación colectiva europea.

**Keywords: collective agreement; after-effects; contract law principles; promotion of collective bargaining**

**Palabras clave: convenio colectivo; ultractividad; principios de derecho de los contratos; fomento de la negociación colectiva**

# Introduction

Most of the legal orders of continental europe confer normative value to collective bargaining agreements. The normative value of a collective agreement refers to the fact that it invalidat, displaces or substitues contrary dispositions contained in other sources, above all those of a contractual origin. Those legal systems also include a system of survival of the content of the collective agreements, mainly individual working conditions, when they expire, generally called “after-effects”.

In some cases, the after-effects are regulated by specific legislative provisions. In other, the absence of the latter has been supplied by jurisprudential constructions, based on the application of general principles of Contract Law and those regulating the relation between sources of law, mainly connected to that normative value.The legal institution which has been developed, in different forms, can be roughly described as one of contractualisation of the working conditions, or, in other words, the incorporation of the working conditions contained in the agreement into the individual employment contract.

The comparative study of the different cases shows important convergence between the models, both in the adopted legal techniques as well as the pursued objectives, revealing the common concern of courts for the protection of the worker, in application of the protective function of Labour Law, through the consolidation of the respective models of collective bargaining or through the correction of the disfunctions introduced by Labour Law reforms. In the Spanish case, this response has been developed as an answer to the disruption of collective bargaining under supranational pressure in the context of crisis measures. In the others, the different solutions have been brought forward in the absence of express legal regulation, or in the more common context of resolving questions of application of the existing legal instruments.

The study that follows analyses first the models where the question of after-effects is regulated expressly by law. The second section proceeds to the discussion of those models where the system of after-effects has been constructed by the Courts, and where the influence of general theory of contract and of relation between sources of law has been more explicit. Within the second part, the Spanish case is of a certain importance. The jurisprudential construction of after-effects of collective agreements has appeared as a response to recent legal reforms creating a void of regulation. Moreover, the reasoning of several courts treating the matter goes further than the more classical narrative of the protection of the individual worker, and gives some insights in the relevance of the proposed solutions for collective bargaining conceptualized as a collective right.

Finally if in most cases there is no explicit reference to international law, with the exception of Spain, the third section shows that the different solutions proposed by jurisprudence can also be embedded in the international definition of the right to collective bargaining, revealing the importance of a holistic vision of the regulation underpinning the European collective bargaining model.

# The legal model: from material protection of working conditions to contractualisation *ex lege*

Among those cases which regulated the after-effects of collective agreements at the same time that they regulated collective bargaining itself, Germany is interesting in that it served as model for other jurisdictions, like Belgium and Austria.

The German regulation of the after-effects of collective agreements (”*Nachwirkung*”), even if it does not qualify the legal mechanism as a form of incorporation of the working conditions within the individual contract as an operation in application of civil law princpiles, provides for similar results, and, as appears with the other cases, has given rise to similar questions in its interpretation and analysis.

Paragraph 5 of § 4 of the Lawon Collective Agreement (*Tarifvertragsgesetz*)[[1]](#footnote-1) provides that when the agreement expires, its normative provisions remain applicable untill they are substituted by another agreement.[[2]](#footnote-2) This “other agreement” can be a new collective agreement, an agreements concluded between Works council and company, or an individual contract.[[3]](#footnote-3) This does not exclude the unilateral modification of working conditions by the employer, because the German system conceptualices such a mechanism as the conclusión of a new contract, the proposal of which, if “socially justified”cannot be refused by the workers if she does not want to give rise to a cause for dismissal (with compensation).[[4]](#footnote-4)

Even if they are configured as having normative legal effect,[[5]](#footnote-5) collective agreements only have limited personal effect, as they only apply to their signatories and their affiliates, and if both worker and employer are bound, even if in case of an employer opting out of its organisation, it remains bound by the agreement.[[6]](#footnote-6)However, the German system also provides for the possibility to declare the extensión of the agreement (it applies to all employers and workers in its scope), by means of an administrative decisión.[[7]](#footnote-7)In the latter case, the system of after-effects extends to all workers included in the scope of the agreement.[[8]](#footnote-8)

An agreement has no after-effects for those workers whose contract is concluded after its expiration.[[9]](#footnote-9) Based on a literal interpretation of the law, jurisprudence refused to consider that this would entail the vulneration of the right to equal treatment, because the decision of the employer not to apply the condition of the expired agreement in that case is grounded on legal provisions allowing it.[[10]](#footnote-10) Moreover, the “new” worker is not affected by the transitory situation created by the expiration of the collective agreement, nor is she affected by a posible void in the regulation of her working conditions. In any case, in practice, the new contracts often contains express clauses of incorporation of the provision of the expired agreement.[[11]](#footnote-11)

It has also been argued that such a system creates tensions with the principle of the prevalence of more favourable contractual norms in case of conflicto with provisions of a collective agreement, in the sense that a new collective agreement with less favourable norms than the precedent could be considered as void because of the contractualisation of the former.[[12]](#footnote-12)However, jurisprudence has taken the view that the fact that the system of after-effects contains a material protection of working conditions (because they remain in force and cannot be modifed unilaterally by the employer) does not entail that the principle of more favourable norm applies between the expired agreement and the “other agreement” referred to by the norm. Moreover, because collective agreements have normative value, and the case is one of succession of two collective agreements (even if the first agreement is “weakened”), it is the rule of temporal collision which applies, which derives form the principle *lex posterior derogat priori.*[[13]](#footnote-13)Here, the solution avoiding “petrification” of the working conditions defined in a collective agreement, as an element of the balance of interests between workers and employers, is based on the *ex legespecialis* character of the system and the rejection of the subsidiary application of the civil law idea of contractualisation of the working conditions, albeit in an implicit way. The German jurisprudenc refuses thus to conceptualise the system of after-effects from the point of view of the theroy of the incorporation of the working conditions in the contract, which is easily justified by the existence of an *ad hoc* regulation which is clear and suficient. However, the effects are almost similar as in the other model and the solution given to posible problems generated by the system also.

The German model has inspired the regulation of the question in other legal orders.

For example, § 13 of the Austrian*Arbeitsverfassungsgesetz*(*Nachwirkung*) provides: “The legal effects of the collective agreement, regarding working conditions which applied directly before its expiration, survive after that expiration untill the application of a new collective agreement, related to those working conditions, of untill a new contract is concluded with the affected workers”.

In Belgium, the *travauxpréparatoires* to the Law of 5 December 1968 on Collective Agreements and Paritary Commissions[[14]](#footnote-14) explicitly refer to the German system “as the most justified from the social point of view”, which restores the imbalance that might be caused by the disappearance of the working conditions.[[15]](#footnote-15) They talk about the model as a mechanism of incorporation of the working conditions in the contract, when it is shown hereabove that it has never been formally recognised as such by the jurisprudence. The Belgian system, however, is legally conceptualised as a system of incorporation,[[16]](#footnote-16) as article 23 of the law states that ‘the individual employment contract, implicitly modified by a collective agreement, is maintained in that state when the agreement ceases to have effect, except agreement to the contrary in the collective agreement itself’. As such it also recognises the normative character of collective agreements through the mechanism of substitution of the contractual provisions by those of the collective agreement, reinforcing the system of annullment of contractual clauses contrary the the collective agreement contained in other parts of the law.[[17]](#footnote-17)As the Belgian system of normativity of collective agreement is absolute (no regime of more favourable conditions and thus of problematic of better incorporated conditions tan those of a new collective agreement) there has not been a lot of controversy about the system, as the working conditions of the new collective agreement annull and replace the posible contrary incorporated conditions of the previous contract.

Finalmente, la incorporación de las condiciones de trabajo no supone que se consideren como teniendo los mismos efectos que las condiciones más beneficiosas del derecho español, ya que las disposiciones de un nuevo convenio aplicable prevalecen sobre las condiciones incorporadas[[18]](#footnote-18) y opera una nueva “conversión legal” en aplicación de los artículos 11 y 23 de la la Ley.

One could say that outcomes are the same, when contractualisation is read within the context of the extensión of normativity and prevalence of collective autonomy above individual autonomy. The German system does not speak about contractualisation, and as such does not create a clash with the equilibirum between both autonomies, and the Belgian does have no problema to recogniseexplicitely the mechanism of contractualisation, as it cannot enter in conflict with the existing hierarchy between both autonomies.

# The jurisprudential model: protection of working conditions through contractualisation

## 3.1. The Dutch case: contractualisation based on the relation between sources of law

The oldest jurisprudential model of regulation of after effect is the Dutch system. As in the German system, collective agreements are binding upon those organisations having signed them, as well as their members.[[19]](#footnote-19) Moreover, any contrary contractual provision is considered null and void and substitued by the corresponding provision of the agreement.[[20]](#footnote-20) Moreover, the agreement completes the contract where the latter does not provide for working conditions.[[21]](#footnote-21)From these precepts, the courts have construed the theory of the incorporation *ab inicio* in the contract of the normative conditions of the collective agreement. Claims which the worker might have against the employer are based on the individual contract, and it is only in reference to the provisions which cannot be incorporated in the contract because of their character that the collective agreement will serve as legal base.[[22]](#footnote-22)

The after-effect (“*nawerking*”) of the agreements is basedon that theory.[[23]](#footnote-23)At the expiration of the collective agreement, the provisions, incorporated in the individual contract, continue to apply, until they are modified by individual or collective agreement (except individual or collective agreement to the contrary).[[24]](#footnote-24)On the other hand, the specific (collective) mechanism of enforcement of those conditions, which are provided by virtue of their inclusión in a collective agreementcannot be activated, and the only protection that those condition are given are those recognised by the legal institution of the individual contract.

A particularity of the Dutch regulation of collective bargaining also resides in the fact that, if the agreement are only binding upon members of the signing organisations, bound employers have to apply the agreement to their workers who do not belong to signing unions.[[25]](#footnote-25) There is however no corresponding action in the hands of those workers, which cannot claim individually for performance, even if the signing unions could activate the mechanisms of protection provided for in the agreement. But even in this case, where ther is no incorporation of contractualisation, jurisprudence has recognised that for the matter of the after-effects, incorporation took place[[26]](#footnote-26)on the grounds that contractualisation took place in application of common law, from the moment that the employer executed his obligation of application of the agreement to non affiliated workers.[[27]](#footnote-27)In practice, employer perform that obligation by including clauses of incorporation in the individual contracts, for which contractualisation operates expressly.[[28]](#footnote-28)

There is also the possibility for the government to extend application of collective agreements to all workers and companies in its scope, by declaring its *ergaomnes* effect,[[29]](#footnote-29) which happened for half of the branch-level agreements, complementing as such the mechanism of application of agreements to non affiliated workers by extension of the agreement to non affiliated employers.[[30]](#footnote-30)However, jurisprudence refused to recognise after-effects to those agreements. The higher courts argue, against the position of part of the literature and the public prosecution’s office, that the content of the law regulating the extension of collective agreements does not allow to be read in the same way as the law on collective agreements, for which incorporation can only happen by virtue of an express clause in the contract.[[31]](#footnote-31)The reason for the absence of analogy would be that the declaration of extension is only of a temporary character and can be cancelled by the government, while the binding force under the law of collective agreements is of a more permanent nature.However, the provisions regulating the legal relation between extended agreement and contract are similar than those regulating the same relation between “classic” agreement and contract, and as a matter of fact, as the contract law principles applicable to that relation.Against the position of the jurisprudence, literature argues that those provisions that give a termporary character to the extension are only related to the period during which freedom of contract is “frozen”, but do not apply in any way to the way in which the different sources of law relate.[[32]](#footnote-32)Moreover, the argument of the lack of will of the parties to consider themselves bound that occurs with the declaration of extension cannot be used as an argument in this discussion because, if it would be accepted, the same jurisprudence could not recognise any after-effect at all to any agreement, because the expiration of the agreement is a product of the will of the parties, who would by this have chosen not to be bound any more.[[33]](#footnote-33)

On the other hand, above the fact that this jurisprudence is quite controversial,[[34]](#footnote-34)courts have recognised certain rights contained in agreements whose extensión has expired, and the content of which a non affiliated worker or a worker of a non affiliated employer could not claim on the basis of the incorporation of its provisions. They did i ton the basis of the theory of “acquired rights”,[[35]](#footnote-35) or legitímate expectation of the parties.[[36]](#footnote-36)But the limited applicability of the criteria which have been developed in that doctrine and the complexity entailed by the distinction between rights which remain claimable has not convinced the opponents to the lack of after effects to stop considering that extended agreements should be treated in the same way.[[37]](#footnote-37)

In conclusion, the Dutch case is paradigmatical in that it recognised explicitly the contractualisation of working condition to find a solution to the problems created by the absence of express regulation. The arguments it has used, based on principles of contract law have been repeated (without express reference) in other cases, the most important of which is the recent jurisprudence of the Spanish Tribunal Supremo.But the jurisprudence in terms of “acquired rights” in the case of extended agreements also echoes the French approach to the problema. An analysis of this more complex jurisprudence is asked before analysing the more clear-cut position of the Spanish Courts.

## 3.2. The French case: limited contractualisation as consequence of the prevalence of the more favourable contractual provisions

The French system of after-effects only applies to collective agreements which are of an indeterminate duration.[[38]](#footnote-38) Once denounced, their validity is extended untill the conclusión of a new agreement, with a maximum period of one year, without prejudice of another agreement on this point (*période de survied’effets*).[[39]](#footnote-39)

Collective agreements are applicable to the organisations of workers and employers which have signed or adhered to them and their affiliates,[[40]](#footnote-40) but their provision apply to all workers of the employers which are bound, without consideration for the affiliation of the former, like in the Dutch case, but with a direct, normative effect.[[41]](#footnote-41)

Relation between the individual contract and the collective agreement is ruled to some extent by the principle of the prevalence of the individual autonomy. Even if the collective agreement is considered as an imperative, “reglamentary norm” (normative effect) and “displaces” thus contrary provisión in the working contract[[42]](#footnote-42), the latter are only invalid if they are less favorable than those of the collective agreement.This is due to the general application of the most favourable norm principle (*principe de faveur*) as a solution to the collision between the sources of labour law (withexceptions to the rule in case of relation between collective agreement of different levels,[[43]](#footnote-43) above all since the latest reform of September 2017).[[44]](#footnote-44)

It is for this reason that courts have constantly refused the theory of automatic incorporation, or contractualisation of the working condition regulated in the collective agreement.[[45]](#footnote-45)On the other hand, this does not mean that a situation of rupture in the reciprocal relations between the parties is created. At the expiration of the period of “normative” after-effects, and in absence of a new agreement, workers maintain the “individual advantages [rights] which they have acquired in application of the agreement”.[[46]](#footnote-46)By “individual right”, the *Cour de Cassation*understandsthe right which, at the moment of the denunciation of the collective agreement, granted the woorker a remuneration or a right which it benefited at personal title” (level and composition of the salary, supplementary rest days when the normal rest day coincides with a public holiday, without including however rights related to working time when they affect a group of workers, like a paid rest of 45 minutes considered as working time[[47]](#footnote-47)) and by “acquired right”, “that which, at the moment of the denunciation of the collective agreement (…) corresponded to a right which has already been exercised and not only exercisable *in abstracto*” (as such, are exluded the right acquired during the period of after-effects, compensation for dismissal or retirement, and the rules of revalorization of the salary).[[48]](#footnote-48)

In the context of the debate about the possible unequal treatment with newly hired workers, the*Cour de Cassation*declared that the objective of the system is to compensate for the prejudice caused by the loss of the rights of the agreement.[[49]](#footnote-49)

Even if the French system of surival of the working conditions seems limited and stricly interpreted by the courts, one should not forget that it inscribes itself in a legal order where the agreement does not have imperative effect on more favorable contractual conditions (to the contrary of what happens in other legal systems, except may the German system, where the special legal regulation of the matter permits to circumvert the problem), reason for which admitting a “generous” system of incorporation could have important consequences, as it would involve that a succession of collective agreement could only occur if it bettered the previous agreement.Moreover, French Labour Law characterises itself for its important use of state norms, reducing the role of collective agreement in the regulation fo working conditions, reason for which voids in the articulation of collective agreements do not have the same consequences as in those legal systems where a greater space is given to collective autonomy, like in the Spanish case.[[50]](#footnote-50)

## 3.3. The Spanish case: contract law principles at the rescue of disruption of collective bargaining

First of all, it is important to remind that the Spanish developments on the matter of after-effects have to be read in the context decentralisation and dislocation of the models of collective bargaining in Southern Europe, under the formal or informal pressure of the institutions of the EU. For example, in Greece, in application of the Memorandum of Understanding of 2012, the indefinite duration of collective agreements was abolished, giving way to periods of validity of 1 to 3 years, with a system of survival of their normative value in case of expiration of 3 months, after which only basic conditions on salary would remain applicable. In Portugal, in connection with the program of structural reforms[[51]](#footnote-51), the period within which a new agreement could be negotiated after notice of expiration is given was reduced, as well as the survival of the normative valude in case of unsuccessfull negotiation within that first period (from 18 months to 1 year).[[52]](#footnote-52)

In Spain, until the 2012 Labour Law reform introduced by urgent governamental legislative decree (and confirmed 6 months later by the Spanish conservative absolute majority), under the informal pressure of EU and International institutions, the system of after-effects of collective agreement was based on the principle of the continuation of the normative effects of the collective agreements after their expiration, until the conclusion of a new collective agreement. This principle could be altered by agreement between the negotiating or concluding parties themselves.

One of the important points of the 2012 reform (which had started by a previous reform of collective bargaining in 2010) was decentralisation of collective bargaining. Company-level agreements were given absolute preference above higher level agreement concerning some core working conditions (quantity of salary, some aspects of working time, etc.), and, if some conditions related to the economic situation, organisation or production of the company are met, higher level collective agreement can be temporarily suspended.[[53]](#footnote-53) The system of after-effects was also altered, in that the continuation with full effects of collective agreements after their expirationwas limited to a period of one year, except agreement to the contrary, after which the “superior collective agreement” would regulate the working conditions. However, this urgent modification of the Estatuto de losTrabajadores, which regulates individual and collective aspects of the labour relation, left open questions and legal voids.

The question of the determination of the “superior agreement” is a difficult one, given the fact that the structure of collective bragaining is mainly left open to collective autonomy and does not provide for an exhaustive coverage, at different levels, of the different economic sectors. Different collective agreements at different levels, all applicable to a company, regulate different matters, nor are necessarily complementary. Also, the reference to the “superior” character of the agreement is not only a question of territorial scope, but also of “functional”, or material scope. This leaves the possibility that, even if a “superior agreement” can be identified, which is not allways the case, the latter would not have the same material scope as the expired agreement or would not regulate the same working conditions. And in absence of collective agreements, the only source which regulates working conditions, apart from the contract, is the law, mainly the provisions of the Estatuto de losTrabajadores in terms of working time, mínimum salary, etc. But it is also important to stress the law does not regulate all aspects of the individual or the collective work relations, and in some cases, even effectively refers to collective bargaining as a necessary source. Moreover, collective agreement do not regulate only working conditions, but contain also important provision related to the organisation of work (profesional classification, flexibility measures,…) or to collective relations between management and labour, the disappearance of which could jeopardise the productive organisation of the companies.

The new regulation of the after-effects gave rise to some companies taking the decision, once the one year period of after-effects had ceased, to modify unilaterally the different working conditions, generally in detriment of the workers. The reasoning behind those acts was that, in the absence of a superior agreement, only the minimal conditions of the Estatuto delos Trabajadores, or the mínimum salary, would apply.

In this context, courts started to adopt mainly two different positions. The first, called “rupturist” in the Spanish debate, was based on a literal construction of the new article 86.3, which stated that after the one year period the collective agreement ceased to have effects (“pierdesuvigencia”). The negative consequences of the fact could only be remediated by an intervention of the legislator, and only in case of special circumstances,[[54]](#footnote-54) workers could claim some aspects of the working conditions as regulated in the expired agreement.

The other position, called “conservationist”, argued for the continued application of the collective agreement, despite the wording of article 63 of the Estatuto de los Trabajadores. Several appeal courts argued for that solution, basing themselves above all on “negative” arguments, in the sense that applying the rupturist thesis, because it would create a situation of *tabula rasa*, would gravely affect the balance between the parties negotiating the new collective agreement. This would go against the principle of promotion of collective bargaining and freedom of association as enshrined in the Spanish Constitution, as well as in international law,[[55]](#footnote-55) and also hamper the necessity to favor productivity and social peace, above all in times of crisis.[[56]](#footnote-56)Other courts also constructed their argument on contractual law principles, stating that the content of the applicable collective agreement at the momento of the conclusion of the contract of employment is an essential element of the will of the parties (above all the worker), in application of art. 1274 of the Spanish Civil Code, element that would disappear in case of alteration of those working conditions. The imbalance introduced in the contract by that disappearance would also make the contract economically non-viable because of circumstances which are not attributable to the worker. The same decisions conclude therefore that at the expiration of the collective agreement working conditions are to be considered as incorporated in the working contract and survive in that legal form, as the signature of the working contract was made taking these conditions into account, and the modification of the latter cannot be left to the discretion of the employer, in application of art. 1256 of the spanish Civil Code.[[57]](#footnote-57)

The Spanish *Tribunal Supremo*, in its landmark decision of 22 December 2014, unified the Spanish jurisprudence on this point, adopting explicitly the theory of the contractualisation (or incorporation) of the provision of the collective agreement in the contract, and precising that this contractualisationoccursat the moment of the signature of the working contract or the conclusion of the applicable collective agreement. Next to repeating the “negative” arguments of the lower courts (rupture of the equilibrium between labour and management and its negative consequences for the promotion of collective bargaining), the decision bases the theory of contractualisation or incorporation, not only on the fact that the working conditions agreed in a collective agreement are essential to the individual contract, but also on the question of the relation between the agreement and the contract as sources of law. In this, it follows the same line as the Dutch jurisprudence, without however referring to it. Basing itself on articles 3 and 9.1 of the Estatuto de losTrabajadores (respectively, list of the sources of Labour Law and substitution of the invalid provision of the contract by those provision that it violates) the Court constructed the individual working contract as the main source of regulation of the work relation, which during its validity is successively being “purified” and completed by legal norms and those of normative collective agreements. Therefore also, the contractualisation does not only operate at the expiration of the one-year period of after-effects, but from the momento the legal work relation is created, momento from which the working conditions are subjected to the corresponding evolution.

It is important to remind that the decision has been controversial, given the numerous dissenting opinions which have been formulated. Most of them refuse the idea of contractualisation because of the problema it would create for the interpretation of other legal institution related with the relation between labour law sources, likethe “more beneficial condition” (*condición más beneficiosa*). The latter institution implies that a more favourable condition resulting from an individual agreement between the worker and the employer (or, under certain circumstances, a particular conduct of the employer) are not to be considered nullified by an applicable collective agreement. Contractualisation would thus result in the “petrification” of the working condition, despite the application of a new agreement. However, it is easy to distinguish between the “more favourable condition”, the origin of which is an individual pact or conduct, and the contractualised condition with origin in the collective agreement, which is a normative, and not contractual, legal instrument. In other words, a “more favourable condition” is a contractualised condition, but nota llcontractualised conditions are “more favourable conditions”. Therefore, the contractualised condition which is not a “more favourable condition” can be replaced by the provisions of a new collective agreement with normative value. The interest of referring to that argument here is that the reasoning is similar as in the German doubt created by the prevalence of more favourable contractual provision over a collective agreement, even if in the latter case, the operation of the after-effects is founds strictly on special legal provisions, in spite of general contractual theory, as is the case here.

# Elements of definition of the regulation of the after-effects of Collective Agreements in the multilevel legal order

There are no explicit sources of International Law which mention of regulate the after-effects of collective agreement or of the legal status of the working conditions as defined in those agreements.

In Spain, the survival of the working conditions has been justified by the necessity not to break the existing balance between the parties which negotiate the new agreements which is PURPORTED to succeed to the expire done. This approach has been connected with the principle of promotion of Collective Bargaining. This principle, which implies a positive obligation on part of the State, is enshrined in the combined lecture of articles 7, 9.2, 28.1 and 37.1 of the Spanish Constitution. Those articles contain, respectively, the definition of the constitutional function of unions[[58]](#footnote-58), the obligation of the powers of the state to promote effective equality (as opposed to formal equality), the fundamental right to freedom of association (which contains the right of unions to collectively bargain) and the right to collective bargaining as such. However, the same principle also derives from article 4 of ILO Convention 98 and article 5 of ILO Convention 154.

The idea that working conditions defined in an expired collective agreement should not disappear abruptly could also be found to be contained in article 6-2 of the European Social Charter, according to which “*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: […] 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements*”

This connection between survival of the working conditions at the expiration of the collective agreement and promotion of collective bargaining is confirmed by the European Committee on Social Rights, which, at the occasion of the supervision of the compliance of Member States with article 6-2 of the Charter takes that aspect into consideration. More specifically the Committee verifies that there is no void in the regulation of working condition when a collective agreement is not renewed or between the expiration of collective agreement and the agreement on a new one.[[59]](#footnote-59)

A similar perspective can also be found in the Judgment of the European Court of Justice of 11 september 2014 (Case C-328/13, *ÖsterreichischerGewerkschaftsbund*) on the application of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The Court recognises that the Austrian law, which provides for a form of contractualisation of the working conditions at the expiration of a collective agreement, “*maintaining the effects of a collective agreement[…] is intended, in the interests of the employees, to avoid a sudden rupture of the standard framework of the agreement governing the employment relationship*”without hindering the employer (in the case at hand, the transferee of the undertaking) “*to make the adjustments and changes necessary to carry on its operations*”. Therefore, it can be said that the function of the regulation of the after-effects coincides with the goal of the Directive to maintain the rights of the workers in case of transfer of undertaking, reason for which the protection of their rights does not end with the expiration of the Collective Agreement as formal instrument. In this, the Court followed the Conclusions of the Advocate General, according to which “*where national law provides that those rights and obligations are to continue to be observed, albeit in the weaker, temporary form*[..], *in order to prevent a legal vacuum*, [..], *in line with Chapter II of Directive 2001/23, the continued observation of those rights and obligations must be interpreted as a natural extension of the rights and obligations previously acquired by the employee. The primary objective of continuing effect is that of a guarantee; it simply maintains the status quo in the interests of legal certainty*”

Another point of attachment could be found in article 151 of the TFUE The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. There, not only the idea that European social policy, as developed by the Union and the Member States, should improve working conditions. Against that backdrop, a disappearance of the working conditions defined in a collective agreement can be seen to hamper this improvement of working conditions, as a new collective agreement would be negotiated on a *tabula rasa*, instead of a certain level of conditions guaranteed by the previous agreement. But also the reference to the promotion of dialogue between management and labour echoes the obligation of promotion of collective bargaining under other international instruments, something which a total disruption of working conditions would difficult, giving a reinforced bargaining position to management.

# Conclusions

The study of the different cases has shown thatconcerning the situations of working conditions regulated in a collective agreement once the latter has expired, recourse is made to legal institutions regulating individual autonomy, combined with the regulation of the relation between sources of Labour Law.In the absence of explicit rules governing the situation after the expiration of a collective agreement, or as an aid to interpretation, contract law is used as a form of protection of the weakest part of the employment relationship. And in those cases, where the law regulates the question specifically, similar solutions are adopted. This is to be put in contrast with the fact that, in principle, the existence of Labour Law finds its roots in the necessity to intervene in those same rules governing individual autonomy.[[60]](#footnote-60)However, what might seem a contradiction is easily resolved by taking into accountthe main purpose of Labour Law, its protective function, which legitimates the use of institution that does not belong directly to its normative corpus. It also shows that Labour Law is not a system which is totally autonomous from contract law.Most continental civil codes, for example, proclaim the principle of subsidiarity of the application of civil law rules compared to other branches of law.In this sense, as a general obervation, in the context of “de-regulative” reforms of labour laws, one should not forget that the norms of contractual law play an important role in the regulation of general contract law theory, to be read within the principle of protection which constituted the genetics of the employment contract.[[61]](#footnote-61)

Also, all systems have found a balance between the protection of the worker and the necessity not to hamper the outcome of the processes developing within the sphere of collective autonomy. In continental Europe, on of the guarantees of those outcomes is the normative character of the collective agreement, which also reinforces the latter as an instrument of governance, in line with the function of Labour Law as a system permitting the integration of the conflict and the transformation of regulatory outcomes. That normativity can also be read as an expression of the prevalence of collective autonomy above individual autonomy, with nuances between the systems, which can be explained by the greater degree with which conditions more favourable for the worker are protected, or, in other words, a greater protection of individual workers, not only against the employer directly, but also indirectly through collective autonomy. As such, the different theories of incorporation orcontractualisation in application of civil law rules, or specific laws, despite the fears of those contrary to them, have never diverted the logic behind the normativity of collective agreement.

Within this context, the Spanish case is particularly interesting, not only in that the jurisprudence explicitly links and resume those different elements, but also because another important element of the debate is discussed and made patent.There, the application of individual contract law princples have also been justified as a way to guarantee a favourable development and operation of collective bargaining as a process. The courts referred explicitly to the principles of promotion of voluntary negotiations, inscribed in the Labour Law constitution[[62]](#footnote-62)and sanctioned by several International Law instruments. In other legal orders, the reasons behind the institution of after-effects seem more to be grounded in a Labour Law narrative of the protection of the worker in transition periods. It is also reflected in the observable EU approach, of course limited by the subject matter of the regulation of transfers of undertakings. However, in Spain, explicit reference is made to the necessity to maintain the balance between the parties negotiating a new collective agreement. The absence of after-effects of the collective agreement would oblige unions to negotiate from scratch, putting them in a weaker bargaining position, and, therefore, breaking the necessary balance for the process of collective bargaining to fulfill its functions.

From that perspective, it is interesting to observe that contract law principles, come to the rescue, not only of individual labour relations, but also of the dynamic of collective labour relations, and ultimately, a reinforced positions of unions in the promotion of interests of workers, but also of the stability of the process of collective bargaining, as a mode of collective action[[63]](#footnote-63), not only in its function of defense of worker interests, but of the integration of the labour conflict in favor of productivity and the organisation of work.

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**COURT DECISIONS**

***Germany***

*Bundesarbeitsgericht*, judgment of 10 December 1997, 4 AZR 290/97

*Bundesarbeitsgericht*, judgment of 28 May 1997, 4 AZR 546/95

*Bundesarbeitsgericht*, judgment of 25 October 2000 - 4 AZR 212/00,

*Bundesarbeitsgericht* judgment of 27 September 2001, 2 AZR 236/00

*Bundesarbeitsgericht*, judgment of 5 May 2009, 10 AZR 1006/08,

***The Netherlands***

*Hoge Raad der Nederlanden* judgment of 18 January 1980, NJ 1980, 348

*Hoge Raad der Nederlanden*, judgment of 19 June 1987, NJ 1988, 70

*Hoge Raad der Nederlanden*, judgmentof 2 April1993, NJ 1994, 612.

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*Hoge Raad der Nederlanden*, judgmentof 7 June 2002, NJ 2003, 175,.

*Hoge Raad der Nederlanden*, judgment of 10 January 2003 (NJ 2006/516)

*Hoge Raad der Nederlanden*, judgment of 8 April 2011 (NJ 2011/371).

*Hoge Raad der Nederlanden*, judgment of 10 January 2013, NJ 2006, 516

*Opinion of Public Prosecution* before the*HogeRaad der Nederlanden*of 1 de October 2015, note 5, [www.rechtspraak.nl](http://www.rechtspraak.nl), reference: ECLI:NL:PHR:2015:2086

***France***

*Cour de Cassation, chambre sociale*, judgment of 11 January 2005, 02-45.608

***Spain***

*Tribunal Supremo*, Judgment of 22 December 2014 (appeal 264/2014)

*Tribunal Superior de Justicia of the Basque Country*, Judgement of 19 November 2013 (case 37/2013)

*Tribunal Superior de Justicia of the Balearic Islands*, Judgement 520/2013 of 20 December 2013

*Tribunal Superior de Justicia de Catalunya*, Judgement 4316/2014 of 13 June 2014

***European Union***

*Court of Justice of the European Union*, Judgment of 11 september 2014 (Case C-328/13, *ÖsterreichischerGewerkschaftsbund*)

***International***

*European Committee of Social Rights*, Conclusions 2006 (Moldavia), art. 6-2;

*European Committee of Social Rights* Conclusions XVIII-1 (Poland), art. 6-2; (Croatia), art. 6-2;

*European Committee of Social Rights*, Conclusions 2014 (Moldavia), art. 6-2; (Portugal), art. 6-2;

1. The law only applies to collective agreements concluded between unions and employers or organisation of employers, excluding from its scope the agreements concluded between the company and Works councils, which, however, has its own system of after.effect. [↑](#footnote-ref-1)
2. The norm has a dispositive carácter, for which a collective agreement can extend its effects further than its period of validity (*Bundesarbeitsgericht*, judgment of 3 May 1986, 5 AZR 319/85) [↑](#footnote-ref-2)
3. Müller-Glöge, R., “BGB § 611 Vertragstypische Pflichten beim Dienstvertrag“, *Münchener Kommentar zum BGB*, Vol. 6, ed., C.H. Beck, Munich, 2012, 357 [↑](#footnote-ref-3)
4. § 2 *Kündigungsschutzgesetz* (Law onProtectionagainstDismissal); *Bundesarbeitsgericht,*judgmentof 27 September 2001, 2 AZR 236/00 [↑](#footnote-ref-4)
5. *§* 4.1 *Tarifvertragsgesetz,* which contains the principle of normative effects of the agreement (without the requirement of meeting formal standards other than its written character, and material standardsof contractual theory), according to which “the normative provisions of the agrement which regulate the content, concluson and extinction of working relations, shall be immediately and imperatively applicable between the parties bound by the agreement which finds themselve in its scope of application”. [↑](#footnote-ref-5)
6. *§* 3 and 4 *Tarifvertragsgesetz* [↑](#footnote-ref-6)
7. *§* 5 *Tarifvertragsgesetz*. The declaration of extention (or general application) is done when it is “required by public interest” and the agreement “has acquired a substantial importance for the development of working conditions in its scope of application” or “the declaration of extention is justified to protect the effectiveness of the development of the norms contained in the agreement against the consequences of adverse economic evolutions”. [↑](#footnote-ref-7)
8. *Bundesarbeitsgericht*, judgment of 25 October 2000 - 4 AZR 212/00, which confirms the jurisprudence base don the argument following which § 4.5 *Tarifvertragsgesetz*does not exclude expresslt the after-effects of agreements with general (ergaomnes) effects and involves that the after-effects start at the expiration of the validity of the agreement. [↑](#footnote-ref-8)
9. *Bundesarbeitsgericht*, judgment of 5 May 2009, 10 AZR 1006/08, or*Bundesarbeitsgericht*, judgment of 10 December 1997, 4 AZR 290/97, in whcih the court argues, against the dominant opinión in the literatura, that the working contract concluded once the period of after-effects has started has to be considered as the “other agreement” contemplated in *§* 4.5 and which replaces the norms of the collective agreement. [↑](#footnote-ref-9)
10. *Bundesarbeitsgericht*, judgmentof 25 October 2000 - 4 AZR 212/00 [↑](#footnote-ref-10)
11. Houben, C-A, “Nachbindung und Nachwirkung im Tarifrecht – Zu Struktur und Anwendungsbereich von §§ 3 III und 4 V TVG“, *Neue Juristische Online-Zeitschrift* 2008 2170, 2182 [↑](#footnote-ref-11)
12. Derived from*§* 4 paragraph 3 *Tarifvertragsgesetz*, according to which contractual provisions contrary to those contained in a collective agreement will only be valid when the collective agreement allows it or when they entail a modification in favor of the worker. [↑](#footnote-ref-12)
13. *Bundesarbeitsgericht*, judgment of 28 May 1997, 4 AZR 546/95 [↑](#footnote-ref-13)
14. Loi du 5 décembre 1968 sur les conventions collectives de travail et les commissions paritaires [↑](#footnote-ref-14)
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16. Horion, P., Syndicats, Conventions collectives de travail, Organes paritaires, Annuaire de a Faculté de Droit de Liège, 1969, 113 [↑](#footnote-ref-16)
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19. Art. 9 *Wet van 24 december 1927, houdendenadereregeling van de CollectieveArbeidsovereenkomst – “Wet CAO”* (Law of 24 December1927 on thespecificregulation of collectiveagreements) [↑](#footnote-ref-19)
20. art. 12 *Wet CAO* [↑](#footnote-ref-20)
21. art. 13 *Wet CAO* [↑](#footnote-ref-21)
22. Van Hoek, A.A.H, “Collective Agreements and Individual Contracts in Labour Law - the Netherlands” in Sewerynski, M. (ed.) *Collective agreements and individual contracts in labour law*, Kluwer Law international 2003, citing the case of the requirement of written form to agree upon the probationary period provided in the collective agreement, the claiming of which could not be based on the contract because of its specific characteristics, but on the collective agreement itself. [↑](#footnote-ref-22)
23. Even if it is based on the provisions of the la won collective agreement, it could be construed in the same way and with the same effects on the basis if the provisión of the Civil Code referring to the validity of provisions and the relation between sources; seeHouweling, A.R. y van der Voet, G.W., “Het leerstuknawerking van collectievearbeidsvoorwaarden op de helling”, *ArbeidsrechtelijkeAnnotaties*, nº 3, 2006, 64 [↑](#footnote-ref-23)
24. Judgments of the*HogeRaad der Nederlanden* (cassation court) of 10 January 2003 (NJ 2006/516) or of 8 April 2011 (NJ 2011/371). In the latter, the Court decreted the maintenance of the incorporated conditions even after the application of a new collective agreement, to the extent that the latter was conceptualised as containing minimal conditions, in the absence of agreement to the contrary. [↑](#footnote-ref-24)
25. Art. 14 CAO wet [↑](#footnote-ref-25)
26. *Hoge Raad der Nederlanden*, judgment of 19 June 1987, NJ 1988, 70 [↑](#footnote-ref-26)
27. Houweling, A.R. and van der Voet, G.W., “Het leerstuk nawerking van collectieve arbeidsvoorwaarden op de helling”, *Arbeidsrechtelijke Annotaties*, nº 3, 2006, 63 [↑](#footnote-ref-27)
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29. Art. 2 *Wet van 25 mei 1937, tot het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten* (“*AVV-wet*”) [↑](#footnote-ref-29)
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31. *Hoge Raad der Nederlanden*, judgment of 10 January 2013, NJ 2006, 516 andjudgment of 18 January 1980, NJ 1980, 348. [↑](#footnote-ref-31)
32. Houweling, A.R. y van der Voet, G.W., “Het leerstuk nawerking van collectieve arbeidsvoorwaarden op de helling”, *Arbeidsrechtelijke Annotaties*, nº 3, 2006, 69; Verhulp, E., “Nawerking: het volle pond graag!”, *Arbeidsrecht,* nº 10, 2002, 13 [↑](#footnote-ref-32)
33. Houweling, A.R. y van der Voet, G.W., “Het leerstuk nawerking van collectieve arbeidsvoorwaarden op de helling”, *Arbeidsrechtelijke Annotaties*, nº 3, 2006, 69; Frenkel, B.S., “De nawerking van de collectieve arbeidsovereenkomst”, *Sociaal Maandblad Arbeid*, 1979, 293 [↑](#footnote-ref-33)
34. See Opinion of Public Prosecution before the*HogeRaad der Nederlanden*of 1 de October 2015, note 5, [www.rechtspraak.nl](http://www.rechtspraak.nl), reference: ECLI:NL:PHR:2015:2086 [↑](#footnote-ref-34)
35. *Hoge Raad der Nederlanden*, judgmentof 28 January1994, NJ 1994, 420, in the case of a complement paid by the employer to the temporal invalidity Benefit for a duration of máximum 2 years, which survives if the agreement has lost its ergaomnes effects before the end of said duration; *Hoge Raad der Nederlanden*, judgmentof 7 June 2002, NJ 2003, 175, in a similar case. [↑](#footnote-ref-35)
36. *Hoge Raad der Nederlanden*, judgmentof 2 April1993, NJ 1994, 612., which discusses the right to additional salary for (voluntary) extra hours; seeVan Hoek, A.A.H, “Collective Agreements and Individual Contracts in Labour Law - the Netherlands” in Sewerynski, M. (ed.) *Collectiveagreementsandindividualcontracts in labourlaw*, Kluwer Lawinternational, 2003; Houweling, A.R.and van der Voet, G.W., “Het leerstuk nawerking van collectieve arbeidsvoorwaarden op de helling”, *Arbeidsrechtelijke Annotaties*, nº 3, 2006, 72-75 [↑](#footnote-ref-36)
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38. Pélissier, J., Auzero, G., Dockès, E., Droit du Travail, 25ª ed., Dalloz, Paris, 2010, 1271; the only rule providing for some protection after expiration is the obligation of the signatory parties to agree upon the forms and the time periods within which the agreement can be renewed or revised. [↑](#footnote-ref-38)
39. Articles L2261-10 and 2261-11 ofthe*Code du Travail*. It is important to specify that in case of denunciation (notice) only by one partof the social partners the collective agreement will remain in forcé for the parties that did not give notice, and the period of after-effects will apply to the parties which did. [↑](#footnote-ref-39)
40. Articles L2262-1 and L2262-2 *Code du Travail* [↑](#footnote-ref-40)
41. Article L2254-1 *Code du Travail* [↑](#footnote-ref-41)
42. Pélissier, J., Auzero, G., Dockès, E., Droit du Travail, 25ª ed., Dalloz, Paris, 2010, 1271 [↑](#footnote-ref-42)
43. With the gradual introduction of excpetions to the príncipe of more favorable norm for the company-level agreement and for somesectorialagreements [↑](#footnote-ref-43)
44. Article L2254-1*Code du Travail* ; it is also curious that, in application of those principles, a worker cannot be bound by obligations contained in a collective agreement which entered into force after her the start of her contract, even if jurisprudence seem to distinguish between types of obligations ; see Pélissier, J., Auzero, G., Dockès, E., Droit du Travail, 25ª ed., Dalloz, Paris, 2010, 1275 [↑](#footnote-ref-44)
45. Mazars, M.F. y Géa, F., “Contrat de travail et norme collective”, Bulletin d’information de la Cour de Cassation, nº 13, 2012 [↑](#footnote-ref-45)
46. Article L 2261-13 *Code du Travail* [↑](#footnote-ref-46)
47. In the latter case, the Court considered that the maintenance of that right was incompatible with the respect by the workers of the collective organisation of work, because it would have allowed them to work 45 minutes less tan the fixed working time; Antomattei, P.-H., *Droit Social*, nº 1, 2015, 96 [↑](#footnote-ref-47)
48. Ysàs Molinero, H., «La pérdida de vigencia de los convenios colectivos en Francia>ultra-actividad y derechos adquiridos”, in Pumar Beltrán, N., *LA flexibilidad interna y los despidos colectivos en el sistema español de relaciones laborales*, Huyghens, Barcelona, 2014, 115-118 [↑](#footnote-ref-48)
49. Cour de Cassation, chambre sociale, judgmentof 11 January 2005, 02-45.608; Radé, C., *Droit Social*, nº 6, 2013, 567 [↑](#footnote-ref-49)
50. Ysàs Molinero, H., «La pérdida de vigencia de los convenios colectivos en Francia>ultra-actividad y derechos adquiridos”, in Pumar Beltrán, N., *LA flexibilidad interna y los despidos colectivos en el sistema español de relaciones laborales*, Huyghens, Barcelona, 2014, 109 [↑](#footnote-ref-50)
51. European Commission, *Recommendation for a Council Recommendation on Portugal’s 2014 National*

*Reform Programme*, COM(2014) 423 ﬁnal. [↑](#footnote-ref-51)
52. Eurofound, *Collective bargaining in Europe in the 21st century*, Publication Office of the European Union, Luxemburg, 2015, 31 [↑](#footnote-ref-52)
53. For an exhaustive view of the 2012 reform in terms of collective labour rights, see the article of Rodriguez-Piñero, M. in this same issue. For a general analysis of the 2012 reform, its context and its relation with the multilevel context, see López, J. de le Court, A. and Canalda, S. “Breaking the Equilibrium between Flexibility and Security”, *European Labour Law Journal*, Vol 5, Issue 1, 2014, pp. 18 - 42 [↑](#footnote-ref-53)
54. The dissenting opinión of magistrate Sempere-Navarro to the Judgment of the Tribunal Supremo of 12 December 2014 cites legal circumstances like vulneration of the dignity of the workers, unjust enrichment, bad faith in the negotiations on part of the employer, all circumstance which for their indeterminated character are difficult for a worker to claim. [↑](#footnote-ref-54)
55. Mainly art. 4 of ILO Convention 98, and art. 5 of ILO Convention 154 and art. 11.1 of the European Charter of Fundamental Rights, and the obligation of promotion of voluntary negotiations they contain. [↑](#footnote-ref-55)
56. See, amongst others, Judgement of the Tribunal Superior de Justicia of the Basque Country of 19 November 2013 (case 37/2013), or Judgement of the Tribunal Superior de Justicia of the Balearic Islands 520/2013 of 20 December 2013 [↑](#footnote-ref-56)
57. See, for example, Judgement of the Tribunal Superior de Justicia de Catalunya 4316/2014 of 13 June 2014 [↑](#footnote-ref-57)
58. To promote and defende the interests of workers [↑](#footnote-ref-58)
59. European Committee of Social Rights, Conclusions 2006 (Moldavia), art. 6-2; Conclusions XVIII-1 (Poland), art. 6-2; (Croatia), art. 6-2; Conclusions 2014 (Moldavia), art. 6-2; (Portugal), art. 6-2; [↑](#footnote-ref-59)
60. The idea of Labour Law [↑](#footnote-ref-60)
61. López López, J., *La extinción del contratocomoúltima ratio: losmecanismos de protección del contrato de trabajo*, EditorialBomarzo, Albacete, 2015, 32-33, where it is argued that the rules on protection against dismissal have to be read taking into account the contract law principle of the carácter of *ultima ratio* of the termination of a contract. [↑](#footnote-ref-61)
62. Reference to Ruth Dukes, the labour constitution [↑](#footnote-ref-62)
63. Julia Lopez, Oñati Seminar [↑](#footnote-ref-63)