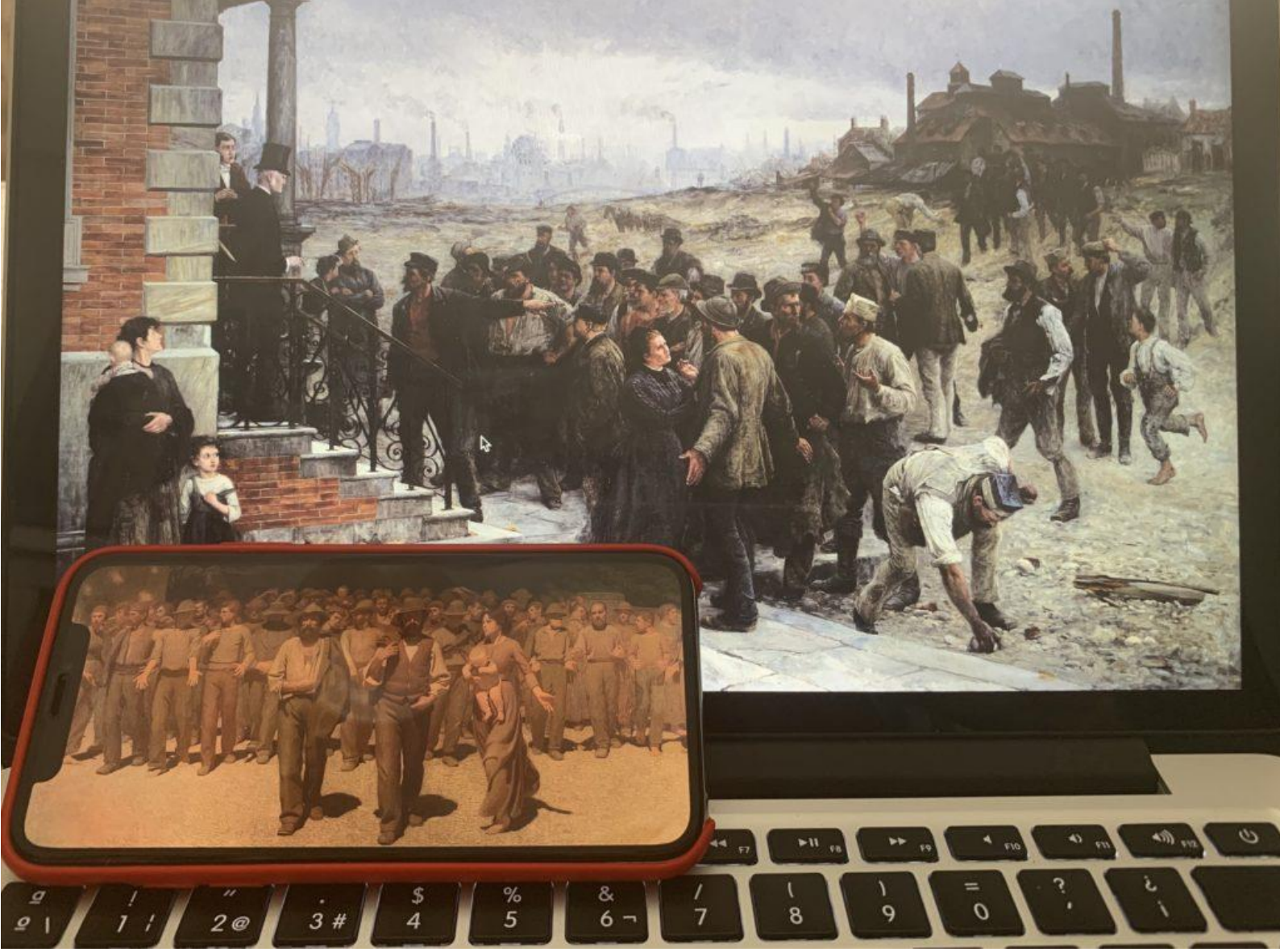

Summary of the final conclusions of the AUNAS Project: “Alternatives for effective Union Action in the new business model”

Financed by the Ministry of Science and Innovation, the State Agency of Research and the European Regional Development Fund (FEDER), (Ref.: RTI2018-093458-B-I00)

Universidad de Oviedo

GOBIERNO DE ESPAÑA
MINISTERIO DE CIENCIA E INNOVACIÓN

The starting hypothesis of the Research Project “Alternatives for effective Union Action in the new business model” (AUNAS), financed by the Ministry of Science and Innovation, the State Research Agency and the European Regional Development Fund (Ref.: RTI2018-093458-B-I00) has been that the traditional institutions of Collective Labour Law (trade unions, staff representative bodies, collective agreements, strikes) are still valid in the new scenarios described, although it is necessary to adjust their legal regime to the new socio-economic context. The object of this research was to analyse in detail the challenges that the collective institutions must face and the adjustments that we consider appropriate so that they can continue to fulfill their essential role of compensating and integrating differences. To this end, a mainly legal perspective is adopted, but enriched with contributions made from a philosophical and sociological point of view. The following lines highlight the main conclusions of the project. Those who are interested in delving deeper into our research can find further information on our website (https://www.unioviedo.es/aunas/), where reference is made to the studies published by the research team, culminating in the collective work *Acción colectiva y negociación colectiva en los nuevos escenarios laborales*, Aranzadi, 2022.

1. On the concepts of “representation” and “work” in postmodern societies

From an ius-philosophical point of view, the joint interpretation of these two concepts depends on the articulation of the three “Rs”, crucial for the construction of a decent job in favour of the dignity of those who work or intend to. These are: “Recognition” (R1), the effective material possibility of “redistribution” (R2) and the true “representation” (R3) of the interests of those who work. The concept of “recognition” (R1) is a priori logical for the understanding of the person, who in the labour context is conditioned by the pressure imposed by the need to have a concept of a universal worker, homogeneous, predefined and affiliated to patterns of “interest and collective rights”. This is a process of homogenization which accumulates problems, both due to the flexible, globalized and dynamic nature of the labour scenarios of our postmodern society, and also because it neglects that the evaluative, economic, timetable conditions, etc. act significantly on what we are, characterizing our reciprocal distinction and diversity. It is necessary, therefore, a reinterpretation which demands that narratives and discourses change substantially to incorporate the affective, emotional, ideological elements, elements of practical reality and self-conception which characterize the person and allow to recognize and discover their vulnerabilities.

Such recognition is not possible without an adequate redistribution of resources (“R2”). This is because the different keys to the vulnerability of gender, ethnicity, age, ideology, etc. are already segmented by the economic demands of class and redistribution and are linked to interpretive hermeneutics which warns us that discrimination is a poli-causal whole with a strong hereditary component on which the distributive injustice is generally the cause and consequence of a global injustice based on interests, prejudices and fallacies. Finally, faced with the social injustice of non-recognition, lack of identification, flawed valuation and inequitable distribution, the third element is fundamental: representation (“R3”). Without doubt, representation introduces us to one of the most complex areas of labour law and of those who work. It is essential to articulate and promote the “R3” of the representation, according to the guidelines imposed by the other two “Rs”: that of “recognition” and the resignification “R1” – to show the value of the narratives that incorporate the affective, emotive, ideological elements, of practical reality and the self-conception of the speaker, and that of the redistribution (R2), oriented towards a fairer redistribution of resources, which equips each person with the tools which enable them to have equal access to the enjoyment of their rights and to carry out their own life project.

It is necessary to avoid overly agglutinative processes, seeking tools of representation that, without failing to take advantage of the strength and effectiveness of collective action, renounce the objectification of people. In other words, efforts should be made to harmonize collective representation with individual and autonomous will and definition. The aim is to promote a real democratization in the management of interests, favouring the representativeness of associative models close to interest groups, that transfer an internal perspective of problems and needs.

2. On social confidence in Spanish trade unions

The project includes among its objectives the analysis of the confidence expressed by Spanish citizens towards trade union organizations throughout the period 2013-15. To that end, the data of the scale of confidence in the main institutions of the State have been used, found in the survey of the Centre of Sociological Research (CIS), in which trade unions have been included, although irregularly. The determinants of the confidence of Spanish citizens in trade unions through a set of socio-demographic, socio-economic and ideological self-positioning variables of the individuals of the CIS survey. The main hypothesis is that, beyond the general low level of confidence expressed towards the unions, there are specific variables related to socio-economic status, the employment situation, type of job and ideological self-positioning of the individuals, which

explain the concentration of negative assessments in certain profiles of those interviewed.

The trade unions face a post-industrial context that weakens their more traditional power resources. In these circumstances, the opening up towards civil society is presented as a means to try to compensate the structural, organizational and institutional weakening. In recent years, Spanish trade unions have explored this opening up towards the community, trying to establish alliances with other interest groups and collectives of civil society, in many cases still emerging and weakly organized. At the same time, they have also increased their agenda, incorporating elements which are not strictly economic or related to work, such as environmental, gender and immigration issues or the defence of the interests of minorities, among others.

The shift of Spanish trade unions towards civil society faces many difficulties. One of the main problems is the extremely low confidence they instil among the citizens. The data of the CIS surveys which ask about confidence in trade unions show that a significantly high percentage of individuals state they have none. The individuals who claim to have no confidence in trade unions, or who express a very low degree of confidence, include organized work among the institutions responsible for creating (or failing to resolve) a situation of economic, labour or social unrest. The reasoning is as follows: if trade unions are a part of the institutional framework that makes public decisions, it will be almost impossible for them to represent the interests of those who feel aggrieved by those same decisions. If this is the case, the trade unions also see at risk one of the main functions that they have carried out within industrialized society: the organization and management of unrest.

The problems of confidence that affect Spanish trade unions reduce the possibility that opening up to civil society may become a strategic option to counterbalance the weakening of the remaining union power resources. Community trade unionism or opening up to society constitutes a model of revitalization for organized labour on which an important part of the literature on the future of class unionism within post-industrial societies in recent years has insisted, above all in Anglo-Saxon countries.

3. On the trade union freedom and the representation and participation of workers in companies

Unlike what happens in other aspects of Collective Labour Law in Spain, the current regulation of the right to freedom of association to a union is in a very suitable position to face the challenges posed by the new labour scenarios.

Regarding the emergence of alternative forms of service provision, the informal concept of employee adopted by the Trade Union Freedom Act, reinforced by the jurisprudence of courts, makes it possible to argue that, irrespective of the legal status that the prevision of services deserves, if it is found that there is a situation of subordination materially similar to that of employees, then there exists the right to exercise the freedom of union association to redress said situation. It thus becomes a fundamental universal right, which extends its scope far beyond the formal boundaries of the Labour Law.

On the other hand, with regard to the emergence of new forms of business organization, the legal configuration of union representation in companies, combined again with the flexible interpretation of the courts, gives unions enormous potential to exercise the representation and participation of workers in the new business realities. The fragmentation and even the disappearance of the workplace, which makes it so difficult to deploy elected workers representatives, affect trade unions to a far lesser degree and they can therefore reach areas that the former cannot.

Therefore, the centre of attention of a reform of the Spanish model to adapt it to the new scenarios must involve a reformulation of the model of elected representation, far more rigid in its legal and jurisprudential configuration than that of the unions. In this sense, getting past the workplace as an electoral unit of reference for the constitution of Workers' Delegates and Works Councils is considered a priority. In this respect, the reform of the Title II of the Workers' Statute Act (ET) is advocated in order to establish a certain degree of freedom in the choice of the ideal area of the constitution of representation of staff, the company rather than the workplace being the unit of general reference. That, combined with the possibility that, if the business organization in certain sectors so advises, the workplace can be chosen by internal agreement or internal operating regulations of the works council.

It is not considered necessary to modify the numerical thresholds for the creation of staff delegates and committees, providing that the company is adopted as reference unit, although it would be reasonable that the law allowed the improvement of these thresholds through collective bargaining, enabling the social partners to make an adjustment in certain sectors which are especially sensitive to this problem. It is also considered obsolete and not very adjusted to the reality of Spain's productive fabric, the requirement of a majority agreement in companies of between 6 and 10 workers to choose a staff delegate, for which reason its elimination from art. 62 ET is considered.

On the other hand, the law should contemplate the possibility of constituting a representative body within the scope of the group of companies, to

process the channels of representation and participation that are not currently contemplated for national, not European, groups. Other proposals are the grouping of work centres by provinces or other territorial demarcations or even the possibility of configuring representative structures of a transversal or consortium nature, for example aggregating companies or work centres located in business parks or industrial estates. With regard to digitalized companies, where often there is no physical workplace to which assign a staff of more or less stable workers and, therefore, collective action and the defence of their interests, it is proposed again to apply the general rule of the company as unit of reference, which would counteract the possible dispersion of the workforce in order to articulate the corresponding representation.

These reforms are important for two reasons. Firstly, they would help the representation and participation of staff become effective in all companies, irrespective of their size or configuration, helping to expand industrial democracy, and contributing to prevent that companies become islands of autocratic power in a society increasingly demanding of democratic values. Secondly, as union and elected representation are strongly united, the rigidities of the latter are partly contagious for the former, which reduces the potential for adaptation which, as we have seen, the freedom of association and its regulation present.

The first of these contagions is produced by the formula used to measure the representation of trade union organizations in Spain: the electoral echo in elections of work councils and delegates. If the elected representation reaches fewer and fewer companies and workers, the reliability of this criterion suffers. In fact, many people have advocated a change in the measurement system or, at least, combine it with complementary criteria, such as implementation or union membership. However, this option raises serious doubts. Firstly, it requires the development of official and reliable channels of verification of membership, which pose practical challenges compatible with the Constitution which are far from negligible. Secondly, proposing a change in the calculation of representativeness does not just entail a simple adjustment of the model, but rather an entire amendment. It would require a terrific legislative, political and social effort, without any guarantee that the result would work any better than the current system, nor that it would achieve the recognition and acceptance that it now has among the social actors. Not even a mixed model would be easy to implement, as shown by some failed attempts in the past in this country. The proposed redefinition of electoral units is likely to be much more operational, and it would also have positive effects on other points of connection between elected and union representation, such as the requirement to be on the works council in order to appoint a union delegate.

We do not believe, however, that it is a problem that our system does not make a distribution of competences between both representations. The current duplicity, in a context where there are clear difficulties for the representation of staff to reach all organizations, favours that where it is possible to constitute one of the representations, this can exercise all the necessary competences. In addition, it has worked as a safety valve, allowing one representation to act when faced with the inactivity or passivity of the other. We do believe necessary a reduction of the legal threshold for the appointment of union delegates. The current 250 workers automatically excludes from this representation, not only small companies, but also a good deal of medium-sized companies. A reduction to 50 workers, in line with what has been carried out with equality plans, would be a reasonable update.

Ad hoc commissions, even in the trade union version that has been tried in some recent reforms, cannot be considered as a viable alternative to the under-representation of many organizations. They are only an emergency mechanism for decision-making in times of crisis, the functionality of which should be reduced to a minimum with a reasonable reorganization of the scope of action of the stable elected representation.

4. On the powers of staff representation in relation to the application of artificial intelligence and remote working

Among the new labour scenarios to which the Labour Law can be adapted is also the automated and algorithmic management of human resources, in which machines adopt autonomously or semi-autonomously decisions with consequences both in the selection and hiring of staff and in the development of the provision of services and even in the termination of the employment contract. The algorithm is not neutral, but rather may contain biases depending on the data it feeds on and the programming that determines its learning, for which reason it must be subject to controls that prevent the erosion of workers' fundamental rights.

The use of AI applications in situations that have an impact on workers' rights represents a high risk. Creating an ecosystem of trust requires collective governance, involving the different actors, including greater union regulation and control, ensuring transparency in the design of the algorithms, the data which they feed on and how they function. This means that it is necessary to complete the provisions on the new competence of the legal representation of workers (art. 64.4.d Workers' Statute), considering that the *Practical guide and tool on the business obligation to inform on the use of algorithms in the work environment,* instigated by the Ministry of Work and Social Economy, is a good base for future

legislative projects. There is also a need for decisive intervention of social dialogue and collective negotiation, which would be good if it resulted in an interconfederal agreement with commitment on minimums.

Algorithmic judgements must be generated and corrected according to ethical and legal criteria, for which it is essential quality human intervention both at the beginning (in the design of the program) and at the end of the process (in the application of the act by management), so that decisions are adopted in accordance with the rights to the protection of personal data, privacy and the non-discrimination of those concerned. Strict compliance with the principle of minimization of data collected, as well as its quality and consideration of diversity, will be of the utmost importance.

It should be borne in mind that in any company the staff representative bodies should be consulted -not just informed- about the introduction of algorithms, to the extent that they involve relevant changes regarding the organization of work in the company (art. 64.5 ET), also including semi-automated decisions with human intervention.

In the management of staff by means of algorithms, it would be convenient to have someone whose mission is to guide, detect and correct irregular situations, preferably through dialogue and, failing that, through the action of the Labour Inspectorate. This would be similar to the way in which some autonomous communities have territorial delegates for the prevention of risks at work and equality agents, created by means of an interprofessional agreement. This would counteract the fact that in some companies there are dynamics that are not very favourable to the fulfilment of the divulgence of information established in article 64 ET.

Similarly, remote working can be an obstacle to staff collective action due to the relocation it implies with respect to the workplace as a meeting place to organize said action. The Law 10/2021 aimed to guarantee the staff who develop the exercise of collective rights, facilitating the flow of information and the communication between representatives and those they represent, so that their demands reach those whose job it is to channel them and raise them with management bodies. Article 19 of said Law establishes a general duty of the company, which “must provide the legal representatives of workers with the necessary elements for the development of their representative activity”. “Among them” expressly refers to access to communications and email addresses used in the company and the implementation of a virtual noticeboard, which constitute specific duties. If those expressly mentioned by the law are not sufficient to ensure the normal development of the representative activity in the specific productive context and location, then others must be provided. Although it would

be up to the staff representatives to prove such insufficiency, if this were proved then it would not be necessary to demand additional elements which were expressly contemplated in the collective agreement.

"Supplying" elements of communication involves providing those which are necessary, and creating them where there were none previously. Therefore, the jurisprudential line should be reviewed in which the right of the union sections to have their own corporative email account is denied, depending on whether or not it could be considered an excessive obligation for the company. When people are employed working remotely, the company must facilitate communication with both elected and union representation, despite incurring additional costs or expenses, either through corporative accounts or communication spaces on the intranet.

As "the effective participation should be guaranteed of those who work remotely in the activities organized or convened by the legal representation or the rest of the workers in defence of their labour interests", if ICTs are used in the company for other purposes, it is proportionate to request that the company provide what is necessary so that the face-to-face meetings of one part of the workforce can be retransmitted synchronously to those who work remotely. This will allow them to also participate actively, if it were not possible through an audio system, then by means of a chat, in which they can for formulate their questions, requests or observations to the works council or staff delegates who jointly preside the assembly (art. 77.1 ET). This guarantee of participation should also extend to the organization of work time, which should be adapted to facilitate travel from the workplace, when it is normally developed remotely, in order to make participation at the workplace easier. Collective negotiation is the most appropriate source to specify the terms of this adequacy.

The dispersion of the workforce is a barrier for the contact between representatives and those they represent, the former requiring more human and material resources than if the workforce were concentrated. Hence, assuring democracy in the company requires providing the means to facilitate it by the different private and public agents. The owners of the companies should assume the costs which arise from the legal duty to provide the means for the development of the representative activity with regard to those who work remotely. The unions should adopt strategies for penetration within this more complicated group of workers, equipping themselves with tools (websites, blogs, social networks) which allow common interconnection with them, looking for and providing spaces for meetings outside the company, even from the union headquarters. Finally, this growing working reality should be taken into account when programming public aid calls to collaborate in this assumption of costs on both sides.

5. On collective bargaining in the new working scenarios

Another of the objectives of this research project is to examine the evolution of the rules on collective bargaining, the articulation of results and the difficulties to introduce them into some of the new business models or put into practice the new legal provisions. At this point, it was necessary to examine the contents of the recent reform of the Title III ET carried out by the Royal Decree-law 32/2021, of December 28. In this respect, it is worth noting that the old saying of the necessary modernization of collective bargaining in Spain, together with the purpose of reverting the most damaging elements for the model of the reforms of 2011 and 2012 and reestablishing some key pieces of the system, are at the base of the contents of this law on the subject. Specifically, two questions have been most directly affected, the first regarding decentralization of the structure of collective negotiation by means of the rule on the priority of application of the company agreement over the sectoral; and the second in relation to the pernicious consequences –in the absence of agreement to the contrary— of having ended the ultra-activity of the denounced agreement, that even after its false closure on account of the Supreme Court sentence of December 22, 2014 (Rec.264/14) did not cease to cause problems and doubts regarding countless related or collateral questions. To this must be added, however, a strengthening of the role of the sectoral agreement, above all in recruitment modalities and stabilization of employment measures, with a reflective effect in the rule itself on the capacity of adaptation at company level to some aspects of fixed-term contracts and discontinuous fixed contracts; and, naturally, the novel provision contained in art.42.6 ET on the collective agreement applicable to subcontractors workers.

Despite the undoubted repercussions of the apparently limited reach of the modifications operated in Title III ET, some other issues still need to be addressed, among which stands out the rethinking of the much questioned and criticised model of “ad hoc” commissions for the negotiation of employment adjustment measures of a collective nature, including implication of collective agreement (article 41.4 ET, extensive to the cases of articles 40, 47, 51 and 82.3 ET); and that, curiously, was corrected in the regulations on the negotiation of the plans of equality whose development is contained in the Royal Decree 901/2020, of 13 October, which regulates plans of equality and their registration and modifies the Royal Decree 713/2010, of 28 May, on the registration and deposit of pacts and collective work agreements.

Looking forward, with a view to the new Workers’ Statute which has been talked about for so long, there are other important points to be improved or redefined; among them, one of the most urgent consists in a true renovation and opening of the criteria to delimit the functional areas of sectoral agreements,

among other things, to help solve more efficiently the problem of the agreement applicable to auxiliary and service companies. Also in need of improvement is the disappointing and complex solution the previously mentioned article 42.6 ET has given to subcontractors workers and, of course, the regulation of collective agreement inaplication, although this, to a certain extent has a bearing on what has been mentioned concerning the negotiation model of the adjustment measures of article 41 ET.

The collective bargaining vacuum which can also be seen in these new work scenarios, where collective labour relations are very underdeveloped and there are great difficulties to find subjects with sufficient legitimacy to develop negotiation, should, in our opinion, be filled by means of a sectoral collective agreement. However, this sectoral agreement should be agreed by trade unions and business associations directly involved with the new business realities. This requires, on the one hand, a change in the approach to unions and collective action by new companies and workers. On the other hand, it is necessary to clearly define the legal and labour nature of the provision of services undertaken in some of these areas. The latest legislative and negotiation experiences in Europe could point to a timid but promising change of scenario in this field.

The other alternative, the negotiation of collective business agreements, involves articulating an adequate representation of staff, which brings us back to considerations already made on the problems of deploying elected representatives in the new business realities. Union representation is an option that cannot be ruled out. However, the negotiation of a collective company agreement is one of the points in which our legislation links both channels of representation and, consequently, there is a certain transfer of the rigidity of one to the other. The negotiation of company agreements could be attributed normatively to the most representative unions, where the articulation of the elected representation is not possible. However, such a solution presents significant dangers, as it does not solve the endemic problems of excessive institutionalization and distancing of the bases of our trade union model.

The collective negotiation of intercompany structures deserves special attention. The transition from the traditional relationship between the workers and the company to others in which bilaterality is overcome, provokes the creation of a series of scenarios in which, on occasions, the internal interests of the parties do not coincide for purposes of negotiation. This fact implies that, from the initial phase of conventional creation itself, there are divergences. The duality of the link of the worker with the contracting company and/or with the actual network produces a multiplicity of situations that cause difficulties to determine the set of rights and obligations to be assumed by the participants.

Likewise, and together with the plurality of parties that make up the agreement, the determination of the subjects of agreement also has aspects which are not always concurrent because the objective of the negotiation is different. Here we can differentiate between agreements which seek inter-company coordination or those which pursue a homogenization of workers' conditions, producing, in the latter, a more intense alteration derived from the creation of a new regulatory framework.

Regarding the procedural aspects for the creation of an organizing agreement in this area, the legislative option which seeks cross-legitimation -which clarified the formula to be able to carry out this type of instruments and, in a way legally enabled its constitution-, presents some grey areas, especially with regard to workers' representation, as the unions with greater representativeness will be those authorized to negotiate, unitary representation may be excluded from said process. Also, from our perspective, an alteration of the electoral unit for this assumption would have been more appropriate, given its multicellular nature.

On the other hand, the concurrence of collective agreements in this environment presents a greater degree of difficulty in specifying which agreement is applicable due to the lack of concise labour regulation which decidedly addresses collective reticular relationships. The absence of an express declaration of the application priority of inter-company agreement over that of the company causes in some cases great difficulties to provide this area an identity of network necessary for its formation. Together with this, the inexistence of intersectoral agreements which agglutinate these interrelated areas to which to turn to, diminishes the protection and projection of these areas which are increasingly present in the production panorama. At this point, the reorganization of union and company structures in the face of these new groupings would appear to be more and more necessary, together with the essential legislative action from which the legal reality can be adapted to that manifested in business practice.

6. On the need for inclusive collective bargaining

All the members of the research team are deeply committed to a fairer society which promotes social inclusion and decent employment for all, with equal treatment and opportunities. We are convinced that the collective governance of labour relations, within the framework of international, European and state provisions on this principle, can play a very important role in achieving the society that we want. For this reason, a balance has been made of the negotiation experiences regarding the principle of non-discrimination, as well as their effectiveness in removing the obstacles which hinder equality and facilitate

solutions that guarantee the inclusion of those people in vulnerable situations or potentially vulnerable groups. As a premise, diversity in business organization and, above all, the way in which collective negotiation is managed, should be rethought. The management of diversity is seen as a corporate commitment, for which reason conventional sectoral or company level regulation should be integrated into company social responsibility.

The profile of the working class has changed. The union and representation model must be modernized and collective negotiation reactivated in order to achieve better working conditions. They should be improved with an inclusive approach that guarantees equal treatment and opportunities and eradicates discrimination due to sex, age, religion, sexual orientation and identity, disability, origin or ethnicity, etc. It has been assessed how collective negotiation can (or should) be the ideal channel to regulate an integral strategy in companies that host a workforce of different profiles.

Mention should be made of the commitment of trade unions to include as a road map the elaboration of strategies of action which aim to eradicate inequality, discrimination and exclusion. They do not want to leave aside the rights of any worker regardless of their origin or condition or their family or personal circumstances, advocating the irreplaceable role of collective agreements. Business organizations, whether through collective autonomy or CSR, also aim to achieve the adaptation and integration of any person into the labour market.

With regard to the opportunity or benefits of collective negotiation in terms of diversity and the usefulness of the agreements in the interests of inclusion, it can be observed, firstly, –albeit with exceptions– there is not sufficient adaptation to the socio-cultural changes of the job market and, secondly, there is an excess of what could be called declarative or proclamative regulation. This is often on top of *friendly* measures which fit in the CSR but do not always guarantee an effective commitment of the company in terms human resources and socio-labour rights.

Finally, it is necessary to draw the social agents' attention to the need to clearly define or specify conceptually what should be included as diversity (inclusion) in the collective agreement, beyond a mere declaration of intentions and principles or sustainability objectives by means of CSR. That is because there is an excess of equality between diversity policies and inclusion strategies in terms of gender equality in the Equality Plans, and the most original conventional formulas on functional diversity, religion, due to age, culture or sexual orientation and identity are neglected.

There is no doubt that diversity and inclusion are a challenge for the XXI century, for society in general and for collective negotiation in particular. Despite the fact that there is still scarce conventional information on the regulation of inclusion of diversity policies in all its representations, we believe that it is noteworthy the existence of clauses on diversity that–in the field of collective autonomy in the strict sense or, at least, thanks to CSR policies– include measures of inclusion of different social groups and collectives. Although it is still early days to talk about an "achievement" of collective negotiation in quantative terms, optimism is justified regarding the leading role played by the collective subjects that materialize the negotiation in relation to the diversity in all its manifestations or types.

7. On the right to strike and its regulation

The Spanish legislator should finally repeal Decree Law 17/1977 and substitute it for a modern law, in accordance with constitutional principles and values. This should regulate the basic aspects of the right to strike, carrying on from ideas that were linked to the bill that was discussed in Parliament and the passing of which was frustrated by a change of legislature. Its main points should be: 1) The reduced consideration of the rights and liberties protected by the Constitution that act as external limits of the right to strike; 2) The list of sectors and activities in which the maintenance of "the indispensable services" must be ensured; and 3) the empowerment and recognition of the role of collective autonomy. This would mean changing from the current "governmental-judicial system" to a legal-conventional model, which is more consequent with the relevant role of workers' trade unions and business associations recognized in the Constitution.

As achieving a complete Organic Law on strikes would seem a very ambitious objective to reach consensus and the necessary quorum, it would be convenient to limit the new heteronomous regulation to the issue that the judicial practice-and the control system of the ILO- has identified as the most problematic: guarantees to maintain essential services for the community. It is important to shed light on this concept, although leaving it necessarily open so that it can evolve to the same extent as the social community, restricting the minimum services to operations that are strictly necessary so as not to jeopardize health, life or the safety of the public.

The constitutional principle of the least restriction as possible of the right to strike requires dissecting each sector organizationally when a strike is called. The essentiality does not depend on whether the company providing the service is public or private, nor will all activities of the service have the same

consideration. Certain decisions adopted based on organizational freedom could have an impact, because if the service were so essential for the community, would the Government choose to decentralize it? It will always be more acceptable to establish more “generous” minimum services when the actual staff have been retained to carry them out.

The provision contained in article 10 DLRT is insufficient and should be replaced by another that promotes autocomposition, not heterocomposition, to determine minimum services. In practice it should not be the governing authority that delimits the concept of essential services, when both the internal control system of the ILO and the analysis of an ample sample of Supreme Court rulings indicate that on too many occasions there are abuses in the exercise of public power. Both the Committee of Union Association and the Commission of Experts in the Application of Agreements and Recommendations consider that “all the interested parties should participate in determining the minimum services to be applied in the event of a strike, for which reason the governing authority should consult workers’ and company organizations before deciding on them”. The proportionality in decisions and sufficient motivation are key requirements, linked to the specific circumstances of the strike in question and the need to specify why a certain percentage or number of workers are designated as minimum services.

As far as the judicial control of acts contrary to the strike is concerned, it would be better if the social jurisdiction were the only competent body both for those contesting the resolutions of the governing authority deciding on the minimum services (now reviewed by administrative courts) and those relating to the execution of said resolutions.

A law as important as the organic law on strikes should be born with the assent of those to whom it is addressed. In this case it is possible that recourse to social dialogue between the social agents and government is not enough. The damage to third parties that characterizes this type of industrial conflict would surely be less if the content of the regulation were also accepted by the “community” to which article 28.2 of Spanish Constitution seeks to provide with guarantees. The action of the Economic and Social Council of the State would be particularly important, as apart from the trade unions and employers, consumers and users are also represented. This fact should be taken advantage of and strengthened to work towards consensus in order to pass such regulation.