



Which securities for workers in time of crisis?

Sylvaine Laulom* and Piera Loi**

* Université Jean Monnet, Saint-Etienne, CERCRID (UMR CNRS 5137)

** Università degli Studi di Cagliari

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Sylvaine Laulom, Université Jean Monnet, Saint-Etienne, CERCRID (UMR CNRS 5137)

Sylvaine.Laulom@univ-st-etienne.fr

Piera Loi, Università degli Studi di Cagliari

loip@unica.it

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Presentation of the project

The aim of this paper is to present the first results of a comparative labour law research project that has been granted by the European Commission and which is still going on. The research addresses the reactions of national labour legislations facing the ongoing economic crisis. It aims at fostering an international comparison on the topic: **‘Which securities for workers in time of crisis?’**.

Taking the flexisecurity challenge put forward by the European Commission seriously, our international research panel is currently exploring the security-side of the notion within a range of European countries. What could be new securities and protections for workers in an Europe in crisis?

The background of this research project is worth recalling in a few words. The same research team has been previously involved in a research project, ‘What Social law in a Europe in crisis?’, granted by the European Commission as well (2011-2012). Labour and social protection laws currently face important constraints, while the economic crisis that hit European Union since 2008 led to a marginalization of the European social policy. The scope of our previous research was intentionally very broad as it intended to compare the national evolutions of labour law and social protection laws since the economic crisis arose (for a broader depiction of the conclusions of this research, see M.C. Escande Varniol, S. Laulom, E. Mazuyer, *Quel droit social dans une Europe en crise?* Larcier, 2012, also see ‘How has the crisis affected social legislation in Europe?’, ETUI, policy brief, 2/2012). The comparison enabled us to trace back some shared evolutions among the countries and it has demonstrated the need to continue the collective thinking on the content that could be given to social protection (broadly conceived) in times of crisis: what should social protection actually mean in times of crisis?

The research project ‘Which securities for workers in time of crisis?’ involves 11 European countries, namely Germany, Belgium, Spain, Greece, Hungary, France, Italy, Poland, United Kingdom, Romania and Sweden (Achim Seifert, University Friedrich Schiller, Iéna, *Pascale Vielle et Elise Dermine*, UCL, Louvain, José Maria Miranda Boto, University of Santiago de Compostela and Yolanda Maneiro Vazquez, University Santiago de Compostela, *Alain Bouilloux*, Université Lyon 2, *Marie-Cécile Escande Varniol*, Université Lyon 2, *Sylvaine Laulom*, Université de Saint-Etienne, Olivier Leclerc, CERCRID et *Emmanuelle Mazuyer*, ERDS-CERCRID, *Lefteris Kretsos*, University of Greenwich, *Tamás Gyulavári*, Pázmány Péter Catholic University, Budapest, *Piera Loi*, University of Cagliari, *Joanna Unterschuetz*, Business and Administration School, Gdynia, Felicia Rosiuru, University Babes-Bolyai, Cluj-Napoca, *Jeremias Prassl*, Université d’Oxford, Jenny Julen Voltinius, University of Lund).

The project, ‘What Social law in a Europe in crisis?’ showed that labor and social protection laws currently face important constraints while the economic crisis that hit European Union since 2008, lead to a marginalization of the European social policy. The notion of flexicurity is still presented as a major aspect of the European and national Employment policies. However, the project ‘What labour law in a Europe in crisis ?’¹ showed an explosion of the insecurities of workers (especially employment insecurity and income insecurity) which goes with an increase of the flexibilities which can be imposed on workers. The economic crisis has weakened the traditional social protections. The Greek, Spanish and Italian examples showed that the national labour laws are under attack. For example, the decentralization of collective bargaining or the fact that employment legislations are questioned showed that national labour laws are undermined under various ways.

Two main issues emerged from our comparative research that will need more analysis.

1. Which securities for which workers? What kind of protection might be granted to new types of workers, falling into the so-called 'grey zone' of labour contract (self-employed, economically dependent workers, free-lance workers, etc)?
2. What role for fundamental social rights in defining new securities for workers? Could they place a barrier against some of the reforms currently planned or enacted in some countries? Our previous research called for paying a greater attention to the legitimacy of some of the measures adopted since 2008 and to confront them with fundamental rights.

2. First results: which securities for workers?

Traditionally, labour law scholars used to distinguish between civil servants and workers/employees, employees and independent workers, fixed term workers and workers with an indefinite duration contract. Of course, the borders between these categories have never been easy to define and, for example, the development of false independent workers or economically dependent workers led in some countries like Italy to the recognition of a new category of workers, “the semi-subordinate workers”. For the European Commission, labour markets, in several EU Member States, have been characterised by increasing dualism or segmentation. These terms refer, essentially, to the coexistence of workers with stable, long-

¹ Appel à propositions VP/2010/001/0042, Quel droit social dans une Europe en crise ?, Larcier Juin 2012, ETUI Policy Brief, n°2012, « How has the crisis affected social legislation in Europe ? ».

term employment relationships and other workers with temporary employment contracts. However, what we want to stress in this project is that somehow the difference between the “insiders” and the “outsiders” is fading as the difference between the categories of workers is not so clear. It could be helpful to rethink the category of precarious work, as a job can be precarious whatever its statute could be. For example, long term contract workers can even be more precarious than a fixed-term contract during the first or second year of the new “trial periods”. It could also be precarious if the open-ended contract is concluded in a small company which is the main subcontractor of a big company. Decreasing the protection of the “insiders” does not improve the situation of the outsiders. Of course, the situation among the Member States is not the same: in some countries particularly hit by the crisis, no more attempt is really made to introduce new securities. In some others, new securities have been defined, but usually in a very limited way.

- ▶ Concerning fixed-term contracts, the economic crisis in most EU countries has affected fixed term workers who lost their jobs.
- ▶ Workers hired with a fixed term contract are a category of workers particularly exposed to the risks produced by the functioning of the labour market, since their contracts are, by definition, mainly constructed in each legal system to respond to precise needs of the enterprises, in order to enhance their (numerical) flexibility so to adapt the volume of the labour force to the market fluctuations. Many Member States have tried to balance flexibility and security for fixed term contracts and tried to prevent abuses arising from the use of successive fixed-term employment contracts or relationships as defined in the Clause 5 of the European Agreement on Fixed-term contracts. At the same time in many Member States it's possible to sign fixed term contracts without any objective reason between an employer and an employee who is hired for the first time, in order to perform any kind of task, following the CJ of the Eu case law. This is a clear sign of abandoning the previous standard of protection and of control
- ▶ All these provisions have been presented as aimed at reducing the bad forms of flexibility and to follow the path of flexicurity, but far from reducing the precariousness linked especially to the abuse arising from the use of successive fixed-term employment contracts, as specified in the clause 5) of the framework agreement on fixed-term work (Directive 99/70/EC), produces the effect of shifting the risks linked to the abuse arising from the use of successive fixed term contracts, from one worker to the another, from one group of workers to another group.
- ▶ Concerning, open-ended contract, there is a clear tendency among the countries, whatever are the political orientations of the national governments, to flexibilize the end of the contract. Justification of the reforms are the same: employment! Among the various measures adopted we can find : extension of the trial period; reduction/ changes in the sanction for unfair dismissal, new and less restrictive definition of economic dismissals, shorter information and consultation procedure, limitation of the role of judges. The consequences are: an extension of the scope of managerial prerogatives (and this evolution has to be linked with the new possibilities given to employers to change working conditions especially regarding working time and pay), extension of workers excluded from the protection of dismissals law, with the sanctions of unfair dismissal being weakened, the regulatory power of the law is undermined. There is a confusion between the cost of dismissals and the cost of unfair dismissals. What does the right not to be unfairly dismissed mean, if the cost for the employer not to respect the legal conditions is reduced? The right to dismiss prevails

against the right for the worker not to be unfairly dismissed. If a distinction could be made between countries where dismissal protection aims at preserving workers' jobs while dismissal protection in other countries offers compensation. There job's protection is becoming weaker, but the compensation is also weaker.

From this point of view a relevant question could be to evaluate, in each Member State, the limits imposed by some legislations to judicial review on economic, technical or organizational reasons, in the area of economic dismissals, since the regulatory power of the law could also be undermined if the access to judges is limited.

- ▶ The situation of civil servants is also changing and in many countries some new flexibilities are introduced and a sort of privatisation of civil servants' statute can be seen. For example, economic dismissal is sometime possible; agency workers can work for public administration, etc. The situation of these workers could also be precarious.

Flexicurity and social risks

- ▶ The European debate around the flexicurity principle has arrived to a turning point and in particular the debate should be redressed to the couple risk-security, rethinking the functions of labour law and fundamental rights as mechanisms to protect workers against the risks produced by the functioning of the market.
- ▶ The economic crisis has shown that the social risks produced by the functioning of the labour market, and indirectly by the functioning of the financial markets, affect different categories of subjects. Traditionally labour law has been built around the protection of a unique category of worker from social risks: the risk of unemployment, the risk of losing the professional skills, the risk of salary reduction and so on. Identifying new social risks and measuring the risks which affect the different categories of workers is a fundamental step in order to avoid new forms of inequalities. A fundamental question should be asked: who should bear the risk of the crisis: employers, workers, the State, and which combination could be defined?
- ▶ The question how and who should be protected against the risks it's a crucial question that could not be leaved to the individuals as it has happened in the UK where a new employment status of employee shareholders has been recognised by a recently approved Statute. Employee shareholders accepting the offer of shares for a minimum value £2000 with Tax-exemptions, loose their 'ordinary' unfair dismissal protection and redundancy pay and some other incidental rights.

In this new framework a series of questions arise:

- ▶ What could be the role of fundamental social rights?
- ▶ What could be the role of judges?
- ▶ What could be the role of collective bargaining?
- ▶ What could be the role of European Union?

