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Change in the Constitutional Framework of the European Union with regard to regulating foreign direct investment[1]

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Abstract

Since the Lisbon Treaty entered into force, the European Union (EU) has assumed powers over foreign direct investment. This article describes the system for allocating powers in this area between the Union and member states. It also comments on the powers still retained by the member states (which they exercise through bilateral investment treaties) and outlines the instruments that could make the EU's investment policy compatible with that of member states. It focuses in particular on developments in the EU's policy based on new global investment agreements that are about to be ratified or are still in the negotiation stage (such as the agreements with Canada, Singapore and the United States) and explores the consequences of establishing a state/investor dispute resolution system, which is envisaged by these agreements, and its compatibility with the principle of EU legal autonomy.

Key words: foreign direct investment, constitutional law, European Union law, bilateral investment treaties, European Union investment agreements, state/investor dispute resolution system.

1. Introduction

The process of European integration in relation to investment law is sparking controversial consequences in the sphere of the organisation of public power and the system of sources which is beginning to reveal the interest in constitutionalist and administrativist doctrine (Schill, 2010; Schneideman, 2000, 2008 & 2013; Terhechte, 2013).

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As we shall see, the main topic of discussion is currently the establishment of an international investor/state arbitration mechanism within the framework of the global trade agreements between the European Union and a third state (a debate which is specifically coming to the fore in the negotiations on what is call the Transatlantic Trade and Investment Partnership, or TTIP, between the United States and the EU). However, several thorny issues on the relationship between public law and investment law are beginning to arise beyond the reforms in competences introduced by the Lisbon Treaty and during the course of the investment policy implemented by the EU institutions in recent years.

The main change brought about when the Lisbon Treaty entered into force consisted of foreign direct investment matters being exclusively transferred to the European Union as part of the common trade policy (articles 206 and 207 in relation to article 3.1.e of the Treaty on the Functioning of the European Union, henceforth TFEU). That is, with the intention of consolidating a global investment pole, the member states seemed to give up an essential instrument in the economic policy of capital imports and exports.

Before the reforms introduced by the TFEU, international investment relations were primarily channelled via the states; therefore, the states had developed a constellation of bilateral investment treaties (BITs) with third states subjected to international public law that regulated the foreign investment system by establishing preferential treatment systems and dispute resolution mechanisms in international arbitration courts. Until 2014, all the EU member states as a whole had signed approximately 1,200 BITs, a figure that was slightly under half of the BITs in force around the world.[2] One noteworthy particularity of the system of litigation designed by some of the BITs signed by the EU member states is that the arbitral rulings from the international arbitration courts can be directly executive and not subject to control (or subjected to very limited control) by the states' judicial authorities.[3] In this circumstance, with the implementation of the EU's power over investment matters, the problem arises of how the agreements which the EU may reach with third states can coexist side by side with the BIT system which many member states have with the same third states, and to what extent they are compatible.

One concern stemming from the new organisation of investment law, and perhaps the most noteworthy one, is to what extent the transfer of the interpretative power and application of investment agreements in the event of conflict to international arbitration courts, as envisaged in the EU/third state global investment agreements, could entail a fracture in the subjection of the European public powers to European law. As the arbitration rulings would be directly executive, this would be a gap through which to avoid the control of both the courts of the member states, which would judge the conflict according to local law and EU law, and the Court of Justice of the EU (CJEU). As we shall see, judging from the zeal with which the CJEU defends its jurisdiction in other

[2] See the 2014 report on investments from the United Nations Conference on Trade and Development, *UNCTAD Investment Report 2014*, available at <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf>.

[3] A good summary of the particularities of international investment arbitration which refers to these BITs can be found in Lavranos (2013a: 201-205).

areas, such as those related to human rights, this possibility could be discarded were it not for the fact that even today, as we shall explain below, the mechanisms of interaction among the international arbitration courts and European jurisdiction display a series of significant difficulties.

This article is organised into a description of the evolution of the constitutional framework of the European Union in relation to investment law divided into the three phases mentioned above: first, the regulation of foreign direct investment matters before the Lisbon Treaty entered into force; secondly, the situation created with the entry into force of the Lisbon Treaty, with particular emphasis on the investment agreements reached under the new system; and thirdly, an analysis of the negotiation processes of the new EU/third state investment agreements still pending ratification which show remarkable (and highly questionable) new developments compared to the agreements reached in the previous phase (we shall particularly examine the cases of the EU/Canada and EU/Singapore agreements, which could determine the regulatory framework of EU/USA TTIP). Likewise, based on the narrative of the integration process and investment law, we shall also analyse the main compatibility problems between the EU system and the systems of the member states articulated around BITs, as well as the main instruments envisaged to overcome these problems.

2. First phase: The EU's constitutional framework in investment matters before the Lisbon Treaty entered into force

Even though the EU was attributed no explicit powers over foreign direct investment, European law did have a significant influence on this matter.[4] Its powers over the movement of capital, the common trade policy, competition law, the freedom of establishment and the environment set limits on the member states' ability to attract investment from outside the EU, as well as on the system of their investments in these third states. For example, principles like the ban on discrimination on the basis of nationality applied to all EU citizens theoretically prevented a member state from negotiating exclusive privileges with the national investors from one state and required any guarantees established in favour of a citizen or company from one member state to extend to any citizen or company in the EU.[5] In a similar vein, and as yet further proof of the influence of EU law on the system of investments from third states, it should be borne in mind that the public authorities of each of the EU member states had to abstain from attracting foreign capital via direct aid or tax exemptions which would violate European competition law. With regard to the freedom of establishment, the European Community could also adopt measures

[4] Regarding the system of power in the field of foreign direct investment before the Lisbon Treaty entered into force, see Dimopoulos (2011: 66-95).

[5] This doctrine, that the advantages offered to a national of a given member state in an agreement with a third state had to extend to all the nationals of all the EU member states can be inferred from a series of cases known as *Open Skies*: Case 466/98, *Commission vs. the United Kingdom* [2002] *ECR* I-9427; Case 467/98, *Commission vs. Denmark* [2002] *ECR* I-9519; Case 468/98, *Commission vs. Sweden* [2002] *ECR* I-9575; Case 469/98, *Commission vs. Finland* [2002] *ECR* I-9627; Case 471/98, *Commission vs. Belgium* [2002] *ECR* I-9681; Case 472/98, *Commission vs. Luxemburg* [2002] *ECR* I-9741; Case 975/98, *Commission vs. Austria* [2002] *ECR* I-9797; and Case 976/98, *Commission vs. Germany* [2002] *ECR* I-9855.

on access to an economic activity which is related to the initial investment made by a national from a third state (Vidal Puig, 2013: 147).

The uncertainty regarding the EU's powers in investment matters meant that its authorities tended to promote action based on the doctrine of the implicit powers stemming from former article 308 of the EC Treaty (ECT) in relation to the projection abroad of the range of internal powers (article 301 ECT).[6] This regulatory structure allowed the European authorities to take measures such as negotiating and reaching agreements incorporating some of the provisions on investment matters with third states, either within the framework of an association agreement in the context of a third state that sought to become an EU member,[7] within the framework of a cooperation agreement aimed at economic development,[8] or within the framework of an association or free-trade agreement with a non-European state in which the investment had a key influence on the movement of goods or the freedom to provide services.[9] This latter circumstance reinforced the role of the European Union institutions in representing all the member states in global economic organisations such as the World Trade Organisation, as well as its ability to negotiate the agreements on investment matters that might be reached in these forums.[10]

However, the vagueness of the EU's authority over investment law continued to allow the member states to implement an investment policy in relation to third states separate from the integration process, which took shape in BITs, as mentioned above. Before the Lisbon Treaty entered into force, these BITs may have been incompatible with EU law precisely because of its influence over certain matters, like the movement of capital, the freedom of establishment and competition law, as under the EC Treaty this authority was unequivocally attributed to the European Community. A conflict that is not yet free of consequences besieged BITs signed between an EU member state and the third European state that later joined the union, back when the third state was not yet a member of the organisation, with all the difficulties of fit that would later stem from abiding by the rules of international public law between two EU member states even if some of them ran counter to EU law. However, in this article we shall not focus on this issue, which is usually referred to as the conflict between intra-BIT and EU law. Instead, we shall focus on the issue of possible incompatibilities between EU action in relation to non-European third states on

[6] Regarding the doctrine on implicit competences associated with foreign action, see Klamert, Marcus and Maydell, Niklas (2008: 493-513). See too, among others, Opinion 2/91 of the Court of Justice of the European Communities, *Convention No. 170 of the ILO* [1993] *ECR* I-106, paragraph 7.

[7] Such as the Association and Stabilisation Agreement with Croatia, OJ 2001 L-330/1.

[8] In this sense, see the example of the economic association agreement between the EU and the Caribbean states (CARIFORUM) 0J 2008 L 289/I/3.

[9] As in the agreements with Chile and Mexico. See the EU/Chile Association Agreement OJ 2002 L-352, signed on the 18th of November 2002, and the agreement between Mexico and the EU on the liberalisation of services (Mexico/EU agreement dated the 27th of February 2001 [2001/153/EC] OJ 2001 L 70/7).

[10] Such as the Agreement on Trade-Related Investment Measures, approved as an appendix in the final report of the agreements resulting from the Uruguay Round which led to the reform of the General Agreement on Trade and Tariffs (GATT) in 1994.

investment matters and the regulation of investments contained in the BITs that the member states have with these same third states (the issue of what are called extra-BITs).

3. Second phase: The European investment law system after the Lisbon Treaty entered into force

As we have seen, the entry into force of the Lisbon Treaty entailed the European Union authorities' taking on exclusive powers in foreign direct investment matters associated with the common trade policy (articles 206 and 207 in relation to article 3.1 TFEU).11 The new articulation of powers stemmed from the realisation that the liberalisation of the movement of goods and services proposed and the trade policy with regard to third states or other regional economic integration organisations also called for the liberalisation of investments and capital flows, as well as en masse European Union intervention in the matter in order to strengthen its negotiation and competitive position in the global investment market.

The explicit incorporation of the term "foreign direct investment" into the EU Treaty also allowed some of the uncertainty about the EU's and the member states' spheres of action to be clarified. Despite this, as we shall see, there were still areas about which there is controversy when determining whether the power corresponds to the EU or the member states, or under which structure the powers are allocated (that is, whether it is an exclusive EU power, as can apparently be deduced from the regulation in the TFEU on foreign direct investment in relation to the common trade policy, or whether in reality it is a shared EU/member state power). We can understand the application of the CJEU's jurisprudence grounded on "implicit powers" in aspects in which the provisions of the Lisbon Treaty have not defined the scope of the EU's powers with sufficient clarity as a consequence of the continuum of these blurry areas of attributed powers (Hindelang & Maydell, 2013).

We should note that the interpretation of the concept of foreign direct investment was already present in the jurisprudence of the Court of Justice of the European Communities before the Lisbon Treaty entered into force; it referred "to any kind of investment made by physical or legal persons which is used to create or maintain direct, long-term relations between the supplier of the funds and the company for which these funds are meant for the development of an economic activity".12 This definition was inspired by the notion of foreign direct investment formulated by other international

11 Regarding the structure of powers in foreign direct investments matters after the Lisbon Treaty entered into force, see, among others: Bungenberg (2011), Dimopoulos (2011), Eilmansberger (2009), Ortino & Eeckhout (2012), Pascual Vives (2011), Reinisch (2013), Strick (2014), Torrent (2010), Vidal Puig (2013) and Woolcock (2010).

12 As in, for example, CJEC decisions C-446/04, *Test Claimants in the FII Group Litigation vs. Commissioners Inland Revenue* [2006] *ECR* I-11753, paragraph 181; C-157/05 *Winfried L. Holböck vs. Finanzamt Salzburg Land* [2007] *ECR* I-4051, paragraph 34; and C-112/05, *Commission vs. Germany* [2007] *ECR* I-8995, paragraph 18.

organisations within the global economic sphere,13 and it allows the terms mentioned in article 206 and 207 TFEU to be interpreted.

However, some state actors, such as the Federal Constitutional Court of Germany (FCCG), have promoted a restrictive idea of what is meant by foreign direct investment, which would entail a series of limitations on the powers transferred to the EU.14 Thus, foreign direct investment would be limited to the initial phase in the transfer of capital and the establishment of the investment ("the investment which is used to gain shares in the control of a company", to word it in the FCCG's terms15); however, as we shall see, it would not include some aspects associated with investment activity which, according to this perspective, would be retained by the authorities of the member states. Thus, from the aforementioned position of the FCCG (setting aside the debatable circumstance of whether a constitutional court of a member state should be able to define the outlines of a power attributed exclusively to the EU) (Terhechte, 2013), and from many sectors of doctrine (Dimopoulos, 2011; Reinisch, 2013: 180 and forward; Tietje, 2009: 237), we can glean that the EU's recognised power in foreign direct investment would not include, at least not exclusively, what is called portfolio investment, which consists of purchasing securities in the capital market "without any intention of influencing the management and control of the company",16 a sphere in which the states can still reserve some powers of regulation. Likewise, foreign direct investment would not affect the states' power to determine the property system nor, consequently, to determine the guarantees on foreign investments in phases after the establishment of the investment, such as the expropriation system or the conflict-resolution system if the ownership of the investment is affected by the state authorities.

Generally speaking, while the EU's sphere of action extends to most aspects related to the initial admission of the investment (with the aforementioned exception of portfolio investment or the acquisition of real estate by physical persons for personal use) (Vidal Puig, 2013), situating the powers related to dealing with foreign investment after admission, such as the issue of property law and expropriations,17 as well as the specific regulations

13 In the case of the International Monetary Fund, see International Monetary Fund: *Balance of Payments Manual*, 1993, paragraph 362, available at <https://www.imf.org/external/pubs/ft/bopman/bopman.pdf>. In the case of the OECD, see Organization for Economic Cooperation and Development: *Benchmark Definition of Foreign Direct Investment*, 2008, available at <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.

14 Ruling by the Federal Constitutional Court of Germany on the Treaty of Lisbon 2 *BvE* 2/08, 30 June 2009, paragraph 379.

15 Ibid, paragraph 379.

16 This would be the definition of portfolio investment according to the Court of Justice of the European Communities, formulated in the cumulative affairs of Cases C-282/04 and C-283/04, *Commission vs. Netherlands* [2008] *ECR* I-9141, paragraph 19.

17 The property law system is reserved for the member states in accordance with article 345 TFEU, although quite a few measures contained in EU law affect the configuration of property law, such that we could state that it is an area of shared powers at the very least (Ortino & Eeckhout, 2011). The system of property law attributed to the member states has not hindered the CJEC from admitting that certain measures contained in EU law that affect property law do not violate the system of allocating powers. Thus, for example, regarding the compatibility among the member states' measures regulating the system of acquiring real estate and EU law's provisions on the movement of capital, see opinion C-452/01 of the Court of Justice in *Ospelt vs.*

stemming from the different sectors of economic activity in which the investment is used, is more controversial (Vidal Puig, 2013: 141-147). These gaps in the system of assigning powers on investment matters outlined by articles 206 and 206 TFEU justifies the member states' maintaining a legal basis of action to continue developing their own investment policies in the field of guarantees after the investment is established. Therefore, they are poised to continue developing the systems of guarantees against expropriations and conflict resolutions incorporated in the BITs reached with third states. For example, since the EU would have no powers to regulate the causes of expropriation of foreign investment, nor over its procedure, nor over the system of resolving disputes between a foreign investor and the public authorities, the international private investor/state arbitration mechanisms contained in BITs and referred to in the international arbitration structures provided for in multilateral treaties could be maintained, such as the Convention on the International Centre for Settlement of Investment Disputes (henceforth, ICSID),[18] part of the World Bank. This diversity of powers between the EU and the member states, which in practice is framed as a sphere of shared power instead of alluding to an exclusive EU power, has meant that in the European investment law system, the EU's policy has still had to coexist alongside the exercise of the states' powers. This situation has generated the need to seek ways to make joint European action compatible with the bilateral action of the member states.

3.1 The EU institutions and investment agreements after Lisbon

Therefore, the first direct consequence of the explicit attribution of power over foreign direct investment matters to the EU has to do with the increasing involvement of the EU institutions in negotiating and reaching investment agreements with third states and, in consequence, the implementation of a Europe-wide investment policy. Since the Lisbon Treaty entered into force, the strategy of the EU authorities has been to negotiate global bilateral trade agreements which include provisions on investments. One example of the former is what are called the "new-generation" free trade agreements (referring to the fact that they were reached after the reforms introduced by the Lisbon Treaty), such as the Free Trade Agreement between the European Union and the Republic of Korea, which includes provisions on investment related to the freedom of establishment.[19]

Even though the issue is secondary to our analysis, it is not specious to remark that European investment policy takes shape within the framework of free trade agreements instead of specific bilateral investment treaties (unlike what has become the practice of the member states), and that there is a clear focus on establishing bilateral relations outside of global forums like the World Trade Organisation. This is the pathway also taken in the third phase of

Schlössle Weissenberg Familienstiftung [2003] *ECR* I-9743, paragraph 24; and regarding industrial law, see SCJEC C-350/92, *Council vs. Spain* [1995] *ECR* I-1985, paragraphs 13-22.

[18] Convention on the Settlement of Investment Disputes between states and nationals of other states reached in Washington on the 18th of March 1965.

[19] See chapter VII of the Free Trade Treaty between the European Union and the Republic of Korea, 2011/265/EU L 127 (Decision of the Council on the 16th of September 2010).

European actions on investment matters which is materialising in the negotiation of bilateral agreements with Canada, Singapore and the United States. As we shall discuss below, the main difference between the agreements in the second and third phases, such as the Treaty with Korea, is that in the third phase not only are there specific chapters on investments unrelated to trade freedoms, but there are also investor/state conflict resolution mechanisms which were absent in the previous regulations, even in the case of agreements approved after the Lisbon Treaty entered into force, which only provided for mechanisms to resolve conflicts between public powers, such as EU/third state.

3.2 Maintenance of BITs between member states and third states

The second situation related to the development of investment law within the new framework of European powers refers to the maintenance of the member states' investment policies, which has taken shape in the fact that their BITs reached with third states have remained in force. Inasmuch as the member states retain powers in investment matters, such as in the configuration of property law, the regime of expropriation and the system to resolve conflicts stemming from state actions on foreign investment, the international public law instruments ratified by the states are still operative. However, this circumstance will not be altered in the event that the EU does not implement an investment policy with a specific state, nor will it mean that state BITs will be fully replaced by agreements between the EU and the same state with which the member state has reached a BIT. In order for the latter to happen, there would have to be a complete match between the subject and the matter regulated in the state BITs and the EU agreements that would allow us to accept that one treaty has been replaced by another according to the Vienna Convention on the Law of Treaties,[20] or that the BIT between the member state and the third state with which the EU also has an agreement has been nullified.

Therefore, the BITs of the member states will remain in force with all the states with which the EU has not reached any agreement, as well as in cases in which there are aspects regulated by the BIT which are not provided for in the EU/third state agreement. This second possibility includes cases in which the BIT between a member state and a third state contains clauses regarding absolute investment protection against expropriation or political risks, or that it refers to an investor/state dispute resolution process, which, as we discussed above, has thus far been absent from the EU agreements.[21]

The entry into force of the Lisbon Treaty and several of the agreements with third states reached by the EU authorities have called for the adoption of measures that confirm the compatibility between the investment system in the European framework and the investment systems of the member states. These measures, spearheaded by the European institutions, entail recognition of the continuation of state powers on this matter, since if the power over foreign direct investment was truly "exclusive" to the EU within the framework of the

[20] Article 59 of the Vienna Convention on the Law of Treaties, from the 23rd of May 1969.

[21] With regard to EU/third state agreements and member state/third state BITs, we should bear in mind that the agreement between the EU and Singapore (still pending ratification) calls for the automatic termination of the BITs reached previously by member states.

common trade policy, any state action would run counter to EU law even if there were no actual collision between state law and EU law (or even if the EU had not exercised its power).[22] In another sense, as we shall see, the general regulation on the compatibility between the EU's action and the member states' action through their BITs with third states governed by international public law represents an attempt to avoid conflicts caused by the coexistence of two systems having to be resolved case by case by the CJEU, as happened in the past.[23] Finally, we should stress that the concern with precisely determining the applicable system is one of the crucial imperatives in a matter like investment law, which depends decisively on the ability to provide legal security in order to attract capital. It would be a paradox if the area of the world with the highest capital flows generated via investment had the greatest uncertainty on the applicable law through the effect of the coexistence between the state systems and the EU system.

3.3 Compatibility measures between the EU's investment policy and the member states' investment policies

The first measure to bear in mind to ensure the coherence between the member states' and the EU's investment policy is that the agreements reached between the EU and a third state are usually negotiated in mixed EU/member state agreements. Therefore, they are international treaties in which the member states are also parties. This was the formula suggested by the FCCG itself in its ruling on the Lisbon Treaty when, as it analysed the assumption of EU powers in foreign direct investment matters and noted that a range of powers influencing the matter were still held by the member states, it stated that an EU agreement that affected spheres allocated to the states, such as the investment protection system, would have to be reached as mixed agreements.[24] The practice of mixed agreements, which was not unknown in the community institutions' foreign actions before the Lisbon Treaty entered into force, has nonetheless become widespread since then and, indeed, characterises all the free-trade agreements which include precepts on investments (such as in the aforementioned free trade agreement with the Republic of Korea).

The second consideration that allows for headway in the implementation of a coherent investment policy between the EU and the member states is naturally the very process of approving the agreement, in which majority consent of the states in the Council is needed. It is true that since there are aspects of investment included in free-trade agreements, and judging from the

[22] In this sense, see the opinion of Advocate General Tizzano in the *Open Skies* series [2002] *ECR* I-9427, paragraphs 112-114; the opinion of Advocate General Maduro in Case 205/06, *Commission vs. Austria* [2009] *ECR* I-1301; and Case 249/06, *Commission vs. Sweden* [2009] *ECR* I-1335, paragraph 28. In the same vein, see Cremona (2008).

[23] This can be gleaned from the decisions of the Court of Justice of the European Union: Case 205/06, *Commission vs. Austria* [2009] *ECR* I-1301; Case 249/06, *Commission vs. the Kingdom of Sweden* [2009] *ECR* I-1335; and Case 118/07, *Commission vs. Finland* [2009] *ECR* I-10889. In all of them, the CJEU noted the incompatibility with EU law of the bilateral investment treaties that the defendant states had with third states. Regarding these decisions, see Díez-Hochleitner (2010) and Ghouri (2010).

[24] Ruling of the Federal Constitutional Court of Germany on the Lisbon Treaty, 2 *BvE* 2/08, 30 June 2009, paragraph 379. See Terhechte (2013: 26).

exclusive nature of the Union's power and the approval procedure which, according to article 207.4 of the TFEU, requires the same majorities in the spheres of external action as in internal action, it would be possible to reach an agreement with a third state with only a qualified majority of the member states. In other words, a treaty on investment could be approved counter to the desire of some member states. However, practice tell us that this situation has never occurred, since the EU's instruments of foreign action have always been unanimously agreed upon; likewise, there are matters of competence which must earn the consent of all the member states both internally and externally. In short, the unanimous approval of the member states' representation in the Council, either by the practical practice of reaching economic treaties or by procedural requirements inasmuch as matters subjected to the role of qualified majority are affected, contributes to the fact that there are not too many divergences between the action of each of the member states related to foreign investment and the desire expressed by the state representations to the EU institutions which consent to joint action.

Finally, as hinted at above, the EU institutions themselves have stipulated that the implementation period of investment policies with third states or organisations in the sphere of economics must be extensive over time, and they have chosen to construct a provisional system that minimises the contradictions with the member states' BITs. This is the structure stemming from EU Regulation 1219/2012, of the European Parliament and Council, dated the 12th of December 2012, which establishes transitory provisions on bilateral investment agreements between member states and third countries.[25] Thus, the general principle of Regulation 1219/2012 is declaring that the member states' BITs reached with third states remain in force, and that the member states are obligated to notify the Commission of the existence of these agreements reached before the EU attained powers in foreign direct investment matters.[26] The notification allows the Commission to evaluate whether the member state's BIT in force with a third state poses a serious obstacle to the Union's negotiating and reaching an investment agreement with the same third state. Thus, by following the trail of the duty of cooperation that the EU Treaty stipulates on how to make the international obligations of a member state before it joined the EU compatible with EU law,[27] Regulation 1219/2012 states that the member states should adopt any measures needed to guarantee that the BITs in which they are engaged with third states do not hinder the implementation of EU action in investments.[28] Partly for this reason, because of the member state's eventual need to renegotiate a BIT to adapt it to EU law or to agree to its termination, the aforementioned regulatory framework states that the Commission may authorise and monitor the action of a member state that is attempting to amend a BIT.[29] Despite this, Regulation 1219/2012 does not prevent the Commission from authorising the member state to start negotiations and reach a new BIT

[25] OJ L 351, 20.12.2012, 40-46. For a comment on Regulation 1219/2012, see Pastor Palomar (2013).

[26] Article 3 of Regulation 1219/2012.

[27] Former article 307 of the EC Treaty, an aspect regulated today by article 351.2 TFEU.

[28] Article 6 of Regulation 1219/2012.

[29] Article 9 of Regulation 1219/2012.

with a third state, which confirms member states' ability to continue developing their own investment policies despite the redistribution of powers effected by the Lisbon Treaty (albeit conditioned upon the consent of the Commission and the possibility of it being informed of and even participating in the course of the negotiations).[30] This last situation is probably envisaged for the circumstance that the member state wishes to reach an investment treaty with a state with which the EU has neither an agreement of this kind nor plans to start negotiations on the issue in the immediate future. Therefore, Regulation 1219/2012 contains a three-fold system on member states' BITs reached with a third state, namely: 1) if the BIT was signed before the 1st of December 2009 (the date the Lisbon Treaty entered into force) or before the EU member state joined the EU for states that did so after the 1st of December 2009; 2) if they were signed between the 1st of December 2009 and the 9th of January 2013 (the date Regulation 1219/2012 entered into force); or 3) if they were signed after the 9th of January 2013.[31] Thus, the Commission's capacity for intervention to ensure the compatibility between the BIT and EU law (and thus the BIT's compatibility with the investment policy developed by the EU in relation to a third state) is greater in the second and third groups than in the first group, which, as mentioned above, apart from the obligation to notification, is subjected to regulation similar to what is provided for in member states' international treaties reached prior to their accession to the EU.

Despite the modifications introduced by Regulation 1219/2012 (and always without prejudice to the procedures that ensure the efficacy of EU law, such as appeals on noncompliance before the CJEU), the vagueness of the powers that allow a state to continue to reach investment agreements and the EU's vacillations and delays in the development of its own investment policy, as well as the indeterminate nature of the mechanisms that allow coherence to be assured between the two levels of governance (such as whether or not authorisation to negotiate a member state/third state BIT is granted by the Commission, as provided for in Regulation 1219/2012 itself), this does not prevent there from being contradictions in foreign direct investment matters which ultimately stem from the very shortcomings that besiege the EU's foreign action and its harmony with the foreign action of the member states in all spheres.

3.4 Consequences and possible tensions from the transfer of powers to the EU on investment matters and foreign policy of member states

The fact that the aspects stemming from investment law and the international relations system have historically been closely tied together can be seen, for example, by the fact that some BITs were framed as part of the entire set of provisions included in what are called friendship treaties, which reflected broader foreign policy initiatives. With the reform sparked by the Lisbon Treaty, the transfer to the EU institutions of the decision on the establishment of privileged relations in investment matters with a third state has contributed to

[30] Article 10 of Regulation 1219/2012.

[31] See Lavranos (2013b) for a striking critique of the system of Regulation EU 1219/2012, given, according to the author, the EU authorities' unnecessary interference in the member states' investment systems via BITs, which provided certainty to investors from third states.

the consolidation of joint foreign action, while it also questions the states' capacity to develop a policy with a third actor which contradicts the will of the EU. For example, if the EU wants to promote a system of privileged investment relations only with states which pledge to maintain a liberal democratic regime and a given standard of laws comparable to what the EU recognises, it seems difficult to claim that the member states are able to preserve bilateral investment regimes with third states that do not meet these conditions. In the same vein, if certain aspects of common foreign policy advise dealing with a crisis via a series of sanctions towards a third state which includes trade limitations, an initiative of this kind is hardly compatible with the circumstance that one or several member states encourage capital to be attracted from the citizens and companies of this conflictive state.

If tensions of this sort have not yet emerged in full bloom it is because the EU has not yet adopted a clear decision on investment matters associated with its foreign policy (Dimopoulos, 2011). The EU institutions themselves have not yet reached an unequivocal agreement on whether a common investment policy prioritises the EU's economic growth and competitiveness in a global capital market without seriously considering human rights and democracy conditions related to the selection of the potential states with which treaties could be reached (this seems to be hinted at from the Commission's intentions in the 2010 Communication which designed the EU's proposed investment policy),[32] or whether investment treaties have to be negotiated preferentially with states that share the EU's principles on democracy and human rights, in addition to their having environmental protection and labour law credentials similar to those in the EU (as the European Parliament seemed to suggest in its 2011 decision on investments).[33]

Fuzzy areas like this are what initially led to the EU's failure to adopt clear measures in relation to the agreements that can be maintained with a third state when the latter is the cause of a crisis which poses a challenge to common foreign policy. For example, the conflict between the Russian Federation and the Republic of Ukraine unleashed in November 2013, in part as the consequence of the process of ratifying the Association Agreement between the EU and Ukraine, did not prompt an in-depth revision of the EU's agreements with the Russian Federation, some of which include aspects related to investments, such as the 1994 Partnership and Cooperation Agreement between the European Communities and Russia.[34] The only consequence for the investment system between the EU and Russia stemming from the political crisis in Ukraine was the suspension of bilateral talks in the negotiations for a

[32] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy.* COM(2010)343 dated 7 July 2010. See especially pages 6-7.

[33] See *European Parliament Report on European International Investment Policy*. 2010/2203(INI) dated 6 April 2011.

[34] *Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and Russia, of the Other Part*, dated 28 November 1997, OJ L 327/3.

global trade agreement which would include a chapter on investments,[35] bearing in mind that before the conflict in Ukraine the European Commission had opened negotiations on an agreement of this kind.[36] In another vein, it is worth noting that the paralysis in the negotiations on a EU/Russian Federation agreement has not stopped the 18 BITs reached by the member states and this partner from remaining in force (Dralle, 2014: 335).

Secondly, the vacillations on an investment policy in EU governance have led to a failure to reconsider the fact that the majority of member states have investment treaties with third states which are not liberal democracies, some of which entered into force during the first decade of the 21st century. Despite this, we should note that some commitment can be perceived in the EU's foreign action with liberal political systems which are respectful of rights, given that the global trade and investment agreements that have been reached after the Lisbon Treaty entered into force (such as with the Republic of Korea) or which are pending ratification (such as with Canada) or which are in advanced phases of negotiation (such as with the United States) are with liberal democracies. The only exception is the opening of negotiations with the People's Republic of China in order to reach a global EU-China agreement on investments (in this case, it is a specific agreement on investments, not a chapter within a free-trade agreement).[37] Despite this, we should also note that these negotiations with the People's Republic of China are in a very preliminary phase.

This general attitude among European authorities when choosing the partners with which to reach free trade and investment agreements (all of them liberal democracies with the exception of China) holds true even though, as we shall see, the member states maintain relations with authoritarian regimes in the normal course of affairs through their capital import and export traffic.

Another focal point of tensions which leads to contradictions between a unified investment policy centred in the EU and the action of the member states has less to do with the conditions of the subject with which the agreement is reached and more to do with the economic policy needs of each member state, which can be quite disparate. For example, making the investment system uniform within the framework of the European Union hinders the member states from being able to define their own approach to investments according to whether they are receiving the capital (and therefore likely to seek more flexible forms of intervention on the foreign investments made in their territory) or exporting capital (in which case they would be more interested in establishing a system of guarantees for their investors in the territory of the third state) (Market, 2011). Likewise, global European investment action would blur the member states' capacity to compete with each other to attract foreign investment, even though the latter is highly limited by the uniform enforcement

[35] On the system of investments between the European Union and the Russian Federation, see Dralle (2014).

[36] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy.* COM(2010)343 dated 7 July 2010, p. 7.

[37] The start of negotiations to reach an EU-China investment agreement was announced at the sixteenth EU-China summit held on the 21st of November 2013. See <http://europa.eu/rapid/press-release_IP-14-33_en.htm>.

of EU law. Certainly the possibilities of offering incentives to foreign investors which allow a regime different to the investment policy implemented by another member state may contradict EU law if, for example, they entail state aid or losses in the level of environmental protection, or if they are associated with discriminatory treatment in favour of the third-state investor which harms other nationals from the EU member states.

3.5 The conflict resolution system in EU/third state investment agreements and its articulation with the conflict resolution mechanisms provided for in BITs

As we have seen, the interpretation of the system of allocating powers between the EU and the member states, which entered in force with the regulation established by the Lisbon Treaty, leaves the door open for the powers retained by the states on matters related to the legal property and expropriation system authorises them to agree to conflict-resolution systems on foreign investment. Thus, in practice, this would materialise in the preservation of member state/third state BITs and the conflict-resolution mechanisms contained therein, subjected to international public law. The main incompatibility which might arise with the survival of BITs in this sphere and EU law would occur if the BIT refers to a conflict-resolution system in an arbitration court regulated by international public law whose decisions are directly enforceable. In this case, it is conceivable that an arbitral ruling may be applicable without the possibility of checking its fit with EU law, since either the legal apparatus of the member state that signed the BIT has no access to this arbitral ruling or, if it does, it cannot exercise any power of review which reaches the point of promoting its inapplicability if it is deemed counter to EU law, or to elevate a prejudicial issue to the CJEU.[38] As mentioned above, the ICSID system, to which a considerable number of BITs between EU member states and third states refer, envisages this scenario, since the arbitral rulings on investment issued within the framework of that organisation are executive and in theory not subjected to judicial review by the legal authorities of the BIT signatory states (Von Papp, 2013: 1060). According to article 54.1 of the ICSID Convention, the contracting parties are bound to recognise the arbitral rulings issued by the convention system as equivalent to the final decision of a court of the member state in the convention (Von Papp, 2013: 1058). Generally speaking, no external power of control over the arbitral rulings in the ICSID system are envisaged beyond the controls contained in the convention itself[39] (therefore, nor is control derived from EU law envisaged), just as the ability to oppose an exception associated with a public policy that impedes or regulates the enforcement of an arbitral ruling is highly restricted both within the ICSID system and by any other autonomous legal order (Kleinheisterkamp, 2012: 421). In these circumstances, the possibility that an arbitral ruling from outside of EU law (even, as mentioned above, in a sphere of EU power such as foreign direct investment) is applicable without intervention by any judicial authority that

[38] On the difficulties of enforcing an arbitral ruling from the ICSID system in the European Union, see the case *Ioan Micula et al. vs. Romania*, ICSID case no. ARB/05/20 (11 December 2013).

[39] See "Article 54", in Schreuer (2009), paragraph 81.

enforces EU law (neither the member states nor the CJEU) has meant that numerous voices are calling for some kind of connection between the conflict resolution system in the BITs and the system of enforcing EU law (Pascual Vives, 2014; Schill, 2011; Von Papp, 2013). In this sense, there are several obstacles to ensuring the possibility of EU law's control over an arbitral ruling, particularly in the sphere of the CJEU's final word. The most noteworthy objections are that first the member states' commitment not to subject conflicts on the interpretation or implementation of the treaties to procedures different to those provided for in the Treaties (that is, for example, a jurisdiction other than the CJEU) is only applied in relation to conflicts with public entities and not, as happened in investments and in the conflict-resolution procedures envisaged in the BITs, between a state and a private party (private investor). On the other hand, it would be difficult to interpret that the investment arbitration courts could be regarded as "judicial bodies" in that they are legitimate for elevating a prejudicial matter before the CJEU, since, among other crucial attributes, they are neither the judicial authority of a member state nor permanent bodies (Von Papp, 2013).[40]

Nonetheless, in the past decade there have been examples of EU law being applied to disputes over investments, either in the jurisdictional sphere of the EU or in the sphere of an investment arbitration[41] in which EU law has been regarded as the applicable law as it falls within a set of norms within relevant international public law or "local" law to decide on the case or to understand that it is a "deed" agreed upon by the parties and essential to resolve the conflict (Von Papp, 2013). One of the assumptions of the CJEU's intervention materialises when the Commission must file a grievance due to noncompliance, especially stemming from a state's lack of action in resolving the incompatibilities between a BIT reached previously to the state's joining the EU and EU law.[42] Therefore, we should note that in this circumstance the involvement of the EU's jurisdictional system depends exclusively on the discretion of the Commission and is not ensured by the same judicial structure articulated between the judges and courts of the member states and the CJEU. Something similar can be said about the considerations that an investment arbitration court, as part of the ICSID or in another context, could make in relation to the application of EU law: the arbitration court is not bound by EU law and there is no certainty that it will invoke EU law in its ruling, which, as mentioned above, cannot be subjected to subsequent judicial control within either the member states or the CJEU. In short, in the current legal order of investment law, EU law cannot exert an influence in either substantive or institutional terms, even if the EU has assumed powers in matters involving foreign direct investment.

In any case, as we shall analyse in the section below, the tendency taking shape in the EU's future global investment agreements with third states does

[40] The Court of Justice of the European Communities itself declared that the arbitral courts of the member states could not be considered "courts" for the purposes of elevating a preliminary ruling. See SCJEC Case 125/04, *Denuit & Cordenier vs. Transorient* [2005] *ECR* I-923.

[41] See, for example, *Electrabel S.A. vs. Hungary*, ICSID case no. ARB/07/19, a resolution on jurisdiction, applicable law and liability (30 November 2012).

[42] Such as in the CJEU ruling in Case 264/09, *Commission vs. Slovak Republic* [2011] *ECR* I-08065.

not so much ensure the possibility of EU legal authorities' reviewing disputes on investment matters but instead, with all the tensions that this can entail with the CJEU jurisprudence, maintaining the system of referring to the dispute resolution mechanism provided for in international public law through which arbitration courts that hand down executive rulings are shaped.

4. Third phase: The UE's global investment policy and the negotiation of free trade agreements with the inclusion of a chapter on investments

With the approval of the communication entitled *Towards a comprehensive European international investment policy*,[43] the Commission informed the other institutions of the directives that shall prevail in the exercise of the power on matters of foreign direct investment assumed by the EU, and in particular on the objectives that will determine negotiating and reaching investment agreements with third states or with international economic integration organisations. The aforementioned document already hinted at the desire to include a chapter on investments in the course of the negotiations of global trade agreements (thus acknowledging the need to associate trade with the capital flows stemming from investment relations) as well as the possibility of recognising an arbitration mechanism to resolve disputes on private party/state investments.[44] While until now trade agreements (and the precepts on investments included in those agreements) only envisaged arbitration instruments that pitted public entities (state/state or EU/state) against each other, largely associated with diplomatic strategies, in the new wave of investment agreements considered by the EU, investor/state arbitration would at least be complementary to the arbitration involving states.[45] Developing the general principles shaped in the communication *Towards a comprehensive European international investment policy*, the trade agreements reached or currently in the negotiation phase with Canada, Singapore, the United States and India include a chapter on the investment system[46] and an international investor/state arbitration system which, somewhat similarly to the dispute resolution mechanisms provided for in the member states' BITs, offer a panoply of arbitration systems from which the investor may choose, which at least include referral to the ICSID structure and to the rules of the United Nations Commission on International Trade Law (UNCITRAL). Of the aforementioned free trade agreements, the negotiations with India and the United States are far from reaching their conclusion, but in the cases of Canada and Singapore the agreements are about to be ratified. What is more, the EU-Singapore agreement is pending a consultation in the CJEU which affects the compatibility between

[43] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European international investment policy.* COM(2010)343 dated 7 July 2010,.

[44] In the context of investment agreements envisaged as mixed EU/member state agreements reached with a third state, those referring to dispute resolution structures would be purely allowed to pit a private investor from a third state against the EU and/or the member states. See Iruretagoiena Agirrezabalaga (2011).

[45] This is what leads some commentators to refer to the tendency to move towards a "hybrid" model of arbitration in investment matters. See Roberts (2014).

[46] In the case of China, as mentioned above, only an investment agreement is being negotiated.

the provisions on investment and those on the arbitration mechanisms provided for in EU law. The CJEU's ruling will thus further flesh out a key aspect in regard to investment arbitration courts and EU law, such as whether the provision of arbitration courts devoted to resolving investor/state disputes contradicts the autonomy of the EU's legal order and, more pointedly, the status of the CJEU as the ultimate interpretative authority on aspects related to EU law.

In another sense, the EU institutions' desire to get this organisation involved in investor/state dispute resolution systems led to the approval of Regulation 912/2014 dated the 23rd of July 2014, which establishes the rules of dividing financial responsibility between the EU and the member states in the resolution of lawsuits by an arbitration court established according to future investment agreements which may be reached between the EU and a third state.[47]

4.1 The EU's adherence or not to international treaties on mechanisms to solve investor/state disputes

As mentioned above, the new wave of EU investment agreements with a third state calls for the establishment of mechanisms to resolve investor/state conflicts with referrals to the rules of the ICSID, for example. However, the EU is not a party to the ICSID convention. What is more, the EU's potential adherence to that convention would require that it be amended, which would necessitate the consent of all 151 signatories of the ICSID Convention, since article 67 of that convention states that this instrument is only open to being signed "by states", which excludes regional economic integration organisations like the EU.[48] The fact that global investment agreements with third states are reached as "mixed agreements" and therefore with the EU member states which, with the exception of Poland, have ratified the ICSID Convention as part of those agreements, does not detract from the EU's role as a main actor in the application of the agreement nor from the possibility that non-compliances that instigate a demand that an arbitration mechanism be set up originate in an act of the EU institutions. These institutions are not subject to the dispute resolution system agreed to with the third state, thus generating a climate of uncertainty which is hardly appropriate in a field such as investments, which requires regulatory clarity to be consolidated. The experience of the EU's adhesion to the European Human Rights Convention would be a precedent which would demonstrate the possibility of reforming an international treaty to which other non-EU states belong in order to include the EU as a member, although it is also a process that reveals the enormous complexities entailed in

[47] Regulation 912/2014, of the Parliament and Council, dated the 23rd of July 2014, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. OJ L 257/121, 28.08.2014. Regarding Regulation 912/2014 and the critique of the complex compatibility between the rules of allocating responsibilities established in that regulation and the rules of international responsibility, see Dimopoulos (2014); Fernández Rozas (2014).

[48] Specifically, article 67 of the ICSID Convention states that it is open to the signing of states that are members of the World Bank, an organisation of which the EU is also not a member either. Regarding the impossibility for the EU to join ICSID Convention without this instrument being reformed, see Burgstaller (2009: 215).

articulating the EU's legal order with a legal order generated by a treaty that is subjected to international public law. If the ICSID system should be one of the main models when resolving investor/state conflicts on the agreements to which the EU is a party, bearing in mind the EU institutions' desire to become crucial actors in the world flow of investments, the imperatives of regulatory certainty and legal security would require the amendment of the ICSID Convention so that the EU could join it as a member, despite the series of technical obstacles and delays that this would entail. Despite this, and with the exception of objections on the autonomy of EU law which we shall outline below, precisely because of the scope of the volume of investment that the major global EU agreements will promote, it might be more useful to instate an ad hoc investor/state conflict resolution mechanism for each agreement or envisage a general arbitration instrument that could be ratified by the EU, its member states and other third states with which the EU reaches investment agreements.

4.2 Investment arbitration courts and the autonomy of EU law. A constitutional boundary?

As discussed above, one of the primary obstacles to instating investor/state conflict resolution mechanisms in the agreements reached between the EU and a third state is the potential incompatibility between these structures and the principle of EU legal autonomy.[49] In recent decades, this principle, which was first developed to delimit the relationship between European law and the law of the member states, has also been associated with the determination of the relations between the EU's legal order vis-à-vis international public law.[50]

The basic idea linked to the principle of autonomy alludes to the fact that the Constituent Treaties generate a legal order that is independent[51] of the legal orders of the member states and international public law in general, such that any conflicts that arise from a norm within the EU legal order shall be resolved within the EU's regulatory system and the procedures established therein. The scheme in question would be projected by the jurisdictional organisation with the allocation in the CJEU of the ultimate authority in interpreting and applying EU law.[52] Specifically, regarding the structure of the jurisdictional organisation derived from the principle of EU autonomy, the CJEU and the legal bodies of

[49] Regarding international investment arbitration courts and the potential collision with the principle of the autonomy of EU law, see primarily Dimopoulos (2014) and Hindelang (2011).

[50] The concept of the autonomy of EU law in relation to international public law and the CJEU's status as the supreme authority in the interpretation of EU law in relation to other international courts are issues which have been particularly developed in the CJEU's rulings on the membership of the European Communities or the EU in other international organisations. See Opinion CJEC 1/91, *European Economic Area I* [1991] *ECR* I-6079; Opinion CJEC 1/92, *European Economic Area II* [1992] *ECR*, I-3493; Opinion CJEC 1/00, *European Common Aviation Area* [2002] *ECR* I-3493; Opinion CJEU 1/09, *European and Community Patent Court* [2011] *ECR* I-1137; and Opinion CJEU 2/13, *Adhesion to the European Human Rights Convention* dated the 18th of December 2014.

[51] The idea of the principle of autonomy of EU law is contained in the founding rulings of the Court of Justice of the European Communities: *Van Gend & Loos* and *Costa vs. ENEL*, SCJEC C-26/62, *Van Gend & Loos vs. Nederlandse Administratie der Belastigen* [1963] *ECR* 1; SCJEC C-6/64, *Costa vs. ENEL* [1964] *ECR* 585.

[52] Article 19.1 TEU.

the member states would be in charge of guaranteeing respect for the EU legal order through a cooperation system in which, to ensure that there are no divergences in the application of EU law by the state courts, there is an obligation to consider the prejudicial matter when there are doubts about the interpretation or validity of the EU's legal provisions, and it is the CJEU's duty to monitor the proper exercise of this task via the trial mechanisms which allow it to uncover noncompliance.[53]

The principle of EU legal autonomy and the allocation of the ultimate interpretative authority of EU law to the CJEU would not prevent EU institutions from reaching international treaties in which jurisdiction is conferred upon a body other than the CJEU.[54] However, this attribution would violate the principle of the autonomy of EU law if the legal body instated by the international treaty of which the EU was a party: 1) when there is any possibility of interpreting EU law in a definitive fashion;[55] or 2) when the interpretation of the applicable norms by the international legal body affects the system of power allocation between the EU and the member states as regulated in the EU constituent treaties, and over which the CJEU holds the maximum interpretative authority.[56]

Bearing in mind these conditions, it is plausible to think that an EU/member states investment agreement with a third state which instates a system to resolve disputes based on international arbitration courts with the authority to rule on investor/state lawsuits might infringe upon the principle of autonomy of EU law if the arbitration court makes an interpretation of original or derivative EU law which the CJEU has no ability to control. This circumstance, as hinted at above, is not unlikely to happen in a system in which arbitral rulings are not susceptible to judicial revision, or when this revision is extremely limited and that, therefore, the courts of the member states cannot file a prejudicial matter before the CJEU or even guarantee the effet utile of EU law. Thus, it is not inconceivable that an international investment arbitration court might become involved in a broad spectrum of areas which EU law could affect (which can range from competition law in relation to state aid to the freedom of movement of capital or energy policy) and that it is decided

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53 See, for example, CJEU Opinion 1/09, *European and Patents Court of the Community* [2011] *ECR* I-1137, especially paragraphs 65, 66, 67, 68, 83, 84 and 86. Regarding the autonomy of EU law and jurisdictional organisation, see Azpitarte Sánchez (2013).

54 Regarding the possibility that an international agreement envisages the creation of a jurisdictional body whose decisions bind the EU institutions, including the CJEU, as long as the autonomy of the EU law system is respected, see CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 182 and 183 and the jurisprudence cited therein.

55 See CJEC Opinion 1/91, *European Economic Area I* [1991] *ECR* I-6079, paragraphs 41-46; and regarding the possibility that the CJEU is not allowed to provide a definitive interpretation of the law stemming from the EU on matters related to the compatibility between EU derivative law and the European Human Rights Convention reviewed by the ECHR and, therefore, and according to the CJEU, in noncompliance with the principle of the autonomy of EU law, see CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 236-248.

56 In this vein, see, CJEC Opinion 1/91, *European Economic Area I* [1991] *ECR* I-6079, paragraphs 31-36, and CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 215-225.

according to an interpretation of the EU norms outside the jurisdictional sphere of both the EU member states' courts and the CJEU.

In another sense, regarding the systems for resolving investor/state disputes, we should say that in theory, as mentioned above, this does not compromise the member states' obligation not to subject disputes on the interpretation of the application of treaties to different procedures than those provided for in the Treaties (article 344 TFEU), since this imperative only affects lawsuits between states, but not those between a private individual and a state. The intervention of private individuals in the conflict may justify an attenuation of the CJEU's jurisdictional scope,[57] but it is unlikely to entail this body's refusal to intervene structurally in conflicts that imply an interpretation of EU law or that cast doubt on the efficacy of this legal order. In any event, in relation to the international arbitration formulas which pit member states against each other, the CJEU already had the opportunity to determine that these states, which are subject to article 344 TFEU, could not avoid the jurisdiction of the CJEU through the international arbitration courts provided for by international treaties if interpretation of EU law is part of the dispute.[58] Thus, according to this jurisprudence, the CJEU prevents member states from resorting to international arbitration in disputes between them, unless they had been subjected to CJEU control before the conflict (Lavranos, 2013a).

We should stress that it is very unlikely for the CJEU to structurally accept a limitation on its jurisdictional scope such as the kind that would stem from a pronouncement in an opinion on a global investment agreement (such as the EU/Singapore agreement, which is pending resolution), even if it provides for an arbitration system to resolve not state/state disputes but investor/state disputes. As mentioned above, however, the incidence of the decisions from international arbitration courts on EU law without the possibility of judicial control (or with very limited control) already happens because of the validity of the member states' BITs with third states. In short, the gap that can be seen in the efficacy of EU law (and, in fact, in one of the principles that guarantees the state's subjection to law, such as judicial control) in a future global investment agreement between the EU and a third state is the same gap that can already be gleaned from the application of the mechanisms to resolve disputes included in

[57] This reinforced nature in defence of the CJEU's jurisdictional sphere in conflicts between public entities based on article 344 TFEU can be found in CJEU Opinion 2/13 on Adhesion to the European Human Rights Convention. The CJEU opined that the adhesion agreement ran counter to article 344 TFEU in that it admitted the possibility that an inter-state or EU/member state lawsuit could be filed with the European Human Rights Court for violations of the ECHR law in relation to EU law without an opinion from the CJEU. CJEU Opinion 2/13, *Adhesion to the European Human Rights Convention*, dated the 18th of December 2014, paragraphs 201-214.

[58] This appears in what is known as the "controversy of the MOX factory" (SCJEC C-459/03, *Commission vs. Ireland* [2006] *ECR* I-4635, paragraphs 123 and forward). The case referred to a lawsuit that pitted Ireland against the United Kingdom in relation to radioactive emissions in the Sellafield plant. This controversy affected two international treaties which provided for the possibility of establishing ad hoc arbitration courts, the United Nations Convention on the Law of the Sea and the Convention for the Protection of the Marine Environment of the North-East Atlantic. Despite this, while understanding the EU law was also applicable in environmental matters, the European Commission filed an appeal on noncompliance against the Republic of Ireland for having subjected the dispute to an international arbitration court instead of the CJEC, as stems from the Constituent Treaties, an allegation which was supported by the CJEC.

the BITs, even though they are rarely impugned by the Commission, and rarely does it push for their amendment or termination under the terms of Regulation 1219/2012, mentioned above. Perhaps the difference consists of the fact that hindering the judicial review of an international investment arbitration and its subjection to EU law and ultimate interpretation by the CJEU may have much greater economic and perhaps even political repercussions than disputes stemming from a BIT, due to the volume of trade and investment relations of the EU as a whole with a third state. A fundamental part of economic systems within the context of globalisation would be avoiding the mandates of the rule of law that decisively accompanied the advent of constitutionalism. In contrast, without yet knowing how it is going to evolve, it should at the very least not go unnoticed.

5. Conclusions

The transfer of powers on foreign direct investment matters to the EU authorities via the Lisbon Treaty could definitively limit the spheres of decision-making of the member states on matters of economic policy and foreign action. Likewise, the Commission's assumption of the capacity to negotiate global investment agreements with third states, and the European Council and Parliament's assumption of the capacity to close these agreements, could have far-reaching repercussions on the organisation of public power and the order of the system of sources of law. Despite this, the EU authorities are still quite far from implementing a global investment policy, even though they have reached some agreements in this regard with third states and are on the verge of ratifying other agreements with investment regulations that affect all spheres of this phenomenon (initial investment, regulation after the establishment of the investment, treatment standards, guarantees against expropriation and conflict resolution). The intention at the level of EU governance to make headway in this area does not downplay the fact that the uncertainties in the system of allocating powers and the member states' traditional involvement in investment policy with third states through international public law instruments, namely BITs, augur the continuity of the member states as prime actors in the development of investment law. At least, as can be gleaned from the structure of Regulations 1219/2012 and 912/2014, the EU institutions themselves seem to recognise a phase of coexistence between investment policy channelled through the member states and the initiative in investment matters spearheaded by the EU. The main uncertainties regarding the compatibility between the plurality of investment systems lies in the conflict solving mechanism and the possibility that in the next phase in the implementation of EU/third state global investment agreements, an arbitration mechanism is articulated to resolve investor/state disputes which changes the application of EU law and the principle of autonomy of the European legal order. This latter does not exclude the risk, already present in the numerous BITs existing between the member states and third states, that the very notion of the rule of law becomes weakened if the arbitral rulings are not subjected to the possibility of judicial control. However, it seems difficult for the instatement of an international investor/state arbitration mechanism provided for in a global EU/third state agreement to be accepted by the CJEU if we bear in mind its jurisprudence on the impossibility for an international body other than the CJEU to have the last word on the interpretation of EU law and the EU/member state allocation of powers.

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The impact of the crisis on social rights

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Abstract

This article analyses, without any attempt to be exhaustive, the legal impact that different measures taken to deal with the economic and financial crisis through legislation meant for urgent circumstances has had on some social rights. In this sense, we specifically focus on the effect of such measures in relation to labour rights, the right to housing and some social benefits.

Key words: social rights, economic and financial crisis, labour rights, right to housing, social benefits.

1. Introduction

The world economic and financial crisis, which has affected Europe particularly intensely in the states within the Eurozone, has unleashed an entire series of institutional reactions to deal with it. These reactions have been constitutionally and legally significant and have had major effects on the regulation of rights in the social, cultural and economic spheres. The constitutional reforms carried out in Germany, Spain and Italy to include the principle of the stability of public finances into the supreme law of the land, known as the *golden rule* on budgetary matters, reveal the scope of the crisis' impact on the foundations of the rule of law, especially the division of powers. It also questions the juridical impact that the legal measures taken to outline and execute this rule may have on the guarantee of the rights that are the most deeply rooted on the underpinnings of the social state.

The purpose of this study is to analyse, without any attempt to be exhaustive, this legal impact on some of the social rights that are part of what is called the welfare state. With this purpose in mind, in addition to offering a summary and descriptive outline of the causes that may explain the serious crisis underway, in the first section we shall analyse the consequences of the repeated use of the legal institution of the decree-law on power relations. We shall then examine the effects that the labour reform has had on the particularly

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significant social rights such as labour rights (art. 35.1 of the Spanish Constitution [SC]; art. 25 Statute of Autonomy of Catalonia [SAC]) and collective bargaining (art. 37.1 SC). We will continue with an analysis of the measures that lawmakers have taken in some autonomous communities (ACs), such as in the 2007 case involving Catalonia at the start of the crisis, and more recently Andalusia, to guarantee the right to decent housing (art. 47 SC; 26 and 47 SAC, art. 56.1 Statute of Autonomy of Andalusia [SAA]). Finally, we shall mention the recent Constitutional Court Ruling (CCR) 61/2013 dated 14 March 2013 on calculating the vesting periods in part-time work contracts, in which the Court declared the system used to calculate vesting periods in part-time contracts when requesting a contributory pension unconstitutional and null and void.

2. The background of the crisis and the legal responses: The reform of article 135 SC

A) The economic and financial crisis that emerged in the middle of the past decade originated in the failure of the real estate sector in the United States in 2007 (Ruiz-Huerta, 2012: 147 and forward). According to the senior European Union politicians, the public debt crisis was the cause of the financial crisis, and in particular the crisis in credit entities in the EU. However, this is a story that contrasts considerably with what is claimed by economists who are more critical of the causes behind the crisis. They claim that the explanation is precisely the opposite: the international financial situation is what caused the public debt crisis, not vice-versa. Additionally, we should add the grave situation of public finances compared to public spending and the revenues of the public administrations in the states within the Eurozone, which had promoted a policy of low fiscal pressure. In the specific case of the Spanish economy, we must also bear in mind the structural problems that have aggravated the situation, namely structural unemployment, low productivity, excessive dependence on a given economic sector or sub-sector, difficulty creating companies and a high level of decentralisation of revenues and spending, which were not accompanied state-wide by suitable coordination mechanisms among the different levels of public administration involved (Ruiz Almendral, 2009: 113).

The general explanation of the crisis has been crafted in the following terms: during the expansive economic cycle, governments drew up budgets with limited public deficits, although public debt was quite high. In contrast, the private sector, particularly in Spain, spurred by the real estate bubble, reacted by tending to take on much higher debt than it could handle. The banks were not very scrupulous when lending capital to whomever asked for it, capital that they did not have either but instead had to largely find abroad. That is, Spanish banks and savings and loans were also in debt. Therefore, the indirect or remote creditor of Spanish citizens has often been and still is European financial entities in the Eurozone (especially Germany and France). The reports predicting the burst of the real estate bubble led to a considerable deterioration in public finances, inasmuch as external private debt affected the economic system of the state via fiscal crisis and growth in sovereign public debt. The risk premium – defined as the difference between what it costs to request credit in a ten-year loan with respect to the German bond – has become an unavoidable benchmark in capturing the health of the economic systems.

This crisis implacably affected the stability of public finances, and the first major response was to incorporate the principle of stability into the supreme law of the land, even though this rule, called the *golden rule*, was already established in European law. The first was Germany in 2009, which after a long period of reflection took the decision to reform its 1949 constitution. It was followed by Spain (2011), which did so almost summarily, and later Italy followed suit (2012). Other states have included it via lower-ranking regulations (France). And it was particularly after the implementation of the principle of stability of public finances that an entire series of laws were enacted that have influenced and affected the purpose and scope of certain rights within the social and economic order.

B) The preamble to the reform of article 135 SC dated 27 September 2011 explicitly includes a European referent, namely the 2011 reform of the EU's 2007 Stability and Growth Plan (SGP), and it justifies the constitutional revision by "the current economic and financial situation, which is marked by a profound, lasting crisis", stating that the reform's goal is "[…] strengthening trust in the stability of the Spanish economy in the middle and long term", as well as "[…]reinforcing Spain's commitment to the European Union while guaranteeing the economic and social stability of our country".

The reform of article 135 introduced an important, decisive change in the formal and material aspects of the regulation of public finances. The constitutional revision was carried out quite quickly without a prior reflection period using an emergency parliamentary procedure in a single reading, via agreement between the government of President Rodríguez Zapatero (Socialist Workers' Party of Spain, or PSOE in its Spanish abbreviation) and the People's Party (PP), which was the opposition at that time.

Its essential content consisted of the establishment of:

- *The principle of budgetary stability,* in which all the public administrations (state, autonomous communities and local entities) have to match their actions to the principle of budgetary stability.
- *European law as the parameter of constitutionality:* The state and the autonomous communities cannot run a structural deficit than exceeds the margins established by the European Union. In this sense, from now on the provisions contained in the Treaty Establishing the European Stability Mechanism issued in Brussels on 2 February 2012 and the Treaty on Stability, Coordination and Governance of the European Economic and Monetary Union signed in Brussels on 2 March 2012 must be borne in mind. The limits to the structural deficit shall be applicable after 2020 (single additional provision).
- *Parliamentary delegation to set the deficit limits.* An organic law will set the maximum structural deficit allowed by the state and the autonomous communities in relation to the gross national product. The local entities must show balanced budgets. This law had to be approved by 30 June 2012 (single additional provision, paragraph 1). According to this constitutional mandate, the law was approved before the deadline: specifically, Organic Law 2/2012 dated 27 April 2012 on budgetary stability and financial sustainability, approved

under the mandate of the government of President Rajoy (PP), which was formed after the legislative elections held on 20 November 2011.

- *Legal reservation for the issuance of conditional public debt*. The state and the autonomous communities must be authorised by law to issue public debt or take on credit. The conditions are the following:
  - Credits to pay the interest and capital of public debt of the administration shall always be understood as included as expenditures from their budgets, and paying them shall be an absolute priority.
  - Credits may not be subjected to amendment or modification as long as they match the conditions on the issuance law.
  - The public debt of all the public administrations may not exceed the reference value established in the Treaty on the Functioning of the European Union.
- *The exception to the limits on deficit and debt*. These limits may only be exceeded under the following circumstances: natural catastrophes, economic recession or extraordinary emergency situations which are beyond the control of the state and considerably harm the financial situation or economic or social sustainability of the state. These circumstances must be agreed upon by the absolute majority of the Congress of Deputies.
- *The content of the organic law*. The law must regulate:
  - The distribution of the limits to the deficit and debt among the different public administrations, the exceptional circumstances in which the deficit may be exceeded, and the manner and timeframe for correcting any deviations which might arise.
  - The methodology and calculation of the structural deficit.
  - Each administration's responsibility in the event that the budgetary stability objectives are not met.
- *The principle of budgetary stability obligates the autonomous communities*. The infra-state political entities, in line with their statutes of autonomy, must adapt their own provisions to those contained in article 135 SC. Thus, for example, Catalonia (Law 6/2012 dated 17 May 2012), Galicia (Law 6/2012, dated 17 May 2012) and Aragón (Law 5/2012, dated 7 June 2012) now have their own laws on budgetary stability.

The reform of article 135 SC necessitates a commentary which must cover three aspects of special interest: a) the background and theoretical underpinning of the constitutionalisation of the rules on balancing the public finances; b) the position of European law in relation to establishing the principle of budget stability in the Constitution; and c) the procedure of revising the Constitution and the content of article 135 SC.[1]

[1] Regarding the reform of article 135 SC, see the *Revista Española de Derecho Constitucional* no. 93, September-December 2011, which gathered the opinions of a group of constitutionalists

a') *Precedents in comparative law on the incorporation of the limit on public deficit into constitutions* are hard to find, because it is certainly not common for a constitutional text to contain rules of this nature. The most significant similar case is the reference to the public debt contained in the 14th Amendment, section 4, of the Constitution of the United States (dated 9 July 1868): "The validity of public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned [...]." It is also common to invoke the case of article 14 of the French Constitution from the Second Republic in 1848, which considers all kinds of obligations contracted by the state from creditors as inviolable, or even the law dated 10 August 1926, approved during the Third French Republic, which amended its constitutional laws by stating that "the amortisation of the public debt is constitutional in nature".

In any event, the incorporation of balanced budgets into the Constitution seems like a very rigid choice. There is clearly no doubt that sound stewardship of public accounts should lead to a reasonable balance between income and expenditures during the budgetary period. And in this sense, the stability of the public finances should be a goal of the state's economic policies, in line with its own economic capacity. However, budgetary instability does not exclude the possibility of running a deficit, whereas the notion of budgetary balance seems to shut down the state's ability to become indebted, which would be contradictory to the objectives of the social and democratic rule of law.

From a legal standpoint, the constitutional reform in Spain, which incorporated the principle of budgetary stability, does not seem absolutely necessary. The external reasons from the European Union are a different matter, which may explain a constitutional reform pushed through urgently during the summer of 2011. Indeed, it was unnecessary because the provisions on budgetary stability were already contained in European primary law (art. 126 of the Treaty on the Functioning of the European Union), and furthermore, the primacy of European law over national law meant that the state was already bound to the objective of compulsory budgetary stability for all public administrations. In accordance with its exclusive competence ex art. 149.1.13ª SC to set "[the] bases and coordination of general planning of the economic activity", the state has the regulatory capacity to approve specific laws on budgetary stability for the general state administration, the autonomous communities (ACs) and the local entities. In this sense, since 2001 it had been legislating in this vein through Organic Law 18/2001 dated 12 December 2001, on General Budgetary Stability (Aznar government, PP), which was modified by Legislative Degree 2/2007 dated 28 December 2007 (Rodríguez Zapatero government, PSOE).

In turn, through repeated jurisprudence (among others, CCR 134/2011 dated 20 July 20110) the Constitutional Court has interpreted that in accordance with articles 149.1.13ª and 14a SC, the state has the competence to take compulsory measures that limit the budgetary capacity of the ACs and local corporations. Therefore, the state already had the legal capacity needed to

(pp. 159-210). See, too, the issue of the journal *Claves de Razón Pràctica,* no. 216, October 2011, with the contributions of Professors Blanco Valdés and Tajadura Tejada; Bassols Coma (2012); Ruiz Almendral (2009); Embid Irujo (2012); Medina Guerrero (2012).

intervene in the economic and financial system without the need for the reform of art. 135 SC.

On the other hand, this constitutional reform starts with a political and financial approach that reflects a given economic and financial option, although it does not necessarily have to be the only possible one. For this reason, it introduces a factor of rigidity in the matter, such as the budgetary authority of the Parliament, which by its very political nature requires a much more flexible legal instrument than the Constitution to deal with the fluctuations in the economic and financial situation at any given time.

b') *The position of European law in determining the principle of budgetary stability in the Constitution*. The reform of art. 135 of the SC was framed as a way to incorporate EU law into the Constitution (Rubio Llorente, 2011: 4 and following), that is, as an opportunity to formalise the presence of the European legal order in Spanish law. However, as mentioned above, the legal authority to establish limits to the deficit and public debt was already provided by EU law; furthermore, the primacy of European law rendered the constitutional reform unnecessary (Ferreres Comella, 2012: 101-102).

Despite this, we should point out the newness of the double reference made in EU law in sections two (public deficit) and three (public debt), which now turn European law into a parameter of constitutionality which constitutional judges must unquestionably bear in mind. This circumstance opens up a new scenario in constitutional jurisprudence, since until now the Constitutional Court has always declared that it is not the judge of EU law (CCR 28/1991, Legal Underpinning [LU] 4 and 64/1991, LU 4). Inasmuch as the constitutional reform itself is what made EU law an integral part of the parameter of constitutionality, the Constitutional Court must somehow incorporate it into its judgement of constitutionality.

c') *The constitutional review procedure and the content of art. 135 SC.*[2]

a") The first observation which must be made on the reform procedure is the speed with which it was undertaken during August 2011, after the in extremis agreement between the two main political parties statewide, the PSOE and the PP, without the cooperation of the minority parties (IU-ICV, UPD, ERC, BNG) or the peripheral nationalist parties (PNB and CiU). This circumstance contrasts with the widespread consensus generated by the approval of the 1978 Constitution, and is a poor precedent for Spain's political life. The constitutional reform was undertaken under the urgent procedure with a single reading. Therefore, it is a reform hastily made, essentially in one month, which appeared in the Official National Gazette (abbreviated BOE in Spanish) dated 27 September of that same year, and it affected an issue of particular importance, namely the inclusion of the golden rule in budgetary matters, without prior political and juridical debate. There was no debate in Parliament, nor discussion among the social and economic stakeholders. Nor was there a prior juridical debate because of the unexpected swiftness of the political decision. This

[2] The considerations made in this section originate in the lecture (*Rapport sur l'Espagne*) I delivered at the 28th Table Ronde Internacional on *Le juge constitutionnel et l'équilibre des finances publiques*, organised by the Institut Louis Favoreu et le Group d'Études et de Recherches sur la Justice Constitutionnelle and held in the University of Aix-en-Provence on 14 and 15 September 2012.

circumstance also contrasts with the two years that Germany required in the reform of its *Grundgesetz* in 2009.

There were attempts to justify the summary constitutional review in the preamble of the reform. After mentioning the EU Stability and Growth Pact, which sought to prevent the appearance of an excessive budget deficit in the euro zone, it argued that: "[...] the current economic and financial situation, marked by a profound, prolonged crisis, has only reinforced the timeliness of carrying out the reference principle in our Constitution, with the purpose of strengthening trust in the stability of the Spanish economy in the middle and long term". Likewise, it adds that the purpose of the reform is "[...] to reinforce Spain's commitment to the European Union while also guaranteeing the economic and social sustainability of our country". The political authors of the reform probably had solid reasons for carrying it out in such a summary fashion, and surely their goal with this decision was to provide a quick response to the request issued to all the member states of the Eurogroup in the wake of the communication issued by the Chancellor of the Federal Republic of Germany and the President of the French Republic, and likely the European Central Bank as well.

b") The parliamentary procedure used to approve this reform was the special urgent procedure with a single reading (Bassols Coma, 2012: 23-29). According to art. 150.1 of the Regulation of the Congress of Deputies (RCD), "When the nature of the project or proposed law being considered advises it, or when the simplicity of its formulation allows it, the Plenary Session of the Legislature, at the proposal of the Committee, heard by the Conference of Presidents, may agree to directly process it in a single reading". If the agreement is adopted, the debate is held in the same way, as a holistic debate (art. 150.2 RCD), meaning that the parliamentary deliberation is carried out on the text as a whole, not article by article. And "if the result of the vote is favourable, the text shall be considered approved and shall be forwarded to the Senate [...]". The single reading procedure in the Senate is similar (art. 129 Regulation of the Senate [RS]).

Therefore, it is clear that the nature of the reform of the Constitution in terms of the importance and relevancy of the content of art. 135 SC advises against carrying out the debate and approval of the project presented by the government in such a summary procedure as single reading. After all, the parliamentary debate was, in fact, reduced to its minimum expression, while the purpose of the reform is nothing short of the incorporation of the golden rule in budgetary matters into the Constitution regarding both the deficit and the public debt. Likewise, this reform directly affects the content of the social rights that may be affected by the reduction in public spending, and therefore the goals of the social and democratic state of law. Therefore, there may be powerful reasons why the nature of the project did not allow for the application of the urgent procedure in single reading. Nor did the content of the project, which is anything but simple. In this sense, the second constitutional reform from 2011 has little to do with the first one effected in 1992 when Spain joined the Maastricht Treaty, which consisted of the addition of the word "passive" in article 13.2 SC related to foreigners' right to vote.

There is no doubt that the choice of this procedure, which avoided debate on a constitutional reform of the political and legal scope of article 135 SC, did

not leave the minority parliamentary groups indifferent. And this was the case of the parliamentary group made up of the deputies from the ERC and the ICV, who filed an appeal against different Congress of Deputies resolutions for failure to admit the complaints cited against the choice of the urgent procedure in single reading to approve the reform. Since this as an act of legislative power, the appeal went directly before the Constitutional Court. The fundamental law invoked by the deputies was the right to political participation, and specifically political representatives' right to *ius in officium* (art. 23.2 SC). The Constitutional Court majority issued an interlocutory rejecting the appeal. The main argument supporting their decision, in relation to the option to use the procedure of single reading, stated that "[...] the norms applicable (art. 150 RCD and similar) do not establish matters not subjected to that procedure [...]", the reason why the legal order did not prevent the use of this procedure. Regarding the request for urgent decision on the reform, the Court further underscored that "[...] it cannot be asserted that there were no underlying reasons for the request, from the time when the term of the legislature had been publicly announced by recourse to the calling of early elections [...]" (Interlocutory dated 13 January 2012). Two of the magistrates who disagreed with the resolution stated that they believed that an issue of this importance should have been resolved with a ruling, while a third expressed his disagreement in the sense that the court should have analysed whether the vote of the Congress of the Deputies which determined the adoption of the procedure of single reading had obeyed the regulatory mandate of art. 150 RCD.

c") The analysis of the content of the reform of art. 135 SC (Medina Guerrero, 2012: 131-164; Embid Irujo, 2012: 65-90) allows us to state that it is a highly detailed precept. Despite this, the most important aspects refer first to the incorporation of European law as a generic parameter of constitutionality to judge the limits on the structural deficit and volume of public debt taken on by all the public administrations as a whole (art. 135.2 SC); secondly the constitutional mandate which establishes that both the state and the autonomous communities must be authorised by law to issue public debt or contract credit (art. 135.3 SC); and thirdly and most importantly, the decisive constitutional mandate which states that credits to pay interest and capital on the administrations' public debt should always be understood as included in the report of expenditures of their budgets, and their payment shall be an absolute priority (art. 135.3 SC).

As discussed above, European law as a partial parameter of constitutionality in financial matters (Schelkle, 2007: 707 and forward) entails a new development and a challenge for constitutional jurisdiction, which until now had refused to judge EU law. The legal requirement on issuing public debt had been stipulated in the previous art. 135.1 SC for the government of the state before the reform, and now it extends to the ACs as well. Yet in the case of the ACs, the SC does not specify whether the law is supposed to be state-wide or regional. However, we should understand that the law can only be a state law, bearing in mind the state's exclusive competence over the bases and coordination of the general planning of economic activity (art. 149.1.13ª SC) and its exclusive full competence over the General Treasury and state debt. Regarding this aspect, the legislation on the financing of ACs (Organic Law 8/1980 dated 22 September 1980, abbreviated LOFCA) had already established that the ACs required authorisation from the state to issue debt (for a period of

less than one year) as long as its purpose is not to resolve treasury issues. Finally, the criterion of absolute priority which the constitutional reform gives to credits to ensure that the capital and interest of the debt are paid is of prime importance, since it poses a major limitation on the Parliament's ability to decide on the order of expenditures which the state must deal with each year in the budget law. There is no doubt that in this respect, the incorporation of the *golden rule* into the Constitution is a limitation on the Parliament's political autonomy to decide on essential aspects of the social state, such as expenditures on healthcare, education and social services.

In turn, the preamble of Organic Law 2/2012 dated 27 April 2012 on budgetary stability and financial sustainability, approved by mandate of the constitutional reform of art. 135, repeats the same arguments as reasons for limiting the decision-making capacity of the General Courts on economic and budgetary matters: the economic crisis with a deficit of 11.2% in 2009 in all the public administrations, and the financial tensions in the European markets which revealed the EU's institutional fragility and the need to strengthen the economic integration process and ensure broader fiscal and budgetary integration among all the EU member states. This situation requires a strong economic policy to be applied based on fiscal consolidation, which entails eliminating the structural public deficit and developing structural reforms. In this sense, we should highlight the fact that along with the changes carried out by the previous government (PSOE), the new government (PP) has undertaken an entire series of modifications which reform the laws related to the workplace, the financial system, healthcare and education. And we should also underscore that almost all of them were done via the legal instrument of the decree law (art. 86 of the SC). Throughout 2012, 29 decree laws were approved, that is, a mean of two per month. Exceptionalism, the former hallmark of decree laws, has become commonplace. This circumstance emphasises the fact that the all the reforms underway are being carried out practically without the involvement of the Parliament, with the absence of debate on their content and possible alternatives, and that furthermore this is taking place under political circumstances in which the PP has an absolute majority. For this reason, it is not too bold to say that there are major reasons for stating that the institutional response to the crisis has not only lowered decision-making capacity in such a sensitive policy area as the Parliament's exercise of budgetary authority, but even more importantly that it is weakening the solidity of the principle of the division of powers.

3. The use and abuse of the decree law as a regulatory instrument

A) Indeed, in its first year at the helm of the executive power, the PP government has repeatedly used urgent legislation: 29 decree laws to approve a broad set of measures without parliamentary debate, most of them related to the economic and financial crisis which is still besieging citizens and companies.[3] The issues which were the target of regulation, which directly or indirectly affect social rights, include: reorganisation of the financial sector; the reform of the labour market, which was later regulated by the law of the Courts;

[3] Until the date on which this article was concluded (9 May 2013), six decree laws had been approved by the government so far that year.

financing mechanisms to pay suppliers of local entities; protection of mortgage holders with no resources; the creation of a fund to finance payments to suppliers; the simplification of the obligation of information and documentation of mergers and split-offs of capital companies; the introduction of tax and administrative measures aimed at lowering the public deficit; the modification of financial norms related to European authorities' oversight powers; the rationalisation of public spending on education; environmental measures; the reorganisation and sale of real estate assets in the financial sector; the liberalisation of trade and other services; measures regarding infrastructures and railway services; the extension of the professional retraining programme for people whose unemployment benefits have run out; the reorganisation and resolution of credit entities which would later be approved as a law, etc.

What is more, the recourse to urgent legislation has not been used exclusively by the state government. After the incorporation of this regulatory instrument into the new generation of autonomous community statutes, which started with the Statute of the Community of Valencia in 2006,[4] the governments of different autonomous communities have also resorted to the expeditious route of the decree law to approve new economic and social regulations aimed at dealing with the effects of the economic crisis.

This was the case, for example, of Catalonia (art. 64 SAC), where the decree law has frequently been used by the government of the Generalitat as well. For example, in late 2011, a decree law was passed to take measures on treasury matters, although it was repealed shortly thereafter. In 2012, the decree laws that were approved affected the Generalitat's Economic Financial Rebalance Plan and other needs sparked by the economic and financial situation, most notably the measure adopted on payment of the euro for expediting medical prescriptions, in which the Catalan administration assesses the processing the prescription regardless of the payment method on the use of healthcare services established by the state. Another was on improvements in economic benefits for temporary incapacity of the staff serving the administration of the Generalitat in its public sector and Catalan public universities; another reorganised certain financial guarantees in the public sector and tax modifications; and yet another decree law adopted measures on commercial timetables and certain promotional activities. Even with the acting government assembled after the early elections called on 25 October 2012, a regulation on a new tax on credit entities was approved, which the government of the state immediately appealed on the grounds of unconstitutionality.

In turn, in 2012 the government of the Balearic Islands used the instrument of the decree law (art. 49, Statute of Autonomy of the Balearic Islands [SABI]) to approve urgent measures on sustainable urban planning, reorganise the Health Service, reduce the public deficit and modify the system of commercial activity.

The government of the Community of Valencia followed suit; over the course of the same year it used this regulatory instrument (art. 44 Statute of Autonomy of the Community of Valencia [SACV]) to take measures against the crisis and to promote economic activity, such as by approving urgent measures to lower the deficit of the Community of Valencia; supporting business initiative

[4] Approved by Organic Law 1/2006, dated 10 April 2006.

and entrepreneurs, micro-companies and SMEs, which was later approved as a law; and regulating administrative certification bodies. It also used decree laws to pass measures to guarantee budgetary stability and foster competitiveness and to restructure and rationalise the public business and foundation sector, which were also later approved as laws. More recently, we should mention the case of Andalusia, in which the government (art. 110 SAA) approved Decree Law 6/2013 dated 9 April 2013 on measures to ensure compliance with the social function of housing.

B) This unbridled dynamic of dealing with the legal measures to counter the crisis makes the Constitutional Court's doctrine on the decree law a mere abstraction. Even though, as a general rule, the court has been fairly flexible in relation to the legal judgement on each case under the assumption of the qualifying competence of article 86.1 SC ("in case of extraordinary and urgent need") (Santolaya Machetti, 1988: 103 and forward), this does not mean that the jurisprudential permissiveness towards the government on the judgement of opportuneness legitimises the indiscriminate avalanche of decree laws on record. This observation is particularly applicable statewide, but that does not exclude its applicability to autonomous community decree laws as well, where we can glean that the same jurisprudential doctrine can be applied to their essence given their legal similarity to the figure of state regulation.

Regarding the crux of the matter being discussed in this study, that is, the effects of regulation on rights in the social sphere, it is not the same if this affect takes place as a consequence of a parliamentary debate on a project or proposed law, which can be amended as part of the different political options expressed in the Parliament, and if it comes from a decision which is, in fact, unilateral by the government. After all, in the parliamentary procedure of the decree law, the position of the Parliament – and specifically the Congress of Deputies – regarding the government is in fact quite forced, and probably more similar in comparative terms to an administrative adhesion contract than a more symmetrical relationship between the parties. In any event, what becomes clear is that the holistic debate prior to the approval or even potential repeal of the decree law does not allow for detailed or particularly plural deliberation on the different aspects contained in the articles of the provision. The government is the one to push the Parliament to accept or reject the entire contents of the decree law ad limine. And if, as with the current legislature in the General Courts, the government also has an ample parliamentary majority, the debate is, in fact, more formal than anything else. The opposition parliamentary groups express their position in forcibly more general terms, and the ministry with authorities over the matter is usually limited to reproducing the arguments contained in the Statement of Motives of the decree law.

C) The Constitutional Court's doctrine on the existence of qualifying competence, based on a situation of extraordinary and urgent need, was initially outlined in CCR 29/1982 dated 31 May 1982 (which was later reiterated), which states that the bulk of this determination, with a reasonable margin of discretion, corresponds to the government, which is the entity that exercises the function of direct policymaking. This general criterion has been applied on social and economic matters. However, despite this general criterion which attributes deference to the government, the Court itself clarified that the qualifying assumption is not synonymous with a kind of open clause that gives the government an omni-modal, unrestricted margin of determination. As the

Council of Statutory Guarantees of the Generalitat de Catalunya has noted when referring to constitutional jurisprudence, this interpretation of article 86.1 SC means that "[…] in spite of the government's determination, because of its factual nature it is a decision that befalls the bodies which have the political direction; the Constitutional Court, as stated in CCR 29/1982 dated 31 May 1982, is not disempowered to control the actions of these political bodies. That is, that the political nature of the decision '[…] cannot be an obstacle to extending the examination of the qualifying competence to the knowledge of the CC or whenever needed to ensure the use of the decree-law in line with the Constitution' (LU 3)".[5]

The rule of deference regarding the political nature of the government's decision seems to have undergone a substantial change or even a kind of turning point in CCR 68/2007 dated 28 March 2007, which declares unconstitutional Royal Decree Law 5/2002 dated 24 May 2002 on urgent measures for the reform on the protection of unemployment and the improvement of employability. Specifically, it deemed that the government provided no justification that would allow it to determine the existence of the assumption of qualifying competence, per art. 86.1 SC.[6] In theory, this ruling signalled a change in criterion in the sense that it required the government, via the report that should accompany the development of the draft provision within the government stating the motives and the parliamentary debate approving it, to make a greater argumentative effort to justify its competence to act extraordinarily and urgently with regard to a specific situation. However, this more restrictive canon does not seem to have convinced the Executive to change the broad and instrumental conception of the assumption of qualifying competence of the decree law as it had been applying, regardless of the political stripe of the governments and parliamentary majorities which had supported them. In the slew of decree laws approved in late 2012, we can find several examples that also sparked a consultative opinion on unconstitutionality from the Council of Statutory Guarantees because of the lack of justification of the situation of extraordinary and urgent need. Its arguments are particularly interesting for the purposes of this paper.

This is the case, for example, of Royal Decree Law 16/2012 dated 20 April 2012 on urgent measures to guarantee the sustainability of the National Health System and to improve the quality and safety of its services, whose content directly affects the right to healthcare. Even though the state government deemed that the requirements stipulated by article 86.1 SC were indeed in place, in its Opinion 6/2012 dated 1 June 2012, the Council stated that "[…] from the text of the Decree Law, one can glean that implementation of the main elements of the new healthcare system will take more than four months (first transitory provision) and therefore these are measures that 'do not instantaneously modify the existing legal status' (CCR 29/1982, LU 3, and 1/2012, LU 11). In this regard, we could argue in favour of the government's thesis that the aforementioned

[5] Council of Statutory Guarantees ruling no. 7/2010, LU 3.

[6] However, we should not downplay the fact that when STC 68/2007 was approved, Royal Decree Law 5/2002, passed by the Aznar government (months later it would be enacted as law), whose content was the subject of an appeal over unconstitutionality, had already been repealed by Decree Law 5/2006, approved by the Rodríguez-Zapatero government, which reinstated procedural salaries in dismissal processes which the former had eliminated.

timeframe is necessary in order to implement the system, but this is not justified in the preamble to the royal decree law, which only contains a general reference to the need to use a regulatory instrument with immediate effects because the measures that seek to guarantee the sustainability of the system will be applied as urgently as possible. This omission is even more glaring when we examine the transcription of the approval debate, in which no reference is made to this issue" (LU 2). Therefore, the Council deemed that the requirement of urgency was not justified.

Its opinion on another case was quite similar in that it also denied that the same requirement was justified in such a core matter as the fundamental right to education, which was affected by Royal Decree Law 14/2012 dated 20 April 2012 on urgent measures to rationalise public spending on education (Opinion 7/2012, dated 8 June; LU 3).

What is more, the excess use of decree laws has not only affected the failure to justify the assumption of qualifying competence, but it also concerns non-compliance with one of the material limits prescribed by article 86.1, which states that decree laws "[...] cannot affect [...] the rights, duties and freedoms of citizens regulated in Title I [...]". This major issue was posed regarding another important reform stemming from the economic crisis, namely the one prescribed by Royal Decree Law 3/2012 dated 10 February 2012 on urgent measures to reform the job market.[7]

In its reference ruling, CCR 111/1983 dated 2 December 1983, constitutional jurisprudence interpreted that "[...] the restrictive clause of article 86.1 SC ('they cannot affect...') must be understood in that it neither reduces the decree law to nothing, as it is a regulatory instrument provided for in the Constitution, 'which it is possible to use to respond to the changing prospects of today's life' (underpinning 5, Ruling dated 4 February 1983), nor permits decree laws to be used to regulate the general system of rights, duties and freedoms in Title I [...]" (LU 8).

According to this reference established by jurisprudential doctrine, the Council of Statutory Guarantees interpreted that "[...] the 'general system' of a right, duty or freedom is comparable to the establishment of its legal regime, that is, the system of rules regarding the competence, purpose, form or procedure that define the law, in addition to the rules referring to the limits and guarantees in exercising it, all of which are essential elements of law" (Opinion 5/2012 dated 3 April 2012, LU 2). In this sense, the Council believed that the new regulation prescribed by the labour reform (article 12 sections 1 and 2, and article 14 sections 1, 3 and 6) introduced an entire series of modifications that affect the exercise of two social rights: labour rights (article 35.1 SC) and the right to collective bargaining (article 38.1 SC). Thus, this entailed a general regulation impeded by the aforementioned constitutional jurisprudence.

Thus, with regard to labour rights, the changes were general inasmuch as Royal Decree Law 3/2012 stated that the matters on which management may agree to substantial changes in the working conditions include the "amount of the salary", an aspect which is an essential part of the collective bargaining

[7] Later, the labour law reform was subjected to regulation by formal law: Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market, which was also the subject of the Council of Statutory Guarantees Opinion no. 10/2012 dated 22 August 2012.

agreement (CCR 225/2001 dated 26 November 2001, LU 7). According to the Council: "[...] given that, furthermore, the business owner is the one who can agree to the modification without regard to the other party in the labour relation, in this case the royal decree law (RDL) also introduces a general regulation which affects the purpose of the right to collective bargaining" (LU 2).

Regarding the right to collective bargaining in RDL 3/2012, the Council also interpreted that it established a general regulation, given that it introduced new elements that brought about substantial changes in its content, such as: the establishment of the general rule of priority in favour of the company's side of the agreement when collective bargaining agreements do exist (art. 14.3 of RDL 3/2012); the introduction of the provision of administrative intervention through which, in the absence of agreement between the parties, the resolution of the dispute is attributed to the decision of an administrative body called the National Consultative Commission on Collective Bargaining Agreements, even if this only stems the unilateral will of one party, (art. 14, section 1, of RDL 3/2012); and finally, the introduction of the rule on the limitation of the validity and efficacy of collective bargaining agreements once they have been appealed, that is, what is called the "ultra-activity" of these agreements (art 14.6 of RDL 3/2012).

4. The case of the labour reform and its effects on the labour rights and to collective bargaining

4.1. On the labour rights

According to its statement of motives, the reform of the labour market initiated by RDL 3/2012 was envisioned as a way to deal with the economic crisis given the "evidence [of the] unsustainability of the Spanish labour model".[8] It was also presented as an instrument to "guarantee both flexibility [...] in the management of human resources" and "the security of employed workers".[9]

One of the most controversial content precepts has been section 3 of article 4 of RDL 3/2012 on indefinite work contracts to support entrepreneurs, which was included within chapter II on "fostering indefinite hiring and other measures to favour job creation". The content was as follows:

> "The legal system of the contract and the rights and obligations derived therefrom shall generally be governed by the provisions contained in the recast text of the Law on the Statute of Workers approved by Royal Legislative Decree 1/1995 dated 24

[8] "The economic crisis has revealed the unsustainability of the Spanish labour model. The problems of the job market, far from being short-term, are structural, affect the very underpinnings of our social-labour model, and require an in-depth reform, which continue to be called for by all the world and European economic institutions despite the regulatory changes undertaken in recent years [...]".

[9] "The proposed reform attempts to guarantee both the flexibility of business owners in managing their human resources and the security of the employed workers and adequate levels of social protection. This is a reform in which everyone wins, both companies and workers, and it strives to satisfy the legitimate interests of everyone more and better."

> March 1995, and the collective bargaining agreements for indefinite contracts, with the sole exception of the length of the trial period referred to in article 14 of the Statute of Workers, which shall be one year in all cases."

The Council of Statutory Guarantees issued the aforementioned interpretative Opinion 5/2012 (LU 5) deeming that this precept did not run counter to articles 35 and 14 of the Constitution, if it was interpreted in accordance with the terms expressed in legal underpinning 6.1 of the Constitution. Nonetheless, we should draw attention to the arguments cited in this regard, especially the warnings about the risks of unconstitutionality which could arise from the content of the precept.

The reservations regarding the unconstitutionality of this precept formulated by the parliamentary groups which asked for the Council's opinion were the following: 1) the extension of the trial period of contracts called for in article 14 of the Statute of Workers (SW) to one year may violate labour rights (art. 35 SC), "in that after one year it allows the contract not to be renewed without the need for indemnification, or equally, it allows workers to be dismissed gratuitously and without justified cause"; and 2) this new regulation, the Council claimed, may violate article 4 of ILO Convention 158 from 1982 on severing labour relationships, which requires a justified cause to sever the labour relationship. In short, the Council's arguments were the following:

- The constitutionally protected content on labour rights (art. 53 SC) is job stability (CCR 223/1992, LU 3), which prevents unfounded temporary contracts and particularly rejects the termination of contracts without just cause (CCR 125/1994, LU 3).
- Article 35 SC guarantees workers *legal status* when the business owner seeks to terminate their job contract. This means that this termination must fulfil certain guarantees: the cause must be legally provided for by law; the decision to terminate the contract must be expressed in a pre-notice; if needed, the corresponding workers' representatives must be consulted; and finally, it must be formalised in a written notification (art. 53.1 SW). If these requirements are not met, the business's unilateral decision may have detrimental effects on labour rights.
- The provisions of article 53.1 SW are in line with international law as part of the state's internal legal system on labour matters (art. 96.1 SC). Specifically, this refers to ILO Convention 158, whose content must be borne in mind regarding the provisions contained in article 10.2 SC, so that the "in accordance" interpretation established by the constitutional precept consists, according to the constitutional jurisprudence in this area, in the fact that the rights that are applicable to the specific case "should not be interpreted in contradiction" with the norms of international law on human rights (CCR 113/1995, LU 7) (Saíz Arnáiz, 2008: 10).
- According to the provisions of art. 3 in article 4 of RDL 3/2012, the trial period in indefinite job contracts to support entrepreneurs is

characterised by permitting the unilateral termination of the contract during that period without any cause being cited and with no indemnification for the worker, nor is any given formalisation required to terminate the contract. Therefore, the reasons why the contract can be terminated during the trial period are not susceptible to judicial control except in the cases which entail a discriminatory act banned by article 17 SW.

- The trial period according to ordinary jurisprudence on social matters consists in "[...] on-the-ground experimentation of the labour relationship through the execution of the respective roles of the parties, and its manifest function is to check the professional aptitude and adaptation to the job [...], with these functions being more significant in qualified and managerial jobs than in other less qualified jobs. It consubstantially has a temporary, provisional nature, hence it is reasonable for its duration to generally be brief" (SCR dated 20 July 2011, Chamber for Social Matters, LU 2).
- The length of the trial period established by RDL 3/2012 is "one year in all cases", with no provisions for shorter lengths. We should add that the statement of motives cites no motivation behind such a length which reflects a legitimate purpose. Likewise, the one-year trial period is applied indistinctly to any kind of job, regardless of whether or not it is qualified, which could lead to discriminatory treatment since the regulation does not distinguish between different situations. The consequence of this regulation could be a denaturation of the trial period.[10]
- Despite this, the Council ultimately determined that the interpretation of this regulatory provision on the length of the trial period could not be limited to its strictly literal reading but instead it had to be placed in systematic relationship with the entire content of article 4 of RDL 3/2012. In this sense, the kind of labour contract introduces an entire series of measures on fiscal incentives (section 4)

[10] Regarding the length of the trial period, we should underscore the jurisprudence of the European Social Rights Committee of the Council of Europe, whose decision dated 23 May 2012 on the grievance filed against Greece by two unions from this country, the General Federation of Employees of Public Electrical Companies (GENOP-DEI) and the Confederation of Unions of Public Employees (ADEDY), interpreted that the one-year trial period runs counter to the European Social Charter of 1961. It specifically refers to Greek Law 3899 dated 17 December 2010, whose article 17.5 stipulates that during the trial period, an indefinite contract can be terminated without forewarning or indemnification for dismissal. The unions claimed that this precept violated article 4.4 of the Human Rights Charter of 1961. The Council's decision on this matter was the following: "*25. i) le droit à un délai de préavis raisonnable en cas de cessation d'emploi s'applique à toutes les catégories de salariés indépendamment de leur qualité, y compris à ceux qui se trouvent dans une relation de travail atypique. Il vaut également en période d'essai. La législation nationale doit être d'une portée telle qu'aucun travailleur ne soit laissé sans protection*" [...] [...] "*27.* [...] *l'article 17.5 de la Loi 3899 du 17 décembre 2010 ne prévoit pas de délais de préavis ni d'indemnité de licenciement dans les cas d'interruption d'un contrat de travail qualifié par elle de 'à durée indéterminée' pendant une période probatoire qu'elle étend à un an." "28. Par conséquent, quelle que soit la qualification qu'est susceptible de recevoir le contrat dont il s'agit, le Comité dit que l'article 17.5 de la Loi 3899 du 17 décembre 2010 constitue une violation de l'article 4.4 de la Charte de 1961.*"

> and bonuses (section 5) targeted at business owners and workers, which can be considered to be aimed at avoiding this denaturation of the trial period because of the employer's abusive or fraudulent use of the purpose of the regulation. Analysing it as a whole, and beyond the absence of guarantees detected, article 4 establishes a regulation that objectively tends to provide greater job stability.

However, we should add that the Council's clear mistrust of the regulation on indefinite labour contracts and support of entrepreneurs did not go unnoticed by the state lawmakers. Indeed, after the content of RDL 3/2012 was enacted as a law, specifically section 3 in fine of article 4 of Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market, they added a new clause clearly aimed at trying to prevent this kind of contracting from becoming, de facto, an instrument that companies can easily abuse by offering unlimited, repeated temporary contracts. The terms of the regulatory addition were the following: "A trial period cannot be established when the worker has previously performed the same functions in the company under any kind of contract".

4.2. On the right to collective bargaining

Another precept of RDL 3/2012 which sparked particular controversy was section 1 of article 14, which rewrites section 3 of article 82 SW on the procedure regulating collective bargaining agreements. The last paragraph stipulates the following:

> "When the consultation period ends without an agreement and the parties have not subjected themselves to the aforementioned procedures [referring to the prior phases when there is agreement among the parties or mediation via the autonomous conflict-resolution systems] or they have not resolved the dispute, either of the parties may ask that the National Consultative Committee on Collective Bargaining Agreements resolve the dispute [...]".

One of the features of unconstitutionality alleged by the plaintiffs is grounded upon the violation of the right to collective bargaining (art. 37.1 SC) because of the establishment of forcible arbitration, as well of the right of judicial protection (art. 24.1 SC) citing the same reason, the latter an aspect which we shall not discuss in light of the content of this article. The Council of Statutory Guarantees also weighed in on this issue in the above-cited Opinion 5/2012 (LU 5). In summary, the crux of its opinion was the following:

- The kind of intervention of an almost arbitral nature that the precept in question attributes to the aforementioned National Consultative Committee on Collective Bargaining Agreements (NCCCBA) is not unheard of in labour law: the labour conflict-solving procedures of the autonomous communities offer a constitutional dimension connected with the rights to collective bargaining (art. 37.1 SC), the right to join unions (art. 28.1 SC), the right to adopt collective conflict measures

(art. 37.2 SC) and the right to judicial protection (art. 24.1 SC). This constitutional dimension stems from the capacity of the arbitration decision to outweigh the judicial ruling. In this sense, constitutional jurisprudence has not hesitated to accept the full conformity of the arbitration with constitutional principles (CCR 175/1996, LU 4).

- However, lawmakers establishing *ex lege* an obligatory administration intervention to solve conflicts over certain matters is an entirely different matter. The Constitutional Court has rejected the constitutionality of obligatory public arbitration as a procedure to resolve conflicts on changing working conditions (CCR 11/1981, LU 24).
- The controversial issue regarding section 1 of article 14 lies in the fact that the decision to turn to the arbitration of the NCCCBA can come from "either of the parties", which means introducing a rule of unilaterality to solicit the intervention of that Committee. The new regulation entails a profound change in the legal system of collective bargaining, since it means establishing a rule which is not generally applicable from the collective bargaining agreement agreed to earlier. This non-application is reached via the sole desire expressed by one of the parties: in consequence, it breaks with the constitutional mandate that guarantees the binding force of collective bargaining agreements which obligate lawmakers (art. 371. SC). As labour doctrine has stressed (CRUZ VILLALÓN, 2012: 394), the new rule ignores the collective *pacta sunt servanda* which is based upon the free consent of the parties, which the recipients cannot alter unless they agree otherwise.
- The new regulation does not guarantee the right to collective bargaining (art. 37.1 SC) because it violates the freedom of negotiation by establishing the rule of unilaterality in the regulatory phase leading to the NCCCBA's intervention, violating the binding force of collective bargaining agreements. In this sense, we should bear in mind what constitutional jurisprudence has to say on this matter:

> "[…] the collective bargaining agreement's subjection to the regulatory power of the state, which is constitutionally legitimate, neither implies nor permits the existence of administrative decisions that authorise the waiver or unique inapplicability of provisions contained in collective bargaining agreements, which would entail ignoring the binding efficacy not only of the collective bargaining agreement but also of the principles guaranteed in art. 9.3 SC.
>
> "Consequently, an interpretation of art. 41.1 SW, which would allow the labour administration to authorise the business owner to make substantial changes in the working conditions provided for and regulated in a collective bargaining agreement in force, would run counter to art. 37.1 SC […]." (CCR 92/1992, LU 4)

- In short, inasmuch as just one party can impose on the other a resolution from the administration (NCCCBA) which rules on the appropriateness of modifying the working conditions, this is admitting that the collective bargaining agreement can be modified administratively, which is why it violates the right to collective bargaining (art. 371. SC).

Subsequently, Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market, in the part relevant for an analysis of the constitutionality of section 1 of article 14, which led to a recasting of section 3 of article 82 SW on the regulatory procedure of collective bargaining agreements, introduced no changes that would avoid the unconstitutionality expressed above by the Council of Statutory Guarantees in Ruling 5/2012 (LU 5).

5. The right to housing and the measures to guarantee it

The high levels private debt of families and companies generated by the economic crisis in Spain has particularly affected the availability of housing purchased through mortgages[11] granted by the different banks. Many citizens' inability to meet their mortgage payments as a result of the devastating effects of the crisis on employment has led to foreclosures and evictions from numerous flats due to lack of payment. The loss of housing has become a large-scale social problem.

Given a situation of social fragmentation which is sounding ever more alarms, some authorities have begun to take measures to dampen the destructive effects on the right to decent, adequate housing (art. 47 SC). Among these measures, the one that has sparked the most legal controversy prescribes the forcible rental of empty homes at the request of the public administration. The Regional Government of Andalusia has recently prescribed this through Decree Law 6/2013 dated 9 April 2013 on measures to ensure fulfilment of the social function of housing.[12] We should also refer to another earlier provision which sparked notable social and legal controversy in its day, but back before the effects of the crisis were as striking in people's everyday lives, namely Law 8/2007 of the Parliament of Catalonia, dated 28 December 2007, on the right to housing.[13] Its previous wording, until the approval of the House Plenary

[11] The conditions under which these mortgages were signed were often abusive, a circumstance which has been noticed by the Luxembourg court in its important ruling on 13 March 2013, issued on the occasion of a preliminary ruling by Mercantile Court no. 3 of Barcelona with regard to certain precepts in Directive 93/13/EEC of the Council, dated 5 April 1993, on unfair clauses in contracts made with consumers. In its provisions, the CJEU ruling interpreted that: "Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that it is opposed to a regulation of a member states, such as the controversial regulation in the main lawsuit, that at the same time, within the framework of the procedure of mortgage foreclosure, does not provide the possibility of formulating motives of opposition based on the unfair nature of a contractual clause which constitutes the foundation of the enforceable title, does not allow the judge to ascertain the declarative process to become competent to determine the unfair nature of this clause, to adopt protective measures, including, in particular, the suspension of the procedure of mortgage foreclosure, when agreeing to such measures is necessary to guarantee the full efficacy of its final decision."

[12] Official Gazette of the Regional Government of Andalusia (BOJA) no. 69, dated 11 April 2013.

[13] Official Gazette of the Government of Catalonia (DOGC) no. 5044, dated 9 January 2008.

Session, had called for measures similar to the ones that the Andalusian government has now taken urgently.[14] The issue of constitutional relevancy sparked by the case is the determination of whether this administrative measure may violate the right to housing (art. 33 SC).

In its statement of motives, Decree Law 6/2013 issued by the Regional Government of Andalusia dated 9 April 2013 introduces a definition of the social function of the right to housing which, in fact, is the same as the one used by constitutional jurisprudence, but to define the right of property:[15] "The social function of housing shapes the essential content of law through the possibility of imposing positive duties on owners which ensure its effective use for residential purposes, with the understanding that this essential content cannot be established based on the exclusively subjective consideration of law or individual interests. The social function of housing, in short, is not an external limit to its definition or exercise but an integral part of the law itself." It then adds that: "therefore, individual utility and social function are inseparable parts of the content of the right of property". After describing the housing situation in Andalusia,[16] the decree law concludes that there is "[…] an outrageously large housing stock that is unused or underused, while at the same time an unmet demand, with not enough housing on the market and inadequate prices, rendering it necessary to promote their use […]."

With this purpose in mind, the content of the decree law stipulates an entire compendium of action initiatives on unoccupied housing which consist of promotional measures. Likewise, on a different front, this time through coercive and sanctioning measures, it also suggests fostering access to housing through rentals, the latter primary targeted at people who cannot maintain their home

[14] In its first five sections, article 42 of the Draft Law on the Right to Housing ("Actions to avoid the permanent vacancy of housing") calls for an entire series of promotional measures aimed at avoiding the proliferation of empty homes. Once these measures were exhausted, section 6 stipulates that in areas where there is a proven strong demand for residency, the administration with authority on the matter may agree to the forcible rental of the home, having previously declared the owner's failure to fulfil the social function. In line with this, if two years have elapsed since notification of the declaration of the home and it still remains empty, the administration may expropriate the use of the home under the terms stipulated by article 3.d of this draft law in order to rent it to third parties for a period that cannot exceed five years, after which the owner may resume use of their home. The draft law then states that the procedure to carry out this action must abide by the urban planning and forced expropriation laws, and in terms of fair price it must value the corresponding indemnification of the right to temporary use and defray the expenses taken on by the administration to manage and execute improvements in the home, if needed. The Generalitat's Consultative Council handed down a majority opinion (4 to 3 members) that section 6 of article 42 of the draft law ran counter to the Constitution because it generated legal insecurity in that "it is unlikely or very difficult to determine, rendering it difficult to apply…", "the lack of determination of what is meant by 'areas where there is a proven strong demand for residency'", and "[…] it leads to discrimination among the owners of unoccupied homes in the same area qualified as having a 'proven strong demand for residency'."

[15] Constitutional Court Rulings 111/1983 and 37/1987.

[16] According to the figures provided in the Statement of Motives, the 2001 population and housing census that year showed there were 548,669 empty homes in Andalusia, which meant 15.5% of the total housing stock and 22.7% of housing described as main residences. According to the latest figures published by the Ministry of Public Works, the housing stock in Andalusia is estimated at 4.5 million, which entails an increase of one million over the stock in 2001. Therefore, in ten years the housing stock has increased almost 25%.

because of a sudden increase in their debt. In this case, we should pay particular attention to the second additional provision on the "Declaration of social interest for the purposes of forced expropriation of the coverage of housing needs of people in special circumstances of social emergency".

The subjective and objective elements of this provision are the following:

> "1. The coverage of the housing needs of people in special circumstances of social emergency involved in eviction proceedings for foreclosure is declared to be of social interest for the purposes of forced expropriation of the use of the home being foreclosed for a maximum period of three years starting from the starting date agreed upon by the jurisdictional body with authority in this matter.
>
> "2. This decree law shall be applicable to homes involved in eviction proceedings initiated by banks, or their real estate subsidiaries or asset management entities, all without prejudice to the provisions contained in the basic state regulations."

Similar to the legal question posed by the Draft Law on the Right to Housing in Catalonia, in this case, too, there is the possible influence of the coercive measure of temporary forced expropriation over the property right of the owners of empty homes, which deserves our attention.

Article 33 SC states that: "2. The social function of these rights shall delimit their content, in accordance with the laws". It then adds that: "3. No one may be deprived of their assets or rights except for a justified cause of public utility or social interest through the corresponding indemnification and in accordance with the provisions of the laws".

In short, the jurisprudence on property law and the social function of housing is the following:[17]

a) The SC's conception of private property law reveals that the Constitution did not choose an abstract conception of this law. This cannot be conceived solely as a subjective sphere with free interpretation of the assets that are the object of the domain reserved by its owner, subjected solely to the general limitations that the law imposes to safeguard the legitimate rights and interests of third parties or the general interest. Instead, property law must also be recognised as a set of duties and obligations established in accordance with the law in line with the values and interests of the collective, and therefore in harmony with the purpose or social utility that each category of assets mentioned should serve.

[17] CCR rulings 11/1983 dated 2 December 1983 and 166/1986 dated 19 December 1986, which respectively resolved the appeal and issue of unconstitutionality referred to in the expropriation of the Rumasa Holding. Likewise, CCF 37/1987 dated 26 March 1987 on a rural property matter (Andalusian Law 8.1984 dated 3 July 1984, on agrarian reform) which established a much more elaborate doctrine on the right to property and its social function. In the same vein are CCRs 164/2001 dated 11 July 2001, 178/2004 dated 21 October 2004, and 112/2006 dated 5 April 2006.

b) The SC does not limit property law to the merely civil conception, reduced to the margins of article 348 of the Civil Code which defines it as "the right to enjoy and have something without any other limitation than those established by law". What can be gleaned from the supreme law is a conception of rights which are not solely susceptible to being limited; instead, their very limits are considered essential elements of their objective content. Therefore, the social function has not been understood by the framers of the Constitution as a simple external limit to the delimitation of the right to property but is also an integral part of it: individual utility and social function jointly define the essential content of the right to property in each category of assets.

c) There is no infraction of the essential content when a legal regulation of the right to property restricts the owner's ability to take decisions on the use, purpose or profit taken from the assets at stake, or when certain duties are imposed to strive for a more productive use of these assets, as long as their profitability can be guaranteed.

d) The Constitutional Court has often used the hermeneutic criterion of the principle of proportionality (suitability, necessity and proportionality), especially in regard to the fundamental rights of freedom and participation of Section 1 of chapter II of title I of the SC.[18] However, this hermeneutic criterion has evolved by incorporating a higher degree of objectivity in the evaluation of the proportionality of the measures taken by public powers, limiting them to the exercise of rights.[19] In this interpretative line, the evolution of the criterion of proportionality has primarily affected the formalisation of its material dimension, and it has sketched the requirements needed so that the content of the action taken by a public power can be considered proportionate. The material expression of the judgement of proportionality has been defined via the need to verify the purpose of a measure by integrating the factual and temporal elements, or the simple ban on measures by public powers that do not meet these criteria.[20]

The second additional provision of the Regional Government of Andalusia's Decree Law 6/2013 dated 9 April 2013 is on depriving people who exercise the right to housing of their ownership. The regulatory measure taken is not a temporary limitation on the right to use the property applied in unique cases involving people who are in circumstances of social emergency as a result of an eviction process and after justifying an entire extremely detailed set of requirements that the potential beneficiary must meet (sections 3 to 15). The proportionality of the measure seems proven given that in a case of eviction, it may be impossible to find an alternative measure that could guarantee the availability of a home in any other way; its need is justified by the absence of a

[18] Among others, Constitutional Court rulings 11/1981 dated 8 April 1981, 53/1985 dated 11 April 1985, 209/1989 dated 15 December 1989, and 214/1994 dated 14 July 1994.

[19] Among others, Constitutional Court rulings 66/1995 dated 8 June 1995, 107/1996 dated 12 June 1996, and 147/2001 dated 27 June 2001.

[20] This jurisprudence is in harmony with what was established by the ECHR in its leading property law case (ECHR ruling dated 23 September 1982; *Sporrong and Lönnroth vs. Sweden*); the Italian Constitutional Court in ruling no. 14 dated 7 March 1964; the Supreme Court of the United States 106 S. Ct. 1058, 1026 (1986) in the *Connolly v. Pension Benefit Corp* ruling; and the ruling by Court 1 of the Constitutional Court of the Federal Republic of Germany dated 1 March 1979.

physical space to live in; and its proportionality in the strict sense is endorsed because furthermore, what is temporally limited is the possession, not the ownership, in the context of a regional situation in which the stock of publicly subsidised homes is rising.

6. Calculating vesting periods in part-time work contracts: The case of CCR 61/2013 dated 14 March 2013. The right not to be discriminated against in the exercise of labour rights

In the new scene of labour relations that has developed over the past decade, part-time work contracts have become a usual feature in the job market landscape. This contractual formula has only become more prominent since the onset of the economic and financial crisis. The latest example is contained in article 5 (part-time contracts) of Law 3/2012 dated 6 July 2012 on urgent measures to reform the labour market.[21] It once again calls for the possibility that workers associated with a company via a part-time contract can work overtime and that these overtime hours can be calculated as part of the Social Security contribution base and the bases regulating job benefits.

However, with regard to part-time hiring and the system of calculating the vesting periods in part-time contracts when there is a request to receive a contributory pension, we should pay attention to the position adopted by the Constitutional Court, whose CCR 61/2013 dated 14 March 2013 declared unconstitutional the method of calculation established by the General Law on Social Security, recast text approved by Royal Legislative Decree 1/1994 dated 20 June 1994 in the wording that appears in Royal Decree Law 15/1998 dated 27 November 1998.

From the standpoint of the guarantee of fundamental social rights, this decision is important because it discourages the use of part-time hiring, for which there are already enough incentives during this long crisis, to avoid situations that are discriminatory towards the worker.

The ruling originated in the issue of unconstitutionality posed by the Social Court of the Higher Court of Justice of Galicia on the initial section of the second letter of section 1 of the seventh additional provision of the General Law on Social Security (GLSS), the recast text approved by Royal Legislative Decree 1/1994 dated 20 June 1994, because it may violate article 14 SC.

We should recall that this method of calculation was already questioned by the Court of Justice of the European Union (CJEU), when it handed down a ruling in which it deemed that the way Spanish law treated part-time workers was discriminatory.[22] The CC has accepted the criterion established by the Luxembourg court in its underpinnings.

[21] This precept modifies letter c) of section 4 of article 12 of the recast text of the Law on the Statute of Workers approved by Royal Legislative Decree 1/1995 dated 24 March 1995.

[22] Section 38 of the CJEU ruling dated 22 November 2012 concluded that: "article 4 of Directive 79/7 should be interpreted in the sense that in circumstances like the those in the main case, it opposes a member state regulation that requires part-time workers, the vast majority of them women compared to full-time workers, a proportionally higher contribution period to access, if desired, a contributory retirement pension in a proportionally lower amount than the partiality of their workday."

Broadly speaking, the background was the following: a woman had proven 18 years of vesting, 11 of which were part-time, but that was not enough to meet the requirements. In order to determine the vested period needed to earn the right to benefits like retirement, permanent disability, death and survival, temporary disability, maternity and paternity, the norm stipulated that only payments made according to hours worked – either ordinary or extra – would be calculated, and their equivalency would be calculated in "theoretical days paid in". With this purpose, the law states that the number of hours actually worked should be divided by five, which is equivalent to the daily calculation of 1,826 hours per year. What is more, to have the right to a pension for retirement and permanent disability, a multiplying coefficient of 1.5 should be applied to the number of theoretical days paid into the system. What results from this operation is the number of days which are regarded as accredited to determine the minimal vesting periods, although it is impossible to calculate more days paid in than what would result if the services had been provided full-time (7th additional provision to the GLSS). We should note that between 1994 and 1998, the wording of this precept was different, and that in CCR 253/2004 it nullifies the former regulation by interpreting that the way part-time and full-time workers were treated was unequal.[23]

Even though based on this ruling the wording changed and corrections were introduced into the calculation rules, this did not prevent the issue of constitutionality from arising, which gave rise to CCR 61/2013. In summary, the arguments were the following:

a) The GLSS continues to treat full-time and part-time workers differently in its calculation of vesting periods, which is not justified by the contributory requirements of the pension system. Likewise, this decision cannot be viewed as a sphere subjected to the free determination of lawmakers either, as sustained by the State Counsel's Office. First of all, in relation to the doubt as to the issue of unconstitutionality via the possible existence of indirect discrimination on the basis of sex, the Court stated that the relative assessment of whether the precept questioned was justified and proportionate is a determining criterion in the solution to be adopted.

Accordingly, recall that as a formally neutral or non-discriminatory treatment with regard to which, in reality, different factual conditions between workers of both sexes can be detected (CCR 240/1999, LU 6 and CCR 3/2007 LU 3), indirect discrimination is applicable to the case of part-time workers. Regarding the particular case that raised the question, the ruling recognises that the provision is formally neutral but that, in an exercise of empirical

[23] "[…] what does not appear justified is that a differential treatment is established between full-time and part-time workers in terms of fulfilment of the required vesting period to access contributory social security benefits, a distinction which is therefore arbitrary and furthermore leads to a disproportionate result, since it hinders access to the protection of social security by workers hired part-time, a situation which predominantly affects working women, as revealed by the statistical figures. Therefore, from this perspective as well we must conclude that the second paragraph of art. 12.4 Law on the Statute of Workers, in the wording that appears in Royal Legislative Decree 1/1995 dated 24 March 1995, violates art. 14 SC as it leads to indirect discrimination because of sex." (CCR 253/2004, LU 8)

jurisprudence, it states that based on the statistical data we can conclude that part-time contracts are an institution that primarily affects women.[24]

b) Based on this, the Court rejects the fact that the criterion of proportionality should serve as the sole criterion for determining the retirement pension received according to the number of hours worked:

> "[...] when part-time work is not a more or less exceptional episode in the employee's working life and when the usual workday is not very long, the application of the criterion of proportionality shall continue to be a disproportionate obstacle for their access to the retirement pension, despite the corrective rule". (CCR 61/2013 LU 6)

c) Likewise, the application of the corrective coefficient for the criterion of proportionality established in the reform of the GLSS after 1998 does not prevent cases like the one affecting the woman in the lawsuit from happening, because:

> "[...] just as we already stated in CCR 253/2004 dated 22 December, 'this hinders the very access to the benefit by requiring a higher number of days worked to accredit the vesting period stipulated in each case, which is particularly burdensome or excessive in the case of workers with extensive periods of part-time contracts in their working lives and in relation to the benefits that require long contribution periods" (CCR 61/2013 LU 6)

7. In conclusion

The economic crisis has had particularly severe effects in the states within the Eurozone, and it has had detrimental effects on the integrity of individuals' social rights. Among other measures taken, the constitutional response to deal with it, which consists of incorporating the principle of budgetary stability into the supreme law, nonetheless has a rather relative juridical value because this principle was already contained in the European treaties. What is more, its pre-eminence over the national legal systems made it possible to avoid a constitutional reform which, particularly in Spain, has reflected more circumstances of political opportunity towards European authorities than criteria of a legal order. In any event, in the incorporation of what is called the golden rule on budgetary stability contains the seed of a labour law which restricts social rights and has at times violated the Constitution.

Indeed, the reform of the labour law approved in Spain to combat the effects of the crisis, grounded upon a single economic policy option based exclusively on lowering deficits and public debt, has translated it to the regulation of labour contracts and, more broadly, to the system of labour

[24] It cites figures from 2002 from the National Statistical Institute which counted 198,100 salaried part-time men and 879,200 women in the same labour situation.

relations, a concept based on the bilateral relationship between business owners and workers. This relationship is grounded upon the supposedly autonomous will of the parties as individual subjects, apart from the dimension of collective interests which is also involved. In this way, the right to collective bargaining articulated via collective bargaining agreements has been subjected to a specific regulation which actually revives the appearance of public arbitration obstructed by constitutional jurisprudence at the request – in fact – of business owners as the preeminent parties in labour relationships, such that it neutralises the labour functionality of the right contained in article 37.1 SC.

A similar effect has taken place regarding labour rights in what the constitutional jurisprudence has interpreted as a defining feature of their content, namely the ban on unjustified dismissal, even though the latest legislation from the General Courts in this regard has managed to mitigate some of the more corrosive effects that the government's urgent legislation had approved.

Another consequence of the crisis affects the legal form of the measures taken to deal with it. In this respect, the regulatory instrument of the decree law has particularly come to the fore and has been used abusively by both the government of the state and the governments of different autonomous communities, breaking with the exceptional nature that theoretically characterises this source of law. The effect has been particularly detrimental to guaranteeing the division of powers as one of the essential principles of the rule of law, such that it is not too bold to state that parliamentary debate in the Congress of Deputies and – no doubt – in the parliaments of the autonomous communities on measures to counter the crisis have been glaringly missing.

Finally, the economic crisis has also revealed the existence of measures aimed at preserving one of individuals' most prized assets, housing, which is threatened by foreclosures caused by unpaid mortgages as a result of the unbridled growth in private debt. In this sense, the provisions approved in the autonomous communities aimed at promoting and at times forcing owners to rent homes for social use do not entail a limitation of the right to property that was impeded by the Constitution but an expression of their social function.

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Youth: Values and Freedom[1]

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Abstract

Professor Joan Manuel del Pozo analyses the concept of youth, stressing its enormous elasticity and high social consideration in today's hegemonic culture. He also points to liquid, paternalistic family pedagogy as the ultimate reason for youths' inability to take on responsibility when they reach adulthood. Noting its discredit, Del Pozo suggests that we reconsider the traditional concept of adulthood as an ultimate life goal and instead begin to consider it an unfinished process of personal construction, a process grounded upon freedom as the core, axiomatic principle around which human beings in their maturation can take on their responsibilities, develop their abilities, fulfil their desires and achieve full realisation along the way.

Key words: education, ethics, youth, *adultescence*, values, freedom.

1. Introduction

> *To be born free is the greatest splendor of man, making the humble hermit superior to kings, even to the gods, who are self-sufficient by their power but not by their contempt of it* (Pessoa, 1984: 414).

I sincerely appreciate the honour of having been invited to the celebration of the 30th anniversary of the Societat Catalana de Pedagogia (SCP) and given the chance to do so around such pedagogically crucial, meaningful concepts of *youth*, *values* and *freedom*.

[1] This conference was held on January 28th 2015 at Institut d'Estudis Catalans on the occasion of the 30th anniversary of the Societat Catalana de Pedagogia.

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Their centrality and meaningfulness require no proof; however, they do require an expression of epistemological modesty from this speaker, which is also a request for understanding for the boldness of attempting such a difficult public reflection in such an intellectual demanding space such as this one. I would like to thank you in advance for your understanding.

In my opinion, the least risky way of approaching this reflection is precisely to literally follow the title suggested to me, which I accepted. Therefore, I shall devote the bulk of this reflection to examining what the concept of youth means today, first by relating it to a certain hegemonic social culture which is defined by some precisely as "youth-oriented". "Youth orientation" can be summarised by the fact that children are in a hurry to become young adults, perhaps merely to enjoy mobile phones and WhatsApp, and those that have already been young adults for some time increasingly resist leaving that life stage for a variety of reasons, some of which we can ascertain. Before and after delving into the concepts of values and freedom, we shall examine two other concepts which I believe are necessary – and which, in fact, are implicit in the title – to complement our reflection: the concept of adulthood and the concept of responsibility. Of all of them, I shall try to ensure that the reflection provides us with a pedagogically more refined understanding of what the process of human growth means in today's society, which increasingly focuses on what we could call the intermediate or young adult phase. Pedagogy, which has always aspired to being useful in all of life's stages but particularly in the growth stages prior to adulthood, is more necessary than ever today, if in fact – as a reality or only an aspiration or desire – young adulthood stretches out indefinitely. If you allow me to use a play on words which is starting to spread, we could say that pedagogy has always been concerned with childhood and adolescence, but now it is also concerned with adultescence, that confusing stage which is a mix between a theoretically chronologically adult age and a persistent desire and lifestyle that is clearly adolescent.

2. Youth: A concept that is more elastic than ever

Elasticity is the property of bodies that is the opposite of rigidity. A rigid body has boundaries that are always the same, which break before they change shape when subjected to heavy pressure. Elasticity, however, changes, constricts or expands its boundaries without either breaking or changing the nature of the body. This elasticity is applicable as an image of the notion of youth which today, after aeons in which its chronological boundaries were unchanging or shifted very little, is tending to expand both forward and backward: forward because many children are in a hurry to stop being children and to enjoy what they perceive as the prerogatives of young adults, such as more stimulating or risky games, better communication tools, more varied friends and ultimately a noticeable degree of autonomy. Likewise, the very fact that our educational laws have situated the start of secondary school at the age of 12 instead of 14 also seems to reinforce this trend: at the age of twelve, kids can now say "I go to high school!" Yet youth is also moving backwards because we can perceive an attitude of permanent simulation of youth at any age which is obvious in ordinary observations of people at work, on the streets, at parties, everywhere. In fact, a pharmaceutical – or para-pharmaceutical – industry has even sprang up to correct the "flaws" of ageing with a dubious name – anti-ageing – which

seems set to attack (because of the "anti") such a natural process as simply getting older. Of course, the physical dimension or corporal appearance, with additional clothing and accessories, is perceivable at first glance, but a more careful observation of the behaviours and mental and social attitudes confirm that the spirit is also waging an "anti-age" fight: perhaps the most obvious guise of this mental and social attitude is expressed in a permanent avoidance of responsibility, which is a characteristic that many sociologists detect in our society. People live believing – quite sincerely! – that our society always has to have a solution ready – be it political, technical, professional or otherwise – for any need or problem, with the view that appealing to personal responsibility is an exaggeration common to authoritarian, underdeveloped societies. This postmodernity has led us to believe, and we have comfortably nestled into this belief, that even if we have to pay a lot, "someone else" should be able to solve our problems. And not too much time had to elapse before the belief included the expectation that everything should be free of charge. This is an attitude that not only evokes the cliché of the blithe irresponsibility of youth but also the ingenuous, though real, dependency of childhood. If we analyse it carefully, it is an attitude which translates into a persistence of childish egocentrism and adolescent narcissism, resulting in a weak self which is self-obsessed, always waiting for "someone else" to solve everything. The causes of the phenomenon no doubt include resoundingly poor family childrearing: the abuse of paternalism, with the excuse of a purportedly "pedagogical" interest in caring for children, combined with the trust and enthusiasm over technology progress in all senses, which provides unlimited protection and assistance to children and young adults, rendering them incapable of coping with the challenges of life with their own means and responsible efforts as they grow up.

3. Adulthood as an unfinished process. Adolescence and *adultescence*

Adulthood, meaning that set of characteristics that express a peak, a full realization of human capacities and considerable psychological and social stability, has been questioned by this intense, widespread "youth orientation" mentioned above. Indeed, the very etymology of the words we are using illustrates the provisional nature of youth and the final stage – not as the end but as the fulfilment – of human capacities. In Latin, *adolescens* means 'that which is growing', while *adultus* means 'that which has grown'. The former is working its way towards a goal, while the latter has reached it. So, it seems that the cultural and social liquidity of our era has diluted this difference and that the stage in which one attains full realisation, or adulthood, is never reached. One continues indefinitely on the road, in progress, without ever reaching a point which can be regarded as the goal. For this reason, a term has been invented to capture this new reality: *adultescence*, in which the Latin term for the past, which expresses completion or fulfilment, *-ultus*, is merged with the term for the present, *-escens*, which expresses an unfinished process. In short, *adultescence* is the chronologically adult stage according to the traditional paradigm, in which one still lives an adolescent life according to the new paradigm. The traditional paradigm would view the ages of life as autonomous, distinct and compact stages, whereas the modern paradigm views the ages of life as a single, open-ended process with no precise time boundaries, which because

of the aforementioned process is more associated with youth – that which is always in the process of taking shape – than with adult life or adulthood.

This, then, leads us to analyse the notion of adulthood. I define it in the title of this section as an "unfinished process", that is, I am situating us outside the old paradigm and denying what seemed to be a sacred feature of adulthood, stability or quietude, to instead highlight the movement or instability, even though seems contradictory. Perhaps the way to overcome this contradiction is by ceasing to talk about adulthood and talking instead about maturation: adulthood seeks to express a stability which seems to have been discredited, while maturation expresses a process that allows one to view oneself as a "youth in progress". The concept of maturation already existed, but it only encompassed the road to adulthood, while in its new meaning the road would be the goal in itself and adulthood would consist of a maturation that is constantly in progress. However, we can legitimately ask: A road leading where? Is there a "place" to go to, a place that expresses that supposed full realisation of human capacities?

A negative answer would be tantamount to total anthropological pessimism: it would mean taking a step in the opposite direction from Kant's invocation (1784) that called us to adulthood. In fact, it would mean encouraging a perpetual, culpable "minority of age" and therefore ultimately a denial of what paradoxically seems to be a need that is keenly felt by young people, a denial of autonomy or freedom, and therefore a move to perpetual dependency.

This is a key point in our reflection: human maturation, the constant fieri which we are as open beings – not predetermined, at least not absolutely – has identifiable milestones, some "place to go", which permits a kind of anthropological optimism. There are many theories on human maturation, and most of them are possibly overly descriptive and minute. At a time like now, a theory formulated by Allport (1961) in the mid-20th century might be more apt precisely because it is not minute and detailed and instead allows us to understand it as a perspective on a broad and perhaps perennially unfinished road.

This theory suggests understanding human maturation as the construction of three personal characters which are as simple yet profound as the following: first, an extension of the self, that is, a perennially ongoing process in which each person bonds or forms ties with many others, in different registers and at differing levels of intensity, but always breaking the child's egocentric inertia and adolescent narcissism. Secondly, a unifying thinking about life, a mental factor involving the desire and ability to interpret the world and existence autonomously and coherently, and to gradually achieve autonomous status in reality, without depending on other interpretations or conceptions of the world (the way children depend on families' explanations of the meaning of things when they ask "why?" questions incessantly). And thirdly, a capacity for self-objectification, which entails the ability to gain distance from oneself to see oneself with perspective, a kind of self-critical sense which is best expressed in a good sense of humour, essentially the ability to laugh at oneself. This, in turn, assumes that in the maturational process we learn what we have and particularly that we have to accept our limitations, a characteristic that is usually lacking in children and adolescents, who are too self-involved to accept

what they are and the fact that they can do considerably less than they think and want.

With regard to these "milestones", we can state that if we accept that the supposed stability of the old paradigm is never attained and therefore that it is gradual and imperfect at all times, sound human maturation has places to go to or. In other words, these are orientations which bring meaning to the effort of self-construction which pedagogy, the education of life itself, calls us to do.

4. Freedom and values

We have found the freedom factor as a fundamental ingredient of human life, much more than a right (which it is and should be) or a political slogan (which it is and should be). It is the core component of humanisation, seen in both the species perspective – in that as humans we are freed, albeit partially and slowly, from the biological determinism of our evolutionary ancestors – and the individual perspective of the person of our time, who does not conceive of existence without the ability to choose and take intimate, inalienable decisions on their own life.

The philosophical understanding of the idea of freedom is complex and allows for a multitude of perspectives, but from the ethical and pedagogical standpoints – which share so many points of convergence – the best way we can understand it is within the framework of the theory of values. Specifically, we can understand freedom as a core value in human life: core in two senses: as a "priority" on the one hand, but also as a "source" of other values. It is a priority compared to other values for a reason: because it is necessary in order to live a human life and therefore one cannot live a life of values if it is not a life of "values in freedom". A being that tries to live values without freedom would almost be a contradiction *in terminis* given that there are only values in the world when a being takes free decisions which, precisely because they are free, "bring values" to each choice. A choice made by a machine, no matter how "intelligent" it is, would never be "values-driven", even if it might be very "logical" or "right" because values comes only from the possibility – which a machine can never have – of having been able to choose another option and not having done it. A machine can only "choose" – and actually it does not choose but automatically "shows" – the best option depending on its programming rules. It could be said that behind each human choice or selection is an implicit "evaluation" mechanism of the choices, and the evaluation comes from values. When we choose A instead of B, even if we are wrong from the standpoint of interest or rational performance, this means that we have "evaluated" A as better than B for our life. That is, we have "given value" to A and denied value to B or deemed its value is lower. And the course of human life is the course of the constant production, change or destruction of values. Precisely for this reason there is another sense of the core of freedom, understood as "the source" of all values. Failing to understand it in this way would be equivalent to a, idealistic theory of autonomous value, legitimate, but I think unfounded, or value that exists in itself, ultimately value that predated human life itself, as a Platonic idea. In fact, the supreme Platonic idea was what we call a value today, even a prime value: the idea of good. The major difference between Plato's and our conceptions is that we consider good as a value to be the outcome of a historical development of human freedom. In other words, we have freely and primarily

repeated good choices as more desirable than their alternative, evil. We have done the same with love versus hate or bravery versus cowardliness. And even more interestingly: these choices, made by the majority, do not preclude some human groups and especially many individuals from having "other values". This is precisely the most genuine sense of human freedom: that we can even disagree on the values held by many as basic or general. To put it one way, this is a tribute to the fact that ethics makes freedom, the conviction that there cannot be a single, homogenous or closed system. From this vantage point, ethics would be the effort of human – philosophical – reflection to develop values-driven criteria that guide life, accepting that the point of departure cannot be anything other than free reflection, free debate, free consensus which, by definition, excludes homogeneity and dogma. Taking this even further, we can say that the idea of an ethics without freedom is an oxymoron.

If this is the state of affairs, it seems that we can establish that the human maturation process is primarily a process of growth "in freedom" and "of freedom". Otherwise, we would be ignoring that centrality of freedom which we claimed above. Pedagogy and education have not always given growth "in freedom" and "of freedom" the priority it deserves. Many educators, especially in politically or simply culturally authoritarian settings, have viewed the component of the risk of freedom, which is, in fact, quite real. Freedom can unquestionably lead us to make mistakes, even errors that are destructive to life itself, one's integral personality and society. It would be unrealistic to deny the existence of risk in freedom, just as it would be unrealistic to believe that because there is a real risk we should restrict or eliminate freedom simply because the final effects of the cautious path are radically incompatible with the ultimate goal that we find desirable, the full realisation of human life. And obviously, a human life without freedom – no matter how risk-free it might be, although it will never be totally risk-free – would be a non-human life and therefore inhuman. Thus, the cost of safety is literally too high: it is as absurd to deny freedom because of a fear or risk as it would be for someone to tear down their house for fear it might catch fire.

The maturation of each human life, the aspiration to a fully realized life course, has profound ties with growth in and from freedom, respectively. And freedom has profound ties with the values that it inevitably generates, as we have just seen. Therefore, the question is whether we can propose values that are simultaneously compatible with the maximum freedom and whether freedom and values together help to achieve the sound maturation desired.

The answer is that a position could be defended that renders the notions of maturation, freedom and values compatible, and that will be our goal today. Even if they never want to give up their youth – despite or even counter to the lessons learned by age and the passage and weight of the years – young people aspire to, and should aspire to, positive maturation. This is especially because, as we have discussed, maturation does not mean stagnation but instead means full realisation, and the satisfaction with and pleasure of life as the very expression of this realisation. As the highest result of the capacity to be free, it also means the production of values that make this full realisation, this possible maturation, meaningful.

5. Sources and pathways of values in the new society

From the pedagogical standpoint, within the almost infinite range of possible values, we must try to choose those which are considered core or fundamental and accept that the aim of universality associated with this goal is nothing other than debatable for the reasons expressed so far. Probably the best way to condense the core values that matter to humanity into an acceptable number is by analysing our human condition and our needs and aspirations, which we could summarise in the four strands that constitute human beings: the rational strand, the ethical strand, the social strand and the aesthetic strand. This assumes a kind of anthropology that goes beyond the classical "rational animal" of tradition, which quite logically channelled the entire interest of human education into the cultivation of rationality, that is, into the strictest theoreticism or cognitivism. Even today, the majority of people believe that the most valuable asset that education should convey is knowledge, and the more knowledge the better. So it seems that, without ignoring knowledge – instead perhaps even improving it – we must encourage children and youth to grow towards an acceptance of the values that make the other three strands meaningful and give them content.

If knowledge is obviously the value that fills the strand of rational needs and aspirations, we should wonder what values fill the other three strands. And I think that we can summarise them in this way: the ethical strand, or the human need to do good and be done good, would have a radical value to cultivate, which is dignity, meant as the self-perception and hetero-perception of natural beings with a right to freedom and therefore inhabitants of the kingdom of purposes – as holding values and rights. They are the holders of a nature which, as Kant wished (1785), must always be seen and treated as a legitimate purpose in itself and never as an instrument for other purposes. The social strand, or the need and aspiration to live with others similar to oneself, without whose cooperation it would literally be impossible to fulfil our nature, would be filled with the value of goodness, or the willingness to give others what they need to together create a cooperative network that leads to the improvement of the whole and the wellbeing of the individuals within it. And finally the aesthetic strand – perhaps the one that has received the least credit traditionally and even today – which is nothing other than the expression of the need to feel emotions and experience feelings, primarily comes through the value of beauty, in all its dimensions, especially the natural and artistic dimensions, but also the personal and group dimensions.

And from what sources and along which pathways can we achieve them? The source and the pathways in primitive eras were quite simple: direct, constant contact between the children and youth and the adults in the family and tribe, where what we today call education or teaching was not even institutionalised because it was simply "upbringing", a "climate", a "narrative" and "practices" experienced as "natural" and as "producers of affective identification and spontaneous integration" into the group. This became somewhat more complex in the West when the polis became the proper and ideal backdrop for the education –the *paideia* – of youth in classical Greece. The old poet Simonides formulated the apothegm *polis ándra didáskei* – 'the city teaches men' – which situates the scenarios, or the source and the pathways of learning values, right in the heart of the city. This is no longer the modest, controlled inter-family setting of the tribe but the space of diverse social classes,

of jobs with differing skill levels, of legal and political conflicts, and even of war, pacts and confederations, of production and trade, of sport, of theatre and music, and of initial educational settings like the gymnasium. In the words of the poet, an educational ideal was synthesised which challenges us even today: everyone – the entire city, everyone in it – has the responsibility for education, as the current idea of "educating city" aims to remind us. First, because the goal of education cannot be restricted to formal learning which is primarily theoretical or cognitive and is reserved for somewhat or extremely elite minorities. And secondly because personal realisation clearly needs to capture and experience values that no institution alone can give: life extends beyond the gymnasium, beyond the school, beyond any public or private institution. And since life should unfold in wholeness and diversity, the most varied authorities in the city become the key to producing and conveying the values needed to live.

In the contemporary world, after the democratic and industrial revolutions in recent centuries and today's globalisation, the formal institution of schools seems to have been given an exclusive hold on education: we are far from the Greek idea of the "city that educates". However, this does not invalidate the fact that new realities, such as the multiple advanced communication technologies, are prime "educational" operators in the new society. Yet they are educational operators that do not "feel" responsible for educating; they simply produce information and entertainment in order to win over an audience and raise consumption, and their criteria are far from and often contradictory with a minimal pedagogical sense. And yet – go figure! – they produce much more education than we might assume. Education as the transmission of values, of course. What values, we might wonder? Well, a few positive ones like the sense of freedom, but also supposed "values" like individualism and competitiveness, spectacularisation and exhibitionism, violence, a disdain for weakness or disability, frivolousness, sexism, rudeness and poor taste, simplification and the crudest stereotypes when referring to any issue. This is a veritable catalogue of negative values or, to situate ourselves within our line of analysis, a constant pedagogy of immaturity. And even though it is not true that the media are the only source that conveys values apart from formal educational institutions, we can say that they act as a mirror of the plurality of sources that transmit them because today everything is reflected in that immense communicative galaxy in which we live. What is more, they are a mirror that not only reflects all kinds of values but also pushes them and promotes them owing to the vastly effective transmission capabilities that technological progress and the communication skills of many professionals have achieved.

Why do we say *pedagogy of immaturity*? Precisely because the vectors of sound maturation – the extension of the self, a unified thinking about life, the capacity for self-objectification – require, as we shall see, values that are the opposite of the ones mentioned above. We could claim that most of the "environmental" values of our liquid culture – which flow from many sources, not only from the media, although they are also channelled through them – tend to keep young people in a permanent adolescence; that is, they work towards adultescence more than towards gradual maturation.

However, we need a more precise approach. Let us attempt it: if on the one hand, we can establish those four core values as "content" values or objectives to be reached – knowledge, dignity, goodness and beauty – then we

must reflect on the "procedural values" or the ways those objectives are achieved. We cannot posit a simple or a mechanical relationship between each pathway and each objective, primarily because each pathway exists unto itself. If not, it would not be a value and would not lead us to the other values because each pathway leads to more than one of the desired objectives. Therefore, we could talk about how the value of knowledge has procedural value, or such a basic – and yet multifaceted – pathway as critical dialogue, without which knowledge would be in danger of being constructed very imperfectly and of being reduced to the sheer accumulation of information. Or to attain, sustain and universalize the value of dignity, we have a procedural value of pathway of extraordinary "ethical performance" – if you allow me this expression – which is nothing other than respect, or the ability to recognise and consequently put into real practice that core of value inherent to each person. Regarding the value of goodness, the procedural value or pathway which should be cultivated and disseminated to achieve it is empathy, or an intimate willingness to understand the other, their circumstances and their needs. And finally, to achieve the value of beauty, the pathway is none other than the cultivation of the sensibility, a disinterested sensibility filled with emotions that can be expressed and shared.

Therefore, both the content and procedural values have ties, a kind of "chemical valence", with the maturation process or the desired human realisation. These ties are not univocal or exact; rather they are multifaceted and approximate, as we said of the relationship between content values and the procedural values. Precisely because we are not nor do we want to be robots, everything that follows is flexible, porous and largely transversal. Nonetheless, we could say that the three milestones of maturation, which are always open and subject to improvement yet also identifiable and clear, are precisely linked to the values in the following way: the extension of the self or the ability to overcome egocentrism and individualism is attained very specifically by practising the social value of goodness, which is great and essential, whose pathway is the kind of empathy that encourages us to make the connection with the mind and heart of the other. Naturally, the extended self is primarily built upon this foundation, which by definition practices links or articulations and weaves the social fabric. At the same time, empathy is one of the values that is acquired the most clearly through osmosis, contagion or the direct transfer from the immediate environs: children and young people of empathetic parents are themselves much likelier to be empathetic of other people.

Unified thinking, or one's own judgement to guide oneself through the complexity of the world, obviously has a clear link to the content value of knowledge, but not just any knowledge, especially not purely accumulative and informative knowledge but instead the kind of knowledge that stems from the constant practice of critical thinking, of understanding and analytical, methodical, contextual and self-corrective rationality. This practice over the years since childhood is the safest way to develop a personality with its own criteria which, also because of the practice induced from both the family and the school, should include a sincere willingness to examine oneself, to practice epistemological modesty, the kind of assertiveness that affirms without imposing which is always poised to evolve when faced with sound arguments, no matter where they come from.

Thirdly, the capacity for self-objectification, which is primarily expressed in self-irony and a sense of humour about oneself, is associated directly with

both critical knowledge – which is essential to self-knowledge – and an empathetic attitude of goodness that allows one to mentally enter and leave oneself, and with the sensibility associated with the value of beauty, which helps to capture all kinds of nuances and contrasts in our existence.

And, in fact, an analysis of the environmental values which are primarily reflected and reinforced in the media tells us that they run counter to or at least diverge from both the core values and the procedural values mentioned as the objectives of maturation. Indeed, individualism and competitiveness directly threaten respect for the other and their dignity, and of course it neglects and denies the cooperation inherent in relationships based on goodness and, incidentally but importantly, the extension of the self. Spectacularisation and exhibitionism, as well as rudeness and poor taste, ignore and destroy sensibility; they incapacitate it to enjoy beauty and thus deprive the emotions. Violence, a disdain for weakness or disability and sexism directly attack goodness and respect and therefore run counter to the extension of the self. And frivolousness, simplification and stereotypes are incompatible with knowledge, especially with critical knowledge and therefore with a kind of thinking or judgement of one's own, as well as with self-knowledge and self-objectification. Therefore, we can claim that the values climate in which the lives of our young people are developing is truly a "pedagogy of immaturity".

6. Responsibility: The core that articulates the greatest freedom and the best values

Transferring responsibility, as Berlin (1969) and others have warned us, has been a mechanism that is an easy fix for many human beings throughout the ages, but particularly in our age, and very especially among younger people who have enjoyed conditions of safety on the one hand and the best technology in all senses in the other, leading them to believe that everything should always be resolved for them by someone else. This passive activity, on the lookout for familiar social or technological solutions, is a safe form of incapacitation to implement the freedom which, as mentioned before, is the core, basic value of our existence. The lack of responsibility radically incapacitates one for freedom; "external" freedom does not depend on responsibility but on the social and legal framework, which is neither authoritarian nor restrictive. However, within a democratic framework, where external freedom is guaranteed, each person is faced with the fundamental challenge of constructing their own "internal" freedom. Philosophy has focused a great deal on this distinction with different terms: external freedom has also been conceptualised as "freedom from" or "negative freedom" or "freedom of choice", while internal freedom has been conceptualised as "freedom to" or "positive freedom" or "freedom of commitment". The underlying idea is clear: one is an elementary freedom – which is necessary but not sufficient – while the other is a higher-order freedom, or the culmination of the best freedom that we humans have been able to conceptualise and practise.

What distinguishes the elementary from the higher-order sense of freedom is precisely responsibility. Responsibility is not needed for negative freedom, which is limited to thinking that one can choose anything because there is no norm or authority constraining this choice: because one will end up choosing nothing – and thus falling into inaction – or choosing any which way,

that is, poorly for one's own interest. Meanwhile if we think of freedom as a way to construct a project with an ultimate meaning – "for" something – or positive freedom with the desire to commit to some valuable objective, then one must develop a responsible pathway which ensures coherence between what one thinks, what one decides and what one ultimately does. This is a good way to understand responsibility. And in terms of the importance of coherence, it is good to remember that the psychologist Erik Erikson claimed that the crisis of youth was nothing more than the crisis of coherence of adult society, not only because he centres the crisis on coherence but also because he incidentally illustrates to us an extremely important point for our purposes today: what we might think about youth we should think about ourselves as adults. The differences are less than what we might think, today even less than when he formulated the idea in 1968.

Other ways of understanding responsibility are certainly fine and necessary for our youth to know. For example, the most well-known way is the notion, primarily captured in the field of law, that responsibility has two essential features: the first is enough intellectual capacity to take responsibility for the value and the consequences of one's choices, while the second is the ability to accept in practice – and not merely be aware of – the costs of all sorts that we may incur from the consequences of our own actions. We need this notion, which is the most widely accepted, as a kind of legal or juridical regulation of social life; however, we believe that for the purposes at hand, which are pedagogical in nature, it is not enough. Being aware of the consequences of our actions and accepting the costs of them is fine, but it is even better to be aware *of the meaning of our choices* even before we think about the consequences. We could say that being aware of and accepting consequences has a purpose that we could call *utilitarian* – it is useful for us and for society as well, while being aware of the meaning and value of our actions – before the consequences, but not regardless of them, obviously – is much better because it means that *we know we are free*, or even better, we know that we voluntarily channel our freedom to serve a given personal, ethical and social project.

This conception of responsibility can be better understood within the framework of the theory of values which we have discussed today. First, we must start with the idea that there are multiple possible human values and that none are absolute. If they were, this absolute would be the only one by definition. If none are absolute, then we somehow need to make compatible or properly coordinate the attainment of the maximum values, which by definition are the ones that fill human aspirations and needs with content. This can entail an effort at hierarchisation – the famous "scales of values" – or, if we do not want to fall into closed schemes, prioritisation criteria in the event of conflict. And here is where responsibility kicks in: given that no one seems to be prepared to establish a fixed, close scale of values – unless they aim to limit people's freedom – then each individual needs some skill or ability or competence that allows them to articulate, combine, coordinate and optimise them both quantitatively and qualitatively. And even more importantly, each individual needs to articulate a wide variety of values, not only among themselves but with the value that we view as the core, albeit not absolute: freedom. If we recognise freedom as a value, as we have, then we also recognise that it resides in the kingdom of the other values – some of the main ones

already discussed – and that therefore it must also "coexist" and "be articulated" with them. There are times in life when the value of freedom should be limited in order to serve the value of love, for example. In the name of loving a person, we limit our freedom to choose many other things – which are also valuable, but less so – and what should guide us in this "articulation" of the value of freedom with the value of love is responsibility. We will have understood that "responsibly" we cannot make supposedly free choices that might harm, abandon or neglect the person we love.

Educating in responsibility, therefore, means educating in values, and especially educating in the use of responsibility as not the absolute core but as one that can be adapted to the complex interplay with the other values of life. Educating in responsibility, therefore, means educating in life itself in its fullness and diversity of values, including most importantly the value of freedom.

Thus, we could say that responsibility gives our young people, or gives all of us at any age, the opportunity to optimally combine the greatest freedom with the best values of existence.

This is an expression of the full realisation of life, associated with sound human maturation, which we can and should offer our youth with the conviction that we are presenting them with a much more substantial, much more interesting, much more joyful and felicitous life proposal than those debatable "values" that a certain climate of pervasive liquid culture primarily imposes upon young people under the guise of the maximum freedom.

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Recovered memory: The use of biographic stories in the second and third generation of Valencian emigrants to the United States of America in the early 20th century

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Abstract

When making use of the biographical method, it is quite common to collect stories directly from those who lived the narrated events. Those stories can be focused on either their entire life or specific aspects that the researcher considers relevant or important. There is an unwavering fact related to the research carried out on the recovery of the memory of Valencian immigrants to the United States of America during the first two decades of the 20th century: those who emigrated have already passed away.

One may think that their stories have also disappeared with them. However, thanks to exhaustive work with their descendants (sons, daughters, grandsons and granddaughters, nephews and nieces) making use of techniques that are closely related to this methodology (biographical interviews, analysis of correspondence and other documents such as photographs), it is still possible to recover assets that otherwise would have ended up disappearing.

The work presented here is organised around several specific issues. If someone narrates another's a life, what do they really remember? How do they remember it? How do they transmit it?

Key words: biographical method, Valencian immigrants in USA, recovered memory, emigrants' descendants.

1. Introduction

The emigration of Valencians to the United States of America in the early 20th century and its social, economic, cultural and other consequences, both

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individually and collectively, are virtually unknown.[1] It has never been the subject of investigation, research or study in academia.[2] With the exception of a handful of local or county publications in books for festivals and similar publications,[3] a rigorous study has never been performed to situate this phenomenon among other better-known ones which shared the same temporal and spatial contexts, such as Alicante natives in Algeria.[4] The 2012 publication of the text by Teresa Morell, *Valencians a Nova York. El cas de la Marina Alta (1912-1920)*, is the most rigorous attempt to explain and show what happened almost 100 years ago in part of Valencia from a quantitative and descriptive standpoint. The other attempt to give this phenomenon shape and body is a study framed within research journalism, the documentary series entitled *Del Montgó a Manhattan* from Info TV, which premiered in 2014 and was directed by the journalist Juli Esteve.

The fact is that there were many fewer emigrants from Valencia to the United States of America than to other destinations,[5] but for some towns in the counties of Marina Alta, Marina Baixa and El Comtat, there was a veritable exodus of people which had many consequences at all levels. One example is Benilloba, a town located in the inland mountainous region in the province of Alicante. According to the 1913 town census, the town had 1,086 inhabitants, 620 of whom were males. Between 1916 and 1920, 150 people left for the United States of America. Almost all of them were men (99%), and 76% were aged 30 or younger (Morrió 2014). Very few stayed permanently in the USA since the majority came back home after a period of time. And thus appears one of the main characteristics of this emigration: generally speaking, it mostly included males engaged in what has been nicknamed "oroneta" (swallow) emigration,[6] that is, young men on a two-way journey seeking much higher salaries than those found at home, with the intention of returning home with their pockets full so they could get married, buy a house or a plot of land or set up a business. Yet it is also possible to follow the travels of the handful of women who were part of this migratory movement as they accompanied their husbands or brothers. And as mentioned above, even though it was not very common, the journey was one-way for some emigrants, who ended up establishing their families in that North American country.

[1]There are also very few studies on Spanish emigration to this North American country. We can find the pioneering work by Rueda (1993), which is almost the only one, and more recently a doctoral thesis from the University of California by Varela-Lago (2008).

[2] In the proceedings of the Workshops of the Emigration of Valencians to America held on the occasion of the Centennial of the Discovery in 1993, there is one lecture, occupying two pages in writing, by Joan Francesc Mira, which provides an overview of the topic.

[3]Just to cite a few: Garcia-Hernandorena (2013), Ortuño (2013), Morrió (2014).

[4] Menages & Monjo (2007), Bonmatí, (1988).

[5]A few figures to quantitatively contextualise this phenomenon: between 1906 and 1920, around one million Spaniards emigrated to Argentina; around 300,000 went to Algeria and around 140,000 went to the United States (Sánchez 1995). The Valencians who chose the USA were tallied in the aforementioned show by Info TV (2014): 15,600 of the Spaniards who entered the USA via New York harbour between 1906 and 1920 were Valencians.

[6] On the other hand, this was the traditional kind of emigration from the counties of Alicante to La Mancha and Castile, and to other Valencian counties such as La Ribera and Xúquer, following the cycles of crops and harvests (grains, grapevines, rice). Emigration to Algeria also tended to be temporary (Bonmatí 1988).

The participants in the events we are recounting died years ago, but their experiences live on, and we have sought their direct descendants in order to bring them back to life, spotlight them and share them. Our goal is to compile the stories of past events recounted by the direct descendants of those emigrants in order to revive an important part of the history of our land and its peoples. Yet we also want to see how these migratory experiences have somehow shaped the individual and collective identity of our towns and our peoples. Given the characteristics of the subject of our study, the approach we are taking is based on subjectivity, with the goal of reviving "particular stories (on gender, class, country, lineage) [which] strive to carve a niche for themselves in the canonical discourses of history" (Marinas & Santamarina 1993: 11), as these authors point out, given our interest "in the processes of individual, group and collective memory" (Ibid: 11). Using the biographical approach, we report on the complexity of human behaviour, its motivations and its subjectivity, plus since this is a diachronic topic, it has evolved over time and been transformed. From this perspective, we are incorporating the point of view of the object of research, plus we are accessing information that cannot be gotten any other way.

On a general level, Carles Feixa surveys the application of the biographical method and the materials that it uses throughout a series of studies produced by the social sciences during the 20th century, which "have used personal narratives to generate academic discourses on social change" (2006:4). On the other hand, the application of this procedure in research on migrations could be regarded as classic since the Thomas and Znaniecki publication *The Polish Peasant in Europe and America*,[7] which came out in the 1920s. It is one of the most widely read publications which strives to reconstruct the trajectories of immigrants. Joan Prat offers a holistic overview of the narratives and life stories related to migratory processes that have given rise to seminal works in the social sciences which have used "individual or multiple autobiographical stories, and within them what are called parallel and/or crossed stories (Pujadas 1992: 41 and forward)" (2007b: 22). The first ten pages of his article "En busca del paraiso: historias de vida y migración" are devoted to those who emigrated to America in the early 20th century. The majority are emigrants who went to Central America (Cuba) or South America (Argentina), even though he also cites the case of the Basques in the United States[8] (2007b). In our study, we follow this author in his definition of emigrants: "an emigrant is one who departs or embarks on his exodus from the vantage point of their home", and of the act or action of migrating as "a spatial change which involves at least a new residence and often a new society, different customs, etc." (Prat 2007a: 221); however, we have not directly interviewed these emigrants but instead their descendants,[9] and our goal was not so much the migratory processes per se but the direct

[7]We have a translation into Spanish edited by Juan Zarco, with a prologue by Ken Plummer, which was published by CIS in 2004. It is a selection from the original work and does not include Wladeck's life story.

[8] This may be the best-known and most widely examined case when discussing emigration from Spain to the United States. The case of the Basque shepherds who emigrated to the western United States has even given rise to the existence of a Center for Basque Studies at the University of Nevada, Reno, which conserves and stewards their legacy.

[9]And obviously, the status of emigrant is not inherited (Moncusí 2007).

consequences of this emigration on the life course of many families, communities and towns.

2. Methodology

The use of a qualitative methodology, the biographical method, has been shown to be a powerful tool for rescuing events that have been concealed by the passage of time from oblivion, events that are unknown and forgotten in many of the counties and towns where they occurred and are only accessible from the information squirrelled away in the drawers of many dressers and many memories. Within the biographical approach, we have used the technique of multiple and parallel biographical stories (Pujadas [1992] 2000). This technique is used when the unit of analysis is broad enough, yet there is a feature that shapes a certain collective identity. In our study, what provides the characteristics of the universe to be studied is the phenomenon of emigration to the United States of America in the early 20th century.

The first job in our research design was to define the criteria which we would use to choose the informants. We came up with four criteria: place, time, kinship and gender. Regarding place, we chose the informants that were going to be part of our study in two specific sites: first, the Valencian counties from which those emigrants left, where we have looked for their descendants; and secondly, the states in the USA where they established residence and where the presence of Valencians can still be traced. This article presents the results of the study carried out in four counties of Valencia: two in the province of Alicante and two in the province of Valencia. The province of Alicante was the origin of the first emigrants to North America (Canada and the USA) in 1906,[10] and it was also the origin of the largest number, and where this emigration has been more prominent and well-known among its inhabitants. Within this province, we chose two counties: Marina Alta, where we made the first contacts and interviewed the first informant; and El Comtat, a county which also witnessed many of its villages left without men as they all went to America (such as the aforementioned example of Benilloba). In the province of Valencia, we chose the county of Safor, which bounds Marina Alta to the south and Ribera Alta to the north, the latter being the other county from the province of Valencia that was included in this study. In Ribera Alta, emigration to the United States of America occurred somewhat later and was less intense. It was highly localised both spatially and temporally: it basically affected three towns (Alginet, Carlet and Guadassuar), and all the emigrants left there in 1920.[11] Regarding those

[10] The choice of this date is neither coincidental nor arbitrary. In 1906, the first expedition of workers from Alicante left for Canada from the village of Orba. From there they went to the United States, where they seem to have been the start of the migratory waves to this country (Morell 2012).

[11] In 1921, the Congress of the United States approved a law called the Emergency Quota Law which restricted the entrance of immigrants into the country (3% of the population of each nationality, according to the 1910 census). This restriction primarily affected those from southern and eastern European countries. This would explain why the greatest influx of immigrants occurred in 1920, for fear of the enforcement of this law. In 1924, another law, the National Origins Act, lowered the percentage of immigrants to 2% and based the calculations of the quotas on the 1890 census. This left out practically any Valencians because, according to that law, only 131 Spanish emigrants could enter the USA (there were practically no Spaniards in the 1890 census).

who remained in the USA, we conducted interviews with the descendants of the Valencians who moved to the states of Connecticut and New York.

Continuing with the second criterion, time, we sought and chose informants whose ancestors had emigrated to the United States of America between 1906 and 1920. Thirdly, regarding kinship, we first interviewed the children of the emigrants, which somehow determined the gender of our informants. We found a majority of women; given the advanced age of these descendants, it was easier to find women than men (women have a higher life expectancy). Likewise, our interviews with women tended to be longer than those with men. Therefore, gender is a factor worth bearing in mind when discussing the conservation and recovery of memory (Comas d'Argemir et al. 1990). We interviewed nieces and nephews since we believe that relationships with aunts and uncles have been fluid and their history matches a history of the extended family beyond the simple nuclear family.

The interviews were semi-structured, and the narrations were inspired by visual and personal materials (photographs, postcards, passports, period magazines) and objects (trunks, suitcases, coins, cameras) carried by the emigrants. These materials were supplied by the informants and carefully conserved by them. The materials and objects thus became prime tools for perceiving and understanding the practices of memory (Dornier-Agbodjan 2004). According to Dornier-Agbodjan, family photographs (in our case, the objects as well) contain the three social frameworks of memory as defined by Maurice Halbwasch, namely language, time and space, although we would also add family, gender and social class. They are stable and collective, and their purpose within the family is to serve as a reminder, a spark of memory. Therefore, the photographs and other documents jealously guarded by the families were scanned and added to the stories to become part of the research.

3. Ethnography and results

Table 1 shows the profile of the informants according to the aforementioned criteria.

The first phase in our fieldwork conducted between 2012 and 2014 included 19 stories. According to the regional distribution, we gathered 47% of them in the province of Alicante (33% in Marina Alta; 67% in El Comtat) and 53% in the province of Valencia (20% in Safor; 80% in Ribera Alta). Eighty-four percent of the informants are the descendants of emigrants who returned home; the remainder are the descendants of those who stayed. The same percentage corresponds to the sons/daughters, grandsons/granddaughters (84%) and nephews/nieces (16%). By sex, 79% of the interviewees were female. Finally, at the time of the interview, 79% were age 70 or older.

The average length of the interviews was an hour and a half. Most of them were conducted in the informants' homes (16). Of the remaining, 3 were held in a café and 1 at the interviewee's workplace. The language of 100% of the interviewees was Valencian, which was also the native language of all the interviewees.

Table 1. Informants according to research criteria

Province	County	Town	Sex	Age	Kinship	Date of emigration	Date of return
Alicante	Comtat	Benilloba	Female	85	Daughter	1919	1921
			Female	82	Daughter	1920	1930
			Female	74	Daughter	1920	1922
	Marina Alta	Orba	Male	85	Son	1916, 1920	1980s
			Female	53	Daughter and granddaughter	Before 1933	1980s
		Pego	Male	74	Son	1920	1923
			Female	55	Daughter and granddaughter	1920	1930
			Female	55	Niece	1917	Did not return
			Female	79	Niece	1917	Did not return
Valencia	Safor	Bellreguard	Female	85	Daughter	1920	1921
		Palmera	Female	75	Niece	1920	Did not return
	Ribera Alta	Carlet	Male	70	Son	1920	1922
			Female	92	Daughter	1920	1921
			Female	91	Daughter	1920	1922
			Female	80	Daughter	1920	1922
			Male	74	Son	1920	1933
		Guadassuar	Female	50	Daughter and granddaughter	1920	1960s
			Female	74	Daughter	1920	1921
			Female	74	Daughter	1920	1932

Once the interviews had been transcribed, they were analysed in order to establish a series of categories of analysis. The establishment and definition of analytical categories extracted from our interviews allows us to theorise and validate the initial hypotheses of our research. They provide information that is often descriptive, but they also show an entire symbolic and interpretative world of a phenomenon such as emigration to the United States of America, which reveals not only how it was experienced but also what it was like and still is like today from the vantage point of the family members of those who emigrated.

Within the categories, the one referring to social-family contexts and the causes of emigration are two of the first to emerge from the stories. The kind of family that traditionally lived in Valencia (as opposed to those who tended to live in the centre and south of the Iberian Peninsula) was a nuclear family associated with a neo-local residence. The system of passing on assets (if there were any) was distributive, so the inheritance as divided equally among the children of a family. For practical purposes, this gave rise to the fragmentation of the inherited assets, which in the case of land led to smallholder farming that was insufficient and scarcely profitable (Comas d'Argemir, 1992). At a time when the demographic transition to a modern society was not yet complete, the birth rate continued to be quite high while the death rate was gradually declining. A large number of children, coupled with the lack of patrimony and adverse socioeconomic conditions, prompted emigration. What is more, if we add to this causes like family trauma (widowhood, orphanhood, illness), the situation could become unsustainable for the nuclear family.

"My father, his father died when he was young and the same happened to my mother, her mother died much earlier…" (Man, 84 years old, Orba)

"It's what happened when they had no father, my grandmother was left without a husband and at the age of 11 he had to leave school and go to work, three daughters and a son." (Woman, 80 years old, Carlet)

"My father had another brother and a sister and his mother was a widow." (Woman, 85 years old, Benilloba)

"My father was one of seven siblings. Three of them emigrated to North America, by the way they went to Washington, and to New York." (Man, 74 years old, Pego)

"They weren't too bad off economically, but the problem was that my grandfather got ill and my grandmother didn't know how to run the business, and they spent money on doctors… And apparently my father, who had married my mother when she was already expecting my eldest sister, said, I'm leaving to make money. (…) My grandmother spent it all, shall we say, all of it. They spent money on my grandfather's illness. And later, I mean, when my father got married they came home, but they also went to the markets in cart, the market of Benissa, the market of… to sell rice, all kinds of grains. And my father, well, that's what he did. And so my grandmother was left hanging and the shop closed." (Woman, 85 years old, Bellreguard)

"My grandfather was the eldest son of a mixed couple [*Blended marriage: This refers to the fact that his great-grandfather was widowed with 3 or 4 children and married a woman who was also a widow with children*]. Together they had more children. His grandfather was the eldest and noticed that there was not enough to go around. My grandfather, his father liked to drink. (…) Because his father did have enough, he did have a house there across from the town hall which belonged to his father, plus… but if they have a slew of children from one woman and from another woman, and they drink and…" (Woman, 74 years old, Guadassuar)

"They had six children, they had six children. That man died before he reached fifty, you know? And so they were left fatherless and then after that…" (Woman, 55 years old, Pego)

> "My father was left fatherless when he was very young. There were six or seven siblings, he was the youngest one and when his father died I don't know if he was two or three years old. And in his home they owned land, but apparently his mother was a gambler, I mean she liked gambling and we know that she gradually lost everything, squandering it and getting indebted." (Man, 74 years old, Carlet)

These circumstances, coupled with the overall economic and political situation, appear in the majority of cases as the reasons and motives for emigrating. Even though this is not the place to examine the historical context on the national, provincial or even county level, we should note that during the time when emigration to the USA happened, there was a widespread socioeconomic crisis, which was further aggravated in the second decade of the 20th century by the repercussions of World War I on the economy of Valencia. The environment which the emigrants left was an agricultural society besieged by a severe crisis. In the interviews, this situation is expressed in a variety of ways. The bulk of emigrants were people who had no land and worked as day-labourers.

> "In my father's home they owned no land." (Woman, 91 years old, Carlet)

> "At home they owned no land, they worked as day-labourers. He went to America with a family member when he was 17 years old." (Woman, 72 years old, Guadassuar)

> "Well, because they were all poor. Here in the village there were only a few rich folks, almost all the land belonged to a few rich folks (and the others worked as day-labourers). And a day's work back then was not like it is today. My grandfather did not want to live like that, my grandfather wanted to live on his own. And when he went abroad for the first time he didn't get enough, so he went again to live the way he wanted to." (Woman, 74 years old, Guadassuar)

Emigration was also one of the strategies used to adapt to the market, and in some cases to resist the state (in the case of those who evaded doing their military service in Africa, for example) which normal, everyday families used to survive and try to improve their living and working conditions. The desire to leave stemmed from their desire to be prosperous; it was a personal incentive to secure better working conditions and a higher quality of life.

In other cases, men of marriageable age undertook the journey with a very clear goal in mind: to earn enough money to be able to get married.

> "(He went to America) because there was no work here and he was going to get married and he went there to earn money so he could get married." (Woman, 91 years old, Carlet)

> "My father went to save money so he could get married. He courted and courted but had no money to get married." (Woman, 80 years old, Carlet)

> "And he said: if I get married with the meagre savings that my mother has I'll take them. And so he said I'm going to America and whatever I bring back is so I can get married." (Woman, 85 years old, Benilloba)

Despite all these economic explanations, there are also some that are in quite a different vein, namely men who were better off economically who undertook the journey as an adventure or with the desire to see the world and leave the village.

> "My father was a butcher and he went with uncle X, who was an electrician. They both had a good life, they wanted for nothing. They ended up installing electricity in the village and that man had earned lots and lots of money. And they said, hey, well let's go abroad and see what we find there." (Woman, 92 years old, Carlet)

> "[…] Because it wasn't out of need because they had a means of living at home, the only thing was it was for adventure and… abroad, young people." (Man, 70 years old, Carlet)

Even though the vast majority of emigrants to the United States of America were men, some women yearned to emigrate as well, and not just trailing behind their father or husband. It was the expression of a craving to leave a farming society where progress and social mobility were virtually impossible. This was expressed by the niece of one of those women.

> "I heard from my grandmother that her sister (Dolores) wanted to leave and… and her mother, that is, the grandmother Dolores said: You want to go there?! And she says: I'm going because I want to wear a sombrero!" [laughter] (Woman, 55 years old, Pego)

Along with the social and family economic reasons, the establishment of networks beyond the unfavourable circumstances in the home or the attraction exerted by a country like the USA reinforced and stimulated emigration. Everything in our research seems to point to the fact that Valencians' emigration

to the USA was not an isolated phenomenon of just a few people with a hankering for adventure. By that time, the USA was a huge magnet for millions of people from all over the world and, as mentioned above, even though it was not a very common destination for Valencians, a series of chains or networks got started in the Alicante county of Marina Alta, which then spread throughout the neighbouring counties until they even reached Castellón.

> "And there was a very important place called "La valenciana". "La valenciana" was owned two partners. One was Manuel Ivars. The name Ivars is from Benissa. And the other was Francisco Sendra, who was my father's uncle. He had his business there, "La valenciana". And every weekend, well, we lived nearby and we went to see how the business was going. What surprised me is that when the postman came, in the centre of the store… everything was men's clothing… for sale. And they sold tobacco, shoes, trousers… and above "La valenciana", above it they had two flats for rent for men who wanted, who had jobs nearby and slept there. So… I was shocked to see when the postman came he just grabbed a cigar box and put the letters in there. I thought, how can he do that? Letters are an individual, private thing and he just put them there. So all the men who worked around there went to check every now and then, to see if there was a letter from their mother or father in Spain." (Man, 84 years old, Orba)

> "But my mother had a job there somewhere else, she worked at different factories: making hats, fabric. In Manhattan there was, there is a neighbourhood where it's all clothing, especially for women, and today it's all exported to China and other places. And my mother, well, she was very lucky. When we left from New Jersey to Manhattan, she had met many friends who were from Oliva, Pedreguer, Ondara, Benigembla and they asked her: you work with us? And she says: yeah, yeah." (Man, 84 years old, Orba)

Our informants told us about how there, their parents, grandparents or aunts or uncles found people from their villages or went wherever Valencians were living and working. This was even further reinforced by the custom, so common in the Valencian countryside, to work in groups or gangs (Mira 1982; Cucó 1992). Sometimes the entire gangs emigrated together, following in the footsteps of other groups with whom they might have shared fieldwork.[12]

> "[...] at the age of 19 they must have said let's go. They may have heard of a gang of men who were going there…" (Man, 70 years old, Carlet).

[12] A review of the files from Ellis Island shows how the ships in which Valencians were sailing, they tended to grouped together by towns (www.libertyellisfoundation.org).

”[…] it says it there, there I thought there were more. Yes, several went together. Yes, there you can find several names from Benilloba: Francisco, Silvestre…” (Woman, 85 years old, Benilloba)

“[…] My aunt married a man from… my Uncle Pedro, who is from Benigembla. And then… Benigembla is a village up in… in the part of Orba, over there. And that village was a tiny little village. If it had 2,000 inhabitants, and I’m not even sure it had that many, more than half of them went there. And so my Uncle Pedro went first, and by the way he got married to go to America because his parents had already gone. So that must have been in around 1916. And they went first. And he was there for two years, after that my Aunt Joaquina went […]. And once they were there they insisted that my father and another sister go, too. But of course, she was the second to the youngest and she was too young to go (Joaquina) and when they had been there two years, it must have been around 1918, she came and my father went there with her in 1920.” (Man, 74 years old, Pego)

“But fortunately he was in a house full of Spaniards. He did, he said, if I eat over there I haven’t eaten, because he ate as if he were here! Because it was a Spanish couple. It was the brother of uncle X, from the same village too.” (Woman, 85 years old, Benilloba)

“[…] Yes, yes, don’t you know they all went together to the same places? Since they were Catholic, they all went to the Catholic church. After that they went, they danced, all the Spaniards gathered and if they were Valencians, so much the better. Because the language made things a lot easier.” (Woman, 55 years old, Pego)

“Dolores, who went later (she already had a brother there) because she went with her husband and her husband didn’t want to go. And she says, well, if you don’t come I’m going myself and she said, ‘Well, Pasqual, we’re attached at the waist’ and he had to go with her.” (Woman, 79 years old, Pego)

“And they already had a cousin there...” (Woman, 55 years old, Pego)

4. Conclusions

According to the anthropologist Marie-José Devillard, “the use of life stories is justified because they are a relevant, effective instrument for highlighting and uncovering deeds and processes (travel, work, marriage, etc.) that have genetically marked the life course of the social agent in question [...], and to find out (via comparison) the regularities that allow us to ascertain the ways of life and action” (2004:168). Despite this, we are aware, just as this author is, of the

limitations of past research. We do not expect or even try to assume that in-depth biographical interviews restore all the dimensions of the social genesis of past events. Even though the biographical approach to studying past migrations is nothing new today, its application to recover virtually forgotten processes is novel, processes which in other parts of Spain (Galicia and Asturias) have been thoroughly studied and always present, but which in Valencia have gone virtually unnoticed.

The intention of this article was to show how emigration to the USA in the early 20th century is remembered, expressed and interpreted by some of the descendants of the original emigrants. We have only shared a tiny sampling of the information gathered, but it already reveals the potential harboured by a qualitative technique like biographical narrations and the richness of this information. Combined with other techniques like keeping field diaries, analysing personal materials and documents such as correspondence and photographs, and examining consular archives, they provide social researchers with essential information. First, they offer a highly descriptive level to help us reconstruct historical deeds which were never reflected in the official of traditional historical sources. Secondly, they allow us to grasp how past events have shaped the individual and collective identity of some of the towns and counties in Valencia through cultural, social or economic changes. It opens up the door to applying new theoretical currents in migration studies, such as transnationalism,[13] when studying past events. It allows us to understand how the emigrants who left their villages, which were still immersed in a backward, traditional, agricultural society, joined worldwide currents towards a society in the process of a modernising transformation towards an urban and industrial society, and that they were capable of conveying knowledge, capital, culture and values to their homes and families through objects, letters and photographs despite the limitations of the period. The importance of transnational ties therefore becomes visible through an entire web in which the networks established by and comprised of Valencian emigrants reveal themselves to be the source of economic, labour social and even emotional support for those men and women who made these networks the fundamental factor in their survival far from their homes. These bonds extend beyond territorial boundaries and have repercussions on the daily lives of each member of the networks, in both the emigrant's home country and in the new country where they are trying to build a life, and they even affect members of the different generations. Thus, the concepts of transmigrant or transnational fields, which have been defined to study contemporary migrations, may successfully be applied to the emigrants of the past as well.

> "I remember that when they came back they always brought presents, especially clothing and necklaces. I still have it because I do theatre and so I save all that stuff. But I remember that I was little and they brought a lollipop that was a pen for all the little kids. And we'd never seen that before. I went to school with that and was a hit! It was such a hit! A pen that looked like a lollipop. And we were so excited! I

[13] As it has been defined by GlickSchiller, Basch & Szanton Blanc, (1995) and GlickSchiller (2013).

mean, they had brought it to me from America. That was amazing!" (Woman, 55 years old, Pego)

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