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Quixote at the Crossroads: The Present Structure and Future Prospects of the Spanish Labor and Employment Law Scheme

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2. *Supreme Court Decision of September 29, 1992* 23
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I. INTRODUCTION

The overall history of Spain in the twentieth century, admittedly, has not been inspirational. Indeed, looking back still farther into Spanish history, one might understandably recall that "[t]here is the Spain of the Black Legend —Inquisition, Intolerance, Counter-Reformation. . . ."[1] This is the Spain upon which many place primary blame for the initial enslavement and genocide of native Americans.[2] In the modern era, there are the atrocities of the Spanish Civil War,[3] followed by the iron and seemingly endless rule of the war's victor Francisco Franco.[4] However, when Franco finally died in 1976, Spain's King Juan Carlos was able to guide a relatively prosperous nation through a peaceful transition into a new era of democracy.

> He got his political reform through Franco's last Cortes without having to dissolve it, had it approved by a 94.2 [percent] 'yes' vote (15 December 1976), and in the eleven months before the elections he abolished Franco's monopoly party structure, introduced a multi-party system, . . . *legalized trade unions*, restored freedom of speech and the press, besides setting up the poll itself, the first free voting since February 1936.[5]

Not only were trade unions legalized, but union and individual employee rights have been secured by the civil code and the Spanish criminal code as well. Indeed, as shown below, the post-Franco Spanish labor code was combined with

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1. CARLOS FUENTES, THE BURIED MIRROR: REFLECTIONS ON SPAIN AND THE NEW WORLD 18 (1992).
2. *See, e.g.*, ZVI DOR-NER, COLUMBUS AND THE AGE OF DISCOVERY 222 (1991).
Throughout the years of protracted debate over the treatment of the Indians, Spain's official intentions remained honorable. Across the Atlantic in the colonies, however, they paved the road to hell. The cycle became a familiar one as Spain gained mastery over what would become of Latin America: Noble ends were proclaimed in Europe, while colonists continued to callously exploit the natives on the far outskirts of the empire.
Id.
3. *See, e.g.*, PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES 328 (1991). "In all, [even] the Left appears to have murdered about 55,000 civilians . . . including about 4,000 women and several thousand children." *Id.*
4. *Id.* at 608-09.
5. *Id.* at 609 (emphasis added).

aspects of Iberia's criminal code to create and preserve powerful rights for individual Spanish employees as well as for organized labor.[6]

The strongly pro-labor scheme was made possible at least in part by the perception of the rest of the developed world that Spain was a good place to do business.

> Until 1993, foreign investors considered Spain to be one of the most attractive countries in which to invest. Spain was given excellent press and enjoyed the best possible image in the international media. All the merits of Spain's political, economic, social and cultural transition were intentionally reorganized. Spain was even held up as an example to be followed, as a symbol of prudence, good sense and efficiency.[7]

Unfortunately, beginning in 1993, Spain began to feel the effects of the worldwide recession. Unemployment took a dramatic climb, its public relations impact aggravated by revelations of political and economic corruption.[8] In 1994, the Spanish economy showed signs of recovery, as exports actually surged.[9] Still three million, seven hundred thousand Spaniards remained out of work at the end of the third calendar quarter of that year, and analysts were referring to the problem as "structural" unemployment.[10] Furthermore, Spain's place in the European community put pressure upon the nation to reduce the job security currently afforded many Spanish employees, with reforms in 1993 aimed at liberalizing employers' legal right to terminate their employees.[11]

The international practitioner representing businesses doing, or seeking to do, business in Spain must anticipate a labor environment characterized by the tensions and contradictions which the foregoing analysis suggests. The historical and traditional aspects of Spanish labor and employment law, notably organized labor's nationwide influence and the individual employee's extraordinary job security, are in collision with the demands for greater competitiveness and efficiency placed upon Iberia and other developed nations by the aggressive entry of cheap labor from developing nations into the world marketplace and by demands for conformity imposed by Spain's membership in the European

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6. *See infra* notes 117-137 and accompanying text.

7. J. & A. Garrigues, *Spain: A Legal Guide to Spain—Investment Law*, REUTER TEXTLINE: EUROMONEY SUPP., Sept. 28, 1994.

8. *Id.*

9. Richard W. Stevenson, *Unemployment Settles In: Europe's Jobless Ailing Amid Recovery*, INT'L HERALD TRIB., Sept. 28, 1994, at 1.

10. *Id.* Structural unemployment, as distinct from cyclical unemployment, is not strapped to the economic cycle, but rather reflects permanent alterations in means of production, such as results of automation and computerization. *Id.*

11. *Spain—Women: Married, Pregnant Can Be Fired, Workers Warn*, INT'L PRESS SERV., Aug. 18, 1994.

community. The aim of this article is to present an innovative exposition of the Spanish labor and employment law scheme, and to provide the practicing transnational lawyer with a reliable guide to the major tenets of that scheme.

Section II of this article presents a fairly detailed overview of Spanish labor law, including the revisions of 1993.[12] Section III suggests where Spain may be headed and what lessons the United States might draw from the Spanish experience.[13]

II. THE SPANISH LABOR AND EMPLOYMENT LAW SCHEME: AN OVERVIEW

One of the first issues which will strike an observer of Spanish labor law is the large volume of legislation controlling the relationship between the employer and the employee. There are many regulations on detailed aspects of the relationship between employer and employee.[14] Spanish law tends to protect the employee to a greater extent than does the law in some other jurisdictions, notably the United States. The basic source of the employment contract's contents are to be found in the individual contract between employer and employee. Extensive legislation and collective labor agreements supplement these private agreements and provide minimum standards which override the private agreement if it is to the advantage of the employee.[15]

The main source of legal regulation of the employment relationship is the Workers' Statute, which is a key piece of legislation passed in 1980.[16] This Act was amended in 1993.[17] The regulation of the labor relationship in Spain is very wide-ranging and includes: the rights and duties of employees in the labor relationship, the rights of employees deriving from employment contracts,[18] the

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12. *See infra* notes 14-210 and accompanying text.

13. *See infra* notes 211-251 and accompanying text.

14. *See XII Congreso Internacional de Derecho de Trabajo y de la Seguridad Social* [XII International Congress on the Right to Work and on Social Security] (1988) (referring to a number of legislative enactments regarding the employer/employee work relationship); *see, e.g., La Ley 8/1988 de 7 de abril* [Law 8/1988, April 7, 1988][Law 8/1980, March 10, 1980][hereinafter E.T.]; *El Estatuto de los Trabajadores* [Workers' Statute]; *La Ley de Imigracion* [The Law on Immigration]; *El Real Decreto 2347/1985, de 4 de diciembre* [Royal Decree 2347/1985, December 4, 1985].

15. *Id.*

16. E.T., *supra* note 14. The Workers' Statute of 1980 addresses the constitutional rights of employees. *Id.* Apart from the Spanish Constitution, it is perhaps the most important guiding principle in Spanish labor legislation. FABREGAT & BERMEJO LAW FIRM, BUSINESS LAW GUIDE TO SPAIN 214 (1990); BERNARDO M. CREMADES, SPANISH BUSINESS LAW 528 (1985).

17. FABREGAT & BERMEJO, *supra* note 16, at 221-22. This act has subsequently been amended through *Reforma del Estatuto de los Trabajadores* [Reform of the Worker's Statute], Ley 11/1993.

18. E.T., *supra* note 14, art. 4. The rights of the employee in the labor relationship are found in Article 4 of the Workers' Statute. *Id.* An employee's duties are defined in Article 5; and the rights and duties of the employee under the employment contract are set out in Articles 17 to 21. *Id.* arts. 5, 17-21.

question of salaries,[19] the amount of working hours,[20] the amendment of the employment contract regarding the changing of functions within the workplace, the changing of the workplace itself, changes in working conditions,[21] the trial period,[22] and the employee's guarantees on changes of employer.[23] The legal provisions applicable to the contents of the labor relationship are basically contained in articles fourteen to forty-eight of the Workers' Statute.[24]

A. The Rights and Duties of the Employee

Under the Workers' Statute, employees in the labor relationship have many rights in addition to their rights deriving specifically from their contract of employment.[25] Employees have the right to have a real occupation or trade, as opposed to just a job, at their place of work.[26] In addition to punctually receiving the agreed salary,[27] employees have the right to a promotion if it is justified by performance and professional training.[28] Employers cannot discriminate against employees who are either seeking work, or are at work, on the grounds of sex, civil status,[29] age (within the limits laid down by the law), race, social status, religious or political ideas, membership or non-membership in a trade union, or language.[30] At work, employees have the right to physical safety and an adequate system of safety and hygiene.[31] Employers are required to respect the privacy and

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19. *Id.* arts. 26-33 and 50(b).

20. *La Constitucion de Espana* [The Spanish Constitution], art. 34 [hereinafter C.E.]. Limits on the length of the workday amount to a constitutionally guaranteed right. *Id.*; *see also* CREMADES, *supra* note 16, at 542 (expressly stating the guidelines that employers must follow in regards to regular and overtime hours, breaks, vacations, leave, and maternity leave).

21. E.T., *supra* note 14, art. 41.

22. *Ley 16/1976, de 8 de abril, de Relaciones Laborales* [Labor Relations Law of April 8, 1976], art. 17 (1) [hereinafter Labor Relations Law]; E.T., *supra* note 14, art. 14.

23. E.T., *supra* note 14, art. 42.

24. *Id.* ch. 2, secs. 1-5 and ch. 3, secs. 1-3. These articles primarily deal with guidelines concerning the lawful contents of the employment contract, fundamental rights of the employee in regards to the contractual relationship with the employer, and an employee's rights under contract suspension. *Id.*

25. *Id.* art. 4.2(h).

26. *Id.* art. 4.1(a); FABREGAT & BERMEJO, *supra* note 16, at 221.

27. E.T., *supra* note 14, arts. 4.2(f), 29.

28. *Id.* art. 4.2(b); FABREGAT & BERMEJO, *supra* note 16, at 221.

29. The civil status of an employee is protected through various statutes and provisions. They are not however, dealt with in Spanish Labor Law. E.T., *supra* note 14, art. 4.2(c); FABREGAT & BERMEJO, *supra* note 16, at 221.

30. E.T., *supra* note 14, art. 17(1). *See also* FABREGAT & BERMEJO, *supra* note 16, at 221.

31. C.E., *supra* note 20, art. 40, § 2; E.T., *supra* note 14, art. 42(d). For additional information, see *Ordenanza General de Higiene y Seguridad en el Trabajo* [General Ordinance on Hygiene and Safety in the Work], Mar. 9, 1971; *Decreto 432/1971, de 11 de marzo, Sobre La Constitucion, Composicion y funciones de los Comités de Seguridad e Higiene en el Trabajo* [Decree 432/1971, of March 11, 1971, on the Constitution, Composition and Functions of the Safety and Hygiene Committees in the Work]; *Ley 14/1986, de 25 de abril, General de Sanidad* [Law 14/1986, of April 25, General of Health] arts. 21 and 22; *Ley General de la Seguridad Social, Aprobación de su Texto Refundido por Decreto* 2065/1974, *de 30 de mayo* [General Law

give due consideration for the dignity of their employees.[32] In addition, individual employees also have the right to bring legal proceedings arising out of their contract of employment.[33]

In addition to obligations deriving from the individual employment contract,[34] the Workers' Statute creates basic duties required of employees. Under the statute, employees must comply with the specific obligations of their positions of work,[35] and with their employers' orders and instructions in the regular course of the latter's management functions.[36] Employees must observe adopted safety and hygiene measures,[37] and contribute to the improvement of productivity. In addition, employees cannot compete with the activities of their employers while so employed.[38]

1. Duty Not to Compete

Special attention should be paid to the duty not to compete with the company. While the employment contract remains in force the employee may not provide labor services for other companies where this is deemed unfair competition or where full dedication has been agreed on with the appropriate financial rewards and in the terms that have been agreed for these purposes.[39]

Post-employment competition clauses cannot have a duration of more than two years if the employee in question is a qualified expert, or six months in the case of other employees.[40] The non-competition clause will be valid only if the employer has a meaningful industrial or commercial interest in the clause, and is paid adequate economic compensation.[41] Where the employee has received specialized training at the expense of the employer to put a specific project in motion or to carry out specific work, the parties may agree that she is to stay with the company for a particular length of time.[42] This agreement cannot be for longer than two years and has to be made in writing.[43] If the employee leaves the com-

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on Social Security, Decree 2065, May 30, 1975] arts. 26, 27, and 186.

32. E.T., *supra* note 14, art. 4; FABREGAT & BERMEJO, *supra* note 16, at 221.

33. E.T., *supra* note 14, art. 4.2(g).

34. *Id.* art. 5(f).

35. *Id.* art. 5(a); FABREGAT & BERMEJO, *supra* note 16, at 221.

36. E.T., *supra* note 14, art. 5(c).

37. *Id.* arts. 5, 39.

38. *Id.* arts. 5(d), 21.1; ANTONIO OJEDA-AVILES, WORKPLACE JUSTICE: EMPLOYMENT OBLIGATIONS IN INTERNATIONAL PERSPECTIVE 292 (Hoyt N. Wheeler & Jacques Rojot eds., 1992).

39. E.T., *supra* note 14, art. 54.2(d); AVILES, *supra* note 38, at 292.

40. E.T., *supra* note 14, art. 21.2.

41. *Id.* art. 21.2 (a)-(b).

42. *Id.* art. 21.4.

43. *Id.*

pany before this time, the employee will be obliged to compensate the employer for damages.[44]

2. Salary

Salary is defined in Spanish law as all financial rewards received by the employee, in money or in kind, in return for rendering labor services to another person.[45] Whatever the form of remuneration it is for time actually worked and for rest periods which are counted as time worked.[46] Under the Workers' Statute, compensation or money to make up for expenses incurred as a consequence of the employee's activities, money received from Social Security, and compensation for moving, being laid off, or dismissed are excluded as salary.[47] These exclusions are designed to maintain uniformity with the regulations on income taxation.[48] However, some Social Security payments, such as those for temporary labor incapacity and retirement pensions, are considered salary. These payments are considered to be income for tax purposes and are subject to tax retention at the source.[49]

Spanish law identifies several types of salary. In the case of *salaries calculated on a time basis,* only the duration of the service is taken into account, regardless of the amount of work actually done, unless there is an express agreement in the contract as to the minimum amount of work to be done.[50] Salary is usually paid monthly. With *salaries calculated on the basis of work done,* account is only taken of the amount and quality of the work done, regardless of the time taken to complete the project.[51] It is possible to agree that the work will be finished within a particular time provided this does not involve a level of productivity which is excessive in the light of normal working practices or require productivity higher than that which is normal for an average employee.[52] There can also be *mixed salaries,* where apart from the basic salary there is an agreement for bonuses or incentives or supplementary payments for the amount or the quality of the work.[53]

If the salary is in the form of money, it has to be paid by the employer in cash, by check, or by some similar means through a bank. Regarding *salaries in*

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44. *Id.*; *El Real Decreto 3/1933* [Royal Decree Law of December 3, 1993] [hereinafter R.D.].
45. E.T., *supra* note 14, art. 26.1.
46. *Id.* art. 26.1; CREMADES, *supra* note 16, at 543; FERNANDO POMBO, DOING BUSINESS IN SPAIN § 15.06(3) (Supp. 1993).
47. E.T., *supra* note 14, art. 26.1; CREMADES, *supra* note 16, at 543; POMBO, *supra* note 46, § 15.06(3).
48. E.T., *supra* note 14, art. 26.2; POMBO, *supra* note 46, § 15.06(3).
49. E.T., *supra* note 14, art. 26.2; POMBO, *supra* note 46, § 15.06(3).
50. POMBO, *supra* note 46, § 15.06(3).
51. *Id.*
52. *Id.*
53. *Id.*

kind, clauses in employment contracts are void if they directly or indirectly force the employee to buy consumer goods in particular shops or other places.[54]

If the salary is *being kept* by the employer, then the state of the premises, the sleeping accommodations, and the food have to be adequate in terms of the circumstances, the status, and the moral and hygienic needs of the employee.[55] Salary in kind is still important in some sectors of the economy, for example, food and accommodation in the tourist industry, housing for porters and security staff, food products in the agricultural sector, the use of a company car, leasing of accommodations, and school fees for company executives.[56]

The law in Spain permits salary to be paid wherever it is specifically agreed between the parties or on the basis of customary practices.[57] The Workers' Statute permits agreement of the parties or customary practices regarding the time of payment, however, payment has to take place during working time or immediately following the end of the workday.[58]

The regularity of payments of salary is determined by what is laid down in sectoral agreements, the individual employment contract, or the customary practice.[59] Periodical remuneration cannot take place at intervals greater than one month except bonuses, special payments, commissions, or other remuneration which accrue after a period in excess of one month.[60] Under the Workers' Statute the employee is entitled to two special payments every year, one at Christmas and the other at the time laid down in a collective agreement or an agreement between the employer and the employees' representatives.[61] It can be laid down in a collective agreement that the special payments are to be spread out over the twelve regular monthly payments.[62]

The payment of salary has to be accompanied by the issuing of a receipt which the law has put in a standard form.[63] The official standard form for the receipt lists various groups of salary items and deductions. The salary receipt, when it has been duly signed by the employee, only attests that the employee has received the amounts referenced in that receipt. It does not represent an acknowledgement that the amounts referred to in the receipt and received by the

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54. *La Ley de Contrato de Trabajo de* 1944 [Work Contracts Act], *reprinted in* MINISTERIAL SERVICES OF LABOR AND SOCIAL SECURITY, XII INTERNATIONAL CONGRESS ON THE RIGHT TO WORK AND ON SOCIAL SECURITY 216 (1988).

55. *Id.*

56. *Id.*

57. E.T., *supra* note 14, art. 29.1.

58. *Id.*

59. Labor Relations Law, *supra* note 22, art. 31; E.T., *supra* note 14, art. 29.

60. E.T., *supra* note 14, art. 29.1; CREMADES, *supra* note 16, at 543; POMBO, *supra* note 46, § 15.06(4).

61. E.T., *supra* note 14, art. 31.

62. *Id.*

63. *Id.* art. 29.1.

employee are actually what was owed, or that the employee has not received or should receive other supplementary payments.[64]

Important to the employee's salary is the legal minimum wage. Since 1963, the same minimum wage has applied to all employees of both sexes, regardless of the sector of the economy in which they work.[65] The national minimum wage is calculated every year by the Spanish government and is currently set at 58,530 pesetas per month.[66] It is illegal to work for someone at below this minimum wage on a full-time basis. It is not possible to renounce the right to receive the legal minimum wage and any collective or individual agreement to the contrary is void.[67] The Spanish government fixes the legal minimum wage after consultations with most of the representative trade unions and employers' representatives.[68] The government takes into account several factors, including the retail price index, national average productivity, the increase in labor's share of national income, and the general economic situation.[69]

In addition, the employee enjoys a series of guarantees for the payment of salary, including ten percent interest on late salary payments and the ability to enforce the employee's right to work if the employer will not give the employee work once the contract is in existence.[70] The Wages Guarantee Fund, an independent agency forming part of the Ministry of Labor and Social Security, will pay the employee any outstanding salary, within certain limits, if the employer is bankrupt or in suspension of payments.[71] It will also pay compensation recognized as a result of a judgment or administrative decision.[72]

Failure to pay or repeated delay in payment of the agreed salary will be sufficient cause for the employee to apply for the termination of the employment contract with the right to the appropriate compensation for unfair dismissal.[73] In the case of commissions, the employee or the legal representatives of the employee may, at any time, ask for information on the accounts for which these payments are based.[74] Salary owed for the last thirty days of work in an amount

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64. *Id.*

65. *Id.* arts. 27.1, 28.

66. *Id.* art. 27.1 (approximately US$350).; CREMADES, *supra* note 16, at 543; POMBO, *supra* note 46, § 15.06(3).

67. E.T., *supra* note 14, arts. 3.1(c), 3.5. According to Article 3, Spanish employees cannot legally renounce their rights, and agree to work under less favorable conditions than those laid out in the articles. *Id.* Because the article provides for a government established minimum wage, the employee may not validly contract to receive less than the established sum. *Id.*

68. *Id.* art. 27.1 (a)-(d).

69. *Id.*

70. *Id.* arts. 29.3, 30. Article 29.3 concerns the 10% interest placed on salaries which are paid late by the employer, while Article 30 relates to the inability of the employee to work under the existing contract. *Id.*

71. *Id.* art. 33.1.

72. Labor Relations Law, *supra* note 22, art. 31; E.T., *supra* note 14, art. 33.2.

73. E.T., *supra* note 14, art. 50.1(b); CREMADES, *supra* note 16, at 539-40. The appropriate compensation for unfair dismissal is forty-five days salary per year of service. *Id.*

74. E.T., *supra* note 14, art. 29.2; POMBO, *supra* note 46, at § 15.06(4).

which does not exceed double the legal minimum wage has preference over any other kind of debts, even those secured with a pledge or mortgage.[75] Debts of unpaid salary have preference over any other kind of debt provided these debts are owned by, or in the possession of, the employer.[76] Unprotected, unpaid salary will have singular preference and will rank above any other debt except those with rights in rem which have preference in accordance with the Mortgage Act.[77]

Guarantees for unpaid salary shall be recognized even if the employer has begun bankruptcy proceedings. Proceedings brought by employees for the payment of their salaries are not suspended by the employer bringing bankruptcy proceedings.[78] The deadline for exercising preferential rights for the payment of salary is one year, after which time the preferential rights expire.[79] The legal minimum wage cannot be attached in legal proceedings. Amounts in excess of the legal minimum wage enjoy immunity from attachment on a decreasing scale according to provisions of the Civil Procedure Act.[80]

3. Wage Tax

Selected groups of employers are obliged to retain and pay to the Treasury a down payment on income tax. These groups of employers are: public and private corporations and other entities residing in Spain; individuals, corporations and other entities which are not residing in Spain, but carry on business through a permanent establishment in this country; and owners of businesses or those carrying on professional or artistic activities residing in Spain with regards to the income paid out while carrying on such activities. The retention of tax is calculated on the basis of the amount of the salary and according to the family circumstances of the taxpayer and the tables contained in the income tax regulations.[81]

4. Time Spent at Work

The Workers' Statute says that the amount of time to be spent at work will be that laid down in collective agreements or individual employment contracts.[82] The maximum time that can be spent at work is forty hours per week.[83] Case law

75. E.T., *supra* note 14, art. 32.1.
76. *Id.* art. 32.2.
77. *Id.* arts. 32, 32.4.
78. *Id.* art. 32.5.
79. *Id.* art. 32.6.
80. *Id.*
81. CREMADES, *supra* note 16, at 542.
82. E.T., *supra* note 14, art. 34.1.
83. *Id.*; CREMADES, *supra* note 16, at 542; POMBO, *supra* note 46, § 15.06(3).

has established that time dedicated to operations prior to the carrying out of work also counts as time worked.[84]

The maximum working day is nine hours.[85] There must also be a twelve hour gap between every working day. Working time can be reduced by contract where the employee is a part-time employee looking after a child under the age of six, or is a mentally handicapped person, by collective agreement or according to rules in the particular sector.[86] There are also exceptions to the work day limit for managers, administrators, senior executives, and domestic servants.[87]

Changing time or work timetables is considered a substantial modification of the conditions of work. If these modifications are not accepted by the employees' representatives, they must be approved by the labor authorities after a report by the Work Inspectorate.[88] Employees are entitled to a minimum of one and a half days of uninterrupted rest during the workweek although some other system may be laid down by a collective agreement, the individual employment contract or the labor authorities.[89] Under certain circumstances, employees can take paid times off work, if the employee gives notice and can provide supporting evidence. Employees can receive paid time off for fifteen days to get married, two days for the birth of a child or the illness of a close relative, and one day off for a change of residence.[90] Additionally, employees receive pay for the time necessary to carry out inexcusable public duties, to carry out trade union functions, or to represent other employees according to the terms laid down by law or in a collective agreement.[91]

Public holidays represent paid time off and are not to be recuperated.[92] These holidays cannot exceed fourteen days a year and two are to be local holidays.[93] The government can move any national public holiday which falls during the week to a Monday except Christmas, New Year's Day and May Day.[94] Paid

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84. CREMADES, *supra* note 16, at 542.

85. E.T., *supra* note 14, art. 34.3.

86. *Id.* arts. 34.3, 37.5; POMBO, *supra* note 46, § 15.06(3).

87. E.T., *supra* note 14, arts. 34.3, 37.5. These exceptions primarily consist of reductions or extensions of the general work day. *Id.* The Spanish government reserves the right to make further exception to the workday when it deems it necessary. *Id. See also* POMBO, *supra* note 46, § 15.06(3).

88. E.T., *supra* note 14, art. 41; FABREGAT & BERMEJO, *supra* note 16, at 225. The Work Inspectorate is appointed by the Spanish Government to oversee, discipline, and mediate such activities as collective bargaining, employment regulations, etc. *Id.* The Inspectorate's power also includes the ability to initiate proceedings against companies that violate the labor legislation. *Id.*

89. E.T., *supra* note 14, art. 37; CREMADES, *supra* note 16, at 542.

90. E.T., *supra* note 14, art. 37.3(a)-(c); FABREGAT & BERMEJO, *supra* note 16, at 225.

91. E.T., *supra* note 14, art. 37.3(d)-(e); FABREGAT & BERMEJO, *supra* note 16, at 225.

92. E.T., *supra* note 14, art. 37.2; CREMADES, *supra* note 16, at 542; FABREGAT & BERMEJO, *supra* note 16, at 223.

93. E.T., *supra* note 14, art. 37.2; CREMADES, *supra* note 16, at 542; FABREGAT & BERMEJO, *supra* note 16, at 223.

94. E.T., *supra* note 14, arts. 37.1, 37.2; CREMADES, *supra* note 16, at 543; FABREGAT & BERMEJO, *supra* note 16, at 223.

annual vacations, which cannot be replaced by financial compensation, are those laid down in the collective or individual work contract and cannot total fewer than thirty calendar days.[95] The timetable for vacations is worked out in each individual firm. The employee has to be informed of the dates two days in advance.[96]

B. Amendment of the Individual Employment Contract Regarding the Changing of Functions Within the Workplace, Change of the Workplace, and Changes in Working Conditions

The current wording of the Workers' Statute states that company management can propose substantial changes to conditions of work on the basis of proven technical, organizational, or productivity grounds.[97] If these changes cannot be agreed upon, the case has to be put before the labor authorities after studying a report by the Labor Inspectorate.[98] The authorities have to reach a decision within two weeks.[99] Significant changes for these purposes are defined as work schedules, timetables, shift work, pay, and systems of work.[100]

If the employee is prejudiced by the changes in conditions to which the employee is entitled, within a month following the change the employee may terminate the contract and receive compensation of twenty days salary per year of service up to a maximum of nine months pay.[101] However, if the change can be said to prejudice the professional training or harm the personal dignity of the employee, the termination of the contract is deemed to be unfair dismissal and the employee is entitled to compensation of forty-five days pay per year of service.[102]

Changing the functions of employees within a firm is allowed under the current version of the Workers' Statute if it is without prejudice to the economic or professional rights of the employees.[103] Under the new version, moves are permitted between equivalent professional categories, and mobility between non-equivalent categories is possible where justified for technical or organizational reasons.[104] The current Workers' Statute provides that an employee cannot be transferred to a geographically different facility of the same company if this transfer implies the relocation of the employee.[105] All geographical transfers must

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95. E.T., *supra* note 14, art. 38.1.
96. *Id.* art. 38; CREMADES, *supra* note 16, at 542.
97. E.T., *supra* note 14, art. 41; POMBO, *supra* note 46, § 15.06(4).
98. POMBO, *supra* note 46, § 15.06(4).
99. E.T., *supra* note 14, art. 41.3.
100. FABREGAT & BERMEJO, *supra* note 16, at 225.
101. E.T., *supra* note 14, art. 41.3.
102. FABREGAT & BERMEJO, *supra* note 16, at 225.
103. E.T., *supra* note 14, art. 39.3.
104. *Id.* art. 39.2.
105. *Id.* art. 40.1. The exception arises if there exists proven technical, organizational, or productivity grounds which justify this action. *Id.*

be authorized by the Labor Minister.[106] Once authorized, the employee may choose between accepting the transfer with compensation for expenses, or to terminate the contract and receive compensation in the amount of twenty days salary per year of service with a maximum of twelve months.[107]

Before an employee can qualify for the above forms of job security, the employee must complete a trial period consisting of no more than six months for qualified experts, three months for other employees, and no more than fifteen working days for non-qualified employees.[108] During the trial period the employee has all the rights and obligations corresponding to the employee's professional category except the normal rights relating to termination of the contract.[109] Therefore, the employee can be dismissed or can resign at any time during the trial period.[110] At the end of the trial period, the contract comes into full effect and the trial period is added to the employee's length of service.[111]

C. The Employees' Guarantee on Changes of Employer

The change of ownership of a company or work center does not by itself extinguish the labor relationship. The new owner is subrogated in and is bound by exactly the same contracted rights and obligations as the previous employer.[112] Where the change is not through inheritance, the transferor or transferee is obliged to notify the employees' legal representatives, and transferor and transferee are jointly and severally liable for three years for the labor obligations which arose before the transfer of ownership.[113] After three years, the employee can only bring an action against the new employer and the employee's rights against the old employer are extinguished.[114] If the transfer is declared to be a crime, such as a fraudulent attempt to reduce the rights of employees under the Criminal Code, both of the employers are jointly and severally liable for the obligations subsequent to the transfer without any time limit.[115]

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106. *Id.*
107. *Id.*
108. *Id.* art. 14.1; CREMADES, *supra* note 16, at 542.
109. E.T., *supra* note 14, art. 14.1; CREMADES, *supra* note 16, at 542.
110. E.T., *supra* note 14, art. 14.1; CREMADES, *supra* note 16, at 542.
111. E.T., *supra* note 14, art. 14.1; CREMADES, *supra* note 16, at 542.
112. E.T., *supra* note 14, art. 44.1; CREMADES, *supra* note 16, at 536-37.
113. E.T., *supra* note 14, art. 44.1; CREMADES, *supra* note 16, at 536-37.
114. E.T., *supra* note 14, art. 44.1; CREMADES, *supra* note 16, at 536-37.
115. E.T., *supra* note 14, art. 44.2; *see supra* notes 14-114 and *infra* notes 116-210 and accompanying text.

D. Criminal Aspects of Spanish Labor Laws

Having outlined the basic tenets of Spanish labor law in Part I, sub-parts A-C, sub-part D discusses the criminal aspect of the Spanish statutory scheme.[116] The distinction between penal and administrative infringement has become a matter of controversy under Spanish labor law.[117] In this regard, some Spanish scholars contend that the distinction is found in the intention and will of the offender.[118] Thus, if the intention of the offender is fraudulent and aimed at willfully causing economic or social prejudice to the employees or to the Social Security system, there is a penal infringement.[119] In contrast, if the offender has acted without willful misconduct or intention to cause the referred prejudices, it is an administrative infringement.[120] Other scholars consider that the distinction is based on the degree of the seriousness of the infringement; only the most serious infringements are crimes.[121]

Therefore, one of the main problems found in this field arises out of the concurrence of criminal and administrative requirements placed upon Spanish employers. In this respect, the Constitutional Court and the Supreme Court have repeatedly declared, by virtue of the principle *ne bis in idem*, the prohibition of double sanction for the same facts.

Nevertheless, the decision of the Constitutional Court 159/1985, of November 27, 1985, recognizes the question of duplicative sanctions.[122] The Court acknowledged that the *ne bis in idem* rule does not always prevent the sanction of the same facts by the authorities of a different order, *e.g.*, criminal and administrative, as the same facts may be contemplated from different perspectives, *e.g.*, they can be contemplated as penal infringements and as administrative infringements.[123]

Leaving aside the administrative sanctions, this portion of the article focuses only on the criminal liability that may arise from the infringement of the labor relationship, working conditions, and social security regulations; criminal liabilities, pursuant to the general principles of Spanish criminal law, would not

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116. *See infra* notes 117-210 and accompanying text.

117. *Id.*

118. *Sentencia de 15 Marzo 1993* [Sentence of March 15, 1993], RAJ 3364 (1993).

119. *El Codigo Penal* (1989), art. 499 bis, 348 a bis [hereinafter C.P.].

120. *Id.* Penalties for labor law violations impose criminal liability only to the degree that the violation was intentional. LUIS RAMOS, CODICO PENAL CON LEGISLACION ESPECIAL Y COMPLEMENTARIA, XXXI (1984).

121. Antonio Baylos y Juan Tordecilla, *Derecho Penal del Trabajo, Sanción Penal-Sanción Administrativa, reprinted in* EL PRINCIPIO NON BIS IN IDEM 208 (Editorial Trotta ed., 1990) (available only in the Spanish language).

122. *Sentencia de 27 Noviembre 1985* [Sentence of November 27, 1985], RAJ 8764 (1985).

123. *Proyecto de ley Organica de Codigo Penal* [Projection of the Organic Law of the Penal Code] (1994).

be imposed upon companies but only upon individuals, such as managers and directors of companies.[124]

1. The Spanish Constitution and Penal Code

The Constitution itself defines the basic principles on which labor,[125] social security[126] and trade union[127] matters should be developed. Moreover, the Constitution grants certain rights and protections,[128] which due to the document's fundamental character, correspond to the ordinary legislation.[129]

Since new employees' rights were legally established by the Constitution of 1978, the Penal Code had to be adapted, modified, or reinterpreted. This created new offenses, such as Articles 177 bis and 348 bis (a) and modifications, such as those in Article 427.[130]

The Spanish Penal Code grants protection to three main labor law interests. These protected interests are characterized as working conditions, including salary and employment stability and access to the Social Security system,[131] as well as the human aspects of working conditions, such as safety and hygiene,[132] and collective actions by employees.[133] Spanish criminal law has been progressively expanding its protection to the above categories of rights and interests in an evolution which substantially started in 1971, with the introduction of Article

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124. *See infra* notes 139-174 and accompanying text.

125. C.E., *supra* note 20, arts. 35, 40, 42.

126. *Id.* art. 129(1) (stating that the law will establish, for those interested parties, the forms of participation).

127. C.P., *supra* note 119, art. 348 bis a.

128. C.E., *supra* note 20, § 35.1 (declaring the right and duty of all Spaniards to work, select their careers, advance in position, and to receive remuneration). *Id.* § 37.2 (dealing with the right of both employees and employers towards collective bargaining). *Id.* § 28 (focusing on the right of the employee to unionize freely).

129. In the labor law framework, this new constitutional model found a quick translation in the following main regulations: R.D., *supra* note 44; E.T., *supra* note 14; *Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical* [Law on the Freedom of Trade Unions (Organic Law 11/ August 2, 1985)]; *Ley 8/1988, de 7 de abril, Sobre Infracciones y Sanciones en el Orden Social* [Law on Infringements and Sanctions relating to Social Order (Law 8/ April 7, 1988)] (guaranteeing the right of employees to unionize).

130. C.P., *supra* note 119, art. 177 bis (stating that those who interfere or try to limit the employees' legitimate right to strike will be penalized by a major arrest and a fine of 100 to 1,000,000 pesetas). *Id.* Article 499 bis (extending to penalties imposed by law on employers who violate an employees' liberty and security in the workplace as defined by the article). *Id.* art. 222 and art. 499 bis.

131. C.P., *supra* note 119, art. 499 bis. Specifically, the article imposes fines and or imprisonment on those employers who place restrictions on social security benefits to the extent that they place the employees' recognized legal rights in jeopardy. *Id.*

132. *Id.* art. 348 bis a. The penalty for placing the employee in danger of physical harm ranges from imprisonment to 100,000 to 500,000 pesetas or a combination of both. *Id.*

133. *Id.* art. 177 bis.

499 bis in the Spanish Penal Code,[134] and recently in 1983, with the enactment of two new provisions aimed at the protection of employees' rights.[135]

Article 177 bis of the Penal Code refers to the criminal offenses against trade union freedom.[136] Under this provision, those who limit or prevent the legitimate exercise of trade union rights or the right to strike may be subject to a penalty from one month and one day up to six months imprisonment, and fines from one hundred thousand pesetas to two million pesetas.[137]

Article 348 bis (a) of the Penal Code is aimed at protecting employees' life and health and, therefore, considers criminal offenders those who, by infringing their duties, do not facilitate the means or procure the conditions allowing employees to carry out their activities under the necessary and requested measures of safety and health.[138] The latter two offenses, together with those contemplated under Article 499 bis, are the basic features of the Spanish Penal Labor Law.

The present economic circumstances and the realities of the working life in Spain have proven the precriminal systems of social and legal control insufficient for protecting employees' rights and interests. Moreover, the criminal protection of employees' rights not only serves the employees, but also the counterpart in the labor relationship. Thus, infringements by the offender-employer can be considered an act of unfair competition vis-a-vis those employers who do comply with the labor requirements and working conditions established by law.

E. Social Offenses Against Economic Rights and Interests of the Employees

The most important criminal provisions concerning social offenses are included in the Penal Code. This portion of this article focuses on the Code, although there are also important administrative rules which impose economic sanctions on the infringement of labor rules and conditions.[139] More specifically, the focus is on Section 499 bis which is the provision in the Penal Code which contemplates the most important criminal unlawful acts (*ilicitos penales*). The Article states that:

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134. *Id.* Art. 499 is divided into three clauses:
(1) Deals with penalties imposed on employers who place restrictions on Social Security benefits.
(2) Deals with sanctions placed on an employer for maliciously restraining or suppressing an employee's recognized legal rights concerning their benefits and/or working conditions.
(3) Sanctions employers who deal with illegal migration of employees.
Id.

135. *Id.* art. 177 bis (dealing with an employer's criminal liability when the employer infringes on an employees trade union right or right to strike).

136. *Id.* art. 177 bis.

137. *Id.*

138. *Id.* arts. 348 bis a, 499 bis. The article does not simply refer to employers. It extends to any individual, who having a duty to protect, fails to do so. *Id.*

139. We mainly refer to *Ley 8/1988 de 7 de Abril* [Law on Infringements and Sanctions in the Social Order, Law 8/ April 7, 1988]. E.T., *supra* note 14, art. 58.

> The following shall be subject to a penalty consisting of [a] minor imprisonment term (i.e. one month and one day to six months of imprisonment) and fines from a hundred thousand Pesetas to two million Pesetas (about seven hundred and twenty-five [U.S.] dollars to fifteen thousand [U.S.] dollars):
>
> 1. who by using unfair proceedings or maneuvers imposes social security and working conditions on his employees that prejudice the rights established by law or collective bargaining agreements;
>
> 2. who by means of assignment of the work force, simulation of contract, replacement or falsity of business or by any other malicious form removes or restrains the benefits of the stability of employment and other working conditions recognized as belonging to the employees by law;
>
> 3. who illegally deals with the work force or intervenes in fraudulent labor migrations even though no prejudice is derived therefrom by the employee;
>
> 4. who in case of crisis of a business unfairly renders ineffective the employees' rights will incur those sanctions contemplated by article 519 of the Penal Code.[140]

If the above offense is committed by a legal entity, the sanctions will be imposed on the managers, directors, or those responsible who, having knowledge of the facts, have not taken the necessary actions to remedy them if they were able to do so.[141] Therefore, Article 499 bis is aimed at protecting employees' rights and interests against: (i) the imposition of illegal working conditions; (ii) illegal alteration of working conditions; (iii) illegal dealing with the work force; (iv) fraudulent migrations; and (v) fraudulent business crisis.[142] These protections are not aimed at protecting the employee's freedom to agree to working conditions, but rather at guaranteeing the minimum working conditions in the labor relationship as established by law and collective bargaining agreements. The freedom of the employee is irrelevant, because under Article 3.5 the Workers' Statute, the employee cannot renounce the minimum labor rights and working

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140. C.P., *supra* note 119, art. 519.

141. The legal entity will be jointly and severally liable together with the directors and those responsible. *Id.* art. 499 bis. An employer violating Article 499 of the Penal Code will be subject to a felony charge and a fine of 100,000 pesos to 2,000,000 pesetas. *Id.*

142. As with Article 519, sanctions will be placed not only on employers, but anyone who has knowledge of the violation and who does not take the necessary action to remedy the situation. *See id.* art. 519.

conditions set forth by law or by the relevant collective bargaining agreement.[143] The freedom of the employee to contract for working conditions only exists over and above these legal minimums and, therefore, beyond that minimum threshold the provisions of Article 499 bis do not apply.[144] However, the criminal protection of an employee's rights beyond that legal threshold may be protected under other criminal offenses determined by law, such as coercion, threat, or swindle, which are not considered to be part of the Spanish labor criminal law.[145]

The collective character of the protection dispensed by Article 499 bis makes the number of affected employees irrelevant. For example, a unique criminal offense will derive from Article 499 bis, regardless of the number of affected employees.[146] The *non-waivable* character of the minimum labor rights by those persons who are entitled to those rights, renders any agreement by the employee to the contrary irrelevant.[147] Employees are also protected from acts done in concurrence with other criminal offenses. Thus, when criminal behavior injures individual rights and interests of an employee apart from his labor rights, and also injures the rights and interests of the employee in its collective labor dimension as foreseen in Article 499 bis, such criminal behavior should be qualified as the cause of different criminal offenses.[148] This means that if behavior, consisting of the abuse of a business's commercial rights, induces someone to sign a document under deception, creates an insolvency situation or a documented falsity, and one of the elements of Article 499 bis is satisfied, then this type of offense will be equated to swindle, fraudulent bankruptcy, and the like.

Therefore, the freedom and safety of an individual employee is not a legally protected interest *qua* individual. The intended protected interests are those of the workers or employees considered to be parties to the labor contract, and members of a social group or class with a specific position within the labor market.[149] In Spain, the state has a strong interest in protecting the minimum conditions of working life of those who render services for a third party. These protections are contained in the law and in the state recognized collective bargaining agreements.[150]

Except for workforce traffic and fraudulent migration offenses, the offenses contemplated by Article 499 bis can only be committed by a limited number of

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143. Labor Relations Law, *supra* note 22, art. 3; E.T., *supra* note 14, art. 3.5.

144. Labor Relations Law, *supra* note 22, art. 3; E.T., *supra* note 14, art. 3.5.

145. C.P., *supra* note 119, art. 285.

146. *Sentencia de 15 Marzo 1990* [Sentence of March 15, 1990], RAJ 3364 (1990).

147. C.P., *supra* note 119, art. 499 bis (3).

148. Sentence of March 15, 1990, RAJ 3364 (1990).

149. C.P., *supra* note 119, art. 499 (1); Sentence of March 15, 1990, RAJ 3365 (1990). Article 1 of the Labor Statute states that a contract is formed when an individual, in exchange for a salary, provides skilled service to another. Labor Relations Law, *supra* note 22, art. 1.

150. Because of the weaker position in the labor relationship, Article 37 (1) of the Spanish Constitution recognizes collective bargaining. C.E., *supra* note 20, art. 37(1). Through the collective bargaining union, individual labor relationships between employer and employee are formalized. *Id.*

persons within a corporation.[151] In a labor relationship, only people with adequate authority are able to impose illegal working conditions on their employees, illegally alter the normal working conditions, or render the rights of employees useless as a result of a fraudulent business crisis.[152]

The typical principal offender under these criminal offenses must be someone, normally within the company, with effective power and authority to contract with employees or to impose working conditions and modify them afterwards. This does not reduce the employer's liability, whether viewed as a legal entity or an individual. The wording of Article 499 bis expressly excludes the word *employer*, using instead the word "Who."[153] Scholars have interpreted the concept broadly.[154] Thus, the expression "Who" refers not only to the individual employer and businessperson, but also to managers, administrators, and other agents and representatives if they have been empowered to determine working conditions.[155]

The last paragraph of Article 499 bis sets forth the principle that, in the case of legal entities, the foreseen sanctions and penalties will be imposed on the administrator and person responsible for the infringements or for not adopting the necessary measures to remedy them. The content of this article is also contained in Article 15 bis of the Spanish Penal Code which reads as follows:

> He who acts as manager or director of a legal entity or as the legal or voluntary representative thereof, shall be personally liable even if it is the legal entity and not the representative that meets the conditions, qualifications or relations required by the specific crime in order to be deemed an offender thereunder.[156]

This provision was heavily criticized when it was enacted in 1983. It was alleged that under Article 15 bis and in those cases where the offense falls within the scope of activities of a corporate body, the courts no longer needed to identify the person who had to be held criminally liable because such a provision automatically placed liability on the managers and directors.[157] The majority of Spanish scholars and jurists view this interpretation as totally unacceptable because it is contrary to the basic principles of criminal law which require the

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151. C.P., *supra* note 119, 499 bis.

152. *Id.*

153. *Id.*

154. *Id.*

155. The statute itself explicitly states that a duty lies on those who have the knowledge that a violation is taking place, have the power to act, but choose not to do so. *Id.*

156. *Id.* art. 15 bis.

157. *Id.*

existence of an act that must be attributable to a person, as well as the existence of intention or negligence relating to the act.[158]

In this respect, it is also worth noting that under Spanish law and pursuant to Articles 25.1 of the Constitution and 1.1 of the Penal Code,[159] strict liability offenses are not admitted. Therefore, managers and directors of companies whose activities result in consequences which fall within the definitions of Article 499 bis, may only be held criminally liable if there is evidence that the infringement of the working conditions can be attributed to one or more of them, through intent or negligence. This provision is very important because the offenders of the law will not only be those who actually carry out the illegal actions contemplated therein, but also those who within the company structure are holding a higher, or at least the same, position and power and have not taken the necessary measures to correct the infringement.[160]

In addition, the provision confirms that violations are permanent offenses or continuing violations, because, even though the offense is committed on the imposition or modification of working conditions, its effects will last while the relevant employee is subject to such illegal working conditions.[161]

F. The Actions Defined by Article 499 Bis

1. Imposition of Illegal Working and Social Security Conditions

The key issue of this action is the concept of imposition and the way it is done. Imposition should be understood, not only to include the use of physical violence or threats, which may consist of other offenses, but especially the advantage an employer may obtain from an employee needing to obtain employment. Thus, the article refers to a real market situation in which employment is hard to find and the employer has a dominant position in this relationship.[162] The use of malicious maneuvers to impose illegal working or social security conditions should, in principle, not be understood as necessarily fraudulent although this could be an aggravating circumstance.[163]

Working conditions are all those conditions which constitute the labor relationship or agreement, such as salary and working hours, established by law and collective bargaining agreements.[164] Social Security conditions are all those conditions that are part of national regulations to prevent personal risks by means

158. For example, one of the elements of Article 499 bis (3) is that the act in question be intentional and that it cause injury to the claimant. *See, eg., id.* art. 499.

159. C.E., *supra* note 20, art. 25.1; C.P., *supra* note 119, art. 1.1 (respectively).

160. The new C.P. specifically addresses this situation in Article 291. C.P., *supra* note 119, art. 291.

161. Sentence of March 15, 1990,RAJ 3364 (1990).

162. *Id.*

163. *Id.*

164. CREMADES, *supra* note 16, at 541-44.

of individual valuable contributions to the Social Security system, such as retirement pensions and unemployment benefits.[165]

2. *Illegal Alteration of the Working Conditions*

The content of this action aims at the protection of the stability of employment and of the working conditions; it is considered by scholars as a mere extension of the provision contemplated in the previous offense.[166]

The Act contemplates practices, such as contract simulation, company substitution, and company falsehood, currently followed by a large number of companies. Simulation of contract occurs when companies hire employees under contractual forms different to the labor forms, such as incorporation of companies, hiring of services, etc., or when companies enter labor relationships whose content, such as the category, the type of contract, or the seniority, is fraudulently modified in the Registry Book of Employees, salary sheets, or the like.[167] Company substitution is the change in the company ownership without complying with the provisions set forth by Article 44 of the Workers' Statute on the transfer of employees or, alternatively, where the aim of the substitution is to render the rights of the employees useless.[168] Company falsehood refers to practices such as the fraudulent change of the corporate domicile to avoid the applicability of a relevant collective bargaining agreement and the rendering of false company data, number of employees, activity, etc., to the Social Security system and Labor Authorities to avoid the applicability of certain legal provisions. Note that appropriation by a company of contributions to the Social Security system also should be included in this type of offense, even though these actions have been traditionally sanctioned only as illegal appropriation.[169]

3. *Illegal Traffic of Work Force*

The first aim of this provision is to protect the prohibition on contracting employees outside of the official employment services, so that the government will not lose control of the content of their working conditions.[170] The law does not try to protect the personal interest or right of a particular employee, but rather the labor market in order to accommodate certain tools of social policy, such as unemployment benefits and public investments, to the relevant circumstances.

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165. FABREGAT & BERMEJO, *supra* note 16, at 234.

166. C.P., *supra* note 119, art. 499 bis, at 3365.

167. *Id.* art. 499 bis; Sentence of March 15, 1990, RAJ 3365 (1990).

168. C.P., *supra* note 119, art. 499 bis.

169. The rights of the employees to receive certain Social Security benefits are damaged as a result of this behavior. *Id.*

170. *Id.*

However, the labor law provisions that this article of the Penal Code protected have been recently revoked. Therefore, these changes in the labor law have made the first aim of this article inapplicable.[171]

The second aim of this provision relates to the illegal assignment of employees. This action must be distinguished from the legal subcontracting of employees which is specifically contemplated in the Workers' Statute.[172] The forbidden actions refer to practices like the assignment of employees in a case where one of the parties involved is an employer (normally a company) without a proper structure or assets enough to guarantee the possible labor debts and a management team.

4. Fraudulent Migration of Employees

These prohibited actions basically refer to international fraudulent migrations. Under the provision, offenders include carriers, custom agents, and in general all individuals and legal entities that are involved in these fraudulent migratory movements.[173] These actions may be punished whether or not the migration has actually harmed the rights or interests of the relevant employees.[174]

G. Spanish Supreme Court Decisions

Since 1971, the Spanish Supreme Court has provided criteria regarding the applicability of the different social offenses contemplated under Article 499 bis, and in that sense, the decisions of the Supreme Court have unified the different criteria that are being followed by the lower Courts in relation to this provision.

1. Supreme Court Decision of March 15, 1990[175]

This decision summarizes the case law applicable to the provisions of Article 499 bis 1st paragraph, which covers the imposition of illegal working conditions and reproduces the legal requirements of the provision. The unlawful behavior always refers to the labor relationship, in the sense that the law, administrative labor regulations, and collective bargaining agreements set forth a combination of rights to protect the weakest party to the relationship and which cannot be modified by the parties involved.[176] The core of this offense is found in the

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171. While the aim is inapplicable in this article, it is thoroughly covered under Art. 286 of the Penal Code. *Id.*

172. E.T., *supra* note 14, art. 27.

173. C.P., *supra* note 119, art. 499 bis (3).

174. *Id.* For a general discussion of the problem of illegal immigration into Europe, see Peter R. Ronge, *Europe Focuses on Immigrant Tide*, NAT'L GEOGRAPHIC, May 1993, at 94-125.

175. Sentence of March 15, 1990, RAJ 3364 (1990).

176. *Id.*

behavior of the employer who imposes working conditions on the employees, or a part of them, that harm the above-mentioned rights.[177] Such behavior must entail malicious maneuvers like violence, threat, duress, deceit, or, as is most common, the employer's abuse of a situation where much unemployment exists.[178] The principal of the offense is the director, the manager or person responsible who agrees or imposes the unlawful working conditions in the labor contract.[179] There should be a subjective element in this action, that is, the intention to prejudice the employees.[180] The offense occurs upon the imposition of the unlawful working conditions on the employees, regardless of whether or not the prejudice to the employees occurs simultaneously.[181] The effects of the offense will last until the unlawful working conditions are corrected.[182]

2. *Supreme Court Decision of September 29, 1992*[183]

In rendering its decision in this case, the Supreme Court stated a complete theory regarding the applicability of Article 499 bis 4th paragraph, the fraudulent business crisis. The principal has to be the employer which, in the case of legal entities, refers to the directors or managers.[184] The prosecutors are the employees of the relevant employer.[185] The line of action must be the same as that contemplated in Article 519 of the Penal Code for fraudulent bankruptcy.[186] The lack of payment must happen once the termination or modification of the labor relationship has been authorized by the labor authorities,[187] and, the offender must also act wilfully.[188]

Another important decision by the Supreme Court, dated April 5, 1993, interprets the word "crisis" which is contemplated in Article 499 bis 4th paragraph. The Court stated that the word should be understood in the technical sense, vis-á-vis the labor law, and that a prior formal declaration of the state of crisis of the company by the relevant and competent authorities should exist.[189] To that end, the Supreme Court said that the expression "legally declared" should

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177. *Id.*
178. *Id.*
179. *Id.*
180. Sentence of March 15, 1990, RAJ 3364 (1990).
181. *Id.*
182. *Id.*
183. *Sentencia de 29 Septiembre 1992* [Sentence of September 29, 1992], RAJ 9693 (1992).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Sentence of September 29, 1992, RAJ 9693 (1992).
189. *Sentencia de 5 Abril 1993* [Sentence of April 5, 1993], RAJ 3887 (1992).

be added to the word "crisis" in order to correctly interpret the content of article 499 bis 4th paragraph.[190]

3. *Supreme Court Decision of June 2, 1993*[191]

This decision focused on the responsibility of the directors of a company. In this case, a company, without formally applying for the benefits of a suspension of payments proceeding or the benefits of a labor authorization to carry out a mass lay-off proceeding, dismissed all its employees and brought the company into an insolvency situation that prevented the employees collecting the due severance payments.[192] The offenders, prior to the shut down of the business, incorporated a new company to carry out the same business with the same corporate domicile, telephone number, machines, assets, clientele, and lease of the same premises after the former company was sued for lack of payment of the due lease rents.[193]

By creating the appearance of an insolvent situation, the Supreme Court held that the actions carried out by the offenders had as their main purpose, the avoidance of the legal rights of the employees, such as severance payments and employment stability.[194] The three Board Directors were found responsible and therefore guilty, although the Secretary of the Board and others alleged that their positions did not empower them to dismiss employees.[195] The Supreme Court held that the offenders could not apply formal arguments to elude their responsibility. In the case at hand, the three members of the Board had initiated the incorporation of the former company and were the promoters of the latter one. The Supreme Court based its decision on the applicability of Articles 499 bis last paragraph, and Article 15 of the Penal Code.[196]

4. *Supreme Court Decision of May 26, 1993*[197]

This decision also refers to the offenses of fraudulent business crisis and fraudulent bankruptcy. In this case the defendant abandoned the activity that she carried out in one of her companies and offered her employees work in a new company, without the seniority rights accrued during their years of service.[198] The employees did not accept the offer and the defendant reacted by shutting down

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190. *Id.* at 3386.
191. *Sentencia de 2 Junio 1993* [Sentence of June 2, 1993], RAJ 6026 (1993).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. Sentence of June 2, 1993, RAJ 6026 (1993).
197. *Sentencia de 26 Mayo 1993* [Sentence of May 26, 1993], RAJ 6499 (1993).
198. *Id.*

the business.[199] This action was challenged before the labor authorities who adopted the necessary measures and compelled the defendant to reopen the company.[200] Afterwards, the defendant notified the employees by telegram that it was compulsory for them to have their annual vacations during the month of June.[201] The company remained closed during that month and the defendant took advantage of the circumstances and removed part of the machinery used in the production process.[202] The employees challenged these actions and the Labor Court issued a decision stating termination of the labor contracts and the consequent right of the employees to receive the severance payment established by law.[203] It was proved to the Court that the prosecuted had been managing various companies with the same corporate purpose and manufacturing the same products and that she moved her employees from one company to another in prejudice of their labor rights.[204] Moreover, the defendant had a participation of almost one hundred percent in all the companies and held the position of Executive Director in the respective Board of Directors and was in charge of hiring, managing, and dismissing the employees and payment of their salaries.[205]

The decision by the Supreme Court stated that the actions undoubtedly constituted the crime of fraudulent business crisis and fraudulent bankruptcy under of Article 499 bis, paragraph three.[206] The Supreme Court confirmed that this form of fraudulent bankruptcy does not require the deceived credits to be mature, but just that the forbidden actions make present and future credits, such as those which will derive from the termination of a labor relationship, ineffective.[207]

The Supreme Court decision of February 11, 1993[208] also emphasizes that the offense is committed when a debtor successfully carries out acts of false disposal of assets, even though the enforceability of the credit is after the disposal.[209] Enforceability requires a proven correlation between the fraudulent actions of disposal and the final result of insolvency rendering the possible actions by the creditors useless.[210]

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199. *Id.*
200. *Id.*
201. *Id.*
202. Sentence of June 2, 1993, RAJ 6026 (1993).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. Sentence of June 2, 1993, RAJ 6026 (1993).
208. *Id.*; *Sentencia de 11 Febrero* 1993 [Sentence of February 11, 1993], *reprinted in* REVISTA LA LEY, May 19, 1993, at 4-5 (available only in the Spanish language).
209. Sentence of February 11, 1993, RAJ 1337 (1993).
210. *Id.*

III. QUIXOTE MEETS AMERICA AT THE CROSSROADS

If, as suggested in the Introduction, Spain's history has its black and bloody side, it must be admitted with equal candor that the history of the United States is luridly colored by both the competitive and the confrontational. The United States historically has been highly litigious.[211] Nowhere has this confrontational philosophy been manifested more boldly than in the world of work, where confrontation has been the hallmark of labor-management relations, especially in the heavy industries which led the way in the United State's nineteenth century climb to commercial ascendancy.[212] A brief description of the Homestead steel strike captures the essence of this confrontational attitude.

> In June, 1892, in Homestead, Pennsylvania, the steel-workers' union struck in protest against a reduction of wages by the Carnegie Steel Company. The company had ordered the wage cut in a deliberate effort to crush the union, and in expectation of battle, set about erecting a military stockade topped with barbed wire behind which it planned to operate the mills with three hundred strikebreakers recruited by the Pinkerton Agency. Having become a philanthropist, Andrew Carnegie discreetly retreated for the summer to a salmon river in Scotland, leaving his manager, Henry Clay Frick, to do battle with organized labor. . . .
>
> On July 5 the strikebreakers recruited by Frick were to be brought in to operate the plant. When they were ferried in armored barges across the Monongahela and were about to land, the strikers attacked with home-made cannon, rifles, dynamite and burning oil. The day of furious battle ended with ten killed, seventy wounded, and the Pinkertons thrown back from the plant by the bleeding but triumphant employees. The Governor of Pennsylvania sent in eight thousand militia, the country was electrified, and Frick in the midst of smoke, death, and uproar, issued an ultimatum declaring his refusal to deal with the union. . . .[213]

In the employment law arena, U.S. citizens stepped away, not only from their European ancestors, but from the English common law, in adopting and developing the concept of employment-at-will. "That doctrine in its raw form holds that an employee who has not been hired for an express period of time (say

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211. *See* TED MORGAN, WILDERNESS AT DAWN: THE SETTLING OF THE AMERICAN CONTINENT 186 (1993) (stating that "[w]hen the frontier became hinterland [and] there was no common enemy, [Americans] started taking one another to court over trifles").

212. James O. Castagnera, *To Confront or Cooperate? The Lesson of Anthracite Coal*, 41 LAB. L.J. 158 (1990).

213. BARBARA W. TUCHMAN, THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR (1890-1914) 81-82 (1966).

a year) can be fired at any time for any reason—or for no reason at all."[214] This development was occurring at about the same time that the Homestead strike was electrifying the nation.[215]

Given that both labor and employment law[216] developed out of this litigious, and at times violent work environment, no one should be surprised to discover a regulatory scheme which, in effect, has institutionalized and even encouraged litigation and confrontation in a sort of laissez faire 'free for all.' Recently, some scholars have gone so far as to suggest that the United States lacks a coherent labor and employment public policy, having settled instead for a happenstance scheme of federal and state statutes that are poorly coordinated, perhaps at times even contradictory.[217]

Today, many top corporate managers have changed their stripes, espousing a combination of so-called employee participation programs and alternative dispute resolution techniques (ADR). In fact, ADR is well-entrenched in the world of union-management relations,[218] and has received the strong support of the U.S. Supreme Court for transplantation into employment law as well.[219] Employee participation or cooperation programs[220] have been less enthusiastically

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214. PATRICK J. CIHON & JAMES O. CASTAGNERA, LABOR AND EMPLOYMENT LAW 4 (2d ed. 1993).

215. *See, e.g.*, H.G. WOOD, LAW OF MASTER AND SERVANT § 134 (1877) (stating that "[w]ith us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will. . .").

216. Typically, the term "labor law" refers to statutes governing the relationships between employers and labor unions, on the one hand, and between unions and their members on the other. *See, e.g.*, the National Labor Relations Act, 29 U.S.C. § 151 (1994) (representing the principal statute controlling labor-management relations). *See also* Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 (1994) (representing the primary federal act governing relations between unions and their members). By contrast, most scholars and practitioners use the term "employment law" to refer to all aspects of workplace regulation, excepting union matters.

217. *See, e.g.*, Charles J. Morris, *In Search of a National Labor Policy*, STATEMENT TO THE DUNLOP COMMISSION, Jan. 1994, at 2.

218. United Steel-workers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960).

219. Gilmer v. Interstate, 111 S.Ct. 1647 (1990); *see generally* James O. Castagnera, *Alternative Dispute Resolution: Construction Industry*, 52 AM. JUR. TRIALS 209 (1994).

220. Although the variety of employee participation programs is very diverse, three general approaches to employee participation have been identified, arranged according to power and purpose:

> Problem-Solving Teams. Typically, these consist "of from about five up to a dozen or so" volunteers who gather for a few hours each week to explore new ways to improve quality, efficiency, and the on-the-job environment. Problem-solving teams do not usually have power to implement their ideas. "Quality circles," depending upon who is using the term, are either a subset of or are synonymous with problem-solving teams.
>
> Special-Purpose Teams. These may function to come up with and introduce new technologies or to reform particular workplace practices. A team may even deal with a company's customers and/or suppliers directly.
>
> Self-Managed Teams. This is probably the model that enters the minds of most when the word "team" is mentioned. Typically, a team, consisting of 5 to 15 employees learns all relevant production tasks for a particular product. For example, in the assembly of an automobile, team members rotate from job to job over time, learning each position, including managerial duties, such as work schedules and purchasing functions, which are an integral part of the self-managed teams' approach.

embraced by the courts and federal agencies charged with enforcing U.S. labor and employment laws. Organized labor has long been skeptical of such programs, believing them to be a device to circumvent Section 8 of the National Labor Relations Act[221] and the means to reintroduce company unions in place of legitimate labor organizations.[222] In 1992, the National Labor Relations Board (NLRB) came down on the side of organized labor, albeit Board members protested that its decision does not affect legitimate employee cooperation programs.[223] With regard to employee participation programs, Labor Secretary Robert Reich has stated that if the NLRB's *Electromation* decision or any subsequent decisions render labor-management cooperation illegal in the workplace, he "will do what's necessary, up to and including amending the National Labor Relations Act" in order to legalize such programs.[224]

In 1993, the Clinton Administration established the Dunlop Commission on the Future of Worker-Management Relations.[225] The commission, headed by former labor secretary John Dunlop, was widely viewed as representative primarily of organized labor's views.[226] However, after several delays,[227] when the Commission finally issued its report in January 1995, it failed to adopt many of organized labor's recommendations.[228] Nonetheless, the Commission did line up with Labor Secretary Reich's views on workplace cooperation.[229]

Numerous bills are pending before both houses of the U.S. Congress, many unabashedly pro-labor, or at least clearly aimed at amending what are perceived by liberal members of Congress as provisions of the National Labor Relations Act which inhibit labor-management cooperation or organized labor's ability to unionize more of the private-sector workforce.[230] Notwithstanding the majority Republican Congress, employee participation and labor-management cooperation survives and prospers in this country, because even pro-labor policy makers seem to accept that the United States must change its litigious and confrontational ways in order to better compete in the worldwide arena.

James O. Castagnera & Patrick J. Cihon, *Employee Ownership and Participation Programs in the 1990s*, *in* 1993 WILEY EMPLOYMENT LAW UPDATE § 9 (Henry J. Perritt, Jr. ed., 1993).

221. 29 U.S.C. § 158 (1994).

222. Owen E. Herrnstadt, *Why Some Unions Hesitate to Participate in Labor-Management Cooperation Programs*, 8 LAB. L.J. 71 (1992).

223. Electromation, Inc., 309 NLRB No. 163 (1992).

224. Frank Swaboda, *Reich Vows to Preserve Workplace Cooperation*, WASH. POST, Mar. 9, 1993, at D3.

225. JAMES O. CASTAGNERA, EMPLOYMENT LAW ANSWER BOOK 11-8 (Supp. 1995).

226. *Workplace Cooperation Commission Reflects Organized Labor's Views*, 54 APPAREL INDUSTRY MAG. 10 (1993).

227. *Dunlop Panel Given More Time to Report*, Daily Lab. Rep. (BNA), Feb. 11, 1994, at d18.

228. *Dunlop Panel Did Not Go Far Enough in 8(a)(2) Proposal, Weiler Says*, Daily Lab. Rep. (BNA), Jan. 19, 1995, at d13.

229. *Id.*

230. *Much Labor Law Reform Debate Expected in 1994*, 144 Lab. Rel. Rep. (BNA), Dec. 20, 1993, at 495-97.

Meanwhile, as stated in the Introduction, the pressures upon the Iberian polity are from the opposite direction but are moving toward the same crossroad.[231] As pressure in favor of a less litigious, more cooperative labor relations scheme mounts in the United States, the pressure upon the Spanish labor and employment law scheme is for ever-increasing liberalizations of the law which limits employers' flexibility, particularly their freedom to sever the employment relationship in order to foster improved competitiveness and productivity.[232] Across the European continent, "[e]xecutives overwhelmingly favour more flexible labour laws to improve Europe's poor job prospects."[233]

In Spain, the response to this pressure is reflected in the 1993 amendments to the Workers' Statute intended to rescind some of the historical rigidity in lifetime employment by permitting the management of private corporations to make substantial changes in working conditions on the basis of technical, organizational, or productivity grounds,[234] and not only to amend, but to terminate, the individual employee's employment contract on the basis of such changes.[235] As experience with these 'reforms' grows, critics, especially from organized labor, have charged that employers are abusing their new termination rights, *inter alia*, by using legitimate grounds for termination to mask their discriminatory motives.[236] For example, the claim has been made that the impact of this new employer flexibility falls more harshly on women than men. [237]

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231. *See supra* notes 1-14 and accompanying text.

232. *See* Pamela M. Prah, *Federal Mediation Service Prepares for Future that may Include Expanded Duties, Director Says*, Daily Lab. Rep. (BNA), Nov. 22, 1994, at d23.

> [T]he AFL-CIO recommended that first-contract arbitration be mandatory if the parties failed to reach an agreement within six months after the union is certified . . . [as]. . . the notion of business-union partnership 'is taking root,' partly because both labor unions and employers see the impact labor-management relations can have on productivity, profits, and job security.

Id.

233. David Marsh, *Europe's Long Term Outlook Gloomy but . . .*, FIN.TIMES, Nov. 17, 1994, at 4.

234. *See supra* notes 97-111 and accompanying text.

235. E.T., *supra* note 14, art. 52 (extending the possibility to terminate the labor contract on an individual basis).

236. Miguel Angel Falguera Baró, *Las Modificaciones en la Relación Individual de Trabajo, 5.15: Los Despidoes Objetivos, reprinted in* LA REFORMA DE LA LEGISLACIÓN LABORAL: TEXTOS Y ANÁLISIS CRÍTICO, EL CAMBIO DEL CAMBIO, Ch. V (Collecció Sociologia 3d ed., 1994) (available only in the Spanish language).

237. *Spain - Women: Married, Pregnant Can Be Fired, Workers Warn, supra* note 11.

> Recent reforms to [the] Spanish labor law have put women more at a disadvantage since they can now be dismissed from their jobs in case they marry or get pregnant, the country's National Workers' Commission (CC.OO.) warns.
>
> About 70 percent of employers in the country's services sector are women. "But they get the worst jobs which are more unstable and their salaries are smaller," said Francisco Figueroa of the CC.OO. in the Spanish city of Seville. Now women employees are more at a disadvantage because businessmen will take advantage of the law to fire them when they marry or get pregnant, Figueroa added.
>
> "The businessman can just cite any of the. . . causes for dismissal approved in the recent labor reform and it is difficult to prove that, as in most cases, the real reasons correspond to a change in civil status," said Teresa Garcia, head of the CC.OO. Women's Department.

Indeed, following their brief flirtation with the Workers' Statute's relaxation of employment security, organized labor organizations seem to be striving to recover through collective bargaining that which has been lost by way of reformation.[238] This all sounds remarkably similar to what organized labor is asking for in the United States.[239]

Thus it seems that two differing traditions of labor and employment legislation—the Spanish system with its emphasis upon employment security, and the U.S. approach with its institutionalization of conflict and confrontation—find themselves face-to-face at an historic crossroad. Both nations are facing the same challenge as they gaze down the road toward the world of work at the millennium. The world view seen by concerned observers on both sides of the Atlantic is one characterized by structural unemployment.[240] The remaining question is whether the Spanish system is better suited to adapt to this twenty-first century challenge then the United States' statutory scheme. A corollary to this question, if answered in the affirmative, is what the United States can learn from Spain.

The Introduction briefly cited a work by the great Mexican writer Carlos Fuentes.[241] Fuentes has wrestled with a somewhat similar question: "What do Ibero-Americans bring to the USA?"[242] We submit that his answer suggests an answer to the question posed.

> The culture of Spanish America . . . brings its own gifts. When asked, both new immigrants and long-established Hispanic Americans speak of religion—not only Catholicism, but something more like a deep sense of the sacred, a recognition that the world is holy. . . .

Id.

238. Julia Hayley, *Labour Reform Failing, Spanish Union Leader Says*, REUTER EUR. BUS. REP., June 16, 1994.

> Unions are agreeing to moderate pay rises this year but are achieving in exchange new guarantees of job security, increased permanent contracts and concessions towards the principle of collective negotiation—exactly what the government has been trying to abolish to make the labor market more flexible.

Id.

239. *See supra* notes 221-223 and accompanying text.

240. *See, e.g., Reich Says U.S. in Jobless Recovery*, REUTERS, Apr. 7, 1993. Stevenson, *supra* note 9, states:

> [F]or the European Union's 20 million unemployed—10.8 percent of the work force—the rebound [in the economy] is only confirming what many of them had feared and what economists had been predicting: that their plight will not end with the recession. Instead, the jobless are beginning to understand what analysts mean by 'structural' unemployment, the kind that will not be swept away by a cyclical economic improvement.

Id.

241. *See generally* FUENTES, *supra* note 1.

242. *Id.* at 347.

> Then there is care and respect for elders, something call [sic] *respeto*—respect for experience and continuity, less than awe at change and novelty . . . .
>
> And of course there is the family—family commitment, fighting to keep the family together, perhaps not avoiding poverty but certainly avoiding a *lonely* poverty.[243]

We suggest that there is something of these values reflected in Spanish labor and employment law.[244] If one is willing to view both the firm and the union as potential versions of the extended family, then perhaps one can begin to grasp the significance of the cultural 'soil' in supporting the main tenets of Spanish labor and employment law. The traditionally 'evergreen' nature of the employment contract, the numerous rights accorded employees, and the concomitant duties imposed upon employers, and the traditional difficulties inherent in terminating the relationship all reflect the cultural ground underlying the legal outgrowths, together constituting an organic whole. Thus, no one should be surprised by the rapid rise in resistance by organized labor in Spain to the 'reforms' implemented in 1993 and 1994.[245]

Nonetheless, whether the Spanish government backs away from some of these revisions to the Workers' Statute or stands its ground in the face of organized labor's challenge, in the long run Spain, like the United States, must adapt to the challenges of worldwide competition and the structural unemployment imposed by information technology as it responds to the competitive demands for ever more efficient and less labor intensive means of production. Even if Spain is willing to suffer economic erosion in order to cling to the full gamut of employee rights that have historically existed, especially during the past two decades since Franco's demise, the rest of the European Community likely would compel change as the price of Spain's continued participation, since "[w]hat progress there has been in battling unemployment has come largely as a

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243. *Id.* at 346-47 (emphasis in original).

244. It seems nearly needless to point out that laws sprout out of culture, as plants out of their soil. Already more than a century ago culture was defined by the new social science of anthropology as "that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of society." DAVID P. BARASH, THE HARE AND THE TORTOISE: CULTURE, BIOLOGY, AND HUMAN NATURE 35 (1986) (quoting EDWARD BURNETT TYLOR, PRIMITIVE CULTURE (1871)). "Having distinguished biological from cultural evolution, we might further subdivide cultural evolution into two major components: social evolution and technological evolution. Social evolution includes forms of law and government." *Id.* at 41. "We have thus substituted cultural rules for biological imperatives . . . Laws and police are uniquely human institutions. . . . " *Id.* at 161. Critical Legal Theory takes this principle to its extreme, focusing "on the role of social forces and power relations as the actual determinants of legal outcomes." Robert J. Borghese, *An Introductory Note on Jurisprudence, in* WHARTON REPROGRAPHICS LEGAL STUDIES 101 BULKPACK 7 (1994).

245. *See supra* note 11.

result of deregulating the labor force."[246] For example, many European employees, including the Spanish, may have to prepare themselves for careers consisting of part-time work in order for their economies to combat structural unemployment.[247] Total joblessness in the European Community was nineteen million on average in 1994, a number equal to the combined populations of Portugal and Belgium.[248] Given such frightening figures, Spanish law will have to reflect flexibility in the foreseeable future.

But, granting this hard reality, one nonetheless can hope to see in Spain a kinder, gentler approach to restructuring its labor and employment to laws in order to address structural unemployment and world competition than has thus far been seen in the United States.[249] Both the Spanish cultural tradition and its labor laws suggest that this will be so.[250]

If the United States intends, as hoped, to face these twin challenges in a humane fashion, the United States corporate leaders, organized labor, and policy makers can profit from a close examination of Spanish labor and employment law. There are indications of an increased openness to the alternative that Spain's law and culture offers to the U.S. confrontational model.[251] It is upon these indications that we pin our hopes.

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246. Stevenson, *supra* note 9, at 161.

247. *Improved Jobless Statistics Mask Fragility of New Work*, AGENCE FRANCE PRESSE, Sept. 17, 1994. It is estimated that part-time work now absorbs fully a quarter of the British workforce. *Id.*

248. *Id.*

249. *See, e.g.*, Christina Duff, *A CEO for New Era Prospers by Practicing Tough Art of Firing*, WALL ST. J., Jan. 11, 1993, at A1 (chronicling a U.S. corporation's response to these same challenges, i.e., trimming the workforce by firing its at-will employees in record-large numbers).

250. *See supra* notes 14-210 and accompanying text.

251. *See supra* notes 218-230 and accompanying text.