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Labour law, constitution and crisis – the portuguese experience

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LABOUR LAW, CONSTITUTION AND CRISIS – THE PORTUGUESE EXPERIENCE[1]

1. In recent decades, Portugal and many other countries have experienced great changes in legislative policy, in what has been referred to as the "*flexibility*" of labour legislation. This has led to a situation where concern should no longer be about *employment security*, but rather about *employment* itself. The changes are essentially aimed at ensuring the flexibility and reduction of labour costs – if necessary at the expense of the stability of employment relationships and workers' rights.

These assumptions, giving expression to the general idea of converting this branch of law into a mere formalisation of the laws of the market, have today become a temptation of employment policies and have influenced institutions such as the European Commission, the OECD and the World Bank.[2]

What is sustained is a model of flexibility identified with the compression of labour costs and of workers' rights – with employees consequently being forced into precarious contracts, increased working hours, greater adaptability, etc.

Obviously these ideas, invoking the rigidity of labour legislation that would hinder the adaptation of enterprises to economic cycles and would create unnecessary obstacles to business and social innovation and so to economic growth,[3] fail to take into account various serious and rigorous studies, some of which were even produced within those organisations themselves, which demonstrate that there is no direct link between labour flexibility and the promotion of employment.

2. As an example of the great changes in legislative policies regarding labour in recent years, we can see what happened in Portugal.

The very difficult economic and financial atmosphere that Portugal has been experiencing in recent years has brought structural amendments to the Portuguese labour framework. The response that has been given to the economic crisis has favoured the adoption of measures towards labour-market flexibility and the reduction of labour costs. Such measures increasingly reveal its neo-liberal character, relying on the assumption that the concept of employment with rights is an enemy of economic growth, leaving the country unable to overcome the present economic crisis.

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[1] Text presented by the author on 24 May 2013 in the NOVA New University of Lisbon Faculty of Law in a Meeting with Public Law Professors of the University of Silesia (Katowice), Faculty of Law and Administration.

[2] Further developments on these flexibility tendencies can be found in M. Rosário Palma Ramalho, *Da Autonomia Dogmática do Direito do Trabalho,* Coimbra, 2001, 590 ff. and 605 ff., and also *Tratado de Direito do Trabalho*, Coimbra, 2012, I, 70 ff.

[3] The evaluation of labour legislation regularly published by certain organisations characterising the Portuguese labour legislation as formally very rigid forget the records of precarious contracts of our country. In fact, there is no such rigidity because, quite simply, the legislation is not enforced.

A further crucial assumption is that, when facing labour legislation and the labour market, the State must be an increasingly neutral player, adrift on the currents of market laws and as a result no longer playing its role of a defender of justice and material equality.

The obligations assumed within the *Memorandum of Understanding* concluded in May 2011 between Portugal, the European Commission, the European Central Bank and the International Monetary Fund,[4] as well as those undertaken in the *Commitment for Employment, Growth and Competitiveness,*[5] signed in January 2012 between the Government and the majority of the Social Partners with seats on the Economic and Social Council (one of the two trade union confederations and the employers' associations), represent the beginning of a major set of legal amendments that put those ideas into force, being considered as a stab in the roots of Portuguese labour law.[6]

In the background of the labour law reform introduced by Law No 23/2012, of 25 June 2012,[7] we can find, for example, the ease of hiring and firing mechanisms, and in general the logic of reducing labour costs at the expense of employee rights.[8]

The major amendments introduced have affected key areas of employment law: the organisation of working time, the supervision of working conditions, the termination of employment contracts on objective grounds and collective labour regulation instruments, merely serving to confirm this logic.

For example, concerning the organisation of working times, it is now possible to negotiate the "*bank of hours*" system directly with the employee (avoiding the former need to negotiate it in the framework of collective bargaining), also making it possible, under certain conditions, to impose such a scheme against the employee's will.[9] Another obvious downgrading of working conditions is clear if one considers that overtime payments were reduced by half, four public holidays were suppressed[10] and the up to three days extra annual leave based on attendance criteria was removed from the labour framework.[11] In terms of terminating labour contracts based on objective just cause, the

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[4] The initial version (and the reviews) of the MoU are available at: http://www.portugal.gov.pt/pt/os-ministerios/primeiro-ministro/secretarios-de-estado/secretario-de-estado-adjunto-do-primeiro-ministro/documentos-oficiais/memorandos.aspx

[5] At: http://www.ces.pt/download/1022/Compromisso_Assinaturas_versao_final_18Jan2012.pdf

[6] See, for example, M. Rosário Palma Ramalho, *Portuguese labour law and industrial relations during the crisis*, Working Paper No 54, ILO (2013), pp. 1–6, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_232798.pdf.

[7] The Portuguese Labour Code was approved by Law No 7/2009 of 12 February, amended by Law No 105/2009 of 14 September, 53/2011 of 14 October, 23/2012 of 25 June, and 47/2012 of 29 August. See www.dre.pt

[8] The explanatory memorandum of this law alone, would justify our attention. In addition to other aspects, it contains reference to *flexicurity*, while the law has nothing to do with this concept. The proper operation of this model is based on certain assumptions not applicable to Portugal, with large structural differences for what happens, for example, in Denmark or in the Netherlands.

[9] This solution is, in my opinion, of dubious constitutionality in the face of the Portuguese Constitution.

[10] The justification for this was that our country has more holidays than most European countries, which is to be demonstrated (note, for example, that Ascension Thursday, Easter Monday, Boxing Day and other holidays are public holidays in some countries and not in Portugal).

[11] Which is indeed curious, when, in 2003, this possibility was pointed out as one of the measures to save the productivity and competitiveness of the enterprises.

amendments have led to cheaper and easier dismissals, especially those carried out by the elimination of the work position, where it relieved the need for enterprises to follow a specific order of dismissal (the criteria of seniority being replaced by the vague and subjective "relevant and non-discriminatory criteria" to be chosen by the employer). Accordingly, the enterprises now have greater freedom to choose the employees who will be made redundant.[12] Last but by no means least, the recent amendments have weakened the enforceability and strength of collective bargaining agreements.

A whole further set of examples[13] could have been given.

The labour reform revealed that, with the alleged aim of fighting the economic crisis, the Government has pursued a certain model of flexibility of the labour market that compresses employees' rights in order to reduce labour costs. Considering this branch of law as a mere management power, the individual and collective rights of employees have been weakened and the employers' powers reinforced, leading to easier dismissals, precarious jobs,[14] variable working hours, easier mobility of employees, etc.

The concept of flexibility adopted by the Portuguese Government has brought with it a deterioration of the rights achieved by the employees over the past decades and, consequently, a weakening of their powers with the correspondent strengthening of the powers of employers.[15]

It is only according to a very particular concept of flexibility that one may sustain that the labour rules, due to their protective nature, are responsible for the weakness of the economy. Only according to such a view is it possible to claim a "*new*" Labour Law that, in accordance with the liberal perspective, should reinforce the value of the individual contract and ensure more effectiveness for business management, greater *flexibility* and lower labour costs – even with a decrease in employee guarantees, which are assumed as part of the causes of the current economic crisis, or at least of the difficulties in overcoming it.

The truth is that the labour legislation is not responsible for the deficient functioning of the economy.

The answer is not in these neo-liberal ideas. The most effective remedy for unemployment is economic growth, which requires better education and vocational training, better management of enterprises as well as active employment policies and social protection. It is impossible to have productivity without adequate organisation and management of the enterprises, without technological progress, training and professional development, not disregarding the importance of the human factor – e.g. the workers'

There is a lot of hypocrisy – and even lies – to justify the introduction of such measures. This is also applicable to the determination of the relevant EU average regarding severance payments (see *infra*), or when referring that there are countries in Europe in which the 13th and 14th months are not paid, pointing as an example the UK, where the wages are paid by week, and not month, etc.

[12] Also removed was the obligation to transfer the affected employee to another work position in dismissals based on the elimination of the work position, as well in those based on unsuitability (dismissals by objective grounds).

As said in the text, the dismissals are also cheaper, above all by the reduction of compensation (severance payments).

[13] E.g. the reduction of unemployment benefits.

[14] When Portugal already has one of the highest rates of precarious jobs in the EU.

[15] In my opinion, the Government is also trying to take advantage of the crisis as an opportunity to compress social rights and the achievements of workers conquered over the past few decades.

motivation and the respect for their rights, which are essential for the well-being and the dynamism of the enterprises. These are the truly decisive factors for productivity.

3. Labour Law was created to protect the weaker party, assuming an asymmetric relation or, in other words, a relationship of power-subjection between the employer and the employee. In fact, based on his economic and social power, the employer is typically in a better position to unilaterally determine the conditions of work. On the other hand, the employee sells his own work and abilities in exchange for a salary, which is normally his only income to support his needs.

The neo-liberal answers in favour of contractual freedom forget the labour law as being this regulatory tool for a relationship where the rights of one party – the employee – are often threatened by the powers granted to the counterparty – the employer.

The reasoning that led to the appearance of labour law, as well as its social function, is still valid.

In addition, and contrary to what is frequently assumed, labour law can not be held responsible for the current weak financial and economic situation. Labour protectionism cannot be pointed out as the major driver for the current weakness of the Portuguese economy.

The high unemployment rate must be challenged through economic growth, and not with neo-liberal policies that sacrifice and reduce the minimum labour standards for the protection of the employee. Economic growth, in turn, must be pursued along a route marked out by higher levels of both educational and professional training, technological development and innovation, active employment and wage policies, and, most of all, through the efficient management of companies without disregarding the rights of employees, whose dignity as individuals is expressly recognised in the Constitution.[16]

4. On the other hand, the economic and financial adjustment programme has not brought any improvements: on the contrary, the unemployment rate and the recession have reached historical levels never before achieved, and the disparity between the richer and the poorer is increasingly accentuated. Two years after the signing the *Memorandum of Understanding,* we are in a worse situation than before, with an economic and social situation that is deteriorating each time more, and unfortunately without a light at the end of the tunnel. The public account deficit is steadily rising, unemployment is also at its highest level and we are witnessing a massive transfer of incomes and power from the have-nots to those who already have a lot, because those who are poorer are supporting the costs of the crisis. The Government is taking the country down this path, even if this violates the Constitution, as is the case in my opinion, considering some of the changes introduced in the Labour Code.

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[16] See Articles 1 (the dignity of the human person as its basic principle), 9 – *d*) (fundamental tasks of the State), 53–57, etc.

The Portuguese Constitution («*Constituição da República Portuguesa*») approved on 2 April 1976 was amended by Constitutional Laws No 1/82 of 30 September, 1/89 of 8 July, 1/92 of 25 November, 1/97 of 20 September, 1/2001 of 12 December, 1/2004 of 24 July, and 1/2005 of 12 August. See www.dre.pt

The evidence that many of the reforms implemented violate the Constitution[17] has led to continued efforts by some legal experts to justify the legality of certain amendments introduced in the Portuguese Labour Code and even some constitutionalists state that the present situation justifies an adaptation of the constitutional rules by limiting its protective scope.

The struggle against the deficit in the public accounts is not a legitimate condition to allow a return to *non-law,* and to disregard the fundamental principles of a democratic State of Law and the Fundamental Law, which imposes the reconciliation between the economic and the social, between the freedom of enterprise and the recognition of workers' rights. Any strategy or response to be given within the present economic crisis must necessarily safeguard the respect for the freedom of economic initiative without sacrificing the employees' rights and achievements, duly recognised as a result of their dignity.

The fundamental task of the State in promoting well-being, quality of life and the material equality of citizens, along with the effectiveness of their economic, social and cultural rights [Article 9 – d) of the Constitution] is not compatible with amendments to the labour law that subvert its fundamental principles and values, along with its social function.

Naturally, this does not imply a total refusal of labour reforms, which may be deemed required to challenge legal schemes that are unjustifiably rigid, and which must be encouraged in order to strengthen the competitiveness of companies. However, the answer must not be neo-liberal policies.

5. The crisis currently being experienced in Europe is not only an economic crisis, but also a social one, which clearly places the need for the old continent to design concrete policies that prevent the impoverishment and correct social inequalities.

The answer to this crisis cannot be marked by a vision that treats work as merchandise and understands labour law as a pure management instrument that must be restored to traditional dogmas of private contract law. The answer has to be a different one. It is necessary to change a trend that says that, ultimately, it would be best to have no labour law at all, or at least to reduce it to a mere instrument of management; that is an ideology that perceives work as a cost, and which views it only as mere merchandising.

The great challenge to labour law is modernisation, and this implies firstly the repudiation of the legislative policy of a neo-liberal nature, which, based on the deregulation and subversion of the traditional labour relations system, is characterised generally by sacrifice, if necessary, of the values that previously guaranteed minimum working conditions.

Faithful solely to the market, neo-liberalism advocates the weakening of the State in their size and purposes, driving labour relations to the abandonment of protectionism and to the return to full *autonomy of will* and *contractual freedom*. Such a concept of the human person, of society and of the State ignores the fact that collective freedoms and worker protection status are an integral part of modern democracy, and that the

[17] See, for example, A. Monteiro Fernandes, *A "reforma laboral" de 2012. Observações em torno da Lei 23/2012*, *ROA,* ano 72, 2012, II/III, p. 555, and J. Gomes, *Algumas reflexões sobre as alterações introduzidas no Código do Trabalho pela Lei n.º 23/2012 de 15 de junho*, *ROA*, ano 72, 2012, II/III, p. 617.

absence of rules on the market always maximises the injustices and the gap between the strongest and the less fortunate.

The truth is that we are faced with a branch of law that still remains true to the assumptions that were in its genesis, material equality and protection of weaker contractor.[18]

An efficient response to the present challenges should assume the major goals of implementing policies of economic growth, promoting better business management efficiency, better modernisation and technology evolution, and the respect of employee rights. It should not be forgotten that this respect is the way to keep employees motivated, and these mean more efficient work. This is indeed the key word for development.

The protectionist character of this branch of law is still justified because, even today, labour relations are relations in which the liberty of one of the parts can be endangered by the stronger economic and social power of the other. The different powers of employer and employee form the basis of traditional labour law, a branch of law that appeared because equality between employer and employee was merely a *fiction*. As said before, the legal intervention was justified in the field of labour relations given the real possibility of employers abusing the powers given by the contractual framework. The imposition of limits to the employer's power led to job security, limitations of working hours, weekly rest and holidays, the guarantee of trade union activity, the right to strike, the right to collective bargaining, social protection, the minimum wage, etc.

On the contrary, the logic of the neo-liberal vision is based on the primacy of the economy over the social. That is why the influence of this thought within the legislative policy is able to bring constitutional offenses on a large scale; in fact, with the neoliberal orientation, the labour legislation follows a direction that goes in many aspects against the constitutional demands – and also against the proper role of labour law, which is in fact based on the recognition of the economic and social inequality of the parties and on the consistent need to protect the weaker party and intends to counteract this status, seeking as much as possible a fair balance between the powers granted to the parties. The increasing of contractual freedom and of the autonomy of will generally contradict the natural commitment of labour law.

On the other hand, the way proposed by the neoliberal ideas – sustaining a policy based on social costs compression – is not able to produce good results and will never lead to the greater competitiveness of the economy. The most effective remedy for unemployment is economic growth and the decisive factors for that are others, as said before.

To counteract the management needs of enterprises to labour legislation is a false problem. The enterprises cannot think that the lack of competitiveness is due to labour legislation and to workers' rights. It is a false question to think only in terms of competitiveness and productivity, forgetting that there is an ethical dimension in economy that cannot be forgotten, and is, in fact, something absolutely essential and the main factor to be taken into account in the management of enterprises.

The path to the modernisation of labour legislation demands linking social progress to economic growth, by making the conciliation between the rights of the workers and the adaptability of enterprises to the requirements imposed for an ever greater com-

[18] Assumptions that more than a century ago were translated so well in the aphorism of Lacordaire "*between the weak and the strong is the law that liberates and freedom that oppresses*" (H. Lacordaire, *Conférences de Notre-Dame de Paris*, Tome III, 1846, p. 494).

petitiveness. The big challenge facing labour law today is to rediscover what has always been its key question, the social justice.

There are values whose pursuit cannot be entrusted to the market, and the first among these values, the basic principle of any society, is *human dignity*. This is what, today, as always, should be the focus of labour law: full self-determination of the worker as a person and as a citizen. So it continues to make sense today – I would even say that, today (at a time when the economic imperatives are questioning many aspects of the traditional labour regime and productivity is often converted into the single criterion to assess the work and its social value) more than ever. As it continues to make sense the fight for a "*freer, more just and more fraternal*" world, as set out in the preamble to the Portuguese Constitution,[19] a fight that has an elective space in the labour area – in line with the protection of the weakest as one of the most relevant functions of the democratic State and with the humanist ideals that proclaim the need for each of us to perform the solidarity that we owe to other human beings, particularly those who have no voice and who have hunger and thirst for justice.

[19] In a certain way, the "*Kampf ums Recht*", of Rudolf von Ihering (Frankfurt am Main, 1872).