Welfare State and globalisation of the economic area

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1. Designed for the first time in the Mexican Constitution of Querétaro (1917) and in the German Republican Constitution of Weimar (1919), the welfare State signalizes the passage from *liberal constitutionalism* – concerned only with the personal autonomy of the individuals in relation to State power –, to the *social constitutionalism* – promoting the intervention of the State for purposes of solidarity and social justice.

This State is no longer the natural "enemy" of the individuals, as previously considered by the liberal ideology, but rather its natural ally, which should, not only *respect* the freedom of each individual, but also *ensure* (*guarantee*) its effective implementation, threatened by those "*economic and social obstacles*" that, in the words of the Italian Constitution, "*limiting the freedom and equality of citizens, compromise the full development of the human person*".

Labour law is exactly a hallmark of the welfare State. This branch of law is for the 20th century and for the Social State precisely the equivalent to the right of property for the 19th century and for the Liberal State.

Regulator of a relationship in which the rights of one party can be put in danger by the stronger economic and social power of the other, labour law was formed historically as a protective regime of employees. It emerged as a reaction to the inability of the civil law to deal with the "*workers' issue*". Key aspects of the evolution of this new branch of law are the intervention of the State through social legislation, as well as the collective autonomy - seeking to ensure substantial equality of the parties and to operate the transfer of the negotiations from the individual to the group, by correcting somehow the situation where the employer imposed by himself his conditions to the employee.

2. The recent years have witnessed, in Portugal and in many other countries, great changes in legislative policy, in what has been referred as "*flexibility*" of labour legislation. A better diffusion of these currents of thought was also promoted by the

globalisation of the economy. Neo-liberalism is today a temptation of employment policies. Invoking that there is no need to protect the worker and that the labour legislation is too rigid, what is advocated is a flexibility model identified with the compression of labour costs and of workers' rights - consequently forced to precarious contracts, more working hours, adaptability, etc.

But the answer is not the neo-liberalism. The most effective remedy for unemployment is the 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 or competitiveness without an adequate organization and management of the enterprises, without technological progress, training and professional development, not disregarding the importance of the human factor - e.g. the workers' motivation and the respect for their rights are essential to the well-being and the dynamism of the enterprises. These are the truly decisive factors for productivity.

As an example of the great changes in the legislative policies regarding labour over the last years, we can see what happened in Portugal, where most of the more recent legislative measures in the area of employment legislation and labour market (as in general in the area of economic policies) assure the compliance with several obligations foreseen in the *Memorandum of Understanding*, signed in May 2011 between Portugal, the European Commission, the International Monetary Fund and the European Central Bank, and in the *Commitment for Employment, Growth and Competitiveness*, signed in January 2012 between the Government and the Social Partners (one of the two trade union confederations and the employers' associations) with seat in the Economic and Social Council. Law n. 23/2012 – which introduced substantial amendments to the Labour Code – will be briefly analysed.

The main changes easily make us understand that the sense of the diploma follows the logic that we have been criticizing: i.e., the reduction of labour costs and of the workers' rights, which is visible in any of the 4 key areas covered by the law: organisation of working time, supervision of working conditions, termination of the employment contract by objective grounds and collective labour regulation instruments.

For example, the bank of hours – which, before, could only be established by collective bargaining – can now be negotiated directly with the worker and under certain conditions, if a majority of workers of a team, section or economic unit accept, can even

be imposed to other workers against their will; the additional pay for overtime was reduced to half of the previous values; 4 of the compulsory holidays (2 civil and 2 religious) were eliminated; it was also erased the possibility – introduced in 2003 - to have up to three additional vacation days based on the level of attendance; the unjustified absence in a normal working day period immediately before or after a rest day or a holiday implies the loss of retribution (also) for this rest day or holiday; etc.

In the dismissals' area, it was eliminated the need for the enterprises to follow a specific order of dismissal (for example, according with criteria of seniority) in the cases of extinction of work position – accordingly. the enterprises have now greater freedom to choose the employees who will be made redundant as they are only obliged to follow "*relevant and non-discriminatory criteria*". In turn, with regard to dismissals based on unsuitability, these dismissals are now allowed to take place even without the introduction of a new technology and without changes in the workplace, creating, in essence, a new type of dismissal. It was also eliminated the need to attempt a transfer to another position on the aforementioned cases either in these dismissals based on unsuitability or in the dismissals based on extinction of work position.

These examples already suffice to demonstrate that the Government continues to bet on a type of flexibility identified with the compression of social costs. In the name of a flexibility concept that considers this branch of law as a mere management power, the individual and collective rights of employees are weakened and the employers' powers reinforced, leading to easier dismissals, precarious jobs, variable working hours, easier mobility of employees, etc.

In Portugal the Government, at all costs, as so often repeated, looks for a constant reduction of labour costs and of workers' rights. But the truth is that two years after the signing of the Memorandum of Understanding we are in a worse situation than before, with an economic and social situation marked by an unemployment rate and recession never before achieved, that gets worse each time more and unfortunately, without alight at the end of the tunnel. The public account deficit is rising more and more, the unemployment is also on its highest level and we are witnessing a massive transfer of incomes and power of those who have less to those who already have a lot, because those who are poorer are supporting the costs of the crisis. The Government follows this way

even if this violates the Constitution, as in my opinion it is the case, considering some of the changes introduced in the labour code.

The answer has to be a different one. It is necessary to change a trend that says that, ultimately, the best would be to have no labour law or at least to reduce it to a mere instrument of management. It is an ideology that perspectives the work as a cost and that views it only as a mere merchandising.

The financial crisis that has gripped Europe today is also a social crisis, which clearly puts the need for the old continent to design concrete policies that prevent the impoverishment and correct social inequalities.

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

Faithful solely to the market, the neo-liberalism advocates the weakening of the State in their size and purposes, driving in labour relations to the abandonment of protectionism and to the return to full *autonomy of will* and *contractual freedom*.

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, that more than a century ago were translated so well in the aphorism "*between the weak and the strong is the law that liberates and freedom that oppresses*". The protectionist character of this branch of law is still justified because even today labour relation is an *asymmetric* relation, a *relationship of power-subjection*, 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 since equality between employer and employee was merely a *fiction*. The legal intervention was justified in the field of labour relations given the real possibility of employers abusing of the powers given by the contractual framework. The imposition of limits to the employer's power led to job security, limitation of working hours, weekly rest and holidays, guarantee of trade union activity, the right to strike, the right to collective bargaining, social protection, minimum wage, etc.

On the contrary the logic of the neo-liberal vision is based on the primacy of the economy over the social. With the neoliberal orientation the labour legislation follows a direction in many aspects against the constitutional demands - and also against the proper role of labour law, which in fact, based on the recognition of the economic and social inequality of the parties and on the consequent need to protect the weaker party, 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 contradict, as a general rule, the natural commitment of labour law, as a 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 way proposed by the neoliberal ideas will never lead to greater competitiveness of the economy. A policy based on social costs compression is not able to produce good results. The most effective remedy for unemployment is economic growth and the decisive factors for that are others as said before.

There are values whose pursuit cannot be entrusted to the market and the first of these values, the founding principle of any society, is the *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 today to make sense - I would even say, today (in a time when productivity is often converted into single criterion to assess the work and the social values tend sometimes to be degraded in by-product of economy) more than ever.