HOW TO MAKE THE FUNDAMENTAL PRINCIPLES OF THE LABOUR LAW BE COMPATIBLE WITH THE MODERN WORK?

Eduardo Alves[6]

ABSTRACT

Based on the current legal regulatory framework in Portugal, it is relevant to reflect on the importance of the scope inclusion of the fundamental principles, applicable to Labour Law, in the text of the Constitution of the Portuguese Republic. The current problem is to know to what extent, with all the recent changes in the labour world, which have been seen largely as a result of globalisation and new technologies, the existing balance between capital and labour does not compromise those principles, with emphasis on the principle of "worker protection". The challenge is, therefore, posed to the State, but also to the interpreter of Labour Law, to permanently ensure a possible balance. The importance of labour compliance, as a tool for mitigating conflicts in labour relations, with principles, ethics, integrity, as a reference, can make it, today, a positive reality in the globalised labour world and can help to minimize risks to which a particular company is exposed. It is therefore instructive to assess the constitutional impact that ends up being given to Labour Law in the laws of an infra-constitutional nature. The case of teleworking appears to be paradigmatic as an instrument for flexibilization of work, which allows companies to attract, motivate and retain professionals. Having followed this path – which seems irreversible – it will now be important to provide this institute with a legal framework that gives it legal certainty without, however, compromising the fundamental principles. The methodology used to carry out this article followed a qualitative analysis, through deductive approach methods and of an analytical and descriptive character, with a monographic procedure.

Keywords: Labour Law, Fundamental rights, Labour compliance, Globalisation.

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[6] PhD in Labour Law. Visiting Adjunct Professor at ISAL. Email: eduardo.alves@isal.pt

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1 INTRODUCTION

The advent of the so-called Welfare State, which began to take shape following the industrial revolution and began its decline in the penultimate quarter of the 20th century, is based on a very close relationship between Capital versus Labour with the "protection" of the State. In this equation, the balance is based on two essential features: full employment and social security, elements relevant for inclusion and social justice.

The truth, however, is that this model, which worked, especially in times of post-World War II reconstruction, until almost the end of the last century, is now exhausted. Various factors, including globalisation, economic tensions and the exhaustion of the role of the State, knowing the finite nature of its action, have contributed to the so-called "crisis of the Welfare State".

Streeck states, in fact, that: "[...] the lack of economic growth threatened the continuity of the mode of pacification of social relations that had put an end to post-war conflicts." (STREECK, 2015, p. 20).

In the world of work the reflexes end up being felt and what was a wage society where, with the possible adjustments of the market, almost all the workers were welcomed, we are now witnessing high rates of unemployment and enormous difficulties to include everyone, even huge contingents of those who are outside the "wage-earning" (ALVES, 2021).

According to Sanson, three clear aspects can be identified which mark this change. First, the increasing annulment of the role of the state as arbiter in the dispute between Capital versus Labour. Secondly, the evolution of the productive forces, which substantially altered the mode of production, making it possible to produce more while employing less. Third, the transfer to finance of the real economy, a process in which there is a displacement of investment from productive capital to financial capital (SANSON, 2020, p.153).

Work is a determining factor in the life of man as a social being. Beyond other more philosophical dimensions, only it contributes to be materially productive and transform nature into what he/she needs to live and evolve.

Weber (2010) provides an expressive demonstration, in the sense of explaining how the transition from patriarchal organisation to capitalist organisation is the result of the passage from tradition to modernity.

Today, however, labour in the traditional form in which it was conceived is at a crossroads. The old social structure of labour has been strongly influenced by economic forces, especially international competition on markets and globalisation.

Moreover, the increase in labour productivity has been achieved by means of formulas that have turned against workers - machines. And these, machinery as a whole, together with the forces of production, do not possess the desired neutrality. As a result, the counterpart of the advance in production has been the "fragmentation" of man himself, who no longer holds the leading role in the production process.

Marx is attributed one of the strongest critiques of this competition and as a consequence the dehumanisation to which workers are subjected. Therefore, he emphasises some points concerning work and workers. He states that the worker externalises himself through the product of his work and that these are transformed into the complement of what he and his peers have produced. These fruits dominate the consciousness of workers, capitalists and also agents of production. The human existence needs work to feel productive in the relationship with others and with the world (SPURK, 2005).

Complementarily, for Smith, the work will constitute the productive activity of people congregating, simultaneously, a dimension that represents an abstract notion of what would be their objectification as value. In fact, in Smith's work, this emerges as a neuralgic point of reflection and of life in society. To this extent, labour is at the origin of wealth and becomes the merchandise within the circuit concerning production and exchange (MERCURE, 2005).

The capitalist crisis, which has been highlighted, is thus faced with the problems of overproduction, mass unemployment, the limited consumer market and the discontent of workers.

As Harvey points out, the exhaustion of the mode of production, whether Fordist or Taylorist as a pattern of accumulation is just another problem arising from this process (Harvey, 2010).

2 THE RIGHT TO WORK AS A FUNDAMENTAL RIGHT - THE PORTUGUESE CASE

At the same time, the right to work, as well as the right to leisure, are basic and fundamental premises for every human being, and therefore a means to their full realization.

Therefore, its ontological dimension ends up constituting a relevant heritage of protection and emerges as one of the Fundamental Rights, today even with wide inscription in the Constitutions of modern States.

In Portugal, work and leisure are fundamental principles that are protected constitutionally, and the Labour Law acquis provided for in the Constitution of the Portuguese Republic (CPR) is embodied in several of its domains (BACELAR GOUVEIA, 2001; REBELO DE SOUSA, MELO ALEXANDRINO, 2000).

As a matter of fact, right at the beginning of the Portuguese *magna carta*, in what the CPR reserves to the "Fundamental Principles" it alludes to this theme, even if indirectly, as an element of the realisation of the economic, social and cultural rights, a consequence of the Social State and as an incumbency of the latter.

It even does so in the sense of:

"promoting the well-being and quality of life of the people and real equality among the Portuguese, as well as the realisation of economic, social, cultural and environmental rights, through the transformation and modernisation of economic and social structures" (article 9, paragraph d) of the CPR).

However, it is in Part I of the CPR that we find the essentials.

Under the Title of "Fundamental Rights and Duties" one finds, here, not only a peculiar category of rights, freedoms and guarantees: the "Rights, Freedoms and Guarantees of Workers" (MIRANDA, 1988); but also, although in a more tenuous way - but equally significant in its protection, some references to the rights of workers, in this case under the category of "Economic Rights and Duties" (MIRANDA, 2000).

Specifically, we can point out in the first of those categories, the rights of "freedom of choice of profession" (article 47, no. 1 of the CPR); "right to job security" (article 53 of the CPR); "rights of workers committees" (article 54 of the CPR); "trade union freedom" (article 55 of the CPR); "rights of trade union associations" (article 56 of the CPR) and the "right to strike and the prohibition of lock-out" (article 57 of the CPR). Regarding the second of these categories, we can point out the following economic rights: "right to work" (article 58 of the CPR) and "workers' rights" (article 59 of the CPR).

The CPR also inscribes in its Part II, some principles, in what is called "Economic Organisation". Here are described with constitutional force all aspects relating to the functioning of the economy and state intervention in this sector, notwithstanding that, in what concerns us here, there are relevant references to Labour. So much so in the case of public sector production units in which the "effective participation of workers in the respective management must be safeguarded (Article 89 of the CRP).

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One may also refer to Part III of the CPR. This part essentially deals with the regulation of political power in Portugal, which is entitled "Organisation of Political Power" and where the field concerning Labour Law ends up appearing in a lateral manner, in a morphological perspective of the mere distribution of legislative power among the "actors" with legislative constitutional powers in Portugal, namely: the Assembly of the Republic and the Government within the framework of the Republic; and, between these bodies, and the regional Legislative Assemblies, in the relations between the State and the Autonomous Regions (REBELO DE SOUSA , MELO ALEXANDRINO, 2000).

What deserves to be highlighted, still, around the Labour Law, in this Part III of the CPR is the care in the delimitation that is presented - Article 165, paragraph 1, subparagraph b) of the CPR - in the considered domain of "relative reserve of legislative competence" of the Assembly of the Republic around the subject of "rights, freedoms and guarantees", which surely ends up including the treatment of several rights in the individual and collective labour plan (BACELAR GOUVEIA, 2003, p.30).

Particularly relevant, if we take into account the competency nature that the matters may also have at regional level, knowing that Portugal is a unitary regional or politically decentralized State, constituting a partial regional State, since it only comprises two Autonomous Regions of Madeira and the Azores (articles 6 and 224 of the CPR).

In this case, one considers the provisions of the Political-Administrative Statutes of the Autonomous Regions of Madeira and the Azores.

In these statutes, labour law matters, with the scope that was pointed out above, are, here, regionally convened as a matter of regional interest and the Regional Assemblies also have "room" to legislate.

Finally, it is enlightening and symptomatic of the constitutional impact that is given to Labour Law and the importance that this ends up deserving, consequently, in terms of relevance, also the fact that in the matters for which the CPR considers that there is irreversibility and, consequently, to be a limit to the very revision of the Constitution, it includes precisely the "rights of workers, workers' committees and trade union associations" (article 288, paragraph e)) which attests to its importance in the constitutional design of the CPR.

3 AT THE CORE OF LABOUR LAW - THE WORKER

The Constitutions of modern states, of which Portugal is no stranger, mark the passage from liberal constitutionalism, concerned only with guaranteeing the personal autonomy of the

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individual against the power of the State, to social constitutionalism, characterised by state interventionism with a view to solidarity and social justice.

It is noteworthy, in what is its essential core, that the principles of Labour Law undeniably constitute a form of protection of the worker, since in this branch of Law, unlike the parity of the parties existing as a rule in common (Civil) Law, there is a flagrant inequality. One may thus say, in line with Monteiro Fernandes, that the basic constituent principle of Labour Law is the principle of "protection of the worker" (MONTEIRO FERNANDES, 2006, p.15).

In this regard it is also eloquent what Leal Amado writes on the subject:

> “As labour force is a quality which is inseparable from the person of the worker, which presupposes a profound involvement of the worker in its execution in a heterogeneous manner, this implies that the law, although it focuses on the labour relationship as a patrimonial relationship of exchange of work and salary, must take this personal involvement into account. The employment relationship is a profoundly asymmetrical relationship, that is, manifestly unequal, marked by economic dependence and legal subordination. For the worker to comply is, first of all, to obey, not only to commit his/her will in the contract, but also to submit to that same contract”. (LEAL AMADO, 2009, p.13).

The Fundamental Right to Work has, therefore, not only a defence dimension, in which its holder is guaranteed to demand that the State refrain from and protect the full enjoyment of the right protected, but also a positive action dimension, in the sense that the State must protect the enjoyment of freedom of work, against what it may be affected by third parties (NOVAIS, 2010).

Therefore, all subjectivity, which is inherent to this duty of protection, should be ensured within the framework of the principles of fundamental rights confronted at each moment, and in each situation, in view of the factual and legal context. This means, therefore, that in each concrete situation, where the two constitutional principles are in confrontation: that of the employer's free economic initiative, on the one hand, and that of the Right to Work, on the other, this principle should prevail whenever a manifestation of the dignity of the human person is at stake, which is the fundamental value ordering the entire legal system, thus making the worker the core of Labour Law.

For all these reasons, it is clear that the Right to Work, as a Fundamental Right, should assume a sufficient dimension to ensure the dignity of the human person and require the State

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to act positively in promoting public employment policies, unemployment assistance and vocational training.

At another level, what is the economic role of social intervention by employers is not an integral element of fundamental rights, it is not part of their essential core, nor does it fit and integrate within the immanent limits of fundamental rights. The reservation of the financially possible should only act as a factual and legal limit of fundamental rights.

4 "TELEWORK" IN PORTUGAL - A RECENT PARADIGMATIC CASE FOR THE AFFIRMATION OF A FUNDAMENTAL RIGHT

One of the most immediate answers to the Covid-19 pandemic was presented to the labour world by telework. We are facing here a simplified expression of a specific regime which includes the provision of work with legal subordination typically carried out outside the company and using recent technological means of information and communication. This legal-labour "figure" exists in many of the international legal systems under the designations of *teletravail, teletrabajo, telelaboro, telearbeit*, etc., and has even originated in the USA in the 70s of the 20th century. It is not, therefore, a recent innovation.

This type of work (as it is considered in Portugal) is recognised in Portugal in the Labour Code - approved by Law no. 7/2009, of 12.02 and subsequent amendments - in articles 165 and following.

The truth is that this reality has motivated, due to its global impact on the labour space in Portugal (right from the beginning of the effects of the pandemic, due to the inevitable confinement and its consequences and that imposed, even, the telework as compulsory by governmental means, being this legally, in the Labour Code, This is legally a voluntary option between the worker and the employer), fierce debate between all political-party forces, with seat in the Parliament, about the limits and scope that the regime of telework in Portugal had and the necessary evolution that it should contain, for the protection of the real rights of workers[7].

In fact, all this ended up leading, through Law no. 83/2021, of 06/12 (which marked the last amendment to the Code), to relevant legislative changes in the current regime of the Labour Code, vis-à-vis what was enshrined in 2009. Basically, the following changes were made

[7] The opinion article by the leader of the Portuguese Socialist Party, Ana Catarina Mendes, published in *The Guardian,* in https://www.theguardian.com/commentisfree/2021/nov/18/portugal-bosses-work-hours-right-to-disconnect, is enlightening.

Fundamentally, the following additions were made: the extension of telework to parents with children up to eight years old (against the previous three years), without the need of an agreement with the employer, provided that it is done by both parents, a reality also extended to workers with the status of informal carer (here, for the maximum period of four consecutive or interpolated years). The new rules also dictate that companies are obliged to pay workers the additional expenses related to "teleworking", such as energy and internet costs - article 168, no. 2.

However, where relevant progress (innovation) in this legal-labour area actually stands out, corresponds to the fact that employers must now promote face-to-face contact between teleworkers and their superiors, at intervals not exceeding two months - Article 169, no. 1, paragraph c); besides the fact that employers have the duty to refrain, also, from contacting the worker during the rest period (except in situations of force majeure), the violation of this rule constituting a serious administrative offence - Article 199-A.

In an analytical manner, the dimension that converges in the sense of trying to understand this modality of labour provision, nowadays, is to note that we are facing an inevitable organisational change in companies. For these, this means broadening the horizons of the model of their operation, including labour relations and the way they take place (without the legal subordination ceasing to exist and, consequently, leaving the perimeter of the employment contract) and giving them a more malleable and plastic connotation by virtue of the virtual dimension that their execution implies (Alves, 2021).

Moreover, the pandemic contributed decisively to the acceleration of the digital transition process of companies and the development of new models of work provision, seeing in telework a possible answer. In fact, nowadays, many workers and employers already recognise its advantages and are even in favour of its adoption after the pandemic. Telework allows geographic flexibility, facilitating workers' mobility and the hiring of professionals anywhere in the world, which contrasts with the traditional paradigm of face-to-face work, restricted to a limited geographic space. It is therefore predictable that, in certain sectors of activity, recruitment processes will become increasingly global, raising with greater frequency complex legal issues arising from the constitution of multi-location employment relationships (such as issues related to the law applicable to the employment contract, determination of the applicable social security regime, etc.).

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As a result, this whole context of technological evolution still has its innovative path and the traditional forms of control and supervision in person of the work activity are beginning to be replaced by other forms and methodologies of remote control. The risks of these, due to their intrusive impact, being considered as damaging the privacy and the fundamental rights of workers, raising problems of delimitation of the contours and limits of the employer's power of direction constitute, in due time and manner, challenges to legislators (besides the interpreter of the Law), as in Portugal we end up witnessing with the recent legislative change.

Therefore, where this type of work is currently particularly paradigmatic, of what should be today the affirmation of a fundamental right, in Labour Law, is precisely in the so-called "right to disconnection".

As stated above, the growing importance of "telework" is leading to relevant changes in the morphology of work and labour relations, which pose new challenges to the legislator and the enforcer of the Law. In fact, in the case considered, telework makes the boundary between working time and rest time less clear, sometimes being associated with an idea of flexibility of the time of work provision, which does not always seem to be compatible with the existing labour law "design".

However, the risks of excessive flexibility, or at the limit, even the disrespect for the most basic leisure and personal life rights of workers, impose the need to ensure, in fact and in practice, the effective rest of workers, thus justifying the express provision of a "right to disconnection". This, thus, became part of the Portuguese labour legal system, through the insertion of article 199-A in the Labour Code and which appears, here, in our view, as a clear evolution in the sense of (re)express affirmation of infra-constitutional connection, via the Labour Code, to a Fundamental Right already duly constitutionally protected in article 59 of the Constitution of the Portuguese Republic, particularly, in no. 1, paragraphs b) and d):

Article 59

(Rights of Workers)

1. All workers, without distinction of age, sex, race, citizenship, territory of origin, religion, political or ideological convictions, have the right

(...)

b) To organise work in socially dignifying conditions so as to enable personal fulfilment and to reconcile work and family life;

(...)

d) Rest and leisure (...);

As the name suggests, the so-called "right to disconnection" from the work environment, in a case of telework, ends up consisting in a "disconnection" in the connection, not so much physical (this ends for real reasons of the labour modality adopted to exist), but, above all, mental of the worker. The "right to disconnection" ends up being, therefore, an element of full realisation of Man, which in the era of full-time connection is increasingly compromised and which gains ground by the indiscriminate use in the work environment of telematic tools.

As such, being a factor of the realisation of human nature, protected as a constitutionally inscribed Fundamental Right for workers, as seen before, rest, "leisure", the conciliation of professional activity with family life, to which is added the right to "disconnect from work" (disconnection), present themselves in an essential manner, as a physical and mental well-being of the worker, improving even his quality of life and health, eventually even reflecting on his/her productivity.

In addition, it should also be seen, due to its growing relevance, as the affirmation of a labour Fundamental Right related to other Fundamental Rights, with constitutional protection, through article 17 of the CPR, such as the "right to health" - article 64 of the CPR, and the "right to rest and to a healthy environment" - article 66 of the CPR, which attests to its importance.

5 THE ROLE OF THE WORKER IN A GLOBALISED WORKPLACE

Globalisation, as demonstrated, has taken world trade to a level of enormous competitiveness, but also of interdependence. As a result, companies have started to adjust and to look for countless alternatives and to create adaptation to this global competition. The role of this globalisation was presented to the world in the sense that companies could break barriers, interacting in front of a system, no longer of a local, regional or national nature, but rather worldwide.

Admittedly, the actors in the world of work, particularly employers, especially companies, as Ianni (2006) states, both produce and reproduce their own dynamics and differentially assimilate the dynamics arising from global society as a more comprehensive whole. However, as Granato (2015) rightly points out, it is in the "space" where development appears unequal, combined and contradictory, that diversities, localisms, singularities, particularisms or identities are expressed.

It ends up becoming inherent to capitalism, therefore, that the social/technical organisations of work and production end up transformed in an equal structural manner, since they develop all the time and everywhere. It is a very rapid process, which inevitably has been

making even some of the productive forces dispensable, technically and socially obsolete. Social forms and techniques of organisation of production and work are modernized to mitigate the uneven development on a national, regional or global scale (IANNI, 2006).

Consequently, the traditional format that was conceived, has been undergoing significant transformations, in many cases creating a gap between different types of workers. Urges, therefore, that the State, but also the society, be attentive and follow the changes correcting if necessary and applying the reduction of differences (ALVES, 2014).

Therefore, today, for all that has been demonstrated before the production of developed capitalism points to the change of the Work, the universal flexibility of the worker and the fluidity of its function[8]. The durable, stable and solid condition of capital is contrasted with the fragility and uncertainty of workers.

The core of the labour process, by its nature, has such precarious foundations that it justifies the existence of workers and their partial functions. That is, in reality, they can become useless and surplus cash without at least having control of this process (SPURK, 2005).

6 CONCLUSION

In the light of the framework just outlined, contemporary Labour Law, while maintaining its initial characteristic, centred on the idea of protecting the worker, must try not to be an obstacle to the advance of technology and the imperatives of economic development.

The inevitability, it seems today, of moving towards the flexibility of some legal institutes and not preventing that, mainly in face of the growth of collective bargaining, the social partners may, in each concrete situation, through collective bargaining, compose their interests directly, without the interference of the State and in the form they judge to be most appropriate at the time; the so-called compliance of labour nature may also play a relevant role in the mitigation of conflicts in labour relations and even help to minimise the risks to which a certain company is exposed, boosting its competitiveness through compliance and ethical-legal example.

It will continue to be increasingly important to maintain quality work and rights (NASCIMENTO, 2011, p. 70).

[8] In Europe and in line with the Framework Agreement of the European Social Partners, companies using new and emerging technologies have a responsibility to provide adequate opportunities for requalification and up-skilling for all employees, so that they can learn to use the most technologically advanced tools, adapt to the changing needs of the labour market and stay in it. Vide in this respect https://ec.europa.eu/social/main.jsp?catId=1223

It is fundamental that all potential consequences and negative effects of the current conjuncture of change in the labour world are not reflected in the guarantees that Labour Law and, above all, the State, should continue to ensure in order to guarantee the common good and sustainable development, the valorisation and dignity of the worker.

In fact, at its level, Labour Law has also felt the reflexes of the competitiveness between companies in different countries. In fact, this ended up happening from the moment when economic agents, as we have seen, took advantage of the facilities provided by the agility of trade in the global economic context, seeking to find their "space" in the capitalist competitive market. It is then understandable, as a consequence, that companies have adjusted their strategy by focusing on all issues of reducing production costs.

Therefore, Labour Law will be required to maintain a balance, without prejudice to an adjustment to contemporary labour. And this must maintain valid, as pillars, solidarity in the performance of work and participation in its results. As Ferrari et al state, the globalisation of social rights can only be equated with economic globalisation, when the dignity of the worker is safeguarded (FERRARI et al, 2002, p. 76).

Here again, the international dimension converges before that which is a global dimension. And the necessary action of international organisations, such as the United Nations (UN) and the International Labour Organisation (ILO), so that there is an alignment of related impulses and a political will is aimed, which goes far beyond the strict limits of firm decisions in the internal local and national conjuncture and, if possible, can even guide it in a concerted manner (ALVES, 2021).

One cannot forget that the present times are symptomatically marked by the dangers created with a global dynamic, coupled with fierce, and sometimes unregulated, international business competition, which can generate a decrease in the level of working conditions and disrespect for fundamental rights. Moreover, between countries, there are markedly different and asymmetric levels of protection and recognition of rights. Moreover, the entire context currently underway, associated with the process of internationalization of production, occurs in an environment in which institutions, legislation and market regulation are still essentially based on national dynamics defined by each country or limited economic space.

This question leads to reflection, in the sense of knowing how to shape a capitalist social formation consistent with the relative suppression and possible changes in the needs of workers, as social beings, without ever conditioning or harming those, which are the fundamental rights

enshrined by the Labour Law and whose inscription is rooted in the Constitutions of modern States.

This is, therefore, clearly the challenge that is permanently faced by legal systems today, recognising, moreover, that the role of the Fundamental Right to Work is vital in promoting human dignity, as a suitable means to produce autonomy, self-determination of the individual and to make him subject of subjective rights (NOVAIS, 2010).

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