

# Welfare State and globalisation of the economic area<sup>1</sup>

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## **Abstract**

A “welfare State” is a concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. The general term may cover a variety of forms of economic and social organization. This article examines the concept of welfare state in the context of legislation adopted in recent years in Portugal that wants to “provide greater flexibility” of the labour market. This article discusses the crisis and the future of the Social State that is also, according to my view, an act of citizenship, a way of expressing our concern with the actual status of the welfare State.

**Keywords:** labour law, welfare state, “flexibility” of labour, globalisation, the financial crisis.

**JEL Classification:** K31

## **Preliminaries**

The development of capitalism itself led to State interventionism, to the welfare State – a compromise between capital and work that occurred from the end of the 19th century onwards and which appears especially as an effect of the 1<sup>st</sup> World War and of the various contemporary social revolutions.

In those times there was a *crisis* of the liberal conscience all over Europe. The liberalism could not (and it wanted not) to tackle social inequalities and social injustice. The welfare State appeared as a way of responding to various problems of society (e.g., work, education, housing, health and social security) and of satisfying the needs of modern times, which the liberal order clearly no longer satisfied. The welfare State was designed for the first time in the Mexican Constitution of Querétaro (1917) and in the German Republican Constitution of Weimar (1919) and 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. From thereafter, the new State is no

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longer the neutral State of liberal tradition, simple framework for the exercise of freedoms, but a State that recognizes the *right* - and the *duty* - to intervene in economic relations, although such an intervention encompasses a sacrifice of individual freedom and of its projections on contractual freedom and private property.

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*)<sup>3</sup> 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*"<sup>4</sup>.

Labour law is exactly a hallmark of the welfare State. According to Alain Supiot, Labour Law is the greatest legal invention of the 20<sup>th</sup> century. Peter Häberle says that this branch of law is for the 20<sup>th</sup> century and for the Social State precisely the equivalent to the right of property for the 19<sup>th</sup> century and for the Liberal State. A "*very noble branch of law*" called it the encyclical *Quadragesimo Anno*, of Pope Pio XI.

### I. Welfare State and labour law

Result of a particular historical evolution, labour law has special principles that differ from certain dogmas of contract law, in order to protect the weaker party, and a specific legal technic consisting in the promotion of equality in favour of that weaker contracting party.

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 was the development of capitalism that, leading to the concentration of the workers and the growth of their numerical strength, generated the conditions that allowed them to claim rights that were not previously recognized and led to state intervention and to the autonomy of a new branch of law, parting its roots from the common law of contracts – the civil law, which was completely neutral to the "*social question*".

According to the liberal legal conceptions, the employer and the worker are free persons and legally equal; therefore, they can negotiate, voluntary and in perfect equality, the conditions of work. But what happens in fact is that the latter, not owning the means of production, can not ensure his livelihood, unless he

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<sup>3</sup> "*Respect*" and "*ensure*": is the difference that clearly follows from article 1 of the German Basic Law (*Grundgesetz*), when using the verbs "*achten*" and "*schützen*".

<sup>4</sup> In addition to the Social State, in which there is a line of continuity in relation to the liberal order, we could also refer as reactions against the liberalism the marxism, triumphant in the Russian Revolution of 1917, and also the several right-wing authoritarian regimes so arising as a result of movements that reflect the so-called (by Marcuse) "*preventive counterrevolution*", as happened in Italy, with the "*March over Rome*", which established the fascist regime, in Spain, with the dictatorship of Primo de Rivera, and also in other countries, such as Portugal (with Salazar).

alienates to the former the only “merchandise” in his disposal and which the employer, in turn, needs: the employee’s workforce. This means that the worker is not only obliged to negotiate, as he must do it under the conditions imposed by the market, which has a very high unemployment rate, making it impossible to obtain better wages and better working conditions.

This inequality between employers and workers deprives the labour contract from its contractual aspects and leads to a "contractual" dictatorship of the employers over the workers.

The worker develops his contractual "freedom", subjecting himself to the conditions determined by the employer, without any chance of countering it. By use of the equality principle, the liberal system prohibits coalitions within employees, the organization of representative associations as the legal exercise of strike, putting face to face and isolated, on one side, *supply of work* and on the other *demand of work* – according to the laws of the market. This gives place to a contract in which the employee does not make more than accept the conditions that were previously fixed by the other contractor, which is economically stronger.

The liberal system does not know economic categories and concrete people, ignores the real inequalities, “stops at the door of the factory”. In the employer’s enterprise is the sacred right of property that makes the law and entitles the employer with the regulatory power of the work process. Because it states the principle of equality before the law, there is no specific law for employment, which is governed solely by civil law, where the dogmas of autonomy of will and contractual freedom are absolute, facing the work as a mere merchandise. Such a system leads to the workers' servitude, with very low wages, to the extension of working hours to 16 and more hours, sometimes without interruption, both for men and for women and children, insufficient hygiene and sanitary conditions of the workplaces, degraded life, premature death, etc.

But it is the development of the capitalism itself, with the need of large masses of workers, which would later on be the determinant factors of the formation of the labour law, which emerged as a reaction to the inability of the civil law to deal with the "*workers' issue*". Under the pressure of their struggles, the legislator will have to draw laws for the protection of workers and to recognize trade unions and their right to negotiate with employers, as well as their forms of struggle. Once the neutrality of the State was broken and a legislative production in labour area was started, the modern labour law started to be drawn up, in a process timidly started in mid 19<sup>th</sup> century.

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.

To sum up, the second period of the capitalism was characterized by the State's intervention in order to protect the weakest part of the contract.

## II. "Flexibility" of labour legislation in Portugal

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. In recent decades, the ideas of *employment* and of *employment with rights* have, in a certain way, appeared opposed. The labour law, which greater concern should be, not the *employment security*, but the *employment* itself, should essentially ensure the flexibility and the reduction of labour costs – if necessary at the expense of the stability of the relationship and of workers' rights.

Neo-liberalism - sustaining the extinction of the main achievements of the workers, by invoking the neutrality of the State and the protection of employment - is today, in fact, a temptation of employment policies and has influenced the European Commission and other institutions such as the OECD and the World Bank, reaching its more finished formulation in the famous proposal of the so-called circle of Kronberg "*more market in labour law*" - expressing, in the background, the idea of converting this branch of law into a mere formalization of the laws of the market.

Invoking that there is no need to protect the worker and that the labour legislation is too rigid<sup>5</sup>, 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.

It is clear that the globalisation of the economy also promoted a better diffusion of these currents of thought. With the fall of the Berlin Wall and the end of the Soviet Union, the bipolar world of the cold war collapsed and we have had a single superpower, the United States. This superpower has had all the interest in the globalization of the world trade and in the end of the protectionism<sup>6</sup>, all this resulting, for example, in the fact that, today, the largest economies of the world are not countries, but multinational enterprises<sup>7</sup>.

But the labour laws are not responsible by deficient functioning of the economy and it is not true that the essence and the social function of this branch of law have lost their reason.

Naturally what represents a mere correction of unnecessarily rigid devices or a mere adaptation of some legal provisions to new needs is perfectly compatible with the traditional philosophy of this branch of law. On the contrary, already

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<sup>5</sup> The evaluation of labour legislation regularly published by some organisations characterized the Portuguese labour legislation as formally very rigid, which would difficult the adaptation of enterprises to economic cycles and create unnecessary obstacles to business and social innovation. But labour relations in our country are not really so rigid. How can labour law be so rigid if we have records of precarious contracts? There is not such a rigidity because, quite simply, the legislation is not enforced. Moreover, there are serious and rigorous studies, some of which even produced within some of those organizations, that evidence that there is no direct link between labour flexibility and the promotion of the employment.

<sup>6</sup> Which for example led directly to the replacement of the General Agreement on Tariffs and Trade by the World Trade Organization, created in 1995.

<sup>7</sup> And also in a loss of power for Europe.

deserves censure, according to my believe, all that may lead to a subversion of the main principles and fundamental values of the traditional legal rules, in particular taking into account that the social function of labour law must not disregard the Constitution, which has as its basic principle the dignity of the human person (art. 2) and according to which are part of the fundamental tasks of the State “to promote the well-being and quality of life of the people and the real equality between the Portuguese”, as well as “the economic, social, environmental and cultural rights, through the transformation and modernisation of economic and social structures” [art. 9 - d)].

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 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 explanatory memorandum of this law, alone, would justify our attention<sup>8</sup>. But putting aside the explanatory memorandum let's focus on the essential of the amendments. 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

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<sup>8</sup> In addition to other aspects, it is therein made reference to *flexicurity*, when the law has nothing to do with this concept - which assumes, in return for the mobility in the labour market, the need of implementation of active employment and vocational training policies and a high level of protection in unemployment, to meet the needs of those who leave the labour market temporarily. The proper operation of this model is based on some assumptions, as a heavy tax burden, generally well accepted and culturally fulfilled by population, a high amount for labour market policies, generous unemployment benefits, high rate of unionization, labour market reforms based on a real social dialogue between the social partners, etc. – and these context is not applicable to Portugal, with large structural differences for what happens, for example, in Denmark or in Holland.

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<sup>9</sup>; 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<sup>10</sup>; it was also erased the possibility – introduced in 2003 - to have up to three additional vacation days based on the level of attendance<sup>11</sup>, 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*". It was also eliminated the need to attempt a transfer to another position in these dismissals by objective grounds (based on unsuitability or based on extinction of work position).

Many other aspects could be mentioned, such as, for example, the reduction of the compensations for dismissal (severance payments)<sup>12</sup> and of the unemployment benefits, questions of constitutionality with regard to collective bargaining, etc. But these examples already suffice to demonstrate that the Government continues to bet on a type of flexibility identified with the compression of social costs<sup>13</sup>. 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<sup>14</sup>, variable working hours, easier mobility of employees, etc.

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<sup>9</sup> Solution in my opinion of dubious constitutionality, in face of, at least, the provision of article 59, paragraph 1, *b*) of the Portuguese Constitution.

<sup>10</sup> It is claimed that our country has more holidays than most European countries, which is to be demonstrated (please note the rise Thursday, Easter Monday, the second day of Christmas and other holidays which are public holidays in some countries, and which are not in Portugal).

<sup>11</sup> What is indeed very curious, when, in 2003, this possibility was pointed out as one of the major measures for the salvation of productivity and competitiveness of the enterprises. There's indeed a lot of hypocrisy - and even lies - to justify the introduction of such measures. This is also applicable to the determination of the relevant European Union average regarding compensations for dismissal (*infra*) or when referring that there are countries in Europe in which the 13 and 14 months are not paid (pointing as an example the United Kingdom, where the wages are paid to the week, and not to the month), etc.

<sup>12</sup> It is mentioned that the severance payments should be aligned with the EU average. What it is really true is that with these modifications it is possible to say that the dismissals for economic grounds (already easier since 1989) are now also cheaper.

<sup>13</sup> In my opinion the Government also tries to take advantage of the crisis as an opportunity to remove social rights and carry out a "reckoning" with the achievements of workers over the past few decades.

<sup>14</sup> Portugal already has one of the highest rates of precarious jobs in the EU.

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

### Conclusions

That's why in Portugal the Government, at all costs, as so often repeated, looks for a constant reduction of labour costs and of workers' rights.

We may, however, ask: *for what?* 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.

Surprising is that some lawyers, namely constitutionalists, refer that the present situation justifies an adaptation of the constitutional rules by limiting its protective scope. But it is not, in fact, legitimate, on behalf of the public accounts deficit struggle, allow the return to *non-law* and forget the Fundamental Law and the democratic State of law, which imposes the reconciliation between the social and the economic, between the freedom of enterprise and the recognition of workers' rights.

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*. Such a conception of the human person, of the society and of the State ignores, after all, that collective freedoms and worker protection status are an integral part of modern democracy and that, on the market, the absence of rules maximizes always 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, 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 to the modernisation of labour legislation is another. It demands linking social progress to economic growth, by making the conciliation between the rights of the workers and the adaptability of the enterprises to the requirements imposed for an ever greater competitiveness. The big challenge for the labour law is today to rediscover what has always been their key question, the social justice and the full citizenship, i.e., a citizenship, not only civil and political, but also economic, social and cultural, also inside the enterprise.

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<sup>15</sup>.

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.

Also because the protection of the weakest is (must be) one of the most relevant functions of the democratic State, the "*fight for law*" ("*Kampf ums Recht*"), in the expression of Rudolf von Ihering, after all the fight for a "*freer, more just and more fraternal*" world, using the words of the preamble to the Portuguese Constitution, has today, at a time when the economic imperatives are questioning many aspects of traditional labour regime, an elective space in the labour area - in line 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 those who have hunger and thirst for justice.

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3. *Memorandum of Understanding*, signed in May 2011 between Portugal, the European Commission, the International Monetary Fund and the European Central Bank
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<sup>15</sup> In my opinion to counteract the management needs of enterprises to labour legislation is a false problem. On the contrary, the human factor – including the motivation of workers - should be something essential and the main factor to be taken into account in the management of enterprises. The enterprises cannot think that the lack of competitiveness is due to labour legislation and to the workers' rights. They have to be aware that the human factor is very important. It's a false question to think only in competitiveness and productivity forgetting that there is an ethical dimension in economy that can not be forgotten and is, in fact, absolutely essential.