THE IDENTITY CRISIS OF THE LABOUR LAW

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Abstract

Labour Law is dealing with a period of tremendous changes, which may jeopardise its legitimacy. It may be even true that labour law is living now its last days, and only a possible 'reinvention' may lead to its survival. One of the reasons for this crisis is found in the evolution of the relation of the labour law with the "mother" branch, civil law. The paper is proposing an exam of the flexible relation between labour law and civil law and to react to the tendency of the reincorporation of labour law in civil law and of the dangers of such development. It is also presented the impact upon labour law of the recent paradigmatic change of the civil law, and some criteria for identifying the applicable civil law norms to employment relations. There are laid down a couple of conclusions regarding the changing of labour law, as well as the uncertain future of this branch of law.

Keywords: *Bogus self-emplyment, labour law, workers, labour relation*

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1. Preliminaries. Traditional labour law

From negation of all protection form[2], to acceptance of protection in an exceptional manner, followed by recognition of the need to derogate from the common law – labour law arose as a result of the need to regulate the labour agreement in a partisan manner, not in a equidistant manner like in the civil law. Labour law intended to compensate a basic contractual disequilibrium in this way.

Traditional labour law was based on the *fordist* foundation of the labour relation. The worker invests most of his adult life in the enterprise, which becomes an element of one's identity. He/she works during well-established working hours, on the premises of the enterprise, with his/her work mates, with whom he/she sets up unions and other organizations, thus participating in collective bargaining, strikes and social actions. This is the context where labour law was created, made up of collective labour agreements concluded in this way, and of the legislation of minimal standards of protection of the worker who has a disadvantage created by subordination towards one's employer.

The goal of the labour law was, depending on the political and conceptual orientation, social peace, social egalitarianism, social justice, or democracy itself. Labour law indeed fulfilled a function that is higher to the re-balancing of the contractual relations; it can be a social regulator.

The two statements: „work is not merchandise"[3] and „the parties of the labour contract are not equal in terms of negotiation power" constitute the basis of the traditional labour law and it is the ethic foundation of the intervention of the law in private relations and of the restriction of the parties' contractual freedom.

Contractual freedom – a fundamental principle of the modern private law – is consumed, like any consumable merchandise, „during the first use". However, labour is not produced in order to be sold, like merchandise, and it is un-dissociable from the employee[4]; so the object of the agreement cannot be separated from one of its parties. Consequently, through derogation from this

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[2] "Social agreements cannot include advatanges for one party to the detriment of the other". G. Plastara, *Contractele civile speciale*, Ancora Publsihing House, 1911, p. 473.

[3] This thesis was formulated within the Philadelphia Declaration of the International Labour Organization (1944). Some approaches consider however that „labour is not a merchandise" is not a statement based on empirical reality, but a normativ statement („labour should not be treated asa a merchandise"). See , B. Langille *Labour Law's Theory of Justice*, in Davidov, G, Langille B. (coord.), „The Idea of Labour Law", Oxford University Press, 2013, p.106.

[4] As mentioned, this is a consequence of the fact that labour is not merchandise. It is inseparable from the person who peforms the work, impossible to store in a warehouse, impossible to increase its quantity, it is numerically determined and relatively difficult to move. See , I.T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, Universul Juridic Publishing House 2012, p. 13.

principle of contractual freedom, the labour law does not allow parties to negotiate freely on the contents of the future agreement.

Labour law is, by definition, a protective law[5]. As mentioned before[6], *between the strong and the weak, the rich and the poor, freedom oppresses and law liberates*.... These are the circumstances where labour law appeared and defined itself as a compensating law, whose goal is not only neutral regulation of the relations between the parties, by protecting the interests of the third parties (like the civil law) but also the protection, done by special means, of the more fragile party: the worker.

In individual relations, the worker has the disadvantage of the vulnerable position – in most cases – in relation to the employer. The labour relation was therefore called „juridical relation with democratic deficit"[7], a deficit that the law aims to correct. Consequently, the apparition of the labour law brought about a significant particularity: the possibility of the workers to negotiate and act not only individually but also collectively thus compensating by the strength represented as a group, the strength deficit of an individual negotiation. Consequently, one essential component of labour law appeared, the collective labour law, seen as the set of regulations for the relations – whether peaceful or conflictual – between the team of workers and the employer[8].

The traditional role of the labour law is the protection of the employee, as vulnerable party of the labour agreement. Simplifying, we can say that the negotiating power of the employee is diminished because, by concluding this agreement, he/she ensures his/her subsistence means, which makes (usually) the conclusion of the agreement to be a more important stake for the employee than for the employer.

The negotiating theory says that «BATNA» (*the best alternative to a negotiated agreement*) determines who has the higher strength upon the negotiation of an agreement. In other words, who is in a more favourable position, if negotiation fails, would be the most powerful during negotiation. On the contrary, he who „has no choice", and finds himself in an unfavourable position if the agreement is not concluded – is weak in negotiation. Namely, most often, the worker[9].

We could therefore state that the main function of traditional labour law is to regulate the relation employer / employee, through an unbalanced hypothesis, with exclusion of those who, not concluding an employment contract and consequently not having the capacity of employee, are not in this disadvantageous position, and with inclusion of those who have the capacity of employee.

But it is more than that – at all levels. On the one hand, not all non-employees can be excluded (as we shall see below). Also because the regulating functions of the labour law do not aim only at the relation employer – employee, but also the relations among employees themselves. Some authors therefore[10] notice that labour law is needed to regulate not only the distribution between labour and capital, but also the distribution of resources among employees. When for instance, social criteria to select employee in case of collective dismissal are negotiated through a collective labour agreement, such a provision does not consider the relation employee – employer, but first of all the relation among employees. It is a clause that favours some employees and disadvantages others. When a labour law norm forbids accumulation of the pension with the salary, it does not aim at regulating the relation employee – employer, but at the exclusion of some employees to allow others the access to the labour market.

Labour law has such a function of resource distribution among workers; it can reject some and encourage others' success, in terms that concern the employer only at a second level.

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[5] As mentioned, labour law is a "partisan" law, a "inequality and not reciprocity" law. See , regarding the mission of the labour law, Al. Țiclea, *Tratat de dreptul muncii*, Universul Juridic Publishing House, 2012, p. 15 – 17 and the bibliography cited by the author.
[6] A. Monchabon, *Cartea cetațeanului*, Humanitas Publishing House, Bucharest, 1991, p. 42
[7] G. Davidov, *Notes, debates and communications. The (changing?) idea of labour law*, în „International Labour Review", vol. 136, nr. 3-4/2007, p. 318
[8] For details, see R. Dimitriu, *O perspectivă asupra dreptului colectiv al muncii*, in "Revista Română de Dreptul Muncii" no. 7/2010, p. 9 – 19.
[9] See, R. Dimitriu, *Dreptul muncii – între disoluție și reinventare*, in „Studii și Cercetări Juridice" no 2/2013, p. 199-221
[10] G. Mundlak, *The Third function of Labour Law*, in „The Idea of Labour Law", *cited book*., p. 322.

2. Economic dependency and subordination

The legal relation which is of interest for the labour law is characterized by two elements: economic dependency and subordination. The analysis of these two indicators can lead to identifying the legal relations that are of interest for the labour law, namely those relations that justify the protection they (through derogation from civil law) are susceptible to provide.

Subordination is translated in the labour right of the beneficiary to give instructions regarding the way in which the work should be performed (most often: duration of the work, place where the work is performed, working hours and the contents of the work). It is not about instructions regarding the result of the work, which the beneficiary of the service under a civil agreement could give but it is about the right (and the obligation) of the beneficiary of the work to instruct the worker on how to perform the work, with two consequences:

- On the one hand, taking the risk, in case the work performed according to the orders received does not meet expectations;
- On the other hand, the right to sanction the employee if he does not comply with the orders received from his employer, irrespective of the result of the work (whether it was the expected one or not).

In the current Romanian law, the concept of "dependent work" is not used in the labour law but only in the fiscal law. It designates any activity performed by a physical person in a „hiring relation". Dependency is the attribute based on which we establish if the activity performed can be considered a service provided under the civil regulations, or under an employment contract. Employees or other persons bound to the employer by individual labour agreements or other legal tools that create a relation between employer / employee involving work conditions, remuneration or other obligations of the employer do not act independently.

However, we are witnessing today an essential modification from this point of view. Increasingly larger categories of independent workers are in the same position of vulnerability as employees. Forms of agreements that are external to the individual labour agreement are proliferating, and the criteria to identify the labour agreement are often outdated.

3. Bogus self-employment

Even if the parties name the concluded agreement an agreement of services or a collaboration contract, if its contents says it is actually a „hiring relation" (the wording of the Fiscal Code) – the fiscal check bodies shall be able to re-qualify the respective agreement. The consequence of this re-qualification shall be the possibility to establish contributions at the level owed in the case of an employment agreement, and to remove the benefits enjoyed by the performer of the work.

The normative acts that implement this legal construction are the Emergency Ordinance no 58/2010[11], modified by the Emergency Ordinance no 82/2010[12], and the Governmental Decision no 791/2010 for the modification and completion of the Methodological norms for the enactment of the Law no 571/2003 regarding the Fiscal Code[13], which introduced a set of criteria to determine the dependency character[14].

The main issue here is the goal of this re-qualification: the payment of the contributions owed by the employee and employer and the reduction of fiscal fraud.

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[11] Published in the „Romanian Official Gazette", Part I, no 431 of 28 June 2010

[12] Published in the „Romanian Official Gazette", Part I, no 638 of 10 September 2010, approved with modification by the Law no 94/2011, published in the „Romanian Official Gazette", Part I, no 404 of 9 June 2011.

[13] Published in the „Romanian Official Gazette", Part I, no 542 of 3 August 2010

[14] See, R. Dimitriu, R. Măntescu, G. Diţă, A. Bontea, D. Cucu, *Consilier – Codul muncii*, Rentrop şi Straton Publishing House, Bucharest, 2011, p. A 10/005 – A 10/009

In fact, the difference between the dependent work relation, based on an individual labour agreement and the independent work relation, based, for instance, on a civil service convention does not stop at fiscal aspects, but it implies other aspects of the legal relation (the employee is entitled to paid holidays, he is subject to regulations regarding the duration of the working time, he enjoys payment of extra hours, he does not work on week-ends and legal holidays, he cannot be paid under the national minimal wages, he is accountable for disciplinary deviations, he enjoys special norms in case of patrimonial liability, he has the right to union membership and negotiate the collective labour agreement, he can go on strike, he can negotiate his rights under the limits provided by laws or by the collective labour agreement etc.). None of these rights can be found with a person who performs independent work.

It is, therefore, wrong to approach the issue of the difference between dependent and independent work exclusively from the point of view of the contributions owed. Even if re-qualifying the legal relation as dependent work is done by the fiscal check body, the effects of this re-qualification shall not be strictly fiscal, but also legal.

The worker wrongly labelled as independent shall be of interest for the labour law to the extent to which his activity can be re-qualified.

Maximal Vulnerability — Minimal vulnerability

Black market workers (unreported work)	**Employees**	**Independent workers**		
		False independency (real position of subordination, potential subject of re-qualification)	Independent from the legal point of view, but economically dependent on the beneficiary of their work	Independent position from the legal and economic points of view

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We notice in the table above that labour law can consider the persons of maximal vulnerability, those who work without legal labour agreements, only at the moment when their activity is known and sanctioned by the labour inspectorate and the agreement is regularly concluded in writing, as an individual labour agreement. Thus, labour law cannot consider the workers who are really independent (those who practically do not need the protection that the labour law can provide), and the workers in a relation of economic dependency (as we shall see further on). Labour law, at least for the moment, considers the employees and the workers that can be re-qualified as employees.

False qualification of the labour agreement as civil agreement is usually done for two reasons:

- To avoid fiscal provisions (and in this case, we are in a situation similar to simulation);
- To deprive the worker of the protection ensured by the labour law (and in this case we can consider that the consent of the worker is vitiated, when he is aware of the fact that he could enjoy the rights he is entitled to due to his contractual position as an employee, but he accepts to comply with the civil provisions because of the absolute necessity – art. 1.218 in the Civil Code)

On the contrary, independent workers who conclude civil agreements with their beneficiaries are not in this disadvantageous position. They negotiate on equal foot with the other party and preserve their equality position during the execution of the agreement. They are not legally subordinated to the beneficiary of their work, they cannot be sanctioned on grounds of

discipline by the beneficiary, but they undertake an obligation of a result, and the failure to achieve this result shall entail only civil law sanctions (termination of the agreement, damages etc.).

Actually, the issue of the criteria to differentiate the kind of legal relation within which the dependent work and the independent work are provided, is a preliminary of the labour law. It was raised since the employment contract did not have regulations and it is still raised today, 100 years later.

There are law systems tod [15] which remain in the „binary" system – dependent work/independent work, while others have introduced a three party system, with more nuances: dependent work, semi-dependent work[16], independent work. There are many law systems where labour law is considered as covering also this intermediary category of workers, who, under the appearance of independency, hide an economic dependency that make them equally vulnerable, just like the employees („employee-like"). After Italy and Germany, Spain is now considering, through separate regulations, this special category: *Trabajadores Autónomos Económicamente Dependenties*.

Sometimes the qualification of the nature of the relation between the parties is objectively ambiguous, sometimes is deliberately hidden[17]. Thus, at present, the traditional classification of employment in employees and independent workers has become insufficient and rigid[18]. Among workers who, without being employees, need a protection similar to employees, data reveal: agricultural workers, independent workers who took over the activity of employees as a result of outsourcing or independent commercial agents[19].

Theoretically, the apparition of this intermediary category of workers makes more difficult the way to establish borders for the labour law. There is a tendency to remove subordination as a qualification criterion in order to have access to the protection provided by the labour law[20]. Indeed, the role of the labour law is to compensate a certain democratic deficit, which we find in the case of the labour agreement.

But if there are also other agreements under which the work is performed and that are characterized by democratic deficit to the same extent like the labour contract, what are the borders of the labour law?

Consequently, one of the identity problems of the labour law is the fact that it is not (at least not any more) clear what are the regulated law issues included in it. The notion of „worker" used in the European law, deliberately vague to cover various persons who have labour relations, cannot be used in the domestic law which needs clear, legally definable concepts[21]. On the contrary, the concept of „employee" (clear, this time) has the disadvantage to be non-accommodating as it covers only persons who have concluded (legally and formally) an individual labour agreement. The definition of the category of persons who work and are of interest for the labour law is vague or limited.

The categories of persons who work without having the capacity of employees, are only exceptionally an issue of interest and of regulations in the traditional labour law. Rarely, some norms cover employment health and safety for certain categories of persons who do not work under a labour agreement, professional training is regulated in some law systems beyond the narrow field of the labour agreement, etc. In principle however, non-employees do not enjoy the protection provided by labour law norms.

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[15] France is one relevant example.
[16] Or para-subordinated.
[17] F. Rosioru, *The changing concept of subordination*, http://mta-pte.ajk.pte.hu/downloads/felicia_rosioru.pdf, p. 19.
[18] T. Ticlea, *Dependenţa economică şi dreptul muncii – probleme actuale şi perspective*, in "Revista Română de Dreptul Muncii" no. 7/2010, p. 71
[19] *Idem*, p. 72 - 74
[20] M. Freedland, *From the Contract of Employment to the Personal Work Nexus*, in „Industrial law Journal" no 1/2006, p. 29
[21] Regarding the concept of "worker", see M. Gheorghe, *Consideraţii privind conceptul de lucrător şi angajator în normele internaţionale şi interne*, Scientific papers session of the legal research institute of the Romanian Academy entitled „Continuitate şi Discontinuitate în Dreptul Român", p. 434-443.

4. Developments. Labour law today

Economic and social realities today resemble very little to what generated, more than 100 ago, the need of the labour law as a branch of law. We are facing today new economic and social realities, and a legitimate question arises: is (still) labour law a reflection of reality? Do the norms of the labour law have the vigour and flexibility to adjust to a new labour paradigm?

Most authors believe that labour law is in its crepuscular time and while some consider it would be possible to „reinvent" it from scratch, others give no chance to such re-birth („it is really over"[22]). Indeed, labour law did not appear at the same time with the law system but later (at the beginning of the 20th century); there may be reasons to believe it will not exist for ever.

Labour migrates from traditional forms of employment to new forms, thus „evading" from the leverage of labour law. A possible solution would be that labour law expand and follow work wherever work is performed irrespective of its forms.

Social approach seems abandoned today in favour of a more economic approach (for instance, by increasing flexibility) or human resources management (to give an example from our recent legislation: assessment criteria have been introduced in the employment contract). In fact, this is abdication from the traditional perspective of labour law.

More important: what is the future of labour law in a world where collective negotiation fades to complete dissolution? Can the traditional labour law (focused on the relations of standard workers, able to unionize) protect the „atypical" workers, who are really vulnerable? Has labour law some legal instruments to compensate the diminishing traditional cohesion force of workers?

With such questions, preserving labour law in immobility, in its traditional form, can lead to „necrosis"[23].

Indeed, labour law does not end abruptly (any more), does not have strict borders (any more) that coincide with those of the individual labour agreement, but it ends gradually, applying at various degrees after the labour agreement ends. What is or what is not a labour agreement – it is a pure social convention, an option (often, temporary) of the law-maker. For instance, there were no regulations for day workers before 2011, their work was performed under a labour agreement. The law-maker decided to regulate it separately, by a law that differentiates the agreement concluded by them and the labour agreement.

Also apprentices – they are employees, according to the Romanian law (object of regulation for the labour law) but they are not employees in other law systems.

The individual labour agreement itself: in our law system, it is concluded *ad validitatem*, which excludes all unwritten agreement under which the work may be performed from the labour law.

If the legitimacy of labour law, as a branch of law, relies on ethical and social justice arguments, it is hard to consider that labour law starts and ends depending on the qualification given – sometimes clumsily – by a normative act to a certain category of workers. To limit protection to the privileged category that had the chance to work under a labour agreement, and to remove all other categories of working people, may mean to give up the original protective nature of labour law.

5. Conclusions

A labour law focused on the individual labour agreement would unfairly exclude some workers who, although they perform their activity based on other basis than the labour agreement, share with employees some characteristics that justify the application of the labour law.

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[22] A. Hyde, *The Idea of the Idea of Labour Law: A Parable*, in „The Idea of Labour Law", coord: G. Davidov, B. Langille, Oxford University Press, 2013, p. 91

[23] Adrián Goldin, *Global Conceptualization an Local Construction*, in „The Idea of Labour Law", coord: G. Davidov, B. Langille, p. 84.

That is why certain authors try to extend the labour law so that it should cover other vulnerable categories that perform work on a basis that has no connection with the labour agreement or with any agreement, such as domestic work. Labour law is seen as covering all circumstances where work is performed, even external to the „labour market". It would regulate protectively the statute of all persons who work, even if only for their own household or on their own.

The idea of expanding labour law beyond its traditional borders – to the area of civil agreements or business law – is more and more promoted. Labour law is currently between Scylla and Caribda: either it diminished its protective nature to fit into the expanded contractual framework, or it behaves by damaging commercial relations, as it pervades the business law agreements with protective norms [24].

Despite counter-arguments, the doctrine of „expansion" of the labour law goes even further on. Given the evidence that the traditional instruments of the labour law are behind reality, some authors express themselves for the configuration of overall regulating areas, where the main object should be the agreements characterized by inequality of the parties upon negotiation.

Labour relations are characterized by a democratic deficit (subordination) and dependency (if not legal, then economic)[25]. The question is: any legal relation with democratic deficit could be governed by the labour law? Can we imagine an extension of this branch to achieve a „universal compensation" of all contractual inequalities?

Labour law is, therefore, seen as a collection of regulatory techniques used to intervene on a market (such as the real estate market) with problems of balance between the parties to negotiation[26]. Labour law is not, practically, „of the labour", it is not even related any more to the labour agreement – abstractisation is complete. It appears as a law of contractual disequilibrium and of informational asymmetry.

We believe that such a mutation would lead to de-substantialization of the labour law which would, therefore, lose its identity immediately. Such a propensity to extend labour law beyond the fence of the enterprise is indeed dangerous and susceptible to incur de-legitimation of the labour law.

Because labour law is not an instrument to compensate legal and informational inequalities upon conclusion and execution of an agreement; it cannot replace the consumer's protection or the intervention of the court to re-establish contractual equilibrium.

Extension of the labour law may lead to its annihilation.

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[24] M. Freedland, *cited book*, p. 28-29.

[25] G. Davidov, *Articulating Labour Law's Goals: Why and How* (January 20, 2012). Accesibil la SSRN: http://ssm.com/abstract=1989136, p. 19 (accessed on 29.03.2013)

[26] A. Hyde, *What is Labour Law?*, în „Boundaries and Frontiers of Labour Law: Goals and Means in Regulation of Work", coord.: G. Davidov, B. Langille, Hart Publishing, 2006, p. 37-61

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