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Objectives

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The Labour Code, its evolution and the established crisis

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Abstract

In the last couple of years, particularly since 2003, we have witnessed innumerous debates, workshops, public and private seminars that have been trying and failing to address this issue– in my opinion; without providing proper answers/solutions.
However, much like everything else in our lives, in order for us to understand our surroundings, we are required to analyze the historical evolution of the Portuguese Labour Law, starting with corporatism until the present time.

1 | The Labour Code and the Established Crisis

In the last couple of years, particularly since 2003, we have witnessed innumerous debates, workshops, public and private seminars that have been trying and failing to address this issue– in my opinion; without providing proper answers/solutions.

And I do not believe that they have managed to provide the necessary answers/solutions, since there are many theorists and very few "Field Men" working on the subject.

However, much like everything else in our lives, in order for us to understand our surroundings, we are required to analyze the historical evolution of the Portuguese Labour Law, starting with corporatism until the present time

Regardless of the frame, it is relevant to underline the important role of the "Romanesque Tradition`s"[1], to the Labour Law as we know it today, that according to Professor António Mezes Cordeiro`s[2] understanding, can be framed under 4 topics:

- *"In ancient Roman society existed multiple known social conflicts; it was already possible at that time to observe the waking awareness of the underprivileged classes; social doctrines were born and legislative measures protecting the workers were put into effect;*

[1] According to Professor Professor António Menezes Cordeiro`s beliefs, *"Roman Law resorted to the overall figure of locatio conductio. This included three terms, individually very distinct in what concerns their own purposes: the "locatio conductio rerum (...)"; the "locatio conductio operis faciendo (...)" e "a locatio conductium operarum (...)"*(*cfr.* CORDEIRO, António Menezes - **Manual Labor Law: Basic dogmatic and general principles; collective labor law; individual labor law.** Reimpr. - Coimbra: Almedina, 1997. p. 37;

[2] CORDEIRO, António Menezes - **Manual Labor Law: Basic dogmatic and general principles; collective labor law; individual labor law.** Reimpr. - Coimbra: Almedina, 1997. p. 35-36.

- *The established Roman Legal Framework knew about the subordinate labour phenomenon and understood the rules appointed to it; despite some of them being broken later on, many of them survived to our days;*
- *Many of the Individual Labour Law rules – and to a lesser extent from other labour sectors, are in fact civil standards, in other words, current Roman standards, with more or less profound adaptations; its origins remain and must be known for the purposes of effective and critical knowledge;*

- *The successive receptions of Roman Law marked the linguistic, conceptual and labour fraamework of today: these frames are, precisely the ones used in contemporary`s Labour Law".*

The corporative structure in Portugal adopted a very important role.

Since the XII century that references to corporations and corporate organization can be found. In Lisbon, at least since 1383/1385 the so called House of Twenty Four is well known. Corporations started declining in Portugal from the Age of Discovery onwards.

Subsequently, the Industrial Revolution brought to light a new social problem, source of many conflicts and tensions that led to new reshaping by the end of the XIX century, known therefore as the "engine of the Labour Law".

During the Liberalism, it is of note to highlight some provisions of the 1867 Civil Code, specifically: arts. 1370.º ss – Contract for Domestic Service; arts. 1399.º ss. – Paid Service Contract; arts. 1424.º ss. – Apprenticeship Contract. [3]

[3] In this regard Professor António Menezes Cordeiro pointed out 3 distinct phases; 1st phase: - liberal (1834-1926); 2nd phase: cooperative (1926-1974) and 3rd phase: Current (1974 onwards). The 1st phase begun with the extinction of old cooperation's, this phase was characterized by a large private autonomy within the labour domain, by the appearance in 1867 of the first Portuguese civil coding as well as the appearance different Decrees – 9th of May 1891 in regards to class association for the defense of its members best interest, Decree of 14th April 1891 concerning the women and minor labour force and the 19th of March 1981 Decree (*cfr.* CORDEIRO, António Menezes - **Manual Labor Law: Basic dogmatic and general principles; collective labor law, individual labor law.** Reimpr. - Coimbra: Almedina, 1997. p. 50-54).

Following the proclamation of the Republic, the right to strike and to lock-out was granted by Decree 6 on December 1910. Simultaneously, law nº83, 24th July 1913 was signed, which instituted a regime of accountability in regards to work accidents, with a mandatory insurance against the aforementioned accidents via Decree nº5637, March10th of 1919. [4]

In both 1915 and 1919, regimes were created purposely to address the labour duration for commerce and industry.[5]

When the first Republic fell to the 28th of May 1926 movement, it was followed by a period of nearly total absence of labour legislation (up until 1933). Never the less such circumstance happened in a period where the right to strike was annulled through Decree nº 13138, February 15th, 1927.

The corporative system mentioned previously, initiated in 1933, was marked by the Political Constitution and the National Labour Status, established by Decree-Law nº23048 in the 23rd of September 1933.[6] It is noteworthy that since 1965 the Labour Law system started to modernize.[7]

[4] Some labour measures are noteworthy in this period: Decree of 8th of March 1911 (weekly rest); Law nº494 in 16th of March 1916 (creation of the Ministry of Labour and Social Security); Decree nº5516, on the 10th of May 1916 (maximum work time was fixed at 8 daily hours and 48 weekly hours); Decree nº10415, December 27th of 1924 (union regulation or social federations).

[5] FERNANDES, António Monteiro – **Labour Law**. 12.ª ed. Coimbra: Almedina, 2004. p. 35.

[6] From the corporatism period the following diplomas stand out: DL 23870, 18th of May 1934 (strike and lock-out punishment); DL 24402, 24th of August 1934 (labour duration regime); L. 1942, 27th of July 1936 (professional illnesses and work related accidents regime); L. 1952, 10th of March 1937 (specific regime of the individual labour contract); DL. 36173, 6th of March, 1947 (legal regime of collective employment). In this sense vide FERNANDES, António Monteiro – **Labour Law**. 12.ª ed. Coimbra: Almedina, 2004. p. 37.

[7] According to Professor António Monteiro Fernanades, in this period one can highlight the following Diplomas: DL 47032, 27th of May 1966 and DL 46408, 24th of November 1969 (legal regime of individual labour contract); DL 409/71, 27th of September (work hours duration regime); DL 49212, 28th of August 1969 (collective relationship regime); L. 2127 3RD of August 1965 and Dec. 360/71, 21st of August (professional illnesses and work related accidents regime) (CFR. FERNANDES, António Monteiro – **Labour Law**.12.ª ed. Coimbra: Almedina, 2004. p. 38).

With the abolishment of the corporative regime, there were introduced some profound alterations to the normative framework, in consonance with the Portuguese Republic Constitution of 1976 (that point onward designated by “CRP”) which consecrated the workers fundamental rights, particularly the right to work (art. 51st at the time which corresponds to the current art. 58º of the Portuguese Constitution); the right to proper work conditions and equality in both treatment and opportunity, suficiencia principles and equal redistribution (arts 52th and 54th that correspond to the current 59th art. of the Constitution); prohibition of unfair dismissal (art. 52th C., that corresponds to the current 53rd art.); freedom of association and collective autonomy (arts. 57th and 58th of the Constitution that corresponds to the current 55th and 56th articles); rights of work labour councils (arts 55th and 56th of the Constitution that correspond to the current 54th article); right to strike and prohibition to lock-out (arts 59th of the Constitution that correspond to the current 58th article).

The understanding stated by Professor Maria do Rosário Palma Ramalho is welcomed in the sense that this period is characterized by the creation of labour norms “driven by the aim of protecting the workers (…)”.[8]

But, "it is obviously in the field of collective labor law that normative evolution ruptures the most, due to the change of the dominant principles, especially with the privatization of the collective labor entities, for the revival of the collective bargaining in private molds with full autonomy and to restore the right to strike." [9]

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[8] In the field of individual labour situations the following diplomas are highlighted: Decree Nº. 372-A/75 of 16th of July (new legal rules governing the termination of the contract and the probationary period), DL No 781/ 75 of October 28th (new legal regime of fixed term contracts) ; Decree 874/ 76 of 23rd December (new legal framework for vacations, holidays and absences), . . Decree No. 292/75 of 16th June (institution and minimum wage regime) , DL n º 392/ 79 of September 20th (establishing the legal regime of gender equality when accessing the labour market and in the workplace) ; . DL No 508 /80. 21st October amended by Decree. 235/ 92 of 24th October (new system of domestic service contract).

[9] On the other hand, in the area of legal labour situations, we highlight the following qualifications: . Decree No. 215-B/75 of April and DL 215-C/75 No. 30, 30th April (new regimes. legal unions and employers' associations); L. No 46 /79 of 12 September (institution of works committees and their legal system) ; . L. No 16 /79 of 26 May (participation of workers'

Welcoming once more the guidance of Professor Maria do Rosário Palma Ramalho, it is considered that prior to the entry of Portugal into the European Communities, the Labour Law has entered a phase characterized by three features: stability of the legal systems under the legal regulative collective area[10]; the concern of strengthening the workers protection on some issues[11] and some mitigation measures guarantees the trend in contract labor system[12].

Before the entry into force of the Labour Code (Law N. 99/2003), its highlighted the regulation of various issues, namely: Employment policy and unemployment protection (Decree Law n. 132/99 of April 21st and Decree n. 118th/99th of April 14th), regime of guaranteed minimum income (L. n. 19-A/96 of the 29th of June), juridical regime of workplace accidents (L. n. 100th/97th, 13rd of September); reformulation of various regimes: workers on board (L. 15th/ 97th of May 31st) , student workers (L. 116th/ 97th, 4th of November), foreign workers (L 20th/98th 12nd of May), athletes (L. 28th/ 98th of 26th of June); protective regimes: underage labor (L n. 58th/99th of 30th June, DL n. 107th/ 2001 of 6th April), protection of motherhood and fatherhood (L n.º 17th/95th of 9th June L. n. 102th/97th, September 13rd, L. n. 142/ 99 of August 31st, DL. n. 70/ 2000 of 4th May, DL. n. 230th/ 2000 of 23rd September), equal access to employment position within workplace (L. N. 105th/ 97th of 13rd September), protection of wages (L. 96th/ 2001 of 20th August), strengthening of the labor contract cessation

representatives in the drafting of labor laws) ; . Decree No. 164-A/76 of 28 February DL. No. 49-A/77 of 12 February and Decree No. 519-C/79, 29 December (recast of the legal regime of collective bargaining and collective bargaining agreements) ; . Decree No. 392 / . 74 of 27 August and L. n º 65/77 of 26 August (replacement of the right to strike and approval of the respective regime).

[10] In this 1st trait, in what relates to the legal regulative area, this refers to the Law n. º 87/89 of 23 March and in matters concerning the strike stands out to L. n. º 30/92 of 20 October

[11] In this 2nd trait we underline the following Diplomas:. Decree n.401st/91 of October the 16th (general principles of safety and health in the workplace); Dl. N. 441st/91 of November the 14th (professional training regime); L. n. 4th/84 of April 5th and decree n. 136th/85 of May the 3rd (system protecting maternity and paternity); Decree 396/91 of October the 16th (reframing child labour).

[12] Special emphasis is granted to this last trait, diplomas easing measures concerning the labour contract system:. Decree n.398th/83 November 2nd (legal regime of employment contract reduction and suspension) Dl. N. 421st/83 December 2nd (new system of overtime labour), D. /#64 – A/89 February the 27th (approval of new legal system that concerns the employment contract termination and fixed-term work contract); Dl. N. 400th/91 16th of October (contract termination due to maladjustment); Decree 358th/89 October the 17th (temporary work schemes); Decree n. 404th/91 October 16th (comission based labour) Dl. N.440th/91 November 14th (home-based work).

regime and the fixed duration employment regime (L. 38th/ 96th of August 31 and L. n. 18th/ 2001 of 3rd July); concern with Community Directives transposition on subjects such as the duty of disclosure (n DL. 5th/ 94th and January 11th), the European Works Councils (L. n . º 40/99 of 9th June), the regime of posted workers (L. No 9th/ 2000 of 15th June) formal grant to employers' associations of the right to participate in the drafting of labor laws (L. 36th/ 99th, May 26th); approval of the scheme of offenses labor (L. 116/ 99 of 4 August.); revision of the Labour Procedure Code (DL. No. 480 /99 of 9 September); approval of the part-time labour scheme (L . n . 103/ 99, 26 July). [13]

The flexibility of the the labor contract truly stands out, in matters such as working time and the functional flexibility scheme. In this sense, it refers to the system adaptability schedules as well as the work schedule flexibility contained in Law n. º 21st/96th of 23rd July and the Law. N. 73rd/98th of 10th November.

The Labour reform peaked with the elaboration and aproval of the Labour Code[14], according to Law n. 99/2003, August 27th, regulated by Law n. 35/2004, 29th of July. The Labour Code had as primary objectives the following: to adapt to reality the labour related legal rules and the systematization of the main existing diplomas into various diplomas and subsequently the creation of a single diploma; taking in consideration the new types of business organizations in search for an increase in productivity.

Regarding the systemization of the 2003`s Labour Code, the issues of technical nature pointed out by Professor Maria do Rosário Palma Ramalho are rooted on the fact that “the Labour Code is clearly based on issues presentation in regards to the legal relationship and, exhaustingly, in the development of elements that compose this concept being poorly achieved”, “the absence of a general section of the Code of substantive nature that precedes the system of employment contracts and collective labour regime/arrangements, hampers their internal organization”;

[13]Cfr. RAMALHO, Maria do Rosário Palma – **Labour Law, Parte I: General Dogmatic**. Coimbra: Almedina, 2005. p. 83-84.

[14] The Labour Code (. Law N. 99/2003) presents itself divided into two books: Book I - "General Part" (art. 1 to 606th ..) that includes three titles: "Sources and Application of Law Labour "(art. 1 to 9)," Employment Contract "(art. 10 to 450)," Collective Right "(art. 440 to 606) and Paper II comprising two chapters: "Criminal Responsibility" and "Accountability misdemeanor."

"The imbalance between the Titles of Book I show how centered the labor contract law showed to be along with its legal system and, therefore, the matter sidelined on collective labour situations"; "the criteria that governed the choice of integrating some issues within the Code and reference to other regulatory instruments are of difficult visibility." [15]

It was not only due to these matters that the 2003`s Code was so important, it was instrumental in allowing the adaptation of the working life system to the daily laboring chores, more so, in such an important issue, one that should be considered “sacramental” to the relationship between employer and employee, it held a greater accountability to the individuals subjected to contracts in what concerns the fulfillment of the Labour contract as well as the collective regulative tools, carrying strong penalties for non-compliance.

It was only with the Labour Code of 2003 that the Governament correctly decided to take a proactive stance within the labourer relationships and thus decided to invert the stagnant collective recruitment/bargaining situation, granting it a “new life”, in what concerns the multiple issues that it originally intended to regulate as well as the time limit on the validity of collective recruitment/bargaining agreements.

This code was therefore a very important tool in putting into practice, innumerous theoretical issues that was dispersed and considered urgent.

Not only that, the diploma itself took on a strong role of accountability for the issues that were poured into it, it stands out – in our opinion, that it was the first time that a Labour Code weighted more on the practical nature of things, it intended to take into account the experience gained through its implementation (as all should do), an example of this was the 20th article of Law 99th/2003 that foreseen that the Code should be revised within 4 years’ time, counting down from the moment it went into effect.

In this sense, the program of the 17th Government presented in the Assembly of the Republic foreseen precisely the revision of the Labour Code, based on the evaluation of its effects, assuming that the former was to be subjected to a committee

[15] Cfr. RAMALHO, Maria do Rosário Palma , Ob cit. p. 95-96.

of renowned known experts. Was this not so, I inquire, how all Codes that rule over our lives should be handled???

And so it was, the problems of labour relationships, through a methodical analysis were poured into the Green Book regarding Labour Relationships, which had as an goal the collection, analysis, synthesis and publication of information considered to be relevant for labour relationships, in order for the aforementioned problems to be weighted by the White Book Commission in regards to the widly discussed labour relationships by both the Political parties as well as the Society as a whole.

It was as a result of several proposals and recommendations, after numerous debates/discussions around the White Book of Labour Relationships that the final text was decided upon, which originated the revised Labour Code, approved by Law 7th/2009, 12th of February, in which we will not discuss here given the fact that it was not given much political and economic censorship.

Law n. 7/2009. 12th of February[17] introduced within the Portuguese legal system, the revision of the labour code. Of this revision it is important to underline, amongst other changes, the fact that this new code makes adaptability a very challenging element, it does not shorten the now extensive labour regulation, it extends the minimal services in the event of strike, but fortunately it grants more protection to parenthood.

Under the revision of the Labour Code, "it were extended to 30 days the unjustified absences in order to assist children of 12 years of age or younger, and for the first time, workers were given 15 days to cater to the needs of children older than 12 years of age, it was also provided 15 days to support spouses, parents and siblings. This diploma also extended the period of parental leave, increasing from the current four years to up to five months, as long as part of this period is to be shared between mother and father". [16]

The Labour Code revision highlights the issues that concern the mobility, regulated by art.119 - the switch to an inferior Category, art. 120 – Functional mobility,

art 194. – Workplace transfer, art. 195 – Transfer requested by employees and lastly, art. 196 which stipulates the procedure in case of transfer of workplace and other changes of which we will not dwell into, for they are not worthy to be considered, for this Code – in our view, was no more than a solution of continuity to the reform conducted in 2003 and not a split/rupture with itself.

The same however cannot be said about the subsequent changes, in relation to the second and third Labour Code changes, namely Laws n.53rd/2011 of October the 14th and Law 23rd/2012 of July the 25th, according to the legislator, conditioned by the current crisis situation in which the country finds itself in.

These reforms aimed to change what concerns dismissals due to job dissolution; dismissals for inadequacy; compensation for the dissolution of job; suspension or reduction of operational activities for reasons related to business crisis; organization of working time; streamlining of bureaucratic and administrative burden for companies.

The most significant changes reported above were defeated by the present Ruling n. 602th/2013 of the Constitutional Court that will end up "tearing up" the major labour legislative changes, more will come, we shall wait.

With these, in our understanding, correct decisions, it begs the question:

Are we faced with a group of amateur legislators, or on the other hand, for a State that should supposedly be a Rule of Law type State, is it showing strong symptoms of forgetfulness?

What is most distressing is that it is with these rules that we must rule ourselves, thus forcing us to live in a climate of constant legal uncertainty.

Excluded from these "confusions" was the fourth amendment to the Labour Code, stipulated by Law n. 47th/2012 of August the 29th, which established a mandatory

schooling for children and youngsters that find themselves of age, and which also established the universality of pre-school education for children from the age of 5.

We conclude therefore that lately we have witnessed significant legislative changes in regards to labour policy, both within the private sector as well as the public, with no end in sight for this tendency.

For some, namely the rulers who are at the behest of the Troika and that act blindly accordingly, such changes are nothing more than a mark of modernity, for others it is nothing more than a huge civilizational regression. We are indeed facing a turning point, all that is left to know is if it is in fact favourable to the employers or it is only apparently favourable.

This is evident since that in the last couple of years it became (apparently) easier to terminate a labour relationship on behalf of the employer, what happens is that coupled with the rise of unemployment (roughly 18%), we are also witnessing the bankruptcies and insolvencies in some sectors, meaning that despite the legislative changes of 2012, and many of which declared unconstitutional, we have not witnessed (even prior to the declaration of unconstitutionality of the Constitutional Court Ruling N. 602nd/2013, published in DR, 1st Grade - # 206th - 24th October 2013) a real recovery of the labour world, because some standards (and important ones) were declared unconstitutional, or even by the fact that the market still has not properly assimilated them, namely in this day and age of constant feeling of legal uncertainty or plain uncertainty in general that we live under since the adoption of measures that are either accepted by the Assembly (given that we have a government ruling with majority), or are denied by the Constitutional Court.

And inevitably, for people like the ones currently governing us , that aim with these measures for our labour market to become more competitive and productive, what actually results is an increasingly stronger lack of motivation to work on behalf of the employees which results in an inverse consequence of what was originally intended.

Could it be that we are facing a crisis within the labour world itself, or is it on the other hand merely a crisis within our own acquis that currently regulates our labour world? If Law isn`t more than the mirror for a communities' values, we are indubitably facing a, hopefully solvable, legislative crisis even though said solution isn't likely to be found in the short term, particularly with the volume of labour related legislation that has showed to be catastrophic, fundamentally because we are in a State of Law and the structural measures/changes forced upon its citizens have no place within the confines of said State of Law, it could result in nothing else but labour related violations to the constitution.

Currently we are on a path that eventually, despite the legislative changes, every Portuguese family will have someone unemployed amongst them and/or suffering with delayed payments, which leaves us to conclude that eventually it may be society itself who is in crisis and that the labour and the right to labour are nothing more than its unfortunate reflection. In a period such as this where it is urgent to define priorities and goals, through a long and wide (preferably nonpartisan) debate could we hope to vanquish this sad reality. But is there truly anyone available for that debate?

2 | Further reading

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