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Freedom of contract and law: Geographical mobility clauses in Portuguese Labour Code.

1. The Portuguese Labour Code of 2003¹ (hereinafter “PLC 2003”) assumed as one of its primary roles the reform of Labour Law *in order to promote its flexibility*. The Portuguese Labour Code of 2009² (hereinafter “PLC 2009”) followed the same line of direction.

However, the idea of flexibility in itself, at least from a particular perspective, might conflict with the social function and basic meaning of Labour Law. In fact, a certain concept of *flexibility* – which seems the one reflected in these Codes – addresses the labour rules in force and, due to its protective nature, responsibility for the weakness of the economy. Thus a request for a “*new*” Labour Law arises which, at least in accordance with a liberal perspective, should reassure the value of the individual contract and ensure more effective 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.

However, it may be just as incorrect to blame Labour Law for the failure of the market, as it would be inaccurate to state that the social essence and function of labour legislation has lost its meaning and purpose. Both the protective feature and the characteristics of this branch of Law are still justified, since the concerns that were at its genesis still remain: substantial equality and protection of the weaker contracting party.

In many ways, the employment relationship remains as a *relationship of power-subordination*, in which the freedom of one of the parties (the employee) is likely to be endangered by the economic and social empowerment of the other (the employer). It is precisely this recognition of the substantial inferiority of the employees’ position that underlies not only the existing legal order, but also the importance given by the Portuguese Constitution to employees’ rights³.

2. Labour Law has developed since equality between employer and employee was merely a *fiction*. Legal intervention was justified early in the field of labour relations given (i) that the employee arises as the weaker party in the contract and (ii) the real possibility of employers abusing powers given by the contractual framework. The genesis of this branch of Law is, therefore, connected to a *relevant protective nature*. Such a nature was enhanced through the interplay between law and collective autonomy – a way to offset the employer’s factual prevalence and to narrow possible abuses.

¹ Approved by Law n. 99/2003 of August 27, regulated by Law n. 35/2004, of July 29.

² Approved by Law n. 7/2009 of February 12.

³ Article 53 of the Portuguese Constitution safeguards employees’ right to job security and forbids dismissals without just cause or for political or ideological reasons.

The collective autonomy and the imposition of limits on the powers of the employer led to the current legal framework – which includes job security, the limitation of working hours, weekly rest and holidays, recognition of trade union activity, the right to strike, the right to collective bargaining, social protection during unemployment, statutory minimum wage, etc. – up to the recognition of the constitutional importance of Labour Law’s fundamental issues and principles.

3. Such fundamental principles, as foreseen in the Constitution, basically reflect the idea that this branch of law is concerned primarily with the employee as a person and to its rights, whether individual or collective. In view of the Constitution, Labour Law must accept not only that the *personality* of the employee is closely involved in the contractual exchange, but also that employment is essential for human dignity and free development of personality: employees’ *fundamental rights* must be seen as basic and structural components of the employment contract. Therefore, the primary role of Labour Law must be the protection of such rights: not only employees’ specific rights – mainly their collective rights – but also their rights as persons and citizens who enter into an agreement and join an enterprise. This function requires limits on the powers given to employers.

4. However, in many aspects, labour legislation ends up following a direction that could be seen as somehow detached from the constitutional demands: (i) while these demands foresee limitations on the powers granted to employers in order to sustain values that are considered superior – as embodiments of the principle of human dignity; (ii) the legislation carries out a general increase of the powers given to the employer and a corresponding increase in the employees’ legal dependence.

For most, this happens in areas where minimum legal protection would be most expected; for example, in the area of mobility, where powers given to employers were significantly increased recently. The law even allows that, in certain cases and under certain conditions, the legal regime might be waived by agreement of the parties. The proper role of Labour Law is thereby distorted. 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, the employment regulation intends to counteract this status, seeking, as much as possible, an equitable balance between the powers granted to the parties. This perspective might be exemplified by the relationship between law and the freedom of contract in what concerns geographical mobility clauses in the PLC 2009.

5. Prior to PLC 2003, article 24, n 1 of Decree Law n. 49.408, of November 24, 1969, regulated geographical mobility. Although this Act is no longer in force, the discussions on the topic go back to that time. In fact, that provision caused great doctrinal controversy concerning its nature (either mandatory minimum or discretionary). It stated the exceptions to geographical irremovability, foreseen in article 21, n. 1, e): “*The employer, unless otherwise stipulated, may only transfer the employee to another workplace if such a transfer does not cause serious harm to the employee or if it arises from the total or partial movement of the undertaking where the employee performs his activity*”. The question was to decide what

meaning should be assigned to the expression “*unless otherwise stipulated*”. Would it provide a default regime, *i.e.*, freely modifiable by the parties, whether more favourable or less favourable to the employee? Or, on the contrary, it stated a mandatory minimum regime – which normally characterises labour rules – according to which the parties could reduce or even eliminate the chances of unilateral transfer of employees, but no longer extend such a possibility?

Article 24, n 1 of Decree Law n. 49.408 was most likely drafted in order to state a mandatory minimum regime. In accordance, the expression “*unless otherwise stipulated*” would only grant the parties the power to reduce or exclude the possibility of an individual transfer. It was also sustained that the security of irremovability, foreseen in article 21, n. 1, e), would otherwise be empty of useful meaning and that an unlimited mobility clause would hardly be compatible with the constitutional guarantee of job security, in what regards conservation of substantial conditions of work⁴. Several authors have argued for this position.⁵

The majority understood, however, that the expression “*unless otherwise stipulated*” used to foreseen a default regime, freely modifiable by the parties, whether more favourable or less favourable to the employees. Otherwise, such an expression would be unnecessary, since the mandatory minimum nature of labour provisions would arise from article 13, n. 1 of the same Act.⁶

6. PLC 2003 removed all doubts: article 315, n. 1 and n. 2 foresees the requirements for individual and collective transfers. Subsequently, n. 3 states that “*by agreement, the parties may extend or restrict the power granted in the preceding paragraphs*”; and article 316, n. 2 provided a similar option for temporary transfers.

PLC 2009 found the same solution: after providing, in article 194, n. 1, the situations in which the employer may transfer an employee to another workplace, n. 2 states that “*the provisions foreseen in the former paragraphs may be extended or restricted by agreement of the parties, which expires after two years, if not enforced*”. Here lies the regulation of geographical mobility clauses, as those in which “the employer reserves himself the right, in the future, of transferring the employee to another workplace”.⁷ The possibility of transfer of the employee may thus be extended by individual contract. The role of the employment contract in promoting geographical mobility is valued; autonomy and contractual freedom are reinforced. However, this clearly turns the “guarantee” of irremovability into merely an option.

⁴ José Gomes Canotilho e Vital Moreira, *Constituição da República Portuguesa, anotada*, 4ª ed., Coimbra, 2007, 713.

⁵ José Barros Moura, *Compilação de Direito do Trabalho – sistematizada e anotada*, 1980, p. 92; João Leal Amadó, “Inamovibilidade: uma garantia supletiva?”, *Questões Laborais*, n.º 3 (1994), 175 ff.

⁶ Bernardo Lobo Xavier, “O lugar da prestação de trabalho”, *Estudos Sociais e Corporativos*, n.º 33 (1970), p. 25; Mário Pinto, P. Furtado Martins e A. Nunes de Carvalho, *Comentário às leis do trabalho*, I (1994), p. 121 ff; e António Monteiro Fernandes, *Direito do Trabalho*, 11.ª ed., 1999, 414 ff.

⁷ Joana Nunes Vicente, “Cláusulas de mobilidade geográfica: vias de controlo possíveis”, *Questões Laborais*, n.º 27 (2006), 61-90 (64).

7. These clauses are therefore admissible under the PLC 2009. The doctrine nevertheless restricts its validity to comply with certain principles, e.g., good faith, employers' legitimate interests in the transfer and geographical limits, considering any clause that provides an unlimited power of transfer to be illegal⁸. Ultimately, the limits that arise from the fundamental principles of good faith and prohibition of abuse of rights demand that neither mobility nor irremovability may be absolute. Therefore, (i) a mobility clause that relies on the decision of an employee's individual transfer upon the pure will of the employer, or (ii) a clause of absolute irremovability of an employee even in the case of movement of the undertaking where the employee performs their activity will not be accepted.^{9/10}

It is also of great importance to take different constitutional values into account, for example, freedom of economic initiative (which includes freedom of choice of a place of business) and guarantee of job security (which has a geographical dimension, protecting the employee from arbitrary changes in the workplace) or a balance between professional and personal or family life.

Moreover, a clause whereby the employer could, at any time and for any reason, transfer an employee to another workplace would conflict with article 280 of the Portuguese Civil Code, which demands a minimum of determinability in order to assure the validity of a contractual clause. Such a provision would, therefore, be null and void.

Good faith also requires that the use of geographical mobility shall meet organizational needs of the company¹¹ and that the employer does not exceed whatever necessary to achieve that interest. If the decision is made for reasons unrelated to that interest or is unreasonable, it will be deemed null and void.¹²

It should also not be forgotten that most mobility clauses are not subject to individual negotiation, but rather to mere acceptance from the employee, which result in the possible application of the Unfair Contract Terms Act. In fact, some of the problems that arise from the inclusion of mobility clauses in employment contracts may be solved through the legal regime of the Unfair Contract Terms – whenever mobility clauses were drawn up by contractual terms pre-formulated, even when partially traded.

Nevertheless, PLC 2009 foresees that the employer has the maximum period of two years to execute the transfer of place of work previously agreed (article 194, n. 2). Even if well intentioned – since it reduces the period in which the employer might exercise such powers – it might have a pernicious result, encouraging the employer to execute it just to avoid the expiry of the clauses.¹³

⁸ Catarina Carvalho, “A mobilidade geográfica dos trabalhadores no Código do Trabalho”, *VII Congresso Nacional de Direito do Trabalho – Memórias*, Coimbra, 2004, 41-80 (51).

⁹ Albino Mendes Baptista, “Local de trabalho, cláusulas de mobilidade geográfica e cláusulas de sedentarização”, *IX e X Congressos Nacionais de Direito do Trabalho – Memórias*, Coimbra, 2007, 337 ff.

¹⁰ João Leal Amado, “Local de trabalho, estabilidade e mobilidade: o paradigma do trabalhador *on the road*?”, *Temas Laborais*, 1.^a ed., 79, e *Contrato de trabalho*, 2009, 252.

¹¹ Albino Mendes Baptista, “Considerações a propósito das cláusulas de mobilidade geográfica”, *Estudos sobre o Código do Trabalho*, 2.^a ed., 124.

¹² Joana Nunes Vicente, “Cláusulas de mobilidade geográfica ...”, 89 ff.; P. Madeira de Brito, “Local de trabalho”, in *Estudos do Instituto de Direito do Trabalho*, vol I (2000), 371; Catarina Carvalho, “A mobilidade geográfica dos trabalhadores ...”, 51; Albino Mendes Baptista, “Considerações a propósito das cláusulas de mobilidade geográfica”, *Estudos ...*, 124.

¹³ João Leal Amado, *Contrato de trabalho*, 253 ff.

8. Given the abovementioned, we may conclude that the rules on geographical mobility are a good example of the approach taken concerning the relationship between law and freedom of will. As an exception to the *pacta sunt servanda* principle (article 406 of the Portuguese Civil Code), these clauses increase contractual freedom and empower the employer with more extensive decision-making margins. We question, however, if the emphasis on autonomy and contractual freedom does not 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).

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José João Abrantes – Rita Canas da Silva: Szerződési szabadság és jog: A kiküldetés szabályozása a portugál Munka Törvénykönyvében

A 2009-es új portugál Munka Törvénykönyvének deklarált célja volt a rugalmasság támogatása. A rugalmasság igényét azonban összhangba kell hozni a munkajog alapvető rendelkezésével, mégpedig annak szociális funkciójával, konkrétan a munkavállaló támogatásával. A munkavállaló kiküldetése terén azonban az utóbbi időben jelentősen megnőtt a munkáltató rendelkezési hatalma. A jelenleg hatályos szabályozás szerint a munkáltató és munkavállaló megállapodhatnak abban, hogy eltérnek a kiküldetés jogszabályi előírásaitól. A szerzők felhívják a figyelmet arra, hogy ez által a kiküldetés jogszabályi korlátja nem jelent többé garanciát a munkavállaló számára. Ez a klauzula felveti a szerződések kiszámíthatóságának és jó erkölcsbe ütközésének kérdését is. Összességében a munkavállaló kiküldetése szabályozásának rugalmassága jól példázza a szerződési szabadság és a munkajog rendeltetése közötti ellentmondásokat.