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The hyper-sufficient employee and the mitigation of contractual dirigisme

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ABSTRACT
Brazil is going through a transition from the Provider State model to a model closer to the Regulatory State, influenced by globalization and changes in the relationship between the public and private sectors. The Labor Reform reflects this change by recognizing the plurality in the world of work and expanding the scope of Labor Law to include professionals from different areas. The emergence of the Knowledge Society highlights the search for greater autonomy and flexibility at work, especially among the most qualified professionals. In this context, Contractual Dirigisme in Labor Law is being mitigated for a portion of workers, such as those considered Hypersufficient, who seek greater autonomy in negotiations related to their work. This article explores these changes and their implications for Labor Law.

Keywords: Regulatory state, Globalization, Knowledge society.

INTRODUCTION

The evolution of the role of the State over time can be observed in the transitions from the Liberal State to the Welfare State and, later, to the Regulatory State. Everything leads us to believe that we have reached the end of the Provider State model, adopted by Brazil after the transition from the military regime, moving towards a State model that is situated between interventionist and liberal, represented, mainly, by the advance of privatizations.

With these changes in the structure and extent of state intervention, Brazil is moving closer to models based on the so-called "third way", or "progressive governance" (as it was recently renamed), trying to promote a harmonious existence between the public and private sectors.

Globalization is one of the main factors responsible for these changes, which are mainly seen in Labor Law. Technological advances, the reduction of distances, the impact of the global economy, have given rise to new forms of work, new professions, changes in the relationship between unions and companies and, above all, a new way for individuals to relate to work.

The Labor Reform certainly embraced this idea, changing several provisions of the CLT that were edited taking as a guide the principle of protection – basic in Western Labor Law.[2] The reform, timidly, recognized the plurality in the world of work that no longer fit into the classic employment contract. Labor

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Law is no longer limited to factory workers, but has come to deal with anyone who practices subordinate activity, which includes more intellectualized professionals and senior executives.[3]

We are faced with an evolutionist approach to Labor Law, notably resulting from the emergence of the Information Society, or better said, Knowledge Society[4], which privileges, in parallel to classical protectionism, the interest of workers who aim at free enterprise and greater autonomy in negotiations related to their workforce.

Greater free time, flexible working hours, autonomy in methods and forms of work, power to negotiate values and tasks are goals for a large portion of the workforce, notably workers who have achieved a greater degree of autonomy within institutions, or who intend to undertake for whatever reasons. These professionals cannot be subject to the dirigisme of the State.

This article aims to report how we can understand Contractual Dirigisme in Labor Law and how the evolution of society has mitigated this principle for a certain portion of workers, citing as the main example the Hypersufficient worker.

CONTRACTUAL DIRIGISME

The Brazilian system is guided by the general clause of guardianship and protection of the human person. It is from the personalization of private relationships and the new conception of Private Law that the protection of the person gains space, overriding merely patrimonial interests. It is about the freedom to be and not to have. State interference is necessary to achieve the objectives set out in article 3 of the CF/1988. It is from this state dirigisme that Private Law must review its individualistic dictates of past centuries.

In postmodern society it is required to respect solidarity to the detriment of individuality, always with an eye to human dignity, so it is necessary that contracts pay attention to this new conception. At the same time, it cannot be seen in the exclusive perspective of the circulation of wealth, since it must be subject to the social order, not allowing the collision of individual interests with superior constitutional values.[5]

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[3] FRANCO NETO, Georgenor de Sousa. The Work of the Hypersufficient and the Dilemma of Protection. São Paulo: LTR, 2021.

[4] "The concept of 'information society', in my view, is related to the idea of 'technological innovation', while the concept of 'knowledge societies' includes a dimension of social, cultural, economic, political and institutional transformation, as well as a more pluralistic and developmental perspective. The concept of 'knowledge societies' is preferable to that of the 'information society' as it better expresses the complexity and dynamism of the changes that are taking place. (...) The knowledge in question is not only important for economic growth, but also for strengthening and developing all sectors of society." BURCH, Sally. *Information Society/Knowledge Society*. Accessed: https://edisciplinas.usp.br/pluginfile.php/4036223/mod_resource/content/2/Sally%20Burch%20Sociedade%20da%20Informa%C3%A7%C3%A3o%20-%20Copia.pdf on 11/28/23

[5] BRASILINO, Fabio Ricardo Rodrigues. *Contractual Dirigisme and Business Contracts*. Journal of Private Law | Vol. 61/2015 | p. 127 - 143 | Jan - Mar / 2015.

Contractual dirigisme on the part of the public power was first recorded by Lehmann[6], who aptly pointed out several models for this state intervention in the free will of the people, illustrating the various forms of interference; namely:

> Establishment of authorization to carry out certain business in private life;
> Coercive regulation of the content of businesses subject to great intersection with the public interest;
> Discipline and/or prohibition for the choice of certain contractors;
> Obligation to contract, especially directed to certain private enterprises;
> Limitation of the structure of contracts, with the consignment, for example, of general conditions for companies offering, under a monopoly regime, services of general interest.

A feeling of protection of other interests spreads after World War II, showing the change from the mere understanding of individualism to a legal solidarity, marked by the obvious realization of the inequality existing in society and of the people involved in a given legal business.

The dogmas of the classical voluntarism of the Liberal State and the unreformable version of the *Pacta Sunt Servanda* are mitigated for this new model of State action of Social Welfare.

In the national doctrine, CAIO MÁRIO[7] presented a study to demonstrate the need for this behavior of the legal systems to face the injuries derived from contractual relations in which the contractual freedom allowed the predominance of some, to the flagrant detriment of the fundamental interests of so many others and the practice of abuses, which would justify the legal intervention, disciplining and regulating the voluntarism of the subjects of law, in order to attach protective bollards.

The mechanisms for the protection of workers, raised to the level of stony clauses with the inclusion of the constitutional provisions of Article 7, clearly reveal the prevalence of the social in relation to private relations. It is clear, therefore, that the state intervenes in private relations due to the protection of the greater interests of society and of the individual, with contractual dirigisme being its greatest example.

CONTRACTUAL DIRIGISME IN THE LABOR FIELD

In essence, Labor Law, like Consumer Law (the latter more modern), came to act in order to legally deconstruct the inequality of forces that permeates the condition of the Employed party. Like any branch of law that aims to compensate for this inequality, Labor Law created mechanisms and principles that sought to strengthen the employee's condition of being underprivileged in the face of the boss.

The solution found by the labour laws of the entire Western world (of Roman-Germanic legal tradition) was, invariably, the intervention of the State in the employment contract, in order to limit to a

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[6] LEHMANN, Heinrich. *Treaty of civil law*; Translation of the latest German edition into notes on Spanish law by José Maria Navas. Madrid: Editorial Revista de Derecho Privado, 1956.
[7] PEREIRA, Caio Mário da Silva. *Injury to Contracts*. 3. ed., Rio de Janeiro: Forense, 1949.

large extent the full autonomy of the will of the parties who agree on an employment contract. It is said that, in Labor Law, the pacta sunt servanda, a basic principle that governs civil contracts, according to which the contract binds and limits the parties, having the force of law, does not fully prevail.

From this it can be concluded that, due to this strong intervention of the State, by means of rules of public order (unavailable and cogent), of binding application, Labor Law would not be a branch of private law.

The matter was provided for in the caput of article 444 of the CLT, which, since 1943, provided that "contractual labor relations may be subject to free stipulation by the interested parties in everything that does not contravene the labor protection provisions, the collective agreements that are applicable to them and the decisions of the competent authorities".

This public intervention in labor contract rules is called Contractual Dirigisme. And it is through this phenomenon that all Labor Law was designed, as well as any Law that seeks to support a hyposufficient side.

Naturally, therefore, such intervention will only be welcome when there is, in fact, a hyposufficient person who lacks some additional protection, even if against his own acts (unavailability).

With the evolution of society, in economic, educational and intellectual terms, the logical conclusion that can be reached is that the hyposufficiency and fragility of parts that generated Labor Law are diminishing, in a certain way.

It is, undoubtedly, a social fact that tends, in the future, to alter the very function of Labor Law. Today's Brazilian society is not the same as the one that forced the state to enact the CLT in 1943.

Currently, there is a significant part of Labor Jurists who consider state intervention excessive, especially when it comes to Rights agreed by the Union itself (a body that already has the function of equalizing differences, placing the parties in a condition of parity).

However, by annulling a collective clause based on the unavailability of labor rights, the State-Judge ends up excessively extending the State's intervention in the employment contract – considering that collective norms are generated within the scope of Collective Labor Law, an environment in which there is no mention of hyposufficiency.

The Labor Reform certainly embraced this idea, changing several provisions of the CLT that were edited taking as a guide the principle of protection – basic in Western Labor Law.[8]

[8] NEME, Pedro Campana. Contractual dirigisme and the new figure of the hypersufficient employee. Accessed: https://vernalhapereira.com.br/dirigismo-contratual-e-a-nova-figura-do-empregado-hipersuficiente/ on 11/28/23

THE HYPERSUFFICIENT WORKER

The terminology "hypersufficient" worker was created by legal practitioners from the 2017 labor reform, which included a single paragraph to article 444 of the Consolidation of Labor Laws. This provision of the law now establishes, in summary, that employees with a higher education degree and who receive a monthly salary equal to or greater than twice the maximum limit of benefits of the General Social Security System, have greater bargaining power with their employer.

The reform, timidly, recognized the plurality in the world of work that no longer fit into the classic employment contract. Plurality that, on the other hand, is the result of technological innovations in recent decades - such as teleworking - and on the other hand, the result of older practices - such as the hierarchical condition of senior executives in companies, which have a low degree of subordination, which justifies their classification as hypersufficient. Since the beginning of the twentieth century, the doctrine has identified changes in subordinate work. Labor Law was no longer limited to factory workers, but began to deal with anyone who practiced subordinate activity, which included more intellectualized professionals and senior executives.[9]

For the reformist legislator, employees with a higher level of education and higher salaries are endowed with greater bargaining autonomy, even becoming equal to unions with regard to matters and limits to be negotiated with their employers.

This terminology was adopted as a counterpoint to the already consolidated term "hyposufficient", understood by the labor doctrine as a characteristic of the worker who depends economically on his employer and, therefore, in order to maintain his source of livelihood, is subject to accept situations or agreements that violate constitutionally guaranteed rights.

The labor reform added article 611-A to the Consolidation of Labor Laws, which presents an exhaustive list of topics on which collective bargaining agreements and conventions will prevail over the law, such as, for example, PLR, job and salary plan, reduction of working hours and wages, classification of the degree of unhealthiness and reduction of intervals. In other words, it places in the hands of the unions the power to negotiate with the companies the suppression of legally guaranteed rights to employees.

This bargaining autonomy of the unions stems from the condition of equality in dealing with the companies, that is, there is no economic dependence, they have the support of lawyers and consultants, they have the power of strike movement, etc. All this allows the unions to have the possibility of freely evaluating the proposals of the companies, placing them within an economic context of the company and even of the country, being able to understand and decide whether the reduction or withdrawal of a certain

[9] FRANCO NETO, Georgenor de Sousa. The Work of the Hypersufficient and the Dilemma of Protection. São Paulo: LTR, 2021.

right at that moment, although it may apparently be harming the worker, in reality, is preserving the social function of the company and the job itself.

The sole paragraph of article 444 extends to hypersufficient workers the negotiating autonomy for these same issues, attributing to them the presumption that they understand the risks of the negotiations, the economic context of the company and the country, and are capable of having autonomy to obtain the advantages and disadvantages of accepting or not the proposed agreement.

That is to say, at least until there is a movement for the declaration of unconstitutionality of this article, the intervention of the State and Labor Law in such contracts has been almost completely removed. It would mean saying, in a certain extremist rhetoric, that hypersufficient employees would not be subjects of law for legal labor protection, since the employee does not need state protection.[10]

MITIGATION OF CONTRACTUAL DIRIGISME

It is true that the changes in the Consolidation of Labor Laws, mentioned in the previous chapters, were promoted as a response to the evolution of society, workers and labor relations themselves.

The Brazil of today is no longer the Brazil of 1943, when the Law was enacted, or even of 1988, when the Magna Carta was published.

Nowadays, the profile of the worker is different. Specifically in relation to the worker understood as hypersufficient, the one who in some way stands out from the other 98% of the workers due to their level of education and the relevant amount received monthly as salary, it is true that they have come to have a greater degree of understanding, being able to assume the condition of deciding on aspects of the employment relationship without the direct intervention of the State.

The legislator understood that this worker may have greater autonomy to negotiate with his employer models of remuneration for performance or participation in the company's profits, thus mitigating contractual dirigisme.

Article 444, in its new wording, brought autonomy of negotiation between the hyper-sufficient worker and his employee, and needs to be endorsed by society and the judiciary, for the sake of the legal security of our institutes. The inclusion of the sole paragraph in Article 444 allows the unequal to be treated unequally. A worker with a degree in higher education and a salary above the average salary of the vast majority of the population cannot be treated as someone with the same vulnerability as other employees, who really need the protection of the State or union tutelage to negotiate their labor rights.

[10] NEME, Pedro Campana. Contractual dirigisme and the new figure of the hypersufficient employee. Accessed: https://vernalhapereira.com.br/dirigismo-contratual-e-a-nova-figura-do-empregado-hipersuficiente/ on 11/28/23

CONCLUSION

There are many criticisms of the contractual freedom of the hypersufficient worker, notably the unavailability and non-waivability of labor rights due to their public nature and the vulnerability of the employee who is economically dependent on the employee, regardless of the level of education or the amount of remuneration received.

Individual negotiation, within certain limits, as is the case with the hypersufficient, does not contradict the nature of Labor Law, which, although it has the function of protection, also aims to coordinate the relationship between employee and employer. Individual negotiation represents only the reduction of the State's tutelage in the relations between employees and employers, that is, the mitigation of Contractual Dirigisme.

The foreign experience, notably the Spanish and Italian legal systems, presents the possibility of differential treatment of some types of workers, with less state regulation. The *staff of the top management* in Spain and the *dirigenti* and *quadri* in Italy, are examples of senior management employees who have broad negotiating powers with their employers. Such models show that it is not necessary to concentrate everything, always, in the hands of the State. Trusting in collective or even individual negotiations, as in the case of the hypersufficient, is a path that is already feasible.

The objective of the Brazilian labor legislator, it seems, was not to reach only senior managers, but to reach a wider range of workers, more graduated, whose academic training allows, in theory, to compete for better vacancies in the labor market and have greater clarity about their relationship with the employer, the labor market and the economic context of the company and the country.

The hypersufficient workers, in the point of view of the reformist legislator, will be better represented by themselves in a negotiation with their employer, than by the union that represents their economic category, which is rightly aimed at protecting the great mass of the most vulnerable workers, who are more susceptible to the abuses of the capitalist system.

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